THE TERRITORIES LAW REPORTS

VOL. III.

(CITED III. TERR. L. R.)

CONTAINING

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

EDITORS AT DIFFERENT PERIODS:

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TORONTO:
THE CARSWELL CO., LIMITED.
19 DUNCAN STREET,
1910.

TORONTO
PRINTED BY THE CARSWELL CO. LIMITED
19 Duncan St., Toronto.

TABLE OF CASES REPORTED

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VOLUME III.

THE QUEEN v. McDONALD.

Criminal law—Evidence—Admissibility — Confession — Inducement by a person in authority—Confession obtained by false statement.

Evidence of an alleged confession made by a person to a constable, who charged him with stealing letters from a post office box, was held not admissible inasmuch as it appeared that the alleged confession was induced by the statements of the constable that "decoy letters have been put in the box" (which was false), "and you must not think they were not watched"; and "you may as well tell us as have it come out in a Court of law."

[SCOTT, J., *November 10th, 1896.*

Statement.

The prisoner was charged with stealing a post letter from a post office box, it being supposed that he had a key to the box. Previous to the prisoner's arrest Mr. Phinney, a post office inspector, accompanied by a sergeant of the North-West Mounted Police, who had acted as a detective in the case, called on the prisoner at his house, and at the trial the Crown proposed to prove by the sergeant a confession of guilt made by the prisoner on this occasion.

On cross-examination of the sergeant by counsel for the prisoner as to inducements held out to the prisoner, the witness said that the prisoner knew he was a detective; that he

Statement. introduced Mr. Phinney as an assistant-inspector in the post office department; that Mr. Phinney opened the conversation by saying, "Well, I've come to talk over mail matter. There has been some mail missing from Dr. L.'s box, and as you have the key, I want to know what you know about it." The prisoner replied, "I have not had the key for over two years, and I don't know anything about it." Mr. Phinney then said, "Mail has been taken out of that box and we have very strong evidence that you are the party that took it." The prisoner still denied it. Mr. Phinney said, "I don't believe you. Decoy letters have been put in the box and you must not think that they were not watched." The witness could not swear that Mr. Phinney did not say, "There is no use your denying it; you were seen taking the letters out of the box." The witness said that Mr. Phinney used words to this effect: "You may as well tell us what you did with those letters as to have it brought out in a Court of law."

Argument was then heard as to whether the evidence of the alleged confession could be received.

Argument. *John R. Costigan*, Q.C., and *P. J. Nolan*, for the prisoner, cited *Regina* v. *Thompson*,[1] *Rex* v. *Mills*,[2] *Regina* v. *Warringham*,[3].

A. L. Sifton, for the Crown.

Judgment. SCOTT, J. (having reserved his ruling till the following day).—I have carefully considered the arguments of counsel with regard to the admissibility of the evidence of the alleged confession, as well as the cases which have been cited, and have come to the conclusion that such evidence cannot be received. According to our law a confession, to be receivable in evidence, must be free and voluntary, and the onus lies on the prosecution to prove that no inducement has been held out or threat made. In this case it was proved that a

[1] 9 Times L. R. 435; [2] 6 C. & P. 146; [3] 15 Jour. 318, 2 Den. C. C. 447*n*.

person in authority said to the accused, "You may as well tell us as have it come out in a Court of law," which may be fairly interpreted, "If you don't tell us it will come out in a Court of law." Moreover, the accused was told that he had been seen taking letters, which was a misstatement, there being no such evidence adduced, and the Crown prosecutor having admitted that there was no such evidence to adduce. This looks like attempting to obtain a confession by false pretences, and was most improper and unwarranted.

Judgment. Scott, J.

I must decline to hear any evidence of the alleged confession.

THE QUEEN v. WHIFFIN.

Conviction — Several offences — Inclusion where statute authorizes joinder in information—Form of conviction—Unauthorized punishment—Hard labour — Amended conviction — Variation from minute of adjudication—Review of evidence on certiorari for purposes of amendment—Adjudication de novo—Exercising magistrates' discretion—Costs in certiorari proceedings.

The Liquor License Ordinance (C. O. 1898 c. 89, s. 102) expressly provides that several charges of contravention of the Ordinance committed by the same person may be included in one and the same information or complaint.

1. Where the magistrate adjudges the accused guilty upon each charge it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by one and the same conviction, which may also adjudge a forfeiture in respect of each offence.

2. Where on a summary conviction the magistrate imposes imprisonment at hard labour on default in paying the fine upon a charge in respect of which the law does not authorize hard labour to be imposed, the magistrate may return to a certiorari an amended conviction omitting the unauthorized part of his adjudication, and the amended conviction will not be bad by reason of such variance from the original adjudication.

3. A conviction in due form will not be quashed because it is founded upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied upon perusal of the depositions that the offence for which the formal conviction was made was in fact committed.

4. Under Criminal Code, sec. 889, the Court may adjudicate de novo on the evidence given before the magistrate in cases removed by certiorari; but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate.

5. Where a magistrate returns an amended conviction in certiorari proceedings and the conviction is sustained only by reason of the amendment costs of the certiorari proceedings should not be awarded against the applicant.

[ROULEAU, J., *May 14th, 1900.*

Statement. Application to quash a conviction against one Alfred E. Whiffin, who was convicted on the 5th July, 1899, of having unlawfully sold intoxicating liquor without a license and having kept intoxicating liquor for the purpose of sale without a license on the following grounds:

1. That the conviction was bad in law inasmuch as it was for two offences. 2. That the said conviction was bad in law inasmuch as it imposed hard labour in default of payment of the fine imposed or of sufficient distress. 3. That the conviction was bad in law inasmuch as it varied from the minute of adjudication. 4. That the minute of adjudication did not disclose the commission of any offence in law.

The minute of adjudication was in these words: "It is this day adjudged by the Court that the accused Alfred E. Whiffin be convicted on the charge of selling intoxicating liquor and of keeping the same for sale, and that the accused Alfred E. Whiffin be fined the sum of fifty dollars for each offence and the costs of the Court, five dollars and thirty-five cents, and in default of payment to two months' hard labour in the guard room at Maple Creek, at N. W. Mounted Police."

The original conviction provided for distress and sale of defendant's goods, and in default of sufficient distress two months' imprisonment at hard labour. In the amended conviction the provision as to distress and hard labour was omitted.

Argument. *James Muir*, Q.C., for the Attorney-General.

R. B. Bennett, for the defendant.

[*May 14th, 1900.*]

Judgment.
Rouleau, J.

ROULEAU, J.—Under s. 102 of c. 89 of the Consolidated Ordinances several charges of contravention of this Ordinance may be included in one and the same information or complaint, and under sec. 106 convictions for several offences may be made although committed on the same day. The amended conviction returned into Court adjudged "the said Alfred E. Whiffin for each of his said offences to forfeit and pay the sum of fifty dollars," which the Justice of the Peace was authorized to do under said sec. 106. Unless there be a statutory prohibition several offences and penalties may be included in one conviction: *R.* v. *Swallow*.[1]

The second ground of objection has been remedied by the amended conviction.

The third ground of objection is that the conviction is bad in law because it varies from the minute of adjudication inasmuch as the minute of adjudication imposed imprisonment at hard labour, which is not authorized by the Ordinance, and the amended conviction imposes only imprisonment.

I am of the opinion that in view of sec. 889 of the Criminal Code and the late decisions given in cases similar to this, a Judge has power to amend a conviction if it follows the adjudication in imposing imprisonment at hard labour, while the magistrate was only authorized to award imprisonment without hard labour. At all events, according to numerous decisions the magistrate has certainly the right to omit such an error in his formal conviction. This is what he did in this case. Amongst other cases I may cite the following, which are very much in point: *Reg.* v. *Harley*,[2] *Reg.* v. *Richardson*,[3] *Reg.* v. *McCay*.[4]

As to the fourth ground, I am of the opinion that this ground is not tenable now in view of sec. 889 of the Crim-

[1] 8 Term. Rep. 284; [2] 20 O. R. 481; [3] 20 O. R. 514; [4] 23 O. R. 412;

Judgment.
Rouleau, J.

inal Code, which says that "No conviction or order made by any Justice of the Peace shall be removed by certiorari, or be held invalid for any irregularity, informality or insufficiency therein, provided the Court or Judge before whom or which the question is raised is upon perusal of the depositions satisfied that an offence of the nature described in the conviction, order or warrant has been committed, over which such Justice has jurisdiction, etc., etc." This, no doubt, gives me the right to adjudicate de novo on the evidence given before the magistrate. But I may add that I am of the same opinion as that expressed in *Ex p. Nugent*,[5] that the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate; also that where the only penalty authorized has been imposed, but with an unauthorized addition, the latter may be struck out on amendment after its return under certiorari.

For these reasons this application is refused without costs. My reason for not granting costs is that costs of certiorari proceedings are not usually given where the conviction is amended and affirmed in the amended form: *R.* v. *Higham*.[6]

Amended conviction affirmed.

[5] 1 Can. Cr. Cas. 12; [6] 6 El. & Bl. 557; 26 L. J. M. C. 116.

THE QUEEN v. CHARCOAL.

Criminal law—Evidence—Confession—Inducement—Person in authority—Burden of Proof—Indians—Indian agent.

If upon a proposal to give evidence of an alleged confession the question is raised whether it was made by the accused to a person in authority and induced by a promise of favor or by menaces or under terror, the onus is on the Crown to show affirmatively that it was not so induced.

Regina v. *Thompson*,[1] followed.

An Indian agent, an *ex officio* Justice of the Peace, under general instructions to advise the Indians of his reserve, who was in fact in the habit of interviewing Indians of the reserve charged with offences with a view to aiding them in their defence, is *quoad* the Indians of his reserve, a person in authority.

Quære, whether a confession by an Indian to the Indian Agent of the Reserve to which the Indian belonged would not be a privileged communication.

[*Court in bank, March 5th, 1897.*

Crown case reserved by SCOTT, J. Statement.

Reginald Rimmer, for the accused, instructed by the Department of Indian Affairs. Argument.

T. C. Johnstone, for Attorney-General of Canada.

[*March 5th, 1897.*]

WETMORE, J.—The prisoner was convicted before my brother SCOTT and a jury of the murder of another Indian called Medicine-Pipe-Stem-Crane-Turning. The murdered man was found in a house on the Blood Reserve on the Belly River near Fort Macleod. He evidently had been murdered by some person. The only evidence connecting the prisoner with the murder was an admission made by him to Robert N. Wilson, who at the time was acting as interpreter to James Wilson, the Indian Agent on the Blood Reserve, to which the prisoner belonged. After the prisoner was arrested on the Judgment.

[1] 62 L. J. M. C. 93; (1893) 2 Q. B. 12; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312.

Judgment. Wetmore, J.

barge and while he was a prisoner he was interviewed by Wilson, the Indian Agent, through Robert N. Wilson, the interpreter, and made the following statement: "I killed the policeman and killed him well. I also killed a boy up the river, but I did not shoot the policeman at Lees Creek. Those who accuse me of that crime lie about me. What I have done I do not deny, I do not hide. I do not like people to accuse me of crimes I did not commit." Wilson, the Indian Agent, then asked the prisoner, "Where did you kill the boy, inside the house or out," to which the prisoner replied "outside." He was then told that the body was found inside and was asked if he did not kill him inside, to which he replied, "No. I killed him outside." Mr. Wilson then asked him, "Where did you kill the man, near the house or below the house or where?" Prisoner replied "Beyond the house." Prisoner was then told that the body was found inside the house and that it was believed that the young man was killed there, and he was to recollect where the killing took place, to which he finally replied, "Ask my wife, she knows all about it and can tell it all to you, my memory is not clear." The part of this admission which it is claimed admitted the murder of the Indian man "Medicine-Pipe-Stem" by the prisoner was, "I also killed a boy up the river." The murdered man was about 25 years old; the prisoner is a much older man, and the only evidence which pointed to the fact that the prisoner had reference to the murdered man was the fact that the man was found murdered at the place I have stated, and the following facts testified to by Robert N. Wilson, namely, that Indians of the prisoner's tribe are from superstitious notions not in the habit of mentioning the names of deceased personal acquaintances in ordinary conversation, if they can avoid it; that middle-aged and elderly Indians are in the habit of speaking of any young man whom they have known from boyhood as a boy, and that the prisoner and the interpreter both reside on a point on the Belly River below the

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Wetmore, J.

scene of the murdered man's death. The evidence of Robert N. Wilson as to the admission in question was objected to. Before it was received Robert N. Wilson, the only witness who gave evidence of the admission, testified as follows: "Neither during the conversation nor at any other time before, did I, to my knowledge, nor did any one else, make any threat or hold out any inducement to him to procure him to make a statement in regard to the killing." On cross-examination he testified as follows: "At the interview I was acting as interpreter to Mr. Wilson, the Indian Agent. In the first instance the interview was between Mr. Wilson and the prisoner through me as interpreter. I do not remember the opening of the conversation. I did not ask him about the shooting. I do not remember telling him that he need not be afraid, as we were not policemen. As far as I can remember any statement he made was entirely voluntary." The learned Judge then put the following question: "Assuming that prisoner did make any implicating statements, can you state from what occurred why he should have made such a statement." Answer: "I think it was because he was in the boasting mood at the time." The learned Judge then put the following question: "From your knowledge of Indian character can you state whether they are in the habit of boasting of acts which were never committed by them?" Answer: "I would say they are not." The evidence was then admitted subject to objection, by which I mean the counsel for the prisoner still pressing his objection.

After the evidence was admitted, Robert N. Wilson in cross-examination testified as follows: "I was rather surprised when he started on the subject of his crime, as they had no connection with the previous subjects. If Mr. Wilson had said anything to him to induce him to speak about his crimes I would have remembered it. I do not remember whether he stated why he had killed the Indian, but I would not swear that he did not make any statement as to his mo-

Judgment. Wetmore, J.

tives." After the admission was received, James Wilson, the Indian Agent, was called and examined by the Crown, and testified as to what occurred at the interview in question as follows: "I am instructed to act as legal adviser to Indians under my jurisdiction. As a rule I always tell them that I am here as their adviser to help them. I remember being in the guard room and having a conversation with prisoner through Mr. Robert Wilson as my interpreter. I heard his evidence with reference to that conversation and what took place there. I believe that he faithfully interpreted between us. I am not prepared to say I did not hold out any threats or inducements to get the prisoner to make a statement. I am not prepared to contradict him when he says that no threat or inducement was held out, and the prisoner's statement as to killing was a voluntary one." On cross-examination he stated: "I as a rule always look after the defence of Indians of my reserve who are charged with offences. They all understand that I do that. They have been repeatedly told so. When necessary to retain advocates to conduct such defences I have always assisted them in the defence and in procuring evidence. I always interview the accused before the trial if possible. I make a rule to tell Indians so charged that what they tell is to their benefit to assist in their defence. I do not remember whether I told prisoner that at the time of the interview at which Robert N. Wilson acted as interpreter. I procured the interview for the purpose of assisting him in his defence."

At the close of the case the counsel for the prisoner applied to have the evidence of Robert N. Wilson as to the admission struck out, which the learned Judge refused. The learned Judge reserved three questions for the consideration of this Court;

1st. Whether the admission was properly received?

2nd. If properly received whether from what subsequently appeared it should have been struck out?

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Wetmore, J.

3rd. Whether the evidence is sufficient to support the conviction?

I am of opinion that the evidence should have been struck out. The authorities are abundantly clear that an admission of guilt made by a party charged with an offence to a person in authority under the inducement of a promise of favour or by menaces or under terror, is inadmissible. This is so clear that it does not require authority to be cited in support of it. Whether if the promise or threat is made by a person not in authority that is sufficient to reject the admission it is not now necessary to decide, because I am of opinion that James Wilson, the Indian Agent, was quoad the Indians on his reserve a person in authority. In the first place he is appointed by the Governor in Council to carry out The Indian Act (R. S. C. c. 43) and the Orders in Council made under it (see s. 8, s.-s. 3 of that Act), and in the second place he is *ex officio* a justice of the peace: see 53 Vic. 1900 c. 29, s. 9.

Assuming the rule which provides that such admissions to persons in authority should not be admissible if made under the inducements mentioned to be sound in principle (and the contrary cannot be now held), I cannot conceive of a case where it ought to be more strictly insisted on than as between an Indian and the Agent of his reserve. These Indians are, for the most part, as we who reside in the Territories know, unacquainted with the English language, or but imperfectly acquainted with it. The rules and prinieples of British law, or upon which it is administered, are not familiar to them, and when a serious matter arises such as has arisen in this case, they must be largely dependent upon the Indian Agent who is over them for assistance and guidance. So we find it stated in evidence in this case by James Wilson, the Indian Agent, that he is instructed to act as legal adviser to Indians under his jurisdiction, and that he always interviews the accused before the trial if possible. I do not wish to be

Judgment.
Wetmore, J.

understood as holding that communications made by an Indian to the Agent under such circumstances are privileged. It is not necessary to hold that for the purposes of this case, and I therefore express no opinion on that question. But I do most unhesitatingly hold that a confession made to such an Agent under the inducement of a promise or of a threat or menace is not admissible. The character of the inducement to render the admission inadmissible may be of a very slight character. An admission obtained under the following inducement, "You had better tell the truth, it may be better for you," was held inadmissible: *Reg.* v. *Fennell*.[2]

It was urged, however, that in this case no positive evidence that an inducement was offered was proved. This is true. But while I do not rule that if an admission of the accused is admitted in evidence without the question being raised whether it was made under some inducement or threat, I do hold that if that question is raised, the burden of proving that it was not made under an inducement or threat is on the Crown and not on the prisoner. This question was discussed in a very recent case in England, decided in 1893, *Reg.* v. *Thompson*,[1] in which CAVE, J., giving the judgment of the Court, lays it down that it is the duty of the prosecution to prove "in case of doubt that the prisoner's statement was free and voluntary," and in concluding his judgment, referring to the evidence on which it was sought to put in the admission, he says: "In this particular case there is no reason to suppose that Crewden's evidence was not perfectly true and accurate, but on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received."

So that in this case I say that in view of the testimony given by James Wilson it was not proved satisfactorily by

[1] 50 L. J. M. C. 126; 7 Q. B. D. 147; 44 L. T. 687; 29 W. R. 742; 14 Cox, C. C. 607; 45 J. P. 312.

Judgment.
Wetmore, J.

the testimony of Robert N. Wilson that the confession was free and voluntary, and therefore the admission ought to have been struck out. I will not repeat the evidence which I have quoted beyond this, that James Wilson swore that he made it a rule to tell Indians so charged that what they tell is to their benefit to assist in their defence, and that he is there as their adviser to help them. Now, while there is no positive evidence that this or anything to that effect was stated to the prisoner in this case, it is not to my mind satisfactorily established that it was not, and the onus of establishing this is on the Crown.

Robert N. Wilson swearing that he does not remember this and he does not recollect that, is not sufficient. In my opinion Robert N. Wilson's testimony on cross-examination that if the Indian Agent had said anything to the prisoner to induce him to speak about his crimes he would have remembered it, will not help the Crown for two reasons. First, because his previous evidence shews that his memory as to what took place is not very accurate or reliable, and in the second place, what would in law be an inducement might not strike the Wilsons as such. I do not wish to be understood as drawing too close lines around the question of the admissibility of such admissions beyond what is laid down in *Reg.* v. *Thompson.*[1] But in this case, in view of Mr. James Wilson's evidence as to his usual course in such cases and Mr. Robert Wilson's want of memory or rather want of positiveness, I am of opinion that the Crown failed to establish satisfactorily what was necessary to allow the evidence of the admission to remain on the Judge's notes.

As without this admission there was no evidence to connect the prisoner with the murder, the conviction must be quashed. It is not therefore necessary to express any opinion as to the other questions reserved by the learned Judge.

RICHARDSON, ROULEAU, and MCGUIRE, JJ., concurred.

MORTON v. BANK OF MONTREAL.

Appeal—Security for costs — Special circumstances — Poverty—Extension of time.

The Judicature Ordinance No. 6 of 1893, s. 504, as amended by Ordinance No. 7 of 1895, s. 7, provides that: "No security for costs shall be required in applications for new trials or appeals or motions in the nature of appeals, unless by reason of special circumstances such security is ordered by a Judge upon application to be made within fifteen days from the service of the notice of motion, application or appeal."

The defendants succeeded at the trial.

The plaintiff served notice of appeal, and at the expiration of 37 days obtained an *ex parte* order extending the time for filing the appeal books. This order was obtained upon an affidavit of the plaintiff to the effect that owing to poverty he had been till then unable to procure sufficient means to meet the cost of printing. On the following day the defendants took out a summons to extend the time for applying for security for the costs of appeal, and for an order for security. The defendants' application was founded upon the plaintiff's said affidavit, and a further affidavit to the effect that the sheriff was prepared to return "*nulla bona*" the execution against the plaintiff for the taxed costs of the action.

† Now Judicature Ordinance C. O. 1898 c. 21, R. 502.

On a reference to the Court in banc, it was

Held, (1) that, inasmuch as the defendants' delay in applying for an extension of time within which to make their application for security for costs of appeal had not prejudiced the plaintiff, the extension should be granted.

(2) That the plaintiff's poverty was a "special circumstance" entitling the defendants to security for the costs of appeal.

[*Court in banc, June 8th, 1897.*

Statement. Summons on behalf of defendants to extend time for moving for security for costs of appeal and for such security referred by RICHARDSON, J., to the Court in banc.

Argument. *Ford Jones*, for defendant.

John Secord, Q.C., for plaintiff.

[*June 8th, 1897.*]

Judgment. ROULEAU, J.—This is a reference made by RICHARDSON, J., for the opinion of this Court, whether an order should be made extending the time for the defendants to apply for an order for security for costs under sec. 504 of The Judicature Ordinance and also for security.

Judgment Rouleau, J.

The material upon which this application is based is the plaintiff's poverty, and an application shewing that on 15th April, 1897, an execution for costs taxed to the defendants in the action had been placed in the sheriff's hands, whose only return if called for of that writ, would be *nulla bona*.

The section of The Judicature Ordinance under which this application is made reads as follows: "No security for costs shall be required in applications for new trials or appeals or motions in the nature of appeals unless by reason of special circumstances such security is ordered by a Judge upon application to be made within 15 days from the service of the notice of motion, application or appeal."

One question to decide is whether the "special circumstances" are such as to entitle the defendants to demand security for costs.

As the same words "special circumstances" are used in the English Rule, as well as in the above section, I think that our Legislature intended to give to them the same meaning and force as the meaning and force given to these words in England.

In re Ivory Hankin v. *Turner*[1] it was decided that the insolvency of the appellant is *prima facie* a sufficient reason for ordering him to give security for costs, though in some cases the Court may not order him to do so.

In the present case the only evidence we have before us is that the appellant is poor and cannot even pay the costs of the judgment obtained against him and appealed from. There is no other special circumstance alleged and proven.

The case of *Farrer* v. *Lacy, Hartland & Co.*,[2] is in my opinion still stronger in favour of the defendants than the previous case. An execution was put in, the affidavit filed

[1] 10 C. D. 372; 39 L. T. 285; 27 W. R. 20. [2] 28 C. D. 482; 54 L. J. Ch. 808; 52 L. T. 38; 33 W. R 205.

Judgment.
Rouleau, J.

on behalf of the respondent stated as a fact that it had produced nothing, and the deponent went on to say that he was informed by the sheriff's officer that there were no assets. Upon that statement of facts, the appellant was ordered to give security for costs.

In *Harlock* v. *Ashberry*,[3] JESSEL, M.R., said that he considered that it was now the settled practice, if the respondent asked for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the costs of the appeal, if unsuccessful, without any other special circumstances.

In the present case, as I have already said, there is no other circumstance shewn except the poverty of the appellant and his inability to pay the costs already incurred.

The same ruling appears to prevail also in the province of Ontario. In the case of *Donnelly et al.* v. *Ames et al.*,[4] it was decided that, when two of the plaintiffs resided abroad, and the other two who resided in the province had no property exigible under execution, the taxed costs of the Court below being unpaid, and execution therefor having been returned *nulla bona*, the appellants should be ordered to give security for costs.

In all the cases cited, I fail to see one case where under the same circumstances as this case, security was not ordered when asked for.

As to the other branch of the case, as the learned Judge found that he was "satisfied that the delay in applying was owing to the fault of the defendants' advocates, for which as plaintiff's position was not prejudiced, the defendants ought not to be shut out," I am of opinion that under that finding the order might have been made.

My opinion is that the time applied for by the defendants should be granted, and the order made that the appellant

[3] 19 C. D. 84; 51 L. J. Ch. 96; 45 L. T. 602, 30 W. R. 112. [4] 17 O. P. R. 106.

should give security for costs, and the learned trial Judge should be so advised.

Judgment.

Rouleau, J.

WETMORE, MCGUIRE, and SCOTT, JJ., concurred.

RICHARDSON, J.—The order will now be made as indicated. Costs will be costs in the appeal to the successful party.

WEST v. AMES HOLDEN & CO. ET AL.

Interpleader—Form of issue — Evidence — Fraud — Admissibility of evidence of fraud—Garnishee proceedings—Husband and wife—Exemptions.

In an interpleader issue between the wife of the execution debtor and the execution creditors in which the question was whether the goods seized by the sheriff were then the property of the wife as against the execution creditors, the trial Judge found and the Court in banc sustained his finding, that the goods or their purchase price being in reality the property of the husband, had been fraudulently transferred by the husband to the wife and therefore were the property of the execution creditors against the wife.

Held, WETMORE, J., dissenting, that notwithstanding the decision of the Supreme Court of Canada in *Donohoe* v. *Hull*,[1] evidence of fraud as affecting the question of property was admissible on the issue.

Per RICHARDSON and MCGUIRE, JJ., the decision of the Supreme Court of Canada in *Donohoe* v. *Hull*,[1] was not applicable; it was not intended or contemplated to apply where, as in an interpleader issue, the question is whether or not a sale or transfer of goods is a mere sham or device to defeat execution creditors.

Per SCOTT, J.—The decision of the Supreme Court of Canada in *Donohoe* v. *Hull*,[1] extended only to proceedings by way of attachment of debts, in which, in order to enable the judgment creditor to succeed, it must appear that a debt exists for which the judgment debtor might have brought an action against the garnishee.

Fraudulent transfer of exemptions discussed.

[*Court in banc, December 11th, 1897.*

[1] 24 S. C. R. 683.

Statement. Trial of an interpleader issue at Calgary before ROULEAU, J.

The formal issue was as follows:

Mary Jane West affirms and Ames Holden & Co. and J. W. Peck & Co. deny that certain goods and chattels, to wit: the goods which were in a certain store building situate on lots 3 and 4 in block 1, Innisfail, plan L, in the Judicial District aforesaid, and on the 5th day of March, 1896, seized in execution by the sheriff of the Northern Alberta Judicial District under the two several writs of *fieri facias* issued out of the Supreme Court of the North-West Territories Northern Alberta Judicial District, the 2nd day of April, 1895, and on the 20th day of August, 1895, respectively directed to the said sheriff, for the having of execution of two several judgments of that Court recovered by the said Ames Holden & Co., and J. W. Peck & Co., respectively, against one G. W. West, were, or some part thereof was, at the time of the said seizure, the property of the said Mary Jane West as against the said Ames Holden & Co., and J. W. Peck and Co.

Argument. *C. C. McCaul*, Q.C., for the plaintiff.

P. McCarthy, Q.C., for the defendants.

[*February 27th, 1897.*]

Judgment. ROULEAU, J.—This is an interpleader issue. The question to be tried is whether at the time of seizure by the sheriff under the writs of *fi. fa.* in the suits of *Ames Holden & Co.* v. *G. W. West* and *J. W. Peck & Co.* v. *G. W. West*, of the goods so seized, the said goods were the property of the claimant Mary Jane West, against the said Ames Holden & Co., and J. W. Peck & Co., execution creditors.

For the purpose of applying the law to this case, it is important to review the facts.

Judgment
Rouleau, J.

On the 3rd October, 1894, the Calgary Hardware Co. were in possession of G. W. West's stock-in-trade which they had bought at a sale under a chattel mortgage to one Sharples. On that day the Calgary Hardware Co. sold the stock-in-trade to Mary Jane West for the sum of $800, and she continued to carry on the business under the name and style of "The Ranchers' Supply Store." It appears by the evidence that Mrs. West got about $400 from her husband to enable her to purchase the said goods from "The Calgary Hardware Co." He gave her besides the building in which the store was kept, and which Mrs. West herself values at about $500. Afterwards Mrs. West removed that building to her lots in the new townsite.

Upon this statement of facts, can the plaintiff claim these goods as her own property separate from her husband? I cannot find any law to sustain such contention. The Ranchers' Supply Store was purchased with G. W. West's money. He dispossessed himself of everything in favour of his wife, although he was heavily indebted at the time to several creditors, and out of the proceeds of the said goods Mrs. West removed the house which her husband made her a present of, and improved the same, and afterwards got a loan of $1,000 on the property. There is no doubt that under this issue G. W. West's creditors cannot claim the lots and the building; but I am of opinion that they can claim the goods seized as being the goods of G. W. West, because they were originally bought with his money, and with the proceeds of the original goods. I do not see how I can apply Ordinance No. 20 of 1890 (respecting the personal property of Married Women) to this case. If I did it would be sufficient in the future for a man to give all his property to his wife and refuse to pay his creditors. Such gift would be illegal in itself *quoad* his creditors, and a man cannot shelter himself that way and refuse to pay his just debts. I do not

Judgment. Rouleau, J.

think the case *Donohue* v. *Hull*[1] goes so far as to say that on an interpleader issue of property or no property it cannot be shewn that a party has transferred his goods and chattels for the purpose of sheltering himself from the payment of his creditors. That case held that in the case of a fraudulent transfer of land, the Supreme Court of the Territories, though exercising the functions and possessing the powers exercised and possessed by a Court of Equity, could not, in these statutory proceedings, grant relief; that that could be obtained only by a suit in equity.

In this case the question is not one of setting aside a conveyance of land, but whether the goods now seized are the goods of the claimant or the goods of the execution debtor. Under the evidence I must necessarily find that the goods were the goods of the execution debtor and uphold the seizure in this case.

The judgment of the Court will be therefore in favour of the defendants, and the plaintiff's claim is dismissed with costs.

Appeal. From this judgment the plaintiff in the issue, Mrs. West, the claimant, appealed.

The appeal came on to be heard on June 7th, 1897.

Argument. *P. McCarthy*, Q.C., for appellant.

J. B. Smith, Q.C., for respondent.

[*December 11th, 1897.*]

Judgment. WETMORE, J.—Taking the whole evidence in this case into consideration I think there was ample to warrant the learned trial Judge in finding that there was a covinous and fraudulent scheme on the part of the plaintiff and her husband to purchase the stock in trade for The Ranchers Supply Store, with her husband's means and property, and to

carry on the business under her name as nominal owner so as to hinder the husband's creditors; that under such scheme the stock in trade was accordingly purchased and the business carried on, but that as a matter of fact the business was the business of the husband, and the stock in trade his. This is, as I conceive, what the learned trial Judge found in effect. If, however, I am in error as to his so finding, that is the way the testimony impresses me, and I, as a member of this Court, so find, as I am at liberty to do under sec. 509 of The Judicature Ordinance. Fraud seems to have been in the minds of these people from the very commencement of the transactions relating to the matters in question. For some time previous and down to some time between the 1st of August and the 4th October, 1894, the husband had been carrying on business in the building hereinafter mentioned and with a stock in which was comprised the stock, etc., purchased from the Calgary Hardware Co., as also hereinafter stated. The husband was indebted to the defendants in this issue and to others, and was either insolvent or had it in his mind to defeat his creditors, it is immaterial which. The building at this time was located on some lots belonging to the husband in what is called the old townsite of Innisfail. One Sharples had chattel mortgages on the stock in trade in this building and on the book debts. Some time in August, 1894 (just what time in August does not appear), West, the husband, went to the coast, and just about the same time the fraudulent scheming of himself and his wife commences. West, when he started for the coast, must have been aware that the beginning of the end of his business was approaching. Before he left he gave his wife his promissory note in her favour and antedated it several years. There was no valuable consideration given for this note (I will refer hereafter to the consideration moving from the wife to the husband, which was attempted to be set up as supporting all these transactions and transfers between them.)

Judgment. Wetmore, J.

The wife, the plaintiff in this issue, brought an action against her husband on this note. This action, as appears by the recital in the chattel mortgages from West to the plaintiff, was commenced on the 24th August, 1894, and the very next day, if the chattel mortgage is correctly dated of the day it was executed, West gave the plaintiff this chattel mortgage on the building in question and the stock in trade, and book debts therein, to secure the amount to recover which the action was so brought, and which is represented in such mortgage to have been $1,069. Now all this was a collusive sham and a pretence. This mortgage professes to be made subject to two mortgages to Sharples and one to the Calgary Hardware Co. The mortgages to Sharples and the Calgary Hardware Co. were not put in evidence, but I gather from the general evidence that they only covered the stock in trade, book debts, and shop fittings, and did not cover the building in question. It is also worthy of mention that although the chattel mortgage to plaintiff is dated 25th August, 1894, the affidavits of *bona fides* and of execution are not made until 25th August, 1895, and the plaintiff swears that she cannot give any explanation about the document. Such proceedings, however, were had, that the Calgary Hardware Co., who apparently had a mortgage subsequent to both of Sharples' mortgages, were, on the 4th October, 1894, the owners of the stock in trade and book debts, etc. Just exactly when, and how, they became such owners does not appear, but that they were then owners is not questioned. On this 4th October the Calgary Hardware Co. sold the stock in trade, fixtures, and book debts to Mrs. West, as expressed in the bill of sale, for $800, for which Mrs. West gave what was equivalent to $396.58 in cash, and to secure the balance gave a mortgage for $600 on such stock in trade, book debts, and fixtures, and immediately commenced business with such stock, etc., under the

Judgment.
Wetmore, J.

name of "The Ranchers' Supply Store," in the building in question, and while it was situate on the husband's lots in the old townsite. The $396.58 paid for this purchase was the property of West, the husband, and was the nucleus of the purchase of the stock in trade of the business of The Ranchers' Supply Store.

The mortgage to the Calgary Hardware Co. was paid out of the proceeds of that business. The purchase of the stock in trade, etc., from such company was negotiated by West, the husband, and the business was practically entirely carried on by him, and the plaintiff had very little, if anything, to say or do about it. Nothing further took place until some time in July or August, 1895, when, as I infer from the evidence, it was considered advisable to increase the stock or buy new stock, and as a matter of course the question of raising the ways and means to procure such stock had to be devised. About this time, as I also infer from the evidence, West arranged with the townsite trustees of the new townsite of Innisfail to obtain a transfer of lots 3 and 4 in block 21 in the new townsite, in consideration of a house being built on such lots.

West swore that this bargain was made by the plaintiff with the trustees. The plaintiff swore that it was made by her husband. I have no doubt that the plaintiff's evidence on this point is correct. But at the same time I have no doubt that the arrangement was that the title when made was to be in the name of the plaintiff; that was a part of the scheme. This arrangement then having been made, they proceeded to remove the store building from where it stood on West's lots to these lots in the new townsite. But before doing this the idea was conceived of getting the right of property in this building in some way vested in the plaintiff, and it is set up that West made a transfer of this building to the plaintiff. The plaintiff swore that this transfer was

Judgment. Wetmore, J.

made, she thought, in July, 1894. West swore, and in this I believe he was correct, that it was made about July or August, 1895, just about the time, as I infer, that the arrangement for the transfer of lots 3 and 4 was made with the townsite trustees. This transfer of the building was made verbally; there was no deed or written transfer, and I strongly suspect that the only transfer there ever was, was that the building was moved from the husband's lots in the old townsite to lots 3 and 4. Anyway the husband's property, the building in question, was taken for the purpose of carrying out the arrangement with the new townsite trustees which formed the consideration of the transfer of the lots. True, some additions were made to it when it got placed on those lots, but they were made with the proceeds of the business.

The building being got on the lots and suitably fitted up, which must have taken a little time, the scheme becomes perfect, and they consider that they are in a position to raise money on it to put into the business, and call it the wife's money. It is claimed that this building was exempt from seizure under execution. Assuming that to be the case it would be very dangerous to raise money on it and put it in the business, so long as it remained the husband's property and was located on his land, because the property purchased with the money so raised and put in the business might not be exempt from seizure, and in that case the whole capital put in the business would have been the husband's, seeing that the $396.58 which made the first payment for the original purchase of the stock was the husband's. So the scheme of putting the lots in the new townsite in the plaintiff's name and hauling the store over there as her property, together with what remained of the stock, is conceived. The building was got over there some time in September, 1895, and as soon as practicable after

Judgment.
Wetmore, J.

that, namely, on 28th October, 1895, a mortgage is executed to The Canadian Mutual Loan and Investment Co. by the plaintiff, and $1,000 raised thereon, with which additional stock was purchased and put into this business with what remained of the old stock, and so the business continued until this stock is seized by the sheriff in March, 1896, under the executions of the defendants and others. It was attempted to be shewn in evidence that there was a consideration moving from the plaintiff to her husband, to support as well the giving to her the $397.33 as the transfer of the building and the note on which she instituted the suit against him and obtained the chattel mortgage from him to her, namely, some money she let him have, as was alleged, 8 or 9 years before the trial. But the evidence as to this was of such a character that the plaintiff's counsel had to admit at the argument that these transactions were entirely voluntary. In fact he covers the whole matter in his factum as follows: "The plaintiff does not attempt to justify the gift of $396.58 or the gift of the house to her on the ground of any debt being due to her by her husband. At most she says there was a moral obligation, and the appellant admits for the purposes of this issue that these transactions were entirely voluntary." The question that is raised under this state of facts is simply this, can a man in insolvent circumstances or with the intention of defeating his creditors purchase a stock in trade with his moneys and by moneys raised out of his property, and pay what remains unpaid by such means out of the proceeds of the business, manage and conduct the whole business himself, make his wife a mere figure-head as the nominal owner of the business, and successfully contend that the business is hers, and not his, simply because he has induced some persons to give credit to her, and not to him, for some of the stock put in the business, and so defeat his creditors? I am of the opinion that he cannot.

Judgment.
Wetmore, J.

And I am further of the opinion that if he cannot manipulate his property himself to raise the means to put in such business and secure it from his creditors, he cannot merely as a device by transferring the property to his wife use her as a means of doing indirectly through her what he could not do directly himself. And I think that is just what West attempted in this case. The case principally relied on in this branch of the case is *The Dominion Loan and Investment Co.* v. *Kilroy*.[2] In that case no part of the husband's means was put in the business, and the stock was sold entirely on the credit of the wife. It is true that the judgment of CAMERON, C.J., in the Court below may appear at first sight to go a long way in support of the plaintiff's contention, but I doubt if even he would have supported the defendant's claim in that case if the facts had been such as I have found them to be in this case. The judgments of some of the learned Judges of Appeal dwell on the fact that the husband's money did not go into the purchase. BURTON, J.A., referring to transactions of a similar character is reported as follows: "There is always the risk of a jury finding that the transaction is colourable and the moneys advanced by the husband; that is a risk to which she may be unfortunately exposed." PATTERSON, J.A., is reported: "Can it be held that the husband purchased them and took the title from the wholesale dealers? The evidence is that they were sold to the wife, the husband acting as her agent, but *paying no money of his own* and not pledging his credit." I think that these remarks just mark the distinction between the two cases. In this case the transaction was colourable, and the money practically paid by the husband, and was his own money. It was urged that the building on which the $1,000 was raised was exempt from execution, and that being so exempt the husband could give it away

[2] 14 O. R. 468; in appeal, 15 O. A. R. 487.

Judgment.
Wetmore, J.

and it could not be followed by creditors. I think that is true as a general proposition, and if this building had been *bona fide* given to the wife, the creditors could not follow it. But when the gift was not *bona fide*, but was made as I have found in this case as a mere device to enable the husband to do through the medium of his wife what he could not do himself, that is to raise money for his own purposes so that his creditors could not follow it, I am of opinion that the transaction constitutes a fraud against which the Courts will relieve the creditors, and I do not think Ordinance No. 20 of 1890 helps the plaintiff in the least. I admit that the provisions of that ordinance are of a very broad and sweeping character; at the same time I am of opinion that it is not so broad as to enable the husband to use the wife to perpetrate a fraud with impunity.

While I have reached this conclusion and have thus expressed my reasons for agreeing with my learned brethren that this transaction is a colourable and fraudulent one as between the plaintiff and her husband, I am of opinion that the defendants cannot succeed in this appeal in view of the shape in which the issue herein is framed. The issue directed and on which the parties went to trial herein was simply to determine whether the property in question or some part of it was at the time of the seizure by the sheriff "the property of the said Mary Jane West as against the said Ames Holden & Co. and J. W. Peck & Co." This is the form in which interpleader issues are usually drawn. The form is that prescribed by the English Rules of Court. But no question of fraud is alleged, and that being the case I find myself unable to get over the effect of the decision of the Supreme Court of Canada in *Donohoe* v. *Hull*.[1] That was an appeal from the judgment of this Court. The proceedings in which the appeal was taken was an issue ordered in a garnishee matter and the issue settled was in effect this, "was the purchase money in Milward's hands

Judgment. Wetmore, J.

the money of Donohoe's judgment creditors as against Mrs. Donohoe?" See p. 691. This Court had decided the transaction by which Mrs. Donohoe acquired the property from the sale of which by her the money sought to be attached accrued, to be fraudulent as against her husband's creditors. The Supreme Court of Canada held that it was not fraudulent. I do not wish to be held as criticizing that judgment in the slightest respect. No doubt it lays down the law correctly, and anyway I and this Court are bound to follow it and the principles of law therein enunciated. At page 692 SEDGEWICK, J., who delivered the judgment of the Court, is reported as follows: "The issue raised was property or no property. The issue upon which the case was decided upon appeal was fraud or no fraud, and that, too, notwithstanding the universal rule that when an action is brought with the express purpose of setting aside a settlement there must be an allegation in the statement of claim that the settlement is fraudulent" (then he cites a number of cases in support of this and proceeds): "I entirely agree with the trial Judge in the view that the whole inquiry as to the circumstances under which Mrs. Donohoe became possessed of the property in question was irrelevant—foreign to the issue agreed upon by the parties." At pages 696, 697, and 698, after discussing the powers of this Court to give equitable relief, and deal with equitable rights in an issue such as was then under discussion, and referring to the fact that the execution creditors in that case claimed that "on general equity principles the money was theirs," the learned Judge proceeds: "The patent answer surely is, The money may be yours, but equity has devised a machinery to determine that. Bring your suit in the ordinary way. File your bill. Join all necessary parties. Bring in the husband. He has a right to shew that his wife's property shall not be appropriated to pay his debts. Bring in the custodian of the fund. He has a right to insist that the money in his hands is paid to the

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Wetmore, J.

proper party. Bring in all persons claiming under the wife and other parties in interest. Let the issues be defined and a trial on those issues be had, and so let equity prevail. That, as I understand it, is equity. It is upon principles such as these that Courts of Equity act. Thus is the Supreme Court of the Territories, bound as it is to administer equity, to act. To dismiss this appeal would be to give to the Court a jurisdiction and authority hitherto unasserted by any Court of Equity, whether in England or here."

What I have quoted as thus laid down is the unanimous judgment of that Court, and is, as I understand it, as equally applicable to the issue now in question as it is to the issue then under consideration. No fraud is charged in this issue. I conceive under that decision it could not be charged in an interpleader issue, but relief must be sought in a suit brought in the ordinary way. The husband is no party to this issue. The issue of fraud or no fraud is not defined. The interpleader proceeding is statutory and interlocutory, and I feel an especial difficulty in getting over this decision in view of the fact that the title on the records to the lots of land, and of course the building thereon on which the $1,000 was raised by mortgage, is vested in the wife, not by conveyance from her husband, but from a third person, and in that respect closely resembles the state of affairs in *Donohoe* v. *Hull*.[1]

It is alleged that the portions of the judgment of SEDGEWICK, J., which I have quoted were not necessary for the decision of that case. That is an argument that may possibly be addressed to the Supreme Court of Canada. It is enough, I think, for this Court that the questions discussed were raised in the case and decided, and I, for my part, would have great hesitation in refusing to be bound by a principle of law laid down by the unanimous judgment of the highest Court in the land.

Judgment.
Wetmore, J.

For this reason and this alone I am of opinion that this appeal should be allowed, the judgment of the learned trial Judge reversed, and judgment entered on the issue for the plaintiff with costs, and the plaintiff to be allowed the costs of this appeal.

McGUIRE, J. (read in his absence by RICHARDSON, J.).—This is an appeal from the judgment of Mr. Justice ROULEAU. The issue before the trial Judge was one raised upon an interpleader order. The respondents had seized certain goods under executions against George W. West. The appellant, the wife of the execution debtor, claimed said goods as hers, and the issue to be disposed of was whether, at the time of the seizure by the sheriff, the goods were the property of the claimant, the present appellant, as against the execution creditors.

There does not seem to be any substantial dispute as to the facts. G. W. West had been carrying on business as a merchant and had become unable to pay his debts—had become practically insolvent. The respondents were creditors of his. West had given a chattel mortgage to one Sharples, who thereunder sold West's goods and stock in trade to the Calgary Hardware Co., who were in possession as owners on the 3rd October, 1894. On that day, it is claimed by the appellant, that she purchased the said goods and stock in trade from the Calgary Hardware Co. There is no doubt that the purchase was made in the name of Mary Jane West. The terms of the purchase were a present payment of $396.58 and a chattel mortgage on the goods and stock in trade so sold, for $600, the balance of the purchase money. This mortgage was given by Mary Jane West. The payment down of $396.58 was made up of cash and cheques, which Mrs. West had received from her husband. Mr. West went with his wife to Calgary to arrange the purchase, and he carried down the $396.58, having, as he said, "got them

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McGuire, J.

from his wife to take down for her." This payment and the mortgage on the goods themselves made up the consideration for the sale. Mrs. West did not put a dollar of her own into the purchase. True, she entered into a personal liability by giving the mortgage, but it is not improbable that the Calgary Hardware Co. considered the security on the goods as ample for the balance of the price. Thereafter the business was conducted, ostensibly at least, as that of Mrs. West, her husband acting as her manager, and in fact carrying on the business. Mr. West says in his evidence that "the Calgary Hardware Co. were paid out of that business," which would seem to mean that the mortgage money was so paid. If so, Mrs. West never paid anything for the goods or stock in trade. There is no evidence that she had, in fact, any means of her own. Her husband owned the building in which he had carried on business, but in his generosity, finding himself unable to pay his honest debts he not only gave her the $396.58 with which to purchase these goods, but he also gave her this building and it was moved to some land which was given to her by the townsite trustees in consideration of putting a building thereon. This building was the one she placed thereon. She took little or no part in the business, which was carried on by her husband, ostensibly at least, as her manager.

It seems to me that the inference drawn by the trial Judge from the facts in evidence as to the ownership of the chattels in question was quite justified. Here is a man who is heavily in debt; all his property except the building is sold out by one of his creditors. But he still has some $400 of cash and cheques. These, he tells us, he gave to his wife for no reason that he can assign, as he admits. But he also makes her a present of the building and assists her to move it over to certain lots presented to her by the townsite trustees. She and he on 3rd October, 1894, go down with

Judgment. McGuire, J.

$400, which had unquestionably been his, and the purchase is made. Was this anything but a colourable proceeding so far as the purchase was in the name of the wife? Instead of buying in his own name, in order to defeat his creditors, he adopts the by no means original device of buying in his wife's name. The only thing of any commercial value given in payment is money and cheques belonging to him. True, she gave a mortgage on the goods purchased. The price was some $996. The $396 paid represented a very substantial proportion, about 40 per cent., of that sum, and the Calgary Hardware Co. doubtless considered themselves safe in taking a mortgage upon the goods for the balance. The personal covenant in the mortgage given by Mrs. West could hardly be deemed as of much value. It seems to me that the transaction was really and in fact a purchase by G. W. West and with his own money, and that his wife's intervention was merely a matter of form—a mere device to protect the goods from the creditors. G. W. West carried on the business as a matter of fact just as if he were the nominal as well as real owner. True, the business went under the style of "The Ranchers' Supply Store," and Mr. West poses as the manager of his wife. It is urged that there is no reason why a wife may not employ her husband instead of a stranger to manage her business. That is true, but the difficulty here is that the business was never in fact the wife's, and to my mind the whole transaction, by which she became the nominal owner, was merely a device—a pretence—the goods never were hers—the business never was hers. Suppose Mr. West, instead of using his wife, had handed the $400 to the man who swept out the store, and arranged that the purchase should be in the name of the servant who never put a dollar of his own into the business, and, in fact, had not a dollar to put in it except what was handed him by his employer for the purposes mentioned, would anyone seriously say that the business could be deemed that of this hired man. The trial

Judgment.
McGuire, J.

Judge has come to the conclusion that the business was never in fact that of Mrs. West, but was really her husband's, and that the purchases of subsequent goods, though made in the name of Mrs. West, were really by G. W. West. This is, as I understand his judgment, the inference he drew from all the facts before him, and I am not prepared to say that he was wrong—in fact if in his place I would, I think, have come to the same conclusion.

I think the appeal should be dismissed with costs.

RICHARDSON, J.—With the judgment of MCGUIRE, J., I agree. In the absence of my brother Judge MCGUIRE, and as concurring in his judgment, I think it but right to explain why no reference is made in his judgment to the case of *Donohoe* v. *Hull*[1] in the Supreme Court of Canada. It was discussed between us before he left for the north, and we arrived at the conclusion that the principle laid down in that judgment was not intended or contemplated to apply where as in a matter like this of interpleader, the question was whether or not the sale or transfer of goods set up was a mere sham or device to defeat execution creditors; we arrived practically at the sme conclusion as my brother WETMORE, but did not consider that the judgment of the Supreme Court of Canada in *Donohoe* v. *Hull*[1] applied.

The appeal is dismissed with costs.

SCOTT, J.—For the reasons stated by my brother WETMORE in his judgment I agree with that portion of it in which he holds the transaction between the plaintiff and her husband, under which the former claims the property in question, was not *bona fide*, but was merely a fraudulent device to defeat and delay the latter's creditors.

But I cannot agree with that portion of his judgment in which he holds that by reason of the judgment of the

Judgment. Scott, J.

Supreme Court of Canada in *Donohoe* v. *Hull*,[1] the respondents cannot succeed on this appeal.

True, the language of SEDGEWICK, J., who delivered the judgment of the Court on that case, at pages 697-8, may be broad enough to include ordinary interpleader issues as well as issues under the garnishee clauses of the Civil Justice Ordinance, yet I cannot bring myself to the conclusion that he ever intended to refer to issues of the former nature. In his judgment in that case he clearly shews that in an issue under the garnishee clauses, the question whether an assignment of the fund in question is void as between the judgment debtor and the judgment creditor under 13 Elizabeth c. 5, is one that cannot affect the determination of such an issue. He points out at p. 688 that one of the elementary principles which runs through all the cases in England and Canada upon those clauses is that, to enable a judgment creditor to obtain an order compelling the garnishee to pay to him a debt which he would otherwise have to pay to the judgment debtor, the latter must be in a position to maintain an action for it against the garnishee, and, quoting from *Vyse* v. *Brown*,[2] he further points out, that, in case the debt sought to be attached had been assigned by the judgment debtor to a third person, it could not be attached, even though it were shewn that the assignment was fraudulent and void against the creditors of the judgment debtor under 13 Elizabeth c. 5, the reason being that the assignment though void as against creditors would be valid between the parties to it, and hence the judgment debtor could not sue the garnishee to recover it. It may, therefore, readily be seen that in an issue between the judgment creditors seeking to attach a fund, and a person claiming that fund under an assignment from the judgment debtor, the question whether the assignment was fraudulent as against

[2] Cab. & E. 223; 13 Q. B. D. 199; 33 W. R. 168; 48 J. P. 151.

creditors could not under any circumstances be relevant to the question whether the debt was one that could be or was properly attached. In an interpleader issue such as in the present case the question to be determined is the ownership of goods seized by a judgment creditor under execution. If the claimant claims under an assignment from the judgment debtor the question whether the assignment is void against the judgment creditor under 13 Elizabeth becomes material in determining the question of ownership. I am unable to discover any reason why the execution creditor should not be permitted to raise that question under the interpleader issue in the same manner as for instance, when the claimant claims under a bill of sale or chattel mortgage he can raise the question that it is void as against him by reason of non-compliance with some provisions of the Bills of Sale ordinance. The positions appear to me to be identical. In each case the parties interested in the property are before the Court; the fact that one may involve equitable considerations and the other purely legal considerations can make no difference because the former as well as the latter may be disposed of in such issues: *Engleback* v. *Nixon*.[4] It may be said that fraud must be specifically charged and pleaded, but in an action where a defect in a bill of sale is relied upon as rendering it void against creditors, that also must be specifically charged and pleaded.

Judgment Scott, J.

Reference to the Ontario Reports will shew that ever since the passing of The Common Law Procedure Act in 1854 it has been the common practice there to raise and dispose of, in interpleader issues where the title to goods is in issue, the question whether a conveyance relied upon is void under 13 Elizabeth or under the statute respecting fraudulent preferences, and I am unable to find that the practice has ever been questioned. The same practice ap-

[4] 44 L. J. C. P. 396; L. R. 10 C. P. 645; 33 L. T. 831.

Judgment. Scott, J.

pears to prevail in the province of Nova Scotia. In *Malyard* v. *Hart*[a] that question was raised in an interpleader issue, and SEDGEWICK, J., disposed of the appeal on the ground that fraud had not been shewn, and without in any way questioning the propriety of raising the question of fraud upon such an issue.

I cannot believe that the Supreme Court of Canada by a few words of general application at the conclusion of its judgment ever intended to go out of its way to overturn a practice sanctioned by such long and general usage.

I am therefore of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs. WETMORE, J., dissenting.

[a] 29 S.C. R. 510.

RE MCARTHUR'S BAIL.

Estreat of bail—Discharge of forfeited recognizance—Jurisdiction of single Judge—Appeal—Criminal Code, s. 922.

An application to discharge a recognizance of bail forfeited by reason of the non-appearance of a prisoner is a civil, not a criminal proceeding.

A single Judge has no power to make an order discharging such a recognizance except upon the ground that the non-appearance was justifiable. Applications on any other grounds must be made to the Court *in banc*.

[*Court* in banc, *June 7th, 1897.*

Statement. This was an appeal on behalf of the Crown from an order of ROULEAU, J., directing that upon the payment of certain costs by the sureties for the appearance of one McArthur to stand his trial for theft, the sheriff should withdraw from the seizure made by him under the recognizance of bail and should return all moneys and securities deposited with him by the sureties.

The appeal was heard before MCGUIRE, RICHARDSON, WETMORE and SCOTT, JJ.

Arguendo. *A. L. Sifton*, for the Crown.

J. R. Costigan, Q.C., for the sureties, objected that the proceeding was in its nature criminal and that, no provision being made for an appeal, no appeal lay.

[*7th June, 1897.*]

Judgment. MCGUIRE, J.—The proceeding is not criminal, but civil. It is laid down in *Re Talbot's Bail*,[1] that proceedings as to recognizances are, after estreat, civil proceedings, and *Reg.* v. *Shipman*,[2] is cited. It it obvious that such proceedings are not in any sense taken to punish the defendants for any criminal offence, but to enforce payment of a sum of money owing by them to Her Majesty by reason of a contract made by them. Mr. Justice ROULEAU evidently regarded the application to him as an ordinary motion in a civil matter, for he ordered the defendants to pay the costs of it. It being then an order in a civil proceeding there is

[1] (1893) 23 Ont. R. 65. [2] 6 U. C. L. J. O. S. 19.

Judgment.
McGuire, J.

no doubt of the jurisdiction of this court to hear an appeal from it.

The trial Court before which McArthur made default in appearance was a sittings of the Supreme Court of the North-West Territories in and for the Judicial District of Northern Alberta presided over by Mr. Justice ROULEAU. The application for discharge of the recognizance was presumably made under sec. 922 of *The Criminal Code, 1892*. Section 919 authorizes the Judge who presided at the trial to order that the sum forfeited upon an estreated recognizance shall not be levied, if it appear to his satisfaction that the default of appearance "was owing to circumstances which rendered such absence justifiable." No such circumstances were attempted to be shewn here, nor was it contended that McArthur's non-appearance was justifiable. So that the application could not have been made under sec. 919. Section 918 deals only with recognizances in certain cases which do not include the offence charged against McArthur, and the only remaining section under which an application for relief from an estreated recognizance could be made was sec. 922.

But is the application under 922 to be made to a single Judge whether sitting in chambers or in court, or should it be to the Court *in banc*? In the case provided for by sec. 912, it is clear that the power of discharging a recognizance is given to a Judge. In sec. 913 no doubt is left, as the words, "the Court at which he is bound to appear," are used and shew that is not full Court which it means. In reading secs. 916, 917, 918, 919 and 923 it will be observed that where by "the Court" is meant the Court before whom the accused was bound to appear, words to that effect are used or the intention sufficiently appears from the context, and so, when the clerk of that Court is meant, words are added which shew that he is the clerk referred to. For example, in sec. 916 "the clerk of the court" is used as sufficiently designating the officer standing in that relation, in all the provinces, to the court of criminal jurisdiction before which the recognizance was forfeited, but, when we read sub-sec. 2, we find that the person with whom one of such rolls is to be filed is not simply called "the clerk," but "the clerk, prothonotary, registrar or other proper officer (a) in Ontario, of a division of the High Court of Justice . . . (c) in the North-

West Territories, of the Supreme Court of the said Territories. It is obvious that the use of the conjunction "or" is not to give a choice of officials to whom the roll may be sent, but it is used because in one province the official performing the duties of a clerk to the Court *in banc* may be called by one name and in another province by another. Only *one* official is intended, by whatsoever name he is known. Now in the Territories which is the official name to be taken —the clerk or registrar? If we take "clerk," then it will read "the clerk of the Supreme Court." But that would be ambiguous since there are several such officers, and there are no added words in the context as there are in other sections to shew which clerk would be meant. "The clerk," would not be any more certain than "a clerk," and in the present case would refer as well to the clerk at Moosomin or Prince Albert as to the clerk at Calgary. "Clerk" then is not the proper designation here. Let us try "registrar." We have a registrar, and only one registrar, and the phrase "the registrar of the Supreme Court" is free from ambiguity. It is quite clear that "the clerk" mentioned in sec. 916 (2), is not the same person as "the clerk" mentioned in the first sub-section. In sub-sec. 4 the words used are "the clerk of the court making the same"—obviously a different official from the one mentioned in sub-sec. 2. Again suppose the trial Court sat in Calgary, does sec. 916 mean that the clerk there is to send one copy of the roll to himself? There is one case in which the roll is to be deposited with the same official by whom it is made—namely, the case of a Court of General Sessions —and for that case special provision is made by sub-sec. 3. I think we must take sub-sec. 2 as if it read "(e) in the North-West Territories, the *Registrar* of the Supreme Court, &c."

Judgment.

McGuire, J.

Proceeding now to sec. 922 the Court there is described as the one "into which any writ of *fieri facias* and *capias* . . . . is returnable." It does not seem to be distinctly stated in what Court it is to be returnable. It is provided by sec. 916 that the writ is to be in Form TTT. That form uses the words "our Court"—possibly ambiguous—but the words "day of . . . term next" point to the sittings *in banc* rather than to a sittings of the Court presided over by a

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single Judge. *The North-West Territories Act*,[3] sec. 56, provides that "the clerk of the district within which the seat of Government of the Territories is situate shall be registrar of the Court sitting *in banc*," and *The Judicature Ordinance*,[4] sec. 500, provides for sittings at Regina of the Court *in banc* at certain fixed times—these sittings, I think, corresponding in the Territories to "terms," as used in Form TTT. In *Re Talbot's Bail, supra*, the writ was issued by the deputy clerk at Ottawa, but was made returnable in the High Court of Justice at Toronto. There is nothing before us showing how the writ in McArthur's case was made returnable, and the presumption is that it was properly drawn. I think that the writ should have been made returnable to the Court *in banc* at Regina. If so, then "the Court" referred to in sec. 922 is not a Court sitting, say, at Calgary, presided over by a single Judge, nor is it a single Judge sitting in Court, but the Court at Regina.

I am confirmed in my opinion that this jurisdiction to relieve from an estreated recognizance as provided in sec. 922 was not intended to be given to a single Judge by the following considerations. By sec. 919 with "respect to all recognizances estreated," a single Judge may, where satisfied that the non-appearance of the accused was "justifiable," make an order that the sum forfeited should not be levied. His jurisdiction to so order is limited to that one case. Now if in sec. 922 "the Court" means a single Judge, he can discharge the recognizance in any case and on *any grounds* which in his discretion make it proper to do so. If that be so then it was useless in sec. 919 to tie him down to the one case where the non-appearance seemed "justifiable." Since in sec. 919 it is to a single Judge the power is given, we can understand the limit placed on his jurisdiction, while if under sec. 922 it is to a Court consisting (in the Territories) of at least three judges, one can see why a wider discretion is given.

Again, after dealing in sec. 917 with certain classes of recognizance and giving, in sec. 918, to a single Judge or to two Justices control over the estreating of these recognizances, after providing in sec. 919 for other recognizances previous to estreat, and *after* estreat, giving a single Judge control in

[3] R. S. C. (1886) chap. 50. [4] Con. Ord. (1898) chap. 26.

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McGuire, J

all cases where the absence is "justifiable," then comes sec. 921 which provides for security to the sheriff for the appearance in the Court in which the writ is returnable of the person against whom the writ has issued, and authorizes the sheriff on the giving of such security, to discharge him from custody. Obviously this is where the application is to be made to the Court *in banc*, because, unlike the other cases provided for, where immediate application can be made to a single Judge, considerable delay may take place before the "term" when the application can be heard, and to save hardship the surety is enabled to secure his release in the meantime. These considerations all seem to indicate that the Court mentioned in sec. 922 is not that presided over by a single Judge.

Again, if the Court mentioned in sec. 922 is a "Court" presided over by a single Judge, why does sec. 916 provide for the clerk forwarding to some other "clerk or registrar" a copy of the roll, since, by hypothesis, the "Court" of which he is clerk has itself jurisdiction to relieve under sec. 922? One would expect him to retain it for use when the occasion arose. And when such other "clerk" receives the roll what is he to do with it? Why is it sent to him unless *his* Court is to deal therewith?

The sections of the Code are not new law and it will help us to understand them if we trace them to their sources.

Sections 917 and 918 are taken from C. S. C. chap. 99, secs. 120 and 121, which are themselves copied from Imp. Stat. 7 Geo. IV. chap. 64, sec. 31, the preamble to which recites that it was passed because "the practice of indiscriminately estreating recognizances" in the cases there referred to (being the same cases as those mentioned in sec. 917 of the Code) "has been found, in many cases, productive of hardship," for which reason a controlling jurisdiction is given to a Judge. All the other sections of the Code we have been considering are taken from the C. S. U. C. chap. 117, and a perusal of the corresponding sections leaves no doubt as to before what Court the writ was to be returnable, and to what Court was given the discretion conferred by sec. 11 of that Statute. Section 6 of chap. 117 is practically identical with our sec. 919 (1) and here the Judge, before whom the default in appearance happened, is given power to relieve

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from an estreated recognizance where the non-appearance is shewn to be "*justifiable.*" Section 916 corresponds to secs. 1, 2, 3, 4, 5 and 9 of chap. 117. Section 2 of chap. 117 says that "one of the rolls shall be transmitted to the office of the Clerk of the Crown and Pleas of the Court of Queen's Bench on or before the first day of the term next succeeding, &c." Section 11, corresponding to sec. 922 of the Code and the form of the writ, shews that the Court into which the writ was to be returnable was the Court of Queen's Bench or Common Pleas at Toronto, and that it was to one of these Courts that jurisdiction is given in cases like the present. There is nothing to indicate any intention to take away from a Court *in banc* and assign to a single Judge the power of relieving from recognizances given by sec. 11.

That being so the learned Judge had no jurisdiction to make any order such as he has made, and it is unnecessary to consider the sufficiency of the material presented for the exercise of his discretion.

So far as appears no objection was taken as to his jurisdiction during the argument upon the application before him. Had the question been raised, then he would no doubt have more carefully scanned the section. The parties however cannot by silence or otherwise confer a jurisdiction where it does not exist.

The appeal will be allowed with costs to be paid by the respondents.

RICHARDSON, WETMORE and SCOTT, JJ., concurred.

Appeal allowed with costs.

REGINA v. MONAGHAN.

Judgment upon stated case—Subsequent motion to quash conviction—Res judicata—Necessity for writ of certiorari.

Held, that where a summary conviction has been questioned on a case stated by the magistrate under s. 900 of *The Criminal Code, 1892*, and has been upheld, a subsequent application to quash it by way of *certiorari*, will not be entertained.

Semble, *per* RICHARDSON and WETMORE, JJ. (SCOTT and ROULEAU, JJ., dissenting), that the papers in connection with a summary conviction, returned by the magistrate to one of the Clerks of the Court under s. 888 of *The Criminal Code, 1892*, are not before the Court for all purposes, and that a writ of certiorari must issue in order that a motion to quash the conviction may be entertained.

[*Court* in banc, *5th December, 1897.*

Statement. This was a motion to quash the conviction of the defendant under R. S. C. (1886), chap. 43, sec. 94, for that he did give and sell intoxicating liquor to an Indian.

Argument. *J. R. Costigan*, Q.C., for the defendant.

James Muir, Q.C., for the magistrates and the prosecutor, objected that as no writ of certiorari had issued the proceedings were not properly before the Court, and that even if they were, the motion should not be entertained since the defendant had had the same points as were raised upon this application already determined by SCOTT, J., adversely to his present contention upon a case stated by the magistrates at the defendant's request.

[*5th December, 1897.*]

Judgment. SCOTT, J.:—On 20th November, 1897, the defendant obtained from ROULEAU, J., a rule *nisi* returnable before the Court *in banc* calling upon the convicting justices to show cause why a certain conviction made by them against the defendant should not be quashed. On the return of the rule the objection was raised on behalf of the prosecution that the conviction was not properly before the Court inasmuch as it had not been brought before it by *certiorari*. By the affidavits filed on the application for the rule it appears that the formal conviction drawn up by the justices was returned into this Court together with the complete record of all the proceedings in connection therewith and that the same are now on file in the office of the Clerk of the Court for the

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Judicial District of Southern Alberta. There is nothing in the materials filed on the application to show for what purpose they were so returned. By sec. 888 of *The Criminal Code, 1892*, it is provided that every justice before whom a person is summarily convicted shall transmit the conviction or order to the Court to which an appeal is given before the time when an appeal from such conviction may be heard, there to be kept by the proper officer among the records of the Court; and, by sec. 879, the Court to which an appeal is given is a Judge of the Supreme Court sitting without a jury at the place where the cause of the information or complaint arose, or the nearest place thereto where a Court is appointed to be held.

By the information it appears that the Clerk of the Court to which the conviction and proceedings were returned by the justices is the clerk to whom the same should have been returned under sec. 888 and, as nothing appears to the contrary, it may reasonably be presumed that they were returned to him under the provisions of that section. At all events they might have been returned to, and be properly on the files of, the Court under the provisions of that section.

In *Paley on Convictions*, [(8th Ed. 1892), p. 444], writ of *certiorari* is defined as a writ which the Queen's Bench Division, by virtue of its superintending authority over all courts of inferior criminal jurisdiction in the Kingdom, has power to award for the purpose of procuring an inspection of their proceedings. In *Short & Mellor's Crown Practice*[1] it is defined as a process which the Queen's Bench Division, by virtue of its superintending power already referred to, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the Queen's Bench Division whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below. Although the intention of sec. 888 of *The Criminal Code, 1892*, appears to be that the conviction shall be returned to the Court in order that it shall be before it in case an appeal is taken from it, yet as it provides that it shall be kept by the proper officer among the records of the Court, I see no reason why it should

[1] 18th ed. p. 89.

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Scott, J.

not be treated as being properly on the files of the Court for other purposes than those of appeal.

In my view the writ of *certiorari* is merely a means to attain an end which has already been attained when the conviction has been brought into Court under sec. 888. In England and in Ontario the writ is necessary, because the conviction cannot be brought before the Court by any other means, but it appears to me that in the Territories when the conviction has been returned to the Court under sec. 888, the issue of a writ of *certiorari* to bring into Court something that is already here is an entirely unnecessary proceeding.

In *Regina* v. *Wehlan*[2] it was held that a conviction once regularly brought into and put upon the files of the Court is there for all purposes. In that case ARMOUR, J., states that "it is the fact of the conviction being on the files of this Court, regularly brought there, that gives the right to move to quash it; how or at whose instance it was brought there, so long as it was brought there regularly, cannot, in my opinion, affect that right." He also agrees with the view expressed by WILSON, J., in *Reg.* v. *Levecque*,[3] to the effect that the Court might still be obliged to consider the conviction as upon a *certiorari* issued at common law, if the conviction were found in Court, however brought there, so long as it was regularly there, and that, as the conviction was in fact in Court, it might be moved against.

In that case ARMOUR, J., points out the clear distinction which exists between the points involved in that case and that involved in *Reg.* v. *McAllan*,[4] viz., that in the latter case the conviction was not regularly brought into Court.

It may be urged that in case the issue of a writ of *certiorari* were held to be unnecessary, justices and prosecutors would be deprived of certain safeguards and privileges which exist in cases where the issue of such a writ is necessary, but if such is the case I cannot see that it affects the question. It can only be said that Parliament is so legislating as to do away with the necessity for the issue of the writ, has omitted to provide for those safeguards and privileges. I cannot accept the view that the issue of the writ is

[2] (1880) 45 U. C. Q. B. 396. [3] (1870) 30 U. C. Q. B. 509.
[4] (1880) 45 U. C. Q. B. 402.

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Scott, J.

necessary merely because the opposite view would result in their being done away with.

It appears upon this application that, after the making of the convictions, the justices, at the request of the defendants and under the provisions of sec. 900 of *The Criminal Code, 1892*, and the rules made thereunder, stated a case for the opinion of a Judge of this Court in which the legality of the conviction was questioned upon substantially the same grounds as those upon which it is now questioned, and it is now contended on behalf of the prosecutor that, as the Judge to whom the case was stated sustained the conviction, the matter is now *res judicata*.

Sub-section 9 of sec. 900 provides that the authority and jurisdiction thereby vested in the Court for the opinion of which a case is stated may, subject to any rules and Orders of Court in relation thereto, be exercised by a Judge of such Court sitting in chambers, and Rule No. 24 of the Rules of this Court provides that the application for a case stated shall state whether the appeal is to be to the Court *in banc* or to a single Judge, in the latter case naming the Judge. The present application is to all intents and purposes an appeal from a single Judge upon a case stated, and no such appeal appears to be contemplated by the provisions of the Code or the Rules of Court. Even though it may not, strictly speaking, be a proceeding by way of appeal, yet I think that as the defendant elected to submit the questions involved to the decision of a single Judge instead of to the Court *in banc*, he should not now be permitted to question the convictions before this Court upon those grounds.

ROULEAU, J., concurred with SCOTT, J.

RICHARDSON, J.:—I concur with the latter portion of the judgment of my brother SCOTT as to *res judicata*, that having elected as he did there is no appeal further, but I am of opinion that, in any event, the proceedings before the magistrate are, in the absence of any writ of *certiorari* or return thereto, not before this Court in such a way that a motion to quash the conviction could be entertained. Upon consideration we have determined that this is a proper case in which costs should be allowed.

Judgment.

Wetmore, J.

WETMORE, J.—I concur with the views of my brother RICHARDSON that this Court has no jurisdiction to entertain this matter until the conviction is properly brought before the Court by virtue of a writ of *certiorari*. This Court has all the jurisdiction which was held by the old Courts of Common Law and Equity at Westminster, in addition to what jurisdiction has been conferred upon it by statutory enactments. In exercising that jurisdiction, however, and in order that the Court may become seized of the special subject matter, it must be brought before the Court either in the method prescribed by the common law practice of the Court, or by statutory enactments. Now this Court, or any Judge of the Court, has no right, in my opinion, to prescribe a procedure different from the procedure so prescribed by the common law or by statute, and I think, to permit this matter to be brought under the notice of the Court in the way it is sought to be done to-day, would be to prescribe a new procedure and virtually to legislate.

So far as the jurisdiction of this Court is concerned in respect of reviewing the decisions of magistrates, there are, so far as I can discover, only three methods of doing it. One is a statutory procedure which gives the right, so far as the Territories are concerned, of appealing to a Judge sitting without jury; another provides for a case to be stated by the magistrate with which this Court or a single Judge may deal according as the person moving in the case elects, and the third is by *certiorari*.

Section 888 of the Code authorizes and directs the magistrates making the conviction to forward it to the officer of the Court to whom the statutory appeal has been given. It is only forwarded to that officer of the Court, however, for the purpose and with the view to that appeal, and when we desire to become possessed of the jurisdiction to deal with it by way of *certiorari*, the process of the Court must be issued in the form prescribed, and after that there must be a return under the seal of the magistrate, then—and only then—we have the record upon which the Court can deal with the conviction by a proceeding to quash it. The conviction which is filed with the Clerk under sec. 888 is not the record in the sense which the return to a writ of *certiorari* is the record, and moreover

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Wetmore, J.

we do not get before us by the filing of the conviction what is necessary in most instances to dispose of the questions raised on *certiorari* because it is necessary to have the evidence. This Court has decided already that the writ of *certiorari* must require a return including the conviction and the evidence, and there is no provision in the Code which directs the evidence to be filed with the Clerk of the Court. It turns out that the evidence is here, but how did it get here, and what record or certificate have we that this is the evidence taken before the magistrates?

The consequence of departing from this rule has, I think, the effect of doing away with some express enactments and decisions affecting the question. For instance, if the writ of *certiorari* is applied for, before the writ can issue at all, the justices have the right to notice. That is by virtue of an Imperial statutory enactment of binding force in these Territories. How is it possible for us, by creating a procedure of our own, entirely to avoid the provisions of that Act? In this case it was attempted to be done by giving notice to the justices that an application would be made to a Judge, not for a writ of *certiorari*, but for the rule *nisi* to quash the conviction. The Act does not provide for notice to be given to the justices of an application for an order to quash, but of an application for a writ of *certiorari*, and when notice is given, as has been done in this case, of an intention to apply for an order to quash the conviction, the provisions of the statute are not being carried out at all, but something entirely different to what the statute contemplates is being done.

Then again, as to the consequences, under the prescribed practice whereby a writ of *certiorari* is issued, the justices may, at any time before the return to the writ of *certiorari*, amend the conviction, and they may do that even after it is lodged with the officer of the Court. Here a statutory appeal has been given, and the justice cannot amend if he is made to return the conviction without a writ of *certiorari*. His power is gone if this practice is allowable, and the result is that proceedings can be taken under which they are liable to the same consequences as if the conviction had been returned to the writ of *certiorari*. Now it must follow that the very moment that the conviction is filed under sec. 888, if the position is the same as if it had been filed with a return to a writ of *certiorari*, the

justices have no longer power to amend, because the moment he has filed the record in Court it is open to any person to move to quash it. But the authorities run contrary to that. They say they can amend it before it is returned with the return to the writ of *certiorari*. It seems to me, therefore, that the establishment of a practice such as is sought to be carried out here, is flying in the teeth of the practice of the Court and the Imperial Statute and the decisions I have mentioned. Judgment. Wetmore, J.

I think, therefore, with my brother RICHARDSON, that we have no jurisdiction to entertain this application until a writ of *certiorari* has been issued and the return made to the Court; but I concur with the latter part of my brother SCOTT'S judgment that the defendant, having elected to take the case stated before a single Judge as he has done, and having got the decision of that Judge, he cannot come before this Court now and attack the conviction upon the very same grounds as those upon which he attacked it before the single Judge. The powers of both are identical. Suppose that, instead of electing to have this case heard before the single Judge, he had elected to have it heard before this Court and got its decision, could he then apply to this Court to quash this conviction just as if it had been brought up by writ of *certiorari*. I think it is a case of *res judicata*, and no appeal to this Court seems to be given from the decision of a single Judge. I do not think that we should allow it to be taken by a side wind.

Rule discharged with costs.

O'BRIEN v. JOHNSTON.

Promissory note—Holder—Equitable set off against drawee—Preferential assignment—Pressure—Rev. Ord. (1888), c. 49.

One Maloney, to secure a claim of $867.00, endorsed to the administrators of the estate of John S. Ewart, a promissory note made in his favour by the defendant. At the same time it was arranged that the administrators should hold the balance of the proceeds in trust, first to pay certain other claims against Maloney and the residue to pay over to him. Subsequently, but before the note became due, Maloney executed an assignment to the plaintiff of all his interest in the moneys secured by the note in trust to pay the claims previously arranged for and certain additional claims amounting to more than sufficient to exhaust the proceeds. The administrators before action endorsed the note to the plaintiff, taking from him an agreement to protect their interest. The defendant claimed to be entitled to deduct from the amount payable by him certain indebtedness of Maloney to him incurred in some collateral transaction, on the ground that the assignment was void under Rev. Ord. (1888) c. 49, or that it was no more than an assignment of a chose in action, and that the plaintiff took subject to the equities between the maker and the payee.

Held, affirming the judgment of ROULEAU, J., that the assignment, having been procured by pressure, was not void; that the administrators at all events were holders in due course, and the plaintiff could rest upon their title; and that there could, therefore, be no set off against the plaintiff.

[*Court* in banc, *11th December, 1897.*

Statement

This was an appeal from the judgment of ROULEAU, J., at the trial in favour of the plaintiff. The action was brought on a promissory note made by the defendant in favour of William Maloney for $3,000, dated 11th August, 1894, and payable at the Bank of Montreal, Calgary, one year after its date. This note, therefore, matured on 14th August, 1895. At the time it was given, Maloney, the payee, was indebted to James A. Lougheed and Jessie S. Ewart, administrator and administratrix of the estate of John S. Ewart, deceased, in the sum of $800 and upwards, and he, immediately after it was made, indorsed it to Lougheed and Ewart as collateral security for such indebtedness. Messrs. Lougheed & McCarter, a firm of advocates practising at Calgary, of which Mr. Lougheed, the administrator, was a member, were also acting for certain creditors of Maloney, and it was arranged between McCarter and Maloney at the same time that the balance of the note, after satisfying the claim of Lougheed and Ewart, was to be

Statement.

applied to pay certain other named creditors, pressure being exercised at all events with respect of one of the claims, the claims then considered being, however, insufficient to exhaust the balance of the note.

Subsequently, and before the note became due, Lougheed & McCarter, acting on their own behalf in respect of an account due by Maloney to the firm, and as advocates as well for the creditors whose claims had been previously secured as for certain new creditors having claims which were sufficient to exhaust the proceeds of the note, procured Maloney to execute an assignment dated 1st August, 1895, by which Maloney assigned to the plaintiff all his interest, claim and demand to the moneys secured by the note in question, with power to demand and receive from Lougheed and Ewart all moneys received by them as proceeds of such note after deducting therefrom the moneys owing to them as representatives of the Ewart Estate, and to stand possessed of such moneys in trust to pay the creditors of Maloney their respective claims.

The note remained in the hands of Lougheed and McCarter until a few days before maturity, when it was discounted at the Molsons Bank, but not having been paid on the due date it was taken up by Lougheed and Ewart and was on the same day by them endorsed to the plaintiff, an agreement being at the same time entered into, whereby, after reciting the indorsement of the note to Lougheed and Ewart, and that they were entitled to receive out of the proceeds $867 and that the plaintiff was entitled to receive the balance, it was agreed that the plaintiff would at once take steps to collect the amount of the note, and out of the proceeds first pay Lougheed and Ewart the sum of $867 and indemnify and save them harmless as to the proper application of the balance. The plaintiff immediately on the note being indorsed to him and on the 14th August, the last day of grace, presented it for payment at the Bank of Montreal, when it was dishonoured. The defendant, admitting the right of the plaintiff to recover to the extent that the Ewart Estate was interested in the note for its claim of $800 and upwards, claimed the right to set off against the balance claims which he had against Maloney, not arising out of the note itself, but out of entirely

Statement. independent and collateral matters, and paid into Court $1,604, which he alleged was sufficient to satisfy the plaintiff's claim. ROULEAU, J., gave judgment for the plaintiff for $1,400.05, being, with the amount paid into Court, the full amount of the plaintiff's claim.

The appeal was heard before RICHARDSON, WETMORE, and MCGUIRE, J.J.

Argument. *C. C. McCaul, Q.C.*, for plaintiff. The assignment of 1st August, 1895, revoked the first endorsation to Lougheed and Ewart so far as any other creditors obtained any rights thereunder, and it is void under *The Ordinance respecting Preferential Assignments*, Rev. Ord. (1888), chap. 49, or is only a mandate, since the creditors have not in any way elected to take the benefit of it. Consequently the defendant can, as against the creditors, other than the estate of John S. Ewart, set off his claims against Maloney. At all events the assignment is not an assignment of the note, but of the proceeds, and the plaintiff holds these subject to all equities as he would under any assignment of a chose in action.

P. McCarthy, Q.C., for defendant.

Judgment. RICHARDSON, J.—Maloney, on pressure by Lougheed & McCarter, the advocates with whom the indorsees had placed the note for collection when due, at once charged any surplus resulting from the collection, after Lougheed & Ewart's debt had been covered, with payment of the claims of certain creditors, and later on, before the note matured, formally assigned such surplus to plaintiff in trust to receive the same, and then, after receipt, pay those, and some other pressing creditors, all named in the instrument, these claims together exceeding such surplus. This by the terms of the note he had the right to do.

Following this assignment and before maturity of the note, Lougheed & Ewart indorsed over "generally" the note to the plaintiff, taking from him an undertaking to collect and apply the proceeds in paying the debt due Lougheed & Ewart, and indemnify them as to the proper application of the balance. The plaintiff thus became holder for value in due course, and I have observed no authority which will per-

mit the setting off as against an indorsee in due course for value of a debt due by a payee to the maker. Such certainly is not an equity attaching to the note itself. Judgment. Richardson, J.

Holding this view, and being also of opinion that the proof of pressure made upon Maloney by the advocates representing the creditors in trust for whom he assigned to plaintiff, was ample to uphold it as against other creditors of Maloney, I think the judgment of the learned trial Judge should stand and the appeal be dismissed with costs.

As to the question of whether this assignment is void under *The Ordinance respecting Preferential Assignments*,[1] I am satisfied that this assignment was procured as the result of honest pressure brought to bear on Maloney by Lougheed and McCarter acting for themselves and the other creditors of Maloney named in the assignment. The testimony of McCarter puts that beyond all question in my opinion. And I can find nothing in the testimony which leads my mind to any other conclusion.

WETMORE, J.—The whole question involved in this appeal is, whether the defendant has under the circumstances of this case the right at common law or in equity to insist upon his alleged matters of set off against Maloney. I have no doubt whatever that at common law the defendant cannot set off against the plaintiff's right to recover on the note the claims against Maloney which he relies on. There is no doubt that the plaintiff was the holder of this note, and, that being so, his rights at common law, so far as the question of the right of set off is concerned, is set at rest by *Oulds* v. *Harrison*,[2] which lays down the law in substance, that an indorsee of an overdue note is not liable to a set off due from the payee to the maker, although the indorsee had notice of the set off, gave no consideration for the indorsement, and took the note on purpose to defeat the set off. That case so far as I know has never been overruled. Judgment.

That the assignment is not, under these circumstances, void, is set at rest by *Stephens* v. *McArthur*[3].

[1] Rev. Ord. (1888), c. 49. [2] (1854) 10 Ex. 572, 24 L. J. Ex. 66, 3 C. L. R. 353, 3 W. R. 160. [3] (1891) 19 S. C. R. 446.

Judgment.

Wetmore, J.

Then, as to the question whether the assignment in question was a mere mandate, a number of cases were relied on on behalf of the defendant. The case principally relied on was *Johns* v. *James*,[4] as embracing the holdings of all the other cases on the subject, and in that respect the learned counsel for the defendant was, I think, correct. In this case, as well as in all the other cases cited on this point on behalf of the defendant, the assignment was a voluntary assignment. The creditors intended to be benefited had not executed the deed; they had not been communicated with; they had never acted in any way or been induced to act by anything that occurred by reason of the execution of the deed, and the creditor in question only intervened after the property had been entirely expended by the trustee. In *Andrew* v. *Stuart*, [5] and *Cooper* v. *Dixon*,[6] the sheriff seized the property before the creditors interested had been communicated with or had in any way expressed their assent to take the benefit of the deed. In this case, however, the deed was not a voluntary deed; it was executed at the request of, and by the pressure of, the creditors interested, of some of the creditors in person, of the others through their advocates, Lougheed & McCarter. Suppose that an assignment had, at the request of any one of the creditors and under pressure, been executed to him personally, and without the intervention of a trustee, could it be held that such a transfer would be merely a mandate because the creditor had not signed it? I think not. What difference does it make then that, a number of creditors being interested, an assignment is at their request and under their pressure made for their benefit to a trustee named by them, even if they do not execute the document? I am at a loss to discover the difference. Can it be said under such circumstances that the transfer was not communicated to the creditors, or that they had not elected to take the benefit of the assignment? My opinion is quite the contrary. I think most decidedly they have elected to take the benefit of the assignment. And I think I have a right to assume, although there is no direct evidence of it, that they have omitted in consequence to further press their judgments by execution or

[4] (1878) 8 Ch. D. 771; 47 L. T. Ch. 53. [5] (1881) 6 Ont. A. R. 495. [6] (1884) 10 Ont. A. R. 50.

their claims by suit where no judgment was recovered. I am of opinion that the assignment under the circumstances is irrevocable and that the plaintiff is therefore trustee for the creditors named, and not for Maloney. Judgment. Wetmore, J.

As to the point raised that the assignment is an assignment of a chose in action, I am rather inclined to the opinion that that contention is correct, but I am also of the opinion that this cannot affect the plaintiff's right to recover the whole amount of the note sued on. It must be borne in mind that this action is brought on the note, and not merely on the chose in action assigned to O'Brien by Maloney. In my opinion the situation was as follows:—Before the note was indorsed to him, the plaintiff was as far as Maloney, under the influence of the creditors, could do it, clothed with the right to receive the proceeds of the note after deducting Lougheed and Ewart's claim for the benefit of such creditors. The moment then that the note was indorsed to him and the agreement between him and Lougheed and Ewart was signed, he became the lawful holder of the note to all intents and purposes as trustee to pay over the whole proceeds, first paying Lougheed and Ewart and then the other creditors, and all the law applicable to holders of promissory notes as indorsees is applicable to him and this note. I can find no case at common law or in equity where the maker of a note has been allowed to set off against an indorsee claims against the payee arising out of collateral matters, unless the indorsee represents the payee. Now that was the state of facts in *Thornton* v. *Maynard*,[1] so strongly relied on by the defendant. In that case the action was brought by the holder of several bills of exchange against the acceptor. The defendant pleaded by way of equitable defence that the drawers became bankrupt and that the plaintiff had received £425 as a dividend from the drawer's estate on account of the bills sued on, and as to that sum was suing only as trustee for the drawers, and the defendant claimed to set off claims due to himself from the drawers, which was held a good equitable defence *pro tanto*. It must be borne in mind that the plaintiff in that case was alleged in the plea to be the trustee of the person against whom the set off was claimed. In

[1] (1875) L. R. 10 C. P. 695; 44 L. J. C. P. 382; 33 L. T. 433.

Judgment. Wetmore, J.

this case the plaintiff is not, according to my holding, the trustee of the person against whom the set off is claimed, namely, Maloney; he is the trustee of Lougheed and Ewart and of the other creditors named in the assignment of 1st August, 1895. In the view I take of this case I think it is quite immaterial whether the note was overdue or not when it was indorsed to the plaintiff, or whether the plaintiff had notice of the matters of alleged set off or not.

The views I have expressed dispose of the whole appeal. I am of opinion that the judgment of the trial Judge should be affirmed and this appeal dismissed with costs.

Judgment.

McGUIRE, J.:—This appeal is from the judgment of Mr. Justice ROULEAU.

Plaintiff sued upon a promissory note for $3,000 and interest, made by the defendant payable to the order of one William Maloney indorsed by Maloney to Lougheed and Ewart and by them indorsed to the plaintiff. Defendant admits that the note was indorsed to Lougheed and Ewart to secure Maloney's indebtedness of some $867 to the Ewart estate, but as to the residue of the note he says that Lougheed and Ewart were to hold the same as trustees for Maloney; that Maloney is indebted to him in respect of certain matters entirely distinct from the note sued upon; that the present plaintiff became holder of the note when overdue and is therefore trustee for Maloney in the same way as his transferrors, and that the defendant is entitled to set off against so much of the proceeds as were so held or to be held in trust for Maloney, the amount of Maloney's said indebtedness to him.

The evidence is clear and uncontradicted that the note was assigned on the day it was made, by Maloney to Lougheed and Ewart for value, *viz.*, as security for the claim of the Ewart estate and to pay certain other creditors of Maloney for whom Lougheed & McCarter were acting as advocates. The note remained in the hands of Lougheed and Ewart till a few days before its maturity, when it was indorsed to the Molsons Bank for collection, but on the day it fell due the bank returned the note to Mr. Lougheed, who the same day on behalf of himself and Jessie

Judgment. McGuire, J.

Ewart indorsed it to the plaintiff. Whether this indorsement was before or after maturity is a disputed fact. In the view I have taken I do not think it is material. Lougheed & Ewart were unquestionably holders in due course and O'Brien can stand on their title. It seems clear that at law a debt due by the payee of a note to the maker and entirely distinct from the note cannot be set off in an action by an indorsee. See *Burrough* v. *Moss*,[8] and *Oulds* v. *Harrison*[9].

But the defendant says that in equity, under the circumstances in this case, he can set-off his debt against the portion of the note to which Maloney was entitled after satisfaction of the claim of the Ewart estate. It will not be necessary for me to consider whether the defendant's contention is correct or not, because I do not agree with him as to the facts. I think that when the note first came into the hands of Lougheed & McCarter, the claims which they held for collection and which the evidence shews Maloney agreed should be paid by them out of the proceeds of the note, may not have been sufficient to exhaust the said proceeds, and as to any residue they would hold it for Maloney. But before the note fell due they became advocates for other creditors, and on the first of August, the date borne by the assignment, and certainly before the ninth of August, according to Mr. McCarter's evidence, Maloney executed an assignment to the plaintiff of the whole proceeds of the note in favour of certain named creditors, clients of Lougheed & McCarter, whose claims would more than exhaust such proceeds, so that, when the note fell due, Maloney had no interest whatever in the note or its proceeds, and the plaintiff was never a trustee nor to be a trustee for Maloney, as to any portion of the proceeds of the note. The evidence is that this assignment was procured through pressure by Lougheed & McCarter and was not voluntary. Though the assignment is to O'Brien, it was made in effect to the creditors represented by those advocates.

It is urged that this assignment was revocable because not executed by any creditor. But the advocates of these creditors were pressing Maloney for payment, and the

[8] (1830) 10 B. & C. 558. [9] (1854) 10 Ex. 572; 24 L. J. Ex. 66; 3 C. L. R. 353; 3 W. R. 160.

Judgment.
McGuire, J.

assignment was made not only with their knowledge, which is the same as the knowledge of their clients, but also, as we have seen, was secured and obtained by them. Under these circumstances, I do not think the assignment was revocable, and so I need not consider whether, even were it voluntary and revocable, the defendant would have a defence to this action.

The plaintiff is I think entitled to succeed, and the appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

REGINA v. SKELTON.

False swearing—Statutory declaration—No allegation of intention to mislead—Amendment of charge—Authority to make declaration——Withdrawal of election to be tried by jury—Preliminary inquiry on several charges against different defendants—Admissibility of statement of accused made upon oath.

The defendant was charged for that in a certain statutory declaration, he did falsely, wilfully and corruptly declare to the truth of certain facts, setting them out. Upon objection before plea the charge was amended on the application of the Crown by adding an allegation that the defendant was duly authorized to make the declaration, but there was no allegation that it had been made with intent to mislead.

Held, that no allegation of intention to mislead was necessary; that the amendment was properly allowed, and that the charge was sufficient in point of form.

Held, further, that s. 26 of *The Canada Evidence Act, 1893*, authorized the making as well as the taking of the declaration.

The defendant pleaded to the charge before amendment and elected to be tried by a Judge with the intervention of a jury. Upon being called upon to plead to the charge as amended he sought to alter his election and to be tried by the Judge alone. This was refused.

Held, that the refusal was justified.

The declaration in question had been made by four parties commencing, "We," and setting out the names of the declarants, but there was no statement that it was made jointly and severally.

Held, that, the defendant having signed it, there was no reason why he should not be taken to have made it of his own personal knowledge.

The evidence at the preliminary investigation was taken on an information against the defendant at the same time as upon separate informations against two of his co-declarants.

Held, that the defendant was properly charged upon such evidence.

The defendant at the preliminary investigation, after being cautioned, requested that he should be sworn, and made his statement upon oath.

Held, that such statement was properly receivable against him at the trial.

[*Court* in banc, *9th December, 1897, 11th February, 1898.*]

Statement.

This was a case reserved by WETMORE, J., under the provisions of section 743 of *The Criminal Code, 1892.*

The defendant was charged at Battleford on 28th October, 1897, as follows:—

James Moore Skelton, of the town of Battleford, in the Judicial District of Saskatchewan in said Territories, stands charged for that the said James Moore Skelton, at Battleford aforesaid, on or about Friday, the sixteenth day of April, A.D. 1897, in a certain solemn declaration made voluntarily before one John Cotton, one of Her Majesty's Justices of the Peace in and for the Northwest Territories, did falsely, wilfully and corruptly declare and state of John Byron Mercer, of Battleford aforesaid, to the effect and in the words following, that is to say, "We," meaning the said James Moore Skelton and others, "know that he," meaning the said John Byron Mercer, "kept in the Conservative committee rooms the Battleford list of voters that had been made out and posted by the enumerator. This, we believe, was done to allow the Conservative committee to examine and revise such lists, and also to prevent their being always open to the public, as provided by law, and that by such action injury was done to the Liberal candidate (he the said James Moore Skelton being then duly authorized by law to make any statements on solemn declaration (s. 147)."

This charge as originally preferred on 28th October did not contain the words within the brackets. Upon the defendant being arraigned upon this charge as originally preferred, and before he pleaded thereto, an application was made upon his behalf to quash it upon the following grounds:—

1. That it did not allege, in the language of sec. 147 of *The Criminal Code, 1892*, that the statement set out in such paragraph was one authorized or required by law to be made on solemn declaration;

Statement.

2. That it did not allege that said statement was made with intent to mislead;

3. That the offence set out in the charge was not founded upon the facts or evidence disclosed in the depositions taken at the preliminary examination, and that the charge was not preferred by the Attorney-General or any one by his direction, or by any one with the written consent of a Judge of any Court of original jurisdiction or by the Attorney-General;

4. That the preliminary inquiry was held against three persons, including the defendant, and not against the defendant alone.

The trial Judge refused to quash the charge, and stated that he would reserve all questions of law raised for the opinion of this Court. He declined to amend the charge. The defendant then pleaded "not guilty" and elected to be tried by a Judge with the intervention of a jury. The Court was then adjourned until the following day to enable a jury to be summoned.

Upon the opening of the Court on the following morning, application was made on behalf of the Crown to amend the charge by inserting the words which are contained within the brackets. On behalf of the defendant, it was objected that the proposed amendments did not cure the objections to the charge as originally laid. The trial Judge allowed the proposed amendments to be made, and a plea of "not guilty" was entered by the defendant to the charge as so amended. The defendant by his counsel stated that he desired to withdraw his election made the previous day to be tried by a Judge with the intervention of a jury, and to elect to be tried by a Judge without the intervention of a jury, and he claimed that inasmuch as he had been called upon to plead *de novo* he had the right to so withdraw his election and make a new one.

The learned trial Judge declined to allow the defendant to withdraw his election and make a new one, on the grounds that he had no right by law to elect to be tried by a Judge in a summary way, that the matter of giving him his option to be so tried was entirely in the discretion of the Judge, and that the charge as amended was substantially the same as that upon which he had made his election.

Statement.

The case was thereupon tried with the intervention of a jury.

The declaration which contained the alleged false statement was made under the *Canada Evidence Act, 1893*, by the defendant, and three others and, in so far as the same is material to the question of law reserved, was as follows:—

"We, James M. Skelton, C. M. Daunais, Wilfrid Latour, Thomas Dewan, all of Battleford, Saskatchewan, do solemnly declare that we know of our personal knowledge that" (here followed the alleged false statements and other statements).

At the preliminary hearing before the justices of the peace, after the examination of the witnesses produced on the part of the prosecution had been completed, the defendant was addressed by the justices in the words following: "having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you at the trial." Thereupon the defendant made a statement, but before making it, he was, at his own request, sworn. The statement was taken down in writing and signed by the defendant, and was offered in evidence by the Crown at the trial. It was objected to on the part of the defendant on the grounds: that it was evidence of the defendant, and not his statement taken in pursuance of *The Criminal Code, 1892*, and that it was not receivable in evidence by virtue of sec. 5 of *The Canada Evidence Act, 1893*.

The learned trial Judge received the statement holding that it was none the less a statement under sec. 591 of *The Criminal Code, 1892*, because the defendant, at his own request, had been sworn before he made it, and, if it was not a statement made under that section, the defendant was a competent witness under sec. 4 of *The Canada Evidence Act, 1893*, and, having offered his evidence under oath, and it having been received, it was not subject to the proviso contained in sec. 5 of that Act, as the proceeding on which he was being tried was not instituted against him after such evidence was given, but had been instituted against him when the information was laid, and was admissible under the general provisions of the last mentioned Act, and by virtue of sec. 592 of the *Criminal Code, 1892*."

Statement.

At the close of the case for the Crown, the objections raised to the charge on the application to quash, were renewed on the part of the defendant for the reasons then urged. It was also urged on his behalf, that perjury or any offence akin to it, could not be assigned on the solemn declaration put in evidence because the plural pronoun "we" was used; that, in order to enable perjury or any offence akin thereto to be assigned on such a declaration, the language should be "we jointly and severally know," and that the word "we" was ambiguous and might include any two of the declarants and not necessarily the defendant.

The jury found the defendant guilty of the offence charged.

The questions of law raised for the opinion of this Court were.

1st. Were the objections raised to the charge on which the application was made to quash said charge or any of them good and valid objections in law, and ought the trial Judge to have quashed the charge on said objections or any of them?

2. Was he authorized by law to allow the charge to be amended in the manner in which it was amended?

3. Did the amendments cure the objections raised to the charge as originally laid or any of them?

4. Was he justified in law, in refusing to allow the defendant to withdraw his election to be tried with the intervention of a jury, and in refusing to try the defendant in a summary way without the intervention of a jury?

5. In view of the objections taken to it, was the defendant's statement or evidence given before the justice at the preliminary examination properly received in evidence?

6. It is an indictable offence under sec. 147 of *The Criminal Code, 1892*, to knowingly, wilfully and with the intent to mislead, make a false statement in a solemn declaration of the character of that in question in this case, and made voluntarily under the circumstances under which the defendant made the declaration in question?

7. If not an offence under sec. 147 of the Code, is it an offence under either secs. 148, 149 or 150, and, if so, under which of these sections?

Statement.

8. Was the objection taken on the ground that the personal pronoun "we" was used in the declaration a good and valid objection?

9. Was the trial Judge correct in holding as he did that the offence charged was an indictable offence under sec. 147 of the Code and not under secs. 148, 149 or 150?

10. If the offence was not an indictable offence under sec. 147, was it an indictable offence under either secs. 148, 149 or 150, and, if so, under which of those sections?

11. In view of the manner in which the charge is framed, and if the offence is one under secs. 148, 149, or 150, and not under sec. 147, can the verdict be treated as a verdict of guilty under any of the first mentioned sections?

The case was heard before RICHARDSON, ROULEAU, and SCOTT, JJ.

Argument.

R. F. Chisholm, for the Crown.

T. C. Johnstone, for the prisoner.

[*11th February, 1898.*]

Judgment.

RICHARDSON, J.:—The learned counsel for defendant urged before this Court that, the charge being bad in substance, it was not amendable, but should have been quashed. Bearing in mind, however, that the amendment was allowed and made before the defendant had pleaded, and as the defect, if it was a defect, was apparent on the face of the charge, it was, in my opinion, amendable under sec. 629 of *The Criminal Code, 1892*.

Then, as to the charge as it stands, is it sufficient in point of form, having regard to the provisions of sec. 611 of the Code?

Notice is given to the accused that he is charged with having, on the 16th April, 1897, in a certain solemn declaration made voluntarily before John Cotton, a justice of the peace in and for the Northwest Territories, falsely, wilfully and corruptly declared and stated of John Byron Mercer to the effect and in the words set forth, "he the said accused, being then authorized by law to make any statements on solemn declaration (sec. 147)." The accused was bound to know, or must be taken to know, that if he had

Judgment.
Richardson, J.

made upon oath, in a judicial proceeding, a similar statement falsely, wilfully, and corruptly, it would amount to perjury.

The evidence established clearly that the object in view in making the false statement was to obtain, or assist in obtaining, Mercer's dismissal from an office he held, and to mislead the person having the power to dismiss him. Sec. 26 of *The Canada Evidence Act, 1893*, in my judgment authorizes the making of such a declaration as in this case, providing, as it does, that "any . . . justice of the peace . . . may receive the solemn declaration of any person voluntarily making the same before him in the form prescribed . . . of the truth of any fact." And sec. 147 is intended to deal with persons who, availing themselves of the rights given by sec. 26 of *The Canada Evidence Act*, abuse them by making false statements of the kinds described.

With regard to the statement of the accused being given in evidence, it clearly appears that, on the preliminary investigation, the accused was clearly cautioned, if not in the exact words, yet to the effect required by sec. 591 of the Code. There was no compulsion, and why what he then stated voluntarily should be excluded because he was sworn, or because what he said was reduced to writing and signed by him, I fail to observe. The proceeding in which the statement was made, was not a proceeding thereafter instituted against him. It was in the then pending proceeding, and sec. 5 of *The Canada Evidence Act* consequently does not apply. In my opinion accused's statement was admissible in evidence on the trial.

As to the 8th question submitted by the learned trial Judge, I am not convinced, after hearing the arguments of the learned counsel for the defendant, that by the use of the word "we" in the declaration in question, when both defendant and others have signed it, it is open to ambiguity, or is any other than the declaration of each of those who deliberately signed the same and solemnly declared before the justice of the peace to the facts therein contained, and therefore I hold the learned trial Judge was right in the view he took.

Judgment. Richardson, J.

In the result, in my opinion the questions submitted for the consideration of this Court by the learned trial Judge should be answered thus:

One, two, five, six and nine in the affirmative.

Question three, it is not necessary to answer, it being covered by the answers to one and two.

Question four does not require a formal answer inasmuch as the objection raised was abandoned on the argument, the point having been decided in this Court. *Reg.* v. *Brewster*[1] and a like objection overruled.

Questions seven, eight, ten and eleven, in the view I take of the whole case, require no direct answer.

In my opinion the rulings of the learned trial Judge appealed from should be affirmed.

SCOTT, J.:—Section 147 of *The Criminal Code, 1892*, provides as follows:—"Everyone is guilty of an indictable offence . . . who, being required or authorized by law to make any statement upon oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding."

In order to ascertain whether a statement would amount to perjury if made in a judicial proceeding reference must be had to sec. 145, which defines that offence. It will there be found that one of the ingredients of the offence is that the statement must have been made with the intention to mislead. I think it is clear that, before the passing of the Code, where the intent with which an act was committed was a necessary ingredient of the offence, such intent must be alleged in the indictment or charge, and there are some provisions of the Code which lend themselves to the view that it is still necessary to allege it, such as for instance sec. 613, which provides that, in an indictment for an offence under sec. 361, it shall not be necessary to allege that the act was done with intent to defraud. The intent to defraud is not necessary to constitute an offence under the latter section, and, if it is unnecessary to allege the intent in cases where it is an ingredient, it seems unnecessary to provide

[1]1896 2 Terr. L. R. 353.

Judgment.
Scott, J.

that it need not be alleged in certain cases where it forms no part of the offence. Take also sub-sec. 1 of sec. 611, which provides that every count of an indictment "shall contain . . . in substance a statement that the accused has committed some indictable offence therein specified." It might reasonably be contended that, where the law provides that an act shall be a criminal offence only in cases where it is done with a certain intent, an indictment alleging that the accused had done the act without alleging that it was done with that intent, would not contain in substance a statement that the accused had committed an offence.

I am free to admit that these and other provisions of the Code led me to entertain the view that the charge in question was defective by reason of the fact that it did not allege the intent to mislead. It contains no direct allegation to that effect, and I am of opinion that the figures "s. 147" at the end of the charge do not constitute a reference to any section of any Statute within the meaning of sub-sec. 5 of sec. 611, but further consideration of other portions of the Code now leads me to the conclusion that the charge is not defective by reason of the omission referred to.

Sub-section 4 of sec. 611 provides that the statement may be in any words sufficient to give the accused notice of the offence with which he is charged, and Form FF in the schedule, which expressly refers to sec. 611, gives examples of the manner of stating offences under it. Form C states an offence under sec. 359 for obtaining goods by false pretences. A reference to that section will show that the intent to defraud is necessary to constitute that offence, and yet Form C contains no allegation of such intent. If such an allegation is unnecessary in a charge under sec. 359, I fail to discover any reason why it should be considered necessary in a charge under sec. 147. I also fail to see that if the charge in question had contained such an allegation it would have given the defendant any further or better notice of the offence with which he was charged, than it now does without such allegation.

I have not overlooked the fact that Mr. Justice TASCHEREAU in his work on the Code expresses the view that a count for false pretences is perhaps the only one that can be laid without an averment of the intent, where such intent is

Judgment.
Scott, J.

necessary to constitute the offence, but I do not agree with his view of the effect of the forms in the schedule. To my mind these are intended to illustrate the provisions of sec. 611, and their effect was not intended to be confined, and is not confined, to the offences stated in them. Section 982 provides that these forms, varied to suit the case, or forms to the like effect, shall be deemed sufficient. It is true, as pointed out by Mr. Justice TASCHEREAU, that the other forms in FF either directly or indirectly allege the intent, where the intent is necessary to constitute the offence, but it will be found that as to some of them at least, such allegation would be necessary in order to give the accused notice of the particular offence with which he is charged.

As to the third objection raised on behalf of the defendant upon his application to quash the charge, the information laid before the justice of the peace on the preliminary examination charged the defendant separately with "committing perjury, in that he made a false declaration before John Cotton, J.P.," and the portion of the declaration on which perjury was assigned, was set out in the information substantially just as it is in the charge in question, and such information stated that such declaration was signed by the defendant and Daunais, Latour and Dewan. Separate informations charging perjury in like manner were laid against Daunais and Dewan respectively, and one preliminary inquiry was held on such informations against the three persons so charged. The evidence in the depositions taken at such preliminary examination disclosed sufficient to warrant the justice in committing the accused persons for trial for an indictable offence in declaring in such declaration what was to them respectively, wilfully and corruptly false in the particulars charged against them in the informations, assuming that an indictable offence can be charged against a person in respect to a false statement so made in a solemn declaration made under sec. 26 of *The Canada Evidence Act, 1893*, under the circumstances under which the accused made the declaration in question.

Upon these facts, as stated by the trial Judge, I am of opinion that the charge in question was founded upon facts and evidence disclosed on the depositions taken before the justice on such preliminary examination, that such prelimin-

Judgment.
Scott, J.

ary examination was sufficient for the purpose, and that the fact that it was held against three persons including the defendant is immaterial.

Holding these views I am of opinion that the objections raised to the charge as amended, and upon which the application was made to quash it, are not, nor are any of them, good and valid objections in law.

In answer to the second question submitted, I am of opinion that the trial Judge had power to allow the charge to be amended in the manner it was amended. Irrespective of any question which may arise as to whether the amendment was as to a matter of form, or one of substance, I think that the Crown Prosecutor, who was acting as Crown counsel at the trial, had the right under sec. 11 of the *North-West Territories Amendment Act*[2] to substitute another charge in respect to the same offence, and, having that right, I see no reason why he should not amend the original charge instead of substituting a new one.

Section 629 of the Code differs from the corresponding section of the Imperial Statute, inasmuch as the former is expressly confined to formal defects, and the reason given by the text writers for so confining it is that there the grand jury are the accusers on the indictment, and the accusation cannot be changed into another one without their consent. If they have brought in an accusation of an offence not known to the law, the Court cannot turn it into an offence known to the law by adding to the indictment. That state of affairs does not exist here, because here the Crown Prosecutor is the accuser, and in the present case he himself applied for the amendment.

As to the fourth question submitted, I am of opinion that the trial Judge was, for the reasons stated by him, justified in refusing to allow the defendant to withdraw his election to be tried with the intervention of a jury, and in refusing to try the case summarily without the intervention of a jury. *Queen* v. *Brewster*,[3] decided by this Court, is an authority upon that point.

As to the fifth question submitted, I am of opinion that the admission of the defendant's statement or evidence given

[2] 54-55 Vic. c. 22. [3] (1896) 2 Terr. L. R. 353.

before the justice on the preliminary examination, was not open to the objections urged against such admission. I agree with the trial Judge in the grounds stated by him for its admission. Judgment. Scott, J.

As to the sixth question submitted, I am of opinion that the act stated in the question is an indictable offence under sec. 147 of the Code.

Upon the argument of the case, it was contended by counsel for the defendant that sec. 26 of *The Canada Evidence Act, 1893*, merely authorized a justice of the peace, etc., to receive the solemn declaration of any person making the same before him as to the truth of any fact, etc., and did not go the length of authorizing such person to make such a declaration; that there is no other law which requires or authorizes a person to make a solemn declaration as to such matters as are contained in the declaration mentioned in this charge, and that, as sec. 147 of the Code only applies to such statements on oath, affirmation or solemn declaration as a person is required or authorized to make, the matter contained in the charge is not an offence under that section. Section 150 of the Code was referred to as bearing out this contention, because it applies only to declarations and statements which a person is permitted to make before an officer permitted to receive them, thus showing that the permission to receive, does not include permission to make.

I cannot find that it ever was the case that a person committed a criminal offence by taking an unauthorized oath, although the administering of such an oath did constitute an offence. The object of sec. 26 of *The Canada Evidence Act, 1893*, and a somewhat similar provision in England, 5 & 6 Will. IV. chap. 62, sec. 18, was to provide a means by which certain statements which were not authorized to be made on oath could be verified. This object was accomplished by permitting certain officers to receive solemn declarations as to such statements. If, instead of doing this, Parliament had authorized the administering of oaths as to such statements it would have removed the only restriction against the taking, as well as the administering, of such oaths. I think, therefore, that the permission to receive a solemn declaration, includes authority to make it.

Judgment.
Scott, J.

Section 150 does not refer to solemn declarations, but merely to statements and declarations, the former being covered by sec. 147. It is only in certain cases that statements and declarations, other than solemn declarations, are specially authorized, and sec. 150 appears to be applicable only to such cases. Section 147, it is true, applies only to oaths, affirmations and solemn declarations which a person is required or authorized by law to make, but it must be remembered that these restricting words are necessary in the case of oaths or affirmations, and that in itself affords a sufficient reason for their insertion.

As to the eighth question submitted, I cannot find any authority directly bearing upon the point involved. In the absence of any authority to the contrary, I see no reason why each one of the declarants should not be taken to have alleged his own personal knowledge of the matters set out in the declaration.

Owing to the views I have expressed it becomes unnecessary for me to refer to the other questions submitted.

In my opinion the rulings of the trial Judge should be affirmed.

ROULEAU, J., concurred.

Conviction affirmed.

RE HARRIS AND BURNE.

Legal profession—Ordinance No. 9 of 1895, s. 15—Principal and agent—Privity between client and agent—Grounds of application in summons—Practice as to striking advocates off the rolls.

The client has a *locus standi* to apply to strike off the rolls agents of his advocates by whom monies have been collected and who fail to pay them over, and the affidavit of the principal is sufficient evidence of non-payment without any affidavit from the client.

The partner of an advocate who has failed to remit monies will not be struck off where he has not himself been guilty of misconduct.

Statement of the practice to be followed in case of applications to strike advocates off the rolls for non-payment of monies.

[*Court* in banc, *9th December, 11th December, 1897.*

Statement. This was an application to strike certain advocates off the rolls, which was made originally to RICHARDSON, J., and by him referred to the Court *in banc*.

The application was made on behalf of a firm of Mowat Bros. of Regina, who had obtained a judgment upon which writs of execution were issued addressed to the sheriff at MacLeod. These writs were sent by Mowat Bros., advocates in Regina, to a firm of Harris & Burne in Macleod, with instructions to obtain payment. Harris made an arrangement with the execution debtors by virtue of which $400 was paid, of which $150 was received by Harris before and $250 after the dissolution of the firm of Harris & Burne. None of these moneys were paid over, and the present application was made on behalf of Mowat Bros. and directed against both Harris and Burne before RICHARDSON, J., by whom it was referred to the Court *in banc*.

It came on for hearing before RICHARDSON, WETMORE, ROULEAU and SCOTT, JJ.

Argument. *N. Mackenzie* and *H. A. Robson*, for both advocates. There is no affidavit of non-payment by Mowat Bros. The affidavit of the principals is insufficient. Mowat Bros. have no *locus standi* to make the application. The summons does not state the grounds of the application. In any event no order should be made against Burne, who never personally received any of the moneys.

J. Secord, Q.C., for Mowat Bros.

W. C. Hamilton, Q.C., for Attorney-General.

[*11th December, 1897.*]

Judgment. WETMORE, J.:—None of the preliminary objections can be sustained. Non-payment has been in effect admitted. The application is not one for the exercise of the ordinary jurisdiction of the Court in the ordinary way, but is a special application under *The Legal Profession Ordinance*,[1] which contains special provisions as to what the summons shall contain, and the summons in question complies with these provisions. *Ex parte Edwards*,[2] settles the question of Mowat Bros.' *locus standi*.

[1] No. 9 of 1895, s. 15. [2] (1881) 7 Q. B. D. 155.

Judgment.

Wetmore, J.

On Burne's part there has been no personal misconduct, and so far as he is concerned, I am prepared to follow the principles laid down by PROUDFOOT, J., in *Re McCaughey*,[3] cited with approval by STREET, J., in *Re Ross*,[4] where he says: "To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to show that his partner has been guilty of fraudulent conduct from which a constructive liability to pay money may perhaps arise." I refer also to *Ex parte Flood*.[5]

This application, therefore, in so far as Burne is concerned, will be dismissed, but under the circumstances without costs.

On consultation with my brother Judges I am at liberty to state, with a view of settling the practice, that in cases where an application is made to strike the name of an advocate off the rolls for non-payment of moneys received by him as an advocate, the following practice will be followed. Upon hearing the application when it comes before this Court, if the Court is of opinion that the advocate is liable to have an order made against him to pay over the moneys, it will make an order that he pay such moneys to the Registrar on or before a day to be named in such order, and provide by such order that, if such money is not paid pursuant to its requirements, the name of the advocate shall be struck off the roll, and that, upon default being made under such order, notice shall be given to such advocate that, on a day to be named in the notice, an application will be made to the Court for an order to issue to the custodian of the roll to strike the name of the advocate off the roll, and on the day named, no cause being shown to the contrary, an order will be issued accordingly. This is practically following the practice as laid down in *Re Bridgman*,[6] in so far as it is applicable to this Court. The Court will, however, reserve to itself the right to depart from such practice under special circumstances and in very aggravated cases.

RICHARDSON, ROULEAU and SCOTT, JJ., concurred.

Order accordingly.

[3] (1883) 3 Ont. R. 425. [4] (1895) 16 Ont. P. R. 482. [5] (1883) 23 N. B. R. 86. [6] (1894) 16 Ont. P. R. 232.

EASTMAN v. RICHARDS.

Landlord and Tenant—Tenancy for eleven months at the rate of $400.00 per year—Monthly payments of rent—Notice to quit—Right of appeal—Judicature Ordinance, s. 503.

Respondents became tenants of the appellant for a period of eleven months, for which they were to pay rent "at the rate of $400.00 per year." They paid the rent monthly. After the expiration the term they continued in possession paying monthly rent. On 9th March, 1896, they gave appellant notice that they would quit the premises on 30th April following. They paid rent up to that date, when they quit the premises in pursuance of their notice. No arrangement was made as to terms upon which respondents were to continue after the expiry of the term. The action was brought for $66.66 rent for the months of May and June.

Held, affirming the judgment of Rouleau, J., that the tenancy was a tenancy from month to month and was properly terminated by the notice to quit.

Held, that the matter in question related "to the taking of an annual or other rent," and that consequently an appeal lay without leave.

[*Court in banc, December 6th, 1897. February 11th, 1898.*

Statement.

On the 16th July, 1894, the defendants wrote a letter to P. McCarthy, Esq., the plaintiff's agent, as follows: "We are prepared to rent that store where the Herald offices used to be and will give $400 a year for the whole, the ground floor as well as the cellar. We will rent for 11 months from the 1st of August next at the rate of $400 per year. The fixings can remain or be taken out, it is no advantage to us one way or the other. If this is satisfactory we want an answer by wire to-morrow."

This offer was accepted by the plaintiff and the defendants entered into possession of the premises on the 1st August, 1894, and remained in possession until the 30th April, 1896. On the 9th March, 1896, the defendants served the plaintiff's agent with a notice that they would quit the premises on the 30th April, 1896, and on the day last mentioned they moved out and tendered the key of the premises to the plaintiff's agent, who refused to accept it. The plaintiff demanded rent from time to time in the same manner as he would have done if the rent had by the terms of the letter been payable monthly, and payment was made by cheques on the Imperial Bank, which invariably specified the month

Statement. or months for which the rent was so paid. Sometimes it would be for one specified month, sometimes for two, sometimes for three. On the expiration of the 11 months the defendants continued in possession without any further or other agreement, and the rent was demanded and paid in the same manner as before, down to and inclusive of the 30th of April, 1896. The present action was for $66.66 rent for the months of May and June, 1896, at the rate of $400 a year, and ROULEAU, J., at the trial, gave judgment for the defendants, holding that the tenancy after 30th June, 1895, was a tenancy from month to month. The plaintiffs appealed without having obtained any leave.

Argument. *Peter McCarthy*, Q.C., for appellant.

James A. Lougheed, Q.C., for respondent.

The appeal was heard before RICHARDSON, WETMORE and SCOTT, JJ.

[*11th February, 1898.*]

Judgment. RICHARDSON, J.:—The respondents here object that there is no right of appeal in this matter, contending that the present case does not come within those intended by the latter words of *The Judicature Ordinance*,[1] sec. 503, which permits an appeal without leave where "the matter in question relates to the taking of an annual or other rent, customary or other duty or fee or a like demand of a public nature or general nature affecting future rigths."

It is to be noted that the matter in question here is whether or not the respondents are liable to pay the appellant two months' rent for certain premises in Calgary, $66.66 as claimed by appellant. The contention of the respondents upon which they seek to have the appeal quashed is that as nothing appears on the record to indicate that future rights will be affected by the adjudication of the matter in question between the parties, that the appeal should be struck out because the last three words "affecting future rights" apply to annual or other rent as well as to the following words, "customary or other duty or fee or a like demand of a public or general nature."

[1] Con. Ord. (1898) Ord. No. 6 of 1893.

Judgment.
Richardson, J.

In my opinion the latter three words apply only to the subjects mentioned after "annual or other rent," and that if those words are given their plain and ordinary meaning they cover not only annual but other kinds of rent and naturally include monthly rents. Consequently an appeal lies without leave.

No authority has been cited by counsel, nor have I found any dealing with the tenancy created by a tenant simply continuing on in possession after the expiry of an original tenancy for a period less than a year, but *Atherstone* v. *Bostock*,[2] cited by counsel for the respondents, shows the distinction which is to be drawn, between expressions in a demise "at the rate of . . . per year" and "at the rent of . . . per year." The latter would carry the interpretation "for a year," while the former would be appropriate to a period different from a year, and to arrive at the intention of the parties their subsequent conduct has to be considered.

In this instance the original taking was for less than a year, and had the respondents so elected they could have left the premises at 30th June, 1895. They did not do this but continued in occupation, paying, and appellant as the evidence shows receiving, rent monthly, the vouchers put in stating the months for which the payments were made.

The conclusion I arrive at is that to hold that respondents became after 30th June, 1895, yearly tenants would not be justified by the evidence, and therefore that the judgment of the learned trial Judge should be sustained and this appeal dismissed with costs.

WETMORE, J.:—The plaintiff contends that the defendants, by holding over under the circumstances detailed, became tenants of the premises from year to year or from 11 months to 11 months from the 30th June, 1895, and that such tenancy could only be terminated by a six months' notice to quit. The defendants claim that under the circumstances they were tenants from month to month from the 30th June, 1895, and that the tenancy was properly terminated on the 30th April, 1896, by the notice to quit of the 9th March.

[2] (1841) 2 M. & S. 511, 10 L. J. C. P. 113.

Judgment.
Wetmore, J.

It is objected, however, on the part of the defendants that this case is not appealable under sec. 503 of *The Judicature Ordinance* without leave of the trial Judge, and that no such leave has been given.

I am of opinion that this case is appealable without leave of the Judge, because to quote the language of sec. 503 of the Ordinance, "the matter in question relates to the taking of . . . a rent." *Bank of Toronto* v. *Le Cure et les Marguillers de L'Oeuvre et Fabrique de La Paroisse de La Nativite de La Sainte Vierge*,[3] *Gilbert* v. *Gilman*,[4] and *Rodier* v. *Lapierre*,[5] were relied on by the defendants for their contention. The two last mentioned cases were decided upon the construction to be placed on par. (*b*) of sec. 29 of *The Supreme and Exchequer Court Act*,[6] and the first mentioned case was decided on the construction to be placed on sec. 8 of chap. 39 of 42 Vic. (1879) (Ca.), which is practically the same as par. (*b*) of sec. 29 of *The Supreme and Exchequer Court Act*, which I will hereafter refer to as "the Act."

There is a very material difference between the language of par. (b) of sec. 29 of the Act and sec. 503 of *The Judicature Ordinance*. At the time that *Gilbert* v. *Gilman* and *Rodier* v. *Lapierre* were decided, sec. 29 of the Act provided that no appeal should lie from any judgment rendered in the province of Quebec in any action, &c., wherein the matter in controversy did not amount to the sum or value of $2,000, unless such matter, if less than that amount, related "to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents *or such like* matters or things where the rights in future might be bound." Now it was urged that the words in this paragraph, "where the rights in future might be bound," are governed by the whole preceding words of the paragraph, so that in order to be appealable a judgment in every instance where the matter in controversy is under $2,000 must not only affect the actual amount in question in the action, but must also upon its face in some way bind, or have the effect of binding, future rights. I must admit that it is quite possible that the language of

[3] (1885) 12 S. C. R. 25. [4] (1889) 16 S. C. R. 189. [5] (1892) 21 S. C. R. 69. [6] R. S. C. (1886) c. 135.

Judgment.

Wetmore, J.

STRONG, J., in *Gilbert* v. *Gilman*, *supra*, and of TASCHEREAU, J., in *Bank of Toronto* v. *Le Cure*, *supra*, is open to that construction, but I cannot discover that the other learned Judges comprising the Court have gone that far, and while I have, as I am bound to have, the highest respect for such very eminent authorities, I am not, I respectfully submit, bound by their individual opinions.

But assuming that these learned Judges have gone as far as it is claimed they have, and that they have laid down the law correctly, nevertheless sec. 503 of the Ordinance is different. It provides that "No appeal shall lie from the judgment . . . of a single Judge . . . unless the matter in controversy on the appeal exceeds the sum of two hundred dollars exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee or a like demand of a public nature or general nature affecting future rights." I am of opinion that the words in this section, "or a like demand of a public nature or general nature," have not reference to, and are not governed by, any other words of the section, unless it may be by the words "customary or other duty or fee." A rent is not a demand of a public or general nature in any sense whatever; a customary fee or duty is. Another difference between the language of the paragraph of the Act and the section of the Ordinance is that the former provides that the appeal shall only lie in the cases "where the rights in future might be bound," while the latter permits an appeal in cases "affecting future rights." It is one thing to bind future rights by a judgment, it is another to affect them.

But coming back to the cases decided in the Supreme Court of Canada before referred to, I am not by any means satisfied that either STRONG, J., or TASCHEREAU, J., ever held, or intended to hold, under paragraph (b) of sec. 29 of the Act, that if a matter in controversy related to the title to an annual rent it would not be appealable although the amount in question was under $2,000, provided that the question raised was as to the title to the rent and not merely as to some defence such as payment, because in none of the cases cited did the question involved relate to the title to an annual rent. And in the latest case, *Rodier* v. *Lapierre*, *supra*, the inference from the language of TASCHEREAU, J., is that if

Judgment. Wetmore, J.

the question had been in respect to the title to an annual rent it would have been appealable.

It was contended, however, on the authority of this case, that the word "rent" in the section of the Ordinance means a ground rent only, according to the technical meaning of a ground rent. Certainly that could not be in accord with the definition which Sir William Ritchie gave to the words "annual rents" in *Gilbert* v. *Gilman*,[1] where he defines them as "annual rents out of lands or tenements." That definition is entirely in accord with my idea of the meaning of the words, and I do not believe that TASCHEREAU, J., in *Rodier* v. *Lapierre, supra,* ever intended to define the words "annual rents" as meaning only ground rents as technically defined. He merely intended to assert that the words meant rents of the character of ground rents as opposed to an annuity or other like charge or obligation which was the character of the claim endeavoured to be enforced in the case before him.

I may also be excused if I make one further reference in respect to par. (b) of sec. 29 of the Act. That paragraph has, since the decisions referred to, been amended by 56 Vic. chap. 29, sec. 1 (1893), by striking out the words "or such like" and substituting the words "and others," whereby the intention, I conceive, was to materially alter the construction of that paragraph, and I cannot but feel that this was done in view of the expression of opinion by some of the learned Judges in those cases.

It is further set up that the learned trial Judge's judgment does not affect the future rights of the plaintiff as to rent, because it does not prevent another suit being brought for future accretions of rent and does not prevent the trial Judge or any other Judge from deciding the other way. Now, while it may be quite possible that the right to future rents under the agreement may not be bound by the judgment—that is the judgment may not be pleadable by way of estoppel—I am most decidedly of the opinion that it is affected by it. And I think that it is a most important distinction between the words of the paragraph of the Act and the words of the section of the Ordinance. The right to future rents is affected because if the learned trial Judge's

[1] (1889) 16 S. C. R. 189, at p. 193.

judgment is correct in law, any action to recover them would be hopeless, since the lease is terminated; and if not correct, the lease is still running and the plaintiff would be entitled to recover his rent. I think this is just one of the very cases in which the Legislature intended to give the right of appeal. Judgment. Wetmore, J.

It was also urged that the words "other rent" in the section do not include a less rent than an annual rent—that it does not for instance include a monthly rent, but I see no reason why these words should not be given their natural meaning. In fact I think it would defeat the clear intention of the Legislature not to do so. We know by experience that it is a very unusual thing to reserve a rent for a longer time than a year; it is quite a common thing to reserve a rent for a less period. This is not a case where the *ejusdem generis* rule is to be applied. I may just in this connection call attention to *Anderson* v. *Anderson*.[8] It is true that that case was decided on the construction of a deed, but the principles upon which deeds and statutes are construed are not very different. I am of opinion that this case is appealable without leave.

As to the merits of this appeal, I am of opinion that the learned trial Judge's conclusion is correct and should not be interfered with. There are a number of cases which lay down the rule that when a lease for years expires and the tenant holds over and pays rent and the landlord receives it, a tenancy from year to year is presumed on the same terms as to payment of rent as under the original lease. In all the cases where such a rule is laid down I think it will be found that the original term was for a year certain or for several years, and that in laying down the rule the Judges were speaking in relation to the term which was in their minds in the particular case. Then there are cases where the original letting has been for less than a year, as for instance for six months, three months, one month, a week. In these cases it has been held that the overholding tenant holds from six months to six months, from three months to three months, from month to month or from week to week, as the case might be. I can find no case where it has been held that an overholding tenant holds for a division of the year, such as for

[8](1895) 1 Q. B. 749.

Judgment. Wetmore, J.

from four months to four months, from five months to five months, or from eleven months to eleven months.

It is claimed, however, that under a letting for say eleven months the tenant is a tenant for years. That may possibly be correct technically. I find it so laid down in an old edition of *Woodfall on Landlord and Tenant*,[9] The writer says, "If the lease be but for half a year or a quarter or any less time the lessee is considered a tenant for years and is styled so in some legal proceedings; a year being the shortest term of which the law in this case takes notice." I cannot find, however, that this is carried forward into the late editions of Woodfall. But assuming it to be correct law, there is no hard and fast rule under it that, where there is a tenancy for years as so defined and the tenant holds over and pays rent, a tenancy from year to year is created and six months notice to quit is necessary. On the other hand the authorities are clear that if a tenancy for a month is created and the tenant holds over and pays rent monthly, a tenancy from month to month is created, and only a month's notice to quit is necessary.[11]

Now I do not wish to be understood as laying down a general rule that, where a party is allowed to hold over after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matters of evidence rather than law, although WIGHTMAN, J., certainly did go that far in *Mayor of Thetford* v. *Tyler*.[10] But I am of opinion that there are cases where the terms of occupancy even as to the nature of the term or character of the holding may be a mixed question of law and fact. This view must have been held in *McPherson* v. *Norris*,[11] and *MacGregor* v. *Deto*.[12] In the latter case, according to the finding of the court, there was an agreement for tenancy of six months commencing on the 15th May, 1855, at the rate of $20 per month, payable monthly. The tenant held over and paid rent. In delivering judgment WILSON, C. J., is reported[13] as follows, "I infer from the conduct of the parties, the correspondence, and the time of payment of the rent, that from and after the 15th November the relationship of landlord and tenant continued between the parties . . . and that the

[9] (5th Ed.) (1856) p. 53. [10] (1845) 8 Q. B. 95, 15 L. J. Q. B. 83. [11] (1856) 18 U. C. Q. B. 472. [12] (1888) 14 Ont. R. 87. [13] At p. 92.

holding was a monthly tenancy." *McPherson* v. *Norris*, *supra*, is in many respects very similar to this case. The original letting in that case was for a term not an aliquot portion of a year, namely, five months up to the 1st April, at a rent of £2 per month, and it was agreed that if the tenant retained possession after the 1st April he was to pay at the rate of £50 a year for the premises, payable monthly. ROBINSON, C.J., who delivered the judgment of the Court, is thus reported:[14] "This gives to the lessee, we think, an option to remain after the first of April as a monthly tenant at the rate of £50 a year, but constituting a tenancy which the landlord may at any time put an end to upon a month's notice." In the case now before this Court the term was for 11 months at a certain fixed rate per year. It is true that the agreement did not specify, as in *McPherson* v. *Norris*, that the rent should be payable monthly, but by the tacit arrangement and understanding of the parties the rent was treated as payable monthly. They had a perfect right to so treat it. And after the termination of the term of eleven months they continued to treat the rent in the same way as payable monthly. Judgment. Wetmore, J.

Now I am of opinion that, under such circumstances, taking into consideration the manner in which the rent had been paid both before and after the expiration of the eleven months, that the learned trial Judge was quite justified in inferring that, as a matter of fact, the rent all through was at a rate of $400 a year payable monthly. And I gather from the tenor of the learned Judge's judgment that he so found, but if he did not so find this Court has the right to draw inferences of fact and I, as a member of the Court, find that the rent was so payable. Reaching that conclusion, the case is quite within *McPherson* v. *Norris*, that is, that after the expiration of the term originally demised, the tenancy in both cases was at the rate of a fixed sum per annum payable monthly. Now that in *McPherson* v. *Norris* was held to constitute a monthly tenancy. I am prepared to follow that case, and I think this appeal should be dismissed with costs.

SCOTT, J., concurred with RICHARDSON, J.

Appeal dismissed with costs.

[14](1856) 13 U. C. R. 472 at p. 476.

THE QUEEN v. COLLYNS.

Theft of cattle—Obliteration of brands—Evidence of similar acts—Admissibility.

Prisoner was charged with the theft of certain cattle, the brands upon which had been obliterated.

Held, that evidence that the brands upon other cattle had been similarly obliterated and that the prisoner had in his possession branding irons adapted to causing an obliteration of the character found, was admissible.

ROULEAU, J., *dissentiente.*

[*Court* in banc, *11th February, 1898.*

Statement. This was a case reserved by SCOTT, J., before whom the prisoner was charged with stealing certain cattle, the property of one Knox. The facts and the questions raised sufficiently appear in the judgments.

The case was heard before RICHARDSON, WETMORE, ROULEAU and SCOTT, JJ.

Argument. *T. C. Johnstone*, for the Crown.

P. J. Nolan, for the prisoner.

[*11th February, 1898.*]

Judgment. WETMORE, J.:—The defendant and one Gervais were charged with stealing two steers the property of one Knox. These animals, according to the evidence, had originally been branded with Knox's brand, but these brands had been almost wholly obliterated by other brands and marks being placed upon them. After such obliteration the steers were claimed by Collyns as his property, and in giving evidence at the trial he himself admitted that this had happened upon one occasion, although he explained that he was at the time at such a distance that he could not distinctly see the brands.

Evidence was received subject to objection on the part of the accused, that the brands upon certain cattle, other than those in question, and only some of which were branded with Knox's brand, had been wholly or partially obliterated in the same manner as the brands upon the cattle in question, and that the substituted brands upon such other cattle, as well as those upon the cattle in question, had been made

either with branding irons in the possession of the accused and used by them in branding cattle owned by them, or in their charge, or with similar branding irons. Judgment. Wetmore, J.

Gervais was acquitted and the defendant Collyns convicted.

The only question reserved for the consideration of this Court is whether the evidence so received and objected to was admissible.

The objections taken to its admissibility were: (1) that the evidence must be confined to the issue, and that the question whether the accused had placed the obliterating brands on the other cattle, or whether such obliterating brands had been put on at all, was not in issue; and (2) that it was not established that the accused had any connection with the other cattle whose brands had been so obliterated, that such cattle ever were in charge of the accused, that they ever were in a situation where the accused might have obliterated the brands, or that the accused had any knowledge or notice of the obliteration of those brands.

There certainly are cases in which the Crown may adduce evidence tending to show that the accused has been guilty of criminal acts other than those charged against him, and I am of opinion that, in cases where such evidence may be adduced, it is not necessary, in order to admit of its being put in, to establish conclusively that the accused has been guilty of such other criminal acts. It is sufficient if the evidence tends to show that the accused has been so guilty.

The law governing the question is laid down in *Makin* v. *Attorney-General for New South Wales*,[1] as follows:—"The principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be rele-

[1] [1894] A. C. 57, at p. 65.

Judgment.
Wetmore, J.

vant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *Reg.* v. *Geering*[2] the accused was charged with the murder of her husband by administering arsenic to him, and the Crown offered in evidence *post mortem* analyses of the contents of the stomachs of the husband and of two sons who had subsequently died, and a medical analysis of the vomit of another son, and also offered evidence that these four persons lived with the prisoner during their lives, and formed part of her family, and that she generally made tea for them and cooked their victuals. This evidence was objected to and received, not because it proved that the sons had been murdered by the prisoner, but merely because it proved that the death of the sons proceeded from the same cause as that of the husband, namely, arsenic, and because it had a tendency to prove that the death of the husband, whether felonious or not, was occasioned by arsenic.

In *Regina* v. *Dossett*[3] the accused was indicted for setting fire to a rick of straw. The rick was set on fire by the prisoner having fired a gun very near to it, and evidence was offered to shew that the rick had been on fire the day previous and that the prisoner was then close to it with a gun in his hand. There was no other evidence offered to shew that the prisoner had on the day previous fired the gun or set fire to the rick. The evidence, however, was received as tending to shew that the rick was fired at the time charged, wilfully. So in *Regina* v. *Gray*[4] the accused was charged with setting fire to his house with intent to defraud an insurance company, and evidence was offered to shew that the prisoner had previously occupied two other houses in succession which had been insured, that fires had broken out in both, and that the prisoner had made claims on the insurance companies for the losses occasioned. There was no other evidence offered to shew that the fires in the two houses had been set by the prisoner, yet the evidence was received as tending to prove that the fire set as charged in the indictment was the result of design not of accident.

[2] (1849) 18 L. J. M. C. 215. [3] (1846) 2 C. & K. 306; 2 Cox C. C. 243. [4] 4 F. & F. 1102.

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The case now in question was tried by my brother SCOTT without the intervention of a jury. The learned Judge has not presented to us the full evidence upon which he found the accused Collyns guilty. He has only presented to us so much of the evidence as bears upon the question which he has reserved for the consideration of this Court. We are not at liberty to travel outside the case; in fact we have not the material before us to enable us to do so. The simple question we have to decide is, was the evidence so received admissible? No doubt we ought to assume that the evidence in question influenced the mind of the learned Judge, since otherwise he would not have reserved the question, and therefore if we reach the conclusion that the evidence was improperly received we ought to grant a new trial. I am of the opinion, however, that the evidence was properly received as tending to shew that the obliterating the brands on the animals alleged to have been stolen was deliberately and wilfully done, and that also that it was part of a design on the part of the perpetrator, whoever he may have been, to acquire cattle in the neighbourhood which did not belong to him.

To understand this question correctly it may be convenient to discuss what branding means. In this country, especially in the extreme western part of it, where large herds of cattle are owned by different persons, and allowed to range indiscriminately over the ranches and mix together, the usual indicia of ownership are the brands which enable each owner to identify his own cattle, each having his own peculiar and distinctive brand. Now I do not wish to be considered as holding that the mere obliteration of a brand, or the attempt to do so, and the substitution of another in itself amounts to the theft of an animal. It is not necessary to express any opinion on that question in this case. I do hold, however, that such obliteration and substitution coupled with other circumstances may be strong evidence of theft.

Now let me examine what the evidence in this case is, in so far as it is presented to us and bears upon the question submitted. It must be borne in mind in the first place that the original brands on these cattle were wholly

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or partly obliterated, that is that an attempt has been made to disguise those original brands. But the evidence not only shews this, but it also shews that an attempt had been made from which it may be inferred that the perpetrator intended to substitute some other indicia of ownership. The evidence adduced tended to shew that some person, we will not say at present who, had conceived the general design of disguising the original indicia of ownership and substituting other indicia of ownership upon a number of cattle in that part of the country, and the substituted indicia of ownership were all of the same character. The next thing proved is, that two of these animals with respect to which the original indicia of ownership were so disguised, and the new indicia of ownership were substituted, are claimed by the defendant Collyns, and it also appears that this same man had in his possession tools with which the disguising and substitution might be done, and that the marks which are so substituted are the brands or marks by which he identifies his own cattle. Now I have marshalled the evidence in my own way, but I have marshalled it just as the facts presented in the stated case warrant. I am of the opinion that the evidence was properly admitted. With respect to the question of what weight is to be given to the testimony I express no opinion. That would entirely depend upon other circumstances which are not before us, and with respect to which we have no power to deal. In my opinion the ruling appealed from should be affirmed.

ROULEAU, J. (dissenting):—The rule is that "no evidence can be admitted which does not tend to prove or disprove the issue joined." In Russell on Crimes (5th Ed.), at p. 403, this rule is thus explained:—"In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge.

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Therefore, it is not allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted."

That is exactly what the Crown has attempted to do in this case. In order to shew that the prisoner had a disposition to alter brands, the Crown brought witnesses to prove that there were other cattle branded with the prisoner's brand over Knox's brand, without any evidence that the prisoner was ever connected with such illegality. Could the prisoner have any chance to answer such evidence when it was sprung on him during the trial? Is it not reasonable to think that if he had known that the Crown intended to adduce such evidence, he would not have been prepared to answer it? It is of common occurrence in the west that *facsimiles* of brands are made by means of a semi-circle and a bar. It is a notorious fact that the Stock Association use such instruments to brand the cattle of members of the Association during the "round up," no matter what his brand is. That being so, the fact of the prisoner having a brand in his possession similar to that found on some of Knox's cattle, is no evidence at all that he is connected with that illegal act. In my estimation all the authorities cited seem to strictly follow the rule above cited. In the case of *Reg.* v. *Oddy*[1], it was held that on the trial of an indictment containing counts for stealing, or for receiving the property knowing it to be stolen, evidence of the possession of other property stolen some time before from other persons was not admissible. In my opinion that case is a great deal stronger than the present, because the prisoner was connected with the facts intended to be proven, while here the prisoner never was connected with the facts proven.

For these reasons I cannot bring my mind to think that this evidence was admissible, and therefore I am of opinion that the learned trial Judge should have refused to admit such evidence.

RICHARDSON and SCOTT, JJ., concurred with WETMORE, J.

Conviction affirmed, ROULEAU, J., *dissenting.*

[1] 2 Den. C. C. R. 269.

RE GALLOWAY.

Land Titles Act—Issue of certificate of title to executor as such—Executor entitled as residuary devisee—Execution against him personally—Entry of, upon certificate of title.

Where an executor is by the will entitled as legatee to the lands of the estate, a registrar should not register against them an execution against the executor personally until he has satisfactory evidence that the debts and other charges against the estate have been satisfied.

Remarks by WETMORE, J., upon the position with regard to executions against an executor so entitled, or an administrator entitled in distribution.

[*Court* in banc, *6th June 14 June, 1898.*

Statement. This was a reference by the Registrar of Titles for Assiniboia to WETMORE, J., under the provisions of sec. 111 of *The Land Titles Act*.[1]

On 21st January, 1897, an execution was registered at the instance of one Orde against the lands of Abraham Galloway, who on the 18th June following obtained probate of the will of his mother Mary Ann Galloway. The testatrix, after making several pecuniary bequests and a specific bequest of a fur coat of the value of $40, and of five acres, part of the N. W. ¼ of S. 32, T. 13, R. 31 W. 2, bequeathed all the rest of her property, real and personal, to her son Abraham (the execution debtor), subject to the payment of her funeral and testamentary expenses. She specially provided that the fur coat should be purchased out of the residuary estate against which, by a codicil, she also charged a bequest of $200 to her daughter.

On the 19th August, 1897, the probate of the will and codicil having been produced to the Registrar of Land Titles, a certificate of title to the quarter section was granted to Abraham Galloway as executor, and on the same day a transfer made by Abraham Galloway to Herbert Samuel Hart, was produced to the Registrar, who cancelled the certificate granted to Galloway and granted a new certificate to Hart. Upon neither of the certificates was any memorandum made of the execution, nor was there before the Registrar any material shewing that debts of the testatrix or the particular legacies under her will had been discharged. Orde, the

[1] 57 & 58 Vic. c. 28 (1894) (Ca.)

execution creditor, having discovered the granting of the certificate to Hart, and the issue of the duplicate certificate without any memorandum of his execution upon it, called upon the Registrar to demand back the duplicate, and then make an entry of his execution thereon, and the registrar being in doubt as to his duty under the circumstances, referred the matter to Mr. Justice WETMORE, who referred it to the Court *in banc*. Statement.

The reference was argued before RICHARDSON, WETMORE, ROULEAU and SCOTT, JJ.

E. L. Elwood, for execution creditor. Argument.

E. A. C. McLorg, for registered owner.

[*14th June, 1898.*]

RICHARDSON, J.—In my judgment the Registrar committed no error by not entering upon the certificate granted or duplicate issued to Hart a memorandum declaring the land named in it, as subject to the Orde execution, for the reason that the land at the time the certificate was granted Hart was not, so far as the registry shewed, Abraham Galloway's own, but stood in his name merely as the personal representative of Mary Ann Galloway, and it was as such representative he transferred to Hart. Until it appeared that the debts and legacies had been discharged the Registrar could not determine that Alexander Galloway had as residuary legatee any interest in the land he thus transferred to Hart. Judgment.

The answer to the formal question put by the Registrar whether it was his duty to demand the certificate of title from Hart, and to endorse the said execution as such a charge, must therefore be in the negative.

An order is to go that the execution creditor pay to Hart his costs of the reference.

WETMORE, J.—I agree with the judgment just delivered by my brother RICHARDSON, but I desire to make one or two further observations.

Land in the Territories, under the provisions of *The Land Titles Act*, goes to the personal representative of the deceased owner and is dealt with by him in the same man-

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ner as personal estate is dealt with, and is distributed in the same manner as the personal estate.

Now the intention of the Act is that the personal representative, whether executor or administrator, shall hold the land for the purpose of the estate in the same way, and to the same extent, for which he holds personal property. It is placed in his hands in the first instance for the purpose of paying the testamentary and funeral expenses and the debts, and is then, and then only, to be handed over to the persons thereto entitled in distribution, or in case of a person dying having made a will, to be handed over to the devisee whether he be residuary devisee or specific devisee.

It is evident, therefore, that the property is liable to be used in the first instance for payment of such expenses and debts, and that the administrator or executor may find it necessary to convert the estate into money just as it may be necessary for the executor or administrator to convert ordinary goods into money for the purpose of administering the estate and paying the debts and liabilities.

When the estate has been wound up then the persons entitled in distribution are entitled to the remainder. If a will has been made the devisee, whoever he may be, is entitled to have the property handed over to him and that whether he is the residuary devisee or a specific devisee. Until that time arrives, however, the executor must be in a position to administer the estate and his hand must be free. It would be to my mind directly against the intention of the Legislature to suffer a cloud to be put upon the title which he may pass to a bona fide purchaser, because it might happen that the executor is the residuary devisee, or otherwise as devisee is entitled to any property.

If that were done then no persons in a case like the present could purchase from an estate with safety; and therefore when the Legislature provides, as it does, that the administrator shall be deemed the owner of the estate, and that the certificate of title shall be issued to him as administrator, he is only the owner for the purpose of dealing with the property for the purposes of the estate. Now, when the estate has been wound up, the devisee becomes entitled to the property, it should be passed to him. and when that time arrives and when, by some pro-

cess, or by notice, I am not prepared to say how, but that there is a means I am satisfied — it may be by order of the Court, or in some other way— the registrar has been officially informed that the title has become absolutely vested in the executor, free of all claims, for administration purposes, the charge against the executor in a case like the present will attach against the property, but until this happens the registrar would not be justified in clouding the title of the executor as such and affecting the title of an innocent purchaser such as Hart is here, no charge of collusion having been set up. Judgment. Wetmore, J.

ROULEAU, J., and SCOTT, J., concurred.

Order accordingly.

CRAGG v. LAMARSH.

Appeal from conviction—Notice of appeal—Sufficiency of—Form of notice—Criminal Code, s. 880, par. [b]—Jurisdiction to hear appeal—Recognizance—Absence of affidavit of justification.

Held, SCOTT, J., *dissentiente*, that a notice of appeal from a conviction is insufficient if it is not addressed to any person.

Held, per curiam, that no affidavit of justification of the sureties need accompany the recognizance.

[*Court* in banc, *7th June, 14th June, 1898.*

This was a case stated for the opinion of the Court *in banc.* Statement

The defendant had served upon the convicting justice notice of appeal from a summary conviction in the form required by Form NNN of *The Criminal Code, 1892*, except that it was unaddressed. The sureties on the recognizance had not made any affidavits of justification. The questions

NOTE.—Sec. 880 (*b*) of the *Criminal Code, 1892*, provided that: —"The appellant shall give to the respondent, or to the justice who tried the case for him, a notice in writing in the form NNN in schedule one to this Act, of such appeal, within ten days after such conviction or order."

Statement. submitted were whether, in the absence of an address, the notice was sufficient to give jurisdiction, and whether affidavits of justification were essential.

The argument was heard before RICHARDSON, ROULEAU, WETMORE and SCOTT, JJ.

Argument. No one for appellant.

R. B. Bennett, for respondent.

[*14th June, 1898.*]

Judgment. WETMORE, J.:—I am of opinion that the notice of appeal not having been addressed to any person, was insufficient to give jurisdiction, and that the learned Judge should be so advised.

Ex parte Doherty,[1] and the *Queen* v. *Justices of Essex*,[2] were cited as tending to establish that the notice in this case was sufficient. In the former case, the notice was addressed to some person, namely, the justice who heard the complaint, and the question was whether that was sufficient—whether the notice should not have been addressed to the complainant or to the justice for him. The Court held that the notice was sufficient. This Court, however, held the contrary in *Keohan* v. *Cook*.[3] It seems to me, therefore, clear that the notice must be addressed to some person.

The Statute under which the *Queen* v. *The Justices of Essex*,[4] was decided, was the *Summary Jurisdiction Act, 1879*,[5] which does not provide, as does sec. 880 of *The Criminal Code, 1892*, that the notice shall be in a prescribed form. It merely prescribes that "the appellant shall . . . give notice of appeal by serving on the other party and on the clerk of the . . . court of summary jurisdiction notice in writing of the intention of appeal." The notice in that case was not only served on the clerk but it was addressed to him. The contention was that it ought to have been addressed to the convicting justices. The Court held that it would put too narrow a construction on the stafutory direction to so hold.

[1](1885) 25 N. B. R. 38. [2](1892) 1 Q. B. 490. [3](1887) 1 Terr. L. R. 125. [4](1892) 1 Q. B. 490. [5]42 & 43 Vic. c. 49, s. 31 (Imp.)

If, however, the Statute had prescribed a form of notice and directed that notice in that form should be given, I am of opinion that the Court would have had to follow such direction. Subsec. 44 of sec. 7 of *The Interpretation Act*,[6] provides that, "Whenever forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them." It is not a slight deviation when the Act gives a form of notice and directs that it shall be addressed to certain persons to issue a notice not addressed to any person. One of the expressed conditions therefore to which the right to entertain the appeal is made subject by the Code not having been complied with, the learned Judge had no jurisdiction to entertain it. Judgment. Wetmore, J.

I am of the opinion, however, that it is not a condition precedent to the right of appeal that an affidavit of justification by the sureties to the recognizance should accompany the recognizance. Such a practice has never prevailed. I never knew or heard of its being done. If it had been necessary it would have been so decided long since.

The requirement that in appeals of this character the appellant shall enter into recognizance with sufficient sureties has been in force in Canada at any rate since 1869, and it has always been assumed that the question of the sufficiency of sureties is a matter entirely for the justice before whom the recognizance is entered into. I say that this has always been assumed because I cannot find anything to the contrary. It is too late now I think to lay down a different rule. Moreover, under sec. 880 (c) of the Code, the party appellant has in this connection to do one or two things in order to give jurisdiction to the appellant tribunal. He has either to enter into a recognizance with two sufficient sureties conditioned as in the sub-section is provided, or deposit a sum of money. If he is in custody and gives the required recognizance, the justice must liberate him. In that case, the justice must be the sole judge of the sufficiency of the sureties, the appellate Court is not in a position to judge of it. But the same recognizance is the one filed as the condition precedent to the appeal. Parliament surely never contemplated that such recognizance should be sufficient for one purpose, namely, to authorize the liberation of the person in

[6]R. S. C. (1886) chap. 1.

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custody, and not sufficient to give the appellate court jurisdiction. The question is quite different from that which arose in *Regina* v. *Richardson*[7] and *Regina* v. *Petrie*.[8] In those cases the Statute and Rule of Court *prohibited* the Court from entertaining a motion to quash a conviction unless the defendant was *shewn* to have entered into a recognizance with one or more sufficient sureties. This was held to be a provision that there must be affirmative evidence before the Court in which the motion was made *shewing* the sufficiency of the sureties before the motion could be entertained.

The learned Judge should be advised that an affidavit of justification of sureties need not accompany the recognizance.

We have no jurisdiction to award costs.

RICHARDSON and ROULEAU, JJ., concurred.

SCOTT, J. (dissenting):—I agree with the view expressed by my brother WETMORE, that it is not incumbent upon the appellant to show the sufficiency of the sureties to the recognizance, and with his reasons for arriving at that conclusion. I cannot, however, accede to the view expressed by him that the notice of appeal is insufficient by reason of the fact that it is not addressed to any person.

It is true that the form of notice which appears in the schedule to *The Criminal Code, 1892* (Form NNN), appears to contemplate that it shall be addressed to some person or persons, but I think it will be conceded that such address would be unnecessary if it were served upon the person for whom it is intended, *viz.*, the prosecutor.

The object of the notice is attained when it gives the person on whom it is served, the necessary information as to what is intended to be attained by it, and when served upon the convicting justice, even though not addressed to any person, its form is such that it fully acquaints him with the fact that the appellant intends to appeal against a certain conviction, which is described with such particularity as to enable the justice to ascertain without any possibility of a doubt what conviction is referred to, and who the prosecutor is. It is reasonable to presume that the justice must

[7](1889) 17 Ont. R. 729. [8](1889) 1 Terr. L. R. 191.

know the object of the notice and that it is intended, not for him, but for the prosecutor, and, knowing this, it would be just as much his duty to inform the prosecutor of it as if it were addressed to him. Judgment. Scott, J.

For these reasons, I am of opinion that the absence of any address is, to adopt the language of sec. 7 (44) of *The Interpretation Act*,[a] but a slight deviation from the prescribed form, and one which does not affect the substance and is not calculated to mislead.

I think that if this view were accepted, the object of the Statute would be better attained than if the decision of this Court in *Keohan* v. *Cook*, *supra*, were extended to cases like the present.

To my mind the form of notice in the schedule is such that it would be difficult for a layman to determine whether it should be addressed to the prosecutor or to the justice or both, because, by using the word "you" when referring to the justice, it appears to contemplate that under some circumstances at least it is intended to be addressed to him alone, or to him and the prosecutor. It would be unreasonable that in every case where the appellant desires to appeal, he should be compelled to employ an advocate to draw up the notice of the appeal, and owing to the difficulty I have mentioned in determining in what manner the notice should be addressed, even the advocate might err in preparing it.

REGINA v. COVENTRY.

Omission to provide necessaries of life, clothing and medical aid to child—Criminal Code, ss. 209, 210 and 211—"Master and servant"—"Head of family"—"Medical Aid"—Permanent injury to health.

Accused had been placed in charge of a child of twelve under agreement with Dr. Barnardo's Homes. The boy's toes were frozen, and after more than three weeks without medical attendance it became necessary to amputate them.

Held, that the relation of the accused to the boy was not that of parent, guardian, or head of a family under s. 209 of *The Criminal Code, 1892*.

Held, further, that in the absence of medical evidence as to its effect the loss of the toes could not be taken to be, or to be likely to cause, permanent injury to health.

[*Court* in banc, *6th June, 15th June, 1898.*

[a] R. S. C. (1886) chap. 1.

Statement. This was a case reserved by RICHARDSON, J., before whom the prisoner was charged on several counts under secs. 209, 210 and 211 of *The Criminal Code, 1892*, for that being a person in charge of a child of twelve, he had omitted to provide the child with the necessities of life, by reason whereof his health was likely to be permanently injured; being the head of a family, he was guilty of a like omission without any result being alleged, and being the master of an apprentice under sixteen, he had omitted to provide him with necessary food, clothing, and lodging, whereby his health was permanently injured and his life endangered. It appeared that the accused had been entrusted with the care of the child by Dr. Barnardo's Homes, under an agreement to provide board, washing, lodging, clothing, and necessaries; that the only article of clothing he had provided was a pair of old moccasins too large in size and having holes in the heels and toes; that the boy complained of his feet being sore, and was told by the accused to get some hot water; that four or five days afterwards the boy had gone to bed where he remained about three weeks, during which time the accused had bathed the boy's feet and put fresh rags upon them; that the boy was then removed to the Winnipeg Hospital, where it was found necessary to amputate all his toes.

The learned Judge convicted the accused, but reserved for the opinion of the Court the questions (1) whether the legal duty of the head of a family to provide necessaries for its members includes the provision of medical attendance; (2) whether there was any evidence of, or of the likelihood of, permanent injury to health, and (3) whether upon these facts the charges could be sustained under any of the counts of the charge.

Argument. *T. C. Johnstone* for the Crown.

W. B. Willoughby for the accused.

The case was argued before ROULEAU, WETMORE and SCOTT, JJ.

[*15th June, 1898.*]

Judgment. ROULEAU, J.:—I cannot bring my mind to understand how, under the agreement in question, sec. 210

Judgment.
Rouleau, J.

of *The Criminal Code, 1892*, would apply to this case, inasmuch as it enacts that "everyone who as parent, guardian, or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years, is criminally responsible for omitting, without lawful excuse, to do so, if" the health of such child is likely to be permanently injured by such omission. The accused in this case was neither the parent nor the guardian of the boy Sargent; nor could it be contended that he formed part of Coventry's family, so that he, Coventry, might have been designated as the head of a family including the boy, because the legal guardian of the boy had a written agreement to engage him to the accused under the conditions already mentioned. If the accused could be indicted under this section, I do not see the necessity or utility of sec. 211, which enacts that "everyone who, as master or mistress, has contracted to provide necessary food, clothing, or lodging for any servant or apprentice under the age of sixteen years, is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured by such omission." It seems to me that the accused can only be indicted under this section, and that his relations between himself and the boy Sargent were clearly those of master and servant under the said agreement.

This being the case, the responsibility of a master towards his servant is not so great as the responsibility of a parent, head of a family, or guardian towards a child while remaining a member of his household under sec. 210.

TASCHEREAU[1] says: "The difference in the two sections 210 and 211 between *necessaries and necessary food, clothing, or lodging*, is a right one. A parent is obliged to supply his child, or a husband his wife, with all the necessaries of life, which would include medical attendance, whilst a master is only obliged to provide his servant or apprentice with the necessary food, clothing or lodging which he has contracted to so provide."

[1] *Criminal Code*, p. 145.

Judgment.

Rouleau, J.

To support this difference TASCHEREAU refers to the case of the *Queen* v. *Downes*.[2] In reading this case I find that it does not support the contention that the word *necessaries* includes medical aid. The accusation in that case was brought under section 37 of 31 & 32 Vic. ch. 122 (Imp.), which specially provides that "medical aid" should be given to a child by his parent. Lord COLERIDGE, C.J., said: "Speaking for myself alone, I may say that had it not been for the Statute to which we have been referred, I should have entertained great doubt upon this case. The Statute makes it an offence punishable summarily wilfully to neglect to provide adequate medical aid for a child."

BRAMWELL, B., was of the same opinion, and he added: "I agree with my Lord COLERIDGE as to the difficulty which would have existed had it not been for the Statute. But the statute imposes an absolute duty upon parents."

Even if the accused has been tried under sec. 210, in my opinion there would still be a great doubt whether the head of a family or guardian would have been guilty of an offence for neglecting to provide medical aid. It seems clear that the same contention cannot be reasonably argued with regard to sec. 211, for the word "necessaries" is not included. The only offence provided is the omission to provide the necessary food, clothing or lodging contracted for, and it is needless to say that this section of the Code cannot be supplemented by an agreement. Having therefore come to the conclusion that sec. 210 of the Code does not apply to this case, it is not necessary for this Court to advise the learned Judge as to the first question.

As to the second question, I must draw a line somewhere. I can only discover the line by reference to the evident scope and purpose of the enactment. It is plain that the object of the law is to protect the servant from such injury as would likely impair his health permanently, and not of an injury that would only be of a temporary effect on his health. In its ordinary sense the word "health" means, "the general condition of the body with reference to the degree of soundness and vigour, whether normal or

[2](1875) 1 Q. B. D. 25; 45 L. J. M. C. 8; 33 L. T. 675; 25 W. R. 278; 13 Cox C. C. 111.

impaired," or "that condition of a living organism and of its various parts and functions which conduces to efficient and prolonged life."

Judgment. Rouleau, J.

Having laid down these definitions given by the best authority which I could find, is this Court in a position to determine under the evidence adduced, that this boy having lost his toes, consequent upon frost bites, has impaired his living organism so as to affect or shorten his life? As far as I am concerned I am not prepared to say. It seems to me that expert evidence should have been given to enlighten the Court upon the consequence of such an injury on the health of that boy. Without that evidence the Court is left only to surmise what is the effect of such an injury as to likely or permanently injure the health of said boy. My answer to the second question would therefore be that the Court is not justified in deciding upon the evidence that the injury suffered by that boy was of such a nature as to permanently injure his health or likely to do so.

As to the third question, I am of opinion that sec. 211 is the only section applicable to the circumstances of this case, and that the conviction could have been sustained with sufficient evidence, under paragraphs 5 and 7 of the indictment, but as there was no evidence before the Court to shew that, by the injury caused to the boy, his health was or was likely to be permanently injured, I am of opinion that there was no case to be left to the jury, and that therefore the conviction must be quashed.

WETMORE, J.—I am of opinion that the contract upon which the boy John Sargent came to the accused was a contract establishing between them the relationship of master and servant, and not that of master and apprentice. The question whether a legal duty or obligation was cast on the accused, the omission to perform which would render the accused criminally responsible, depends entirely upon whether the duty or responsibility arises by virtue of either secs. 209, 210 or 211 of *The Criminal Code, 1892*. Counsel for the Crown urged that offences at common law were charged in the sixth and eighth paragraphs of the charge. The learned Judge who reserved this case informs us that no such contention was made before him. And if such

Judgment. Wetmore, J.

contention had been made the evidence failed to prove the charge laid in the sixth paragraph, because that paragraph alleged the obligation to arise by virtue of the relationship of master and apprentice having existed between the accused and the boy. As a matter of fact there was no evidence of any such relationship. But apart from this I can find no case where criminal liability at common law has been held to be established by reason of the matters set out in either the sixth or eighth paragraphs of the charge. Even assuming there was an obligation or duty on the part of the master to furnish a servant or apprentice under the age of sixteen with food, clothing, lodging and necessaries, and he omitted to do so, and by reason thereof the servant or apprentice became or was likely to be permanently injured in health, no criminal responsibility was established at common law. Cases may be found shewing that when death was caused by such omission a criminal responsibility was established.

Then was a criminal responsibility cast on the accused by virtue of any omission to perform a duty or obligation under secs. 209, 210, or 211 of the Code? I am very clearly of opinion that section 210 does not apply to the circumstances of this case at all, because I am of opinion that the duty referred to in that section upon a parent, guardian, or head of a family, is a duty in the nature of the natural duty cast upon such person, for instance, the natural duty of a parent to provide necessaries for his child. No such natural duty was cast upon the accused in this case in respect to the boy Sargent. Unquestionably there was an obligation of the accused by virtue of sec. 211, the omission to perform which, without lawful excuse, would render him criminally responsible if the consequences followed thereupon as therein expressed. But there was no obligation on the accused by virtue of that section to furnish medical attendance or medicines. I have very great doubts whether a legal duty was cast upon the accused by virtue of sec. 209, and if it was, whether he was thereunder bound to supply medical attendance or medicine. But I do not feel myself called upon to decide either of these questions arising under sec. 209, because in my opinion there was no evidence to establish that the health of the boy had been, or was likely to be, permanently injured, by reason of any omission established by the evidence.

Judgment.

Wetmore, J.

It is quite true that the boy's toes were amputated and there was evidence from which it might be found that this was the result of negligence on the part of the accused. It is quite clear without the aid of expert testimony that the loss of the toes would be a permanent bodily injury, but their loss would not necessarily be a permanent injury to health as I understand the expression.

A person may have a limb amputated, but his organs of health may be perfect. One would not in ordinary popular language speak of such a person as being a person in bad health. It is true the doctor stated that if no medical aid had been called, the toes would have dropped off, and after some months the wounds would have healed up, leaving painful stumps. The painful stumps, I take it, would have been a temporary, not the permanent result. There is no evidence that these painful stumps would be the permanent result. Anyway this testimony refers to a state of things which would have occurred if no doctor had been called in. As a matter of fact a doctor was called in. I am of opinion that in order to warrant a conviction of the accused under any of the charges, there should have been expert testimony to establish either that the health of the boy had been or was likely to be permanently injured by the omission of the accused, and that there was no such testimony.

The answers to the 2nd, 3rd and 4th questions put by the learned Judge in the case reserved should be "no." And the conviction of the accused should be ordered to be quashed.

In view of the answers given to the second and third questions, it is unnecessary to answer the first.

SCOTT, J., concurred.

Conviction quashed.

SMITH v. MACKAY.

Interpleader—Chattel mortgage—Bona fides—Production of books—Solicitor and client—Privilege—Form of order for production.

On an interpleader issue between an execution creditor and a chattel mortgagee, where the chattel mortgage has been taken to an advocate to secure his client's indebtedness to him for professional services, the books and papers of the advocate are not privileged from production so far as they are required to show the propriety and amount of the charges made.

[*Court* in banc, *7th June, 15th June, 1898.*

Statement. The plaintiff, an advocate, claimed certain goods seized under execution as chattel mortgagee thereof, under a chattel mortgage for $3,000, dated fourteen days before the delivery of the writ to the sheriff, and reciting that "the mortgagor is indebted to the mortgagee in various sums of money for professional and other services, amounting in all to the sum of $3,000, and the mortgagee has demanded security for the said sum, and in consequence of the said demand the mortgagor has agreed to execute these presents." The sheriff obtained an interpleader order. After delivery of the issue, an order was taken out by the execution creditors for the examination of the advocate, and he was served with a notice to produce on his examination all books, papers, letters, copies of letters, etc., and particularly all books of account, ledgers, dockets, day books and other documents containing any entry of charges against the execution debtor, or showing any dealings between the debtor. On the examination, the advocate refused to produce the papers and books by reason of professional privilege. The Clerk of the Court declined to order the production, but on appeal the Clerk's ruling was reversed by SCOTT, J., and the plaintiff was ordered to produce all books and papers which might be necessary to show how and in what manner his claim for professional services and money advanced was made up. From this order the advocate appealed.

The appeal was heard before RICHARDSON, ROULEAU and WETMORE, JJ.

Argument. *H. W. H. Knott*, for appellant.

C. C. McCaul, Q.C., for respondent.

[*15th June, 1898.*] Judgment. Richardson, J.

The judgment of the Court was delivered by

RICHARDSON, J.:—The appellant asks the reversal of the order appealed from, on the ground that the books and papers, production of which was ordered, are protected from production by reason of legal professional privilege, the relation of solicitor and client having existed between the appellant and his mortgagor at the time of such entries of charges being made in the said books of account, etc., such entries being made by the appellant in his professional capacity of advocate for the said mortgagor. There appears to be no doubt that the execution creditor's object in seeking production of the appellant's books and papers is to shew from their contents that the consideration recited in the chattel mortgage is not duly set forth, and also to establish the opposite of the allegations contained in his affidavit of *bona fides* endorsed on the mortgage, in order to contend that as against him the mortgage is fraudulent.

That this in ordinary cases of interpleader would be proper seems undoubted, but does an advocate stand in a different position when he takes from a client a chattel mortgage, and when he took it knew that the security was open to be questioned by execution creditors of the mortgagor, under the provisions of the Ordinance?

An ordinary mortgagee, *i.e.*, one other than an advocate, would under circumstances similar to those in the present case, surely be bound, and could not escape, producing his books of account for verification by entries made therein, of charges for moneys, with times and places they were advanced or paid to the mortgagor. The result would either confirm, or the opposite, the recital, in so far as it included advances. *Quoad* these in my opinion there can be no privilege because the mortgagee is an advocate, and the mortgagor had been his client, and Mr. Justice SCOTT'S order must be supported to that extent.

As to the other branch of the consideration, *i.e.*, the appellant's claim for professional services, he admits he has books and papers in his office from which these can be ascertained. From the simple production of these for such

Judgment.
Richardson, J.

purpose as verifying advances no privilege can I conceive attach, but in this holding it must not be assumed that the opposing litigant may enter into and notice every detail or the contents of every paper, or of every charge entered in the books produced to the examiner. For instance, the appellant, on production of a paper, may be able to say the matter within it is of a private and confidential nature, *e.g.*, advice to the client. In such cases he may, and it would seem is bound, if asked, to state the time he was engaged in looking up and expressing his advice particularly charged for to answer. In suits brought or defended for the client the appellant's docket would give the style of suit brought or defended, and what was done on the client's side; if costs were taxed to him, the amount, if not taxed, then, applying the tariff between advocate and client to the items entered, their total would show if the sum charged the client corresponded with the entry in the docket.

The case of *Gardner* v. *Irvin*[1] is very much in point here. To an order for discovery, the defendants made affidavit that they were in possession of certain documents relating to the matters in question in the action set forth in the first and second parts of the schedule annexed. The affidavit then stated that one reason for objecting to produce the documents in the second part of the schedule was "that the same are privileged." The documents were described in that schedule as "correspondence between ourselves and our solicitors;" "correspondence between our solicitors and their agents;" "cash books, ledgers and accounts; writ of summons, statement of claim and other pleadings, counsel's opinion, statement of case in Russian court, including copies of depositions and evidence taken." *Held*, insufficient; that defendants ought to verify the facts on which they claim privilege, and that cash books and ledgers *prima facie* are not privileged.

Since possibly it may be that the order of Mr. Justice SCOTT may be open to a wider construction than intended, it is thought proper to more definitely express how it should have been worded, and the following is substituted: "That the plaintiff produce to the examiner all his books of ac-

[1] (1878) 4 Ex. D. 50; 48 L. J. Ex. 223; 40 L. T. 35; 27 W. R. 442.

count containing any entries of charges against Charles Thomas Gisborne Knox, or against the firm of Knox and Hooper, tending to show how, and in what manner, his claim for professional services and moneys advanced is made up, and also all papers and documents relating to such charges, or tending to show how or in what manner such claim is made up, except such as do contain anything of a strictly confidential character as between advocate and client, and which are by reason thereof privileged." Judgment. Richardson, J.

Under the circumstances, neither party will have costs.

Order accordingly.

IN RE HARRIS (No. 2.)

Legal Profession Ordinance—Advocate undertaking to repay—Failure to repay—Application to suspend—Attachment.

Where costs have been paid to an advocate upon his undertaking to repay them in the event of the ultimate success of the party by whom the payment is made, no order can be made against him under the summary punitive jurisdiction of the Court until after the advocate has made default in complying with a special order to repay by which a time is set for repayment.

[*Court* in banc, *8th June, 15th June, 1898.*]

This was an application by the Alberta Railway and Coal Co. under sec. 15 of *The Legal Profession Ordinance*,[1] to strike one Harris off the roll of advocates and suspend him from practising. The facts appear in the judgment. Statement.

[1]No. 9 of 1895, sec. 15, which, as amended by No. 5 of 1896, sec. 2, provided as follows:—"If upon application supported by an affidavit of facts being presented to a Judge, it shall appear that an advocate has been guilty of such misconduct as would in England be sufficient to bring a solicitor under the punitive powers of the Supreme Court of Judicature, the Judge shall, by summons, call upon the advocate to answer the facts and upon the return of the summons hear the complainant and advocate, and any evidence adduced by them, and if as a result of such hearing the Judge find the complaint well founded, he may direct that such advocate shall be suspended and disqualified from practising as such until the end of the then next sittings of the Court *in banc*, provided that the Judge, instead of directing the suspension and disqualification to practise of such advocate as aforesaid, may refer the matter to be dealt with by the Court *in banc* at its next sittings."

The application was heard before RICHARDSON, ROULEAU, WETMORE and SCOTT, JJ.

Argument. *James Muir*, Q.C., for applicant.

C. C. McCaul, Q.C., for respondent Harris.

H. W. H. Knott, for respondent Burne.

The Attorney-General for the Government of the North-West Territories.

[*15th June, 1898.*]

The judgment of the Court was delivered by

Judgment. WETMORE, J.:—Messrs. Harris & Burne were advocates on the record for the plaintiff in a suit brought by one John L. Patton against the Alberta Railway and Coal Company in which the plaintiff recovered a judgment against the company, on which judgment execution was issued. An appeal was taken by the company to this Court and application was made to Mr. Justice SCOTT to stay proceedings on such execution until after judgment was given on appeal. The learned Judge made an order staying such proceedings upon certain terms and among other things ordered that no execution should issue for the plaintiff's costs in the action until after the expiration of five days after the plaintiff's advocates should have given to the defendants their personal undertaking to pay to the defendants such costs in the event of the defendants succeeding in the action.

Messrs. Harris & Burne thereupon gave their personal undertaking whereby they undertook, promised and agreed with the company to pay such company the amount of the plaintiff's costs in that action to be paid to them in the event of the defendants finally succeeding in the action *when directed*. The document stated on its face that it was given pursuant to the order of Mr. Justice SCOTT and was clearly intended to be the undertaking contemplated by that order. In my opinion it was an undertaking and not merely a contract; the words "promise and agree" did not under the circumstances deprive it of its character of an undertaking.

Judgment.
Wetmore, J.

This undertaking having been given the costs amounting to $641.25 were paid by the company to Messrs. Harris & Burne.

The company finally succeeded in the action and demand was made on Messrs. Harris & Burne to repay such moneys, which they failed to do. The company thereupon applied to Mr. Justice ROULEAU in Chambers and obtained an order directing Messrs. Harris & Burne, in pursuance of the order made by Mr. Justice SCOTT and of their undertaking, to repay the company forthwith $641.25. This order of Mr. Justice ROULEAU should be described rather as a direction than an order. It was the direction which under the undertaking was required to be given. This direction was served on Mr. Harris on the 22nd December last and on Mr. Burne on the 3rd January last, and these gentlemen have not complied with its terms. These are the material facts in the case.

A large amount of material involving a lengthy cross-examination of Mr. Conybeare on his affidavit and assertion of motives against the company and a number of contradictions between the parties were produced which have not the slightest bearing on the question before us and which I can only characterize as the veriest trash in so far as this application is concerned. One is almost inclined to think that such material was produced in the hope of being able to withdraw the mind of the Court from the consideration of the real questions involved. The true facts are that Mr. Harris has got possession of money which by virtue of his undertaking he at any rate ought to have repaid long since and has not repaid.

The only question is whether the present proceedings taken against him were the proper ones to be taken. Mr. Justice ROULEAU'S direction not having been complied with, application on behalf of the company was made to him under section 15 of *The Legal Profession Ordinance* as amended,[1] and a chamber summons was issued calling upon Harris to show cause why he should not be suspended and disqualified from practising as an advocate until the end of the next

[1] Quoted above.

Judgment.

Wetmore, J.

session of this Court *in banc*, upon the grounds specified in the summons. Upon its return it was, at Harris' request, enlarged and ordered to be served on Mr. Burne. At the hearing of this summons the learned Judge, instead of directing that Mr. Harris should be suspended and disqualified, directed that the matter should be referred to the Court *in banc*, as he was at liberty to do under Ordinance No. 5 of 1896, sec. 2.

At the argument before this Court the learned counsel for the company stated that, in view of the fact that Mr. Burne resided without the jurisdiction of this Court, he had doubts if this Court had jurisdiction to deal with him, and therefore he did not ask for an order as against him, but he asked for an order that Mr. Harris should be struck off the roll of advocates or suspended from practising and for payment of costs by him of these proceedings.

I am of opinion that Mr. Harris is not under the facts stated liable to be proceeded against under section 15 of *The Legal Profession Ordinance* as amended. Nor is he liable to be proceeded against under section 16 of that Ordinance. No. 9 of 1895, sec. 16, as amended by No. 5 of 1896, sec. 3, provided as follows:—"The Supreme Court may strike the name of any advocate off the roll of advocates for default by him in payment of moneys received by him as an advocate, or may suspend such advocate from practising for such period as may be considered proper, or for any breach of the provisions of this Ordinance, or for any of the causes for which a solicitor of the Supreme Court of Judicature in England may be struck off the roll of solicitors in that Court." I do not agree that secs. 15 and 16 are entirely independent of each other. I have no doubt whatever that an application may be made to the Court *in banc* under sec. 16 against an advocate without any application having been made to a Judge under sec. 15. But if an application is made to a Judge under the section last mentioned he cannot finally deal with the matter; he must refer it to the Court *in banc* to deal with, but he may in the meanwhile suspend and disqualify the advocate from practising. In fact before the amendment of 1896 he could not report the matter to this Court unless he did in the meanwhile suspend and disqualify.

Judgment.

Wetmore, J.

The amendment of 1896, however, permitted the Judge to refer the matter to the Court *in banc* without in the meanwhile suspending or disqualifying the advocate. When, however, the matter is so referred this Court under the provisions of sec. 15 is to consider the evidence and proceedings and may hear the parties or their counsel in the same manner as if the application had been originally made to this Court, and make such order therein as it may deem fit. I do not understand by that that this Court has the power arbitrarily to make any order it sees fit to make. It means that this Court is to make such order as it may deem fit which it is authorized to make according to law and the established practice, and in order to ascertain what order may be made we must so far as the cases for which punishment is provided under that section are concerned refer to sec. 16 as amended by Ordinance No. 5 of 1896, sec. 3.[2] Advocates of the Territories are officers of this Court, and this Court or a Judge thereof may exercise the same power and jurisdiction over them as was exercised by the Supreme Court of Judicature in England at the time of the passing of the Ordinance over solicitors in England.[3] This Court therefore has the right to exercise its summary jurisdiction over such officers to compel them to perform their duties in the same manner that the Supreme Court of Judicature can exercise in summary jurisdiction over similar officers in England. It is one thing to apply to the summary jurisdicton of the Court to compel an advocate to do his duty; it is quite another thing to have an advocate brought under the punitive powers of the Court.

It was not contended on the part of the applicant in this case that the Court had power under the proceedings taken herein to issue an attachment against Mr. Harris. In fact it was rather conceded that the Court had not such power. So fully was this conceded that, although the matter was specially brought under the notice of the counsel for the applicant, he expressly refrained from asking for an attachment and asked that Mr. Harris be struck off the roll or suspended, and in consequence counsel for Mr. Harris expressly stated that he did not consider it necessary to argue the question of the power of this Court under the present procedure to order an attachment.

[2] Quoted above. [3] See s. 11 of Ord. No. 9 of 1895.

Judgment.

Wetmore, J.

It was also conceded that the direction made by Mr. Justice ROULEAU was not such an order as would warrant the Court in issuing an attachment under its summary jurisdiction, but it was contended on behalf of the applicant that Mr. Harris was liable under sec. 16 to be struck off the rolls simply because being an advocate he did not pay over the moneys; that such moneys were received by him as an advocate within the meaning of sec. 16; that, if the undertaking had been to pay over the moneys in the event of the defendant finally succeeding in the action without the words "when directed" being used, the advocate would be liable to be proceeded against under secs. 15 and 16 if the defendant finally succeeded in the action and the advocate failed to pay such moneys when demanded, without any summary application being made to obtain an order from the Court, and that Mr. Justice ROULEAU's order was only a step necessary to be taken because the words "when directed" were in the undertaking.

I cannot subscribe to that contention. I am of opinion that the default in paying over moneys received by an advocate for which punishment is provided for in sec. 16 is for default in paying over moneys which from the mere fact in itself that the advocate received them were required to be paid over—for failing to pay over moneys which the advocate received, not to be used by him at all, but to be paid over to some third person, as, for instance, to his client. The provision did not apply to moneys which the advocate had the right when received to use for his own benefit.

Now these moneys were not paid to Mr. Harris to be put away and kept untouched by him until the appeal was decided. They were given to him to be used: they were ordered to be given to him under the belief that *prima facie* he was entitled to them for his own purposes and he had the right to so use them immediately on receiving them. I am of opinion that sec. 16 of the Ordinance does not apply to moneys so received by an advocate.

But it was further contended on behalf of the applicant that attachment for disobeying an order of the Court is a punitive process; that an advocate who becomes liable to have such a process issued against him is guilty of such con-

duct as would bring him under the punitive power of the Court, and that Mr. Harris, being liable to have proceedings taken against him which would render him liable to have an attachment issued against him, was *ipso facto* guilty of such misconduct as would render him liable to be proceeded against under sec. 15. I am by no means prepared to concede that an advocate who becomes liable to have an attachment issued against him for not obeying an order of the Court directing him to perform a duty as an officer of the Court, is brought within the punitive powers of the Court within the meaning of sec. 15, but assuming for the purpose of this case that he would be so brought within such punitive powers, he is not guilty of misconduct or liable to the punitive powers of the Court because he is liable to be proceeded against under its summary jurisdiction. When the summary jurisdiction has been invoked and an order has been made and disobeyed, then, and not until then, is he brought or liable to be brought under the punitive powers of the Court.

He can in no case be said to be within the punitive powers of the Court until he has done something to enable the Court to punish him, that is, so far as the matter we are now discussing is concerned, to issue an attachment against him. Now the mode of compelling an advocate to fulfil a formal undertaking made by him as such to pay over moneys is laid down in *Cordery on Solicitors*[4]; upon an application being made to the summary jurisdiction of the Court, an order for payment will be made, and if that order is disobeyed it will be enforced by attachment. But the attachment does not go until the order is disobeyed. No application of this sort was made in this case and consequently no such order has been made. Mr. Justice ROULEAU's direction was not intended to be such an order, and it could not because it did not prescribe the time or times after service of the order within which the money was to be paid as prescribed by sec. 330 of the *Judicature Ordinance*.[5]

For these reasons I am of opinion that this Court is not warranted in ordering Mr. Harris to be struck off the roll or suspended, and therefore that this application must be refused.

[4](2nd ed. 1888) pp. 135 and 138. [5]Con. Ord. (1898) c. 21

Judgment. Wetmore, J.

I am of opinion, however, that no costs of opposing the application should be allowed to Mr. Harris. He is an officer of this Court and ought beyond all question to have carried out his undertaking and repaid the money long ago. The facts present no shadow of excuse or justification whatever for his not doing so. Moreover he has most unnecessarily put the applicants to a great expense in having Mr. Conybeare examined on his affidavit, at any rate to a very great length which such cross-examination was carried.

Application refused without costs.

THE QUEEN EX REL. THOMPSON v. DINNIN.

School Ordinance, 1896, s. 28—"Resident ratepayer"—School Trustee—Quo warranto.

At a meeting for the election of school trustee two candidates were put in nomination. After the close of the nominations one of the electors asked the returning officer to declare one of the candidates elected on the ground that one of the two electors by whom the other was nominated was not a resident elector. The chairman refused the request, and at the election which followed the candidate objected to received a majority, and was declared elected. It appeared that the nominating elector objected to owned a half section within the school district, but that his residence and farm buildings were on other property separated from the half section by a road allowance, the whole, however, being worked as one farm.

Held, by RICHARDSON and WETMORE, JJ., that leave to file an information in the nature of a quo warranto should be granted.

Held, by ROULEAU and SCOTT, JJ., that in view of the action of the applicant in not calling attention to the disqualification of one of the nominating electors until too late to remedy the irregularity, and in view of the fact that no injustice or inconvenience had been caused, or any result followed different from what would have followed the fullest compliance with the law, the leave should not be granted.

Semble, by the Court, that the nominating elector objected to was not a resident of the district.

[*Court* in banc, *10th June, 15th June, 1898.*

Statement.

This was an application for leave to file an information in the nature of a *quo warranto* against one John R. Dinnin to show by what authority he claimed to exercise the office of trustee of the Abernethy Public School District, No. 300. The facts appear in the judgment.

Statement. The application was heard before RICHARDSON, ROULEAU, WETMORE and SCOTT, JJ.

Argument. *H. A. Robson*, for applicant.

W. C. Hamilton, Q.C., for respondent.

[*15th June, 1898.*]

Judgment. WETMORE, J.—It is claimed that Mr. Dinnin improperly holds this office on the following ground. A vacancy having occurred in the office of trustee an election was held at the annual meeting of ratepayers held in the district in January last to fill such vacancy, when one James Morrison was nominated for such office by the applicant Robert C. Thompson, seconded by one David J. Gibbons, both being resident ratepayers of the district, and John R. Dinnin was nominated by Charles S. Dickinson, seconded by A. Garratt. It is set up that Dickinson was not a resident ratepayer of the district and therefore not qualified to nominate a trustee, and that Thompson, after the time for receiving nominations had closed, requested the returning officer to declare Morrison elected on the ground that the nomination of Dinnin was void because Dickinson had no right to nominate him.

Dickinson owns the north half of section 13 in township 20, range 11, which is situated in the school district and was assessed for school purposes in respect thereof. His residence and the buildings occupied in connection with it as such are situated on the north-west quarter of section 18, township 20, range 10, which is not within the school district, and is not assessed for the purposes of the district. The evidence I think goes to establish that the north half of section 13 and the north-west quarter of section 18 are practically owned and occupied by Dickinson as one farm, being separated only by the road allowance which runs between them. In view, however, of the conclusion I have reached this is not material.

I am of opinion that Dickinson can not be considered a resident ratepayer of the district. As a matter of fact the north-west quarter of section 18 is not situated within any school district, but if it were situated in another district than that of Abernethy, for instance, in the Chickney district,

Judgment. Wetmore, J.

which is situated to the east, I am of opinion that Dickinson would be a resident ratepayer of Chickney and not of Abernethy, and the proper place for him to vote and nominate persons for trustees, would be in Chickney. That being so, he cannot be considered a resident ratepayer of Abernethy because his place of residence is not situated in any school district. Moreover by sec. 2 (b), sub-sec. 2 of *The School Ordinance, 1896*,[1] after the erection of the school district (which is the case in this instance), in order to constitute a person a resident ratepayer, he must be *actually* resident within the school district. Section 28 of that Ordinance provides that "each trustee shall be nominated by a mover and seconder both of whom must be present and be *resident* ratepayers." Section 39 provides that "except as it is otherwise expressly provided the procedure at an annual school meeting shall be the same as that prescribed for the first school meeting." It may possibly be a question whether sec. 28 relates to matters of procedure and therefore is not embraced by sec. 39. I am, however, of opinion that all the provisions from secs. 27 to 34 inclusive, which are placed under the heading "First Election of Trustees," are not limited to the first school meeting. Some of them are general in their application and sec. 28 is one of them. That the provisions of that section are not on its face limited to the first meeting is made apparent by sec. 29 which provides that "in case the number of nominations do not exceed the number of trustees to be elected, the chairman shall declare the person or persons nominated to be elected." At the first meeting three trustees are required to be elected; at subsequent annual meetings it may be that only one person is required to be elected. If the provisions of sec. 28 were to be confined to the first meeting, the word "person" in section 29 was quite unnecessary, since that word can only have reference to a meeting where only one trustee is required to be elected.

I am of opinion, therefore, that Dickinson was not qualified to nominate Dinnin and therefore that his nomination was bad by law.

It is urged however that the granting leave to file this information is discretionary with the Court, and that in the

[1] No. 2 of 1896.

Judgment.

Wetmore, J.

exercise of this discretion it should not be granted because on another occasion in 1895, when Dinnin was nominated by Dickinson and elected, no objection was raised thereto by the applicant, although present, and *Rex* v. *Parkyn*,[2] and *Reg.* v. *Lofthouse*,[3] were cited in support of such contention. There is a distinction between both these cases and the present one. In the former the objection sought to be raised had been raised at a previous election and overruled. The relator was then present, the objection was overruled, and the relator voted for the person elected. The objection taken in that case would apply to any person elected. In the latter the objection raised was that the voting papers were not in proper form. The relator had, however, at previous elections voted with similar voting papers and had been himself so elected.

In the case now under consideration no objection had ever been raised to Dickinson's nomination in 1895, nor does it appear that Thompson voted for the candidate he nominated, and therefore this case is quite distinguishable from *Rex* v. *Parkyn*, *supra*, and in *Rex* v. *Benney*,[4] the case just preceding *Rex* v. *Parkyn*, it was held that it was no answer to the application that the relator frequently acted with the party against whom he applied in corporation business during the two years following such party's election, the relator not being shewn to have otherwise concurred in his election, and that the relator was not disqualified by the mere circumstance of having formerly taken part in other elections when the same irregularity existed as that complained of, but was not noticed.

In so far as the circumstances of the case which I am now discussing are concerned they are not more in accord with those in *Rex* v. *Benney* than those in *Rex* v. *Parkyn*. In *Reg.* v. *Lofthouse*, *supra*, the matter complained of was a mere irregularity at the most. Furthermore in 1895, when Dinnin was nominated and elected, *The School Ordinance, 1896*, was not in force. The election was held under Ordinance No. 22 of 1892 and amending Ordinances, and there was no such provision as sec. 28 of *The School Ordinance, 1896*.

[2] (1831) 1 B. & A. 690. [3] (1866) L. R. 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N.S.) 619; 14 L. T. 359; 14 W. R. 649. [4] (1831) 1 B. & A. 684.

Judgment.

Wetmore, J.

The fact that Dickinson voted on other questions that came before the meetings on other occasions does not seem to me to affect the question. In fact I am not prepared to say he had not the right to so vote on such other questions. Neither does the fact that he held the offices of auditor, assessor and collector affect the question.

I quite agree that the power to grant leave to file information is discretionary in the Court and that in the exercise of such discretion the leave will not be granted in some cases when the matter complained of is merely an irregularity which might in the abstract avoid the election provided that no injustice had been done. I take the language of BLACKBURN, J., in *Reg* v. *Cousins*,[5] to state the law correctly in this respect when he lays it down that, "The rule always acted upon is, that if the right person has been elected and it is not shewn that any one else has been kept out, or the result of the election in any way affected, the Court will not allow the writ to issue." The difficulty in this case is that the right person has not been elected. The right person to be elected was Morrison, who was properly nominated. It seems to me that a majority of electors might just as well have voted for John Jones, who was not nominated at all, and John Jones have been so declared elected, as have voted for Dinnin. That is if any effect is to be given to sec. 28 of *The School Ordinance, 1896*. In *Reg.* v. *Benney*,[6] the charter of the borough required that the common clerk or deputy town clerk should be present at the election, but no clerk or deputy clerk was present. It did not appear that any injustice had been done, yet leave to file the information was granted.

In my opinion the nomination of Dinnin was absolutely void under the section of the Ordinance and was no nomination at all. Our discretion must be a legal discretion, and I think under all the circumstances of this case the leave ought to be granted. The mere fact that the relator did not raise the objection to the nomination before the time for nominations closed does not, in my opinion, disqualify him from being relator, even assuming that his object in so acting was to secure the election of his candidate. I am the

[5] (1873) L. R. 8 Q. B. 216; 42 L. J. Q. B. 124; 28 L. T. 116.
[6] (1831) 1 B. & A. 684.

more impressed with this view from the fact that the relator, when he did make the objection after the time for nomination closed, made it to Dinnin himself, who acted as chairman at the meeting and returning officer at the elections. Judgment. Wetmore, J.

I think the leave to file the information should be granted.

RICHARDSON, J., concurred with WETMORE, J.

SCOTT, J.:—I cannot agree with the conclusion reached by my brother WETMORE.

Upon this application the only objection taken by the applicant to the election of Dinnin was that taken by him at the time of the election, viz., that Dinnin was not nominated by a resident ratepayer of the district. Had the question been now squarely before this Court for decision, it is probable that it would be obliged to hold that Dickinson was not a resident ratepayer within the meaning of *The School Ordinance, 1896*, and, as sec. 28 provides that each trustee shall be nominated by a mover and seconder, both of whom must be resident ratepayers, it is also probable that it might be obliged to hold that Dinnin was not duly elected.

But the matter has not yet reached the stage at which that question must be decided. There is abundant authority to the effect that leave to file an information in the nature of a *quo warranto* under which the question can be tried is a matter entirely within the discretion of the Court and that in exercising that discretion the Court is bound to consider all the circumstances of the case.

In *Rex* v. *Parry*, Lord DENMAN, C.J., says,[7] "It was in effect asserted that whenever a reasonable doubt is raised as to the legal validity of a corporate title we are bound to grant leave to file an information. This proposition, however, is wholly untenable. Every case (and they are most numerous) which has turned upon the interest, motives or conduct of the relator, proceeds upon the principle of the Court's discretion; *however clear in point of law the objection may have been to the party's abstract right to retain his office*, yet the

[7] (1837) 6 A. & E. 810, at p. 820.

Judgment.
Scott, J.

Court has again and again refused to look at it or interfere upon one or other of those grounds." Further on[8] he shews that the light in which the relator appears, his behaviour and conduct relative to the subject matter of the information previous to making the motion, the light in which the application itself manifestly shews his motives, the purpose which it is calculated to serve and the consequences of granting the information, are matters which may be taken into consideration, and that leave may be refused even in cases where it is clear that the title of a defendant at the time of his election may be void.

He says[9]: "On the one hand, if the rule be made absolute, the dissolution of the corporation may at least be reasonably apprehended, on the other it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent or indirect motives for the acts complained of as irregular, nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law as they lay it down. They do not go to the length of suspecting that a single vote had been won or lost or that the burgess list would have varied in a single name."

In *Reg.* v. *Ward*,[10] Lord Blackburn quotes as above from *Reg.* v. *Parry*, and shews that the absence of a corrupt or fraudulent motive and of any allegation that the proceedings complained of will produce injustice or inconvenience, are matters which should be taken into consideration even in cases where the dissolution of the corporation would not be threatened by the granting of the rule.

Also in the *Queen* v. *Cousins*,[11] Lord Blackburn says, "Ever since the Statute, 4 & 5 W. & M. ch. 18, sec. 2, the Court has had a discretion to exercise as to allowing an information in the nature of a *quo warranto* to be filed—and especially has that discretion been exercised in the case of annual officers. The rule always acted upon is that if the right person is elected, and it is not shewn that anyone else has been kept out, or the result of the election in any way affected, the Court will not allow the writ to issue."

[8] At pp. 821, 822. [9] At p. 822. [10] (1873) L. R. 8 Q. B. 210; 42 L. J. Q. B. 126. [11] (1873) L. R. 8 Q. B. 216; 42 L. J. Q. B. 124; 28 L. T. 116.

Judgment.
Scott, J.

In my opinion the conduct of the applicant at the meeting at which the election was held, was such that this Court, in the reasonable exercise of its discretion, should refuse his application. I think there can be no doubt that had the objection to the nomination of Dinnin been taken by him within a reasonable time, the defect would have been cured by some one of those resident ratepayers present who afterwards voted for him moving his nomination. The delay in taking the objection until after the time for nominations had expired was a mere device on the part of the applicant to secure the election of his candidate, even though he might not be the choice of a majority of those entitled to vote. The result of the subsequent election shews that Dinnin was the choice of that majority, and I cannot see how the result of that vote was in any way affected by the irregularity complained of in his nomination.

It may be said that if he was not properly nominated he was not the right man to be elected, but, as it appears that he possessed the requisite qualifications and was the choice of the majority of voters, he was undoubtedly the man who should have been elected, and as there is nothing in the material before us to lead to even a remote suspicion that there was any corrupt or fraudulent motive on the part of Dinnin or his supporters, or that the irregularity in his nomination has, to adopt the language of Lord Denman above quoted, produced any injustice, inconvenience or any result different from what would have followed the fullest compliance with the law, I think his election should not be disturbed.

I do not attach much importance to the refusal of Dinnin as chairman or returning officer to allow the objection to his nomination and to declare Morrison elected. It unfortunately happened that he was placed in the peculiar position of being the returning officer at an election at which he himself was a candidate. It is at least open to question whether under the Ordinance he was not authorized to so act. At all events no exception has been taken to his so acting, and he is not charged with any misconduct in that capacity beyond the fact of his refusal to give effect to the objection referred to. I think his refusal was at least excusable under the circumstances. Dickinson had at other meetings been permitted to vote as a resident ratepayer, and

Judgment. Scott, J.

the circumstances were such that a layman might reasonably conclude that he actually was such.

In my opinion the application should be refused, but without costs to Dinnin.

In stating this conclusion, I do not wish it to be understood that I think an application for the writ should be refused in all cases where it is made on the ground of the irregularity of the nomination of a candidate for trustee under circumstances different from those appearing on this application.

ROULEAU, J., concurred with SCOTT, J.

The Court being equally divided, application refused without costs.

GRAVELEY v. SPRINGER.

Chattel mortgage—Sufficiency of description of goods mortgaged—Contemporaneous agreement under seal.

The property covered by chattel mortgage was described as "all cattle and horses of whatever age and sex branded $\overline{5}$ on the left side and all increase thereof, together with the said brand and branding irons." The defendant, the mortgagee, had owned a number of cattle some of which were branded "M. S." others ▭ and others "$\overline{5}$" with one or both of the other brands. All those branded "$\overline{5}$" were sold to the mortgagor.

Held, that the description was sufficient for identification, and that no mention of the locality where the cattle were at the time mortgage was given was necessary.

By a contemporaneous agreement under seal the mortgagor agreed for three years to give his whole time and attention to looking after the horses and cattle, and mortgagee agreeing to allow the mortgagor to sell sufficient to pay running expenses.

Held, that the agreement did not affect the correctness of the statement of consideration, which was stated as $3,000, the purchase price of the cattle.

[*Court* in banc, *6th June, 6th December, 1898.*

Statement.

This was an appeal from the judgment of ROULEAU, J., at the trial of an interpleader issue respecting eighteen head of bulls and steers, seized by the sheriff of the Northern

Alberta Judicial District, under an execution issued upon a judgment recovered by the plaintiff against one Muntz. The facts appear in the judgment. Statement.

The appeal was heard before RICHARDSON, WETMORE, MCGUIRE and SCOTT, JJ.

J. A. Lougheed, Q.C., and *R. B. Bennett*, for appellant. Argument.

James Muir, Q.C., for respondent.

[*6th December, 1898.*]

The judgment of the Court was delivered by

SCOTT, J.:—The defendant claims the cattle in question under a chattel mortgage made by Muntz to him. This mortgage, bearing date 17th July, 1894, was given by Muntz, who is described therein as of Doniberg Ranche, in the District of Alberta, rancher, to secure the payment to the defendant of $3,000 payable in three years from the date of the mortgage without interest. The property is described as follows:—"All cattle and horses of whatever age and sex branded $\overline{5}$ on the left side, and all increase thereof from time to time until the moneys hereby secured are fully paid, together with the $\overline{5}$ brand and the branding irons for said brand, and all right, title and interest therein and thereto." Judgment.

It is contended on behalf of the plaintiff that this mortgage is void against him as an execution creditor of Muntz for non-compliance with the provisions of sec. 8 of *The Bills of Sale Ordinance* then in force,[1] inasmuch as it does not, to quote the words of that section, "contain such full and sufficient description of the goods and chattels comprised in it that the same may be readily and easily known and distinguished."

The evidence shews that in the spring of 1894, the defendant owned a number of cattle, some of which were branded "MS," others "□," and others "$\overline{5}$," in conjunction with one of the other brands mentioned, and that all those bearing the $\overline{5}$ brand were sold by him to Muntz, who

[1] No. 18 of 1889.

Judgment.
Scott, J.

gave the mortgage in question upon them. There is nothing in the evidence to shew that any cattle bore the $\overline{5}$ brand other than those sold by the defendant to Muntz, and intended by them to be included in the mortgage.

In view of this evidence, I am of opinion that the description in the mortgage was a sufficient compliance with the provisions of the section referred to. In the ranching districts of the Territories, where cattle of different brands are of necessity permitted to graze together on the open prairies, brands borne by such cattle practically constitute the only means of identification. For the purpose of such identification, it does not appear to me to be necessary that all the brands borne by each animal should be referred to. Where each animal of a particular band bears several brands, some of which are borne by cattle of other bands, but one, and only one, of which is borne by all the cattle of that band and by no other cattle, the latter brand would afford the only means of identifying by brands the cattle belonging to that particular band.

Then, as the $\overline{5}$ brand was sufficient to make the identification of the cattle comprised in the mortgage unquestionable, the mention of the locality where they were at the time the mortgage was given was unnecessary. That appears to be necessary only in cases where the property comprised cannot be, or is not described with such certainty as to render identification possible without it. See *Barron on Bills of Sale*, 2nd Ed., p. 497 *et seq.*, *McCall* v. *Walff*.[2]

I can find nothing in the Ordinance referred to which indicates that a mortgage within it should shew on its face that the property comprised was situated within some particular registration district of the Territories, or even that it was within the Territories. The Ordinance merely requires that the mortgage shall be filed within the specified time in the office of the registration clerk of the district in which the property was situated at the time of its execution, and that requirement appears to have been fulfilled in this case.

The mortgage in question contains the following proviso, "provided always, anything hereinbefore contained to the contrary notwithstanding, that the said mortgagors shall

[2] (1885) 13 S. C. R. 130.

Judgment.
Scott, J.

be at liberty at any time to sell bulls and steers." It is contended that by reason of this provision the mortgage is not a mortgage of the bulls and steers. The basis of this contention is that giving the mortgagor the right to sell all the bulls and steers practically revests in him the absolute control of them, and no security or protection in respect of them is afforded to the mortgagee.

The evidence shews that, by an agreement under seal contemporaneous with the mortgage, and made between the parties thereto, the mortgagor agreed that he would for a period of three years from that time give his whole time and attention in looking after, tending and maintaining the cattle and horses mentioned in the mortgage, and the mortgagee agreed that he would allow the mortgagor to sell a sufficient number of bulls and steers from time to time as should be necessary to pay the running expenses of the ranche, regard being had to economy. It was also provided that no horses or any other cattle should be sold for any purpose without the consent of the mortgagee in writing. I think it may reasonably be inferred that the power given by the mortgagee to sell bulls and steers was intended by the parties to be restricted to sales authorized by the agreement, *viz.*, those only which might become necessary in order to pay the running expenses of the ranche. The wider power expressed in the mortgage may have been stated there merely for the purpose of satisfying purchasers from the mortgagor that he had authority to sell them. In that view the actual power conferred seems to be no wider than the implied power which the mortgagor would otherwise have had, to sell cattle in the ordinary course of his business as rancher: see *National Mercantile Bank* v. *Hampson*.[3] In fact it may be doubted whether the power conferred is as extensive as the implied power would have been, as under the latter he could have sold not only bulls and steers, but also horses and female cattle.

It is also contended by the plaintiff that the mortgage is void as against him on the ground that the consideration therefor is not duly expressed as required by sec. 7 of the Ordinance referred to, inasmuch as the agreement referred to shews that the mortgage does not set forth the terms upon

[3] (1880) 49 L. J. Q. B. 480: 5 Q. B. D. 177: 28 W. R. 424.

Judgment.
Scott, J.

which it was taken, and that a creditor searching in the clerk's office and reading the mortgage would not be properly informed of the nature, purposes and scope of the transaction, which would appear from the agreement to be one for future advances.

The consideration of the mortgage was a debt of $3,000 due by the mortgagor to the mortgagee, and there is nothing in the evidence to shew that there was any further or other consideration. The mortgagor in his evidence states that he agreed to run the cattle for three years and not pay interest on the money he owed, and that he was to be allowed besides the expenses of running the ranche. I think that in making this statement, he was merely referring to the terms of the agreement in writing between him and the mortgagor, and not to any further or other agreement, but even if there had been such an agreement between them, it was not one which in any way affected the question of the consideration for the mortgage. It was one which related merely to the terms of the payment. It in effect merely provided that in case the mortgagor took care of the cattle for three years and ran the ranche, he was to be allowed the expense of running it as a payment on the mortgage.

Neither is there anything in the written agreement which affects the consideration or shews that it was otherwise than is expressed in the mortgage. Its object appears to have been to provide for the preservation of the mortgaged property during the continuance of the mortgage, and the powers thereby conferred upon the mortgagor appear to have been conferred for the purpose of carrying out that object. It is true that the written agreement shews that the whole agreement between the parties was not contained in the mortgage, but as the portion of the agreement outside the mortgage does not affect the question of the consideration, there appears to be no provision of the Ordinance referred to requiring that it should be so contained.

It was also contended that because the mortgage permits the mortgagor to sell the bulls and steers, it is fraudulent and void as against the plaintiff. The basis of this contention is that the power is a general one to sell all bulls and steers. As I have already expressed the view that, by the

agreement between the parties, the power was restricted to such an extent that it was not in excess of the implied power under such mortgages, it is unnecessary for me to deal with that contention. Judgment. Scott, J.

At the trial the agreement in writing to which I have referred was tendered in evidence by the defendant. Its reception was objected to on the ground that the mortgage could not be varied by any subsequent agreement. In my view it was one contemporaneous with the mortgage.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

PACIFIC INVESTMENT CO. v. SWAN.

Interim injunction restraining disposition of property before judgment—Extending statutory remedies—Fraudulent dispositions of property.

Semble, per RICHARDSON and WETMORE, JJ., (ROULEAU, J., *dissentiente*) that a plaintiff is not entitled before judgment to an interim injunction to restrain a disposition of property by a defendant. To obtain any relief of that nature before judgment, a plaintiff must make out a case within the statutory provisions dealing with garnishee and attachment proceedings.

Held, by the Court, that in this case the material was in any event insufficient and that no injunction should be granted upon it.

[*Court* in banc, *6th June, 6th December, 1898.*

This was an appeal by the plaintiff from an order of SCOTT, J., dissolving an interim injunction restraining the defendant from receiving certain moneys from trustees. The facts appear in the judgment. Statement.

The appeal was heard before RICHARDSON, ROULEAU and WETMORE, JJ.

C. C. McCaul, Q.C., for appellant. Argument.

James Muir, Q.C., for respondent.

[*6th December, 1898.*]

Judgment.

WETMORE, J.:—This action was brought to recover the amount of a judgment obtained in the High Court of Justice in England by the plaintiff against the defendant, and in the alternative to recover alleged calls on stock or shares which the plaintiffs claim the defendant held in their company. The defendant appeared and filed a defence herein. One Lizzie M. Barter obtained a decree in a recent action in this Court, wherein she was plaintiff and the present defendant Swan and others were defendants, whereby the defendant Swan and one T. S. C. Lee were appointed receivers with the power of eventually converting the property of the Quorn Ranche Company, Limited, into cash, and out of the proceeds, after making certain specified payments, to divide the balance, share and share alike, between the said Lizzie M. Barter and the defendant Swan until Barter was paid $20,000 and some interest.

The plaintiff in this action applied to Mr. Justice ROULEAU and obtained, *ex parte*, an injunction order restraining the defendant Swan, his agents and servants and anyone claiming under them from receiving from the said receivers in the earlier action any property, money, cheque, or security for money, and the receivers from giving, paying or transferring to such defendant any such property, money, cheque or other security for money. The defendant thereupon applied to dissolve such injunction order, and Mr. Justice SCOTT, on hearing the parties, made an order dissolving it. The plaintiff appeals from Mr. Justice SCOTT's order.

It is conceded in the plaintiff's factum (I think there can be no question, rightly) that by the practice in England such an injunction order could not be obtained before judgment to prevent a debtor from transferring his property or getting in debts due to him even if this was done for the express purpose of defrauding a creditor and defeating his claim in a pending action. I may say that in the material used before ROULEAU, J., on which the injunction order was granted, it was alleged that, in the belief of the plaintiff's advocate who made the affidavit, the receivers were about to sell and dispose of the assets in their hands for the purpose of paying over to the defendant the portion of the proceeds he

Judgment.

Wetmore, J.

was entitled to with a view of defeating the creditors of the defendant and especially the plaintiff in this action. I fail to discover in the material used before the learned Judge any evidence of such fraud or contemplated fraud. It is claimed, however, on the part of the plaintiff that the condition of affairs in this country is different from what it is in England; that in England a debt due by a third person to a defendant in an action for a liquidated demand cannot be attached before judgment by the plaintiff in the action, but that in this country this can be done by virtue of sub-sec. 47 of sec. 1 of Ordinance No. 6 of 1897, and further that that property can in this country be attached before judgment by virtue of *The Judicature Ordinance*,[1] and that consequently as in England the Courts will give relief in the mode known as equitable execution after judgment to enable the judgment creditor to obtain the benefit of his judgment when an impediment exists which prevents such creditor recovering the amount of his judgment under ordinary process of execution, so the Courts in this country will grant similar equitable relief when a plaintiff before judgment is in a position to issue a garnishee process or attachment and some impediment exists which prevents the garnishee process or attachment being enforced against the debt or property.

It was also conceded at the argument by the plaintiff's counsel that the application for the injunction was made because the plaintiff could not prove that the receivers had any moneys in their hands to pay to the defendant. Assuming for the present that the plaintiff's contention is correct in the abstract, I am of opinion that this appeal must fail on the ground that the material on which ROULEAU, J., made the order for the injunction was not sufficient. As in England a party plaintiff could not get such an order until after judgment or order for payment of money, that is, until he was in a position to issue execution, so in this country he could not get an injunction before judgment until he proved himself in a position to obtain a garnishee process or issue an attachment. Now the plaintiff in this case was not in a position to obtain a garnishee process because there is no affidavit that the receivers were in fact indebted to the plain-

[1] No. 6 of 1893, s. 394, as amended by s.-s. 53 of s. 1 of Ordinance No. 6 of 1897.

Judgment.

Wetmore, J.

tiff as required by sub-sec. 47 of sec. 1 of the Ordinance No. 6 of 1897. There is nothing in Mr. McCaul's affidavit to that effect, and, notwithstanding the examination for discovery of the defendant, it is quite possible that at least some of the matters pleaded in the statement of defence may afford a defence to the action. It would be monstrous that a person's property should be taken away from him or that he should be prevented from dealing with it when neither a judgment has been recovered against him, nor any clear sworn testimony is presented shewing indebtedness. As to issuing an attachment under sec. 394 of *The Judicature Ordinance*, there is nothing whatever established as required by that section to entitle the plaintiff to issue such an attachment.

This appeal, however, was brought with a view of having the question of the abstract right to have an injunction order issued in such cases and a receiver appointed, and it would be a matter of some regret if that question was not settled. I am of opinion that even if it had been established that the plaintiff was in a position to issue a garnishee process or an attachment, such an order as that made by ROULEAU, J., ought not to have been made.

As before stated it is conceded that in England no such order could be made before judgment, therefore no such order can be made in this country unless there is statutory authority to make it or authority to make it arises from some legislation. In so far as the order in question is concerned, the only legislation out of which an authority to make it can be spelled or inferred is in sub-sec. 47 of sec. 1 of Ordinance No. 6 of 1897, or sec. 394 of *The Judicature Ordinance*, as amended, *supra*. As to sub-sec. 47 of sec. 1 of Ordinance No. 6 of 1897, the only effect of a garnishee summons is to bind the debts *due or accruing due*. The decisions of the Court have clearly defined what is meant by debts due or accruing due; there must be *debitum in presenti* although it may be *solvendum in futuro*. *Webb* v. *Stenton*,[2] is the ruling case on this point. In that sense there was no debt or accruing due from the receivers to the defendant, and, in my opinion, the legislature having restricted the binding power of the garnishee

[2](1883) 11 Q. B. D. 518; 52 L. J. Q. B. 584; 49 L. T. 432.

Judgment.
Wetmore, J.

process to debts of this character, even a court of equity cannot give a wider effect to the language of the Legislature than the Legislature itself intended. Of course we must assume that the Courts in putting the construction I have named upon these words gave effect to the intention of the Legislature. As to sec. 394 of *The Judicature Ordinance* (and the same is true of both the provisions of the Ordinance under discussion), the Legislature has provided a means by which and has fixed the extent to which the relief can be granted, and I am of opinion that it can be obtained only in the prescribed manner and to the prescribed extent. It must be borne in mind too that the legislation relied on interferes with the common law rights of the subject to deal with his property as he pleases, and the Courts should be very careful how they extend any legislation which affects such rights beyond what the language of the legislature clearly expresses.

Moreover, I can perceive a very wide difference between invoking the aid of a court of equity to secure to a person the fruits of a judgment recovered, and invoking its aid under the circumstances under which it has been invoked in this case. When a person has obtained a judgment it is conclusive against the judgment debtor, the judgment creditor is entitled to have his judgment satisfied and therefore he has an established unquestionable right to relief which ought to be respected. In this case the plaintiff has not established a conclusive right as against his alleged debtor. It may in the event turn out that he has no claim whatever against the defendant and equity is asked to stretch out its arm to secure to him relief which he may never establish. To say the least, I have very grave doubts whether the court of equity should so exercise its powers unless compelled to do so by clear legislative authority.

I think this appeal should be dismissed and Mr. Justice SCOTT's order dissolving the injunction affirmed with costs.

ROULEAU, J.:—The plaintiffs admit that such a proceeding as this would not be entertained in England, because the Courts there will not interfere prior to judgment by injunction or receiver to prevent a debtor from transferring his property, or obtaining payment of any debt due him, even

Judgment. Rouleau, J.

if for the express purpose of defrauding his creditors and defeating a claim in a threatened, or even pending action.

The conditions in the North-West Territories are entirely different. A creditor here can attach any debts due or to accrue due to the defendant, if the debtor has attempted to sell or dispose of his personal property with intent to defraud his creditors generally, or the plaintiff in particular. He can attach the personal property to answer the judgment which he expects to recover. But a creditor is deprived of these remedies if the debtor conveys all his assets and book debts to a trustee, because a debt due to a trustee cannot be garnished or attached to answer the debt due by the *cestui que trust*.

Under these circumstances the plaintiffs contend that they are deprived of their legal remedies and apply to the court of equity to extend the arm of the law, so as to prevent the defendant to defraud the plaintiffs of their claim.

If there is an instance where equity follows the law, I believe it should in this case. In ordinary conditions the law provides a clear legal remedy and gives explicit legal rights. I do not see why the Court, exercising its auxiliary jurisdiction, would not remove any impediments that should stand in the way of the enforcement of legal process.

To use the language of Mr. Justice GWYNNE in the case of the *London Life Insurance Co.* v. *Wright*,[3] I am not concerned to seek whether or not any reported case can be found in which the Court of Chancery has interfered in the manner in which this Court may interfere here in a case and under circumstances similar to the present. It may be that there is none, but it is of little consequence that it should be so. It may be indeed that to the respondent is due the unenviable reputation of having been the first to design and contrive the peculiar phase of fraud which he rests upon as his defence to the plaintiff's claim; *crescit dolus*, but as fraud increases and extends its ramifications the remedial power of the Court of Chancery to prevent its consequences and to give ample and effectual redress extends also. It matters not how gigantic are its proportions or how new and uncommon the

[3] (1881) 5 S. C. R. 466, at pp. 507-8.

shape which it assumes, the remedial power of the Court rises and becomes equal to the occasion. Judgment. Rouleau, J.

This language of Mr. Justice GWYNNE is supported by *Kerr on Injunctions*.[4] He says, "It is, however, the duty of the Court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all these new cases, which from the progress daily making in the affairs of men must continually arise, and not, from too strict an adhesion to forms and rules established under different circumstances, decline to administer justice and enforce the rights for which there is no other remedy. The jurisdiction of the Court must not be narrowed to cases in which the jurisdiction has been exercised. The cases in which the jurisdiction has been exercised are merely examples, and must not be looked on as to the measure of the jurisdiction."

In ordinary circumstances there is no doubt that the plaintiffs would have had this legal remedy by attachment, but owing to the intervention of trustees in this case the plaintiffs were deprived of that legal remedy. I do not see any reason why this Court could not grant equitable relief owing to the impediment in the way of the legal process. I think this conclusion is fully borne out by the principles laid down in the above authorities.

While holding that this Court has jurisdiction to grant the equitable relief asked for, I am of opinion that this relief should not be granted except on material as complete and positive as that required for the issue of writs of attachment or garnishee. There is no doubt in my mind that in this case the material was not sufficient. On this ground I come to the same conclusion as my brother WETMORE.

Appeal dismissed with costs.

[4] (3rd Ed., 1888), p. 4.

TAYLOR v. POPE.

Practice—Counterclaim—Third party.

The rules as to third party procedure do not apply to a counterclaim against the original plaintiff and a third person.

[WETMORE, J., *March 6, 1888.*

Statement.

This was an application on behalf of the plaintiff to strike out the title of cause by counterclaim, the counterclaim, the notice and all matters in the defence referring in any way to George Vegar. The action was originally brought by John W. Taylor against George Pope to recover for services in cutting the defendant's crop of grain. The defendant appeared and pleaded "never indebted" and counterclaimed against the original plaintiff and one George Vegar and he entitled his pleading as follows:—

"BETWEEN:

John W. Taylor,

Plaintiff.

and

George Pope,

Defendant,

by original action;

AND BETWEEN THE SAID

George Pope,

Plaintiff,

and

John W. Taylor and George Vegar, of Whitewood,

Defendants,

by counterclaim."

The pleading then went on to set out the defence of never indebted and this was followed by the counterclaim.

A copy of this pleading with a notice endorsed addressed to him in form similar to Form 2, Appendix B, of the *Eng-*

lish Rules,[1] was served on Vegar. No leave was obtained to make Vegar a party nor was any order made by a Judge in or affecting the premises. Statement.

F. F. Forbes, for the plaintiff. Argument.

W. White, for the defendant.

WETMORE, J.—The principal objection raised by the applicant was one of practice, namely, that George Vegar could only be brought into Court or proceeded against under third party procedure, and that under sections 44 and 45 of "*The Judicature Ordinance, 1886*,"[2] that could only be done by leave of a Judge first obtained. In my view of the law these sections are not intended to embrace a case where a defendant sets up matter by way of counterclaim. The practice and procedure by counterclaim where the defendant in the original action counterclaims against the original plaintiff and a third person is in England regulated by Order XIX., Rule 3, and section 24, sub-sec. 3, of "*The Supreme Court Judicature Act, 1873*,"[3] and the rules made under that sub-section, and the practice and procedure in this case is entirely different from that prescribed under Order XVI., Rule 48, For instance, under the last mentioned rule the notice issued in the first instance to the third party must be by leave of a Judge, and the form of the notice is prescribed. It is Form 1, in Appendix B. And rules are prescribed in the same order for and applicable to that particular case. Sub-section 3 of section 24 of "*The Supreme Court Judicature Act, 1873*," which gives the right to counterclaim against a person not an original party to the action provides that the relief may be granted against such person provided that he has been served with notice of the claim pursuant to any rule of court. It is not laid down that such notice is to be given *by leave of a Judge*. The Court then by Order XXI., Rules 11 and 12, for the purpose of carrying out this provision, proceeded to prescribe the form of notice and how it shall be served; by Rule 11 the title of the defence is prescribed; by Rule 12 the form of notice to be endorsed on Judgment.

[1] See Wilson's Judicature Acts (5 Ed.), p. 645.

[2] These sections laid down the practice to be followed "where the defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief, over against any other person, etc."

[3] 36 and 37 Vict. c. 66 (Imp.).

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Wetmore, J.

the defence is laid down, viz. Form No. 2 in Appendix B, a form of notice entirely different from that prescribed under Order XVI., Rule 48. Then Order XXI. proceeds to make provisions peculiarly applicable to this procedure by counterclaim. Section 78 of the Ordinance is in substance identical with Order XIX., Rule 3, referred to. Sub-section 3 of section 6 of the Ordinance is identical in substance with section 24, sub-section 3 of "*The Supreme Court Judicature Act, 1873*" also referred to. The only difference is that sub-section 3 in the English Act provides that relief may be given provided that the party has been served with notice pursuant to "any rule of Court," while sub-section 3 of section 6 of the Ordinance provides that relief may be given provided that the party has been served with notice pursuant to the "Ordinance." I cannot, however, find in the Ordinance any provisions expressly providing for this notice. But I do find section 456 in this Ordinance which provides that "when no other provision is made by this Ordinance the procedure and practice existing in England on the first day of January, A.D. 1885, shall (adapted to the circumstances of the Territories) be followed as nearly as may be." I am therefore forced to the conclusion that when the North-West Council almost word for word adopted these provisions in the English practice applicable to counterclaims against third persons, it intended that the practice applicable in England to such practice should be followed here, and not that a practice applicable to an entirely different provision should be followed. For there is nothing in these provisions applicable to procedure by counterclaim which can be said to be not "adapted to the circumstances of the Territories." Now the practitioner in this case has followed the English practice strictly, he has entitled his defence in accordance with Rule 11 of Order XXI.; he has endorsed it with the notice in accordance with Rule 12 of that order and served it. The only difference is that he has notified Vegar to appear within ten days instead of eight. But no point was made of that, assuming any point could successfully be made on that ground. I am of opinion therefore that the practice the defendant has followed is correct.

Summons dismissed with costs.

CRITCHLEY v. SIMERS.

Practice—Replevin—Affidavit—Pleading.

To support a writ of Replevin it is not necessary to allege in the Statement of Claim an unlawful detention in actual words; it is sufficient if the facts alleged show such to be the case.

Affidavit in support of a Writ of Replevin may be sworn before the issue of the Writ of Summons, but in such case it should not be entitled in the cause.

[WETMORE, J., *Nov. 14, 1888.*

Statement. Application by summons in Chambers to set aside a writ of replevin heard at Calgary before WETMORE, J. The points involved appear in the judgment.

Argument. *E. P. Davis,* for defendant.

Judgment. WETMORE, J.—This was an application to set aside the writ of replevin. The grounds set forth at the argument on the return of the summons were:

1. That the statement of claim did not allege that the property replevined or sought to be replevined was unlawfully taken or detained.

2. That the affidavit on which the writ was issued was sworn on the 22nd October, and was intituled in the cause, whereas there was then no cause in Court as the writ of summons was not issued until the 23rd October.

As to the first objection to the issuing of the writ of replevin; assuming that the defect in the statement of claim if well taken would constitute the writ a nullity, which I doubt, let us examine if the objection is well taken. Now, I do not consider it necessary under section 318 of the Ordinance,[1] to specify in words in the statement of claim that the property was unlawfully taken or is unlawfully detained, if it can be gathered from the whole statement that in substance an unlawful taking or detention is claimed. Replevin is defined to lie for the unlawful taking or detention of property; this is the old definition in the books. The form of statement of claim is taken from the old form

[1] "The Judicature Ordinance," 1886, s. 318; corresponding to C. O. 1898, c. 21, Rule 426.

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Wetmore, J.

of declaration in replevin, which had been in use for years. It seems to me it would be rather late in the day to set up that such a declaration was bad because it did not allege an unlawful taking or detention in words. But if we examine the statement of claim in this case, it seems to me that it alleges facts which amount to an unlawful detention; it alleges that "the defendant . . . took the goods and chattels of the plaintiff . . . and unjustly detained and still detains the same though requested by the plaintiff to deliver up the same." An unjust detention after a request to deliver must be an unlawful detention. This objection therefore cannot prevail.

As to the next objection to the writ of replevin, that the affidavit was sworn before the issuing of the writ of summons and intituled in the cause, I must say that this struck me at first as a very serious objection. But I think the practice may be considered as analogous to the practice in England respecting the issuing of writs of capias on the order of a Judge after the commencement of the action. Section 318 of *The Judicature Ordinance, 1886,* provides that "the plaintiff may at any time *after the issue* of the writ of summons obtain a writ of replevin . . . on his complying" with certain provisions embraced in the following section, namely: by *filing* an affidavit embodying certain specified things. In *Schletter* v. *Cohen*,[2] it was held that an affidavit to obtain a capias after the issuing of a summons *must not be intituled* in the cause. I cannot lay my hand on this case here, but in *Wakefield* v. *Bruce*,[3] it was held by Judge Gwynne, page 85, on an application to set aside an attachment because the affidavit was intituled in the cause and was made before the issuing of the summons, that this did not invalidate the affidavit, and he refers to *Schletter* v. *Cohen*,[2] and also *Hargreaves* v. *Hays*,[4] I have read this last mentioned case. It was held there that it was no objection to an affidavit made for the purpose of obtaining an order to hold a party to bail that it was intituled in the cause before the issuing of the summons. Lord Campbell, C.J., held that the intituling it did

[1] 7 M. & W. 389.
[2] 5 P. R. 77.
[3] 5 E. & B. 272.

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not vitiate it, and it could be treated as surplusage. It was held that it was not necessary to intitule it as at the time it was sworn there was no cause in Court. If, however, when it was sworn there was a cause in Court and it had not been intituled in the cause it would be bad, as perjury could not be assigned on it; and Judge Gwynne in the case in 5 Practice Reports approves of this view. And Earle, J., in giving judgment in *Hargreaves* v. *Hays*,[4] referring to *Schletter* v. *Cohen*,[2] says: "I am not surprised that in *Schletter* v. *Cohen*,[2] the objection was taken that the affidavit did not shew the names of the parties to the cause; inasmuch as it might be said that without a cause the affidavit is of no use. It was however there held that the affidavit might be sworn contingently with a view to a cause in which the writ was to issue, and there is a great convenience in this practice." I quite concur in this language and think it quite as applicable to the practice relating to the issue of writs of replevin in the Territories as to the practice of issuing writs of capias after action brought in England. I therefore under the authority of these three cases arrive at the conclusion that an affidavit to obtain a writ of replevin may be sworn before the issuing of the writ of summons, that in that case it need not be intituled in the cause; but if it is intituled in the cause it may be treated as surplusage and it will not vitiate the affidavit, but if the affidavit is sworn after the writ of summons is issued it must be intituled in the cause. This second objection therefore cannot prevail.

Summons dismissed with costs.

McGUIRL v. FLETCHER.

Mechanics' lien—Practice and procedure—Summons under Ordinance No. 6 of 1884.

Instituting proceedings to realize a claim means that they shall be instituted against all parties whose interests are to be affected by such proceedings. *Bank of Montreal* v. *Haffner*[1] approved; *Cole* v. *Hall*[2] criticized.

The adaptability to the Territories of the practice existing in Ontario under "The Mechanics' Lien Act" of Ontario discussed.

[WETMORE, J., *Feb. 26, 1889.*

[1] 10 A. R. 592.
[2] 24 C. L. Journal 505, 12 P. R. 584, affirmed 13 P. R. 100.

Statement. The plaintiff brought action against the owner to realize a claim of lien within the 90 days allowed by the Ordinance, and proceeded theron to judgment and execution, but omitted to make S., a mortgagee, a party. Subsequently and after the expiration of the 90 days the plaintiff obtained a chamber summons for an order directing the taking of accounts and sale of the property. This summons was served on S., the mortgagee, whose security was thereby sought to be affected.

Argument. *W. White,* for plaintiff.

F. F. Forbes, for the mortgagee.

Judgment. WETMORE, J.:—This is an application on behalf of the plaintiff for an order directing accounts to be taken and enquiries made under section 19 of "*The Mechanics Lien Ordinance*," being *Ordinance No. 6 of 1884*, and for an order directing the sale of the estate subject to the lien. A summons was granted by me on the 29th January last returnable before me at Chambers. The salient facts established by the affidavits and other material upon which the summons was granted are as follows:—

The work and materials with respect to which the lien was claimed was done and furnished by the plaintiff for the defendant upon what is known as The Assiniboia Roller Mills, situated on Lots Nos. 11 and 12 in Block 10 in the town of Moosomin. The work was commenced on or after the 18th January, 1887, and was completed on the 6th December of the same year. On the 29th December a mortgage from the defendant to Charles J. Smith was executed of the whole block No. 10, which was registered in the land titles office in Regina on the 3rd January, 1888, and within 30 days from the 6th December a statement of claim and an affidavit was filed by the plaintiff in the registry office pursuant to section 9 of *The Mechanics Lien Ordinance*. On the 11th February the plaintiff commenced an action in this Court against the defendant for work done and materials provided, the particulars in the statement of claim being the same with the exception of one small item of $1 additional as those filed in the registry office on the 3rd January. On the 24th February judgment by de-

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fault was obtained in this action and on the 12th March a *fieri facias* upon this judgment was issued against the goods and lands of the defendant and on the 6th of April a copy of this execution was registered in the registry office against these lots Nos. 11 and 12. These last mentioned proceedings the plaintiff alleges were taken under section 19 of "*The Mechanics Lien Ordinance,*" to recover the amount of the lien by judgment and execution. On the 24th February, the same day that judgment by default was recovered against the defendant, a certificate of ownership was issued to Charles J. Smith of the whole of block number 10. On the 5th March and within ninety days from the 6th December a certificate by me to the effect that proceedings had been instituted to realize the claim under "*The Mechanics Lien Ordinance,*" was registered under the provisions of section 25 of that Ordinance. At the return of the summons Mr. Forbes appeared for Charles J. Smith, and applied for an enlargement of the summons in order to obtain affidavits from his client, but Mr. Forbes having stated that he had some preliminary objections and objections touching the jurisdiction to proceed, to urge against the summons it was enlarged until last Tuesday, when the parties were heard with respect to these objections and the summons was further enlarged until this day with the understanding that if I held that these objections were not well taken a further enlargement should be granted to enable Mr. Forbes to procure the affidavits. At the hearing of these objections Mr. Forbes urged: 1st. That this proceeding by summons returnable at Chambers is not warranted in any event.

2nd. That if it is warranted it is an alternative remedy and that the plaintiff having elected to proceed against the defendant to recover the lien by judgment and execution and having pressed that remedy to a termination cannot now proceed by summons and order against Smith after the expiration of the 90 days specified in section 25 of *The Mechanics Lien Ordinance.*

3rd. That not having proceeded against Smith within the 90 days so specified the lien as against him has ceased absolutely.

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The last objection practically goes to the merits of the plaintiff's right of lien. The other two objections raise very important questions in practice under the lien ordinance. It was suggested at the argument that this Ordinance was taken in substance from "*The Mechanics Lien Act*," of Ontario. I have examined chapter 120 of the Revised Statutes of Ontario which is "*The Mechanics Lien Act*," in that revision, and there can be little doubt but that that chapter is the model upon which the Ordinance was in a great measure framed. Some sections in the Ordinance are identical and word for word or nearly so with sections in that Act. There are some sections in the Ordinance which appear to be original; those sections however seem to apply only to liens for wages and do not affect the questions I am now discussing. Other sections of the Ordinance however while framed with the same intention as corresponding sections in the Act, are of necessity very materially different in view of a different machinery existing here, and I refer especially to matters of procedure. One material difference is the mode provided in the Ordinance for the recovery of the lien from that provided in the Ontario Act. Now in order to arrive at the intention of the North-West Council in this respect it is well to consider the machinery that the Legislature of Ontario had at their hands, at the time of the passing of the Act, available for the recovery of the lien, and how it was made available, and then to consider the machinery the North-West Council had at their hands available for that purpose at the time of the passing of the Ordinance, and how it was made available. It well known that where a lien is created by contract or given by statute and no special provisions are made for enforcing or realizing it, the jurisdiction to do so is generally found in a Court of Equity, the machinery of that Court being best adapted to the purpose. In Ontario at the time of the passage of the Act referred to and ever since they had the Court of Chancery, which as a matter of course is essentially a Court of Equity. In Ontario therefore it would be quite natural that jurisdiction to enforce the liens under the Act should be vested in that Court. But the legislators doubtless appreciating the fact that the costs and expenses in the Court of Chancery were very great cast about to ascertain if some

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less expensive method of enforcing the lien in cases where the amount was comparatively small could not be found and determined to make use of the County and Division Courts for that purpose. Accordingly by sections 12 and 13 of the Act they distributed the jurisdiction to recover the liens, giving jurisdiction to the County and Division Courts respectively and to the Judges thereof when the *amount* of the lien claim was within the jurisdiction of such Courts respectively, and in all other cases giving it to the Court of Chancery. But in giving this jurisdiction to these inferior Courts another difficulty evidently arose. These Courts were Courts of common law, that is, they were Courts in which only such claims as are usually enforced and recovered in Courts of common law are enforced and recovered, as, for instance, actions of debt, or for damages for breach of contracts, or damages for torts to the person or property and the like. The procedure in these Courts would not in some instances be suitable for realizing the amount of the lien. When the property upon which the lien attached was owned and continued to be owned by the person at whose instance the work was done, there being no encumbrance on it and no subsequent conveyance of it, the machinery of these Courts would be quite sufficient to realize the amount of the lien, because in that case all that would be necessary would be to sue on the claim, recover judgment and issue execution, which could sooner or later be executed on the property bound by the lien, and therefore it was enacted that proceedings to recover the lien could be taken in these Courts when they had jurisdiction "according to the usual procedure of the said Court by judgment and execution." That would meet the case I have just instanced. But in cases where some person other than the party at whose instance the work was done had an interest in the property subject to the lien, as for instance, if there was a prior encumbrance or a subsequent transferee, the lien could not be worked out by the *usual procedure* of these Courts; an account might be necessary for instance, to ascertain the value of the property, the priority of the several parties, the amounts for which such priority should be allowed and in the event of a sale to enable directions to be given as to the amounts which should out of the proceeds of the sale be paid to the

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respective parties, and as to the order in which they should be paid. The procedure of these Courts provided no method by which this could be done and therefore jurisdiction was given to the Judge of the Courts to "proceed in a *summary manner by summons and order*" to take accounts and make requisite enquiries and generally to work the matter out. In giving the jurisdiction to the Court of Chancery in other cases of lien however it was not considered necessary to give the Judges of that Court power to take accounts and make enquiries, &c., because that power was inherent in that Court and the Judges of it according to the ordinary procedure of the Court.

Now, we turn to the Territories. What machinery had the North-West Council at the time of passing the lien ordinance available for recovering the amount of the lien? The only Courts then in existence were the District Courts presided over by the stipendiary magistrates; the jurisdiction of those Courts at the time *The Mechanics Lien Ordinance* came into force was established by *Ordinance No. 4 of 1878, sec. 4;* they had among other things "jurisdiction over *all* matters of civil law and equity," there was no limitation as to amount. At the very same session in which this Lien Ordinance was enacted "*The Administration of Civil Justice Ordinance (1884)*" (*No. 3 of 1884*) was passed, which by sec. 100 came into force on the 1st of the following November. It must as a matter of course be assumed that the council had in mind this Ordinance No. 3 of 1884, and the machinery thereby created when it passed the Lien Ordinance. By this Ordinance No. 3 the District Courts were continued and their jurisdiction was by section 5 continued "over *all* matters of civil law and equity." I must confess that on looking over the procedure generally prescribed by this Ordinance and especially the form of judgment prescribed by section 25, and the appendix, I had very great doubts whether such procedure was *apt* for the purpose of working out suits of the nature of those generally worked out in a Court of Equity, and whether the council had not so limited the powers of the Courts by the prescribed procedure, that they were practically Courts of common law only; such procedure being to my mind applicable only to such civil suits as are usually brought in a Court of com-

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mon law. Section 61 however provided that "When proceedings are had in any action wherein the forms given in the appendix are not suitable for the purpose the clerk with the approval of the Judge shall provide the same." This section even did not satisfy my mind. It seemed to me yet that in many instances where suits were commenced in these Courts of the nature of those usually brought in Courts of equity and seeking for the relief peculiar to such Courts that the Judge must have been driven to the necessity of granting a procedure of his own. But the question of whether the Council intended that these District Courts should have the power of granting the relief usually granted by Courts of equity is set at rest by section 9 and sub-sections of Ordinance No. 5 of 1885. That section repeals section 21 of Ordinance No. 3 of 1884 prescribing the procedure in case of appeals and substitutes other provisions, and it is quite evident from the provisions of this section 9 of Ordinance No. 5 of 1885 that the council must have contemplated that under Ordinance No. 3 of 1884 the District Courts had power to enter judgments granting such relief as is usually granted in Courts of equity. Now then when "*The Mechanics Lien Ordinance*" was passed the members of the North-West Council had available for the purpose of enforcing the liens these District Courts having jurisdiction over all matters of law and equity, and these were then the only Courts in existence or likely to be in existence in the Territories so far as was known. The council therefore gave these Courts and the Judges thereof jurisdiction to enforce those liens by providing in section 19 of the Ordinance that "proceedings may be taken in the Court of the judicial district to recover the amount of the lien by judgment and execution or the Judge of said district may take accounts and make requisite enquiries and may direct the sale of the estate subject to the lien, and such further proceedings may be taken for this purpose as the Judge thinks proper." It was urged for the plaintiff that under this section the only person who would be recognized by the Court against whom proceedings could be taken was the "owner" or person at whose instance the work was done, that if proceedings were taken against him with a view of recovering a judgment and execution against him under

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the first part of the section within 90 days from the completion of the work and the Judge's certificate is registered with the registrar as provided in section 25, the requirements of the ordinance as to time are satisfied and the Judge may under the other provisions of section 19 proceed against encumbrancers and subsequent transferees in a summary way by summons and order at Chambers without bringing such encumbrancers or subsequent transferees personally into Court by the ordinary process. If the council contemplated in any case that the parties affected by a lien whether owner or encumbrancer or subsequent transferee or whoever they might be could for the purpose of realizing the lien be proceeded against before a Judge "*In a summary manner by summons and order,*" as they most undoubtedly could in Ontario under section 12 of the Ontario Act, as I read that section, when the amount of the lien was within the jurisdiction of the inferior Courts; then it is most unfortunate that they should have left out of the Ordinance those words which I have underscored and which apppear in that section of the Ontario Act, and which make the intention clear beyond all question. I do not think that such was the intention of the council. I think the intention of the council may be fairly set at in this way. The council had before it this Ontario Act as a model. it contemplated using the district Court as the machinery by which the lien should be enforced. This might have been accomplished by enacting (as in the case of the powers given to the Court of Chancery by the Ontario Act, section 13), that the lien might be realized in the district Court according to its ordinary procedure, and that the Judge might take accounts and make requisite enquiries, but if that had been done it would probably have been held that the lien would have to be realized in all cases by a procedure akin to that of the Court of Chancery in England and Ontario. That is, although the parties in all cases would have been brought into Court by the ordinary process of the district Court, there would be a decree declaring that the plaintiff held a lien and a reference would be ordered and all the machinery set in motion usually appurtenant to a Court of equity until an order for sale was obtained. But the members of the council it seems to me have adopted in one respect an

idea suggested by the jurisdiction given to the inferior Courts in Ontario, and that is that it may not be necessary in all cases to resort to the Court to obtain a decretal order that the lien has been established against the property and to take accounts and make enquiries and to obtain an order for a sale, but that the amount of the lien may in some cases be realized in a simpler way, by simply getting judgment on the claim against the person at whose instance the work was done and issuing execution. This would be sufficient in the case I put before, when the title to the property subject to the lien remained in the person for whom the work was done, and there was no encumbrances. It might be equally difficult if the person for whom the work was done merely held the equity of redemption in the property and continued to hold it and the contractor did not care to proceed against the mortgagee, knowing that the value of such equity was sufficient to recover his lien, and so the Ordinance contained a provision giving the option of proceeding to recover the amount of the lien by judgment and execution, so that such course might be taken when it was apt for the purpose. But when such course was not apt for that purpose then the proper parties would have to be brought into Court and the Judge would have to take accounts and make enquiries. But in every instance the parties had to be brought into Court by the ordinary process. In no case had the Judge original summary jurisdiction over the parties by a summons issued at Chambers. I understand this section 19 to mean as follows: *Proceedings may be taken in the Court of the judicial district to cover the amount of the lien and such proceedings may be by judgment and execution if the circumstances are such that the lien can be effectually realized in that way, but if not, then such proceedings must be by the Judge taking accounts and making enquiries, &c.* It will not be disputed I presume that the powers exercised by the district Courts and the stipendiary magistrates are now exercisable by the Supreme Court and the Judges thereof. If the stipendiary magistrate had the power to deal with the matter in a summary way by summons and order I think I would have but little difficulty in arriving at the conclusion that the Judges of the Supreme Court had the same power. I have arrived at the conclusion that the stipendiary magistrates

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had not any such power and consequently that I have not jurisdiction to entertain this application. I say nothing of the inherent power of the Supreme Court to deal with matters of lien, because in order to exercise such power, if it exists, the parties must be brought into Court by the usual and ordinary process of the Court.

I may add that if in coming to this conclusion I am in error I think Mr. Forbes' second objection must prevail.

Section 25 of "*The Mechanics Lien Ordinance*" provides that: "Every lien which has been duly registered shall cease absolutely after 90 days from the completion of the work unless proceedings have been taken to realize the claim under the provisions of this Ordinance." This provision of this section is identical with the provisions of sec. 21 of *The Mechanics Lien Act* of Ontario. In the *Bank of Montreal* v. *Haffner*,[1] it was held under this section of the Ontario Act that it was too late to commence proceedings against a mortgagee to enforce the lien against his interests after the expiration of the 90 days although the proceedings had been taken against the owner within that time. Judge Osler in giving his judgment in that case, at page 597 is reported as follows: "I think that by instituting proceedings to realize a claim is meant that they shall be instituted against all parties whose interests are to be affected by such proceedings. There can be no doubt that a mortgagee is a necessary party to any action in which his security is to be affected and the land comprised in it sold *in invitum* as regards him." I entirely concur in this view and in the conclusion at which the Ontario Court of Appeal arrived on that point in that case. I have not lost sight of the fact that Smith's rights as mortgagee were acquired *after the work in respect of which the lien is claimed was commenced;* and it may be that if proceedings had been taken against Smith before the expiration of the 90 days under section 13 and section 2, sub-section 3, of "*The Mechanics Lien Ordinance,*" the plaintiffs lien would have been held to have had priority over Smith's mortgage. It is not necessary for me to decide that because on the 11th February when proceedings to recover the lien

were commenced Smith had an interest in the property with respect to which the lien was claimed, this interest was on record and Smith should have been made a party to proceedings by which that lien was effected within the 90 days in order to make such lien available as against his interests, and not having been made such a party the lien as against his interest ceased, and only continued against the equity of redemption. It is urged however on behalf of the plaintiff that as Smith is a subsequent encumbrancer to the plaintiff it was sufficient to proceed against the defendant within the 90 days and that Smith could be added after an order was made for accounts to be taken even although the 90 days had expired, it being alleged that this was in accordance with the practice of the Court of Chancery in Ontario, where subsequent encumbrancers were added in the Master's office, and a decision of Ferguson, J., in that Court in *Cole* v. *Hall*,[2] was relied on. This decision was adversely criticized by the editor of the Law Journal at p. 481, and I must say I am very much impressed with the pertinency of the editor's remarks. I think this decision of Judge Ferguson is not within the *ratio decidendi* of the *Bank of Montreal* v. *Haffner*.[1] And I know of no such practice prevailing in this Court, or, rather, that should be allowed to prevail, in the teeth of a clear implication created by a statutory enactment or what is equivalent thereto. There is another objection to adding Smith as a party to the case of *McGuirl* v. *Fletcher*, which I will state later on. If there was nothing beyond this mortgage and the equity of redemption was still in the defendant I would have very little hesitation in expressing my opinion that the plaintiff's rights as against any interest Smith had in the property had ceased. Refraining however at present from expressing my opinion as to how far Smith might first be compelled to first realize under his security upon property covered by the mortgage and not affected by the lien, the plaintiff had a right to proceed against the equity of redemption and apparently he has done so. He obtained judgment against Fletcher on the 4th February. In order to recover the amount of the lien as against the equity of redemption it was not up to that time necessary to make Smith a party to that action or to any

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action affecting the equity. On the 24th February, however, the same day judgment was signed, the equity of redemption became vested in Smith. Now at the time proceedings were commenced against Fletcher and up to the time judgment was signed the plaintiff could not know that Smith had any interest in the equity of redemption. Contemporaneous with the time of Smith getting a title to this equity the plaintiff had done everything necessary for him to do under the Ordinance for the purpose of enforcing his lien against this equity and had proceeded against all parties interested in such equity so far as he knew. It may be quite possible that under these circumstances Smith holds this equity subject to the plaintiff's lien and that it may be enforced against him notwithstanding the 90 days have expired. It is quite true that some 9 days of the 90 days had to run after the 24th February, and therefore proceedings might have been taken against Smith during that time. That may not be the question. Suppose instead of getting his certificate of title on 24th February, Smith had got it on the very last day of the 90 days, would he take it free of the lien? I express no opinion on this point. I merely hold now that I cannot bring Smith before me in a summary way under section 19 of the Ordinance. Because in my view, if the intention of this section is to confer on the Judge power in a summary manner by summons and order to take accounts, &c., it is an original jurisdiction and a proceeding which the party may take in the alternative instead of proceeding by judgment and execution and must be commenced within the 90 days. Mr. White however applied to make Smith a party to the suit of *McGuirl* v. *Fletcher*, by adding him as a defendant under the powers to amend given under "*The Judicature Ordinance (1886)*." Now how can Smith be made a party to an ordinary common law action brought for work and labour done and materials furnished for Fletcher? But apart from that, that action has been terminated, an ordinary judgment has been recovered for the amount of the claim. It was held by the Court of Appeal in *Attorney-General* v. *Birmingham*,[3] that fresh parties could not be added after final judgment. This decision was made

[3] 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127.

in July, 1880, under Order XVI., Rule 13, of the Rules of 1875, which is the same as Rule 11 of Order XVI. of the Rule of 1885, and of sec. 39 of *The Judicature Ordinance, 1886*, with some modification. (See Wilson's Judicature Acts, page 237 and note.) In that case the Master of the Rolls in giving judgment is reported as follows: "A statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made an action must be brought for that purpose." Another reason it seems to me why I cannot make Smith a party to that action is that it is not within the purview of the summons. I am of opinion therefore that if the plaintiff has no remedy against this property under the execution, upon which I express no opinion, and if he has any other remedy against this property in Smith's hands, it must be by an action brought for that purpose. I express no opinion on the third point raised by Mr. Forbes, any opinion expressed by me must in my view of the case be extra-judicial. And in addition to this so many questions are raised by Smith acquiring the equity of redemption which possibly may affect his mortgage interest so far as the plaintiff's lien is concerned involving among other questions the doctrine of merger that I would not venture to express an opinion before these questions were fully discussed. The summons must be dismissed. The plaintiff to pay costs.

Judgment.
Wetmore, J

Summons discharged with costs.

WISE v. CURRIE.

Practice—Costs—Service fees.

To effect service of a Writ of Summons, the Sheriff's officer *bona fide* travelled from the Sheriff's office, where the writ was received, to the defendant's residence, seven miles, and not finding the defendant at home, he travelled from there to the residence of C., which was only four miles from the Sheriff's office, and there the defendant was found and served. The Clerk on taxation allowed mileage for the entire distance travelled.

Held, on review, that the Sheriff was entitled to mileage for eight miles only, that is, the distance from the Sheriff's office to the place where service was actually effected and return.

[WETMORE, J., *Jan. 8, 1891.*

Statement. The facts sufficiently appear above.

Argument. *F. F. Forbes,* for defendant.
R. Stevenson, for plaintiff
W. White, for the sheriff.

[*8th January, 1891.*]

Judgment. WETMORE, J.:—Paragraph number 23 of Sheriff's fees in the schedule to *The Judicature Ordinance,*[1] provides that the sheriff shall have "mileage for every mile necessarily travelled and sworn to in serving and executing summonses, writs and other processes and papers of every description from the place where the same are severally received or the sheriff's office (whichever is nearest) to the place of service or execution as aforesaid and return." This point presents some difficulty. If the schedule had provided that the sheriff should have mileage from the sheriff's office to the place where the process is served or executed I would have little difficulty in interpreting such a provision to allow mileage from the sheriff's office to the place of service or execution by the usual and most convenient route of travel. Again if the mileage was allowed for every mile necessarily travelled from the sheriff's office to the place of service I might see my way clear to construe such a provision to allow what would have been necessarily and *bona fide* travelled from the sheriff's office if the officer had started from that point, and if he *bona fide* travelled to the defendant's residence expecting to find him there, but on arrival discovered he was at a point nearer the sheriff's office and travelled back and served him there and allow mileage for the whole distance travelled. But the trouble in the case under consideration is that the distance is to be computed from one of two points whichever happens to be nearer to the point of service. The first difficulty that presents itself in interpreting the paragraph in question is that it would seem at first sight to contemplate that in order to entitle the sheriff to mileage he or his bailiff must have actually travelled over the ground, for it allows mileage "for every mile necessarily *travelled and sworn to.*" And therefore the party serving or executing would have to come to the sheriff's office or the

[1] "The Judicature Ordinance," R. O. 1888, c. 57.

Judgment.
Wetmore, J.

place where the writ was received, whichever place was nearest to the place of service and from there actually start on his journey and go over the ground. But could the Legislature ever have contemplated that? How is the sheriff to get his mileage if the paragraph of the tariff in question is strictly construed? The paragraph evidently contemplates that the mileage is to be computed from the nearest point, but it also contemplates, strictly construed, that the officer is actually in serving the writ to travel over the route between the nearest point and the point of service and swear to it. How can the officer do that when to serve the writ he has travelled by an entirely different route and has not travelled one inch over the route contemplated by the Legislature in going to serve the writ?

What the Legislature intended it seems to me was that the mileage should be computed from the nearest of the specified places to the point of service by the shortest route usually travelled, and that the route with respect to which mileage is charged must be verified by oath to be the shortest route. The paragraph must be construed as if it read as follows: "For mileage for every mile (*that would be*) necessarily travelled and sworn to (*as such*) in serving and executing summonses, writs and other processes . . . from the place where the same are severally received or the sheriff's office (whichever is nearest) to the place of service or execution as aforesaid and return." I can see no other way of giving effect to the intention of the Legislature in the cases I have suggested than by so construing the paragraph, and I have not suggested any case which is not liable to arise. If I am justified in interpolating the words I have for the purpose of construing this section (and I must confess I feel that in doing so I may have possibly somewhat stretched the rules of construction), but if I am so justified, that ends the first point raised, because these words cannot be interpolated for one case that may arise and considered not there for another. But without interpolating these words I have arrived at the conclusion in view of the manner in which the paragraph strikes my mind as hereinbefore stated that the most that the Legislature intended to allow for mileage is the number of miles from the nearer of the two specified places to the place of service.

Order accordingly.

GILLIES ET AL. v. KAAKE.

Husband and wife—Fraudulent assignment—Parties.

Where an action was brought by an execution creditor to set aside as fraudulent a deed of assignment of a homestead from the execution debtor to his wife, and also the patent issued thereon by the Crown, and the wife was made the sole defendant.

Held, hesitante, that in default of appearance,

1. Notice to the Crown was not necessary.
2. The husband was not a necessary party.

[WETMORE, J., *July 14, 1891.*

Statement. The facts sufficiently appear from the judgment.

Argument. *Stevenson,* for the plaintiffs.

The defendant was not represented.

Judgment. WETMORE, J.:—The defendant in this suit is a married woman, and the action is undefended, the defendant not appearing. On the first day of the present sittings of the Court the plaintiffs moved for judgment in accordance with the terms of the statement of claim.

The statement of claim set up in substance that prior to the 24th January, 1887, Adam Kaake, the husband of the defendant, was indebted to the plaintiffs, and on the 12th April, 1887, the plaintiffs recovered a judgment against Adam Kaake for the amount of such indebtedness and costs and that such judgment was still unsatisfied in part. That prior to the said 24th January Adam Kaake had entered for the N. W. quarter of section fourteen (14) township twelve (12) range thirty-two (32) west of the first principal meridian, as a homesteader under the provisions of *The Dominion Lands Act*,[1] and had become entitled to receive a patent thereto. That by deed bearing date the said 24th January Adam Kaake assigned all his interests in such property to the defendant, who caused such deed to be registered in the office of the Minister of the Interior, and thereupon a patent was issued to the defendant, was deposited in the office of the Registrar of the Assiniboia Land Registration District and a certificate of ownership was issued to the defendant, and it was alleged that the deed of assignment from Kaake to his wife was made by him and received by her with the

object of defeating, hindering and delaying the plaintiffs and other creditors of Adam Kaake, and the plaintiffs claimed:— Judgment. Wetmore, J.

1. A declaration that such deed is fraudulent and void as against them and the cancellation and setting aside thereof.

2. A declaration that the said patent is void.

3. The delivery up and cancellation of the said certificate of ownership.

4. That the defendant, Mary Ann Kaake, be restrained by the order and injunction of this honourable Court from selling or otherwise disposing of the said land.

5. That the plaintiff may have such further and other relief as the nature of the case may require.

6. The costs of this suit.

Upon considering this case the following questions occurred to me as presenting difficulties, and I submitted them to the plaintiffs' advocate.

1st. Can the patent be set aside without making the Crown a party? Referring to section 57 of the *Dominion Lands Act*,[1] the relief provided there is to be given upon "hearing the parties." Can I set aside a patent without notice to the party that made it?

2nd. Can I set aside the deed from Kaake to his wife without Kaake being made a party? The action has proceeded on the assumption that the property is not acquired by the wife's earnings, but by the husband's means, and is, therefore, in equity Kaake's. Can the wife be sued as a *feme sole* under such circumstances? *N. W. T. Act*, s.s. 36 to 40. And if she can be sued as a *feme sole* ought not the husband to be a party, and he is charged with fraud and it is his deed which is attempted to be set aside.

3rd. If the deed and patent are set aside how can that benefit the plaintiffs, Adam Kaake's creditors? The effect would be to re-vest the title in the Crown, and it would not be liable to the execution. *Dominion Lands Act*, section 32, subsection 3. Is the possibility of being able to make arrangements with the Crown sufficient to put the plaintiffs in a position to ask to have those instruments set aside?

[1] R. S. Can. 1886, c. 54.

Judgment.

Wetmore, J.

As to the first and second questions:

I must say that I am unable to perceive by my own judgment unaided by authority how a patent from the Crown can be set aside without notice to the Crown or how a deed can be set aside without notice to the party who made it, especially when that party is charged with fraud.

However, Mr. Stevenson has referred me to *Rees* v. *The Attorney-General*.[2] The following is the note on that case appearing in Robinson & Joseph's Digest, 970. "A bill alleged that the patentees obtained their patent by false representations to the Government and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another:—*Held*, that to such a bill the Attorney-General was not a necessary party." If that case is good law it seems to be directly in point. Under the circumstances of this case as set out, the patentee, the defendant, would not be entitled to compensation if the patent was set aside.

As to the 2nd question: Mr. Stevenson has referred me to *McFarlane* v. *Murphy*.[3] Section 40 of the *N. W. T. Act* is in substance the same as section 20 of the Revised Statutes of Ontario, 1877, and that appears to be the same as section 9 of *The Ontario Married Women's Act* of 1872. The following is extracted from the note on *McFarlane* v. *Murphy*[3] in Robinson & Joseph's Digest, 1604: "To a bill against a married woman to set aside a mortgage made to her on the ground that the same was fraudulent as against creditors, the husband was made a party defendant. *Held*, on demurrer, that since the passing of *The Married Women's Property Act*, 1872, the husband was not a necessary or a proper party." In that case, however, the husband was not the grantor, which I think makes all the difference in the world. *Scott* v. *Burnham*[4] was also brought under my notice. That was a suit to set aside a conveyance as void against creditors, and the vendor and vendee were both made defendants. The deed was declared void as against the plaintiffs with costs on the lower scale. After judgment it was suggested that the costs should be on the higher scale as the vendor

[2] 16 Gr. 467.
[3] 21 Gr. 80.
[4] 19 Gr. 234.

Judgment
Wetmore, J

resided in the United States, out of the jurisdiction. On the other hand, it was claimed that the vendor having parted with the whole estate in the property and claiming no further interest in it, the circumstances (not stated in the bill or answer) of a small balance of the purchase money having been due her at the date of filing the bill was immaterial for the purpose of relief on the ground on which the decree was made. Mount, V.-C., held that she was not a necessary party for the purpose of relief on the ground on which he proceeded.

If Adam Kaake were not the husband of the defendant I think this case would be an authority that it is not necessary that he should be joined. As he is the husband and the action is founded on the assumption that the property is not acquired by the wife's earnings I have some doubts whether he ought to be joined. However, as no person has appeared to raise the question, and I think that the defendant ought to have set up her coverture if she desired to do so, my doubts are not sufficient in view of the authorities stated to induce me to refuse to order the relief claimed.

As to the 3rd question, Mr. Stevenson claims that under section 38 of *The Dominion Lands Act*,[1] the Crown is bound to issue a patent to Kaake if the deed to his wife is set aside. I by no means hold that such is the case, but it may possibly be open to make this contention good as no person has appeared to raise the last questions. And in view of what is urged and also of the authorities cited, I, although with some hesitation, grant a portion of the relief claimed.

There will be a decree.

1. Declaring the deed from Adam Kaake to the defendant fraudulent and void as against the plaintiffs.

2. Declaring that the said patent is void as having issued through fraud.

3. Ordering the certificate of ownership to the defendant to be delivered up and cancelled.

4. The defendant to pay the costs of this suit out of her separate estate.

Decree accordingly.

McKENZIE, APPELLANT, v. THE TRUSTEES OF LITTLE CUT ARM SCHOOL DISTRICT, RESPONDENTS.

Assessment and taxation—Appeal to Judge—Personal property—When taxable—Meaning of "situated" as applied to personal property—Costs.

Personal property brought into a school district for a mere temporary purpose is not "situated" within the district within the meaning of section 98 of the School Ordinance, R. O. 1888, c. 59, so as to be liable for assessment.

[WETMORE, J., *Aug. 21, 1891.*

WETMORE, J.:—I find under the evidence that the appellant down to sometime in May last occupied lands as a farm situated without the respondent school district, and that he had a herd of cattle which he kept in connection with his farming operations on this land; that in May and prior to the assessment being made up by the assessor, he moved away from this farm into the school district with a view of being nearer the school so as to enable him to have his children educated. He accepted a position as manager of the business of a Mr. Wolff, who owned a ranch in the district, and his wife accepted the position of housekeeper for Mr. Wolff. He so left his farm and accepted these positions for himself and wife, intending to return to his farm in the fall. He turned his cattle out to range the prairie, not having any intention whatever to take them to Wolff, or to bring them within the district, but simply intending that they should range the prairie wherever they chose to go. He never himself before his name was placed on the assessment list did any act with the intention of causing them to come within the school district or to do anything there with them. As a matter of fact, these cattle did repeatedly and from time to time before the appellant's name was placed on the list, stray within the limits of the district and graze there. The only question is whether under such circumstances they were liable to assessment within the district. I think no question whatever can arise with respect to the cattle the appellant had at Sunnymeade District, and for which he was assessed there. Those cattle never came or even strayed into the Cut Arm District until after the appellant's name was placed on the assessment list. And as

Judgment.
Wetmore, J.

to the horses with respect to which he was assessed there is no evidence whatever that he had any horses or that there were any horses of his in the district when his name was placed on the list. The question which I have to determine arises under section 98 of *The School Ordinance*.[1] It is quite clear under that section that the property to be as essed, whether real or personal, must be in some sense situated within the district in order to be taxed, and that without reference to whether the owner or possessor is resident or not. And in this respect, so far as personal property is concerned, the section is somewhat *sui generis*. The question is: when can personal property be said *to be situated* within the district. Sub-section 1 of section 97 defines the meaning of "personal property." I think I would have little trouble in deciding that choses in action, such as debts, &c., are situated in the district when the owner resides there. But when is visible personal property, which can be moved from place to place, or cattle, which in this country are liable to range over a great extent of country, situated in the district for the purpose of being taxed? Now, I think the term "*situated*" as used in section 98 is so far as cattle are concerned, somewhat analagous to the term "resident" as applicable to a human being. A human being may be resident in a certain place and not there at the moment he may be miles away. It is a question of intention. I think if the homestead or farm of the appellant had been situated in another school district and not in the Cut Arm district I would have little hesitation in deciding that they would be assessable in such other district and not in the Cut Arm District, because the intention when they were turned out was that they should return eventually to the premises, and there was no intention then that in the meantime they should be placed or engaged or used on or with any other premises, nor was that intention changed at any time so far as I can discover. And the mere fact that they casually strayed on other premises would not make them assessable on those premises. I think that disposes of the whole question. If personal property is for a mere temporary purpose brought into a district, I do not think it is situated there for the purpose of assessment. Nor do I think if cattle casually stray

[1] R. O. 1888, c. 59.

Judgment. Wetmore, J.

into a district that they are liable to assessment. When I use the term "for a mere temporary purpose" I wish it understood with a limitation, because I do not desire for a moment to be considered as holding that if the appellant, when he moved his family to Wolff's to stay there during the summer, and had so taken up his temporary residence there for the summer—if he had brought his stock there deliberately, they would not have been liable to assessment. I think the appeal must be allowed, and the assessment roll amended by striking out the appellant's name and the assessment against him.

As to the question of costs; I think they are discretionary with me. The respondents are public officers acting in the discharge of their duty, and the section is not clear. I think they acted prudently under the circumstances; besides, the appellant seeks to get his children educated at the expense of the district for nothing. No order as to costs.

Appeal allowed without costs.

CADDEN, APPELLANT, v. THE TRUSTEES OF MEADOWVALE PROTESTANT PUBLIC SCHOOL DISTRICT No. 175, RESPONDENTS.

Assessment and taxation—The School Ordinance, R. O. 1888, c. 59, s. 106—Construction of statute—Completion of assessment roll—Time for—Omission—Effect of—Property acquired prior to completion of assessment roll—Assessor's powers.

The provisions of the School Ordinance which require the assessment roll to be completed by the first of April, or so soon thereafter as may be, are as against a ratepayer directory only, but imperative as against the trustees.

Any property, liable to taxation, acquired before the actual completion of the assessment roll, is liable to assessment.

Statement.

The School Ordinance required the assessment roll in school districts to be completed "by the first day of April, or so soon thereafter as may be, in each year." The appellant was not on the first day of April, 1891, a resident of the respondent school district, neither did he have any property therein. Shortly afterwards he became a resident of the district and acquired property liable to taxation for school purposes. The

assessor had not completed the assessment roll at the time the appellant so became a resident and acquired property, and the assessor accordingly entered the appellant's name on the roll and assessed him in respect of such property. The assessment was affirmed by the Court of Revision and thereupon the appellant appealed to a Judge of the Supreme Court as provided by law, an two grounds: Statement.

(a) That the assessment roll, not having been completed by the first day of April was invalid; and

(b) That the appellant was not liable to assessment inasmuch as he was not until after the first day of April either a resident or possessed of property in the district.

[WETMORE, J., *Aug. 25, 1891.*

WETMORE, J.:—Section 106 of *The School Ordinance*[1] provides that the assessment roll shall be completed by the first day of April or *so soon thereafter as may be in each year*. The Ontario Act relating to municipal assessments provides that the assessment list completed shall be lodged with the clerk of the municipality on or before the 1st May in each year. It was held in *Nickle* v. *Douglas*,[2] that a failure by the assessor to complete the roll until after the 1st May did not avoid the assessment. So in *Regina* v. *Ingall*,[3] it was held that delay in making, depositing, transmitting and approving the valuation list within the time prescribed by section 42 of *The Metropolis Valuation Act*, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative, a *fortiori* the omission to complete the roll before the first of April would not invalidate it under the Ordinance, which directs it to be completed by the 1st day of April, or so soon thereafter as may be. The reason for holding this is that the whole machinery for carrying on the schools, or the work of the municipality as the case may be, is not to be rendered useless by the negligence or possibly by the design of the assessors. Therefore this rule that the section is directory only is to be applied only as against the ratepayer. I am rather inclined to Judgment.

[1] The School Ordinance, R. O. 1888, c. 59.
[2] 35 U. C. Q. B. 126; affirmed 37 U. C. Q. B. 51.
[3] 46 L. J. M. C. 113; 2 Q. B. D. 199; 35 L. T. 552; 25 W. R. 57.

Judgment. Wetmore, J.

think, and I believe that it is supported by authority, that the section is imperative as regards the trustees. And it is quite possible that if the roll is not completed by the 1st of April or within a reasonable time thereafter (the reasonableness of which time must always depend on circumstances) the trustees may be liable to be fined under section 65 of the Ordinance. However, I express no decided opinion on this point, as it is not before me, I merely throw out the suggestion as a warning to trustees. I must hold the assessment roll generally to be valid. The appellants, however, claim that they should not have been entered on the roll at all, as they were not residents of the district, and had no assessable property therein until after the 1st day of April. There is ample authority to support the position that after the assessment roll is completed the assessors have no further control over it, but if any additions are to be made it must be done by the board of revision on proper notice. But I can find no case which holds that the assessors have not full control over it until it is completed. Section 98 of the Ordinance provides that "All real and personal property situated within the limits of any school district" shall be liable to taxation, subject to certain exemptions which do not affect the assessments in question. There is no provision that the real and personal property which may become subject to taxation before the 1st of April shall be liable. I hardly think it will be disputed that if the lists were not completed before the 1st April and a person moved into the district and acquired property on 31st March, that property would be assessable if it was not included in the specified exemptions. If the assessment list was completed on the 30th March, and the property was acquired on 31st March, the assessors could not assess it simply because under the authorities I have mentioned, the assessment was completed and the assessors' duty at an end. I am, therefore of opinion that if persons move into a district and acquire property liable to taxation at any time before the assessment roll is completed, and thus before the assessor's powers have expired, they are liable to be assessed, and this whether they move in before or after the 1st of April. I am more inclined to that view under *The School Ordinance,* because it is not imperative even on the trustees that the roll

shall be completed by the 1st of April, it is to be completed "on the 1st day of April or *so soon thereafter as may be.*" If any person is liable to be assessed who moves in and acquires property liable to assessment before the 1st day of April, why would not such person be equally liable to be governed by the words "so soon thereafter as may be," and therefore liable to assessment at any time while those words have effect, and if so liable until the assessment is completed and the assessor's duties are at an end. Judgment. Wetmore, J.

Assessment affirmed.

WALLEY v. HARRIS.

Interpleader—Chattel mortgage—Validity—Consideration—Ordinance number 18 of 1889, section 7.

Where a chattel mortgage was in fact given to secure a past indebtedness, but on its face purported to be given in consideration of money "in hand well and truly paid" by the mortgagee to the mortgagor,

Held, that the consideration was duly expressed within the meaning of section 7, of Ordinance Number 18, of 1889.

A small inaccuracy in the statement of the consideration is not sufficient to avoid a chattel mortgage.

[WETMORE, J., *May 18, 1892*

This was an interpleader issue to determine the validity of a chattel mortgage executed by one Hillman to the plaintiff. The sheriff seized certain goods under an execution placed in his hands by the defendants against Hillman and the plaintiff claimed these goods under a chattel mortgage in his favour executed by Hillman prior to the seizure. Statement.

Prior to the execution of this mortgage the plaintiff had recovered judgment against Hillman for $80 and interest and costs which was wholly unpaid; and one Wright held a note against Hillman's wife which was overdue and paid in part; and one Bradford held a note against Hillman for $30 and interest, which was also overdue, and Hillman was also indebted to the plaintiff upon an open account for $27.89.

Hillman agreed with the plaintiff that if he would pay the balance due on Wright's note and take up the Bradford

Statement

note he would execute a chattel mortgage to the plaintiff to cover the plaintiff's judgment including interest and costs, the open account, the amounts paid to take up the Wright and Bradford note and the expense of preparing and registering the chattel mortgage. The plaintiff agreed to this and accordingly paid the amounts due on the Wright and Bradford notes, and a few days afterwards Hillman executed the mortgage in question. The amount which the mortgage was intended to secure was $232.14 of which $228.14 represented the bona fide indebtedness of Hillman to the plaintiff at the time of the execution of the mortgage and the balance $4 was to cover the costs of the mortgage.

Argument.

F. F. Forbes, for the defendant:—The mortgage is void in as much as the consideration for which it is made is not duly expresed because the consideration was a past indebtedness and not money paid by the plaintiff to Hillman as specified in the mortgage.

W. White, Q.C., for plaintiff, contra.

Judgment.

WETMORE, J.—A number of Ontario cases were cited in support of the validity of the mortgage but it does not seem to me that they are applicable, as the Ontario Acts R. S. O. 1887, chapter 119, and R. S. O. 1887 chapter 122 under which these decisions were made contain no such provisions as that of section 7 of the Ordinance referred to, making the instrument void if the consideration is not duly expressed. I am of opinion that the English authorities decided under section 8 of the *Imperial Bills of Sale Act*, 1878 are more applicable. The last case which I can find decided under that section is *Richardson* v. *Harris*,[1] decided in the Court of Appeal. In that case the consideration of the bill of sale was expressed to be the sum of £500 paid by the assignee to the assignor. As a matter of fact only a portion of this £500 was so paid by the assignee to the assignor. The balance was retained by the assignee by agreement with the assignor in satisfaction of certain acceptances of the assignor held by the assignee which were not due, of a post dated cheque which also was not due and of two charges, one for leaving the property assigned on the assignee's pre-

[1] (1889) 22 Q. B. D. 268; 37 W. R. 426.

Judgment.
Wetmore, J.

mises, and the other for the expenses of making an inventory and the other expenses of the assignment. The Court held that the consideration was not truly expressed and that the bill of sale was therefore void. But the judgment seems to be based on the ground that there was no debt due and payable by the grantor irrespective of the contract by virtue of which the £500 was to be paid. That is, the amount of the acceptance and cheque were neither due nor payable. And there was nothing due respecting the other sums retained otherwise than by the agreement by and under which the £500 was payable. But it seems to me that if there had been a debt really due and payable by the grantor to the grantee outside of the contract and the grantee had retained the amount of such debt, and that had been the only retention, the Court would have held the consideration to have been sufficiently stated. In the text of *May on Fraudulent Conveyances* (2nd edition), after commenting upon a number of cases bearing on this question I find the following at page 143: "In *ex parte Rolph*,[2] and *ex parte Frith*,[3] these cases were all reviewed and reconciled in the Court of Appeal by the application of the following principle laid down by James, L.J., in *ex parte Challinor*,[4] and quoted with approval by Cotton, L.J., in *ex parte Bolland*,[5] whether the whole of the mortgage money secured by a bill of sale is actually paid by the lender into the hands of the borrower or whether part of it is with his privity or by his direction employed in the payment of a debt due by him, it is equally in a legal sense paid to him, and the whole sum may in either case be truly stated in the deed as the consideration paid to the grantor. But the money retained or applied must be in respect of a debt strictly so called, a debt existing at the time. Independent of any created by the bill of sale."

I have read the case of *ex parte Bolland*,[5] and it bears out the text in May above referred to.

[2] (1881) 19 Ch. D. 98; 51 L. J. Ch. 88; 45 L. T. 482; 30 W. R. 52; 46 J. P. 181.
[3] (1882) 19 Ch. D. 419; 51 L. J. Ch. 473; 45 L. T. 120; 30 W. R. 529.
[4] (1880) 16 Ch. D. 260; 44 L. T. 122; 29 W. R. 205.
[5] (1882) 21 Ch. Ch. D. 543; 52 L. J. Ch. 116; 47 L. T. 488; 31 W. R. 102.

Judgment. Wetmore, J.

That case seems very much in point. So far as $228.14 of the consideration for the mortgage in question is concerned, therefore, I find under these authorities that it is in a commercial and mercantile and therefore in a legal sense correctly expressed. As to the balance, which must be made up out of the monies paid for preparing and registering the mortgage, the amount is so small that I ought not to hold the mortgage void on account of that sum; a small inaccuracy in the statement of consideration is not sufficient to avoid a bill of sale. *Ex parte Winter.*[6] I held that the consideration is duly expressed in the chattel mortgage.

Judgment for the plaintiff.

BRADSHAW, APPELLANT v. THE TRUSTEES OF RIVERDALE PUBLIC SCHOOL DISTRICT, RESPONDENTS.

Assessment and taxation—Appeal from Court of Revision—When assessment is to be considered complete—Assessor's power to alter assessment roll—Grounds of appeal—Power of Judge on appeal.

An assessment is complete ***quoad*** any particular property as soon as the assessor has valued it and placed it on the assessment roll.

A Judge, on appeal from the Court of Revision of a school district, has no power to arbitrarily amend mistakes or omissions in the assessment roll, but any such mistake or omission must be the subject of a specific appeal.

No objections against an assessment can be entertained by a Judge on appeal, unless they were raised before the Court of Revision.

[WETMORE, J., *Oct. 27, 1892.*

Statement.

This was an appeal by one George Hume Bradshaw to WETMORE, J., from the Court of Revision of the Riverdale Public School District No. 152 of the North-West Territories. The facts sufficiently appear from the judgment.

Judgment.

WETMORE, J.—On the 27th February the assessor went to the appellant's residence to assess him. Immediately upon his arriving there, the appellant caused a band of about fifty horses to be driven out of the district to a place he had at Red-

[6] (1881), 44 L. T. 323; 29 W. R. 575.

path. While unquestionably this was done with a view of avoiding the assessment it was done with the *bona fide* purpose of permanently removing them from the district. The assessor proceeded to take a list of the appellant's property, and the appellant verbally told him what property he had in the district, leaving out the band of horses so moved off, but including in it a number of other horses and other live stock. The assessor took this down on his list, and before the 12th March entered the valuation of it on the regular assessment roll. I find this, because the appellant in his testimony swore that when he went to the assessor on the 12th March with his new statement, put in evidence and hereafter referred to, the assessor got the roll and prepared to change the statement. On the 12th March the appellant moved the greater portion of the horses and live stock of which he had furnished the assessor a statement out of the district to Redpath, and on the same day handed in to the assessor a written statement in which was included only the horses and live stock then remaining in the district, and he claimed he was only liable to be assessed in respect to the horses and live stock so remaining at that time. Between the 27th February and the 12th March the appellant and the assessor had two or three conversations respecting the appellant furnishing another statement, and the assessor consented to accept another statement. But I find that when the assessor accepted the statement given him by the appellant on 27th February and valued the property included in it and entered it on the roll, he did so with the intention of holding that property liable to assessment, and never abandoned that intention; that in any conversations he had with the appellant respecting another statement, he was claiming that the band of fifty horses driven off on the 27th was liable to assessment, and that a statement should be furnished including that band, and when consenting to accept another statement he expected that the appellant intended to hand in one including that band; that the appellant knew that and temporized with him with a view of moving away some more of his horses and stock before the roll was sworn to, and then handing in a statement of what remained only, expecting by this means to relieve what he so removed from liability for assessment.

Judgment. Wetmore, J.

I therefore find that the assessor in so far as he could do so without swearing to the roll had conclusively and finally assessed the appellant upon the property included in the statement given to him on the 27th February. The roll was sworn to on the 15th March. The assessor refused to alter the roll to make it in accordance with the statement handed to him on the 12th, and the Court of Revision refused to alter the assessment, and the appellant appealed to me. The grounds of appeal were: 1st. That the appellant had been assessed upon personal property which was not within the district when the assessment was made. 2nd. That he had been assessed upon such property, which was not within the district when the roll was sworn to. Section 98 of "*The School Ordinance*,"[1] provides that "all real and personal property situate within the limits of any school district . . . shall be liable to taxation" subject to certain exemptions not material to this case. The simple question is whether the property in question which the appellant claims is not liable to assessment had been assessed before the 12th March, when the statement of that date was handed in. The learned counsel for the appellant contended that it was not, because; 1st. The assessment could not be deemed to be taken before the roll was sworn to, as up to that time it would be open to the assessor to correct mistakes or to alter the assessment. 2nd. That the assessor having consented to accept another statement from the appellant had not concluded the assessment against him, and therefore such assessment was not taken, and, if, before it was taken, the property was removed from the district, it was not liable to assessment. And the fact that the assessor expected to receive a different statement from that put in did not affect the case. I have not been able to lay my hands on a case directly in point. In *Marr* v. *The Corporation of The Village of Vienna*,[2] it was held that the appellant was not liable to assessment in Vienna, because when the assessor went to the appellant's former residence and took the assessment the appellant had changed his permanent residence to Ingersoll, and was only temporarily at Vienna. Reading that case, however, I cannot help but conclude that if when

[1] The School Ordinance, R. O. 1888, c. 59.
[2] 10 U. C. L. J. 275.

Judgment.
Wetmore, J.

the assessor went to the place, a state of things had not existed under which the Judge found that the appellant had changed his residence, but that such state of things were brought about after the assessor had been there and before the roll was sworn, the appellant would have been found liable. Unquestionably on the 27th February when Rowland, the assessor, went to Bradshaw's place the property in question was liable to assessment. And I am of opinion that when he took the statement, put a valuation upon it and formally entered it upon the assessment roll, Bradshaw was made liable to pay taxes in respect of it. That is, on general principles the assessment was then taken or made, and the property could not be relieved by being subsequently removed from the district before the roll was sworn to. Looking at section 106 of the Ordinance, I should say that it contemplates that the assessment shall be completed before it is sworn to. The roll is first completed and then for the purpose of verifying it as so completed it must be sworn to before it is lodged with the secretary of the trustees. Then *quoad* the assessment of each individual ratepayer it is on general principles made and completed possibly when the assessor takes the statement of property, at any rate when he values it and places the valuation on the roll. But did the conduct of the assessor under the circumstances of the case in question in consenting to receive a new statement leave the matter open so that I must hold that as regards the appellant, the assessment against him was not taken or made on the 12th March? I think not. In my opinion, the assessor having entered this property on the roll with the intention that it should stay there, no matter what might happen, *quo ad* that property, had made the assessment, and it did not lie within the power of the appellant by leading him to believe that he intended to hand in a statement including the property handed in before and additional property as well (which I find to be the case) relieve the property already handed in and assessed from liability. It was attempted to raise some other objections against the assessment, but as they were not raised before the Court of Revision I will not entertain them. The learned counsel for the respondent claimed that the band of fifty horses removed from the district on the 27th February should be

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Wetmore, J.

included in the assessment, and applied to me to amend the roll by inserting the value thereof in it, claiming that I had the power to do so under sub-section 7, section 112, of the Ordinance.[1] That section provides that the assessment roll passed by the Court of Revision shall be produced to the Court of Appeal, and that "Such roll shall be altered and amended according to the decision of the Judge, if then given, who shall write his initials opposite any part of the said roll in which any mistake, error or omission is corrected or supplied;" and that if the decision is not then given, the secretary may when it is given so amend the roll according to the decision. That sub-section was enacted for the purpose of directing how the subject matter of the appeal may be dealt with in case the appeal is allowed, not to give the Judge power arbitrarily to go over the roll and amend mistakes or omissions that are not embraced by the appeal. That is, if there has been a mistake, error or omission made, and it is appealed against, the Judge finding that it has been made may correct it and initial the correction or cause the secretary to do so as the case may be. If there has been an omission to assess Bradshaw with respect to these fifty horses, nobody has appealed against the omission, and I have no power to correct it.

The appeal will be dismissed and the assessment affirmed. I will allow no costs to the respondents, because the appellant was put to the expense of unnecessarily attending a sittings of the Court by the respondent's secretary posting a defective notice.

Assessment affirmed without costs.

BYERS v. MURPHY.

Conversion—Sheriff—Judgment for costs—Subject matter of Suit—Seizure—Exemptions Ordinance.

Held, that a judgment solely for costs does not entitle the judgment creditor to seize under execution the article, the price of which formed the subject matter of the action in respect of which the costs were incurred.

[WETMORE, J., *Jan. 23, 1893.*

Statement. This was an action by an execution debtor against a sheriff for conversion. The facts appear sufficiently from the judgment.

Argument. *F. F. Forbes*, for plaintiff.
W. White, Q.C., for defendant.

Judgment. WETMORE, J.—There is no dispute about the facts in this case. One A. G. Hamilton sold the plaintiff a horse, for which the plaintiff paid him part in cash and for the balance gave him an order on one Ard Bell. Hamilton sued the plaintiff and Ard Bell on this order and after the writ was issued, one of the defendants paid the whole amount due on the order to Hamilton, who accepted it. The costs of that action were not paid and Hamilton proceeded with the action to recover such costs. The action was tried before me and I ordered judgment for such costs, which was signed accordingly and execution thereupon issued, and the defendant, who is the sheriff of the Judicial District of Eastern Assiniboia, levied upon the sorrel mare in question. The plaintiff gave the defendant notice that he claimed that the mare was exempt from seizure, the defendant however paid no attention to this notice but went on and sold the animal. The plaintiff's agent attended the sale and forbade it. The only question raised at the trial on behalf of the defendant was that this animal was not exempt from seizure by virtue of section 3, of chapter 45, of *The Revised Ordinances*,[1] it being claimed that the price of the mare seized was the subject matter of the judgment upon which the execution was issued. It is not necessary for me to decide whether as the suit was brought on the order, it

[1] R. O. 1888, c. 45, s. 3; corresponding to C. O. 1898, c. 27, s. 4.

Judgment.

Wetmore, J.

could be held to be an action for the price of the horse or any part thereof, because as I construe the section referred to, the price of the article seized in order to allow the section to operate must form the subject matter of the judgment, not the subject matter of the action, and I am of opinion that the judgment being entirely for costs the price of the mare in no sense formed the subject matter of the judgment. It was urged that when the amount due on the order was paid to Hamilton the costs had begun to run and the amount so paid could be applied to those costs, which would leave part of the subject matter of the judgment therefore to be the balance of the order. I am not prepared to say what would have been the effect if Hamilton had so applied the payment. It is sufficient to say that he did not so apply it. He applied the payment solely in satisfaction of the order and came to Court and asked judgment for the costs and got it and issued execution for such costs. I cannot therefore under what I consider the plain language of the section, hold that the price of the mare formed any part of the subject matter of the judgment. There was no pretence that apart from section 3 of the Ordinance, the mare was not exempt from seizure. The plaintiff, therefore, is entitled to recover. As to the damages—they are the fair market value of the mare. The price realized at the sheriff's sale is under the circumstances no criterion of that value. On the other hand, I think the plaintiff has sought to put an extravagant value on her. Taking the evidence of Davis and Hamilton together, I think $65 is about her fair value. I therefore order judgment for the plaintiff for $65 and costs.

Judgment for the plaintiff.

HOGG v. PARK.

Sale of goods—Warranty of soundness—Failure of warranty—Conditional sale—Return of goods—Distinction between remedies of buyer under conditional sale and under absolute sale—Counter claim—Damages—Costs.

Defendant had given plaintiff a note in payment for a mare sold by plaintiff to the defendant with a warranty of soundness. The sale was a conditional one, the note providing that the property in the mare should remain in the plaintiff until the note or any renewal thereof was paid. After getting possession, the defendant immediately discovered that the mare was unsound and at once took the mare to the plaintiff, pointed out such unsoundness, and asked plaintiff to take the mare back and return the note. The plaintiff refused. The defendant thereupon housed and fed the mare until a sale could be arranged, and sold the mare at auction for the best price obtainable.

On an action by the plaintiff against the defendant for the amount of the note, it was *held*,

(1) That although the sale was not an absolute one so as to enable the defendant to maintain an action against the plaintiff for breach of warranty, the defendant could nevertheless set up such breach by way of counterclaim to the plaintiff's action against him on the note.

(2) That the defendant having acted promptly was entitled to reject the mare and return her to the plaintiff.

(3) That the plaintiff, having refused to accept the mare back when he ought to have done so, had waived his right to take possession and had clothed the defendant with the absolute property in the mare if the defendant had chosen to exercise such right.

(4) That the plaintiff, having refused to take the mare back when he ought so to have done, the defendant was justified in selling her.

(5) That the defendant was entitled to damages in a sum equal to the amount of the difference between the price for which the defendant purchased the mare and her real value, and also to a reasonable sum for her keep, and the expenses attending the sale.

[WETMORE, J., *Jan. 30, 1893.*

Statement. Action on a "lien note." The facts sufficiently appear in the head note.

Argument. *F. F. Forbes,* for plaintiff.

W. White, Q.C., for defendant.

Judgment. WETMORE, J.—I find that the mare, the price of which forms the consideration of the note sued on was sold to the defendant with a warranty of soundness, and that she was not sound at the time of such sale. In view of the fact that the defendant's pleading charges the plaintiff with fraud in that he knew that this animal was unsound at the time

Judgment
Wetmore, J.

of the sale, it is somewhat significant that, although the plaintiff was examined on his own behalf before the trial with the object of having his deposition put in at the trial, not one word can be found in his testimony to the effect that the animal was sound or that if she was unsound he was not aware of it at the time of the sale. While however this fact induces me to look with suspicion upon the transaction, I am of opinion that the burden of proving the fraud charged is upon the defendant and the evidence given on his behalf is not sufficient to satisfy my mind that the plaintiff was aware of the unsoundness at the time of the sale. I do not say but what there may be testimony which might be considered *prima facie* evidence of this knowledge. I merely state that it is not sufficient to satisfy my mind. It is claimed that the counterclaim is founded on the fraud and not on a warranty. While the counterclaim does in paragraph 2 allege that the plaintiff was well aware that the mare was not sound when he so represented her to be, it does not charge that the defendant was induced to buy her or to make the note by reason of any fraudulent representation. The counterclaim is pleaded by way of set-off or in the nature of a set-off to the plaintiff's claim, and paragraph 2 may be treated as surplusage. Treated in this way the counterclaim simply sets up a warranty and claims by reason of the facts alleged therein; 1st. That the note be cancelled. 2nd. Damages. It is immaterial whether the plaintiff was or was not aware of the unsoundness at the time of the warranty. If the sale in question was an absolute one I would have very little difficulty in arriving at a conclusion. The sale however was not absolute as by virtue of the memorandum written at the foot of the note the property in the mare was not to pass from the plaintiff until the note or any renewal of it was paid. This raises a difficult question and it appears to me that it is rendered more so by the fact that the animal was sold by the defendant a few days after the contract was made and of course before the note became due. It may throw some light upon the case to discuss what would have been the position if the sale had been an absolute sale. The pleadings as they were originally framed, assumed an absolute sale, and nothing was set up shewing that the sale was conditional until the trial, when a copy of the note was

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Wetmore, J.

put in and the plaintiff's amended reply to the counterclaim was added. Assuming that the sale had been absolute and in the absence of fraud on the part of the vendor, I do not think that the defendant had the right to tender the animal to the plaintiff and so avoid the contract and set up that there was no consideration. *Roscoe Nisi Prius* (14th ed.), p 441, was cited in support of the defendant's right to do so. The author at that page is treating the question of damages in an action for a breach of warranty, and no doubt if the vendor, where there has been a breach of warranty, receives the article back the buyer could if the price had been paid recover the price back as damages for the breach of warranty. So in this case I apprehend that, if the mare was tendered, and the plaintiff had received it, it would have amounted to a rescission of the contract, and the defendant could have set up that there was no consideration for the note or that the consideration had failed. But in this case the vendor refused to receive the animal back. It is to be borne in mind that this is a sale of a specific chattel and therefore if the property had passed to the buyer he could not refuse to accept the animal and reject the contract. *Benjamin on Sales*,[1] sec. 1254. In section 1255 of the same work it is laid down "Where the property in the goods has passed to the buyer *unconditionally* the law gives him no right to rescind the contract in the absence of an express stipulation to that effect, and the property therefore remaining in him, he is bound to pay the price even if he reject the goods which still remain his. His proper remedy therefore is to receive the goods and exercise the rights explained in the next chapter." What those rights are I will discuss later on. Lord Chelmsford is quoted in 6 *Mews' Fisher's Digest*, at 885, as stating in *Couston* v. *Chapman*,[2] as follows: "In England if a horse is sold with a warranty of soundness and it turns out to be unsound, the purchaser cannot return the horse, unless there is a stipulation that if the horse does not answer to the warranty, the purchaser shall be at liberty to return it." *Lewis* v. *Cosgrave*,[3] is cited in 1 *Mews' Fisher's Digest*, at 1754 and 6 *Ib.*, 887, in sup-

[1] 3rd Edition (American) by Kerr.
[2] (1872) L. R. 2 H. L. (Sc.) 250.
[3] 2 Taunt. 2.

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Wetmore, J.

port of the following:—that "in an action on a bill given for the price of goods sold under a warranty the breach of the warranty is an answer to the plaintiff's demand if the defendant has tendered back the goods although the plaintiff did not accept them." This appears to have been an action on a bill or cheque given for the price of a horse sold with a warranty. I have not been able to read this case. As usual in the absence of a complete library I have to depend largely on text books for authorities. But looking at *Byles on Bills* (14th ed.), p. 153, where this case is cited, and at *Mews' Fisher's Digest*, col. 920, where it is again cited, I should judge that in that case the buyer was aware of the unsoundness at the time of the warranty, and that the fraud avoided the security. And I should be inclined to think in that case even if the buyer after the tender and refusal to accept back the property dealt with it as his own warranty tender and refusal would not have avoided the security. If the buyer of a specific chattel purchased with a warranty to whom the property has passed unconditionally cannot rescind the contract if the vendor refuses to receive back the chattel, what remedy has he? We find in section 1261 of *Benjamin*,[1] that he has two remedies, one of which is that "if he has not paid the price he may set off or set up by way of counterclaim damages for breach of warranty in the vendor's action for the price." This could not be done at common law. The buyer could only set up the defective quality of the warranted article in diminution of the price, and he might resort to a cross action if he claimed special or consequential damages: *Benjamin*,[1] sec. 1266. Or he might resort to a cross action for general and consequential damages if he did not set up the warranty in diminution of the price. I doubt if at common law an action was brought by the vendor against the vendee on a note given by the latter to the former for the price of the article warranted the buyer could set up the warranty in diminution of the amount specified in the note, but that he would have to resort to a cross-action. But whether that is so or not, under section 86 of *The Judicature Ordinance*,[4] (which is the same as Order XIX., Rule 3, of the English Rules), and sub-section 3 of

[4] R. O. 1888, c. 58; corresponding to C. O. 1898, c. 21, s. 110.

Judgment.

Wetmore, J.

section 8 of the same Ordinance[5] (which is the same as sub-sec. 3 of sec. 24 of *The Imperial Supreme Court of Judicature Act* 1873), the defendant may know whether the action is brought against him by the vendor for the price or upon his note given for the price "set off or set up by way of counterclaim" damages for breach of warranty and recover both general and consequential damages, and if the balance is found in favour of the defendant, the Judge could under Order XXI., Rule 17, of the English Rules, which is applicable here under section 13 of Ordinance No. 21 of 1890,[6] certify a balance in favour of the defendant and give judgment for such balance. If therefore the sale to the defendant in this case had been absolute, I think by course would have been perfectly clear, and that would be to ascertain the damages which the defendant would be entitled to recover on his counterclaim, and if they exceeded the amount due upon the note to the plaintiff, to certify a balance in his favour and give judgment accordingly. If on the other hand they were less to give judgment for the plaintiff on his claim for the amount due on the note and for the defendant on his counterclaim for the amount of the damages and possibly after that if desired to exercise my powers to order one judgment to be set off against the other. But the difficulty is as before stated that this is not an absolute sale, the property was not to pass to the defendant until the note was paid, and unless the rights of the parties have been altered by their conduct subsequent to the date of the note and the underwritten memorandum, the property in that mare is yet in the plaintiff as between him and the defendant. It is laid down in *Frye* v. *Milligan*,[7] and *Tomlinson* v. *Morris*,[8] that in such a state of things the buyer cannot maintain an action against the vendor for breach of warranty, and it is urged for the plaintiff that if that is good law the defendant cannot set up the breach of warranty by way of counterclaim. It is true that I am not bound by the authority of these Ontario cases, but I would hesitate very much before I

[5] R. O. 1888, c. 58, s. 8, s.-s. 3; corresponding to C O. 1898, c. 21, s. 8, s.-s. 3.

[6] This section incorporated into the Judicature Ordinance the English procedure and practice as it existed on January 1, 1890, as far as applicable.

[7] 10 O. R. 509.

[8] 12 O. R. 311.

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Wetmore, J.

attempted to lay down the law differently from that which is laid down by two solemn decisions of a division of the High Court of Justice of Ontario. But I think the law is correctly laid down in those cases. I quite agree with the remarks of Rose, J., in *Frye* v. *Milligan*,[7] p. 513. "It would seem anomalous that as here when the contract expressly provided that no property should pass . . . and when therefore the vendor had the right to retake possession there should be a recovery of damages, being the difference in value between the article contracted for, but to which the plaintiff was not and might never become entitled, and the article supplied, to the possession of which she had ceased to be entitled." But is there not a distinction between bringing an action on a breach of warranty seeking damages in the absolute, and seeking by way of counterclaim in an action practically brought to recover the price of the warranted article, to diminish the amount which the vendor seeks to recover, because the buyer did not get an article of the quality the vendor agreed to give him, and because by reason of the breach of his agreement the buyer was put to loss and damage to which he ought not to have been put. Because it seems to me that is what the buyer in substance sets up when he counterclaims. In *Frye* v. *Milligan*,[7] at page 514, ROSE, J., referring to the remedies which the plaintiff in that case might have, states that she might "pos ibly plead the breach in answer to an action for the price." I am inclined to think that that could be done. The vendor by the mere fact of bringing his action virtually says to the defendant, "I don't care whether I have carried out my agreement or not, I don't care whether the animal I sold you is what I represented her to be or not, and therefore whether she is worth what I sold her to you for or not, I intend by process of law to make you pay the whole price you agreed to pay me. I will pursue all my remedies. I will still retain my right of ownership in this property I sold you. I will take possession of it if I choose, and let the sheriff sell it under execution, and if sufficient is not realized from such sale to satisfy my claim, I will resort to what other property you may possess; or I will resort to what other property you possess in the first instance." Has the defendant then only one remedy left; namely, must he as

suggested in *Frye* v. *Milligan*,[3] at p. 514 under the circumstances of that case pay for the mare and then bring a separate action for the breach of the warranty? It seems to me that that would be against the present policy and intention of the law, because the intention of section 86 of the *Judicature Ordinance*,[4] is to prevent circuity and multiplicity of actions, and surely it would seem to me in that view to be a defect in the law if the defendant should be called upon and compelled to pay the plaintiff $100 and upwards when in conscience and by reason of the plaintiff's tortious acts he really owes him perhaps but a few dollars, perhaps nothing or perhaps the plaintiff owes him. If the property in question had not been live property, if, for instance, it had been furniture or machinery and did not come up to the warranty and the defect had been discovered immediately after it came to the possession of the defendant, and if the defendant had promptly offered to return it and demanded his note and the plaintiff refused to accept the property and give up the note, and if the defendant had not dealt with the property after that in any way except to warehouse it or protect it from injury I think I would have had very little hesitation in ordering the note to be delivered up to be cancelled, and dismissing the plaintiff's suit out of Court. But the difficulty is that this is live stock and had to be fed and taken care of, which involves the loss of time and the expenditure of money or its equivalent. And in the next place the defendant exercised an act of ownership over the mare and sold her. I find as a matter of fact that the defendant immediately after he got possession of this mare discovered the defect, that he immediately went to the plaintiff, told him what was wrong with the animal and asked him to take her back and give up the note, which the plaintiff refused to do. If the sale had been absolute the defendant might under such circumstances have sold the mare for what he could get and recover as damages the difference between the price he agreed to give for her and what she brought at such sale and for her keep for such time as would be required to sell her at the best advantage. Returning to the fact that this was not an absolute sale what could the defendant have done apart from selling the mare other than what he did do? He could not turn her out on the

Judgment.
Wetmore, J.

Judgment

Newlands, J.

prairie in the beginning of winter—nearly the 1st of December, that would have been cruel and inhuman, it would have been equally cruel and inhuman to allow her to suffer for food and water. The defendant thereupon housed and fed her and exercised no other act of ownership over her except to sell her. I am not sure but that if the defendant had chosen to keep her until now he might not under the circumstances have recovered for the animal's keep during the whole time as damages. But was he bound to do that? Did the plaintiff's conduct then under the circumstances affect his right of property in the animal. By the constitution of this Court I am empowered to administer justice on the principles of law and equity at the same time and in the same suit, and I am disposed if I can do so acting within the limits of such principle to discover some method by which I can give effect to the intention of the legislature of avoiding multiplicity of actions and of compelling the plaintiff to do what in conscience he ought to do. In *Benjamin on Sales*,[1] sec. 1251, treating of the remedies of the buyer on breach of warranty it is laid down that: "He may except in the case of a specific chattel in which the property has passed to him . . . refuse to accept the goods and return them, or it is sufficient for him without returning the goods to give notice to the seller that he rejects them and that they remain at the seller's risk." In sec. 1262 he says: "That the buyer *when the property has not passed to him* may reject the goods if they do not correspond with the warranty seems to be the necessary result of the principles established heretofore in the chapters on delivery and acceptance." I apprehend that the author had not in his mind when he wrote this, any arrangement by which the possession passed to the buyer while the property remained in the vendor. He had in his mind sales by sample or the sale of a specific article to be delivered at a future day subject to a warranty or similar agreements. If, when the article was presented for delivery it was not according to sample, or according to the warranty, the buyer could, before he accepted the property reject it. The buyer in such cases always has a reasonable time for inspection. I can, however, discover no difference in principle between the case now before me and the cases which I assume the author had in view.

Judgment. Wetmore, J.

In either case when the property has become vested the buyer cannot at his own mere will divest himself of such property. In either case if there is a defect, if he acts promptly, and the property has not become vested, he can refuse to clothe himself with the property and reject the chattel. This is based on the principle that a party cannot vest and divest himself of a right of property at his pleasure. In this case the defendant did act promptly, and the plaintiff ought to have received the mare back when it was offered to him. The defendant, by advising the plaintiff of the defect in the animal, offering to return her and demanding his note practically said: "I refuse to clothe myself with the property in that animal." The plaintiff in refusing to accept it back did so at the risk of there being a breach of his warranty, and if there was he ought to have complied with the defendant's request, and in not doing so he virtually said, "I insist upon you clothing yourself with the property in that animal, and I will compel you to pay for her." And in view of the animal requiring care, food and attention, I hold that he by such conduct waived his right to take possession of her and clothed the defendant with an absolute property in her if he chose to exercise it. It seems to me that under such an agreement as this, if at any time the buyer had a right to rescind the agreement and offer back the property, and did so and the vendor refused to receive it he ought not to be allowed to claim a right of possession which he refused to exercise when he ought to have done so. Holding as I have held, however, that although if there was no absolute sale the defendant could set up the breach of warranty by way of set-off or counterclaim in an action for the price or on a note given for the price, the doctrine of waiver which I have held only affects the question of damages. The damages which the defendant is entitled to are: first, the difference between the price the mare was sold for by the plaintiff and her real value; second (as there is no pretence that she was kept an unreasonable time to affect a sale to the best advantage, and I therefore find that she was not) a reasonable sum for her keep during that time. The evidence as to her real value is not very satisfactory. The question is: what was she worth when the defendant bought her? What would a

Judgment. Wetmore, J.

person have been then willing to give for her at a fair sale, knowing the defect? The price that was realized at the sale by the defendant might be a fair criterion of her actual value. If the parties at the sale were of the *bona fide* opinion that there was no cloud on the title it would have been a fair criterion, because it was admitted to have been a fair sale. But in the absence of evidence that the persons present were *bona fide* of that opinion I must find the contrary, because the note and memorandum were registered at the time of sale, and that was at any rate *prima facie* evidence of a cloud on the title. It may be, however, that as the plaintiff by his own wrongful dealing had forced the defendant to keep a horse that he did not want and one that was sick, he must take the consequences of the defendant having to sell her with the cloud on the title, because it would be unreasonable to force the defendant to keep such an animal and take care of it, and therefore the plaintiff would be bound to accept as the value whatever the defendant could realize on such a sale. It is not necessary for me to decide that because I am satisfied that the mare was not worth more than $10. As the defendant actually got $10 for her I cannot find, so far as he is concerned, that she was worth less, and I therefore find that she was worth $10, and no more. The defendant is, therefore, entitled as general damages to the difference between that sum and $100, the price agreed to be paid for the animal, or $90. The defendant kept her from the 22nd November to the 5th December, when he sold her. That would be 13 days. The evidence, and that is not contradicted, established that $1 a day is a fair charge for such keep. But he only charges in his particulars $10 for a fortnight's keep, he cannot be allowed more than at that rate, and for 13 days that would amount to $9.28. He contracted an account with Harris for $1.50 for medicine and attendance and with the auctioneer for selling, $1.00; in all $11.78. I therefore award the defendant on his counterclaim $101.78. The plaintiff is entitled to $100 on his note. I allow him no interest. Under section 57 of *The Bills of Exchange Act* (1890), it is in my opinion optional with me to allow interest from the maturity of the note. I do not consider this a case in which interest ought to be allowed. I set off the amount

awarded to the defendant against the amount awarded to the plaintiff and certify a balance in favour of the defendant for $1.78, and order judgment to be entered for the defendant for such balance, with his costs of the action and of the counterclaim. I award the whole of these costs to the defendant because I think the whole litigation and trouble has been caused by the plaintiff refusing to take back the mare when the defendant offered to return her and to give up the note, both of which I think he ought to have done. Judgment. Wetmore, J.

Judgment for defendant with costs.

ADAMS ET AL. V. HUTCHINGS ET AL. (1).

Practice — Examination for discovery — Refusal to answer — Attachment.

An examination for discovery should be confined to the matters in question in the action, and should be governed by the rules of evidence. Any evidence that may be material on any question arising for the decision of the tribunal trying the cause is a proper subject for examination.

Where the refusal to answer a question on an examination for discovery raises a more or less fine point of law, such party should be ordered to attend and answer before attachment proceedings are taken.

[WETMORE, J., *Feb. 9, 1893.*

This suit was instituted to set aside a chattel mortgage from defendant Smithers to defendant Hutchings dated the 19th March, 1890; a mortgage of real estate from Smithers to Hutchings, dated 22nd March, 1892; and an assignment of book debts, accounts and notes from Smithers to Hutchings dated as stated in the statement of claim the day of March, 1892 (but which being produced appeared to be dated also the 22nd March, 1892) as being fraudulent against creditors. These instruments were attacked as being made without consideration, and to hinder, delay and defeat creditors and therefore void under the Statute 13 Eliz., cap. 5, and also as being void under the Ordinance respecting preferential assignments. The defendant Smithers did not appear to the action; the defendant Hutchings did and filed a defence. The plaintiffs procured the examination of Statement.

Statement. Smithers under section 32 of Ordinance No. 21 of 1890,[1] and in the course of such examination Smithers made statements which would seem to indicate that about the 19th March, 1892, he executed another chattel mortgage to Hutchings in substitution or satisfaction of the chattel mortgage dated the 19th March, 1890. The plaintiffs then procured an order for the examination of Hutchings at Winnipeg, and Hutchings was examined in pursuance of such order. On such examination he was questioned by the plaintiff's counsel in substance as to whether any such mortgage or other document had been executed as intimated by Smithers about the 19th March last, or about the time of the executing the mortgage of the real estate and the assignment of book debts, accounts and notes. A number of questions were put in this direction, which Hutchings declined to answer, and this application was made under section 43[2] of the last mentioned Ordinance for an attachment against Hutchings, and to strike out his defence and for liberty for the plaintiffs to sign judgment against him.

Argument. *F. F. Forbes,* for the motion.

W. White, Q.C., contra.

Judgment. WETMORE, J.:—It was urged on behalf of the defendant Hutchings that I ought not to use the examination of Smithers which was produced on the application, because: 1st, Smithers was not a proper party to examine under section 32 of the Ordinance referred to,[1] not having appeared to the action; 2nd, his examination was *ex parte* and without notice to Hutchings, who therefore had no opportunity of being represented thereat. I do not think it necessary to determine these questions, because, if Smithers' examination is not used, then the matter resolves itself into the simple question whether or not the plaintiffs had a right to examine Hutchings as to whether another instrument or security had been executed by Smithers contemporaneous with the execution of the mortgage of real estate and the assignment of debts, and if there had been, whether it was received in satisfaction of the chattel mortgage of 19th March, 1890,

[1] Corresponding to C. O. 1898, c. 21, Rules 201 and 202.
[2] Corresponding to C. O. 1898, c. 21, Rule 214.

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and it would be quite immaterial how or from whence the plaintiffs obtained the information to put them on an examination with respect to this subject. The point is whether or not they had the right so to question Hutchings. Although section 32 and the following section of the Ordinance appear to be framed for the purposes of discovery, it would seem that the examination therein provided for must be confined to the matters in question in the action, and must be governed by the rules of evidence. Now, if the effect of these questions (assuming that Hutchings' answer would be that there was a chattel mortgage or another security executed on the 22nd March last), would be merely to prove that the chattel mortgage of 19th March, 1890, was satisfied, and therefore that Hutchings had no right to enter into possession of Smithers' stock in trade under it, which it is alleged he did do, I would hesitate before I held the questions to be proper. Because no such case as that is raised by the pleadings. But I am of opinion that if a chattel mortgage or other security than those specified in the pleadings was given on the 22nd March last or about that time, and it was given in satisfaction of the chattel mortgage of the 19th March, 1890, it may have an important bearing on a phase of the case which the tribunal before whom the cause is tried, may have to deal with. In order to point out what this bearing may be I will state what has transpired in the cause before me. In the first place the advocate for the plaintiffs applied for and obtained an interim injunction order to restrain Hutchings from parting with or disposing of the property in question, until the 18th May last, and this injunction was afterwards continued until the trial, and George B. Murphy was appointed receiver to sell the goods seized under the chattel mortgage and collect the debts assigned and pay the proceeds realized into Court. I will assume that this has been done, because, if not, and Hutchings is still in possession of the goods or is collecting the debts it would be in direct contempt of my order, and Hutchings or his agents having notice of such order would be liable to process of attachment. Under sub-section 5 of section 8 of *The Judicature Ordinance*[a] the Court not only has power

[a] R. O. 1888, c. 58.

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to grant, but *shall* 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 by them respectively in such cause or matter; so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning any such matters avoided." Assuming that the securities attacked in this action are not void as against creditors, that Smithers is *bona fide* indebted to Hutchings, and Hutchings has a right to use these securities to realize his debt, these instruments are only securities for such debt, and all that Hutchings has a right to under them is to get his money. In view of the fact that the money is in Court, and the Court has got to order it to be paid out, the question is before the Court as to how much of that money Hutchings is entitled to. Because, if there is anything left after his claim is paid, including his costs of this action if they should be ordered to be paid out of the fund, it would belong to the plaintiffs. If such a document was given in satisfaction of the chattel mortgage of the 19th March, 1890, and it is drawn in the usual form, it might be *prima facie* evidence of the indebtedness of Smithers to Hutchings at the time it was given, and therefore be material evidence on this branch of the case before the tribunal trying the cause. There is another ground upon which I think the evidence is admissible, and that is upon the question of the fraud charged. Possibly if such an instrument exists it could not, under any circumstances, be held to affect the chattel mortgage of the 19th March, 1890, with fraud. But the mortgage of real estate and assignment of debts of the 22nd March, 1892, are also attacked for fraud. Now if by a document contemporaneous with those instruments Hutchings obtained an assignment of all Smithers' property not included in such mortgage and assignment and not exempted from seizure under execution, and so obtained the whole of Smithers' property to be assigned to him by way of security it might, coupled with other circumstances, go to establish that the assignment of last March so attacked was not made with the *bona fide* purpose of securing the indebtedness to Hutchings, but was a device to hinder, delay or defeat creditors, and

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so under these circumstances void under the Statute of Elizabeth. For instance, supposing the real amount of the indebtedness is wholly disproportioned to the value of the property mortgaged, that may not in itself be conclusive of fraud, but it certainly is an element for the tribunal investigating the facts to consider. See *Barron on Bills of Sale* (2nd ed.). 100 & 101. So under the *Preferential Assignments Ordinance*,[4] the same facts could be properly considered, at any rate coupled with other circumstances, to establish that there was no pressure brought to bear to induce the making of the instruments attacked or that any alleged pressure was simply a device to evade the Ordinance. I am, therefore, of opinion that the plaintiffs had a right to examine Hutchings to discover whether there was any chattel mortgage or other document executed by Smithers and Hutchings contemporaneously with the mortgage and assignment of debts of the 22nd March last, or about that time, and if there was, to have it produced and to examine Hutchings as to the circumstances under which it was made and with what object, and as to the property covered by it. I may add that if the cause had been on trial before me I would have allowed the questions on another ground, and that is, as affecting the question of Hutchings' knowledge of Smithers' insolvency (assuming that he was insolvent). Possibly if these securities were obtained under pressure and with the *bona fide* intention of securing Hutchings and not to hinder, delay or defeat creditors, Hutchings' knowledge in this respect would be immaterial. I cannot discover that this has been decided by authority. There seems to have been an impression that this knowledge would affect the question. See Barron, p. 98 & 103. I would have allowed the evidence as being material so as to enable the plaintiffs to raise the question. That, however, may be considered as merely a matter of expediency, and in an application of this sort it might not be allowable for me to exercise a discretion, but I would be bound to decide upon the strict question of the admissibility of the testimony. I therefore hold the evidence admissible on the two other grounds stated. It is useless for me to make an order for an attachment against Hutchings, as he is out of the jurisdiction, and at any rate

[4] R. O. 1888, c. 49.

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I would not be disposed to do so, as by his refusal to answer he raised a fine question for my consideration. For the same reason I am not disposed to strike out the defence peremptorily. I will, therefore, order that the matter of the examining of the defendant Hutchings be referred back to the examiner, Mr. Gilmour, and that Hutchings attend before him at Winnipeg at such time and place as he may appoint and answer all questions that may be put to him touching the existence of a chattel mortgage or other document executed by Smithers to him contemporaneous with or about the time of the execution of the mortgage of real estate and assignment of debts, accounts and notes mentioned in the statement of claim, and dated 22nd March, 1892, and do produce such mortgage or document, if any, and do answer all proper questions as to the circumstances under which such mortgage or document, if any, was executed, as to any arrangement or expressed intention in executing the same, and as to the property embraced thereby. If Hutchings refuse to answer these questions, the plaintiffs to be at liberty to make a new application to strike out the defence. One part of this application was based on the refusal of Hutchings to produce some letters from his solicitor at Moosomin to him. These letters, if produced, could not be received in evidence if objected to. Apart from any question of privilege, such letters being by a third party, could not bind Hutchings, and he was, therefore, justified in refusing to produce them.

I will reserve the question of the costs of this application and of Hutchings' further examination.

Order accordingly.

MOLSONS BANK v. HALL.*

Practice—Security for costs—Assets—Nature of—Corporation carrying on business within the jurisdiction—Costs.

(1) An affidavit of assets to be sufficient to answer an application for security for costs must disclose that such assets are of a substantial nature, and such that the sheriff would be able to readily realize therefrom; but,

(2) In the case of a corporation carrying on a branch of its business within the jurisdiction such particularity is not necessary. It is sufficient to show that it possesses sufficient assets available for seizure under execution to satisfy a judgment against it for costs.

[WETMORE, J., *March 25, 1893.*

Statement. Summons for security for costs. The points involved appear in the judgment.

Argument *D. H. Cole,* for defendant.

W. White, Q.C., for plaintiff.

Judgment. WETMORE, J.:—This is an application on behalf of the defendant for security for costs. The defendant's affidavit alleges that the plaintiffs have their head office in the city of Montreal. The affidavit of Mr. McGregor, the plaintiffs' manager at Calgary, alleges that the plaintiffs have a branch agency and carry on business at Calgary within the jurisdiction of this Court and that they are possessed of property in the Territories worth over $1,000, and available for seizure under execution. If the right of the plaintiff to escape giving security only depended on the allegation as to the property they had in the Territories I would question very much if they had gone far enough, whether they ought not to establish the nature of the property, that is, that it is of a substantial character, and by that I mean that it does not consist of money alone or of such property which the 279th section of *The Judicature Ordinance*[1] renders liable to seizure under execution but which, although liable to seizure the sheriff would possibly experience difficulty in getting at: 1 *Archbold Practice* (14th ed.) 397, and *Hamburger* v.

* See *Commercial Bank* v. *Kirkham*, 6 Terr. L. R. 479, in which Wetmore, J., threw doubts on the *ratio decidendi* of this case.—T. D. B.

[1] "The Judicature Ordinance," R. O. 1888, c. 58.

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Poetting.[2] See also *Edinburgh & Leith Railway Co.* v. *Dawson*.[3] I am of opinion, however, that the application is answered taking the whole of McGregor's affidavit together. The Molsons Bank was incorporated before confederation of the Provinces, and is, in common with all banks in Canada, subject to the Legislative jurisdiction of the Parliament of Canada.[4] If the bank were not doing business within the jurisdiction of the Court I think I would have had very little hesitation in ordering security. But it is doing business here, and has assets here, and under such circumstances I cannot see how it can be treated as a foreign corporation. I can find very little assistance from authorities on this question. There are one or two cases I have run against in the digests which, however, are of some help. In *The Limerick & Waterford Railway Co.* v. *Fraser*,[5] the plaintiffs were compelled to give security, although they had £3,000 in a bank in London and most of the members resided in England, but it will be observed that the corporation carried on *all* its business in Ireland. So in the Edinburgh and Leith *Railway Company* v. *Dawson*,[3] cited in 5 *Mews' Fisher's Digest*, 1780, it was held that the plaintiffs must give security, although they had money and exchequer bills in the hands of their bankers in London, such property, notwithstanding 112 Vict., c. 110, s. 12, not being of a sufficiently permanent nature, but it is noticed that that corporation carried on their work out of the jurisdiction. I fancy the same will be found true respecting *The Kilkenny & Great Southern and Western Railway Co.* v. *Fielden*.[6] In *The Loubic & Halifax Steam Navigation Co.* v. *Williston*, decided in the New Brunswick Supreme Court, a company incorporated in Canada and having no property in the province was required to give security. I apprehend that if these several corporations were doing business within the jurisdiction and had property there they would not have been required to give security. I am of opinion that it being established that the plaintiff is carrying on a branch of its business within the jurisdiction, it is not necessary to set forth the nature of the

[2] 47 L. T. 249; 30 W. R. 769.
[3] 7 Dowl. 573; 1 W. W. & H. 561; 3 Jur. 55.
[4] See British N. A. Act, s. 91. s.-s. 15.
[5] 4 Bing. 394; 1 M. & P. 23; 6 L. J. (O. S.) C. P. 9.
[6] 6 Ex. 81; 6 Rail. Cases 785; 2 L. M. & P. 124; 20 L. J. Ex. 141; 15 Jur. 191.

property which it has here liable to execution with the same particularity that it might be necessary if it was not doing such business. The summons will be dismissed, but as I think the point of practice is new I will make the plaintiffs' costs of opposing the application, costs in the cause. Judgment. Wetmore, J.

Summons discharged, costs in cause.

HARRIS v. CUMMINGS.

Lien note—Repossession and resale of goods—Right to sue for balance.

Where a lien note contained a provision for repossession and resale, "the proceeds thereof to be applied upon the amount unpaid of the purchase price," it was held that the note was not rescinded by repossessing and reselling the machinery for which the note was given.

[WETMORE, J., *April 26, 1893.*

This was an action on two agreements in writing executed by the defendant. The notes were specified on their faces to be given for a Brantford Binder, and each note contained the following clause: "The title, ownership and right to the possession of the property for which this note is given shall remain in A. Harris, Son & Co. (Limited), until this note or any renewal thereof is fully paid, and if default in payment is made or should I sell or dispose of my landed property, or if for any reason A. Harris, Son & Co. (Limited) should consider this note insecure, they have full power to declare the same due and payable even before maturity of same and take possession of and sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price." The plaintiffs took possession of and sold the implement under these provisions and applied the proceeds of sale to the first note, and sued to recover the balance unpaid. Statement

W. Peel, for defendant: By repossessing and selling, plaintiff rescinded the contract of sale, and there was, therefore, no consideration for the notes: *Sawyer* v. *Pringle,*[1] *Harris* v. *Dustin.*[2] Argument.

D. L. Scott, Q.C., for plaintiff, *contra.*

[1] 20 O. R. 111; 18 A. R. 218.
[2] 1 Terr. L. R. 404.

Judgment.

WETMORE, J.:—There is a very material distinction between the cases cited for defendant and the one I am now asked to decide in as much as the notes in question expressly authorize a sale and direct the proceeds to be applied upon the amount unpaid of the purchase price. In the cases relied on by the defendant there was no power of sale, there was a bare right to take possession. I am not prepared to say that the result of the reasoning of Burton and Osler, JJ., in *Sawyer* v. *Pringle*[1] would not bear out the defendant's contention. And *The Minneapolis Harvester Works* v. *Halley*.[2] cited by Haggerty, C.J., in that case, appears to have been exactly in point and also to support the defendant's contention. I am not, however, prepared to hold that the vendor can be taken to have rescinded the contract by doing what his agreement authorized him to do, or that the defendant has the right under such circumstances to treat the contract as rescinded, and I am not disposed to carry the doctrine of rescission in such cases any further than the facts in *Sawyer* v. *Pringle*[1] warranted. In that case Haggerty, C.J., is reported as follows, at page 222: "Where the contract contains this term as to resuming possession, we generally find this followed by a power given to the vendors to sell the chattels either with or without notice, and to credit the proposed purchaser with the proceeds realized from the sale, leaving him expressly liable for any difference between that and the contract price. In such a case the contract would *undoubtedly not be rescinded.*" In that view I quite concur. It is true that in this case there is no express provision that the vendor shall be liable for any difference between the proceeds of sale, and the contract price, but it seems to me that such is the clear intention of the parties—as clear as if it had been expressly stated.

Judgment for plaintiff.

[2] 27 Minn. Rep. 495.

CLARKE v. LEE.

Building Contract—Work not according to specifications—Damages.

Where a party engages to perform work in a certain specified manner for an agreed price, and he fails to perform the work in the manner specified, such party can recover only the agreed price less the cost of altering the work so as to make it correspond with the specifications.

[WETMORE, J., *April 26, 1893.*

Statement. This was an action for work and labour. The learned Judge found the following facts:

The plaintiff contracted and agreed with the defendant to do all the stone and brick work and plastering in connection with the construction of a church and to furnish the materials therefor, which work was to be done according to certain specifications, for which the plaintiff was to be paid the sum of $708.60 sued for; that such specifications required the walls of the basement to be of stone and to be eight feet high from the bottom of the basement to the underside of the joists above, and that these walls as built were nearly eighteen inches short of that. The specifications also required that the stone foundations should be not less than two feet above the ground at the highest point and they were not so built; that this stone work was not done in a workmanlike manner, it was not pointed as it ought to have been above the ground, and part of it where it came above the ground was out of plumb. The specifications required the walls of the building to be veneered with an outer coating of white bricks. The bricks used were not white bricks and were inferior in quality to white bricks. This brick work was not of a workmanlike manner, the bricks were very irregularly laid, the arches were irregular and crooked, the walls were out of plumb and not straight.

Argument. *D. H. Cole*, for plaintiff.
W. White, Q.C., for defendant.

Judgment. WETMORE, J.:—In every contract for work there is a condition implied by law that the work shall be done in a workmanlike manner, but this is not a condition going to the

Judgment
Wetmore, J.

essence of the contract: *Addison on Contracts* (9th ed. by Smith) 807. The same author proceeding at the same page quotes Tindal, C.J., in *Lucas* v. *Godwin*,[1] as follows: "If it were a condition precedent to the plaintiff's remuneration, a little deficiency of any sort would deprive the plaintiff of all claim for payment, but under such circumstances a jury may say what the plaintiff really deserves to have." The same author at the same page lays down the following: "Where a party engages to do certain work in a certain specified manner but does not perform the work so as to correspond with the specification he is not entitled to recover the price agreed upon, nor can he recover according to the actual value of the work done; what the plaintiff is entitled to recover is the price agreed upon in the specification subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work to make it correspond with the specification," and for this he cites *Thornton* v. *Place*.[2] The plaintiff in this case therefore is entitled under my findings to recover the amount of the agreed price for his work, $708.60, less what it would cost to alter the work to make it correspond with the specification. I have nothing to guide me in arriving at these deductions except the testimony of the witness Eady. I find therefore that it would take 3½ cords of stone more than was used, to make that work correspond with the specification, and I allow the labour in respect of such stone work so deficient, at $6 a cord, which amounts to $21. The evidence as to the value of such stone is most unsatisfactory. Copeland fixes it at about $1 a load. But there is nothing to shew how many loads there are in a cord. I know what constitutes a cord, and my own judgment tells me knowing that stone is very heavy that there must be at least three loads in a cord, and I do not think therefore I will be doing an injustice to the plaintiff by allowing $3 a cord for the stone, which comes to $10.50. In order to make that portion of the stone wall which was out of plumb right it would have to be taken down and rebuilt, and for the labour of rebuilding it and for pointing that portion of the stone wall which was not pointed, I allow $6. I have nothing

[1] 3 Bing. (N. C.) 737; (1837) 6 L. J. C. P. 205; 4 Scott. 502; 3 Hodges 114.

[2] 1 Moo. & Rob. 218; 42 R. R. 781.

Judgment. Wetmore, J

to enable me to fix what it would cost to take this portion of the stone wall out of plumb, down. The brick walls would all have to be taken down and rebuilt in order to make them right. I allow the bricks necessary to build these walls at 16 M. and the cost of labour taking down the bricks now there, cleaning them and putting up the walls anew and material at $13 a M., which comes to $208. And I allow the value of the bricks called for in the specification over those furnished at $2 a M., which comes to $32.

Recapitulation.

Contract price for work		$708 60
Deduct:		
3½ cords of stone at $3 a cord $10 50		
Labour on 3½ cords at $6 a cord... 21 00		
Taking down stonework not plumb and pointing portion not pointed. 6 00		
Taking down and rebuilding brick walls ... .208 00		
Value of bricks called for over those furnished 32 00		277 50
Leaving a balance due plaintiff of		431 10
Scraping cellar, $11; 4½ days' work on cellar, $9		20 00
26 hours shingling, $7.80; 1 lamp, 50.....		8 30
½ days help with rafters		1 50
		$460 90
Credit as per statement of claim		531 65
Leaving the plaintiff overpaid		$70 75

I therefore order judgment for the defendant on the plaintiff's claim for his costs and judgment for the defendant on his counterclaim for $70.75 with costs. To be one taxation of costs.

Judgment for defendant.

CLARKE v. BROWNLIE.

Practice—Pleading—Seal—Setting aside writ—Costs.

(1) A document which purports to be a statement of claim but which does not substantially comply with the requirements of the practice is insufficient to support a writ of summons.
(2) It is not fatal to the service of a writ of summons that the copy had no marks thereon to indicate that the original writ was sealed, provided that such original was in fact properly sealed. *Cameron* v. *Wheeler*[1] followed.

[WETMORE, J., *May 30, 1893.*

Statement. This was an application by defendant to set aside the writ of summons and statement of claim and service thereof for irregularity. The irregularities appear in the judgment.

Argument. *F. F. Forbes,* for defendant.
W. White, Q.C., for plaintiff.

Judgment. WETMORE, J.—The objection to the summons and statement of claim is that the statement is merely the plaintiff's account against the defendant entitled in the cause, or in other words it is a document which would merely amount to particulars of the plaintiff's claim. It does not state in terms that the action is for the price of goods sold and delivered or goods bargained and sold or money paid. And it does not in terms state what amount is claimed as due. Looking at the account and reading it as accounts are usually read, I should infer that the action is brought for work and labour, goods sold and delivered and money paid for the defendant. I infer that because the items charged in the particulars are charged as such matters as those I have specified are usually charged for. I infer also that the plaintiff claims as due $210.35, because although the document does not expressly state so, that is the balance remaining after deducting a credit given. I apprehend that there can be very little doubt as to what the action was brought for and that the defendant has not been in any way misled; unobjected to, it would be good as a statement of claim. Nevertheless I am satisfied that the document does not amount to a statement of claim, and that it is open to objection on that

[1] 6 U. C. Q. B. 355.

Judgment.
Wetmore, J.

ground. The original ordinance regulating the practice in this Court, namely, *The Judicature Ordinance*, 1886, by sec. 15 provided that the summons in a cause should be issued by the clerk on his receiving "a plain statement in writing in duplicate of the complaint or cause of action or particulars of the claim in the form of an account." Under that section the particulars filed in this case would have been sufficient. But that section was repealed by Ordinance No. 3 of 1887, sec. 2, and new provisions made; by that Ordinance, sections 2 and 3 which have been carried forward into *The Judicature Ordinance*,[2] and form sections 17 and 18 of that Ordinance it is provided that at the time of the issue of the writ "two copies of the plaintiff's statement of claim and of the relief or remedy to which he claims to be entitled shall be left with the clerk." It will be observed that the practice of depositing particulars of the claim in the form of an account, is omitted from these provisions. I assume therefore that the legislature intended that that practice should be no longer followed. The term "statement of claim" was new to me until my arrival in the Territories. By the practice to which I was accustomed the term "declaration" was applied to what is now called the statement of claim. But there can be no doubt what is meant by the term "statement of claim," it is taken from the English Practice and Forms for them are given in the English Rules. A form for guidance in an action like this case will be found in Appendix C., sec. 4, Nos. 1 and 2, *Wilson's Judicature Acts* (5th ed.), 664, wherein it is stated in terms what the form of action is, that is, it is for goods sold and delivered or for money received, or as the case may be, and it is specifically stated what amount is claimed as due. It was claimed that this application to set aside the statement of claim and service thereof was wrong, that the defendant ought to have applied for a further statement, and *Fawcus* v. *Charlton*,[3] was relied on for that contention. That case was decided under order 21, r. 4, of the English Rules in force prior to the Rules of 1883, and which has not been carried forward into the new rules, and the case must have been decided under some provision of the rule authorizing an application for a

[2] Revised Ordinances, 1888, c. 58.
[3] 10 Q. B. D. 516; 52 L. J. Q. B. 710.

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further statement to be made. I am therefore of opinion that the defendant has pursued the proper course in making this application. As a rule I am not disposed to encourage applications on mere technical grounds when no injustice has been done, and when the party complaining has not been in any way misled, and when the application would appear to be made either for delay or for the purpose of obtaining costs. And I would I think be disposed when some trifling inadvertence was taken advantage of to support such application while I granted the application to refuse costs. But I think in this case the proceeding is such a very casual way of following the practice, that it either shews gross ignorance or gross carelessness on the part of the practitioner and ought to be marked. I will therefore allow the defendant his costs but I will fix a lump sum therefor. There is nothing in the objection as to the copy of writ not being marked (L.S.). The original writ was produced and is properly sealed: *Cameron* v. *Wheeler*.[1] Application was made to amend the statement of claim under Order LXX., Rule 1. Assuming that the lodging a statement of claim is a condition precedent to the issuing of the summons I think there was a colourable compliance with the practice, and it can be amended. I will therefore order that this application be dismissed on the plaintiff on or before the 21st day of June next taking out an order and amending the statement of claim on file by inserting before the word "particulars" therein the following words: "The plaintiff's claim is for the price of work and labour done by the plaintiff for the defendant, and for the price of goods sold and delivered, and for money paid by the plaintiff for the defendant," and by inserting before the figures "210.35." the words "balance due," and paying to the defendant's advocate on this application, the sum of twelve dollars for his costs of this application, and in that event a copy of the amended statement of claim is to be served on the defendant, and he is to have ten days from such service to appear. If the amendment is not made and the costs so fixed paid by the 21st June the statement of claim and the writ of summons and service thereof will be set aside with costs, which I fix at the amount above stated and additional costs of taking out the order and issuing execution.

Order accordingly.

HANSON v. PEARSON.

Practice—Regular judgment—Setting aside—Merits—Delay.

(1) Mere delay is no answer to an application to set aside a judgment on the merits, unless an irreparable wrong be done.
(2) The affidavit of merits should be made by the party having personal knowledge.

[WETMORE, J., *June 20, 1893.*

Statement. This was an application by defendant to set aside on the merits a regular judgment signed in default of appearance upon which judgment executions had issued.

Argument. W. *White*, Q.C., for defendant.

B. Tennyson, Q.C., for plaintiff.

Judgment. WETMORE, J.—This is an application to set aside a regular judgment signed against the defendant, on the ground that the defendant has a meritorious defence. The action is against the defendant as endorser of a promissory note, and the meritorious defences relied on are:

1st. That the defendant was induced to endorse the note by the fraudulent misrepresentations of the plaintiff's agent.

2nd. That the note was not when due, duly presented for payment.

3rd. No proper notice of dishonour.

It appears by the præcipe for the writ of summons filed that the plaintiff resides at Cannington Manor and the defendant at Estevan. The note in question was made and endorsed at Oxbow and the transactions upon which the defence is based all appear to have transpired there. It is therefore impossible for me to conclude whether Estevan, Cannington Manor or Carnduff would have been the most convenient place to try the cause at. The defendant seems to have concluded that Estevan would have been the proper place to try it, for it appears that he had his witnesses at the last sittings of the Court there expecting it to be tried. The defendant was served with the writ of summons on the sixth of April, it is quite apparent therefore that if he had taken all the time allowed him by the practice he would have had

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his defence in by the 22nd April. I have no right to assume it would have been in before. Between the 22nd April and the 3rd May, when the Court sat at Estevan, would only be eleven days. I hardly think that the plaintiff could within that time (certainly he could not unless he used very extraordinary despatch seeing that the plaintiff's advocate resides at Oxbow) have filed his reply so as to bring the cause at issue, and given his notice of application to set the cause down for trial so as to have the cause set down for trial, and proper notice of trial given for the Court at Estevan. I am not in a position therefore to hold that the plaintiff has lost a trial at Estevan by the omission of the defendant to appear and plead. Nor am I prepared to say that he has lost a trial at the sittings at Cannington Manor on the 9th May, for it really appears to me at present from the circumstances detailed in Mr. Elwood's affidavit that Carnduff would be the most convenient place for trial. If so no trial has been lost. There can be no possible doubt that the defendant has acted in the most casual manner in this case. In the first place when served with the writ he merely sends a letter to the clerk directing him to enter an appearance; the clerk very properly forthwith writes him stating that his letter is not an appearance and advising him to retain an advocate. Although he receives that letter on the 14th April, two days before the time limited by the summons for appearing has expired, he pays no attention to it, but quietly waits until Mr. White appears at the Estevan Court on the 14th May. Up to this time possibly his laches may be the result of ignorance of the law. But one would imagine that the clerk's letter explaining that he had made one mistake would have been sufficient to have waked him up. However, it seems that it did not. But how to account for the subsequent delay, is beyond me. No application is made until the 18th May, a fortnight after he saw Mr. White, and then no affidavit of merits is produced by the person who can possibly have any knowledge of the facts upon which the merits are based, and that is the defendant himself, but his advocate comes in making an affidavit of merits based on something his client has told him. I am not prepared to say that an advocate may not in some cases make an affidavit of merits. That would depend upon the nature of the merits. But as

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by the practice which now prevails, the merits must be disclosed in a case like the present. I think the party who has a personal knowledge of the facts should make the affidavit, otherwise all a defendant who wishes to delay a cause has to do is to tell some plausible cock and bull story to his advocate so that the advocate can swear that he is informed and believes so and so, and the object is attained. The application on the 18th was refused, and not until the 25th, after execution was issued, was the application made on proper material. Under these circumstances if I was satisfied that the plaintiff had lost a trial I would only let the defendant in upon the terms among others of paying the amount of the judgment into Court. But, as I have stated, I am not satisfied that the plaintiff has lost a trial. That being so, the only question is—do the defendant's affidavits disclose sufficient merits to warrant having his defence enquired into? If they do I will not enquire into them on this application. Of course I would not allow the defendant in merely to plead a frivolous or vexatious defence. Now if it is true that the plaintiff's agent knowing it to be untrue represented to the defendant that the lien note given by Lee bound the horses, and that the plaintiff could follow them and so induced the defendant to sign the note in question, which was a further security for the debt the lien note was given to secure, I am not prepared to say that that might not afford a good defence to the action. When a defendant has made an affidavit of merits the plaintiff cannot in general make an affidavit in answer that he has no merits, Arch. *Q. B. Practice* (14th ed.) 268. So I am not now prepared to say that Coke, the justice of the peace, was a proper party to present the note for payment or give notice of dishonour; possibly a very nice question may be raised on that point. If the plaintiff had appeared I would certainly on the facts before me if an application were made to strike out such appearance, have held that he had disclosed sufficient grounds to give him leave to defend, as his affidavits disclosed matters which reasonably shew plausible ground of defence; and I can see no reason why I should not grant him the indulgence he seeks for now. The same principle it seems to me ought to govern in either application. I held in *Roberts* v. *Peace*,[1]

[1] Decided June 22, 1888. Not reported. No written judgment was delivered.—T. D. B.

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that mere delay is no answer to such an application as this if an irreparable wrong is not done. The only thing to do is to grant the application, and put the plaintiff as nearly as possible in the same situation as though the action had proceeded in its regular course: *Archbold Q. B. Prac.*, 266. I will therefore order that the judgment and executions herein be set aside upon the defendant paying to the plaintiff or his advocate within two weeks after taxation his costs of opposing this application to be taxed, and consenting, should the plaintiff desire to do so, to go to trial at the next sittings of this Court to be held at Carnduff, and undertaking not to plead any defence denying the endorsing of the note by him and to admit such endorsement at the trial if necessary. If costs not paid at the time above specified application dismissed with costs.

Order accordingly.

GRAHAM, APPELLANT v. THE TRUSTEES OF BROADVIEW SCHOOL DISTRICT, RESPONDENTS.

Assessment and Taxation — "The School Ordinance"—Appeal—Notice—Grounds—Income—Omission to assess property of other persons—Property purchased at tax sale—Owner—Occupancy of—Personal property—Meaning of "situated."

An appellant from the Court of Revision to a Judge of the Supreme Court is limited to the grounds taken before the Court of Revision and such additional grounds as arise out of the decision of the Court of Revision in respect of such grounds.

Wages earned as section-foreman of a railway company is "income," and as such liable to taxation, and it is immaterial that such wages have been invested in property which is also liable to taxation.

The purchaser of lands at a tax sale, and who is not in occupation thereof, is not liable for assessment in respect thereof during the period allowed for redemption.

Cattle are assessable in the district where they are usually kept, and the district in which the owner resides is *prima facie* the district in which they are properly assessable. *McKenzie* v. *Cut Arm S. D.*[1] approved.

[WETMORE, J., *July 8, 1893.*

Statement.

This was an appeal from the Court of Revision of the Broadview school district to a Judge of the Supreme Court

[1] Ante p. 156

under sec. 117 of *The School Ordinance*.[2] The appeal was heard before WETMORE, J., at Broadview. Statement.

WETMORE, J.—The notice of the time and place when I intended to hear this appeal which was posted at the usual place where the trustees held their meetings did not disclose the grounds of appeal.[3] The reasons alleged were that no grounds were stated in the notice of appeal from the Court of Revision, but that the grounds were set forth in the notice of appeal to the Court of Revision, and these, unless something further was set forth in the notice of appeal to me, would be the grounds of appeal to me. As the appellant, the assessor and the trustees were all represented before me, and no objection was taken to this notice, I will so far as regards the persons who were represented or appeared before me consider it sufficient. I have held in other appeals to me of a like nature that the appellant is limited to the grounds of appeal taken before the Court of Revision and grounds arising out of the decision of that Court in respect to the grounds so taken. One of the grounds taken before the Court of Appeal was that property of other persons than the appellant was not assessed which ought to have been assessed. It appears from the examination of the appellant before me that he urged before the Court of Revision that Thorburn & Sons and Walter C. Thorburn should have been assessed in respect to personal property on which they were not assessed, but it does not appear that the appellant (whatever some other appellants may have done) urged before such Court that any other person should be assessed in respect of property not on the list. He did however urge before me that such other persons should be so assessed. The appellant cannot succeed in having such property placed on the list as against such other persons for two reasons: 1st. It was not urged by the appellant before the Court of Revision. 2nd. Such property cannot be placed by me in the assessment list against such persons, they not having been served with notice that their assessment was Judgment.

[2] "The School Ordinance," No. 22 of 1892.

[3] S.-s. 4 of s. 117 of the School Ordinance required the secretary of the school district to post up a notice "in his office or the place where the Board of Trustees holds its sittings, containing . . . . a brief statement of the ground or cause of appeal, etc."

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appealed against. I cannot practically assess property against ratepayers without any notice having been given to them. This will apply to Mrs. Thorburn and Miss Thorburn as well as others. I think however Walter C. Thorburn and Thorburn & Sons are in a different position. Walter C. Thorburn is one of the trustees, a member of the Court of Revision, and he is also manager of Thorburn & Sons, and he was aware of the appellant's contention before the Court of Revision that he and the company should be assessed in respect to property on which they were not assessed. As such trustee he received notice of this appeal, and he appeared before me and acted as the representative of the trustees, and he without any objection testified as to property owned by him and Thorburn & Sons which was not on the list. I therefore think, but not without some hesitation, that I have power to deal with this question as regards Walter C. Thorburn and Thorburn & Sons.

It was also urged before me that Walter C. Thorburn ought to have been assessed in respect to income. It may be that he ought to have been so assessed, but I express no opinion, as no such ground of appeal was taken in the notice of appeal to the Court of Revision. There are two or three grounds of appeal taken in that notice other than those I have already or will hereafter refer to, in which there is nothing and it is not necessary to mention further.

The substantial grounds of appeal of which I can take notice are:

1st. That Walter C. Thorburn and Thorburn & Sons should be assessed in respect to property not on the list.

2nd. That the appellant is not assessable in respect of income.

3rd. That the appellant is not assessable in respect to property purchased last Fall at a tax sale.

4th. That the appellant is not assessable in respect to the lots his house is on or in respect to the house.

5th. That the appellant is not assessable in respect to the horned cattle on which he was assessed.

As to the first ground specified; I am of opinion that Walter C. Thorburn should be assessed $72 in respect to

the cutter and buggy he admitted that he owned, and that Thorburn & Sons should be assessed $65 in respect to the horses they owned, which they took in lieu of debt. Judgment. Wetmore, J.

I am of opinion that the appellant is properly assessable on income. No objection was taken as to the amount of income on which he was assessed. The objection was that he was not liable to be assessed on income at all. This income represented wages he earned as section foreman of the Canadian Pacific Railway. No doubt this is income, and all that it is necessary to say is that it does not come within the exemption provided by sub-section 8 of section 103 of the *School Ordinance*.[2] The reason urged against his liability to assessment on this income was that he invested these wages in property in Broadview, and was liable to be assessed in respect to such property. The law does not provide that it shall be exempted on that ground. The income exempted is that *derived from*, not *invested in*, capital liable to assessment.

As to the liability of the appellant to be assessed in respect of the land purchased at the tax sale; I think this raises a very nice question. I am of opinion however that Graham is not under the circumstances of this case liable to be assessed in respect of this land. The facts are that Graham purchased these lots last fall, and the treasurer gave him a certificate as provided by section 145 of the *School Ordinance*.[2] Graham has never entered into the possession of these lots or used them in any way. It was urged that inasmuch as section 103 requires that "*all* personal . . . property situated within the limits" of the school district shall be liable to taxation, this property must be assessed against someone and the only person it can be assessed against was the appellant. But section 105 provides against whom land and personal property shall be assessed, namely, the person in possession or occupation thereof. Therefore, before this land can be assessed against the appellant it must be made to appear that he is a person in possession or occupation thereof. Now, if no person is in actual possession or occupation of land, the owner would in law be in constructive possession thereof, and it would be assessable as against him. Graham was not in the actual possession or occupation of

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the land. The question therefore arises what is the effect of the certificate granted by the treasurer under section 145—does it vest the ownership of the land in Graham so as to make him the constructive occupier thereof, and therefore render him liable to have the property assessed against him? While section 146 provides that the person to whom the certificate is granted shall become the owner for certain purposes, it is clear that he is not the absolute owner, because he cannot exercise all the acts of an absolute owner, for instance, he cannot cut timber on it or improve it or permit anybody else to do so. All he can do is to use the land without deteriorating its value. Under section 147 the original owner may redeem the land. In fact, the appellant cannot in any event become absolute owner until the expiration of two years from the sale. The effect of the certificate therefore is not to make the purchaser absolute owner, but only owner for certain purposes, namely, to protect the property in the meantime until it is redeemed or becomes his absolutely: see *Nelles* v. *White*,[4] and with a view to such protection he may go into possession. And use it to the extent provided in section 146, and he may maintain ejectment against persons in possession as laid down in *Cotter* v. *Sutherland*,[5] but he is not owner to any greater extent. He is not owner so that if he does not actually take possession he can be considered constructively in possession. If, however, Graham had gone into actual possession of these lots I am not prepared to say that he would not be liable to be assessed in respect of them.

I have no doubt that Graham was liable to be assessed in respect of lots 18 to 20 in block 55, and of the buildings thereon. If any mistake was made in assessing 480 acres against Mr. Lillis it cannot relieve Graham. These lots were properly assessed against Graham. It appears he is both the owner and occupier of them, and that is all that is necessary.

The only other question remaining is whether the appellant is properly assessed in respect of the neat cattle. Graham did not dispute before the Court of Revision that he owned these cattle, his only claim to be relieved was that the

[4] 29 Gr. 338, affirmed 11 S. C. R. 587.
[5] 18 U. C. C. P. 357.

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cattle were not at the time within the Broadview district. that they were in another district. I have appreciated the difficulty of deciding when "personal property" as defined by section 102, sub-section 1, is to be considered "situated within the limits" of a school district under section 103. The question came before me in the case of *McKenzie, appellant, and The Trustees of The Little Cut Arm School District, respondents.*[1] I stated in that case that I thought I would have very little trouble in deciding that *choses in action,* such as debts, &c., are situated in the district when the owner resides there. And as respects other personal property, such as cattle, I held that the word "situated" is somewhat analogous to the term "resident" as applicable to a human being. A human being may be temporarily absent from home, but his residence is where he is domiciled. Cattle might be temporarily in one district, but they are "situated" for the purposes of taxation where their headquarters are, or where they are usually kept. I see no reason to change my opinion. Now Graham resides at Broadview, his personal property would naturally be presumed to be usually kept where he resides. If they were anywhere else it will be assumed they were there for a temporary purpose; and it lies upon the owner to show that they were not there for a temporary purpose. Graham in this case failed to show that they were not in Chaplin for a temporary purpose. In fact the evidence is rather the other way, because some of these cattle were at the time of hearing this appeal actually in Broadview. I am not prepared to say that there was not express evidence before the Court of Revision to shew that these cattle were sent to Chaplin for a temporary purpose, namely, to winter. If the construction I put on the term is not the correct one, a person might escape taxation with respect to property of this description altogether. All that would be necessary to do would be to move it off until the assessment is made up and filed, and then bring it back.

The order will be that the assessment roll be amended in the following respects:

1st. By inserting the name of Walter C. Thorburn therein and assessing him $72 in respect to 1 cutter and 1 buggy.

2nd. By assessing Thorburn & Sons $65 more in respect to two additional horses.

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3rd. By striking out the assessment against John Graham in respect to lots 12 to 16 in block 34 and 17 to 22 in block 52.

And that in all other respects the assessment against the said John Graham be confirmed.

There will be no order as to costs.

Order accordingly.

ADAMS ET AL. v. HUTCHINGS ET AL. (2).

Assignments and preferences—Mortgage—Setting aside—Pressure—Validity — Substitution — Possession — Repudiating mortgage —Preference—Description—Costs.

Held, (1) The execution of a chattel mortgage by the mortgagor and its delivery to and acceptance by the mortgagee or his agent constitutes such mortgage a valid and binding instrument as between the parties to it, without any further act on the part of the mortgagee.

(2) A mortgagee's solicitors are his agents for accepting such delivery.

(3) A mortgagee of chattels cannot validly repudiate the mortgage without giving proper notice to the mortgagor.

(4) The substitution of one chattel security for another has the effect of cancelling the substituted security.

(5) To constitute a chattel mortgage a preference it must be "the spontaneous act or deed" of the insolvent, and must have been given "of his own mere motive and as a favor or bounty proceeding voluntarily from himself." *Molson's Bank* v. *Halter* (18 Can. S. C. R. 88), and *Stephens* v. *McArthur* (19 Can. S. C. R. 446), applied.

(6) Although a mortgagee may have no right to take possession of the mortgaged chattels, still if he does do so, and the mortgagor assents thereto, the possession is lawful *quoad* the mortgagor, and such assent may be implied from conduct. *Dedrick* v. *Ashdown* (15 Can. S. C. R. 227) distinguished.

(7) Where in a chattel mortgage there are some items that can be identified and others that cannot, such mortgage is void *in toto only* if the items that can be distinguished are few and insignificant, but where such items are neither few nor insignificant the mortgage is *quoad* such items valid.

[WETMORE, J., *Oct. 30, 1893.*

Statement.

This was an action brought by Adams Brothers, execution creditors of the defendant Smithers, for the purpose of setting aside certain mortgages and an assignment of book debts, executed by Smithers to his co-defendant Hutchings. The action purported to be brought on behalf of the plain-

tiffs and other creditors. The defendant Hutchings alone, defended the suit. Charles Adams, the assignee of Smithers, was joined as co-plaintiff. Statement.

The defendant Smithers was in business at Moosomin as a harness maker, and was on the 19th of March, 1890, indebted *bona fide* to the defendant Hutchings in the sum of $1,600 and upwards, and on that date and for the purpose of securing such indebtedness Smithers executed in favour of Hutchings a chattel mortgage on certain stock in trade situated in Smithers' store, and specified in a schedule attached to such mortgage. This mortgage was duly filed with the registration clerk, but was not renewed and kept on foot as required by section 11 of *The Bills of Sale Ordinance*.[1] On the 29th March, 1892, Smithers' *bona fide* indebtedness to Hutchings amounted to some $3,000, made up of the principal sum of $1,600, secured by the mortgage of March 19, 1899, some accrued interest, a current account of $1,100 and upwards and $300 principal, and some interest on a real estate mortgage that Smithers had executed to Hutchings some time previously in the year 1885, and on March 22nd, 1892, Smithers to secure his whole indebtedness to Hutchings, executed to Hutchings an assignment of book debts, a further chattel mortgage for $1,600 on his stock in trade and a further real estate mortgage for $700.

At the time of the execution of these securities on the 22nd of March, 1892, the property mentioned in the schedule attached to the mortgage of the 19th of March, 1890, had been almost altogether disposed of in the course of Smithers' business and was not in his shop, but there was a provision in that mortgage which made stock and goods acquired and placed on the premises subsequent to its date, subject to the mortgage.

These securities of the 22nd of March, 1892, upon being executed by Smithers were left with and accepted by the solicitors of Hutchings at Moosomin. They forwarded the chattel mortgage to Hutchings at Winnipeg that he might make the affidavit of *bona fides* thereon. Hutchings, however, upon receipt of this document, for some reason which was not made clear at the trial beyond that it was in consequence of a letter he received and a conversation he had with his

[1] Ordinance No. 18 of 1889.

Statement.

traveller, and a consultation with his Winnipeg solicitor, refused to make the affidavit of *bona fides* and returned the mortgage to his solicitor at Moosomin and it was destroyed. This mortgage was drawn for six months, and only provided for Hutchings taking possession in case of default in payment of the monies secured according to the proviso for payment, that is, after the expiration of six months or in case Smithers should sell or dispose of the property mortgaged or remove it off the premises (save as afterwards provided), or should suffer or permit it to be taken in execution. Then there was a provision authorizing the property to be bargained and sold during the continuance of the security in the usual course of the retail business carried on by Smithers.

On the 28th of March, 1892, six days after the execution of the securities of the 22nd of March, 1892, Hutchings, without giving any previous intimation to Smithers, by one Hamilton, his bailiff took possession of Smithers' stock in trade and proceeded to sell the same, not by virtue of the chattel mortgage of the 22nd of March, 1892, but professedly by virtue of the chattel mortgage of March 19th, 1890, to which mortgage the warrant to the bailiff was annexed. Smithers thought Hutchings had seized under the mortgage of March 22, 1892, but raised no objection to Hutchings taking possession, and allowed Hutchings' representative to remain in possession and gave up the keys to him, and Smithers actually went himself and took employment under him. Subsequently to such possession, namely, on the 6th of April, 1892, Smithers assigned to Charles Adams, one of the plaintiffs, all his property, including his stock-in-trade, for the benefit of his creditors generally. The plaintiffs, Adams Brothers, on the 14th of April, 1892, recovered judgment against Smithers, and on the same day lodged an execution with the sheriff, and thereupon this action was commenced. An injunction was obtained prohibiting Hutchings from disposing of the mortgaged property or collecting the debts assigned to him, and eventually a receiver was appointed to sell the property, collect or sell the debts and pay the proceeds into Court to abide the event of this suit.

Argument.

J. A. M. Aikins, Q.C. (*F. F. Forbes* with him), for the plaintiff.

W. White, Q.C., for the defendant.

Judgment.

WETMORE, J.:—It is claimed that Hutchings by his refusal to make the affidavit of *bona fides* on the chattel mortgage of March 22nd, 1892, and by his returning the same to his solicitors, had never accepted the said mortgage. I cannot, however, concur with that contention. The mortgage did not require to be executed by Hutchings to give it validity. It was not even contended that that was necessary, and the affidavit of *bona fides* was only necessary for the purpose of having it registered. The moment it was executed by Smithers and delivered to and accepted by Hutchings or his authorized agent, it became a valid and binding instrument as between Smithers and Hutchings. The moment, therefore, it was so executed and left with and accepted by White & Wyssman, Hutchings' solicitors in the matter, and therefore his agents to accept delivery of the instrument for Hutchings, it became as binding and valid as if delivered to and accepted by Hutchings himself. But it was claimed that assuming that to be so, Hutchings had a right to repudiate this mortgage; the only ground claimed at the trial as giving such right was that Smithers had not fairly represented to Hutchings the extent of his indebtedness to other parties when Hutchings agreed to accept the securities. In fact that he misled him and led him to believe that such indebtedness was very much less than it actually was, and that that being the case I have a right to infer that from the letter received by Hutchings and by the conversation with his traveller Hutchings had learned the true state of affairs, and that thereupon he repudiated the chattel mortgage which he had a right to do. There is no doubt that Smithers did mislead Hutchings and grossly mislead him too as to his indebtedness to other persons. Now, I am not prepared to say that this might not have afforded Hutchings grounds to apply to the Court to have the instrument set aside. I am not even prepared to hold that it would not justify him if he acted promptly in repudiating the mortgage provided that he did so in a proper way. But I do hold that he could not repudiate the instrument without any notice whatever to Smithers and without giving any reason for it whatever to him for doing so. And there is no evidence that either the one or the other was done. The only thing that Smithers knew so far as appears before me was that without any notice

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or assigning any reason whatever, Hutchings a few days after Smithers executed this mortgage, sent a man and took possession. And even then Smithers was not notified that possession was taken under the mortgage of 1890. But further, I am not by any means satisfied that Hutchings sought to repudiate this mortgage because Smithers had misled him. I may further say that inasmuch as the three securities of 22nd March, 1892, were all substantially executed at one time, were given to secure the same indebtedness and were practically one transaction, I have great doubts whether Hutchings could repudiate one of these securities and hold onto the others. It will be noted that he never attempted to repudiate the assignment of debts or the real estate mortgage. However, I express no decided opinion on the point. I find that the mortgage of the 19th March, 1890, was at the time of its execution, a good and valid mortgage against all the world. I am not satisfied under the evidence that Smithers was then insolvent or on the eve of insolvency or unable to pay his debts in full, and assuming that he was so insolvent or unable to pay his debts the mortgage was obtained as the result of honest *bona fide* pressure on the part of Hutchings and was, therefore, under the law as laid down in *Stephens* v. *McArthur*,[2] a good and valid mortgage. It was urged, however, on the part of the plaintiffs that the chattel mortgage of the 22nd March, 1892, was substituted for the chattel mortgage of 19th March, 1890, and has the effect of cancelling it. Under the authority of *Martin* v. *McDougall*,[3] *Smale* v. *Burr*,[4] and *Ramsden* v. *Lupton*,[5] I hold that this point is well taken, and that the mortgage of the 19th March, 1890, ceased to exist, that as between Hutchings and Smithers and *a fortiori* as between Hutchings and Smithers' creditors it was cancelled, and that the possession assumed to be taken under it cannot be supported. It was urged, however, that if Hutchings' possession could not be supported under that mortgage it could be supported under the chattel mortgage of 22nd March, 1892. On the other hand, this was disputed on four grounds, namely:

[2] 19 Can. S. C. R. 446.
[3] 10 U. C. Q. B. 299.
[4] L. R. 8 C. P. 64; 42 L. J. C. P. 20; 27 L. T. 555; 21 W. R. 193.
[5] L. R. 9 Q. B. 17; 43 L. J. Q. B. 17; 29 L. T. 510; 22 W. R. 129.

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1st. That Hutchings having expressly taken possession under the mortgage of 1890 could not be held to be in possession under the mortgage of 1892, especially as at the time of taking possession he considered that he had repudiated that mortgage.

2nd. Because the mortgage of 1892 was void as against creditors under *The Preferential Assignments Ordinance*.[6]

3rd. That the possession under that mortgage was not open and notorious; and moreover, that, if any, it was unlawful, and therefore the mortgage not being registered under section 3 of *The Bills of Sale Ordinance*[1] was void as against creditors.

4th. That the mortgage does not contain such sufficient and full description of the mortgaged property that the same may be readily and easily known and distinguished, and therefore it is void under section 8 of *The Bills of Sale Ordinance*.[1]

As to the second point, I have already found that the debt secured by the mortgage was an honest debt. I find that Smithers at the time that that mortgage was given was insolvent and that Hutchings knew it. Taking into consideration the fact that Smithers' stock-in-trade was not very extensive, that his indebtedness to Hutchings alone had increased from $918 in 1887 to $1,900 in 1890 and to $3,000 in 1892. Taking also into consideration the value that he put on his stock and other assets, and which Hutchings accepted, it seems to me that Hutchings could not help but know even on the assumption that he only owed between $400 and $500 outside of himself that he was hopelessly insolvent. But the mortgage I am now discussing was given as the result of pressure on the part of Hutchings. That is, Smithers did not offer to give the mortgage. It is true that when in Winnipeg in February, 1892, he went to see Hutchings, and there are one or two expressions in his testimony from which it might be inferred that he did offer the security on his stock, but I have scrutinized this testimony closely, and I have arrived at the conclusion that Smithers

[6] R. O. 1888, c. 49.

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being in Winnipeg very naturally went to see Hutchings with respect to his indebtedness, that Hutchings began to press him with a view to getting paid or getting secured, and naturally asked him what he could do, and in reply he stated that all he could do was to give a new chattel mortgage. I cannot, however, look upon such an offer as that as the "spontaneous act of the debtor," as expressed by Strong, J., in *The Molsons Bank* v. *Halter*.[1] Then unquestionably when Hutchings came to Moosomin in March of that year he came with the express object of pressing Smithers to give him security. If the matter rested here I would have no hesitation in the matter whatever, the validity of this mortgage so far as the *Preferential Assignments Ordinance*[2] is concerned would be placed beyond question by *Stephens* v. *McArthur*.[2] But I must say that there are one or two circumstances in evidence in this case which makes me hesitate to hold this mortgage valid even with *Stephens* v. *McArthur*[2] before me. Smithers swore that at this interview at Winnipeg in February, 1892, Hutchings, in speaking of his other creditors, told him to let them "go to blazes." Now Hutchings denies this, and it is the only part of that conversation he does deny. But I am of opinion that Hutchings did make this remark, because I cannot in any other way account for Hutchings' conduct with respect to this mortgage. As has already appeared when he received this mortgage he attempted to repudiate it and sought to retain his lien upon Smithers' stock by resorting to what seems to me to be the forlorn hope of the mortgage of 1890. He does this after consulting his Winnipeg solicitor. Now, why did he take this course? His counsel wishes me to infer that he did it because Smithers had misled him as to the extent of his indebtedness. But at that time, March, 1892, *Stephens* v. *McArthur*[2] had been decided for four months, the effect of the decision must have been pretty well known, and that case decided it seems to me very clearly that if the mortgage was the result of pressure the fact that the mortgagor was insolvent and that the mortgagee knew it did not invalidate it. In fact the suppression of the true extent of his indebtedness by Smithers would place Hutchings in a better position, because it might enable him to say fairly, in his evidence, that he knew nothing about

[1] 18 Can. S. C. R. 88.

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Smithers' indebtedness beyond what he told him, that he was honestly of the opinion if Smithers only owed this small amount over and above what he owed him that he might pull him through. But this is not all. I cannot shut my eyes to what was brought under my notice in Chamber applications. An order was taken out to examine Hutchings in this case, and he persistently refused to give any information whatever in respect to this mortgage until he was compelled to do so by an order made by me. Now I cannot conceive from any evidence before me what induced him to take this course, unless it is that he did make this remark to Smithers and feared that this remark, coupled with the other inducements he had held out, influenced Smithers to give the securities of March, 1892, and, therefore, that it would be held that they were given with intent to prefer him, and I may say that were I left to my own unaided judgment I would not in the light of such facts hesitate to hold that these securities were given with intent to give Hutchings a preference over the other creditors. I am free to confess that I have had strong doubts whether so far as the point I am discussing is concerned this case could not be distinguished from *The Molsons Bank* v. *Halter*,[1] and *Stephens* v. *McArthur*.[2] In fact, at one time I had brought my mind to the conclusion that it was distinguishable. Upon scrutinizing these decisions closely, however, I have arrived at a different conclusion, and of course I must follow what I understand those cases to decide. Strong, J., in *The Molsons Bank* v. *Halter*,[1] at p. 94, lays down that the "word 'preference' imports a voluntary preference, that is to say, a spontaneous act of the debtor." In the same case at page 102, Gwynne, J., is reported as follows: "To constitute a preference it must have been given by the insolvent of his own mere motives and as a favour or bounty proceeding voluntarily from himself." Taschereau, J., concurred with Strong. We, therefore, have the majority of the Court as constituted in that case adopting this language. In *Stephens* v. *McArthur*,[2] Strong, J., is reported at p. 454, as follows: "It has, however, been forcibly argued on this appeal, both in the appellant's factum and by his counsel at the bar, that if it is once demonstrated that the word preference means *ex vi termini* a voluntary preference, then the class of contracts, deeds, instruments or acts which

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are to be avoided as having the effect of a preference must also be restricted to such as are spontaneous acts or deeds of the debtor. This argument appears to me irresistible." This judgment was concurred in by Fournier, Taschereau and Gwynne, JJ. Notwithstanding then this remark of Hutchings I cannot hold the giving of this mortgage to be given of Smithers' "own mere motive and as a favour or bounty proceeding voluntarily from himself." I cannot hold it to be his "spontaneous act or deed." There was a pressure such as was held to be sufficient in *Stephens* v. *McArthur*,[2] that is, there was a demand by Hutchings on Smithers for the security. And therefore I feel that so far as the *Preferential Assignments Ordinance*[6] is concerned I am bound to hold this mortgage valid as against creditors. Having arrived at this conclusion it is unnecessary for me to consider the question raised by Hutchings' counsel as to that Ordinance being *ultra vires* the North West Legislative Assembly.

As to the third point, that the possession was not open and notorious and was unlawful, and the mortgage void as against creditors not being registered under *The Bills of Sale Ordinance*.[1] Section 3 of this Ordinance provides that "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels made in the Territories which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within fifteen days of the execution thereof be registered;" otherwise under section 7 it is "null and void as against creditors of the mortgagor."

It is not questioned that this mortgage was not registered, and it is claimed in the first place that the "change of possession" mentioned in this section 3 must be open and notorious. I find, however, that the possession was open and notorious. That Hutchings had complete and full possession by his agent Campbell, who held the keys and managed the business from the time the bailiff entered, and that the possession was rendered still more notorious by the advertisements of sale which were posted on the premises and elsewhere generally in public places. It is further claimed that such possession must be a lawful possession and that it was not lawful in this case because there was a clause in the mortgage which provided that the mortgaged property might

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during the continuance of the mortgage be "bargained and sold in the usual course of the retail business carried on by the mortgagee." It was decided in *Dedrick et al.* v. *Ashdown et al.*,[8] that in a mortgage of personal chattels there may be an implied contract that the mortgagor shall remain in possession until default of equal efficacy as an express clause to that effect. In the mortgage now in question there is the following clause: "In case default shall be made in payment of the said sum of money in the said proviso mentioned or of the interest thereon or any part thereof, or in case the mortgagor shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them or remove the same or any part thereof out of the premises aforesaid, *save as hereinafter mentioned,* or suffer or permit the same to be seized or taken in execution without the consent of the mortgagee, his executors, administrators or assigns, to such sale, removal or disposal thereof first had and obtained in writing then and in such case" the mortgagee or his representatives might enter the premises and take possession of the goods and sell them. It will be observed that these provisions in this mortgage are word for word identical with the provisions for entry in the mortgage in question in *Dedrick* v. *Ashdown*,[8] except that that mortgage did not contain the words I have italicized. And that mortgage did not contain the clause which I have before quoted from the mortgage now in question, providing that the property might, during the continuance of the mortgage, be bargained and sold in the usual course of the retail business carried on by the mortgagor. Nevertheless it was held in *Dedrick* v. *Ashdown*[8] that the mortgagor had a right to remain in possession until default or until some of the contingencies arose specified in the mortgage which gave him the right of entry; *a fortiori* in this case the mortgagor would have a right to remain in possession until default or until some of such contingencies arose. Now when Hutchings took possession there had not been default in payment according to the proviso for payment, nor had any of the contingencies specified arisen. He therefore *prima facie* had no right to take possession, and such possession was unlawful. That being so, however, who, so far as the parties before me

[8] 15 Can. S. C. R. 227.

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are concerned, had the right at the time this possession was taken to protest against this unlawful act? I think Smithers and he only, had such right. It was held in *Parkes* v. *St. George*,[9] under an Act of the Ontario Legislature similar to *The Bills of Sale Ordinance*[1] that if a mortgagee of a chattel mortgage, which was void against creditors under that Act only by reason of its not being registered or by reason of its non-compliance with the provisions thereof, got possession of the mortgaged property before a creditor who was in a position to impeach the mortgage did so the mortgage would be valid against creditors, and the mortgagee would hold the property. Patterson, J., however, expressed the opinion "That the remedial effect of delivery of possession depended on the act of the mortgagor; and that a mortgagee taking possession by virtue of his mortgage without any act amounting to a delivery or new transfer by the mortgagor would still hold merely under the defective conveyance which had not been accompanied by an immediate delivery and followed by an actual and continued change of possession." See *Smith* v. *Fair*.[10] Now that is the only expression of opinion by a judicial authority that I can find limiting the remedial effect of delivery of possession in such cases. And I must say in the absence of any decision binding upon me I am inclined to agree with Patterson, J. But was there in this case any recognition by the mortgagor, Smithers, of Hutchings' right to take possession? Because I think such recognition could be made just as well by his conduct as by express words. It is clear that neither of the plaintiffs or any other creditor at the time Hutchings took possession had taken any step to impeach the mortgage. Adams Brothers had not recovered their judgment, the assignment had not been made to Charles Adams. As between Smithers and Hutchings the mortgage was undoubtedly good and binding. It is true Smithers might have said "You (Hutchings) have no right to take possession of this property. I have the right to possession until some of the contingencies arise which authorize you to take possession, and none of such contingencies has arisen, I protest against your act," and so hold him at arm's length, as the mortgagor did in *Dedrick* v. *Ash-*

[9] 10 A. R. 496.
[10] 11 A. R. at p. 758.

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down.[8] He might possibly have said nothing but have walked away and left Campbell there and by so doing not in any way have helped Hutchings' act. But if it were possible for Smithers by his conduct to have assented to Hutchings' possession I do not see how he could have done so more effectually than he did, and that is just in my opinion where this case differs from *Dedrick* v. *Ashdown*,[8] and what was otherwise an unlawful entry or possession was made lawful. Because I find that he not only allowed Campbell to remain in possession but he gave up the keys of the premises to him or Hamilton; he allowed Campbell to remain in possession of the keys and to assume full management of the business, and he actually went in himself and took employment under him. Now, all this was done by Smithers with full knowledge. He was under the belief that Hutchings had taken possession under the chattel mortgage of 1892. And he must be assumed to know the contents of this mortgage as to his (Smithers) remaining in possession. Surely he had a right if he saw fit to do so to waive the provisions in the mortgage as to his remaining in possession. Who had the right at the time to say he should not? Having done so he could not treat Hutchings as a trespasser or wrongdoer. And if he could not do so, the plaintiffs could not then do so. Therefore, when Hutchings took possession he was a trespasser or wrongdoer, or he was not. If he was not, his possession was lawful. And I, therefore, hold it was lawful. Having arrived at that conclusion I decide the third objection raised to the validity of this mortgage in favour of its validity.

I am of opinion that the first objection to its validity must fall with the objection I have just dealt with. Hutchings having the title to this property subject to Smithers' right of possession and Smithers having waived his possessory right can Hutchings, although professedly going in under an instrument which gave him no right whatever, set up his title under the valid instrument? I think he can. *Quoad* Smithers he was not a trespasser, and the plaintiffs were not in a position to say he was. His possession, therefore, was good. I have already drawn one distinction between *Dedrick* v. *Ashdown*[8] and this case. I will now draw another one. In that case the mortgagee did not take possession of the property at all, either by himself or his agent. The

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sheriff was not the mortgagee's agent, and the mortgagee was deprived of his property by virtue of an abuse of the process of the Court. Hutchings in this case had the possession and he had the title, and he therefore could not be treated as a wrongdoer.

As to the fourth objection taken to the validity of this mortgage: The description of the property is very much the same as the description of the mortgage in question in *McCall* v. *Wolff*.[11] It is not at all in accordance with the description of the property in *Quirk* v. *Thomson*,[12] which was "all and singular the goods, etc.," now being in the store of the mortgagors and specifying the locality of the store. If there was no evidence in this case throwing light on this description I would be bound by *McCall* v. *Wolff*[11] and would have to hold this description insufficient. But there is evidence which throws light on this description which aids me with the mortgage in my hand to identify a large portion of the property and distinguish it. It will be borne in mind that Strong, J., in *McCall* v. *Wolff*[11] dissented from the majority of the Court, holding the description sufficient, and Henry, J., held that the mortgage should be held valid with respect to such of the items that could be identified, of which it seems there were some, but the majority of the Court held that these items were so few and insignificant that they held the mortgage void in toto. The items which can be identified and distinguished in this case as I will point out hereafter are by no means few and insignificant. In fact they represent by far the largest part of the property intended to be mortgaged. The Chief Justice who delivered the judgment of the majority in *McCall* v. *Wolff*[11] is reported at p. 133 as follows: "It may have been the intention to convey all the goods in the store, but the mortgage does not say so, *nor is there any evidence to shew the goods named in the schedule were the only goods of that description in the store or what were the exact goods in the store.*" Of course if the mortgage in this case had stated that the goods were all the goods in the store the description would have been sufficient as decided by *Quirk* v. *Thomson* and *Hovey* v. *Whiting*.[13] If in

[11] 13 Can. S. C. R. 130.
[12] 1 Terr. L. R. 159; 18 Can. S. C. R. 695.
[13] 14 Can. S. C. R. 515.

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McCall v. *Wolff*[11] there had been evidence to show that the goods named in this schedule were the only goods of that description in the store I apprehend the decision in that case would have been the other way, and that seems to be the view that Gwynne, J., takes of that case in *Hovey* v. *Whiting*.[13] Now in this case there is evidence and uncontradicted evidence to shew that a very large proportion of the goods mentioned in the schedule were the only goods of that description in the store. Smithers swore as follows: "The contents of these pages (Exhibit 1) represented all the stock in trade in my shop on 21st March, 1892, when Mr. Hutchings examined it, except the harness referred to which I had got from Adams Bros." And further on: "I don't think the goods that came from Adams were attached to the chattel mortgage in the schedule." I find that these goods got from Adams Bros. were not included in the schedule. I must so find because that is the only evidence I have on the subject and Smithers made out the stock list (1) in February and these Adams goods came into his store in March. Now we have it established in evidence what the description of these goods was. They were harness and collars. Apart from the harness and collars mentioned in exhibit 1 (of which I have found the schedule attached to this mortgage to be a copy leaving out the tools mentioned on page .012) there can be no difficulty with this evidence in identifying the rest of the property, because there was no other property of the same description in the shop; *quoad* that property therefore I hold the mortgage to be valid. I do not think that this holding is at variance with *McCall* v. *Wolff*,[11] and it is in accord with Gwynne, J.'s, judgment in *Hovey* v. *Whiting*[13] as I understand it. As to the harness and collars mentioned in exhibit (1) I am of opinion that the mortgage cannot be supported. The value of the property referred to as got from Adams Bros. was from $200 to $235, and the bulk of it was according to Smithers in stock when he executed the mortgage, and I so find. This property will not be embraced in the last clause in the mortgage relating to after acquired property because it was not in the words of this clause *new or further goods or stock which he acquired or placed upon the premises during the continuance of the mortgage.* It was urged that as the mortgagee had taken possession, that

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cured the defective description. I can quite understand that if Hutchings had only taken possession of the quantity and description of the harness and collars specified in exhibit (1) that might be an identification and appropriation of the property mortgaged, as stated in *Barron on Bills of Sale* (2nd ed.), pp. 66 and 481. But the difficulty is that Hutchings seized all the harness and collars in the shop, including the harness and collars got from Adams Bros. Under the evidence before me I am utterly unable to say which and how much of this harness, and which and how many of these collars were got from Adams Bros., and therefore to identify which or what part of this property was included in the mortgage, and so far as this portion of the property is concerned it is quite within the decision in *McCall* v. *Wolff*.[11] I may add that I cannot find under the evidence that Smithers intended to consent to Hutchings taking any more property than he was authorized to take under the terms of the mortgage. Hutchings in fact took possession of this Adams Bros. harness and collars under the mortgage of 1890, as being covered by the clause in that mortgage relating to after acquired property, but having held that that mortgage was cancelled he cannot support his possession to that property under that mortgage, and for the reasons I have stated he cannot support it under the mortgage of 1892. There is no difficulty whatever in arranging this matter; the whole property was sold by the receiver, George B. Murphy. He testified that the whole property received by Hutchings was inventoried at $1,169.68, and was sold at 59½ cents on the dollar, realizing $695.95. There is no dispute that this was a fair sale. Now all that is necessary to do will be for the sheriff to take the inventory which he made, take out from it all the harness and collars specified in it and figure what the inventoried price would be at 59½ cents on the dollar, deduct that from the gross receipts at the sale, and the balance will belong to Hutchings under his mortgage. And I direct the receiver to make that calculation and report to me and also to report what was realized from the tools of trade of Smithers at 59½ cents on the dollar of their mentioned value. Under my findings no question can be raised as to the validity of the assignment of the book debts and the mortgage on the real estate. The real estate

is not embraced by either the *Bills of Sale Ordinance*[1] or the *Preferential Assignments Ordinance*.[6] Neither are the book debts embraced by the *Bills of Sale Ordinance*,[1] and I have great doubts if they are embraced by the *Preferential Assignments Ordinance*,[6] and if they are, the assignment would be equally valid with the chattel mortgage of the same date. And under my findings these assignments would be perfectly good under the Statute of Elizabeth. See *ex parte Games*,[14] as cited in *May on Fraudulent Conveyances* (2nd ed. by Worthington) 97. Judgment Wetmore, J.

After delivering this judgment up to this point the receiver reported that no tools of trade came into his possession or were claimed by Hutchings and that the amount realized from the sale of the harness and collars at 59½ cents on the dollar is $184.17. This deducted from $695.95 leaves $511.78, which belongs to Hutchings under his chattel mortgage.

Decree that the injunction granted herein be dissolved.

That the chattel mortgage of the 19th March, 1890, became cancelled on the 22nd March, 1892, and was not on the 28th March, 1892, when the defendant Hutchings took possession of the stock in trade and personal property of the defendant Smithers a valid and binding security.

That the real estate mortgage and assignment of book debts of the 22nd March, 1892, are good and valid and binding securities in the hands of the defendant Hutchings as against the plaintiffs and other creditors of the defendant Smithers to secure his (Smithers') indebtedness to the defendant Hutchings.

That the chattel mortgage of the 22nd March, 1892, is a good, valid and binding security in the hands of the defendant Hutchings as against the plaintiffs and other creditors of the defendant Smithers to secure such indebtedness to Hutchings in so far as regards all the stock in trade and chattels seized by the said Hutchings except the harness and collars seized by him, and as regards the said harness and collars the said mortgage is void as against the plaintiffs and other creditors of the defendant Smithers.

[14] 12 Ch. D. 314.

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That out of the monies realized by the receiver from the sale of such stock in trade and chattels the receiver be paid out of Court the expenses of sale and keeping thereof, but not including any allowance that may be made to him for his services, and that out of the balance remaining a sum be paid out of Court to the defendant Hutchings bearing the same proportion that $695.95 does to $511.78.

That out of the monies realized by the receiver from the collection of the book debts be paid out of Court to such receiver the legal expenses of collection or attempted collection of such book debts, but not including any allowance that may be made to him for his services, and that the balance, if any, be paid out to the defendant Hutchings, and that the receiver do hand over to the defendant Hutchings all such book debts as remain uncollected in order that the said Hutchings may proceed with the collection of such debts upon the defendant Hutchings paying to the receiver any balance of such legal expenses of collection or attempted collection that may remain unpaid, if any, out of the monies so collected as aforesaid.

That the balance remaining in Court realized from the sale of the said stock in trade and chattels be paid out of Court to the plaintiffs Charles Adams to be distributed among such creditors as may come in and contribute to the expenses of this suit.

I reserve all further directions that may be necessary.

I find the value of the several securities in question in this case to be as follows:

The chattel mortgage	$695 95
The book debts at 20c. on the dollar....	254 55
Real estate mortgage	700 00
In all	$1,650 50
The plaintiffs have been successful as to..	184 17
Leaving the defendant Hutchings successful as to	$1,466 33

or, in round numbers, the plaintiffs have been successful as to one-ninth of the property in question and the defendant Hutchings as to eight-ninths.

I therefore order that the plaintiffs' costs be taxed as between party and party, including a counsel fee of $90, and that the costs of the defendant Hutchings be also taxed, including a counsel fee of $90. And that the defendant Hutchings do pay to the plaintiffs one-ninth of the costs so taxed to them, and that the plaintiffs have judgment therefor. And that the plaintiffs do pay to the defendant Hutchings eight-ninths of the costs so taxed to him, and that the defendant Hutchings have judgment therefor. Judgment. Wetmore, J.

I allow to the receiver 5 per cent. commission on the monies received by him over and above disbursements which have been provided for before in this judgment. The receiver's commission will be included in the plaintiffs' costs.

Judgment accordingly.

STANIER v. FLEMING ET AL.

Landlord and tenant—Tenancy at will—Right to distrain—Excessive distress.

A tenant at will may by agreement made during the tenancy change the nature of his holding so as to make the rent payable at fixed periods, and upon this being done a right of distress is given to the landlord.

Held, also, that in levying distress for rent a bailiff is justified in seizing sufficient to make the realization of the rent and expenses certain, but must be careful not to take more than what is manifestly sufficient for that purpose.

[WETMORE, J., *Oct. 31, 1898.*

This was an action against the defendant Mrs. Currie and Fleming her bailiff for an unlawful distress of the plaintiff's goods, and in the alternative for an excessive distress. The following statement of fact is abstracted from the judgment of the learned thial Judge: The plaintiff was put into possession of the premises in respect of which the rent was claimed by one Tudge under a verbal agreement of sale and purchase thereof, Tudge being in possession at the time this agreement was made. Tudge went into possession under a lease or agreement for lease made verbally with M. R. Currie, the husband of the defendant Currie. The defendant Currie was unaware of these transactions at the time, but subse- Statement

Statement. quently she adopted Tudge's act of putting the plaintiff in possession and the plaintiff by his conduct recognized her right to so adopt it and therefore the plaintiff held the property as tenant at will to the defendant Currie.

On the 3rd day of April, 1893, the plaintiff verbally agreed to pay the defendant $15 a month rent for a term commencing the 5th of September, 1892. The plaintiff failing to pay the rent, the defendant distrained for the amount of the rent from the 5th of September to the 5th of April at $15 a month.

Argument. *W. White*, Q.C., for plaintiff.

E. A. C. McLorg, for defendant.

The learned trial Judge after stating his findings of fact, an abstract of which is given above, proceeded:

Judgment. WETMORE, J.—The question of whether under the facts which I have found, the defendant Currie was justified in distraining is a question of law. It is laid down in *Woodfall's Landlord and Tenant* (13th ed.) 419, that "An actual tenancy at a fixed rent may be implied from the very slight circumstances." In *Cox* v. *Bent*,[1] the plaintiff held the premises in question under an agreement bearing date 7th December, 1824, by which the defendants agreed to let and demise them to him "in consideration of the rent of £450 and of the covenants and agreements to be entered into by the said Cox in a certain indenture of lease to be executed on or before the 29th day of September next ensuing." The plaintiff had paid no rent but he admitted a charge of half a year's rent in an account rendered him by the defendants. The defendants distrained on the plaintiff for a year's rent ending 25th March, 1827. The plaintiff replevied the goods seized. The defendant avowed a tenancy for a year ending 25th March, 1827, at a yearly rent payable half yearly on the 25th March and 29th September. The Court held that this admission of the plaintiff constituted him a tenant from year to year, and

[1] 5 Bing. 185; 2 M. & P. 281; 7 L. J. (o.s.), C. P. 68; 30 R. R. 566.

liable to distress. In *Vincent* v. *Godson*,[2] Lord Chancellor Cranworth lays it down: "That it is not necessary there should be an actual payment of rent is clear from the case of *Cox* v. *Bent*.[1] Any other act affording the same evidence of intention would do as well. In *Watson* v. *Waud*,[3] the facts were that the defendant on the 18th May, 1851, agreed to demise to the plaintiff certain premises at the yearly rent of £145 payable on the 14th November and 14th May. A Mrs. Richardson had occupied a cottage, part of the premises at £5 a year rent. Owing to no notice to quit having been given to her, she continued in possession of the cottage and the plaintiff entered into possession of the rest of the property. In October, 1851, the plaintiff and defendant agreed that the defendant was to receive from Mrs. Richardson, rent for two half years, and deduct that £5 from the rent to be paid for the whole by the plaintiff and that the plaintiff was to pay £70 to the defendant on the 14th November, 1851, and the 14th May, 1852. The defendant distrained for the £70 which he claimed to be due on the 14th November, 1851. The Court held that the agreement of October operated as a new demise and that the defendant was entitled to distrain as he did. In *Kelly* v. *Irwin*,[4] the facts were in many respects similar to those in *Watson* v. *Waud*,[3] and Wilson, J., in delivering judgment of the Court, is reported at page 356 as follows: "If this case were like the one just referred to (*Watson* v. *Waud*) in all material respects we should have held that a new tenancy had been created by the agreement of April, 1866, and that a new rent had been agreed to also. But there is this material difference between the two cases; there the new agreement was made before the rent in question fell due, so that on the day of payment the relationship of landlord and tenant was existing and the money that became payable was rent. Here the agreement which had relation only to the year 1865 was not made until after that year had altogether expired so that the relation of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but was merely a sum in gross and

Judgment. Wetmore, J.

[1] 24 L. J. Ch. 122; 4 De G. M. & G. 546; 2 W. R. 408; 2 Eq. R. 834.
[3] 8 Ex. 335; 22 L. J. Ex. 161; 1 W. R. 133.

Judgment.

Wetmore, J.

could not therefore have been distrained for." In the case I am now deciding, the agreement was made before the rent fell due on the 5th April, so the relationship of landlord and tenant did exist between the plaintiff and Mrs. Currie on that date. And therefore the facts of this case are more in accord with *Watson* v. *Waud*[3] than those in *Kelly* v. *Irwin*.[4]

When there is a tenancy at will at a fixed rent, such rent may be distrained for. See *Woodfall Landlord and Tenant* (13th ed.) 227, citing *Anderson* v. *Midland Railway Co.*[5] See also *Yeoman* v. *Ellison*.[6] Now as it is good law that if a person is in possession of land not under a demise, but under an agreement for a lease, he can by his conduct or by special agreement change the nature of his holding to a demise giving his landlord power to distrain, or that if a person is in possession as in *Watson* v. *Waud*,[3] he can make an agreement operating as in that case, and giving the right to distrain; I cannot see on principle why a tenant at will cannot during his tenancy make an agreement to pay his rent at a fixed period, and so give his landlord power to distrain. Therefore upon the issues joined upon paragraph 1, and the amended paragraph 1a of the statement of defence I find for the defendants.

As to the claim for excessive distress; the amount directed to be distrained for was $90, and no question was raised as to that amount being excessive if the defendants were justified in distraining at all. The only excessive distress complained of was that the bailiff had distrained on more property than was necessary to realize the amount of rent and expenses of distress. In calculating the expenses of distress the bailiff cannot reasonably be expected to decide upon a certain sum; he must make allowance for contingencies, owing to possible postponements either for want of bidders or at the request of the tenant, and the expenses of advertising are not altogether ascertainable with certainty. I would therefore be inclined to think that after making all allowances for unforeseen occurrences, and allowing the charges provided by law for levying the distress, man in pos-

[4] 17 U. C. C. P. 351.

[5] 30 L. J. Q. B. 94; 3 E. & E. 614; 7 Jur. (N.S.) 411; 3 L. T. 809.

[6] L. R. 2 C. P. 681; 36 L. J. C. P. 326; 17 L. T. 65.

session, disbursements for advertising allowance for appraiser and commission to the bailiff, that $30 would not be an excessive estimate to cover possible expenses of distress. Therefore if the bailiff had distrained goods with a view of having possibly to raise $120 from the sale of them he would not have been very far astray. No doubt if the value put on the property distrained by the plaintiff is correct, the distress was excessive because he values the property at $455, and to seize that amount of property to realize about $120 would be outrageous. But I am satisfied that the plaintiff's valuation of some of this property is greatly exaggerated, especially when we consider that if the rent was not paid the usual way of realizing it is to sell the goods by auction. The question is not what the goods were worth to the plaintiff, but what, allowing for the state of the market would they likely fetch at a fair auction sale. At any rate, that would be one fair way of estimating their value when seized under a distress for rent. There were three other witnesses called as to the value of these articles, namely, Dunn, Hamilton and Banks, and I have no reason to suppose that they were otherwise than independent witnesses. Dunn valued the property on two occasions, the first time shortly after the seizure, and the second time with Hamilton, a month and upwards afterwards. Dunn and Hamilton made a very materially different valuation on some of the property from what Dunn did the first time he valued. They valued everything except thoroughbred pigs at much less. As to the writing desk and Banner waggon, that is accounted for because Dunn stated that these articles were not in the same condition when he and Hamilton valued them, that they were in when he first valued them, some veneering had in the meanwhile been knocked off the desk and some of the spokes of a wheel of the waggon had been knocked out and the wheel considerably knocked about. I am of opinion that in deciding this question of excessive distress the defendants must be bound by the value of the article when the bailiff seized, not the value a month afterwards when they had become damages, because we are inquiring into his acts at the time of the seizure, not afterwards.

Judgment.
Wetmore, J.

Judgment.
Wetmore, J.

I will, therefore, in order to get at the question of whether there was an excessive distress accept as a starting point Dunn's valuation of these articles on the first occasion, as I have no other means of arriving at it in view of the condition they were then in, except the plaintiff's valuation, which as I have before stated is exaggerated. I do not consider either Dunn or Hamilton very competent to form an opinion as to the value of the piano. The other articles valued by Dunn and Hamilton in May were in the same condition that they were in when seized, at least, I assume they were, as there is no evidence to show they were not. I therefore with the same object accept their valuation of these articles. I take Hamilton's valuation of three common pigs, and Bank's valuation of the piano, with respect to which I believe him competent to form an opinion.

In this way I find that these articles would probably fetch at a fair auction sale as follows:—

The writing desk, $30; piano, $50; pony, $20; Banner waggon, $30; 2 thoroughbred pigs, $45;	$100 00
3 common pigs, $30	105 00
	$205 00

That would be $85 more than the $120, which I have held the bailiff might fairly consider that it might be necessary to raise and which he was justified in distraining for. It is laid down in *Woodfall Landlord and Tenant* (13th ed.) 464, that the goods distrained must not be "excessive in quantity and value; *i.e., much beyond* what is necessary to satisfy the actual arrears of rent." It is laid down in *Roden* v. *Eyton*,[1] "that a party seizing under distress is bound only not to take what is manifestly excessive." In *Roscoes' Nisi Prius* (15th ed.) 821, it is laid down that "when a landlord is about to make a distress he is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take." Where a person is pursuing a remedy provided by law for the recovery of his rights, I am not disposed to hold him liable for an error in judgment unless the error is a gross one. And although I am free

[1] 6 C. B. 427; 18 L. J. C. P. 1; 12 Jur. 921.

to confess that the bailiff in this case trod pretty closely upon the border line, I am not prepared to say that his seizure was so *manifestly* excessive that I ought to hold him and his principal liable for an excessive distress. Judgment. Wetmore, J.

While I have taken the figures I have mentioned as a starting point, I am of opinion that the bailiff might reasonably allow something for the scarcity of cash proved to exist, the accidents which prevail even at the best auction sales and conclude that some of the articles would not even realize what I have set down. It is quite possible in view of the testimony that a purchaser might not have been found for the piano at all, and, if so, a very little deduction from the value of the other articles would leave a very small margin. I think a bailiff is justified in seizing sufficient to make the realization of the amount of rent and expenses certain, while at the same time he must be careful not to take what is manifestly more than sufficient. I have therefore, although I must say with considerable hesitation arrived at the conclusion that the distress was not excessive and find for the defendants on the issues arising out of that branch of the plaintiff's claim. On this point I would also refer to *Huskinson* v. *Lawrence*.[8]

Judgment for defendants with costs.

SMITH v. CLINK.

Bills of Exchange—Order for payment—Necessity for giving notice of dishonour of—Validity of verbal agreement to give a reasonable time for payment.

Defendant being indebted to plaintiff, gave to the plaintiff at his request on account, an order for $31.50 on one Thompson payable to plaintiff or order on the understanding that the plaintiff would give the defendant a "reasonable time" to pay the balance of his indebtedness. The plaintiff duly presented the order to Thompson, who refused to accept for more than $20.00, claiming that was all he owed the defendant. The plaintiff thereupon, without returning the order or giving any notice of dishonour, issued a writ for the full amount of his claim.

Held, that notice of dishonour was necessary to support the action *quoad* the amount represented by the order.

Held, further, that a promise to give a "reasonable time" for payment is not too indefinite.

Held, further, that the agreement to give the defendant a reasonable time was a binding agreement, under the circumstances.

[WETMORE, J., *Dec. 16, 1893.*

[8] 25 U. C. R. 58.

Statement. This was an action for goods sold and delivered and money lent. The facts are sufficiently stated above.

Argument. *F. F. Forbes,* for plaintiff.

D. H. Cole, for defendant.

Judgment. WETMORE, J.:—I am of opinion that *quoad* the amount represented by this order the plaintiff ought to have given notice of dishonour before he commenced the action. In the first place the defendant was entitled to have the order presented because the Thompsons being indebted to him in the amount of the order were bound as between him and them to accept or pay it.[1] And when the order was not paid or accepted the defendant was entitled to notice of dishonour.[2] The consequences of not giving notice of dishonour are that the drawer in this case would be discharged not only from liability on the bill itself, but on the consideration for which the bill was given. See *Byles on Bills,* 15th ed., 239, 14th ed., 241, and *The Bills of Exchange Act,* sec. 48. In *Smith* v. *Mercer,*[3] the plaintiffs sold to the defendants goods to be paid for by cash or "approved bankers bills." The defendants paid by an "approved bankers bill," they were not parties to this bill however. This bill was dishonoured, the defendants received no notice of dishonour. An action being brought against the defendants for the price of the goods it was held that they were discharged because they had not received notice of dishonour. Bramwell, B., in giving judgment in that case says: "They (meaning the defendants) are liable in the same manner and with the same incidents as if they had been called on as they might have been to indorse the bill. But they are not liable otherwise and therefore not liable without a notice of dishonour being given to them." It was urged that the bringing the suit was a sufficient notice on dishonour. I think not. I think the defendant was until he received notice of dishonour entitled to believe that his order would be honoured. The moment he received the notice of dishonour he might

[1] "The Bills of Exchange Act," 53 Vict. C. 33, s. 45, and s. 46, s.-s. (b).

[2] Ibid, s. 48.

[3] (1867) L. R. 3 Ex. 51; 37 L. J. Ex. 24; 17 L. T. (N.S.) 317.

take steps promptly to take up the order and so avoid being saddled with costs. It would be exceedingly unfair I think under such circumstances to saddle an entirely innocent and unsuspecting drawer of a bill, such as the defendant was, with costs in this way. I think the action was brought too soon and the defendant is entitled to be credited with the amount of such order. This, however, would still leave a balance due to the plaintiff. Judgment. Wetmore, J.

It was claimed however that the plaintiff was too precipitate in bringing his action as to the whole amount, because there was a binding agreement on his part not to sue until the expiration of a reasonable time. Two questions are raised here: First. Whether a promise to give a reasonable time was not too indefinite? Second. Whether the promise was not *nudum pactum* as being without consideration? As to the first question: In *Oldershaw* v. *King*.[4] a promise to guarantee the debt of a third person made in consideration of the creditor forbearing to press the debtor for immediate payment was held to be a sufficient consideration for the promise to guarantee and that the promise to forbear was a promise to forbear for a reasonable time. See also *Alliance Bank* v. *Broom*.[5]

I, therefore, am of opinion under these authorities that the promise of forbearance was not too indefinite. I am also of opinion that the promise was not *nudum pactum*. I do not pretend to hold that a promise made in consideration of the payment of part of a debt to forbear suing for the balance would not be *nudum pactum* provided that there is no dispute as to the claim, for in that case the debtor would only do what he is bound to do anyway. But when the promise is made in consideration of the debtor giving a security such as that in question, a negotiable security, although for part of the debt, I think the consideration is sufficient. The defendant was not bound to give the document which would make the third party liable. In *Bradford* v. *O'Brien*,[6] Robinson, C.J., lays it down: "If the plaintiff in order to obtain

[4] (1857) 27 L. J. Ex. 120; 2 H. & N. 517; 3 Jur. (N.S.) 1152; 5 W. R. 753.

[5] (1864) 34 L. J. Ch. 256; 2 Dr. & Sm. 289; 5 N. R. 69; 10 Jur. (N.S.) 1121; 11 L. T. 322; 13 W. R. 127.

[6] 6 U. C. Q. B. 417.

Judgment. Wetmore, J.

the defendant's promise, parted with anything that was of value to himself, that would constitute a valid consideration "though the thing so given up would be of no legal value in the defendant's hands." Here the defendant in order to obtain the plaintiff's promise parted with his claim against the Thompsons, something which was clearly of value to him and which no doubt would have been of value to the plaintiff if the Thompsons had accepted the order. I am therefore of opinion that this action was brought too soon.

Judgment for defendant with costs.

FARRELL v. WILTON.

Infant—Adoption—Parent's right to custody—Liability of parent for maintenance.

Held, that a father, who has given his child to another to adopt and rear, has, notwithstanding, the right to retake the custody of the child at any time.

Held, further, that a father so retaking his child is liable for maintenance during such period of adoption only by virtue of a contract express or implied.

[WETMORE, J., *Dec. 16, 1893.*

Statement.

This was an action brought for the board, clothing and maintenance by plaintiff of Rubina Wilton, an infant daughter of the defendant, from March, 1888, to December 30th, 1892. The facts sufficiently appear from the judgment.

Argument.

W. White, Q.C., for plaintiff.

H. A. J. Macdougall, for defendant.

Judgment.

WETMORE, J.—In the fall of 1887, the defendant's wife and the mother of Rubina died. Previous to Mrs. Wilton's death the child had been staying with the Farrells for some eight or ten months or more, but before the mother died she had been brought home. After the mother's death the defendant proposed to give the child to the Farrells to bring up, and he made that proposition to the plaintiff who asked

him for writings on the matter, but the defendant refused to give writings stating that his word was as good as writings, and that he would never ask her back. Upon this understanding the child was brought to the Farrells' in March, 1888, and was accepted by them under such understanding. I find that the Farrells treated the child well, clothed and fed her properly according to their station in life, that they became much attached to her and she became attached to them; that there was nothing in their treatment of her sufficient to cause the defendant to take her away. However, on the 30th December, 1892, the defendant took the child to his own home on the pretence that he wanted her there to spend New Year, and she never was brought back again. Judgment. Wetmore, J.

Now the question is, can the plaintiff under these circumstances recover from the defendant for the board, clothing and maintenance of the child from March, 1888 to December 30th, 1892?

I have searched the books in vain for a case where an action has been maintained under similar circumstances. In the first place it is clear beyond all question that the defendant had the right to revoke the authority he gave with respect to the custody of the child, at any moment. See *The Queen* v. *Barnardo*,[1] and *Barnardo* v. *McHugh*.[2]

It is quite clear that if the defendant had demanded possession of his daughter from the Farrells, and they had refused to grant it, on application to the Court a writ of *habeas corpus* would have issued to compel them to do so and it would be no answer that the Farrells claimed to be reimbursed the expenses they had been at for her board or would the execution of the writ have been delayed until such had been paid. The defendant was therefore justified in law in taking his child away from and in omitting to bring her back to the plaintiff.

In *Urmston* v. *Newcomen*[3] the majority of the Court held that the general question as to the father's liability did

[1] (1889) 58 L. J. Q. B. 553; 23 Q. B. D. 305; 61 L. T. 547; 37 W. R. 789; 54 J. P. 132.

[2] (1891) 61 L. J. Q. B. 721; (1891) A. C. 388; 65 L. T. 423; 40 W. R. 97; 55 J. P. 628.

[3] 4 A. & E. 899; 6 N. & M. 454; 5 L. J. K. B. 175.

Judgment. Wetmore, J.

not arise because to quote the language of Denman, C.J., at page 908, "In order that the law should imply a liability in the father to repay another for supporting his child it is absolutely necessary that the desertion of the child by the father should be proved." Patterson, J., at page 910, says, "It is immaterial whether the letter of September 27th constituted a binding contract on the plaintiff. It is enough if it induced the defendant to part with the child so as to negative the presumption of a contract by him." In *Seaborne* v. *Maddy*,[4] Parker, B., in charging the jury says: "No one is bound to pay another for maintaining his children either legitimate or illegitimate, except he has entered into some contract to do so. Everyone is to maintain his own children as he himself shall think proper and it requires a contract to enable another person to do so and charge him for it in an action." In *Shelton* v. *Springett*,[5] Jarvis, C.J., lays it down: "It is well settled that a father is not without some contract express or implied liable for necessaries supplied to his son." The only question then under the authorities I have to decide is: was there any contract by which the defendant bound himself to pay the plaintiff for the maintenance of the child? It is manifest that there was no express promise or contract to do so. Was there an implied contract then, if there was, when did it arise? There was no such implied contract when the defendant gave the child to the plaintiff, the circumstances entirely rebutted any such implication. The plaintiff took her with the intention of boarding, clothing and maintaining her without charging the defendant anything, and the defendant gave her to the Farrells under that understanding. Did the implication of a promise to pay arise when he took her away? The law is that he was at liberty to revoke his consent and take her away at any time. The plaintiff must be presumed to know the law. How then, could the defendant doing an act which he had a right to do, and which the plaintiff must be presumed to know he had a right to do when they took the child raise an implied assumpsit or promise having relation back to the time when they so took the child and beating down the understanding which was then the other way. I

[4] 9 C. & P. 497.
[5] 11 C. B. 452.

cannot understand on what principle of law I can so hold that. Admitting that the defendant acted in bad faith, if you choose, he was acting strictly within his legal rights. Certainly no action could have been brought against him for damages for his breach of contract in taking the child away. If not, I cannot see how in substance the same end can be obtained by bringing an action for maintenance. It seems to me too, that it would be very idle to say to a parent in poor circumstances: Notwithstanding that you have contracted to give up your child to another never to ask or take her back again, still you are at liberty to take her back, the law regards the parent's rights and the ties of domestic relations of this nature too strongly to say that you are not at liberty to do so; yet if you do take her back, you will be liable to be mulcted in a large sum for her maintenance. No man in moderate circumstances would dare to assert his legal rights for it would be ruinous. In this case for instance over $1,000 are claimed; that if allowed would almost ruin the defendant, I should judge. I am of opinion that the plaintiff being presumed to know the law must be presumed to have taken the child under the understanding that he would maintain her at his expense, running the risk that the plaintiff might revoke his consent and if he did he would have to remedy. I must find for the defendant.

Judgment. Wetmore, J.

Judgment for defendant with costs.

HAMILTON v. WILKINSON.

Practice—Setting down for trial—Venue.

In setting a cause down for trial the situation of the parties and the peculiar circumstances of each case should be considered and the case set down for the most convenient place and time.

[WETMORE, J., *June 8, 1894.*

Application to set down for trial.

Statement.

F. L. Gwillim, for plaintiff.
Bertram Tennyson, Q.C., for defendant.

Argument.

Judgment.

WETMORE, J.—This is an application on behalf of the plaintiff to set the cause down for trial at the sittings to be held at Moosomin on the 8th January instant. It is opposed on three grounds, one of which is that the cause of action arose near Estevan. That in itself does not strike me as a good reason for directing the trial to take place there. According to the old practice in England the plaintiff had the right to lay his venue in transitory actions where he pleased, and that meant that he had the right to choose where the trial should take place. That right however was subject to the defendant's right to take out a rule to have the venue changed to the place where the cause of action arose upon an affidavit setting forth that the cause of action arose in such place and not elsewhere. This rule went as a matter of course, and was what was called in the old practice a side-bar rule. The rule provided however that the venue might be brought back to the place where it was originally laid, upon the plaintiff filing counsel's hand to give evidence of some material matter happening outside the place to which the venue was changed by the defendant's rule and if such counsel's hand were filed and the plaintiff failed on the trial to give evidence of such material fact happening or incurring outside of such place the plaintiff was nonsuited. Of course it was open to either party to apply to change the venue upon special grounds, as, for instance, it being very much less expensive and very much more convenient to try it at a particular place. This practice has been abandoned in England and now the plaintiff has the right to lay his venue or fix the place of trial where he pleases. The place so fixed however may be changed, but the plaintiff will only be deprived of his right upon the defendant showing a "manifest preponderance of convenience" in trying it elsewhere: 1 *Archbold Q. B. Practice* (14th ed.) 589. And he would be deprived of it if it were shewn that the trial at the place fixed would be attended with very great additional expense: *Ib.* 590. In the North-West Territories we have not the divisions of counties as they have in England and in Eastern Canada. The plaintiff, therefore, cannot fix a venue as is done there, either by setting it forth in his pleading or by giving notice to the defendant, and consequently the Ordinance provides that when a cause is at issue the plaintiff

Judgment.
Wetmore, J.

may apply to a Judge to fix a place of trial, which the Judge may do either by directing it to be set down for a regular sittings or appoint a special Court with a time and place of trial. And in my opinion the intention of the Legislature is that the Judge shall take into consideration the situation of the parties to the cause and fix the place of trial at the most convenient place. I may say now as regular sittings are established all over the judicial district I would not be disposed to appoint a special Court to try a civil action (except a small debt case) unless under special circumstances, but would appoint the trial to take place at some one of the regular sittings. In exercising this authority the Judge ought to be governed by a variety of considerations. In the first place, I think in view of the immense extent of this country and the great distances, he ought not to allow a plaintiff arbitrarily to select a place for trial which would be convenient for neither party, as for instance, if a plaintiff residing here with his witnesses and a defendant residing in Carnduff with his witnesses, the plaintiff ought not to be allowed to have the trial fixed for Saltcoats or even for Whitewood or Grenfell. In such case the place of trial should be either Moosomin or Carnduff. Neither should the place of trial be fixed so as to suit the convenience of advocates and to the inconvenience of parties and witnesses. On the other hand, if the matter of convenience and expense are about evenly balanced I should say that the plaintiff's wish as to the place of trial should prevail. If, however, the preponderance of convenience is decidedly on the side of the defendant his wish should prevail. And in saying this I am not disposed to weigh the question in very nice scales, and I would be disposed to take other matters into consideration also. In fact I am rather inclined to think that each case should stand on its own merits, and that no hard and fast rule should be laid down.

The defendant in this case also opposes this application on the ground that the preponderance of convenience is in favour of trying the cause at Estevan, as he has two witnesses, himself and one Blanks, who both reside at Estevan. The plaintiff's affidavit does not disclose how many witnesses he has or where they reside, although I understood Mr. Gwillim, who appeared for him, to state that

Judgment. Wetmore, J.

the plaintiff was the only witness for himself. If so, I am inclined to think that the balance of convenience is rather in favour of trying it at Estevan. It is true that the difference is only one witness, and that certainly is not much. But the advocate for the plaintiff is Crown Prosecutor, and almost invariably has to attend these outlying sittings, whereas if the defendants wish to bring their own counsel from Carnduff, and the trial is fixed here, they must bring him up specially and at very great expense. And moreover as the cause of action arose at Estevan it may be necessary as the trial progresses to call some other witnesses unexpectedly, who would likely be found there. I do not wish it to be understood that any one of the grounds stated would in itself be considered sufficient to deprive the plaintiff of the privilege of having his case tried at Moosomin, but I think taking the three facts together the balance of convenience is in favour of Estevan. However, apart from that, the defendant's third objection must prevail, the plaintiff under all the circumstances has delayed too long in taking steps to have this cause set down for the next Moosomin sittings. This cause was at issue on the 20th March. Nevertheless, no steps are taken to have it set down until the 20th December, when notice of motion is served on the agent of the defendants' advocate here for the 26th. Now that would have been ample time in which to make the application if the advocates and the parties lived near here. But the plaintiff's advocate ought to have considered that the advocate of the defendant lives a long distance from here, that the mails only go to where he lives, three times a week, and that it takes at least two days for a letter to reach him from here, and that it would be reasonable that the agent would have to correspond with his principal. It is true that if the agent had mailed a letter to Mr. Elmore on the 20th it would have reached him, barring accidents, on the 22nd, but he did not write until the 21st, the day after he was served. Now, while the agent must exercise diligence I am not disposed to say that he was guilty of neglect in waiting until the next day, or that he did not act with reasonable promptness. I do not know what pressure of business he might have had or what time of the day he was served. A letter mailed here on the 21st would not leave until the 22nd, and would not reach Carnduff until

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Wetmore, J.

the 25th, Christmas day, and consequently Mr. Elmore did not get it until the 26th, Tuesday; on that day the mail leaves Carnduff for here, and unless Mr. Elmore could prepare his affidavit to catch that mail, he could not get one before, nor by the ordinary course by any possibility before Saturday morning, December 30th, exercising reasonable promptness; it is just what he did do, and he presents a state of facts which certainly, to say the least, requires consideration before I could comply with the plaintiff's application. The next day was Tuesday, and the next day New Year's day. I was not able to give the matter the consideration it deserved before the 2nd January, and certainly will not now in view of the fact that the defendant has to issue subpœna to Estevan and get a witness from there, order the cause to be set down for the Moosomin sittings opening next Monday. A letter written Mr. Elmore to-day would reach him Friday; he could not possibly get a subpœna to Estevan before Monday, and the witness could not get here before Thursday morning, the 11th. Of course, if the defendant's advocate had been guilty of laches I might compel them to use the wires, but he has not been guilty of laches, he has acted with promptness, and under the circumstances I will not rush him on to trial. If people will put things off to the last moment they will sometimes find that they will experience difficulties. If the parties will consent to have the trial set down for the next sittings at Estevan I will order it. If not, I will dismiss this application. The costs of each party in any event to be costs in the cause.

Order accordingly.

JOHNSTON v. KEENAN.

Master and servant — Infant — Wages — Counterclaim — Unconscionable agreement.

A hiring at $9.00 per month "for the herding season" entitles the servant to payment of wages at the end of each month, and the servant's subsequent desertion of the master does not forfeit the servant's right to such wages.

An agreement on the part of an infant to pay for any sheep lost during the herding of same by the infant is unconscionable and cannot be enforced.

[WETMORE, J., *Jan. 20, 1894.*

Statement. Action by an infant for wages against his master. The facts appear in the judgment.

Argument. *D. H. Cole*, for plaintiff.

F. F. Forbes, for defendant.

Judgment. WETMORE, J.:—This was an action brought to recover a balance of less than $100 claimed to be due for wages. The plaintiff is an infant. He commenced to work for the defendant on the 4th April, and continued to work for him until the 15th October, when he left. This is not disputed. It is also proved and not disputed that he was to be paid $9 a month. But the defendant swore that the plaintiff was engaged at $9 a month for the herding season, which, according to the testimony, ended when the snow became so deep that the sheep could not get through it to graze. The plaintiff left the defendant's employment without justification before the herding season was over, and the defendant contends that he is, therefore, not entitled to recover any wages. The plaintiff on the other hand swore that no time was mentioned in the bargain during which he was to stay, that he was just hired at $9 a month. It is not necessary for me to determine this question of fact which is so in dispute, because under either state of facts the plaintiff is entitled to recover for six months wages, down to the 4th October, and cannot recover for the broken portion of the month, from the 4th to 15th October. If the plaintiff is correct this was a hiring from month to month and the plaintiff could have left at the expiration of any month and recovered his wages down to the time he so left. This was not disputed. If the defendant was right a periodical payment of wages accrued due at the end of each month, and the plaintiff could have maintained an action therefor, and that right would not be lost by the plaintiff's subsequent desertion or abandonment of his contract: *Chitty on Contract* (11th ed.) 530. *Roscoe N. P.* (15th ed.) 464. *Smith's Master and Servant* (Blackstone ed.). See *Taylor* v. *Laird*,[1] and *Button* v. *Thompson*.[2]

[1] 1 H. & N. 266; 25 L. J. Ex. 329.

[2] L. R. 4 C. P. 330; 38 L. J. C. P. 225; 20 L. T. 568; 17 W. R. 1069.

Judgment.
Wetmore, J.

The defendant has counterclaimed or set off a claim, among other things for the loss of some sheep and lambs. The defendant does not set up in his pleading that these animals were lost through the negligence of the plaintiff, nor did his counsel contend at the trial that they were lost through the plaintiff's negligence. But the defendant swore that it was agreed between him and the plaintiff that the plaintiff would pay for any sheep that were lost during the herding. The plaintiff denied that any such agreement was made. It is not necessary for me to determine this question of fact either, because if the plaintiff is right of course he is not liable as contractor, but if the defendant is right he cannot hold the plaintiff responsible under such an agreement. It would be an utterly unconscionable agreement, it is simply an agreement to insure the defendant's property against not only the plaintiff's negligence but against pure accident, and no such agreement will be enforced against an infant, because it is inequitable. See *Chitty on Contracts*, 143, and 1 *Story's Equity Jurisprudence* (13th ed.) 240. I have less hesitation in ruling in this way because, when the plaintiff first bargained with the defendant for the hiring no such terms as these were mentioned, the plaintiff before concluding the bargain went to his home, I assume to consult his father, and it was only after his return, according to the defendant, that this provision was urged. The other items of the defendant's set off are included in the $8 credit given by the plaintiff, which he fully explained. I, therefore, allow the plaintiff six months wages at $9 a month.....$54 00

Deduct the credit 8 00

And I order judgment for the plaintiff for $46 and costs.

Judgment for plaintiff.

ADAMS ET AL. v. HUTCHINGS ET AL. (No. 3).

The judgment pronounced after trial[1] reserved "all further directions that may be necessary." Relying on this, the defendant some six months after judgment was pronounced applied for further consideration, the matter so to be considered being certain costs and expenses of the defendant's bailiff for keeping possession of the property in dispute after service of an interim injunction order and before the appointment of a receiver. The request for such further consideration was made and the proceedings therefor taken according to the English practice in the Chancery Division.

Held, (1) That such practice was correct.

(2) That a reservation of further directions does not entitle a party to move for further consideration.

(3) That, in any event, the Court will not take into consideration at a further hearing any matter which was not raised by the pleadings, and which should have been brought under the notice of the Court at the trial.

[WETMORE, J., *April 21, 1894.*

Statement. This was an application for further consideration in alleged pursuance of the judgment[1] pronounced on the 30th October, 1893, after trial. The defendant Hutchings moved to set the cause down for further consideration, and he took the steps required by the practice in England in the Chancery Division for so doing, that is, he requested the clerk to so set it down, and he gave notice to the plaintiffs' advocate that it was so set down. When the matter came up Hutchings' advocate stated that the application was for the purpose of obtaining the costs and expenses of Hutchings' bailiff for keeping possession of and taking care of the property in dispute from the time of the service of the interim injunction order herein until the receiver took possession.

Argument. *W. White*, Q.C., for the defendant.

F. F. Forbes, for the plaintiff, *contra*.

Judgment. WETMORE, J.:—I am of opinion that if Hutchings is or ever was in a position to recover these costs (and with respect to that I express no opinion) he could only do so by way of damages and not as costs in the cause. The plaintiff's advocate took several objections to this proceeding, only two of which it will be necessary to refer to, viz.: 1st. That neither the request to have the cause set down or the notice to him

[1] For text of judgment see ante p. 206.

specified the nature of the further consideration required. 2nd. That all matters in difference in this suit were *res adjudicatae* by my judgment of the 30th October and the decree thereupon. That the question as to the right to recover these costs should have been raised at the hearing, and that not having been done it could not be raised now.

So far as I can find, Hutchings' advocate was correct both in the form of request to have the cause set down and in the form of notice he gave to the plaintiffs' advocate. But when my attention was drawn to it, it struck me that it surely would be a very extraordinary proceeding if a party could by an application of this sort without specifying what he was going to ask, bring the other party before the Court and possibly spring something on him that he never for a moment contemplated. Then my attention was drawn to Order XXXVI., r. 21, of the English Rules, which prescribes that "When any cause or matter in the Chancery Division shall have been *adjourned* for further consideration the same may, after the expiration of eight days and within fourteen days from the filing of the chief clerk's certificate be set down . . . for further consideration." Of course this involves the inquiry, what is meant by "the Chief Clerk's Certificate?" And when or under what circumstances is a cause set down for further consideration? On looking into the practice in England I find that where a matter has been heard before a Judge and he is not in a position to make a final decree until some account is taken or inquiry made, he adjourns the cause for further consideration, and in the meanwhile his chief clerk is directed to take the account or make the inquiry, and when this is done he files a certificate thereof and thereupon if this certificate or report is not excepted to the party wishing to move has the cause set down for further consideration and gives notice thereof to the opposite party, and that is all that is required. It is not necessary to state what relief he is going to apply for, because he is going on the clerk's certificate to apply for the relief that he has prayed for by his pleading. See *Daniel Ch. Pr.* (6th ed.), pages 958, 959 and 1140. But my judgment of the 30th October was final; I directed no accounts or inquiries and therefore I could not have adjourned for further consideration and did not do so.

Judgment. Wetmore, J.

It is true that I reserved all further directions that may be necessary, but that must be limited to such directions as may be necessary to carry out my decree, and which I think for instance would include the plaintiffs' application for the costs of the further examination of Hutchings in Winnipeg, which was incidental to the matters I decided.

But moreover the claim which Hutchings is now seeking to recover was not brought under my notice at the trial, it was not set up by his pleading. I find it laid down in *Daniel Ch. Pr.*, 1163, as follows: "The Court will not take any matters into consideration at the further hearing which were in issue at the first hearing, but were not then decided, put into a train of investigation or reserved; such matters being considered as abandoned, or in such a state as to not entitle the plaintiff to any order on them." *A fortiori* I cannot now by this proceeding hold the plaintiff liable for a claim for damages at any rate which was never in any way brought under my notice at the hearing, and which was not in issue. Hutchings it seems to me is altogether wrong in this application, and this application must be dismissed, and as he has put the plaintiffs to the expenses of coming here to no purpose it must be dismissed with costs.

Application dismissed with costs.

STEVENS v. KEENAN.

Practice—Set-off and counterclaim.

Held, a claim sounding in damages and arising out of the contract sued on by the plaintiff is properly matter of set-off and not of counterclaim.

[WETMORE, J., *May 16, 1894.*

Statement. Application by plaintiff to strike out a portion of the defence as embarrassing.

Argument. *F. F. Forbes*, for plaintiff.

B. Tennyson, Q.C., *contra.*

Judgment.

Wetmore, J.

WETMORE, J.:—This action was brought by the plaintiffs to enforce a lien or charge which they claim to have on the defendant's land by virtue of an agreement signed by him under seal for the sale to him of a traction engine and appurtenances.

Paragraph 2 of the defence sets up that the defendant is entitled to a set off of $212 under circumstances which may be stated shortly as follows: Under the agreement, the plaintiff relies on, the defendant was to get a new engine, but it was subsequently agreed that a second-hand one should be supplied and the defendant allowed $200 on the purchase price, and the defendant did not get a set of wood grates, part of the engine, for which he claims $12. It was urged that this is not a matter of defence, but is a matter of counterclaim. Unquestionably there is a distinction between matter of counterclaim and matter of set off—all the books establish that. But I am of opinion that this is properly matter of set off and not of counterclaim. The amount claimed is damages arising out of the contract on which the plaintiffs claim, and it is laid down in *Young* v. *Kitchin*[1] that in such case the defendant should not counterclaim, but claim to set off. *Young* v. *Kitchin*[1] is cited with approval by Lord Hobhouse in delivering the judgment of the Judicial Committee in *Gov. of Newfoundland* v. *Newfoundland Railway Company*.[2]

Possibly this set off may not strictly be pleaded in form; for instance, it omits the formal heading "Set off," but that does not appear to be fatal: *Lees* v. *Patterson*.[3] The defendant has complied with Order XXI., Rule 10, by stating specifically that he relies upon the matters therein alleged by way of set off, and so far as anything has been brought to my attention is concerned he has substantially complied with the rules of practice. I, therefore, hold paragraph 2, to be unobjectionable.

Application dismissed.

[1] 3 Ex. D. 127; 47 L. J. Ex. 579; 26 W. R. 403.
[2] 13 A. C. 199; 57 L. J. P. C. 35; 58 L. T. 285.
[3] 7 Ch. D. 866; 47 L. J. Ch. 616; 38 L. T. 451; 26 W. R. 399.

HUNT v. WARREN.

Sale of goods—Appropriation of to the contract—Destruction of goods.

The defendant bargained with the plaintiff to put up in stack for the defendant twenty-five tons of prairie hay. After the hay was put up the defendant paid plaintiff $10.00 on account, and defendant wrote out and plaintiff signed the following receipt:—

Sept. 30th, '93.

"Received of G. C. Warren the sum of ten dollars ($10) as part payment for twenty-five tons of hay bought by him from me this summer. I agree to fireguard and fence it, making it free from all danger until G. C. Warren shall have drawn it to his farm next winter, when G. C. Warren is to pay me the balance, viz., forty-two dollars.

"E. J. Hunt."

Held, that the right of property in the hay had become vested in the defendant, and that the plaintiff could recover the purchase price notwithstanding that the hay was burned before delivery.

[WETMORE, J., *June 2, 1894.*

Statement. This was an action for goods sold. The facts appear sufficiently from the head-note and from the judgment.

Argument. *F. F. Forbes*, for plaintiff.

W. White, Q.C., for defendant.

Judgment. WETMORE, J.—It is claimed that the receipt must be looked upon as the sole and only bargain between the parties and that it amounts to a sale of the hay on condition that the defendant should fence and fireguard it as therein provided. I am of a different opinion. In so far as the bargain for the sale of the hay is concerned it is merely a receipt for the $10 paid on account (and is so expressed) and extending the time of payment until the winter when the defendant would haul it away.

As to the fire-guarding and fencing, it is an agreement entered into at its date. And the whole transaction disclosed an appropriation by the defendant to himself of the specific stack of hay in question. Before the hay was hauled away and sometime in the month of September or October last it was destroyed by a prairie fire which raged during the prevalence of an extraordinarily high wind. The plaintiff had previously fenced and fireguarded the stack. The fire-

guard was about 20 feet from the stack, and was from 18 feet to 20 feet wide. The wind was so strong that the stack caught fire on the top when the fire on the ground was from 70 to 100 feet from the bottom of it. The grass was very long in the vicinity. Judgment. Wetmore, J.

The plaintiff's right to recover was disputed on the following grounds:—

1st. There was no delivery of the hay.

2nd. The defendant was not to pay for it until he hauled it away, and he never hauled it away.

3rd. The plaintiff agreed to fireguard it, making it free from all danger, which he did not do, because:

(*a*) By reason of the length of the grass he should have made a wider fireguard.

(*b*) He agreed to make it absolutely free from all danger which he did not do, as the event proved.

I have very grave doubts whether there was not a delivery of the hay to the defendant, that when the plaintiff agreed to fence and fireguard it, and did so he became the defendant's bailee. However, it is not necessary to decide this question because I am clear whether there was a delivery to him or not, the right of property became vested in the defendant, and in the absence of a stipulation to the contrary the plaintiff could have brought an action for the price; the hay was at his risk from the 30th September. In *Chitty on Contracts* (11th edition by Russell), 354, it is laid down: "It is clear that by the law of England the sale of a *specific chattel* passes the property therein to the vendee without delivery, and so it is where the sale is of a specific chattel on credit, though the credit may be limited to a definite period, for such a sale transfers the property in the goods to the vendee giving the vendor a right of action for the price and a lien upon the goods if they remain in his possession till the price be paid." In *Benjamin on Sales* (3rd ed.), 265, I find the following. In *Simmons* v. *Swift*,[1] Bayley, J., said: "Generally where a bargain is made for the purchase of goods and nothing is said about payment or delivery *the*

[1] (1826) 5 B. & C. 857; 8 D. & R. 693; 5 L. J. (O.S.) K. B. 10; 29 R. R. 438.

Judgment. Wetmore, J.

property passes immediately so as to cast upon the purchaser all future risk if nothing remains to be done to the goods although he cannot take them away without paying the price." So in *Dixon* v. *Yates*,[2] Park, J., said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery . . . When there is a sale of goods generally no property in them passes till delivery, because until then the very goods sold are not ascertained. But when by the contract itself the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel and to pay the stipulated price the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract therefore, is to vest the property in the bargainee." The principles so clearly stated by these two eminent Judges are the undoubted law at the present time. Now I do not pretend to assert that by the bargain made in August there was the sale of a specific chattel, for that was not the case, the plaintiff was at liberty to obtain the hay where he pleased, no specific hay was sold. But when the hay had been gathered and placed in stacks as agreed and the defendant notified of that fact, and he adopted the act, the same consequence would follow as if there had been the sale of a specific chattel.

The evidence is conflicting as to whether the defendant was notified that the hay was stacked before the 30th September, but on that day he was most unquestionably notified and he then not only adopted the act by acquiescence but he treated the property as his own by employing the plaintiff to fireguard and fence it, and thereupon the property passed to him. In *Benjamin on Sales* (same edition), page 302, it is laid down: "After an executory contract has been made it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the appropriation of specific goods to the

[2] (1833) 2 L. J. K. B. 198; 5 B. & Ad. 313; 2 N. & M. 606; 1 H. & W. 564.

Judgment.

Wetmore, J.

contract; the sale element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time, but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in *Rhode* v. *Thwaites*,[3] "the selection of the goods by one party and the adoption of that act by the other, converts that which before was a mere agreement to sell, into an actual sale, and the property thereby passes." I am of opinion, therefore, that there is nothing in the objection as to the delivery, possibly the action ought not to have been "for goods sold and delivered," but the words "and delivered" may be treated as surplusage, thus leaving the action for goods sold, which would be a proper form of action.

As to the second objection, that the defendant was not to pay for the hay until he hauled it away; I am of opinion under the authority of *Alexander* v. *Gardner*[4] and *Fragana* v. *Long*,[5] that the property having passed to the defendant and he being unable to take it away by reason of its destruction the plaintiff is entitled to recover. In the first mentioned case the plaintiffs agreed to ship to the defendants a quantity of butter for which payment was to be made by a bill at two months from the date of landing. The butter was shipped but was lost on the voyage and never landed. It was held that the plaintiffs were entitled to recover the price of the butter. In the other case the plaintiff residing at Naples ordered goods from M. at Birmingham to be despatched on insurance being effected; terms three months credit from the time of arrival. M. effected the insurance, declaring the interest to be in the plaintiff, and marked the goods with plaintiff's initials, they were delivered to the defendant, a ship-owner, to be carried to Naples, by whose negligence they were damaged. Held, that the property in the goods vested in the plaintiff as soon as they left Birmingham, that he was liable to pay for them whether they arrived or not, and that he was entitled to sue the ship-owner for the damage done by his negligence.

[3] (1827) 6 B. & C. 388; 9 D. & R. 293; 5 L. J. (O.S.) K. B. 163; 30 R. R. 363.

[4] (1835) 4 L. J. C. P. 223; 1 Bing. N. C. 671; 1 Scott 281, 630; 3 Dowl. 146; 1 Hodges 147.

[5] (1825) 4 B. & C. 219; 6 D. & R. 283; 3 L. J. (O.S.) K. B. 177.

Judgment.
Wetmore, J.

As to the liability of the plaintiff arising out of his agreement to fireguard and fence this hay. I am doubtful whether assuming the plaintiff to be liable this is available as a defence or whether it is not a matter upon which he would be only liable on counterclaim. However the defendant has counter-claimed and as I have arrived at the conclusion that the plaintiff is not liable at all this question is not material. As to the contention that the plaintiff should have made a wider fireguard under the circumstances; what the plaintiff was bound to do under his agreement was to fireguard and fence that stack in the same way that a prudent and careful man would fireguard and fence his own property to preserve it from danger, and in my opinion that is all the parties to this agreement contemplated he should do, and I arrive at that conclusion from reading the document itself after placing myself in the situation of the parties and considering the object that they had in view. Now I am not to take judicial notice of what a proper fire guard should be. If I were to use my own experience from what I have observed I should say that this fireguard was wider than those that I have usually seen. But the evidence shews that this one was from eight to ten feet wider than the usual run of fireguards. There was not a particle of evidence that the fireguard was not properly made or that it was not of a proper width, or that the plaintiff had omitted a single precaution that he ought to have taken, beyond the fact that the stack took fire. On the other hand the uncontradicted testimony was that the fireguard was properly made, and that it was wider than they usually are. The evidence shews that if he had made the guard fifty feet wider than he did it would not have saved the stock. And surely this agreement never contemplated that the plaintiff was bound to provide against an extraordinary contingency such as arose that day the stack was burned. I therefore find that the plaintiff fire guarded and fenced this stack in the way that prudent and careful man would fire guard and fence his own property.

The remarks that I have made on this branch of the question are applicable to the other branch of it, namely, that he agreed to make it absolutely free from all danger, that is, the agreement did not contemplate that. But if it

did and by that is meant that the plaintiff was to fence and fireguard it so as to absolutely insure it against all danger it would have been practically impossible for him to do so. The strongest fence he could have built might not stand a stampede of cattle. He might have made a fireguard wider than any man's mind might conceive of and the wind might carry a piece of burning brush into the stack in spite of all he could do. I may say in addition that the price he was to get for this fencing and fireguarding, $2, shews to my mind that neither of the parties could ever have contemplated that he was to build such a fence or make such a fireguard as would be necessary absolutely and beyond all possible peradventure to preserve the property as contended for by the defendant. Judgment. Wetmore, J.

Judgment for plaintiff with costs.

SMITHERS v. HUTCHINGS.

Practice—Review of taxation of costs—Grounds.

Held, on a review of taxation of costs that it is not necessary to set forth in the notice the grounds of the application, nor to lay objections in writing before the taxing officer.

[WETMORE, J., *June 16, 1894.*

This was an application by the plaintiff to review the taxation of costs by the clerk of the Court. Statement.

F. F. Forbes, for plaintiff. Argument.

W. White, Q.C., for defendant.

WETMORE, J.—The defendants raised two objections to the review; 1st. That under section 471 of *The Judicature Ordinance*[1] the grounds of the application should have been stated. 2nd. That objections in writing should have been carried in to the clerk. Judgment.

[1] Ordinance No. 6 of 1893, s. 471: "Every notice of motion or application shall state in general terms the grounds of the application."

Judgment.

Wetmore, J.

Section 471 of the Ordinance[1] is a general clause, and is no doubt applicable when special provisions have not been made with respect to any particular proceeding, but when such special provisions have been made it is not applicable. It will be observed that by section 471[1] the grounds of the application are to be stated in *general terms*. It will be observed that in this respect it differs from what is prescribed where an application is made to set aside a proceeding for irregularity; there different language is used: "the several objections intended to be insisted upon shall be stated in the summons or notice of motion," and I have ruled that in these applications the objections must be stated with particularity. But under section 471[1] the grounds may be inserted in general terms. So assuming that this section is applicable to applications for review of taxation it would be quite sufficient to allege as a ground that the items "are not warranted by the tariff of fees." This will be assumed, however, in every case to be the ground and I cannot believe that the Legislature intended that these general words must be introduced into every notice of review.

As to the second objection, the plaintiff relied upon the English practice which is very elaborate. The party dissatisfied must carry in before the taxing officer after he has taxed the bill, but before he has signed his certificate or allocatur objections in writing specifying the objectionable items, then the taxing officer must review his taxation of these items, and then any party dissatisfied with such taxation on review may apply for a review before a Judge. Now I am of opinion that the intention of the legislature of the North-West Territories was to provide a simple method of reviewing the taxation by the clerk and of avoiding all this roundabout method, and it has provided a simple procedure applicable to review by which the Judge may on the material that has been before the clerk have the bill of costs and such material brought before him, and review the taxation. The plaintiff seems to have complied with the ordinance, and I am of opinion that the matter of the review is properly before me. It may be prudent however to furnish an affidavit shewing that the items were objected to before the clerk, because it might be possible that in the exercise of my discretion as to costs I might not allow any costs of review even if

the applicant were successful unless the clerk were very grossly wrong. However, I lay down no rule. Each case must depend on its own circumstances. I merely throw out the suggestion. Of course if any such affidavit is used it must be served with the notice. Judgment. Wetmore, J.

Objections overruled.

MASSEY v. PIERCE.

Pleading—Chattel mortgage—Validity—Agent—Authority.

A plea of *non detinet* puts in issue only the fact of a detention adverse to or against the will of the plaintiff. It does not put in issue the fact of a detention.

[WETMORE, J., *June 29, 1894.*

This was an action of detinue, the plaintiffs claiming that the defendant detained certain wheat which they alleged to be their property under and by virtue of a chattel mortgage thereon in plaintiff's favour. The case was tried by WETMORE, J. Statement.

WETMORE, J.—The mortgage under which the plaintiffs claim is bad as against the defendant, a purchaser for value, because the affidavit of *bona fides* is made by an agent, and there is no copy of an authority in writing for him to take the mortgage attached to such affidavit as required by section 3 of *The Bills of Sale Ordinance* (No. 18 of 1889), and the mortgage is consequently void as against the defendant under section 7 of that Ordinance. The defendant must therefore succeed under paragraph 2 of the statement of defence. Judgment.

But I am of opinion that the plaintiffs are entitled to their costs upon the issue joined upon the first paragraph of the defendant's statement of defence. By that paragraph the defendant denied that "he wrongfully deprived the plaintiffs of 268 bushels of wheat or any number of bushels whatever by refusing to give them up upon demand." I take no notice of the remainder of this paragraph which in view of the alleged cause of action is simple trash. I have

Judgment. Wetmore, J.

inspected the authorities and find that the opinion I intimated at the trial is correct, and that is that such a defence only puts in issue the fact of a detention adverse to or against the will of the plaintiff. It does not put in issue the plaintiff's right of property. *Bullen & Leake* (4th ed.) 348, 383, and 384, and cases cited in 3 *Mews' Fish. Dig.*, col. 330. Assuming the right of property to be in the plaintiffs they clearly proved an unlawful detention. As the case came down for trial that was the only issue before the Court. The defence on which the defendants succeed was an amendment applied for after the plaintiffs' evidence was all in and allowed by me. Under such circumstances the plaintiffs are entitled to my finding on the issue joined on the first paragraph of the defence, and to the costs of it, which I am inclined to think will include all the witnesses they called and their subpœnas, as these witnesses only testified as to the alleged conversion of the property. However I express no decided opinion on that point, I will leave it to the clerk. I find for the plaintiffs on the issue joined upon the first paragraph of the statement of defence with costs. I find for the defendant on the issue joined upon the second paragraph of the statement of defence with costs.

And let judgment be entered accordingly.

So far as the merits are concerned this is a judgment for the defendant and he is entitled to the general costs of the cause.

Judgment accordingly.

KING v. KEENAN AND STEVENS & BURNS, CLAIMANTS.

Interpleader—Order for chattels—Registration—Costs.

Ordinance No. 8 of 1889, "An Ordinance Concerning Receipt Notes, Hire Receipts, and Orders for Chattels," required such instruments to be registered when the condition of the bailment was such that the possession of the chattel should pass without any ownership therein being acquired by the bailee."

Held, that where the condition of the bailment, although not so specified in the instrument, was nevertheless in fact of the above character, such instrument must be registered under the Ordinance.

An instrument is none the less an order for chattels within the Ordinance, because it contains a provision that payments made thereon should be considered as rent only.

[WETMORE, J., *July 4, 1894.*

Sheriff's interpleader. The facts and points involved appear sufficiently from the judgment. Statement.

D. H. Cole, for plaintiff and sheriff. Argument.

F. L. Gwillim, for claimants.

WETMORE, J.—It was admitted by the advocate for the claimants that the instruments under which they claim the separator and traction engine seized by the sheriff, were not registered under Ordinance No. 8 of 1889, intituled *An Ordinance Concerning Receipt Notes, Hire Receipts and Orders for Chattels.* But it was urged that the instruments were neither receipt notes, hire receipts nor orders for chattels and were therefore not embraced by that Ordinance. I am of opinion that they are orders for chattels. This is so palpable on the face of the documents that it is idle to discuss it. I cannot make the fact appear more plainly that the documents themselves make it appear. It was urged that the instruments were leases of the chattels mentioned. I cannot find a single word in them amounting to words of letting or demise. The only words that could possibly be construed to approach words of demise is a clause in each instrument appearing at the end of the provisions authorizing the vendors to sell the chattels upon certain specified contingencies arising, which clause is as follows: "All prior payments shall be considered as rent only." That is, that all payments made prior to any sale under such provisions should be considered as rent only. Now the object of that clause was not as I conceive to convert the translation into a letting or demise, but it was an attempt to provide that in the event of the vendors being in a position to exercise their powers to sell, previous payments should not be considered as payments on account of the purchase money, but as sums paid for the use of the chattels, thus leaving the vendors clear to recover the whole amount of the agreed selling price. Whether this clause would be effectual for that purpose, it is not necessary to determine. But I am very clear that this clause can have no effect to alter the character of these documents as gathered from the whole of their respective contents. Keenan by these documents orders the chattels, he is throughout called the purchaser and Stevens & Burns are called the vendors, and it is pro- Judgment.

Judgment.
Wetmore, J.

vided that shipment at Winnipeg by Stevens & Burns is to be considered complete delivery to and acceptance by Keenan, and the price to be paid for them is specified. The intention of the parties as gathered from the instruments clearly was that the transaction was to be one of sale and delivery by Stevens & Burns to Keenan by which the actual possession of the chattels was to pass to Keenan, but the right of property was to remain in Stevens & Burns until they were paid for, and that being so no words such as I have quoted can have any effect to alter that clear intention.

Then it was urged that because these instruments provided that the "right of possession of the said goods shall not pass to the purchaser but shall remain in the vendors until, &c.," that the bailment of the chattels was not of the character provided for by the Ordinance referred to and therefore was not embraced by it. This point however was decided against the claimants' contention by *The Western Milling Co.* v. *Darke et al.*,[1] decided at the last sittings of the Supreme Court of the Territories. The Ordinance deals with the actual possession of the bailee not his right of possession. The right of possession may be one thing, the actual possession another. And the intention of the Ordinance is to provide for the case where the condition of the bailment is such that the actual possession passes to the bailee without his acquiring the ownership, and receipt notes, hire receipts or orders for chattels are given by the bailees for the chattels. I do not consider it necessary that the condition of the bailment should be specified in the receipt note, hire receipt or order for the chattel. If as a matter of fact the bailment is of such a character that the possession has passed to the bailee then the receipt note, hire receipt or order for chattel as the case may be, must be registered. Words cannot alter facts, if as a matter of fact the bailment was of such a character that the possession *actually* passed, words in the receipt note or other document to the effect that "the right of possession" shall be in the other party cannot alter the fact. Take for instance the very documents under consideration. They specify and shew beyond all peradventure that it was the intention of the parties that the actual possession of the chattels was to pass to

[1] 2 Terr. L. R. 40.

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Keenan; as I have before stated shipment at Winnipeg was to be complete delivery to and acceptance by Keenan. The vendors were to ship the chattels and Keenan agreed to receive them. All this was done. Now is it not idle to contend under such circumstances that the actual possession did not pass to Keenan, because it certainly passed under the very provisions of the agreement, but the ownership was to remain in Stevens & Burns. Now that fills the Ordinance. We have a case, to use the language of the Ordinance, where the condition of the bailment is such "that the possession of the chattel should pass without any ownership therein being acquired by the bailee." Now this is the fact and the visible fact. Can that be cut down by a formula of words which says that the "right to possession of the said goods shall not pass to the purchaser, but shall remain in the vendors?" Words are only a means of expression, and when the acts of the parties and the actual facts under the law gives third parties such as judgment creditors or purchasers for value without notice certain rights, these rights cannot be cut down by empty words. I have arrived at the conclusion that the claimants must be barred, and so order. The execution creditor must pay to the sheriff his costs of interpleader proceedings and possession money from the time of the claim to this date and the claimants must pay to the execution creditor his costs of the interpleader proceedings and the amount so ordered to be paid to the sheriff. As the sheriff employed the plaintiff's advocate I allow him no costs of interpleader.

Claimants barred.

IN RE HARPER.

Dominion Lands Act — Homesteader — Encumbrance filed prior to issue of patent—Validity of as against encumbrancee—T. R. P. Act, s. 125, and Dom. L. A., s. 42, construed.

The words "assignment or transfer" in section 42 of the Dominion Lands Act are used in their popular sense of an absolute parting with the homestead right, and not in the technical sense of pledging the right by way of security.

The provision in section 42 of the Dominion Lands Act against the transfer of the homestead right is intended to operate only as between the Crown and the homesteader. *Harris* v. *Parkin*[1] considered.

[WETMORE, J., *Sept. 18, 1894.*

[1] 4 Man. L. R. 115.

Statement. This was a reference by the Registrar of Titles to WETMORE, J., under the provisions of the *Territories Real Property Act*.[2] The facts and points involved sufficiently appear in the judgment.

Argument. *Bertram Tennyson*, Q.C., for the encumbrancee.

F. L. Gwillim, for the homesteader, Harper.

Judgment. WETMORE, J.—The Registrar of Land Titles submitted to me under *The Territories Real Property Act*,[2] the following question, namely: "Has he power to remove an encumbrance from a certificate of ownership, the same having been regularly filed under section 125 of *The Territories Real Property Act*."[2]

The question that is raised is whether the encumbrance above mentioned is under section 42 of *The Dominion Lands Act*[3] void as between Harper, the party creating the encumbrance, and the party in whose favour the encumbrance was made, whom from what appeared before me at the argument I take to be the Haggart Bros. Manufacturing Company (Limited). After carefully considering the legislation affecting the question I have arrived at the conclusion that it must be answered in the negative. It does not appear before me either from the question submitted or from the abstract of title or in any other way what the nature of this encumbrance is. In the view I take of the question however this is not material (otherwise I would have obtained further information from the Registrar) for I will assume the encumbrance to be a mortgage drawn according to the old form of mortgage, and that is I think making the strongest assumption I can against the party insisting on the encumbrance. The first legislation in point of time I can find affecting the question is 35 Vic. cap. 23 (1872). Sub-section 17 of section 33 of that Act is undoubtedly the original legislation out of which section 42 of the present *Dominion Lands Act*[3] grew. The Act of 1872 limited the provision to homestead rights. This provision was continued with a proviso and addition by sub-section 17 of section 34 of cap. 31 of 42 Vic. (being the con-

[2] R. S. C. 1886, c. 51.
[3] R. S. C. 1886, c. 54.

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solidation of 1879). By 46 Vic. cap. 17, section 36 (being the consolidation of 1883) the provision was extended to pre-emption rights and that section is substantially indentical with section 42 of the present *Dominion Lands Act*.[3]

The first legislation that I can find in the direction of section 125 of *The Territories Real Property Act*[2] is section 125 of 49 Vic. cap. 26 (1886), which is identical with section 125 of *The Territories Real Property Act*.[2] In fact these two acts are almost identical all through. Now if matters had remained in this situation and it was found that section 36 of cap. 17 of 46 Vic. and section 125 of cap. 26 of 49 Vic. were so inconsistent with each other that both would not be given effect to, by a very well known rule of construction the latest enactment would prevail and section 125 of 49 Vic. cap. 26, would impliedly repeal section 36 of 46 Vic. cap. 17. But section 7 of 49 Vic. cap. 27, recognizes section 36 of 46 Vic. cap. 17, by referring to it and amending it. The Legislature therefore evidently did not contemplate that that section was repealed. Here we have two acts enacted at the same session and assented to on the same day, one containing an enactment exactly similar to section 125 of the present *Territories Real Property Act*,[2] and the other recognizing and making an enactment exactly similar to section 42 of the present *Dominion Lands Act*.[3] And both these enactments are carried forward into the Revised Statutes. Seeing that this is the case and if there was nothing further it would beyond all question be my duty if possible so to construe these sections that one would not conflict with the other, and not to let the doctrine of implied repeal prevail if it could be avoided. This duty is made more imperative seeing that section 8 of cap. 4 of 49 Vic. (see R. S. p. 12), provides that "The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as *declaratory* of the law as contained in the said Acts and parts of Acts so repealed and for which the said Revised Statutes are substituted." I will therefore turn my attention to the question whether these two sections can be so read as not to conflict, and I am of opinion that they can be so read. It will be perceived that all the provisions which I have referred to relating to Dominion lands make

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void *assignments or transfers* of homestead or pre-emption rights. Now undoubtedly a mortgage of land according to the old form was in form, and at law an assignment or transfer of the land subject to be defeated upon a condition, namely, the payment of the money received or the performance of the covenants contained in it as the case might be. But in equity it was not so considered and in the ordinary and popular acceptation of the term a man was not considered to have assigned or transferred his property when he mortgaged it, he was simply considered to have given a security upon it. And so section 77 of *The Territories Real Property Act*[2] adopts the popular acceptation of the term, and provides that a mortgage "shall have effect as security, but shall not operate as a transfer of the land." I may say that this section 77 has not influenced me in arriving at the conclusion I have reached and I only quote it as an illustration, because I am of opinion that this section beyond this does not affect the question. I am of opinion that parliament in using the words "assignment or transfer" in section 42 of *The Dominion Lands Act*,[3] and in the corresponding sections in prior Acts relating to Dominion lands, intended to use them in the popular sense of an absolute parting with the right, and not in the sense of pledging the right by way of security. Giving that construction to this section there is no conflict whatever between it and section 152 of *The Territories Real Property Act*.[2] And there is no difficulty in giving full effect to this last named section. A person entered and located as a homesteader or with a view of pre-empting land is undoubtedly rightfully in possession, and that section contemplates that "*any* party rightfully in possession" without exception may mortgage or encumber his possessory right, that such mortgage or encumbrance may be filed with the Registrar and if the grant afterwards issues to the mortgagor or encumbrancer that the mortgage or encumbrance shall be a charge upon the land. Probably it is not necessary for me to go any further, but assuming that I am wrong and that I ought to consider a mortgage in the old form an assignment or transfer of the land under section 42 of *The Dominion Lands Act*,[3] I am still inclined to the opinion that the registrar's question ought to be answered in the negative, and were it necessary I do not think I would

hesitate to so decide. With all respect for the judgment of the Court of Queen's Bench of Manitoba and the opinion of the majority of the learned Judges of that Court as laid down in *Harris* v. *Parkin*,[1] I am very much inclined to adopt the view stated in the head note to that case to have been held by Wallbridge, C.J., and Dubuc, J., and intimated by Killam, J., in his judgment at page 132 to be held by the Chief Justice, namely: that the provision against the transfer of the homestead right is intended to operate only as between the Crown and the homesteader; of course the same principle would apply to the pre-emption. At common law possession was *prima facie* evidence of title in fee simple. A person in possession of land could hold it against every one who could not shew a better title. A person in possession could convey or mortgage the land and the transferee or mortgagee had a perfectly good title as against every person who could not show a better title than his grantor or mortgagor. Now I cannot conceive that section 42 of *The Dominion Lands Act*,[3] or the several provisions of a similar character which I have quoted from preceding Acts relating to Dominion lands were ever intended to cut down that principle or doctrine. I look at these enactments; take the very first of them, 35 Vic. cap. 23 (1872), the preamble is as follows: "Whereas it is expedient with a view to the proper and efficient administration and management of certain of the public lands of the Dominion that the same should be regulated by statute. Therefore, &c." The preamble to the first consolidation of these laws, 42 Vic. cap. 31 (1879), was in substance the same, and so the preamble to the next consolidation, 46 Vic. cap. 17 (1883) is the same. I am aware that the preamble of an Act does not necessarily indicate the intention with which it was enacted, but it may be looked at with the object of assisting us in our search for such intention and is sometimes of great assistance in that direction. But looking at the whole object and purview of these several enactments I cannot help for my part but arrive at the conclusion (although in view of the decision of the Court of Queen's Bench of Manitoba, I do so with great diffidence) that the object of these enactments was simply to regulate the management of Dominion lands, and as part of that object to provide how these lands should be

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dealt with as between the Crown and their locatees and persons claiming under their locatees, leaving locatees and strangers as between themselves to their common law rights. In carrying this out the statute intends to provide among other things that the Crown will recognize no transfers except as provided in section 42. And in another place that as against the Crown the land shall not be liable to be taken in execution before the issue of the patent. See section 32, sub-section 3 of *The Dominion Lands Act*.[3] I think possibly the key to the whole question may be found in that section in the provision that "The title to the land shall remain in the Crown until the issue of the patent therefor," which provision is brought down from the first Act (see 35 Vic. cap. 23, section 33, sub-section 13). That is, it seems to me all that is intended by section 42 of the present *Dominion Lands Act*,[3] and the section of the other Acts for which it is substituted. Possibly without any such legislation the Crown would not be bound to recognize transfers. I am inclined to think it would not, but probably it was deemed advisable when legislating to regulate those lands to declare what the law is, and put it in black and white as the saying is, so that there could be no misunderstanding; especially as there was one portion of the Dominion, namely, in New Brunswick, where these transfers were recognized as I know from my own knowledge. I therefore answer the Registrar's question in the negative.

Registrar advised accordingly.

BELL v. LAFFERTY.

Interpleader—Chattel mortgage—Mortgagee in possession—Lien for money paid — Substituted chattels — Validity of mortgage as against prior execution creditors.

The plaintiff held a chattel mortgage on a stallion called Richard the 3rd, executed on April 27, 1893, by one McDougall, against whose goods the defendant had previously placed a *fi. fa.* with the Sheriff, but of which the plaintiff was unaware at the time of taking the mortgage. The mortgage was taken to secure a *bona fide* indebtedness. The plaintiff, in September, 1893, was in possession of the stallion under his mortgage, and gave him to the mortgagor, McDougall, as agent, to be sold in British Columbia and the proceeds invested in other horses. This was done, and such horses were brought back to the plaintiff's premises at Qu'Appelle, where they were seized by the Sheriff under the *fi. fa.* An interpleader issue having been directed and tried, *held*, that the property in the horses was in the plaintiff to the full extent of the plaintiff's claim.

[RICHARDSON, J., *Sept. 19, 1894.*

Statement. This was an interpleader issue to determine the plaintiff's right to certain horses claimed by him, and seized by the sheriff under *fi. fa.* issued at the suit of the defendant against one McDougall. The facts are sufficiently set forth in the head note and the judgment.

Judgment. RICHARDSON, J.—In a suit of *Lafferty* v. *McDougall*, the writ of summons issued January, 18th, 1893, and was served on defendant January 20th, 1893. The judgment was entered for plaintiff July 7th, 1893, and *fi. fa.* goods given to the sheriff August 17th, 1894, under which writ the sheriff seized on August 18th, 1894, some horses and colts.

Following immediately upon the seizure W. H. Bell claimed the horses and colts so seized, and upon the sheriff's application under the interpleader provisions of the *Judicature Ordinance*, Bell, the claimant, and the execution creditors were brought before me with the result that under section 415, I have heard all the evidence adduced in respect of the claim of the contesting parties, and upon this evidence have to determine whether or not the claim of Bell is supported by the evidence, and if so, as it was not questioned that the horses seized would not if sold realize more than that claim, the proper order would be that the sheriff withdraw.

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Richardson, J.

The only evidence adduced was that of the judgment debtor McDougall, and the claimant Bell and Bell's books. Both these men swore to an indebtedness of McDougall to Bell on April 27th, 1893, of $400, for which on that day McDougall executed in Bell's favour a chattel mortgage upon a number of horses, the whereabouts of all of which, save a stallion known as Richard 3rd was unknown, they having strayed. The mortgage money was to be paid August 27th, 1893, with interest at 15 per cent. It then was shewn that with Bell's consent, necessary under the terms of the mortgage, the stallion Richard 3rd was taken out of Western Assiniboia by McDougall to the Brandon and Winnipeg races shortly after the date of the mortgage, at which latter place he was found by Bell to have been detained for charges made by one Webb incurred through McDougall, and to obtain his release and get the stallion back. Bell had to pay out $128.75 on August 6th, 1893, when the horse came into the possession of Bell and remained so until in the following September, when McDougall was allowed to take the horse as Bell's agent (Bell paying the transportation expenses) to British Columbia to be there used in racing and afterwards to be traded off for other horses which latter were to be shipped east to Bell.

McDougall states that the horse was taken to British Columbia, used there, and left for the winter undisposed of, for the reason that owing to deep snow, horses could not be safely driven over the mountains. McDougall returned east, but after spring opened was engaged by a syndicate or party in which both he and Bell were interested, to go out to British Columbia to purchase some polo ponies, and having done this, he was, for Bell, to look after the disposition of Richard 3rd. McDougall was absent until August 6th or 7th, 1894, when he returned to Qu'Appelle in charge of a car consigned to Bell containing the horses and colts the subject of this dispute. Both McDougall and Bell state that the horses and colts were allowed by the C. P. R. agent into Bell's possession who employed McDougall to look after them during the day on the prairie, and at night they were kept in Bell's corral in which condition they were seized by the sheriff. Up to this time the freight charges had not been paid owing, as explained by Bell, to an over charge

which on the day of seizure had been taken off by the C. P. R. and Bell then paid for freight charges $170. Bell in his examination explains, what, but for such explanation would seem a very suspicious circumstance in connection with the mortgage. His ledger does not shew the payment of $150 to McDougall on April 27th, 1893, the date of the mortgage as sworn to but a payment of $50 with two later payments of $50 each on the 13th and 22nd of May. His explanation is that after giving McDougall the $150, and several hours after the execution of the mortgage, McDougall handed him back $100 to keep during his absence hunting his horses, to pay $50 to his servant, and the other $50 as he might require, which was done and these payments were made on the dates in the ledger. I do not consider the explanation an unsatisfactory one. Bell admits receiving $125, the proceeds of the sale of one of the horses, other than Richard 3rd, included in the mortgage.

Then as to the nature of the claim as put in by Bell after the seizure as one of direct ownership instead of arising as disclosed at the hearing. He then asserted ownership, but explained how he claimed that his ownership arose. It would be a matter for the Court to determine whether his ownership was absolute or subject to equities and it would be open no doubt to the execution creditor to ask the Court to give them the benefit of these equities, an application as I understand they declined in the face of the evidence of value given before me. Now nothing indicates that when dealing with McDougall, Bell had any notice that Lafferty had a judgment or was even suing McDougall, consequently Bell cannot be said to be a party seeking to defraud or defeat them.

Bell in my judgment, in September, 1893, was in possession of Richard 3rd and had a valid lien on him. In this condition the horse was intrusted to McDougall as Bell's agent to take to British Columbia, there to do with him just what has happened, that is, exchange him and convert his earnings into other shares than those in question, and these represented, when shipped from British Columbia to Bell at Qu'Appelle, the Richard 3rd so taken, in September, 1893.

Had Richard 3rd been seized under the *fi. fa.*, Bell would

Judgment. Richardson, J.

be entitled to have the seizure removed, he having a right to the horse subject if to aught, an equity for any surplus over Bell's claim on a sale. Having this, I cannot see on what grounds the property for which Richard 3rd was exchanged can be placed in any other condition than that horse was.

The sheriff will withdraw from seizure. No action to be brought against him. The execution creditors will pay the sheriff's and claimant's costs after taxation.

Order accordingly.

PERRY v. HUNTER ET AL.

Practice — Judgment — Interlocutory or final — Setting aside —Affidavit of merits—Necessity for—Costs.

An interlocutory judgment is irregular if it awards damages and omits to state that such damages are to be assessed, or if such judgment awards costs.

It is not necessary to produce any affidavit of merits on an application to set aside an irregular judgment.

[WETMORE, J., *Nov. 1, 1894.*

Statement.

Application by summons in Chambers to set aside a judgment for irregularity and for leave to defend. The judgment was entered in default of pleading and purported to be interlocutory only.

Argument.

R. Stevenson, for defendant.

D. H. Cole, for plaintiff.

Judgment.

WETMORE, J.—The action is for the detention of goods, and the statement of claim claims a return of the goods, damages for their detention, and costs of the suit. The judgment awards a return of the goods and then proceeds as follows: "And it is further adjudged that the said plaintiff do recover against the said defendant damages for the detention of said goods and chattels and costs of this suit." So far as the application to be let in on the merits is concerned it must fail, as the grounds of defence are not disclosed, nor is there anything disclosed in the affidavit on

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which the application is made sufficient to warrant an investigation on the part of the defendants, and I have repeatedly held that in order to set aside a regular judgment one or the other must be disclosed. According to the endorsement on the judgment it is intended to be an interlocutory judgment. If it really is an interlocutory judgment it would be quite correct, because under section 126 of *The Judicature Ordinance* that is the judgment the plaintiff would be entitled to sign on default of delivering a defence. But I am of opinion that this judgment goes further than such a judgment ought to go and therefore is not an interlocutory judgment, but more in the nature of a final one. Under *Ivory* v. *Cruikshank*[1] I am of the opinion that this judgment even considering it an interlocutory judgment was quite correct in awarding a return of the goods, and see *Annual Practice* (1894), p. 1187, but I think it is irregular in not following the form as to the awarding of damages in not stating how these damages were to be ascertained, and in awarding costs. A form of interlocutory judgment where the demand is unliquidated is given in the Rules of Practice: See *Wilson's Judicature Acts*, p. 694; and a form of such a judgment where the specific chattel and damages for its detention are sought to be obtained is given in *The Annual Practice*, 1894, p. 1187, and in both forms it is alleged that the damages are to be assessed, shewing that they are not determined and therefore that the judgment is interlocutory, and in neither form is there any mention of costs. I may say that sections 126 to 131, both inclusive, of *The Judicature Ordinance*, are substantially the same as Rules 4 to 9, both inclusive, of Order XXVII. of the *English Rules*. Section 132 of the Ordinance however which is clearly substituted for Rule 11 of Order XXVII. differs from that rule, but the difference is not of such a character as to alter the practice which should be followed under section 126 of the Ordinance as corresponding with that under Rule 4. And that practice is as I have stated. I am therefore of opinion that the judgment is irregular. It was urged however that on an application to set aside an irregular judgment if the opposite party has been in fault an affidavit of merits should be produced disclosing the nature of

[1] W. N. (1875) p. 249.

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the defence. *The Annual Practice* (1894), p. 567, was cited for that proposition, and it certainly bears it out very much I must say to my astonishment. My idea of the practice has always been that where there is an irregularity in any proceeding the opposite party can take advantage of it and have it set aside as a matter of right, provided that he has done nothing or has not acted in a way to waive the irregularity, and in such case it would not be necessary to disclose merits. And I am yet of that opinion. No authority is cited in the *Annual Practice* for the proposition except text books, namely *Chitty's Forms* and *Archibold Q. B. Practice*. I have examined *Archbold Q. B. Practice*, p. 333 (the page cited in The Annual), and find it laid down there (apparently under the heading of setting aside a judgment by default generally) that the application should be supported by an affidavit shewing that the defendant has a defence on the merits and accounting for the default. The cases cited for that are *Watt* v. *Barnett*,[2] and *Smith* v. *Dobbin*.[3] Both these cases are cited in 5 *Mews' Fish. Digest*, the first at col. 1666, and the other at cols. 1648 and 1683. And it appears that in both these cases the judgment was regular. In *Archbold Q. B. Practice* the question of setting aside judgments regular and irregular are separately treated of from pages 264 to 268, and there is no statement there that an affidavit of merits is necessary on an application to set aside an irregular judgment. In *Farden* v. *Richter*,[4] Matthew, J., set aside what he considered an irregular judgment without an affidavit of merits. The Court of Appeal held the judgment regular and held it could not be set aside without an affidavit of merits, and set aside the order of Matthew, J., but if the judgment had been held irregular unquestionably Matthew, J's., order would have stood. In this case what was laid down in *Smith* v. *Dobbin*[3] is stated on p. 129.[5] The judgment in this case must be set aside, but as the irregularity could never have occurred if the defendants had filed their defence in time, and they therefore made default, I will allow no costs.

Judgment set aside without costs.

[2] 3 Q. B. D. 183, 363; 38 L. T. 903; 26 W. R. 745.
[3] 3 Ex. D. 338; 47 L. J. Ex. 65; 37 L. T. 777; 26 W. R. 122.
[4] 23 Q. B. D. 124, 129; 58 L. J. Q. B. 224; 60 L. T. 304; 37 W. R. 767.
[5] Of 23 Q. B. D.

BOLTON v. MacDONALD.

Trespass — Distress — Fences — Ordinance No. 26 of 1891-92 discussed—Damages—Unlawful detention—Estray—Care of.

Domestic animals are not liable to be distrained *damage feasant* in the absence of a lawful fence surrounding the property damaged, but if an estray comes upon a person's premises, although not lawfully fenced, and commits damage or becomes troublesome, the owner of the premises has the right to tie such animal up and retain possession until the costs of keep are paid, which costs would include the trouble to which the owner of the premises was put.

Held, further, that an owner of premises tieing up an estray is bound to properly care for, feed and water the estray.

[WETMORE, J., *Nov. 21, 1894.*

Statement. The plaintiff's steer got into the defendant's herd on the defendant's land which was not surrounded by a lawful fence and the steer being troublesome, and continuing to remain with the defendant's cattle, the defendant tied him up and notified the plaintiff, first verbally and subsequently in writing. The plaintiff watered and fed the animal once a day only, which the Court found to be insufficient, in consequence whereof, the animal lost flesh and deteriorated in value. The plaintiff after receiving the written notice demanded a return of the animal which the defendant refused until his charges were paid. The plaintiff thereupon brought this action for damages for alleged trespass, unlawful detention and improper care of the animal.

Argument. *F. F. Forbes*, for the plaintiff.

W. White, Q.C., for the defendant.

Judgment. WETMORE, J.—The defendant claims in the first place that he had the right to distrain the animal *damage feasant*. The plaintiff in answer to this sets up that:

1st. The defendant could not so distrain because: (*a*) The property on which the animal was found trespassing as alleged was not surrounded by a lawful fence as provided by Ordinance No. 26, of 1891-1892, respecting fences. (*b*) The property with respect to which the alleged damage was done was not surrounded by a lawful fence as provided by that Ordinance.

Judgment.
Wetmore, J.

2nd. If the defendant could so distrain he abandoned the distress.

I do not feel called upon to decide the last question, in view of the conclusion I have reached upon the others.

The questions raised under the Ordinance respecting fences depend upon the construction to be given to the first section[1] thereof. The learned counsel for the defendant urged that that Ordinance does not apply to damage caused to live animals, and that it only applies to damages caused to growing crops and hay. And that if domestic animals trespass upon lands not in crop or hay lands the owner of them is liable to an action and the animals themselves are liable to be distrained for any damage they may do by virtue of the common law of England, although the land may not be fenced, and he urges this because section one of the Ordinance provides that the fence shall be "not less than eight feet" from the property damaged, and that as live animals are capable of moving around and are ordinarily liable to do so, it would be impossible to surround them with a lawful fence not less than eight feet distant.

So far as I have been able to discover, this provision in section 1 of the Ordinance is *sui generis*. In all the Acts relating to fences which I have seen, it seems to be clearly provided that if a person build a lawful fence around his property or any part of it, the whole of the property so fenced and the fence itself is sacred and if his neighbour's cattle break the fence or escape into the fenced property, the neighbour will be answerable for damages. Now what object had the legislature here in inserting such a provision? What right did it intend to protect? What danger to guard against? I am free to confess that I have had the greatest difficulty in trying to discover what the object could be or what was intended, and I have by no means arrived at a conclusion satisfactory to myself. It has occurred to me that possibly it might have been intended to keep owners of cattle harmless against damages which their animals

[1] The section reads: "No action for damages caused by domestic animals shall be maintained, nor shall domestic animals be liable to be distrained for causing damage to property, unless the same is surrounded by a lawful fence not less than eight feet from said property. Provided that all stacks of hay or grain erected in a field surrounded by a lawful fence must be not less than 100 feet from such fence."

Judgment.
Wetmore, J.

might occasion by reaching through or over the fence, but if that is the object why allow so much ground, for there is no domestic animal that can begin to reach that distance; and when I see the provision in the same section that stacks of hay or grain erected in a field surrounded by a fence must be not less than 100 feet from the fence, and the provision in section 6, that other stacks of hay must be not less than 12 feet from the fence I am forced to the conclusion that such could not have been the object. Then it has occurred to me that the object was to remove temptation a reasonable distance from the animals, and certainly a great deal may be said in support of that view. But was it the intention of the Legislature that if a person cropped his land to, say, within four feet of his fences and his neighbour's cattle broke in and destroyed the whole of his crop, both that part within eight feet of the fence, and that part further away, the owner of the crop was to be without remedy for any of the damage done? If so, where is the language that will limit the right of redress? And in discussing this last proposition it will be as well to examine the law relating to fences as it stood prior to the passing of this Ordinance. Prior to the passing of this Ordinance, chapter 12 of the *Revised Ordinances*[2] governed. Now it must be borne in mind that both these Ordinances were passed not with the object of protecting the owner of the land or other property from damage by his neighbour's cattle, but to protect the cattle owner, that is, to provide that the owner of the land or property must take certain precautions, at any rate, with respect to certain property, before he could hold the cattle owner responsible. Bearing this in mind, then, section 1, of Ordinance No. 12, of the *Revised Ordinances*[2] provided that "No action for damages caused to crops and fields by domestic animals shall be maintained unless such crops and fields are enclosed by a lawful fence," and section 3 was somewhat similar to section 6 of Ordinance No. 26, of 1891-1892. Chapter 12 of the *Revised Ordinances*[2] therefore provides that the owner of crops and fields and stacks of hay and grain could maintain no action for damages caused thereto by domestic animals unless the property was fenced as therein provided, leaving I assume to the land-owner any remedy he might have at

[2] R. O. 1888, c. 12.

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common law for damage to other property by such animals untouched. Possibly there might be little or no difficulty in construing that Ordinance although it might be a difficult thing to determine just what was meant by the term "fields" therein. But this I am quite confident of, namely; that if a piece of land was set apart and enclosed for the purpose of pasturing cattle therein, it would be a field (a pasture field) within the meaning of that Ordinance, and that the owner thereof could not maintain an action for damage done therein by a domestic animal unless such field were surrounded with a lawful fence.

Now when this Ordinance was repealed by Ordinance No. 26 of 1891-1892, and the provisions therein contained enacted, was it intended to alter that state of things? Was it intended to be provided that if a man's cattle broke into his neighbour's pasture field and did damage there, that he was to be liable for the damage although there was no lawful fence about it? I cannot imagine that the Legislature ever contemplated or intended any such thing. Surely if the Legislature had intended to do this, it would have used words more apt for the purpose. It never would have by the first section as it did practically expunge, the words "crops and fields" which have a limited meaning, and substitute the very general and comprehensive word "property," a word that embraces both real estate and chattels. Moreover this section itself shews that the word "property" as used in it was used with its comprehensive meaning, the very provision respecting stacks of hay and grain shews that the word was intended to include personal property as well as real, because stacks of hay and grain are personal property. The legislature never could have intended that the land-owner must enclose his whole property and to do so that he must, if bordering on a highway build his fence eight feet on the highway or if not bordering on a highway that he must build it eight feet on his neighbour's property. That would be simply in its consequences an absurd construction. I therefore construe the section in question to intend as follows: That the owner of domestic animals shall not be liable to action for damages done by such animals to real or personal property, nor will the animals be liable to distress therefor unless such property at the time the damage was done was

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surrounded by a lawful fence as provided by the Ordinance, and the damage must be done to that part of the real property which is situated eight feet or more from the fence, and if personal property is injured it must at the time of the injury have been on that part of the land so eight feet or more from the fence. And after all said and done, this construction is simply giving the words of the section their plain ordinary meaning; of course this may render it difficult for persons to maintain their rights or to obtain their remedies for injuries done to cattle in a properly enclosed pasture field, because the burden of proof will be on them and it may be difficult to shew that the injury was done outside the eight feet limit. There is another result of the conclusion I have reached which is somewhat peculiar and that is, that if a person build a fence around his property, no matter how lawful or how expensive it may be, if a vicious animal breaks it down, the owner of the fence will have no remedy unless it is surrounded by another lawful fence at least eight feet away.

The right to distrain cattle *damage feasant* is a right arising by virtue of a trespass or wrongful entry by them on land. Damage may be done to personal property on the land as the consequence of such entry and the owner may upon distraining have the right to hold the cattle until the damage to such personal property is satisfied, but unless there has been a wrongful entry on land there is no right to distrain *damage feasant* for damage to personal property. I therefore hold that the defendant had no right to distrain the animal in question *damage feasant*.

The defendant also claimed the right to seize the animal, tie it up and retain possession of it until his charges for keeping it were paid under Ordinance No. 21 of 1893. This Ordinance was cited apparently with the idea that it was framed with the intention of enabling persons to pick up stray animals and hold them and recover for their trouble in doing so. I am of the opinion that the Ordinance was not specially enacted with that object, but on the contrary was enacted in the interests of the owners of stray animals, and to compel the finders to give notice of the estray or to take the steps provided in the Ordinance so that if possible the owner, if unknown, may get notice.

Judgment.

Wetmore, J.

I arrive at this conclusion because section 5 of the Ordinance provides that "any person who does not comply with the provisions of this Ordinance shall be liable to a fine," and the only person required to do any act under the Ordinance is the finder of the estray. Notwithstanding this, however, section 3 provides that "the owner of any animal shall be entitled to recover the same from any person in whose possession such animal may be, upon tender of all charges incurred up to the time of tender." And section 4 provides that "in the case of the owner and the finder not being able to agree as to the costs of keep, &c., they shall immediately appoint an arbitrator or arbitrators under the provisions of the *Arbitration Ordinance* of 1891-1892." These provisions, in my judgment, indicate a clear intention by implication on the part of the Legislature that the finders of estrays may keep them and retain possession of them until their charges with respect to them, including their costs of keep, are paid. And I have no hesitation in holding that if an estray comes upon a person's premises (although they are not lawfully fenced) and commits damage or becomes troublesome, the owner of the premises has the right to tie him up to prevent his doing further damage, or continuing to be troublesome, and in that case (and possibly providing that he complied with the Ordinance in other respects) to retain possession of him until his costs of keeping the estray so tied up, which would include the trouble the owner of the premises was at, are paid, but not to retain possession until the damage he had done was paid, because that would be contrary to the provisions of the *Fence Ordinance*, to which I have before referred. But if such owner does tie up an estray he is bound to use proper care with respect to the animal, he is bound to see that he is properly fed and watered, and not to allow him to deteriorate in value or suffer for the want of such care. It affords no excuse for not doing so that it involved extra trouble, inconvenience and expense; at any rate, unless such trouble, inconvenience and expense were of such a character that it would be unreasonable that the owner of the premises should undertake them, because the law gives the owner his remedy—he can retain the animal as a lien for all this extra trouble, &c., and if the owner of the animal refuses to

pay it, it is a matter which the arbitrators appointed under section 4 ought to and would take into consideration. It, therefore, affords no excuse for the defendant not sufficiently watering and feeding this animal that he was afraid of his water supply near home giving out and that to enable him to water and feed him properly he would have to haul water a mile and a half. Anyway, all that meant was that he would have to haul water this distance for his own cattle sooner than he otherwise would. It was reasonably possible for him to get sufficient water, and he ought to have done so, and the difficulty he would have in getting it or the time expended in doing so or if he watered him out of his own well, the fact that by doing so he would inevitably have to haul water for his own cattle sooner than he otherwise would, would all be matters for the consideration of the arbitrators.

The result of my findings and holdings is that the defendant was justified in taking this stag and tying him up, that he was not called upon to give the plaintiff notice under section 21 of the Ordinance because he had reason to believe that the plaintiff had full notice as therein provided, and he would not be liable to a penalty under section 5, for not doing so. That section 3 contemplates that under such circumstances he shall be entitled to his charges incurred with respect to the animal, and he was justified in refusing to deliver him up when demanded, such charges not having been tendered or paid, but he was guilty of a wrongful act in not properly feeding and watering the animal. The defendant must, therefore, be acquitted of the wrongful seizure and detention, but must make good the damage caused by his omission to feed and water. I fix these damages at five dollars ($5).

As to the defendant's counterclaim, he is not entitled to recover for feeding and watering the animal in question. Section 4 of Ordinance Number 21, of 1893, provides a mode for ascertaining the amount of the costs of keep, &c., in case the parties cannot agree. That section is imperative, and assuming that an action at law will lie at all for these services, such action cannot be maintained until the amount is

Judgment. Wetmore, J.

ascertained as provided in such section. Nor can the defendant recover for the damages done by the steer for trespass on his land or for the injury received by his cows therefrom, because the property was not lawfully fenced.

Judgment for plaintiff.

BRADSHAW v. RIVERDALE SCHOOL DISTRICT (No. 2).

Assessment—Taxation—Jurisdiction of Judge on appeal from Court of Revision—Validity of assessment.

The powers given to a Court of Revision under sections 107 to 111 of the School Ordinance[1] and to a Judge under section 112, do not enable a Judge acting thereunder to inquire into the legality of the whole assessment, and a ratepayer who has resorted to the provisions of these sections is not thereby estopped from taking substantive proceedings to set the assessment aside as being invalid and contrary to law.

Held, further, that a Board of Trustees may by subsequent conduct adopt an assessment made by a person not legally appointed, and thereby render such assessment invalid.

[WETMORE, J., *Nov. 21, 1894.*

Statement.

The plaintiff was a ratepayer in the defendant school district in the years 1892 and 1893. In the year 1892, one Rowland purported to act as assessor, and the assessment roll was prepared by him. Rowland, however, had not been appointed in the manner required by the Ordinance. The plaintiff was assessed and was rated for taxes amounting to $32.36. He complained to the Court of Revision against his assessment on two grounds, namely, that he had been assessed for personal property which was not within the school district: first, when the assessment was made; second, when the roll was sworn to. The Court of Revision sustained the assessment, and the plaintiff thereupon appealed to a Judge of the Supreme Court (Mr. Justice Wetmore) who dismissed the appeal and affirmed the assessment. The defendant having seized certain of the plaintiff's goods to satisfy these taxes, the plaintiff brought this action, to set the seizure aside and to declare the assessment invalid on the

[1] "The School Ordinance." R. O. 1888, c. 59.

ground that Rowland's appointment as assessor was invalid, and consequently that the assessment was invalid. The plaintiff also replevied the goods. Statement.

F. F. Forbes, for the plaintiff. Argument.

W. White, Q.C., for the defendant

The learned trial Judge found on the evidence as a fact that Rowland's appointment was invalid. On this point the judgment is not reported. The judgment then continued as follows:—

WETMORE, J.:—It was urged on behalf of the defendants that the plaintiff having recognized the assessment by entering a complaint to the Court of Revision and by appealing from their decision to me is estopped from setting up that the assessment is not a valid one. And also that I having by my judgment affirmed the assessment such judgment is final and conclusive under sub-section 12 of section 112[1] and rendered the assessment valid. I am rather inclined to the opinion that there is nothing in these contentions, that the jurisdiction given to the Court of Revision by sections 107 to 111 (inclusive) of the Ordinance is not to enquire into the assessment upon grounds which impeach the validity of the whole of it, as not being prepared according to law, and, therefore, a nullity, but it is in the nature of an enquiry into the validity of the assessment of the different individuals assessed, as, for instance, whether the individual has been assessed too little or too much, or possibly whether he is liable to assessment at all. The powers of the Court, which will be found in section 111, seem to imply that, because the powers are to alter or amend the roll, there are no powers given to quash or set it aside. And the powers of the Judge sitting as an appellate tribunal seem to be no greater. See section 112, sub-section 7. Judgment.

I am inclined to think, therefore, that sub-section 12 of that section only renders such decision and judgment of the Judge as he has the jurisdiction to make on the appeal final and conclusive, not a judgment affecting the legality of the whole assessment which he had no power to make.

Judgment.
Wetmore, J.

Then as to the acts of the plaintiff estopping him from attacking the validity of the assessment, I am inclined to think under the authority of *Nickle* v. *Douglas*,[2] that he is not estopped. But while I am of this opinion, I am also of opinion that there is evidence in this case from which I can find and ought to find that although the defendants did not properly appoint Rowland assessor in the first instance, they afterwards adopted him as their assessor and the assessment which he made as being the act of their assessor. And I am of opinion that if they did so adopt him and his assessment that it rendered such assessment valid. I can find nothing in the Ordinance which prescribes the time within which an assessor shall be appointed. Section 96 provides that "the trustees of any school district or an assessor whom they may appoint as soon as may be in each year shall prepare an assessment roll." The Ordinance then goes on to provide what the roll shall contain, and how it shall be made up, and section 106 provides "that the assessment roll shall be completed by the first day of April or as soon thereafter as may in each year." This last provision is clearly directory. Now then, what is there is the Ordinance to prevent the trustees adopting this man's acts at any time before they proceed to enforce the assessment. I can find nothing. There is nothing in section 56 to prevent it. Then the question arises: does the evidence shew that they did so adopt Rowland as their assessor and his assessment? I am quite alive to the fact that it might be successfully urged that the burden of proving that all the steps required by law to be taken to render this assessment valid were taken rests upon the defendant. But is there not *prima facie* evidence of the acts of adoption which I have mentioned, by the board of trustees, of the clearest character? The board of trustees and the Court of Revision are one and the same. I believe in Ontario it is different; there the Court of Revision may not necessarily be composed of the trustees only, in some cases other persons may be members of the Court of Revision. But in the Territories under section 110 of the Ordinance the board of trustees and only the board of trustees constitute the Court of Revision. They are none the less the board be-

[2] 37 U. C. Q. B. 51.

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cause they are the Court of Revision. Now this board sitting as a Court must have been called together by virtue of section 56. There was no other mode of getting them together, and the plaintiff recognized this board or Court of Revision as being properly constituted by appearing before it and lodging a complaint before it and appealing from their decision to the Judge. How did the plaintiff know when and where the Court of Revision was going to sit? He must have known it either from a notice served on him under section 108 of the Ordinance or from the notice posted under section 109. But in either case the notice of the time and place of meeting of the Court of Revision could not have been given without the direction of the Board of Trustees. The Ordinance provides no specified time for the meeting of the Court; it is to be not less than fifteen or more than thirty days from the time of the filing of the roll. (See section 110). The precise time within that period the board must fix. The assessor or secretary who signed the notice under section 108 could only insert the time and place of meeting of the Court when the board had fixed the time and place.

And as to the notice under section 109, that section provides in terms that the meeting therein provided is to be the act of the board. "The board of trustees shall cause to be posted, &c." Now the board to do all these acts must have been called under section 56. What the board did in these particulars must have been in reference to some assessment, but the only assessment was Rowland's. In view of the plaintiff's conduct in recognizing the Court of Revision I think I am justified on the principle of *omnia acta rite*, in the absence of evidence to the contrary in assuming that everything that was done was properly done. I, therefore, find that the board of trustees fixed a time and place for sitting as a Court of Revision upon the assessment in question, that they authorized this to be inserted in the notice given under section 108, that they caused the notice to be given under section 109, and they, as a Court of Revision sat upon the assessment under section 110. And I hold that by so doing they adopted Rowland as their assessor, and the assessment made by him.

Judgment. Wetmore, J.

There will be judgment for the defendants that the plaintiff do restore the goods replevied to the defendants with $2 damages for detaining the same, and do pay the defendants their costs of this action.

Judgment for defendants with costs.

TURNER v. HARRIS.

Interpleader—Husband and wife—Ordinance No. 20 of 1890.

Ordinance No. 20 of 1890[1] is *intra vires* of the legislative assembly. *Re Claxton*[2] considered.

[WETMORE, J., *Nov. 28, 1894.*

Statement.

This was the trial of an interpleader issue, the claimant (the plaintiff in the issue) being the wife of the execution debtor. The question for discussion was the claimant's right to certain cows seized by an execution creditor (defendant in the issue) under execution. The learned Judge found on the evidence that the purchase of the cows by the claimant was an honest transaction, that the money with which they were purchased was the claimant's and that the transaction was not a pretext to cover the husband's property so as to protect it against his creditors. The question was raised whether the Ordinance (No. 20 of 1890) was *ultra vires*.

Argument.

W. White, Q.C., for creditors (defendant).

F. F. Forbes, for claimant (plaintiff).

Judgment.

WETMORE, J. (after stating the facts):—The only question remaining is whether Ordinance No. 20 of 1890[1] is *intra vires* the Legislative Assembly. If it is, it is conceded that under the facts as I have found them on the question of fraud the plaintiff is entitled to succeed. If it is *ultra vires* it is conceded that the de-

[1] The Ordinance provided that "a married woman shall in respect of personal property be under no disabilities whatever 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*."

[2] 1 Terr. L. R. 282.

fendant must prevail under the authority of *Brittlebank* v. *Gray Jones*,[1] at any rate so far as my judgment is concerned. I have no doubt that if this Ordinance had been passed after the enactment of the Dominion Statute, 54-55 Vic. (1891), cap. 22, s.s. 6 and 19, the Ordinance would have been perfectly good, and that, notwithstanding there might have been no words expressly repealing sections 36 to 40 of *The North-West Territories Act*. But if the Ordinance was not *intra vires* at the time it was passed the enactment of 54-55 Vic. cap. 22, will not give it validity as there are no words in the statute that have that effect. The question, therefore, is, had the Assembly power to pass this Ordinance under the provisions of the old section 13 of *The North-West Territories Act* and of the order in council made thereunder? Or is this Ordinance *ultra vires* as being inconsistent with, altering or repealing the provisions of sections 36 to 40 above referred to of the last mentioned Act? The provisions of the orders in council above referred to in so far as they relate to the right to legislate upon the subject in question will be found set out in *In re Claxton*,[2] at page 95. I mentioned this case at the trial and intimated that it might be found to settle the question raised here. On examining it, however, I am of opinion that it does not do so. The question raised there was whether sub-sec. 9 of sec. 1 of cap. 45 of *The Revised Ordinances*, which exempted 160 acres of land as a homestead, from execution, was *ultra vires* as being inconsistent with *The Homestead Exemption Act*. (Rev. Stat., cap. 52), and it was held that it was because *The Homestead Exemption Act* expressly provided in effect that a homestead exempt from execution should *not exceed* eighty acres, and only exempted that to a certain specified value and gave the execution creditors the benefit of the surplus value, and therefore the Ordinance which exempted more was inconsistent with that Act. I cannot find anything in Ordinance No. 20 of 1890 which is inconsistent with, alters or repeals any of the provisions of sections 36 to 60 of *The North-West Territories Act*. If the Ordinance had taken away any rights which were given to a married woman by that Act it would have been *ultra vires*, but the Ordinance does not do that; it does not touch one single right given to a married woman by that Act; she

Judgment. Wetmore, J.

[1] 1 Terr. L. R. 70.

Judgment.
Wetmore, J.

has them all yet, but it goes further and gives her further and other rights with respect to her property, and I see no objection to the Assembly doing so under its powers to legislate in relation to "Property and Civil Rights in the Territories." If these sections had in express terms provided that married women should have no further privileges as to property than as herein provided, then this case would have come within the *ratio decidendi* of *In re Claxton*,[2] but to hold the Ordinance *ultra vires* would be simply to hold that if the Parliament of Canada legislated upon a particular subject included in the terms "property and civil rights," the Assembly would have no powers to legislate upon that subject at all. I am not prepared to go that length.

There will be judgment for the plaintiff on the issue with costs, which will include her interpleader costs. The sheriff is ordered to withdraw and the defendants to pay the sheriff's costs of interpleader and possession money.

Judgment for plaintiff with costs.

CALVERT v. FORBES (No. 1).

Practice—Indorsement on order—Seal—Order not fixing time.

The memorandum required by s. 311 of No. 6 of 1893 (C. O. 1898, c. 21, s. 36) to be endorsed on the copy of an order, forms no part of the order, but is merely a notice to the defendant.

The omission of an order to state the time or the time after the service of the order within which an act is required to be done does not render the order ineffectual, but the Court will make a supplemental order fixing the time.

It is not necessary to endorse on the copy of an order served any words or marks to indicate that the original is under the seal of the Court, when the seal on the original is pointed out to the party served at the time of service.

[WETMORE, J., *Dec. 26, 1894.*

Statement.

On the 7th July, 1894, a Chamber order was made in this action ordering an account to be taken before the clerk at such time and place as he might appoint of monies received by the defendant as advocate for the plaintiff, of the amount of such monies paid by the defendant to the plaintiff, and of the amount of the defendant's lawful charges and claims

Statement.

against the plaintiff, and for the clerk to certify in whose favour the balance of indebtedness is after such accounting and the amount thereof, and also ordering the clerk to enquire what papers and securities are held by the defendant as such advocate belonging to the plaintiff and to report. The defendant was ordered at least ten days before the time appointed for taking such accounts, to make out his account and verify the same by affidavit as required by section 216 of *The Judicature Ordinance*,[1] and file the same with the clerk. On the 29th November, 1894, the clerk appointed Monday, the 24th December, at 2 o'clock in the afternoon, at his office, as the time and place for taking the accounts. This order and appointment was taken out and served upon the defendant about the 29th of November, and on the copy order served on the defendant was endorsed a memorandum as required by section 311 of *The Judicature Ordinance*.[1] The defendant applied to set aside the order and appointment and the proceedings thereunder with costs on a number of grounds.

Argument.

The defendant in person.

W. White, Q.C., for plaintiff.

WETMORE, J.—The affidavit on which the application was based disclosed the fact that the order referred to and an appointment thereunder had been taken out in July, that an application had been made for an attachment against the defendant for non-compliance with the order, and that such application had been dismissed with costs. Among the grounds on which the application was made were the following: "That the endorsement required by section 311 of *The Judicature Ordinance*[1] which appears on the said order and the copy thereof served on the defendant was wrongly and irregularly placed on the said order, the same having been added without any order for that purpose, and after the said order had been taken out and once served and proceedings taken thereunder.

"That the plaintiff's application under the said order to enforce the same having been once refused for non-com-

[1] Ordinance No. 6 of 1893

Judgment.
Wetmore, J.

pliance with the Ordinance, no subsequent proceeding ought to be allowed under said order.

"That the time within which the act or acts required to be done under the said order having once expired the time for doing the act or acts cannot be enlarged."

I refused a summons upon these grounds. As to the first ground above stated, because the memorandum referred to in sec. 311 of the Ordinance forms no part of the order, it is merely a notice to the defendant to be endorsed on the copy of the order served on the defendant. As to the other two grounds, because the order still stands good, it never was set aside. And because a mistake was made in working it out so that an attachment could not be obtained for disobeying it would not prevent the order being taken out *de novo*, and a new appointment made under it by the clerk. And no further order of the Court would be required for the purpose. The original order still existed, my fiat for the order was still on file, and the clerk could extend that fiat and issue the formal order under seal as often as it became necessary to do so.

I granted a summons however on two grounds: 1st. That the order itself does not state the time or the time after the service of the order within which the act required is to be done, as provided by section 311 of *The Judicature Ordinance*.[1] This however does not render the order ineffectual, but the Court will make a supplemental order fixing the time. The objection therefore affords no ground for setting aside the order or the service of it.

The other ground on which I granted a summons was that the copy of the order served is not a true and correct copy of the original, as the original is under the seal of the Court while the copy does not purport so to be. That is, that the copy of the order served did not have "L.S." on it, as is usual when the original is a sealed instrument. The affidavit of Mr. Bryne of the service of the order effectually disposes of this objection, for he distinctly swears that at the time of service he pointed out to the defendant the seal on the original. That certainly serves the same purpose as writing L.S. on the copy, because the L.S. only indicates the fact that the original was sealed and the place of sealing.

The defendant was acquainted of that by ocular demonstration. The application therefore to set aside the order and appointment and the service thereof, fails. Judgment. Wetmore, J.

Summons discharged with costs.

CALVERT v. FORBES (No. 2.)

Practice—Costs—Counsel fee—Review of taxation.

Counsel fees are properly taxable to a defendant who is an advocate and appears in person.

[WETMORE J., *Dec. 28, 1894.*

The plaintiff had taken attachment proceedings against the defendant who was an advocate, charging the defendant with non-compliance with a Chamber order, which proceedings were dismissed by WETMORE, J., with costs. The defendant appeared in person on such proceedings and the taxing officer on taxation allowed the defendant a counsel fee of $5 on the application in Chambers. The plaintiff applied to review. Statement.

F. L. Gwillim, for the plaintiff. Argument.

The defendant in person.

WETMORE, J.—It has been held in Ontario in two cases, *Smith* v. *Graham*,[1] and *Clarke* v. *Creighton*,[2] that "counsel fees should not be taxed to a counsel conducting his own case." Section 534 of *The Judicature Ordinance*,[3] provides that duly enrolled advocates shall be entitled "*to charge and be allowed* such fees as may be from time to time prescribed by the Judges of the Supreme Court." The tariff now in use has been so prescribed. I cannot find any Ontario enactment of the character of that in the Territories which I have cited. In *Hamilton* v. *McNeil*,[4] the Supreme Court of the Territor- Judgment.

[1] 2 U. C. Q. B. 268.
[2] 15 P. R. 105.
[3] "The Judicature Ordinance," No. 6 of 1893.
[4] 2 Terr. L. R. 151.

Judgment. Wetmore, J.

ies decided this month that under that section of the Ordinance an advocate could recover from his client such counsel fees as are prescribed by the tariff. I think the principle of that decision will allow an advocate who sues or appears in person when costs are awarded to him to have taxed to him such counsel fees as are prescribed by the tariff provided that such counsel fee is not a mere advising fee. An advocate would not be allowed a counsel fee for advising himself, nor I judge a fee for instructing himself. But the fee in question is not a mere advising fee. It is a fee that represents the work of hunting up authorities and the actual argument before the Judge, and I think it has been rightfully taxed.

Taxation affirmed.

COMMERCIAL BANK v. CRERAR.

Practice—Summons to Extend Time for Pleading.

Held, before moving for an extension of time for pleading, application should first be made to the opposing litigant to extend the time by consent, but the omission to do so affects the question of costs only.

[WETMORE, J., *Dec. 28, 1894.*

Statement.

Application by defendant for further time to file and serve his statement of defence.

W. White, Q.C., for plaintiff:—The defendant should before moving, having endeavoured to arrange for an extension by consent.

Argument.

F. F. Forbes, for defendant:—This is not necessary, because by Order LXIV., Rule 8, of the English Rules the time may be enlarged by consent in writing without application to a Judge, but by the *Judicature Ordinance*,[1] Rule 71, the defence must be delivered within six days after the appearance is entered "or such further time as may by order of the Judge be allowed for the purpose."

[1] "The Judicature Ordinance," No. 6 of 1893.

Judgment.

WETMORE, J.—In the Territories the statement of claim is served on the defendant with the writ of summons. In England it is delivered after appearance by the defendant. Order XXI., Rule 6, of the English Rules, provides that a defendant shall deliver his defence "within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last *unless such time is extended by the Court or a Judge.*" Rule 7, of Order LXIV., is the same as section 555 of *The Judicature Ordinance*,[1] but both these English rules must be read with Rule 8, of Order LXIV. So the language of Rule 6 of Order XXI. as to further time to deliver defence is in effect the same as that of section 71 of the Ordinance.[1] I see, therefore, no reason why Rule 8 of Order LXIV. should not be incorporated into the practice here. It is no more inconsistent with sections 71 and 555 of the Ordinance[1] than it is with Rule 6, of Order XXI. and Rule 7, of Order LXIV. I think therefore the defendant ought to have applied to the plaintiff for an extension of time before applying for the summons or given some reason for not doing so. But I do not think that this is a reason for refusing the application. It only affects the question of costs. I will make the order but allow no costs of the application to the defendant in any event. The plaintiffs' costs of opposing the application will be costs in the cause.

Order accordingly.

SEEMAN v. ERICKSON (No. 1).

Practice—Replevin—Counterclaim.

In a replevin suit where the defendant counterclaimed for a return of the chattels, it was held that the proceeding by counterclaim was irregular and that the right to the return of the goods should be set up in the defence.

[WETMORE, J., *Dec. 28, 1894.*

Statement.

The action was brought for alleged wrongful detention by the defendant of the plaintiff's cattle. The plaintiff also replevied the cattle and had them delivered to his possession.

Statement. The defendants defended the action and counterclaimed for their return. The plaintiff took out a Chamber summons for an order striking out the counterclaim as unnecessary.

Argument. *F. L. Gwillim,* for plaintiff.

F. F. Forbes, for defendant.

Judgment. WETMORE, J.—It is laid down in *Chitty's Forms*[1] that the defence "may partake of the nature of the old *avowry* or *cognizance* and claim a return of the goods." I see no reason why a return of the goods may not be claimed by the defence, and it appears to me to be the best way of doing it. A counterclaim proper is an independent cause of action. The right to have the goods returned is not a right independent of the cause of action, and of the plaintiff's proceedings. It is a right if the defendant's defence is found in his favour to be put in *statu quo* and arising out of the plaintiff's proceeding in the action.

The right to counterclaim is entirely the creation of statute. It is a right that did not exist until the statute gave it, and is now given in England by virtue of the Rules of Court, made under a statute, and here by virtue of the *Judicature Ordinance.*[2] Suppose the legislature had given the proceeding by replevin as it has given it, but gave no right of counterclaim, and no such right existed, surely there would have been some way in which the defendant could get a return of his goods if he was entitled to it. The only way unless a special mode had been provided would be by setting up his right by his defence. That is, by simply treating his defence as in the nature of an avowry. By the old practice in England an avowry was pleaded to the declaration in replevin. The fact that a right of counterclaim is now given generally does not seem to me to affect or alter the question. Why should a defendant counterclaim? Why should not the practice be more in accordance with the old practice? It serves the purpose, and to counterclaim only means the accumulation of costs. I am therefore of opinion that a counterclaim is unnecessary, and that the right to a return of

[1] See p. 626.
[2] "The Judicature Ordinance," No. 6 of 1893, s. 103.

the goods should be set up in the defence, but that the defendant should disclose the fact that the property has been replevied by the plaintiff. Judgment. Wetmore, J.

Summons made absolute with costs.

HARRIS v. HARRIS (1).

Husband and wife—Alimony—Powers of Supreme Court—Jurisdiction—Implied authority of wife in relation to husband's affairs—Status of wife—Costs.

Held, (1) The jurisdiction of the Supreme Court of the North-West Territories is limited to the powers and authorities exercised by the Courts of Common Law, Chancery and Probate in England on July 15, 1870, and consequently in the absence of express legislation there is no jurisdiction to entertain a suit for alimony.

(2) A wife has no implied authority to spend her money on her husband's behalf, and the husband is not liable unless such expenditure was made at his request.

(3) A married woman is liable to pay costs in favor of her husband out of her separate estate, this being an incident to her status as a *feme sole* in respect of such property.

[WETMORE, J., *Jan. 25, 1895.*

Statement.

Action for alimony brought by a wife against her husband. The statement of claim also contained a claim for money paid by the plaintiff for building additions to defendant's house; sinking and cribbing wells on his premises; on account of the purchase price of land owned by him and in paying taxes against defendant's lands. The statement of claim did not allege that the money was paid at the defendant's request. The defendant took two objections in point of law: (a) That there was no jurisdiction to entertain a suit for alimony, and (b) That the moneys were not alleged to have been paid at the defendant's request, and that therefore no cause of action was shown in respect thereto. On application these questions of law were set down for argument before trial, and were argued before WETMORE, J., in Chambers.

Argument.

D. H. Cole, for defendant.

W. White, Q.C., for plaintiff.

Judgment.
Wetmore, J.

WETMORE, J.—As to the jurisdiction of this Court in a suit for alimony; the original jurisdiction of the Court is to be found in section 8 of *The North-West Territories Act*.[1] Without setting out that section I may just state that I am of opinion that it confers on this Court all the powers and jurisdiction which were on the 15th day of July, 1870, exercised by the Courts of Common Law in England (that is, by the Courts of Queen's Bench, Common Pleas and Exchequer) and by the Courts of Chancery and Probate there. At that date none of these Courts had or exercised any jurisdiction with respect to alimony. That was a jurisdiction at that time exclusively exercised by the Court for Divorce and Matrimonial causes. Prior to the creation of the Court for Divorce and Matrimonial causes it was exercised by the Ecclesiastical Courts. But whether exercised by the Ecclesiastical Courts, or by the Court for Divorce and Matrimonial Causes, alimony was only granted as an incident to a suit for a divorce, or for the restitution of conjugal rights or the like. I can find no case where in England up to the date specified, alimony has been allowed as a distinct and independent right apart from such a suit as I have mentioned. Such a suit being brought perpetual alimony might be decreed, as, for instance, incident to a decree for a divorce from bed and board or interim alimony or alimony *pendente lite* might be decreed pending a suit so instituted. It is true that by *The Supreme Court of Judicature Act*, 1893,[2] sec. 16, the jurisdiction of the Court for Divorce and Matrimonial Causes was vested in the High Court of Justice, and by sec. 34 was assigned to the Probate, Divorce and Admiralty division of that Court. But of course that was all after the 15th July, 1870. I am not prepared to say that the laws in force in England at that date relating to marriage and divorce are not in force in these Territories by virtue of section 11 of *The North-West Territories Act*, so far as they are applicable here. And I am not prepared to say that these same laws which provide in effect that a husband or wife is entitled under certain state of facts to a divorce *a vinculo matrimonii*, or *a mensa et thoro*, and as an incident that a wife is entitled to alimony are not applicable here.

[1] Revised Statutes of Canada, 1886, c. 50.
[2] 36 & 37 Vic. c. 66 (Imp.).

Judgment.

Wetmore, J.

Neither am I prepared to say that the word "laws" in this section 11 must be construed to mean "statute laws." It is not necessary to decide any of these questions at present. All it is necessary for me to decide is that this Court has not the jurisdiction to decree the relief of alimony prayed for in this suit or any such relief growing out of the marital relation which the Court of Divorce and Matrimonial Causes in England had the exclusive power to decree there. In Ontario (possibly I should say Upper Canada) and Manitoba the Courts have held that the Legislatures there intended to confer on the Court of Chancery in Upper Canada, and on the Court of Queen's Bench in Manitoba the authority to adjudicate upon claims for alimony, and such Courts have assumed such jurisdiction in consequence of such intention although they have declined to assume jurisdiction to entertain suits for divorce, or for the restitution of conjugal rights. See *Soules* v. *Soules*,[3] *Severn* v. *Severn*,[4] and *Wood* v. *Wood*.[5] We have no such legislation here on the subject as they have had in Upper Canada, or in Ontario or Manitoba. Upon reading the judgment of Mr. Chancellor Blake in *Severn* v. *Severn*[4] one would be almost inclined to think that had he not been bound down by authority he would have been disposed to have held that the matrimonial law of England had been introduced into the province of Upper Canada, and that its administration even to the extent of the power to decree a divorce *a vinculo matrimonii* must of necessity be in some Court, and that therefore it was inherent in the Court of Chancery there. Of course I am not bound by authority as he was. But assuming that I held the same views which I am inclined to think he had I would hesitate very much to give effect to them, seeing that no Court in any province of Canada where the law of England governs has attempted to exercise any jurisdiction belonging exclusively to the Ecclesiastical Courts in England or to the Court for Divorce and Matrimonial Causes there, unless such jurisdiction has been given more or less clearly by some legislative authority. But I may go further and state that in my opinion no such jurisdiction could be exercised unless it was

[3] 2 Gr. 299.
[4] 3 Gr. 431.
[5] 1 Man. L. R. 317.

Judgment. Wetmore, J.

expressly given. And moreover so far as the jurisdiction of this Court is concerned in view of the fact as I believe it to be that Parliament intended to and did limit such jurisdiction to the powers and authorities exercised by the Courts mentioned in sec. 48 of *The North-West Territories Act*, I hold that there is no inherent power in this Court to go beyond such powers. 57 and 58 Vic. (1894), cap. 17, sec. 20 of *The Dominion Acts*[6] was referred to, but it will not help the plaintiff; the Assembly has not exercised any such power as in that section referred to.* The *Judicature Ordinance*, section 9, was also referred to as conferring the power to adjudicate in a suit for alimony. The provisions of this section are taken almost word for word from the English *Supreme Court of Judicature Act, 1873*, sec. 24, and the object is obvious, that is to direct that law and equity shall be concurrently administered. The object was not to confer on the Common Law or Chancery Division of the Court the jurisdiction of the Probate Division. I am therefore of the opinion that the objection to the jurisdiction is well taken and must prevail.

As to the question raised with respect to the claim for money paid; the learned counsel for the plaintiff abandoned that part of the claim. I must say I do not see how he could well avoid doing so. No express request to pay the moneys claimed is alleged and no request can be implied from the circumstances alleged. Adultery, cruelty and desertion may justify a wife in pledging her husband's credit for her maintenance and for necessaries. It will give her however no implied authority to expend her money in paying his debts, in buying property for him or in making additions thereto, at any rate, unless some other circumstances are disclosed than appears in this statement of claim. This decision substantially disposed of the whole action. I must under section 152 of the *Judicature Ordinance* order that the action be dismissed.

[6] This section gave the Legislative Assembly power to confer on the Territorial Courts jurisdiction in matters of alimony.

* On September 30, 1895, the Legislative Assembly exercised the power given them and passed an Ordinance, No. 14 of 1895, conferring jurisdiction to grant alimony on the Supreme Court, N. W. T. —T. D. B.

Judgment.
Wetmore, J.

The only question remaining is whether I should order the plaintiff to pay the costs of this action. Ordinance No. 20 of 1890 gives a married woman in respect of personal property all the rights and makes her subject to all the liabilities of a *feme sole*. Although the language is not the same, the effect of that Ordinance is the same as sec. 1. subsec. 2, of *The Married Women's Property Act*, 1882 (Imp. Stat. 45 and 46 Vic., cap. 75). I have not the case *Ramsay* v. *Margett*, by me at present, but in the report of the case in the W. N. (1894), p. 49, Lord Esher lays it down and Davey, L.J., is reported as agreeing with him; that since the passing of that Act a husband and wife stood in the same position as two men formerly did." *Sweet* v. *Sweet*,[r] was an action brought by a married woman without the intervention of a trustee against her husband on a covenant in a deed of separation, and the Court held the action would lie. While the Ordinance gives a married woman all the rights of a *feme sole* as regards personal property it subjects her to the same liabilities as a *feme sole*, and she is therefore liable to costs as a *feme sole*. In this case the plaintiff has not only instituted a suit for alimony but she has included in it a claim for money. Both claims according to my ruling and one of them by the admission of her advocate, are put forward without the slightest warrant. I am not administering the law according to the practice of the Probate Division of the High Court of Justice in England, except in so far as cases for administering the estates of deceased persons are concerned, and I see no reason why the costs in this case should not follow the usual rule and abide the event. I am not prepared to say that the costs of this suit are not in the nature of necessaries for which the plaintiff may pledge her husband's credit. That might depend on facts and circumstances which I am not now in a position to enquire into, but which possibly I might be called upon to enquire into by a suit properly instituted for the purpose by her advocate or possibly by the plaintiff herself. The order will be that this suit be dismissed with costs to be paid by the plaintiff out of her separate property.

Action dismissed with costs.

[r] (1895) 1 Q. B. 12; 64 L. J. Q. B. 108; 15 R. 146; 71 L. T. 672; 43 W. R. 303; 59 J. P. 373.

SEEMAN v. ERICKSON (2).

Practice — Replevin — Affidavit — Irregularity — Laches—Waiver —Means of knowledge.

The plaintiff issued a writ of replevin on an insufficient affidavit. The defendant filed a defence in which he recognised the replevin and asked for a return of the property replevined. A month later the defendant moved to set aside the writ of replevin as irregular, having just become aware of it.

Held, (1) That the writ of replevin was not void but irregular.

(2) That such irregularity might be waived; and

(3) That, as the defendant had the means of searching and inspecting the affidavit, he should have done so, and his delay of a month coupled with the recognition of the replevin in his pleading constituted a waiver.

[WETMORE, J., *Jan. 25, 1895.*

Statement. Application by defendant after defence delivered to set aside a writ of replevin for irregularity.

Argument. *F. F. Forbes,* for defendant.

W. White, Q.C., for plaintiffs.

Judgment. WETMORE, J.—There is no doubt that the affidavit does not comply with the Ordinance in this respect. See *Jud. Ord.*, sec. 402.[1] It was urged that the affidavit does substantially comply with the Ordinance, that is, that it substantially discloses where the property is, because Mitchell, the deponent, alleges the plaintiff carried on a business as a rancher at Theodore in this judicial district, and that the cattle to replevy which the writ issued were unlawfully taken by the defendants out of the plaintiff's herd which was ranging on the White Land River near Theodore. For all I know Theodore may be very near the boundary of this judicial district (as I believe as a matter of fact it is, but of course I do not take judicial notice of that fact one way or the other) and therefore the property might have been so taken without this district. But assuming that they were taken within the district it does not follow that they were so within when the writ was applied for, and the provision referred to in the section of the Ordinance has reference to the time the

[1] No. 6 of 1893, s. 402: "Writs of replevin shall be issued . . . upon . . filing an affidavit naming the Judicial District in which the property is."

Judgment. Wetmore, J.

writ is applied for, not at the time of the wrongful taking. The affidavit is clearly bad and in my opinion the writ would be a nullity were it not for section 540[2] of the Ordinance. I have no doubt that the property was in this judicial district because it was replevied by the sheriff of this district, as appears by his return, which he could not have done had the property not been within his bailiwick. There is no reason therefore why I should direct that the proceeding should be held void. I must therefore consider the omission merely an irregularity. The question then arises, has the irregularity been waived by the laches or the conduct of the defendants. I am clearly of the opinion that it has been waived. The property was replevied on the 17th November as appears by the sheriff's return. The writ of summons was served on the 15th November, two days before; an appearance was entered for the defendants on the 27th of November, and a defence was delivered and filed on the 1st of December. Prior to this application an application was made on behalf of the plaintiff to strike out the defendant's counterclaim, which was filed with that defence. And that counterclaim claimed a return of the cattle; such a claim is only reconcilable with the fact that the cattle were in the plaintiff's possession and they could only get them by virtue of the replevin in view of the way in which the defence and counterclaim were shaped. Here therefore we have a clear recognition of the replevin. This application to set aside the writ of replevin was not made until the 31st of December, a month and a half after the cattle were replevied, and a month after the defence was delivered. The party seeking to take advantage of an irregularity must come within a reasonable time. There is no hard and fast rule as to what is a reasonable time, that depends upon the circumstances of each case and may be governed by the conduct of the parties. Under the circumstances of this case the parties have not come within a reasonable time. I do not now put it upon the ground that they have taken a fresh step after knowledge of irregularity, but that they are guilty of an unreasonable delay. Mr. Forbes, their advocate, has sworn that he was not

[2] "Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void unless . . the Judge shall direct, but such proceedings may be set aside as irregular, etc."

Judgment.
Wetmore, J.

aware of the irregularity until the 28th December. There is no reason why he should not have been aware of it. The affidavit in question has been on file all the time from the 10th of November, when the writ of replevin issued, and open to his inspection, and if he wished to attack the proceedings he should have searched; and having waited all this time coupled with the fact that he filed a pleading recognizing the replevin I hold that he has not come within a reasonable time. I am also of opinion that he took a fresh step after he became aware or had the means of becoming aware of the irregularity. It may be that the replevin proceedings are not a step in the cause. They are a proceeding in the cause however and the defendants recognized the proceeding by counterclaiming as they did. It it true that section 541 says nothing about having the means of becoming aware of the irregularity. It lays it down that the application shall not be allowed "if the party applying has taken any fresh step after knowledge of the irregularity." Still in my opinion if a party has the means of informing himself and does not choose to avail himself of it and by his proceeding recognizes the regularity of the proceeding attacked he ought not to be allowed to take advantage of some technicality or accidental omission. In *The Halifax Banking Co.* v. *Smith*,[3] an application was made by the bail to set aside the recognizance of bail because the affidavit to hold to bail did not comply with the statutory requirements. The bail swore that they were not aware of the non-compliance with the statute until after they had put in special bail. The Court held that the proceeding was irregular, but that the irregularity had been waived by putting in special bail, and that the fact that they were not aware of the irregularity was not an excuse, as the affidavit to hold to bail had been filed before bail was put in. Allen, C.J., says, p. 618: "They had the means of knowing it and that is enough."

Summons discharged with costs.

[3] 25 N. B. Rep. 610.

CAMPBELL v. FISHER (ELIZA B. FISHER, CLAIMANT).

Practice—Application to Judge in Chambers instead of to Court—Powers of Judge.

A Judge sitting in Chambers has no jurisdiction to deal with an application that should properly have been made to him in Court, but such application must be dismissed.

[WETMORE, J., *Feb. 15, 1895.*

Statement. This was an application by summons to WETMORE, J., in Chambers, to set aside an order previously made in Chambers barring the claimant.

Argument. *E. A. C. McLorg,* for claimant.
Wyssman, for plaintiff.
W. White, Q.C., for sheriff.

The learned Judge held that under section 8 of *The Judicature Ordinance*,[1] the application should have been made to him sitting in Court instead of in Chambers. The judgment then proceeded:

Judgment. WETMORE, J.—It occurred to me whether I might not under section 5 of *The Judicature Ordinance*[2] announce that I am sitting in Court, and then make the order applied for. I am of opinion, however, that I cannot do so because sitting in Chambers I am not properly seised of the question as I have not here jurisdiction to entertain the application at all, and I cannot transfer to the Court what I am not seised of. I have great doubts anyway whether under section 52 a

[1] "Every order made by a Judge in Chambers may be varied, set aside or discharged by the Judge sitting in Court, as aforesaid, and no appeal shall lie from any such order, to vary, set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court in banc."

[2] "A Judge sitting in Chambers, if he shall announce that he is sitting in Court, shall have, possess, exercise and enjoy all the powers and authorities, rights and privileges, immunities and incidents of the said Court, and any judgment given or decision or determination or rule, order or decree made by him while sitting as aforesaid, in respect of any matter lawfully brought before him, shall be subject to the provisions in this Ordinance relating to appeal to the Court in banc."

Judgment. Wetmore, J.

Judge in Chambers can transfer Chamber work to the Court or turn a Chamber application into an application to the Court; whether by that section it is not intended that a Judge sitting in Chambers may announce that he is sitting in Court and thereupon he may hear any application that may be made to the Court, but in that case the procedure applicable to the Court must be followed and not the procedure applicable to Chamber practice. I regret very much therefore that I will have to refuse this application.

Summons dismissed.

HAMILTON v. McNEIL.

Solicitor and client—Extent to which negligence of advocate is ground for refusing costs.

As against his client, an advocate is entitled to the costs of all work done unless the negligence of the advocate is such that the client derives absolutely no benefit from the work.

[WETMORE, J., *April 5, 1895.*

Statement.

Review by plaintiff of the taxation of his advocate's bill. The items objected to were disputed on the ground that through the negligence or ignorance of the advocate, the plaintiff was prevented from recovering them against the defendant.

Argument.

W. White, Q.C., for client.

The advocate in person.

Judgment.

WETMORE, J.—This action was brought by the plaintiff Hamilton, against the defendant to recover the purchase money of a lot of land sold by the plaintiff to the defendant. The defendant refused to accept a conveyance of the property and defended the action on a number of grounds. The land was situated in Manitoba, in the county of Shoal Lake, the registry of land titles for each county being at Birtle. At the trial the plaintiff set out to prove that the title was clear and free from cloud. In doing so, however, he shewed that there was a mortgage against the land in favour of Maxwell & Sons, and he produced an examined copy of a dis-

charge of this mortgage by Maxwell & Sons on file and registered in this registration office and certified by the Registrar to be so filed and registered, and the advocate tendered this document in evidence as proving not only that the cloud created by this mortgage was removed so far as the registry allowed, but also that the discharge had actually been executed by the mortgagees, and he relied on *Roscoe's Nisi Prius* (15th edition) p. 92 for this contention. I received the evidence as an examined copy and held that it proved that so far as the registry office shewed the cloud was removed, but that it did not prove the execution of the discharge by the mortgagees, and that it was necessary to prove this fact. In taking the whole case into consideration I was of opinion that the plaintiff was entitled to succeed provided that the execution of this discharge by Maxwell & Sons was proved, but if not that he must fail. The evidence shewed that this discharge by the law of Manitoba could not be removed from the registry office. Under section 236 of the *Judicature Ordinance*,[1] I granted the plaintiff's advocate leave to prove the execution of this discharge before a time specified and directed that if desired a commission should issue to examine witnesses at Birtle to prove that fact and adjourned the Court to enable the proof to be forthcoming. The commission was issued and the discharge was duly proved under it and therefore judgment was ordered for the plaintiff with costs, but the advocate not having called upon the other party to admit this document under section 209 of the *Judicature Ordinance*[1]a I under that section refused to allow the costs of the commission or of proving the document as between party and party. The advocate however, has charged this commission and his costs incidental to proving this document under it in his bill as between advocate and client and the items in question are *some* of those arising out of these charges.

Judgment.
Wetmore, J.

The question raised as to these items has presented many difficulties to my mind. Assuming that the question of negligence and ignorance can be raised before the taxing officer on taxation (and I am inclined to think that such question can be raised on taxation). See *in re Massey & Carey*.[2] I think

[1] "The Judicature Ordinance" No. 6 of 1893.
[2] 26 Ch. D. 459; 53 L. J. Ch. 705; 51 L. T. 390; 32 W. R. 1008.

Judgment. Wetmore, J.

I am safe in holding that a client on taxation of costs between his advocate and himself ought not to be allowed to defeat his advocate's right to costs on a ground of negligence which would not avail him if he had been sued by the advocate, and set up the alleged negligence as a defence. I gather from what authorities I have had access to that where an action is brought on an attorney's bill and negligence is set up as a defence, it is a question of fact, not whether the course was proper, but whether it was so wholly useless as that the client had derived no benefit from it. See *Fletcher* v. *Winter*,[3] *Dunn* v. *Hallen*.[4] In other words, it must be established that the work on the item objected to is entirely useless. I cannot hold that the work in question was entirely useless; on the contrary it was the means by which the plaintiff secured his judgment, without it he would have failed. On this ground alone, I will have to affirm the taxation as to these items.

Taxation affirmed.

CAVANAGH v. GILROY.

Small debt procedure—Protest fees—Demand for debt.

Protest fees are recoverable under the Small Debt Procedure, as a liquidated demand.

[WETMORE, J., *May 2, 1895.*

Statement.

This was an action by the payee of a promissory note against the maker and included protest fees thereon amounting to $2.04. The facts and points raised sufficiently appear from the judgment.

Argument.

W. White, Q.C., for plaintiff.

F. F. Forbes, for defendant.

Judgment.

WETMORE, J.—The defendant abandoned at the trial all the matters of defence set up in the dispute note except that

[3] F. & F. 138.
[4] 9 Bing. 287; 2 F. & F. 642.

Judgment.
Wetmore, J.

contained in paragraph 2, by which he claimed that the charges for protest fees do not come within section 27 of Ordinance No. 5 of 1894.[1] The amount of these fees, $2.04, is not disputed. The simple contention is that in order to recover them the action would have to be brought under the ordinary practice of the Court, and not under the small debt procedure. I think it would be a matter of great regret were I forced to uphold this contention, because it would mean that in every action on a bill or note where there was a protest and the plaintiff was desirous of recovering the protest fees, no matter how small in amount the note was, he would have to proceed under the more expenisve procedure and would be entitled to full costs thereunder. But I am of opinion that the point is not well taken. For the purposes of discussing this question, I think the provisions of section 27 of Ordinance No. 5 of 1894,[1] may be compared with a portion of the provisions of Rule 6 of Order 111 of the English Rules, and the English decisions applicable to such portions of that rule may be applied to the section of the Ordinance. That rule provided that "when the plaintiff seeks only to recover a debt or liquidated demand in money . . . the writ of summons may . . . be specially indorsed" as therein directed. In *Sheba Gold Mining Co., Limited* v. *Trubshawe*[2] an action was brought for goods sold and delivered and the writ was specially endorsed under the rule for the price of the goods, and for interest from the date of the writ to judgment. The Court held that the special endorsement as to the claim for interest was not proper, because if the interest was recoverable at all, it would only be recoverable under 3 and 4, William IV., chapter 42, section 28 (Imp.). as unliquidated damages. It will be borne in mind that it did not appear in this case that there was any agreement to pay interest nor was it claimed by virtue of any statute. In the *London and Universal Bank* v. *Clancarty*,[3] an action was brought on two promissory notes, and the writ was specially endorsed under the rule for the amount of the notes and interest from the date of the writ to judg-

[1] Corresponding to C. O. 1898, c. 21, s. 602.
[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. 689; 61 L. J. Q. B. 225; 66 L. T. 798; 40 W. R. 411.

Judgment.

Wetmore, J.

ment, and the Court held that the special endorsement was proper under section 57 of the *Bills of Exchange Act*, 1882 (Imp.), because by that section the interest and noting as well as the amount of the bill (or note) should be 'deemed to be liquidated damages." And a distinction was drawn between that case and the *Sheba Gold Mining Co.* v. *Trubeshawe*,[2] because in the latter case the interest was in the nature of unliquidated damages, and in the other it was liquidated damages by virtue of the statute. Now the provisions of section 57 of the *English Bills of Exchange Act*,[4] are identical with section 57 of the *Canadian Bills of Exchange Act*, 1890, except that under the English Act the expenses of protest are only recoverable when protest is necessary. In *Dando* v. *Boden*,[5] an action was brought on a bill of exchange and the writ was specially endorsed for the amount of the bill, and a claim for "bank charges." It was held the term "bank charges" was a sufficient description of the expenses of noting and that the special endorsement therefor was proper, it was endorsed for a liquidated demand. I understand the terms "an action on demand for debt" and "an action on demand for a liquidated demand" to be synonymous. And applying these cases, the claim for protest fees is under section 57 of the *Canadian Bills of Exchange Act* a claim for a liquidated demand or a debt, just as much so in fact as the face of the note is under the section. My conclusion is that the protest fees are recoverable under section 27 of the Ordinance No. 5 of 1894; and there will be judgment for the plaintiff for the full amount of his claim and costs.

Judgment for plaintiff.

[4] See those provisions as set out in (1892) 1 Q. B. at p. 690.
[5] (1893) 1 Q. B. 318; 62 L. J. Q. B. 339; 68 L. T. 90; 41 W. R. 285.

CREAGH v. SUTHERLAND AND READE, GARNISHEE.

Attachment of debts—Money placed with returning officer as deposit —Garnishee—What attachable by garnishment.

The defendant was a candidate for election as a member of the Legislative Assembly, and under the election laws in force the sum of $100 had to be deposited with the returning officer to be forfeited under certain conditions, but to be returned in the event of the candidate's election. The garnishee was the returning officer, and one McDonald on the defendant's behalf advanced the required deposit from his own funds. Upon the defendant being declared elected, the plaintiff garnisheed the deposit.

Held, that service of a garnishee summons will bind only so much as the defendant can honestly deal with without prejudicing the rights of third parties, and that consequently the money in the hands of the garnishee, not being such as the defendant could honestly deal with, was not attachable. *Davis* v. *Freethy*[1] approved and followed.

[RICHARDSON, J., *May 15, 1895.*

Statement. This was a trial of a garnishee issue, heard before RICHARDSON, J. The facts are set out in the head-note.

Argument. *H. A. Robson*, for the plaintiff.

Ford Jones, for the garnishee.

Judgment. RICHARDSON, J.—On the 3rd December, 1894, the plaintiff recovered a judgment against the defendant for $85.50. Plaintiff commenced his suit 31st October, 1894, and his writ was served on defendant November 6th, 1894. On November 1st, 1894, on an affidavit of Mr. Robson who deposed on information and belief that defendant was a candidate for election to the Legislative Assembly N. W. T., as a member of which election the garnishee was a returning officer, and in accordance with the requirements of the N. W. T. Election Law then in force, the defendant would deposit with the said returning officer $100, returnable to defendant in case of his election, and that he Mr. Robson had been informed that defendant had received at the polls a majority of the votes and therefore the garnishee was then, on November 1st, 1895, indebted to the defendant in this $100, the plaintiff obtained a garnishee summons which was served on the defendant on November 5th, 1894. The garnishee having disputed any indebtedness to the defendant, the question was set down for

[1] 59 L. J. Q. B. 318; 24 Q. B. D. 519.

Judgment. Richardson, J.

hearing at the recent sittings at Fort Qu'Appelle. At this hearing the following facts were proven:

1. That the garnishee was the returning officer for the election named. The nomination day was October 24th, 1894, the polling day October 31st, 1894, and the declaration day November 5th, 1894. That on the last named day the returning officer declared the defendant elected, at which time, and when the garnishee summons was served, there was and yet remains in his hands the sum of $100.

2. That the $100 in question was paid to the garnishee by Mr. D. H. McDonald of his own money and not defendant's.

The question resolves itself into whether or not on November 5th, 1894, this money was attachable. In my judgment it was not, as service of a garnishee summons will bind so much as, and no more than, the judgment debtor could honestly deal with without interfering with the interests of third parties.

I refer to *Davis* v. *Freethy*,[1] and cases there referred to.

In this case McDonald paid the $100 to the returning officer, and it was his own money, nothing was ever done by McDonald to change the relative positions then entered into between him and the garnishee of bailor and bailee of it nor could defendant after the election was over deal with it without interfering with the interests of McDonald as bailor; defendant could not honestly deal with it either by assignment or otherwise, consequently it was not subject to garnishment.

Judgment, that garnishee at the time of service of the summons, November 5th, 1894, was not indebted to the defendant the judgment debtor, and that the plaintiff pay the garnishee his costs of disputing the claim.

Judgment accordingly.

TRUMBELL v. TAYLOR.

Practice — Striking out appearance — Question of law — Leave to defend—Power of Judge to strike out sham defences.

On an application for summary judgment, the Judge, while giving leave to defend, has power to strike out such defences as are sham defences, but it would be an improper use of the practice to make such an application with this end in view. Before a summons is granted a *prima facie* case should be made out, showing that the defendant has no defence whatever.

[WETMORE, J., *May 17, 1895.*

Statement. This was an application under section 96 of the *Judicature Ordinance*,[1] for leave to enter judgment. The facts and points involved are sufficiently set forth in the judgment.

Argument. *F. F. Forbes*, for plaintiff.

W. White, Q.C. for defendant.

Judgment. WETMORE, J.:—The 4th and 5th paragraphs of the defence raise questions of law well worthy of consideration, and such that I ought not to deal with them on this application. I must, therefore, allow the defendants to defend this action. I am quite clear on this point. The only question that gives me any difficulty is whether I have power on this application to strike out the 1st, 2nd and 3rd paragraphs of the defence? The defences raised by these paragraphs are evidently sham defences. I have, with very considerable hesitation, arrived at the conclusion that I have power to strike them out. I think it would be a defect in the practice if under the circumstances of this case being possessed of the facts, I would be forced to send these parties to try out a question of fact when there is no fact in dispute at all; the whole substantial question between them being one of law. Nevertheless, unless the practice authorizes me to do so, I cannot strike these paragraphs out on this application. Section 556 of *The Judicature Ordinance*[2] provides that "subject to the special provisions of this Ordinance the procedure and practice existing in the Supreme Court of Judicature in England *at the time of the coming into force* of this Ordinance shall as

[1] Ordinance No. 6 of 1893, s. 96, as amended by No. 5 of 1894, s. 5; C. O. 1898, c. 21, s. 103.

[2] The Judicature Ordinance of 1893.

Judgment.

Wetmore, J.

nearly as may be, be held to be incorporated herewith." Now, although this Ordinance was assented to on the 16th September, 1893, it did not *come into force* by virtue of section 1, until the 1st January, 1894. Between these two dates, namely, in November, 1893, a great number of new rules of practice and procedure were promulgated in England which were in force there on 1st January, 1894, at the time of the coming into force of the Ordinance. Very many of these rules are not at all inconsistent with the special provisions of the Ordinance and are, therefore, in force here. Among these rules is rule 8 of Order XIV., which provides that "Where leave, whether conditional or unconditional, is given to defend, the Judge shall have power to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order XXX., and may order the action to be forthwith set down for trial." See *Annual Practice* (1895), p. 342. I see nothing in Order XXX. inconsistent with the special provisions of the Ordinance. It is laid down in the *Annual Practice* (1895), p. 343, that "when some defences are mere sham ones they may be struck out" in an application of this sort. And *Bolton* v. *Thorne-George*[3] is cited in support of that practice. I have, therefore, arrived at the conclusion that taking section 101 of the Ordinance[4] and rule 8 of Order XIV. together, I have power to strike out the paragraphs in question of the defence, and order the questions of law raised by the 4th and 5th paragraphs of the defence to be set down for hearing under section 151 of the Ordinance. While I have reached this conclusion I wish it understood that in my opinion this is an application which ought not to have been made. By that I mean, if I had the same light thrown on the question that I have since received I would not have granted the summons, because on the very face of the plaintiff's material the defendants had raised a question of law well worthy of consideration and, therefore, were entitled to defend. And while, when once seised of the application to strike out the appearance, I am of opinion that I have all the powers to deal with the case as I intend doing, I am at the same time

[3] 38 Sol. Jo. 683.

[4] The Judicature Ordinance of 1893, s. 101: "Leave to defend may be given unconditionally or subject to such terms . . . as the Judge may think fit."

of opinion that the application should not be made with a view of getting rid of some of the defences which may be entered. And a summons ought not to be granted unless a *prima facie* case is presented by which it appears that the defendant has no defence whatever. It is right to say that in this case I think the plaintiff's advocate applied with the belief that the defendants had no reasonable grounds of defence whatever. Under all these circumstances I think justice will be done by ordering the costs of both parties to this application to be costs in the cause. There will be an order striking out the 1st, 2nd and 3rd paragraphs of the defence, and setting down the questions of law raised by the 4th and 5th paragraphs of the defence for hearing at the next regular sittings of the Court at Moosomin on the 24th June next The costs of both parties to this application to be costs in the cause. Judgment. Wetmore, J.

Order accordingly.

CALVERT v. FORBES (No. 3).

Practice — Reference to clerk to take accounts — Procedure on — Certificate of clerk—Mode of settling—Application to confirm.

The rules of Court governing proceedings on references before the chief clerk in England are applicable to and govern proceedings in the N. W. T. on a reference to the Clerk of the Court.

The Judge in directing the reference has power to make such order as to enable him to remain seized of the matter in Chambers.

Comments on the procedure requisite to confirm or vary the certificate of the Clerk after reference.

[WETMORE, J., *June 1, 1895.*

This was an application by the plaintiff for judgment after a reference to the clerk to take accounts. The facts and objections appear sufficiently from the judgment. Statement.

W. White, Q.C., for plaintiff. Argument.

The defendant in person.

WETMORE, J.:—The present application raises a question of some importance in practice and one that deserves attention. The action is one brought by a client against his Judgment.

Judgment.
Wetmore, J.

solicitor for an account and for delivery of papers and securities held by him. The defendant appeared in person, but delivered no defence, and the plaintiff applied in Chambers for judgment in accordance with his statement of claim, and acting under that section, I ordered an account and inquiry to be taken by the clerk and directed the clerk to report the result of such accounting and inquiry, and I further directed that upon such report and certificate being filed, either party should be at liberty to apply to the Judge in Chambers for such judgment or relief as he may be entitled to. The clerk has filed his report, finding a balance in favour of the plaintiff, and that the defendant has certain papers and securities of the plaintiff in his possession, and notified the defendant through the mail that he had so filed his report. The plaintiff applied to me in Chambers for an order for judgment for the amount so found in his favour and for an order for the delivery over of the said securities and papers and for the costs of the action and of the reference. I granted an ordinary Chamber summons. The defendant at the return of such summons objected that the application by summons is wrong, that under Rule 54 of Order XXXVI. of the English Rules, it should be by a four days' notice of motion.

2. Or under Rule 55 of the same order it should be by an eight days' notice of motion.

3. That it was not sufficient for the clerk to notify him by letter of the filing of the report, but a copy of the report should have been served on him.

As to the first objection mentioned, it is quite sufficient to say that that rule does not apply because the cause was not adjourned for further consideration.

The second objection is, however, not so easily disposed of, and I am inclined to think were it not for a very material difference between the practice established here and that in England it might prevail. By the practice in England in an action like the present where the defendant has appeared, but has delivered no defence, proceedings would either have to be taken under Order XV. or under Rule 11 of Order XXVII. Section 132 of *The Judicature Ordinance*[1] ap-

[1] "The Judicature Ordinance," No. 6 of 1893.

plies to *all* actions except those mentioned in the two preceding sections. It, therefore, applies to an action such as the present. It differs materially from Rule 11 of Order XXVII. By the English Rule the plaintiff has to set the cause down on motion for judgment, which I fancy would have to be an application to the Court. By the section of the Ordinance referred to the application can be made to a Judge in Chambers, and the section contains the very important provision, at the end by which the Judge may make "such order as may be necessary to do complete justice between the parties." Under that provision, I am of opinion that the Judge may make such order as to enable him to remain seized of the matter in Chambers and to administer speedy justice without adjourning for further consideration, as is done under the English Practice. See 1 *Daniel's Chancery Practice* (6th ed.) 362. For by that practice, unless the cause is adjourned for further consideration, it would seem by Rule 55 of Order XXXVI. the application would have to be to the Court and not in Chambers. If my order did not contain the clause giving the parties leave to apply to the Judge in Chambers for such judgment or relief as they may be entitled to, it is possible that the English practice would have had to be followed. But I am of opinion that under section 132 of the Ordinance I was warranted in inserting that clause, that the plaintiff has the right to make the application as therein provided, and that acting under such clause the application by Chambers summons under sections 483 and 486 of the Ordinance is correct. No injustice or injury can be done from the shortness of time, the whole matter is in my hands, and if the defendant requires further time to examine the report it can be very readily granted him by enlargement. In fact, I am of opinion that the intention of section 132 is to put the whole proceeding for judgment in such cases in the hands of the Judge. See section 477.

As to the third objection, there is nothing in Rule 53 of Order XXXVI. inconsistent with the Ordinance, it is, therfore, in force here. Under that rule notice of the report may be sent by mail. No objection is taken to the form of the notice in this case except that it should be a copy of the report. That is not necessary. The party having notice

Judgment.

Wetmore, J.

that the report is filed can search and ascertain its contents. As the merits of the application were not discussed I will adjourn the further hearing of it.

Preliminary objections overruled.

The learned Judge thereupon adjourned the motion. Further argument was subsequently heard, the same counsel appearing. Judgment was delivered on the subsequent points raised on July 8th, 1895. The points and objections raised are set forth in the judgment.

[WETMORE, J., *July 8, 1895.*

WETMORE, J.:—The greater part of the objections raised by the defendant would rather form grounds of an application to set aside or vary the report than grounds of objection to the report being confirmed. I am inclined to the opinion; in fact, I may say I have formed a very decided opinion, that if the defendant objects to the clerk's report and desires to have it varied or set aside he should have taken out a summons for that purpose, and unless he did so within eight clear days after the report is filed it would be binding on him. But as the plaintiff raised no such objection as this I will not shut the defendant out. There are no such officers in this country as official referees. But under sections 56 and 57 of *The Imperial Supreme Court of Judicature Act*, 1873, the Court or a Judge may order a reference to any official of the Court or by *consent* to a special referee. In this instance the reference was to the clerk arbitrarily by me and without any consent of the parties. And the proceedings before him will be regulated and conducted as the proceedings before the chief clerk in England are regulated and understood by the rules of Court there. The clerk of the Court here performs all the duties of and stands in the place of the different clerks in the High Court in England in so far as the rules applying to such clerks are applicable here. I do not know that *Daniel's Chancery Practice* (6th ed.), is a very safe guide as to the practice in this particular; as what that work lays down as to it is largely based on the Consolidated Ordinances of the Court of Chancery of Hilary Term, 1860, which were abrogated by the Rules of the Supreme Court, 1883. (See

Wilson's Judicature Acts (5th ed.), pages 182 and 785). As to the practice as I have stated it, I refer to *The Supreme Court of Judicature Act,* 1873, sections 56 and 57 Rules of Court (England), Order LV., Rule 70, *Dyke* v. *Cannell,*[2] *Walker* v. *Bunkell,*[3] *In re Fletcher.*[4] Some of these authorities apply to reports of referees, but it seems both in the case of a report by a reference and the certificate of the chief clerk if a party is dissatisfied there should be an application to set aside or vary the report or certificate. But the form of a report by a referee seems to be different from the certificate of the clerk. I think it is possible if the certificate in the case were the report of a referee it would be sufficient, and in that case likely if a party objects to the report he need not apply to vary it or set it aside within the eight days, but he must do so before it is confirmed. It would be too late to do so afterwards; he could take out a summons or make a motion returnable before or at the same time as the summons or motion to confirm.. I am of opinion that that part of my decision in this matter on the 1st June wherein I held that under Rule 52 of Order XXXVI. notice of the report might be sent by mail was wrong. I think that that rule does not apply to the clerk's certificate at all, but that the proceedings in relation thereto are governed by Order LV. Rules 65 to 67, inclusive, and the certificate should be settled on appointment as therein provided. In that case the certificate would be signed in the presence of the advocate or under such circumstances that they would have to take notice of when it was signed. But this point was never taken at all by Mr. Forbes in the preliminary objections; the only objection he then raised was that he should have been served with a copy of the report. There was nothing, whatever, in that objection, and therefore my decision on the 1st June would, as to the result be the same at that time. There was a number of objections taken by Mr. Forbes in his affidavit filed on 18th June, pretty nearly all of which were dealt with by the affidavits of the clerk and Mr. White filed on 21st June. I do not consider it necessary just now to deal with some of these objections as they may be raised again and possibly the same

Wetmore, J.

[2] 11 Q. B. D. 180; 49 L. T. 174; 31 W. R. 747.
[3] 22 Ch. D. 722; 52 L. J. Ch. 596; 48 L. T. 618; 31 W. R. 661.
[4] W. N. (1893) 201.

Judgment. Wetmore, J.

affidavits used. At present I will have to give effect to one of Mr. Forbes' objections taken after I had given judgment on the preliminary objections referred to. He has objected that the clerks' certificate is informal. The proceedings before the clerk are regulated by the English Rules, Order LV., Rules 65 to 71, inclusive. The certificate as to the accounts is not at all in accordance with the form prescribed by rule 67 and does not comply with rules 66 and 68. It seems to me that the whole difficulty has arisen from the omission to take out the appointment as directed by Rule 66A. I do not consider the objection to the formality of the certificate a merely technical one, because if the parties had attended before the clerk to settle the certificate and the certificate had been prepared in due form reference would have been made in it as prescribed in Rule 66, and Mr. Forbes would have known "upon what the result stated in the certificate" was founded, and could have governed himself accordingly; that is, moved to vary it if he thought it open to him, or otherwise. As to what the certificate should state, see also *Daniel's Chancery Practice*, 1061. I may just say that there is nothing in the objection that each item of the account should have been dealt with as the inquiry progressed. The eighth paragraph of the clerk's affidavit disposes of that, because it was arranged that the whole of the questions raised should be discussed when the evidence was all in. While a question of the allowance or disallowance of an item may be adjourned to a Judge it does not follow that it must be so adjourned. If either party wishes it adjourned he should apply to have it done, and it is just here where I think Mr. Forbes has a right to complain. How could he, under the arrangement as so stated by the clerk, make application to have a question of disallowance so adjourned until he knew it was disallowed, and how would he know that an item was disallowed when he was not called on to settle the certificate, and the first notice he got of the disallowance was notice that the certificate had been signed and filed. In fact the defendant has not had the advantage of the procedure. See 2 *Daniel's Chancery Practice*, 1051. I do not think that it was necessary that the clerk should be sworn. In taking the inquiry he was acting as an officer of the Court, and as such has been sworn. Moreover, the defendant cannot lie by and let the

proceedings go on, and if the report happens to be against him raise such a question as that. It is not necessary to make any order as to filing the evidence as if it is considered the practice to do so, it can be done without any order. I may just suggest that as a matter of expediency it had better be done. I will order that the matter be referred back to the clerk in order that an appointment may be taken out to settle his certificate and that the clerk may prepare a certificate in due form and according to the practice of the Court. All questions of costs of this application to be reserved. Judgment. Wetmore, J.

The whole difficulty has arisen here by treating the report of the clerk as the report of a referee instead of as the certificate of the chief clerk.

Order referring matter back to the clerk.

TRUMBELL v. TAYLOR (No. 2).

Intoxicating liquor—Bill of exchange—Consideration—Jurisdiction—Repeal of part of Act—Retrospective operation—Interpretation of statutes.

The mere fact that the consideration of a bill of exchange is intoxicating liquor does not of itself render the bill void under the N. W. T. Act as originally enacted.

Where by a clause in an Act of Parliament the Courts are deprived of jurisdiction which they would otherwise have, and that clause is by itself repealed, such clause is to be treated as if it never existed, and a retrospective jurisdiction immediately attaches.

[WETMORE, J., *July 2, 1895.*

Action on a bill of exchange given in payment for intoxicating liquor. The bill was dated May 2, 1892, and matured four months thereafter, and at the date of making the bill and also at the date of maturity thereof there was no jurisdiction in the Courts to entertain any action on the bill by virtue of sub-sec. 4 of sec. 88 of *The North-West Territories Act.* Subsequently these portions of that sub-section so depriving the Courts of such jurisdiction was repealed, and thereupon the plaintiff brought this action. Statement.

F. F. Forbes, for plaintiff.

W. White, Q.C., for defendant. Argument.

Judgment.

Wetmore, J.

WETMORE, J.:—This is an action brought upon a bill of exchange drawn by the plaintiff upon Taylor & Wilson and accepted by them. This firm was composed of the defendant Taylor and one Samuel Wilson, since deceased, and the action is brought against Taylor and the administratrix of the deceased Wilson. The 1st, 2nd and 3rd paragraphs of the statement of defence were on a Chamber application ordered to be struck out, and the case was set down for argument on the questions of law raised by the 4th and 5th paragraphs of the defence.

These questions of law are:

1st. That the consideration of the bill sued on was intoxicating liquor sold and delivered by the plaintiff to Taylor & Wilson, and, therefore, that the bill is void.

2nd. That as intoxicating liquor was the consideration in the bill this Court has no jurisdiction in respect of the action.

The first ground was not very much pressed at the argument. Section 92 and the following sections of *The North-West Territories Act*,[1] relating to the prohibition of intoxicants were referred to. The bill was dated the 2nd May, 1892, and accepted about the 16th of the same month. At that time Ordinance No. 18 of 1891-1892 was in force. (See section 143 of that Ordinance). And by virtue of the Act of Parliament, 54 & 55 Vic. (1891), cap. 22, sec. 19 and sec. 146 of the Ordinance before referred to, the sections of *The North-West Territories Act*,[1] relating to prohibition of intoxicants was repealed. There is no allegation in the defence that the liquor was sold prior to the 1st May, 1892; it may have been sold the day the bill was drawn for all I know. I have no right to assume the contrary. But assuming the liquor was sold before the repeal, it is only sales of intoxicating liquor made without the special permission in writing of the Lieutenant-Governor that are prohibited by these sections, and are, therefore, void. There is no allegation that the liquor in question was sold without such permission. Then so far as the Ordinance is concerned, there is no allegation that the plaintiff was not licensed to sell intoxicating liquors. The statement of claim alleges that the

[1] Canada, Revised Statutes, 1886, c. 50.

plaintiff is a merchant and resides at Virden, in the province of Manitoba, and that the acceptors carried on business at Whitewood in the Territories. For all that is alleged the sales may have taken place in Manitoba and have been legal there. The mere fact that the consideration of the bill was intoxicating liquor does not in itself render the bill void. Paragraph 4 of the statement of defence, therefore, affords no answer to this action.

The question raised as to the jurisdiction of the Court is raised under subsection 4 of section 88 of *The North-West Territories Act*. That section as it originally stood provided that "no Court or Judge in the Territories shall have jurisdiction in respect of any action for . . . the price of any intoxicating liquor . . . or of any action by any person on any . . . bill of exchange, the consideration or any part of the consideration for which was . . . any intoxicating liquor . . ." Acting under the Act of Parliament, 57 & 58 Vic. (1894), cap. 17, section 10, the Governor in Council, by proclamation of 1st August, 1894, repealed that part of sub-section 4 of section 88 of *The North-West Territories Act*, which I have quoted. So that now the Court has jurisdiction in respect of actions for the price of intoxicating liquors, and in actions brought on bills of exchange, the consideration for which is intoxicating liquors. It was urged on behalf of the defendants that as the contract was of such a nature that it could not be enforced by the Courts at the time it was made or at the time it matured (four months after its date), the repeal of the provisions prohibiting the jurisdiction cannot be so construed as to have a retrospective operation, to enforce a contract not enforceable at the time it was made or matured. At first sight the question did not seem to me to present much difficulty. But the more I consider the question the greater difficulty I have in coming to a conclusion; and subsection 52 of section 7 of *The Interpretation Act* does not seem to render the difficulty any less. Apart from the provisions of any *Interpretation Act* it appears to have been established that "when an Act of Parliament is repealed it must be considered (except as to transactions passed and closed) as if it had never existed." That is the general rule. See Lord Tenterden in *Surtees* v.

Judgment. Wetmore, J.

Ellison,[2] and see also Tindal, C.J., in *Kay* v. *Goodwin*.[3] It is quite possible that subsection 52 of section 7 of *The Interpretation Act* amounts to nothing more than a statutory provision protecting the exceptions as to transactions passed and closed mentioned by Lord Tenterden, and it may be that the making and accepting of the bill in question was "an act done" within the meaning of that subsection, and if that subsection was applicable to that Act the repeal of a clause affecting the remedy with respect thereto would affect such Act and the repeal, therefore, ought not to be construed as to so affect it. The provision prohibiting the jurisdiction may possibly be a right which the defendant has not to have an action brought against him in the Territories in respect of such acceptance, and may, therefore, be a "right" within the meaning of subsection 52. I am free to confess that I am unable to make up my mind very clearly upon these questions. But I am rather inclined to the view that the repeal in question does not affect any act done or any right of action existing, accruing, accrued or established, that it merely affects the procedure or remedy for enforcing an act or right or obtaining damages or compensation for its breach. It is unnecessary, however, for me to consider this question further, because I have, although with very great hesitation, arrived at the conclusion that this subsection does not apply to the repeal in question. I regret very much that I have not had access to a complete library in order to enable me to investigate this question, and have, therefore, been driven to rely largely on text books. There evidently seems to be a distinction drawn between the repeal of "an entire act and merely repealing a single clause in an act." Hardcastle, in quoting Lord Tenterden's remarks in *Surtess* v. *Ellison*,[2] interpolates the word "entire" into them, (*Hardcastle on Statutes* (2nd ed.) 392), and I have above copied the language of this author at p. 393. The *Interpretation Act* makes a distinction between the repeal of an Act and the repeal of part of an Act." For instance, subsections 48, 49, 50 and 51 all specifically deal with "the repeal of any Act or part of an Act." or make provisions "whenever any Act is repealed wholly or in part." The provisions of subsection 52 are made in respect to "the repeal of an Act" or "the revoca-

[2] 9 B. & C. 750; 4 Man. & Ry. 586; 7 L. J. (O.S.) K. B. 51.
[3] 6 Bing. 576.

Judgment.
Wetmore, J

tion of a regulation;" it contains no reference to a "part of an Act" or "a part of a regulation." Now it seems to me that this must have been designedly done and therefore that a distinction is to be drawn between cases where the whole Act is repealed and where only part of an Act is repealed. I am not prepared to go the length of laying down the rule as broadly as Kelly, C.B., is alleged to have laid it down in *Atty.-Gen.* v. *Lamplough*,[4] as quoted by Hardcastle at p. 393. But I am prepared to lay down the rule thus far, that where a clause in a statute such as that which is contained in sub-section 4 of section 88 of *The North-West Territories Act* deprives the Court of jurisdiction which it would otherwise have and that clause is by itself repealed as was done by the Order in Council that the clause "is to be taken as if it never existed." and that the jurisdiction immediately attaches in respect of any legal contract in existence at the time of the repeal. The order in council has the same effect that a repealing statute would have. I have, therefore, arrived at the conclusion, but as I have before stated with very great hesitation, that the question of law raised as to the 5th paragraph of the defence must be decided in favour of the plaintiff. I must say that I have not very much regret in reaching this conclusion as the defence does not strike me as a very good one in conscience. The defendants have obtained the plaintiff's goods and have promised to pay for them, and I do not think it is very much to be regretted if they are compelled to do so. It is just possible that the defendants may be able to plead some matters of fact which will be a bar to the plaintiff's right to recover in this action. I will, therefore, order judgment for the plaintiff on the questions of law raised in respect of the fourth and fifth paragraphs of the statement of defence. And I will give the defendants leave to file and deliver an amended statement of defence, provided that they do so and pay the plaintiff's costs of and incidental to the argument of these questions, and the setting the same down for argument, and also the plaintiff's costs of the Chamber application to strike out the defence, within twenty days from this date. Otherwise there will be judgment for the plaintiff for the full amount of the claim with costs.

Order accordingly.

[4] 47 L. J. Ex. 555; 3 Ex. D. 214; 38 L. T. 87; 26 W. R. 323.

NOBLE v. WIGGINS.

Infant—Contract of hiring—Parent's right to sue for wages—Master and servant.

A parent suing for the wages of an infant cannot stand in any better position than the infant could if the infant were himself suing.

[WETMORE, J., *Oct. 28, 1895.*

Statement. Action by a parent to recover the wages of her infant son. The boy who earned the wages was only fourteen years old, and was sent out by the plaintiff to hire himself the best way he could and to whomsoever he could. The defendant hired him without any intervention on the part of the plaintiff or without any notice that she claimed his wages, and the defendant paid the boy for his work before he received any notice that the plaintiff claimed the wages.

Argument. *W. White*, Q.C., for plaintiff.

E. L. Elwood, for defendant.

Judgment. WETMORE, J.:—There is no evidence or contention that the lad was imposed on in any way, or that the transaction was in any way to the disadvantage of the lad. Under these circumstances I hold that the plaintiff cannot recover. It is not necessary for the purpose of this case to hold that a parent cannot sue for and recover the wages of his infant child when the minor himself enters into the contract of hire, as the lad did in this case, although that seems to have been held in *Delesdernier* v. *Burton*.[1] I put my decision on this ground; that, as the infant could, under section 549 of *The Judicature Ordinance*,[2] have maintained the action in his own name, the defence set up would have been a good answer to such action. And, therefore, the defendant having paid the lad the wages before he received any notice not to do so and before he was notified that the plaintiff claimed the wages, it is a good discharge as against the parent.

Judgment for the defendant with costs.

[1] 12 Gr. 569.

[2] The Judicature Ordinance of 1893.

ALLEN v. PIERCE.

Building contract — Architect's certificate — Architect supplying material—Pleading—Work not according to contract—Damages.

A building contract required a certificate to be "obtained and signed by" the architect prior to payment, but did not specifically require the certificate to be produced to the owner of the building.

In an action against the owner to recover the balance of the contract price, *held*, not necessary to produce such certificate to the defendant before action, and that an averment in the statement of claim that such certificate had been so produced was not material.

An architect's certificate is conclusive unless obtained fraudulently or unless the certificate is wilfully unfair or partial.

The fact that the architect also supplied the lumber for the building in question is sufficient to call on the Court to closely scrutinize all the circumstances connected with the giving of the certificate.

If a certificate is shewn to be wilfully unfair and partial in one respect, it invalidates the whole certificate.

Where the material or workmanship is not up to that contracted for, the owner of the building is entitled to such damages or to have such deductions made from the contract price as to put him in such a position as to have the building altered so as to make it in accordance with the contract.

Clarke v. *Lee*, ante p. 191, followed.

If no time be mentioned in a building contract for its completion, it must be completed within a reasonable time, and what is a reasonable time will depend on all the circumstances. Where, however, a time is mentioned, the building must be completed by that time.

[WETMORE, J., *Nov. 16, 1895.*

Statement.

This was an action on a building contract brought by the contractor against the owner to recover the balance of the contract price and of some extras in connection with the building, and for some work altogether outside the contract. The contract price for the building was $4,350, to be paid as follows: "Seventy-five per cent. of the invoice of material delivered at the work and the work performed on the building at the end of each and every week during the construction. The balance of the contract price as above named to be paid in ten days from the completion of the contract. Provided that in each of said payments a certificate shall be obtained and signed by T. T. Thomson." Payments were made on account of the contract from time to time as the work progressed through Thomson, and when the work was alleged to have been completed, a balance was claimed to be due to the plaintiff. The statement of claim averred that Thomson gave the plaintiff a certificate, signed by him, shewing the balance due as provided by the agreement and

Statement. then went on to aver that this certificate was produced to the defendants by the plaintiff and a request made for the balance certified to. The defendant, in his statement of defence, denied that this certificate was so produced. At the trial a certificate was put in evidence signed by Thomson and dated before the action was commenced. But this certificate was never produced or shewn to the defendant before action, and he never saw it or knew anything about it until it was so produced at the trial.

Argument. *E. L. Elwood,* for plaintiff.

W. White, Q.C., for defendant.

Judgment. WETMORE, J.:—I find that no certificate such as was contemplated by the contract, was ever produced to the defendant before action brought. The question now arises whether the averment, in the statement of claim, that such a certificate was so produced is a material averment or not. I have arrived at the conclusion that it was not a material averment. No doubt a provision could be inserted in a contract of this sort rendering it necessary to produce to the owner the certificate of the architect before a right of action would accrue. But the clause in the contract in question does not go that far. It merely provides that "a certificate shall be obtained and signed by T. T. Thomson." Now, a certificate was obtained and signed by T. T. Thomson, and that is all the contract required. It was not questioned, either by the pleadings or at the trial, that this certificate was delivered to the plaintiff before action brought. I can find no authority directly in point. But, it seems to me, that the principle that should govern is directly analogous to that which governs in the case of award; and it is not necessary to prove in an action upon an award that the defendant had notice of the award: *Roscoe Nisi Prius* (15th ed) 447. In *McGinnis* v. *The Corporation of Yorkville*,[1] which was an action on a building contract by the contractor for work and materials, the defendant among other defences pleaded in substance: "That it was agreed by the contract . . . that all disputes should be referred to the architect; . . . that differences arose as to the work done and the

[1] 21 U. C. Q. B. 163.

omissions, variations and extra work claimed for, and that these were referred to the architect, who awarded that the plaintiff was indebted to defendants in $579.32 for work omitted, less $253.70 due to him for extra work." On the trial it appeared that this award was given to the defendants, but not to the plaintiff. The Court held that this was sufficient. Burns, J., who gave the judgment of the Court, is reported at page 174 as follows: "The architect made his award in writing within the time and furnished it to the defendants. That was a publication of it, *and it was not required by the contract that it should be sent to the plaintiff.*"

Judgment. Wetmore, J.

The next question that arises for my consideration is as to the effect of this certificate. It is urged for the plaintiff that it is conclusive upon the parties. The general rule is that such a certificate is conclusive both at law and in equity. But where the certificate is fraudulently given or the architect or arbitrator is found guilty of unfairness or partiality a Court of Equity will relieve against his award or certificate: *Addison on Contracts* (9th ed.) 805; *Ormes v. Beadel*[2]. It may be, and I think it quite possible, that the authorities go so far as to lay it down that the unfairness or partiality must be wilful before the Court will grant relief against the certificate. In other words, if the certificate is the *bona fide*, honest opinion of the architect it is conclusive, no matter how mistaken he may have been. The defendant has set up, by his defence, that this certificate was obtained by fraudulent collusion between the plaintiff and the architect, in that the architect is personally interested, with the plaintiff, in the moneys which the plaintiff expects to realize by reason of this action, and unless the plaintiff succeeds the architect will be unable to recover the amount of his lumber account supplied by him to the plaintiff in carrying out the contract. He also sets up that the architect, when he gave the certificate, was well aware that the building was not completed according to the plans and specifications. He also charges the architect with unfairness and partiality in favour of the plaintiff. Under the Ordinance I am sitting here to administer Justice on the principles of law and equity, and, if the defendant has estab-

[2] 2 Giff. 166; 6 Jur. (N.S.) 550; 2 L. T. 308.

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Wetmore, J.

lished this defence, he is entitled to relief against the certificate. I am not very much impressed with the part of the defence which sets up the interest of the architect as an answer to the action. In the first place, I am satisfied that the defendant was aware, when the contract was entered into, that Thomson, the architect, was going to supply the lumber for the building. In the next place, the evidence does not satisfy me that Thomson, at the time he gave this certificate, was interested in any way in the balance he certified in favour of the plaintiff, or that the plaintiff was in any way indebted to him for lumber. But the fact that Thomson supplied the lumber for this building is one that ought to, and does, influence me to closely scrutinize all the circumstances surrounding the giving of this certificate. Because there is the temptation, if he had not the material of the quality the contract calls for, to supply an inferior article; and, possibly, if he had the requisite material, to supply an inferior article and get the benefit of the difference. Now, there are one or two suspicious circumstances in connection with this certificate, and one of them more than suspicious. In the first place, there is the long time elapsing between the Spring of 1893, when the building was completed, and February 25th, 1895, before any certificate was given; at any rate, any certificate that the plaintiff felt justified in exhibiting to the Court. Why should all this delay exist if the contract had been properly carried out? There is one piece of testimony, entirely uncontradicted, that satisfies me that this certificate is, in one respect at least, wilfully unfair and partial. I will not use the word "fraudulent;" it is not necessary to do so. Nevertheless, what I find may constitute legal fraud in the architect. The piece of testimony to which I refer has reference to some of the lumber supplied. The specifications call for siding of the quality known as second dry. The testimony of McIntosh and Ballentin establishes that the siding on the north and east sides of this building was not second dry; it was the third quality of siding and an inferior article. Neither Thomson nor Allen, who were both in Court, even pretended to contradict this testimony, and they must have known just what quality of siding was furnished. How Thomson could certify as he did with the knowledge which

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Wetmore, J.

he must have had, that this material was not what the contract called for, and expect that his certificate would not be open to the charge of wilful unfairness and partiality, I am at a loss to conceive. In addition to this there was one omission at least for which no allowance is made at all. It is claimed that this omission was made at the defendant's request. Assuming that to be so for the present, that is no reason why an allowance should not be made for it. The contract provides for it. I allude to the fan-lights over the windows. Having arrived at the conclusion that this certificate is wilfully unfair and partial in one particular, I can put no confidence in it in any particular where it is attacked. The defendant is, therefore, entitled to be relieved against it. And, wherever the evidence establishes that the work is not done in a workmanlike manner, or the material is not of the quality contracted for, or work which the contract requires to be done has not been done, the defendant is entitled to be relieved just as if the contract did not provide for a certificate by the architect; and in granting this relief it is to be borne in mind that wherever the defendant charges bad workmanship or inferior material, the plaintiff has either joined issue or replied denying the defendant's allegations in these respects. Therefore, I have only, under the pleadings, to determine whether the defendant's allegations are true or not. In granting this relief I will follow the course I adopted in *Clarke* v. *Lee*[3], and *Summerfeld* v. *Warren*.[4] I will merely repeat that it is not a mere matter of difference between the value of the material supplied and that contracted for, or of the work done and that which ought to have been done, or of the house as it stands and that which ought to have been built under the contract. If these were the standards of damages there would be no point in a man contracting for the best materials; he might as well contract at the start for an inferior quality, because they are cheaper. He might as well employ inferior men at the start, because they are cheaper. The owner of the building is, therefore, entitled to recover such damages, or to have such deductions made as will put him in a position to have

[3] Ante p. 191.
[4] Not reported.—T. D. B.

Judgment. Wetmore, J.

just the building he contracted for. I am of opinion that the defendant is not entitled to any damages or deduction by reason of the building not having been completed in time, or by reason of his having lost a tenant for it. The contract did not provide that the building should be completed by the 15th October, as alleged in the statement of defence and counterclaim, or at any other specified time. So the defendant cannot recover any such damages by reason of a breach of any provision of that sort. But, it is claimed further, that the rent was lost by reason of the plaintiff not having performed the contract according to the specifications, and by reason of the bad plastering. I am of opinion that these facts, in no way, contributed to the loss of this rent. I am of opinion that the loss of this rent was due to the fact that the tenant only went into possession of part of the premises and did not get the whole of them until the Spring. While I do not think the question has been raised by the pleadings, I may add that, in my opinion, under all the circumstances, the plaintiff completed his contract in so far as he did complete it in a reasonable time. If a builder enters into a contract of this sort, at the time of year this contract was entered into, and agrees to complete it by a specified time, he is bound to complete it by that time, and it would afford no answer that the cold and frost prevented him. Cold and frost, during the latter part of October and November and December may be calculated upon, in this country, with almost invariable certainty, and if they come and interfere with the proper completion of the work, it is not an unforeseen act of God, and the builder must take the consequences of his express contract. Where, however, no time is specified for the completion of the contract, it must be completed in a reasonable time, and what is a reasonable time will depend on circumstances. If the weather is of such a character that the work, or some part of it, cannot be completed in a workmanlike manner without resorting to extraordinary means, the builder would, I conceive, be justified in postponing such work until the weather became suitable. I am of opinion that in this case the weather was not suitable for plastering, at any rate, without resorting to extraordinary means to guard against frost, and the plaintiff would have been quite justified in

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postponing that work until suitable weather for it arrived. Under such circumstances, the defendant chose to put his tenant into possession before the work was completed, and before the builder was bound to complete it. The defendant, therefore, took all the risk which might arise by reason of this uncompleted state of things, and has no right to any damages by reason of that for anything that transpired between the time he put his tenant in and the time at which the plaintiff was bound to have the building finished.

There is no doubt, however, that some of the work on this building was not done in a workmanlike manner. Take the plastering for instance. It froze and came off. It is true that some of this was repaired in the Spring, but I am satisfied that more of the plaster than Griffith repaired afterwards came off or got loose by reason of the frost. In fact, the plaintiff himself does not pretend to say that it was a good job. The most he swears to is: "The plastering was the best I could have made out of it at that time of the year." Now, in the first place, that is not the issue raised by the pleadings as to the plaster; the only issue as to the plaster, raised by the pleadings, is, whether it was a workmanlike job or not. On that issue I find that it was not, and I am quite disposed to let my decisions rest upon my findings under the issues raised. I think it is about time that advocates begin to understand that there is some meaning to the rules of pleading. That they cannot put one thing on record and then travel all over creation and raise anything and everything. If that practice is to prevail the rules of pleading had better be abolished at once and let the plaintiff file his claim and then let the defendant, without filing any defence whatever, come in and set up whatever he pleases. However, I may say, if I am called upon to decide whether the state of the weather is an excuse for not doing a workmanlike job, I am satisfied that in law it is not. While, as I have before stated, when there is no time fixed for the completion of the building, the defendant is not bound to proceed with it when the weather is unsuitable (and the question of the suitability of the weather must always be one of fact). If he does choose to go on with it and it turns out to be an unworkmanlike job, he cannot set

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the weather up as an excuse. I also find that the roof was not water tight, it leaked around the dormer windows.

Some of the material was not according to the specifications in quality, as, for instance, the siding which I have before referred to on the north and east sides of the building. That on the south and west sides appears to have been all right. It was set up that the painting on the outside of the building was not a workmanlike job. No complaint was made at the trial, of the inside painting. I find that the painting on the south and west sides of the building was a sufficiently good job. And it is immaterial whether that on the north and east side was good or not, as the defendant will have to be allowed for taking off and putting on the siding on these sides, and that will include painting it under any circumstances.

In some instances the contract was not filled according to its terms.

The specifications required furring to be put under the second and third floor joists . . . making the ceiling to come even with ceilings throughout. It is admitted that this was not done with respect to the ceiling of the second flat, and, in consequence, the ceiling in that flat in the old building is not even with the ceiling in the new building. With respect to this, the plaintiff sets up: 1st, that this was a mutual mistake of the architect, the plaintiff and the defendant; 2nd, that it was not possible to make the ceilings even with each other; 3rd, that he was excused from doing it by the architect, who was authorized to do so by the defendant.

This may have been a mistake of the architect, but I cannot bring my mind to the conclusion that the plaintiff was in any mistake about it, and, certainly, there was nothing to shew that the defendant was under any mistake in respect of it. The provision in the specification is as plain as words can make it. The plaintiff read the specifications, or I assume he did, before he tendered. The evidence of Mr. McIntosh and Ballentin make it abundantly clear that the work could have been done so as to comply with the specifications. Why then should there have been any mistake on the plaintiff's part? It was a matter of considerable

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difference to the defendant whether part of his building was to have miserably low rooms or conveniently high ones, or whether the ceiling of his halls was to be disfigured by unsightly jogs. I cannot, under these circumstances, conceive under what principle the plaintiff can hope to escape the consequences of not performing this part of the contract by merely setting up that this provision was a mistake of the architect. Then as to the architect excusing the plaintiff from doing this work: assuming that the defendant employed Thomson to superintend this work, and I am of opinion that this is involved in the clause providing for a certificate from him before payments were made, that would not empower him to authorize the plaintiff to dispense with the performance of part of the contract or to vary it without the consent of the defendant. Now, I have examined the evidence carefully, and I cannot find one instance where the contract was departed from, that the defendant was ever consulted or ever authorized a departure from the contract, except as to the balcony. Then it is urged that the clause in the contract providing that if any dispute arose respecting the true construction or meaning of the drawings and specifications, it should be decided by Thomson, his decision should be final. I cannot conceive that that clause was ever intended to empower the architect to dispense with a clear and unequivocal provision of the contract, more especially without consulting one party to it at all. As a consequence of this work not being done, the fanlights were not put over some of the doors as provided for by the contract. The defendant must be allowed for that.

In allowing the defendant for this bad work and bad materials and failure to perform work, I have based my judgment on the figures of Barnard, McIntosh and Ballentin.

There is another departure from the contract entirely unauthorized by the defendant, and that is the material of the stair railing. The specifications call for butternut for this; the plaintiff saw fit to put in birch. It is claimed that birch costs as much as butternut; that is not the question. If Mr. Pierce fancied butternut, and it was agreed that he should have it, he has a right to have it. Neither is it any answer to say that the butternut could not be got. As a matter of fact, I do not think any very great effort was made

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Wetmore, J.

to get it, and it is simply nonsense to tell me that this wood could not be got. Eastern Canada is full of it, and there were quite convenient means to get it here. The fact is that getting butternut made a little extra trouble, and these men just made up their minds that they would palm off on the defendant whatever they pleased. As, however, no figures were presented to me to enable me to decide how much it would cost to remove the birch railing and put in butternut. I can only give nominal damages as to that.

The locks on two of the doors were not those called for by the specifications, and were of a less value by $2.35.

I find that the defendant authorized the change to be made in the balcony, but, at the same time, if the balcony as built, cost less than the one provided for by the contract, the defendant should be allowed the difference. If it cost more the plaintiff ought to be allowed for it. Thomson and the plaintiff both swear it did cost more, but how much more they do not state. I, therefore, cannot make the plaintiff any allowance. McIntosh and Ballentin both seem to think that it could not cost more, and I may say, frankly, that I am inclined to agree with them, but, at the same time, I do not think that they made such an examination of this balcony as would warrant them in swearing definitely as to the difference. I will, therefore, make no allowance either way for this change. I am not satisfied, under the evidence, that any allowance ought to be made for it.

In all other respects I find the contract properly fulfilled.

The result of this judgment is, that in so far as relates to the cause of action arising out of the contract and the extras claimed in respect to that contract, it is in favour of the defendant, and some matters of defence the defendant has set up to that part of the action, have been found against him.

In taxing the costs the clerk will allow to the defendant the general costs of the cause and counterclaim, not to include, however, any costs in respect of the paragraphs of the defence found against him.

The plaintiff will only be allowed the costs that are solely applicable to the issues found in his favour

When the costs are taxed, one judgment will be set off against the other, and execution may issue for the balance in favour of the party in whose favour such balance may be. Judgment. Wetmore, J.

I must again express my regret that in forming my judgment with respect to the questions of law involved in this case, I have had to rely largely on text books and digests. Now, I have not even the benefit of a library at Regina. I do not suppose that there is a Superior Court in the Dominion of Canada so awkwardly placed in this respect as the Supreme Court of these Territories.

Judgment accordingly.

CLARKE v. PRESTON.

Company—Shareholder—Action against—Seizure of shares by sheriff under execution against the company—Payment by shareholder to execution creditor of company—Execution not returned nulla bona—Effect of payment—Pleadings—Amendment—Costs.

Shares in a joint stock company are not "securities for money" that can be seized by the sheriff under execution issued against the company.

A shareholder has no right to pay the amount unpaid on his shares to an execution creditor of the company until after the execution has been returned *nulla bona*.

The provisions of the Ordinance for enforcing a judgment against a company must be strictly followed.

[WETMORE, J., *Nov. 16, 1895.*

Under execution issued against The Farmers Joint Stock Grist Mill Company of Eastern Assiniboia, by a judgment creditor of the company, the sheriff seized and sold the shares of the defendant and others in that company, upon which there were certain amounts unpaid. The plaintiff was the assignee of the purchaser of the defendant's shares so sold by the sheriff, and brought this action to recover the amount unpaid to the company on such shares. Statement.

D. H. Cole, for plaintiff.
B. Tennyson, Q.C., for defendant. Argument.

WETMORE, J.:—This action was brought against the defendant as a shareholder of the Farmers Joint Stock Grist Mill Company of Eastern Assiniboia, to recover the amounts Judgment.

Judgment. Wetmore, J.

unpaid on his shares. The plaintiff does not sue as an execution creditor or as the assignee of an execution creditor of the company, but he sues as the assignee of a purchaser from the sheriff under an execution. The statement of claim does not state against whom the execution was issued, but it was treated at the trial as being against the company. In fact, I cannot conceive who else it could be against.

The only defence set up originally, was payment of all calls and monies for which the defendants were liable in respect to their shares.

When the case was called on for trial, an application was made to amend the defence by setting up, among other things, "that the shares were not properly the subject of seizure and sale by the sheriff." This action being for a claim under $100, I then refused the amendment. But, in looking into the matter subsequently, and after the evidence was in, it was clear to me that a very serious question of law arose on the face of the statement of claim as to the plaintiff's right to recover, and I allowed the defendant to amend in the particular above specified, and adjourned the Court to hear the argument on the question of law raised by such amendment. Dealing with the question of payment raised, I am of opinion that the defendant must fail as to that. The payments relied on were made to Thomas T. Thomson, a judgment creditor of the company, who had issued an execution against the company which had not been levied. The defendant claimed that the payment was authorized, and was a discharge to him by virtue of section 63 of *The Companies Ordinance*.[1] The right that a judgment creditor of a company has to enforce his judgment against a shareholder is entirely statutory. He had no such right at common law. I am of opinion that it was the intention of the Legislature that the judgment creditor should have no recourse against the individual shareholder until efforts had been made in vain to obtain payment from the company. This would be in accordance with the practice that prevailed in England: See *Lindley's Law of Companies* (5th ed.) 277. The provision was, therefore, inserted in the sec-

[1] Revised Ordinances, 1888, c. 30, s. 63; C. O. 1898, c. 61, s. 62.

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Wetmore, J.

tion in question, that the shareholder should not be liable to an action at the suit of the judgment creditor until an execution at his suit against the company had been returned unsatisfied in whole or in part. Until this is done, the shareholder has no right to pay the judgment creditor, because it might be that the company had means to pay the judgment. I do not mean to lay it down that the shareholder must wait to be sued before he pays, but he must wait until the execution against the company has been returned *nulla bona* in whole or in part. In this case there was no evidence that the execution was returned unsatisfied. The evidence was that the execution was not levied. That might mean that the sheriff had not seized, or if he had seized, he had not realized. It would be quite consistent with that evidence that the sheriff dare not return the execution *nulla bona* in whole or in part, without laying himself open to be proceeded against for a false return.

With respect to the question of law raised; it is almost unnecessary to state that the execution under which the sheriff purported to sell must have been at the suit of a judgment creditor of the company. Now the section above referred to of *The Companies Ordinance,* prescribes the mode by which a judgment creditor can enforce his judgment against a shareholder. That method must be followed strictly. If it is necessary to cite authority for that, I refer to *Christie* v. *Howarth,*[2] cited by Mr. Tennyson. If a judgment creditor could have the stock seized and sold under execution, and the purchaser could compel the shareholder to pay, the provision in the section referred to with respect to the execution against the company being returned unsatisfied, before a remedy could be had against the shareholder, might be entirely evaded. So far as I can find, the only authority under which the plaintiff can find a pretence of relying in his action, is section 341 of *The Judicature Ordinance,*[3] and to render that section applicable, he must establish that these shares are "securities for money." I am satisfied that they are not securities for money. A security for money is something that the owner thereof can assign or transfer in law or equity. The company cannot

[2] 8 Can. L. T. 433.

[3] Ordinance No. 6 of 1893, s. 341; C. O. 1898, c. 21, R. 359.

Judgment. Wetmore, J.

transfer these shares. As a matter of fact, the shares are property in the shareholder, and he can assign them to a third person. The maker of a bond or note or of a debenture or mortgage, has nothing to assign. But, assuming these shares were securities for money, the sheriff has no power, under section 341, to sell them under an execution; he can seize the property or choses in action mentioned in that section, but he must either assign them to the execution creditor at their *par value* at the time of the assignment, and the execution creditor may, probably, then sue on them in his own name, or the sheriff may sue on them himself, and pay the proceeds over to the execution creditor. There is, therefore, no right of property or right of action whatever in the plaintiff.

There will be judgment for the defendants. But as the defendants brought the plaintiff down to trial on a pleading upon which they failed, and if they had raised the question of law on their pleading, there might, possibly, have been no necessity for investigation of the facts, and in view of the fact that the defendants accepted the amendments on the terms to abide what order I might make as to costs, I think the ends of justice will be attained by awarding costs to neither party.

Judgment for the defendant dismissing the action.

Action dismissed without costs.

SMITH v. DICKINSON, ET AL.

Writ of summons—Service—Partnership—Society sued co nomine—Setting aside writ—Practice.

A writ was issued against a number of defendants, including "The Moose Jaw County Association of Patrons of Industry." Application was made by the Association to set aside the writ and service as against it, the application being supported by the affidavit of one McClelland, the president of the Association, who deposed that "the Association was not a body corporate, or an association or company of men with power to make contracts."

Held, (1) An application cannot be made to set aside a writ of summons in part.

(2) It is not sufficient for the applicant to depose that the Association has not the power to contract, but that the objects of the Association should be set out.

(3) In the absence of information as to the objects of the Association, it was impossible to decide whether it was a partnership or not, and since a partnership could be sued *co nomine*, the material was insufficient to support the application.

[WETMORE, J., *Dec. 10, 1895.*

Application to set aside a writ of summons and service thereof as against the defendant, The Moose Jaw County Association of Patrons of Industry. The facts are set forth in the head-note. Statement.

F. F. Forbes, for the motion. Argument.

F. L. Gwillim, contra.

WETMORE, J.:—This is an application by Chambers summons to set aside the writ of summons and the service thereof as against The Moose Jaw County Association of Patrons of Industry. It does not seem to be disputed that the writ is a good, valid and regular writ as against the other defendants, Dickinson, Langford and McClelland. This is the first time I ever heard of an application to set aside a writ in part. In order to set aside a writ it seems to me that it must be either void or irregular altogether. If a person has been improperly joined in the writ, it is a matter of defence. If partners are attempted to be sued in their firm or partnership name, and the wrong firm name is used, an application, possibly, might be made to strike out such name. If an unincorporated association, such as this Moose Jaw Association is claimed to be, is joined in the writ with other defendants by the name of the Association, it might be a proper application to strike this name out as defendants, but it affords no ground for setting the writ aside. This part of the application must fail on that ground. But, dealing with it on the merits, I do not see how the application can succeed, assuming that the question can be raised at Chambers at all. The material on which the summons was granted was the affidavit of James McClelland, and the only grounds alleged for the Association not being liable to be sued, are, that it is not a body corporate, nor an association or co-partnership or company of men carrying on business as such, with power to make contracts. There is nothing to shew what the objects of the Association are. That there is an association of this name is clear, because McClelland swears that he is the president of it. For what purpose is it associated? Mr. McClelland swears that it is not a body corporate or an association or company of men with power to make contracts. It seems to me that Mr. Mc- Judgment.

Judgment.
Wetmore, J.

Clelland, in swearing to this, is infringing on my province and stating a proposition of law. The proper way would be to state the objects of the Association, and then I would be able to judge whether the Association had power to contract, that is, whether it had power to bind its members by contract or whether it was a partnership concern. Now, I have no doubt that at common law a body of men could associate themselves together for a common purpose without being incorporated, and, whatever contract or bargain such persons might make by themselves or their duly constituted agents, within the scope of the objects of the association, could be enforced against them. The difficulty at common law was that the suit would have to be brought against every individual member of the association by name, and if that was not done, the members who were sued could plead in abatement of the non-joinder of the others. If they did not plead in abatement they could not take advantage of the non-joinder. If they did plead in abatement they would have to disclose the names of their associates, and they could be added. But each and every individual member was liable. The difficulty was getting at them. Take, for instance, a club formed for the purpose of providing refreshments and amusements to its members and their guests, such as we find in pretty nearly every large town, or take an association, such as it is possible that this Association may be, formed for the purpose of, among other things, enabling its members to obtain provisions and supplies at a cheap rate. Now, the club or the association, as the case may be, has to purchase provisions and supplies to carry out its object, the members of the club or association then must be liable for the price of such supplies. I have known, in my experience, instances where an action for such supplies had been brought against the individual members of such a club. I never heard the right of action questioned. Now, how do these individuals contract? Each and every man does not go in person to the party from whom the supplies are required and contract, but they do it through their agents, sometimes a person called a manager, sometimes by a committee, but, manager or committee, if he or it act within the scope of their authority, the individual members of the club or association are bound. The difficulty at common law was, as

Judgment.

Wetmore, J.

I have stated, to find out who all the members of the association were. And, among other things, possibly, to remedy this difficulty, Order XVI., Rule 9, of the English Rules was promulgated, and section 44 of *The Judicature Ordinance*,[1] was passed, which provides that: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . on behalf or for the benefit of all persons so interested." (And see *Lindley on Companies* (5th ed.), 270, 271). I have no doubt that if this action had been brought against Dickinson, Langford and McClelland *on behalf* of themselves and all other persons, members of The Moose Jaw County Association of the Patrons of Industry, it would have been properly brought, and it seems to me that that would have been the safest method to adopt, but the action is not stated to have been so brought. Then are the members of this Association a partnership associated together for their purpose or business under the name of "The Moose Jaw County Association of the Patrons of Industry?" Because, if so, they are liable to be used by that name under section 48 of *The Judicature Ordinance*,[1] which is taken from the English Rules, Order XLVIIIa, Rule 1. In *Firmin* v. *The International Club*,[2] two persons were carrying on business under the name of The International Club, and the writ was issued against the club and one member only served. No appearance was entered and judgment was signed by default; the Court of Appeal refused to set aside the judgment. As before stated, there being no evidence before me to shew what the objects of the Club are, I cannot ascertain whether the association *eo nomine* has been properly joined or not. This is also an answer to the application to set the service of the summons aside, because, if the association is properly joined *eo nomine*, the service on McClelland, he being one of the partners, is good under section 50 of *The Judicature Ordinance*, which is taken from Order XLVIII, Rule 3, of the English Rules.

I may also call attention to *Lindley on Companies*, p. 271, when speaking of actions against unincorporated com-

[1] The Judicature Ordinance of 1893.
[2] 5 L. Times Rep. 612.

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panies; it is laid down: "Where no change has occurred amongst the shareholders, an action may be brought in the name of the company," and, for that, the author refers to Order XVI., r.r., 14 & 15, which have been repealed, and other provisions substituted by Order XLVIIIa, which I have before referred to. If this is good law an action may, in such case, be brought against a company by its name, and possibly, it might be necessary, on this application, to shew that there has been a change in the shareholders or members since the debt was contracted. I express no opinion as to that, as I have not fully considered it.

This application must be dismissed with costs.

Summons discharged with costs.

CALVERT v. FORBES (No. 4).

Solicitor — Practice — Witness fees on reference to clerk to take accounts.

A witness attending before the clerk on a reference to take accounts is entitled to witness fees either on the scale provided for witnesses attending trial or on the scale provided by the English Rules.

[WETMORE, J., *Dec. 10, 1895.*

Statement. Application by the plaintiff to review the taxation of his costs of suit. The points involved appear in the judgment.

Argument. *F. L. Gwillim,* for plaintiff.

The defendant in person.

Judgment. WETMORE, J.:—This is an application on the part of the plaintiff to review the taxation of his costs. This was an action brought by the plaintiff against the defendant, an advocate for an account and an enquiry as to the securities of the plaintiff held by the defendant, and for an order that the amount found due to the plaintiff be paid to him, and that such securities be handed over to the plaintiff. The defendant did not appear, and on application made in Chambers by summons an order was made for an account and enquiry to be taken by the clerk, for the clerk to report,

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Wetmore, J.

and that on such report being filed, either party should be entitled to apply in Chambers for such relief as they might be entitled to. The clerk held the enquiry and took the accounts, both parties appeared before him and were examined *viva voce* and a very lengthy investigation was held, and the clerk reported a balance in favour of the plaintiff, and that certain securities of the plaintiff were in the defendant's hands. A judgment or order was made for the defendant to pay over this balance and to hand over the securities and to pay the costs of the action, including those of the enquiry before the clerk. The plaintiff claimed to have taxed to him his costs of travel and attendance before the clerk as a witness, and his affidavit of increase in respect thereof, which the clerk disallowed. The defendant contends that the plaintiff is not entitled to any costs unless the *Judicature Ordinance*,[1] provides for them, and that the *Judicature Ordinance*[1] does not so provide; that section 532 is the only section out of which a right to these costs can be attempted to be spelled, and that that section does not give a witness a right to costs in attending an enquiry like this before the clerk, because that section refers to the tariff therein mentioned and the tariff limited the right of witnesses to fees in going to, staying at, and returning from *trial*, and that this proceeding, before the clerk, was not a trial, it was an enquiry. That strictly, and in a legal sense, there can only be a trial when according to the practice the cause is in that position that it can be, and is, set down for *trial* before a Court or a Judge. Now, I am free to confess, that this does raise a question which I find great difficulty in deciding. This tariff for witnesses' fees, I find, is a re-enactment of the tariff in the old *Judicature Ordinance* 1886, incorporated into the *Judicature Ordinance* of 1886 by sections 4 and 5 of Ordinance No. 21, of 1889, and brought down into the present Ordinance of 1893. In looking at the tariff provided by the Ordinance of 1886 and 1888, it would seem that the Legislature drew a distinction between a trial and a reference to a clerk or other person, because by item 87, a counsel fee for brief at trial was provided, and by item 88, a different counsel fee for attendance before the clerk or

[1] The Judicature Ordinance of 1893.

Judgment.

Wetmore, J.

other person on a reference. Notwithstanding this, however, I would have had very little hesitation in holding in this case that the reference to the clerk was part and parcel of the trial, had the defendant appeared and pleaded, and had the cause been set down and come before me for trial, and had I, after deciding that the plaintiff was entitled to an enquiry and account, made a reference to the clerk to take such account and hold such enquiry, and reserved my final judgment until the clerk reported. No doubt, I could, if I saw fit, have taken the account and held the enquiry myself in Court, and it would, in that case, have, undoubtedly, been part of the trial. But the practice authorizes, and it is usual for the Judge to refer matters of this sort to a clerk or some other person, and if he does, such person is simply the deputy of the Court or Judge, just as the chief clerk in England is the deputy of the Judge: Section 2, *Daniels' Chancery Practice* (6th ed.) 961. The reference is part of and incidental to the hearing or trial, the only difference being that instead of the Judge or Court holding this part of the trial, it is referred to the officer of the Court to hold it, and without any very great straining of the word "trial" in the tariff in question, I would hold that a witness attending the clerk and being examined before him, would be entitled under that tariff, and the party calling him, if successful, would be entitled to have them taxed against the opposite party. But the difficulty in this case is that the case was not set down and did not come on for trial in the technical sense. Nevertheless, it was, in one sense, a trial, because it was an investigation of and determination of disputed facts between the parties to the suit. I am of the opinion that section 249 of the *Judicature Ordinance*[1] will not hold the plaintiff, because I think that that section only applies to a person attending to be examined under section 245, or to produce documents under section 246, neither of which sections affect the question now before me. Section 245 was enacted for the purpose of enabling a party to obtain evidence before trial, with a view of having it at the trial; section 245, to enable a party to have inspection of a document before trial, and I assume it has more especially, reference to documents in possession of persons not parties to the suit, as section 179 has more

especial reference to the production of documents in the possession of a party to the suit. Judgment. Wetmore, J.

Upon considering what the law is in England and in Canada in respect to the right that a witness has to his expenses upon attending an enquiry of this sort, and the right that a party producing such witness has, if successful, to have such expenses allowed him on taxation and on looking at the Ordinance as a whole, I have reached the conclusion that the Legislature did not intend to alter the law in this respect. I have no doubt that in England, by the practice there, a witness attending such an enquiry would be entitled to his expenses, and the party producing him, if successful, would be entitled to have these expenses taxed against the opposite party. And I am satisfied that the same practice would prevail in the Courts in Eastern Canada. Of course, it makes no difference that the witness is a party to the suit. In England, however, there seems to be no tariff of fees provided for witnesses; the amount of their expenses to be allowed against an unsuccessful party is entirely in the discretion of the taxing officer, *Archbold Q. B. Practice* (14th ed.) 715. Now there are cases specified in the Ordinance when witnesses may be compelled by subpœna to attend certain enquiries or examinations, and no special provision is made for the amount of fees they are to be paid, if the tariff in question is limited to witnesses attending a trial, of course, I do not allude to persons attending under sections 245 and 246, because, in those cases, section 249 provides that they "shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial;" but take section 240, which provides for an enquiry as to damages in certain cases; the attendance of witnesses may be compelled, in that case, by subpœna, and it is immaterial whether the question of damages arises on a trial or it is a matter of assessing them on a judgment by default. In fact, I am satisfied that the section is intended, more especially, to be used in the latter case. Now it is the clear practice that a witness cannot be compelled to attend on a subpœna, or punished for not attending, unless his expenses are tendered, and a witness subpœned under that section would not be an exception to

Judgment. Wetmore, J.

that rule. What amount of fees, then, must be tendered to such witness to compel his attendance if Mr. Forbes is right, and the tariff in question only applies to witnesses attending on trial? In the next place, I refer to section 190 of the Ordinance.[1] The preceding sections provide for the examination of a party to a suit with a view to discovery. Section 187 provides that a party may be compelled to attend and testify in the same manner and upon the same terms "as any witness." It does not say upon the same terms as any witness *attending a trial,* and, therefore, the witness is not brought within the language of the tariff according to Mr. Forbes' construction of it. Then section 190 provides that the party, upon being served with a copy of the appointment and a subpœna, and "upon payment of the *proper fees,* shall attend." Now, what are the proper fees to pay such party? If Mr. Forbes' construction of the tariff is correct, it does not apply to that case, because, clearly, such party is not a witness attending a trial, he is only a witness attending an examination. But it is clear that the Legislature intends that something is to be paid to him. What is to be paid then. Now, it appears to me, in view of the light thrown upon the intention of the Legislature by these sections that Mr. Forbes is upon the horns of a dilemma. Either section 532, and the tariff it refers to, are general, and apply to all cases where a witness is entitled to fees by the Ordinance or by the practice, or it is limited to the case of a trial, and, in other cases, where witnesses are entitled to fees, they must be paid according to some other law or rule of practice. Either the tariff in question does apply and the clerk ought to have allowed the plaintiff the fees provided by that tariff, or it does not apply, and, in that case, section 556 of the Ordinance will operate to being the English practice in force, and the clerk ought to have allowed the witnesses travelling expenses "according to the sums reasonably and actually paid," but in no case to exceed one shilling per mile one way. The moment we reach this conclusion it seems to me that the question of whether the tariff applies to the special case or not is a matter of indifference, because any clerk, having that tariff as a guide, could not go far astray in applying it to any case; at any rate, so far as the person against whom he is taxing

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the costs is concerned. Now, the plaintiff swears, in his affidavit of increase, that he paid $15 for railway fare, and he was absent three days, and he claims $21, or $2 a day for every day absent; all I can say is, if he can get away at $2 a day for his reasonable expenses over and above his railway fare, he is travelling very economically. Knowing the distance to Winnipeg, the plaintiff's travelling expenses at one shilling a mile one way, would amount to over $52, but if he is satisfied with $21, we will let it rest. Once having established that a witness is entitled to fees or expenses, I have no hesitation in following the usual practice that the party producing him, if successful, is entitled to have them taxed on some scale or principle against the unsuccessful party. I may add that, on the whole, I am inclined to the opinion that the Legislature intended that the tariff should apply to all cases when a witness is compellable or entitled to attend an enquiry, that it intended that the word "trial" should include an enquiry where testimony is taken *viva voce*. It is not necessary, however, to express a decided opinion on the subject.

The plaintiff is, therefore, entitled to be allowed the following items:

Affidavit of increase, 60c; copy do. to serve, 20c.	$ .80
Letter to plaintiff with pleadings, 53c.; paid oath, 25c.	.78
Witness fees	21.00
	$ 22.58

He is not entitled to letter returning 53c., and the attending to swear was abandoned.

Order accordingly.

UNION BANK v. STEWART AND SMITH & BRIGHAM, GARNISHEES.

Garnishee—Charging order—Solicitor's lien for costs—Creditors' Relief Ordinance—Solicitor and client costs under small debt procedure.

Seizure by the sheriff of sufficient goods to satisfy an execution does not operate as a satisfaction of the judgment under the Creditors Relief Ordinance.[1]

An advocate's lien for costs takes priority over a garnishee summons, although the garnishee summons be served before any charging order is applied for. An advocate is, in the absence of special agreement to the contrary, entitled as against his client to recover for his services under the small debt procedure the fees taxable by the general tariff.

[WETMORE, J., *Dec. 14, 1895.*

Statement. Application by the plaintiff under Chamber summons for payment out of Court of moneys paid in by the garnishees. The facts and points involved are sufficiently set forth in the judgment.

Argument. *F. L. Gwillim,* for plaintiff.

D. H. Cole, for defendant and for himself personally.

Judgment. WETMORE, J.:—Smith & Brigham brought an action against the defendant Stewart. Stewart defended that action and pleaded a set off upon which he succeeded, a balance having been certified in his favour, and judgment was ordered in his favour against Smith & Brigham for such balance and costs, which judgment was signed. The Union Bank, who are judgment creditors of Stewart issued a garnishee summons and attached the amount of Stewart's judgment. Smith & Brigham paid the amount of this judgment into Court. After the money was so paid, Mr. D. H. Cole, Stewart's advocate, in the suit of *Smith & Brigham* v. *Stewart,* made an application to me for a charging order, charging the moneys so paid in claiming to have a lien thereon for his costs of obtaining that judgment against Smith & Brigham. I would have had no hesitation in granting Mr. Cole a summons, but, knowing under the practice, that an application must be made on behalf of the Union Bank to have this money paid out, I did not grant

[1] Ordinance No. 25 of 1893.

Judgment.
Wetmore, J.

it. But when Mr. Gwillim, on behalf of the Bank, applied for an order to have the money paid out to his client, he consented, at my suggestion, that on the return of his summons, the right of Mr. Cole, with respect to this money, should be dealt with. At the return of this summons Mr. Cole appeared both on behalf of Mr. Stewart and for himself. It was established that the Union Bank had, before issuing the garnishee process herein, issued a fi. fa. execution against Stewart for the amount of their judgment, and that the sheriff had, under that execution, seized sufficient property of Stewart's to satisfy that execution. It was also established that another execution against Stewart, at the suit of one Elliott, had been placed in the sheriff's hands. But it was admitted that the sheriff had seized sufficient property of Stewart's to satisfy both these executions. The sheriff had not, however, received or made the amount of these executions in cash. It was claimed, however, that by this seizure Stewart was absolutely discharged as to the amount of the bank's judgment, as the value of the goods was sufficient to satisfy that judgment. I have no doubt that this contention is correct (*Archbold Q. B. Practice* (14th ed.) 869), unless *The Creditors' Relief Ordinance*[1] alters the law in that respect. I am of opinion that it does alter the law. Before that Ordinance was passed, execution creditors were entitled to be paid the amount of their executions in the order of their priority. If the sheriff, therefore, seized sufficient goods to satisfy an execution in the order of its priority, it discharged the judgment because the execution creditor was certain to get his money, or if he did not, he had his remedy against the sheriff. But the Ordinance in question has taken away the right of priority among execution creditors, provided that certain steps are taken as provided by the Ordinance. If these steps are taken, while the sheriff may have seized goods to satisfy every execution in his hands at the time of the levy, it does not follow that these execution creditors will be paid in full at all. It must be borne in mind that the sheriff is not to enter in his book the notice provided by paragraph (a) of section 3 of that Ordinance when the seizure is made, but when the money is made. In this case the money is not made yet, so far as I know. Now, I must assume, that the

Judgment.
Wetmore, J.

sheriff will do what the law says he *shall* do. If, therefore, when the money on these executions is realized, the sheriff enters the notice as provided, a dozen more executions, for all one knows, may be lodged within the month, and they will, if so lodged, be entitled to participate *pro rata* in the proceeds of the sale. Therefore, it is clear that the Union Bank may not have their judgment paid. Under such circumstances it cannot be said that the seizure is a satisfaction of the judgment. I am not prepared to say that a state of facts might not be presented under which I would have to hold that the seizure was a satisfaction of the debt, but such a state of facts had not been presented to me. The Union Bank has, therefore, the right to pursue all its remedies for the recovery of its judgment. Apart from the question of costs no injustice is done to the execution debtor because whatever is realized by the garnishee proceedings, over and above the garnishee costs, must be credited on the execution, the judgment debtor cannot be made to pay it twice. I am, therefore, of opinion that in so far as the facts before me shew the amount of Stewart's judgment against Smith & Brigham was attachable as between the Union Bank and Stewart.

As respects Mr. Cole's lien for his costs of obtaining this judgment against Smith & Brigham, it was urged that Mr. Cole was not entitled to any costs. Smith & Brigham's action was brought under the small debt procedure prescribed by Ordinance No. 5 of 1894, and it was contended that under that procedure an advocate is not entitled to any costs as between attorney and client. I am quite satisfied that an advocate would be, at least, entitled to the ten per cent. provided by section 146 of that Ordinance, and his disbursements for clerk's and sheriff's fees, as provided for by that Ordinance. But I cannot find, anywhere in the Ordinance, any provision which prohibits an advocate retained to prosecute an action under that procedure, and who does prosecute such action recovering as between attorney and client the fees properly taxable to him under the general tariff. Section 46 entirely related to the costs taxable as between party and party leaving the rights and remedies of advocates as against their clients untouched. Of course an advocate cannot recover, against his client, more clerk's

and sheriff's fees than he has, or ought to have paid, and can only have taxed to him the fees which these officers are entitled to under the small debt procedure. I have endeavoured so to construe item No. 96 of the tariff as to fix Mr. Cole's costs at a lump sum, but I am unable to put such construction upon it, as I think that item has reference entirely to the costs payable to a party, not to costs payable by a client to his advocate. The advocate is not a party. I regret I am unable to put the construction on this item I would like to, for it certainly is an injustice that suitors shall be liable to their advocates for such large fees and can only receive the small amounts from their adversary if successful. It was conceded that if Mr. Cole had a lien he was entitled to have his costs taxed as between attorney and client. I may first intimate that in future I think a practitioner ought, before he accepts a retainer in actions brought under this small debt procedure, to draw the client's attention to the state of the law, and give him to understand, distinctly, that he intends to exact payment according to the tariff, if he intends to do so. It was further agreed that Mr. Cole was not entitled to his lien as against the garnishee summons because the garnishees, Smith & Brigham, had no notice of the lien; and *The Canadian Bank of Commerce v. Crouch*[2], is relied on for that contention. It would seem that Osler, J., was of the opinion, in that case, that the attachment of the debt would have priority over the attorney's lien, if the garnishee, at the time he was served with the attaching order or garnishee summons, had not notice of the lien (see his judgment at p. 444). I must say that I cannot concur in that view. I cannot conceive that that was the opinion of the Court of Appeal in the case of *Birchall* v. *Pugin*,[3] cited by Osler, J., at p. 443. Then Coleridge, C.J., is reported as follows: "Until the execution creditor's position is perfect (i.e., by reason of having obtained an order to pay over the money garnished) I think the Court is bound to prefer the attorney." Two cases have been decided in England since *The Canadian Bank of Commerce* v. *Crouch*[2] was

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Wetmore, J.

[2] 8 P. R. 437.

[3] L. R. 10 C. P. 397; 44 L. J. C. P. 278; 32 L. T. 495; 23 W. R. 923.

Judgment.

Wetmore, J.

decided, namely, *Shippey* v. *Grey*[4] and *Dallow* v. *Garrold*,[5] in which it was held that the charging order in respect of the attorney's lien took priority over the garnishee summons, and in both these cases the garnishee summons or attaching order was served before the charging order was applied for, and in both these cases the garnishees occupied the same relative position that Smith & Brigham do in this case. That is, they were the judgment debtors of the primary debtor. In *Archbold Queen's Bench Practice* (14th ed.) p. 169, it is laid down that "the right is effectual against everyone except a purchaser for valuable consideration without notice." I can quite conceive that if Smith & Brigham could have done so, and did pay the Union Bank the money without notice of the lien, or if they had paid the money into Court without notice of the lien, and had not made the suggestion provided for by section 373 of the *Judicature Ordinance*,[6] and the Court had ordered the money to be paid out to the Union Bank, that Smith & Brigham would have been protected. But as the money has been paid into Court, and before it has been paid out Mr. Cole has asserted his right of lien, he will be protected. That is the way I construe the authorities. Under the circumstances Mr. Cole must produce an affidavit before the clerk shewing that there was no special agreement or understanding of any kind between him and Stewart as to the amount he was to be paid for his services in the case against Smith & Brigham, and, if there was any understanding the nature of it. If there was any such understanding, the clerk will tax Mr. Cole's costs as between attorney and client on the basis of that understanding, provided, however, that no such understanding shall be construed to allow Mr. Cole more than he would be entitled to under the tariffs; otherwise his costs will be taxed according to the tariffs applicable.

The clerk will, therefore, tax Mr. Cole's costs as between advocate and client in the cause of *Smith & Brigham* v. *Stewart*. If there was an agreement or understanding as to his costs, the sum to be allowed in accordance with such agreement or understanding provided that such costs will

[4] 49 L. J. C. P. 524; 42 L. T. 673; 28 W. R. 877.
[5] 14 Q. B. D. 543; 54 L. J. Q. B. 76; 52 L. T. 240; 33 W. R. 219.
[6] The Judicature Ordinance of 1893.

not exceed the amount taxable under the advocate's tariff provided for by the Rules of Court, and the clerk's and sheriff's tariffs provided for by Ordinance No. 5 of 1894. If no such agreement or understanding, or if by any such agreement the costs would amount to more than taxable under the said tariff, then such costs to be taxed under the said tariffs. Judgment. Wetmore, J.

The amount of such costs, when taxed, to be paid to Mr. Cole out of the monies paid into Court by the garnishees. The balance, if any, to be paid to the judgment creditor.

Under the circumstances I will allow no costs of this application to Mr. Cole. The judgment creditor's costs to follow the practice.

Order accordingly.

REGINA v. PIERCE.

Criminal law — Theft — Distress — Warrant — Authority of advocates to execute.

Defendants were charged with stealing wheat held under seizure by The Canada North West Land Company. The warrant under which seizure was made was executed by a firm of advocates as agents for the said company.

Held, that the work of executing a warrant of seizure is that of an agent and not of an advocate as such, and, in the absence of evidence that the advocate had been specially appointed as agent to execute such warrant, there was no authority so to do, and the seizure thereunder was in consequence unauthorized and void. Comments on "The Criminal Code, 1892, s. 306."

[WETMORE, J., *Jan. 13, 1896.*

Indictment for theft. The facts appear sufficiently above and in the judgment. Argument.

W. White, Q.C., for the Crown. Statement.

T. C. Johnstone, and *D. H. Cole*, for defendant.

This is a prosecution against the defendants for stealing a quantity of wheat under lawful seizure and detention by Alexander G. Hamilton. The charge was laid under section 306 of *The Criminal Code*, 1892.[1] The evidence shewed

[1] 55-56 Vic. c. 29.

Judgment.
Wetmore, J.

that James Pearson, by chattel mortgage dated the 22nd August, 1895, had given to The Canada North West Land Company, Limited, a mortgage which covered the grain in question. It does not appear that this mortgage was registered with the registration clerk as provided by *The Bills of Sale Ordinance* then in force (No. 18 of 1889). Hamilton seized the grain in question under a warrant dated the 18th October, 1895, directed to him as bailiff and signed as follows: "The Canada North West Land Company, by White & Gwillim, their advocates and agents" which authorized and required him to seize and take all the goods and chattels mentioned in a certain chattel mortgage made by James Pearson . . . "to us, The Canada North West Land Company," and to sell and dispose of the same so as to realize the sum of $258, alleged to be due under such mortgage. The warrant referred to the mortgage annexed thereto, and, as a matter of fact, a duplicate copy of such mortgage was so annexed to the warrant. This warrant purported to be under seal, but it was not under the seal of the company, and I assume, therefore, that the seal was that of White & Gwillim. When Hamilton seized the property it was in stack, not threshed, and he proceeded to advertise it for sale. By chattel mortgage dated the 3rd May, 1895, and duly registered with the registration clerk on the 7th May, the said James Pearson and one William Pearson, executed to the defendant Stephen Pierce, a mortgage which also covered the grain in question. It will, therefore, be seen that Pierce's mortgage had priority in point of time over that of the company. On the 9th October Pierce executed a warrant under his hand and seal to the defendant Rogers, by the name of Joseph Rogers, whereby he authorized and required him to seize and take the property embraced in his mortgage and to sell and dispose of the same so as to realize the amount due under such mortgage. Pierce's mortgage was attached to this warrant and referred to therein. Rogers' name, however, is "Job" not "Joseph." Rogers, under the warrant, and before Hamilton seized, made what he claimed was a seizure of the stacks of grain referred to. When Hamilton seized he put one, Vance, in possession of the stacks. That is, Vance lived about a quarter of a mile from where the stacks were and in sight of them, and Ham-

Judgment.
Wetmore, J.

ilton told him to watch them, and Vance did so by keeping an eye to them from his residence, and, occasionally, when his business called him to go nearer the stacks. It does not appear that Vance ever went out expressly to look after the stacks until the threshers came there. Pierce, after Hamilton's seizure, sent these threshers there, and they threshed the grain in question, and Pierce paid them for doing so. In some way, however, which the evidence does not explain, Vance, with the assistance of James Pearson, took possession of the grain as it came from the thresher and put it in James Pearson's granary. While this was going on, the defendants appeared on the scene. Pierce demanded the grain. Vance refused to give it up and the defendants took it away, and this last constituted the alleged act of stealing. It is not alleged that in doing this the defendant committed a breach of the peace. It is clear that if Pierce's mortgage was *bona fide* and complied with the provisions of *The Bills of Sale Ordinance*, that Pierce, as mortgagee, and Rogers, as his servant acting under him, had a right to take this grain as they did, and that irrespective of whether the alleged seizure by Rogers was a lawful seizure or not, or of whether it was no seizure at all, as claimed by the Crown; because the legal title to the property was in Pierce by virtue of his mortgage, and the seizure by Hamilton, as against Pierce, the owner in law thereof, was unlawful, and the detention thereof, as against Pierce, was also unlawful. It was not claimed that Pierce's mortgage was tainted with actual fraud or that it was fraudulent under the Statute of Elizabeth, but it was claimed, on behalf of the Crown, that the mortgage was void as against The Canada North-West Land Company, Limited, and those claiming or acting under them, because it did not comply with the provisions of *The Bills of Sale Ordinance* in the following respects:

1. At the time the mortgage was executed the Pearsons were not indebted to the defendant Pierce in the sum of $300 mentioned in the mortgage, but only in the sum of about $265, and that the Pearsons were to take up the balance, $35; by goods from Pierce's store, Pierce being a merchant.

Judgment.
Wetmore, J.

2. The consideration for which the mortgage was made was not duly expressed therein and was, therefore, void against the company under section 7 of the Ordinance.

I have set out the questions which were raised by the Crown, not because I intend to decide them, because I do not so intend; it is not necessary in the view I take of the case. I have set them out because I wish to make a comment on them later on.

The defendants' counsel, at the close of the case for the Crown, took the objection that there was no evidence that White & Gwillim had any authority, as agents of the company, to sign and seal the warrant to Hamilton, and, therefore, that there is no evidence to establish that Hamilton's seizure was a lawful one. I reserved the consideration of this question, and I am of opinion that it is fatal to the success of this prosecution. As a matter of fact there is no evidence of any such authority. The only evidence as to the execution of this warrant is that the signature to it is in the handwriting of Mr. Gwillim, a member of the firm of White & Gwillim, and that Hamilton received such warrant with the company's mortgage from White & Gwillim. It was urged that on this evidence I ought to assume that White & Gwillim had authority to execute the warrant, because White & Gwillim are a firm of advocates, and the mortgage came to Hamilton out of their possession. In the first place, let me state that there was no evidence in this case that the firm of White & Gwillim is a firm of advocates, and I doubt very much whether I can take judicial notice of the fact that it is a firm of advocates. But assuming that I must take judicial notice of the fact that the firm of White & Gwillim is a legal firm, composed of W. White, Esq., Q.C., and F. Gwillim, Esq., both of whom, I am aware, are advocates of the Territories and, therefore, officers of this Court, I am, nevertheless, of opinion that I can only assume that they are acting with authority when they are doing acts which appertain to them as officers of the Court. Now, it is no part of the duty of an advocate, as an officer of the Court, to execute warrants on behalf of their principals authorizing third persons to take possession of their property by virtue of an indenture of two parties executed under seal, such principal being one of the parties to such indenture, all of which was the

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case with respect to the company's mortgage. I am of opinion that, in such case, the authority must be proved, and I am rather disposed to think that the principals being a corporation, the authority ought to be under the corporate seal. I have not been able to find a case in point, but there are some cases which seem to point in the direction that the authority must be proved. In *Smith* v. *Keal*,[2] it was held that it was not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa. to direct the sheriff to seize particular goods. In *Viney* v. *Chaplin*[3] it was held that it was not within the ordinary business of a solicitor to receive purchase money belonging to his client or money due to him on mortgage, nor to receive money from him for the purpose of investment generally. In *Harman* v. *Johnson*[4] it was held that the receipt of money by one of a firm of attorneys for a client professedly on behalf of the firm for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney so as without further proof of authority from his partners, to render them liable to account for the money so deposited, such a transaction being part of the business of a scrivener, and attorneys as such not necessarily being scriveners. So I think the transaction of signing a warrant to seize property is the work of an agent, and not of advocates as such. On this ground, and on this alone, I find the defendants not guilty and acquit them.

I may further draw attention to the fact, although it was not raised, that the mortgage was to "The Canada North West Land Company, Limited," and the warrant is signed by White & Gwillim as agents of "The Canada North West Land Company," and the body of the warrant describes the money as being due to "The Canada North West Land Company"—the word "Limited" is left out.

It is but fair to the defendants that I should state that the defendant Pierce gave evidence which might tend to

[2] 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76.
[3] (1858) 27 L. J. Ch. 434; 2 De G. & J. 468; 4 Jur. (N.S.) 619; 6 W. R. 562.
[4] (1853) 2 E. & B. 61; 22 L. J. Q. B. 297; 3 Car. & K. 272; 17 Jur. 1099; 1 W. R. 326.

Judgment. Wetmore, J.

establish that, at the time the mortgage to him was given, the Pearsons were actually indebted to him in the sum of $300. There was a memorandum in his mortgage that the amount of the mortgagee's claim was for seed wheat and goods furnished. Pierce's evidence went to establish that the $300 was made up of an old note of $147.11, given for goods, and a little over $21 for interest on that note, and the rest was all made up of goods and seed wheat furnished, except a small claim of $2, for drawing the chattel mortgage. I will not state what conclusions of fact I have reached on the evidence in so far as they affect the questions raised under *The Bills of Sale Ordinance*. But I am satisfied that the defendants have been guilty of no moral wrong whatever. It is clear from the Crown's own witnesses that the Pearsons, very shortly after the mortgage was given to Pierce, took up the whole balance the mortgage was given to secure, and long before the company ever got their mortgage honestly owed Pierce the whole $300, and the defendants took the property in question under a fair colour of right, under the honest *bona fide* belief that it was the property of Pierce and that, therefore, they had the right to take it. I will go further and state that the questions raised by the Crown are questions of great nicety, and the defendants might well believe that Pierce owned this property. It seems to me, therefore, to be a horrible thing that when a *bona fide* dispute, with respect to the title to property, may arise between private persons or corporations such as has arisen here, that men acting honestly within what they conceive to be their legal rights, can be placed in a position to be branded as common thieves if it should turn out that through some technicality they did not own the property which they honestly thought they did. Nevertheless, if the construction is to be put on section 306 of *The Criminal Code*, 1892, which the Crown in this case claim to put upon it, such will be the result. While I have some doubts about it, I am not prepared to say that the construction might not be correct. The section is penal and must be strictly construed. The more I consider the words "under lawful seizure and detention" in the section, the more I am impressed with the idea that it is difficult to escape giving the construction to them that the Crown has urged. Nevertheless, I cannot

conceive that Parliament ever contemplated such consequences. I can quite understand that Parliament intended to protect property seized by officers of the law and to provide that persons interfering with property seized by such officers do so at their peril, but I cannot conceive that they ever intended to place one private individual honestly claiming property as against another private individual in such a position. I am very glad that I am relieved from branding these defendants as common thieves by reason of what they did in this matter, and I can only say that had I been driven, by a strict reading of the law, to find them guilty. I would have imposed the minimum punishment that the law allows, probably about ten minutes in gaol. I shall take care to bring this case under the notice of the Minister of Justice, with a view of having the law, in this respect, amended. I have advisely refrained from expressing an opinion as to how the securities in question are affected by *The Bills of Sale Ordinance*, as I do not approve of this drastic method of getting private rights fairly open to dispute settled at the risk of sending one of the parties to the penitentiary, or of getting such rights settled at the expense of the Crown and without any risk to one of the parties. Judgment. Wetmore, J.

The defendants are acquitted.

CALVERT v. FORBES (No. 5).

Advocate — Attachment — Judgment obtained in ordinary suit — Effect of—Discipline—Judicature Ordinance—Interpretation.

An order to imprison an advocate cannot be granted for non-payment of money under a judgment or order obtained in an ordinary suit in the Court, but disciplinary jurisdiction of the Court must be resorted to for such a purpose.

The Judicature Ordinance providing for the issue of a "writ of committal" to enforce a judgment, and the notice of motion having asked for the issue of a "writ of attachment," the motion was refused.

Comments on the construction to be given the various Judicature Ordinances.

[WETMORE, J., *Feb. 3, 1896.*

Application for an attachment against the defendant, an advocate. Statement.

F. L. Gwillim, for the plaintiff. Argument.

The defendant in person.

Judgment.

WETMORE, J.:—This is an application on notice of motion for an attachment against the defendant for a contempt of Court in not paying over certain monies ordered to be paid by him to the plaintiff by a Chamber order made before me and in not delivering up a cow in pursuance of such order. In so far as the non-payment of the monies are concerned, the defendant claims that he is not liable to imprisonment by virtue of *The Debtors' Act*, 1869. I am of opinion that the provisions of that Act referred to for the purposes of the questions raised in this case, are in force in the Territories by virtue of *The North-West Territories Act*, sec. 11. As a matter of fact that was not disputed. But it was urged that the defendant came within the exception provided by paragraph 4 of section 4 of *The Imperial Statute* above mentioned. As a matter of fact, the defendant is an advocate of this Court, and the statement of claim herein charged him with receiving, as such advocate, certain monies and securities of the plaintiff, which he refused to account for or pay over, and claimed an account and payment of the amount found due and delivery over of the securities. The defendant failed to appear and, under section 45 of *The Judicature Ordinance*,[1] an account was ordered to be taken before the clerk. This account was taken and the clerk reported a balance in favour of the plaintiff, and certain securities of the plaintiff to be in the defendant's hands; and, thereupon, the order in question was made as a final order or judgment in the cause directing the defendant to pay over the balance and hand over the securities so reported. Although the defendant did not appear to the writ of summons (I presume because there was no preliminary question to be decided) he filed an affidavit claiming that the plaintiff owed him, and, in taking the account, which extended over a number of years, a very lengthy enquiry was held by the clerk. The action was commenced and proceeded with as an ordinary action for an account, and the disciplinary jurisdiction of the Court was not attempted to be invoked until this application was made for an attachment. The facts which I have just stated are gathered on inspection of the papers and proceedings on file in the cause; they were

[1] The Judicature Ordinance of 1893.

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not brought out in the affidavits or other papers served on the defendant with notice of motion for the attachment. The defendant sets up that it is not competent for me to inspect the papers and proceedings on file, other than the affidavits so served on him, that I can only take notice of the facts disclosed by those affidavits and, therefore, that I cannot take notice of the fact that the statement of claim on file charged him with receiving the monies in question as an advocate, and he further claims that this contention is made all the stronger because the notice of motion sets forth that these affidavits, the Chamber order in question and the exhibits therein referred to, will be used in support of the motion, and does not state that any other material whatsoever will be used. The affidavits so referred to were two affidavits of John Henry Scott Coyne, one proving the service of the order and of the endorsement thereon on the defendant, the other proving service of a demand on him, and those of Mr. White and the plaintiff, proving that the monies had not been paid or the cow delivered, the exhibits mentioned in Coyne's affidavit being the order and indorsement, and the demand served. I am not prepared to say that Mr. Forbes' contention may not be correct, but in view of the conclusion I have reached it is not necessary to decide it. The plaintiff cannot obtain an order for the imprisonment of the defendant unless he brings him within the exception provided by paragraph 4 of section 4 of *The Debtors' Act*, 1869, and in my opinion an advocate is not brought within that exception unless the order, on its face, directs him to pay the money in his character as an advocate. The order in question does not do that, it is merely the ordinary order which would be made in any like case in which the defendant was not an advocate. I may further state that in directing the order to issue I never contemplated that I was making an order against the defendant in his capacity as an advocate; it never occurred to me that the proper proceedings had been taken to authorize me to make an order against him in that capacity. I looked upon the allegation in the statement of claim, that the defendant was an advocate merely as a matter of description, just in the same manner as the statement of claim alleged that the plaintiff was

Judgment.
Wetmore, J.

an agent, and I looked upon the allegation that the defendant received the monies as an advocate merely as a statement made by the way. In fact the claim alleged that the plaintiff did not know the amount of monies which the defendant had received. I considered that the action was merely brought for the purpose of ascertaining what the amount of these monies was, and what balance the defendant held, and with a view of obtaining the ordinary remedies for payment when the balance was ascertained. This view, I think, is strengthened by the fact that the defendant had a very large contra account against these monies received by him. I cannot conceive that, in an ordinary suit of this sort, it could ever be contended that an extraordinary remedy should be granted against the defendant for the recovery of the monies, because he happens to be an advocate. It seems to me that if the plaintiff desires to obtain the extraordinary remedy against the defendant he should first invoke the summary disciplinary jurisdiction of the Court and proceed against him thereunder. Suppose the plaintiff had been aware of the amount of monies collected by the defendant and had brought an action for monies had and received and recovered the ordinary judgment in such an action, I do not think that he could then have obtained this extraordinary means of enforcing it. In *In re Gray*,[2] it is laid down that when a solicitor has committed a breach of professional duty in failing to pay over money received by him for his client, the fact that the client has brought an action against him and recovered judgment for the money does not take away the disciplinary jurisdiction of the Court summarily to order payment of the money to the client. This case in my opinion goes to show not only that a process to imprison the solicitor will not be issued on such a judgment, but that in order to get such a process the disciplinary jurisdiction of the Court must be resorted to. That it will not be issued upon an ordinary judgment or order of the Court for the payment of money obtained in an ordinary suit, that in such cases the only process the plaintiff can have in England is either one of those provided by Order XLIV., r. 17; in the Territories that provided by section 319 of *The Judicature Ordinance* as amended by Ordinance No. 5 of

[2] 61 L. J. Q. B. 795; (1892) 2 Q. B. 440; 41 W. R. 3.

1894, section 11. Section 5 of *The Debtors' Act*, 1869, will not help the plaintiff, because it has not been shewn that the defendant has or has had since the date of the order, the means to pay the monies in question. In view of the provisions of sections 319, 320, 321 and 322 of the Ordinance, it might possibly be successfully urged that section 5 of that Act is not in force in the Territories. I express no opinion on that point, however. The order for an attachment, therefore, *quoad* the moneys ordered to be paid must be refused. Judgment. Wetmore, J.

That part of the application which relates to the omission to deliver up the cow stands on a different footing. I have great doubts whether the order in question directs the defendant to deliver the cow to the plaintiff. The order directs the plaintiff to deliver "the papers and securities found by the said certificate of the said clerk to be held by the defendant belonging to the plaintiff as follows." The order then proceeds to enumerate a number of notes and other papers and securities, and among these is placed a "cow credited on account of notes of John McLeod." Now, this is certainly not a paper, and I doubt very much whether it can be called a security. As a matter of fact, this cow ought not to have been set down as a security; the value of it ought to have been charged against the defendant. However, assuming that it is a security within the meaning of the order, I have no doubt that the defendant is liable to process of imprisonment for refusing or omitting to deliver it up. But I am of opinion that a writ of attachment is not the proper process of imprisonment to be issued in the Territories for disobedience to an order of the Court or a Judge requiring a party to do an act made in an ordinary suit. I do not wish to be understood as holding that an attachment cannot be issued in the Territories against an advocate for disobeying an order to do an act or to pay monies made under the disciplinary jurisdiction of the Court. I express no opinion as to that one way or the other. All I hold is that such a writ cannot be issued for disobedience to an ordinary judgment or order of a Court or Judge requiring a party to a suit to do an act. I am free to confess that I have had considerable difficulty in construing the several *Judicature Ordinances* that have been in force here since the creation of the Supreme Court of these Territor-

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Wetmore, J.

ies. The difficulty I have experienced is that these Ordinances have to a very large extent copied and enacted the English rules and especially referred to each rule so copied. The framer of the Ordinance has gone on and copied a number of these rules one after the other and then, without any apparent reason, passed over a number of these rules as equally applicable to the Territories as those he has copied, and passed on to others. Now this, to my mind, would shew an intention not to adopt the rules so passed over or to make them applicable to the practice here, and I have had great doubts whether the section 556 of the Ordinance now in force, or the section corresponding thereto in the preceding Ordinances, were sufficient to make the rule so apparently intentionally omitted applicable here. And this is especially true of the first Ordinance, passed in 1886. In subsequent Ordinances many of these rules so omitted have been incorporated therein. But I found that unless some of these rules so omitted were held to be part of the practice here, the Ordinance could not, in many points of practice, be worked out. It is not necessary to particularize, for instances are arising nearly every day where the practitioner has to resort to the English rules to work out the practice. The consequence was that a very wide interpretation had to be given to section 556 of the present Ordinance, and to the sections corresponding thereto in the preceding Ordinances, and the whole of the English rules are held to be in force here, except where the Ordinance has changed them or shewn an intention to do so, or when the machinery does not exist to work them out. Now, in some instances, the Ordinance has copied an English rule in part, and as regards other parts of it, made different provisions. In such cases there is a clear intention to depart from the English rule. In other instances the Ordinance has copied the English rule in part and has left the other part out, making no provisions with respect to the part so left out. It seems to me that it would be carrying section 556 of the Ordinance too far to hold that that part of the rule, so designedly left out, was incorporated in the practice here, and that is just the question that arises with respect to the power to order a writ of attachment to issue for not delivering this cow. In comparing the section of *The Judicature Ordinance* bearing on

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the question with the English rules I will refer to the marginal numbers of the rules. Section 331 of the Ordinance following rule 602 provides that "every order of a Court or Judge, in any cause or matter, may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." Section 319 of the Ordinance, following Rule 595, provides a process for the recovery of money or costs awarded by a judgment or order. That section originally was a *verbatim et litteratim* copy of the English Rule. But the Legislature, subsequently, by Ordinance No. 5 of 1894, sec. 11, amended the section by striking out the words "or one or more writ or writs of *elegit*"; that was a clear indication, on the part of the Legislature, that a writ of "*elegit*" should be no longer available to enforce an ordinary judgment or order for the payment of money or costs, that a *fieri facias* should be the only process available for the purpose. Section 320 of the Ordinance provides a process for enforcing a judgment for the recovery or possession of land and exactly follows Rule 583. Section 321 of the Ordinance provides a process for enforcing a judgment for the recovery of property other than land or money, and refers to Rule 584. But there is a marked difference between this section and the Rule referred to. The Rule provides three processes for enforcing such a judgment: (a) by writ for delivery of the property; (b) by writ of attachment; (c) by writ of sequestration. The section of the Ordinance only provides one process for enforcing such a judgment, namely, "By writ for delivering the property." It seems to me that this is a clear indication of an intention on the part of the North-West Legislature, that a writ of attachment or a writ of sequestration should not be available here to enforce the judgment mentioned in that section. Now we come to the section of the Ordinance bearing upon the order in question in this cause, and upon this application. Section 322[3] provides a process for enforcing a judgment requiring a person to do any act other than the payment of money, and refers to Rule 585, but here, again, we find a marked difference between the section and the Rule. The Rule provides for two processes for enforcing

[3] This section was subsequently amended to make it correspond with the English Rule referred to.—T. D. B.

Judgment.

Wetmore, J.

such a judgment, namely, "by writ of attachment or by committal." The section of the Ordinance only provides for one process, namely, "by writ of committal." This I take to be a clear indication, on the part of the North-West Legislature, that a writ of attachment should not be available for enforcing such a judgment. But it may be urged that a writ of attachment is a writ of committal, that they are synonymous. I do not think so; if that was the intention of the Legislature, why did it use the term "writ of committal." A writ of attachment was a process well known, one that has been in use for centuries; why was its name changed if the Legislature intended the same process? I am quite satisfied that the processes given by the English Rule to enforce such a judgment as we are now considering, was by writ of attachment or by order of committal. I can find, in the English practice, no such process as a writ of committal. But there is a difference, and a marked one, in point of form between a writ of attachment and an order of committal. If we inspect the prescribed form of a writ of attachment (*Wilson's Judicature Acts* (5th ed.), 713) it will be seen that the writ of attachment was before the Court to answer touching the contempt. The order for committal (the form of which will be found in Wilson at page 744) directs the party to be committed to prison. I am of opinion that the intention of the Legislature is that the form of the writ of committal provided by the Ordinance shall follow in substance that of the order of committal, that is, that it shall direct the sheriff to commit the party to prison. In looking at the practice I can find no practical distinction in substance between the effect of a writ of attachment and an order of committal. Under either process the sheriff commits the party to prison. See Rule 620 and 1 Daniel Ch. Prac. (6th ed.), 888, and Annual Practice, 1895, p. 828. Nevertheless, a distinction seems to be kept up, and in *Callow* v. *Young*,[4] where an application was made for an attachment, the party moving was allowed to amend his notice of motion by asking for a committal as well as attachment. And, as before stated, I cannot understand the Legislature providing for a writ of committal instead of a writ of attachment, unless it intended that the latter named

[4] 56 L. T. 147; 56 L. J. Ch. 690.

writ should not be resorted to in the cases provided for. That is, it has provided for a different form of writ. This being a matter where the liberty of the subject is concerned the Ordinance must be strictly followed. In this case I will not allow the notice to be amended, because I think it was an error on the part of the clerk to put this cow down as a security. The facts are that the defendant took a cow from one McLeod at $20, on account of a note in favour of the plaintiff, and this $20 was credited on the note; the plaintiff never got the cow or the value of it. There was no question that the cow was worth more than $20. Under such circumstances, the defendant should have been charged with the value of the cow. The animal was not a security as the clerk was directed to report under the reference. If the value of the cow had been credited the plaintiff would not have been in a position to move for a process of imprisonment against the defendant; the order for payment of money would, in that case, have embraced the $20. I have less hesitation in refusing to amend because I perceive that the plaintiff is not deprived of his remedy of either obtaining the value of the cow with the money ordered to be paid or of making the consequences very serious for the defendant. In view of all the circumstances of this case, the extraordinary delays that have taken place in the plaintiff realizing his money, that the defendant is an officer of this Court, and that the ground on which he escapes the order for imprisonment *quoad* the cow was not raised by him, I will allow no costs of opposing this application.

Judgment.
Wetmore, J.

Application dismissed without costs to either party.

ROSS v. WRIGHT.

Conditional Sale—Lien note—Affidavit of bona fides—Defect in—Validity of note—Purchaser without notice of lien—Bills of Sale Ordinance—Applicability to lien notes — Nullity—Irregularity—Ordinance No. 8 of 1889.

(1) The fact that the *jurat* to an affidavit of *bona fides* on a "lien note" erroneously states the date, is merely an irregularity and does not invalidate the note.

(2) Where a note was on a separate sheet of paper from the affidavit of *bona fides* and fastened to it by a pin, and the registration clerk placed the number on the affidavit and not on the note itself, this was held to be a substantial compliance with the Ordinance requiring the "instrument" to be numbered.

(3) Section 11 of the *Bills of Sale Ordinance* (No. 18 of 1889), which requires renewal statements to be filed, is not applicable to Ordinance No. 8 of 1889. *Western Milling* v. *Darke*,[1] discussed.

[1] 2 Terr. L. R. 40.

[WETMORE, J., *Feb. 17, 1896.*

Statement. This was an action for the unlawful detention of a buggy. The plaintiffs replevied this buggy according to the practice. The article was covered by what is commonly called a "lien note," dated the 17th August, 1893, made by one J. Peterson, in favour of the plaintiffs, which, together with an affidavit of their agent as to its correctness and as to the *bona fides* of the transaction, purported to have been registered with the proper registration clerk under *Ordinance No. 8 of 1889*, on the 30th August, 1893. This affidavit, however, appeared on the face of the jurat to have been sworn on the 31st August. As a matter of fact it was sworn on the 30th August, before it was registered, before the registration clerk. The note and affidavit were fastened together by a pin, the note being on the inside, and they were numbered 3069, the number being written on the back of the affidavit. No statement exhibiting the interest of the holder of the note in the buggy, of the amount due on the note and of the payments made on account with an affidavit verifying the same, as is provided by *The Bills of Sale Ordinance* (No. 18 of 1889), was ever filed with the registration clerk since the note was registered. The defendant was a *bona fide* purchaser of the buggy for value and without actual notice of the plaintiff's claim. The registration clerk was called as a witness at the trial, and established that as a matter of fact the affidavit of *bona fides* was sworn to before him by McLean, the deponent thereto, on the 30th August, before the note was filed, and that the error in the jurat arose in this way: The affidavit and jurat were partly written and partly printed, and when it was brought to Mr. Neff, the registration clerk, to be sworn, all the written part, including the date in the jurat, was filled in in McLean's handwriting, and, after swearing McLean, the clerk signed the jurat without noticing the error in the date.

Argument. *W. White*, Q.C., for plaintiff.

F. F. Forbes, for defendant.

Judgment. WETMORE, J.:—The defendant contends that the lien note is invalid against him because:—

1. Owing to the erroneous date in the jurat the affidavit of *bona fides* is void and is no affidavit at all.

Judgment. Wetmore, J.

2. The numbering on the back of the affidavit is not a compliance with section 10 of *The Bills of Sales Ordinance* (No. 18 of 1889), as the numbering should be on the note itself.

3. Section 11 of *The Bills of Sale Ordinance* applies to the instrument in question, and no statement with accompanying affidavit having been filed within the year as required by that section, the instrument ceased to be valid as against subsequent purchasers.

As to the validity of the affidavit of *bona fides;* a number of cases were cited which went to establish that the jurat of an affidavit must state, and state correctly, the date on which it was sworn, and if it is defective in this respect it is fatal to the validity of the affidavit. But the case principally relied on was *In re Robertson et al.*,[2] in which Morrison, J., held that when the jurat of an affidavit stated that it was sworn on a day, which had not then arrived, the affidavit was a nullity. All the cases so cited, including *In re Robertson*,[2] were cases used in some proceeding in the Courts. Whatever technical rules prevail, according to the practice of the Court, to prevent affidavits being read or received in proceedings there (and there are a number of technical rules which have that effect), the authorities establish, to my mind, that these rules will not be followed to render invalid affidavits made for a purpose such as the affidavit in question was made for. Perjury may be assigned on an affidavit made to be used in a proceeding in the Courts, although it cannot be read in such proceeding by reason of its not complying with some technical rule of practice. In 3 *Russell on Crimes* (9th Canadian edition) 104, a case is cited (*Rex* v. *Hailey*[3]) where a person who was a marksman was indicted for perjury in an affidavit made by him, the jurat did not state when it was sworn, or that the affidavit was read over to the party. Either one of these omissions would be fatal to the affidavit being read in the proceeding in which it was intended to be used, yet it was held that perjury could be assigned on it. Littledale, J., is there quoted to have laid down as follows: "The omis-

[2] 5 P. R. 132.
[3] 1 Car. & P. 258; R. & M. 94

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Wetmore, J.

sion of the form directed by this and other Courts to be used in the jurat of affidavits may be an objection to their being received in the Court, whose rules and regulations the party has neglected to comply with, but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the Court for which it is prepared, that, nevertheless, perjury may be assigned on it." In *DeForrest et al.* v. *Bunnell*[4] exception was taken to the affidavit of a mortgagee to a chattel mortgage because it did not appear, by the jurat, that the oath was administered by the Commissioner who took the affidavit within the Territory for which he was appointed such Commissioner, namely, the County of Brant. McLean, J., in giving judgment is thus reported, at p. 379: "But under any circumstances I do not think we are obliged to look at the jurat to an affidavit of this description with the same strictness as if it were an affidavit to be used in a proceeding in Court, and governed by a Rule of Court. If the place were altogether omitted at which the affidavit was sworn it would, nevertheless, be an affidavit containing all that Statute requires; and if untrue, perjury might be assigned on it, and a prosecution sustained on proving that it was sworn within the County of Brant before a Commissioner for that county, just as effectually as if the name of the place where it was sworn were correctly inserted in the jurat." It is clear, according to the technical rules, that an affidavit, the jurat of which does not directly, or by reference, state the place where it was sworn, cannot be read in a proceeding in a Court. It seems to me, therefore, that perjury could be assigned on the affidavit now in question on proving that, as a matter of fact, it was sworn to on the 30th August. In *Magee* v. *Davidson*,[5] the affidavit of *bona fides* to a chattel mortgage did not comply with the Rules of Practice, nevertheless, the Court upheld it. Draper, C.J., in delivering the judgment of the Court, is reported: "I entirely subscribe to the opinion expressed in *De Forrest* v. *Bunnell*,[4] that we are not called upon to notice or sustain objections to affidavits such as are required by the Statutes relative to chattel mortgages, which rest only on their own compliance

[4] 15 U. C. Q. B. 370.
[5] 7 C. C. C. P. 521.

Judgment.
Wetmore, J.

with certain Rules of Court, established to regulate the practice and proceedings therein." In *Hollingsworth* v. *White*[6] a bill of sale was executed on the 31st December, 1860. The affidavit of its execution was actually sworn, on the 10th January, 1861, but according to the jurat it purported to be sworn on the 10th January, 1860. Now if the jurat of an affidavit of *bona fides* of a chattel mortgage purporting that it was sworn on a day that has not arrived, makes the affidavit a nullity, it seems to me that *a fortiori* an affidavit of the execution of such an instrument the jurat of which purports that it was sworn months before the execution of the instrument, would make such affidavit a nullity. But the Court in *Hollingsworth* v. *White*[6] held that the insertion of the year 1860 for 1861 was a clerical error and could be amended. The Court, therefore, could not have considered the affidavit a nullity but merely an irregularity, because that is just one of the distinctions between a nullity and an irregularity—a nullity cannot be amended, an irregularity can. In that case the Court upheld the bill of sale and to do so they must have held that the irregularity did not affect the validity of such bill of sale. On the authority of that case I think I am bound, in view of Mr. Neff's evidence, and the endorsement of date of filing on the lien note, to hold the insertion of the 31st August instead of the 30th in the jurat of the affidavit in question to be a clerical error, capable of amendment. I may say that according to the endorsement on the lien note it purports to have been filed on the 30th August, and Mr. Neff swore that the endorsement was made on that date. In *Ex parte Johnson*,[7] the affidavit filed on the registration of a bill of sale was sworn before a commissioner to administer oaths, but in the jurat he merely signed his name and did not add his title commissioner. It was held that the affidavit was sufficient. It was contended by counsel, however, that this omission was fatal, and *Heward* v. *Brown*[8] was cited in support of such contention. Cotton, L.J., in delivering his judgment in *Ex parte Johnson*,[7] at page 345, referring to *Heward* v. *Brown*,[8] states: "That was in some technical proceeding at common law to which Lord Justice

[6] 6 L. T. 604; 10 W. R. 619.
[7] 53 L. J. Ch. 763; 26 Ch. D. 338; 50 L. T. 214; 32 W. R. 693.
[8] 4 Bing. 393; 1 M. & P. 22; 6 L. J. (O.S.) C. P. 9.

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Bowen may, perhaps, refer, but I do not think I need, because fortunately we have another case which shews that, however that may be as to technical proceedings, yet in the present state of the law under *The Bills of Sale Act* we can arrive at something like common sense." And Bowen, L.J., is reported at page 350: "I should think it was a very gloomy day for English law if the Court of Appeal was to hold an affidavit under the *Bills of Sale Act* void because, although the name of the commissioner before whom the affidavit was sworn is stated, the jurat does not describe him as a commissioner." I think I am quite justified in following Lord Justice Cotton and laying down that in the present state of the law under Ordinance No. 8 of 1889, and under *The Bills of Sale Ordinance*, we can arrive at something like common sense, and in paraphrasing Lord Justice Bowen's remark by stating that in my opinion it would be a very gloomy day for the administration of law in these Territories if the Courts were to hold an affidavit under either of these Ordinances void because the officer before whom the affidavit was sworn made some accidental slip or oversight in the jurat as to the date the oath was administered. I am of opinion, therefore, that the affidavit in question is not void, and that the registration is not invalid on that ground.

As to the second ground of objection, I am of opinion that the numbering in the manner stated was a substantial compliance with section 10 of *The Bills of Sale Ordinance* (No. 18 of 1889).

As to the third ground of objection, that no statement with accompanying affidavit was filed within the year under section 11 of *The Bills of Sale Ordinance*. At the time the instrument in question was registered, 30th August, 1893, section 2 of Ordinance No. 8 of 1889 was in force, and by that section the provisions of chapter 47 of the *Revised Ordinances*, and the amendments thereto, were made applicable to the instruments specified in Ordinance No. 8 of 1889. But chapter 47 of the *Revised Ordinances* was repealed by Ordinance No. 18 of 1889, which consolidated and amended the Ordinances relating to chattel mortgages and bills of sale, and these two Ordinances of 1889 were assented to and became law on the same day. And therefore, by virtue of section 8, subsection 39, of *The Interpretation*

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Ordinance, we must, in section 2 of Ordinance No. 8, for chapter 47 of *The Revised Ordinances*, read Ordinance No. 18 of 1899, which was substituted therefor. Section No. 11 of Ordinance No. 18 of 1889 was amended by Ordinance No. 36 of 1894, section 3, by extending the time during which chattel mortgages could run without being renewed, as it is commonly called, from one year to two years. Section 2 of Ordinance No. 8 of 1889 was repealed by Ordinance No. 21 of 1894, section 2, and other provisions substituted, but both of these Ordinances of 1894 were assented to and became law on the 7th September, 1894. Consequently, if section 11 of Ordinance No. 18 of 1889, as it originally passed, applied to the lien note, it ceased to be void as against purchasers in good faith for value thirty days before the 30th August, 1894, or on or about the 1st August, 1894. The first question that arises then is: did this section 11 apply to the instruments specified in Ordinance No. 8 of 1889? For if not it did not apply to the lien note in question. Assuming it to be an instrument embraced by the last mentioned Ordinance, of course that question depends on the construction to be given to section 2 of Ordinance No. 8, which provides (making the alteration that I have suggested) that the provisions of Ordinance No. 18 of 1889 "shall apply to such receipt notes, hire receipts or orders for the purposes of this Ordinance in so far as the provisions thereof may not be incompatible with or repugnant to the provisions of this Ordinance." In *The Western Milling Company* v. *Darke et al.*,[1] decided by the Full Court in June last, it was held that section 8 of Ordinance No. 18 of 1889 is incorporated into Ordinance No. 8 of 1889 for the purpose of providing that the documents specified in the last mentioned Ordinance shall contain such sufficient and full description of the chattels mentioned in them that the same may be readily and easily known and distinguished. But the Court expressly refrained from going any further and from stating what other provisions were so incorporated. The judgment of the Court affecting this question was delivered by myself, all the other Judges concurring. I find that I used the following language: "In my opinion the Legislature intended to provide by section 2 of that Ordinance (No. 8 of 1889) that the provisions of *The Bills of Sale Ordinance* applicable to bills of

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sale and chattel mortgages shall *in so far as they are applicable* apply to receipt notes, hire receipts and orders for chattels. . . . There may be, and I think there are provisions in *The Bills of Sale Ordinance* that are entirely inapplicable to the documents mentioned in Ordinance No. 8 of 1889, and when that is the case they are to use the language of section 2 of the last mentioned Ordinance incompatible with the provisions of that Ordinance. Dealing with this question then from this standpoint, are the provisions of section 11 of *The Bills of Sale Ordinance* applicable to receipt notes, hire receipts and orders for chattels? Is the language of that section in itself applicable to these last mentioned documents? Or has the Legislature in Ordinance No. 8 used apt words to make such language so applicable? Because, if the language of this section is not in itself applicable to these instruments and the Legislature has not by Ordinance No. 8 used apt words to make it so applicable these instruments are not affected by that section. It must be borne in mind that Ordinance No. 8 as well as Ordinance No. 18 of 1889 are enactments, the effect of which is to abridge or restrain written instruments, and that they must, therefore, have a limited construction: *Hardcastle on Statutes* (2nd ed.) 141. While I quite recognize the rule "That if possible the words of a statute must be construed so as to give a sensible meaning to them"[9] it must be construed *ut res magis valent quam pereat* so that the intention of the Legislature may not be treated as vain or left to operate in the air: *Hardcastle on Statutes*, 82. I must also bear in mind that in construing a statute "The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret not to enact."[10] And while my construction of section 2 of Ordinance No. 8 may reduce the operation of the part of it under consideration "within very narrow limits," and while I may be of opinion that those who "passed or assented to the

[9] Brown, L.J., in *Curtis* v. *Stovin*; 58 L. J. Q. B. 174; 22 Q. B. D. 513; 60 L. T. 772; 37 W. R. 315.

[10] *Brophy* v. *Atty.-Gen. Man.*, 64 L. J. P. C. 70; (1895), A. C. 202; 11 R. 385; 72 L. T. 163.

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wording of that enactment were under the impression that its scope was wider," I cannot be influenced by such considerations because "the question is not what may be supposed to have been intended but what has been said."[11] And applying the principles of construction, which I am about to follow, the Supreme Court of the Territories in *Conger* v. *Kennedy*,[12] decided last December, held that Ordinance No. 16 of 1889 respecting the personal property of married women had no practical operation whatever, although it was pretty generally conceded to be the supposition that those who passed that Ordinance were under the impression that it had a wide scope. I may say that the construction that I am about to give to that part of section 2 of Ordinance No. 8 under consideration does not deprive it of any operation whatever, because there are parts of Ordinance No. 18 of 1889 applicable to receipt notes, &c., as, for instance, section 8; and I have no doubt that section 10 is equally applicable, and possibly some other sections, but it is not necessary to specify which of these are. Looking at section 11 of Ordinance No. 18 in the light of these authorities, I can find nothing there applicable to receipt notes, hire receipts or orders for chattels, it has reference entirely to mortgages. It provides that "every mortgage filed in pursuance of this Ordinance shall cease to be valid" unless the prescribed statement is filed. A receipt note, hire receipt or order for a chattel is not a mortgage. Then it is provided that the statement shall exhibit "the interest of the mortgagee, his executors, administrators or assigns," and that it shall set forth "the amount still due for principal and interest thereon," that is, on the mortgage. The affidavit is to be made by "the mortgagee" or "one of several mortgagees" or "the assignee or one of the several assignees," that is, of the mortgagee, or by "the agent of the mortgagee or assignee or mortgagees or assignees." The holder of a receipt note, hire receipt or order for a chattel is not a mortgagee or the assignee of a mortgagee in any sense whatever. There is nothing whatever in section 2 of Ordinance No. 8 to authorize me, in reading section 11 of No. 18 for the purpose of Ordinance No. 8, to substitute for the word "mortgage," the words "receipt note, hire receipt or order for a chattel," or for the

[11] *Brophy* v. *Atty.-Gen. of Man.*, *supra*.
[12] 2 Terr. L. R. 186.

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word "mortgagee" to read "the holder of a receipt note, hire receipt or order for a chattel." And if I attempted to so read section 11, I must substitute these words, which I am nowhere authorized to substitute. I am, therefore, of opinion that that section is not applicable to Ordinance No. 8.

There was another question raised on behalf of the plaintiffs which impressed me very much, and that is that the lien note on which they relied was not a receipt note because it contained no words, admitting the receipt of the chattel in question, it was not a hire receipt because it did not admit the receipt of the chattel for hire, nor was it an order for a chattel because it contained no words ordering the chattel to be delivered. It was merely a promissory note alleged to be given for an Empress buggy and double harness, and admitted the ownership and right of possession to such property to be in the plaintiffs until the note was paid, and therefore did not require to be registered under Ordinance No. 8. It is not necessary to decide this question for the purposes of this case, but I may say that I consider it well worthy of consideration. The instrument in *The Western Milling Co.* v. *Darke*[1] was in substance the same as the one in question in this suit. It was objected in that suit that the instrument was not one that was embraced by Ordinance No. 8, because it was not a condition of the note that the possession of the chattel should pass without the property being acquired by the bailee. The Court overruled that objection, but the question now raised by Mr. White was not then raised or considered.

As the plaintiff has obtained possession of the property in question by replevin proceedings, the damages will only be nominal.

Judgment for the plaintiff for one dollar, damages and costs, including the costs of the replevin proceedings.

Judgment for plaintiff.

REGINA EX REL. SHEPHERD v. LAMONT.

REGINA EX REL. SHEPHERD v. STREET.

Municipal law—Quo warranto—Disclaimer—Effect of—Costs.

A respondent who files a disclaimer under section 82 of Part II. of *The Municipal Ordinance*,[1] 1894, thereby admits the validity of the *quo warranto* and the proceedings on which it is based. Such a disclaimer operates as a resignation of the seat, and ends the suit save for the question of costs.

Relators should not be discouraged from bringing cases of invalid elections under notice of a Judge at the peril of having to lose the costs necessarily incurred.

[WETMORE, J., *Mar. 6, 1896.*

Statement. Writs of summons in the nature of a *quo warranto* were issued, one to try the validity of the election of Lamont as mayor of Whitewood, and the alleged election of one Benjamin Limoges as such mayor, the other to try the validity of the election of Street as a councillor. The material filed disclosed that there were only two candidates for the office of mayor but did not disclose how many candidates there were for the office of councillor. Neither of the elections was complained of on the ground of corrupt practices but the principal objections were to the qualifications of the candidates, although in Lamont's case there were some technical objections as well. The respondents in each case filed a disclaimer under section 82 of Part II. of *The Municipal Ordinance*.[1]

Argument. *H. A. J. MacDougall*, for relator.

F. F. Forbes, for respondents.

Judgment. WETMORE, J.:—The learned counsel for the respondents took objection to the writs and applied to have them set aside on the ground that the sureties of the relator were not as a matter of fact able to justify, and that I had been imposed upon by their affidavits of justification, and therefore that there was an abuse of the process of the Court. This objection, however, was abandoned upon my intimating that it did not seem to me that it was open to him after filing

[1] *The Municipal Ordinance*, No. 3 of 1894.

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of record a disclaimer under section 82, because it seemed to me that without a valid writ he had no *locus standi* to file in Court a disclaimer under that section, and by filing such disclaimer he waived any irregularity in the writ. The questions then narrowed down to two:

1st. Whether costs should be awarded against the respondents.

2nd. Whether I could hold that Limoges was entitled to the seat of mayor.

Dealing with the second question, I am of opinion that it is set at rest by section 85 of Part II. of the Ordinance. This part of the Ordinance provides two periods at which an elected mayor or councillor may disclaim, namely, by section 82, under which, if the election is not complained of on the ground of corrupt practices on the part of the person complained against, he may disclaim within one week after service on him of the writ, and by section 84, under which the person elected may disclaim at any time after the election and before his election is complained of. Section 85 prescribes what the effect of a disclaimer shall be. It is the only section which does prescribe what such effect shall be, and it prescribes the effect of a disclaimer not only under section 84 but also under section 82. Section 85 may be divided into two parts; one part dealing exclusively with a disclaimer under section 84, the other part dealing with disclaimers under both sections 82 and 84. The section begins as follows: "Such disclaimer shall relieve the party making it from all liability to costs." That part of the section in my opinion relates exclusively to a disclaimer under section 84, the section immediately preceding it, and relieves the party disclaiming before the election is complained of from all liability to costs, at any rate, unless he consented to his nomination or accepted office. The remaining part of section 85 reads as follows: "And when a disclaimer has been made in accordance with the "preceding *sections* it shall operate as a resignation, and the candidate having the next highest number of votes shall then become the councillor or other officer as the case may be." This part of the section evidently relates to a disclaimer under either section 82 or 84. It uses the words "sections," the plural, and there is

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no other provision that prescribes the operation of a disclaimer under section 82. Sections 82 to 87, both inclusive, of the Ordinance are substantially the same as sections 192 to 198, both inclusive, of *The Municipal Act* of Ontario as I find it in *Harrison's Municipal Manual* (4th ed.), pages 146 to 149. Sections 82, 83, 84 and 85 of the Ordinance correspond with sections 192, 193, 194 and 195 of the Act. I see it laid down in *Harrison's Municipal Manual* in note (a) to section 192 of the Act, that "if the party, instead of disclaiming under this section or section 194 accept office, he can only resign under circumstances detailed in sections 172 and 173 of this Act." This is merely the assertion of the author and does not appear to be supported by authority, and strikes me as possibly somewhat ambiguous. If he intends to assert that a person who accepts office cannot disclaim under section 192, I do not agree with him. Because section 180 of the Act provides in effect that an election may be complained against within six weeks after the election or one month *after acceptance of office* by the person elected. And section 192 gives the party elected a right to file a disclaimer within one week after service of the writ on him, and this right is not limited to a person who has not accepted office. The only limitation is in case the election is complained of on the ground of corrupt practices on the part of the person elected, and then section 195 prescribes the effect of a disclaimer. Section 71 of the Ordinance corresponds with section 180 of the Act as to the times within which an election may be complained against. The question then is: what is the effect of these disclaimers under section 85 of the Ordinance? It seems to me the section is very clear. In the first place it operates as a resignation of the seats, and in the next place, the candidate having the next highest number of votes (in case there is such a candidate) shall become the officer instead of the person elected. And thus my powers and duties under the *quo warranto* proceedings come to an end except in so far as respects the question of costs. It is not for me to declare who is entitled to the seat; section 85 is left to its operation, and provides for that. In *Regina ex rel. Hannah* v. *Paul*,[2] it seems that it was held that the effect of a disclaimer after issue of the writ is to

[2] 9 C. L. J. 238.

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put an end to the suit. I have not had the means of obtaining access to this case, but the effect of it as stated in Harrison is in accordance with my opinion of the law. The reference in *Harrison's Municipal Manual*, at page 149, note (*a*) to *The Queen ex rel. Freeman* v. *Jones*,[3] caused me to hesitate somewhat in reaching the conclusion I have, but I found on inspecting this case that it was decided under an old Act, 16 Vic. chap. 181, and more over the complaint alleged corrupt practices on the part of the respondent. The remarks of Osler, J., in *Regina ex rel. Mitchell* v. *Davidson*[4] also caused me to hesitate. The respondent in that case having accepted office, delivered to the clerk a disclaimer under section 192 of *The Ontario Act*, and the Judge is reported at page 435 as follows: "The disclaimer filed with the Clerk in Chambers serves no purpose, for the affidavits satisfy me that the defendant assented to his nomination and accepted office." But the only question that was raised in that case was the question of costs, and I conceive that the learned Judge meant to convey the idea that this disclaimer served no purpose to relieve the respondent from liability for costs. No doubt that would lay down the law correctly. I am, therefore, of opinion that I have no further concern in this case except as regards the question of costs, and I must leave the question as to who is entitled to the seats in question to the operation of section 85 of the Ordinance. I will only draw the attention of persons concerned to *Smith* v. *Petersville*[5].

As to the question of liability for costs. It is unnecessary to discuss whether the respondents would be liable for costs if they had disclaimed under section 84 of the Ordinance, because they did not disclaim under that section. The affidavits disclose that both the parties whose election is complained of accepted the respective offices to which they were elected, and having disclaimed under section 82 of the Ordinance, it is clear that their liability to costs is in my discretion under section 87 (and see *Harrison's Municipal Manual*, 148 note (*l*)). It is urged that I, in the exercise of my discretion, ought not to award costs to the relator, because the sureties, although they justified, were not as a matter of fact in a position to do so, and, therefore, imposed

[3] 1 P. R. 306.
[4] 8 P. R. 434.
[5] 28 Gr. 599.

Judgment.
Wetmore, J.

on the Judge, and the issue of the writ was an abuse of the practice. A number of affidavits were read to shew that these sureties were not possessed of any available property to pay their debts, and the defendants asked for leave to cross-examine the sureties on their affidavits. These affidavits produced on behalf of the defendant undoubtedly point very strongly to the conclusion that the sureties were not in a position to justify, and if this had been an application to set aside my fiat for the writ, and the writ itself and subsequent proceedings, I would not have hesitated to grant the application to cross-examine. But I am of opinion that it does not lie in the defendants' mouth to say by their disclaimer in effect, we have no rights to these suits, the relator was perfectly right in lodging his complaint, but we ought not to be ordered to pay costs, because we have not got the security the law intended for our costs if we had been successful, when, as a matter of fact, they never could be successful and entitled to costs. I am of opinion that a disclaimer under section 82 admits the validity of the *quo warranto* and the proceedings on which it is based, and it does not then lie in the respondent's mouth to attack them. I am not prepared to say what the effect might have been if a disclaimer had been lodged under section 84 and the respondents had applied to set aside the fiat and subsequent proceedings. I refuse to allow the cross-examination of the sureties. I see no reason why the relator should be deprived of his costs. I agree with the decisions in Upper Canada[a] that relators are not to be discouraged from bringing cases of invalid elections under notice of a Judge at the peril of having to lose the costs necessarily incurred. Possibly if the objections were merely technical in their character I might see my way clear to relieve the respondents from the payment of costs. But in Street's case the objection, and the only one, is of the most substantial character—it denied his property qualification. The law requires a certain property qualification, and in my opinion persons who have not this qualification ought not to be encouraged to offer themselves and accept the position with the idea that if they are elected and no one objects well and good, and if any one does object they can put him to

[a] *Reg.* v. *Beard*, 3 P. R. 357; *Reg.* v. *Lewis*, 8 P. R. 497; *Reg.* v. *Hall*, 2 C. L. Ch. 182; *Reg.* v. *McNeil*, 5 U. C. C. P. 137.

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costs and expenses, and themselves get clear of all consequences by disclaiming. I must assume that Street was aware of his want of qualification, and I am, therefore, clear that he ought to pay the relator his costs. I have also arrived at the same conclusion with respect to Lamont, although some technical objections were alleged against his election, still his want of qualification was attacked on two grounds—one as respects property, the other on account of his being surety for a municipal officer, and these grounds were verified by the affidavits filed, and I assume they were well taken. I will, therefore, allow the relator his costs in both matters. It was urged that the relator should not be allowed the costs of an amended statement filed, and served on the respondent Lamont, and that some of the affidavits on which the fiat was issued were unnecessarily diffuse, and some of the paragraphs were immaterial. I think these are matters for the clerk. See *Regina ex rel. Walker* v. *Hill*.[1]

Order accordingly.

RE SMITH.

Dominion Lands Act—Mortgage—Filing—Recommend for Patent—Possession—Registrar—Appeal.

A mortgage is not an "assignment or transfer" within the meaning of Section 42 of the *Dominion Lands Act* (Revised Statutes, 1886, c. 54).

A homesteader rightfully in possession of land is entitled to mortgage the same prior to recommend for patent.

A homesteader who has taken actual possession in his own person of his homestead in pursuance of an entry therefor is to be considered as rightfully in possession thereof for the purpose of executing the mortgage.

[WETMORE, J., *March 30, 1896.*

Statement.

This was an appeal to a Judge at Chambers under section 110 of the *Land Titles Act*, 1894, from the refusal of the Registrar at Regina to file a mortgage of lands before the recommend for patent had been granted.

Argument.

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

The Registrar in person.

[1] 6 C. L. J. 138.

Judgment.

WETMORE, J.:—The affidavits and the material used before me on this application disclose that Sylvester Smith, the mortgagor, in the month of November, 1894, obtained an entry as a homesteader in respect of the land mentioned in the mortgage; that at the time he obtained such entry he was residing on such land, and has been ever since, and was at the time of the execution of the mortgage residing on it; that he has caused a house and two stables to be erected thereon, and has dug the necessary wells there. In the season of 1895 he had about twenty acres under crop which he had previously broken, and during the same season he ploughed an additional twenty-five acres on it. But he has not yet received the recommend for his patent to the said land. On the 11th January, 1896, he executed the mortgage in question to The Patterson & Brothers Company, Limited. The mortgagees thereupon applied to the Registrar of the Assiniboia Land Registration District to file such mortgage, claiming the right to have such mortgage filed under subsection 2 of section 73 of *The Lands Titles Act*, 1894.[1] The Registrar, however, refused to file such mortgage, and upon being required under sec. 110 of such Act to set forth in writing the grounds of such refusal he set forth as such grounds, "That until the recommend for the patent is granted he was not able to accept any mortgage for filing, that the date of the recommendation is the evidence that the mortgagor is rightfully in possession." The mortgagees thereupon applied to me under section 110 of the Act by petition setting forth the grounds of their dissatisfaction with such refusal of the Registrar. I caused the Registrar to be served with this petition, and appointed a time and place to hear it. The Registrar appeared before me at the time and place so appointed and insisted that the grounds of his refusal were valid in law, and, moreover, that he had refused, under instructions from the Department of the Interior, applicable to cases such as the present. As it thus appeared that the Crown was interested in this question I appointed a further time to hear the petition, of which I directed notice to be given to the Minister of the Interior, as representing the Crown. Such notice was given in accordance with my directions, but no person appeared to represent

[1] 57-58 Vic. c. 28.

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Wetmore, J.

the Minister. In the absence of special authority to do so, the instructions of the Department of the Interior cannot alter or control the law. This was not controverted, and no such authority was pointed out to me. It was claimed that the Registrar was justified in refusing to file this mortgage because it was void under section 42 of *The Dominion Lands Act*.[2] The question whether a mortgage executed by a person rightfully in possession of land prior to the issue of the patent is void under that section was discussed in *In re Harper*,[3] decided by me on 18th September, 1894. The question in that case was raised under the section referred to, and section 125 of *The Territories Real Property Act*.[4] In that case the patent had issued and the question was whether a memorandum of the mortgage should be endorsed on the duplicate certificate of ownership issued to the patentee. It thus became a question between the patentee and mortgagee, the Crown was in no way any longer interested. Although in giving judgment in that case I intimated that I was disposed to adopt the view stated in the head note to *Harris* v. *Rankin*,[5] to have been held by Wallbridge, C.J., and Dubuc, J., that the provision in section 42 of *The Dominion Lands Act*,[2] against the transfer of the homestead or pre-emption right is intended to operate only as between the Crown and the homesteader, I do not decide the case on that ground. Nor do I put my decision in this case on that ground. I will quote from my judgment in *In re Harper*.[3] After assuming that the encumbrance then in question was a mortgage drawn according to the old form of mortgage whereby it professed to transfer the title to the land and contained a clause rendering it void on payment of the money I proceeded as follows: "The first legislation in point of time I can find affecting the question is 35 Vic. cap. 23 (1872). Subsection 17 of sec. 33 of that Act is undoubtedly the original legislation out of which sec. 42 of the present *Dominion Lands Act*[2] grew. The Act of 1872 limited the provisions to homestead rights. This provision was continued with a proviso and addition by subsec. 17 of sec. 34 of cap. 31 of 42 Vic. (being the Con-

[2] R. S. Can. 1886, c. 54.
[3] Ante p. 257.
[4] R. S. Can. 1886, c. 51.
[5] 4 Man. L. R. 115.

solidation of 1879). By 46 Vic., cap. 17, sec. 36 (being the Consolidation of 1883) the provision was extended to pre-emption rights, and that section is substantially identical with section 42 of the present *Dominion Lands Act*.[2] Judgment. Wetmore, J.

"The first legislation that I can find in the direction of sec. 125 of *The Territories Real Property Act*[4] is section 125 of 49 Vic., cap. 26 (1886), which is identical with sec. 125 of *The Territories Real Property Act*.[4] In fact these two Acts are almost identical all the way through. Now if matters had remained in this situation, and it was found that sec. 36 of cap. 17 of 46 Vic., and sec. 125 of cap. 26 of 49 Vic. were so inconsistent with each other that both could not be given effect to, by a very well known rule of construction the latest enactment would prevail. And sec. 125 of 49 Vic. cap. 26, would impliedly repeal sec. 36 of 46 Vic., cap. 17. But sec. 7 of 49 Vic., cap. 27, recognizes sec. 36 of 46 Vic., cap. 17, by referring to it, and amending it. The Legislature, therefore, evidently did not contemplate that that section was repealed. Here we have two Acts enacted at the same session and assented to on the same day, one containing an enactment exactly similar to sec. 125 of the present *Territories Real Property Act*,[4] and the other recognizing and making an enactment exactly similar to section 42 of the present *Dominion Lands Act*.[2] And both these enactments are carried forward into the Revised Statutes. Seeing that this is the case, and if there was nothing further it would beyond question be my duty if possible so to construe these two sections that one would not conflict with the other, and not to let the doctrine of implied repeal prevail if it could be avoided. This duty is made more imperative seeing that sec. 8 of cap. 4 of 49 Vic. provides that 'the said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect. . . as *declaratory* of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.' I will, therefore, turn my attention to the question whether these two sections can be so read as not to conflict. And I am of opinion that they can be so read. It will be perceived that all the provisions which I have referred to relating to Dominion lands make void *assignments or transfers* of homestead or pre-emption rights. Now un-

Judgment.
Wetmore, J.

doubtedly a mortgage of land according to the old form was in form and at law an assignment or transfer of the land subject to be defeated upon a condition, namely, the payment of the money secured or the performance of the covenants contained in it, as the case might be. But in equity it was not so considered; and in the ordinary acceptance of the term a man was not considered to have assigned or transferred his property when he mortgaged it, he was simply considered to have given a security upon it. . . . I am of opinion that Parliament in using the words 'assignment or transfer' in section 42 of *The Dominion Lands Act*,[2] and in the corresponding sections in prior acts relating to Dominion lands intended to use them in the popular sense of an absolute parting with the right, and not in the sense of pledging the right of way of security. Giving that construction to this section there is no conflict whatever between it and section 125 of *The Territories Real Property Act*.[4] And there is no difficulty in giving full effect to this last mentioned section." I see no reason to change the opinion thus expressed. And it is quite applicable to the question now raised. Subsec. 2 of sec. 73 of *The Land Titles Act*, 1894,[1] has not altered the state of the law in that respect. But on more reflection I find that I must arrive at the conclusion that the Registrar ought to file this mortgage on other grounds. Assuming that the words "assignment or transfer" in section 42 of *The Dominion Lands Act*[2] includes an assignment by way of mortgage. Parliament must have intended by sec. 125 of *The Territories Real Property Act*,[4] and subsec. 2 of sec. 73 of *The Lands Titles Act*, 1894,[1] that the particular description of assignment executed by the persons therein specified, namely, a mortgage created by a party rightfully in possession of the land, should be taken out of the operation of sec. 42 of *The Dominion Lands Act*.[2] Otherwise the section 125 would have been and the subsection 2 of section 73 would be entirely inoperative, because the sec. 42 provides that "Every assignment or transfer made or entered into *before the issue* of the patent shall be null and void." But it is claimed that a person can only be deemed to be rightfully in possession of land under subsec. 2 of sec. 73 of *The Land Titles Act*, 1894,[1] when the recommend for his patent is granted. I can find nothing in

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any of the sections referred to which so limits the operation of subsec. 2 of sec. 73. It is certainly not to be found in sec. 42 of *The Dominion Lands Act*,[2] because, as before stated, that renders void every assignment or transfer made *before the patent is actually issued* and if it governs the case renders the subsec. referred to of *The Lands Titles Act*[1] entirely inoperative. It is not to be found in that subsection. If that subsection had provided that "any mortgage or other encumbrance created by any party rightfully in possession of land prior to the issue of *the recommend* for a grant may be filed, etc.," or words to a similar effect, the contention would be correct. And if Parliament had intended the subsection to have that operation I conceive it would have used the words I have suggested, or similar words. It seems to me that the words of the subsection are plain, and there is no difficulty in giving them their ordinary meaning. It provides that "any mortgage or other encumbrance created by any party rightfully in possession of the land prior to the issue of the grant may be filed, etc." Why in this case should the plain, unambiguous language of the Act be departed from? The only question that seems to me to arise in order to allow the section to operate is: is the mortgagor rightfully in possession? If he is the mortgage must be filed. Now, is this mortgagor rightfully in possession? He has obtained an entry for a homestead, and subsec. 3 of sec. 32 of *The Dominion Lands Act*[2] provides that "The entry for a homestead . . . shall entitle the recipient to take, occupy and cultivate the land entered for *and to hold possession of the same* to the exclusion of any other person or persons whomsoever and to bring and maintain actions for trespass committed on the said land." Then section 36 of the same Act[2] provides that "Every person who has obtained homestead entry shall be allowed a period of six months from its date within which to perfect the entry by taking in his own person *possession of the land* and beginning continuous residence thereon and cultivation thereof." In this case at the time the entry was obtained, in November, 1894, the mortgagor was residing on the land, he continued such residence, he cropped it in the season of 1895 and prepared it for a crop in 1896. It seems to me, therefore, under such a state of facts and in view of

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the sections of the Act which I have just quoted, idle to contend that he was not rightfully in possession of the land when he executed the mortgage. It is a possession authorized by the express provision of an Act of Parliament, and if that is not rightful it is very difficult to imagine what is. In this connection I will also refer to 54 & 55 Vic. (1891) cap. 24, s.s. 3 & 4. But, further, the mortgage in question is in the form prescribed by *The Land Titles Act,* 1894,[1] and it seems to me that sec. 74 of that Act takes the case entirely out of sec. 42 of *The Dominion Lands Act*,[2] because sec. 74 provides that "A mortgage or encumbrance under this Act shall have effect as security but shall not operate as a transfer of the land thereby charged." This seems to me conclusive of the whole matter. I will, therefore, order the Registrar to file the mortgage in question as of the 17th of January last past.

Order accordingly.

BROAD v. NICKLE ET AL.

Sale of goods—Warranty of title—False representation—Return of goods—Promissory note—Consideration.

Where an article is sold with a warranty of title, and a promissory note is given for the price of such article, and the warranty fails, the buyer may, upon discovering the want of title, *forthwith* tender the article back and resist payment of the note on the ground that it was given upon a consideration that failed.

[WETMORE, J., *April 30, 1896.*

Statement.

This was an action brought by the payee of a promissory note against the maker and endorser. The plaintiff sold the defendant Nickle a yoke of oxen for $80. Nickle paid $10 down in cash and gave the note in question for the balance, $70. The defendant McGregor became a party to the note as surety. The only defence set up by the defendants was that they respectively became parties to the note by reason of the plaintiff falsely representing that the oxen in question were free from encumbrances, whereas at the time of purchase they were subject to a chattel mortgage, and that im-

mediately on the defendant Nickle discovering the existence of the mortgage he returned the oxen. Statement.

T. C. Gordon, for plaintiff. Argument.
E. L. Elwood, for defendant.

WETMORE, J.:—The plaintiff claimed at the trial that he did not give a warrant of title in respect of these oxen at the time of sale, and that he did not represent that they were free from encumbrances, and, in the next place, if he did, that he had authority to sell the animals. I find that as a matter of fact the plaintiff at the time of sale twice warranted the title to these cattle. The testimony of both the defendants establish that at the time of the sale the plaintiff stated in substance "that he had a yoke (of cattle) to sell." The plaintiff does not pretend to contradict this, and I am of opinion that under the authorities that amounted to a warranty of title. I am of opinion, however, that that particular warranty would have been satisfied if the plaintiff had succeeded in establishing, as he attempted to do, that he had authority from the mortgagees to sell the oxen. I also find that at the time of sale the defendant Nickle asked the plaintiff "If there was anything against the oxen," and he replied, "No." That also I hold to be a warranty of title and a representation that the oxen were free from encumbrance. As a matter of fact there was at the time of the sale a chattel mortgage against them executed by the plaintiff in favour of the Massey-Harris Company, Limited, to secure two hundred and twenty-two dollars and interest, and such mortgage was then duly registered and was and still is so far as I know in full force. This was not questioned. The sale of the oxen was made and the note in question given in April or May, 1895. In October, and before the note became due, the plaintiff informed the defendant McGregor that there was a chattel mortgage against the oxen. This was the first information either of the defendants had of the mortgage. McGregor immediately informed Nickle who as promptly as it could be done after interviewing the plaintiff with a view of getting the matter arranged and that without success tendered the cattle back to the plaintiff at his place, who refused to accept them, and Nickle left the cattle Judgment.

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there with the plaintiff, and demanded back his note. Of course the representation made to Nickle that there was nothing against the cattle was false representation, and I cannot doubt that the plaintiff knew it to be false, seeing that he himself made the mortgage. The plaintiff claims that he had authority from the mortgagees to sell these cattle, that he got such authority from the agent of the mortgagees, Thompson. I cannot find from the evidence that Thompson had any power to authorize the plaintiff to sell. That is, if the mortgagees had taken the oxen from Nickle, there was nothing in evidence to shew that the plaintiff sold these cattle by authority of the company and, therefore, that Nickle might resist the company's right of possession. I, therefore, find that the representation in law was a fraudulent representation, and the cattle having been tendered back, the defendants have a good defence to this action, and the plaintiff is not entitled to recover. *Lewis* v. *Cosgrave*,[1] (cited in *Byles on Bills* (14th ed.), 153. Possibly in view of later authorities the effect of *Lewis* v. *Cosgrave*[1] as stated in the text in *Byles* may not be good law, as the warranty there was a warranty of quality and not of title, and it does not appear that the article was accepted back by the vendor. But I am prepared to hold and do hold that when there is a warranty of title to an article sold, and it turns out, as in this case here, that the vendor had nothing to sell, that the true owner might at any time deprive the vendee of the property and leave him without anything that a security such as a promissory note given by the vendee to the vendor for the price of the article is while in the hands of the vendor absolutely void as being made without consideration, and the vendee can, on such ground, resist the payment of such note in an action at the suit of the vendor. I can find no express authority in point. But it seems to me that this must be good law; the vendee really has received nothing whatever. There are a number of cases which seem to establish that when a specific chattel is sold with a warranty which fails that such breach of warranty affords no answer to an action for the price unless the vendor receives the article back and so rescinds the contract, or it is part of the agreement that the vendor shall in case of breach receive the article

[1] 2 Taunt. 2.

back. I take it, however, that all these cases must be cases where the warranty is one of quality, not of title. In *Eicholtz* v. *Bannister*,[2] it was held that when there was a warranty of title and it turns out that the vendor had no title, but the goods were stolen and were claimed by the true owner, the buyer could recover back the price from the vendor "*as money paid upon a consideration which failed.*" That being so, I am of opinion that when an article is sold with a warranty of title and a promissory note is given for the price of such article, and the buyer discovers that the title is bad that he has got nothing, he can forthwith (provided that he does it forthwith) tender the article back and resist payment of the note on the ground that it was given upon a consideration which failed. There must, therefore, be judgment for the defendants with costs. There is a principle involved in this case however, and I would be inclined to allow the plaintiff to appeal if he desires to do so and applies for leave promptly. Judgment. Wetmore, J.

Judgment for defendants with costs.

SIMPSON v. PHILLIPS AND LATHAM, Garnishee.

Garnishee — Promissory note given by garnishee to defendant — Whether attached—Exemption—Purpose of legislation.

The plaintiff sought by means of garnishee process to attach the monies payable under an undue promissory note given by the garnishee to the defendant.

Held, that inasmuch as it was open to the plaintiff to seize the note under execution, and as the remedy provided by garnishee process was intended to secure to judgment creditors what could not be reached by execution, the promissory note was not garnishable.

[Richardson, J., *May 2, 1896.*

Trial of a garnishee issue. The facts appear in the judgment and head-note. Statement.

T. C. Johnstone, for plaintiff. Argument.

Gordon, for defendant and garnishee.

[2] (1864) 34 L. J. C. P. 105; 17 C. B. (N.S.) 708; 11 Jur. (N.S.) 15; 12 L. T. 76; 13 W. R. 96.

The following cases were cited: *Tapp* v. *Jones*,[1] *Exley* v. *Dey*,[2] *Roblee* v. *Rankin*,[3] *Jackson* v. *Cassidy*.[4]

Judgment. RICHARDSON, J.:—The garnishee summons in this case was served on Mrs. Latham, the garnishee, on November 28th, 1895, consequently what she then owed Phillips was attached by it. She admitted owing $51.25 and paid this sum into Court, but as plaintiff claimed that she owed Phillips a larger amount, an order was made to have the question thus raised disposed of at the late Moose Jaw sittings.

Phillips having claimed, out of the money paid in, an exemption as a hired servant of $25 under section 378 of the *Judicature Ordinance*, which the plaintiff disputed, his right was also set down to be then and there determined.

At the sittings named plaintiff's counsel, Mr. Johnstone, admitted that Phillips' claim for the exemption of $25 was one that plaintiff could not oppose.

As regards the garnishee, the facts as disclosed and found are: Phillips entered Mrs. Latham's service as a farm servant April 17th, 1895. The wages agreed on were $20 per month. On July 17th, he had served three months and had received in cash $20, and calling for his balance $40, then due, Mrs. Latham not having cash on hand gave Phillips her note for this $40, payable to himself on January 1st, 1896, which settled the wages to July 17th, 1895. Phillips worked on until November 28th, 1895, when consequent upon the service of the garnishee summons, he refused to continue. He had by then earned four months wages $80, and had received in various small sums $28.75, which left due him by Mrs. Latham $51.25, which she has paid into Court.

It was shewn at the hearing that on receiving in July the $40 note, Phillips endorsed his name on the back and deposited it with Mr. Baker, who was Mrs. Latham's banker, and it was there when the garnishee summons was served and remained there until after maturity, when it was returned to Phillips.

[1] L. R. 10 Q. B. 591; 44 L. J. Q. B. 127; 33 L. T. 201; 23 W. R. 694.
[2] 15 P. R. 353, 405.
[3] 11 Can. S. C. R. 137.
[4] 2 O. R. 521.

Judgment at. Richardson, J.

The contention of the plaintiff was that by the service of the garnishee summons the $40 note was attached, and at the hearing, this note being still Phillips', I entertained that view although contested by Mr. Gordon, Mrs. Latham's counsel, who referred me to two Ontario cases, one of which, at least on reference, I find, has no bearing whatever on this case.

The law bearing on garnishment of promissory notes is fully discussed in *Roblee* v. *Rankin*,[3] where it is held that an undue promissory note is not garnishable, but a note overdue held by the payee a judgment debtor, is because the debt for which it was given has revived.

As the provision for garnishing debts was created to secure for judgment creditors what could not be reached by execution, and, as by section 341 of the *Judicature Ordinance*, promissory notes are liable to seizure under execution, and it was always open to the plaintiff to seize the note in question if he chose under execution, my finding is that nothing beyond the money in Court is changed by the garnishee summons. Following *Roblee* v. *Rankin*[3] is not a hardship, as the plaintiff had rights which he elected not to exercise.

Out of the money in Court $25 is to be paid out to Phillips, the balance to plaintiffs, who are to pay Mrs. Latham her costs of the hearing at Moose Jaw. No other costs to any of the parties.

Order accordingly.

SEVILLE v. HUGHES, ET AL.

Practice—Security for costs—Evidence—Documents marked "without prejudice"—Funds of plaintiffs in defendant's hands.

Security for costs will not be ordered where the defendants have in their hands funds of the plaintiffs sufficient to indemnify themselves against the costs of defence.

[WETMORE, J., *May 22, 1896.*

Statement.

This was an application for security for costs. The points are sufficiently set out in the judgment.

Argument.

W. White, Q.C., for defendant.

F. F. Forbes, for plaintiff.

Judgment.

WETMORE, J.—This is an application on the part of the defendants for security for costs. It is resisted by the plaintiff on the ground that the defendants have monies of the plaintiff's in their hands or are indebted to him in an amount sufficient to cover any costs which they may incur by their defence. In support of this contention the plaintiff relied on *Re Contract & Agency Corporation*[1]; *Re Carrol*[2], and *Duffy* v. *Donovan*[3]. I am of opinion that these cases establish that if it is clearly made apparent, say, by the admissions of the defendants that the defendants hold funds of the plaintiff or are indebted to him in such an amount, that I ought not, in the exercise of my discretion, to order security, unless there are some exceptional circumstances which should induce me to do so. And so I, in effect, held, the other day, in *Strang & Co.* v. *Lindsay Bros.*[4] The summons herein was granted on the affidavit of the defendant Hughes, which was in the usual form. An affidavit of Mr. Hamilton, the plaintiff's advocate, was used in shewing cause by which it appears that the plaintiff advanced to the defendants, in May, 1893, £600, for which the defendants gave an acknowledgment, which is referred to in such affidavit as exhibit A. The fact of this advance is not controverted, nor is it denied that this acknowledgment was given by the defendants. These are, therefore, facts which I am at liberty to consider on this application. Mr. Hamilton, also, in his affidavit, referred to a number of letters forming the subject of a correspondence between his firm and Messrs. White & Gwillim, who were acting for the defendants respecting the plaintiff's claim against the defendants; and these letters were referred to as establishing an admission by the defendants, through their agents, of their indebtedness to the plaintiff. It was urged on behalf of the defendants that I ought not to allow these letters to influence me, or, in other words, that they were not receivable in evidence because they were written "without prejudice." Now, this correspondence between these two legal firms was opened by Messrs. White & Gwillim's letters of the 5th August, 1895, and the proposition therein made is

[1] 57 L. J. Ch. 5.
[2] 2 Cham. Prac. Reports 305.
[3] 14 P. R. 159.
[4] Not reported.—T. D. B.

clearly stated to be made "without prejudice," and I am of opinion that this correspondence being so marked "without prejudice," is just of the character which would, *prima facie*, exclude its admissibility against the defendants. It seems to me to come within the Rule excluding such documents as laid down in *Re Daintrey*.[5] Here were persons in negotiation with each other and terms offered for the settlement of a negotiation possibly of a dispute. It was not necessary that each letter should be marked "without prejudice," the opening letter of the correspondence having been so marked. I will, however, call attention to the fact that Messrs. White & Gwillim's letter of the 17th December is so marked. As a matter of fact the whole correspondence shews that it grew out of Messrs. White & Gwillim's letter of the 5th August, and it was carried on down to the conclusion as a negotiation between the parties with a view of settling the matters between the principals. But the plaintiff contends that, inasmuch as an offer was, in that correspondence, made by the advocates for the defendants, which was accepted by the advocates for the plaintiff, and the defendants had partially carried out the arrangement so agreed on, that a binding contract was made which the plaintiff could enforce, and that the whole correspondence was, therefore, admissible for the purpose of shewing the terms of the compromise and also for the purpose of shewing that there is an admitted indebtedness from the defendants to the plaintiff. Judgment. Wetmore, J.

I have inspected the statement of claim on file and I find that the action is not based on the acknowledgment of the 26th May, 1893 (exhibit A. to Mr. Hamilton's affidavit), but is based on an alleged account stated on the 20th December, 1895, and an alleged agreement made by the advocates of the parties by the correspondence in question. Now it is very clear that the very first question that is going to arise in this case is whether this correspondence is admissible or not for the purpose of proving the agreement alleged to have been made by it. If it is not admissible, that branch of the plaintiff's case must fail. It does not appear, on the face of the statement of claim or in any other material

[5] 1893, 2 Q. B. 116; 62 L. J. Q. B. 511; 69 L. T. 257; 41 W. R. 590.

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used before me, how the alleged account stated was made. In view of the nature of the statement of claim, I have very great doubts where I would not order security for costs if the admission of indebtedness, or that the defendants had monies of the plaintiff in their hands, was to be spelled out of the correspondence in question between the advocates. It is clear that the alleged account stated cannot be spelled out of that correspondence, because there is no communication in it of the 20th December. I conjecture that it is supposed to be contained in the defendants' letter of the 20th December, referred to in Messrs. White & Gwillim's letter of the 21st December (exhibit M to Mr. Hamilton's affidavit). That letter is not before me, and I cannot state whether it amounts to an account stated or not, and there is no material before me to shew that the defendants in person ever admitted an indebtedness by way of account stated to the plaintiff. If, however, this indebtedness on an account stated as well as the other agreement set up by the plaintiff in his statement of claim is sought to be established by the correspondence between the advocates, then it appears that if I decide that this correspondence is admissible, I decide on this application the very question in controversy between the parties. I am by no means clear that this correspondence is admissible, and if not admissible for the purpose of establishing the plaintiff's cause of action because it is written "without prejudice," it is not admissible for the purposes of prejudicing or defeating the defendants on this application. I think, on an application of this nature, I ought not, practically, to decide the very matters in controversy, if the defendants have a *bona fide* matter of defence worthy of consideration, and I think they have. If no account stated is established, and the correspondence in question is not admissible, *quoad* the alleged cause of action, the defendants are neither indebted to the plaintiff nor have they funds of his in their hands. A very estimable article on the question of admissibility in evidence of documents marked "without prejudice" will be found in 30 Canada Law Journal, page 627 (16th December, 1895).

But I am of opinion that the fact that the defendants have funds of the plaintiff in their hands sufficient to indemnify them against the costs of this action is proved in

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the other material used on this application. It seems to me on principle not necessary that the indebtedness should arise out of the alleged cause of action. If as a matter of fact, the defendants have funds in their hands belonging to the plaintiff, which would be available to pay these costs if the plaintiff did not succeed in his action, I ought not to order the plaintiff to give security (*In Re Contract & Agency Corporation*[1]). Now the defendants do not pretend to deny that they received the £600 referred to in the 3rd paragraph of Mr. Hamilton's affidavit, or that they gave for it the acknowledgment of the 26th May, 1893. When this affidavit was read the defendants' counsel applied for and obtained leave to answer it and produced a further affidavit of the defendant Hughes. I wish now to deal with this application as if the correspondence between the advocates was not before me and without reference to the matter which Messrs. White & Gwillim, in their letter of the 5th August, 1895, suggested would be set up as a defence to this claim of £600 if the plaintiff insisted on immediate payment. I wish to deal with the application merely on the material supplied by the affidavit of Hughes, the first four paragraphs of Mr. Hamilton's affidavit and the statement of claim. Looking at this material then, the defendants do not *deny* their indebtedness to the plaintiff in respect of this £600. To understand what the defendants set up it is necessary to specify what the statement of claim sets up. It sets up, in substance, an account stated for $3,484.80, and that an agreement was made between the parties by which the defendants agreed to pay $390.78, a portion of such amount, and to give the plaintiff a first mortgage to secure the balance with interest on certain specified land property; that the defendants paid the $390.78, but refused to give this mortgage for the balance, $3,094.02, and claims for relief a declaration that this land is charged with this balance and interest thereon, that the defendants be ordered to execute the mortgage and that, in the meanwhile, they be restrained from disposing of the land. Limiting myself to the material which I am now using, the defendants do not deny their indebtedness to the plaintiff for the sum of £600; they merely set up that Miss Hughes, the sister of the defendant Hughes, loaned the defendants $3,000; that J. H.

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E. Hart, the father of the defendant Hart, loaned the defendants $3,000; and that J. W. Menis, the father of the defendant Menis, loaned the defendants $2,000, and that these advances were, as they claim, before the advance of the £600 by the plaintiff, secured by an equitable mortgage on the property on which the plaintiff claims a mortgage, and therefore, that Miss Hughes and Messrs. J. H. E. Hart and J. W. Menis will resist the right of the plaintiff to have this property charged with a mortgage to him as against them, and will ask to be allowed in to defend this action. It is to be noted that while the acknowledgment which the defendants gave the plaintiff on the 26th May, 1893, for this £600 is differently worded from the acknowledgments given Miss Hughes and Messrs. J. H. E. Hart and J. W. Morris for their advances, still that acknowledgment of the 26th May purports to secure the plaintiff's advance to him in the same way that the advances of the other parties were secured to them, namely, on the mill building and machinery. Now, whatever the effect of that acknowledgment of the 26th May may be as between the plaintiff and creditor of the defendants, I am satisfied that as between the plaintiff and the defendants it was intended as a loan just as the advances by the other parties were, and it was contemplated that this advance should be repaid by the defendants to the plaintiff. As a matter of fact the contrary was not contended. That being so the fact of the defendant's indebtedness to the plaintiff in the sum of £600 is uncontradicted. The defendants have no interest personally in this contention of other parties beyond giving their assistance in all legitimate ways in getting their rights, if they have any, secured. The fact of their personal indebtedness for the sum of £600 is not affected by it in the slightest degree, and I cannot see that all this puts the defendants in a position to obtain security for costs. It will be time enough to consider the right of these other parties to obtain security for costs when they become parties to the action, if they ever do so. It may, possibly, be urged that the defendants may have a defence to this claim of £600, which they are not bound to disclose now. This position was not taken at the argument, but as it has occurred to me I will deal with it now. In *Re Carroll*[2] was an appeal against a solicitor for

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an account. Security for costs was ordered to the solicitor, and this order was appealed against. The affidavits disclosed that the solicitor had received from the plaintiff $6,555 or upwards, which he had not paid over or accounted for; this was not denied, and the order for security was set aside. Mowat, V.C., in delivering judgment is reported as follows: "Now here it does appear that the solicitor has in his hands a sufficient security for his costs, and unless he is able to file an affidavit denying this, I think the order for security must be discharged. Had he denied the allegations made on the part of the plaintiff, he would, no doubt, be entitled to security without any adjudication on the question of fact so raised." So, in this case, if the defendants had denied or explained away or rendered questionable the *prima facie* case raised by Mr. Hamilton's affidavit as to the indebtedness for £600, they would have been entitled to security, but they have not done so. In *Duffy* v. *Donovan*[3], the defendants were trustees for the plaintiff and the receipt of money in trust was admitted, and that it was lost. Haldane, one of the defendants, swore that he had a good defence on the merits, which he did not disclose, and obtained an order for security for costs. It was shewn that a large portion of the money stood in the bank in the joint names of the trustees. Although Haldane did not disclose his defence, it would seem that he left the administration of the trust to his co-defendant, and Haldane was, for that reason, under the impression that he was not liable, as the money was not lost through his personal administration of the trust. The Court set the order for security aside. In delivering his judgment, Meredith, J., is reported at page 163 as follows: "A defendant is not, on an application of this sort, bound to disclose his defence; he has a right to reserve that till a motion for judgment or other proceeding properly calls for it; and he may do that without prejudice in any way to his defence, whatever it may be, and the mere fact of his having so far failed or declined to disclose his defence, ought not to be taken as an admission that he has no defence. But, under all the circumstances of this case, in my opinion, the Court should say to this defendant, if you do not choose to disclose your defence to rid yourself now of the *prima facie* case against you upon your admis-

Judgment, Wetmore, J.

sion that you received monies ample for your security, you cannot have the order of the Court for such security."

So in this case, under all its circumstances, if the defendants do not choose to disclose or suggest any substantial matter to rid themselves of the indebtedness of £600, *prima facie* established against them, I ought to say to them that they cannot have security.

I will now deal with this application on the assumption that the correspondence in question is admissible, without, however, deciding that question, but merely to ascertain if it discloses or suggests any defence to this claim for £600. I can find nothing that does so except what appears in Messrs. White & Gwillim's letter of 5th August, and a suggestion is made there, but there is no sworn testimony to support it. This letter was written in answer to a demand on the defendants for this £600, and the suggestion is that the question of a partnership existing between the defendants and a son of the plaintiff's will come in question; that is all. But suppose that this is established, it does not strike me that it will help the defendants in this application. As before stated, the acknowledgment of the 26th May contemplates that the plaintiff is to get the £600 back, and, therefore, as between the plaintiff and the defendants it is an indebtedness from them to him. But assuming that I am mistaken in this, and that if put in to purchase a partnership interest for the plaintiff's son and that if it were lost in the business, that is, the business failed and became insolvent, the defendants would not be liable to the plaintiff to pay it back; on the other hand, it would be true that if the business had not failed and the partnership was wound up the plaintiff would be entitled to take out what he put in, and, therefore, could charge the defendants with this £600. There is no evidence that this business has failed or is insolvent. It is true that they have shewn considerable indebtedness to other persons, but that does not establish insolvency. So anyway I look at it it seems to me that the defendants, as between themselves and the plaintiff, have in their hands funds of the plaintiff sufficient to indemnify themselves against any costs they may be put to in this action, and that under the circumstances security should not be ordered.

Summons discharged with costs.

PATREE v. KINCAID.

Negligence—Setting fire to straw and refuse—Fire escaping—Damages—Liability for.

Although a farmer has the right to set fire to straw and refuse on his own land, still by so doing he is using his land other than in the natural way, and if such fire from any cause escape and cause damage to a neighbour, the farmer is, following *Ryland* v. *Fletcher*,[1] liable for such damage.

[RICHARDSON, J., *Mar. 27, 1896.*

Statement. Action for damages sustained by the plaintiff as a result of a fire escaping from the defendant's farm and burning the plaintiff's buildings, etc. The case was tried before RICHARDSON, J., without a jury.

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

T. C. Johnstone, for defendant.

Judgment. RICHARDSON, J.:—In this action the plaintiff, after asserting that the defendant and he were neighbouring farmers, alleges that on 13th November, 1893 (the defendant having set fire to a heap or stack of straw on his own land), this fire spread to the plaintiff's land, burnt his buildings and contents, as also his grain and hay then on his said land. As an alternative the plaintiff charges that the defendant carelessly and negligently set fire to a heap of straw on his own land, and by reason of his negligence and carelessness the fire spread to the plaintiff's land, burnt his buildings and contents, with a quantity of wheat and hay belonging to plaintiff and then on plaintiff's land.

In defence the defendant pleads not guilty by Statute Imperial Act, 1493, ch. 76, sec. 86.

2. He denies having set the fire charged.

3. That if he did, the fire did not spread on to plaintiff's land or do the injury charged.

4. If defendant did set the fire alleged by plaintiff on his own land, he did so for the purpose of burning weeds and rubbish in a proper and husbandlike manner, and in

[1] (1868) 37 L. J. Ex. 161; L. R. 3 H. L. 330; 19 L. T. 220; affirming 35 L. J. Ex. 154; L. R. 1 Ex. 265; 4 H. & C. 263; 12 Jur. (N.S.) 603, 14 W. R. 799.

Judgment. Richardson, J.

doing so used every precaution to prevent its spread, nor was he guilty of negligence or carelessness.

5. The objection is raised by defendant that inasmuch as the plaintiff's statement of claim does not set out facts from which carelessness or negligence could be inferred, or that defendant was not acting otherwise than as a farmer had a right in setting out fire, or that there was a want of due precaution in allowing the fire to spread, the plaintiff must fail.

To this defence, the plaintiff besides joining issue, charges that defendant's first plea is bad in law because the Imperial Act set up is not in force in the North-West Territories.

The case came on for hearing at the last Regina sittings. The evidence established:—

1. That plaintiff and defendant were near neighbours with an intervening farm of one Middleton, the plaintiff's farm being south-east of the defendant's.

2. That on 10th November, 1893, the defendant having completed threshing his grain had on his stubble field, where the threshing occurred, a stack containing straw and the refuse from the machine, and weed seed, and as it was of importance that this refuse and weeds should be got rid of, the weather being clear, the defendant determined upon burning it, and, to effect this, he first burnt a guard around this heap, then fired the heap, the straw portion of which was soon consumed, defendant remaining until this had happened. He then left the fire remaining smouldering in the refuse and weeds. That, on the 11th of November, the defendant visited the place where the fire was still smoldering in the seeds. On the 12th of November the defendant did not visit the place, he remaining at his house on both 11th and 12th of November, watching at times if there were any indications of fire, but observed none. (Defendant's house was about 50 rods from the fired pile.) On 13th November, 1893, between 11 a.m. and noon, a strong wind having sprung up from the north-west, fire started from the pile referred to, across the prairie in a south-easterly direction. The first defendant saw of this was after it had reached Middleton's and was consuming his house.

Judgment.
Richardson, J.

As the result of carefully considering the evidence given by the several witnesses at the hearing, as well as defendant's acts and conduct after the fire, I find that it was this fire which spread on from Middleton's to the plaintiff's and was the cause of the destruction of the plaintiff's house and contents, his stables, some grain in his granary and stacked hay.

This being so, the plaintiff's case is, in my judgment, made out in so far as shewing that the destruction of plaintiff's property, on 13th of November, was caused by the fire which defendant started on 10th November having spread over and on to plaintiff's land.

But the substantial question before me is whether or not the defendant is, on these facts, liable in law for the damage sustained by plaintiff.

The defendant claims that as a matter of law the plaintiff's claim is not sufficiently stated to entitle him to recover, in that facts are not set out in detail; with this I do not coincide, holding as I do that plaintiff's statement contains the material facts, *i.e.*, the act of setting out the fire and its results to plaintiff, thus complying with section 102 of the *Judicature Ordinance*.[2]

To determine the question of liability, it must be assumed that defendant had the right to start a fire on his own land for his own purpose; such not being forbidden so far as I know by law.

Having acted on 10th November on his rights, what were his duties to his neighbour the plaintiff. As to this, numerous authorities were given by both sides; all of these within my reach I have looked at and read. I am bound, however, by *Ryland and Fletcher*,[1] which is the guiding authority in England for the principle, that while a person is using his land in a natural way he is not bound to exercise extraordinary precautions and is entitled to rely on his neighbour, also, using his land in a natural way. Yet, if a farmer uses his land otherwise, he is bound to take extraordinary precautions to prevent damage to others. In the *Fletcher* v. *Ryland Case*,[1] Lord Cranworth lays down this

[2] "*The Judicature Ordinance*," 1893, s. 102; corresponding to C. O. 1898, c. 21, s. 109.

Judgment. Richardson, J.

rule: "If a person brings or accumulates on his land anything which if it should escape may cause damage to his neighbour, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

Here, fire was not naturally on defendant's land, it was brought and placed there by him. He knew the conditions of the country and the risks of fire escaping when winds are known to spring up suddenly, still he had the right to use fire on his own land, but, in my judgment, he was bound to see it did not, under any circumstances, escape on plaintiff's land, his neighbour's farm. His conduct, as given by himself, when he saw fire smoldering on the 11th, not looking at it on the 12th, except from his house, fifty rods distant, or even looking at all early on the 13th, raises with me the presumption of carelessness which is negligence and an utter absence of such precautions as he was bound to take, and plaintiff's loss, as I have found, was occasioned by defendant's want of proper precaution. I must hold defendant liable.

As I find carelessness, it is not necessary to consider if the Imperial Act pleaded is in force in the North-West Territories.

Judgment for plaintiff.

HAMILTON v. BJARNASON.

Promissory note—Assignment—Plaintiff's right to sue.

The statement of claim was based on an alleged promissory note made by defendant, payable to the order of one Bertrand and assigned to the plaintiff. The defendant denied such assignment. The evidence disclosed that the alleged assignment was not written on the note, but on a separate piece of paper, and purported to assign a "promissory note."

Held, that the assignment, not being written on the note, was invalid and bad; and that, assuming the instrument sued on not to be a promissory note, the assignment was invalid and bad, as it did not contain apt words as required by R. O. 1888, c. 50.

[WETMORE, J., *June 11, 1896.*

Statement. Action by assignee of an alleged promissory note against the maker.

Argument. *D. H. Cole,* for plaintiff.

F. F. Forbes, for defendant.

Judgment.

WETMORE, J.:—The alleged assignment is made by the payee, but is not written on the note, but on a separate piece of paper, and purports to assign to the plaintiff all the payee's "right, title and interest in a certain promisosry note made by E. Bjarnason in my favour and dated December 3rd, 1894, for the sum of $50." There is no other reference to the note. It is claimed that as the defendant is sued as a maker of a note I must treat it as a note, and, if so, this assignment not being written on the note, and the note being payable to order, the assignment is bad under *The Bills of Exchange Act, 1890.* Promissory notes are exempted from the operation of Ordinance cap. 50 of *The Revised Ordinances*,[1] respecting choses in action, by sec. 6 thereof. Under sec. 31, sub-sec. 3, and sec 32, sub-sec. 1, par. (*a*), and sec. 88 of *The Bills of Exchange Act,* 1890, this assignment is bad, not being written on the note; and see *Byles on Bills* (14th ed.) 171.

It seems to me that the plaintiff is on the horns of a dilemma and has no title to the document sued on under any aspect one may view it. It was set up that the instrument sued on was not a promissory note. It is not necessary to decide that question. But, assuming that it is not a promissory note, the alleged assignment is bad because it professes to assign a promissory note, and, consequently, if this instrument is not a promissory note there are not apt words in the alleged transfer to pass it under the Ordinance I have referred to. In either aspect of this question the plaintiff must fail.

Judgment for defendant with costs.

MORRISON v. MORRISON.

Practice—Writ of summons—Endorsement of service—Default judgment—Setting aside.

The English Rule requiring endorsement of service is incorporated with the *Judicature Ordinance* of 1893.

Where the defendant made affidavit that he had not been served personally, but that the writ had been served on his wife, and no affidavit of the wife was produced in corroboration, an application to set the service aside was refused.

[RICHARDSON, J., *June 13, 1896.*

[1] R. O. 1888, c. 50: "An Ordinance respecting choses in action."

Statement. This was an application to set aside a judgment signed in default of appearance. The grounds of the application are set forth in the judgment.

Argument. *H. A. Robson*, for the motion.

J. Secord, Q.C., contra.

Judgment. The defendant here applies to have the judgment by default entered in this suit against him and any subsequent proceedings set aside. The grounds upon which his application is made are:—

1. That there was not personal service upon him of the writ of summons, and,

2. That there was not endorsed upon the original writ of summons a memorandum of the day of the week and month upon which the service was (if at all) affected.

The material upon which the application is based consists:—

1. An affidavit of the defendant denying personal service.

2. An affidavit explaining the delay from April 11th to May 4th, 1896, in making the application.

3. The writ itself and the proceedings in the clerk's office.

On the hearing, May 9th, 1896, the application was resisted and an affidavit of Mr. Smith, plaintiff's advocate, read, which merely alleges that on the 18th or 19th of March last, the defendant called at his office and offered $60 in settlement of plaintiff's claim sued for, which, being refused, the defendant asked for two or three days further time to enter an appearance, which was given up to the 23rd March; that on the 25th March, Mr. Smith called on Mr. Dickson, who the defendant had told the former was his (defendant's) advocate, and asking Mr. Dickson if he had entered an appearance, received an answer in the negative coupled with a statement that he, Mr. Smith, had better go on and enter judgment.

At this stage, Mr. Robson asked that the matter stand to allow defendant to put in affidavit in reply, and particularly one of defendant's wife, upon whom it was alleged in

defendant's affidavit, the service of the writ had been, as she had informed defendant, made. Judgment. Richardson, J.

I took time to consider such application, and have arrived at the conclusion that to receive defendant's wife's affidavit in support of his own, on the original application, would not be proper, as it would not be in answer to any portion of Mr. Smith's affidavit, who does not deny the fact stated by defendant in his affidavit, but as Mr. Smith alleges facts as occurring at an interview with defendant in his office, and, subsequently, with Mr. Dickson as representing defendant, and as these allegations may, if not met, have some bearing upon that branch of the application in which non-personal service is complained of, I thought the opportunity should be afforded defendant of meeting or explaining away the same as he may be advised, and enlarged the motion.

On the resumption of the case on May 23rd, 1896, an affidavit of the Mr. Dickson referred to in Mr. Smith's affidavit was produced in which that gentleman's version of the interview, as given by the former, is, in part, contradicted. It does not, however, in my judgment, have any bearing upon the question of the service, which stands thus: A formal affidavit by John Boyd of personal service, merely and simply denied by the defendant by his affidavit which, as it indicates another person whom he understood had been served and as there was no corroboration of defendant's statements by the person said to have been served or any facts supporting it, that alternative of the application for setting aside the service because the writ was not personally served cannot be conceded.

As regards the other alternative, that is, for having the judgment set aside because upon the original writ of summons a memo. of the day of the week and month the service was made was not endorsed, this involves the determination as to whether or not Marginal Rule E. 62, is incorporated with the *Judicature Ordinance*[1]. Section 556 of this Ordinance enacts that: "Subject to (that is, unless specially provided for by) this Ordinance, the procedure and practice existing at the time of the coming into force of this Ordinance (January 1st, 1894), shall, as nearly as may be, be held to be incorporated herewith."

[1] *The Judicature Ordinance* of 1893.

Judgment.
Richardson, J.

Then section 567 enacts that the forms contained in the appendix shall be used in and for the purposes of the clerk's office, with such variations as the circumstances may require and as to all other matters the forms used in the "Administration of Civil Justice in England, with such variations as will make them respectively applicable to proceedings in the Supreme Court of the Territories, whether *in banc* or otherwise, may be used."

Now there is in the *Judicature Ordinance*,[1] sec. 295, which follows in words, English Rule 1020: "Affidavits of service shall state when, where and how and by whom such service was effected."

There is in the *Judicature Ordinance*[1] no special provision relating to the service of original writs of summons[2]. But such existed in England by English Rule 62 in force January 1st, 1894, which directed that "the person serving a writ of summons shall, within three days at most after such service, endorse on the writ, the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default, and every affidavit of service of such writ shall mention the day on which such endorsement was made." Then, English Rule 102, from which our section 80 is taken, provides that "when any defendant fails to appear to a writ of summons and the plaintiff is desirous of proceeding upon default of appearance he shall, before taking such proceeding upon default, file the original writ . . . with an affidavit of service."

And under this Rule, the official form to be used in the administration of justice in England (see Annual Practice and Chancery Forms) is prescribed; consequently, as no form is contained in the appendix to the *Judicature Ordinance*,[1] the form prescribed for use in England is the one to be used, I opine, in this Court, and as in the *Judicature Ordinance*[1] no special provision is made regulating the proceeding to be followed upon or after service of the writ of summons, which there is in England by English Rule 62, I am bound

[2] Subsequently, Ordinance No. 6 of 1897 was passed by s. 1, s.-s. 10, of which it was provided that indorsement of service should be unnecessary, but that the writ and statement of claim should be marked as exhibits to the affidavit of service.—T. D. B.

to hold that that rule is incorporated with the *Judicature Ordinance*[1] as is also the form of affidavit I have referred to. Judgment. Wetmore, J.

In this case the original writ on the files contains no such endorsement as is required by section 62. Therefore, by that Rule the plaintiff was not at liberty, in fact was forbidden in as plain language as could be used to exercise the limited powers authorized for signing a judgment by a plaintiff on default of appearance as he did. Signing the judgment was, as stated by Russell, L.J., in *Smurthwaite* v. *Hannay*[2], a proceeding in a suit not authorized by the law and the Rules applicable to procedure and was more than an irregularity.

The judgment signed was as Exeter, L.J., states in *Hughes* v. *Justin*,[4] wrong. The defendant is entitled, following *Anlaby* v. *Pretorius*,[5] to have it set aside, *ex debito justitiæ*.

Summons made absolute with Costs.

OWEN v. TINNING (1).

Practice—Pleadings—Untrue allegations of fact—Striking out.

Untrue allegations in a statement of defence will be struck out only when an abuse of the process of the Court has been clearly and unmistakeably established.

[RICHARDSON, J., *June 20, 1896.*

This was an application by summons in Chambers to strike out certain paragraphs in the statement of defence on the ground that such allegations were shewn to be untrue by the depositions of the defendant taken on his examination for discovery. The motion was argued before RICHARDSON, J., on June 11th, 1896, who reserved judgment. Statement.

T. C. Johnstone, for the plaintiff, cited: *Nutt* v. *Rush*[1]; *McMaster* v. *Beattie*[2]; *Richley* v. *Proone*[3]. Argument.

N. Mackenzie, for the defendant:—The application is made too late, the cause having been at issue since May

[3] 63 L. J. Q. B. 737; (1894) A. C. 494; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.
[4] (1894) 1 Q. B. 667; 63 L. J. Q. B. 417; 70 L. T. 365; 42 W. R. 339; 10 Times Rep. 291.
[5] 20 Q. B. D. 764; 57 L. J. Q. B. 287; 58 L. T. 671; 36 W. R. 487.

[1] 4 Ex. 490; 7 D. & L. 192; 19 L. J. Ex. 54.
[2] 6 P. R. 162.
[3] 1 B. & C. 286.

Argument. 14th, 1896. Application to strike out cannot be granted unless made promptly. He referred to Odgers on Pleadings, and cited *Cross* v. *Howe*[4]; *Saunders* v. *Jones*[5]; *Parker* v. *Ibbotson*[6]; *Attorney-General* v. *L. & N. W. Railway Co.*[7]; *Boaler* v. *Holder*[8].

Judgment. RICHARDSON, J.:—By Chamber summons before me, the plaintiff sought to have paragraphs 1 and 2 of the statement of defence struck out because, by examination of the defendant for discovery, these were shewn, it was alleged, to be untrue.

To this on the hearing, Mr. Mackenzie, for the defendant, raised the technical objection that isasmuch as the cause was at issue on the 14th of May, 1896, and as by the authorities given in the Annual Practice, it has been held, as a general rule, that an application to strike out must be made promptly after pleading, the application should be dismissed.

The application, however, is not one of an ordinary nature, but one which, if it can be upheld, is to be made with reasonable promptness and may be made at any time before the cause is set down for trial, namely, to have an abuse of the process of the Court removed, and the defendant's technical objection cannot prevail. I think the plaintiff has been, under the circumstances, reasonably prompt.

What the plaintiff seeks is, that, because by the examination before the clerk it is disclosed that the paragraphs in question (which are simply traverses of the plaintiff's contention in his statement of claim that he was hired by the defendant for a year) are untrue in fact, such paragraphs should be struck out. Upon this I am referred to *Nutt* v. *Rush*,[1] *McMaster* v. *Beattie*,[2] and the *Annual Practice*.

In both the above named cases the actions were upon promissory notes; in the former there was an affidavit of the plaintiff not only verifying the indebtedness created, and that it was due and unpaid as alleged, but that the plea put in

[4] 62 L. J. Ch. 342; 3 R. 218.
[5] 47 L. J. Ch. 440; 7 C. D. 435; 37 L. T. 769; 26 W. R. 226.
[6] 27 L. J. C. P. 236; 4 C. B. N. S. 346.
[7] (1892) 3 Ch. 275; 62 L. J. Ch. 271; 2 R. 84; 62 L. T. 810.
[8] 54 L. T. 298.

Judgment.
Richardson, J.

was false and a sham which was unanswered in any way by the defendant. In the other case the defendant was examined and then swore that the note he was sued on was unpaid (the plea was payment before action) and that the defence was entered for time merely. In the English case[1] the defendant did not dispute the plaintiff's contention as to the falsity of the defence, and in the other case, the defendant distinctly admitted it. In both cases the defences were held embarrassing and abuses.

In *McMaster* v. *Beattie*,[2] it was the Master who dealt with the application. In another case, *Turner* v. *Neal*[3], disposed of by the same Master shortly after, he refused an order to strike out the defendant's plea. The application was based on an examination of the defendant. In this case the Master gives as his reason for the refusal of the order, that because "although there can be little doubt that the plea was false, it involved a point which required evidence for its establishment in addition to the defendant's admissions, and no matter how clear the case might be, he had no power to strike out the plea unless the defendant, in a proceeding of the Court, admitted its falsity." In this case it is true the defendant states that the contract between the plaintiff and himself was effected "by letter," and letters are put in and identified, but he not only makes no admissions of falsity, but distinctly states that the defendant had not a yearly engagement.

The authorities, as I comprehend them, only warrant striking out, in such instances, an extraordinary proceeding when an abuse of the process of the Court is clearly and unmistakably established, which is not the case here.

Application dismissed.

HAMILTON v. BECK.

Practice—Taxation of costs—Witness fees—Review.

A party attending Court as witness in more than one cause is nevertheless entitled to full fees in each cause.

[WETMORE, J., *July 10, 1896.*

Statement.

Review by the defendant of the taxation of witness fees by the clerk. The judgment sufficiently sets forth the facts.

Argument. The plaintiff in person.

F. L. Gwillim, for defendant.

Judgment. WETMORE, J.:—This is a review of taxation of costs. The cause was tried at Yorkton in May last, and resulted in a judgment for the plaintiff. The plaintiff was a necessary and material witness on his own behalf. He travelled from Moosomin, his place of residence, for the purpose of giving his testimony in the cause, a distance of 100 miles. The plaintiff was also a witness in another cause tried at the same sittings, but was not aware when he left Moosomin that he would be required as a witness in such other cause. The plaintiff was also a party plaintiff in a suit tried at a sittings of the Court held at Saltcoats a couple of days after the Yorkton sittings. As a matter of fact, Saltcoats would be passed by the plaintiff on his way returning from Yorkton to Moosomin. The clerk allowed the plaintiff his full mileage and attendance sufficient to cover his time in going to, attending at and returning from such Court for the purposes of the trial of this cause only. It is claimed that this was erroneous—that the defendant is only liable for a proportionate part thereof and that they should be divided proportionately in this cause and such other causes, and 1 *Archbold Queen's Bench Practice* (14th ed.) 175, was relied on. I think the rule in England as to allowance of witness fees is different from what it is here. In England the amount to be allowed witnesses is in the discretion of the taxing master[1]. In this country the taxing officer has no discretion, he must allow the fees prescribed by the Ordinances, in suits under the ordinary practice as prescribed by *The Judicature Ordinance*[2], section 532, and the tariff appended to that Ordinance, and in cases under the small debt procedure prescribed by Ordinance No. 5 of 1894, section 48, and the tariff appended thereto. The rule in England as laid down in Archbold, that, "if the witnesses attend in one cause only, they will be entitled to the full allowance—if they attend in more than one cause they will be entitled to a proportionate part in each cause

[1] *Archbold Queen's Bench Practice*, p. 715; Order LXV., Rule 27, Sub-Rule 9.

[2] Ordinance No. 6 of 1893.

Judgment.

Wetmore, J.

only," seems to have been embodied in directions given to the master in H. & T. 1853. See *Archbold Queen's Bench Practice*, 715, notes (*z*) and (*a*). The question then arises whether those directions *quoad* such witnesses are embodied in the practice here by virtue of section 556 of *The Judicature Ordinance*.[2] I am of opinion that they are not, because they are inconsistent with the provisions of the two Ordinances, and the tariff which I have cited and which fix the amount of fees to be allowed. In the Court in which I practised when at the bar the fees of witnesses were fixed by statute in the same way that they are here, and it was always considered that these fees were fees to which the witness was entitled in each cause no matter how many causes there were at the same sittings in which he attended; just as the fee for attendance on the part of the advocate was a fee in each cause. The question came up in that Court for decision in *Chapman* v. *The Providence Washington Ins. Co.*[3] These two cases were entered for trial at the Charlotte circuit and were postponed on application of the defendants on the terms of payment of the costs of the day. On the taxation of these costs the clerk allowed full costs in each case for the attendance of the plaintiff and one Smith, one of his witnesses. The Court held that this was correct. See *Murray* v. *Williston*[4].

Taxation affirmed.

CALDER v. MIEKLEJOHN AND UNION BANK, GARNISHEE.

Attachment of debts—Garnishee paying into Court—Various courses open to a garnishee considered.

A garnishee who pays money into Court must pay in the amount of his whole indebtedness to the defendant. The form of judgment and execution against a garnishee who does not admit the amount of his liability is to levy the debt due from the garnishee to the principal debtor or so much thereof as will satisfy the judgment against the principal debtor.

[WETMORE, J., *July 29, 1896.*

[2] S. C. New Brunswick, 3 P. & B. 496.
[4] S. C. N. Bruns., 1 Allen 492.

Statement. Trial of the liability of garnishees.

The facts sufficiently appear in the judgment.

Argument. *D. H. Cole,* for plaintiff.

F. L. Gwillim, for garnishee.

No one for defendant.

Judgment. WETMORE, J.:—The Union Bank being garnisheed entered an appearance and filed a dispute, among other things denying liability to the defendant, and also alleging that the only way they were indebted to the defendant is under a trust account. The garnishees subsequently paid into Court $40 to cover the debt and costs, and stated they were willing to abide the order of the Court as to whether the monies were garnishable. In taking this course the garnishees abandoned their denial of liability, and as they did so before the plaintiff made any application, he was not prejudiced. Under section 371 of *The Judicature Ordinance*[1], I fixed a time and place to try the question of the liability of the garnishees, and whether the monies paid into Court by the garnishees is trust money or not. This order having been duly served on the defendant, he failed to appear at the time and place appointed. The advocates for the plaintiff and the garnishee appeared, however, and the advocate for the plaintiff set up that the amount of money paid into Court by the garnishees was not sufficient to pay the debt and costs, that the garnishee owed the defendant more than $40 under the same circumstances that they owed that sum, and that the whole amount was attachable for the purpose of satisfying the judgment debt and costs, including, I think, the costs of the garnishee proceedings. This contention is correct on its face. That is, *prima facie,* if $40 of this money is attachable, the whole of it is attachable, and whatever amount is attachable it is so far as it will extend attachable for the whole amount of the judgment debt and costs, including the costs of the garnishee proceedings. These latter costs are under the provisions of sec. 376 of the Ordinance *prima facie* liable to be added to the judgment. Under no circumstances can an order be made against a garnishee until after judgment against the principal debtor.

[1] Ord. No. 6 of 1893.

Judgment.

Wetmore, J.

If the debt is garnisheed before judgment, an order against the garnishee is suspended until such judgment by sec. 368 of the Ordinance[1]. A garnishee who is indebted to a principal debtor and served with a garnishee summons may take several courses; he may do nothing, and then, when judgment is recovered against the principal debtor, an order will be made against the garnishee for judgment and execution to levy the debt due from him to the principal debtor, or so much of it as will satisfy the judgment against the principal debtor, and this latter judgment would usually include the garnishee costs. Or, and perhaps it might be the most prudent course to take, unless the garnishee owes the principal debtor a sum larger than any possbile judgment that may be obtained against the principal debtor, the garnishee might file a statement admitting the amount of his liability and denying and further liability. In that case, unless the primary creditor chooses to set up that the liability is greater, no order can be made for judgment against the garnishee in a greater amount than he so admits. Or the garnishee can pay the amount of his indebtedness to the principal debtor into Court; but if he takes this course he must pay the whole amount of such indebtedness into Court he cannot pay part of it in. There is just the important difference between sec. 370 of the Ordinance[1] and Order XLV., Rule 3, of the English Rules, from which that section* is in part taken. Under the English Rules the garnishee, if he pays into Court, can pay in an amount equal to the judgment or order. Under the section of the Ordinance he must, if he pays into Court, pay in the amount due from him to the debtor. And the money so paid into Court will, of course, be subject to the order of the Court, and the Court, no doubt, would apply it, when the proper time arose, to the primary creditor's judgment, unless the garnishee, or someone, suggested that the money belonged to a third person or was trust money. Looking at the dispute note filed by the garnishee herein, I would assume that they hold more monies of the principal debtor than $40 in the same way that they held that. At any rate, the plaintiff avers that they do. The garnishees have suggested that this money is trust money. I consider that that question is dis-

* Section 370 was subsequently amended.—T. D. B.

Judgment. Wetmore, J.

posed of, as at the return of the order referred to, no person has appeared to substantiate that it is trust money. I assume, therefore, that it is not. But, unless the bank admits a larger indebtedness and pays the same into Court, I must institute an inquiry to ascertain what the whole amount of the bank's indebtedness to the principal debtor at the time of the service of the garnishee summons was.

Order accordingly.

OWEN v. TINNING (2).

Master and servant—Contract of hiring—Letters—Evidence.

Where a contract is to be made out by an offer on one side and an acceptance on the other, such acceptance to be binding must be unequivocal.

[RICHARDSON, J., *Aug. 8, 1896.*

Statement.

This was an action for alleged wrongful dismissal. The facts sufficiently appear in the judgment.

Argument.

T. C. Johnstone, for the plaintiff.

N. Mackenzie, for the defendant.

The following cases were referred to on the argument: *Gibson* v. *Barton*[1]; *Re Aberaman Iron Works* v. *Wickens*[2]; *Appleby* v. *Johnston*[3]; *Honeyman* v. *Marryat*[4]; *Towne* v. *Campbell*[5]; *Jones* v. *Mills*[6]; *McPherson* v. *Norris*[7]; *Burnet* v. *Hope*[8]; *Evans* v. *Roe*[9]; *Hyde* v. *Wrench*[10]; *Lilley* v. *Elwin*[11]; *Ridgeway* v. *Hungerford Market Co.*[12]; *Beeston* v. *Collyer*[13]; *Lash* v. *Meriden Britannia Co.*[14].

[1] L. R. 10 Q. B. 329; 44 L. J. M. C. 81; 31 L. T. 396; 23 W. R. 858.
[2] L. R. 4 Ch. 101; 20 L. T. 89; 17 W. R. 211.
[3] (1874) L. R. 9 C. P. 158; *sub. nom. Johnston* v. *Appleby*, 43 L. J. (C.P.) 146; 30 L. T. 261; 22 W. R. 515.
[4] 21 Beav. 14; 3 W. R. 502, *affirmed* 6 H. L. C. 112; 10 E. R. 1236; 26 L. J. Ch. 619; 4 Jur. (N.S.) 17.
[5] (1847) 3 C. B. 921; 16 L. J. C. P. 104.
[6] (1861) 10 C. B. (N.S.) 788; 31 L. J. C. P. 66; 8 Jur. (N.S.) 387; 58 J. P. 273.
[7] 13 U. C. Q. B. 472.
[8] 9 O. R. 10.
[9] (1872) L. R. 7 C. P. 138; 26 L. T. 70.
[10] 3 Beav. 334; 4 Jur. 1106.
[11] 11 Q. B. 742; 17 L. J. Q. B. 132; 12 Jur. 623.
[12] 3 A. & E. 171; 4 N. & M. 797; 1 H. & W. 244; 4 L. J. K. B. 157.
[13] 4 Bing. 309; 2 C. & P. 607; 12 Moore (C.P.) 552; 5 L. J. (O.S.) C. P. 180; 29 R. R. 576.
[14] 8 A. R. 680.

Judgment

RICHARDSON, J.:—It appears from Mr. Balfour's letter of August 8th, 1895 (it being admitted that Mr. Balfour was acting for defendant), that the plaintiff had advertised for a position as manager of a general store, and this being so, that Mr. Balfour's client, that is, the defendant, desired to hear from plaintiff on the subject.

In response to this, the plaintiff, on August 10th, 1895, writes Mr. Balfour a letter in which, after detailing his qualifications, etc., he says:—

"Please give your client to understand that I want a permanent position as manager, which is to include all the duties pertaining to such an office. I shall want a year's engagement at least at $1,200 a year, salary payable weekly, if convenient to my employer. . . . I trust we shall be able to come to terms. I can be at the service of your client at any time, a few days' notice being given to me beforehand. Waiting your reply, I remain."

On August 15th, 1895, the plaintiff again writes Mr. Balfour:—

"If your client has not decided already against my application, and should desire an interview before doing so, no doubt but that mutual arrangements could be made with that end in view. . . . It has just occurred to me that possibly your client does all the buying himself, and merely needs a manager for store and office, in which case he will doubtless think my price too high. If this be so and he assumes the duty of buying and will make me an offer, or ask me for another offer, I shall be pleased to write you again, but if, as I just thought, I was to act as buyer as well, then my price remains. . . . Trusting you will favour me with a reply at your earliest convenience, unless my application still means a probable engagement."

Plaintiff's offer, as I construe the above two letters, is: By the first that he would, if accepted by defendant as such, serve him as general manager of his business for at least one year, at and for the yearly salary of $1,200, payable weekly if convenient to defendant; and by the second: If the defendant did not require a general manager which included buying, but only for store and office, then the price quoted was too high, and if the defendant did the buying, then if

Judgment. Richardson, J.

defendant would make plaintiff an offer or ask the plaintiff for another offer, he, the plaintiff, would write again.

Put shorter:—

Plaintiff offered his services as defendant's manager for a year at $1,200. If less than full manager required, then as manager for store and office the price quoted was too high and defendant was requested to make plaintiff an offer or that plaintiff should be asked for another offer.

Matters stood in this condition until September 11th, 1895, when defendant wrote plaintiff:—

"If you care to accept a position in my store at a salary of $75 per month, you can come at once. Your duties would be to take charge of the dry goods, also assist in buying—of course your future would depend entirely upon yourself."

As I interpret the meaning of this correspondence, the defendant did not require either a manager for his whole business or even a manager for his store and office; but desiring some one to take charge of the dry goods part of his store and to assist in buying, he offered plaintiff this position at $75 per month.

This, I am bound to hold, is not an acceptance of plaintiff's proposal, but an independent, distinct proposal emanating from defendant to plaintiff to engage him by the month at $75 per month.

Before actually entering into defendant's service, plaintiff wrote defendant:—

"Sept. 12th, 1895 (Thursday).

"Yours of the 11th instant to hand. In reply would say that I am ready to go to you just as soon as you give me the assurance that the position I am to fill is such a one as I have already, in a former letter, told you I was in search of. What length of time will you give me an engagement? . . . If your offer is based upon my requirements as stated in my advertisement in *Free Press*, and upon the details of my former letter, I think $1,000 is little enough. . . . If you will write me more fully by return mail and tell me how many hands you employ, if your reply is satisfactory, I can be with you on Monday morning's train. Trusting we can arrange matters to our mutual

satisfaction, and hoping to hear from you by return mail, I am, etc." Judgment. Richardson, J.

To this letter defendant made no reply. It would, in the natural course of the mail, have reached the defendant on 13th September, Friday, and if promptly answered, defendant's reply might have reached plaintiff on 14th September. But, instead of waiting for the requested reply from the defendant, on the 14th of September, Saturday, defendant received a telegram from the plaintiff worded: "Shall come Saturday or will you write me again?" This is answered Monday, the 16th of September, when defendant sends this telegram to plaintiff: "I would like you to come at once."

On September 18th, plaintiff arrived, and at once entered defendant's employ, and, until his discharge, 31st March, 1896, performed the services defined by defendant's letter of September 11th, 1895, and was paid at the rate of $75 per month.

On both sides it was asserted that whatever contract of hiring yearly or monthly there was between plaintiff and defendant, it was to be construed from the correspondence I have referred to.

I have already determined that defendant's letter of September 11th, could not be construed into an acceptance of either of plaintiff's proposals made in August, and that this letter of September 11th, 1895, contained a counter proposal from defendant to plaintiff which I feel bound to hold from plaintiff's subsequent conduct is the one under which plaintiff entered defendant's services. And, having construed this as a monthly hiring, and, as in any judgment, sufficient notice for its determination has been given by defendant to plaintiff, plaintiff's action fails. It is, therefore, not necessary I should consider the other branch of the case relating to dismissal for cause. But should the Court above me determine I have erred in my construction of the correspondence, it will make the proper adjudication which, under those circumstances, I should have made.

Action dismissed with costs.

CANTELON, APPELLANT, v. TRUSTEES OF LORLIE SCHOOL DISTRICT, RESPONDENT.

WATSON, APPELLANT, v. TRUSTEES OF LORLIE SCHOOL DISTRICT, RESPONDENT.

Assessment and taxation—Appeal—Pre-emption—Occupancy.

Any act of ordinary ownership, however slight, performed by the holder of a pre-emption entry upon his pre-emption, constitutes such person the occupant thereof so as to render him liable to assessment.

Such occupancy will continue, without any interruption, as a constructive occupancy, so long as the right of entry lasts.

[WETMORE, J., *Aug. 11, 1896.*

Statement. These were appeals by one A. Cantelon and one H. B. Watson against the assessment of their respective pre-emptions by the trustees of Lorlie School District number 338 of the North-West Territories, under the provisions of *The School Ordinance*.[2]

Judgment. WETMORE, J.:—These appeals came on to be heard before me at Wolseley at the same time, and the same question is involved in each appeal. The appellants are homesteaders, who obtained pre-emption entries under *The Dominion Lands Act*[1] No grants have been issued to either of these gentlemen. They were assessed in respect of their pre-emptions, and against this assessment they have appealed. They are living on their homesteads, and I, therefore, assume that they obtained their homestead and pre-emption entries in the regular way, and I also assume, as there is no evidence to the contrary, that their homestead entries have not been forfeited or cancelled, and it follows that their pre-emption entries have not been forfeited or cancelled. These appellants have used their pre-emptions but very slightly. Mr. Watson has occasionally cut hay on his, the same as he does on other Government land. Mr. Cantelon got hay on his before the school district was formed, not since, and they have not used these lands in any other manner. The question is whether these appellants are occupants of these pre-emptions and so liable to be assessed in respect thereof by virtue of *The School Ordinance*.[2] Section 103 of the Ordinance provides that "All

[1] R. S. C. 1886, c. 54.
[2] Ordinance No. 22 of 1892.

real . . . property situated within the limits of any school district . . . shall be liable to taxation," subject to certain specified exemptions. Among these exemptions is included, by clause 2 of that section: "All property held by Her Majesty," but by clause 3 of that section, where any property so held by Her Majesty "is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof."

Sub-section 3 of section 32 of *The Dominion Lands Act*, provides that "The entry for a homestead and for its attached pre-emption, if any, shall entitle the recipient to take, occupy and cultivate the land entered for, and to hold possession of the same to the exclusion of any other person or persons whomsoever and to bring and maintain actions for trespass committed on the said lands." I am of opinion, under this sub-section, that if a person having a pre-emption entry enters on his pre-emption and does an act thereon such as an owner of the land would ordinarily do, no matter how slight such act may be, such person becomes the occupant of such pre-emption, and such occupancy will continue as constructive occupancy until the right of entry is cancelled or forfeited or the party releases his right to the Crown. In these cases these parties, by going on their pre-emptions and cutting hay, did do such an act with respect to these lands as an owner thereof would ordinarily do, and they are, therefore, in the eyes of the law, the occupants thereof, and liable to be assessed in respect thereof. The fact that Mr. Cantelon has not so used his pre-emption since the school district was formed, does not affect the question. His occupancy having once commenced continues, in the eye of the law, until cancelled, forfeited or released. A person once becoming an occupant of land of this description cannot shuffle it on and off like an old coat. I therefore affirm the assessment and dismiss these appeals, with costs to the respondents.

I decline to decide whether a person who has never used his pre-emption is liable to assessment. Any opinion I might give on this point would be entirely extra judicial, as the question is not raised under the evidence.

Appeals dismissed with costs.

HARRIS v. HARRIS (2).

Husband and wife—Alimony—Ordinance No. 14 of 1895[1]*—Practice—Solicitor — Legal cruelty—Costs—Jurisdiction — Evidence — Applicability of the Matrimonial Causes Act, 1857 (Imp.)*[2] *considered.*

(1) The practice existing in England in the Court for Divorce and Matrimonial Causes is not applicable to the Northwest Territories.

(2) The Ordinance[1] confers jurisdiction to grant alimony as an independent relief, notwithstanding that in England such relief could have been obtained only as incidental to a decree for judicial separation or for the dissolution of the marriage, or for restitution of conjugal rights.

(3) In considering the question of legal cruelty, the station in life of the parties must be borne in mind.

(4) A wife is entitled to her costs of an unsuccessful suit for alimony, unless she has separate means out of which to pay them, or unless her solicitor has been guilty of misconduct in countenancing improper litigation or takes oppressive and unnecessary steps in promoting the case.

[WETMORE, J., *Oct. 1, 1896.*

Statement. This was an action for alimony by a wife against her husband, tried before Wetmore, J., without a jury.

Argument. *W. White,* Q.C., for plaintiff.

D. H. Cole, for defendant.

Judgment. WETMORE, J.:—This is an action brought by a wife against her husband, under Ordinance No. 14 of 1895,[1] for alimony. It is claimed on behalf of the defendant that this Court has no jurisdiction, the Ordinance being *ultra vires* the Legislative Assembly. There is nothing in this objection; the right to legislate is expressly declared by *The Dominion Statute* 57-58 Vic. cap. (1894), cap. 17, sec. 20. It is also claimed that the procedure is wrong; that the plaintiff ought to have applied by petition as provided by *The Imperial "Matrimonial Causes Act,* 1852."[2] I am also of opinion that there is nothing in this objection. In enacting this Ordinance, the Legislature did not confer on this Court jurisdiction to

[1] "The Supreme Court . . . shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights . . ."

[2] 20 & 21 Vic. (Imp.) c. 85, s. 17.

entertain suits for restitution of conjugal rights or for judicial separation, and sec. 17 of The Imperial Act prescribed the practice with respect to such suits. Neither did the Legislature make the practice in "the Court for Divorce and Matrimonial Causes" in England applicable here. It simply conferred on this Court jurisdiction to grant alimony in the cases therein mentioned. And such relief must be sought for and obtained in the same manner that any other relief which such Court has jurisdiction to grant must be sought for and obtained, namely, under the practice prescribed by "*The Judicature Ordinance.*"

Judgment. Wetmore, J.

The plaintiff herein seeks the relief prayed for on the grounds of cruelty, desertion and adultery. The Ordinance provides that alimony may be granted in the following classes of cases:

1st. To any wife who would be entitled to alimony by the law of England.

2nd. To any wife who would be entitled by the law of England to a divorce and to alimony as incidental thereto.

3rd. To any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

I am not clear as to what meaning is to be attached to the word "divorce" as used in the Ordinance, that is whether it is limited to a divorce from the bond of matrimony, or whether it also embraces what was formerly known in England as a divorce *a mensa et thoro*. A divorce *a mensa et thoro* seems to have been done away with by sec. 7 of *The Matrimonial Causes Act*, 1857[2] and what is called a judicial separation substituted therefor. I must say, however, that I am under the impression that before the passing of that Act the terms "a divorce *a mensa et thoro*" and "a judicial separation" were commonly in use as meaning the same thing. If the word "divorce" in the Ordinance is to be limited to a divorce from the bond of matrimony, a question might possibly be raised whether this Court has jurisdiction to entertain a suit for alimony in cases coming within the first class above specified. Giving the word this limited meaning, I would have little difficulty in holding

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that the jurisdiction was confined to cases coming within the last two clauses. As to cases coming within the third class the Ordinance is very clear. As to cases coming within the second class, all that would be necessary to determine would be: first, would the wife be entitled to a divorce from the bond of matrimony, or, in other words, to a dissolution of the marriage, under the English law? And, if she would, are the circumstances of such a character that the Court, in its discretion, would grant her alimony under sec. 32 of *The Matrimonial Causes Act*, 1857?[2] Both of these questions being answered in the affirmative this Court would grant the relief under the Ordinance. The difficulty which presents itself in cases coming within the first class is that by the law of England alimony is only granted as incidental to some other proceeding, such as a decree for a judicial separation or for a dissolution of the marriage (2 *Bishop on Marriage and Divorce* (6th ed.) sec. 351). This was practically the case before *The Matrimonial Causes Act*, 1857,[2] was passed; only before the Act was passed the decree in one case was for "a divorce *a mensa et thoro*" and it is now for "a judicial separation." In the other case it was for "a divorce *a vinculo matrimonii*," it is now for "a dissolution of the marriage." But as this Court has no jurisdiction to entertain a suit for a judicial separation or for a dissolution of the marriage or for restitution of conjugal rights, it might be urged that the wife would not be entitled to permament alimony under cases coming within the first class, because by the law of England she would not be entitled to it until it was found that she was entitled to a decree for a judicial separation or for a dissolution of the marriage, and then only as incidental to such decree. This difficulty evidently struck Blake, Chancellor, in *Severn* v. *Severn*.[3] However, I am of opinion, that the jurisdiction to grant alimony as an independent relief having been exercised in Ontario for so many years under an Act, quite as ambiguous in its language conferring the jurisdiction as that of the Ordinance in question, it was the intention of the Legislature to confer on this Court the jurisdiction to grant alimony as an independent relief in cases where it may find that the wife would have been entitled to the relief as inci-

[3] 3 Gr. 431.

dental to a decree made in England provided a suit had been instituted there on the same state of facts. It is, therefore, not necessary for the purposes of this case to decide in what sense the word "divorce" is used in the Ordinance. Judgment. Wetmore, J.

In order to entitle the plaintiff to the relief claimed I must find, under the evidence, that if she and the defendant resided within the jurisdiction of the Court for Divorce and Matrimonial Causes in England, she would be entitled to a decree for a judicial separation or for a dissolution of the marriage, or for restitution of conjugal rights by reason of the defendant living separate from her.

Under *The Matrimonial Causes Act*, 1857,[2] a decree of judicial separation "may be obtained . . . on the ground of adultery or cruelty or desertion without cause for two years and upwards" (secs. 7 and 16 of Act), and a decree for dissolution of the marriage may be obtained by a wife on the grounds of "adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro* or of adultery coupled with desertion without reasonable excuse for two years or upwards." (Sec. 27 of the Act.) It is unnecessary to refer to the other grounds on which a dissolution may be decreed against a husband because the evidence does not support them or are they alleged in the pleading. Under sec. 22 of the Act in suits for judicial separation or restitution of conjugal rights the Court shall "give relief on principles and rules . . . as on which the Ecclesiastical Courts have heretofore acted and given relief," but subject to the provisions of such Act and the rules and orders made thereunder.

I will endeavour, in the first place, to determine whether under the evidence, the plaintiff would be entitled, under the law of England, to a decree for judicial separation on the ground of cruelty. I am free to confess that I have had very great difficulty in satisfying my mind as to the true facts in this case. The parties immediately concerned, and some of their immediate relatives, and some of the other witnesses, did not impress me with their truthfulness. And the difficulty that I have experienced is that of coming to a correct conclusion from a mass of exaggeration, and, in some instances, of downright untruthfulness. The par-

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ties were married in Ontario in March, 1856, and lived there until 1882, when they came to this country. They had a large family, the result of the marriage. The plaintiff alleges, in her pleadings, and by her evidence, that their married life has been unhappy for many years, that the defendant is a person of jealous disposition, that by his jealous disposition he made her life uncomfortable, and frequently struck her, before they came to this country, and struck her on several occasions since they arrived here, and that he accused her of being too free with other men. Her evidence does not go the length of establishing that he accused her of having improper connection with these men, but rather of being too free with them. The defendant does not deny that he intimated to her, by his manner and otherwise, that she allowed too much freedom to other men. On the contrary he practically insisted in his testimony that he did so. But he utterly denied that he ever struck her in his life. The occasions on which the defendant struck her in Ontario are not particularized in the statement of claim, and the evidence with respect to them is of the most general character. I have no means of arriving at any conclusions as to the circumstances under which the blows were given, if given at all. I am of opinion, however, that if given they could not have been of a very serious character, because had they been, they would, I assume, have been particularized in the statement of claim, and more especially referred to in her evidence than they were. Morever, according to the plaintiff's testimony, the defendant's course of ill-treatment commenced about four years after their marriage, that would be in 1860. But from that time down to 1882, or, for twenty-two years, they lived together in what is now the province of Ontario, where, under the law of that province or of the province of Upper Canada, she might have obtained the relief which she is now seeking in this case, but there is no evidence that she ever applied for it. I assume that she did not. The acts of cruelty particularized in the statement of claim, and with respect to which the plaintiff gave testimony, are in the order of time as follows:—

In January, 1884, as she was going to bed, the defendant pushed her off the bed.

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In June, 1884, he struck her on the neck with his fist. In June, 1887, he struck her on the eye with his fist and attempted to expel her from his house. There was also some testimony given that he struck her in February, 1885, but as this blow is not particularized in the statement of claim, as the plaintiff did not consider it of sufficient importance to refer to it in her examination in chief and it was only brought out from her on her cross-examination, as no evidence was given of the character of the blow or the circumstances under which it was given, I assume that it could not have been of a very serious character.

There is another circumstance to which I must refer. The defendant made an entry for his homestead, which is situated about half a mile from Moosomin. He went to Birtle and made this entry, according to his testimony, in January, 1884, according to the plaintiff in January, 1883 However, the year is immaterial. According to the testimony of the plaintiff and her two sons, the day after the defendant returned from making this entry, and after they had had their dinner, the plaintiff proposed to her children that they should hurry up and get the dishes washed and go out and see their new home, whereupon the defendant threatened to blow the brains out of the first one that would put his foot on the place. The defendant denies that he ever threatened his wife or children. If any such threat was used, I am of opinion that nobody took it seriously, because I find that one of the boys was, subsequently, out there helping to put up some of the buildings on it. But I am of opinion that no such threat was used. In the first place, it seems to me so unlikely that without any cause or provocation whatever he would have made such a threat. It is true that on a subsequent occasion he ordered one of the sons, who was driving with him out to this farm, to go home, but this was in the summer of 1884, and after the unpleasantness to which I will hereafter refer had commenced. Knowing what this country is in the winter time, in January, it seems to me very unlikely that people, especially females, would seriously propose in the way suggested going to inspect a farm without trails on it, and without buildings on it, and entirely unoccupied (I assume, in the absence of evidence to the contrary, that the defendant had

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not occupied this property before he made his entry). What would there be to see at that time of the year with the snow covering the ground? I will now proceed to scrutinize the testimony respecting the alleged acts of cruelty specially mentioned in the statement of claim and particularly referred to in the testimony given by the plaintiff and on her behalf. I will, however, first state that I find, as a matter of fact, that the defendant was a person of a jealous disposition. It is also important to bear in mind the fact that these parties are not persons of high education or of refined habits, in fact, they are quite the contrary. The first of these acts in point of time was the occasion when the defendant is alleged to have pushed the plaintiff off the bed. According to the plaintiff's testimony this occurrence happened in this way: one William Galbraith, who is a son-in-law of these parties, was working at the house putting up a partition between the dining-room and bed-room. Some of the boarders were going away early the following morning and required their breakfast before they started, and the plaintiff stayed up later than the rest to sweep up the shavings that were made at the dining-room table. When she went to bed, and while sitting on the bed taking off her shoes, the defendant, who had previously retired, pushed her off the bed with such violence that she would have fallen if she had not saved herself by a chair which was there, he at the same time saying: "Damn you, are you coming into bed with me after being up all night with Billy Galbraith." It does not appear how he pushed her, whether it was with his hands or his feet, but it was a push, not a blow. Now, assuming this to be true, it strikes my mind as the most reprehensible of the alleged three acts of violence with which I am now dealing. If it did occur it was entirely the outcome of the defendant's jealous disposition. But the evidence discloses no reason whatever for being jealous of Galbraith, and it would seem absurd to imagine, without any evidence to establish it, that any cause for jealousy could be given by a woman in respect of her son-in-law. The result of this act was that the plaintiff left the defendant's bed, refused to sleep with him and has never slept with him since. That the plaintiff did, about this time, cease to occupy the same bed with the defendant

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is admitted by both parties, but the defendant gives a very different account of the circumstances under which the plaintiff so ceased to sleep with him; at present, however, I prefer dealing with this case in the light of the plaintiff's testimony than of that of the defendant. But I think I am not very far astray when I express the opinion that this refusal of hers to sleep with him went a long way to render more acute any unpleasantness which may have previously existed. I am more impressed with this when I consider the jealous disposition of the defendant.

The other two alleged acts of cruelty to which I am now referring, if perpetrated at all, were not, in my opinion, the result of deliberate, systematic cruelty, but were blows given in scrimmages in which the plaintiff was taking an active part. On the first of these occasions the defendant, according to the plaintiff's own testimony, was endeavouring to put his son James out of her bed-room. And, it seems to me, that if he ordered James to go out of the room and he did not obey, the father had, strictly, the right to put him out. However, the plaintiff interfered to prevent him, and caught hold of James and threw her arms about him, and in the course of the scrimmage got a blow, so she says. On the other occasion, according to her testimony, Martin, a son-in-law, came to the house between eight and nine o'clock in the evening, the defendant also being there. The plaintiff took it into her head that Martin had come there to assist her husband to put her out of the house. Why she arrived at that conclusion I cannot conceive, because there is not a particle of evidence to justify her in doing so. It is true that Robert Lynes swore that the defendant told the plaintiff to get out of the house, but that was at a later stage of the transaction. The plaintiff, however, opened the proceedings by asking Martin what he was doing there at that hour of the night, and informed him it was time for all decent persons to be at home who had a home to go to. It would not occur to me that between eight and nine o'clock on the 30th June was an unseemly hour for a man to be outside his own home. However, on her saying this Martin made a step towards her, as she says, to catch hold of her and drag her out of the house. Why she reached that conclusion I do not know, it does not appear;

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but she immediately attempted to throw a dish of dirty water in his face, and then the scrimmage commenced. And I can read very plainly between the lines that there was a pretty general row all around. This did not come out all at once, but it came out bit by bit. The plaintiff says she got a blow from her husband, and it appears Martin struck some member of the famliy, and I have no doubt that Robert Lynes struck the defendant, and, as Phillip Currie, one of the witnesses, states, "it was a kind of a mixed up affair." I will have occasion to refer to this transaction again, but for the purposes of the branch of the case I am now considering, it is not necessary, at present, to refer to it at any greater length. I do not wish to be understood as finding, as a matter of fact, that the defendant struck the plaintiff or used personal violence to her at all, or, if he did, that they were of the serious character represented. I make no finding in that respect at all. I do not consider it necessary. All I can say is that the testimony of Mary Montgomery and Thomas Rice induces me to have very grave doubts on the subject. For the purpose of this branch of the case I will assume that the violence in the North-West Territories was of the character and consequence stated by the plaintiff, but with the colouring I have put on it shelled out of the whole testimony in the case. The question is, does this constitute legal cruelty so as to justify a decree for a judicial separation by the law of England? In considering this it is important that we should bear in mind the station in life of the parties. Sir John Nicholl is quoted in the text of 1 *Bishop on Marriage and Divorce*, sec. 741, as using the following language in *Westmeath* v. *Westmeath*[4]: "What must be the extent of injury or what will reasonably excite the apprehension will depend upon the circumstances of each case. So, likewise, what may aggravate the character of ill-treatment must be deduced from various considerations, in some degree from the station of the parties . . . a blow between parties in the lower conditions and in the higher stations of life bears a very different aspect. Among the lower classes, blows sometimes pass between married couples who, in the main, are very happy and have no desire to part; amidst

[4] 2 Hy. Ecclesiastical Supp. 1; 2 Hagg. Supp. L. 72.

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very coarse habits such incidents occur almost as freely as rude or reproachful words; a word and a blow go together." I will make no comment on these remarks beyond quoting them, and stating that they only influence my mind in assisting me to arrive at the question of fact as to what effect these alleged acts of cruelty had on the mind of the plaintiff. It is very difficult to lay down a hard and fast rule as to what constitutes legal cruelty, and I will not attempt to do so. In *Milford* v. *Milford*,[4a] the Judge Ordinary is reported as follows: "The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety; or there must be the reasonable apprehension of it. The Court, as Lord Stovell once said, has never been driven off this ground. . . . The ground of the Court's interference is *the wife's safety and the impossibility of her fulfilling the duties of matrimony in a state of dread.*" It is not essential, however, that there should be personal violence. In *Kelly* v. *Kelly*[5] it was held that if force, whether physical or moral, is systematically exerted to compel the submission of a wife "*to such a degree and during such a length of time* as to break down her health and render serious malady imminent," although there be no actual physical violence such as would justify a decree, it is legal cruelty and entitles her to a judicial separation (and see 1 *Bishop on Marriage and Divorce*, sec. 733). In *Bethune* v. *Bethune*[6], the facts relied on to establish the charge of cruelty consisted of a long course of systematic neglect and insult. The husband refused to allow the wife to occupy the same room with him or to go out with him. He was frequently absent and refused to give any account of his absences; he told her he hated her presence, and frequently used violent language and threatened to leave her if she did not do as he wished. Her health rapidly failed during her married life, and in the opinion of her medical attendants her husband's conduct and the mental distress and anxiety caused by her marital relations generally *accounted fully for the serious*

[4a] 37 L. J. P. & M. 77; affirming, 36 L. J. P. & M. 30; L. R., 1 P. & M. 295; 15 L. T. 392; 15 W. R. 319.

[5] L. R. 2 P. & M. 31, 59; 39 L. J. P. & M. 28; 22 L. T. 308; 18 W. R. 767.

[6] (1891) P. 205; 63 L. T. 259; 60 L. J. P. & M. 18.

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condition in which they found her. The Court held that this constituted legal cruelty. These are the latest cases I can find on the question of what constitutes legal cruelty. It will be observed that when the force is not physical it is an essential ingredient that it must be of such a character as to seriously affect the wife's health. As before intimated, the evidence does not satisfy me that the defendant struck the plaintiff in Ontario, or in the Territories in 1885. The whole case, so far as the physical violence is concerned, is narrowed down to the acts of violence set out in the statement of claim; as before stated, the first of these acts was merely a push, it was not of a character to endanger the personal health or safety. As a rule one violent act is not sufficient to warrant a decree. In *Smallwood* v. *Smallwood*[7], Sir Cresswell Cresswell is reported as follows: "That the conduct of the defendant was unwarrantable is true, but I have examined the cases referred to and find in each of them not merely one violent act committed under excitement and not producing any considerable injury to the person, but repeated acts furnishing such evidence of *savitia* as warranted the Court in concluding that the wife could not cohabit in safety with such a husband and was therefore entitled to the protection of the Court." (1 *Bishop on Marriage and Divorce,* sec. 746. As to the two other acts of violence—no doubt wrong—for it is wrong for a man to strike a woman, but at the same time they were committed under special circumstances and not, to my mind, of a character to endanger the wife's personal health and safety; nor was there any reasonable apprehension on her part that his conduct would be such as to endanger her health or safety, because the state of affairs that brought that about would not ordinarily be likely to occur again. Lord Stowell, in *Evans* v. *Evans,*[8] cited in 1 *Bishop on Marriage and Divorce,* sec. 717, note, laying down the law as to the causes for divorce, states that "they must be grave and weighty and such as shew an absolute impossibility that the duties of the married life can be discharged." As a matter of fact I find in the first place that the plaintiff did not re-

[7] 2 Sw. & Tr. 397; 31 L. J. P. & M. 3; 8 Jur. (N.S.) 63; 5 L. T. 324; 10 W. R. 65.

[8] 1 Hagg. Con. C. 35 (1790).

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fuse to sleep with the defendant on the ground that she apprehended or feared physical violence from him, but because she resented the imputation made on her, and possibly not without reason, interpreted it to be an imputation on her chastity. I do not believe, as a matter of fact, that she was in the slightest degree in fear or dread of him by reason of the alleged violence. The act of leaving his bed was not the act of a woman in fear or dread. Nor was that of resisting him when he attempted to put James out of the room. Nor was her conduct, at the time of the row on the 30th June, 1887. On one occasion the defendant attempted to take possession of one of the barns on the place where the plaintiff resided and twice, at least, put locks on this barn. The plaintiff on every occasion broke them off. All this, to my mind, shews anything but fear or dread. As to the imputation made against her of any alleged force other than cruelty, there is no evidence whatever that it affected her health in the slightest degree. Lord Stovell in *Evans* v. *Evans*[s], before referred to, gives an admirable exposition as to the legal duties of husbands and wives to bear with each other's foibles and faults and inequalities of temper. I am therefore of opinion that the plaintiff has failed to establish a right to relief on the ground of cruelty. Then, as to the alleged desertion. Prior to this the plaintiff and defendant kept a boarding-house and stable in Moosomin, the plaintiff managing the boarding-house, the defendant the stables. He had entered for a homestead, as before stated, and that would very naturally take him away from the town residence to perform his homestead duties. As before stated, in 1884, the plaintiff refused to sleep with him. After this, trouble commenced to arise between them about one Kennedy, who was a boarder at the house. The defendant became jealous of Kennedy; whether he had cause for being jealous I am not prepared to say. He ordered Kennedy out of the house, who refused to go, and he evidently was encouraged to remain by the plaintiff. Now I think the defendant was master of the house and had a clear right to say who should be there as a boarder, and who not, and when he expressed such a strong desire as he did that Kennedy should leave it was the wife's duty to see that such wish was carried out,

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and not to cross it. On the 16th February, 1885, in consequence of some quarrel about Kennedy he removed his sleeping and some other furniture to his homestead and took up his abode there. But from time to time he came to the place in town where his wife was, and on some occasions remained there all night. But he does not seem to have been very cordially received; on these occasions he is met with cold looks, the wife continues her refusal to sleep with him, Kennedy is allowed to remain there and he has frequent altercations with him, and one or two personal encounters, in all of which his wife and sons clearly take the part of Kennedy against him. There is one indication that down to 30th June, 1887, he did not intend permanently to absent himself from his wife, because on the 28th of that month, according to the evidence of his son Thomas J., observing that they had been fixing up the stable, he said: "I see you are fixing up the stable. Now I will fix it up better when I come back." This rather kindly remark is met by Thomas John leaving the stable and going to the house and watching him from there. Why he watched him I cannot say. It only serves to shew the feeling he had towards his father. On the 30th June again, while in the house and before any disturbance had occurred or anything to indicate that one would occur, this same Thomas John went out to interview a magistrate to see what he was to do with him. Why? This appears very much to me as if some person other than the defendant was getting ready for a row. And shortly after this that row before referred to commenced, when Martin was present, and the plaintiff says she got a blow on the eye. I am satisfied, in the light of Rice's testimony, that the attempt on that occasion was on the part of the plaintiff to eject the defendant from the house, not of the defendant to eject her. I find as a matter of fact that she did not want him there and desired to get rid of him. It is true that the defendant then left and never went back to her or to the house, but I find as a matter of fact that this was exactly in accordance with her wishes. In fact, on cross-examination, she admitted that she did not want him there. The plaintiff has never requested him to return. Under these circumstances I cannot hold that there was desertion on his part without cause so as to warrant a de-

cree for judicial separation at the plaintiff's instance. Nor can I hold under the Ordinance that he lived separate from her without *any* sufficient cause. In fact I have very grave doubts whether the defendant, if the parties were residing in England, might not be in a position to maintain a suit against the plaintiff for a judicial separation on the ground of her desertion. This suit also fails on the ground of desertion. This disposes of the plaintiff's right to relief on the ground of the defendant's cruelty or desertion. It only remains to consider whether she is entitled to relief on the ground of the defendant's adultery, because, under the law of England, she would be entitled to a judicial separation on the ground of the husband's adultery, and, whatever may be the law in the United States, I incline to think that it would afford no defence by way of recrimination that the wife had been guilty of any misconduct short of her own adultery. (See *Otway* v. *Otway*, 13 Prob. Div. 141). It would seem that her cruelty would be no answer. On the same principle I conceive that her desertion or refusing to sleep with her husband would be no answer. The testimony to support this charge of adultery on the part of the defendant is that of Agnes Clendenning, the alleged *particeps criminis*, Frederick Williams, Peter Shields and his wife, Margaret Shields. The alleged acts of adultery, and they are several, are stated to have commenced in June, 1891, and to have continued through the spring and summer of 1892. Agnes Clendenning swears positively to these adulteries and states all the circumstances, and that they were committed at Harris' house, on what is called the Moosomin Farm. Clendenning is the only witness who testifies directly to these acts of adultery. The other witnesses were called merely by way of corroboration. Shields and his wife lived between where Harris resided and where Clendenning resided with her father. Williams was hired with Shields. There was a path which led from Clendenning's house past Shield's to Harris', and a person going from Harris' house to Moosomin might go by that path, although it was not the usual route to take. Their testimony is in substance as follows: William on one occasion saw Agnes Clendenning go to Harris' house, but he did not see her go into the house, and he frequently saw her going

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in the direction of Harris' house, but never saw her going in, and on one occasion he saw Harris going in the direction of Clendenning's house, and he says that at the time he saw all this Harris was living at this house on his farm. Peter Shields saw Agnes Clendenning go into Harris' house, commencing in June, 1891. He saw her several times go into the house, but never recollects of seeing her come out; he several times saw her going in and coming from the direction of the house. He also saw Harris on several occasions going to Clendennings. This was in 1891 and in 1892, after Harris returned from Ontario. On one occasion he saw Harris in Clendenning's house. He swore that at the time these events happened Harris was living at his house and saw him about there. He does not, however, state that he saw Harris about the house on the occasions that the girl went over there, or that he ever saw them together at the house. He also swore that on one occasion when this girl came from Harris' she showed him $5. Margaret Shields also saw her going over to Harris' house and going in both in 1891 and 1892, and saw Harris going in the direction of Clendenning's house, but she only saw him and the girl together on one occasion, when they came from the direction of Harris' house going towards Clendenning's. And she on one occasion saw Harris in Clendenning's house. Shields also swore that he knew that Agnes did work for Harris. He did not state the nature of the work. She also worked for Shields. Harris denied that he ever had connection with her. If the case rests here I would have no hesitation whatever in holding that the charge of adultery was not proved. The girl Clendenning is evidently a loose character. By her own admission she, before she came to this country, had had connection with another man, and part of the very time she alleges she was having connection with the defendant she was having connection with Martin and Beattie, two of the defendant's tenants, who were living on this very place of Harris. She was utterly shameless in the matter; she informed Shields and Mrs. Shields and Dan Shields of her liason with Harris, and shewed Shields money which she claimed was the reward of her prostitution with Harris. This was done as if she took pride in her disgraceful conduct. Her manner in the witness box was rather of one who was

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testifying to something she felt proud of. I ought not to receive the testimony of such a character to prove another person guilty of an immoral act of this sort unless corroborated. It would be against authority to do so: *Ginger* v. *Ginger*,[9] and *Aldrich* v. *Aldrich*.[10] But there is another reason why I should be cautious how I gave credit to this witness. At the time of the trial she was undergoing a sentence of imprisonment for arson in burning a house of this very defendant. And I happen to know, because she was tried and sentenced by me for this offence. Harris was instrumental in getting her convicted. On the trial of this case for alimony she at one time admitted she was guilty of the arson, but she subsequently stated that she set fire to the house accidentally. I know that this is not true, and I cannot shut my eyes to what I actually know myself. That was the account she gave of the origin of the fire at the time it was discovered; she said she supposed a spark had set fire to some hay that was there. It was proved by unimpeachable testimony that the fire when discovered was *all* inside the building; there was no trace of hay around the building, and the only stove in it, and the stove-pipes, were stone cold, so that it was impossible for the fire to have caught as she suggested. It seems to me, therefore, that this girl uncorroborated is utterly unworthy of credit. If this girl was working for Harris there was nothing suspicious in her going to Harris' house, or his going to Clendenning's or in that direction or his accompanying her to her home. Were it not for one or two peculiarities of the defendant's own testimony this branch of the case would give me very little trouble, but he has certainly contradicted himself with respect to her in one or two particulars, and his evidence and that of Williams and the two Shields and John Thompson seem to be in some respects not altogether reconcilable. He swore that he "never saw her at the Moosomin Farm *in the house* in 1891." I cannot say, however, that this is a contradiction because none of these witnesses swore that they saw this girl in the house with Harris or that they saw Harris about at the very time they saw her go into this house. And according to Williams, supposing 1891 was the year he speaks of, he thinks

[9] (1865) L. R. 1 P. & M. 37; 35 L. J. P. & M. 93.
[10] 21 O. R. 447.

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there were other persons then living in this house besides Harris, because being over there on one occasion he heard voices in the house. But Harris swore that on one occasion he loaned the girl 10 cents but that was in 1892, and Beattie and Martin were then living there; he also swore that she never was at his place when Thompson was there, and never was there and had a talk with him when Thompson was there. In his examination before the clerk he swore that when she came to borrow the money he "was not alone, John Thompson was present." Now Thompson was not there in 1892 at all, he was there in 1891, and Thompson, who was called for the defendant, swore this girl was there on one occasion in 1891 talking to Harris; he does not, however, state that he gave her any money on that occasion, and he swears she was not in the house. Harris also swore before the clerk that he thought that was the only time he saw her at his place. He swore before me that between March and May, 1892, he saw her there three times. It must be borne in mind that at this time Martin and Beattie were living there. He also swore before the clerk that he was "never in her house;" by that I assume he intended the house where she lived (her father's). Before me he swore he "only stopped in (Clendenning's) twice," and Mr. and Mrs. Shields both swear they saw him in there. He does not in express terms deny walking with the girl or that the girl was working for him. But it seems utterly inconsistent with his testimony that either of these things could have taken place. On the other hand, there are some matters in the testimony of Williams and the two Shields that struck me as peculiar. According to the testimony of Shields and his wife these circumstances they testify to commenced in 1891. Shields swears that Williams was working for him in 1891. I take that to mean that these circumstances he and his wife testify to took place the year Williams was working for him. Now Williams and the Shields testified before me on 15th January, 1896, and it would appear that when he was working for Shields he was helping to stack; Williams stated when he testified to me that he was 13 years old going on 14. He must have been in the fall of 1891 not quite nine years old. I am at a loss to know what use a lad of that age could be at stacking. Williams also swore that he did not recollect

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the date on which the matters to which he was testifying occurred, but he guessed "it was going on three years ago," and that he supposed he "would then be about ten years of age." This would make it 1892. Is it possible that these people have made a mistake in their dates, and that the circumstances to which they testified took place in 1892, when this girl was having her liasons with Martin and Beattie? Because if this were so it would reconcile a good many circumstances with each other. Her frequent trips backwards and forwards could then be quite understood. On the whole I have arrived at the conclusion that the evidence does not satisfy me that the defendant was guilty of the adultery charged, and the burthen of proof is on the plaintiff. Notwithstanding the defendant's contradictions, there is no corroborative testimony shewing that in one single instance the defendant was found in a compromising situation with this girl. The corroborative evidence merely shews that there was a possibility that he might have been in a position to have committed adultery with her. But there is not a particle of corroborative evidence that they were ever even seen together in the house where the adultery was alleged to have been committed. Since writing the preceding part of this judgment I have gone out to view the house where Shields lived at the time of the transactions to which he and his wife testified. Mrs. Shields testified, speaking of the Clendenning girl, "I saw her go into Harris' house, I could see her from my own house," and on cross-examination she swore, "the bluff between our house and Harris' is at the side, the bluff would not stop the view from our house to Harris' house; we have two doors, back and front." Now, this is absolutely untrue. It is utterly impossible to see the Harris house from the Shields house, either from the back door or the front door or from any part of the house. The bluff is right between and absolutely prevents it, and the bluff is not the result of recent growth. It is quite a large bluff and in order to see the Harris house it would be necessary to go to the westward quite a distance, and much further still if one went to the eastward. The Harris house can be seen from the barn, but not from the house. That, I am satisfied, must have been the state of things when the Shields lived there. This shakes my confi-

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dence in Mrs. Shields' testimony very materially. I therefore, find the adultery not proved. This disposes of the merits of this case. This suit must be dismissed.

The only remaining question is that of the costs. In *Flower* v. *Flower*,[11] which was a suit for judicial separation on the ground of cruelty, it was held that the Court has power to disallow the wife's costs of the hearing of a suit in which she has been unsuccessful, but it will only exercise that power in cases where the wife's attorney has been guilty of some misconduct or has instituted the suit knowing that it was without reasonable ground. In *Robertson* v. *Robertson*,[12] Brett, L.J., is reported: "If the wife's solicitor either knowingly promotes a case which it must be clear to anybody has not foundation at all, so that he is countenancing improper litigation, or if he takes steps which are merely oppressive or obviously unnecessary, or if he crowds a case with absurd evidence, all those are reasons why if he so misconducts himself the costs of the wife should be disallowed in whole or in part." And see *Hall* v. *Hall*.[13] Unless the wife's solicitor has been guilty of misconduct of the character specified above or the wife has separate means of her own out of which to pay her costs, the rule in England is to allow her her costs of an unsuccessful suit for a divorce or judicial separation or of an unsuccessful defence. The reason for the rule is that otherwise the wife would be defenceless; and I am of opinion that the rule is applicable in this country to suits for alimony. It was urged that in this case the wife had means of paying her costs, namely, out of the earnings of the boarding house in which she is living. There is no evidence that she had accumulated any means or that the earnings of the house are now more than sufficient to provide her with the necessary means of support. In the absence of such evidence I cannot assume that they are more than sufficient for such purpose, and therefore that she has the means to pay her costs. Then, have her advocates been guilty of any misconduct of the character above specified so as to warrant me in refusing to order payment of

[11] L. R. 3 P. & M. 132; 42 L. J. P. & M. 45; 29 L. T. 253; 21 W. R. 776.
[12] L. R. 6 P. D. 119; 51 L. J. P. 5; 45 L. T. 237; 29 W. R. 880.
[13] (1891) P. 302; 60 L. J. P. 73; 65 L. T. 206.

her costs? In so far as that branch of the case is concerned, which is based on cruelty and desertion, I am of opinion that it is utterly without foundation. In fact I am of opinion that the wife is the party in fault. But at the same time I am of the opinion that the advocates did not institute the proceedings knowing that that branch of the case was without foundation. It is but fair to assume that until the trial they were only acquainted with the facts as presented by their client and as coloured by her and hence believed that there were reasonable grounds for instituting the suit on the ground of cruelty and desertion. So far as the branch of the suit which is founded on the charge of adultery is concerned. I am of opinion that there were reasonable grounds for instituting the suit; that is, the circumstances surrounding that branch of the case were of a character which reasonably called for an inquiry.

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Correspondence with a view of obtaining a support for the plaintiff were opened by her advocates in November, 1891. In answer to their letter then written the defendant offered to the advocates to make her an allowance if they could agree on the figures. This was never communicated to the plaintiff, nor does it appear that any negotiations were entered into with a view to fixing the amount of such allowance. If nothing further had transpired I would have no hesitation in refusing to allow the plaintiff's costs. Because I think if a person situated as the defendant was shews a disposition to do what is fair, and the advocates, instead of meeting propositions as they ought to do, persist in dragging him through the annoyance and vexation of a trial in the belief that their costs are safe no matter what the result may be, I would have no hesitation in refusing them costs. But two years after this, in June, 1894, nothing having been done, the plaintiff's advocates again wrote demanding an allowance for her support, and this time the defendant answered in writing, but he then merely offered to take her back to live with him, he did not offer to make her an allowance. I assume, therefore, that he had abandoned that offer, and I also assume that in view of the reports that the defendant had been guilty of adultery with the Clendenning girl and considering the plaintiff's testimony given on the

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trial the advocates were of opinion that it was idle to submit any proposition to live with her husband to the plaintiff. And, while I am of opinion that this proposition ought to have been submitted to the plaintiff, I have come to the conclusion that the omission to do so is not under the circumstances sufficient to justify me in refusing the costs. I may say, however, that I reach this conclusion with very great regret, and simply because I consider that I am weighed down by authority to do so. I think this plaintiff has had very little to complain of. I am of opinion that she drove her husband (who, no doubt, was not without serious faults), out of his own house; she allowed her children to treat him with utter contempt and disrespect. On the other hand, he has never since, without any interference I may say, allowed her the possession of his property and his means thereby of earning a comfortable living, out of which she was able not only to live but to make valuable additions and alterations to the property. He has never shewn any disposition to interfere with her in the enjoyment of this property. In view of the situation in life of these people I cannot conceive that she ought to expect anything more. If the matter of these costs was between her and him I would not allow them, but it seems that decided cases will not permit me to refuse the costs, because it would be punishing the advocates.

This action will be dismissed. The defendant to pay the plaintiff's costs of this action to be taxed as between party and party. No witness fees will be allowed for the following witnesses: the plaintiff, Thomas J. Harris, James Harris and William Moir. Nor shall any allowance be made for travel or attendance of any witnesses unless it is proved to the satisfaction of the clerk by affidavit that the fees for such travel and attendance were paid in cash before the date of delivering this judgment. Nor shall any allowance be made for disbursements unless they are disbursements for which the advocates are personally liable, or it is proved by affidavit that they have been actually paid before the date of this judgment.

Action dismissed; defendant to pay plaintiff's costs.

RUSSELL v. NESBITT ET AL.

Trespass—Fixture—What constitutes—Intention of parties.

Whether an article not annexed to or fastened to the freehold is a fixture is entirely a matter of intention.

[WETMORE, J., *Nov. 7, 1896.*

Statement. This was an action for trespass. The plaintiff, in the year 1892, erected a dwelling house on land belonging to a joint stock company against which land there was a mortgage in the usual form. The plaintiff had no authority or permission from the company for so doing, but the directors of the company were aware of the fact that the plaintiff was so building the house there, and raised no objection to it. This building was not fastened to or let into the land, it merely rested on the surface and some of the soil was thrown up around it for the purpose of banking it. The plaintiff did not place the building there with the intention of its remaining there permanently. On the 6th of October, 1894, the land was sold under the said mortgage, and purchased by the defendants. A short time previous to the sale, the plaintiff moved the house off the mortgaged land on to adjoining land, and after the sale the defendant took it and moved it back.

Argument. *E. L. Elwood,* for plaintiff.
T. C. Gordon, for defendant.

Judgment. WETMORE, J.:—According to the modern doctrine it is not necessary in all cases to constitute a fixture that the article should be annexed to or fastened to the freehold. The question is one of intention. A building may be placed on land merely resting on the surface of it, but if it is placed there with the intention of its remaining there permanently it will be considered a fixture, and part of the freehold; and in considering the question, the character of the person placing it, whether owner of the land, or tenant or a stranger, forms an important element. See *Doran* v. *Willard,*[1] and *Fowler* v. *Fowler.*[2] The leading case governing those decisions was *Holland* v. *Hodgson.*[3] On the other hand, if the

[1] 8. C. N. B. 1 Pug. 358.
[2] 8. C. N. B. 2 Pug. 448.
[3] (1872) 41 L. J. C. P. 146; L. R. 7 C. P. 328; 26 L. T. 709; 20 W. R. 990

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building is placed on the surface of the land with the view of its being removed at a future time, or with the view that it may, if occasion arises, be removed at a future time, and is placed there with either of those views, by a person who is not the owner of the land, but a tenant or a stranger, and is not placed there with a view to permanency, the effect of those decisions is to establish that it is not a fixture. I accept the law as laid down by these cases. I find that the building in question was not a fixture, that it is a chattel. The mere fact of banking the house did not, under the circumstances, constitute a fixture. And that the defendants are liable for a trespass in taking it as they did.

There will be judgment for the plaintiff for the value of the house and interest from the time of taking, say from November 1st, at six per cent.

Judgment for plaintiff.

MASSEY-HARRIS CO. v. OTT.

Practice—Setting aside judgment—Irregularity—Time for appearance—Clerk.

Where the defendant, after the time limited for appearance, tendered to the clerk of the Court an appearance, and the plaintiff had previously tendered to the clerk the necessary papers for the entry of default judgment, but judgment had not been yet signed, and the clerk refused to accept the appearance and signed judgment, the judgment was set aside for irregularity.

[WETMORE, J., *Nov. 13, 1896.*

Statement.

The time allowed for appearance having expired, the plaintiff's advocate handed to the clerk of the Court on the street, before he opened his office, the necessary papers to sign final judgment; after the clerk reached his office, but before judgment had been actually entered, the defendant's advocate tendered the clerk an appearance on behalf of the defendant. The clerk refused to accept the appearance on the ground that it was too late, and signed judgment. The defendant's advocate thereupon applied to set the judgment aside as irregular.

Argument.

D. H. Cole, for defendant.

E. A. C. McLorg, for plaintiff.

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WETMORE, J. (after reciting the facts) :—The clerk having accepted the plaintiff's papers and all parties having treated the office as open and the time as being office hours, I must assume, for the purposes of this case, that they were tendered to the clerk during office hours, and consequently that the appearance was also tendered to him during office hours. The question then simply comes down to this: whether the appearance having been tendered to the clerk before judgment was signed, he should have accepted it, and, not having done so, whether the judgment is irregular. Under section 71 of *The Judicature Ordinance*,[1] the defendant may appear at any time before the plaintiff has taken any further step in the cause after service of the writ of summons. In Ontario he may appear at any time before judgment. (*Ontario Judicature Act*, 1881, Rule 61.)

In *Harris* v. *Andrews*,[2] it was held, under the Ontario Practice, that an appearance was in time if filed while plaintiff is entering judgment so that it be not fully signed. And see *Fralick* v. *Hoffman*.[3] In *Smith* v. *Logan*,[4] the Court of Appeal reversing the judgment of the Divisional Court, held the appearance in time if tendered while the clerk was in the act of entering the judgment and before the stamps were affixed. Under these authorities, the only question here is, had the plaintiff taken any further step before the appearance was tendered? The mere fact of making out a judgment roll was not taking a further step. It is clear if the plaintiff had simply made out their judgment roll and papers after the ten days limited for appearance and had not tendered them to the clerk before the appearance was filed or tendered, the appearance would be in time. Handing a judgment roll to the clerk in the street is not taking a step in the cause, the clerk cannot conduct his business there. *Fralick* v. *Hoffman*,[3] before referred to, decides that, and I quite agree with that decision. It was contended that I had ruled, in *Martin* v. *Price*,[5] that preparing a judgment roll and handing it to the clerk was a step in the cause. I did not hold that. In that case I refused to consider the question of the alleged irregu-

[1] Ordinance No. 6 of 1893.
[2] 3 U. C. L. J. 31.
[3] 1 Cham. Rep. 80.
[4] 17 P. R. 121, 219.
[5] Not reported.

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larity because the ground of the alleged irregularity was not stated. The facts of that case were very much the same as in this; the judgment papers and the appearance were tendered simultaneously, and I expressed great doubts whether the judgment was regular. I am of opinion that in this case, the appearance having been tendered to the clerk the moment he entered his office, I must hold, under the circumstances, that it was tendered either before or simultaneously with the judgment papers, and therefore the clerk ought to have received the appearance and not entered judgment. It was urged that this was not an irregularity because there was no patent irregularity on the face of the proceedings, and *Devine* v. *McKenzie*,[6] was cited for this proposition.

There was no irregularity in that case, the parties had agreed upon a further time within which the defence was to be entered, it was not entered at the time agreed on, on account of the illness of the defendant's solicitor, and the plaintiff signed judgment. It was attempted to treat this as an irregularity, which it clearly was not. In the other cases I have cited the signing of the judgments were held to be irregular. I may say, if the plaintiff's contention is correct, a person might make a false affidavit as to the time of serving a writ, swearing he served it four or five days before he actually did, the defendant might come within the ten days after actual service and find a judgment signed and be driven to swear to merits to set it aside, because according to the record, that is, according to the papers filed, the judgment would be regular on its face.

Judgment set aside with costs.

BYERS v. FERNDALE SCHOOL DISTRICT.

Practice—Security for costs—Temporary residence within the jurisdiction—Cross-examination on affidavit—Intention of plaintiff to reside in the jurisdiction—Grounds upon which security for costs is granted—Delay.

A plaintiff who is temporarily resident within the jurisdiction may be required to give security for costs.

The reason why a litigant who is not resident within the jurisdiction, and who has no *substantial* means within the jurisdiction, may be called on to give security for costs now, is that if judgment be recovered against him, there is no means of enforcing examination for discovery.

[WETMORE, J., *Dec. 26, 1896.*

[6] 9 Can. L. T. Occ. Notes 119.

Statement. Application by defendant for security for costs. The plaintiff filed an affidavit in answer that he was residing within the jurisdiction, upon which affidavit he was cross-examined, from which it appeared that at most the plaintiff was only temporarily resident within the jurisdiction.

Argument. *W. White*, Q.C., for defendant.

E. A. C. McLorg, for plaintiff.

Judgment. WETMORE, J.:—Since Rule 26a or Order LXV. was formulated in England, a person temporarily resident in the jurisdiction there is required to give security. And I am of opinion that such rule is in force in the Territories. It is quite applicable to the conditions here. I am not satisfied, however, that the plaintiff can be said to be even temporarily resident in the Territories any more than a person merely passing through there on a visit could be said to be temporarily resident. He may be on his homestead to-day and away to-morrow. However, assuming that it could be classed as a temporary residence under the rule before referred to, he will be required to give security. But there is another ground of opposing the order that developed on the cross-examination, and that is that he intends to permanently reside in the Territories and is making his plans to do so. If I thought that he was really honest in this intention, I would not make the order. But I do not think that he is honest in this intention, because if he is, I think with the time and opportunity he has had to do it he would have been able to do a great deal more than he has done with a view of carrying that object out. In fact he has practically done nothing in that direction. I cannot help but feel that the plaintiff is merely making a pretence with a view of escaping giving security, and that when this case is determined on the merits, if it goes against him, he will very speedily be found on the Manitoba side of the boundary line. I take it that the reason why a plaintiff, who is not a resident within the jurisdiction and who has no substantial means within the jurisdiction to satisfy a judgment against him, may be called on to give security for costs, now is, that if judgment is recovered against him there is no means of enforcing an examination against him for discovery. Accordingly, in *Grant* v. *Winchester*,[1] "A plaintiff out of the

[1] 6 P. R. 44; 9 C. L. J. 193.

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jurisdiction with no certain place of abode and having no property in (the jurisdiction) though stating on affidavit that she was only temporarily absent and intended to return was ordered to give security for costs, there being no circumstances from which the Court could reasonably infer that the intention to return would certainly be carried out." So, in this case, I am not satisfied that the plaintiff's intention to reside in the Territories will be carried out.

There is nothing in the objection that the defendant has delayed too long in making this application. I have repeatedly ruled that delays will not affect the right to security unless it is apparent that the plaintiff has been prejudiced by such delays. In this case the plaintiff need not be delayed. There is ample time to furnish security and get to trial at the next Moosomin sittings. But anyway, if the plaintiff cannot manage that, the delay has been brought about by his opposing the summons for security and making a very unsatisfactory affidavit.

Order for security.

WESTMAN v. OGMUNDSON ET AL.

Partnership—Practice—Judgment—Setting aside—Terms—Costs.

Mere delay is not a bar to an application to set aside a regular judgment on the merits unless it be shewn that an irreparable injury will be thereby done to the plaintiff.

The applicant moved to set aside a regular judgment signed against a partnership in the firm name on the ground that there never was such a firm and that the applicant had never been served with writ of summons, and was not a member of such firm. The plaintiff's counsel raised no objections to the applicant's want of *locus standi* to attack the judgment, but consented to the judgment being set aside as on the merits and on the usual terms sufficient to protect the plaintiff. It appeared that certain goods of the applicant had been seized by the sheriff under an execution issued on the judgment against the firm. The judgment was ordered to be set aside upon the applicant paying the amount thereof into Court and paying the costs.

[WETMORE, J., *Jan. 5, 1897*

Statement. Application to set aside a regular judgment. The facts and points involved are sufficiently set forth in the head-note and the judgment.

Argument. *W. White*, Q.C., for the motion.

Bertram Tennyson, Q.C., contra

Judgment.

WETMORE, J.:—This is an application on the part of one Gisli Johnson to set aside the judgment entered herein against the defendants, John Ogmundson & Son. Gisli Johnson is a son of John Ogmundson, one of the defendants, and he asks to have the judgment set aside on the ground that he never was served with the writ of summons, and that there never was such a firm of John Ogmundson & Son, and that he never was in partnership with John Ogmundson. It does not appear on the material used before me on this application on whom the writ of summons was served. I assume that it was served on John Ogmundson. I may say, though, that I have inspected the affidavit of service of such writ and find that, as a matter of fact, it was served on John Ogmundson. This judgment was signed on the 16th November, 1895. Gisli Johnson became aware about the 16th December, 1895, that he was joined as a party. How he then became aware that he was a party, what the nature of his information was or why he should reach the conclusion that he was a party, I am not informed. The fact that he was intended to be one of the defendants does not appear to be disputed. Execution having been issued, and the sheriff having levied upon some property thereunder, a portion of which Johnson claims, he (Johnson) on the 17th December, 1896, a year after he became aware that he was joined as a party, and seven months after a Court at which any question involved might have been tried out, made this application. I am free to confess that when I first commenced to consider this application it seemed to present considerable difficulties, but upon investigating the practice these difficulties have disappeared. Assuming that there was such a firm as John Ogmundson & Son, the service of the writ of summons on John Ogmundson was good.[1] But, furthermore, John Ogmundson not having disputed the fact that he is a partner and having allowed judgment to go against the firm, I must assume that as against him there is such a firm, and as against him such judgment is good. I doubt very much whether Gisli Johnson has a *locus standi* to attack this judgment at all. The plaintiff has nowhere on the record or by any proceeding asserted that he is a partner, nor has he done so by causing him to be served with a copy of the first process, and unless Gisli Johnson admits himself to be a partner and disputes the liability of the partnership on the

[1] The Judicature Ordinance No. 6 of 1893, s. 31, s.-s. 5.

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merits, it seems to me it would be quite time enough for him to interest himself when proceedings were taken under sec. 324 of *The Judicature Ordinance* for leave to issue execution against him individually. It is not necessary, however, for me to decide that question, as it was not raised, and also in view of the course Mr. Tennyson has taken on behalf of the plaintiff. I have ruled in two or three cases that mere delay in making an application to be let in to defend on the merits is no answer to such an application unless it is shewn that an irreparable injury will be done to the plaintiff by the indulgence. It is quite clear that Gisli Johnson, if allowed in at all, can only be allowed in on the merits. No irregularity has been shewn against the judgment whatever. I think that the whole tenor of the sections of the *Judicature Ordinance* which I am about to refer shew that; and see *Western National Bank of the City of New York* v. *Percy Triana & Co.*[2] But in view of the great delay that has taken place from the time that Johnson became aware that he was intended as a party and of the fact that John Ogmundson has not attacked the judgment I would, in the exercise of my discretion, if I had been asked to do so, have dismissed this summons with costs on the ground that the application was entirely unnecessary, and that Johnson's rights could be quite effectually maintained without it. But Mr. Tennyson did not ask me to do this, he took another course; and I only mention what I would have so done if asked, because it has some bearing on what I am going to order in respect to the costs of this application. I will now proceed to discuss how Johnson is affected by the proceedings and judgment against John Ogmundson & Son. Section 48 of *Judicature Ordinance*[3] provides that partners may be sued in the firm name. I have already pointed out that service on John Ogmundson was good service on the firm. But in order to ascertain what is the effect of such judgment we must have recourse to sec. 324 of the Ordinance, and by that we find that the plaintiff may have execution upon it; 1st. Against any property of the partnership. That does not prejudice Gisli Johnson, because if there is such a firm as John Ogmundson & Son

[2] (1891) 1 Q. B. 304, 313; (1890) 60 L. J. Q. B. 272; 64 L. T. 543; 39 W. R. 245.
[3] No. 6 of 1893.

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and property belonging to that firm can be found whereon to levy the sheriff can levy, but the sheriff has got to find the property so belonging to the firm, and if there is no such firm he cannot find it. Then in the second place, the execution may be levied as provided in paragraph 2 of that section. We need not stop to discuss that paragraph because no person before me on this application is within it. In the next place, however, the execution may be levied against any person (that means the property of any person) who has been served as a partner with the writ of summons who has failed to appear. So John Ogmundson having been served as a partner, and having failed to appear, the execution can be levied against his property. But Gisli Johnson not having been served with the writ of summons the execution cannot be levied against his individual property until the plaintiff applies under sec. 324[4] to a Judge for leave to do so, in which case Johnson would have an opportunity of being heard and of disputing the liability in any way he sees fit, and of course among other things by setting up that he is not a member of the firm at all, and in that case the question of his liability would have to be tried out and determined. How then is Johnson prejudiced so far as the proceedings against John Ogmundson & Son are concerned? If the proceedings directed by sec. 324 have not been taken against Johnson, and the sheriff has levied the execution on his individual property the sheriff had no right to do so, and if the plaintiff has instructed the sheriff to do so he is liable to Johnson as a trespasser. But Johnson is in no worse position than any other person whose property has been wrongfully taken by the sheriff under execution, and he can have recourse to the same remedies. Johnson is amply protected without this application. But I must now deal with the course that Mr. Tennyson, on behalf of the plaintiff, has seen fit to take on this application. I was at one time disposed to think that as Mr. Tennyson did not raise the point which I have just discussed that I ought to dismiss this application without costs to either party. I have on reflection, however, and on examining the provisions of the Ordinance, changed my mind. I think Mr. Tennyson has taken a course which is entirely open to him. If Gisli Johnson has

[4] No. 6 of 1893, s. 324.

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instituted an application which he ought not to have made, he cannot set up that he ought not to have done so. And Mr. Tennyson may waive any objection to the proceedings. At the return of the summons, therefore, Mr. Tennyson, on behalf of the plaintiff, raised no objection to the application either on the ground of delay or that Johnson had no *locus standi* to attack the judgment, or that I, in the exercise of my discretion, should refuse the application; he simply stated that he was willing that the judgment should be set aside and Johnson let in to defend, provided that such terms were imposed on him as to keep his client safe. He practically says, "my client has got a judgment against John Ogmundson & Son, he has issued an execution on it and levied upon property. *Omnia acta rite* will be presumed. I am prepared to shew that there is such a firm as John Ogmundson & Son, and that Gisli Johnson is a member of it. Johnson, in making this application, has appealed to the indulgence of the Court. He must therefore submit to the same terms as other persons who appeal to the indulgence of the Court; he must in the first place pay the costs of my appearing to this application, and in the next place, in view of the delay which has taken place and the fact that the execution has been levied, Gisli Johnson must pay the amount of judgment, execution and sheriff's costs into Court, so that if the plaintiff is successful he may have his money. You must not force my client to lose his grip on this property, which, for all you know at present, has been properly seized, and from which he can realize his debt, and you must not put him in the position after fighting out a law suit and being successful to find that all property on which the judgment may be realized has been spirited away. Moreover, in setting aside such judgment, you are also setting aside the judgment against John Ogmundson. Nevertheless, I am contented if you make my clients safe." I think this course was quite open to Mr. Tennyson. I will, therefore, order that on Gisli Johnson paying to the plaintiff, or to Mr. Tennyson for him, the costs of signing judgment and issuing execution herein and of opposing this application, and paying into Court the amount of such judgment and interest thereon, less the costs of signing such judgment, and also paying into Court the sheriff's fees and expenses of and incidental to

the seizure made by him under the execution, including poundage and possession money, the judgment and execution herein and the levy made thereunder be set aside. These terms to be complied with before the 10th February, otherwise the application will be dismissed with costs. Judgment. Wetmore, J.

Order accordingly.

NOTE.—The applicant declined to accept the terms and thereupon the application was dismissed with costs.

—T. D. B.

STEWART v. BANK OF OTTAWA ET AL.

Interpleader — Sheriff — Lease — Bona fides — Intent of parties—Defrauding creditors—Setting aside—13 Elizabeth, Cap. 5—Right of tenant to profits even though lease be void.

Held, that a lease, although made for valuable consideration and *bona fide* as between the parties to it, was, nevertheless, void as against creditors, there having been in both parties an intent to delay and defraud creditors, which intent gave rise to the lease. Comments on *Wood* v. *Dixie*.[1]

[WETMORE, J., *Feb. 17, 1897.*

An interpleader issue. The facts and points appear in the judgment. Statement.

D. H. Cole, for plaintiff. Argument.

W. White, Q.C., for defendants.

WETMORE, J.:—This is an interpleader issue directed to try the right to certain stacks of grain seized by the sheriff under two executions issued respectively at the suit of the defendants against Ronald Stewart, the father of the plaintiff, and claimed by the plaintiff. The plaintiff claims under a lease of Ronald Stewart's lands executed to him on the 31st December, 1895, by Ronald Stewart, and that the grain was raised by him on such land as tenant by virtue of such lease. This lease is in writing under seal, and demises the lands for a term of three years from the date of it. The expressed considerations for this lease are: 1st. That the plaintiff was to support the lessor, his wife and children then residing with Judgment.

[1] (1845) 7 Q. B. 892; 9 Jur. 796.

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him, with provisions during the time free of charge. 2nd. That he was to break thirty acres of the demised land the first year of the term and twenty acres the second year, and the lessor was to have the privilege of residing on the demised premises during the term, if he desired to do so, free of charge No doubt the consideration expressed on the face of the deed if *bona fide* and not a mere sham or pretence, is a good and valuable consideration. The plaintiff sets up that this lease was procured by him under the following circumstances: He had been working for his father, since he was able to work, without wages, his father of course maintaining him. For three seasons prior to the execution of the lease he had worked out in threshing gangs earning wages, the most of which at the time of the execution of the lease he had in his possession or was due him, and he also owned a pair of horses presented to him by his uncle Alexander Stewart. Ronald Stewart, the father, was in financial difficulties, and in the latter part of 1895 his grain was seized by the sheriff, and it seems that this was not the first seizure of the sort that had been made. At this time Ronald Stewart had only three horses, two of which were mortgaged and subsequently taken away under this mortgage. The plaintiff then being a little over twenty-one years of age, was dissatisfied with this state of things, and refused to work any longer with his father under the same conditions, and proposed that the father should lease him his farm for a rent payable in money. This proposition was abandoned, and the plaintiff then suggested the arrangement which was embodied in the lease in question. It is very clear that one reason for the plaintiff entering into the arrangement was the fact that Ronald Stewart was involved, and any crop he might raise on the place would be liable to seizure if he farmed the place himself. The plaintiff admits that. Another reason he sets up is that his father was unable to walk very well, and another reason was that he had no horses to farm with, as the mortgaged horses had been seized under the mortgage. The plaintiff also claims that he has so far carried out the obligations cast on him by the lease that his father has not since interfered with the working of the farm, that he has supplied all the labour to work it, and that the earnings of it will go to him and not to his father. There are some other matters of detail given in

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evidence respecting this transaction which I may have occasion to refer to hereafter, but I have stated in substance what the plaintiff sets up. The defendants set up in the first place that this lease is void as against creditors of Ronald Stewart under the Statute 13 Eliz. cap. 5, it having been executed to hinder and defraud creditors. This case has presented itself to me in two aspects. First, assuming that the lease as between Ronald Stewart and the plaintiff was a *bona fide* transaction and not a mere sham, and therefore that as between them the consideration was good and valuable, what effect would it have in view of the facts which I find as hereinafter stated on the plaintiff's right of property in the grain as against the defendants? Are the defendants correct in their contention that this lease is a mere sham and pretence arranged and entered into to defeat creditors, and by which it is hoped that the surplus earnings after supporting the family may be retained for the benefit of Ronald Stewart and his family? As this case presents some unusual and peculiar features, and is a very proper case for an appeal, and may, therefore, be appealed and, as in case there is an appeal I could not sit thereon in the Court *en banc*, I think the parties are now entitled to the benefit of my opinion in every phase which the case can assume, and on my findings on any facts which may arise from consideration on the hearing of such appeal. I will, therefore, deal with the case in both the aspects which I have stated, at any rate so far as the findings of fact are concerned. Assuming then as between the plaintiff and Ronald Stewart that this lease was a *bona fide* and honest transaction, and that the consideration was for value and that Ronald Stewart is to have nothing whatever to do with and no interest in the crops raised on the farm, it does not follow that in that case this lease would be valid as against Ronald Stewart's creditors Because, notwithstanding this, if there was an actual and express intent in both parties to the lease thereby to delay or defraud creditors (*May on Fraudulent Conveyances* (2nd ed.) 84), and such intent was the *causa causans* of the instrument (if I may apply such an expression to this instrument) it would be void as against creditors. While I lay down this proposition in this way, I am free to confess that I have some difficulty in reaching that conclusion. *Wood*

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v. *Dixie*[1] is acknowledged generally, so far as it goes, to contain a correct exposition of the law when the property in question is sold for valuable consideration and the sale is attacked on the ground of the intent to defeat creditors. I am not able to reconcile that case as closely as I would like to with decisions which preceded and followed it. The case is accepted as establishing that "a sale of property for good consideration is not either by the common law or by the Statute of Elizabeth fraudulent against creditors, merely because it was made with the intention of defeating a particular execution." Wherever I find this case referred to, however, stress appears to be laid on the word *merely*. See *May on Fraudulent Conveyances* (2nd ed. 99). In *Smith* v. *Moffatt*[2], the sale impeached was for a valuable consideration; the trial Judge "left it to the jury to say whether the deed was a *bona fide* transaction, a deed made for a valuable consideration, or whether it was fraudulently made as a mere scheme or contrivance for the purpose of delaying, hindering or defrauding creditors; and, if the latter, to find for the defendants" (claiming under the execution creditors of the assignor). The Judge refused to add "that if they (the jury) believed the consideration was paid to cover the property and protect it from creditors, they should find against the deed." The defendant objected to this direction; the Court held that the charge was substantially in accordance with *Wood* v. *Dixie*[1]. In delivering judgment Draper, C.J., is reported at page 493 as follows: "It appears to me that all the defendant had a right to ask was contained in the learned Judge's direction, for it involved necessarily the enquiry whether the consideration was substantial in reference to the value of Dolson's interest in the property at the time he conveyed it to Smith, whether that consideration was paid in order to acquire the title and not to give colour to a scheme to defeat and delay creditors; in other words, *whether the transfer of the property would have taken place if the intention to defeat and delay creditors had not existed in the minds of both these parties at the time of the transfer and their acts were in furtherance of that intention.*" Morrison and Adam Wilson, J.J., concurred with Draper, C.J.

[2] 28 U. C. Q. B. 486.

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Golden v. *Gillam*[3] was an action to set aside a deed made for a valuable consideration by a woman in favour of her daughters as being fraudulent and void under the statute 13 Elizabeth, ch. 5, by reason of its having been made with intent to defraud creditors. The deed was upheld as having been executed in good faith for a valuable consideration influenced by honest family consideration and without any intention to defeat or defraud creditors, but there are expressions in the judgments in this case which point in the direction that there are a class of cases where a deed may be void as against creditors, although made for a valuable consideration, where there is an actual and express intent to defeat or defraud creditors. For instance, Fry, J., is reported, at page 156, as follows: "The effect of the fact that there is good consideration in a deed of this sort is very great. It does not necessarily shew that the deed may not be void within the statute, 13 Elizabeth, because in many cases good consideration has been proved and yet the object and purpose of the deed has been to defeat and delay creditors. It has been, therefore, executed for an unconscientious purpose, and the fact of there having been good consideration will not uphold the deed. . . . The fact that there is a deed between man and man for valuable consideration, shews, at once, that there may be another purpose and intention in the transaction than the defeating or delaying of creditors and rendering the case, therefore, more difficult on the part of those who contest the deed." And at page 157 he is reported as follows: "I, therefore, proceed to enquire, looking at all the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed." Jessel, M.R., is reported at page 503 as follows: "When a deed is made for valuable consideration you cannot set it aside at the instance of the creditors unless you shew *mala fides;* of course you may shew it in any way in which *mala fides* may be shewn." It seems to me, therefore, very clear that these eminent Judges were of the opinion that an instrument for valuable consideration might be void

[3] 51 L. J. Ch. 154, affirmed 503; 20 Ch. D. 389, 391; 46 L. T. 222.

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as against creditors under the statute in question, and that when, adopting the negative of the language used by Fry, J., there was no other purpose and intention in the transaction than the defeating or delaying of creditors, the instrument would be so void or, to use the negative of the language of Draper, C.J., before quoted, when the transfer of the property would *not* have taken place if the intention to defeat and delay creditors had not existed in the minds of both the parties at the time of the transfer and their acts were in furtherance of that intention, the instrument would be so void.

I have, therefore, reached the conclusion before stated, that if in this case the intent to defeat Ronald Stewart's creditors was the *causa causans* of the lease being executed it is void as against the defendants. Having reached this conclusion as to the law, I cannot, on the plaintiff's own testimony, resist the conclusion, as a matter of fact, that this lease was executed with the express intention of defeating Ronald Stewart's creditors, that were it not for that intention, it never would have been entered into at all; that the defeating of the creditors was the *causa causans* of the lease being entered into.

I am, therefore, of opinion that this lease is void. But I do not think that this conclusion disposes of this case. The only effect of this is to establish that the lease is void as against creditors, so that if the property embraced by it was capable of being seized by the creditors, the lease could be set aside, or if purchased under execution against Ronald Stewart, the purchaser would take the property freed of the lease. It does not follow that the crops raised on the place by the plaintiff's labour could be seized under such execution.

I can find no case that establishes that. In all the cases where the transaction has been held invalid for fraud of this sort, the property in question has been the very property attempted to be conveyed by the fraudulent instrument; not the earnings which have been made in respect to such property. The only case I can find is quite the other way. In *Kilbride* v. *Cameron*[4], all the Judges concurred in this;

[4] 17 U. C. C. P. 373.

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that if, as between the father and sons, the land passed by conveyance from the father to the sons which were as against creditors of the father fraudulent and void, the crops raised by the sons would not belong to the father. The members of the Court were divided not on that question, but on the question whether there was a question to be submitted to the jury so far as the plaintiff was concerned whether the conveyances were merely colourable or mere pretence or not. And if a mere sham, whether the crops did not really belong to the father. One Judge held that there was evidence of that character to go to the jury, the other Judge that there was not. There is this difference between that case and this; in that case the father did not furnish the means of raising the crop. In this case the implements used in raising the crop were the implements of the father. However, I am of opinion, assuming this lease to be *bona fide* as between the plaintiff and his father, that notwithstanding its *mala fides* as to creditors, the stacks of grain, being raised by the plaintiff's labour, are not liable to seizure under the execution.

I am, therefore, driven to decide the other question raised by the defendants.

(The learned Judge here proceeded to review the evidence and found, as a fact, that the lease in question was a mere sham devised merely to defeat the creditors of Ronald Stewart and even as between the plaintiff and his father not *bona fide*, and that, therefore, the crop was liable to seizure under the execution. This portion of the judgment being purely a finding of fact is not reported.—T. D. B.)

Judgment for defendants on the issue with costs.

THE ONTARIO & WESTERN LUMBER CO., LTD. ET AL., v. COTE ET AL.

Interpleader — Chattel mortgage — Preference — Fraud — Pressure —Consideration — Statute of Elizabeth — Evidence — Bills of Sale Ordinance—Bona fides.

One Lachlan Galbraith, being in insolvent circumstances, executed certain mortgages in favour of plaintiffs, upon request of their agent. Galbraith swore that he gave the mortgages voluntarily and without pressure being brought to bear.

Held, that the mortgages having been given at the request of the plaintiff's agent, they were given under pressure, and were valid against creditors under *The Preferential Assignments Ordinance*;[1] that it was immaterial whether or not the mortgagees were aware of the insolvency; that plaintiffs being liable on certain acceptances of Galbraith's was a sufficient reason for desiring and obtaining the security of the mortgages, and that the implied undertaking of the plaintiffs to protect Galbraith against any liability on such acceptances was a sufficient consideration to support the mortgages.

[WETMORE, J., *Feb. 17, 1897.*

Statement.

Trial of an interpleader issue tried before WETMORE, J., to determine the right of property in a stock of general merchandise, store fixtures, furnishings and furniture lately in a store situated on lot No. 2 in block 24, Fleming, occupied by one Lachlan Galbraith; in a quantity of lumber, lately situated about 200 yards east of the railway depot in Fleming, in a quantity of oats lately in a lean-to to the said store; in another quantity of oats lately in a house on the S. W. ¼, 10-16-30, west of 1st, and in a grain warehouse situated about 50 feet S. E. of said depot. The plaintiffs claimed under two chattel mortgages made to them respectively dated 15th April, 1896, by Lachlan Galbraith. The defendants were execution creditors of Galbraith. The learned trial Judge stated the material facts as found by him as follows:—

"Galbraith being indebted to the Ontario & Western Lumber Co., Ltd., that company (hereafter called the Ontario Company), from time to time drew drafts on him for the amount of their indebtedness payable to the order of the Imperial Bank of Canada which Galbraith accepted. The last of these acceptances was for between $1,864 and $1,865, and matured on the 23rd April, 1896, eight days after the chattel mortgages were given. What the general course of

[1] R. O. 1888, c. 49.

Statement.

dealing between the Ontario Company and the Imperial Bank as to these acceptances was, does not appear. This draft was held by the Imperial Bank for value, that is, they discounted it for the drawers in the usual course of banking business. I may say that in the view I take of this case. I do not consider this fact material. But I find it in view of one of the questions raised by the learned counsel for the defendants. This draft of the 23rd April represented the whole indebtedness of Galbraith, matured and unmatured, to the Ontario Company at the time the promissory notes and mortgages in question were given on 15th April, 1896, and such indebtedness was honest and *bona fide*. On the 1st March, 1894, Galbraith was honestly and *bona fide* indebted to The Safety Bay Lumber Co., Ltd., (also a plaintiff in this issue), which I will hereafter call the Safety Bay Co., in the sum of $1,179.35, for which he on that date, gave them his promissory note for that amount payable on demand, with interest at 8 per cent. until paid. This note was put in evidence and is held by the Bank of Ottawa. Between the date of that note and the 15th April last, Galbraith had paid $50 on account of this note on the 31st October, 1894. On 26th December, 1895, he shipped to the order of the Bank of Ottawa a carload of wheat containing 609 bushels, with instructions to hold it until the opening of navigation if possible, and then to sell it and apply the proceeds on this note. He has never received any returns as to this consignment or any information with respect to it. There is no direct testimony that this wheat ever reached the consignees or was ever sold. I must assume, as the evidence stands, that when the notes and mortgages were given on the 15th April, this wheat was not sold, as the instructions were to hold it, if possible, until the navigation opens, and it is a notorious fact to all persons acquainted with the country, that navigation is not open on the 15th April. Therefore, on that date, so far as the evidence shews, Galbraith was not entitled to be credited with the proceeds of that consignment, as the instructions were to apply them when the wheat was sold. There was due then, on this note on the 15th April, 1896, after allowing the interest and giving credit for the $50 payment, $1,329.82. On that date Galbraith was in hopelessly in-

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solvent circumstances and unable to pay his creditors in full. He, however, was under the belief that if he could induce his larger creditors to wait, he could, by degrees, pay off smaller and more pressing creditors and eventually pay off all his liabilities. Prior to and at that date, the Ontario Company held a mortgage for $1,000 on a farm of Galbraith's, as part security for their claim (this farm was not worth more than the amount of the mortgage), and one Rogers held a mortgage on the stock of general merchandise in question, to secure a claim of his. Matters being in this condition, James Kennedy, the general agent of both the plaintiffs, requested Galbraith, some time prior to the 7th March, 1896, to give the plaintiffs a mortgage on the grain warehouse in question, in further part security of their claim, which Galbraith consented to do. This mortgage was prepared, and on the 15th April, Kennedy brought it to Moosomin to be executed by Galbraith; when he arrived here he found that Galbraith had, in the meanwhile, executed a mortgage on this warehouse to the defendants Coté, and, therefore, Galbraith, at Kennedy's request, gave the mortgages in question and also second mortgages on a lot of land occupied by him as a boarding house property in Fleming. On obtaining these mortgages, the plaintiffs held security on all Galbraith's property except on his notes and book debts, which represented at their face about $1,000, a safe which was subject to a lien to some other party, commission which he was or would be entitled to on some grain in the warehouse, and an interest in a farm near Minnedosa, in Manitoba. The amount of his interest in this farm, or the value of it, is not proved. Kennedy requested Galbraith to give the plaintiffs security on the book debts, which he refused to do. The properties which the plaintiffs so held, under their several mortgages, were not of sufficient value to pay their claims in full, and outside of these mortgages the properties available to pay other creditors were of very trifling value. Prior to these mortgages being executed by Galbraith, but on the same day and just immediately before he executed such mortgages, he signed a promissory note in favour of the Ontario Company for $1 846, payable on demand, and another note in favour of the Safety Bay Co., for $1,175, also payable on demand. The two mort-

gages were given, as appears on their faces, to secure to the respective companies the amount of the notes so respectively made in their favour, and were filed with the registration clerk on 17th April, 1896. The evidence does not satisfy me that these mortgages were made with the intent on the part of Galbraith to defeat, delay or prejudice his creditors. That is, I am satisfied that no such object was present in his mind when these securities were given. I am satisfied that they were given under "pressure" as that word has been defined in recent decisions. That is, they were given at the request of Kennedy, the agent of the plaintiffs." Statement.

E. A. C. McLorg, for plaintiffs. Argument.

W. White, Q.C., for defendants.

After stating the facts as given above, the learned Judge proceeded:—

WETMORE, J.:—In *Adams* v. *Hutchings*[2], decided by me on the 30th October, 1893, I layed down what, in my opinion, constituted "pressure" in the light of *Molsons Bank* v. *Halter*[3], and *Stephens* v. *McArthur*[4]. I am unable to distinguish this case, in that respect, from *Adams* v. *Hutchings*[2] and I have nothing to add to my remarks in that case. It is claimed, however, that Galbraith, having sworn when examined before the clerk, "The giving of the notes and mortgages were voluntarily done by me as a protection to the lumber companies, and that no pressure was brought to bear," and having sworn at the trial, "I was desirous of giving them (the plaintiffs) security, I wanted to see that the lumber companies were protected. I wanted to give the Ontario & Western Lumber Co. security and also the Safety Bay Lumber Co. security," that this was conclusive that the securities were voluntary and given without pressure. I am not at all of that opinion. The terms "voluntary" and "pressure" as applicable to assignments or securities of the character in question have obtained in the mind of a lawyer a very different meaning from what they may have in the minds of other people. I venture to assert Judgment.

[2] Ante p. 206.
[3] 18 Can. S. C. R. 88.
[4] 19 Can. S. C. R. 446.

Judgment.
Wetmore, J.

that an ordinary person, not a lawyer, who simply executed a mortgage because he was asked to do so, would have a difficulty in understanding that he did it under *pressure*, and if asked if he did it under pressure would inevitably answer "No." Pressure would, to his mind, convey the idea of some force or influence greater than a mere request. So, if asked if he did it *voluntarily*, the idea would be conveyed to his mind whether he did it willingly or unwillingly, and if he did not do it unwillingly, that is, if, having consented to do it, he did it, he would consider he did it voluntarily and answer "Yes." It would never occur to him that the question intended was "Was the execution of the mortgage your own spontaneous act, did the idea of executing it emanate from you and not from the mortgagee?" So when Galbraith testifies that he was "desirous of giving them security," all he conveys was that having consented to give it he was desirous to do what he so consented to. Advocates cannot, by using technical words or forms of expression which a witness does not appreciate, trap such witness into making admissions which must be held conclusive. And in this case, where the circumstances under which the securities were given are stated in detail, I find as a matter of fact that they were not given voluntarily, and were given under pressure. It is claimed that there was no consideration for these mortgages because the object of the securities given on the 15th April was to secure the acceptance of the $1,864 draft held by the Imperial Bank, and the note for $1,179.35 held by the Bank of Ottawa, and that as these banks held these securities, and not the plaintiffs, there was, on the 15th April, no indebtedness from Galbraith to the plaintiffs, the indebtedness was to the banks. And involved in this, that the plaintiffs were not in a position to exercise pressure on Galbraith, and, so far as the $1,864 draft was concerned, the Ontario Company were not in a position to exercise pressure, because that acceptance was not due on the 15th April. In view of what transpired between the Safety Bay Company and Galbraith, and in the absence of evidence to the contrary, I must assume that the Bank of Ottawa held the Safety Bay Company liable on the note as indorsers, and, of course, Galbraith would be liable to them as maker. With respect

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Wetmore, J.

to the draft held by the Imperial Bank, I must assume that the Ontario Company must have been aware that Galbraith could not or did not intend to meet it when it became due, and that they would be liable to the bank as drawers. And for these reasons, each of these companies desired to be secured against their liabilities on these papers to the extent, at any rate, for which they obtained such securities. No doubt it was against these liabilities that Kennedy requested Galbraith to secure the plaintiffs, and the notes and mortgages given on the 15th April were given for the purpose of carrying out that object and were all part of one transaction. Now, what was the effect of taking these notes and giving these mortgages on the 15th April? And were the facts that the note held by the Bank of Ottawa and the draft held by the Imperial Bank were outstanding, and that the plaintiffs respectively were and would be liable on them, a sufficient consideration to support the notes of the 15th April? I think that at common law there would be no question that the consideration would be sufficient. That is so clear, to my mind, that it does not need discussion. And the effect of taking the notes and the mortgages would be that the Ontario Company would be bound so far as Galbraith was concerned, when the acceptance held by the Imperial Bank matured, to protect Galbraith against any liability on it, at least to the amount of $1,846, for which they took Galbraith's securities on the 15th, and the Safety Bay Company would be bound to protect Galbraith against the note held by the Bank of Ottawa, at least, to the amount of $1,175, for which they took Galbraith's securities on the 15th. Having once arrived at the conclusion that the indebtedness represented by this draft and by the notes of 1st March, 1894, was an honest *bona fide* indebtedness, I cannot discover that the manner in which that indebtedness was attempted to be secured on the 15th April was a badge of fraud either at common law, under the Statute of Elizabeth, or under *The Preferential Assignments Ordinance*.[1] It seems to me that it was a manner of arranging to secure that indebtedness which was quite open to the parties. And so far as *The Preferential Assignments Ordinance*[1] is concerned, if we once arrive at the fact that the consideration or indebtedness was honest and *bona fide*, and one that the

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Wetmore, J.

plaintiffs might call on and press Galbraith to secure, and he did so, that the principle laid down in *Stephens* v. *McArthur*[4] will apply. It was claimed, however, that inasmuch as the mortgages in question are confessedly given to secure the notes made on 15th April, there was no pressure to give security with respect to those particular notes, the pressure was to give security with respect to the draft, and the note of 1st March, 1894. It seems to me that that contention is most refined, and the answer to it is that the giving the securities in the way they were given was not from any point it may be viewed "the spontaneous act of the debtor." The whole thing was the arrangement and design of the plaintiffs by their agents and advocates.

In *Stephens* v. *McArthur*[4], at p. 451, Strong, J., is reported as follows: "Whether there was or was not notice to the appellant of the insolvency of the debtors, is a point which, in the view I take of the meaning and construction of the statute, is not material to the decision of the present appeal." That learned Judge delivered the judgment of the majority of the Court in that case, and I take what I have just quoted as laying down the law to be "that if the debt is honest and *bona fide*, and the security has been obtained through pressure, it is immaterial whether or not the mortgagee had notice of the mortgagor's insolvency," I am, therefore, of opinion that so far as *The Preferential Assignments Ordinance*[1] is concerned, the mortgages are valid.

It was also claimed that these mortgages were void under the Statute of Elizabeth because the mortgagor got an advantage to himself, he got an extension of time for six months. Galbraith swore that he signed the mortgages under the belief that he was getting an extension of time. And, in fact, the mortgages recite that the mortgagor had requested the time for payment of the notes alleged to be secured to be extended for six months. And the effect of the mortgages were to give the extension subject to the provisoes contained in them. No authority has been presented to me or can I find any for rendering the mortgages void for such cause. If that would be a cause for rendering a mortgage void, I can hardly conceive of a case where a mortgage would be valid, because nearly every mortgage provides

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for payment of the monies secured at a future time or on an event which will arise subsequent to the date of execution. It was also urged that the fact that these mortgages were taken for amounts less than were then represented by the draft and the note of 1st March, 1894, it was a badge of fraud. I cannot preceive why it is a badge of fraud. Surely a creditor may take security for part of his claim without prejudicing it.

It was also claimed that the mortgages were invalid as against creditors under secs. 4 and 8 of *The Bills of Sale Ordinance*[5], because the affidavits of *bona fides* were made by agents of the mortgagees, and no copy of the authority to such agent to take the mortgage was attached to it as provided by section 4 of that Ordinance. In the case of The Ontario Company, the affidavit was made by the manager. It has been held in the Courts of Upper Canada, by several decisions under a similar section of an Act in force there, and from which, no doubt, the section of the Ordinance in question was taken, that where the president or principal officer of a corporation makes the affidavit he does not act as agent, he acts directly and in chief, and not by delegation, and, therefore, the authority to an agent in such case need not be given. (See Barron on *Bills of Sale* (2nd ed.) pp. 292 and 238 and cases cited there.) A manager of a corporation is a principal officer, and I am not disposed to depart from these authorities. In the case of the Safety Bay Company's mortgage the affidavit purports to be taken by a member of "the firm of the Safety Bay Lumber Company." The mortgage is to the Safety Bay Lumber Company. In the title of the interpleader issue this company is called the Safety Bay Lumber Company, Limited, and I am asked to conclude, by reason of this word "Limited" being used, that this is an incorporated company. And in addition to the same objection taken to the Ontario Company mortgage that Cameron is not even an agent and was not qualified to make the affidavit at all, the difficulty about this is that I cannot assume a mortgage apparently valid on its face to be bad, or an affidavit of *bona fides* apparently regular on its face to be untrue, unless there is

[5] Ordinance No. 8 of 1895.

Judgment. Wetmore, J.

evidence to establish it. The onus of that lies on the party attacking the security. In order to hold this affidavit bad I have got to hold that Cameron, who made that affidavit, put forth an untruthful proposition when he described himself as one of the firm of the Safety Bay Lumber Company, that this company was not a firm, that it was an incorporated company. I do not think that I can hold that simply because the word "Limited" has been used in the title of the interpleader issue, at any rate, without some evidence establishing that by the law of Ontario, no partnership can do business under such a style as that used by the plaintiffs in question. This company is described as of Rat Portage, in Ontario. It is not, so far as I am able to discover, incorporated under any Act of the Parliament of Canada. There is no evidence that it is incorporated under an Act of the province of Ontario. I am not aware of any law or principle of law which would prevent persons in partnership doing business under the partnership style or firm of the Safety Bay Lumber Company, Limited, if they chose to adopt that style and firm, and if they do under the practice, they can sue or be sued in the firm name. I am of opinion, therefore, that under the evidence I cannot hold this affidavit bad, because, assuming these plaintiffs now in question to be a partnership, the affidavit is made by "one of several mortgagees" and satisfies this section of the Ordinance.

It was further claimed that the consideration is not truly set out in the mortgages, and, therefore, they are void under sec. 8 of *The Bills of Sale Ordinance*[5], because the real object of taking the securities was to protect the mortgagees against their liabilities on the draft held by the Imperial Bank and the note held by the Bank of Ottawa. I have practically discussed that question in a previous part of this judgment. Admitting that that was the real object of the transaction on the 15th April, I cannot see any objection to its being done in the way it was done. I have already held that there was a good and valuable consideration for the notes given on the 15th April. That being so, I can discover no objection to the plaintiffs taking security for them, and if they did, and the mortgages expressed that they were given to secure those notes, the consideration

would be truly expressed. I do not think that sec. 5 of *The Bills of Sales Ordinance*[5] applies to these transactions. Judgment. Wetmore, J.

Judgment for plaintiffs with costs.

MERCHANTS BANK v. ROCHE PERCEE COAL CO.

Winding-up Act—Seizure by sheriff—Chamber summons by liquidator for possession—Jurisdiction.

A Judge in Chambers has no jurisdiction to order a sheriff to give up to a liquidator under "*The Winding-up Act*,"[1] possession of goods and chattels seized under execution prior to the making of the winding-up order.

[WETMORE, J., *May 25, 1897.*

Application by the liquidator of the defendant company under *The Winding Up Act*,[1] for an order that the sheriff give up possession to the liquidator of the goods and chattels of the defendant company seized by him under execution issued in the above suit. Statement.

A Chamber summons was granted by ROULEAU, J., returnable at Moosomin and was heard by WETMORE, J. The facts and points involved are set forth in the judgment.

E. A. C. McLorg, for the liquidator. Argument

D. H. Cole, for the sheriff.

F. L. Gwillim, for the plaintiff.

WETMORE, J.:—The petition in the winding-up proceedings was presented to the Court of Queens Bench of Manitoba, and a winding-up order was made by that Court. No objections was raised as to the jurisdiction of that Court to entertain the petition and make the order. Section 14 of the Act[1] provides that "The Courts of the various provinces and the Judges of the said Courts respectively shall be auxiliary to one another for the purposes of this Act."[1] The subsequent part of that section is not material to this application, because it is not proposed to wind up the business of the company in this Court. The facts as I find them under the material presented to me are that the Judgment.

[1] "*The Winding-up Act*," R. S. Can., 1886, c. 129.

Judgment.

Wetmore, J.

petition for winding up this company was presented to the Court of Queens Bench, on the 8th March last, and the winding-up order was made on the 15th March, and by that order Mr. Bertrand was appointed liquidator. Mr. Bertrand in his affidavit swears that the order for winding up was made on the 8th March, but I am of opinion that I must be bound by the order itself, a copy of which is presented as an exhibit to Mr. Bertrand's affidavit and a certified copy of which was also filed in the office of the clerk of the Court on the 30th March, under section 85 of the Act.[1] Mr. Bertrand swears that he was appointed provisional liquidator on the 4th March. I cannot perceive under what authority he was then appointed provisional liquidator under the circumstances as section 20 of the Act[1] only authorizes such appointment after the petition was presented. On the 9th March the plaintiffs obtained judgment against the defendants and the same day lodged an execution with the sheriff, who on the 15th March seized the property in question under such execution.

I am of opinion that I have not jurisdiction to make the order sought for by Chamber order. The thirteenth section of *The Winding Up Act*[1] does not apply, because: 1st. This application was made after the winding up order was made.

2nd. It was not made by the company or by any creditor or contributor of the company.

3rd. It is for an order for the sheriff to give up possession of the goods, not to restrain further proceedings.

Sections 16 and 17 will not apply because all the proceedings in the action were concluded and the execution lodged before the winding up order was made, and the actual levy was made the very day the winding up order was made, and is therefore contemporaneous with such order —not made after it. And the effect of the lien or charge created by the lodging of such execution and the levy thereunder is governed by section 66. The only authority cited to me in support of my jurisdiction to order the sheriff to give up possession of the property by Chamber order was *Miller* v. *McCuaig*.[2] I do not for a moment doubt that this Court has power to control its own proceedings. Nor do I doubt

[1] 6 Man. L. R. 539.

Judgment.

Wetmore, J.

that when a judgment has been satisfied a Judge in Chambers has power to stay proceedings on any execution issued on such judgment. That jurisdiction has always so far as I know been well recognized. But a Judge has not power by Chamber order so far as I can discover to decide against which property an execution shall attach or what property it shall bind. If the sheriff under execution against A seizes the property of B, a Judge cannot by Chamber order direct the sheriff to give up such property, nor can a Judge by Chamber order compel the sheriff to give up property exempt from execution. The right of property in such case must be tried out in the ordinary way. Section 66 of the Act[1] confers no authority on a Judge to make an order for the sheriff to give up the property. It simply does away with the lien or charge created by the execution, leaving the property freed from such lien or charge, subject to the lien for costs as provided—with that section before him the sheriff will proceed at his peril.

I was inclined to think at first sight that possibly section 77 of the Act,[1] and Rule 79 of *The Rules of the Supreme Court of the Territories* might confer the jurisdiction on me, although that section and that rule were not cited to me by counsel. But on consideration I am of opinion that they will not help the matter. Section 77 of the Act[1] merely authorizes a single Judge to do what the Act[1] authorizes the Court to do, and Rule 79 merely provides that where the Act[1] authorizes an application to be made to a Judge for the purpose specified it may be made in Chambers. Section 66 of the Act[1] authorizes no such application as that now made to be made to the Court or a Judge, as, for instance, section 13 does, which authorizes an application to the Court. Possibly section 17 of the Act[1] might also where it is applicable authorize an application to a Judge in Chambers, because if the execution is void it may be set aside in Chambers or proceedings under it stayed. But the execution to which section 66 applies is not void. The property as before stated is simply relieved from the charge created. In some of the provinces of Canada a memorial of judgment may be filed with the Registrar of Deeds which binds the property of the execution debtor, and section 66 of the Act[1] has reference to such a memorial. It seems to me that no

Judgment. Wetmore, J.

Chamber order could be made setting aside any such memorial or ordering the registrar to cancel the registry thereof. Nevertheless, section 66 relieves the property in the case mentioned from the charge created by such memorial.

I am of opinion that Mr. Bertrand must if the sheriff will not give the property up enforce his rights by action or injunction, according to the ordinary practice or the sheriff may interplead; and this application must be dismissed, and Mr. Bertrand must pay to the plaintiffs and the sheriff their costs of opposing it.

Application dismissed with costs.

MORTON v. BANK OF MONTREAL (No. 2).

Appeal—Failure to comply with order for security for costs—Extending time—Meaning of "forthwith." "extenuating circumstances."

Where an appellant is ordered to give security for costs "forthwith," he must do so with all reasonable celerity, otherwise the appeal will be dismissed with costs unless there are extenuating circumstances.

[*Court* in banc, *Dec.* 7, *1897.*

Statement.

Motion by the defendant to have the plaintiff's appeal dismissed with costs for failure to forthwith furnish security for costs as required by an order made June 8th 1897; and counter-motion by the plaintiff for leave to furnish the security and inscribe his appeal.

Argument.

J. Secord, Q.C., for plaintiff.

Ford Jones, for defendant.

The judgment of the Court, was delivered by ROULEAU, J.

Judgment.

ROULEAU, J.:—A motion was made on the first day of the term for an order allowing the plaintiff to inscribe his appeal to this Court upon payment of the sum of $100 into Court as security for costs in pursuance to the order of RICHARDSON, J., dated the 8th day of June, A.D., 1897. An application had been made on the 11th May last by the defend-

Judgment.
Rouleau, J.

ants for an order to extend the time to apply for security for costs, and RICHARDSON, J., referred the said application to the Court *in banc*. On the 8th June, 1897, the said Court *in banc* advised the HONOURABLE MR. JUSTICE RICHARDSON, that this order should be granted.[1]

On the same date the plaintiff was ordered to forthwith pay into Court the sum of one hundred dollars as security for the defendants' costs of the appeal, and that in default of such payment being made as aforesaid the said appeal be not heard.

The plaintiff has ever since made default to comply with the terms of the said order, and he waits till this term of the Court and asks the Court to grant him the indulgence of inscribing his appeal and paying into Court the said amount of one hundred dollars.

The right of the plaintiff to be heard by this Court was dependent on his giving security forthwith, and as soon as default of giving security was made, his right of appeal was gone. This seems to have been decided in *Harris* v. *Fleming*, 30 Weekly Reporter[2], but as that volume was not in the library, I could not verify that decision. At all events it seems to me that before the plaintiff asks for an indulgence from this Court he should be in a position to show good reasons why he did not comply before this time with the terms of the order. There are numerous authorities to show that where an order has been made for the appellant to give security for the costs of an appeal, if he does not give it within a reasonable time, the Court will dismiss the appeal without giving further time, unless there are extenuating circumstances. *Washburn & Moen Manuf. Co.* v. *Patterson*,[3] *Vale* v. *Oppert*,[4] and *Judd* v. *Green*,[5] also says that the delay must be explained.

There was no proof or material upon which this motion was based. The only thing this Court had was the verbal explanation of the plaintiff's advocate, which is no evidence

[1] See the Judgment of the Court, ante p. 14.
[2] At p. 555.
[3] 54 L. J. Ch. 643; 29 Ch. D. 48; 52 L. T. 705; 33 W. R. 403.
[4] 5 Ch. D. 633; 25 W. R. 610.
[5] 46 L. J. Ch. 257; 4 Ch. D. 784; 35 L. T. 783; 25 W. R. 293.

Judgment. Rouleau, J.

or proof that the plaintiff deserves the indulgence of this Court.

By the terms of the order, the plaintiff was to give security "forthwith." According to the best authorities the word "forthwith" in matters of procedure means within 24 hours, and when a statute enacts that an act is to be done "forthwith" it means that the act is to be done within a reasonable time. In *Burgess* v. *Boetefeur*,[6] it was decided that the word "forthwith" means with all reasonable celerity. No doubt the plaintiff cannot contend for a moment that he used reasonable celerity. I may add that he ignored the said order till five days before the term of this Court. Not only he had days to consider his position, but he took months. He cannot possibly claim to be within the range of the meaning of the word "forthwith."

I am therefore of the opinion that the plaintiff's motion be dismissed with costs.

And as a consequence of this judgment the defendants' motion asking that the plaintiff's appeal be dismissed with costs is granted.

Appeal dismissed with costs.

MITCHELL v. THE ONTARIO WIND, ENGINE & PUMP CO.

Practice—Service of writ of summons—setting aside—Foreign corporation—Agent.

Where a writ of summons was served within the jurisdiction on an agent of a foreign corporation, and it appeared that the agent was not resident in the Territories, but was there temporarily, and doing business of a passing character, such service and a judgment signed thereon were, *hesitante*, set aside with costs.

[WETMORE, J., *Mar. 9, 1898.*

Statement.

Application by defendants to set aside the service of a writ of summons and all subsequent proceedings thereon, including the judgment signed against the defendants.

Argument.

D. H. Cole, for defendants.

E. L. Elwood, for plaintiff.

[6] 8 Scott (N.R.) 194; 7 M. & G. 481; 13 L. J. M. C. 122; 8 Jur. 621.

Judgment.

WETMORE, J.—The service was made on one Kenneth D. McLay an alleged agent of the defendants. It is claimed that McLay was not an agent of the defendants. I am inclined to think, however, upon reading the alleged contract sued on in this case, and the letters from Stephen H. Chapman, the president of the defendant company, to the plaintiff that McLay has been held out as an agent of the defendants. Whether however he is such an agent that could be served with the writ of summons herein is quite another matter. The defendants are a foreign corporation having their head office at Toronto, Ontario. Whatever the character of McLay's agency was, I am satisfied under the evidence that he was never resident agent at Yorkton or at any other place in the Territories for the defendants. I find that he was an agent of the defendants at Winnipeg, Manitoba, and that on three occasions at the most he came into the Territories at Yorkton temporarily and transacted business for them of a passing character. It is claimed that service of the summons on McLay was good service under sub-section 3 of section 31 of *The Judicature Ordinance*.[1] I have reached the conclusion, but with very great hesitation, that the service is not good. The section in question was no doubt taken from the Ontario Act. I find it is practically the same language in the *Revised Statutes of Ontario* (*1877*), chapter 50, section 21; and this was taken from *Consolidated Statutes of Upper Canada*, chapter 22, section 17. I can only find two decisions which afford me any assistance. The first is *Taylor* v. *Grand Trunk Railway Co.*[2] In that case Morrison, J., held that service of a writ of summons on the station agent of a railway company whose head office was without the limits of Ontario was not a good service. I do not wish to be understood that I am prepared to go that length. It is possible that as the employment of a station agent involves permanency of residence where the work is being carried on and continued attention to the work which he is required to do for the company, he would be held to transact or carry on business for the company within the meaning of the section. The other case I refer to is *Wilson*

[1] No. 6 of 1893; C. O. 1898, c. 21, Rule 14, Sub. Rule 3.
[2] 4 P. R. 300.

Judgment.
Wetmore, J.

v. *The Aetna Life Assurance Company*.[3] In that case the writ was served on the local agent of the company at Ottawa, although the company had a head office at Toronto. The master held the service good, and I am inclined to agree with him. But it will be observed that in that case the service was on the local agent at Ottawa, he was the agent appointed at Ottawa, and within the jurisdiction of the Court, to carry on or transact business for the company there? In the case at bar McLay was the agent at Winnipeg, not at Yorkton; he was only at Yorkton temporarily doing business of a passing character. I cannot conceive that the legislature ever contemplated that an agent of that character could be served with process for his company. If such a person can be served with process for a corporation, then any person coming into the Territories to do any trifling thing for his employers, a company, can be served with process for the company. I am of the opinion that the person authorized to be served with process under the section must be some person resident and domiciled in the country who has authority to carry on or transact the business of the company or some part of the business of the company. It is not necessary that he should have the power to transact all the business, that he should be the head manager or agent in the Territories. But, what he does transact or carry on, he must do it in view of his residency and of there being something in the nature of permanency attached to his employment until he is discharged. It is not intended that persons having claims against a corporaton may catch some transient employee and because he does some passing business serve the company through him with process.

Summons made absolute with costs.

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[3] 8 P. R. 131.

ALLOWAY ET AL. V. HUTCHISON (No. 1.)

Practice—Security for costs—Affidavit—Power of Judge to examine record—Discretion—Merits—Cross-examination.

On an application for security for costs the plaintiff objected that the application could not be made until appearance had been entered, and that as the affidavit filed did not state that such had been done, nor show the state of the cause, the application should be dismissed, there being no power to enable the Judge to examine the record so as to ascertain in what stage the suit was.

Held, (1) Appearance is necessary.

(2) The state of the record should be disclosed by affidavit, but that

(3) The Judge has discretionary power to examine the record.

Comments on the extent to which the merits of the case can be examined into on an application for security for costs.

[WETMORE, J., *Mar. 18, 1898.*

Application for security for costs. The facts and findings are sufficiently stated above and in the judgment. Statement.

J. T. Brown, for defendant. Argument.

E. A. C. McLorg, for plaintiff.

WETMORE, J.:—I have repeatedly held that application for security for costs may be made at any stage of the proceedings provided that the other party is not prejudiced by undue delays. The present practice however lays it down that it cannot be made until after the defendant has appeared,[1] and I am of opinion that the affidavits should disclose in what stage the suit is. This was held in *Torrance* v. *Gross*,[2] and in *Hall* v. *Brigham*.[3] It was alleged, however as a matter of fact that an appearance was entered and that the suit is at that stage. It is objected that the affidavits should disclose that fact and that I have no power to examine the records to ascertain it. Judgment.

The question of my power to examine the records has been repeatedly raised and *Chamberlain* v. *Wood*,[4] has been relied on in support of my power to do so. I do not think I have ever yet decided the question because it has not been neces-

[1] Archbold, Q. B. Practice (14th Ed.), 400.
[2] 2 P. R. 55.
[3] 5 P. R. 464.

Judgment.
Wetmore, J.

sary. I must however decide it in this case. I am of the opinion that I have the power. *Chamberlain* v. *Wood*;[4] *Craven* v. *Smith*;[5] *Hall* v. *Brigham*[3] and *Hollingsworth* v. *Hollingsworth*,[6] establish this. But, while I have the power to do so, I am not bound to do so, it is discretionary with me. The correct practice is to bring the matters before the Judge by affidavit and if this is not done the Judge may refuse to examine the records. When the records are at a distance, as for instance at Yorkton, the matters must as a rule be brought before me by affidavit. It would be next to impossible for me to examine the records, at any rate without great delays. Then, ought I to examine the records in this case? The papers are filed in the chief clerk's office and are therefore easy of access to me. In *Hall* v. *Brigham*,[3] the records were examined by the Master. I cannot see that I would be doing any injustice to any party by examining them in this case. I have done so. I find that the case is in this stage: An appearance has been entered for the defendant. It is claimed that this appearance is a nullity? Why it is a nullity has not been stated, and I cannot discover that it is a nullity. It is not apparently in the usual form, but it seems to me that it is to the effect of the usual form. No application has been made to set it aside and I decline to treat it as a nullity as at present advised. The defendant has made the affidavit as to merits required by rule 520 of *The Judicature Ordinance*,[7] and is *prima facie* entitled to an order for security. Affidavits were produced to establish that the defendant made the promissory notes sued on. Suppose he did make the notes, he may still have a defence to the action. I have repeatedly held that I will not try out the merits on an application of this sort, although I will in some cases allow the defendant to be cross-examined on his affidavit with a view of disclosing whether it is false or not. No application for cross-examination was made in this case.

Order for security.

[4] 1 P. R. 195.
[5] L. R. 4 Ex. 146; 38 L. J. Ex. 90; 20 L. T. 400; 17 W. R. 710.
[6] 10 P. R. 58.
[7] C. O. 1898, c. 21.

PROCKTER (APPELLANT) v. HARPER (RESPONDENT).

Criminal law—Appeal from Justice of the Peace—Notice of appeal—Service on Justice—Addressed to both respondent and Justice—Costs.

S. 880, par. (b) of C. C. 1892 requires a notice of appeal in a prescribed form to be given "to the respondent or to the Justice who tried the case for him." The notice of appeal in this case was addressed to both the respondent and the Justice, and was served on the Justice only; *held*, that the notice was not invalid, the address to the Justice being surplusage, and that as the Code does not require service on the Justice, he must be assumed to have known that the service on him was for the respondent.

A party who deliberately abstains from appearing in answer to a summons, and is thereby convicted, will be deprived of his costs on the conviction being quashed on appeal.

[WETMORE, J., *May 10, 1898.*

Elliott, for appellant. Argument.

The respondent did not appear.

WETMORE, J.—The appellant was convicted before N. H. Neilson, Esq., J.P., of an assault on the respondent; he was duly served with a summons to appear before the justice and answer the matter of the information, and deliberately omitted to obey such summons. The reason given by his advocate at the hearing of the appeal was that he considered the justice partial and he could not get fair play. The justice very naturally convicted, and the appellant appealed. The respondent failed to appear at the hearing of the appeal. I think it is a matter of regret that an appeal is allowable under the circumstances. But I am of opinion that an appeal lies. The appellant ought to have appeared before the justice and presented his side of the case, and given him an opportunity of deciding on it. If then the appellant considered that the justice acted partially he could have taken his appeal. But having abstained from appearing at all he might assume almost that as a matter of course a conviction would go against him, and it seems to me that it was a hardship on the respondent (because it might possibly have been unnecessary if the appellant had appeared) to drag him before a Court of Appeal, and such a practice should be discontinued. I can in one way discountenance it, and that is by refusing the appellant the costs of the appeal should the Judgment.

Judgment. Wetmore, J.

appeal be successful. The respondent not having appeared at the appeal to support his conviction, and the appeal being in the nature of a re-hearing, the conviction must be quashed, providing that the preliminaries to give the Appellate Court jurisdiction have been taken.

The only question arising on these preliminaries is whether the notice of appeal is sufficient. This notice was addressed to "Phillip Harper (the respondent) and N. H. Neilson" (the J. P.), and served on the justice only. Section 880 of *The Criminal Code*,[1] provides that the notice is to be given "to the respondent or to the justice who tried the case for him." There is no provision for any notice to be given to the justice as such justice. This section also prescribes the form of notice. Upon inspecting this form (NNN), it provides that it shall be addressed to the parties to whom the notice of appeal is required to be given. The section of the Code referred to requires the notice to be given to the respondent, and if given to the justice it is given to him for the respondent. If the notice in this case therefore had been addressed to Harper alone and so served on the justice, I have no doubt that it would have been sufficient, because in that case it would have strictly complied with the requirements of the law. Is the notice bad then because it was addressed to the respondent *and* the justice. I am of opinion that it is not bad for that reason. The address to the justice may be treated as surplusage. In *ex parte Doherty*,[2] the notice was addressed to the justice alone and served on him only; the Court held, King, J., *hesitante*, that the notice was sufficient. *Keohan* v. *Cook*,[3] is at variance with that decision, and of course I am bound by the last mentioned case. But *ex parte Doherty* is important, because King, J., who hesitated, expressed the opinion that the notice would have been sufficient if addressed to the respondent and served on the justice; and because the Court laid it down that the notice having been delivered to the justice he "must be taken to know for what purpose it was given," of course on the principle that every one must be assumed to know the law. Under *The Summary Jurisdiction Act*, 1879,[4] sec. 31,

[1] "The Criminal Code," 55-56 Vict. c. 29.
[2] 25 N. B. R. 38; 6 C. L. T. 547.
[3] 1 Terr. L. R. 125, IX. C. L. T. 318.
[4] 42 & 43 Vic. c. 49 (Imp.).

Judgment.
Wetmore, J.

sub-sec. 2, the appellant was required to give notice of appeal by serving it "on the other party and on the clerk of the . . . Court of summary jurisdiction." A notice of appeal was served on the clerk of summary jurisdiction addressed to the clerk and not to the justices from whose decision the appeal was brought. It was urged that the notice should have been addressed to the convicting justices although it might be served on the clerk. The notice however was held good: *Regina* v. *Justices of Essex*.[5] I am of opinion that the notice in this case having been addressed to the respondent substantially complies with the form although it is addressed to the justice as well, and, therefore that the requirements of sec. 880, par. (*b*), of the *Criminal Code*,[1] have been strictly complied with, and that as the Code does not require the notice to be served on the justice, he must be assumed to have known that the service on him was for the respondent.

The conviction will be quashed, but, for the reasons before stated, without costs.

Conviction quashed without costs.

REGINA v. SIMPSON.

Summary conviction—No offence—Certiorari—Costs.

There is no jurisdiction on *certiorari* proceedings to award costs against a Justice or informant unless at any rate they have been guilty of misconduct, but where a Justice after notice of *certiorari* proceedings is served on him proceeds to a distress and sale he will not be protected from any damages to which on the quashing of the conviction he may, without such protection, be liable.

[WETMORE, J., *June 3, 1898.*

Statement.

The defendant was convicted for using insulting language to one James May (the informant), by calling him a "damned liar," and adjudged to pay a fine of $10 and $8.15 costs. On this conviction a distress warrant was issued and two cows seized thereunder and sold by a constable, one

[5] (1892) 1 Q. B. 490; 61 L. J. M. C. 120; 66 L. T. 676; 40 W. R. 446; 17 Cox C. C. 521; 56 J. P. 375.

Statement. Stoddart. A motion was made by way of *certiorari* to quash the conviction.

Argument. *E. L. Elwood,* for the motion.

J. T. Brown, contra.

Judgment. WETMORE, J.—It is conceded on all sides that the matter charged against the defendant and of which he was convicted is not an offence either at common law or by virtue of any statute or Ordinance, and therefore that the justice had no jurisdiction and that the conviction must be quashed. It is claimed however that no costs should be awarded either against the justice or the prosecutor, and I am of that opinion. In the first place, I have great doubts whether I have jurisdiction to award costs against the justice or informant; at any rate I have no such jurisdiction unless there has been some misconduct on the part of the justice or informant. See *Reg.* v. *Banks.*[1] While no doubt a very gross blunder has been made by the justice in entertaining the charge, and possibly by the informant in laying it, I cannot discover anything which I can call misconduct on the part of either. I have no doubt that each of these was honestly of the opinion that the matter charged was an offence punishable by summary conviction. The defendant himself it would seem was of that opinion at the trial. He raised no objection to the justice's jurisdiction, but on the contrary according to his own affidavit asked for further time stating in effect that he could prove that the informant was "a damned liar." In fact I am satisfied that he never ascertained that the magistrate had no jurisdiction until after the conviction was made. Moreover, while it is possible in view of the facts brought under my notice that the justice ought not to have entered a plea of guilty upon the defendant's statement (but I am not prepared to so hold, and it is not necessary to do so), yet the justice was prepared and offered to grant the defendant a reasonable adjournment, of eight days, which the defendant refused to accept unless the justice would agree to give a further enlargement at the expiration of that time. The justice very properly refused to do this, stating how-

[1] 2 Terr. L. R. 81.

Judgment.
Wetmore, J.

ever that he might if he thought it necessary. It would have been quite time enough to consider the question of further adjournment when the time for doing so arrived, namely, when the time of the first adjournment was reached. Under these circumstances I would not be disposed to grant costs even had I the jurisdiction to do so, but would leave the defendant to his right to recover such costs as damages in any action he may bring if such costs are in law so recoverable. The only remaining question is whether I should under sec. 891 of *The Criminal Code* restrain the defendant from bringing an action against the justice or the officer who acted under the warrant of distress. I am of opinion that I ought not to so restrain the defendant. In the first place, the defendant's property has been seized and sold under the distress warrant, and this has been done without any right in law. The defendant has committed no offence against the law whatever, and although the defendant did not raise any question of jurisdiction before the justice, nevertheless on the very day after the distress warrant was issued and before any property seized under it could possibly have been sold, the justice was served with a notice that the defendant intended to apply for a *certiorari* to quash the conviction. This ought reasonably to have put the justice on his guard, and he had then ample time to have stopped the sale or have attempted to do so. No steps appear to have been taken in that direction, but the sale went on and the defendant was deprived of his property. I therefore see no just reason why the justice should be protected. So far as the constable is concerned, apart from the fact that the warrant of distress showed on its face that the justice had no jurisdiction to issue it (a circumstance which if it stoood alone might influence me to protect the constable) I have a strong suspicion that more property was sold than was necessary to realize the fine and costs. It seems that $61 worth of property was sold to realize $22.18. Under the circumstances I will suffer the defendant to pursue whatever remedies he may have at law.

Conviction and warrant issued thereunder quashed.

Order quashing conviction.

DIGEST OF CASES REPORTED IN THIS VOLUME

ACCOUNT.

See COSTS, 6—PRACTICE, 14.

ADMINISTRATION.

See LAND TITLES ACT, 1.

ADMISSIBILITY.

Of statement of accused. *See* CRIMINAL LAW, 3.
Of evidence of similar acts. *See* CRIMINAL LAW, 4.

ADOPTION.

Of assessment. *See* ASSESSMENT & TAXATION, 5.
Of infant. *See* INFANT, 2.

AFFIDAVIT.

See BILLS OF SALE & CHATTEL MORTGAGES, 4—COSTS, 9—JUDGMENT, 1, 2—PRACTICE, 2, 15, 18.

AGENT.

See CRIMINAL LAW, 5—HUSBAND AND WIFE, 1—PRACTICE, 17—SOLICITOR, 1.

ALIMONY.

1. Husband and Wife—*Alimony—Ordinance No. 14 of 1895—Practice—Solicitor—Legal Cruelty—Costs—Jurisdiction—Evidence—Applicability of the Matrimonial Causes Act, 1857 (Imp.), Considered.*]—(1) The practice existing in England in the Court for Divorce and Matrimonial Causes is not applicable to the Northwest Territories.—(2) The Ordinance confers jurisdiction to grant alimony as an independent relief, notwithstanding that in England such relief could have been obtained only as incidental to a decree for judicial separation, or for the dissolution of the marriage, or for restitution of conjugal rights.—(3) In considering the question of legal cruelty, the station in life of the parties must be borne in mind.—(4) A wife is entitled to her costs of an unsuccessful suit for alimony, unless she has separate means out of which to pay them, or unless her solicitor has been guilty of misconduct in countenancing improper litigation or takes oppressive and unnecessary steps in promoting the case. *Harris* v. *Harris.* (Wetmore, J., 1896), p. 416.

AMENDMENT.

See CONVICTION, 1—SOLICITOR, 4.

ANIMALS.

See TRESPASS, 1—BILLS OF SALE AND CHATTEL MORTGAGES.

APPEAL.

See ASSESSMENT AND TAXATION—CONVICTION, 3, 4—COSTS, 1, 10—LANDLORD AND TENANT, 1.

ARCHITECT.

See BUILDING CONTRACT, 2.

ASSESSMENT AND TAXATION.

1. Assessment and Taxation—*Appeal to Judge—Personal Property—When Taxable—Meaning of "Situated" as Applied to Personal Property—Costs.*]—Personal property brought into a school

district for a mere temporary purpose is not "situated" within the district within the meaning of section 98 of the School Ordinance, R. O. 1888, c. 59, so as to be liable for assessment. *McKenzie* v. *Little Cut Arm School District*. (Wetmore, J., 1891), p. 156.

2. Assessment and Taxation — *The School Ordinance, R. O. 1888, c. 59, s. 106—Construction of Statute—Completion of Assessment Roll — Time for — Omission—Effect of—Property Acquired Prior to Completion of Assessment Roll —Assessor's Powers.*]—The provisions of the School Ordinance which require the assessment roll to be completed by the first of April, or so soon thereafter as may be, are as against a ratepayer directory only, but imperative as against the trustees.—Any property, liable to taxation, acquired before the actual completion of the assessment roll, is liable to assessment. *Cadden* v. *Meadowvale S. D.* (Wetmore, J., 1891), p. 158.

3. Assessment and Taxation — *Appeal from Court of Revision—When Assessment is to be Considered Complete —Assessor's Power to Alter Assessment Roll — Grounds of Appeal — Power of Judge on Appeal.*] — An assessment is complete *quoad* any particular property as soon as the assessor has valued it and placed it on the assessment roll.—A Judge, on appeal from the Court of Revision of a school district, has no power to arbitrarily amend mistakes or omissions in the assessment roll, but any such mistake or omission must be the subject of a specific appeal.—No objections against an assessment can be entertained by a Judge on appeal, unless they were raised before the Court of Revision. *Bradshaw* v. *Riverdale S. D.* (Wetmore, J., 1892), p. 164.

4. Assessment and Taxation — *The School Ordinance—Appeal—Notice — Grounds — Income — Omission to Assess Property of Other Persons — Property Purchased at Tax Sale—Owner —Occupancy of — Personal Property — Meaning of "Situated."*]—An appellant from the Court of Revision to a Judge of the Supreme Court is limited to the grounds taken before the Court of Revision and such additional grounds as arise out of the decision of the Court of Revision in respect of such grounds.—Wages earned as section-foreman of a railway company is "income," and as such liable to taxation, and it is immaterial that such wages have been invested in property which is also liable to taxation.—The purchaser of lands at a tax sale, and who is not in occupation thereof, is not liable for assessment in respect thereof during the period allowed for redemption.—Cattle are assessable in the district where they are usually kept, and the district in which the owner resides is *prima facie* the district in which they are properly assessable. *McKenzie* v. *Cut Arm S. D.*, approved. *Graham* v. *Broadview S. D.* (Wetmore, J., 1893), p. 200.

5. Assessment—*Taxation—Jurisdiction of Judge on Appeal from Court of Revision — Validity of Assessment.*] — The powers given to a Court of Revision under sections 107 to 111 of the School Ordinance, and to a Judge under section 112, do not enable a Judge acting thereunder to inquire into the legality of the whole assessment, and a ratepayer who has resorted to the provisions of these sections is not thereby estopped from taking substantive proceedings to set the assessment aside as being invalid and contrary to law.—*Held*, further, that a Board of Trustees may by subsequent conduct adopt an assessment made by a person not legally appointed, and thereby render such assessment valid. *Bradshaw* v. *Riverdale S. D.* (No. 2). (Wetmore, J., 1894), p. 276.

6. Assessment and Taxation — *Appeal—Pre-emption—Occupancy.*]—Any act of ordinary ownership, however slight, performed by the holder of a pre-emption entry upon his pre-emption, constitutes such person the occupant thereof so as to render him liable to assessment. — Such occupancy will continue, without any interruption, as a constructive occupancy, so long as the right of entry lasts. *Cantelon and Watson* v. *Lorlie S. D.* (Wetmore, J., 1896), p. 414.

ASSIGNMENT OF PROMISSORY NOTE.

See BILLS, NOTES AND CHEQUES, 3.

ASSIGNMENTS AND PREFERENCES.

1. Promissory Note—*Holder—Equitable Set off against Draweee—Preferential Assignment — Pressure — Rev. Ord. (1888), c. 49.*]—One Maloney, to secure a claim of $867, endorsed to the admin-

istrators of the estate of John S. Ewart a promissory note made in his favour by the defendant. At the same time it was arranged that the administrators should hold the balance of the proceeds in trust, first to pay certain other claims against Maloney and the residue to pay over to him. Subsecuently, but before the note became due, Maloney executed an assignment to the plaintiff of all his interest in the moneys secured by the note in trust to pay the claims previously arranged for and certain additional claims amounting to more than sufficient to exhaust the proceeds. The administrators before action endorsed the note to the plaintiff, taking from him an agreement to protect their interest. The defendant claimed to be entitled to deduct from the amount payable by him certain indebtedness of Maloney to him incurred in some collateral transaction, on the ground that the assignment was void under Rev. Ord. (1888), c. 49, or that it was no more than an assignment of a chose in action, and that the plaintiff took subject to the equities between the maker and the payee.—*Held*, affirming the judgment of Rouleau, J., that the assignment, having been procured by pressure, was not void; that the administrators at all events were holders in due course, and the plaintiff could rest upon their title; and that there could, therefore, be no set off against the plaintiff. *O'Brien* v. *Johnston*, (Ct. en banc, 1897) p. 50.

2. Assignments and Preferences —*Mortgage—Setting Aside — Pressure — Validity — Substitution — Possession — Repudiating Mortgage — Preference —Description — Costs.*] — *Held*, (1) The execution of a chattel mortgage by the mortgagor and its delivery to and acceptance by the mortgagee or his agent constitutes such mortgage a valid and binding instrument as between the parties to it, without any further act on the part of the mortgagee.—(2) A mortgagee's solicitors are his agents for accepting such delivery.—(3) A mortgagee of chattels cannot validly repudiate the mortgage without giving proper notice to the mortgagor.—(4) The substitution of one chattel security for another has the effect of cancelling the substituted security.—(5) To constitute a chattel mortgage a preference it must be "the spontaneous act or deed" of the insolvent, and must have been given "of his own mere motive and as a favour or bounty proceeding voluntarily from himself." *Molsons Bank* v. *Halter* (18 Can. S. C. R. 88), and *Stephens* v. *McArthur* (19 Can. S. C. R. 446), applied. —(6) Although a mortgagee may have no right to take possession of the mortgaged chattels, still if he does do so, and the mortgagor assents thereto, the possession is lawful *quoad* the mortgagor, and such assent may be implied from conduct. *Dedrick* v. *Ashdown* (15 Can. S. C. R. 227), distinguished.—(7) Where in a chattel mortgage there are some items that can be identified and others that cannot, such mortgage is void *in toto only* if the items that can be distinguished are few and insignificant, but where such items are neither few nor insignificant the mortgage is *quoad* such items valid. *Adams* v. *Hutchings* (No. 2), (Wetmore, J., 1893), p. 206.

3. Interpleader—*Chattel Mortgage— Preference — Fraud — Pressure — Consideration — Statute of Elizabeth — Evidence — Bills of Sale Ordinance — Bona Fides.*] — One Lachlan Galbraith, being in insolvent circumstances, executed certain mortgages in favour of plaintiffs, upon request of their agent. Galbraith swore that he gave the mortgages voluntarily and without pressure being brought to bear.—*Held*, that the mortgages having been given at the request of the plaintiff's agent, they were given under pressure, and were valid against creditors under The Preferential Assignments Ordinance; that it was immaterial whether or not the mortgagees were aware of the insolvency; that plaintiffs being liable on certain acceptances of Galbraith's was a sufficient reason for desiring and obtaining the security of the mortgages, and that the implied undertaking of the plaintiffs to protect Galbraith against any liability on such acceptances was a sufficient consideration to support the mortgages. *Ontario* v. *Coté*. (Wetmore, J., 1897), p. 454.

See INTERPLEADER, 1—PARTIES, 1.

ATTACHMENT OF DEBTS.

1. Attachment of Debts — *Money Placed with Returning Officer as Deposit —Garnishee — What Attachable by Garnishment.*]—The defendant was a candidate for election as a member of the Legislative Assembly, and under the election laws in force the sum of $100 had to be deposited with the returning officer to be forfeited under certain conditions, but to be returned in the event of the candidate's election. The garnishee was the returning officer, and one McDonald

on the defendant's behalf advanced the required deposit from his own funds. Upon the defendant being declared elected, the plaintiff garnisheed the deposit.—*Held*, that service of a garnishee summons will bind only so much as the defendant can honestly deal with without prejudicing the rights of third parties, and that consequently the money in the hands of the garnishee, not being such as the defendant could honestly deal with, was not attachable. *Davis* v. *Freethy*, approved and followed. *Creagh* v. *Sutherland and Reade*, garnishee. (Richardson, J., 1895), p. 303.

2. Garnishee—*Promissory Note given by Garnishee to Defendant — Whether Attached — Exemption — Purpose of Legislation.*] — The plaintiff sought by means of garnishee process to attach the moneys payable under an undue promissory note given by the garnishee to the defendant.—*Held*, that inasmuch as it was open to the plaintiff to seize the note under execution, and as the remedy provided by garnishee process was intended to secure to judgment creditors what could not be reached by execution, the promissory note was not garnishable. *Simpson* v. *Phillips & Latham*, garnishee. (Richardson, J., 1896), p. 385.

See PRACTICE, 16—SOLICITOR, 3.

ATTACHMENT OF PERSON.

See PRACTICE, 3—SOLICITOR, 2, 4.

BAIL.

See RECOGNIZANCE, 1.

BAILMENT.

See BILLS OF SALE AND CHATTEL MORTGAGES—SALE OF GOODS.

BILLS, NOTES AND CHEQUES.

1. Bills of Exchange — *Order for Payment—Necessity for giving Notice of Dishonour of—Validity of Verbal Agreement to give a Reasonable Time for Payment.*]—Defendant being indebted to plaintiff, gave to the plaintiff at his request on account, an order for $31.50 on one Thompson payable to plaintiff or order on the understanding that the plaintiff would give the defendant a "reasonable time" to pay the balance of his indebtedness. The plaintiff duly presented the order to Thompson, who refused to accept for more than $20, claiming that was all he owed the defendant. The plaintiff thereupon, without returning the order or giving any notice of dishonour, issued a writ for the full amount of his claim.—*Held*, that notice of dishonour was necessary to support the action *quoad* the amount represented by the order.—*Held*, further, that a promise to give a "reasonable time" for payment is not too indefinite.—*Held*, further, that the agreement to give the defendant a reasonable time was a binding agreement, under the circumstances. *Smith* v. *Clink*. (Wetmore, J., 1893), p. 229.

2. Intoxicating Liquor—*Bill of Exchange — Consideration — Jurisdiction —Repeal of Part of Act—Retrospective Operation — Interpretation of Statutes.*] —The mere fact that the consideration of a bill of exchange is intoxicating liquor does not of itself render the bill void under the N. W. T. Act as originally enacted.—Where by a clause in an Act of Parliament the Courts are deprived of jurisdiction which they would otherwise have, and that clause is by itself repealed, such clause is to be treated as if it never existed, and a retrospective jurisdiction immediately attaches. *Trumbell* v. *Taylor* (No. 2). (Wetmore, J., 1895), p. 313.

3. Promissory Note—*Assignment—Plaintiff's Right to Sue.*] — The statement of claim was based on an alleged promissory note made by defendant, payable to the order of one Bertrand and assigned to the plaintiff. The defendant denied such assignment. The evidence disclosed that the alleged assignment was not written on the note, but on a separate piece of paper, and purported to assign a "promissory note."—*Held*, that the assignment, not being written on the note, was invalid and bad; and that, assuming the instrument sued on not to be a promissory note, the assignment was invalid and bad, as it did not contain not words as required by R. O. 1888, c. 70. *Hamilton* v. *Bjarnason*. (Wetmore, J., 1896), p. 398.

See ASSIGNMENTS AND PREFERENCES, 1, 3—ATTACHMENT OF DEBTS, 2—SALE OF GOODS, 4 — SMALL DEBT PROCEDURE, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Chattel Mortgage—*Sufficiency of Description of Goods Mortgaged—Contemporaneous Agreement Under Seal.*]—The property covered by chattel mortgage was described as "all cattle and horses of whatever age and sex, branded $\overline{5}$ on the left side and all increase thereof, together with the said brand and branding irons." The defendant, the mortgagee, had owned a number of cattle some of which were branded "M. S." others $\underline{\overline{5}}$ and others "5" with one or both of the other brands. All those branded "$\overline{5}$" were sold to the mortgagor.—*Held*, that the description was sufficient for identification, and that no mention of the locality where the cattle were at the time mortgage was given was necessary.—By a contemporaneous agreement under seal the mortgagor agreed for three years to give his whole time and attention to looking after the horses and cattle, and mortgagee agreeing to allow the mortgagor to sell sufficient to pay running expenses, — *Held*, that the agreement did not affect the correctness of the statement of consideration, which was stated as $3,000, the purchase price of the cattle. *Graveley* v. *Springer*. (Ct. en banc, 1898), p. 120.

2. Interpleader—*Chattel Mortgage—Validity — Consideration — Ordinance Number 18 of 1889, s. 7.*]—Where a chattel mortgage was in fact given to secure a past indebtedness, but on its face purported to be given in consideration of money "in hand well and truly paid" by the mortgagee to the mortgagor. *Held*, that the consideration was duly expressed within the meaning of s. 7 of Ordinance No. 18, of 1889.—A small inaccuracy in the statement of the consideration is not sufficient to avoid a chattel mortgage. *Walley* v. *Harris*. (Wetmore, J., 1892), p. 161.

3. Interpleader—*Order for Chattels—Registration—Costs.*]— Ordinance No. 8 of 1889, "An Ordinance Concerning Receipt Notes, Hire Receipts, and Orders for Chattels," required such instruments to be registered when the condition of the bailment was such that the possession of the chattel should pass without any ownership therein being acquired by the bailee. — *Held*, that where the condition of the bailment, although not so specified in the instrument, was nevertheless in fact of the above character, such instrument must be registered under the Ordinance.—An instrument is none the less an order for chattels within the Ordinance, because it contains a provision that payments made thereon should be considered as rent only. *King* v. *Keenan & Stevens*, claimants. (Wetmore, J., 1894), p. 254.

4. Interpleader—*Chattel Mortgage—Mortgagee in Possession—Lien for Money Paid — Substituted Chattels — Validity of Mortgage as Against Prior Execution Creditors.*]—The plaintiff held a chattel mortgage on a stallion called Richard the 3rd, executed on April 27, 1893, by one McDougall, against whose goods the defendant had previously placed a *fi. fa.* with the sheriff, but of which the plaintiff was unaware at the time of taking the mortgage. The mortgage was taken to secure a *bona fide* indebtedness. The plaintiff, in September, 1893, was in possession of the stallion under his mortgage, and gave him to the mortgagor, McDougall, as agent, to be sold in British Columbia and the proceeds invested in other horses. This was done, and such horses were brought back to the plaintiff's premises at Qu'Appelle, where they were seized by the sheriff under the *fi. fa.* An interpleader issue having been directed and tried, *held*, that the property in the horses was in the plaintiff to the full extent of the plaintiff's claim. *Bell* v. *Lafferty*. (Richardson, J., 1894), 263.

5. Conditional Sale—*Lien Note — Affidavit of bona fides—Reject in—Validity of Note—Purchaser Without Notice of Lien—Bill of Sale Ordinance—Applicability to Lien Notes—Nullity—Irregularity—Ordinance No. 8 of 1889.*] — (1) The fact that the *jurat* to an affidavit of *bona fides* on a "lien note" erroneously states the date, is merely an irregularity and does not invalidate the note.—(2) Where a note was on a separate sheet of paper from the affidavit of *bona fides* and fastened to it by a pin, and the registration clerk placed the number on the affidavit and not on the note itself, this was held to be a substantial compliance with the Ordinance requiring the "instrument" to be numbered.—(3) Section 11 of the Bills of Sale Ordinance (No. 18 of 1889), which requires renewal statements to be filed, is not applicable

to Ordinance No. 8 of 1889. *Western Milling* v. *Darke, discussed. Ross* v. *Wright.* (Wetmore, J., 1896), p. 361.

See ASSIGNMENTS AND PREFERENCES, 2.

BRAND.

See CRIMINAL LAW, 4—BILLS OF SALE & CHATTEL MORTGAGES, 1.

BURDEN OF PROOF.

See CRIMINAL LAW.

BUILDING CONTRACT.

1. Building Contract—*Work Not According to Specifications—Damages.*]—Where a party engages to perform work in a certain specified manner for an agreed price, and he fails to perform the work in the manner specified, such party can recover only the agreed price less the cost of altering the work so as to make it correspond with the specifications. *Clarke* v. *Lee.* (Wetmore, J., 1893), p. 191.

2. Building Contract — *Architect's Certificate—Architect Supplying Material —Pleading—Work Not According to Contract—Damages.*]—A building contract required a certificate to be "obtained and signed by" the architect prior to payment, but did not specifically require the certificate to be produced to the owner of the building.—In an action against the owner to recover the balance of the contract price, *held*, not necessary to produce such certificate to the defendant before action, and that an averment in the statement of claim that such certificate had been so produced was not material.—An architect's certificate is conclusive unless obtained fraudulently or unless the certificate is wilfully unfair or partial.—The fact that the architect also supplied the lumber for the building in question is sufficient to call on the Court to closely scrutinize all the circumstances connected with the giving of the certificate.—If a certificate is shewn to be wilfully unfair and partial in one respect, it invalidates the whole certificate. Where the material or workmanship is not up to that contracted for, the owner of the building is entitled to such damages or to have such deductions made from the contract price as to put him in such a position as to have the building altered so as to make it in accordance with the contract. *Clarke* v. *Lee*, followed.—If no time be mentioned in a building contract for its completion, it must be completed within a reasonable time, and what is a reasonable time will depend on all the circumstances. Where, however, a time is mentioned, the building must be completed by that time. *Allen* v. *Pierce.* (Wetmore, J., 1895), p. 319.

CANADA EVIDENCE ACT.

See CRIMINAL LAW.

CERTIFICATE OF ARCHITECT.

See BUILDING CONTRACT, 2.

CERTIORARI.

See CONVICTION, 1, 2, 5.

CIVIL OR CRIMINAL PROCEEDING.

See RECOGNIZANCE, 1.

COMPANY.

1. Company—*Shareholder — Action against — Seizure of Shares by Sheriff under Execution against the Company—Payment by Shareholder to Execution Creditor of Company—Execution not Returned nulla bona—Effect of Payment—Pleadings — Amendment — Costs.*] — Shares in a joint stock company are not "securities for money" that can be seized by the sheriff under execution issued against the company.—A shareholder has no right to pay the amount unpaid on his shares to an execution creditor of the company until after the execution has been returned *nulla bona.* —The provisions of the Ordinance for enforcing a judgment against a company must be strictly followed. *Clarke* v. *Preston.* (Wetmore, J., 1895), p. 329.

CONDITIONAL SALE.

See BILLS OF SALE AND CHATTEL MORTGAGES—SALE OF GOODS.

CONFESSION.

See CRIMINAL LAW, 1, 2.

CONSIDERATION.

See ASSIGNMENTS AND PREFERENCES — BILLS OF SALE AND CHATTEL MORTGAGES, 1, 2 — BILLS, NOTES AND CHEQUES, 2—MASTER AND SERVANT, 1—SALE OF GOODS, 4.

CONSTRUCTION OF STATUTES.

See ASSESSMENT AND TAXATION, 2 — ATTACHMENT OF DEBTS, 2—BILLS, NOTES AND CHEQUES, 2 — BILLS OF SALE AND CHATTEL MORTGAGES, 4 —HOMESTEAD, 1 — SOLICITOR, 4 — TRESPASS, 1.

CONTEMPORANEOUS AGREEMENT.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

CONTRACT.

1. Master and Servant—*Contract of Hiring—Letters—Evidence.*]— Where a contract is to be made out by an offer on one side and an acceptance on the other, such acceptance to be binding must be unequivocal. *Owen* v. *Tinning* (No. 2). (Richardson, J., 1896), p. 410.

See MASTER AND SERVANT, 1.

CONVERSION.

1. Conversion — *Sheriff—Judgment for Costs—Subject Matter of Suit—Seizure — Exemptions Ordinance.*]— *Held*, that a judgment solely for costs does not entitle the judgment creditor to seize under execution the article, the price of which formed the subject matter of the action in respect of which the costs were incurred. *Byers* v. *Murphy*. (Wetmore, J., 1893), p. 169.

CONVICTION.

1. Conviction—*Several Offences—Inclusion where Statute Authorizes Joinder in Information—Form of Conviction — Unauthorized Punishment — Hard Labour—Amended Conviction — Variation from Minute of Adjudication—Review of Evidence on Certiorari for Purposes of Amendment—Adjudication de novo—Exercising Magistrates' Discretion — Costs in Certiorari Proceedings.*]—The Liquor License Ordinance (C. O. 1898, c. 89, s. 102) expressly provides that several charges of contravention of the Ordinance committed by the same person may be included in one and the same information or complaint. — Where the magistrate adjudges the accused guilty upon each charge it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by one and the same conviction, which may also adjudge a forfeiture in respect of each offence.—2. Where on a summary conviction the magistrate imposes imprisonment at hard labour on default in paying the fine upon a charge in respect of which the law does not authorize hard labour to be imposed, the magistrate may return to a certiorari an amended conviction omitting the unauthorized part of his adjudication, and the amended conviction will not be bad by reason of such variance from the original adjudication.—3. A conviction in due form will not be quashed because it is founded upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied upon perusal of the depositions that the offence for which the formal conviction was made was in fact committed.—4. Under Criminal Code, sec. 889, the Court may adjudicate *de novo* on the evidence given before the magistrate in cases removed by certiorari; but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate.—5. Where a magistrate returns an amended conviction in certiorari proceedings and the conviction is sustained only by reason of the amendment, costs of the certiorari proceedings should not be awarded against the applicant. *Queen* v. *Whiffin*. (Rouleau, J., 1900), p. 3.

2. Judgment upon Stated Case—*Subsequent Motion to Quash Conviction—Res Judicata—Necessity for Writ of Certiorari.*]—*Held*, that where a summary conviction has been questioned on a case stated by the magistrate under s. 900 of The Criminal Code, 1892, and has been upheld, a subsequent application to quash it by way of certiorari, will not be entertained. *Semble*, per Richardson and Wetmore, JJ. (Scott and Rouleau, JJ., dissenting), that the papers in connection with a summary conviction, returned by the magistrate to one of the clerks of the Court under s. 888 of The Criminal Code, 1892, are not before the Court for all purposes, and that a writ of certiorari must issue in order that a motion to quash the conviction may be entertained. *Reg.* v. *Monaghan.* (Court en banc, 1897), p. 43.

3. Appeal from Conviction—*Notice of Appeal—Sufficiency of—Form of Notice—Criminal Code, s. 880, par. (b)—Jurisdiction to Hear Appeal — Recognizance—Absence of Affidavit of Justification.*]—*Held*, Scott, J., *dissentiente*, that a notice of appeal from a conviction is insufficient if it is not addressed to any person.—*Held, per curiam*, that no affidavit of justification of the sureties need accompany the recognizance. *Cragg* v. *Lamarsh.* (Court en banc, 1898), p. 91.

4. Criminal Law—*Appeal from Justice of the Peace—Notice of Appeal—Service on Justice — Addressed to Both Respondent and Justice—Costs.*]—S. 880 par (b) of C. C. 1892 requires a notice of appeal in a prescribed form to be given "to the respondent or to the justice who tried the case for him." The notice of appeal in this case was addressed to both the respondent and the justice, and was served on the justice only.—*Held*, that the notice was not invalid, the address to the justice being surplusage, and that as the Code does not require service on the justice, he must be assumed to have known that the service on him was for the respondent.—A party who deliberately abstains from appearing in answer to a summons, and is thereby convicted, will be deprived of his costs on the conviction being quashed on appeal. *Prockter* v. *Harper.* (Wetmore, J., 1898), p. 473.

5. Summary Conviction — *No Offence—Certiorari—Costs.*]—There is no jurisdiction on certiorari proceedings to award costs against a justice or informant unless at any rate they have been guilty of misconduct, but where a justice after notice of certiorari proceedings is served on him proceeds to a distress and sale he will not be protected from any damages to which on the quashing of the conviction he may, without such protection, be liable. *Regina* v. *Simpson.* (Wetmore, J., 1898), p. 475.

COSTS.

1. Appeal—*Security for Costs—Special Circumstances—Poverty—Extension of Time.*]—The Judicature Ordinance No. 6 of 1893, s. 504, as amended by Ordinance No. 7 of 1895, s. 7, provides that: "No security for costs shall be required in applications for new trials or appeals or motions in the nature of appeals, unless by reason of special circumstances such security is ordered by a Judge upon application to be made within fifteen days from the service of the notice of motion, application or appeal."—The defendants succeeded at the trial.—The plaintiff served notice of appeal, and at the expiration of 37 days obtained an *ex parte* order extending the time for filing the appeal books. This order was obtained upon an affidavit of the plaintiff to the effect that owing to poverty he had been till then unable to procure sufficient means to meet the cost of printing. On the following day the defendants took out a summons to extend the time for applying for security for the costs of appeal, and for an order for security. The defendants' application was founded upon the plaintiff's said affidavit, and a further affidavit to the effect that the sheriff was prepared to return "*nulla bona*" the execution against the plaintiff for the taxed costs of the action.—On a reference to the Court in banc, it was—*Held*, (1) that, inasmuch as the defendants' delay in applying for an extension of time within which to make their application for security for costs of appeal had not prejudiced the plaintiff, the extension should be granted. (2) That the plaintiff's poverty was a "special circumstance" entitling the defendants to security for the costs of appeal. *Morton* v. *Bank of Montreal.* (Court in banc, 1897), p. 14.

2. Practice—*Costs—Service Fees.*]—To effect service of a writ of summons, the sheriff's officer *bona fide* travelled from the sheriff's office, where the writ

was received, to the defendant's residence, seven miles, and not finding the defendant at home, he travelled from there to the residence of C., which was only four miles from the sheriff's office, and there the defendant was found and served. The clerk on taxation allowed mileage for the entire distance travelled.—*Held*, on review, that the sheriff was entitled to mileage for eight miles only, that is, the distance from the sheriff's office to the place where service was actually effected and return. *Wise* v. *Currie*. (Wetmore, J., 1891), p. 149.

3. Practice—*Security for Costs—Assets—Nature of—Corporation Carrying on Business Within the Jurisdiction — Costs.*]—(1) An affidavit of assets to be sufficient to answer an application for security for costs must disclose that such assets are of a substantial nature, and such that the sheriff would be able to readily realize therefrom; but, (2) In the case of a corporation carrying on a branch of its business within the jurisdiction such particularity is not necessary. It is sufficient to show that it possesses sufficient assets available for seizure under execution to satisfy a judgment against it for costs. *Molsons Bank* v. *Hall*. (Wetmore, J., 1893), p. 187.

4. Practice—*Costs—Counsel Fee — Review of Taxation.*]—Counsel fees are properly taxable to a defendant who is an advocate and appears in person. *Calvert* v. *Forbes* (No. 2). (Wetmore, J., 1894), p. 285.

5. Solicitor and Client—*Extent to which Negligence of Advocate is Ground for Refusing Costs.*]—As against his client, an advocate is entitled to the costs of all work done unless the negligence of the advocate is such that the client derives absolutely no benefit from the work. *Hamilton* v. *McNeil*. (Wetmore, J., 1895), p. 298.

6. Solicitor—*Practice—Witness Fees on Reference to Clerk to take Accounts.*]—A witness attending before the clerk on a reference to take accounts is entitled to witness fees either on the scale provided for witnesses attending trial or on the scale provided by the English Rules. *Calvert* v. *Forbes* (No. 4). (Wetmore, J., 1895), p. 336.

7. Practice—*Security for Costs—Evidence — Documents Marked "Without Prejudice"—Funds of Plaintiffs in Defendants' Hands.*] — Security for costs will not be ordered where the defendants have in their hands funds of the plaintiffs sufficient to indemnify themselves against the costs of defence. *Seville* v. *Hughes, et al.* (Wetmore, J., 1896), p. 387.

8. Practice—*Taxation of Costs — Witness Fees—Review.*]—A party attending Court as witness in more than one cause is nevertheless entitled to full fees in each cause. *Hamilton* v. *Beck*. (Wetmore, J., 1896), p. 405.

9. Practice—*Security for Costs — Temporary Residence within the Jurisdiction—Cross-examination on affidavit—Intention of Plaintiff to Reside in the Jurisdiction—Grounds upon which Security for Costs is Granted—Delay.*] — A plaintiff who is temporarily resident within the jurisdiction may be required to give security for costs,—The reason why a litigant who is not resident within the jurisdiction, and who has no substantial means within the jurisdiction, may be called on to give security for costs now, is that, if judgment be recovered against him, there is no means of enforcing examination for discovery. *Byers* v. *Ferndale School District*. (Wetmore, J., 1896), p. 440.

10. Appeal—*Failure to Comply with Order for Security for Costs—Extending Time—Meaning of "Forthwith." "Extenuating Circumstances."*]—Where an appellant is ordered to give security for costs "forthwith," he must do so with all reasonable celerity, otherwise the appeal will be dismissed with costs unless there are extenuating circumstances. *Morton* v. *Bank of Montreal* (No. 2). (Court in banc, 1897), p. 466.

See ALIMONY, 1—COMPANY, 1—CONVICTION, 1, 4, 5—CONVERSION, 1—HUSBAND & WIFE, 1—JUDGMENT—MUNICIPAL LAW, 1—PRACTICE, 8, 10, 18 PLEADING, 1—SOLICITOR, 3.

COUNTERCLAIM.

See PRACTICE, 1, 7, 11—SALE OF GOODS, 1.

CRIMINAL LAW.

1. Criminal Law—*Evidence—Confession—Inducement—Person in Authority—Burden of Proof — Indians—Indian*

Agent.]—If upon a proposal to give evidence of an alleged confession the question is raised whether it was made by the accused to a person in authority and induced by a promise of favour or by menaces or under terror, the onus is on the Crown to shew affirmatively that it was not so induced, *Regina* v. *Thompson*, followed. — An Indian agent, an *ex officio* Justice of the Peace, under general instructions to advise the Indians of his reserve, who was in fact in the habit of interviewing Indians of the reserve charged with offences with a view to aiding them in their defence, is *quoad* the Indians of his reserve, a person in authority.—*Quære*, whether a confession by an Indian to the Indian agent of the reserve to which the Indian belonged would not be a privileged communication. *The Queen* v. *Charcoal.* (Court en banc. 1897), p. 7.

2. Criminal Law — *Evidence—Admissibility — Confession — Inducement by a Person in Authority—Confession Obtained by False Statement.*]—Evidence of an alleged confession made by a person to a constable, who charged him with stealing letters from a post office box, was held not admissible inasmuch as it appeared that the alleged confession was induced by the statements of the constable that "decoy letters have been put in the box" (which was false), "and you must not think they were not watched"; and "you may as well tell us as have it come out in a Court of law." *The Queen* v. *McDonald.* (Scott. J., 1896), p. 1.

3. False Swearing — *Statutory Declaration—No Allegation of Intention to Mislead—Amendment of Charge—Authority to Make Declaration—Withdrawal of Election to be Tried by Jury—Preliminary Inquiry on Several Charges against Different Defendants — Admissibility of Statement of Accused Made upon Oath.*]—The defendant was charged for that in a certain statutory declaration he did falsely, wilfully and corruptly declare to the truth of certain facts, setting them out. Upon objection before plea the charge was amended on the application of the Crown by adding an allegation that the defendant was duly authorized to make the declaration, but there was no allegation that it had been made with intent to mislead. *Held*, that no allegation of intention to mislead was necessary; that the amendment was properly allowed, and that the charge was sufficient in point of form.—*Held*, further, that s. 26 of the Canada Evidence Act, 1893, authorized the making as well as the taking of the declaration.—The defendant pleaded to the charge before amendment and elected to be tried by a Judge with the intervention of a jury. Upon being called upon to plead to the charge as amended he sought to alter his election and to be tried by the Judge alone. This was refused.—*Held*, that the refusal was justified.—The declaration in question had been made by four parties commencing, "We," and setting out the names of the declarants, but there was no statement that it was made jointly and severally.—*Held*, that, the defendant having signed it, there was no reason why he should not be taken to have made it of his own personal knowledge.—The evidence at the preliminary investigation was taken on an information against the defendant at the same time as upon separate informations against two of his co-declarants.—*Held*, that the defendant was properly charged upon such evidence. —The defendant at the preliminary investigation, after being cautioned, requested that he should be sworn, and made his statement upon oath. — *Held*, that such statement was properly receivable against him at the trial. *Regina* v. *Skelton.* (Court in banc, 1898), p. 58.

4. Theft of Cattle—*Obliteration of Brands—Evidence of Similar Acts—Admissibility.*]—Prisoner was charged with the theft of certain cattle, the brands upon which had been obliterated.—*Held*, that evidence that the brands upon other cattle had been similarly obliterated and that the prisoner had in his possession branding irons adapted to causing an obliteration of the character found, was admissible. Rouleau, J., *dissentiente. The Queen* v. *Collyns.* (Court in banc, 1898), p. 82.

5. Criminal Law——*Theft—Distress—Warrant—Authority of Advocates to Execute.*]—Defendants were charged with stealing wheat, held under seizure by the Canada North West Land Company. The warrant under which seizure was made was executed by a firm of advocates as agents for the said company.—*Held*, that the work of executing a warrant of seizure is that of an agent and not of an advocate as such, and, in the absence of evidence that the advocate had been specially appointed as agent to execute such warrant, there was no authority so to do, and the seizure thereunder was in consequence unauthorized and void

Comments on "The Criminal Code, 1892, s. 306." *Regina* v. *Pierce*. (Wetmore, J., 1896), p. 347.

See CONVICTION, 1, 2—INFANT, 1—RECOGNIZANCE, 1.

CROSS-EXAMINATION ON AFFIDAVIT.

See COSTS, 9—PRACTICE, 18.

DAMAGES.

See BUILDING CONTRACT, 1, 2 — CONTRACT, 1—JUDGMENT, 2 — NEGLIGENCE, 1—PRACTICE, 7 — SALE OF GOODS, 1—TRESPASS.

DELAY.

See COSTS, 9—JUDGMENT, 1—PRACTICE, 9.

DESCRIPTION OF GOODS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1—ASSIGNMENTS & PREFERENCES, 1.

DEVISE.

See LAND TITLES ACT, 1.

DISCOVERY, EXAMINATION FOR.

See PRACTICE, 3—PRIVILEGE, 1.

DISTRESS.

See CRIMINAL LAW, 5 — LANDLORD & TENANT, 2—TRESPASS, 1.

DOMINION LANDS ACT.

See HOMESTEAD, 1, 2.

ELECTION.

See CONVICTION, 2—CRIMINAL LAW, 3.

ENCUMBRANCE.

See HOMESTEAD, 1.

ESTRAY.

See TRESPASS, 1.

EVIDENCE.

See CONTRACT — CONVICTION, 1—COSTS, 7—CRIMINAL LAW, 1, 2, 3, 4—INTERPLEADER, 1, PRIVILEGE, 1.

EXAMINATION FOR DISCOVERY.

See DISCOVERY.

EXECUTION.

See BILLS OF SALE AND CHATTEL MORTGAGES — COMPANY, 1 — EXEMPTIONS UNDER EXECUTION — LAND TITLES ACT, 1.

EXECUTOR.

See ADMINISTRATION.

EXEMPTIONS UNDER EXECUTION.

See CONVERSION, 1—INTERPLEADER, 1.

FALSE SWEARING.

See CRIMINAL LAW, 3.

FENCES.

See TRESPASS, 1.

FINES AND FORFEITURES.

See CONVICTION, 1.

FIRE.

See NEGLIGENCE, 1.

FIXTURES.

1. Trespass — *Fixture—What Constitutes — Intention of Parties.*] — Whether an article not annexed to or fastened to the freehold is a fixture is entirely a matter of intention. *Russell* v. *Nesbitt et al.* (Wetmore, J., 1896), p. 437.

FOREIGN CORPORATION.

See PRACTICE, 17.

FRAUD AND MISREPRESENTATION.

See SALE OF GOODS, 4.

FRAUDS ON CREDITORS.

1. Interpleader — *Sheriff—Lease—Bona Fides — Intent of Parties — Defrauding Creditors — Setting Aside—13 Eliz., c. 5—Right of Tenant to Profits even though Lease be Void.*]—*Held*, that a lease, although made for valuable consideration and *bona fide* as between the parties to it, was, nevertheless, void as against creditors, there having been in both parties an intent to delay and defraud creditors, which intent gave rise to the lease. Comments on *Wood* v. *Dixie*, *Stewart* v. *Bank of Ottawa et al.* (Wetmore, J., 1897), p. 447.

See ASSIGNMENTS AND PREFERENCES, 1, 2, 3—INJUNCTION, 1—INTERPLEADER, 1—PARTIES, 1.

FURTHER CONSIDERATION.

See PRACTICE, 6.

GARNISHEE.

See ATTACHMENT OF DEBTS.

GUARDIAN.

See INFANT, 1.

HEALTH, INJURY TO.

See INFANT, 1.

HOMESTEAD.

1. Dominion Lands Act — *Homesteader — Encumbrance Filed Prior to Issue of Patent—Validity of as against Encumbrancee—T. R. P. Act, s. 125, and Dom. L. A. s. 42, construed.*]—The words "assignment or transfer" in section 42 of the Dominion Lands Act are used in their popular sense of an absolute parting with the homestead right, and not in the technical sense of pledging the right by way of security.—The provision of section 42 of the Dominion Lands Act against the transfer of the homestead right is intended to operate only as between the Crown and the homesteader. *Harris* v. *Parkin*, considered. *In re Harper*. (Wetmore, J., 1894), p. 257.

2. Dominion Lands Act—*Mortgage — Filing — Recommend for Patent — Possession — Registrar — Appeal.*] — A mortgage is not an "assignment or transfer" within the meaning of section 42 of the Dominion Lands Act (Revised Statutes, 1886, c. 54).—A homesteader rightfully in possession of land is entitled to mortgage the same prior to recommend for patent.—A homesteader who has taken actual possession in his own person of his homestead in pursuance of an entry therefor is to be considered as rightfully in possession thereof for the purpose of executing the mortgage. *Re Smith*. (Wetmore, J., 1896), p. 376.

HUSBAND AND WIFE.

1. Husband and Wife—*Alimony—Powers of Supreme Court—Jurisdiction—Implied Authority of Wife in Relation to Husband's Affairs—Status of Wife—*

Costs.]—*Held*, (1) The jurisdiction of the Supreme Court of the North-West Territories is limited to the powers and authorities exercised by the Courts of Common Law, Chancery and Probate in England on July 15th, 1870, and consequently in the absence of express legislation there is no jurisdiction to entertain a suit for alimony.—(2) A wife has no implied authority to spend her money on her husband's behalf, and the husband is not liable unless such expenditure was made at his request.—(3) A married woman is liable to pay costs in favour of her husband out of her separate estate, this being an incident to her status as a *feme sole* in respect of such property. *Harris* v. *Harris* (1). (Wetmore, J., 1895), p. 289.

See ALIMONY, 1—INTERPLEADER, 1—PARTIES, 1—ULTRA VIRES, 1.

INDIANS.

See CRIMINAL LAW, 1.

INDIAN AGENT.

See CRIMINAL LAW, 1.

INDUCEMENT.

See CRIMINAL LAW, 1, 2.

INFANT.

1. Omission to Provide Necessaries of Life, Clothing and Medical Aid to Child—*Criminal Code, ss. 209, 210, 211—"Master and Servant"—"Head of Family" — "Medical Aid"—Permanent Injury to Health.*] — Accused had been placed in charge of a child of twelve under agreement with Dr. Barnardo's Homes. The boy's toes were frozen, and after more than three weeks without medical attendance it became necessary to amputate them.—*Held*, that the relation of the accused to the boy was not that of parent, guardian or head of a family under s. 209 of the Criminal Code, 1892.—*Held*, further, that in the absence of medical evidence as to its effect the loss of the toes could not be taken to be, or to be likely to cause, permanent injury to health. *Regina* v. *Coventry.* (Court en banc, 1898), p. 95.

2. Infant—*Adoption—Parent's Right to Custody — Liability of Parent for Maintenance.*]—*Held*, that a father, who has given his child to another to adopt and rear, has, notwithstanding, the right to retake the custody of the child at any time.—*Held*, further, that a father so retaking his child is liable for maintenance during such period of adoption only by virtue of a contract express or implied. *Farrell* v. *Wilton.* (Wetmore, J., 1893), p. 232.

See MASTER AND SERVANT, 1. 2.

INJUNCTION.

1. Interim Injunction Restraining Disposition of Property before Judgment—*Extending Statutory Remedies—Fraudulent Dispositions of Property.*] — *Semble, per* RICHARDSON and WETMORE, JJ., (ROULEAU, J., *dissentiente*) that a plaintiff is not entitled before judgment to an interim injunction to restrain a disposition of property by a defendant. To obtain any relief of that nature before judgment, a plaintiff must make out a case within the statutory provisions dealing with garnishee and attachment proceedings.—*Held*, by the Court, that in this case the material was in any event insufficient and that no injunction should be granted upon it. *Pacific Investment Co.* v. *Swan.* (Court en banc, 1898), p. 125.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES.

INTERPLEADER.

1. Interpleader—*Form of Issue — Evidence — Fraud — Admissibility of Evidence of Fraud—Garnishee Proceedings—Husband and Wife—Exemptions.*] —In an interpleader issue between the wife of the execution debtor and the execution creditors in which the question was whether the goods seized by the sheriff were then the property of the wife as against the execution creditors, the trial Judge found and the Court en banc sustained his finding, that the

goods or their purchase price being in reality the property of the husband, had been fraudulently transferred by the husband to the wife and therefore were the property of the execution creditors against the wife.—*Held*, WETMORE, J., dissenting, that notwithstanding the decision of the Supreme Court of Canada in *Donohoe* v. *Hull*, evidence of fraud as affecting the question of property was admissible on the issue.—*Per* RICHARDSON and MCGUIRE, JJ., the decision of the Supreme Court of Canada in *Donohoe* v. *Hull*, was not applicable; it was not intended or contemplated to apply where, as in an interpleader issue, the question is whether or not a sale or transfer of goods is a mere sham or device to defeat execution creditors.—*Per* SCOTT, J.:—The decision of the Supreme Court of Canada in *Donohoe* v. *Hull*, extended only to proceedings by way of attachment of debts, in which, in order to enable the judgment creditor to succeed, it must appear that a debt exists for which the judgment debtor might have brought an action against the garnishee.—Fraudulent transfer of exemptions discussed. *West* v. *Ames Holden & Co. et al.* (Court en banc, 1897), p. 17.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1, 2, 3, 4 — FRAUDS ON CREDITORS, 1 — PRIVILEGE, 1 — ULTRA VIRES, 1.

INTOXICATING LIQUOR.

See BILLS, NOTES AND CHEQUES, 2.

IRREGULARITY.

See BILLS OF SALE AND CHATTEL MORTGAGES, 4—JUDGMENT—PRACTICE.

ISSUE.

Form of. *See* INTERPLEADER, 1.

JUDGMENT.

1. Practice—*Regular Judgment—Setting Aside — Merits — Delay.*] — (1) Mere delay is no answer to an application to set aside a judgment on the merits, unless an irreparable wrong be done.—(2) The affidavit of merits should be made by the party having personal knowledge. *Hanson* v. *Pearson.* (Wetmore, J., 1893), p. 197.

2. Practice — *Judgment—Interlocutory or Final—Setting Aside—Affidavit of Merits — Necessity for—Costs.*]—An interlocutory judgment is irregular if it awards damages and omits to state that such damages are to be assessed, or if such judgment awards costs.—It is not necessary to produce any affidavit of merits on an application to set aside an irregular judgment. *Perry* v. *Hunter et al.* (Wetmore, J., 1894), p. 266.

3. Practice—*Striking out Appearance—Question of Law—Leave to Defend—Power of Judge to Strike out Sham Defences.*]—On an application for summary judgment, the Judge, while giving leave to defend, has power to strike out such defences as are sham defences, but it would be an improper use of the practice to make such an application with this end in view. Before a summons is granted a *prima facie* case should be made out, shewing that the defendant has no defence whatever. *Trumbell* v. *Taylor.* (Wetmore, J., 1895), p. 305.

4. Practice—*Writ of Summons—Endorsement of Service—Default Judgment—Setting Aside.*]—The English Rule requiring endorsement of service is incorporated with the Judicature Ordinance of 1893. — Where the defendant made affidavit that he had not been served personally, but that the writ had been served on his wife, and no affidavit of the wife was produced in corroboration, an application to set the service aside was refused. *Morrison* v. *Morrison.* (Richardson, J., 1896), p. 399.

5. Practice—*Setting Aside Judgment—Irregularity—Time for Appearance — Clerk.*]—Where the defendant, after the time limited for appearance, tendered to the clerk of the Court an appearance, and the plaintiff had previously tendered to the Clerk the necessary papers for the entry of default judgment, but judgment had not been yet signed, and the clerk refused to accept the appearance and signed judgment, the judgment was set aside for irregularity. *Massey-Harris Co.* v. *Ott.* (Wetmore, J., 1896), p. 438.

6. Partnership—*Practice—Judgment—Setting aside — Terms—Costs.*] — Mere delay is not a bar to an application

to set aside a regular judgment on the merits unless it be shewn that an irreparable injury will be thereby done to the plaintiff.—The applicant moved to set aside a regular judgment signed against a partnership in the firm name on the ground that there never was such a firm and that the applicant had never been served with writ of summons, and was not a member of such firm. The plaintiff's counsel raised no objections to the applicant's want of *locus standi* to attack the judgment, but consented to the judgment being set aside as on the merits and on the usual terms sufficient to protect the plaintiff. It appeared that certain goods of the applicant had been seized by the sheriff under an execution issued on the judgment against the firm. The judgment was ordered to be set aside upon the applicant paying the amount thereof into Court and paying the costs. *Westman* v. *Ogmundson et al.* (Wetmore, J., 1897), p. 442.

See CONVERSION, 1 — SOLICITOR, 4 — PRACTICE, 16.

JURAT.

See BILLS OF SALE & CHATTEL MORTGAGES, 4.

JURISDICTION.

Of Judge in Chambers: *See* PRACTICE, 13—WINDING-UP ACT, 1.

Of Judge on Appeal from Court of Revision: *See* ASSESSMENT & TAXATION, 3, 4, 5.

Of Judge to Strike out Sham Defences: *See* JUDGMENT, 3.

Of Judge to Award Costs in Certiorari Proceedings: *See* CONVICTION, 5.

Of Court of Revision: *See* ASSESSMENT & TAXATION, 5.

See ALIMONY, 1 — BILLS, NOTES AND CHEQUES, 2—HUSBAND & WIFE, 1—RECOGNIZANCE, 1.

JURY.

See CRIMINAL LAW, 3.

JUSTICE OF THE PEACE.

See CONVICTION, 5.

LACHES.

See JUDGMENT, 1—PRACTICE, 12.

LANDLORD AND TENANT.

1. Landlord and Tenant—*Tenancy for Eleven Months at the Rate of $400.00 per Year—Monthly Payments of Rent—Notice to Quit—Right of Appeal—Judicature Ordinance, s. 503.*]—Respondents became tenants of the appellant for a period of eleven months, for which they were to pay rent "at the rate of $400 per year." They paid the rent monthly. After the expiration of the term they continued in possession paying monthly rent. On 9th March, 1896, they gave appellant notice that they would quit the premises on 30th April following. They paid rent up to that date, when they quit the premises in pursuance of their notice. No arrangement was made as to terms upon which respondents were to continue after the expiry of the term. The action was brought for $66.66 rent for the months of May and June.—*Held*, affirming the judgment of ROULEAU, J., that the tenancy was a tenancy from month to month and was properly terminated by the notice to quit.—*Held*, that the matter in question related "to the taking of an annual or other rent," and that consequently an appeal lay without leave. *Eastman* v. *Richards.* (Court in banc), p. 73.

2. Landlord and Tenant—*Tenancy at Will—Right to Distrain — Excessive Distress.*]— A tenant at will may by agreement made during the tenancy change the nature of his holding so as to make the rent payable at fixed periods, and upon this being done a right of distress is given to the landlord.—*Held*, also, that, in levying distress for rent a bailiff is justified in seizing sufficient to make the realization of the rent and expenses certain, but must be careful not to take more than what is manifestly sufficient for that purpose. *Stanier* v. *Fleming et al.* (Wetmore, J., 1893), p. 223.

See FRAUDS ON CREDITORS, 1.

LAND TITLES ACT.

1. Land Titles Act—*Issue of Certificate of Title to Executor as Such—Execu-*

tor Entitled as Residuary Devisee—Execution Against Him Personally—Entry of, upon Certificate of Title.]—Where an executor is by the will entitled as legatee to the lands of the estate, a registrar should not register against them an execution against the executor personally until he has satisfactory evidence that the debts and other charges against the estate have been satisfied.—Remarks by WETMORE, J., upon the position with regard to executions against an executor so entitled, or an administrator entitled in distribution. *Re Galloway.* (Court in banc, 1898), p. 88.

See HOMESTEAD, 1, 2.

LEGAL CRUELTY.

See ALIMONY, 1.

LEGAL PROFESSION ORDINANCE.

See SOLICITOR.

LIEN.

1. Mechanics' Lien — *Practice and Procedure — Summons under Ordinance No. 6 of 1884.*]—Instituting proceedings to realize a claim means that they shall be instituted against all parties whose interests are to be affected by such proceedings. *Bank of Montreal* v. *Haffner* approved: *Cole* v. *Hall*, criticized.—The adaptability to the Territories of the practice existing in Ontario under "The Mechanics' Lien Act" of Ontario discussed. *McGuirl* v. *Fletcher.* (Wetmore, J., 1889), p. 137.

See BILLS OF SALE & CHATTEL MORTGAGES, 4—SOLICITOR, 3.

"LIEN NOTE."

See BILLS OF SALE AND CHATTEL MORTGAGE, 5—SALE OF GOODS, 1, 2.

LIQUIDATED DEMAND.

See SMALL DEBT PROCEDURE, 1.

LIQUOR LICENSE ORDINANCE.

See CONVICTION, 1.

MAINTENANCE.

See INFANT, 2.

MASTER AND SERVANT.

1. Master and Servant—*Infant — Wages — Counterclaim—Unconscionable Agreement.*]—A hiring at $9 per month "for the herding season" entitles the servant to payment of wages at the end of each month, and the servant's subsequent desertion of the master does not forfeit the servant's right to such wages. —An agreement on the part of an infant to pay for any sheep lost during the herding of same by the infant is unconscionable and cannot be enforced. *Johnston* v. *Keenan.* (Wetmore, J., 1894), p. 239.

2. Infant—*Contract of Hiring—Parent's Right to sue for Wages—Master and Servant.*]—A parent suing for the wages of an infant cannot stand in any better position than the infant could if the infant were himself suing. *Noble* v. *Wiggins.* (Wetmore, J., 1895), p. 318.

See CONTRACT, 1—INFANT, 1.

MEANS OF KNOWLEDGE.

See PRACTICE, 12.

MECHANICS' LIEN.

See LIEN.

MORTGAGE OF LAND.

See HOMESTEAD, 2.

MUNICIPAL LAW.

1. Municipal Law—*Quo Warranto—Disclaimer—Effect of—Costs.*] — A respondent who files a disclaimer under section 82 of Part II. of the Municipal

Ordinance, 1894, thereby admits the validity of the *quo warranto* and the proceedings on which it is based. Such a disclaimer operates as a resignation of the seat, and ends the suit save for the question of costs.—Relators should not be discouraged from bringing cases of invalid elections under notice of a Judge at the peril of having to lose the costs necessarily incurred. *Regina ex rel. Shepherd* v. *Lamont; Regina ex rel. Shepherd* v. *Street.* (Wetmore, J., 1896), p. 371.

NECESSARIES.

Omission to Provide: *See* INFANT, 1.

NEGLIGENCE.

1. Negligence—*Setting Fire to Straw and Refuse—Fire Escaping—Damages—Liability for.*]—Although a farmer has the right to set fire to straw and refuse on his own land, still by so doing he is using his land other than in the natural way, and if such fire from any cause escape and cause damage to a neighbour, the farmer is, following *Ryland* v. *Fletcher*, liable for such damage. *Patree* v. *Kincaid.* (Richardson, J., 1896), p. 395.

See COSTS, 5.

NOTICE.

Of Appeal from Conviction: *See* CONVICTION, 3, 4.

Of Dishonour: *See* BILLS, NOTES & CHEQUES, 1.

To Quit: *See* LANDLORD AND TENANT, 1.

Knowledge: *See* PRACTICE, 12.

NULLA BONA.

See COMPANY, 1.

NULLITY.

See BILLS OF SALE & CHATTEL MORTGAGE, 4—PRACTICE, 2, 12.

OBLITERATION OF BRANDS.

See CRIMINAL LAW, 4.

OCCUPANCY.

See ASSESSMENT AND TAXATION, 6.

ORDER.

See PRACTICE, 9, 13.

PARENT AND CHILD.

See INFANT, 1, 2—MASTER & SERVANT, 2.

PARTIES.

1. Husband and Wife—*Fraudulent Assignment—Parties.*]—Where an action was brought by an execution creditor to set aside as fraudulent a deed of assignment of a homestead from the execution debtor to his wife, and also the patent issued thereon by the Crown, and the wife was made the sole defendant.—*Held, hesitante*, that in default of appearance,—1. Notice to the Crown was not necessary.—2. The husband was not a necessary party. *Gillies et al,* v. *Kaake.* (Wetmore, J., 1891), p. 152.

See PRACTICE, 1.

PARTNERSHIP.

Judgment against: *See* JUDGMENT, 6.

PATENT.

To Land: *See* HOMESTEAD, 1, 2.

PERSON IN AUTHORITY.

See CRIMINAL LAW, 1, 2.

PLEADING.

1. Pleading—*Chattel Mortgage—Validity—Agent—Authority.*]—A plea of *non*

detinet puts in issue only the fact of a detention adverse to or against the will of the plaintiff. It does not put in issue the fact of a detention. *Massey* v. *Pierce*. (Wetmore, J., 1894), p. 253.

2. Practice—*Pleadings—Untrue Allegations of Fact—Striking Out.*]—Untrue allegations in a statement of defence will be struck out only when an abuse of the process of the Court has been clearly and unmistakably established. *Owen* v. *Tinning* (1). (Richardson, J., 1896), p. 403.

See PRACTICE.

PRACTICE.

1. Practice — *Counterclaim—Third Party.*]—The rules as to third party procedure do not apply to a counterclaim against the original plaintiff and a third person. *Taylor* v. *Pope*. (Wetmore, J., 1888), p. 132.

2. Practice — *Replevin—Affidavit—Pleading.*]—To support a writ of replevin it is not necessary to allege in the statement of claim an unlawful detention in actual words; it is sufficient if the facts alleged shew such to be the case.—Affidavit in support of a writ of replevin may be sworn before the issue of the writ of summons, but in such case it should not be entitled in the cause. *Critchley* v. *Simers*. (Wetmore, J., 1888), p. 135.

3. Practice—*Examination for Discovery—Refusal to Answer—Attachment.*]—An examination for discovery should be confined to the matters in question in the action, and should be governed by the rules of evidence. Any evidence that may be material on any question arising for the decision of the tribunal trying the cause is a proper subject for examination.—Where the refusal to answer a question on an examination for discovery raises a more or less fine point of law such party should be ordered to attend and answer before attachment proceedings are taken. *Adams et al.* v. *Hutchings et al.* (1). (Wetmore, J., 1893), p. 181.

4. Practice—*Pleading—Seal—Setting Aside Writ—Costs.*]—(1) A document which purports to be a statement of claim but which does not substantially comply with the requirements of the practice is insufficient to support a writ of summons.—(2) It is not fatal to the service of a writ of summons that the copy had no marks thereon to indicate that the original writ was sealed, provided that such original was in fact properly sealed. *Cameron* v. *Wheeler* followed. *Clarke* v. *Brownlie*. (Wetmore, J., 1893), p. 194.

5. Practice—*Setting down for Trial—Venue.*]—In setting a cause down for trial the situation of the parties and the peculiar circumstances of each case should be considered and the case set down for the most convenient place and time. *Hamilton* v. *Wilkinson*. (Wetmore, J., 1894), p. 235.

6. Practice—*Further Consideration.*]—The judgment pronounced after trial reserved "all further directions that may be necessary." Relying on this, the defendant some six months after judgment was pronounced applied for further consideration, the matter so to be considered being certain costs and expenses of the defendant's bailiff for keeping possession of the property in dispute after service of an interim injunction order and before the appointment of a receiver. The request for such further consideration was made and the proceedings therefor taken according to the English practice in the Chancery Division.—*Held*, (1) that such practice was correct.—(2) That a reservation of further directions does not entitle a party to move for further consideration.—(3) That, in any event, the Court will not take into consideration at a further hearing any matter which was not raised by the pleadings, and which should have been brought under the notice of the Court at the trial. *Adams* v. *Hutchings et al.* (No. 3). (Wetmore, J., 1894), p. 242.

7. Practice — *Set-off and Counterclaim.*]—*Held*, a claim sounding in damages and arising out of the contract sued on by the plaintiff is properly matter of set-off and not of counterclaim. *Stevens* v. *Keenan*. (Wetmore J., 1894), p. 244.

8. Practice—*Review of Taxation of Costs—Grounds.*]—*Held*, on a review of taxation of costs that it is not necessary to set forth in the notice the grounds of the application, nor to lay objections in writing before the taxing officer. *Smithers* v. *Hutchings*. (Wetmore, J., 1894), p. 251.

9. Practice—*Indorsement on Order—Seal—Order not Fixing Time.*] — The memorandum required by s. 311 of No. 6 of 1893 (C. O. 1898, c. 21, s. 36) to be endorsed on the copy of an order, forms no part of the order, but is merely a notice to the defendant.—The omission of an order to state the time or the time after the service of the order within which an act is required to be done does not render the order ineffectual, but the Court will make a supplemental order fixing the time.—It is not necessary to endorse on the copy of an order served any words or marks to indicate that the original is under the seal of the Court, when the seal on the original is pointed out to the party served at the time of service. *Calvert* v. *Forbes* (No. 1). (Wetmore, J., 1894), p. 282.

10. Practice — *Summons to Extend Time for Pleading.*]—*Held*, before moving for an extension of time for pleading, application should first be made to the opposing litigant to extend the time by consent, but the omission to do so affects the question of costs only. *Commercial Bank* v. *Crerar.* (Wetmore, J., 1894), p. 286.

11. Practice — *Replevin—Counterclaim.*]—In a replevin suit where the defendant counterclaimed for a return of the chattels, it was held that the proceeding by counterclaim was irregular and that the right to the return of the goods should be set up in the defence. *Seeman* v. *Erickson* (No. 1). Wetmore, J., 1894), p. 287.

12. Practice—*Replevin—Affidavit — Irregularity — Laches — Waiver—Means of Knowledge.*]—The plaintiff issued a writ of replevin on an insufficient affidavit. The defendant filed a defence in which he recognized the replevin and asked for a return of the property replevined. A month later the defendant moved to set aside the writ of replevin as irregular, having just become aware of it.—*Held*, (1) That the writ of replevin was not void but irregular.—(2) That such irregularity might be waived; and. —(3)That, as the defendant had the means of searching and inspecting the affidavit, he should have done so, and his delay of a month coupled with the recognition of the replevin in his pleading constituted a waiver. *Seeman* v. *Erickson* (2). (Wetmore, J., 1895), p. 294.

13. Practice—*Application to Judge in Chambers Instead of to Court—Powers of Judge.*] — A Judge sitting in Chambers has no jurisdiction to deal with an application that should properly have been made to him in Court, but such application must be dismissed. *Campbell* v. *Fisher* (*Eliza B. Fisher, claimant*). (Wetmore, J., 1895), p. 297.

14. Practice—*Reference to Clerk to Take Accounts — Procedure on—Certificate of Clerk—Mode of Setting—Application to Confirm.*]— The rules of Court governing proceedings on references before the chief clerk in England are applicable to and govern proceedings in the N. W. T. on a reference to the clerk of the Court. —The Judge in directing the reference has power to make such order as to enable him to remain seized of the matter in Chambers.—Comments on the procedure requisite to confirm or vary the certificate of the clerk after reference. *Calvert* v. *Forbes* (No. 3). (Wetmore, J., 1895), p. 307.

15. Writ of Summons—*Service — Partnership—Society Sued eo nomine—Setting Aside Writ—Practice.*]—A writ was issued against a number of defendants, including "The Moose Jaw County Association of Patrons of Industry." Application was made by the association to set aside the writ and service as against it, the application being supported by the affidavit of one McClelland, the president of the association, who deposed that "the association was not a body corporate, or an association or company of men with power to make contracts."—*Held*, (1) An application cannot be made to set aside a writ of summons in part.—(2) It is not sufficient for the applicant to depose that the association has not the power to contract, but that the objects of the association should be set out.—(3) In the absence of information as to the objects of the association, it was impossible to decide whether it was a partnership or not, and since a partnership could be sued *eo nomine*, the material was insufficient to support the application. *Smith* v. *Dickinson, et al.* (Wetmore, J., 1895), p. 332.

16. Attachment of Debts—*Garnishee Paying into Court—Various Courses open to a Garnishee Considered.*]—A garnishee who pays money into Court must pay in the amount of his whole indebtedness to the defendant. The form of judgment and execution against a garnishee who does not admit the amount of his liability is to levy the debt due from the garnishee to the principal debtor or so much thereof as will satisfy the judgment

against the principal debtor. *Calder* v. *Micklejohn and Union Bank*, Garnishee. (Wetmore, J., 1896), p. 407.

17. Practice — *Service of Writ of Summons—Setting Aside — Foreign Corporation—Agent.*]—Where a writ of summons was served within the jurisdiction on an agent of a foreign corporation, and it appeared that the agent was not resident in the Territories, but was there temporarily, and doing business of a passing character, such service and a judgment signed thereon were, *hesitante*, set aside with costs. *Mitchell* v. *The Ontario Wind, Engine & Pump Co.* (Wetmore, J., 1898), p. 468.

18. Practice—*Security for Costs — Affidavit — Power of Judge to Examine Record — Discretion — Merits — Cross-examination.*] — On an application for security for costs the plaintiff objected that the application could not be made until appearance had been entered, and that as the affidavit filed did not state that such had been done, nor shew the state of the cause, the application should be dismissed, there being no power to enable the Judge to examine the record so as to ascertain in what stage the suit was.—*Held*, (1) Appearance is necessary.—(2) The state of the record should be disclosed by affidavit, but that.—(3) The Judge has discretionary power to examine the record.—Comments on the extent to which the merits of the case can be examined into on an application for security for costs. *Alloway et al.* v. *Hutchinson* (No. 1). (Wetmore, J., 1898), p. 471.

See ALIMONY, 1—COSTS—JUDGMENT—PLEADING, 1, 2—SMALL DEBT PROCEDURE—SOLICITOR, 1.

PRE-EMPTION.

See ASSESSMENT AND TAXATION, 6.

PREFERENTIAL ASSIGNMENTS.

See ASSIGNMENTS AND PREFERENCES.

PRELIMINARY INQUIRY.

See CRIMINAL LAW, 3.

PRESSURE.

See ASSIGNMENTS AND PREFERENCES, 1, 2, 3.

PRIVILEGE.

1. Interpleader—*Chattel Mortgage—Bona Fides—Production of Books—Solicitor and Client—Privilege—Form of Order for Production.*]—On an interpleader issue between an execution creditor and a chattel mortgagee, where the chattel mortgage has been taken to an advocate to secure his client's indebtedness to him for professional services, the books and papers of the advocate are not privileged from production so far as they are required to shew the propriety and amount of the charges made. *Smith* v. *McKay*. (Court en banc, 1898), p. 102.

PRODUCTION.

Order for. *See* PRIVILEGE, 1.

QUO WARRANTO.

See MUNICIPAL LAW, 1—SCHOOL TRUSTEE, 1.

RATEPAYER.

See SCHOOL TRUSTEE, 1.

RECOGNIZANCE.

1. Estreat of Bail — *Discharge of Forfeited Recognizance — Jurisdiction of Single Judge—Appeal—Criminal Code, s. 922.*] — An application to discharge a recognizance of bail forfeited by reason of the non-appearance of a prisoner is a civil, not a criminal proceeding.—A single Judge has no power to make an order discharging such a recognizance except upon the ground that the non-appearance was justifiable. Applications on any other grounds must be made to the Court en banc. *Re McArthur's Bail.* (Court en banc, 1897), p. 37.

See CONVICTION, 3.

RECORD.

Power of Judge to Examine. *See* PRACTICE, 18.

REGISTRAR.

Reference by to Judge. *See* HOMESTEAD, 1, 2.

REPLEVIN.

See PRACTICE, 2, 11, 12.

RES ADJUDICATA.

See CONVICTION, 2.

SALE OF GOODS.

1. Sale of Goods — *Warranty of Soundness—Failure of Warranty—Conditional Sale — Return of Goods — Distinction between Remedies of Buyer under Conditional Sale and under Absolute Sale—Counterclaim — Damages —Costs.*]—Defendant had given plaintiff a note in payment for a mare sold by plaintiff to the defendant with a warranty of soundness. The sale was a conditional one, the note providing that the property in the mare should remain in the plaintiff until the note or any renewal thereof was paid. After getting possession, the defendant immediately discovered that the mare was unsound, and at once took the mare to the plaintiff, pointed out such unsoundness, and asked plaintiff to take the mare back and return the note. The plaintiff refused. The defendant thereupon housed and fed the mare until a sale could be arranged, and sold the mare at auction for the best price obtainable.—On an action by the plaintiff against the defendant for the amount of the note, it was *held*, (1) That although the sale was not an absolute one so as to enable the defendant to maintain an action against the plaintiff for breach of warranty, the defendant could nevertheless set up such breach by way of counterclaim to the plaintiff's action against him on the note.—(2) That the defendant having acted promptly was entitled to reject the mare and return her to the plaintiff.—(3) That the plaintiff, having refused to accept the mare back when he ought to have done so, had waived his right to take possession and had clothed the defendant with the absolute property in the mare if the defendant had chosen to exercise such right.—(4) That the plaintiff, having refused to take the mare back when he ought so to have done, the defendant was justified in selling her.—(5) That the defendant was entitled to damages in a sum equal to the amount of the difference between the price for which the defendant purchased the mare and her real value, and also to a reasonable sum for her keep, and the expenses attending the sale. *Hogg* v. *Park*. (Wetmore, J., 1893), p. 171.

2. Lien Note—*Repossession and Resale of Goods—Right to Sue for Balance.*]—Where a lien note contained a provision for repossession and resale, "the proceeds thereof to be applied upon the amount unpaid of the purchase price," it was held that the note was not rescinded by repossessing and reselling the machinery for which the note was given. *Harris* v. *Cummings*. (Wetmore, J., 1893), p. 189.

3. Sale of Goods—*Appropriation of to the Contract—Destruction of Goods.*]—The defendant bargained with the plaintiff to put up in stack for the defendant twenty-five tons of prairie hay. After the hay was put up the defendant paid plaintiff $10 on account, and defendant wrote out and plaintiff signed the following receipt:—"Sept. 30th, '93,—Received of G. C. Warren the sum of ten dollars ($10) as part payment for twenty-five tons of hay bought by him from me this summer. I agree to fireguard and fence it, making it free from all danger until G. C. Warren shall have drawn it to his farm next winter, when G. C. Warren is to pay me the balance, viz., forty-two dollars. E. J. Hunt."—*Held*, that the right of property in the hay had become vested in the defendant, and that the plaintiff could recover the purchase price notwithstanding that the hay was burned before delivery. *Hunt* v. *Warren*. (Wetmore, J., 1894), p. 246.

4. Sale of Goods—*Warranty of Title —False Representation—Return of Goods —Promissory Note — Consideration.*]—Where an article is sold with a warranty of title, and a promissory note is given for the price of such article, and the warranty fails, the buyer may, upon discovering the want of title, *forthwith* ten-

der the article back and resist payment of the note on the ground that it was given upon a consideration that failed. *Broad* v. *Nickle et al.* (Wetmore, J., 1896), p. 382.

SALE OF LAND FOR TAXES.

See ASSESSMENT AND TAXATION, 4.

SCHOOL DISTRICT.

See ASSESSMENT AND TAXATION.

SCHOOL TRUSTEE.

1. School Ordinance, 1896, s. 28 —"*Resident Ratepayer*"—*School Trustee—Quo Warranto.*]—At a meeting for the election of school trustee two candidates were put in nomination. After the close of the nominations one of the electors asked the returning officer to declare one of the candidates elected on the ground that one of the two electors by whom the other was nominated was not a resident elector. The chairman refused the request, and at the election which followed the candidate objected to received a majority, and was declared elected. It appeared that the nominating elector objected to owned a half section within the school district, but that his residence and farm buildings were on other property separated from the half section by a road allowance, the whole, however, being worked as one farm.—*Held*, by RICHARDSON and WETMORE, JJ., that leave to file an information in the nature of a *quo warranto* should be granted.—*Held*, by ROULEAU and SCOTT, JJ., that in view of the action of the applicant in not calling attention to the disqualification of one of the nominating electors until too late to remedy the irregularity, and in view of the fact that no injustice or inconvenience had been caused, or any result followed different from what would have followed the fullest compliance with the law, the leave should not be granted.—*Semble*, by the Court, that the nominating elector objected to was not a resident of the district. *The Queen ex rel. Thompson* v. *Dinnin.* (Court en banc, 1898), p. 112.

See ASSESSMENT AND TAXATION.

SET-OFF.

See ASSIGNMENTS AND PREFERENCES, 1—PRACTICE, 7.

SETTING ASIDE.

See ASSIGNMENTS AND PREFERENCES, 2—JUDGMENT, 1, 2, 4, 5—PRACTICE.

SHERIFF.

See COMPANY, 1—CONVERSION, 1—COSTS, 1—SOLICITOR, 3—WINDING-UP ACT, 1.

SMALL DEBT PROCEDURE.

1. Small Debt Procedure—*Protest Fees—Demand for Debt.*]—Protest fees are recoverable under the Small Debt Procedure, as a liquidated demand. *Cavanagh* v. *Gilroy.* (Wetmore, J., 1895), p. 300.

See SOLICITOR, 3.

SOLICITOR.

1. Legal Profession—*Ordinance No. 9 of 1895, s. 15—Principal and Agent—Privity between Client and Agent — Grounds of Application in Summons—Practice as to Striking Advocates off the Rolls.*]—The client has a *locus standi* to apply to strike off the rolls agents of his advocates by whom monies have been collected and who fail to pay them over, and the affidavit of the principal is sufficient evidence of non-payment without any affidavit from the client. — The partner of an advocate who has failed to remit monies will not be struck off where he has not himself been guilty of misconduct.—Statement of the practice to be followed in case of applications to strike advocates off the rolls for non-payment of monies. *Re Harris and Burne.* (Court en banc, 1897), p. 70.

2. Legal Profession Ordinance — *Advocate Undertaking to Repay — Failure to Repay—Application to Suspend—Attachment.*] — Where costs have been paid to an advocate upon his undertak-

ing to repay them in the event of the ultimate success of the party by whom the payment is made, no order can be made against him under the summary punitive jurisdiction of the Court until after the advocate has made default in complying with a special order to repay by which a time is set for repayment. *In re Harris* (No. 2). (Court en banc, 1898), p. 105.

3. Garnishee—*Charging Order—Solicitor's Lien for Costs—Creditors' Relief Ordinance — Solicitor and Client Costs under Small Debt Procedure.*]—Seizure by the sheriff of sufficient goods to satisfy an execution does not operate as a satisfaction of the judgment under the Creditors Relief Ordinance. — An advocate's lien for costs takes priority over a garnishee summons, although the garnishee summons be served before any charging order is applied for. An advocate is, in the absence of special agreement to the contrary, entitled as against his client to recover for his services under the Small Debt Procedure the fees taxable by the general tariff. *Union Bank* v. *Stewart and Smith & Brigham*, Garnishees. (Wetmore, J., 1895), p. 342.

4. Advocate—*Attachment—Judgment Obtained in Ordinary Suit—Effect of—Discipline — Judicature Ordinance — Interpretation.*]—An order to imprison an advocate cannot be granted for non-payment of money under a judgment or order obtained in an ordinary suit in the Court, but disciplinary jurisdiction of the Court must be resorted to for such a purpose. — The Judicature Ordinance providing for the issue of a "writ of committal" to enforce a judgment, and the notice of motion having asked for the issue of a "writ of atachment," the motion was refused.—Comments on the construction to be given the various Judicature Ordinances. *Calvert* v. *Forbes* (No. 5). (Wetmore, J., 1896), p. 353.

See ALIMONY, 1 — COSTS, 4, 5, 6 — CRIMINAL LAW, 5—PRIVILEGE, 1.

STATED CASE.

See CONVICTION, 2.

STRIKING OUT.

See PRACTICE, 1, 7 — JUDGMENT, 3 — PLEADING, 2.

SUMMARY JUDGMENT.

See JUDGMENT.

TENANCY.

See LANDLORD AND TENANT, 1, 2—FRAUD ON CREDITORS, 1.

TERRITORIES REAL PROPERTY ACT.

See HOMESTEAD, 1, 2.

THEFT.

See CRIMINAL LAW, 4, 5.

TIME.

See ASSESSMENT AND TAXATION, 2 — BILLS, NOTES AND CHEQUES, 1 — BUILDING CONTRACT, 2—COSTS, 1, 10—JUDGMENT, 1, 5—PRACTICE, 9, 10.

TITLE, WARRANTY OF.

See SALE OF GOODS, 4.

TRESPASS.

1. Trespass — *Distress—Fences — Ordinance No. 26 of 1891-92 Discussed—Damages — Unlawful Detention—Estray —Care of.*]—Domestic animals are not liable to be distrained *damage feasant* in the absence of a lawful fence surrounding the property damaged, but if an estray comes upon a person's premises, although not lawfully fenced, and commits damage or becomes troublesome, the owner of the premises has the right to tie such animal up and retain possession until the costs of keep are paid, which costs would include the trouble to which the owner of the premises was put.—*Held*, further, that an owner of premises tieing up an estray is bound to properly care for, feed and water the estray. *Bolton* v. *McDonald* (Wetmore, J., 1894), p. 269.

See FIXTURES, 1.

ULTRA VIRES.

1. Interpleader—*Husband and Wife—Ordinance No. 20 of 1890.*] — Ordinance No. 20 of 1890, is *intra vires* of the legislative assembly. *Re Claxton*, considered. *Turner* v. *Harris*. (Wetmore, J., 1894), p. 280.

WAGES.

See MASTER AND SERVANT, 1, 2.

WARRANTY.

See SALE OF GOODS, 1, 4.

WINDING-UP ACT.

1. Winding-up Act — *Seizure by Sheriff—Chamber Summons by Liquidator for Possession — Jurisdiction.*]—A Judge in Chambers has no jurisdiction to order a sheriff to give up to a liquidator under The Winding-up Act, possession of goods and chattels seized under execution prior to the making of the winding-up order. *Merchants Bank* v. *Roche Percee Coal Co.* (Wetmore, J., 1897), p. 463.

WITNESS FEES.

See COSTS, 6, 8.

WORDS AND PHRASES.

"Assessment." *See* ASSESSMENT AND TAXATION, 3.
"Assignment or transfer." *See* HOMESTEAD, 1, 2.
"Extenuating circumstances." *See* COSTS, 10.
"For the herding season." *See* MASTER AND SERVANT, 1.
"Forthwith." See COSTS, 10.
"Income." *See* ASSESSMENT AND TAXATION, 4.
"Occupant." *See* ASSESSMENT AND TAXATION, 6.
"Person in authority." *See* CRIMINAL LAW, 1.
"Resident ratepayer." *See* SCHOOL TRUSTEE, 1.
"Security for money." *See* COMPANY, 1.
"Situated." *See* ASSESSMENT AND TAXATION, 1.
"Special circumstances." *See* COSTS, 1.
"Without prejudice." *See* COSTS, 6.

WRIT OF SUMMONS.

See JUDGMENT, 4—PRACTICE, 4, 15, 17.