THE

MANITOBA REPORTS,

VOLUME IX.

CONTAINING

REPORTS OF CASES DECIDED IN THE COURT OF QUEEN'S BENCH

FOR

MANITOBA.

2922

WITH A TABLE OF THE CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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JUDGES

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DURING THE PERIOD OF THESE REPORTS.

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HON. JOSEPH DUBUC, J.

HON. ALBERT CLEMENTS KILLAM, J.

HON. JOHN FARQUHAR BAIN, J.

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ERRATA.

Page 43.—In the fourth line of head-note after "and" insert "defendant."
Page 399.—Line 27, for "Ed" read "Eden."
Page 442.—Line 24, for "Whitney" read "Whiting."
Page 500.—Line 3, for "1 M.R." read "2 M.R."
Page 583.—Last line, for "Browning" read "Brownrigg."
Page 606.—Line 28, for "Roach v. Roach" read "Roche v. Roche."

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REPORTS OF CASES

DECIDED IN

The Court of Queen's Bench for Manitoba.

CHARLEBOIS v. THE GREAT NORTH WEST CENTRAL RAILWAY COMPANY.

Before BAIN, J.

Railway Company—Lien on railway, equipment and land grant—Power of Company to grant—Parties.

The plaintiff's bill alleged that the defendant company was a duly incorporated company, with its head office at Ottawa, Ontario; that the plaintiff entered into an agreement with the defendant company, to build and equip fifty miles of the railway in Manitoba for £200,000, which the company agreed to pay him; that he built and equipped the fifty miles of the railway according to the terms of the agreement; that under the terms of the agreement he was entitled to a lien on and to hold possession of the fifty miles of the railway and the franchise, rolling stock, land grant, &c., as security for the amount due him and that in September, 1891, there was due him over $600,000. It also alleged that he obtained a judgment by consent in Ontario, by which it was declared that he had a lien on the railway, land grant, &c. for $622,226, and it was ordered that the defendant company should within six months, pay the said sum with interest; that the judgment also declared, at the request of plaintiff, that certain specified amounts of the said sum should be paid to certain named third parties, and the fund was charged with these payments as a first charge; that the defendant made default in payment, and the plaintiff obtained a second judgment in Ontario to enforce the first judgment; that by this judgment, it was ordered the company should pay the $622,226, and should forthwith deliver up possession of the railway, land grant, &c. to the plaintiff, and the company was perpetually restrained from selling or negotiating the bonds of the company, making and issuing bonds, and from dealing with the land grant. The bill prayed amongst other things that the company be ordered to pay the $622,226 and interest, and forthwith to deliver possession of the said railway, rolling stock, &c., and that it be restrained from interfering with the plaintiff in his posses-

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sion thereof, and also that the company be restrained from alienating or encumbering the railway, land grant, &c., and from issuing bonds &c. The defendant company demurred to so much of the bill as sought payment of the money to persons other than the plaintiff, and to so much of the bill as sought to obtain an order for delivery of the possession of the railway &c., on the ground these third persons were necessary parties to the suit. It also demurred for want of equity to so much of the bill as sought to restrain the defendants from alienating or otherwise disposing of the railway, land grant, rolling stock, &c.

Held, that at this stage of the proceedings, the third parties did not appear to be necessary parties, and that if it should prove to be necessary at the hearing, a decree could be made saving their rights.

Held, *also*, that the clause in the contract giving the plaintiff a lien and first charge on the fifty miles of railway, land grant, rolling stock, &c., until he was paid, was *intra vires*. A railway company has a general power to give securities for purposes within the scope of the power conferred upon the company to construct and operate the railway, unless this power is expressly negatived in the Act of Incorporation, and express power to borrow and give specified securities, will not exclude the general power.

Bickford v. *Grand Junction Railway Company*, 1 S. C. R. 696, followed.

ARGUED: 22nd June, 1892.
DECIDED: 2nd July, 1892.

Statement.

THE plaintiff's bill alleged that the defendants were a duly incorporated Company, with its head office at Ottawa, in the Province of Ontario, and the chief officers of the Company resided in Ontario; that the Company entered into an agreement with Her Majesty the Queen, to build and equip and put in operation a line of railway from a point near Brandon, in this Province, to Battleford, in the North West Territories, and that in consideration of the performance of the agreement by the Company, Her Majesty agreed to give to the Company a grant of 6,400 acres for each mile of the railway built and equipped; that on the 16th of September, 1889, by an agreement made between the plaintiff and the Company, the plaintiff agreed to build and equip the first fifty miles of the railway, beginning at or near Brandon, for the sum of £200,000, which the Company agreed to pay him. It was alleged that the plaintiff built and completed the said fifty miles according to the terms of the agreement, and that under the terms of

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the agreement he became entitled to a lien on, and to hold the railway and the franchise, rolling stock, land grant, &c., as security for the payment of the amount due him for his work, and that in September, 1891, there was due by the Company to the plaintiff for his work, a sum exceeding $600,000. That in September, 1891, the plaintiff recovered a judgment against the Company in the High Court of Justice in Ontario, by the consent of the defendants, by which judgment it was declared that the plaintiff had a lien on the railway, land grant, &c., for the sum of $622,-226, and it was ordered that the defendants should within six months pay the said sum with interest. The judgment declared that, at the request of the plaintiff, certain specified amounts of the said sum were to be paid to certain named third parties, and the fund was charged with these payments as a first charge, and the judgment recited or declared that these third parties accepted the provisions of the judgment in full of all other liens then claimed by them. The second charge on the fund was the sum of $380,397 in favor of the plaintiff, and the remaining charge was $130,000, to be paid to D. McMichael, as trustee, in full satisfaction of all claims under a certain specified agreement. The judgment further ordered that in default of such payments or any of them, the plaintiff might proceed to exercise all his rights or charges against the railway, &c., his rights being those of a mortgagee with judgment for sale, and that until default, the defendants should have possession of the railway, subject to the plaintiff's lien or charge, and subject to his right to have possession upon default. The bill went on to allege that the plaintiff, pursuant to the judgment, delivered up possession of the railway, &c., to the defendants, and that they by their servants and workmen, had been in possession ever since, that the Company had made default in the performance of the terms and conditions of the said judgment, and had not paid the plaintiff the $622,226 found due by the said judgment. That after the Company had made default, the plaintiff, on the 29th of February, 1892, obtain-

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ed a second judgment in the Court in Ontario for the purpose of enforcing the first judgment; that by this judgment it was ordered that the Company should forthwith pay the sum of $622,226, and should forthwith deliver up possession of the railway, land grant, &c., to the plaintiff, and all the Company's rights thereto, and the Company were perpetually restrained from selling or negotiating the bonds of the Company, and from making and issuing bonds, and from dealing with the land grant, and from exercising any acts of possession or ownership over the railway, &c., and from interfering with the plaintiff in the possession and control thereof. The bill then set out that the Company had not paid the amount directed by the second judgment, and that they had refused to deliver up the possession of the railway, &c. to the plaintiff, and that the plaintiff feared that the Company might, unless they were restrained in this Province, proceed to dispose of or encumber the railway and the rolling stock to innocent holders for value without notice.

The bill therefore prayed: (1) That the Company might be ordered to pay the $622,226 and interest as found due by the said judgments. (2) That the Company be ordered orthwith to deliver possession of the said railway, rolling stock, &c., and that they be restrained from interfering with the plaintiff in his possession thereof. (3) That the Company be restrained from alienating or encumbering the railway, land grant, &c., and from issuing bonds, &c. (4) That the Company might be ordered to specifically perform and carry into effect the terms and conditions imposed upon the Company by the two judgments of the Ontario Court. (5) And for further and other relief.

The defendants demurred to so much of the bill as sought payment of the money directed by the judgments to be paid to persons other than the plaintiff, and to so much of the bill as sought to obtain an order for the delivery of the possession of the railway, &c., to the plaintiff, on the ground that these third persons mentioned in the judgment were necessary parties to the suit. They also demurred for want of

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equity to so much of the bill as sought to restrain the defendants from alienating or otherwise disposing of the railway, rolling stock, land grant, &c. There was further a demurrer for want of equity to the whole bill, except so much of it as sought to recover payment of the money ordered by the said judgment to be paid to the plaintiff, and lastly, there was a demurrer to the whole bill for want of equity and for want of parties.

W. H. Culver, Q.C. and *C. W. Bradshaw* for defendant. The defendant Company was incorporated under an order in Council, and its charter was confirmed by an Act of the Parliament of Canada passed in the 21st year of Her Majesty's Reign, chaptered 85. Clause 9 gives power to Company to make provision for payment to contractors in paid up stock. Clause 11 makes provision for selling Company, and mortgaging the land grant for the purpose of raising money for the prosecution of the undertaking. Clause 14 provides for issuing bonds for the purpose of raising money for prosecuting the undertaking, and securing the repayment of said bonds by mortgage deed. This clause practically the same as section 94 of the Railway Act. Clause 22 provides for the Company entering into an agreement with any other company for the use, or practical use of the railway. No permission anywhere for leasing it to an individual. By section 1 of the charter, the Railway Act is incorporated with it. Under section 31 of the Act, every Company incorporated under a special Act is vested with powers in Railway Act. Sections 93, 94 and 95, provide for the Company's power to borrow money. Section 227 provides that no company shall levy or collect any money for services as a common carrier except subject to the provisions of the Railway Act. Section 278 provides for sale of railway to purchaser not having corporate powers. The defendant Company contends that railways and other companys governed by special Acts of Parliament conferring upon them rights and privileges, which they would not otherwise enjoy,

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cannot delegate or transfer these rights and privileges to other persons. *Lindley on Companies*, pages 202 and 207.

It is settled law that in the absence of express power so to do, one railway company cannot lease its line to another, and exclude itself from using it. *Winch* v. *Birkenhead Ry. Co.*, 5 De. G. & Sm. 562; *Shrewsbury & Birmingham Ry. Co.* v. *North Western Ry. Co.*, 6 H. L. C. 113; *Hodges on Rys.*, 7th ed., page 50; also at pages 54, 65, 124 & 130; *Shelford on Rys.*, Vol. 2 p. 665; *Redfield on Rys.*, Vol. 1 p. 617. The defendant Company therefor contends that neither under its charter or the provisions of the Act, had it any power to give a lien on the Railway, and its undertaking, to the plaintiff as alleged by the bill, and that the alleged lien is void as being contrary to public policy, and *ultra vires*. The only provision for an individual operating a railway is section 278 of Railway Act, and the plaintiff cannot be deemed to be a purchaser within this section. Unless there is power to dispose of surplus lands, this cannot be done. *Hodges*, page 349. There cannot be a sale of the land on which a railway is constructed, without the sale of the entire undertaking. *Re Bagnalstown & Wexford Ry. Co.*, 16 L. T. N. S. 616. The contract in question relates only to the first fifty miles, and it is submitted that a lien on a portion of the road is void. In *Attorney General* v. *Great Eastern Ry.*, 5 App. Cas. 473, it is laid down that in an Act granting special power, what is not permitted is prohibited. As the charter of the defendant company expressly provides for payment to contractors in paid up stock, and there is no provision for giving the contractor a lien on the road, it is submitted the alleged lien is *ultra vires* and void, and if *ultra vires* cannot be ratified. *Redfield on Rys.*, Vol. 1, p. 617. The lands in question are not in Ontario, and the Ontario Court could act only *in personam*; *Piggott* on *Foreign Judgments*, 249: *Norris* v. *Chambres*, 3 D. F. & J. 584; *Re City of Mecca*, 6 Prob. Div. 107; *Penn* v. *Baltimore*, 2 White and Tudor, 5th ed. 939. The plaintiff is in no better position with the judgment than with his contract. What

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is meant by asking that the judgments may be specifically performed? This Court cannot declare specific performance of these judgments. There is nothing to shew where lands are, nor is there any presumption that they are in Manitoba; *Burns* v. *Davidson*, 21 O. R. 547. This Court cannot exercise any jurisdiction in respect of land grant, as it is not in Manitoba. All parties must be before the Court; *Hodges*, p. 125. All the parties mentioned in the Ontario judgment should have been made parties. They have charges on the fund.

H. M. Howell, Q.C. and *T. D. Cumberland* for plaintiffs. We admit that a demurrer may be to part of bill or to parts separately, but there cannot be two demurrers to any one part. This demurrer is, as to a portion, for want of parties and is too broad. *Lewis' Equitable Draftsman*, 253. A demurrer bad in part is bad wholly. The agreement is that the plaintiff was to have possession, and the other parties have nothing to do with this; the plaintiff was to act as their trustee, and so represents them, so the others are not necessary parties. We are entitled to payment of what we are adjudged by the judgment, and at all events on this ground the bill is good; *Watson* v. *Hawkins*, 24 W. R. 884. The partial demurrers do not sufficiently point out the parts of the bill objected to; *Barnes* v. *Taylor*, 4 W. R. 577. The Ontario cases followed the early English cases, but the Dominion statute allows us to sell a railway now, and the purchaser has certain rights. *Redfield* v. *Wickham*, 13 App. Cas. 467, shews that under a *fi. fa.* a railway can be seized and sold by the Dominion statute, and in this respect section 278 changes the policy of the law. It is startling to be told this agreement is *ultra vires* as it is one of the usual agreements entered into for the building of a railway. It is not foreign to the purpose of the Company to make a contract to build it, or to take lawful means to give security on its property. At common law, according to *Lindley*, any Company can alienate its property. In *Winnipeg and Hudson's Bay Railway Co.*

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v. *Mann*, 7 M. R. 81, this Court held that *Bickford* v. *Grand Junction Railway Company*, 1 S. C. R. 796, was binding, and the Company has power to make such an agreement. The plaintiff contends that the contract was *ultra vires*, and he was to have and hold possession of road. The judgment in Ontario binds the personal property in any event, and we must succeed as to this. This would dispose of the demurrer, as the plaintiff is, in any event, entitled to this possession. The first judgment was equivalent to a contract. It was a consent judgment, and equal to contract; *Conolan* v. *Leyland*, 27 Ch. D. 637; *Seton on Decrees*, 3rd ed. 1120; *Re West Devon Great Consols Mine*, 38 Ch. D. 51. We allege the amount is due under the contract, section 17 of bill, and so on the basis of the contract the plaintiff must succeed. The Ontario judgment is a decree for restitution of personal property as well as for real, and so the demurrer must be over-ruled. We were entitled to possession of personal property under contract, and gave it up under arrangement in first judgment, and this not being carried out we are now entitled to be put again in possession. The law of the *forum* may not perhaps bind real estate out of the jurisdiction, but it will compel parties to comply with their contracts; *Houlditch* v. *Marquess of Donegall*, 2 C. & F. 470; *Sutphen* v. *Fowler*, 9 Paige, N. Y. Ch. 282; *Watts* v. *Waddle*, 31 U. S. R. 401; *Massie* v. *Watts*, 10 U. S. R. 157; *Piggott*, p. 143; *Companhia de Mocambique* v. *British South Africa Co.* [1892], 2 Q. B. 358. Between States such decrees will be enforced; *Burnley* v. *Stevenson*, 24 Ohio St. 474; *Hanley* v. *Donoghue*, 116 U. S. R. 4; *Paget* v. *Ede*, L. R. 18 Eq. 124. *Norris* v. *Chambres*, 29 Beav. 246, upholds *Penn v. Baltimore*, 1 Ves. Senr. 444. As to parties—*Barned's Banking Co.* v. *Reynolds*, 36 U. C. R. 256; *Alivon* v. *Furnival*, 4 Tyr. 751; *Agacio* v. *Forbes*, 14 Moore P. C. 170; *Dicey on Parties*, p. 183. We are entitled to relief prayed in the third prayer. This comes in under the contract, and the judgment of the Court below asserts this. If we can get this decree, we register the

decree. No demurrer to the fourth prayer. Such a case as this should not be disposed of on demurrer; *Sheffield Waterworks* v. *Yeomans*, L. R. 2 Ch. 8; *Hope* v. *Hope*, 22 Beav. 366; *Cochrane* v. *Willis*, 9 L. T. N. S. 792. 1892. Argument.

BAIN, J.—The general demurrer to the whole bill for want of equity and for want of parties must be overruled, because the plaintiff would be entitled at all events to a decree for the payment of the amount due by the defendants to the plaintiff, and which by the judgments in the Ontario Court, the defendants were ordered to pay to himself personally.

There is nothing in the bill to shew that any of the third parties mentioned in the judgment are entitled to a lien on the railway, &c., and I think that the demurrer as to the part of the bill that asks for an order for the delivery of the railway to the plaintiff, because these third parties are not made parties,, must also be overruled.

These third parties do not seem to have been parties to the suit in the Ontario Court, and it appears to have been at the request of the plaintiff that the order or judgment directed that a portion of the moneys due from the defendants to the plaintiff, should be paid to them. It does not appear that there is any privity between them and the defendants, and as they are concurrently interested with the plaintiff, I am inclined to think that it cannot be said at this stage of the proceedings that they are necessary parties to the suit. Should it appear to be necessary at the hearing, a decree could be made saving their rights.

The main contention of the defendants is, that the clause in the contract between the plaintiff and the defendants, set out in paragraph 6 of the bill, by which the plaintiff is given a full and complete lien and first charge over the fifty miles of railway equipment and land grant, and the undertaking generally, until he is paid the sum specified, is *ultra vires* and void, and that, therefore, neither this clause nor the judgments in the Ontario Court give the plaintiff any equity to ask for an order for the delivery of

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possession of the road or for restraining the defendants from alienating or encumbering it.

The defendants are incorporated as a railway company under an Act of Parliament, and the law is clear, that, as Lord Blackburn said in *Attorney General* v. *Great Eastern R'y Co.*, 5 App. Cas. 473, where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what is not expressly or impliedly authorized by the Act is to be taken to be prohibited. Neither the special Act incorporating the defendants, nor the Railway Act, expressly authorizes such an agreement as we find here, and unless it is impliedly authorized by one or other of these Acts, it will be *ultra vires*.

It seems to be settled in England that, under the Acts in force there, a railway company cannot mortgage or charge the permanent way or fixed plant or franchise so as to give the mortgagee the right to enter upon the property or otherwise to interfere with the Company's possession. In *Redfield* v. *Wickham*, 13 App. Cas. 467, Lord Watson said that the cases of *Gardner* v. *London C. & D. R'y Co.*, L. R. 2 Ch. 201, and *In Re Bishop's Waltham R'y Co.*, L. R. 2 Ch. 382, conclusively establish that, in England, the undertaking of a railway company duly sanctioned by the Legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the Company; and the reason of this rule he states to be, that Parliament has made no provision for the transfer of the statutory powers and duties from a railway company to any other person, and that it would be contrary to the policy of the Legislature to permit creditors to issue executions which would have the effect of destroying the undertaking. The cases cited by Mr. Culver shew that the Ontario Courts have taken the same view of the policy of the law and have held that the lands and property of a railway company cannot be sold under execution, and that the only remedy open to a mortgagee is in the appointment of a receiver. *Peto* v. *Welland R'y Co.*, 9 Gr. 455;

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Phelps v. *St. Catharines R'y Co.*, 18 O. R. 581; 19 O. R. 501. Relying on these cases it was urged that if the policy of the law will not allow a mortgagee to take possession of a railway, neither will it allow possession to be taken by the plaintiff under such an agreement as is set out in the bill. But the defendants have overlooked the fact that the policy of the Canadian law in this respect has been declared by the Judicial Committee in the above case to be different from that of the English law, and that section 278 of the Railway Act has recognized that, as Lord Watson said, "A railway or section of a railway, may, as an integer, be taken in execution and sold like other *immeubles* in ordinary course of law." This section shews also that the railway may be purchased by a private individual, who, under the provisions of the section, may operate the road.

But this section 278 applies only to cases where the road is sold under a mortgage or charge authorized by law, and only indirectly affects the question under consideration. *Bickford* v. *Grand Junction Railway Co.*, 1 S. C. R. 696, is more directly in point. In this case the Railway Company executed a mortgage on part of their railway to secure the payment of the price of the iron rails required for the undertaking, and the mortgage was held to be invalid by the Court of Appeal in Ontario, because it was beyond the powers of the Company to create such a security. The Supreme Court held, however, that the mortgage was *intra vires* and valid. But I find that the provisions in the present Railway Act are materially different from those that were in the Railway Act in force when the *Bickford* case was decided, and I regret that I have not had the advantage of hearing this case discussed from the point of view of the defendants. Mr. Justice Strong delivered the judgment of the Supreme Court, and the considerations that led him to hold the mortgage to be valid, were the following: Every statutory company is to be held to possess the power of mortgaging its property, unless its incapacity to do so is expressly declared, or is to be im-

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plied, by the terms of the Act of Incorporation, and this incapacity may be deduced either from the object of the corporation being limited to certain specified objects, or from its property being subject to trusts in favour of the public, with which a mortgage would be inconsistent. The General Railway Act expressly authorized the company to borrow money and issue debentures and to mortgage the lands, tolls and other property of the company, for the payment of the loans and debentures, and it also gave the company power to acquire lands for the construction and maintenance of the company, and "to alienate, sell and dispose of the same." But the express power to borrow money and to give securities for the money so borrowed, did not exclude the general power of the company, incidental to its existence as a corporation, to deal with its property by way of mortgage, nor did this express power to borrow restrict the express powers given to alienate, sell or dispose of its land. He held, therefore, that the company had power to give the mortgage, provided it were given for an object within the scope of the company, and he held that it was given for such an object, because the iron for which the mortgage was given, was indispensible to enable the company to carry out its undertaking.

It is to be observed, however, that neither in the defendant's Act of Incorporation, nor in the present Railway Act, do we find a provision authorizing the Company to alienate, sell and dispose of the lands acquired by them for the construction of the road. By section 90, s-s. 6, of the Railway Act, they are authorized to acquire lands for the construction of the road, but the power to alienate and dispose of these lands is restricted to so much thereof as are not necessary for the purposes of the road. In so far, then, as the judgment in the Supreme Court proceeded on the general power the Company had to alienate and dispose of its lands, it is not applicable to the present case. Then, too, the powers of the present Company to borrow money and issue debentures are more restricted and more fully defined, both by the special Act and the Railway Act, than

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were the powers of the Grand Junction Co., and it may be that the two cases are distinguishable in this respect. However, the decision seems to go the length of holding that the express power to borrow and to give the securities specified, will not negative or exclude the general power the Company has to give other securities for purposes within the scope of the powers conferred upon the Company to construct and operate the railway, and although on this point the case goes further than any English case I have seen, it is not for me to question its authority.

It is not unusual, I understand, for railway companies to give contractors a lien or charge on the railway and undertaking, as security for the amount due them for building the road; and it is, perhaps, in the circumstances of this country, not contrary to the public interest that railway companies should be able to make such agreements. The Court in Ontario has assumed the agreement here to be valid, and as the authorities stand, I cannot undertake to say that it is not.

If the agreement for the lien is valid, then the plaintiff is entitled to some part, at any rate, of the relief he asks, and the second and third demurrers must be overruled.

It is to be remembered that, as Mr. Justice Strong points out, the single question that was before the Supreme Court in the *Bickford* case, was that of the validity of the mortgage, and the case decided nothing more than that the mortgage was not invalid, and the nature and extent of the mortgagee's remedies were in no way determined. The agreement here may not be invalid, but it does not follow that the plaintiff will be entitled to all the relief he asks for.

There is no demurrer limited only to the relief prayed for in the 4th prayer of the bill, *i. e.*, That the defendants may be ordered specifically to perform and carry into effect the terms and conditions imposed upon the defendants by the two judgments in the Ontario Court. The plaintiff and the chief officers of the defendants reside in Ontario; and, as the Master of the Rolls said in *Morris* v. *Chambres*, 30

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L. J. Ch. 285, the cases "establish that when a plaintiff in England has an equitable demand against the defendant, also residing here, this demand will be enforced by the Court here, not merely against the defendant personally, but, if the circumstances of the contract or dealing between the parties justify it, by a declaration of a lien against the property of the defendant out of the jurisdiction of the Court, and in some cases even by the appointment of a receiver. This is the full extent of the assertion of jurisdiction by this Court, and there is always the difficulty that the declaration and decree of this Court may be a mere *brutum fulmen* and incapable of being enforced against the defendant." On this principle the Courts in Ontario may have had jurisdiction to make the decree they did, but I know of no authority that would enable the plaintiff to require that this Court here should recognize and give effect to the orders of the Ontario Court in respect of the railway and land in Manitoba. A demurrer, however, must be taken as a whole, and if it appears that the plaintiff is entitled to any relief under the part of the bill demurred to, the demurrer must be overruled.

Demurrers overruled.

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FREEHOLD LOAN CO. v MCLEAN.

Before TAYLOR, C.J.

Mortgage suit—Mortgagees in possession—Commission on rents received by agent of mortgagees—Manifest error in Report—Costs.

A mortgagee cannot have any allowance for his personal care or trouble in receiving rents.

Where the property is at a distance, or where the circumstances are such that the mortgagee would, if himself the owner, employ a bailiff or collector, an allowance may be made.

The Master, in making his report, made an error in the calculation of interest, manifest on the face of it. Defendant gave notice of appeal, plaintiffs' solicitor on being served with the notice of appeal, having had his attention directed to the error, at once wrote offering to attend in chambers and consent to an order amending the report, but the appeal was proceeded with.

An order was made amending the report, without costs to either party.

ARGUED: 21st December, 1892.

DECIDED: 5th January, 1893.

Statement.

THE defendant appealed from a report made by the Master, under an order allowing an appeal from the original report made in the cause.

The facts sufficiently appear in the judgment.

W. Redford Mulock, Q.C., for plaintiffs.

C. W. Bradshaw, for defendants.

TAYLOR, C.J.—The appeal is upon two grounds. The first of these is that interest, for the six months from the date of the report until the day appointed for redemption has been allowed to the plaintiffs at twelve per cent while they are only entitled to six per cent. When the original report was made, the plaintiffs were allowed interest after the time at which their mortgage became payable at nine per cent, but on an appeal they were held to be entitled to six per cent., and a reference back to the Master was directed to reduce the allowance accordingly. That being so, it is impossible to conceive that the Master, taking the account

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under the order, intentionally and knowingly allowed twelve per cent. It is plainly an error, and how it occurred is easily seen. The principal is stated to be $4049.15, and the six months interest is given as $242.94. That is a years interest at six per cent, and evidently the Master computed the interest for a year, and then forgot to divide the sum by two. The solicitors were not present when the computation was made, and neither of them is responsible for the error. The plaintiffs' solicitor on being served with the notice of appeal, had his attention directed to it, and at once wrote offering to attend in Chambers, and consent to an order amending the report, but the appeal was proceeded with. The error is one which might very well have been corrected by an order in Chambers, *White* v. *Courtney*, 1 Ch. Ch. 11; *Watson* v. *Moore*, 1 Ch. Ch. 266.

The second ground of appeal, is that the Master when charging the plaintiffs with rents and profits received by them, deducted and allowed them a sum for the expenses of collecting these. This it is claimed was an improper allowance, and the defendants rely on passages in *Fisher on Mortgages*, and in *Coote* to the effect that a mortgagee in possession cannot have any allowance for collecting rents. Now it is quite true that a mortgagee cannot have any allowance for his personal care or trouble in receiving rents and it is said in *Fisher*, vol. 2, p. 953, to have been so laid down during the existence of the usury laws. In *Coote*, p. 743, it is said that the Courts fearful of opening a door to fraud and usury have imposed the restriction. And in *Stains* v. *Banks*, 9 Jur. N. S., 1049, Stuart, V. C. refused any allowance for collecting rents. But it is not an inflexible rule that no allowance can be made. As I understand, where the property is at a distance, or where the circumstances are such that the mortgagee would, if himself the owner, employ a bailiff or collector, an allowance may be made.

In the old case of *Bonithon* v. *Hockmore*, 1 Vern. 316, it was said that where a mortgagee or trustee manage the estate themselves, there is no allowance to be made them

for their care and pains; but if they employ a skilful bailiff and pay him, that must be allowed, for a man is not bound to be his own bailiff. So in *Godfrey* v. *Watkins*, 3 Atk. 517, Lord Hardwicke said that if the estate was so situated that the mortgagee must have employed a bailiff, if it had been his own, he shall then be allowed such sums as he has paid to a bailiff to receive the rents of the estate. See also *Davis* v. *Dendy*, 3 Mad. 170. In *Langstaffe* v. *Fenwick*, 10 Ves. 404, it seems to have been laid down by Sir W. Grant, as the general rule, that a mortgagee shall not charge for receiving the rents personally, though he may have a receiver at the expense of the mortgagor.

In *Carew* v. *Johnston*, 2 Sch. & Lef. 280, Lord Redesdale said, "A mortgagee is not entitled to receiver's fees for himself, he is if he pays a receiver." In the latest case I have found *Eyre* v. *Hughes*, 2 Ch. D. 148, commissions on receipt of rents stipulated for by a solicitor mortgagee, in a mortgage prepared by himself, and insisted upon as a condition of making further advances to his client were not allowed. But Bacon, V. C., after dealing with that question said, "All of which is consistent with the other principles recognized in similar cases, where the mortgagee entering into possession cannot receive the rents with his own hands and finds it necessary to employ a man for that purpose. That expenditure is allowed on the taking of the account, but that is only allowed because the mortgagee himself derives no personal benefit from the transaction."

That is the test; was it reasonable for the mortgagee to employ a receiver, and did he receive no benefit from the commission charged? If so, it is proper in taking the account to allow what was paid, to a reasonable amount.

In the present case there is no evidence upon the subject, except that in the affidavit of the plaintiffs' manager, there is a submission to account for rents received less five per cent. expenses of collecting them. It must be assumed that the Master was satisfied this was a proper allowance to make. The plaintiffs, a Company who can act only by agents, might not unreasonably employ a bailiff to collect

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the rents. Certainly there will be no reference back for such a trifling sum as $5.30.

The second ground of appeal is disallowed. As to the matter complained of in the first, there will be an order amending the report. There will be no costs to either party.

STOBART v. AXFORD.

Before TAYLOR, C.J.

Attachment of debts—Money in Bank on Trust account—Onus of proof where account a mixed one—What can be garnished.

Defendant F. A. was, at one time, carrying on business in partnership with his brother, and plaintiffs recovered a judgment against the firm. He was also a county court clerk, and acted as an agent for two Insurance companies and two Loan companies. In connection with these employments he opened an account in a bank which was styled, "Frederick Axford, trust," in which were deposited trust moneys or moneys representing trust moneys. Plaintiffs' judgment creditors, obtained an order garnishing the amount at the credit of the account, and then applied to have the money paid over to them. The evidence showed that F. A. drew out from this account moneys for his own purposes, or moneys to repay other trust moneys received by him before the opening of this account, which he had used.

Held, that the improper withdrawal by a trustee of moneys from a trust account, and the improper use by him of moneys so withdrawn, can never deprive other trust moneys lying at the credit of the account of their trust character.

Unless the money is money with which the debtor can deal as his own, it cannot be garnished.

Where the account is a mixed one, the *onus* is on the party seeking to attach it, to show that the money is the debtor's with which he can deal, and in the absence of proof that the account or so much of it is his, the money will be treated as all trust money.

In the absence of clear evidence that the balance on the account did not consist of trust moneys, it should be held to be so.

ARGUED: 16th January, 1893.
DECIDED: 20th February, 1893.

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Statement.

THE defendant Frederick Axford was at one time carrying on business in partnership with his brother, and the plaintiffs recovered a judgment against the firm. He was also a county court clerk, and acted as an agent for two Insurance companies and two Loan companies. In connection with these employments, he opened an account in the Imperial Bank at Winnipeg, which was styled, "Frederick Axford, Trust." The plaintiffs obtained, and served, an order garnishing the amount at the credit of this account, and then applied to have the money paid over to them. On the motion to pay over, the Bank appeared disclaiming any interest in the fund, but suggesting that it was not the money of the defendant, but of persons for whom he held it upon trust. Who these persons were the Bank was unable to say, but submitted that they sufficiently appeared from an affidavit made by the defendant and his cross-examination thereon. As these persons were numerous and serving them would have caused great expense, it was agreed upon before the Referee that such service should be dispensed with, and that the question should be argued as if they were before the Court by the Counsel who appeared for the defendant, and Judge Ryan, who held an assignment, made however after the service of the garnishing order.

The question was whether the amount was one liable to be garnished.

J. S. Ewart, Q.C., and *I. Pitblado*, for defendant. If an account is kept in which trust moneys and private moneys are mixed, then private moneys are drawn out, the residue will be treated as trust moneys if debtor owes trust money. A creditor can only attach that which the debtor can deal with. A creditor has no greater right than a debtor. *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238; *Re General Horticultural Co.*, 32 Ch. D. 512; *Campbell* v. *Gemmell*, 6 M. R. 355. It is not absolutely necessary to argue that the technical relation of trustee and *cestui que trust*, existed between Axford and *cestui que trustent*. Sufficient if fiduciary relation existed which would make it morally

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improper for Axford to deal with the money. Sufficient if the parties for whom money received could follow it, and as between them and Axford say the money is theirs; *Re Hallett's Estate*, 13 Ch. D. 696; *Frith* v. *Cartland*, 2 H. & M. 417; *Ex parte Cooke*, 4 Ch. D. 123; *Bodenham* v. *Hoskyns*, 2 D. M. & G. 902; *Pannell* v. *Hurley*, 2 Coll. 241; *Hancock* v. *Smith*, 41 Ch. D. 456. If all money in the bank belongs to persons to whom debtor stood in a fiduciary relation, that is sufficient though it cannot be shown how much belongs to this one and how much to that. As to the mixing of the moneys, Axford had a till with separate compartments. Trust moneys went into one; his own into another. In safe had them kept separate, also when sending moneys to Winnipeg, defendant got cheques from people in Glenboro, giving them trust moneys for these. But these in trust. *Pennel* v. *Deffell*, 4 D. M. & G. 372; *Re Goodfallow*, 19 O. R. 299; *Van Alen* v. *American National Bank*, 52 N. Y. 1; *National Bank* v. *Insurance Co.*, 104 U. S. R. 54. If an account be mixed, defendant is bound to show what is his, in the absence of proof all will be held to be trust money. The same *onus* on Stobart. Opening of account as trust account important; *Bodenham* v. *Hoskyns*, 2 D. M. & G. 903. Bank had no notice except from heading of the account; *Ex parte Kingston*, L. R. 6 Chan. 637.

H. M. Howell, Q.C., for plaintiffs. If the statement was, "In trust for A.B.," then the plaintiffs might meet with difficulty, but the entry is, "Fred. Axford trust," and on the next page, "Fred Axford, trust account." *Re Monkman & Gordon*, 3 M. R. 145. Where there is a wrongful conversion, then trust moneys can be followed, they cannot in a simple case of debts. There was no breach of trust here, simply defendant owed certain people some money.

TAYLOR, C.J.—There seems no doubt the account was opened for the purpose for which the defendant says it was opened. The defendant's books and accounts have been

kept in a confused and irregular way, so that it is exceedingly difficult to trace and identify sums of money received by him as trustee, with the amounts paid at different times into the Bank. There is also no doubt that the defendant drew out from this account, moneys for his own purposes, or rather perhaps money to repay other trust moneys received by him before the opening of this account, and which he had improperly used. But the improper withdrawal by a trustee of moneys from a trust account, and the improper use by him of moneys so withdrawn can never deprive other trust moneys, lying at the credit of the account, of their trust character.

Unless the money is money with which the debtor can deal as his own, it cannot be garnished; *Campbell* v. *Gemmell*, 6 M. R. 355; *Re General Horticultural Co.*. 32 Ch. D. 512; *Badeley* v. *The Consolidated Bank*, 38 Ch. D. 263. Where the account is a mixed one, the *onus* is on the party seeking to attach it to show that the money is the debtor's with which he can deal; and in the absence of proof that the account or so much of it is his, the money will be treated as all trust money, *Ex parte Kingston*, L. R. 6 Chan. 637. There can be no doubt the defendant opened the account for the purpose of depositing trust moneys, and that he did deposit there trust moneys, or moneys representing trust moneys. It is true he did not, in many cases, deposit the identical moneys he received, but his position and local circumstances must be kept in mind. The Bank at which the account was opened was in Winnipeg, and the defendant was living at a distance at Glenboro. He in many cases did not deposit the identical dollar bills or silver he had received, but with these he cashed the cheques of shop keepers in the neighbourhood, who had also accounts at banks in Winnipeg, and he then sent for deposit in the trust account, the cheques so received. Such a mode of dealing was a mutual convenience for him and for them. So, he was paying out moneys for the Ogilvie Milling Co., and on one occasion at least he used for that purpose some hundreds of dollars of the trust

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moneys in his hands, the Company covering that by a deposit in this trust account. From the fact that the cheques taken as already mentioned, seem sometimes to have been in excess of, and sometimes less than the exact amount of trust moneys then in hand, arises to some extent at least the difficulty in tracing and identifying deposits made, with the trust moneys they are said to represent.

There is undoubtedly confusion about the accounts, but it is plain and beyond all doubt, that the defendant received and held moneys for other people, moneys of which he was a trustee, that he opened this account for the purpose of depositing these moneys, and that he did deposit in this account moneys so received and held, or what represented these moneys. There is now a certain balance at the credit of that account, and the defendant undoubtedly owes the persons for whom he received and held moneys an amount larger than that balance. In the absence of clear evidence that the balance at that account does not consist of trust moneys, it should be held to be so. That seems the current of the modern authorities. *Ex parte Cooke*, 4 Ch. D. 123; *Re Hallett*, 13 Ch. D. 696, and *Hancock* v. *Smith*, 41 Ch. D. 456, may be referred to.

The present case is quite different from *Re Monkman & Gordon*, 3 M. R. 145. There, the person whose account was garnished, was not in any sense a trustee of the money lying to the credit of the account.

The motion to pay over the money should be refused with costs to be set off *pro tanto*, against the judgment the plaintiffs have recovered against the defendant. The Bank very properly did not appear on the motion after it had been referred by the Referee to a Judge. In the first instance, they had to appear, and should be allowed, say $5 for so appearing.

Motion refused with costs.

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RE FOULDS.

Before TAYLOR, C.J.

Infant—Habeas Corpus—Application by father for custody of child—Misconduct—Onus of establishing.

It is *prima facie* the right of a father to have the custody of his infant child, and the care of its education and bringing up.

The *onus* of proving him unfit for such a charge rests upon the person who seeks to take the child away, or to keep it away from him.

The Court is always unwilling to interfere with the common law rights of the father.

That the conduct of a husband is such that his wife cannot live happily with him, is not a sufficient cause for interfering with his right to the custody of the children.

ARGUED: 1st May, 1893.
DECIDED: 31st May, 1893.

THIS was an application by Henry Foulds to obtain the custody of his son William, a boy nine years of age. Jessie Foulds the wife of the applicant, mother of the infant, had since October, 1892, been living separate from her husband. In the month of December she went to her husband's house and took away the infant with other children, and he had ever since been with her and under her control in Winnipeg. Statement.

T. G. Mathers for the applicant.

N. F. Hagel, Q. C., for the respondent.

TAYLOR, C.J.—Numerous affidavits have been filed on both sides, and it is a painful thing to find a husband and wife who have been married twenty-four years, with nine children, seven girls and two boys, making such charges against one another.

In the affidavits filed on behalf of Mrs. Foulds, it is alleged that the applicant is a man of violent, passionate and uncontrolled temper, who has long kept his household in a state of great unhappiness by his conduct, language

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and threats. Three of the elder children, Alexander, Ellen Margaret and Alice Mary, make affidavits stating that they have left home on that account. As one of them puts it, "I could no longer stand or endure my father's language and temper to my mother, my brothers and sisters, and to myself, which was such as to keep, and did keep, our household in a continuous uproar, and state of turmoil, and often in a state of great fear." The affidavits of the other two are much to the same effect. Mrs. Foulds has made an affidavit in which she narrates a great deal of unkind and cruel usage of herself, on account of which she says she ceased to live at home. She speaks of two occasions on which she was assaulted by her husband, on one of them being, she says, severely beaten and bruised on her head and about her neck. Her statements as to these are corroborated by her son Alexander, and by Leplan, a servant man then working on the farm. The applicant admits that on one of these occasions he did strike her, under, as he alleges, great provocation, but he denies any such aggravated assault as she, and those who support her, swear to. The neighbour to whose house she went immediately after, has made an affidavit in which he says he remembers the occasion of her coming, and he did not observe on her any marks or other evidence that she had been assaulted or beaten, and he had ample opportunity of observing, and would have seen marks or bruises upon her head and neck, had there been any.

That the husband and wife have for some time lived unhappily together there seems no doubt, but that the conduct of a husband is such that his wife cannot live happily with him, has been held not a sufficient cause for interfering with his right to the custody of his children. As Lord Cottenham said, in *Re Spence*, 2 Ph. 252, "It does not follow because a husband's conduct is such as to make his wife very unhappy, that he is therefore to be deprived of the custody of his children. To justify such an interference with the father's rights, his misconduct must be of such a nature as to be likely to contaminate and corrupt the

morals of his children." Nor, is there ground for interfering on account of occasional acts of what a third person might think to be cruelty, if such cruelty is really little more than harshness, *Blake* v. *Lord Wallscourt*, 7 L.T. 545; or, the fact that the father is a man of passionate temper, and has occasionally given way to acts of severity, *Curtis* v. *Curtis*, 5 Jur. N. S. 1147.

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The charges made against the applicant, which might be regarded as affecting his relation to his children, are mostly couched in general terms. The affidavits of the three elder children have already been referred to. Mrs. Foulds in her affidavit brings a charge that the infant, while with his father, was taken and kept away from school, and in consequence his education was being neglected. The facts connected with his removal from school are set out in the affidavit of the applicant, and that charge seems fully disposed of.

She further makes the general statement, that her husband has a violent temper, and one which he in no way controls, "he delights in most tantalizing speech, and in cruel treatment to me and oftentimes in being cruel with his children." She says she removed the child, "in consequence of his father's cruelty and threats, and conduct towards my said children." Also, that before she took the children away, a person named McGregor came and told her, "that my husband was treating my children so badly that I had better go out and bring the children away." No affidavit is made by McGregor, and no information is given as to what the illtreatment was, or what means of knowledge he had.

The most specific charge is thus stated. "During the last year, at least, I lived with my husband, he continuously, and I believe always on returning from Winnipeg brought liquor home with him and excessively drank the same, being often in a state of deep intoxication, and being very violent at such times to me and my children." This is supported by the affidavit of a person, who describes himself as a resident of the same Township, and as having

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known the applicant for nine years. He says he has frequently seen him in a state of intoxication from the excessive use of intoxicating drink.

To meet these charges a large number of affidavits are filed. While it is true that persons outside the family may not have the same opportunities of observing and knowing a man's conduct and actions, yet there are occasions on which near neighbors have means of judging, and it is incredible that such a number of his neighbours, men of undoubted character and property, men who have known the applicant for many years, should speak of him in the terms they do, were he a man of such wholly bad character as represented on the other side.

The applicant in his own affidavit explains, in what appears to be a reasonable way, many of the allegations contained in the affidavits of his wife and children. The charge of drinking to excess he positively denies, although he admits that since his wife left him, and he has been so upset and troubled, he has been drinking, but not to excess. He says that for seven years before March, 1892, he never touched intoxicating liquor at all, and that as to bringing home liquor, he did during harvest and at threshing times occasionally bring home some liquor for the men then employed, but never more than a bottle at a time, and that not more than half a dozen times. In this he is corroborated by his neighbors, some of whom have known him intimately for twenty five years, and who say they have never seen him under the influence of liquor, and have always regarded him as a strictly temperate man. Mr. Sheriff Inkster who has known him for twenty years, and who has frequently been at his house, gives him a high character, and says that not only did he never see him under the influence of liquor, but that on several occasions having asked him to take a glass of liquor, he refused, giving as the reason that he did not touch intoxicating liquor at all.

Besides these affidavits of neighbours, there are two from men who have at different times been in the applicant's

employment, living in the house. They give him a good character, and speak of the friendly and affectionate terms on which he lived with his children.

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If the applicant has a violent temper which he does not control, the evidence shows that Mrs. Foulds has also a violent temper, and I think there can be no doubt that, as between husband and wife, there are faults on both sides.

One cause of dissension between them seems to have been that the daughters desired to leave the farm, and come to live in Winnipeg. To this their father was strongly opposed, while their mother favoured their doing so. I cannot help thinking that the daughters, and the eldest son, having left the farm and come to Winnipeg, countenanced in doing so by their mother, is largely the reason why she has left, and is now living apart from her husband.

Some letters written by the children are produced. In one of them the son proposes that he and Alice should go out and make a bargain with his father about keeping the farm. Then one of the girls in town writes to a sister then on the farm desiring her to come to town also, and in which she says, "We hear you are all very happy and contented, but I hope you will not go back on us now." Then there is a letter from one of the younger girls written before Mrs. Foulds took the children away. Some of the language in that letter when speaking of the farm is bad, but evidently it is not any ill usage or bad treatment from her father that she complains of, only that the place is "so lonesome," and "awful dull," and that specially since her mother and elder sisters had left. It further appears that on one occasion, after Mrs. Foulds, the two daughters and the son had left, but before the rest of the family were taken away, the three young people with a number of their companions came out from the city to have what they called, "a surprise party," and danced and enjoyed themselves in the house until nearly morning. That is scarcely consistent with these young people being in such constant fear and terror of their father.

The law on this subject is well settled. It is *prima*

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facie the right of a father to have the custody of his infant child, and the care of its education and bringing up. The onus of proving him unfit for such a charge rests upon the person who seeks to take the child away, or to keep it away from him. The Court is always unwilling to interfere with the common law rights of the father.

The latest case in which I have seen this question discussed is *Re Agar-Ellis*, 24 Ch. D. 317. In that case Lord Brett, after stating the law, said, "But there are limits to the forbearance and patience of the law in particular cases, which have been already referred to in argument. If, for instance, a father by his immoral conduct has become a person who really is unfit in the eyes of everybody to perform his duties to his child, and therefore to claim the rights of a father towards his child, the Court then will interfere . . . And so if the father has allowed certain things to be done, and then out of mere caprice has counter-ordered them, so as in the eyes of everybody to cause an injury to the child, then the Court will not allow this capricious change of mind, although if the thing had been done originally the Court could not have interfered. I am not prepared to say that the patience of the Court in the case of its ward, might not be exhausted by other conduct of the father, by cruelty to a great extent, or pitiless spitefulness to a great extent. I am not prepared to say the Court would not interfere in such a case, although no Court has yet decided it, but the Court could not interfere on such grounds as that, except in the utmost need and in the most extreme case." And Cotton, L. J. said, "It has been said that we ought to consider the interest of the ward. Undoubtedly. But this Court holds this principle, that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising

that power which nature has given him by the birth of the child."

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Upon the evidence I cannot say that the applicant has done anything to forfeit his natural right to the custody of his child. Nothing has been proved as to his conduct towards his children, which renders him unfit to have the custody of them. The material interest of this infant will be materially benefitted by his being with his father.

The applicant is entitled to the custody of the infant.

RUTHERFORD v. BREADY.

Before TAYLOR, C.J., DUBUC and BAIN, JJ.

Judgment—Application to set aside—Irregularity — Want of merits—New material not to be used on appeal.

Action against two defendants commenced in May, 1883. Judgment signed in September, 1883, for want of appearance. There was an affidavit of personal service filed.

Defendant P. in October, 1892, applied to set aside the judgment on the ground that he had never been served with the writ, and had only lately learned of the judgment. He swore positively that prior to the date given in the affidavit as that of the service of the writ he had left the Province, and did not return for some years afterwards, and never was served with the writ or any papers of any kind relating to the suit; some other person was served by mistake for defendant. Defendant did not swear to merits, nor did he show that the writ had never come to his knowledge.

Held, that the fact that defendant never was served with the writ of summons or a copy thereof, constituted an irregularity only and not a nullity. In order to take advantage of such irregularity, defendant must show, not only that he was not served with the process, but that such process did not come to his knowledge or into his possession.

On a summons by way of appeal from an order of the Referee, no affidavits can be looked at except those that were before the Referee.

ARGUED : 7th February, 1893.

DECIDED 4th April, 1893.

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Statement.

THIS was an action against two defendants commenced under The Summary Procedure on Bills of Exchange Act, 1855, on the 18th of May, 1883, and judgment was signed on the 29th of December, 1883, for want of an appearance. The writ of summons was filed in Court with an affidavit of personal service of the writ. The defendant Parsons in October, 1892, applied to the Referee in Chambers to set aside the judgment on the ground that he had never been served with the writ, and had only lately learned of the judgment. He swore positively that prior to the date given in the affidavit as that of the service of the writ he had left Manitoba for Ontario, and that he did not return to Manitoba for some years afterward, and that he never was served with any papers or process of any kind relating to the suit, and never was served with the writ of summons or a copy thereof. He supported his affidavit also by those of his co-defendant and another party showing his departure from Manitoba before the alleged date of service.

On the other hand, the party who made the affidavit of service made a further affidavit, which suggested very strongly that he was not personally acquainted with this defendant, and was not in a position to know that he really had served him. This affidavit appeared in this respect to strengthen the defendant's case. For the plaintiff, affidavits were also filed, showing that the existence of the judgment was brought to the notice of the defendant Parsons over a year before the application was made, but these affidavits were met by others in rebuttal.

The Referee dismissed the application, and the defendant thereupon appealed to a Judge, adding a substantive application to set aside the judgment, on further affidavits denying notice of the proceedings, or that they had in any way come to his knowledge.

The appeal was heard by Killam, J., who dismissed the same with costs, and defendant then applied to the Full Court to reverse his decision.

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Argument.

J. S. Ewart, Q.C., for defendant. The writ is for service within the jurisdiction. It is clear that Parsons was out of the Province before writ issued. His affidavit shews he was not served and his and two other affidavits shew he was not within the jurisdiction. Killam, J., held that judgment was not shown to have come to knowledge of Parsons, and that there had been no delay. The Referee held we did not negative knowledge. Killam, J. was of opinion that we should have shown that no order was made allowing plaintiff to proceed without personal service. Now it is impossible for us to show no such order was made. But circumstances show no such order was made. It is incompatible with the affidavit of service. The affidavit was sworn on the day judgment signed and affidavit filed. If order had been made this affidavit could not have been used. We moved to set aside judgment because affidavit not true, and the affidavit in reply excludes any such order. It is inconsistent with the writ, which is for service in jurisdiction. Counsel did not suggest the existence of such an order. Counsel's argument was that service of writ should have been attacked and set aside. The production of the affidavit of service is sufficient to show the judgment was signed on this writ. *Ashcroft* v. *Foulkes*, 18 C. B. 261, shows Court will order papers in Court to be produced for inspection, or a further affidavit might be allowed to be put in. The circumstances rebut the presumption that the writ came to defendant's knowledge.

O. H. Clark, for plaintiff. The onus of showing the judgment is on defendant. *Reynolds* v. *Fenton*, 16 L. J. C. P. 15; *Sheehy* v. *Prof. Life Assurance Co.*, 22 L. J. C. P. 244. Defendant has not denied knowledge of writ. *Phillips* v. *Ensell*, 3 L. J. N. S. Ex. 338; *Emerson* v. *Brown*, 8 Scott, N. R. 219; *Herbert* v. *Darley*, 4 Dowl. 726; *Cooper* v. *Watson*, 5 P. R. 30; *Archbold's Pr.* 212; 1475; *Cicely* v. *Bennison*, 2 L. J. N. S. Ex. 3. The application should be to set aside service; *Cinqmars* v. *Equitable Fire Insurance Co.*, 2 P. R. 207. Judgment signed nine years ago; *Leslie* v. *Foley*, 4 P. R. 246.

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TAYLOR, C.J.—I have some doubt as to the defendant's omission to allege that there was no order to proceed under the C. L. P. A., 1852, being a sufficient ground for refusing his application. It is no doubt true, as was once said by a learned judge in Ontario, that in hunting an irregularity you must stop all the earths, still the fact of an affidavit of personal service having been sworn to on the very day upon which judgment was signed, would seem to exclude the existence of such an order. On the other hand in *Sheehy* v. *Professional Life Assurance Co.*, 22 L. J. C. P. 244, a plea to a foreign judgment, obtained by default, that defendants had never been served with process, was held bad because it did not allege that they did not appear in the action, although it did allege that the plaintiff had caused an appearance to be entered for them, which, as I understand, he could do only upon their failure to appear.

I agree, that the evidence of the judgment having come to the knowledge of the defendant in February or March, 1891, is not satisfactory.

This is not a case like *Morris* v. *Coles*, 2 Dowl. 79, in which it was left in doubt, on conflicting affidavits, whether the defendant was ever served or not. There seems no doubt here that the defendant Parsons was in Ontario at the date when he is said to have been served in Winnipeg, and that the affidavit of personal service filed when judgment was entered is incorrect, some other person having been served in mistake for the defendant. From an affidavit made on this application by the person who served the writ, it would appear that he did not know the defendant, and all he can say is that where he did not know the person to be served his invariable practice was to make enquiries, and if the person served was not the defendant, it was some person who misled him by admitting that he was.

The defendant does not in any affidavit, filed on the application before the Referee, and in my opinion only these can be looked at, deny that the writ came to his

knowledge. He invariably uses the expression that he did not, until a few days before giving his instructions for this application, know that judgment had been signed against him.

The learned Judge who heard the appeal says in his judgment, that the cases cited in support of the contention that the defendant should have sworn that the writ did not come to his knowledge, are all cases in which the circumstances suggested that it did so. No doubt in *Rhodes* v. *Innes*, 7 Bing. 329; *Cicely* v. *Bennison*, 2 L. J. N. S. Ex. 3; *Phillips* v. *Ensell*, 3 L.J.N.S. Ex. 338; *Emerson* v. *Brown*, 8 Scott, N. S. 219; *Herbert* v. *Darley*, 4 Dowl. 726; *Williams* v. *Piggott*, 1 M. & W. 574, the circumstances would favor the idea that the writs did or might have come to the defendant's knowledge. But in *Giles* v. *Hemming*, 6 Dowl. 325; and *Cooper* v. *Watson*, 5 P. R. 30, which may not have been cited before the learned Judge, there is nothing so far as the facts are reported which would lead to such an inference, yet in each of them relief was refused, because the defendant did not swear that the process had not come to his knowledge. In the former, counsel urged in reply to an objection by the Judge that knowledge was not denied, that, as the affidavits showed service had been effected upon another person a sufficient *prima facie* case had been made, so as to call upon the plaintiff to show what the circumstances of the service really were, but even a rule *nisi* was refused. In *Archbold's Practice* it is laid down broadly, and without any limitation, that on an application like the present, it must appear from the affidavits in support of the application, that the process never came to the defendant's knowledge or into his possession.

The objection that the application should have been to set aside the service cannot be supported. *Cingmars* v. *Equitable &c. Co.*, 2 P. R. 207, seems to favor it, although there the motion was to set aside a judgment for want of service, or for an irregularity in the service. But such cases as *Cicely* v. *Bennison*, 2 L. J. N. S. Ex. 3; *Phillips* v. *Ensell*,

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3 L. J. N. S. Ex. 338; *Emerson* v. *Brown*, 8 Scott, N. S. 219, and others show that is not necessary. All these were applications to set aside declarations filed and judgments entered on the ground that there had been no service of the writ. In none of them was it to set aside the service.

In them, as in the present case, the foundation of the claim to relief was that there had been no service. *Hardwick* v. *Wardle*, 4 D. & L. 739; and *Brooks* v. *Roberts*, 1 C. B. 636, were cases in which judgment had been signed after the plaintiffs had entered appearance for the defendants, and the applications were refused because they were to set aside the declarations filed and all subsequent proceedings, not the appearance, the first irregular proceeding. Here the signing judgment, if, as alleged, there was no service of the writ, was the first irregular proceeding, and the defendant has moved against that.

On the ground then, that the defendant has not on the material at which the Court can look, denied that the writ came to his knowledge, and without dissenting from, although doubting the ground taken by the learned Judge who heard the appeal from the Referee, I am of opinion that the present appeal should be dismissed with costs.

DUBUC, J.—The defendant Parsons, in his affidavit in support of his application to set aside the judgment herein, swears that he never was served with the writ of summons issued in this cause, or a copy thereof. This constitutes an irregularity only, and not a nullity. *Archbold's Prac.*, 211; *Holmes* v. *Russel*, 9 Dowl. 487.

In order to take advantage of such irregularity and to succeed in his application, the defendant must show in his affidavit, not only that he was not served with the process, but that such process did not come to his knowledge or into his possession. Such was the doctrine laid down in *Emerson* v. *Brown*, 8 Scott, N. S. 219; *Phillips* v. *Ensell*, 2 Dowl. 684; *Giles* v. *Hemming*, 6 Dowl. 325; *Sheehy* v. *Professional Life Ass. Co.*, 22 L. J. C. P. 244. The same was held in Ontario in *Cooper* v. *Watson*, 5 P. R. 30.

By the affidavit filed herein, it is shown that, at the time

of the issuing of the writ of summons, and of the alleged personal service on the two defendants, Bready and Parsons, in Winnipeg, the said Parsons was in Ontario, and that the said service was effected on the defendant Bready, and probably on some person who pretended to be the defendant Parsons. Bready and Parsons were then carrying on an hotel business, as partners, in Winnipeg, and the promissory note sued on appears to have the firm name, "Bready & Parsons," signed to it as makers thereof. The applicant has shown that he was not served with the writ of summons; but, under the above authorities, it is not sufficient; he should have sworn that the said writ did not come to his knowledge or into his possession.

On his having failed to do so, I think he is not entitled to have the said judgment set aside, and the appeal should be dismissed with costs.

BAIN, J.—In the summons by way of appeal from the order of the Referee, the defendant should not have been allowed to include a substantial motion to set aside the judgment, and no affidavits can be looked at on the application except those that were before the Referee.

The writ was one under the Bills of Exchange Act, and the plaintiff could sign judgment either by filing an affidavit of personal service of the writ, or under a judge's order under the C. L. P. Act, 1852, for leave to proceed. The defendant Parsons shews clearly that the writ was never served on him personally. He does not expressly show that the judgment was not signed under a judge's order; and failing to show that it was not so signed, my Brother Killam thought he had not put himself in a position to ask to have the judgment set aside.

The defendant does not swear to merits, and as what he complains of is only an irregularity, he was bound to make the irregularity clearly apparent and not leave it open to conjecture that, although he was not personally served with the writ, the judgment may still be regular. But attached to the writ of summons is an affidavit of the

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personal service of the writ on both defendants. This affidavit was sworn on the day on which judgment was signed, and the Prothonotary's stamp on it shews that it was filed in his office on that day. The plaintiff's attorneys evidently thought that they had effected personal service on both defendants; and the circumstances seem to be so clearly incompatible with the signing of the judgment otherwise than on the affidavit of personal service, that I hardly think it open to reasonable conjecture that the judgment may have been signed under an order to proceed.

The statement of the defendant Parsons that he did not know of the judgment until a few days before he moved to set it aside has not, I think, been disproved. But in his affidavit he carefully abstains from stating that the writ did not come to his knowledge or possession. Now whether it did or not is a matter within his own knowledge; and if it did the judgment might be quite regular, although there was not personal service. And as there is nothing in the circumstances of the case that can shut out the reasonable conjecture that the defendant may have learned of or received the writ, I think he was bound to show expressly that he did not. In the cases that were cited to the learned Judge in Chambers on this point, the circumstances were such as suggested that the writ had come to the knowledge or possession of the defendant. Here there is nothing actually to suggest that he knew of or received the writ, but at the same time there is nothing to show that it would be unreasonable to conjecture that he did. On this ground then I think it must be assumed the judgment was regularly signed. *Giles* v. *Hemming*, 6 Dowl. 325; *Archbold's Prac.* p. 212. The application must be dismissed with costs.

Application dismissed with costs.

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BANK OF NOVA SCOTIA V. HOPE.

HOPE & CO., CLAIMANTS.

Before TAYLOR, C.J., DUBUC AND KILLAM, JJ.

Interpleader—Form of order—Power to direct sale of goods in default of claimant giving security—Discretion in Referee.

Under an execution against the defendant, the Sheriff seized certain goods which were claimed by D. H. & Co.

Thereupon the Referee, on the application of the Sheriff, made an order that upon the claimants paying into court $100, or giving security for that amount, the Sheriff should withdraw from possession, but in default of making such payment, or the giving of such security, that the goods should be sold and the proceeds, after deducting expenses, paid into court to abide further order.

Held, that the Referee had jurisdiction to make the order, and that the discretion vested in him was properly exercised.

ARGUED: 16th February, 1893.

DECIDED: 18th February, 1893.

Statement.

Under an execution against the defendant, the Sheriff seized certain goods which were claimed by D. Hope & Co. Thereupon the Referee, on the application of the Sheriff under the Interpleader Act, made an order that, upon the claimants paying into Court $100, or giving security for that amount, the Sheriff should withdraw from possession, but in default of making such payment, or the giving of such security, that the goods should be sold, and the proceeds, after deducting expenses, &c., paid into Court to abide further order. The order further directed the trial of an issue as to the ownership of the goods seized.

Against this order, in so far as it ordered the payment into Court or the giving of security, the claimants appealed, but the appeal was dismissed by Mr. Justice Dubuc. From the order made by him they then appealed to the Full Court.

G. A. Elliott for claimant. The Referee had no jurisdiction to make such an order except by the consent of the

1893. parties. Prior to the C. L. P. Act, 1862, the Court had no
Argument. power to order a sale of goods seized, when a claim was made to such goods. Section 13 of that Act provided that when the claimant claimed under a chattel mortgage or bill of sale, the Court might order a sale. This is the only provision relating to sale where goods seized are claimed, and the authorities show that this power is very strictly construed. Here the claimant claims as absolute owner, and the Referee had therefore no power to make the order complained of. *Day's C. L. P. A.*, 361; *Pearce* v. *Watkins*, 2 F. & F. 377; *Chitty's Forms*, 824, (Form 4 & footnote); *Wilson's Judicature Act*, 4th Ed. p. 485, (Forms p. 702); *Harrison* v. *Wright*, 13 M. & W. 816. The Sheriff does not require such an extraordinary remedy as this. He has ample means of protecting himself without it. He can take an indemnity from the execution creditor, or keep possession of the goods. *Kennedy* v. *Patterson*, 22 U. C. R. 556; *Walker* v. *Olding*, 1 H. & C. 629.

T. D. Cumberland for Sheriff. The order in question is the usual form of order. The power to make such an order existed long prior to the passing of the C. L. P. Act., 1860. Section 13 of this last mentioned Act was passed to suit special circumstances. Previous to that section even though there might be a large surplus over and above the amount due a mortgagee of chattels, yet the mortgagee could defeat the execution creditor entirely. Our Interpleader Act, R. S. M. c. 77, s. 8, is broad enough to cover this order. The Court is empowered to make all orders which the circumstances of the case may require. If the claimant had shown special circumstances, the Referee might have made a different order. He referred to *Howe* v. *Martin*, 6 M. R. 477; *Wright* v. *Redgrave*, 11 Ch. D. 24; *Reid* v. *Murphy*, 12 P. R. 338; *Churchill on Sheriffs*, p. 508.

I. Pitblado for plaintiffs. The Referee had power to make this order. Section 13 of the C. L. P. Act., 1860, refers to cases where the chattel mortgage or lien is

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virtually admitted by the execution creditor, but the latter wants the surplus. An application for sale under this section does not arise under interpleader proceedings, but by way of a special application. *Day*, p. 353, (note); *Pearce* v. *Watkins*, 2 F. & F. 377. Section 13 does not apply at all to the provisions to be contained in an order made directing an interpleader issue. One of the essential things to be provided for in an interpleader order is the disposition to be made of the goods, and the order made here is the usual order in this respect. *Cababe on Interpleader*, pp. 101 to 104, 171; *Wilson's Judicature Act*, p. 433, 485. (Forms p. 529 *et seq*); *Interpleader Act*, R. S. M. c. 77, s. 8; *Heathcote* v. *Livesley*, 19 Q. B. D. 285; *Howell* v. *Dawson*, 13 Q. B. D. 67; *White* v. *Binstead*, 13 C. B. 307; *Darby* v. *Waterloo*, 37 L. J. C. P. 203. If Referee had power to make this order, then the order is discretionary, and the Court will not interfere with his discretion. The discretion in this case has been properly exercised. Claimant now carries on the business owned by defendant previous to his failure. Defendant is claimant's manager, and looks after all her business. He made the affidavit filed on behalf of the claimant, and on cross-examination refused to answer many pertinent questions.

TAYLOR, C.J.—It is argued that the Referee had not, and that the Court has not, any jurisdiction to make an order requiring a claimant to pay money into Court, or give security. The sole authority of the Court to order a sale, it is argued, is derived from section 13 of the C.L.P. Act., 1860.

This contention is, it seems to me, unfounded. In interpleader matters a judge has by statute jurisdiction "to make such rules and orders as may appear just, according to the circumstances of the case." Under the provisions to that effect in the Interpleader Act in England, orders were, long before the passing of the C.L.P. Act., 1860, section 13, made for the sale of goods in default of the value being paid into Court or security given, pending the trial of

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an issue as to the ownership of the goods; *Abbott* v. *Richards*, 15 M. & W. 194; *Hollier* v. *Laurie*, 3 C. B. 334. In the former case, indeed, the claimant was not even given the option of giving security, and it was held that under the section giving the Court power to make such orders as may appear reasonable and just, a judge could do all that was just, proper and equitable under the circumstances. Pollock, C. B., though he seems to have had some doubt, said that the supposed hardship on the party of having his goods seized and sold, perhaps for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the judge at the time of the making of the order. The other members of the Court entertained no doubt whatever. Here the Referee thought proper, under the circumstances, to order that money should be paid into Court, or security given, and that in default the goods should be sold. I have no doubt of his jurisdiction to make such an order. My Brother Dubuc, on the appeal, so held, and had no doubt that the discretion vested in the Referee was in this case properly exercised. I think so too, and am of opinion that this appeal should be dismissed with costs.

KILLAM, J.—This is an application to reverse an order of my Brother Dubuc, dismissing an appeal as to a portion of an interpleader order of the Referee in Chambers.

A horse was seized by the Sheriff under an execution against the defendant, and was claimed by the defendant's wife as her absolute property. The Sheriff made the usual application based on affidavit stating that the horse was, when seized, in the possession of the defendant. In support of the claim there was produced merely the affidavit of the husband, the execution debtor, upon which he was cross-examined. It is unnecessary to state the particulars of his depositions. The Referee made an order for the trial of an issue as to the claimant's right to the horse, and directing that upon certain security being given, and upon payment of certain possession-money, the Sheriff with-

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draw from possession, but that in default of the security being furnished, or the possession-money paid, the horse should be sold by the Sheriff, and the proceeds, after deduction of the costs of sale and possession-money, paid into Court to abide further order. The claimant appealed against the order on several grounds, of which, however, only one is now relied on,—that is, an objection to the direction for a sale in default of security being given, or possession-money being paid by her.

The main contention of the claimant's counsel upon this point is that the Referee had no jurisdiction to direct a sale where the horse was claimed as the absolute property of the claimant, and not by way of security only. It is argued that in England, under an Interpleader Act similar to our own, such an order could not be made before the Act 23 & 24 Vic. c. 126, by the 13th section of which it was expressly provided for in case of a claim by way of security only.

I am unable to agree with this view. On the contrary, in *Abbott* v. *Richards*, 15 M. & W. 193, the jurisdiction to make such an order was distinctly upheld, long before 23 & 24 Vic.; and in *Walker* v. *Olding*, 1 H. & C. 621, where the claimant had claimed as absolute owner by purchase, and a similar order had been made, Pollock, C. B., said that the common order had been made, and pointed out expressly that, even though both the claimant and the execution creditor should join in requesting that the Sheriff remain in possession, yet the Judge, at the Sheriff's instance alone, might direct a sale.

The contention of the claimant's counsel is based on a misconception of the purpose of the 13th section of the Act 23 & 24 Vic. c. 126, which is intended to authorize a sale even though the claim of the claimant be admitted or be found valid. The object was to get at an equity of redemption, and to avoid the injustice of allowing a mortgagee of goods to hold, as against an execution creditor, property worth much more than his debt. Without that Act, even if the goods were sold pending the trial of an

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issue, the mortgagee recovering a verdict in the issue would apparently have been entitled to the whole of the proceeds, whereas the statute enables the Court to make a just disposition of the proceeds, and to insist on a sale without giving even the option of furnishing security and taking the goods, as in the first form given in *Chitty's Forms*, at p. 824.

The discussion of the practice in *Cababe on Interpleader*, at pp. 103-4, and in *Lush's Practice*, p. 779, shows that the authors implied the right to sell, apart from the Act 23 & 24 Vic. c. 126.

The order, then, being in the common form, it was necessary, I think, for the claimant to show the special grounds rendering it unjust in this particular instance to direct a sale if security should not be given.

I agree that the application should be dismissed, with costs.

DUBUC, J., concurred.

Application dismissed, with costs.

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RUDDELL V. GEORGESON.

Before DUBUC, KILLAM AND RAIN, JJ.

Crown Lands—Sale of, for taxes before Patent issued—Subsequent issue of Patent to assignee of original purchaser from the Crown.

B. agreed to purchase Dominion lands, and paid a large proportion of the purchase money; by divers assignments B's interest became vested in defendant. The land was subsequently bought by plaintiff at a tax sale; he obtained a deed therefor, and after payment to the Crown of the balance of the purchase money obtained a patent for the land.

Plaintiff filed his bill praying for a declaration that defendant held the legal estate in the land as trustee for the plaintiff.

Held, on demurrer, that the plaintiff could not ask that the defendant be ordered to convey the legal estate to him, until he had paid, or tendered to the defendant, the amount that he paid to acquire the legal estate. The Municipality was empowered, on the tax sale, to convey only such interest in the lands as the Crown might have given or parted with, or might be willing to recognize or admit. The Crown was free to recognize such right as the plaintiff acquired under the tax deed or to disregard it and recognize the defendant as the person entitled to the patent. Having done the latter, the fact that thereby the defendant was enabled to hold the land free from the taxes which had been imposed, and from the consequences of the non-payment of these, was no ground for the Court interfering.

ARGUED: 6th December, 1892.
DECIDED: 4th April, 1893.

Statement.

THE bill alleged that in 1881 the land in question was part of the unappropriated Dominion lands vested in Her Majesty, and open for sale by Her Majesty, represented by the Minister of the Interior for Canada, and that on 19th October, 1881, one William Beech agreed to purchase the land, became the purchaser thereof, paid a large proportion of the purchase money, and thereby became entitled to an estate or interest in the land, and, upon payment of the price agreed to be paid, to have a Crown patent therefor issued to him or his assigns. Then several mesne conveyances were set out, under which all the right, title and interest of Beech in and to the land became vested in

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the defendant. It was then alleged that taxes were assessed and levied upon the land for each of the years 1883, 1884, 1885 and 1886, and that, these being unpaid, the land was on the 26th of July, 1887, sold for taxes and bought by the plaintiff, who, on the 28th of July, 1889, obtained from the Municipality a tax deed of the land in the form prescribed by The Municipal Act of 1886. It was further alleged that, in pursuance of the agreement of sale entered into by William Beech and by virtue of the several deeds set out, the defendant acquired the position of Beech, paid the balance of the purchase money and procured the Crown patent for the land to be issued to him on 20th October, 1891, as purchaser of the land pursuant to the original agreement. It was also alleged that the money paid to complete the purchase was the money of Beech, that he procured the patent to be issued to the defendant, believing that thereby the land would be held freed from taxation and from the tax sale, and that the defendant always held, and then held, the patent as trustee for Beech. Proceedings taken by the defendant to bring the land under the provisions of the Real Property Act and the filing of a caveat by the plaintiff were then alleged. The plaintiff submitted that the defendant held the legal estate in the land as trustee for the plaintiff, and the prayer was for a declaration that he held the legal estate in the land as such trustee.

To this bill the defendant demurred for want of equity.

The demurrer was heard by Taylor, C.J., who allowed the same. The plaintiff then applied to the Full Court to reverse his decision.

H. M. Howell, Q.C., for plaintiff. The defendant's patentee was applying for certificate to quiet his title against tax purchaser. Beech, it is alleged, was purchaser from the Crown, and entitled to get patent as soon as he paid balance. His position defined by The Dominion Lands Act, 42 Vic. c. 31, s. 5, (D. 1879,) as amended by 44 Vic. c. 16, s. 4, (D. 1881.) There are restrictions as

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to homesteads, but none as to making purchases. Beech obtained what an ordinary purchaser from an ordinary person would get, and the plaintiff has acquired Beech's rights. The Municipal Act, 44 Vic. c. 3, s. 66, (M. 1881,) is the first provision for taxing Crown lands and interests in them. These lands are probably exempt by the B. N. A. Act, but not exempt by the terms of the Municipal Act. See also The Municipal Acts, 46 & 47 Vic. c. 1, s. 286, (M. 1883), 47 Vic. c. 11, s. 302, (M. 1884), and 49 Vic. c. 52, s. 650, (M. 1886). Tax sale took place under the last section. These shew Legislature intended to tax the interests of purchasers from the Crown. *Church* v. *Fenton*, 28 U. C. C. P., 396. The land was sold for arrears for 1883-4-5-6. If any taxes were due, the sale was valid. When a Provincial statute is being construed, it will be deemed constitutional unless it is clearly *ultra vires*, and the Court will endeavor in every way to uphold it unless it is manifestly *ultra vires*. *Fletcher* v. *Peck*, 10 U. S. R. 128; *Ogden* v. *Saunders*, 25 U. S. R. 269; *People* v. *Orange*, 17 N. Y. 241; *Cooley on Taxation*, 218, 219. The interest of a mortgagor when the Crown is mortgagee may be sold for taxes, and the equity of redemption will pass to tax purchaser. *Reg.* v. *Wellington*, 17 O. R. 619; 17 A. R. 445; *Quirt* v. *The Queen*, 19 S. C. R. 510. Beech the purchaser from the Crown obtained a definite title and interest under his agreement, which he could enforce against the Crown. *Craig* v. *Templeton*, 8 Gr. 485; *Thomas* v. *The Queen*, L. R. 10 Q. B. 35; *Windsor & Annapolis Ry. Co.* v. *The Queen*, 10 S. C. R. 357, 11 App. Cas. 615. *C. P. R.* v. *Cornwallis*, 19 S. C. R. 702, shews the interest one has by contract with the Crown. *Harris* v. *Rankin*, 4 M. R. 115, held that this interest is seizable in execution and relief could be given as in *Yale* v. *Tollerton*, 13 Gr. 302. This Court has repeatedly held that when a right has been acquired in unpatented lands against the Crown, this right is subject to Provincial laws. *Harris* v. *Rankin*, 4 M. R. 115; *Clarke* v. *Scott*, 5 M. R. 288; *Re Mathers*, 7 M. R. 434. We are entitled to a

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Argument. lands and to keep defendant from getting certificate.

J. S. Tupper, Q.C. and *F. H. Phippen* for defendant. Plaintiff not entitled to relief asked, because under section 650 of the Municipal Act only an interest, "given or parted with," in unpatented lands passes under a tax deed, and there is no allegation that the Crown has divested itself of any interest in this land. The Crown has exercised its discretion in granting this land to defendant and the Court has no right to interfere except on grounds of mistake, error or improvidence, which are not alleged. *Boulton* v. *Jeffery*, 1 E. & A. 111; *Simpson* v. *Grant*, 5 Gr. 267; *Barnes* v. *Boomer*, 10 Gr. 532; *Kennedy* v. *Lawlor*, 14 Gr. 224; *Farmer* v. *Livingstone*, 8 S. C. R. 145; *Fonseca* v. *Attorney General*, 17 S. C. R. 649. The plaintiff's only relief can be by way of specific performance. This would not lie against the Crown and consequently cannot be granted against defendant who is assignee of the Crown. *C. P. R.* v. *Cornwallis*, 7 M. R. 1; 19 S. C. R. 702; *Simpson* v. *Grant*, 5 Gr. 267; *Clarke* v. *The Queen*, 1 Ex. R. Can. 182; *Peterson* v. *The Queen*, 2 Ex. R. Can. 77. Any doubt on this point is now removed by The Exchequer Court Amendment Act, 54 & 55 Vic. c. 26, (D. 1891.) The bill admits an amount due the Crown which was paid by the defendant; the defendant has therefore a lien on the land until this has been repaid; as bill contains no offer of repayment, demurrer will lie. *Lewis' Equity Pleading; Wiggins* v. *Meldrum*, 15 Gr. 377; *Harding* v. *Pingey*, 10 Jur. N.S. 873. Plaintiff's title is not sufficiently stated. It depends on tax deed, and that deed depends on certain prior steps which must be taken in accordance with the statute, and which, when taken, alone create authority in the Municipality to convey and should therefore be specifically alleged. *Alloway* v. *Campbell*, 7 M.R. 514; *O'Brien* v. *Cogswell*, 17 S. C. R. 430; *Gillespie* v. *Lloyd*, 1 W.L.T. 243; *Walburn* v. *Ingilby*, 1 M. & K. 77; *Lewis' Equity Pleading*, 26, 27, 33, 21. The pleadings show

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that these lands were unpatented Crown lands, and that the Crown had a substantial interest therein. Such lands are not taxable, and therefore the plaintiff has no title. *British North America Act*, s. 125 ; *Whelan* v. *Ryan*, 20 S. C. R. 65; *Attorney General* v. *City of Montreal*, 13 S. C. R. 353. Section 650 of The Municipal Act, 49 Vic. c. 52, (M. 1886,) authorizes the assessment of certain classes of unpatented lands; the bill brings the land in question within the lands described in this section. It should go further and show in addition that some specific interest in the land had been actually parted with by the Crown, and that this interest is the only interest affected by taxation; if the statute authorizes any other taxation it is "*ultra vires*."

H. M. Howell, Q.C., in reply. The bill is to be taken now in favour of demurrer. *Grant* v. *Eddy*, 21 Gr. 568; *Palmer* v. *Solmes*, 45 U. C. R. 16; *Richardson* v. *Jenkin*, 10 P. R. 292. It is implied the Crown sold all its interest. The allegations are sufficient. *Municipality of London* v. *G. W. R.*, 16 U. C. R. 500; *Boulton* v. *Jeffrey*, *supra*, explained in *Dougall* v. *Lang*, 5 Gr. 292. The Municipal Act cures all assignments, and all we had to do was to allege an assignment. The deed is made good by statute. The Municipal Act, 46 & 47 Vic. c. 1, s. 43, s-s. 5, explains meaning of "land," including interests therein. *C. P. R.* v. *Cornwallis*, 19 S. C. R. 710. This suit is to stop issue of certificate. Suppose terms of agreement were such that Beech had no claim to ask Crown to carry it out. The Crown recognized his right to have the agreement performed, but the plaintiff and not defendant was the proper assignee. We are in as good a position as a purchaser under an execution.

DUBUC, J.—Two questions are raised by this demurrer: (1.) Whether unpatented lands, the fee being in the Crown, can be, as to the estate and interest of a purchaser or caveatee, held liable to taxation for municipal purposes; (2.) Supposing them to be so liable, whether the plaintiff

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has, by his bill, made out such a case as should entitle him to the relief prayed for.

As to the first point, it may be noticed that by the 125th section of the British North America Act, it is declared that, "No lands or property belonging to Canada, or any Province shall be liable to taxation."

Our provincial statutes show, however, that from the early establishment of municipalities in this Province, the Legislature has assumed to empower municipal corporations to impose taxes on unpatented lands, and to sell the said lands for non-payment of taxes, saving however the rights of Her Majesty in said lands, and declaring that such sale shall only have the effect of transferring to the purchaser such rights of pre-emption or other claim as the holder of such land or any other person had acquired, if any, in respect of the same. Such provision is found in the Municipal Act of 1880, c. 1, s. 39, s-s. 11. The same is copied almost *verbatim* in the Municipal Act of 1881, c. 3, s. 66.

The language is somewhat varied in the Act of 1883, c. 1, s. 286, and is as follows:

"Where the title to any land sold for arrears of taxes is in the Crown, the deed therefor, in whatever form given, shall be held to convey only such interest as the Crown may have given or parted with, or may be willing to recognize or admit that any person or persons possesses or possess under any color of right whatever, and the Municipality on whose behalf any land shall be sold for arrears of taxes, as aforesaid shall, in case of such sale being declared invalid, be liable only for the purchase money actually paid therefor to the county treasurer, and interest thereon as for damages or otherwise."

The said clause is repeated in the Act of 1884, s. 302, and in the Act of 1886, s. 650.

By the above section, the Legislature merely assumes that the said lands are taxable and liable to be sold for arrears of taxes, without any positive enactment empowering the Municipal Corporation to tax them, and without

declaring from what time they are so liable to taxation. But section 288 of the Act of 1884 provides that unpatented lands vested in or held by Her Majesty, which may be thereafter sold, or agreed to be sold to any person, or which may be located as a free grant, shall be liable to taxation from the date of such homestead or pre-emption location, sale or grant; but that such taxation shall not in any way affect the rights of Her Majesty in said lands.

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Whether, by the above enactments, with their well guarded saving exceptions, the Legislature has exceeded its authority or not, is a matter for very serious consideration. Viewed from what appears to be the most reasonable standpoint, it seems that in the case of a homesteader who has only paid his entry fee, and has done very little or no improvement, being only allowed to remain in possession by the indulgence of the Crown, or in the case of a purchaser in the same circumstances, who has only paid a small instalment of the purchase money, when the estate and interest of such homesteader and purchaser can be forfeited at any moment, it would be difficult to hold such lands liable to taxation, and subject to be sold for non-payment of taxes, and to determine what estate, if any, would pass by such sale.

On the other hand, what would be said of a homesteader having complied with the requirements of the statute, or of a purchaser having paid the whole of the purchase money, when, in either case, the party entitled to his patent would delay several years in asking for it, in order to escape from taxation?

And where should the line be drawn between two such states of circumstances?

The question was raised before the Supreme Court in *Whelan* v. *Ryan*, 20 S. C. R. 65, a case appealed from this Court, and reported in 6 M. R. 565; but different opinions were expressed by the learned Judges, and the point was left unsettled.

As the demurrer may be determined on other grounds,

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it does not become necessary to give a formal decision on this contested question.

Assuming the lands to have been liable to taxation, has the plaintiff, by his bill, made out such a case as to entitle him to the relief prayed for?

After stating that the lands in question were in Oct., 1881, purchased from the Crown by one Beech who paid a large proportion of the purchase money, that they were assessed during several years, sold for taxes in July, 1887, conveyed by the Municipality to the plaintiff in July, 1889; that by several deeds specifically described, made between December, 1881, and September, 1891, the said lands were eventually conveyed to the defendant, the bill alleges that by the said several deeds, the defendant acquired the position of the said Beech, paid the balance of the purchase money, and procured the Crown patent to the said lands to be issued to him in Oct., 1891. It further alleges that the conveyances to the defendant were made at the instance, and for the benefit of Beech, and the moneys paid to complete the purchase were the moneys of Beech. And it prays that it may be declared that the defendant holds the legal estate in the said lands as trustee for the plaintiff, and that he may be ordered to convey them to the plaintiff.

The defendant contends that, in any event, the plaintiff could not succeed under the state of facts set out in his bill, without offering to reimburse to the defendant the sum paid by him to the Crown. I think the contention may be conceded to be a right and correct one.

In *Wiggins* v. *Meldrum*, 15 Gr. 377, the plaintiff had assigned the lands in question to one C., and afterwards to one M., to secure advances, but at the time he had no title thereto; the Crown having given effect to the assignment to C., and issued the patent to him, the plaintiff sought to get the legal estate outstanding in C., but without paying M.; it was held under the maxim: "He that comes into equity must do equity," that he was first bound to pay the advances made by M.

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In *Harding* v. *Pingey*, 10 Jur. N. S. 872, a mortgagor filed a bill against a mortgagee for an account, and to restrain him from selling the mortgaged premises, and prayed that on payment by the plaintiff to the defendant of what, on taking the account, might be found due, the defendant might be ordered to reconvey the property; the Court held that this was not a sufficient offer to pay what should be found due, and a demurrer to the bill was allowed, with leave to amend the bill by inserting a formal offer to pay.

In the present case, the plaintiff made no offer of any kind. He alleges, it is true, that the money paid by the defendant to the Crown was the money of Beech, but the allegation does not place him in a much better position. And, if Beech himself had paid to the Crown the balance of the purchase money, at the time of the issue of the patent in 1891, and the patent had been issued to him, I doubt very much whether the plaintiff who had purchased whatever estate and interest Beech was supposed to have in the lands in 1887, could succeed without offering to repay him the sum paid afterwards to the Crown to obtain the patent.

Under the statutory provisions above referred to, the Municipality was empowered to convey only such interest in the said lands as the Crown might have given or parted with, or might be willing to recognize or admit as possessed in July, 1887, by Beech or any other person or persons. By the conveyance to him by the Municipality, the plaintiff acquired such interest only, and nothing more. Beech had, at that time, no title to the lands, which were vested in the Crown. Whatever interest in said lands was afterwards acquired and obtained by Beech or the defendant, by paying the balance of the purchase money to complete the title, was never transferred or conveyed to the plaintiff. I cannot see how he can be entitled to ask that the estate and interest subsequently acquired by the patentee in paying the balance of the purchase money, be declared to be held in trust for him. And he having

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acquired only a limited interest, so declared by statute to be limited, how can he demand that the whole estate and fee in the said lands be conveyed to him, without at least offering to pay for the remaining interest granted by the Crown to the patentee, which remaining interest he, the plaintiff, never paid for, and which was never transferred to him?

After getting the conveyance from the Municipality, the plaintiff might have himself applied for the patent, and for aught we know, the Crown might have entertained his application, and on his paying the unpaid balance of the purchase money, might have issued the patent to him. But when he chose to stand by for over two years, and allow the defendant, whether with his own money or the money of Beech, to go on and complete the purchase by paying the said balance, and to acquire the remaining interest, which till then, had continued to be vested in the Crown, he cannot, consistently with the true principles of equity, claim such remaining interest, without at least paying or offering to pay for it.

In my opinion, the plaintiff has not, by his bill, made out such a case as to entitle him to the relief prayed for, and the order of the learned Chief Justice allowing the demurrer should be affirmed.

The appeal should be dismissed with costs.

KILLAM, J.—This is a re-hearing of a demurrer to a bill in equity. The original hearing was before the Chief Justice, who allowed the demurrer.

The plaintiff claims that the Crown, by its officers, entered into an agreement for the sale to one Beech of certain unappropriated Dominion lands in Manitoba, for—though this appears only by inference—a price in money; that Beech paid a portion of the purchase-money, and was let into possession; that the lands were assessed, rated and sold for taxes in the Municipality in which they lay, and that the plaintiff became the purchaser at the tax sale, and the lands were conveyed to him by the officers of the

Municipality pursuant to this sale; that by several conveyances Beech's claim to the lands became transferred to the defendant, who paid to the Crown the balance of the purchase-money payable under the original agreement of sale; that subsequently to the conveyance to the plaintiff the patent from the Crown was issued granting the lands to the defendant as the purchaser pursuant to such agreement; that the conveyance to the defendant was made at the instance and for the benefit of Beech, who supplied the purchase-money paid to the Crown; that, as between them, the defendant holds the lands as trustee for Beech; and that all this was done in the belief that the lands would thereby be held free from the taxes and the sale to the plaintiff, and for the purpose of preventing their being bound by the conveyance to the plaintiff.

The bill also alleges that the defendant has applied to bring the lands under The Real Property Act, and notice of the application having been served on the plaintiff he lodged a *caveat* against the defendant's application, and filed his petition in support thereof, whereupon the Chief Justice directed this bill to be filed to establish the plaintiff's title, and that unless such title is established a certificate of title will be issued to the defendant under that Act. The plaintiff claims that the defendant holds the lands as trustee for him, and prays a declaration to that effect and a conveyance to himself.

The enactment in force at the time of the sale to Beech authorizing a sale of Dominion lands was that contained in the Act 44 Vic. c. 16, s. 14, (D., 1881). It may be questionable whether the bill sufficiently alleges an agreement of sale binding on the Crown under this section, or sufficiently shows the terms and conditions of the sale; but I shall assume that it does appear by the bill that there was an agreement of sale binding on the Crown, and that no conditions remained to be fulfilled by Beech except payment of the remaining portion of the purchase money as and when it should become due.

The bill alleges that, "by virtue of the purchase and

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payment aforesaid, Beech became entitled to the immediate possession of the said lands." It is not quite clear whether this is intended as an allegation of the terms of the agreement of sale or of its legal effect. I know of no statute which annexes such a consequence to such an agreement. In *Whelan* v. *Ryan*, 20 S. C. R. 75, Mr. Justice Patterson referred to the 82nd section of the Dominion Lands Act, 1879, 42 Vic. c. 31, as if it applied to lands agreed to be sold by the Crown. It may be, however, that there was something in the evidence in that case bringing it within the language of the section, and, as he points out, the case was one in which the purchasers had fully paid for the lands before the imposition of the taxes. In the present instance the bill does not show the issue of any "entry receipt or certificate" which would entitle the purchaser, under that section, "to maintain suits at law or in equity against any wrong doer or trespasser." I think that we must treat Beech as in the ordinary position of a purchaser under an agreement which still remains executory on both sides, except that he had paid a portion of the purchase-money.

Some exception has been taken to the bill as not properly showing that all the steps were taken necessary to assess the lands and render them liable to the taxes for which they were assumed to be sold; but it appears to me that in this respect the bill is sufficiently minute, and that, to the extent of the powers of the Municipality and its officers, taxes were duly imposed upon the lands for the years mentioned, and a valid sale and conveyance made to the plaintiff.

The authority for the assessment of such lands is found in the various Municipal Acts from 1883 down (46 & 47 Vic. c. 1, pt. 1, s. 271; 47 Vic. c. 11, s. 288; 49 Vic. c. 52, s. 514). By these Acts, also, "The taxes accrued on any lands shall be a special lien on such land, having preference of any lien, privilege or encumbrance of any party except the Crown." The advertised notice of sale was required to specify the lands as "patented or unpatented." And by each

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Act "Where the title to any land is in the Crown, the deed therefor, in whatever form given, shall be held to convey only such interest as the Crown may have given or parted with, or may be willing to recognize that any person or persons possesses or possess under any color of right whatever." See ss. 254, 285, and 286 of the Act of 1883; 270, 301 and 302 of the Act of 1884; and 637, 645 and 650 of the Act of 1886.

It is argued for the defendant that, under the 125th section of the British North America Act, 1867, by which it is provided that "No lands or property belonging to Canada or any Province shall be liable to taxation," these enactments are inoperative in respect of the lands in question. On this point, however, I agree with the opinions expressed by Mr. Justice Gwynne in *Church* v. *Fenton*, 28 U. C. C. P. 384. He there held that the agreement for sale vested in the contracting purchaser an estate and property in the land, and that "incident to this estate and property arose certain civil rights which were placed under the exclusive control of the Provincial Legislature." "Assessment," he said "is but a mode of exercising that control. The purchaser's estate in the land was as much liable to the maintenance of municipal institutions, which are under the exclusive control of the Provincial Legislature, as the estate of any other person in the Province holding real estate. It is only such estate that the assessment law really affects. The estate of the Crown is not sought to be prejudiced at all."

Now, I do not mean to say that the agreement made with Beech conferred upon him such an estate or interest in the lands as Mr. Justice Gwynne held that the purchaser from the Crown acquired under the legislation of the Parliament of the Province of Canada. All that I do say is that, while it is for the Parliament of the Dominion to determine what rights and interests in the property of Canada may be granted away or conferred upon individuals, and the modes and conditions by and upon which this may be done, those rights and interests, once granted or con-

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ferred, cease to be the property of Canada, and become property subject to the Provincial laws and to direct taxation by authority of the Provincial Legislature. A grant of the fee simple is but a grant of an interest in land, not of the land itself; and to tax the fee or any less interest, legal or equitable, which the Crown has actually parted with, is not to tax any land or property belonging to Canada.

In the case of *The Rural Municipality of Cornwallis* v. *The Canadian Pacific Ry. Co.*, 19 S. C. R. 702, it was held in the Supreme Court that, by the agreement for the construction of the Canadian Pacific Railway and the Act ratifying it, the Company acquired such an interest in a certain portion of its land grant, before the issue of the Crown patent therefor, that it could recover back moneys paid to redeem the land from an illegal sale for taxes. Apparently, however, that decision proceeded upon the basis that, as respects that portion of the land grant, the Company had performed all conditions necessary to entitle it to receive the patent.

As it appears to me, the utmost that the plaintiff can claim is that by his purchase and the tax deed he became entitled to stand in the position of Beech, and to complete the purchase from the Crown. How far Beech acquired a taxable interest in the lands, or the Provincial statutes operated to transfer to the plaintiff Beech's rights under the contract with the Crown, we deem it unnecessary now to determine. Certainly a purchaser under such an agreement cannot ask to have his vendor, or an assignee of his vendor, declared to be a trustee for him. He has, I take it, in general, two remedies in equity for a repudiation of the contract. First, he may seek specific performance of the contract by the vendor, or any assignee of the vendor, who takes with notice of the contract. Secondly, he may acquiesce in the repudiation of the contract, and enforce a lien upon the property for any portion of the purchase-money which he may actually have paid. That a purchaser from the Crown can obtain either of these remedies,

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KILLAM, J.

whether as against the Crown itself or as against an assignee of the Crown, has never, so far as I know, been determined.

The decision in *Church* v. *Fenton*, 28 U. C. C. P. 384; 4 A. R. 159; 5 S. C. R. 239, involves no such conclusion. There the taxes were imposed under the authority of the Legislature of the Province of Canada, when that Legislature had full power to determine the interests conferred by a mere agreement of sale of Crown lands, and the extent to which the lands could be assessed, and the effect of a sale thereof for taxes. The lands had been paid for and the patent issued before the sale for taxes.

The assessment and the sale for taxes, even if it operated to transfer Beech's rights under the contract to the plaintiff, placed Beech under no obligation to complete the contract for the plaintiff's benefit, and rendered it in no way inequitable for him, or for the defendant as trustee for him, to acquire and hold the lands as against the plaintiff. I do not see any possible principle upon which the plaintiff can dispute the right of the defendant to stand at any rate in the position of the Crown, unless it be that he can enforce specific performance as against the defendant while he might not be able to do so as against the Crown.

It does not appear to me that this bill is to be upheld upon the ground that it is filed, pursuant to the order of the Chief Justice, to establish the plaintiff's claim under his petition under The Real Property Act. By the rules in Schedule R. to that Act, R. S. M. c. 133, the Court may direct any question of fact arising under such a petition to be tried upon an issue somewhat similar to an interpleader issue, or (Rule 9.) "If, at the hearing of such petition, it shall appear to the Court that, for the purpose of justice, it is necessary or expedient that an action or suit should be brought, the Court may order such action or suit to be brought accordingly." This does not appear to me to enable the Court to give itself jurisdiction to entertain an action at law or suit in equity, other than it might otherwise have been able to entertain. According to the allegation

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KILLAM, J.

the Chief Justice directed "this bill" to be filed. It may be that it is intended thus to allege that a bill exactly or substantially like the present was directed to be filed; but even so, I cannot take this as a judicial determination that the present bill will lie. The Chief Justice himself did not so intend, for he has found the bill demurrable. I can understand that there may frequently be cases in which an application to bring land under The Real Property Act, as that of the applicant, free from incumbrances, or from certain claims or incumbrances, should properly be deemed to give an equitable right to have a decree in equity declaring the existence of certain interests or liens. Such a course of action may show that the defendant is attempting to repudiate the contract or the plaintiff's alleged rights thereunder; but it cannot otherwise give the plaintiff a right to relief in equity.

The learned Chief Justice appears to have considered that the plaintiff could have no relief except by suit to set aside the patent. Even if this view be incorrect, as is claimed by the plaintiff, the plaintiff would be limited, in my opinion, to one of two courses: to affirm the contract and seek to have it performed in his favor by the patentee of the Crown, offering on his part to perform it; or to acquiesce in the apparent repudiation of his rights, and seek to enforce a lien for the portion of the purchase money paid prior to the accrual of his rights. Instead of this, the plaintiff claims that the defendant is absolutely a trustee for him of the lands in question, when clearly the defendant is not so.

It was suggested upon the argument, that, at any rate, there might upon this bill be a decree that the defendant was a trustee *pro tanto* for the plaintiff, or some declaration of the plaintiff's right to an interest in the property. I think this impossible, as the bill does not disclose whether the plaintiff seeks to enforce the contract, and is willing to perform it on his part, or whether he foregoes this and would be satisfied with a lien for purchase money paid.

In no view, then, does it appear possible to support the

bill, and in my opinion the order allowing the demurrer should be affirmed with costs. 1893.

Judgment.

BAIN, J.—The plaintiff alleges in his bill that the defendant paid the Crown the balance of the purchase money for the land in question, and so procured the patent to be issued to him. There is no allegation, however, that the plaintiff has ever paid or offered to pay to the defendant this balance of purchase money. Now, even assuming that the assessment and sale of the land before the issue of the patent, had the effect of vesting in the plaintiff the interest Beech acquired by his agreement to purchase from the Crown, it seems clear that the plaintiff cannot ask that the defendant be ordered to convey the legal estate to him, until he has paid or tendered to the defendant the amount that he paid to acquire the legal estate. The bill has been filed in pursuance of an order made on a petition under the Real Property Act, but the Court has to deal with the bill as it would with one in any ordinary suit in equity. The suit is analogous to one for specific performance, and in such suits the plaintiff can never obtain a decree until he has shown the performance of all conditions precedent. *Williams* v. *Brisco*, 22 Ch. D. 441. KILLAM, J.

I think the judgment, allowing the demurrer, must be affirmed.

Order allowing demurrer affirmed.

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CHARLEBOIS v. GREAT NORTH-WEST CENTRAL RY. CO.

Before TAYLOR, C.J.

Security for costs—Application for further security—What must be shown.

Although an order for security for costs has been made and complied with, an order for further security can be granted upon a proper case being made.

On an application for further security defendants must show that they could not have foreseen that the cause was one in which security to a larger amount than that usually ordered would have been proper.

In this case the defendants failed to show that costs already incurred, and to which they were entitled, had exhausted the security already given.

Application refused.

Bell v. *Landon*, 9 P. R. 100, followed.

ARGUED: 22nd December, 1892.

DECIDED: 5th January, 1893.

Statement. Under an order of course requiring him to give security for costs, the plaintiff paid $400 into Court. The defendant Company then moved for further security on the grounds that the amount paid into Court would not more than meet the costs already incurred, and that the suit would be an exceedingly costly one. The application was refused by the Referee, and from his decision the Company appealed.

H. M. Howell, Q.C., for plaintiff cited *Lydney &c. Iron Co.* v. *Bird*, 23 Ch. D. 359; *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62; *Bell* v. *Landon*, 9 P. R. 100; *North* v. *Fisher*, 10 P. R. 582; *Duffy* v. *Donovan*, 14 P. R. 159; *Re Contract Corporation*, 57 L. J. Ch. 5; and *Exchange Bank* v. *Barnes*, 11 P. R. 11.

C. W. Bradshaw for defendants cited *Western Canada Oil Co.* v. *Walker*, L. R. 10 Ch. 628; and *British Linen Co.* v. *McEwan*, 6 M. R. 29.

TAYLOR, C.J.—For the plaintiff it is urged that, while a

defendant can, when obtaining an order for security have the amount for which security is to be given fixed at such a sum as will bear some proper relation to the costs likely to be incurred, yet an order having once been made, no second order can be granted. And in any event that it has not been shown that the necessity for increased security has become known to the Company since the first order was obtained.

This is a suit on the equity side of the Court, and there seems no doubt that while at common law an order for further security could be made, no second order could be got in equity in England until 1875, when G. O. 55, R. 2, was passed. That order seems to have been passed to make the practice, as to security for costs, the same in all the divisions of the High Court of Justice.

Section 34 of The Administration of Justice Act, R. S. M. c. 1, is quite as wide as the English General Order. The language used is almost identical. It provides that security is to be furnished, "for such amount, and at such time and times, and in such manner and form as the Court or Judge may direct." The provision being for the giving of security at such time and times as the Court or a Judge may direct, I have no doubt that although an order for security has been made and complied with, an order for further security can be granted upon a proper case being made.

But there is a material difference between the practice here, and that which prevailed in England when the first order for security was made in *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62. There, at that time, the amount for which security had to be given was fixed by general order. Under our G. O. 312, the sum for which security is to be given is to be fixed by the Judge or Master making the order upon the first application. The Ontario General Order being the same as ours, Boyd, C. in *Bell* v. *Landon*, 9 P. R. 100, refused an order for further security, where it was not shown that the defendants could not have foreseen that the cause was one in which security to a larger amount

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TAYLOR, C.J.

than that usually ordered would have been proper, or as he expressed it, could not have foreseen that the cause would be one of the ponderous proportions it had assumed. Here the Company has failed to show that costs already incurred, and to which it is entitled, have exhausted the security already given. And it does not show that the costly character of the litigation was not, and could not have been foreseen. All it can say is, that it expected a demurrer would dispose of it. Well, the demurrer was tried, and failed.

I think *Bell* v. *Landon* should be followed, and I refuse the present appeal with costs to the plaintiff in any event.

Application refused with costs.

RE BISHOP ENGRAVING AND PRINTING COMPANY.

Before TAYLOR, C.J.

Company—Winding Up—Orders for contributories to pay, judgments of the Court—Liability of contributory to examination as a judgment debtor.

Orders to pay, under section 78 of The Winding Up Act, R. S. C. c. 129, are judgments of this Court.

An order to examine a judgment debtor should not be granted, unless the creditor shows that execution has been issued, placed in the sheriff's hands, and returned *nulla bona*, or that if called upon to return the *fi. fa*, the sheriff would return same *nulla bona*.

Query, whether contributories ordered to pay money can be examined under A. J. Act, R. S. M. c. 1, s. 64.

ARGUED: 8th May, 1893.
DECIDED: 9th May, 1893.

Statement.

THIS was an application by the Liquidator to examine, as judgment debtors, three contributories who had been

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Statement.

ordered to pay calls, and had made default in doing so. The first call was made by an order dated 10th June, 1887, and the second by an order dated 12th November, 1888. In each of these a specified sum was ordered to be paid by each of the contributories moved against. The non-payment was sworn to by the Liquidator.

G. R. Howard for liquidators.

T. S. Kennedy, Q. C., and *T. D. Cumberland* for contributories.

TAYLOR, C.J.—It is objected that these orders are not judgments within the meaning of section 64 of The Administration of Justice Act, and also that there should have been a further order made after a summons calling upon them to show cause why they should not pay the amounts demanded.

The orders made under The Winding Up Act, provide that every application to the Court to make a call shall be upon an order *nisi* or summons stating the proposed amount of such call, served four days before the day appointed, on every contributory proposed to be included in the call, and upon the copy served on each contributory there is to be endorsed a memorandum, specifying the amount which such contributory will be required to pay. An order for a call may be made so as to direct payment of not merely the amount of the call, but also the amounts or balances payable by the respective contributories, and the time and place of payment, but no one is to be ordered to pay a larger sum than specified in the memorandum endorsed on the summons, without notice, &c. Where a contributory is ordered to pay a specific amount, then at the expiration of the time for payment, if no receipt from the Bank into which the amount is payable, has been deposited with the clerk of Records and Writs, execution may be issued without further order.

Under section 78 of The Winding Up Act, every order of the Court, or a Judge for the payment . . . made under the Act, shall be deemed a judgment of the Court

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Judgment.

TAYLOR, C.J.

. . . and may be enforced against the person or goods and chattels . . . of the person ordered to pay in the same manner in which judgments or decrees of any superior court obtained in any suit may . . . be enforced in the Province where the Court enforcing the same is situate.

The orders now in question were both made after the issue and service of a summons properly endorsed. They direct payment to the Liquidator, or into a Bank, of specific sums by the contributories now moved against, and the second one provides that in default of payment, execution may be issued by the Liquidator for the sums mentioned, with any and all balances which may be due under the order for the first call. These orders were duly served and I cannot see that any further order could be necessary before taking proceedings to enforce payment. These orders are under section 78 of the Act judgments of this Court.

It seems to me, however, doubtful if the parties ordered to pay, can be examined under section 64 of The Administration of Justice Act. It is not every judgment for payment of money that will entitle the judgment creditor to examine the judgment debtor. The wording of the section seems scarcely to apply to a case like the present, and the section has been given a rather strict construction, both in Ontario and in this Province.

But the further objection is taken, that an order to examine cannot be granted because no writ of execution has been issued. It seems to me this step must be taken before an order can be made under section 64, if it does apply. That has been the uniform practice hitherto. To obtain a summons for the examination of a judgment debtor, the creditor has always been required to show that execution had been issued, placed in the sheriff's hands, and returned *nulla bona*, or that the sheriff could not find goods of the judgment debtor within his bailiwick, and if called upon to return the *fi. fa.*, his return would be *nulla bona*.

Now, without deciding that the Court will in no case

direct an examination until after such a return I do not think I would be justified in departing from the long established practice, solely upon an affidavit of the Liquidator, that to the best of his knowledge and belief, none of these contributories have any property liable to seizure under execution, and that if writs were issued they would be returned *nulla bona*.

1893. Judgment. TAYLOR, C. J.

The application must be refused.

CREDIT FONCIER FRANCO-CANADIEN v. ANDREW.

Before TAYLOR, C.J.

Mortgage suit—Mortgage repayable by an annuity—Mortgagee's remedies—Right to foreclosure.

A mortgage contained a proviso for redemption as follows.—"Provided this mortgage to be void on payment of $900 of lawful money of Canada, with interest at eight per centum per annum as follows:—Firstly, the said principal sum to bear interest at the said rate from the date hereof until the first day of December next, to be then paid: and thereafter, secondly, the said principal and the interest thereon to be payable by an annuity of $91.80 per annum for twenty years, being composed of the interest on the said principal at the said rate of eight per centum per annum, and a sum for the progressive sinking of the debt, of $2.20 per centum per annum, such annuity to be paid in half yearly payments of $45.90 each on the first days of June and December in every year, the first of such payments to be made on the first day of June next."

Held, on demurrer, that the instrument was simply a mortgage securing repayment of a sum of money advanced by the plaintiffs, in instalments extending over a period of twenty years.

The fact that the plaintiffs had a power of sale did not prevent an application to the Court for foreclosure. To obtain a foreclosure of the equity of redemption upon default in the payment of a mortgage, is what a mortgagee is entitled to.

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In the case of a mortgage where there has been default in payment, foreclosure is the appropriate remedy.

ARGUED: 1st February, 1893.

DECIDED: 8th May, 1893.

Statement.

THE bill in this case alleged that, under a mortgage made by the defendant in pursuance of the Act respecting Short Forms of Indentures and containing all the covenants and provisoes set forth in the second schedule to that Act, the plaintiffs were mortgagees of a certain parcel of land for securing $900 and interest which the defendant covenanted to pay. The proviso for redemption was set out; "Provided this mortgage to be void on payment of $900 of lawful money of Canada with interest at eight per centum per annum as follows:—Firstly, the said principal sum to bear interest at the said rate from the date hereof until the 1st day of December next, to be then paid. And thereafter, secondly, the said principal, and the interest thereon to be payable by an annuity of $91.80 per annum for twenty years, being composed of the interest on the said principal at the said rate of eight per centum per annum, and a sum for the progressive sinking of the debt of $2.20 per centum per annum, such annuity to be paid in half yearly payments of $45.90 each on the 1st days of June and December in every year, the first of such payments to be made on the first day of June next, (1887). Such payments to be made in gold if required, and to be made at the office of the company in Winnipeg, and taxes and performance of statute labour and observance and performance of all covenants, provisoes and conditions herein contained." It was then alleged that, by the mortgage it was provided that upon default in payment of any of the annuities, the whole principal sum secured should immediately become due and payable; that default had been made in payment of the annuity due on the 1st of June, 1891; that $77 had been paid on account of principal, and $152.50 on account of interest, and that there was due for principal $823, and for interest and insurance $204.90. The prayer was for payment of the

amount due, for delivery of possession, and in default of payment, for foreclosure. 1893. Statement.

To this bill a demurrer for want of equity was filed.

J. T. Huggard for plaintiffs.

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

TAYLOR, C.J.—The defendant's contention is, that this being a charge of an annuity the plaintiffs cannot have a foreclosure, but have only a right to a sale. And that, as the mortgage deed, according to the allegations in the bill, contains all the covenants and provisoes set forth in the second schedule to the Act respecting Short Forms of Indentures, it contains a power of sale, so the plaintiffs have no need to come to the Court for relief and the bill is unnecessarily filed.

Sampson v. *Pattison*, 1 Ha. 533, relied on in support of the demurrer, was a case in which land was conveyed to A. in trust that the same should stand charged with a sum of money, and subject thereto in trust for B. with a power of sale by A. upon non-payment after notice, and Vice-Chancellor Wigram held that no right of foreclosure arose out of such a contract. The form of the security pointed out the manner in which the trust was to be worked out and payment obtained. Another case relied on is *Watson* v. *Waltham*, 2 A. & E. 485. That was an action of trespass to which the defendant pleaded that the plaintiff surrendered certain copyhold premises to A. upon trust for securing repayment of certain moneys to W. and in default, upon trust that A. should at any time when W. should think proper, sell the premises and surrender them to the use of the purchaser, and that the money not having been paid, the defendants as the servants of A. under and by virtue of the indenture broke and entered in order that A. might take, hold, and enjoy possession of the premises. This plea was held bad on special demurrer, but the judges do not seem to have been quite agreed as to the reason for holding it so. Lord Denman, C.J., said one ground of his decision was that the power to sell did not imply a right to enter and

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Judgment.

TAYLOR, C.J.

turn persons out. Littledale, J. and Williams, J., seem to have thought the plea defective, because it did not allege that W. thought proper to require a sale and that the entry was in prosecution of that purpose. *Jenkin* v. *Row*, 5 De. G. & Sm. 107, and *Scweitzer* v. *Mayhew*, 31 Beav. 37, were both cases in which lands were conveyed upon trust to sell and repay certain moneys. Foreclosure was held not the proper remedy on default in payment, and it was so because there were express trusts for the purpose of raising the money. It was held that the fact that the débtor had a right to redeem and prevent a sale, could not supersede or vary the trusts expressed in the deed. *Kirkwood* v. *Thompson*, 2 H. & M. 392; *Paton* v. *Wilkes*, 8 Gr. 252, are to the same effect.

In *Cupit* v. *Jackson*, 13 Price, 721, powers of entry and distress, and a right to pernancy of the rents, issues and profits in satisfaction of an annuity when in arrear were expressly given, and it was argued that these remedies should, in the first instance have been resorted to, but the Lord Chief Baron held it competent for the plaintiff to file a bill praying the Court to decree that the arrears of the annuity should be raised by sale or mortgage of the estate. *Manly* v. *Hawkins*, 1 Dr. & Wal. 363, and *Fay* v. *Fay*, 5 Law Rec. N.S. 198, are decisions to the same effect. In neither of these cases was there an allegation of any difficulty to prevent the plaintiff availing himself of the remedies given by the deed.

It is true that in *Sollory* v. *Leaver*, L. R. 9 Eq. 22, and *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495, Malins, V.C., refused to grant a receiver where there was a power to distrain, but the earlier authorities seem more in accordance with the general practice of the Court. Thus it has never, so far as I can find, been held that a mortgagee having a power of sale is prevented from filing a bill to have the mortgaged estate sold under the decree of the Court, *Slade* v. *Rigg*, 3 Ha. 35; *Wayne* v. *Hanham*, 9 Ha. 65; *Kerrick* v. *Saffery*, 7 Sim. 317; *Lamb* v. *McCormack*, 6 Gr. 240.

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Judgment.

TAYLOR, C.J.

That the plaintiffs have a power of sale, does not then prevent an application to the Court.

But are the plaintiffs entitled to ask for foreclosure, or is a sale the only relief they are entitled to? In the case of a mortgage, where there has been default in payment, foreclosure is the appropriate remedy. The instrument set out in the bill is plainly one to secure the repayment of a sum of money, and the Court always presumes an instrument of this nature, intended as a security for money advanced, to be an ordinary mortgage, accompanied with the usual remedies, unless the terms of the instrument exclude that construction, *Balfe* v. *Lord*, 2 Dr. & War. 480. Do the terms of the instrument here exclude that construction? It is one to secure the repayment of $900 and interest, and the defendants covenant to pay that sum and the interest. The principal money is to bear interest at eight per cent until the first day of December following the date of the instrument, which interest is then to be paid After that date $91.80 is to be paid each year by an annuity for twenty years in two equal payments on the 1st days of June and December in each year. There is no magic in the use of the word annuity, that in itself means simply an annual payment. In the strict meaning of the term, an annuity signifies a stated sum of money payable at regular periods and derived from a fund or source in which the annuitant has no further property than the claim for payment of his annuity. In that way an annuity is distinguished from the interest of money &c., where the same person who receives the income, also holds in property the capital which produces it. There is never a contract by the grantor of the annuity to repay the purchase money. Here there is a covenant to repay the amount advanced. Then the annual payment is expressed by the instrument to be made up of interest upon the principal, and so much of the principal itself. In addition there is provision made, that upon any default in payment the whole principal sum secured shall immediately become due and payable.

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Judgment.

TAYLOR, C.J.

The instrument is simply a mortgage securing repayment of a sum of money, advanced by the plaintiffs, in instalments extending over a period of twenty years. To obtain a foreclosure of the equity of redemption upon default in the payment of a mortgage, is what a mortgagee is entitled to, so the present demurrer must be overruled.

The defendant may have leave to answer within fourteen days if he so desires.

Demurrer overruled.

CREDIT FONCIER FRANCO-CANADIEN v. SCHULTZ.

Before DUBUC, J.

Mortgage—Rate of Interest after maturity of mortgage—"To be paid on all and any payment in default."

A mortgage under the Act respecting Short Forms of Indentures contained the usual clauses, but, in addition thereto there was the following.

"The said mortgagor covenants with the said Company that the mortgagor will pay the mortgage money and interest, and observe the above proviso, and in the case of default, at the said rate, compounded with rests each half year, to be paid on all and any payment in default, whether of principal or interest or both."

Held, that interest was payable after maturity, at the rate of eight per cent. per annum.

The following cases distinguished:

People's Loan and Deposit Co. v. *Grant*, 18 S. C. R. 262.

Freehold Loan Co. v. *McLean*, 8 M. R. 116.

Manitoba and N. W. Loan Co. v. *Barker*, 8 M. R. 296.

ARGUED: 13th April, 1893.

DECIDED: 1st May, 1893.

Statement.

THE bill was filed to enforce, by foreclosure, a mortgage made by defendant.

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Statement.

The question was whether the interest stipulated in the mortgage should, after the time fixed for payment of the principal be continued payable at the rate stipulated, or should be reduced to the legal rate of six per cent.

J. T. Huggard for plaintiff. The question is, are we entitled to eight per cent. interest upon principal after maturity or only six per cent. We concede that the first part of the first covenant containing the words, "until the principal is fully paid," does not entitle us to interest at eight per cent. after maturity of the principal, but we claim that under the words, "arrears of interest at the rate above mentioned," and under the covenant, we are entitled to interest at eight per cent. after maturity. There is an intention to make a *post diem* rate within the meaning of the authorities.

F. H. Phippen for defendant. Only two points are open for discussion. First, how much is due on this mortgage. Second, whether that amount being ascertained the defendant has tendered a sufficient sum. Tender is admitted and is for more than the amount claimed by the bill, with costs. Defendant must therefore succeed. In ascertaining amount due, interest at six per cent only should be allowed. *Manitoba & N. W. Loan Co.* v. *Barker*, 8 M. R. 296.

DUBUC, J.—It is provided in the mortgage that the interest shall be at the rate of eight per cent. per annum, and that the principal sum of $5000 shall be payable on the first day of December, 1891, and interest half yearly upon the principal on the first days of June and December; arrears of interest to bear interest at the rate above mentioned.

The point raised here has been decided in *Re European Central Ry. Co.* 4 Ch. D. 33; *St. John* v. *Rykert*, 10 S. C. R. 278; *The People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262; *Archbold* v. *The Building & Loan Association*, 15 O. R. 237; and in our own Court in *Freehold Loan Co.*

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Judgment.

DUBUC, J.

v. *McLean*, 8 M. R. 116, and *The Manitoba and N. W. Loan Co.* v. *Barker*, 8 M. R. 296.

It is held in those cases that when the mortgagor covenants to pay the principal on a specified day with interest thereon at the stipulated rate "until paid," or "until the whole is fully paid and satisfied," or "until repayment thereof," the meaning of these words was "until the day fixed for payment," and after such day, the legal interest was only chargeable.

In *St. John* v. *Rykert*, Mr. Justice Strong, after stating the construction to be given to the words used in the mortgage, says at p. 288, "I should have arrived at this conclusion without authority, for I take it that in the absence of express words showing that the parties contemplated payment, not *ad diem*, but *post diem*, we ought not to presume that they intended to make provision for a breach of the covenant, and I should have thought that a proper and salutary construction, requiring as it does, parties who stipulate for a larger amount of interest than the usual and legal rate to make clear by precise and unambiguous language what their intention was."

In *The People's Loan and Deposit Co.* v. *Grant*, C. J. Ritchie says: "'Shall be fully paid and satisfied,' necessarily refers to the time fixed for payment . . . . . until fully paid and satisfied according to the times fixed in the deed. I can see nothing in these words to show any intention to extend the time of payment of principal or interest beyond the respective times named in the mortgage."

The point above discussed has been conceded by the plaintiff's counsel; but he contends that the clause in the mortgage, "Arrears of interest to bear interest at the rate above mentioned," changes the meaning, and may be construed as indicating an intention that the rate of interest should be continued at eight per cent. after maturity of the mortgage. I think, however, under the light of the authorities cited, and particularly under *The Manitoba & N. W. Loan Co.* v. *Barker*, where a clause of

similar purport was in the mortgage, that such a clause cannot have the effect of altering the construction of the previous clause as to interest.

The next clause in the mortgage is as follows:

"The said mortgagor covenants with the said Company that the mortgagor will pay the mortgage money and interest, and observe the above proviso and in case of default at the said rate compounded with rests each half year to be paid on all and any payment in default, whether of principal or interest or both."

It is argued that the words in that clause, "in case of default," and "any payment in default," apply to default of payment of the principal at maturity, and that the interest, "at the said rate" should be paid after the time fixed for payment of the principal. It can hardly be said that the language used is as clear as it can possibly be. But the question is whether it sufficiently and really expresses an intention of the parties that the stipulated rate of interest shall continue after the time fixed for payment of the principal.

The mortgage is an ordinary mortgage in which the usual provisoes and covenants are printed. The latter part of the clause in question commencing "and in case of default" &c., is added to the usual covenant and written by the conveyancer. Something must have been meant by the added sentence. When it says that, in case of default, the interest at the said rate, compounded with rests each half year, is to be paid on all and any payment in default, whether of principal or interest, or both, I think it shows clearly enough an agreement to pay interest on principal after maturity of the mortgage, and the interest agreed to be paid is interest "at the said rate," i. e. at eight per cent.

It is a well known doctrine that when interest is allowed after maturity on a certain sum agreed to be paid, on a specified day, with a fixed rate of interest, the amount so allowed is not considered as interest agreed to be paid, or as the enforcement of a contract, but as damages for breach of contract. And the damages recoverable in such cases

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are calculated, not on the stipulated, but on the legal rate of interest. It is generally so, unless the party chargeable with interest has specifically agreed to pay the same rate of interest after the principal has become payable.

In this case the covenant is that the mortgagor will pay interest at the said rate on all and any payment in default, whether of principal or interest, or both. Default in payment of principal is supposed to occur only after the time fixed for payment. It seems, therefore, manifest that there was an agreement to pay interest at the stipulated rate, after maturity.

In my opinion the written part of the clause added to the covenant, distinguishes this case from those cited *supra*, and the fair construction to be given to that added clause is, that there is a stipulation to pay interest at the stated rate after the time fixed for payment of the principal.

The plaintiffs are entitled to a decree in the usual form on the case made out by their bill.

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JACKSON v. THE BANK OF NOVA SCOTIA.

Sale of Goods—Sale of horse, by owner to his employee—Bills of Sale Act—Immediate delivery—Change of possession—Seizure of horse under execution against vendor—Claim by vendee—Interpleader Issue.

Interpleader issue respecting the right to a stallion. D. H. acquired the horse in question in March, 1891. During 1891 and 1892 printed notices were put up advertising the horse in which it was stated that reference for particulars was to be had to D. H., although there was no statement of the ownership of the animal. H. did not, himself, travel with or personally take care of the horse, but arrangements were made in his name with the persons at whose places the horse was put up, and printed forms were used on which was the heading, "D. Hope, proprietor."

On 20th June, 1892, plaintiff bought the horse from H., giving his note at 6 months for the amount of purchase money, and H. gave him an absolute receipt acknowledging payment of the whole of the purchase money, and an order for delivery of the horse. The horse was then away in the country and was not brought back to Winnipeg until 23rd June, when plaintiff presented the order to C. who took care of the horse, and told him he had bought it, he told C. to change the book containing the forms of contracts by substituting the plaintiff's name for that of H.; he gave C. charge of the horse and told him to tell everybody that the horse was his, plaintiff's.

Held, that the transaction must be treated as a real agreement for the sale of the horse to the plaintiff. The plaintiff's note was apparently accepted in payment, and there was such a delivery and acceptance as satisfied the Statute of Frauds.

But, the sale was void as against the defendant, because of its not having been accompanied by an immediate delivery, and the possession of the plaintiff could not avail to give him a title, which the sale did not give as against the defendant in the issue.

ARGUED: 13th December, 1892.
DECIDED: 31st January, 1893.

THIS was an interpleader issue respecting the right to a stallion, named Young Borland, seized by the Sheriff under execution issued by the defendant in the issue against D. Hope, and claimed by the plaintiff in the issue. Statement.

The facts appear in the judgment.

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Argument.

W. H. Culver, *Q.C.*, and *I. Pitblado* for defendant. The sale was void under the Bills of Sale Act. There was no immediate delivery. The sale was made on a Monday, the horse was out in the custody of Hope's servant, and did not return until Thursday, it was then taken to Enright's stable and remained there overnight. There was no actual and continued change of possession. When the horse was at Enright's stable, it was there with Enright as bailiff of Hope and Enright's possession was possession of Hope, also at other stopping places the horse was advertized as that of Hope. The tickets used showed Hope was the owner and there was no satisfactory evidence showing the change. *Pettigrew* v. *Thomas*, 12 A. R. 577; *Snarr* v. *Smith*, 45 U. C. R. 156; *Danford* v. *Danford*, 8 A. R. 518; *Tuer* v. *Harrison*, 14 U. C. C. P. 449; *Scribner* v. *McLaren*, 2 O. R. 265; *Scribner* v. *Kinloch*, 12 A. R. 367; 14 S. C. R. 77; *McLeod* v. *Hamilton*, 15 U. C. R. 113; *Doyle* v. *Lasher*, 16 U. C. C. P. 263; *Herman on Chattel Mortgages*, 201; *Barron on Bills of Sale*, 106, 299, 305, 315; *Frazer* v. *Lazier*, 9 U. C. R. 679; *Haight* v. *Munro*, 9 U. C. C. P. 462; *Heward* v. *Mitchell*, 10 U. C. R. 542; *Deady* v. *Goodenough*, 5 U. C. C. P. 163; *Proudfoot* v. *Anderson*, 7 U. C. R. 573.

G. A. Elliott for plaintiff. It was not necessary to give notice of the transaction. Colter had control of the horse, not Enright. An endeavour to secrete may be evidence of fraud, but does not necessarily amount to such. The property was taken possession of by the vendee long prior to the defendants' execution, and any defect in the sale was remedied by vendee's subsequent possession. *Barron on Bills of Sale*, pp. 142-3, and 313.

KILLAM, J.—The defendant recovered its judgment against Hope on the 3rd June, 1885. What steps were taken to realize on the judgment do not appear, and the writ under which the seizure was made was an *alias* writ issued on the 29th June, 1892. The seizure was made on the 21st July, 1892. D. Hope at one time carried on some business, but he became insolvent in 1883. At some time

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subsequently the business of manufacturing tents, awnings, &c., was started in the name of Hope & Co., which Hope states to have been the business of his wife, and of which D. Hope was the manager. D. Hope also became possessed of some horses, and in 1891 and the beginning of 1892 he owned seven or eight horses, one of which, the stallion now in question, he acquired in March, 1891, and owned until the 20th June, 1892. During the years 1891 and 1892, printed notices were put up in stables in Winnipeg, and in places in the country, advertising this horse as standing for service at different places in and near Winnipeg on certain days, and it was also so advertised in a newspaper known as The North West Farmer. One such notice, said to be similar to all so posted up, is produced in which parties are referred for particulars to D. Hope, although there is no statement of the ownership of the animal. Hope did not himself travel with or personally take care of the horse, but arrangements were made in Hope's name with the different parties at whose places the horse was put up, and a book containing printed forms to be filled up as contracts with or acknowledgments of the owners of mares with which the horse was used was furnished to the groom, and on each of these forms was the heading, "D. Hope, Proprietor."

The plaintiff claims to have purchased the animal of Hope on the 20th June, 1892. The plaintiff was a carpenter employed in the tent factory of Hope & Co., at wages amounting to $2.50 per day. He states that at the time of the alleged purchase he was possessed of a house and lot, subject to a small incumbrance, besides a horse and buggy and some other assets, and was worth $1800 or $2000 above his liabilities, and that Hope knew his financial position. His account of the purchase is this: he had previously desired to purchase the horse, and had at one time offered to Hope to buy a half interest in it, and subsequently on different occasions to purchase the animal; that, on the 20th June, 1892, he repeated to Hope the offer to purchase the horse for $700, which Hope then

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said he would consider; that, subsequently, on the same day, Hope said he would accept the offer; that he then told Hope that he could not pay for it at once, but would give his note at six months for the amount, with the privilege of making payments as he went along; that Hope then agreed to this, that Hope drew up the note which plaintiff signed, and Hope then gave him a receipt, which is produced, and an order, which is not forthcoming; that the horse was then away in the country and was not brought back to Winnipeg until the 23rd June, when he immediately presented the order to one Colter, who travelled with and took care of the horse, and told Colter that he had bought the horse; that nothing else was done just then, but the groom took the horse to the stable; that that evening Colter came to the tent factory and met the plaintiff, and they talked about the horse; that the plaintiff then said, "What about wages?" and Colter replied, "Something about as I am getting, we won't quarrel about that;" that he then told Colter to change the book containing the forms of contracts by substituting the plaintiff's name for Hope's; that Colter then did so on a number of the forms; that Hope came in the same evening and took off the pages of the book containing the prior contracts; that on the same evening or the following morning he gave Colter charge of the horse and told him to substitute his name for Hope's in the posters and to tell everybody he saw that the horse was the plaintiff's.

Hope corroborates the plaintiff's account of the sale, and says that he never afterward exercised any control over the horse.

Colter states that the first he learned of the sale was when he returned to Winnipeg on the afternoon of the 23rd June, and that plaintiff then gave him the order, but that he has lost it. He gives its contents as follows:—

"Mr. Neil Colter,

Please deliver to J. W. Jackson the horse Young Borland as I have sold him to him. He will settle with you for the balance of the season."

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Colter corroborates plaintiff's account of the conversation in the evening and the changes in the book, but says that he does not think that he changed any of the duplicates given to the owners of the mares.

The receipt, which was produced, was an absolute one, acknowledging payment of the whole of the $700, "for stallion Young Borland."

At the beginning of the season, Hope made an arrangement with the manager of a livery or boarding stable in Winnipeg for the keeping of the horse when it should be in the city. Similarly, arrangements were made by Hope, or in his name, at the different places in the country where the horse was to stand. These parties, however, furnished only food, standing room and shelter, and Colter fed, watered and took care of the horse.

Neither Hope nor the plaintiff informed any of these parties of the change of ownership. Colter states that he told several parties that the horse belonged to Jackson, that he told this to one O'Neill, whose place in the country was one of those at which the horse stopped, the first time he visited the place after the sale; that he thinks he told Costello, manager of the Winnipeg stable, of it, and that he knows it was known at that stable that the horse was Jackson's; but, on further examination, Colter states that he does not think that he told those with whom he stopped of the change. Colter also states that he cannot say if he told the parties served of the change, and that they might think they were dealing with Hope, and that so far as there was anything to show them they would be dealing with Hope. He admits, also, that he advised Jackson not to change the tickets or the posters. There is no evidence of a change in any of the posters except one produced in court by the plaintiff and stated by him to have been obtained from Colter, and it does not appear that this one was ever posted up. The plaintiff states that Colter did not change the posters. Colter explains his advice against making known the change of ownership as being on account of its being usual to insure the getting of a foal

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and to repeat the service when unsuccessful, and of the danger of making customers afraid that such arrangements might not be respected upon a change of ownership.

There was no agreement between Hope and the plaintiff as to what should be done in cases of this kind.

The horse was used with two mares in the country on the 21st June, and with two others in the city on the 23rd June.

Costello places the time when he first learned of the transfer at the 23rd July. Up to that time he made his charges against Hope, and these were paid by the plaintiff after the seizure and the interpleader proceedings in order to get possession of the horse, as Costello refused to give up the animal without payment.

O'Neill states that Colter told him of the change of ownership, but that he cannot say whether this was in May or June or at the same time that he heard of the seizure.

Several other parties with whom the horse was put up were called. Of these all but one denied hearing of the change of ownership, and one states that he was told of it by a neighbour, that he thinks this was in June, but at any rate it was before the end of the season.

The plaintiff states that he did not know until about the end of July what wages Colter was getting from Hope. Colter states that he was engaged for the season, which was to end 9th July, for $100, and that he continued on after that date without any further agreement with the plaintiff.

The plaintiff claims to have made some payments to Colter, and to have furnished him with money for small expenses connected with the horse.

There being no formal bill of sale or other written transfer of the property in the horse, the *onus* is upon the plaintiff to establish the sale, the delivery, and an actual and continued change of possession of the animal.

The transaction is a most suspicious one, and I have hesitated somewhat as to whether I ought to hold it to have been a real and *bona fide* sale. However, both Hope

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and the plaintiff swear to an agreement amounting to an absolute sale, and they are to some extent corroborated by Colter. There is nothing but the peculiar nature of the transaction which could lead me to doubt the truth of their statements. Hope had, for a considerable time, owned property which could have been seized, and, so far as I know, he had other property subject to seizure, both at the time of the alleged sale and at that of the seizure. He does not appear to have made any secret of his ownership. What previous attempts had been made to realize on the defendant's judgment, nor why the attempt was made just when it was, I am not informed. There is no evidence that Hope had any notice of or reason to apprehend such a step, when he assumed to sell to the plaintiff.

I think, then, that I am not at liberty to treat the transaction as other than that which the effect of the statements of these witnesses make it, a real agreement for the sale of the animal to the plaintiff. The plaintiff's note was apparently accepted in payment, and there was such a delivery and acceptance as satisfied the Statute of Frauds.

It remains, then, to consider the effect of The Bills of Sale Act, R. S. M. c. 10, s. 2, which requires such a sale to be "accompanied by an immediate delivery" and "followed by an actual and continued change of possession." As I have said, the *onus* is upon the plaintiff to establish these circumstances.

In my opinion there was no delivery of the horse to the plaintiff until the morning of Friday the 24th June. Colter was not a bailee of the horse; he was a mere servant of Hope, and his possession was that of Hope. Neither actual nor formal delivery was made when the plaintiff presented the order to Colter. The latter, remaining the servant of Hope, drove away with the horse and put him up so far as appears, as the horse of Hope, at the stable where Hope had engaged shelter and food for him. Although Colter fed and cared for the animal, I think that its custody and possession was then in the proprietor of the stable. This is the natural inference, and

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it is supported by Costello's claim to hold the animal until paid for keeping it, and the plaintiff's submission to that claim. The services of the horse were obtained by two parties on the 23rd. The inference which I make from the evidence is that this occurred between the arrival of the horse in Winnipeg and the meeting of the plaintiff and Colter in the evening of the 23rd. It was not until that evening that the plaintiff and Colter made any agreement by which the latter became the plaintiff's servant. It could only be on Colter's taking out the horse in that capacity, the next morning, that there was any delivery of any kind to the plaintiff.

As to what constitutes an immediate delivery under this Act, there are no decisions of this Court to determine; but in several cases in the Courts of Ontario are found decisions or judicial remarks upon the similar statute of that Province, which may be considered with advantage.

In *Frazer* v. *Lazier*, 9 U. C. R. 679, Chief Justice Robinson appears to have thought that the grantee should go into possession at the time of the execution of the instrument of transfer.

In *Ontario Bank* v. *Wilcox*, 43 U. C. R. 489, Wilson, J., said that the words of the Act, "seem to require that the change of possession, as well as the delivery of the goods, should immediately accompany the mortgage."

In *Haight* v. *Munro*, 9 U. C. C. P. 462, delivery was not made at the time of the execution of the transfer, because the goods were at a distance and could not be then actually delivered; but the delivery was made as soon as it could be conveniently done thereafter, and this was held sufficient. Draper, C.J., said, "I think immediate delivery means delivery as quickly as the nature of the case admits of . . . . . that it is a question of fact not exclusively depending on there having been some interval of time between the signing of the instrument of sale and the actually being possessed."

In *McMaster* v. *Garland*, 8 A. R. 5, Spragge, C.J., said, "In getting at the meaning of the words of the Act,

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and saying what is a delivery and an immediate delivery of the goods which are the subject of mortgage or sale, as the case may be, we are to look at the nature of the goods and their locality, and the place where the mortgagee or purchaser is to receive them, and of what kind of delivery they are capable."

These last two sets of remarks appear to me to interpret the statute properly, and to leave the question to be disposed of as one of fact in each case. See, also, *Carruthers* v. *Reynolds*, 12 U. C. C. P. 596. After careful search I can find no report of any case analogous to the present.

Taken as a question of fact, I cannot find in this instance that there was an immediate delivery. Hope made none. He signed a paper giving his servant authority to make delivery. The horse was then only a few miles from Winnipeg, and it would not have been difficult or expensive to insure the order reaching the servant on the day of its being given or on the next day. In the meantime the horse was being given food and shelter on Hope's credit and on the faith of his ownership. More than that, the circumstances were such that the parties must necessarily contemplate the possibility of contracts being made by which Hope would be bound to give the future services of the horse, and yet no provision was made for the plaintiff furnishing them. In such a case, it appears to me that the utmost expedition was required to obtain "immediate delivery." Then, upon the return of the horse to Winnipeg, he was not at once delivered, but further expense was incurred for his maintenance on Hope's credit and on the faith of his ownership, and further contracts were made in Hope's name and by his servant for the services of the animal.

Upon the question of change of possession, I find that Colter actually ceased to be the servant of Hope and became the servant of the plaintiff on the evening of the 23rd June, and took out and cared for the horse in that capacity on and after the 24th June. I find this on the same principle as that on which I find the fact of there

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being an actual sale to the plaintiff. The plaintiff and Colter swear to the circumstances, and I cannot say that I have more than a suspicion arising from the unusual nature of the transaction to weigh against their evidence.

As Wilson, C.J., said in *McMaster* v. *Garland*, 31 U. C. C. P. 329, "When the possession is changed, it does not require to be given personally to a creditor, purchaser or mortgagee; it may equally be given to a trustee or bailee for him." It was, as I find, given to the plaintiff's servant, which was equivalent to giving it to the plaintiff himself.

However, I cannot find that the change was made known, either to the public generally or to those having dealings with Hope or in respect of the horse. I do find that it was not intended to be made known. Even if the plaintiff did give to Colter the instructions of which he speaks, he was properly induced by the advice of Colter to leave the matter in his hands.

Notwithstanding Colter's statement of what he told O'Neil, I am not, in view of some of his other statements, satisfied that he told even him until after the seizure. I think that it was made known to no one until long after the defendant's execution reached the Sheriff's hands, and probably not until after the seizure. The only explicit statement of Colter upon this point relates to his telling O'Neil, and it is not clear that this was before the execution reached the Sheriff's hands. So far, then, as this question of secrecy is concerned, I find it as a fact and that it was intentional; but I do not think that, in view of the reason given by Colter, I can hold that this was done with fraudulent intent, unless that very reason can be said to be founded on such an intent towards customers. I do not find it to have been so.

Now, I fully agree with the strongest remarks found in the reports as to one great object of the statute being to prevent secret transfers and the giving of credit on the faith of apparent ownership of goods not belonging to the custodian. See *Heward* v. *Mitchell*, 10 U. C. R. 535; *Wilson* v. *Kerr*, 17 U. C. R. 168; *Ontario Bank* v.

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Wilcox, 43 U. C. R. 489; *Danford* v. *Danford*, 8 A. R. 521; *Gunn* v. *Burgess*, 5 O. R. 685; *Steele* v. *Benham*, 84 N. Y. 634.

Still, I think that secrecy is not necessarily in all cases an absolute test of the reality of the change of possession, but that it is really a circumstance throwing more or less suspicion upon that reality. This was the view of Burns, J., in *Harris* v. *The Commercial Bank*, 16 U. C. R. 487.

In *Reid* v. *McDonald*, 26 U. C. C. P. 147, Gwynne, J., pointed out that the statute did not expressly require a *visible* change of possession.

The class of cases most analogous to the present is that in which goods are held by warehousemen or bailees for others. There, as held in *Richardson* v. *Gray*, 29 U. C. R. 360, an actual change of possession may be effected by transfer of a warehouse receipt or other acknowledgment of the bailment, and the undertaking of the bailee to hold for the transferee. This view was taken by my brother Dubuc in *Jones* v. *Henderson*, 3 M. R. 433; and although his decision was reversed by the Full Court, it was upon a different ground. See, also, *Maulson* v. *The Commercial Bank*, 17 U. C. R. 30.

The point upon which I have the most doubt arises from the placing of the horse in the custody of parties with whom Hope had arranged therefor, and without informing them of the change. With some hesitation, I cannot find that this retransferred the possession to Hope.

I find, then, that there was, on and from the 24th June, an actual and continued change of the possession. This was prior to the issue of the defendant's execution, and if the opinion expressed by Mr. Justice Burton in *Parkes* v. *St. George*, 10 A. R. 518, and adopted by Mr. Justice Osler in *Smith* v. *Fair*, 11 A. R. 755, be accepted, this avoids the want of an immediate delivery. With the greatest respect, however, for the opinions of those learned judges, I prefer the view taken by Mr. Justice Patterson in those cases, and which was very clearly expressed by him in *Whiting* v. *Hovey*, 13 A.

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R. 14. He there said, referring to *Parkes* v. *St. George*, "I expressed my opinion in that case that, although a grantee could not by any act of his own in seizing the goods give himself a better title than he had under his deed, yet the grantor might by making a delivery which would operate as a conveyance of goods capable of passing at law by delivery effectually cure a prior defective conveyance."

In *Ontario Bank* v. *Wilcox*, 43 U. C. R. 489, Wilson, J., said, "If immediate possession be not taken, the mortgagor may obtain credit as the owner of the goods, and if the mortgagee can, just before the sheriff seizes, take the goods under his mortgage, all the mischief is done which it was the purpose of the statute to put an end to."

The English decisions to which Mr. Justice Burton refers were under the Act 17 & 18 Vic. c. 36, which avoided the bill of sale only so far as regarded chattels in the possession or apparent possession of the grantor at the time of his becoming bankrupt or filing a petition in insolvency or executing an assignment for the benefit of his creditors, or of the execution of process against him.

I quite agree that our Act should be deemed to avoid the sale or mortgage only as against creditors having, by execution or otherwise, but for such sale or mortgage, some lien on or interest in the goods, and that until such lien or interest attaches the Act does not prevent a free disposal of the goods. I also agree that probably one object which legislators had in view was that attributed by Mr. Justice Burton, the freeing of sheriffs and creditors from the difficulty raised by the apparent possession of goods. This was apparently regarded by Wilson, J., in *Doyle* v. *Lasher*, 16 U. C. C. P. 263, as an important object.

Under the Act, 13 Eliz. c. 5, the retention by a transferor of the possession of the transferred property was usually a badge of fraud. It was, I conceive, largely out of this doctrine that such enactments as the Bills of Sales Acts in Upper Canada and this Province arose.

This is more clearly exemplified by the course of legislation in the State of New York, where similar language is found in the statutes. See *Hanford* v. *Artcher*, 4 Hill, 297.

The very language of the statute is suggested by the reference in *Edwards* v. *Harben*, 2 T. R. 595, to *Bamford* v. *Baron*. This view is exemplified in *Carpenter* v. *Mayer*, 5 Watts, 485. It is not clear whether, in that case, the Court was dealing with rights under a statute of the State of Pennsylvania, or at common law and under the Statute of Elizabeth, but Kennedy, J., said, "It is not sufficient to make a transfer of goods available against the creditors of the assignor that the possession be in the assignee or changed at the time of the levy; in order to render such transfer good, a corresponding change of the possession must accompany the transfer, or follow it within a reasonable time. This is a general principle applicable to all absolute assignments of personal chattels, and has its foundation in the common law as well as in the Statute of Elizabeth."

Now, if the transfer were fraudulent, the taking of possession would not make it valid. It appears to me that the statute intended to constitute the non-delivery, or want of change of possession, an absolute and irrebuttable legal presumption of fraud, where there should be no bill of sale filed under its provisions, and that if the statute be not complied with it is not permissible to consider whether or not the transaction was *bona fide*. See judgment of Osler, J., in *Scribner* v. *McLaren*, 2 O. R. 265; also *Doyle* v. *Lasher*, 16 U. C. C. P. 263; *Pettigrew* v. *Thomas*, 12 A. R. 577.

In the present case, there was not in my opinion a delivery such as to constitute a fresh transfer. The order was given by Hope upon completion of the bargain, and it was accepted by the plaintiff and the note of the latter was given without further condition. The transaction was then binding and the property transferred as between Hope and the plaintiff. If the plaintiff did not take steps to

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obtain immediate delivery, it was no fault of Hope's. Hope was bound to do no more after that, except to abstain from preventing delivery. He could have refused to make any further transfer for the purpose of perfecting the plaintiff's title, or he might have insisted on a further consideration for giving such. The servant had no authority to do more than carry out the sale which Hope had already made. His subsequent delivery of the horse to, or receipt of it for, the plaintiff, could not amount to a new conveyance by Hope. The plaintiff's possession was founded on the sale of the 20th June. On the 29th June, when the defendant's execution reached the Sheriff's hands, that sale was void as against the defendants because of its not having been accompanied by an immediate delivery, and the possession of the plaintiff could not avail to give him a title which the sale did not give as against the defendant in the issue.

I shall, therefore, enter a verdict for the defendant.

Verdict for defendant.

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SUN LIFE ASSURANCE COMPANY v. TAYLOR.

Before KILLAM, J.

Fixtures—Machinery—Mortgagee and Execution creditor—Interpleader—Question whether machinery part of realty.

In the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purpose of a manufacturing business for which the freehold is occupied, and to which it is devoted, become part of the freehold, even though the mode of affixing them is such that they can easily be detached without injury either to themselves or to the freehold.

In the absence of evidence of a contrary intention, similar pieces of machinery standing on the freehold, but not affixed to it, except by the leathern bands communicating to them motive power, retain the character of chattels, notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is devoted.

A fastening by cleats affixed to the building only, and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient, in itself, to make the machine a part of the realty.

Longbottom v. *Berry*, L. R. 5 Q. B. 123, followed.

ARGUED: 19th October, 1892.
DECIDED: 7th January, 1893.

Statement.

THIS was an interpleader issue as to the title to certain machinery and other articles, seized under a writ of execution issued by the defendants in the issue, against the goods and chattels of certain persons trading as The Western Woollen Mills Co.

The plaintiff Company claimed as mortgagee of the lands on which the articles in question were situated, contending that they were fixtures and part of the realty.

The facts sufficiently appear from the judgment.

J. S. Hough, for plaintiffs, cited the following cases:—*D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 396; *Ex parte Astbury*, L. R. 4 Ch. 630; *Metropolitan Counties &c. Society* v. *Brown*, 26 Beav. 454; *Fisher* v. *Dixon*, 12 Cl. & F. 312; *Wystow's Case*, 4 Man. & R. 280 (g.); *Reg.* v. *Wheeler*, 6 Mod. 187; *Walmsley* v. *Moore*, 7 C. B. N. S. 115; "Fixture," defined by *Ewell*,

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Argument.

p. 21; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Adamson* v. *McIlvanie*, 3 M. R. 29; *Dickson* v. *Hunter*, 29 Gr. 73; *Keefer* v. *Merrill*, 6 A. R. 121; *Chidley* v. *Churchwardens of West Ham*, 32 L. T. N. S. 486; *Rex* v. *Guest*, 7 A. & E. 951; *Rex* v. *Birmingham & Staffordshire Gas Light Co.*, 6 A. & E. 634; *Reg.* v. *Haslam*, 17 Q. B. 220; *Staley* v. *Castleton*, 5 B. & S. 505; *Harter* v. *Salford*, 6 B. & S. 591; *Stevens* v. *Barfoot*, 13 A. R. 369; *Dewar* v. *Mallory*, 26 Gr. 621; *Carscallen* v. *Moodie*, 15 U. C. R. 304; *Hellawell* v. *Eastwood*, 6 Ex. 312; *Mather* v. *Fraser*, 2 K. & J. 536; 2 Sm. L. C. 191, 192; *Canada Permanent* v. *Merchants Bank*, 3 M. R. 285; *Turner* v. *Cameron*, L. R. 5 Q. B. 306.

T. D. Cumberland, for defendant, cited:—*Brown on Fixtures*, p. 56; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Adamson* v. *McIlvanie*, 3 M. R. 285; *Rogers* v. *Ontario Bank*, 21 O. R. 416; *Chidley* v. *Churchwardens of West Ham*, 32 L. T. N. S. 486; *Haley* v. *Hammersley*, 3 D. F. & J. 587; *Walmsley* v. *Moore*, 7 C. B. N. S. 115; *Ex parte Montgomery and Bristow, In Re McKibbin*, 4 Ir. Ch. N. S. 520, cited in *Brown on Fixtures*, 130; *Waterous Engine Works Co.* v. *Henry*, 2 M. R. 169.

KILLAM, J.—In the year 1883, one George Reid, being the owner in fee simple of these lands, applied to the plaintiff Company for a loan of $1,500, to be secured by mortgage of the property. The application was made on a printed form used in the loaning business of the Company, and gave separately the values and cost of the land and the buildings thereon, without specific reference to the machinery. Accompanying the application is a report of the Company's valuator, giving separate valuations of land and buildings, again without specific reference to machinery, The building was then used for the purposes of the manufacture of woollen fabrics of some kind, and contained machinery and appliances suitable for the purpose, similar to the most of those now in question. There is no evidence of the cost of the buildings alone, or of their separate values at the time of the application, which would aid one

in determining whether the machinery was intended to be included in the references to buildings.

The application was accepted and the $1,500 advanced, the Company receiving from Reid a mortgage in the ordinary statutory short form, in which the land alone was specifically conveyed.

About a year and nine months after the making of the mortgage, Reid found himself in financial difficulties and unable to pay an instalment of the principal, which had become due. At the instance of Mr. Gilroy, the plaintiff's local manager, Reid then gave to the Company an instrument in the form of a bill of sale by way of mortgage of various pieces of machinery and other articles, including some not now claimed to be chattels, and some which would appear to be so. Gilroy states that he was advised in the first instance by the Company's solicitors that the mortgage of the land would cover permanent machinery, and relying upon this advice he appears to have considered that some portion, at any rate, of the machinery was included in the security. He states, however, that there was always a question in his mind about the machinery, and that the bill of sale was given merely by way of precaution to settle any question that might arise, and was given after the solicitors had again advised that it was unnecessary. The recital in the instrument is that the mortgagor had agreed to give "further and more complete security, in consideration of the mortgagees forbearing to immediately press him and to foreclose their present security." This mortgage was filed in the proper County Court Office, but the filing was never renewed, and no claim is now made by the plaintiff under it.

A few days after the giving of the chattel mortgage, Reid assigned for the benefit of his creditors. This assignment covered both real and personal property in such general terms as to afford no evidence of what was deemed to come within either class.

About a year later Reid's assignee conveyed to Louis La Franchise and William L. Tait, for an expressed

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consideration of $600, all his interest in certain lands in the Town of St. Boniface, "being all the land, and that certain building and premises known as the St. Boniface Woollen Mills," (describing by metes and bounds the lands mortgaged to the plaintiff.) The conveyance was in the ordinary form usually termed a "quit claim deed," but was expressed to be made subject to the plaintiff's mortgage and to another mortgage to Messrs. Thibaudeau Bros. & Co. There were added a covenant by the purchasers to pay up overdue interest on these mortgages and to indemnify their grantor against them, and also a covenant of the purchasers to immediately put improvements upon the said mill and premises to the value of $1000. The terms of the mortgage to Thibaudeau Bros. & Co. do not appear.

Some three months thereafter one Bailey conveyed to Tait, by a deed of conveyance in the ordinary statutory short form, his (Bailey's) interest in land and building by the same description as in the conveyance to Tait and La Franchise, with the addition of the words, "together with all the buildings, improvements, plant, machinery and stock in trade, and goods and chattels, rights and assets therein and thereon, or in connection with the said milling business." The nature of Bailey's interest in the property does not appear.

Then, on the 30th January, 1890, La Franchise, for the expressed consideration of $1, conveyed to Tait all his interest in the property by the same description as in the conveyance to Tait and himself.

Tait, and presumably La Franchise with him, took possession of the premises and continued thereon for some years, the business of manufacturing woollen goods, the machinery and appliances apparently remaining on the premises. There is no evidence to show whether Tait and his co-purchaser gave any further consideration than the $600 for the land, building, machinery and appliances, or how they acquired the machinery and appliances. Nor is anything shown to account for their covenant to make improvements, or whether they did so, or, if so, whether

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such improvements were in any respect in machinery.

In July, 1890, for an expressed consideration of $50, Tait conveyed to John Alexander Stephenson, one of the judgment debtors, the land and building, by the same description as in the conveyance to Tait and La Franchise, "subject to two mortgages registered against the property." This conveyance was in the ordinary statutory short form, and contained a covenant by Stephenson to pay off the two mortgages and indemnify Tait against them. At that time $500 of the principal secured by the plaintiff's mortgage had been paid, and there remained owing $1000 and some arrears of interest.

In reality Stephenson and his brother, another of the judgment debtors, purchased from Tait the whole property, land, building, machinery and appliances. The exact terms of the purchase are not quite clearly shown. One witness, Michael Ryan, speaks of it from a conversation between the Stephensons, which he heard. He says that to the best of his recollection the price was $1250, $50 cash and Stephenson to assume the mortgages. On cross-examination, he stated that he did not know whether this sum was what they gave or what they then proposed to give. Gilroy states that the Stephensons told him they were paying $1250, that there was a balance of a mortgage to Thibaudeau Bros., which they were clearing off, and that Tait was to pay all arrears on the plaintiff's mortgage and leave $1000 to be assumed by the Stephensons from 1st May. E. F. Stephenson states that he thinks they agreed to pay 1400 and odd dollars, that he thinks it was 1460 and some taxes and other things, that they figured out they had to give $50 to Tait but found other liabilities.

No written agreement, other than the deed mentioned, was made between Tait and the Stephensons, and no bill of sale or other written transfer of the machinery or of anything in the building was given by Tait to them, except the deed mentioned.

When the Stephensons were negotiating the purchase from Tait, they applied to Gilroy to have a reduction made

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in the rate of interest on the plaintiff's mortgage. In doing this, they represented that they intended to expend a considerable sum in repairs and improvements to both buildings and machinery, and that it would be of advantage to the plaintiff Company to have this done and the mill again put in operation. The proposed reduction was made in the rate of interest and the Stephensons completed their purchase, acquired possession, made improvements in building and machinery, adding some new pieces of machinery, and ran the mill for a considerable time, carrying on therein, in partnership with the other judgment debtors, under the style of The Western Woollen Mills Co., the business of manufacturing blankets, tweed cloths, yarn and other woollen goods, and also of carding wool for customers. They entered into no covenant or agreement with the plaintiff to pay off its mortgage.

Gilroy states that the Stephensons were to expend $1000 or $1200 in improvements and to put the property in first class order for a woollen mill, that he had many conversations with the Stephensons in which the matter was always discussed on the basis of the plaintiff having security upon the whole property, that after the purchase John A. Stephenson pointed out improvements made by himself and brother and claimed that they had expended more than they had stipulated for in making the mill ready for effective work. Gilroy also states that he had had many conversations with Tait, in which Tait admitted and it was always understood that the property covered by the plaintiff's mortgage comprised the mill and the larger portion of the machinery.

The Stephensons did expend money in repairs and improvements both in the building and in the machinery, and they added new machinery, but there is no evidence of the amount expended on the building and of that expended on the machinery.

The building of itself is now, apparently, of little value. It does not appear to have been constructed expressly for use as a woollen mill, although it has been devoted to that

use nearly all the time since its erection. It would not appear that there are any architectural features or other peculiarities of construction rendering the building specially adapted for the use to which it has been put. It could equally well be used as a warehouse or for other manufacturing purposes.

The defendants, at the trial, abandoned the contest as to a few things,—the tenter bars and poles, the dry bars and reeds belonging thereto, and the shafting and pulleys.

The following articles were put in by the Stephensons after they acquired the property:—An English blanket loom, secured to the floor for the purpose of steadying it; a narrow loom, fastened to the floor by screws, apparently for the same purpose; a wool picker, fastened by bolts to the floor, put in to replace a former one taken out by them; a dry room, furnace, fan and piping, of which the dry room is clearly a part of the building, the furnace and fan are not shown to be affixed, and the piping is connected with the steam boiler; a beamer, fastened to the floor by bolts in order to steady it; a blanket-scouring vat and rollers, about the fastening of which the evidence is not sufficiently clear; three dye tubs, not fastened; and a steam pump, used to pump water from the river into a tank, from which it is supplied to the boiler and the vats, &c., this pump being in a small excavation made to receive it under the building, but being connected with the building only by the pipe which supplies it with steam from the boiler, and the pipe, or pipes, carrying the water to the tanks, &c.

Of the remaining articles in question, the principal of them were apparently brought on the property by Reid, as similar pieces of machinery are mentioned in the chattel mortgage. Three carding machines and a cushion roll carding engine are not attached to the building in any way, except that they are operated by leather belts from the shafting propelled by a steam engine. Their own weight is sufficient to keep them in position. About a narrow loom on the premises before the Stephensons acquired them, the evidence is not clear. I am unable to

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find that it is affixed to the building otherwise than by the belts which supply the motive power. A broad loom is fastened to the floor by screws and bolts, and by nails through wooden connections. A spinning jack is partly fastened to the floor, and is partly movable, running on a track fastened to the floor. About a yarn twister and a cropping machine, the evidence is somewhat contradictory. If there is any fastening of the former, it is merely by a board nailed to the roof of the building and to the upper side of the machine for the purpose of holding a spool. I cannot find these articles to be affixed in fact. A fulling mill was built inside the building, and is apparently a permanent fixture, almost an integral part of the building. A warper is not fastened in any way. It is a movable machine, running on wheels upon an iron track which is fastened to the floor. The track is of strips of iron rounded on top, and the wheels are curved to fit the iron. I find that the track is no part of the machine, although the machine is built for running upon such a track. A broad teasel gig is said by one witness to be fastened to the floor by a standard or upright piece of board or timber, and by another witness to have no fastening except cleats which keep it in place. About a wool scouring vat, there is no evidence of fastening. A water tank has no fastening, except the piping running into and out of it. A screw press rests on blocks in the floor, and is supported or kept in place by braces nailed to it and to the floor above it. The plates and papers would appear to be really portions of the machine. Similarly the loom supplies, headles, reeds, and beams would appear to be portions of the looms, and to go with them.

It appears that all of these machines were necessary to the business carried on by the Stephensons; although separate machines completed independently separate processes of the manufacture, some machines completed different articles of manufacture and were unnecessary to the manufacture of other articles.

Some of the machines could be removed from the

building intact; some of them would require for the purpose to be taken apart, but apparently this could be done without injury to the machines. Most of these machines are bought and sold as separate articles of trade, new or at second hand.

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It appears to me that, as to most of the articles in question, the case is governed by the decision in *Longbottom* v. *Berry*, L. R. 5 Q. B. 123. That case must be deemed authority for the proposition that, in the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purposes of a manufacturing business for which the freehold is occupied, and to which it is devoted, become part of the freehold, even though the mode of affixing them is such that they can easily be detached without injury either to themselves or to the freehold. The decision upon this point was affirmed, in error, in *Holland* v. *Hodgson*, L. R. 7 C. P. 328, and approved and followed in *Cross* v. *Barnes*, 46 L. J. Q. B. 480, and *The Sheffield, &c., Building Society* v. *Harrison*, 15 Q. B. D. 358, and I consider it binding upon this Court.

I do not deem it of importance, as against the presumption so raised, that the separate pieces of machinery are devoted to separate and distinct portions of the work, or that they are ordinarily bought and sold as separate and entire chattels.

The same could probably be said of nearly all the pieces of machinery referred to in the cases which I have cited. The case of *Chidley* v. *The Churchwardens of West Ham*, 32 L. T. N. S. 486, upon which the defendants so strongly rely, related to a question of rating under the poor laws; and the judgment in *Reg.* v. *Guest*, 7 A. & E. 951, shows that such cases afford no criterion as to the position of machinery as between mortgagor and mortgagee, or its liability to be taken in execution as chattel property. In *Longbottom* v. *Berry* it was expressly stated, as part of the case, that the machinery was not liable to the poor rate. See, also, as to this, *Reg. v. Haslam*, 17 Q. B. 220; *Reg.* v.

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Southampton Dock Company, 14 Q. B. 587; *Tyne Boiler Works Co.* v. *Overseers of Longbenton*, 18 Q. B. D. 81.

Nor do I think that the execution of the bill of sale shows that these pieces of machinery had been, and were still regarded as retaining the character of, individual chattels. That instrument was drawn at the instance of the plaintiff's manager, to prevent any such difficulty as has now arisen, and it appears to me that it would be unsafe to rely upon it as showing either that the machinery was considered to be chattel property, or that it had, or had not, been intended to be covered by the previous mortgage. The mortgagee's agent asked for this additional security. It does not appear whether or not he communicated to the mortgagor his belief or his doubts about the machinery. Although only a few days elapsed thereafter before the mortgagor assigned, yet he may then have hoped to find a way out of his difficulties. The mortgage was apparently prepared by the mortgagee's solicitors, and I suppose that the mortgagor was satisfied to give it for the purpose of gaining time from that creditor.

On the other hand, it appears to me that the decision in *Longbottom* v. *Berry* determines quite as clearly that, in the absence of evidence of a contrary intention, similar pieces of machinery standing on the freehold, but not affixed to it except by the leathern bands communicating to them motive power, retain the character of chattels, notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is thus devoted. There the case was just as strong for finding the loom machine and the beaming frame to be parts of the realty, as it is in the present instance for finding the carding engines to be so.

In *Keefer* v. *Merrill*, 6 A. R., at p. 132, Mr. Justice Burton is reported as saying, "I think it impossible to hold that the mere circumstance of the machines being brought upon the land by the owner of the freehold raises a presumption that he intended them to become a part of the realty; although the slightest annexation might raise a

presumption that he intended to improve the land, and make them a permanent accession to the freehold." And at p. 139, Mr. Justice Patterson is reported, after referring to the cases of stone walls, rail fences and sculptured figures or vases forming part of the architectural design of a mansion, to have said, "I am not aware of any case in which articles unattached to the realty and merely standing upon it have been held to lose their character of chattels, unless they are of the classes described, or in which a chattel such as a machine complete in itself, or even complete as a machine though receiving motive power by a connection by a belt or pipe with some other machine, has been held to belong to the realty, merely because used in a building where a manufacture for which the machine was adapted was carried on. Decisions contrary to such a contention are numerous. Neither can I perceive that on any sound principle it makes a difference whether the building was erected for the purpose of the particular manufacture, or was once used for something else."

I agree entirely with the expressions thus cited. The decisions in *Crawford* v. *Findlay*, 18 Gr. 51, *Dickson* v. *Hunter*, 29 Gr. 73, and *Adamson* v. *McIlvanie*, 3 M. R. 29, were based on special circumstances not now presenting themselves.

There is, however, in the same report some language of Mr. Justice Burton which is, perhaps, intended to go farther. After referring to some cases of constructive annexation, he says, (p. 127), "To these, may be added as coming within the same principle, in the case of a deed or mortgage of a manufactory, that portion of the machinery of such manufactory, whether the same be fast or loose, which is essential to the operation of the fixed machinery and intended to be used as part of it, and without which it would be useless, and the building no manufactory at all." I am not sure whether this is intended to apply to independent machines carrying on separate processes necessary to the completion of the product of the factory. If so, I do not think that, whatever

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a Court of Appeal may find, I am at liberty to follow it. As I have said, I think that I am bound by the decision in *Longbottom* v. *Berry* to hold otherwise. But the language is applicable, and to that extent I adopt it, to such a machine as the spinning jack, which is one machine though in two portions, and to the plates and papers which go with the screw press.

I am unable to find upon the evidence of Mr. Gilroy either an agreement, on the part of Reid, Tait or the Stephensons, that any portion of the machinery should become a part of the realty or be charged with the plaintiff's mortgage, or an admission that it had so become.

The references to the conversations are very loose and general. Gilroy himself claims to have had, throughout, an opinion that some portion of the machinery was subject to the mortgage. His understanding at the time of the effect of a conversation, as well as his subsequent recollection of it, would be influenced by this view. On the other hand, he does not himself appear to have considered that all machinery was part of the property subject to the mortgage on the realty, and these conversations can hardly be considered as admissions that every article was so.

Then, the bill of sale is no unimportant element in a consideration of the effect of these conversations. At the time of the transfer to Tait, that bill of sale was an existing security, unless void as preferential. Under the recent decision of this Court in *Roff* v. *Krecker*, 8 M. R. 230, it ceased to be valid as against either Tait or the Stephensons at the expiration of two years from its filing, even though each of them had actual notice of its existence. Whether they knew of it, or of its filing, or of its not having been re-filed, does not appear; but they may have known of it and may have supposed it to be a valid and subsisting security by re-filing or otherwise, and if, in the belief that it was so, they spoke of the machinery as subject to a mortgage in favor of the plaintiff, they could not now be prevented from disputing this, or from claiming that the machinery was not part of the freehold.

At one time upon the trial, there suggested itself to me the idea that, if it could be shown that the consideration expressed in the conveyance to John A. Stephenson was the full price paid by the Stephensons for land, building and machinery, and no separate transfer was made of the latter or other indication given that the machinery was not regarded as part of the realty, this would be strong evidence that everything was regarded as together forming realty. The evidence, however, does not distinctly show the full consideration paid or agreed upon, and as possession appears to have been at once transferred a bill of sale in writing was not required.

As to the teasel gig, I share the doubts expressed by Vice Chancellor Strong in *Crawford* v. *Findlay*, 18 Gr. 51. I incline to the view that a fastening by cleats affixed to the building only, and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient in itself to make the machine a part of the realty. As the evidence of any further fastening is not clear, I find for the defendants as to this article.

It does not appear how the piping is fastened to the water tank, and I cannot find it to be more a fixture than the washer referred to in *Longbottom* v. *Berry*.

The screw press appears to be so affixed as to pass with the realty. Upon the evidence in this case, I find that the plates and papers go with it, the circumstances not appearing exactly the same as those stated respecting somewhat similar articles in *Longbottom* v. *Berry*. As all the looms are not affixed, and as there is no distinction among the supplies, I cannot find for the plaintiff in respect of these.

The article upon which I have the greatest difficulty is the steam pump. The mode of attaching the pipes is not shown, but I assume that it was tolerably secure. In *Longbottom* v. *Berry*, a sizing machine attached only to pipes by screw or union joints was considered to be part of the realty. In view of this and of the pump being situated in a place specially prepared for it, I think it must

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go to the plaintiff. I find a verdict for the defendants as to the three carding engines, the cushion roll carding engine, the narrow loom on the upper floor of the building, the yarn twister, the cropping machine, the furnace and fans, the warper, the broad teasel gig, the blanket scouring vat and rollers, the wool scouring vat, the dye tubs, the water tank, the loom supplies, headles, reeds and beams, and for the plaintiff as to the other goods in question.

CARSCADEN v. ZIMMERMAN.

Before TAYLOR, C.J.

Judgment debtor—Examination of—Return by Sheriff necessary before order made.

A judgment debtor is not examinable until the judgment creditor has placed a *fi. fa.* in the Sheriff's hands, and it has either been returned *nulla bona*, or the Sheriff has notified the judgment creditor, that, if called upon to return the execution, such would be his return.

Ontario Bank v. *Trowern*, 13 P. R. 422, followed.

ARGUED: 2nd October, 1893.
DECIDED: 5th October, 1893.

Statement.

This was an appeal from an order of the Referee, made under R. S. M. c. 1, s. 64, requiring the defendant to attend and be examined as a judgment debtor touching his estate and effects.

The affidavit upon which the original summons was obtained, made by one of the plaintiffs, set out that on the 5th September 1893, they recovered a judgment against the defendant for $707 and placed an execution in the Sheriff's hands; that at the time they did so there were in

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the Sheriff's hands three other prior executions for amounts making in all $5,901; that on 8th September, under the executions then in his hands, the Sheriff sold the goods and chattels of the defendant, realizing therefrom $5000 or thereabouts; and that the three prior execution creditors claimed to be entitled to the whole of the amount realized by the Sheriff. The affidavit then proceeded, "I am informed by the Sheriff that he can find no other goods and chattels of the said defendant liable to execution out of which he can satisfy all the executions in his hands against the defendant, and that he can make no more money on the executions in his hands," concluding with the allegation that the plaintiffs will derive material advantage from the examination of the defendant.

In answer to this an affidavit was made by the defendant's attorney, stating that the plaintiffs in this action had served upon the Sheriff a notice that they claimed for their execution priority over two of the other three executions, and claiming that the proceeds of the goods seized be applied in payment of their execution before any part thereof was applied in payment of the executions over which they claimed priority; that the Sheriff had retained and held in his hands sufficient to pay the plaintiffs' execution in full; and that the Deputy Sheriff had informed him that the Sheriff could not make a return of *nulla bona* or any other than a special return, and that an interpleader order had been applied for.

A. Haggart for plaintiffs.

Hon. J. D. Cameron for defendant.

TAYLOR, C.J.—For the defendant it is contended that no order for the examination of the judgment debtor can be made until after the writ of execution has been returned *nulla bona* by the Sheriff, or until the Sheriff has stated that if pressed for a return he must so return it. The plaintiffs on the other hand contend that all they can be required to show on applying for such an order is, that an execution

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has been issued and what proceedings, if any, have been taken to make the money under it.

The case of *Ontario Bank* v. *Trowern*, 13 P. R. 422, in which MacMahon, J., held, that a judgment debtor is not examinable until the judgment creditor has placed a *fi. fa.* in the Sheriff's hands, and it has either been returned *nulla bona*, or the Sheriff has notified the judgment creditor, that if called upon to return the execution, such would be his return, was remarked upon. It was said, that the early cases referred to by the learned judge do not show that to have been the practice. In *Irvine* v. *Mercer*, 3 C. L. J. O. S. 49, where the plaintiff's affidavit was merely that he had recovered a judgment which remained wholly unsatisfied, Richards, J., refused an order saying that the affidavit should have shown that some attempt had been made to make the money by execution. In *Smith* v. *McGill*, 3 C. L. J. O. S. 134, the affidavit stated that judgment had been obtained, and that it remained unsatisfied, except as to part made by the Sheriff under execution, and the report says that Richards, J., refused a summons, on account of the insufficiency of the affidavit, which should have shown that the balance cannot be obtained by execution or otherwise in the ordinary way, as for instance that the Sheriff has returned *nulla bona*, or something to the like effect, and should also have specified what efforts have been made, if any, to make the amount from defendant.

In *Carter* v. *Carry*, 3 C. L. J. O. S. 49, in which the same learned Judge refused to make an order *ex parte*, the affidavit did state that the Sheriff had made a return of no goods.

There can be no doubt, however, that, as I remarked in *Re Bishop Engraving and Printing Co.*, *ante* p. 62, the practice has always been as stated by MacMahon, J., in *Ontario Bank* v. *Trowern*.

But it was further urged by the plaintiffs in support of their contention, that before the passing of the C. L. P. Act, 17 & 18 Vic. c. 125, s. 60, a judgment creditor could file a bill in equity for discovery in aid of an execution, and that

on such a bill he had only to allege and prove the issue of execution. In this connection two cases were cited, *Mountford* v. *Taylor*, 6 Ves. 788; and *Smith* v. *Hurst*, 10 Ha. 30. No doubt that is a good test of what a judgment creditor should have to prove on applying for an order to examine, for the provisions of the C. L. P. Act as to discovery, were introduced to do away with the tedious and expensive process of obtaining such discovery by the resort to a court of equity.

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I have examined the two cases cited, and a number of others, and they are all cases where either a judgment creditor sought to redeem an incumbrance so as to render property available for his execution, or cases in which he sought discovery and also relief against some fraudulent transaction of the judgment debtor. Now, as I pointed out in *Leacock* v. *Chambers*, 3 M. R. 645, a judgment creditor seeking to set aside a fraudulent transaction of the debtor, is not prevented from seeking relief until he has exhausted his legal remedies. The reason for requiring him to show that he has recovered judgment and issued execution, is said to be that until execution is issued the creditor's title is incomplete, or as it is said in *Mitford on Pleading*, p. 149, "The creditor must show that he has proceeded at law to the extent necessary to give him a good title."

Mountford v. *Taylor*, 6 Ves. 788, was a case in which a judgment creditor who had sued out writs of *elegit*, filed his bill for the discovery of freehold estates, charging that the defendant had, upon his election as a member of Parliament given in his qualification, and if the estates composing it were since conveyed away it was without consideration. The defendant filed a demurrer as to the discovery of his qualification, and an answer to the rest of the bill, but the demurrer was overruled because the answer did not meet the charge that the lands had been conveyed away without consideration. In *Smith* v. *Hurst*, 10 Ha. 30, the judgment creditor sought relief against a conveyance made for the purpose of hindering, delaying and defeating the defendant's creditors. The bill filed a few days after the entering of the

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judgment, did not allege that an *elegit* had issued, and relief was refused as to the freehold estates because the plaintiff's title was incomplete, he not being entitled to the aid of the Court against these until the expiration of a year from the time of entering up his judgment. He was, however, given relief against the personal and leasehold estates, the bill alleging that the Sheriff would, in consequence of the deed impeached, make a return of *nulla bona*.

In *Taylor* v. *Hill*, 1 Eq. Ca. Abr. 132, pl. 15, the plaintiff who had judgment, but no execution, supposing that some particular effects of the debtor were in the hands of the defendant brought his bill for discovery of these. On a demurrer that no such bill would lie against the debtor himself, much less against a third person, Lord King agreed that it would not lie against the debtor, nor to have general discovery from a third person, but only for particular things as this bill was, so he overruled the demurrer.

Smithier v. *Lewis*, 1 Vern. 398, was a case in which plaintiff alleged that defendant, to defraud plaintiff, had assigned his estate to trustees and lent money in the name of a friend, praying discovery and that this might be liable to the debt; a demurrer to the discovery was overruled. In *Angell* v. *Draper*, 1 Vern. 398, the plaintiff having obtained judgment against J. S., filed his bill alleging that defendant on pretence of a debt due him, and to prevent plaintiff recovering his debt, had got goods of J. S. in his hands, and praying relief and discovery, a demurrer was allowed because plaintiff should have sued out execution before filing his bill. In *King* v. *Marissal*, 3 Atk. 192, the judgment creditor after obtaining judgment and issuing execution filed a bill alleging that the debtor to defeat the verdict had conveyed all his effects to the defendant by way of mortgage, and prayed to have the conveyance set aside as fraudulent, or that in case anything was really due, she might be permitted to redeem. As the defendant's answer was only as to his belief with what view the debtor executed the deed, Lord Hardwicke, saying that he should

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have been interrogated more particularly, was of opinion that the plaintiff could carry it no further than to redeem, and decreed accordingly. In *Shirley* v. *Watts*, 3 Atk. 200, a judgment creditor who had not taken out execution filed a bill to redeem the defendant, a mortgagee of leaseholds, but the Master of the Rolls dismissed the bill, because, till execution, the plaintiff had no lien on the leasehold estate.

The statement in *Mitford on Pleading*, p. 149, that it is not necessary for the plaintiff to procure returns to the writs of execution, occurs in a paragraph which refers to bills brought to obtain the benefit of executions defeated by fraudulent dealings.

I have found no reported case on a bill brought solely for discovery in aid of an execution, but a decision of Lord Nottingham in such a case is referred to in *Balch* v. *Wastall*, 1 P. W. 444. The case cited is stated there as a case in which "Lord Nottingham held that, one who had a judgment, and had lodged a *fieri facias* in the Sheriff's hands, to which *nulla bona* was returned, might afterwards bring a bill against the defendant, or any other, to discover any of the goods or personal estate of the defendant, and by that means to affect the same; but he must first go as far as he can at law by delivering the writ of *fieri facias*, and getting it returned." That seems an authority against the contention of the plaintiffs.

The statutory examination is one which I have always understood, should not be lightly resorted to. As my brother Killam said in *Ferguson* v. *Chambre*, 3 M. R. 574, "The examination is very extensive and could be warranted only by necessity for its use." Here the Sheriff cannot make a return of *nulla bona*, for he has in his hands sufficient money to pay the plaintiffs' claim in full. If their contention as to priority is sustained upon the trial of the interpleader issue, they will be paid and satisfied. Whether there is an absolute necessity for a return from the Sheriff before an order for examination can be made or not, in the absence of any special reasons the making of an

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order in this case might well have been delayed and should have been delayed until the issue has been disposed of.

In my opinion the rule is as laid down in *Ontario Bank* v. *Trowern*, that a judgment debtor is not examinable until the judgment creditor has placed a *fi. fa.* in the Sheriff's hands, and it has either been returned *nulla bona*, or the Sheriff has notified the judgment creditor, that if called upon to return the execution such would be his return. If ever this rule is departed from, and I doubt if it should ever be so, it should be only under most exceptional circumstances.

The present appeal is allowed with costs, and the original summons in Chambers dismissed with costs. The costs should be set off *pro tanto* against the amount due upon the judgment.

Appeal allowed.

WYLD V. LIVINGSTONE.

Before KILLAM, J.

Writ of summons—Special endorsement—Sufficiency of—Cheque dishonored—Notice of—Amendment of indorsement after summons for judgment taken out.

In an action on a dishonored cheque final judgment will not be ordered, unless the indorsement on the writ contains either an allegation that notice of dishonor was given to the drawer, or a statement of the facts excusing the giving of such notice.

The indorsement on a writ cannot be amended by striking out objectionable particulars, after a summons for final judgment has been taken out, in order to support the summons.

ARGUED: 6th July, 1893.
DECIDED: 24th August, 1893.

Statement.

APPEAL from an order of the Referee giving the plaintiffs leave to sign final judgment on a writ specially endorsed, (in part,) as follows:—

To amt. of prom. note made by defts. in favour of plffs. dated 8 Feb., 92, due Mar. 15th, 92	320.39
To int. at 6% from due date to this date	2.13
To protest fees on above	3.25
To amt. of cheque drawn by defts. in favour of plffs. dated Mar. 12, 92	320.39
To goods sold and deld by plffs. to defts.	4.24

J. S. Hough for plaintiffs.

H. E. Crawford for defendant.

KILLAM, J.—It is admitted that in one particular, the claim of $4.42 for "goods sold and deld. by plffs. to defts.," the indorsement is insufficient. In conformity with the decision in *Fruhauf* v. *Grosvenor*, 61 L. J. Q. B. 717; 67 L. T. N. S. 350, I must hold, also, that the claim upon the cheque is insufficient in not showing notice of dishonor or facts excusing such notice. I express no opinion as to the claims for protest fees, or as to the effect of the abbreviations.

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It has been suggested that the indorsement might now be amended by striking out the objectionable particulars, but in view of the decisions in *Gurney* v. *Small*, [1891] 2 Q. B. 584, and *Paxton* v. *Baird*, [1893] 1 Q. B. 139, I do not think that this can be done after a summons for final judgment in order to support the summons.

The appeal must be allowed and the summons before the Referee discharged, with costs of the original application, which I fix at $5. I allow no costs of the appeal, as it is admitted that the objections were not taken before the Referee.

Appeal allowed.

MACARTHUR v. LECKIE.

Before TAYLOR, C.J., DUBUC AND BAIN JJ.

Contract of sale—Construction of covenants—Whether dependent or independent.

An agreement for sale contained the following provision; "The said party of the second part, for himself, ... doth covenant, promise and agree to and with the said party of the first part, his heirs, ... that he or they shall and will well and truly pay or cause to be paid the said party of the first part . . . . . the said sum of money, together with the interest thereon, on the days and times and manner above mentioned, and also shall and will pay and discharge all taxes, ... *In consideration whereof and on payment of the said sum of money with interest* as aforesaid and in manner aforesaid, the said party of the first part doth covenant, promise and agree to and with the said party of the second part to *convey and assure* or *cause to be conveyed and assured* to the said party of the second part, his heirs and assigns . . . . . the said pieces or parcels of land . . . . . and shall and will suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default," &c. Then followed a provision that

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time was to be of the essence of the contract and that unless the payments were punctually made, the plaintiff might re-enter on and re-sell the lands and all payments made were to be forfeited.

Held, that the covenants were independent covenants.

The purchaser was bound, on his covenant, to pay the purchase money before the vendor could be compelled, on his covenant, to convey the property agreed to be sold.

The intention of the parties, as far as it can be gathered from the wording of the covenant must be given the greatest weight.

ARGUED: 10th May, 1893.
DECIDED: 21st July, 1893.

Statement.

THIS was an action on a covenant for payment of $1150 and interest, the declaration showing the covenant to be an absolute one for payment and that the money was overdue. The defendant pleaded three pleas, to which the plaintiff demurred. All of the pleas showed that the covenant sued on formed part of an agreement in writing, which was set out *in hæc verba*.

The instrument began with the recital that the plaintiff had agreed to sell to the defendant, and the latter to purchase of the former, certain described lands "at and for the price or sum of eleven hundred and fifty dollars, lawful money of Canada, payable in manner and on the days and times hereinafter mentioned, that is to say:—one third part thereof on the execution of these presents, and the balance in two equal half-yearly instalments, from the date hereof, together with interest on the unpaid principal payable with each instalment at the rate of eight per cent per annum." Then the instrument proceeded, "Now it is hereby agreed between the parties aforesaid in manner following, that is to say:—The said party of the second part," (the defendant) "for himself," &c., "doth covenant, promise and agree to and with the said party of the first part" (the plaintiff,) "his heirs," &c., "that he or they shall and will well and truly pay or cause to be paid the said party of the first part . . . . . the said sum of money, together with the interest thereon, on the days and times and manner above mentioned, and also shall and will pay and discharge all taxes, rates and assessments wherewith

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the said land may be rated or charged after this date. *In consideration whereof and on payment of the said sum of money with interest*, as aforesaid and in manner aforesaid, the said party of the first part doth . . . . covenant, promise and agree to and with the said party of the second part to *convey and assure* or *cause to be conveyed and assured* to the said party of the second part, his heirs and assigns . . . . . the said pieces or parcels of land . . . . . and shall and will suffer and permit the said party of the second part, his heirs and assigns to occupy and enjoy the same until default," &c. Then followed a provision that time was to be of the essence of the contract, and that unless the payments were punctually made, the plaintiff might re-enter on and re-sell the lands and all payments were to be forfeited.

The first of the pleas demurred to alleged that "the plaintiff had not, at the date of the said agreement, nor *had he at any time afterwards* nor *hath he now a good title*" to the lands, "nor *any right or title to convey the same*."

The second and third of these pleas were pleaded only as to $383.33, and interest of the moneys claimed, and were intended to answer the claim for the last instalment only. The first of them denied any *tender of a conveyance*, and the second that the plaintiff was *ready and willing to convey* according to the terms of the agreement.

The demurrer was heard by Killam, J., who entered judgment for the plaintiff.

The defendant then applied to the Full Court to reverse this decision, and to have the demurrer of the plaintiff struck out or overruled.

J. S. Ewart, Q.C., for the defendant. It is quite clear that if a day be fixed for conveyance and the same day be fixed for payment, the promises are dependent; *Goodisson* v. *Nunn*, 4 T. R. 761; *Glazebrook* v. *Woodrow*, 8 T. R. 370. It was originally held that if a time were fixed for payment, and *none* for conveyance the purchaser must pay without getting conveyance; *Pordage* v. *Cole*, 1 Wms. Saund. 319;

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Wilks v. *Smith*, 10 M. & W. 355; although, in the converse case, where a time was fixed for conveyance, and none for payment, the vendor could not sue without alleging readiness and willingness to convey; *Heard* v. *Wadham*, 1 East, 619. The later authorities establish that in both these cases the promise is not independent; *Marsden* v. *Moore*, 4 H. & N. 500; *McDonald* v. *Murray*, 11 A. R. 102; *Sugden's V. & P.*, 365. The present case is within these cases for the addition of the words, "on payment," does not postpone the time for conveyance. "In contracts for the sale of lands the conveyance of the estate and the payment of the purchase money are presumptively concurrent and dependent acts:" *Leake on Contracts*, 567; and will so be held unless there is "some very definite expression to the contrary;" *Anson on Contracts*, 282, 3; and see *Sugden's V. & P.*, 365; *Dart's V. & P.* 1086; *Thorpe* v. *Thorpe*, 1 Salk. 170; *Marsden* v. *Moore*, 4 H. & N. 500 (Bramwell, B., *arguendo*); *McDonald* v. *Murray*, 11 A. R. 119. The words "on payment," mean "at the time of;" *Stapleton* v. *Shelburne*, 1 Bro. P. C. 215; *Merrit* v. *Rane*, 1 Str. 458; *Reg.* v. *Humphery*, 10 A. & E. 335; *Manby* v. *Cremonini*, 6 Ex. 807; *Black* v. *Rose*, 2 Moo. P. C. N. S. 278; *Paynter* v. *James*, L. R. 2 C. P. 348; *Brown* v. *Pickering*, 8 Times L. R. 726; *Stroud*, 529, 531. Decisions cited to the contrary are distinguishable: *Dicker* v. *Jackson*, 6 C. B. 103, on the ground that there the time for delivering the abstract *might* have fallen after the time for delivery; the three cases of *Mattock* v. *Kinglake*, 10 A. & E. 50; *Sibthorpe* v. *Brunel*, 3 Ex. 825; and *Tisdale* v. *Dallas*, 11 U. C. C. P. 238, turn upon this, that the payment was not for the conveyance, but "for the purchase," which meant for the agreement to purchase. The cases of *Reg.* v. *Arkwright*, 12 A. & E. N. S. 960; *Folkard* v. *Met. Ry.*, L. R. 8 C. P. 470, show merely that "on," may under certain necessary circumstances mean "after." *Yates* v. *Gardiner*, 20 L. J. Ex. 327, is obscurely reported; the pleadings treated the promises as dependent, and the question arose as to the Judge's charge, but what the objections were we are not

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told. In *Armstrong* v. *Auger*, 21 O. R. 98, the payments were in sums too trifling to make any one of them dependent upon conveyance. *McCrae* v. *Backer*, 9 O. R. 1, was decided on the faith of *McDonald* v. *Murray*, 2 O. R. 573, which was afterwards overruled in 11 A. R. 102. In *Wilson* v. *Wittrock*, 19 U. C. R. 391, Robinson, C.J., admitted that there were some cases and many *dicta* in our favor, but thought that the four cases he cited bound him; none of these cases were however in point. For analogous cases he cited *Tate* v. *Meek*, 8 Taunt. 279; *Bankart* v. *Bowers*, L. R. 1 C. P. 484, 9; *Woods* v. *Matheson*, 8 M. R. 158. That the money is payable in instalments can make no difference in the meaning of the words "on payment," vendor will convey. In *Thompson* v. *Brunskill*, 7 Gr. 542, the payments were by instalments, but the V. C. had no doubt that the promises were dependent. It is argued that as the purchaser trusted the vendor in making the first two payments, it is easy to understand that he was willing to trust him for the third. But there was no trusting at all. If the vendor had title the purchaser could at once register his agreement and bind it. If there was no title, purchaser could rescind at any time. *Noble* v. *Edwardes*, 5 Ch. D. 393; *Weston* v. *Savage*, 10 Ch. D. 736; *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Wylson* v. *Dunn*, 34 Ch. D. 577. If there was title, but also encumbrances, the purchaser could pay his money into court. *Thompson* v. *Brunskill*, 7 Gr. 542; *Wardell* v. *Trenworth*, 24 Gr. 465; *Cameron* v. *Carter*, 9 O. R. 426; *Armstrong* v. *Anger*, 21 O. R. 98; *Greenwood* v. *Turner*, 64 L. T. N. S. 261. That the vendor might "cause to be conveyed," would give him no more time than if he were to convey himself. The whole contract shows that it was a case in which the vendor was the owner, and the conveyance from others was meant for paying off encumbrances, or the like.

T. H. Gilmour, for plaintiff. The agreement as set out in the second plea sustains the count; it is the usual form of count for a covenant. The agreement is to sell for $1150,

and the covenant is to pay "the said sum of money." Intention, most important. Intention at the time of agreement being made. *McDonald* v. *Murray*, 11 A. R. 101. The question is, are the covenants dependent or independent. *Armstrong* v. *Auger*, 21 O. R. 102. The following cases are distinguished from the present. *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Thompson* v. *Brunskill*, 7 Gr. 542. The words, "cause to be conveyed," are wanting. *Noble* v. *Edwardes*, 5 Ch. D. 393; *Cameron* v. *Carter*, 9 O. R. 426; *McCrae* v. *Backer*, 9 O. R. 1.

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DUBUC, J.—The question to be determined is whether, under the agreement alleged in the declaration, and set out in full in the pleas, the payment of the purchase money by the defendant, and the conveyance by the plaintiff, are to be held concurrent acts, to be done simultaneously, or one before the other, or in other words, whether the respective covenants of the purchaser to pay, and of the vendor to convey, are dependent or independent covenants.

Numerous authorities from the earlier reports to the present time have been cited, and in reading them it is easy to see that the question is far from being settled. Rules have been laid down which were afterwards departed from or only partially followed; the form of covenants and the particular words used in them have been discussed, and special, and sometimes different, interpretations have been given according to the peculiar circumstances of each case. The standard rule generally followed is that the intention of the parties, as far as it can be gathered from the wording of the covenant, must be given the greatest weight.

As stated by Grose, J., in *Glazebrook* v. *Woodrow*, 8 T. R. 366; "The question is whether these covenants be dependent or independent, and that must be collected from the apparent intention of the parties to the contract. There is certainly some confusion in the books on the subject, some of the older cases leaning to construe covenants of this sort to be independent, contrary to the

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real sense of the parties, and the true justice of the cause."

But there, very often the difficulty arises. What did the parties really intend? This must be determined by giving to the words used in the covenant, the legal interpretation adopted and followed by the courts in construing similar or analogous covenants.

In the agreement in question herein, the covenant of the defendant to pay or cause to be paid the purchase money, is first stated in plain terms. Then comes the covenant of the plaintiff, commencing: "In consideration whereof and on payment of the said sum of money," &c, the plaintiff covenants to convey and assure or cause to be conveyed and assured, &c. My brother Killam, who heard the demurrer in the first instance, after reviewing a great many authorities bearing on the question, came to the conclusion that the above were independent covenants, and that the defendant was bound on his own covenant, to pay the purchase money, before the plaintiff could be compelled, on his covenant, to convey the property agreed to be sold.

If the transaction which the agreement is evidencing was considered in itself, independently of any legal or technical bearing, it would seem natural to hold that the payment of the purchase money by the purchaser, and the conveyance by the vendor should be made simultaneously. And, looking to the matter in that light, if I were to follow my own personal view of it, I would be disposed to consider the covenants as dependent on each other. But agreements of that nature, with practically the same covenants and similar words in said covenants, have received a legal construction by judicial decisions, and have acquired a technical meaning.

On the authorities quoted and discussed by my brother Killam, and particularly on *Pordage* v. *Cole*, 1 Saund. 320; *Wilks* v. *Smith*, 10 M. & W. 355; *Sibthorp* v. *Brunel*, 3 Ex. 826; *Tisdale* v. *Dallas*, 11 U. C. C. P. 238; *McCrae* v. *Backer*, 9 O. R. 1; *Armstrong* v. *Auger*, 21 O.

R. 98; to which I may add *Wilson* v. *Wittrock*, 19 U. C. R. 391, in which the covenants are peculiarly similar to the covenants in this case; and on the grounds on which my brother Killam based his decision, I think that the covenants herein should be held to be independent covenants. 1893. Judgment. DUBUC, J.

The order allowing the demurrer should be affirmed with costs.

BAIN, J.—When one man agrees to purchase a piece of land from another, it is reasonable to suppose that the purchaser will expect to get the land when he pays the purchase money; and the tendency of modern decisions is, all the text books say, to hold that the payment of the purchase money and the conveyance of the land are to be reciprocal and concurrent acts. But it is for the contracting parties in each case to make their own bargain, and if a purchaser chooses to make an absolute and independent agreement to pay the purchase money, the courts must give effect to it. In *Stavers* v. *Curling*, 3 Bing. N. C. 355, Lord Kenyon said, "The rule has been established by a long series of decisions in modern times, that the question whether the covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears by the instrument, and by the application of common sense to each particular case; to which interpretation, when once discovered, all technical forms of expression must give way." In other words, the Court is to try in each case to arrive at the intention of the parties by applying the ordinary rules of construction and interpretation to the agreement they have made, and give effect to their agreement whatever it may be. In each case, therefore, the decision turns principally on the wording of the agreement in question; and it is not, perhaps, to be wondered at, that, if one tries to reconcile the cases with what one would like to consider as fixed principles, there appears to be more or less confusion and disagreement. In all the English cases

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we have been referred to, I have not found one in which the wording of the agreement was at all the same as in the agreement here.

From a careful consideration of the terms of this agreement, and after referring to a large number of cases, my brother Killam came to the conclusion that the intention expressed was that the defendant bound himself absolutely to make the payments on the days specified, and that the plaintiff was not bound to be ready to complete the conveyance until a reasonable time after the payment of the last instalment of purchase money. I think the learned Judge was not justified in reading the words, "heirs and assigns," in the plaintiff's covenant to convey "to the party of the second part, his heirs and assigns," as "heirs or assigns;" for, as the words stand in the agreement, they have an obvious and natural meaning as limiting the estate that the vendor is to convey. But for the other reasons stated in the judgment, I am inclined to think, that, having regard only to the wording of the agreement, I would come to the same conclusion that the learned Judge did.

We are not, however, without authority that this is the proper interpretation of this agreement. In *Wilson* v. *Wittrock*, 19 U. C. R. 395, the covenant of the defendant Wittrock for the payment of the purchase money in three instalments was in the same form as the defendant's covenant here, the last payment falling due on the 12th of January, 1859. Then followed the plaintiff's covenant for conveyance, worded exactly as is the plaintiff's covenant here, except that the conveyance was to be to him, his heirs or assigns; and after the words, "by a good and sufficient deed in fee simple," there were added the words, "as per abstract of title, to be furnished by the said Wilson within a reasonable time before the 12th day of January, 1859." In all other respects, the agreement seems to have been in the same form as the one before us. The action was brought by Wilson on the 23rd of February, 1859, for the recovery of the last instalment of purchase money

which fell due on the 12th of January preceding. The defendant pleaded, setting out the agreement, and alleged that the plaintiff had not furnished the abstract of title within a reasonable time before the date mentioned, and that on that day the defendant tendered and offered to the plaintiff to pay him the said money, if the plaintiff would then furnish the abstract and execute a conveyance of the land, which the plaintiff refused and neglected to do. Issue having been joined on this plea, Richards, J., directed a verdict to be entered for the plaintiff, subject to the opinion of the Court, and the Court unanimously held that he was entitled to retain the verdict. I should consider that the special agreement of the plaintiff to furnish the abstract a reasonable time before the day fixed for the payment of the last instalment of purchase money, gave a stronger ground for argument than there is in the present case, that the payment and the conveyance were to be concurrent and reciprocal acts; but all the judges held that the covenant of the defendant was an absolute and independent one, and that the plaintiff's execution of the conveyance, which I take to be the same as his being ready and willing to convey, was not a condition precedent to his right to demand payment of the whole of the purchase money. Of course, there, as in the present case, the covenant to pay the first and second payments was clearly independent, and the purchaser was relying wholly on the promise of the vendor that he would convey. As to the last payment, Robinson, C.J., said, "There are some cases and many *dicta* in the books which seem to give support to what the defendant is contending for in that respect, "*i. e.*, that the payment and conveyance were to be concurrent, "but I think the weight of authority is decidedly against it, considering the particular terms of this agreement, which bound the vendee to make his payment on certain days, and which impose no duty on the vendor till payment of the money; or, in the words with which the vendor's covenant begins, 'upon payment of the sum of money with interest,' that is, of the whole purchase money; 'in

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the manner aforesaid,' that is, on the day set." Then the learned Chief Justice refers to four English cases which, he says, are all inconsistent with the conclusion that the defendant's covenant to pay the purchase money was not an absolute and independent covenant. These cases, however, all turn on the terms of the agreements in question in them, and they are scarcely as directly in point as one might suppose them to be from the reference to them in the judgment.

Wilson v. *Wittrock*, does not seem to have been referred to in either of the subsequent cases of *Tisdale* v. *Dallas*, 11 U. C. C. P. 228, or *McCrae* v. *Backer*, 9 O. R. 1, but the decisions in both these cases tend to confirm the view that the defendant's covenant is an absolute one.

The agreement here is in a form that has been in common use in Ontario for many years, and the form has been commonly used in this Province, very much because it was used in Ontario. The decisions of the Ontario courts as regards its construction are, therefore, entitled to peculiar weight.

If the covenant to pay the purchase money is an independent one, the plea alleging want of title in the plaintiff cannot, it would seem, be an answer at law to the action; and if the defendant is entitled to any relief on this ground, he would have to seek it through an equitable plea. In *Wilks* v. *Smith*, 10 M. & W. 355, where the defendant had demurred to the declaration because it did not allege that the plaintiff had a title to the land and was willing and ready to convey, Parke, B., said, "I think that it is no objection that he has not averred that he had a title to the land. . . . The consideration for the defendants paying the interest is the plaintiff's undertaking to sell the land, not the actual sale of it. . . . The plaintiff is not bound to do anything before the money is paid."

By demurring to the pleas in which the agreement is set out, the plaintiff admits that the agreement set out is the one on which he sues; and the defendant takes the further

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objection that the agreement does not contain such a covenant on the part of the defendant, as is sued on in the declaration. It would certainly have been better pleading if the declaration had alleged the covenant in the terms in which it is set out in the agreement, but as the agreement is referred to, and as the legal effect of the covenant in the agreement is the same as the one declared on, I think the defect is only in matter of form.

The judgment for the plaintiff on the demurrer should be affirmed, and this application dismissed with costs.

TAYLOR, C.J., concurred.

Application dismissed with costs.

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MUNRO V. IRVINE.

Before DUBUC, KILLAM AND BAIN, JJ.

Infant—Action for maintenance of—No formal promise to pay—Request—Implied agreement.

Action for maintenance of infant. Defendant's wife having died, defendant requested plaintiff's wife to take charge of the child, which she did for over three years, when the child was returned to her father. There was no formal promise by the defendant to pay for the keeping of the child.

Held, that if there was no formal promise to pay by the defendant, there was no formal promise to keep the child without remuneration, and as there was a request, an agreement to pay should be implied.

Per KILLAM, J.—The mere fact of the maintenance by one person of the child of another, does not imply a contract to pay for such maintenance.

Per BAIN, J. Apart from contract, a father is under no obligation, that can be enforced in a civil action, to support his children.

ARGUED: 3rd May, 1893.
DECIDED: 27th May, 1893.

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Statement.

THE defendant's wife having died, the plaintiff's wife took charge of the infant daughter of the defendant, when she was one month old, and kept her over three years. After the child was returned to her father, the plaintiff brought this action for the maintenance of the child.

There was no express contract that the defendant was to pay for the maintenance of the child, the question was whether an implied agreement had been established, or could be inferred from the facts and circumstances of the case.

The defendant contended that the plaintiff's wife, who was his sister, adopted the child and never intended to charge for her keep. From the evidence it appeared that when the defendant's wife died, the defendant asked his sister, the plaintiff's wife, to take charge of the child, until the coming of a female relative of his, who was expected in five or six weeks. The relative did not come and nothing more was said at the time. When the child was about nine months old, the plaintiff's wife spoke of sending her to her father. The defendant then called and said she need not send her home, that he did not want her. The question of adoption of the child was not mentioned until June 1892, when the child was about two years and nine or ten months old. The plaintiff then told the defendant that he must pay for the keeping of the child. He demanded $400 if the child was to return to her father; or $200, and he would then adopt the child. The defendant refused to accede to either demand. The evidence did not show that previous to that occasion there was any mention or intimation that the plaintiff or his wife intended to adopt the child; and the contention of the defendant as to the adoption of the child, was not sustained.

The case was tried at the assizes at Portage la Prairie, before Taylor, C.J., without a jury, when a verdict was entered for the plaintiff for $225.

The defendant then moved before the Full Court, pursuant to leave reserved at the trial, that the verdict for he plaintiff be set aside, and that instead thereof a verdict

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of non-suit be entered, or the amount of the verdict be reduced, or that a new trial be had between the parties, on the ground that there was no evidence of a contract between the plaintiff and the defendant, and if the defendant was in any way liable to the plaintiff, the damages awarded were excessive.

H. M. Howell, Q.C., and *W. J. James* for defendant, cited the following cases:—*Mortimore* v. *Wright*, 6 M. & W. 482; *Shelton* v. *Springett*, 11 C. B. 452; *Schouler on Domestic Relations*, § 241; *Hughes* v. *Rees*, 10 P. R. 301; *Simpson on Infants*, 2nd ed. 174; *Hayman* v. *Heward*, 18 U. C. C. P. 353.

W. J. Cooper, for plaintiff, cited *Addison on Contracts*, 416; *Schouler on Domestic Relations*, § 236; *Hughes* v. *Rees*, 10 P. R. 301; *Griffith* v. *Patterson*, 20 Gr. 615.

DUBUC, J.—From the evidence it does not appear that there was any personal promise by the defendant to pay for the keeping of the child, but a request to the plaintiff's wife to take the child is clearly shown. There was a request when the child was first taken, and another request to keep her when she was nine months old. From such request, the law implies a promise to pay.

Some cases were cited in which it was held that a father is not liable for goods furnished to his son, even for necessaries, ordered by the son without the father's knowledge. In *Mortimore* v. *Wright*, 6 M. & W., Lord Abinger says at p. 486: "In point of law, a father who gives no authority and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law."

Schouler on Domestic Relations, commenting upon that case, says in section 241: "But very slight evidence may

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sometimes warrant the inference that a contract for the infant's necessaries is sanctioned by the father; so zealous is the Court to enforce a moral obligation wherever it can." In the case of *Mortimore* v. *Wright*, the son was within one month of twenty-one years.

Simpson on Infants, 2nd ed. says at page 174: "If the father know that a child is incurring debt for necessaries, there may be evidence for the jury that it is by his authority. Thus in two cases where the father knew that an infant child was maintained by a third person, he has been held liable."

The present case is very different from these cases where the son has himself purchased goods which were considered necessaries. The defendant not only knew that his infant child was cared for by the plaintiff's wife, but had requested her to do so. As to the first request, if the defendant had taken the child back after five or six weeks, as he intimated that he would do, the circumstances under which the plaintiff's wife had taken the infant would justify the inference that she did not expect to be paid for the keeping. But, after that period was expired, the child was left with her, and the defendant could not expect that she would keep the child for years without any remuneration. If there was no formal promise to pay, by the defendant, there was no formal promise to keep the child without remuneration; and as there was a request, an agreement to pay should be implied.

The verdict should be affirmed, and the application refused with costs.

KILLAM, J.—I agree entirely with the contention on the part of the defendant, that the plaintiff's claim depends upon contract, express or implied, and that none such is to be implied from the mere fact of the maintenance by one person of the child of another.

Here, the plaintiff's wife took the child at the express request of the defendant; and it is admitted that if she had been a stranger to the defendant, a contract to pay for the care

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and maintenance of the infant could properly be implied. Upon the argument I felt some doubt as to whether it should be so in the present case, but upon further consideration of the evidence, I incline to think that it would have been fairly open to a jury to infer, under all the circumstances, that there was not an intention in asking and in rendering the services that they should be wholly gratuitous. I think that the case is one in which it must have been left to a jury to determine whether the necessary contract should be implied, and I am not prepared to say that if I had occupied the position of a jury, I should have found a different verdict from that entered by the learned Chief Justice.

I agree that the application must be dismissed with costs.

BAIN, J.—Apart from contract, a father is under no obligation that can be enforced in a civil action to support his children; and if the plaintiff is entitled to succeed here, there must be evidence that the defendant agreed to pay what would be reasonable compensation for taking care of the child. *Mortimore* v. *Wright*, 6 M. & W. 482. *Bazeley* v. *Forder*, L. R. 3 Q. B. 565. There was no express agreement that the plaintiff was to be paid, and the law will not imply a promise on the part of the defendant from the mere fact that the plaintiff, or his wife acting for him, took charge of and cared for the child. There must, therefore, be evidence of what may be called a tacit contract, that is, of circumstances or conduct from which it was open to the learned Judge, who tried the case, reasonably to infer that both parties understood and intended that if the plaintiff's wife took and kept the child, the defendant for whose benefit it was kept, would pay what the service rendered was fairly worth. The plaintiff's wife is the defendant's sister; but the only bearing this fact has on the case is that *prima facie* there would be more likelihood of services being offered and accepted without any intention on either side that they were to be charged for, than there would be in the case of mere strangers.

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It was at the defendant's request that Mrs. Munro first took, and afterwards, when she spoke of sending the child home, continued to keep it. If Mrs. Munro's evidence is credited, it is impossible that the defendant could have believed, as he says he did, that when she first took the child "she adopted the child then and there," and his subsequent conduct seems to have been inconsistent with his having thought that she had adopted the child and that he was relieved from further responsibility for it. Neither the plaintiff nor his wife were under any obligation to be at the expense and trouble of keeping the defendant's child for him; and as Lord Esher, M. R., said in *Ex parte Ford*, 16 Q. B. D. 305, "whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." The learned Chief-Justice who tried the case, and who was in the best position to judge as to the credibility of the witnesses and the effect of their evidence, has drawn the inference, and as it is an inference that may reasonably be drawn from the evidence, his decision I think, should be affirmed. The amendment to the Q. B. Act in 55 Vic. c. 8, s. 1, (M. 1892.) requires the Court to act upon its own view of what the evidence proves, but in cases of this sort, the Court cannot do other wise I think, than recognize that the trial Judge had an advantage over it in arriving at a correct estimate of the value and effect of the evidence, and give this fact due weight in forming its own judgment of what the evidence proves.

The amount of damages awarded is not in any way unreasonable, according to the evidence, and I think the defendant's application must be dismissed with costs.

Application dismissed with costs.

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ADY V. HARRIS. 163

Before KILLAM, J.

Husband and wife—Separate business—Farming business—Land owned by wife—Ownership of crop—Onus of proof.

Held, that where the husband ostensibly carries on upon the land of his wife the work of farming, it should be presumed, in the absence of evidence to the contrary, that his wife allows him the use of her land for the purpose and that the crops are his, and that where he does the work with the assistance of a hired man, the *onus* is upon the wife, notwithstanding her ownership of the land, to establish that the husband is her servant, and the farming business really hers.

Held, also, that such evidence as was presented in this case, (being that of the husband and wife solely) not corroborated by independent evidence, and contradicted by the independent and written evidence, as far as it went, ought not to be taken as sufficient to establish that the farming business was carried on by the wife, although if the *onus* of establishing this were not upon the wife, it would not sufficiently show that it was the business of the husband.

ARGUED: 19th October, 1892.
DECIDED: 24th January, 1893.

Statement.

THIS was an interpleader issue respecting the right to certain stacks of grain, seized under execution issued on a judgment recovered, by the defendant in the issue, against the goods of the husband of the plaintiff in the issue.

The facts appear from the judgment.

J. S. Hough, for plaintiff. On husband's evidence plaintiff is entitled to succeed. Marriage was after 1875. Plaintiff's claim is under ss. 2 & 5, of Married Women's Act. Wife had two cattle, husband none. Afterwards she received money from her father which was separate estate. With this she acquired more cattle and a horse. Increase amounted to between 15 and 20 in 1886. Husband mortgaged and was pressed for payment. Debts then almost wholly due to mortgage company. No great debts outside. It is reasonable they should desire to preserve pro-

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perty. They desired to pay debts and conveyed for that purpose. Mortgage company was paid out of stock. Transaction was for value and she undertook to pay mortgage. Transaction properly stated in deed. Fact of husband living with wife on farm and doing some work does not make property his. *Dominion Savings Co.* v. *Kilroy*, 14 O. R. 468; 15 A. R. 487. Here wife managed whole business. If property vested in wife proceeds belong to her unless contrary shewn. Wife says farm was managed by her, she looked after liabilities and paid them. Only mortgage they had was to Loan Company. Ady continued liable and wrote as debtor. Wife shows she hired all help and paid them. All household debts hers except Munro's, and she did not know how this kept. All moneys received by her and disbursed by her. Husband retained no proceeds. Were no representations of ownership. Ady bought binder without wife's knowledge, or consent and on his own account. She allowed him for cutting. Binder bought for use on other farms. *Ingram* v. *Taylor*, 7 A. R. 216.

J. H. Munson for defendant. Assuming that the title to the land had been acquired *bona fide* by the wife, the crops are not the fruit of her separate dealings. *Lett* v. *Commercial Bank*, 24 U. C. R. 552; *Harrison* v. *Douglass*, 40 U. C. R. 410; *Meakin* v. *Samson*, 28 U. C. C. P. 355; *Irwin* v. *Maughan*, 26 U. C. C. P. 455; *Totten* v. *Douglas*, 15 Gr. 126. The transfer of the land was void as in fraud of creditors. *Ingram* v. *Taylor*, 46 U. C. R. 52; 7 A. R. 216, went on the ground that it was quite apparent the land was given the wife advisedly and publicly, and was so known to be her own property. Here on the contrary credit was given on the faith of belief in the husband's ownership. The origin of the business was a fraud and the conveyance would be set aside as such. Ady was in difficulties. His wife says the conveyance to her was for the purpose of preserving the farm. The farm and implements were really the husband's. The repairs to the implements were paid by the husband, and so far as could be

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seen he continued to exercise his usual control over the farming operations, working as before, hiring men for farm work, selling the crops and receiving the price. The husband did the farming and the wife's claim is colorable and fictitious. *Commercial Bank* v. *Wilson*, 3 E. & A. 257; *Parenteau* v. *Harris*, 3 M. R. 329; R. S. M. c. 95, ss. 2, 14.

KILLAM, J.—Thomas Ady, the execution debtor, was originally a blacksmith, but at the time of his marriage he owned, occupied and farmed a half section of land, and ever since that time he and the plaintiff have resided on and cultivated that land, and the grain in question was raised thereon. The marriage took place since the 14th May, 1875, and there was no marriage contract or settlement.

The plaintiff states that at the time of her marriage, she owned two head of cattle; that subsequently she received from her father $300, with which she bought some more cattle and some horses; these animals were kept and cared for on the land mentioned and in the year 1886 amounted, with their increase, to between 15 and 20 head of cattle and three horses. In the years 1881 and 1882, Thomas Ady made two separate mortgages of the land to a Loan Company to secure sums amounting together to $1000 and interest. In 1886 the interest on these mortgages was considerably in arrear and the Company was pressing for payment. The plaintiff and her husband state that about this time an agent of the Company visited the farm and suggested as a consideration for delay that the Company should be given security upon the stock &c., and that Thomas Ady said that he could not do this as the stock belonged to his wife. The agent then, as they say, suggested that the land should be transferred to the wife and that she should assume the mortgage and give the additional security. Their statement is that it was eventually agreed that this should be done and that the wife should pay up $200 of the arrears as soon as some of the stock could be sold.

The name of the agent is not given and there is no oral confirmation of these statements, but in September, 1886,

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Thomas Ady wrote a letter to the manager of the Company at Winnipeg, asking to have the land transferred to his wife right away, enclosing $5. This amount was handed over to the Company's solicitors, who prepared a deed of conveyance of the land from Thomas Ady to one Walter Jackson, a clerk in the employ of the solicitors, to the use of the wife and her heirs, and this deed was executed by Thomas Ady and registered shortly afterward. The deed is expressed to be made in consideration of the wife assuming a mortgage then existing against the lands and of the sum of $200 paid by Mrs. to Mr. Ady, and to be "subject to the mortgage hereinbefore referred to from the party of the first part to The North British Canadian Investment Company," but it contained no covenant for payment of the mortgage moneys. The letter and the circumstances of the drawing of the deed serve to some extent to corroborate the statements of Mr. and Mrs. Ady as to the object of the transfer.

The $200 mentioned in the conveyance was never paid except to the Loan Company, and it appears that it was never intended that it should be otherwise paid. It is doubtful whether all was paid out of the proceeds of the cattle, though some portion appears to have been so. Nothing whatever was paid until December, 1887, and then only $100. In March 1888, $50 more were paid and in November, 1888, another sum of $150, which I should judge to have been realized on a mortgage of the land.

At the time of the transfer Thomas Ady was in pecuniary difficulties and was being pressed by creditors. At that time the market value of the land was not greater than the amount due on the mortgage, and it is probable that on a forced sale the mortgagees would have been unable to realize the whole debt.

The plaintiff states that she manages and controls the farm; that a hired man and her husband do the work of the farm; that she hires and pays the hired man who is kept only in spring and fall, the husband doing the work at other times; that only one is kept, except one spring when

her husband was ill; that she pays for the help out of the produce of the land; that she gets the proceeds of the crops; that she also makes butter from the milk of her cows and in this way maintains the family; that she buys the necessaries for the family, or, if her husband does so, it is only by her directions; that she herself did none of the work of raising the crops, except at odd times during the harvest; that she had no arrangement with her husband as to his work on the place or how he was to be remunerated; that he began to farm when she got the place; that sometimes she sent her husband to engage a man, but made the bargains with such men when they came to the farm; that sometimes she paid such men herself, and sometimes her husband did so; that her husband took the grain raised on the farm to market, got tickets for it and the money, but that she sent him to do this; that the wagon and implements used on the farm are her husband's, some purchased before and some after the transfer to her; that she superintended the work of the farm, and was the ruler both in the house and outside; that the neighbors knew that her husband did not own the farm; that immediately after the transfer nothing was done differently from what had been done previously, except that she hired the man who helped the first spring and told her husband where to plough, a matter about which, she stated, her husband previously did not consult her; and that her husband furnished her with the seed the first year and she returned the same quantity to him in the fall.

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This last statement was made in a manner that was rather suspicious, and is not confirmed by the husband.

The husband states that after the transfer he put up a blacksmith shop, though before he had an anvil and bellows, and that after the transfer he did not work so much as previously on the farm but more as a blacksmith; that afterwards he exercised no supervision over the farm; that he and his wife talked over between them the places of sowing, which he admits they had previously sometimes done; that after the transfer he handed to his wife the

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proceeds of the grain, though he had previously been in the habit of keeping them.

After the transfer Thomas Ady wrote to the Loan Company a number of letters transmitting money or asking for time. In these he wrote as for himself and as if the land and the crops were his own. These letters were written by direction of Mrs. Ady. He bought, on his own credit, twine for binding the grain and implements for use on the farm, and gave his notes therefor. Mrs. Ady says that she directed her husband to buy the twine. The accounts for necessaries with one at least of the merchants who supplied them were kept in the husband's name.

In 1888, Thomas Ady mortgaged the land to Elizabeth Thompson, but a subsequent mortgage to Mrs. Thompson was made by the wife to secure the same sum. In November, 1888, an agreement was made in writing between Thomas Ady and the Loan Company for an extension of the time for payment of the original mortgage and a reduction of the rate of interest, Mrs. Ady not being named as a party to the instrument.

The judgment, to enforce which the goods in question were seized, was recovered upon promissory notes of Thomas Ady given in 1891 for a binder, a plough, binding twine and some repairs to machinery.

The binder, the plaintiff claims, was bought by her husband on his own account. She states that he used it but a day and a half on her land and that she paid him for that work. The plough, apparently, the plaintiff does not claim. What was done with the twine does not appear. I assume that it was used on the Ady farm. Thomas Ady gave to the defendant Company a mortgage on some horses to secure the price of the binder, but he claims that he told the agent when he did so that the horses belonged to his wife. The wife says he told her of this. The agent says that Ady made no such statement and that he trusted Ady as the apparent owner of the land.

I incline to think that the proper inference respecting the

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transfer of the land is that it was not intended to be a real transfer, but was made to delay, defeat or defraud creditors. The whole case as to the wife's possessing separate property depends on the evidence of herself and her husband. So, also, does the case as to her managing the farm, while the documentary and any independent evidence shows that the husband was the ostensible occupant and farmer and the ostensible purchaser of the farming implements and of the supplies for the farm and household. However, it does not sufficiently appear that any of the former liabilities still exist or that there was any intent to defraud future creditors, and as I think that, apart from the transfer and its *bona fides*, the plaintiff should fail, I will not found my judgment upon that ground, but assume the transfer to be valid as against creditors.

If this case involved solely a question of separate occupation or trade, I should hold, without hesitation, that even accepting the plaintiff's statements, the farming was not such. Upon this point, I agree entirely with the views expressed by Harrison, C.J., in *Harrison* v. *Douglass*, 40 U. C. R. 410, Rose J. in *Dom. Loan, &c. Co.* v. *Kilroy*, 14 O. R. 468; Osler J. in *Dom. Savings &c. Soc.* v. *Kilroy*, 15 A. R. 487; and in *Levine* v. *Claflin*, 31 U. C. C. P., 616; by Burton J. in *Murray* v. *McCallum*, 8 A. R., 277; and by Boyd, C. in *Campbell* v. *Cole*, 7 O. R. 127.

In *Harrison* v. *Douglass*, the husband and wife resided together upon land in which the wife had a two-thirds interest and the husband none except through the wife. They were married before the passing of the Act 35 Vic. c. 16 (O. 1872), and it was held that that Act did not deprive the husband of his common law rights in respect of the wife's land, and that the occupation of the land and the farming business were to be presumed to be his. In *Lett* v. *The Commercial Bank*, 24 U. C. R. 552, the husband and wife resided on and the husband farmed land devised to trustees for the wife with power to let the same and pay her the rents. It was there, also, held that the natural presumption was that the husband was the tenant of the land

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and the crops his. So, also, in *Parenteau* v. *Harris*, 3 M. R. 329, where the evidence showed that the husband was carrying on the farming work on his wife's land, it was held that the crops were his.

On the other hand, in *Ingram* v. *Taylor*, 46 U. C. R. 52, 7 A. R. 216, where there was evidence that the farming business was carried on largely by hired help and was intended to be the wife's, the land being hers, although the husband did some portion of the farm work, it was held that the crops belonged to the wife as being the issues and profits of the land, and that the question of separate business did not arise.

So far as the last mentioned case can be considered as parallel with the present, it occurs to me to observe that it is hardly correct to speak of these crops as being wholly the issues and profits of the land. They were partly the proceeds of the husband's labor and management of the farming business, and, to that extent, property received from the husband and not protected by the statute.

Now, it appears to me that, where the husband ostensibly carries on upon the land of his wife the work of farming, it should be presumed, in the absence of evidence to the contrary, that his wife allows him the use of her land for the purpose and that the crops are his, and that, where, as in the present case, he does the work, with the assistance at times of a hired man, the *onus* is upon the wife, notwithstanding her ownership of the land, to establish that the husband is her servant and the farming business really hers. I say nothing as to the effect of its being established to be hers.

It appears to me, also, that such evidence as is here presented, not corroborated by independent evidence, and contradicted by the independent and written evidence, so far as it goes, ought not to be taken as sufficient to establish that the farming business was carried on by the wife, although if the *onus* of establishing this were not upon the wife I could not find that it was shown that it was the business of the husband.

My verdict, then, must be for the defendant, with leave reserved to the Court to enter a verdict for the plaintiff. 1893.

Verdict for defendant. Judgment. KILLAM, J.

CARSCADEN V. PHILION.

Before TAYLOR, C.J., KILLAM AND BAIN, JJ.

Next friend—Appointment of—Property qualification— Incumbered property—Joint ownership.

Where a proposed next friend for a married woman was shown to be possessed of property worth more than double what was necessary, but it consisted of real estate heavily encumbered and personal property, both kinds of property being owned jointly with another person,

Held, That the appointment as next friend should be refused on the ground of the nature of the property.

Held, also, that a next friend should, at least, be shown to be possessed of such property as would formerly, had he been a plaintiff resident abroad, have relieved him from the necessity of giving security for costs.

ARGUED: 4th May, 1893.
DECIDED: 27th May, 1893.

IN this case a petition, praying that the decree might be set aside, was presented by a married woman, not a party to the cause. When it came on for hearing all proceedings were stayed until the appointment of a next friend for the petitioner. An application to the Referee in Chambers for the appointment of one Joseph Sheppard as next friend was refused, but on appeal to a Judge in Chambers the order of the Referee was reversed, and he was appointed. From the order then made the plaintiffs appealed to the Full Court. Statement.

Sheppard made an affidavit that he was worth $600 after payment of all his liabilities and over and beyond all statutory exemptions. Upon this affidavit he was cross examined, and seemed to give full information as to his property both real and personal.

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Argument.

A. Haggart for plaintiffs, appellants. The motion for appointment of next friend is improperly framed. It is made by petitioner. It should have been by next friend on behalf of petitioner. *Leggo's Forms*, 440–442; *Pearse* v. *Cole*, 16 Jur. 214; *Ontario Bank* v. *Smith*, 6 M. R. 600; *McMicken* v. *Ontario Bank*, 5 M. R. 152; *Cooney* v. *Girvin*, 1 Ch. Ch., 94. Proposed next friend is insufficient. Referee decided on that ground. The only evidence as to the sufficiency is an affidavit of next friend and cross-examination thereon. The only land owned by Sheppard is in the name of himself and his son. He has only an undivided one-half interest therein. The land is also subject to a lien for unpaid purchase money and before costs could be realized the encumbrance might have to be paid. The land owned is the residence of Sheppard, and consequently exempt under Manitoba statutes. *Ontario Bank* v. *McMicken*, 7 M. R., 203; *Osborne* v. *Inkster*, 4 M. R., 399. The examination of Sheppard shows that he is an obligor on a bond to the Crown for $2,000 for carrying mails. In England and Ontario, bonds to the Crown, unless registered as provided by statute, are of no more effect than bonds between subjects. In Manitoba they have their old time force and virtue.

N. F. Hagel, Q. C., for the petitioner. 1 & 2 Vic., c. 110, made registration of bond necessary, to be a lien on land. The question of sufficiency of next friend is the test. *Stovel* v. *Cole*, 3 Ch. Ch., 421. Here Sheppard swears that he is solvent, that he has $600 over and above exemptions. The residence and land are not exempt because they are partnership property and as such are personalty. The affidavit and cross examination show that Sheppard has his plant and that his receipts from the Government amount to $3,848 a year. He and his son do the work. He has an indemnity by chattel mortgage from the petitioner.

TAYLOR, C.J.—(After stating the facts,) *Stovel* v. *Coles*, 3 Ch. Ch. 421, is relied on as stating what must be

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proved. But there, after deducting fifty per cent. for alleged over valuation, the uncontradicted evidence of the proposed next friend showed him still worth more than double what was necessary. In the present case it is the nature of the property, rather than the value, that is objectionable.

The real estate spoken of by Sheppard consists of a lot in Winnipeg, bought for $2250, on account of which $800 has been paid, and on which since it was bought, $400 has been laid out in improvements. The lot then is subject to an incumbrance of unpaid purchase money amounting to $1450, which the plaintiffs, if they recover judgment for costs, may possibly have to pay off, before they can benefit by their judgment. A person proposed as a next friend should, I think, at the least, be shown to be possessed of such property as would formerly, had he been a plaintiff resident abroad, have relieved him from the necessity of giving security for costs. To do that it has been held in Ontario that the property must be unincumbered, *Gault* v. *Spencer*, 3 C. L. J. N. S. 70; *Ganson* v. *Finch*, 3 Ch. Ch. 296. In England also it may be inferred from *Swinbourne* v. *Carter*, 23 L. J. Q. B. 16, that the possession of unincumbered property was necessary. But without going so far as to say that in no case will property subject to an incumbrance be deemed sufficient, certainly it must be an incumbrance of small amount. Here the amount is large, more than three fifths of the whole purchase money remains a charge upon the property.

And there is a further objection. The property is owned by Sheppard and his son, he has only an undivided interest. Property so held has been refused as sufficient security, because the interest of a tenant in common is not so saleable as that of a sole owner, a purchaser having to run the risk of the costs of a partition suit and other expensive proceedings. It was so held in *Higgins* v. *Manning*, 6 P. R. 147, by the Referee in Chambers in Ontario, and his judgment was affirmed by Strong, V. C. on appeal.

The personal property which Sheppard has consists of horses, wagons and harness, &c., but this it was admitted,

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he owns only in partnership with his son. Now, all that could be seized and sold under an execution against him, would be his unascertained interest in the partnership, a most unsaleable commodity. To realize that interest, whatever it may be, a suit in equity would be necessary and an interest in an estate which has to be administered by the Court will not be regarded as security. Strong, V. C., so held, affirming an order of the Referee in *Wilson* v. *Wilson*, 6 P. R. 152.

The proposed next friend is not shown to be possessed of any property other than the lot of which he is a tenant in common, and the personal property in which he has an interest as a partner. He is therefore possessed of no property which can be held to qualify him to be the next friend of a married woman.

The objection was also taken, that Sheppard is a contractor with the Crown for carrying the mails, and having as such given a bond for the performance of his contract, is a Crown debtor and therefore not a sufficient next friend. I do not think it is necessary to dispose of this objection. The exact position in this Province, of a person who has given a bond to the Crown, and the rights of the Crown as to his property, would require some consideration. Besides, the bond is given, not to Her Majesty, but to the Postmaster General, and it may be a question, whether, under the provisions of The Post Office Act, R. S. C. c. 35, s. 116, the remedy, in case of default, is not merely by an ordinary action brought upon the bond in the name of the Postmaster General. In *Reg.* v. *McNabb*, 30 U. C. R. 479, the bond was to Her Majesty.

On the ground, however, of the nature of the property, the appeal should in my opinion be allowed with costs, and the order of the Referee in Chambers restored.

The plaintiffs to have the costs of the original appeal.

BAIN, J.—The object for which the next friend of a married woman is appointed is, that he may be answerable for the costs the defendant may become entitled to recover.

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When security for costs is ordered to be given, the practice of the Court is to require security to the amount of $400; and, in analogy to this practice, a next friend should be shewn to be a person owning and possessed of property, available to the defendant's process, of the value of $400 over and above his just debts and all statutory exemptions.

I quite agree that the evidence we have before us fails to show that the person offered here as next friend meets the requirements of the rule. Nominally he may be worth over $400, but none of his property is in a shape in which it is practically available to process.

I think the application must be allowed with costs and the order of the Referee restored.

KILLAM, J., concurred.

Appeal allowed.

RIGBY v. REIDLE.

Before BAIN, J.

Action on promissory note—Domicile of defendant out of jurisdiction—Personal service within jurisdiction.

An action on a promissory note is transitory, and a defendant may be sued thereon in Manitoba, although the cause of action arose, and the domicile of the defendant be out of the jurisdiction, provided he be personally served with process within the Province.

McKay v. *Barber*, 3 M. R. 41, followed.

ARGUED: 22nd March, 1893.

DECIDED: 24th March, 1893.

Statement.

This action was brought in Manitoba upon a promissory note made by the defendant in the Northwest Territories and payable there. The defendant also had his domicile

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there, but while in Manitoba temporarily, he was personally served with the writ of summons. No appearance was entered and the plaintiff obtained judgment by default.

The defendant afterwards came to reside in Manitoba, and finding the judgment entered against him, he moved to set it aside, on the ground that there was no cause of action in Manitoba at the time the suit was begun, and the Court, therefore had no jurisdiction. The Referee dismissed the application, and the defendant appealed to a Judge in Chambers.

G. A. Elliott for the plaintiff.

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

BAIN, J.—The Referee was right, I think, in dismissing the application of the defendant to set aside the judgment entered against him herein. The cause of the action may have arisen out of the jurisdiction, but an action on a promissory note is a transitory one, and it was quite competent for the plaintiff to bring an action on the note in this Court. Of course if the writ had been served on the defendant outside of the jurisdiction, the service would have been invalid, but it appears that, although the ordinary domicile of the defendant was out of the jurisdiction, service of the writ was made on him personally when he happened to be within the jurisdiction. This personal service within the jurisdiction gave the Court complete jurisdiction in the action, and the judgment entered in it is valid and binding on the defendant. See *McKay* v. *Barber*, 3 M. R. 41.

The application to reverse the order of the Referee must be dismissed with costs.

Appeal dismissed.

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WINNIPEG JEWELLERY COMPANY v. PERRETT.

Before TAYLOR, C.J.

Tuesday trial—Powers of judge sitting at—Issues on record—Action—Tender before action—Payment into Court.

Declaration on the common counts.

Pleas 1. Except as to $42.15, never indebted and payment.

2. Except as to $42.15, tender before action and payment into Court.

Plaintiffs filed two replications.

1. Accepting the money paid into Court in satisfaction.

2. Traversing the tender before action.

The record having been entered for Tuesday trial, the defendant objected that no judgment could be entered upon it.

Held, that the Judge had the powers and authorities of a Judge of Assize and *Nisi Prius*, and was bound to try the issues on the record.

Wells v. *Abrahams*, L. R. 7 Q. B. 554, considered.

ARGUED: 4th April, 1893.
DECIDED: 6th April, 1893.

Statement.

THE plaintiffs sued upon the common counts: the defendant pleaded, except as to $42.15, never indebted and payment, and as to $42.15, tender before action and payment into court; the plaintiffs filed two replications, first, accepting the money paid into court in satisfaction and discharge of the causes of action in respect of which it was paid in, and second, traversing the tender before action. The record having been entered for trial upon a Tuesday, the defendant objected that no judgment could be entered upon it. Evidence as to the tender was taken subject to the objection. The evidence was conflicting as to whether the tender was before or after action.

J. S. Hough, for plaintiffs.

G. A. Elliott, for defendant.

TAYLOR, C.J.—I cannot entertain the objection raised by the defendant's counsel. Whether any judgment, or what

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judgment, can be entered in this action upon the pleadings as they stand, is not a matter for me to deal with.

I am sitting under the provisions of R.S.M. c. 36, s. 53, and this action has been entered for trial under s. 60. By that section I have, and can exercise the powers and authorities of a judge of Assize and *Nisi Prius*. Then here is a record brought before me, having on it an issue of tender or no tender, and that issue I am bound to try. A judge sitting at *Nisi Prius* is not the Court out of which the record proceeds, nor does he represent the Court, he is only a commissioner, the instrument of the Court to try the issues raised, and these issues he is bound to try, *Wells* v. *Abrahams*, L.R. 7 Q.B. 554.

On the issue raised, I must find for the plaintiffs. The action was begun on the 18th of July, 1892, and the evidence of tender leaves it quite uncertain whether it was made upon the 18th or 19th, or it may even have been on the 20th, the witness is not certain as to the day.

Verdict for plaintiffs.

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COPELAND V. HAMILTON.

Before KILLAM, J.

Sale of goods—Agreement for—Warranty—Action for breach of—Property passing—Damages—Measure of—Bailment.

Plaintiff sued in a County Court upon a promissory note given to him by defendant upon an agreement for the sale of a horse.

A condition of the agreement was that the property was not to pass to defendant until payment. Defendant filed a counter claim for breach of an alleged warranty that the horse was sound. The horse was delivered to defendant and used by him for some time, but died before maturity of the note from a cause not connected with the unsoundness complained of. At the trial, the Jury found that there was a warranty, that the horse was unsound, and that the difference in value between the horse as it was, when delivered, and it would have been if sound, was $90, for which amount a verdict was entered for defendant on the counter claim.

The plaintiff appealed to the Court of Queen's Bench.

Held, 1. That the consideration for the note was in part the bailment, and in part the promise of the vendor to sell.

2. That an action lay for the breach of warranty, and that the purchaser should recover as general damages, for the period of the bailment and for the proposed sale together, the same amount as if there were an immediate sale.

3. That the right of action for the breach of warranty arose at once, just as in the case of an absolute sale of a specific chattel.

Frye v. *Milligan*, 10 O. R., 509 and *Tomlinson* v. *Morris*, 12 O. R., 311, not followed.

ARGUED: 18th April, 1893.
DECIDED: 7th June, 1893.

THIS was an appeal from a County Court. Statement

The plaintiff sued upon a promissory note given to him by the defendant upon an agreement for the sale of a horse. One of the conditions of the agreement was that the property was not to pass to the defendant until payment of the price. The defendant alleged that the plaintiff warranted the horse to be sound, and a counter-claim for breach of this warranty was set up. The horse was

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delivered to the defendant, and used by him for some time, but it died before maturity of the note, from a cause not connected with the unsoundness complained of.

The action came on for trial, and after taking some evidence, the Judge found that there was such conflict of testimony upon the counterclaim, that he considered it desirable to submit the case to a jury. A jury was then empanelled, and by consent of the parties, the notes of the evidence already given were read to the jury, and further evidence was given. The learned Judge left to the jury three specific questions:—(1), as to the warranty, (2), as to the soundness, (3), as to the difference in value between the horse as it was, and as it would have been if sound. The jury found that there was a warranty, that the horse was unsound and that this difference in value was $90, for which amount a verdict was entered for the defendant on the counter-claim.

I. Pitblado for plaintiff.

W. J. Cooper for defendant.

The following cases were referred to:—*Fryc* v. *Milligan*, 10 O. R. 509; *Tomlinson* v. *Morris*, 12 O. R., 311; *Battley* v. *Faulkner*, 3 B. & Ald., 288; *Fielder* v. *Starkin*, 1 H. Bl., 17; *Poulton* v. *Lattimore*, 9 B. & C., 259; and *Ellis* v. *Abell*, 10 A. R., 226.

KILLAM, J.—For the plaintiff it was contended that there could be no right of action for breach of warranty, as the property had not passed to the defendant, and that, therefore, such a counter-claim could not be set up; secondly, that the evidence of the warranty and of the unsoundness was unsatisfactory, and the verdict against the weight of evidence.

Upon the latter point, while to some extent the circumstances would seem to throw doubt on the defendant's claim, there was evidence for the consideration of the jury, and I am not in a position to say that they should not have believed the statements of the defendant and his witnesses.

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The first point involves a question that has never yet been settled in this Province, although it has occasionally been raised. In view of the frequency with which such contracts are entered into, it is a question of considerable importance. In Ontario it was held, in *Frye* v. *Milligan*, 10 O.R. 509, and *Tomlinson* v. *Morris*, 12 O.R. 311, under contracts differing in some respects from that now in question, that the purchaser could not maintain an action for general damages for breach of warranty until the property passed to him, but it was suggested that he might be entitled to sue for special damages.

In the present instance the agreement was one for the sale of a specific animal. It does not appear clearly whether there was any express agreement for possession during the currency of the note or at whose risk the animal was to be in the meantime. Was it lent to the defendant without consideration? Was the plaintiff bound by an absolute agreement to sell it to the defendant upon payment therefor? If both of these questions should be answered in the affirmative, then it would appear that all consideration for the note has failed, and the plaintiff should not have recovered anything. It seems to me, however, that it was open to the jury to infer that the whole consideration for the note was not an agreement for the sale of the horse to the defendant *in futuro*, but that the agreement was one, also, for the bailment of the horse to the defendant at the risk of the latter until maturity of the note, and then for a sale if the animal should still be in existence. In this view a part of the consideration for the note would be the bailment, and a total failure of consideration could not be alleged. If such an inference was open and would support the verdict, we must suppose it to have been made.

Now, it is clear that upon a bailment for hire there may even be an implied warranty. See *Sutton* v. *Temple*, 12 M. & W. 52; *Jones* v. *Page*, 15 L. T. N. S. 619; *Fowler* v. *Lock*, L. R. 7 C. P. 272, 9 C. P. 751, *n.*, 10 C.P. 90. Certainly there may be an express warranty.

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The warranty, if any, was of soundness at the making of the agreement, not at the date of the maturity of the note. By that time, even if alive, the animal might be worthless, or it might have recovered.

The unsoundness was such, according to the evidence of the defendant, as to impair the usefulness of the horse from the time of its delivery to him. There was then, an immediate breach of the warranty and immediate damage to the defendant. Whether upon a sale or upon a bailment, these are not deemed to be new breaches of warranty, and new rights of action as often as damage results to the purchaser. In *Battley* v. *Faulkner*, 3 B. & Ald. 288, it was held that the cause of action for breach of warranty on a sale of unascertained goods was complete upon delivery of the goods, and that the time for the purposes of the Statute of Limitations ran from that date, notwithstanding that the defect was not discovered for long after, and although the claim was in part, at least, for special damage subsequently incurred.

The principle of decision in such a case as this must be the same, whether the subject of the sale remains in existence or not. The defendant is absolutely bound upon his note. If the article sold be wholly destroyed, so as to be incapable of sale when the note is paid, the defendant would suffer no further damage and then, according to the argument for the plaintiff, he could never have a cause of action for the greater part of his claim. Even if, as in the Ontario cases, there were an express right to re-sell upon default and credit the purchaser with the proceeds, these proceeds could not be expected to be as large as if the article were as warranted.

It appears to me that the reasonable view of such a contract is that the right of action arises at once, just as in case of the absolute sale of a specific article, and that the purchaser should recover as general damages, for the period of the bailment and for the proposed sale together, the same amount as if there were an immediate sale.

The consideration for the note is in part the bailment,

and in part the promise of the vendor to sell. This latter promise is worth less than if the article sold were as warranted. To treat the matter upon the principle of the plaintiff's contention would seem to involve the liability of the purchaser for the whole purchase money, while precluding him forever, in many instances, from a right to recover for defects warranted against.

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I dismiss the appeal with costs.

Appeal dismissed with costs.

INTERNATIONAL &c. CORPORATION v. GREAT NORTH WEST CENTRAL RAILWAY COMPANY.

Before TAYLOR, C.J.

Foreign judgment—Action on—Embarrassing pleas—Application to strike out—Pleas which might have been pleaded to the original cause of action.

To a count on a foreign judgment the defendant pleaded nine pleas which might have been pleaded in the foreign country to the original cause of action. There was no evidence that they were untrue.

Held, that these pleas could not be struck out on the ground of embarrassment or delay, and the fact that the plaintiffs might be put to great expense about procuring evidence in the foreign country to meet, by way of anticipation, what was set up in the pleas, was no ground for striking them out.

ARGUED: 5th June, 1893.
DECIDED: 12th June, 1893.

Statement.

THIS was an appeal by the defendants from an order of the Referee, striking out nine pleas filed by them to the first count of the declaration. That count was on a judgment recovered by the plaintiffs in England.

The application before the Referee was based on an affidavit verifying the pleadings and showing that the pleas

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C. P. Wilson, for the plaintiffs.

C. W. Bradshaw, for the defendants.

The following cases were referred to:—*Manning* v. *Thompson*, 17 U. C. C. P. 606; *Meyers* v. *Prittie*, 1 M. R. 27; *Gault* v. *McNabb*, 1 M. R. 35; *Woods* v. *Tees*, 5 M. R. 256; *Fowler* v. *Vail*, 27 U. C. C. P. 417, 4 A. R 267; *British Linen Co.* v. *McEwan*, 6 M. R. 295.

TAYLOR, C.J.—The pleas are all pleas which might have been pleaded in England to the original cause of action so they may, under section 39 of The Administration of Justice Act, be pleaded now in this action. *British Linen Co.* v. *McEwan*, 8 M. R. 99. On what ground they were struck out by the Referee does not appear, but it is sought to support his order on the ground of embarrassment or delay. Should they be struck out on that ground?

I do not think that, by the proviso at the end of section 39, it was meant to extend the powers of the Court as to striking out pleas. Apparently it was placed there only to prevent the argument being used that the Legislature having given a defendant the right to raise certain defences, the Court has no power over them. It enables the Court to exercise over pleas pleaded under that section, the same powers which it can exercise by virtue of the provisions of the Common Law Procedure Act.

The onus of proving these pleas rests upon the defendants. There is no evidence that they are untrue, but it is said they are embarrassing, because the plaintiffs may be put to great expense about procuring, in England, evidence to meet, by way of anticipation, what may be set up under them. But if the pleas are good pleas, that seems no ground for striking them out. It was sought to strike out a plea on that ground in *The Welland Railway Co.* v. *Blake*, 6 H. & N. 410, and there the Court held that if it was a

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lawful plea they had no power to set aside pleas as embarrassing, being limited to such as are at once embarrassing and irregular, informal or tricky, and contrary to the rules and practice of pleading, and that it put the plaintiff to a large amount of difficult, expensive and needless proof was no ground for striking it out. *Woods* v. *Tees*, 5 M. R. 256, is also an authority against striking out these pleas.

The appeal should be allowed and the order striking out the pleas set aside. The costs of the appeal and before the Referee, to be costs in the cause to the defendant in any event.

Appeal allowed.

THE UNION BANK OF CANADA V. TIZZARD.

(THE COMMERCIAL BANK OF MANITOBA, CLAIMANTS.)

Before BAIN, J.

Interpleader—Goods seized in possession of mortgagee—Who should be made plaintiff in issue.

In April, 1892, the plaintiff placed a writ of *fi. fa.* against the goods of defendant in the sheriff's hands. The sheriff seized certain goods as the property of defendant, but they were claimed by the Commercial Bank. They had been mortgaged to the Bank in January, 1892, and were taken possession of by the Bank a few days before the seizure, and at that time were in the actual possession of the Bank. An interpleader issue was directed and the question was, which party should be made plaintiff in the issue.

Held, that the execution creditors should be made plaintiffs.

ARGUED: 3rd July, 1893.
DECIDED: 10th July, 1893.

On the 20th April, 1892, the plaintiffs placed a writ of *fi. fa.* against the goods and chattels of the defendant in the Sheriff's hands. On the 15th of November, 1892, the Sheriff was about to seize certain goods under the writ as

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the property of the defendant, but the goods were claimed by the Commercial Bank. They had been mortgaged to the Bank by a chattel mortgage dated in January, 1892, and were taken possession of by the Bank under the mortgage a few days before the Sheriff attempted to seize them, and at that time were in the actual possession of the Bank.

The Commercial Bank, by arrangement, paid the Sheriff $900, which money he held as if it were the proceeds of the sale of the goods, and the Sheriff obtained an interpleader order as to this money.

The Referee directed an issue between the plaintiffs and the Commercial Bank; and referred the question, Who was to be the plaintiff in the issue? for the decision of a Judge.

J. S. Ewart, Q.C., for the plaintiffs.

J. H. Munson, for the Commercial Bank.

BAIN, J.—The practice has been long settled in this Court that, when goods in the possession of a claimant have been seized under the execution, the burthen of showing that the goods were liable to seizure rests with the execution creditor; and he is, therefore, made the plaintiff in the issue. But it is argued that this practice should not be followed here, because, at the time the execution was placed in the Sheriff's hands, and when the goods, or the debtors' interest in them, became bound by the writ, they were in the defendant's own possession.

I cannot see, however, that this is any reason for departing from the usual practice. The chattel mortgage was executed and filed before the writ was placed in the Sheriff's hands; and its effect was to convey the property in the goods to the mortgagees, and the mortgagor retained a right to the possession only for so long as he observed the stipulations in the mortgage. Presumably the mortgagor has made default in these stipulations, and the mortgagees have taken possession, as they had the right to do without reference to the plaintiff's writ, which could in no way affect their title under the mortgage. *Prima facie*, then, it appears that the property in the goods and the right to their possession is in the mortgagees, the claimants; and I

think the burthen rests on the plaintiffs to show that these goods found in the possession of the claimants, are liable to be seized under their execution. 1893. Judgment. BAIN, J.

BANK OF BRITISH NORTH AMERICA v. MUNRO.

Before TAYLOR, C. J.

Appeal from Referee—Computation of time—Last day Sunday—Pleas—Application to strike out—Demurrer.

G. O. 97 provides that "Appeals from the order or judgment of the Referee in Chambers shall be made by summons, such summons to be taken out within four days after the order or judgment has been pronounced," &c.

Held, That where the last day happens to fall on a Sunday, the time should be reckoned exclusively of that day.

Where pleas are clearly bad they should be struck out, and the plaintiff not put to the expense of a demurrer.

ARGUED: 20th March, 1893.
DECIDED: 30th March, 1893.

THIS was a summons by way of appeal against an order of the Referee striking out two of the defendant's pleas. Statement.

F. H. Phippen, for defendant. The Referee had no authority to strike out these pleas because they were bad in law. That is a question for demurrer and not for chambers. *Day's C. L. P. Act*, s. 87. The old practice, before the Common Law Procedure Act, was to move for leave to sign judgment. *Cowper* v. *Jones*, 4 Dowl. 591; *Merchant's Bank* v. *Galbraith*, 1 W. L. T. 217; *Woods* v. *Matheson*, 2 W. L. T. 20, and *Woods* v. *Tees*, 5 M. R. 256. Where it is a mere question of law, then it is a proper case for demurrer. Neither Judge nor Referee has power in such cases to strike

1893. Argument. out. It does not then come within the meaning of the statute as an embarrassing plea and must be dealt with by common law practice.

J. H. Munson for plaintiff. The declaration is against defendant as maker of three promissory notes, made to the order of Wilson & Co., and by them endorsed to plaintiffs. The pleas in question disclose no defence and should be struck out. Original want of consideration is no defence as against endorsees for value even with notice. *Cooper* v. *Watson*, 23 U. C. R. 345; *Smith* v. *Commercial Union Insurance Co.*, 33 U. C. R. 69; *Hart* v. *Alexander*, 2 M. & W. 484; *Cowan* v. *Doolittle*, 46 U. C. R. 398; *Woods* v. *Tees*, 5 M. R. 256; *Griffith* v. *Griffith*, 6 P. R. 172; *Re Overend & Co., Ex parte Swan*, L. R. 6 Eq. 344.

TAYLOR, C.J.—The summons was objected to as too late, not having been taken out as required by order 97 of 13th April, 1889, "within four days after the order or judgment complained of has been pronounced." The order was made on the 1st of March and the summons was obtained on the 6th, but the 5th was Sunday. It seems to me that R. G. 174 of Hilary Term 1853 applies, and it provides that where the last day happens to fall on a Sunday or certain other days, the time shall be reckoned exclusively of that day. *Reg.* v. *Justices of Middlesex*, 7 Jur. 396; *Peacock* v. *The Queen*, 4 C. B. N. S. 264; *Re Simpkin*, 2 E. & E. 392, and *McLean* v. *Pinkerton*, 7 A. R. 490, are all cases in which time was limited by some statute, so the rule of Court did not apply.

In *Hood* v. *Dodds*, 19 Gr. 639, where the time was limited by statute, Blake, V. C., held that the last day, a Sunday, was excluded, but the Act there provided that the word day should mean a juridical day.

The ground upon which the appeal is based is, that the validity of the pleas struck out by the Referee should have been left to be dealt with on a demurrer. That argument would have force if any serious question could be raised as to the validity of the pleas, but they are clearly bad.

Neither of them raised any defence to the action whatever and the plaintiffs should not be put to the expense of a demurrer. *Lane* v. *Ridley*, 12 Jur. 44; and *Bishop of London* v. *McNeil*, 9 Ex. 490, are both authorities for dealing with such pleas, as the Referee dealt with the pleas here and striking them out, I therefore dismiss the appeal with costs.

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Appeal dismissed with costs.

MANITOBA & NORTHWEST LOAN CO. v. BOLTON.

Before BAIN, J.

Garnishment—Chattel mortgage—Fraudulent discharge given to defeat creditors—Discharge not under seal—Debt not paid.

I. B. was indebted to J. B. in the sum of $500. More than six years after the cause of action arose, and when the debt was barred by the Statute of Limitations, I. B. executed a chattel mortgage under seal in which he covenanted to pay J. B. the $500 with interest. Afterwards I. B. learned that this debt could be garnished by J. B.'s creditors, and with a view of preventing this, he induced J. B. to execute a discharge of the mortgage, but no money was paid. The discharge was in the statutory form but not under seal.

The plaintiffs obtained a judgment against J. B. and garnished I. B.

On the return of a summons to pay over, an interpleader issue was directed to determine the validity of the discharge. On the trial of the issue,

Held, That the discharge was fraudulent and void as against creditors.

ARGUED: 18th July, 1893.

DECIDED: 26th July, 1893.

Interpleader issue.

The plaintiffs obtained judgment against James Bolton, the defendant, and garnished his brother, Isaac Bolton. On the return of a summons to pay over, an interpleader issue was directed to try whether the garnishee was in-

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J. A. M. Aikins, Q. C., for the plaintiffs.

J. A. Machray, for the defendant.

BAIN, J.—The question at issue here is, whether on the 7th of May, 1891, there were any debts, obligations or liabilities due, owing, payable or accruing to James Bolton from one Isaac Bolton.

It appears from the evidence that some eight or nine years ago Isaac Bolton, the defendant in the issue, borrowed $500 from his brother James. No acknowledgement or security for the indebtedness was given at the time, but on the 24th of March, 1892, the defendant executed a chattel mortgage to James to secure the payment of the $500, with interest at 7 per cent. The mortgage is under seal, and the mortgagor covenants to pay the $500 in two annual instalments, with the interest thereon. The reason this mortgage was given was, it appears, that Isaac was being sued for some indebtedness and he desired to secure his brother for the money he owed him.

After he executed the mortgage the defendant learned, he says, that his indebtedness under it to his brother could be garnished by his brother's creditors; and with a view to prevent this he induced his brother to execute a discharge of the mortgage. This discharge is in the statutory form but it is not under seal. The indebtedness from the defendant to James has never been paid or satisfied.

The finding on the issue, must, I think, be in favor of the plaintiffs.

It may be that, at the time the chattel mortgage was executed, James Bolton's remedy for the $500 he had lent the defendant, would have been barred by the Statute of Limitations; but if the defendant chose to acknowledge his indebtedness and give a chattel mortgage to secure its payment, there was under the mortgage a legal debt

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due or accruing due from the defendant to his brother that might be attached under The Garnishment Act. This indebtedness has not been paid or satisfied, and the statutory discharge that is set up is one that was executed by James, and was obtained by the defendant, with the express intention of preventing James Bolton's creditors from attaching the indebtedness.

I need not consider whether, if the transaction were *bona fide*, the effect of the statutory discharge would be to release the debt, when in fact it has not been paid or satisfied; for it is clear that this discharge is fraudulent and void as against creditors, and cannot be set up. The debt due from the defendant to James Bolton was available to the creditors of the latter for the payment of his debts; and a voluntary release of the debt is an injury to his creditors, and it is void under the statute.

I enter a verdict for the plaintiffs and find that on the 7th of May, 1892, there was an indebtedness of $500 with interest at 7 per cent. from 24th March, 1892, due or accruing due from Isaac Bolton to James Bolton, and that of this indebtedness $250 with interest at 7 per cent. from said date became due and payable on the first day of January, 1893, and $250 with interest as aforesaid on July 1st, 1893.

Verdict for plaintiffs.

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BÉNARD v. MCKAY.

Before BAIN, J.

Liquor License Act—Hotel-keeper—Promissory note given for liquor supplied on premises—Illegality of—Actions on—Ultra Vires.

The Liquor License Act, R. S. M. c. 90, s. 134, provides that, "If any hotel-keeper receive in payment or as a pledge for any liquor supplied in or from his licensed premises, anything except current money or the debtor's own cheque on a bank or banker, he shall for each such offence be liable to a penalty of twenty dollars and in default of payment, to one month's imprisonment."

Declaration on two promissory notes made by defendant payable to plaintiff.

Pleas to each count.

1. That plaintiff was a licensed hotel-keeper, and that part of the consideration for which the note was given was for liquor supplied by plaintiff to defendant in his hotel.

2. That the note was received by the plaintiff as a pledge for liquor supplied by him to the defendant in his hotel.

On demurrer to these pleas,

Held, 1. That these pleas were good on the ground that by the imposition of a penalty for taking anything but money in payment, or as a pledge, for liquors supplied in licensed premises, the Legislature had clearly intended to make it unlawful to take anything but money.

2. That the above provision was *intra vires* of the Legislature.

Hodge v. *The Queen*, 9 App. Cas. 117, and *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, applied.

ARGUED: 19th May, 1893.
DECIDED: 1st June, 1893.

Statement. THE plaintiffs sued to recover the amount of two promissory notes made by defendant, payable to the plaintiff. To each of the counts in the declaration the defendant pleaded that the plaintiff was a licensed hotel-keeper under the provisions of the Liquor License Act, carrying on the hotel business in Winnipeg, and that part of the consideration for which the note was given to the plaintiff, was for and on account of liquor supplied by plaintiff to defendant in his hotel, and that the note was

received by the plaintiff in payment for the liquor so supplied to the defendant. 1893. Statement.

A further plea to each of the counts alleged that the note was received by the plaintiff as a pledge for the liquor supplied by him to the defendant as aforesaid.

The plaintiff demurred to these pleas on the ground that they confessed, without avoiding, the plaintiff's claim.

G. A. Elliott, for plaintiff.

J. R. Haney, for defendant.

The following cases were referred to. *Proctor* v. *Nicholson*, 7 C. & P. 66; *Manitoba Electric & Gas Light Co.* v. *Gerrie*, 4 M. R. 215; *Cope* v. *Rowlands*, 2 M. & W. 149; *Cundell* v. *Dawson*, 4 C. B. 376; *Scott* v. *Gilmore*, 3 Taunt. 226.

BAIN, J.—The defence raised by the pleas in question is founded on section 134 of the Liquor License Act. This section declares that, "if any hotel-keeper receive in payment or as a pledge for any liquor supplied in or from his licensed premises anything except current money, or the debtor's own cheque on a bank or banker, he shall for each such offence be liable to a penalty of $20, and in default of payment, to one month's imprisonment."

By the imposition of a penalty for taking anything but money in payment, or as a pledge, for the price of liquor supplied in licensed premises, the Legislature has clearly intended to make it unlawful and illegal to take anything but money. It was therefore illegal for the plaintiff to take the note sued on from the defendant, and if it was illegal for him to take it, he certainly cannot bring an action against the defendant to recover its amount. *Re Cork &c., Ry. Co.*, L.R. 4 Chy. 748; *Manitoba Electric & Gas Light Co.* v. *Gerrie*, 4 M.R. 216.

The defendant's contention that the provision of the Liquor License Act is *ultra vires* of the Legislature, because it deals with and interferes with a matter relating to trade and commerce, seems now to be hardly open to argument.

Prior to Confederation, among the powers and functions

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ordinarily exercised by municipalities in the several Provinces, was the power to regulate and restrict the sale of liquor. These restrictions were in the nature of police or municipal regulations for the repression of drunkenness and the good government of places which were licensed for the sale of liquor. And in the case of *Hodge* v. *The Queen*, 9 App. Cas. 117, the Judicial Committee held that the Provincial Legislatures, by virtue of the exclusive powers conferred upon them by B. N. A. Act to make laws in relation to Municipal Institutions and all matters of a merely local or private nature, have still power to make such restrictions and regulations, and that restrictions and regulations thus made do not interfere with the "regulation of trade and commerce." Then the case of *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, shews that the words "regulation of trade and commerce," which the B. N. A. Act reserves for the exclusive jurisdiction of the Parliament of Canada, are not to be taken in an unlimited sense, and do not confer upon Parliament the power to regulate by legislation the contracts of a particular business or trade in a single Province.

In my opinion the provisions of this section 134 are within the jurisdiction of the Legislature as a regulation for the good government of licensed premises, and as tending to repress drunkenness; and it is a regulation and restriction without which any Act having in view both or either of these objects would be in a marked degree defective.

It may be, too, that the Legislature has authority by virtue of its jurisdiction in matters relating to "property and civil rights," to enact as it in effect does, that a hotel keeper who takes a note in payment of liquor cannot recover on the note, just as it has to say that an action cannot be brought on a note that is barred by the statute of Limitations.

The action is brought by the hotel-keeper, who took the note, and, as against him, I think the pleas demurred to disclose a valid defence. There will, therefore, be judgment for the defendant on the demurrer.

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LONG V. WINNIPEG JEWELRY CO.

Before TAYLOR, C.J., KILLAM AND BAIN, JJ.

Examination—Affidavit having served purpose for which filed—No motion pending—Order to examine on—Ex parte order—Deponent refusing to attend on examination.

Plaintiff brought an action by a writ issued under The Summary Procedure on Bills of Exchange Act, and defendant Company obtained, on an affidavit of D., its president, an *ex parte* order giving it leave to appear. The plaintiff then obtained *ex parte*, from the Referee in Chambers, an order directing D. to appear before a special examiner and submit to be examined *viva voce* on his affidavit. In support of this application there was filed an affidavit of plaintiff's attorney that it was plaintiff's intention to move to rescind the order giving leave to appear. This order, with examiner's appointment, was duly served and conduct money paid, but D. did not appear. A motion was then made before the Referee to strike out the defence or set aside the order allowing appearance. The Referee made an order directing D. to appear for examination at his own expense and in default that the defence should be struck out.

From this order defendant appealed to a Judge in Chambers, who reversed the order and dismissed the application. Plaintiff then appealed to the Full Court.

Held, That the order for examination should not have been made on the grounds that the affidavit had served its purpose and there was no motion pending.

Held, also, that the Court was not obliged to enforce the order, although it had been made and had not been rescinded.

ARGUED: 5th December, 1892.
DECIDED: 18th February, 1893.

Statement.

THIS was an action commenced by a writ issued under The Summary Procedure on Bills of Exchange Act, and the defendant Company obtained *ex parte* an order giving it leave to appear. This order was made on affidavit of W. F. Doll, the Company's president. The plaintiff then obtained from the Referee in Chambers an order directing Doll to appear before a special examiner and submit to be examined *viva voce* on his affidavit. In support of the application for this latter order there was filed an affidavit of the plaintiff's attorney, stating that it was the

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intention of the plaintiff to move to rescind the order giving leave to appear. The order for examination, with an appointment of the examiner, was duly served, and $1.25 conduct money paid to Doll therewith, but Doll did not appear. A motion was then made before the Referee to strike out the defence on the ground of Doll's disobedience of the order for his examination, or to set aside the order allowing the appearance. Upon this application the Referee made an order directing Doll to appear for examination at his own expense, and the defendant to pay the costs of the application, and ordering that, in default thereof, the defence should be struck out. From this order the defendant appealed to a Judge in Chambers, and Mr. Justice Dubuc, who heard the appeal, reversed the order of the Referee and dismissed the application on the ground that the affidavit of Doll had served its purpose and there was no motion pending for which the cross-examination could be important. The plaintiff then applied to the Full Court to reverse this order and restore the order of the Referee.

W. H. Culver, Q.C. for plaintiff. The plaintiff should succeed on two grounds. 1. The order to examine was authorized by practice. 2. The order to examine so long as it stands must be obeyed. Referee made order for President to attend and be examined on payment of costs. Order properly made. Ad. Jus. Act, s. 40. Equity practice to be followed after order obtained, but the statute empowers party to examine. *Felan* v. *McGill*, 3 Ch. Ch. 56; *Cath. Publishing Co.* v. *Wyman*, 11 W. R. 399; *Hooper* v. *Campbell*, 13 W. R. 1003. Not an *ex parte* matter. Party could have cross-examined before, had he chosen to do so. *North Western National Bank* v. *Jarvis*, 2 M. R. 53. Order for cross-examination on affidavit and order for leave to appear rescinded. *Lyons* v. *Carberry Milling Co.*, by Killam, J. not reported. If cross-examination would serve no purpose judge would not make order. Here there was an affidavit that a motion was to be made for which the examination

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was required to be taken. Referee had discretion to make order for cross-examination. Having made order it was not a nullity, but only an irregularity. *Herr* v. *Douglas*, 4 P. R. 105; *Holmes* v. *Russell*, 9 Dowl. 487. Here must have waived irregularity. *Thompson* v. *Sequin*, 8 M. R. 79. No motion has been made to rescind the order to examine. Until it is set aside it must be obeyed. *Waldie* v. *Burlington*, 7 O. R. 194; 13 O. R. 104. The defendant should have moved to discharge the order to examine. *Holmsted's orders*, 182; *West* v. *Downman*, 26 W. R. 6. *In Re Padstow*, 20 Ch. D. 142; *Clindinning* v. *Varcoe*, 7 P. R. 61. When order made by Master in excess of jurisdiction, what is to be done? *White* v. *Beemer*, 10 P. R. 531; *Williams* v. *Corby*, 8 P. R. 83.

J. S. Hough, for defendant. The case is the same as in equity practice, where subpoena and appointment issued for examination. If irregular, may move against it or may decline to attend and take objections when motion made to compel attendance. *McMurray* v. *G. T. R.*, 3 Ch. Ch. 130; *Stovel* v. *Coles*, 3 Ch. Ch. 362; *Bolkow* v. *Foster*, 7 P. R. 388. Order here has no greater force than subpoena and appointment in equity. If the affidavit has answered its purpose, then there can be no cross-examination. When an order is made on an affidavit, its purpose has been served. A motion to rescind, a new and separate motion. *Imperial Bank* v. *Taylor*, 1 M. R. 244. An affidavit of defendant's intention to make an application is not sufficient. *Catholic Publishing Co.* v. *Wyman*, 11 W. R. 399; *Hooper* v. *Campbell*, 13 W. R. 1003; *Traders Bank* v. *Keane*, 13 P. R. 60; *Felan* v. *McGill*, 3 Ch. Ch. 56. The equity practice is to govern proceedings under section 40, Administration of Justice Act. In *West* v. *Downman*, 29 W. R. 6, the judgment does not go so far as head note. As to striking out defence, because an officer of a corporation does not attend to be examined, see *Badgerow* v. *G. T. R.*, 13 P. R. 132; *Central Press Association* v. *American Press Association*, 13 P. R. 353, section 43 Administration of Justice Act.: Ont. Rule 499.

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KILLAM, J.

The judgment of the Court was delivered by

KILLAM, J.—The order for the examination was made under The Administration of Justice Act, R. S. M. c. 1, s. 40, by which "any person . . . . making an affidavit in any action or proceeding, or otherwise howsoever, shall be liable, and, upon a Judge's order for that purpose . . . . shall be compelled to submit to a *viva voce* cross-examination upon his . . . . . affidavit, ... and the practice under this section shall, as near as may be, conform to the settled practice in this respect in proceedings in equity."

In England such a cross-examination in equity was authorized by statute, 15 & 16 Vic. c. 86, s. 40, under which any party having made an affidavit "to be used or which shall be used on any claim, motion," &c., was rendered liable to attend for cross-examination thereon. An order in similar language appears in the General Orders in Chancery of Ontario, No. 268, and it is repeated among the General Orders in Equity of this Court, as No. 264.

Both in England and in Ontario it is the settled practice to allow cross-examination on an affidavit only during the pendency of a claim, motion or other proceeding on which the affidavit is to be used. *Catholic Publishing Co.* v. *Wyman*, 11 W. R. 399; *Hooper* v. *Campbell*, 13 W. R. 1003; *Clindinning* v. *Varcoe*, 7 P. R. 61; *Felan* v. *McGill*, 3 Ch. Ch. 56; *McMurray* v. *G. T. R. Co.*, 3 Ch. Ch. 130; *Stovel* v. *Coles*, 3 Ch. Ch. 362.

If this practice depended upon the use of the words "to be used or which shall be used", found in the English Act and the Ontario Order, I do not know that I should consider it applicable under our Act as a part of the "settled practice in proceedings in equity", but it appears to me that it is based upon a proper principle which is equally applicable under our own Act. The principle was applied by the late Chief Justice Wallbridge in *Imperial Bank* v. *Taylor*, 1 M. R. 244, and I have several times refused orders to examine on similar grounds. I do not

now remember whether, in *Lyons* v. *The Carberry Milling Co.*, to which reference has been made, a summons had been taken out to set aside the attachment before I made the order for cross-examination upon affidavits on which the order for the writ was made. It may be that in that instance, and, perhaps, in others, such orders have been granted for the purposes of motions merely proposed and not yet pending, but I do not think that in this respect a practice has become so firmly established that it can have weight with the Court. Now that the question has been distinctly raised and discussed, I am of opinion that the order for the examination ought not to have been made. The statement in the attorney's affidavit does not bind the plaintiff to make a motion. Whatever had been his intention he was at liberty to change it, and the result of the examination might induce him to do so.

If no motion were made how could the defendant recover any costs incurred in the examination? Perhaps he might do so as costs in the cause, if successful in the action, but this would be an unsatisfactory and often an unjust condition.

It may well be that, under the language of our statute, it may be more easy to find authority for the examination for the purposes of a motion to rescind an order based on a certain affidavit, than under the English Act; but I think that it would be quite improper to allow the examination until such motion should become a pending one.

Then, was the Referee bound to enforce the order when it had once been made and had not been rescinded? I think not. In *Bolkow* v. *Foster*, 7 P. R. 388, Blake, V.C., said "Under the practice which has for many years been in force in this Court, a party subpœnaed has had the right, on an application being made to note the bill *pro confesso* for non-attendance in pursuance of a *subpœna*, to show that the *subpœna* should not have issued, or that, under the circumstances, he should not have been called upon to attend and be examined. It has not been held necessary that he should move to set aside the *subpœna* or appoint-

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Judgment. I have already referred.

KILLAM, J. The Administration of Justice Act, R. S. M. c. 1, s. 43, provides that, if the party to be examined fails without sufficient excuse to comply with the order, an application may be made to dismiss the action or to strike out the defence, as the case may be, and that the Judge may make an order accordingly.

It is common practice, however, to give another opportunity to comply, just as is done in similar cases in equity. This shows that the section is not considered to give an absolute right to have the action dismissed or the defence struck out for the default, but that it is regarded merely as giving a means of enforcing the order for examination. In this case that order was obtained *ex parte*, and I do not think that the Court was obliged to take active steps to enforce it, though in many cases I can well conceive that the party in default would not be given costs of opposing the application to enforce the order. So far, however, as this application is concerned, it should, I think, be dismissed with costs, as the plaintiff has taken the responsibility of pressing the matter after the objection had been raised and a Judge had decided against him.

Application dismissed with costs.

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GILLIES V. THE COMMERCIAL BANK OF MANITOBA.

Before DUBUC, J.

Pleading—Demurrer for want of parties—Suit to enforce agreement to pay creditors—Creditors not necessary parties.

The plaintiff filed a bill to enforce the provisions of a chattel mortgage, by which the defendants agreed with the plaintiff to pay her creditors. The creditors were not parties to this agreement. The prayer of the bill was in the alternative—that the money found due under the agreement should be paid to the plaintiff, to be applied by her in paying the creditors, or that it should be paid into Court for the benefit of the creditors.

On demurrer for want of parties on the ground that the creditors should have been made parties to the suit,

Held, That the creditors were not necessary parties on the grounds (1) That, in case the plaintiff should succeed if the money were paid into Court the creditors' interests would be amply safe guarded, and the defendants protected against any future demand by them. (2) That, as the creditors were not parties to the agreement on which the suit was brought their rights against the plaintiff could not be barred by this suit.

ARGUED: 31st May, 1893.
DECIDED: 14th June, 1893.

Statement.

Demurrer to the plaintiff's bill of complaint for want of parties.

The defendants claimed that the chattel mortgage, the provisions of which were sought to be enforced by the bill, was in the nature of an assignment for the benefit of creditors, that the defendants were trustees, and that the creditors, *cestuis que trustent* under the agreement, should be made parties to the suit.

J. H. Munson for defendants. The real parties to the suit are the creditors, and the Court should declare that the creditors should be parties. They ought not to shield themselves behind the plaintiff, but should be plaintiffs. The plaintiff made a mortgage to the Bank, in the nature of an assignment for benefit of creditors. The moneys to be realized were to be applied in three ways. (1.) To pay the trade indebtedness

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incurred in running the business after the 13th March, 1892. (2.) In payment of the debts which existed on 1st March, 1892. (3.) In paying the plaintiff for management of the business $125 a month. Assuming what is alleged to be true, the Bank is a trustee for the creditors, and what is claimed, or will be claimed by the other side, is that the trustee represents the *cestuis que trustent* and that they need not be otherwise represented in this suit, and that the estate is represented by the Bank. Assuming the Bank was a trustee for the creditors, then the question is, does the Bank as defendant sufficiently represent the beneficiaries of the estate. The rule is that all parties having an interest in the suit should be parties. *Quantz* v. *Smelzer*, 6 P. R. 228. It may be said this demurrer for want of parties cannot be maintained, because it is only to one part of the bill. But a demurrer for want of parties is a general demurrer to the bill. *Simpson* v. *Smyth*, 1 E. & A. 9. Plaintiff is a married woman; there is no next friend; she is insolvent, and the creditors stand behind her and put her forward to fight their case; they should be parties and the Bank should not be held to represent them; G. O. 39; *Attorney General* v. *Macdonald*, 6 M. R. 372; *Newton* v. *Egmont*, 4 Sim. 574; *Adair* v. *New River Co.*, 11 Ves. 429. The interests of the plaintiff and the creditors are adverse; *Liddell* v. *Deacon*, 20 Gr. 72; *Payne* v. *Parker*, L. R. 1 Chy. 327; *Young* v. *Ward*, 10 Hare, App. 58; *Real Estate Co.* v. *Molesworth*, 3 M. R. 116. The creditors are necessary parties. *Horsman* v. *Burke*, 4 M. R. 245; *Leacock* v. *Chambers*, 3 M. R. 645.

H. M. Howell, Q.C., for plaintiff. The demurrer is too broad. The case of *Cullin* v. *Rinn*, 5 M. R. 8, shows that the covenantee may sue although he has not paid the debt and has sustained no financial loss. The same principle as to parties prevails in equity as at law. *Real Estate* v. *Molesworth*, 3 M. R. 116 at p. 120. If any relief can be granted the demurrer must fail. *In Re Rotherham Alum and Chemical Co.*, 25 Ch. D. 103; *Williams* v.

Balfour, 18 S. C. R. 472; *Dicey on Parties*, 83; *Charlebois* v. *G. N. W. C. Ry. Co.*, 9 M. R. 1; *Watson* v. *Hawkins*, 24 W. R. 884; *Barnes* v. *Taylor*, 4 W. R. 577. 1893. Argument.

DUBUC, J.—The plaintiff contends that the chattel mortgage, with its particular provisions, is a mere agreement by which the defendants agreed with the plaintiff to pay her creditors, and, there being no privity of contract between the defendants and the said creditors, the latter cannot sue the defendants on the said agreement, and, therefore, that they are not necessary parties.

It is a well known doctrine that all the parties interested in the subject matter of a suit, should be brought before the Court, unless their interest may be sufficiently protected, under the bill, as framed, without their being made parties.

In this case the plaintiff being the person to whom the promise was made, and being the party mostly interested in the subject matter of the suit, is certainly a proper party to sue. She is interested in seeing that the property she assigned to the defendants be properly applied as agreed in the chattel mortgage, and that the defendants should give an account of their dealings with said property.

Each of the creditors is also interested to the extent of the amount of his claim against the plaintiff, and, although there is no privity of contract between the said creditors and the defendants, I am not prepared to hold that they would not, under any circumstance, be entitled to file a bill in order to protect their interests, if the plaintiff did not and would not bring this suit. But is their interest sufficiently protected in this suit? The prayer of the bill is in the alternative; it asks that the defendants should pay to the plaintiff the money found due by them under the agreement, to be applied by her in paying the said creditors, or that they should be ordered to pay said money into Court for the benefit of said creditors. By the latter course being adopted, viz., by the money being paid into Court, in case the plaintiff succeeds, the creditors' interests would be amply safeguarded; and the defendants them-

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selves would also be protected against any future demand or interference by the said creditors. So, on that ground, I think the creditors are not necessary parties to this suit.

It may also be urged that, if the said creditors were to be brought before the Court in this suit, the plaintiff would have no other alternative but to make them defendants. Then, their interest, not being conflicting with, but being rather analogous to and in the same line as the interest of the plaintiff, they would have no ground to defend the said suit; and, as they were not parties to the agreement on which the suit is brought, their rights against the plaintiff for payment by her of their respective claims conld not be concluded or in any way barred by this suit. On that ground, also, I think it may be held that the said creditors are not necessary parties.

In my opinion, the demurrer should be overruled with costs.

Demurrer overruled.

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BRITISH EMPIRE &c. ASSURANCE CO. v. LUXTON.

Before KILLAM, J.

Principal and Surety—Discharge of Surety—Concealment of dishonesty of Servant—Default by servant before bond of suretyship executed.

Declaration in two counts on a bond of the defendant, conditioned for the fulfilment by an agent of the plaintiff Company of its regulations, and for payment to the Company, monthly, of such sums as the agent should receive for the use of the Company, and, at the expiration of his agency, of all moneys belonging to the Company. One count alleged the receipt by the agent of divers sums and non-payment of the same monthly or at all. The other count alleged a termination of the agency, receipt by the agent during its continuance of large sums of money and non-payment thereof.

Pleas on equitable grounds.

7. That, before the defaults alleged and before the execution of the bond, the agent had been the plaintiff's agent in a like capacity and, while such agent had, as such, committed divers other defaults of the same kind, and that the plaintiff, well knowing these defaults, neglected to inform the defendant thereof, but retained the agent as such, and that the defaults sued for occurred during such continuance.

9. That, while the agent was so acting and before the defaults complained of, the agent had committed during his service divers other defaults of the same kind, and for which the Company might lawfully have dismissed him, yet the plaintiff, well knowing thereof, omitted to inform the defendant thereof and continued the agent in the service, and that the defaults complained of were committed during such continuance.

On demurrer to these pleas,

Held, 1. That the seventh plea was bad on the ground that the party in whose favor a contract of suretyship is made is not necessarily bound to communicate to the surety every fact material to the risk, as in the case of an applicant for insurance, but that the non-communication must occur under such circumstances as to be fraudulent towards the surety.

The North British Insurance Co. v. *Lloyd*, 10 Ex. 523, followed.

2. That the ninth plea was good on the authority of *Sanderson* v. *Aston*, L. R. 8 Ex. 73.

ARGUED: 16th December, 1892.
DECIDED: 7th February, 1893.

Demurrer to pleas.

Statement.

The plaintiff sued in two counts on a bond of the defendant, conditioned for the fulfillment by an agent of

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the plaintiff Company of its regulations, and for payment to the Company, monthly, of such sums as the agent should receive for the use of the Company, and, at the expiration of his agency, of all moneys belonging to the Company.

One count alleged the receipt by the agent of divers sums for the use of the Company and non-payment of the same monthly or at all, although requested so to do. The other count alleged a termination of the agency, receipt by the agent during its continuance, of large sums of money and non-payment thereof.

The pleas demurred to were the seventh and the ninth, both pleaded on equitable grounds to the two counts. The seventh plea set up that, before the defaults alleged and before the execution of the bond, the agent had been the plaintiff's agent in a like capacity, and, while such agent, had, as such, committed divers other defaults of the same kind, and that the plaintiff, though well knowing these defaults, omitted and neglected to inform the defendant thereof, but notwithstanding these defaults, for which the plaintiff Company was entitled to dismiss the agent, it retained him as such, and that the defaults sued for occurred during such continuance.

The ninth plea alleged that, while the agent was so acting and before the defaults complained of, the agent had committed during his service divers other defaults of the same kind, and for which the Company might lawfully have dismissed him, yet the plaintiff, well knowing thereof, omitted to inform the defendant thereof and continued the agent in the service, and that the defaults complained of were committed during such continuance.

H. M. Howell, Q.C., for plaintiffs. There must be fraud to avoid suretyship, non-disclosure must amount to fraud, *East Zorra* v. *Douglas*, 17 Gr. 462; *Peers* v. *Oxford*, 17 Gr. 472. Not a fraud to fail to disclose slight defaults committed from time to time, *Meaford* v. *Lang*, 20 O. R. 42, 541. The following cases were also cited:—*Phillips* v. *Foxall*, L. R. 7 Q. B. 666; *Sanderson*

v. *Aston*, L. R. 8 Ex. 73; *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394; *Black* v. *Ottoman Bank*, 6 L. T. N. S. 763; *Madden* v. *McMullen*, 4 L. T. N. S. 180; *Railton* v. *Mathews*, 10 Cl. & F. 935; *Hamilton* v. *Watson*, 12 Cl. & F. 109. 1893. Argument.

N. F. Hagel, Q. C., for defendant. The plaintiff is bound to disclose his knowledge of the insured on obtaining contract. The pleas are under the authority of *Sanderson* v. *Aston*, L. R. 8 Ex. 73, each being a little stronger, as there it was left to be implied that plaintiff might have dismissed for cause existing, while we expressly allege here employment after knowledge of default. *Sanderson* v. *Aston* is approved in the Ontario cases. *Meaford* v. *Lang*, 20 O. R. 42; *Corp. of Adjala* v. *McElroy*, 9 O. R. 580; *Exchange Bank of Canada* v. *Springer*, 7 O. R. 309, show that it is not important whether there was embezzlement. It is a question of honesty. The count alleges more than mere temporary failure to account, general defaulting after requests to account. As to the cases in 17 Gr. there is a different rule as to municipal officers and that of employment of master and servant. This distinction is drawn in *Meaford* v. *Lang*. In that case and in the 17 Grant cases the sureties knew as much of the employee as the obligees. I refer further to *Brandt on Suretyship*, ss. 348–366. If the pleas are not sustained I ask leave to amend.

KILLAM, J.—The ninth plea is clearly good, under the authority of *Sanderson* v. *Aston*, L.R. 8 Ex. 73. I think that the principle upon which *Phillips* v. *Foxall*, L.R. 7 Q.B. 671, was decided applies to support the plea. The decision in the latter case appears to show that, in case of security being given for the good conduct of a servant, the surety has a right to say that upon a default secured against, and for which there is a right to dismiss, the servant shall not be retained without the consent of the surety or his being given an opportunity to withdraw from the obligation. This view is supported also, by *Byrne* v. *Muzio*, 8 L.R. Ir. 410, and *Township of Adjala* v. *McElroy*, 9 O.R. 580.

A different principle, however, applies to the seventh

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plea. In *The North British &c. Ins. Co.* v. *Lloyd*, 10 Ex. 523, it was held that the party in whose favor a contract of guarantee or suretyship is made is not necessarily bound to communicate to the surety every fact material to the risk, as in case of an applicant for insurance, but that the non-communication must occur under such circumstances as to be fraudulent towards the surety. The earlier cases were there sufficiently distinguished, and do not now call for remarks from me.

The same view is supported by *Pledge* v. *Buss*, Johns. 663; *Lee* v. *Jones*, 14 C.B.N.S. 386, 17 C.B. N.S. 482; *Township of East Zorra* v. *Douglas*, 17 Gr. 462; *Peers* v. *The County of Oxford*, Id. 472.

Usually, and probably always, this question of fraud would be one of fact for a jury. But even if there could be a case in which the Court could determine as a matter of law that the facts concealed were so material, and the circumstances so strongly called for their communication that the failure to communicate of itself constituted a fraud, such does not appear in the present instance.

There may, as alleged, have been similar previous defaults, even after repeated requests for payment, and yet these may have been of such a trivial character or so excused that a jury, or a judge sitting as a jury, would not consider the failure to communicate them material or fraudulent. Much, also, might depend on the circumstances under which the defendent entered into the agreement of suretyship.

There will be judgment for the plaintiff on the demurrer to the seventh plea, and for the defendant on the demurrer to the ninth plea.

As to the application to amend, the rule may give the defendant leave to add a plea in the terms set out in *Lee* v. *Jones*, provided that to-day or to-morrow the defendant shall file his affidavit that he is advised and believes that the plea is true in fact.

Such a plea, it appears to me, ought sufficiently to raise any question intended to be raised under the seventh plea;

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but if, on further consideration, the defendant's counsel shall not be satisfied that this is the case, there should be little difficulty in getting leave to add a further plea on application in Chambers within a reasonable time, and on sufficient proof of the circumstances and of the truth of the facts proposed to be set up. Any increased costs occasioned to the plaintiff by the addition of the plea will be costs in the cause to the plaintiff in any event.

SEXSMITH V. MONTGOMERY.

Before DUBUC, J.

Prohibition—Municipal election—Resignation of Reeve—Subsequent withdrawal of resignation—Petition to declare seat vacant—Time for presenting petition—Powers of clerk.

S. was elected Reeve of a rural municipality in December, 1892. On 18th March, 1893, he resigned his seat in the council in writing pursuant to the statute. Afterwards, on the 6th day of May, 1893, S. attended a meeting of the council, he proceeded to take part in the proceedings of the council and voted on a motion to amend the minutes of the previous meeting declaring that the council accepted the withdrawal of his resignation, and declared the motion carried by his casting vote, the other members of the council being evenly divided.

A petition was then filed to have the seat declared vacant. On the hearing before the County Court Judge, the respondent took two preliminary objections—1. That the provisions of section 178 of the Municipal Act do not apply to the case of a member of the council who has resigned his seat. 2. That the petition was not presented within the time prescribed by the statute. These objections were over-ruled S. then applied in the Queen's Bench for a prohibition.

Held, 1. That, under the circumstances alleged in the petition, the remedy by petition provided for in section 178 was the proper remedy.

2. That the 21 days mentioned in section 197, within which a petition must be presented, began to run at the time the act complained of was done, and that the petition was presented in time.

3. That, as there was a *bona fide* dispute on a doubtful legal question concerning the vacancy of the seat, the Clerk was right in not assuming to determine it by issuing a writ for a new election.

ARGUED: 4th July, 1893.

DECIDED: 13th July, 1893.

Statement.

This was an application for a writ of prohibition. George

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Statement.

Sexsmith was elected Reeve of the Rural Municipality of Dufferin on the 20th day of December, 1892. He accepted the office and continued to hold it up to the 18th day of March, 1893. On that day at a regular meeting of the Council, Sexsmith left the chair and delivered to the Clerk of the Municipality in writing his resignation of the office of Reeve. Afterwards on the 6th day of May, 1893, he attended a meeting of the Council and proceeded to take part in the meeting as Reeve, and voted on a motion to amend the minutes of the previous meeting declaring that the Council accepted the withdrawal of his resignation, and declared the motion carried by his casting vote, the other members of the Council being evenly divided.

A petition was then filed to have the seat declared vacant. On the hearing before the County Court Judge, the respondent took two preliminary objections.

1. That the provisions of section 178 of the Municipal Act did not apply to the case of a member of the Council who had resigned his seat.

2. That the petition was not presented within the time prescribed by the statute. These objections having been overruled, Sexsmith applied in the Queen's Bench for a writ of prohibition.

J. S. Ewart, Q.C., for the applicant.

J. H. Munson for the respondent.

The following cases were referred to:—*Reg.* v. *White*, 18 U. C. R. 226; *Rex* v. *Payne*, 2 Chitty, 367; *Reg.* v. *Blizard*, L. R. 2 Q. B. 55; *Reg.* v. *Winchester*, 2 Nev. & P. 274; *Rex* v. *Oxford*, 6 A. & E. 349; *Reg.* v. *Ricketts*, 3 Nev. & P. 151; *Reg.* v. *Cornwall*, 25 U. C. R. 293; *Grant on Corporations*, 234; *Reg.* v. *Francis*, 18 Q. B. 526; *Hardwick* v. *Brown*, L. R. 8 C. P. 406.

DUBUC, J.—The two preliminary objections raised against the petition filed in this matter are: (1) That the provisions of section 178, of the Municipal Act, R. S. M., c. 100, do not apply to the case of a member of the Council

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who has resigned his seat; (2) That the petition was not presented within the time prescribed by the statute.

The learned Judge of the County Court, before whom the matter was first brought, overruled these objections.

The respondent now comes before me by way of application for a writ of prohibition.

Section 178 provides that when a vacancy occurs in a Municipal Council by forfeiture, or disqualification, or otherwise, proceedings may be taken by petition, under sections 192 to 252 of the Act.

Section 179 enacts that any mayor, reeve or other member of a council may in writing resign his seat in the Council.

Section 180 provides that when a vacancy occurs by resignation, death, judicial decision or otherwise, the head of the council, or clerk, shall forthwith issue his warrant for another election.

The provisions of section 180 are evidently intended for cases where the vacancy is clearly established, without any dispute about it. The Legislature could not have intended that, in a contested case, where a dispute may arise as to whether the seat is or is not really vacant, involving legal points of some difficulty, the clerk of the municipality should be entrusted with the power of determining the question. What is then to be done? The section does not say. I quite understand that where there is no dispute about the vacancy, the clerk should promptly proceed to cause a new election to be held; and if he refuse to do so, the interested parties may resort to *mandamus* to compel him to act. This would be the proper and ordinary proceeding for such cases. But, where a *bona fide* dispute arises about same doubtful or apparently doubtful point, I do not think that the clerk could or ought to assume to determine the question, and should cause proceedings to be taken for a new election, until the point has been settled, and the vacancy unquestionably established. And, if he could not and ought not to act, is it proper that he should be compelled by *mandamus* to do so?

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In this case, as alleged in the petition, the respondent, after being duly elected Reeve of the Municipality, gave to the Council his resignation in writing, and afterwards attended a meeting of the Council, and proceeded to take part in the meeting as such Reeve. No doubt, during the period intervening between the giving of his resignation and the occasion when he pretended again to act as Reeve, as there was then no apparent dispute about the vacancy, the Clerk could properly have taken proceedings for a new election. But on the respondent assuming to act as Reeve, and on his having withdrawn his resignation and the withdrawal being declared accepted by a vote of the Council, as alleged in the petition, this raised a dispute and a contestation about a doubtful legal point, which a clerk could not properly undertake to determine.

Then the vacancy ceased to be an indisputable one such as is contemplated by section 180, and became a questionable and contested vacancy, requiring to be established, being in the nature of those mentioned in section 178. In such a case, and under such circumstances, I think the remedy by petition provided for in section 178, should be held to be a proper remedy. Vacancies in the Council occurring by forfeiture, disqualification or otherwise, mentioned in section 178, should, in my opinion, be held to mean all vacancies not clearly or indisputably established, and to comprise vacancies by resignation where the truth or the validity of the resignation can reasonably be questioned, and requires to be established.

As to the point that the petition was not presented in time, I agree with the view taken of section 197 by the learned Judge of the County Court. That section provides for the time of presenting petitions questioning the validity of an election, and declares that it should be presented within 21 days after the day on which the election was held, or in case of corrupt practices, within 21 days after the date of the alleged act of corrupt practice. Without its being so stated, it means, in case of forfeiture or disqualification within 21 days from the act, thing or circum-

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stance set out in the petition as causing the forfeiture or disqualification. In a case like the present, it must mean within 21 days from any act or thing complained of and alleged in the petition, as showing that the member, whose sitting in the council is contested, is occupying or pretending to occupy in the council a seat which he has no right to occupy, and which should be declared vacant.

The petition herein alleges that the respondent took part in the meeting as Reeve, and then insisted and still insists on acting as such Reeve. The illegal sitting of the respondent, when, as alleged, the seat became vacant by his resignation, is the act complained of, and his insisting and persisting in sitting under such circumstances, is, if the seat is vacant, a continuous act of illegality. The petition, therefore, must be held to have been presented within the 21 days prescribed.

I think that the rule for prohibition should be dismissed with costs.

Rule dismissed with costs.

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CARSCADEN v. ZIMMERMAN.

Before BAIN, J.

Practice—Examination of judgment debtor—Fraudulent judgment—Interpleader—Evidence for use on motion or summons.

Under section 46 of the C. L. P. Act, 1854, a judgment creditor who claims that prior judgments are fraudulent and void and is called upon by interpleader summons issued at the instance of the Sheriff to maintain or abandon his claim, may examine the judgment debtor as to the nature of his dealings with the other judgment creditors, and as to the indebtedness on which such other judgments were obtained, and such examination may be used upon the return of theinterpleader summons.

ARGUED: 26th October, 1893.
DECIDED: 28th October, 1893.

Statement. In a contest for priority between the plaintiffs and certain other execution creditors of the defendant Zimmerman, the Sheriff obtained an interpleader summons. The plaintiffs claimed that certain of the other judgments against the defendant, prior to theirs were fraudulent and collusive as not founded on real debts; and while the interpleader summons was pending, they obtained an order for the examination of the defendant, the judgment debtor, under section 46 of the C.L.P. Act, 1854. Upon the examination, plaintiffs' counsel sought to interrogate the witness as to the nature of his dealings with the other execution creditors, whose judgments plaintiffs claimed were fraudulent, and as to the indebtedness on which these judgments were obtained. But on the advice of his counsel defendant refused to answer such questions, on the ground, as stated in the examination, that the examination was only upon an interlocutory motion, and the examination must be confined to that motion. The plaintiffs then moved to commit defendant for refusing to answer the questions put to him on the examination.

A Haggart, for plaintiffs.

J. D. Cameron, for defendant.

The following cases were referred to:—*Phillips Electrical*

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Works v. *Armstrong*, 8 M. R. 48; *Cockerell* v. *Van Diemen's Land Co.*, 16 C. B. 255; *Ashcroft* v. *Foulkes*, 18 C. B. 261; *Thomas* v. *Stutterheim*, 5 W. R. 6; *Morgan* v. *Alexander*, L. R. 10 C. P. 184; *Central News Co.*, (*Ltd.*) v. *Eastern Telegraph Co.*, 50 L. T. N. S. 235; *Day's C. L. P. Act*, s. 46; *Harrison's C. L. P. Act*, 252.

BAIN, J.—In advising his client not to answer the questions put to him, the defendant's counsel was, I think, taking altogether too narrow a view of the scope of the examination under the order. The order, under section 46, can be made only as incidental to some other substantive motion or application before the Court; and the intention of the section is to afford a means of obtaining evidence to be used upon the substantive motion or application. A good example of the advantage there is in the Court or a Judge having the power given by the section, as well as of the circumstances under which the power should be exercised, is seen in the cases of *Morgan* v. *Alexander*, L. R. 10 C. P. 184, and *Roberts* v. *Evans*, 34 L. J. Q. B. 7.

In the present case the pending summons was for an order under the Interpleader Act, to settle the priorities of the several execution creditors. The plaintiffs claim that their judgment and execution are entitled to priority; and it would be necessary for them on the return of the summons to have evidence to support their contention. They claim, it appears, that two of the other judgments were obtained by fraud and collusion between the parties who recovered them and the judgment debtor; and if their contention is well founded, it is not at all likely that the judgment debtor would be willing to make an affidavit for them to use on the return of the summons. The case, then, seems to be just such an one as the section was intended to meet; and I think the defendant was bound to answer all questions put to him that were relevant to the matter in question under the interpleader summons, and the answers to which would be evidence for the plaintiffs upon its return.

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Under the circumstances, the order that I make now is that the judgment debtor must attend again for examination at his own expense. The plaintiffs will have the costs of the application.

BOYLE v. WILSON.

Before BAIN, J.

Pleading in Equity—Amendment of Bill—Departure in Replication—Costs.

When a plaintiff is not entitled to relief on the case made by his bill, but may be so entitled on facts set up or partly set up in the answer, he should amend the bill instead of making admissions in the replication.

The plaintiffs sought relief at the hearing on a case or state of facts different from that set forth in their bill of complaint, but which was partly set up in the answer. In their replication they admitted these allegations in the answer, but did not amend their bill, and brought the case on for hearing. The evidence failed to establish the case made by the bill, and the plaintiffs did not ask leave to amend.

Held, without deciding whether the plaintiffs were entitled to any relief on the evidence submitted, that the bill should be dismissed with costs unless the plaintiffs wished leave to amend, which they might have on payment of costs.

ARGUED: 19th October, 1893.

DECIDED: 27th October, 1893.

Statement.

THIS was a suit for the foreclosure of a mortgage. At the hearing it was objected that the plaintiffs were not entitled to any relief on the bill, as filed, as they had not made out the case therein set up.

The facts appear sufficiently in the judgment.

A. Monkman and *O. H. Clark* for plaintiffs.

J. A. M. Aikins, Q. C., for defendants.

The following cases were referred to:—*Brussels* v. *Ron-*

ald, 4 O. R. 1; *Carlisle* v. *Orde*, 7 U. C. C. P. 456; *Leith* v. *Freeland*, 24 U. C. R. 132; *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Allard* v. *Kimberly*, 4 M. & W. 410; *Loosemore* v. *Radford*, 9 M. & W. 657.

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BAIN, J.—This is a suit for the foreclosure of a mortgage made by the defendant to the plaintiffs, and the bill is in the ordinary form, except that it sets out in full the proviso in the mortgage. Under the proviso the mortgage is to be void on payment of the amount secured, with the interest, either to the plaintiffs or to the Canada North West Land Co., (Limited), on account of a balance due the Company, under an agreement of sale of certain lands made between the Company and the mortgagor.

In the answer the defendant alleges that he had made an agreement with the plaintiffs to sell them the land mentioned in the proviso for a certain price; that there was due to the Land Company on the land the sum of $2122, payable either in cash or in shares of the Company, and that the mortgage was given to indemnify the plaintiffs against any loss they might be at by reason of this claim of the Land Company.

These allegations were admitted by the plaintiffs in their replication; and so it appears on the face of the pleadings, that the plaintiffs are seeking relief on a case or state of facts other than that set forth in their bill. This was pointed out by Mr. Aikins before the plaintiffs opened their case, but Mr. Monkman thought it was unnecessary to apply for leave to amend the bill and proceeded with the hearing.

The evidence of the plaintiff Vanderburg only confirms the admission on the pleadings that the mortgage was given to indemnify the plaintiffs against the claim of the Land Company. The plaintiffs were not entitled to give evidence of a case that they had not made in their bill, but apart from this difficulty, the evidence failed to show that they had suffered any loss or damage by reason of the claim in question. Then it was urged that I should take the mortgage to have been intended as a covenant to pay

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off the incumbrance on the land on a certain day, and that in this view, on the authority of such cases as *Lethbridge* v. *Mytton*, 2 B. & Ad. 772 and *Carlisle* v. *Orde*, 7 U. C. C. P. 457, the plaintiffs would be entitled to a decree for the full amount of the principal and interest. This, however, would also be another case than the one made in the bill, and the pleadings, as well as the evidence that was given, shew that the intention was that the mortgage was not to amount to a covenant to pay off the incumbrance, but only a covenant of indemnity against the incumbrance.

The plaintiffs are not entitled to any relief. If they wish to amend, they may have leave to do so on payment of costs. If they do not wish to amend, the bill will be dismissed with costs, but without prejudice to their right to file another bill to enforce the mortgage.

SHIELDS v. MCLAREN.

Before BAIN, J.

Security for costs—Insolvent plaintiff—Assignment of claim sued on—Practice.

A plaintiff or petitioner will not be ordered to give security for costs on the ground that he is insolvent and has assigned the claim, if the assignment was only given as security and he is still interested in the collection of the money.

ARGUED: 12th June, 1893.
DECIDED: 26th June, 1893.

Statement.

A solicitor had filed a petition for an order under Imp. Stat. 23 and 24 Vic. c. 127, s. 28, charging the fund in court for payment of his costs. The parties entitled to the fund, applied for an order requiring the solicitor to give security for the costs of the petition, on the ground that he had assigned his claim for the costs in question and

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that he was himself insolvent.

For the purposes of the application, the solicitor admitted that he was insolvent, and that the claim had been assigned under the circumstances stated in the judgment.

T. S. Kennedy, Q. C., for petitioner.

W. Redford Mulock, Q. C., for J. Shields.

W. E. Perdue, for Logan.

C. P. Wilson, for McLaren & Haggart.

The following cases were referred to:—*Martindale* v. *Conklin*, 1 M. R. 338; *Little* v. *Wright*, 16 Gr. 576; *Wainwright* v. *Bland*, 2 C. M. & R. 470; *Tennant* v. *Brown*, 5 B. & C. 208; *Hathaway* v. *Doig*, 9 P. R. 91; *Delaney* v. *McLellan*, 13 P. R. 63; *Wallbridge* v. *Trust & Loan Co.*, 13 P. R. 67; *Mason* v. *Jeffrey*, 2 Ch. Ch. 15; *Briscoe* v. *Briscoe*, [1892] 3 Ch. 543.

BAIN, J.—The petition itself alleges that the petitioner has assigned to one Acton Burrows all his right, title and interest in the costs in question, as security for the payment of certain moneys which he covenanted to pay to Burrows. It appears that this covenant is contained in a marriage settlement under which the solicitor agreed to pay Burrows, the trustee of the settlement, $20,000 within six months after the date of the instrument; and, in order to secure the payment of this sum, the solicitor assigned and set over to Burrows all his right, title and interest in and to certain moneys mentioned in a schedule attached to the settlement; and these costs, it is alleged, are among the moneys assigned.

It was admitted on the argument that there is still due and owing on the solicitor's covenant over $10,000. Burrows is, therefore, entitled to these costs, if they can be collected; and as the petitioner is himself insolvent, I was at first inclined to think he should be ordered to find security for costs. I find, however, that the English cases are opposed to this view. In *Andrews* v. *Morris*, 7 Dowl., 712, Coleridge, J. said,—"The principle is, that where an-

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other person is, in fact, proceeding with an action in the name of the party on the record, and that party is insolvent, the Court will compel him for whose benefit the action is proceeding, to come in and give security for costs." But where, as in the present case, the plaintiff has assigned the subject matter of the action by way of security only, he still has some interest in the claim, and it cannot be said that he is proceeding in the action wholly for the benefit of his assignee. In *Lush's Practice*, p. 932, note v., it is said that when an insolvent plaintiff has some interest in the action and has assigned only by way of security, he will not be required to give security for costs. This view seems to be borne out by such cases as *Day* v. *Smith*, 1 Dowl., 460; *Wray* v. *Brown*, 6 Bing. N. C., 271; and *Parker* v. *G. W. Ry. Co.*, 9 C. B. 766. In this last case it was shown that the plaintiff was insolvent and that he had assigned and made over all his interest in the cause of action against the Railway Co. to one Scott, and had given him a power of attorney to collect the claim against the Company. But the assignment contained a proviso for redemption upon the plaintiff paying Scott a certain sum of money; and the Court refused to order the plaintiff to give security for costs. Wilde, C. J., said—"All the cases I am aware of in which security for costs has been ordered, have been cases where the action is shown to have been really brought for the benefit of a third person in the name of the nominal plaintiff."

In the present case, the interest of the petitioner in the costs in question is much the same as was that of the plaintiff in the claim against the Railway Company in the case referred to; and following this and other cases of the kind, I must refuse to order him to give security.

Application refused.

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DOLL v. CONBOY.

Before DUBUC, J.

Interpleader—Married Womens' Act—Separate property of wife—Ownership of goods in business carried on by wife living with husband.

In August, 1890, the judgment debtor who carried on a jewelry business was sold out under execution, and he remained indebted and ceased carrying on business. In March, 1891, his wife opened a jewelry store in her own name. All goods purchased for the business were sold to her and the wholesale dealers would not have sold on credit to the husband. The invoices, drafts, receipts &c. were all made, and the correspondence conducted, in the name of the wife. She was the tenant of the premises, and paid the rent. The husband was employed in the store, attending to the correspondence and the financial part of the business under a power of attorney from his wife, and he did most of the repairing and assisted in the selling and buying.

The wife was in the shop most of the time, selling, buying and doing some of the repairing. She claimed to have been sixteen years in the jewelry business and to have had a good deal of experience, and she had abandoned keeping house to attend to the business.

Held, that under these circumstances the goods in the shop were the property of the wife as against execution creditors of the husband.

Dominion Savings Co. v. *Kilroy*, 15 A. R. 487, followed.

ARGUED: 21st March, 1893.

DECIDED: 26th April, 1893.

Statement.

This was an interpleader issue to determine the ownership of the goods seized by the Sheriff of the Western Judicial District, on the 16th November, 1892, under a writ of execution at the suit of W. F. Doll, the plaintiff, against James Conboy. The goods seized were claimed by Mary Jane Conboy, wife of James Conboy, and Ellis *et al*, and the executrix of Ed. Eaves, two of Mrs. Conboy's execution creditors.

In August, 1890, the stock in trade of James Conboy, who was owner of a jewelry store in Brandon, was seized by the Sheriff under an execution issued upon a judgment obtained by Doll against the said James Conboy. The goods were sold by the Sheriff and James Conboy ceased

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carrying on business. The amount realized was not sufficient to satisfy the judgment. The execution in question was an *alias* writ upon the same judgment.

In March, 1891, Mrs. Conboy opened a jewelry store in her own name in Brandon. She bought goods from different wholesale dealers from time to time, but principally from Ellis & Co., of Toronto, and Ed. Eaves, of Montreal, the two execution creditors who were claimants with her in the issue. Dixon, commercial traveller for Ellis & Co., stated that the goods were sold to Mrs. Conboy, upon her credit, and he swore that he would not have sold any goods to James Conboy. Robertson, commercial traveller for Ed. Eaves, said about the same thing. The invoices, drafts, receipts, &c., were all made in the name of M. J. Conboy, (Mrs. Conboy) and the correspondence conducted in that name. In the fall of 1891, the business was moved across the street, into a store rented by Mrs. Conboy from W. A. Macdonald. The lease was made in her name, the rent paid by her, and the receipts made to her.

As to the way in which the business was carried on, it appeared from the evidence that James Conboy was employed in the store, attending to the correspondence and the financial part of the business, under a power of attorney from Mrs. Conboy, doing most of the repairing and assisting in selling and buying. Mrs. Conboy was in the store most of the time, selling, buying and doing some of the repairing; she had been sixteen years in the jewelry business and had had a good deal of experience. The store, under James Conboy, had been carried on under the name of "J. Conboy and Co." Under Mrs. Conboy, it was advertised and known as "Conboy the Jeweller."

J. S. Ewart, Q.C., and *A. M. Peterson* for plaintiff referred to the following cases:—*Meakin* v. *Samson*, 28 U. C. C. P. 355; *Re Gearing*, 4 A. R. 173; *Parenteau* v. *Harris*, 3 M. R. 329; *Harris* v. *Rankin*, 4 M. R. 129; *Osborne* v. *Carey*, 5 M. R. 237; *Gowans* v. *Chevrier*, 7 M. R. 62; *Ady* v. *Harris*, 9 M. R. 127.

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W. A. Macdonald, for Mrs. Conboy and Ellis & Co., referred to *Dominion Savings Co.* v. *Kilroy*, 15 A. R. 487; *Meakin* v. *Samson*, 28 U. C. C. P. 355; *Murray* v. *McCallum*, 8 A. R. 277; and *Ingram* v. *Taylor*, 7 A. R. 216.

A. D. Cameron for Eaves.

DUBUC, J. (after stating the facts).—The question is whether the goods in the store, at the time of the seizure, should be held to have been the property of James Conboy, and liable for his debts, or whether they were the separate property of Mrs. Conboy.

Several cases in our own Court were referred to in favor of the plaintiff's contention.

In *Parenteau* v. *Harris*, 3 M. R. 329, the goods seized consisted of grain raised on a farm belonging to the wife. The seed grain had been purchased partly by each; the husband had paid for a portion of the threshing by his labor. He did all the work on the farm and the horses and implements used belonged to him. It was held that the crop belonged to the husband and could be seized under an execution against him. That case differs from the present case in this, that the goods seized had been produced by the work and labor of the husband.

In *Harris* v. *Rankin*, 4 M. R. 115, the question was whether the transfer or assignment of his homestead right to his wife, was valid as against a judgment registered against the land previous to the assignment. It has no application to this case.

The same may be said of *Osborne* v. *Carey*, 5 M. R. 237, where the husband sold his entire business for cash and notes, and transferred the notes and all his book debts to his wife and shortly afterwards left the country, making no provision for the plaintiff's claim.

The case of *Gowans* v. *Chevrier*, 7 M. R. 62, also cited, went on quite different grounds from those raised here.

In *Merchants Bank* v. *Carley*, 8 M. R. 258, the husband, who was managing the business carried on in the name of his wife and of his brother, was examined as a judgment

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debtor, and the point raised was whether he should be compelled in said examination, to disclose whether there was any profit in the business so as to determine what interest he might be entitled to in said profits; while in this case, it is not a question of profit, but a question of property which is in issue.

As stated by the learned Chief Justice, in *Merchants Bank* v. *Carley*, after citing some English and Ontario cases, amongst others *Murray* v. *McCallum*, 8 A. R. 277, and *The Dominion Savings Co., &c.*, v. *Kilroy*, 14 O. R. 468; 15 A. R. 487, the English and Ontario Acts under which these cases were decided, are very similar to our own Act.

In *Meakin* v. *Samson*, 28 U. C. C. P., Mr. Justice Galt, who gave a dissenting judgment, says at p. 361: "When the original owners of the goods come forward and testify that the delivery and sale was to the wife, and not to the husband, I fail to see how any Court is justified in saying contrary to the express words of the statute, that they shall be liable for his debts."

In *Dominion Savings Co.* v. *Kilroy*, *supra*, the husband who had failed in business and had become insolvent, about three years after the failure, made an arrangement with a wholesale firm to supply goods to his wife upon her own credit and responsibility. The wife had no capital of her own. The business was managed solely by the husband, under power of attorney from the wife who took no part whatever in the same, and was at first carried on in premises owned by the husband, subject to a mortgage, on which she neither paid rent nor agreed to do so; but subsequently in premises leased by the wife. The goods were sold, and further goods from time to time furnished by the firm on the like credit and responsibility. The plaintiffs had recovered a judgment against the husband for a debt contracted by him before his failure, upon which an execution was issued and the goods in question seized; it was held that the goods were the property of the wife and not of the husband. That judgment was unanimously affirmed in appeal.

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In the Court of Appeal Mr. Justice Burton says, at p. 488 of 15 A. R.: "I must confess that I entirely agree with and endorse the judgment given by Mr. Justice Galt in *Meakin* v. *Samson*, 28 U. C. C. P. 360," and further on, at p. 489:—"Where, as in the present case, the evidence clearly establishes that the merchant furnishing the goods would not have entrusted them to the husband, knowing that he was insolvent, but was willing to sell them to the wife, nothing but a process, which I am almost inclined to speak of as a legerdemain, could transfer that property to the husband and make it liable for his debts. Of course I quite agree that where the whole thing is a device to enable the husband to obtain property and incur liabilities on the faith of that property being his from being in his apparent possession, very different considerations arise. Here, neither the execution creditors who are the claimants, nor any other creditors have been deceived, and it is a question solely of property, the evidence being all one way. The question in *Murray* v. *McCallum*, 8 A. R. 275, was altogether different under a different section of the Act, founded upon the property having been purchased from earnings which were not the separate earnings of the wife."

Mr. Justice Patterson expresses himself as follows, at p. 490: "The plaintiffs here undertake to prove the goods to be the goods of the husband and liable to be taken in execution for his debt; not a debt contracted on the strength of any apparent ownership of these goods, but an old debt. The husband, if he has title, must have got it in one of two ways: either as purchaser of the goods from the wholesale dealers, or by marital right to the personal property of his wife. Now, if the goods ever were the wife's they remained hers. Section five prevented the title passing to the husband. Can it be held that the husband purchased them, and took 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. The vendors sold to the wife, and would not have given credit to the husband. Unless we

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hold that a married woman cannot under such circumstances purchase goods, but that as a matter of law, the purchaser is the husband, without reference to the intention of the parties, it seems to me impossible to ignore the title of the wife."

I have quoted the above at length because that case is very similar to this one, and the language of the two learned Judges is very applicable to the present case.

There is only one feature of this case which is less favorable to the wife as claimant. Mrs. Conboy says she started business with some money obtained from the sale of the household furniture, and by keeping boarders. It is argued that the money obtained from the sale of the furniture belonged to the husband. It may be that James Conboy was entitled to part of that money, and that the goods which were bought for cash at the time with that money might have been held liable for his debts; but it cannot be denied that those goods formed only a small portion of the stock in trade, and that does not alter the fact that the business was carried on by Mrs. Conboy, in a store leased by her; that the great bulk of the stock in trade was purchased by her; that the wholesale dealers sold those goods to her, upon her credit, and that they were unwilling to sell any goods to James Conboy. Then, there is another important feature which renders this case much stronger in favor of the claimant than in *Dominion Savings Co.* v. *Kilroy*, Mrs. Conboy took an active and very material part in the business. She personally did most of the selling and buying, and even some of the repairing; she had abandoned keeping house to attend to the business.

Section 2 of The Married Womens' Act, R. S. M. c. 95, which enacts that all property acquired by a married woman during coverture, shall be free from the debts and obligations of her husband, says that the section shall not extend to any property received by a married woman, from her husband during coverture.

Can the property in question in this case be said to come

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within the latter part of the section? I do not think so. If the seizure had taken place immediately or shortly after the store was opened in March, 1891, there might be some ground for holding that the small portion of the stock paid for with the money which might have been claimed by James Conboy as his own money, might be considered liable for his debts, if the goods paid for with such money could be identified. But the stock must have been renewed several times during the twenty months of business which elapsed before the seizure in November, 1892, as shown by the invoices received, and drafts given in connection with the business which were produced at the trial. There is nothing in the evidence to show or indicate that a single article of the goods originally purchased was in the store when the seizure was made. The question is not one of proceeds and profits, but solely a question of property. The vendors sold the goods to his wife, upon her credit, and not to the husband, as it was shown that they were not disposed to give him any credit. To repeat the language of Mr. Justice Patterson, in *Dominion Savings Co.* v. *Kilroy*, in the Court of Appeal, "Unless we hold that a married woman cannot under such circumstances purchase goods, but that as a matter of law, the purchaser is the husband, without reference to the intention of the parties, it seems to me impossible to ignore the title of the wife."

I think a verdict should be entered in favor of the defendants.

Verdict for defendants.

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ATCHESON v. RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.

Before BAIN, J.

Demurrer—Right of action against a Municipality—Legislative Authority—Recovery of damages from Municipality—Negligence in exercising Statutory powers—Municipal Act—Powers of Municipality limited to its own territory.

No action will lie for doing that which the Legislature has authorized to be done, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently.

And if by a reasonable exercise of the powers either given by the Statute or existing at common law, the damage could be prevented, it is, within this rule, "negligence," not to make such reasonable exercise of the powers.

In the absence of such negligence, a party injured by the acts of a Municipal Council can only resort to the arbitration provided for by the Municipal Act.

In declaring against a municipality for damages to plaintiff's land arising out of the construction of drainage works by defendants, it is necessary to allege that such ditch or drain was within the territorial limits of the municipality.

ARGUED: 14th April 1893.
DECIDED: 24th April, 1893.

Statement. DEMURRER to the declaration, the first count of which alleged that the plaintiff was possessed of a farm, and the defendants by constructing a drain near to his land diverted certain water from its usual and natural course, and brought the same through the ditch so constructed by them, so that the water or a portion thereof escaped, and spread over the plaintiff's land causing him to lose the use and enjoyment of the land and preventing him from putting the same under crop. The 2nd and 3rd counts of the declaration set out the same cause of action, but further alleged that the damage was caused by the negligent construction of the ditch.

The defendants demurred contending that the plaintiff's only remedy was under the compensation clauses of the

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Municipal Act, and that the construction of the drain in question being authorized by statute, there was no right of action for damages thereby.

On the argument of the demurrer the further objection was taken to all the counts of the declaration that they did not allege that the plaintiff's land, and the ditch or drain that the defendants constructed, were within the limits of the defendants' municipality.

W. J. Cooper for plaintiff.

W. E. Perdue for defendants.

The following cases were referred to:—*Rankin* v. *G. W. R.*, 4 U. C. C. P. 463; *Grimshawe* v. *G. T. R.*, 19 U. C. R. 493; *McLean* v. *G. W. R.*, 33 U. C. R. 198; *Mayor of Montreal* v. *Drummond*, 1 App. Cas. 384; *Williams* v. *Raleigh*, 21 S. C. R. 103; [1893] A. C. 540; *Wallis* v. *Assiniboia*, 4 M. R. 89; *McLellan* v. *Assiniboia*, 5 M. R. 265; *Henly* v. *Mayor of Lyme*, 5 Bing. 91; *Reeves* v. *Toronto*, 21 U. C. R. 162; *Farrell* v. *London*, 12 U. C. R. 343; *Perdue* v. *Chinguacousy*, 25 U. C. R. 21; *Stalker* v. *Dunwich*, 15 O. R. 344; *Alexander* v. *Howard*, 14 O. R. 45; *Nickle* v. *Walkerton*, 11 O. R. 433; *Derinzy* v. *Ottawa*, 15 A. R. 712; *McGarvey* v. *Strathroy*, 10 A. R. 631; *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430; *City of New Westminster* v. *Brighouse*, 20 S. C. R. 520.

BAIN, J.—The defendants are a Rural Municipality and its Council has authority under the provisions of the Municipal Act to construct drains for draining property in the Municipality. By section 665, the Council is bound to make compensation to the owners or occupants of lands taken or used, or injuriously affected, by the Council in the exercise of any of its statutory powers; and the damages are to be fixed by arbitration, if the claimants and the Council are not able to agree on the amount of compensation. The law on this subject is clearly and concisely stated by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. at p. 455, as follows; "It is now thoroughly well

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established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by the statute to the promoters or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

In the second and third counts of the plaintiff's declaration, it is charged that the defendants did the work improperly and negligently, and these counts, so far as this point is concerned, disclose a ground of action against the defendants and are not demurrable. It is not charged in, nor can it be inferred from, the first count that the damage alleged there was caused by the negligent use of the defendants' power. It may be that the plaintiff's lands were injuriously affected by the drainage works without negligence, either of commission or omission, being attributable to the Council or its officers, and if this be so, then the plaintiff has no right of action against the defendants, and this count is demurrable.

On the argument of the demurrer, the further objection was taken to all the counts of the declaration that they do not allege that the plaintiff's land, and the ditch or drain that the defendants constructed, are within the limits of the defendants' Municipality.

If the damage complained of was caused by the negligence of the defendants in the exercise of their statutory powers within the Municipality, the plaintiff, I suppose, would have a right of action whether his land was within or outside of the limits of the Municipality. But a Municipal Corporation has definite territorial limits, and its council and officers can act only within these limits unless the Legislature has specially provided that they may act beyond them. The Municipality is only responsible for the acts of its council and officers that are within the scope of

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the powers conferred upon the Municipality. It was, therefore, necessary for the plaintiff to allege in his declaration that the ditch or drain was constructed in or at a place where the Municipality had authority under the Municipal Act to direct one to be constructed.

On this ground I allow the demurrer to all the counts of the declaration. The plaintiff can amend as he may be advised.

Demurrer allowed.

BROCK V. D'AOUST.

Before KILLAM, J.

Practice—Examination of judgment debtor—Refusal to answer—Certificate of examiner—Reading over letter before acknowledging signature—Discretion of examiner in taking down answers.

A certificate of the examiner, as to what took place upon the examination of a judgment debtor, is proper evidence on a motion to commit for refusal to answer, and it is not necessarily an objection that such certificate was settled and given *ex parte*.

It is improper for defendant and his counsel during the examination to converse together, and especially in another language.

A witness, when shown a document and asked whether the signature is his, is not entitled to read over the document before answering the question. If he really cannot answer the question without reading over the document or some part of it, he should say so.

Semble, The judgment debtor under examination is not entitled to have every word or sentence he uses taken down by the examiner. The latter may use his discretion and only put down relevant answers or explanations.

ARGUED: 25th May, 1893.
DECIDED: 7th June, 1893.

Judgment having been recovered in this suit by the Statement.

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plaintiffs, they obtained an order for the examination of the defendants as to their property and means &c.

After the examination of the defendant, D'Aoust, had proceeded for some time, he refused, by advice of his counsel, to answer further questions and withdrew. It was certified by the examiner that, contrary to his ruling, D'Aoust's counsel repeatedly suggested to the defendant the answers to be given, and that, frequently, before the defendant would answer, he and his counsel held conversations between themselves in the French language. The plaintiffs applied for an order to commit D'Aoust for refusing to make satisfactory answers to questions put on this examination and for his refusal to answer, or that he attend again at his own expense and answer such questions as were properly put and other questions.

W. F. Hull for plaintiff.

J. T. Huggard for defendant.

The following cases were referred to:—*Re Ryan* v. *Simonton*, 13 P. R. 299; *Jones* v. *Macdonald*, 14 P. R. 109; *Graham* v. *Devlin*, 13 P. R. 245; *Foster* v. *VanWormer*, 12 P. R. 597; *Ross* v. *Van Etten*, 7 M. R. 598.

KILLAM, J.—Some preliminary objections were taken which do not appear important.

Objection is taken that the certificate of the examiner is not admissible evidence, and particularly on the ground that it was settled and given *ex parte*. I think that the certificate is proper evidence in such a case and that the examiner need not call upon the parties to be present at the settling of his certificate. In the absence of evidence of partiality or misconduct the Court relies on its officers, who may in their discretion give their certificates as to such examinations quite independently, or, if the case seems fitting, call in the parties to settle the same. I would, however, merely add a word of caution. It would be partial and wrong for an examiner to accept from either party a dictation of the form of the certificate or of the state-

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ments to be made therein, and he should not hear a request or argument in favor of a special certificate without giving both parties an opportunity of being present on the offering thereof. But if a party or his counsel chooses to withdraw before the conclusion of an examination, he must take the consequence of any request or argument of the examining counsel in favor of a special certificate being acceded to.

Affidavits of D'Aoust and his counsel have been filed, in which explanations of his course are offered. In these affidavits it is stated that D'Aoust is a French speaking Canadian, who makes errors in speaking English, and that his conversations in French with his counsel were as to the meanings of English words in questions or the proper English words to be used in answering; that the examining counsel refused to allow the defendant to read a letter the signature to which he asked the defendant to acknowledge; and that his answers were not taken down fully.

I see nothing in any of these statements to justify the defendant's course. It does not appear whether the examiner or the examining counsel understands or speaks French, but as the depositions are in English it is not to be presumed that they do, though it is claimed that an agent of the plaintiffs who was present does understand French. The course taken by the defendant and his counsel in thus conversing, and especially when their conversation was in another language, was improper. The difficulties of the defendant in understanding or in answering should have been explained and an interpreter obtained or the consent of the plaintiff's counsel to the defendant's counsel acting as such procured.

I think that the defendant was not entitled to read over the letter produced or to have it read to him before answering the question as to his signature. If he really could not say whether the signature was his without reading over the letter or some part of it, he should simply have said so.

It does not appear to me that a judgment debtor under

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examination is entitled to have every word he uses taken down by the examiner. The examination is for the information of the creditor. The debtor should be given every opportunity to qualify or explain his answers, and the examiner should give him the benefit of the doubt and take down all that by possibility may bear upon the questions or serve to explain any answers given, the conduct of the debtor, or the state of his affairs, but he should not allow the debtor to increase the cost of the examination or detract from its efficiency by introducing a mass of irrelevant matter. It is clear that in this respect some discretion should be given to the examiner, and to justify the extreme course taken in this case by the debtor he must show the Court that he was being treated with gross unfairness. At present, I think it would have been better if the examiner had taken down the statement which the defendant is said to have made as part of his answer to the question immediately preceding that at which the examination broke off, but it has not been shown to me that it really served to explain an answer or that its appearing upon the depositions was important in the interests of the debtor. It not being shown what were the other statements not taken down, I cannot infer from the mere fact that the debtor or his counsel calls them explanations that the examiner erred in not writing them out.

The depositions as a whole are not calculated to impress one favorably towards the defendant. It may be, as he says, that he is not an expert book keeper and that he did not keep, and seldom saw, the books of his firm. It does seem, however, that he might have made some attempt to find in the books the desired information and the entries respecting those matters which he himself stated the books would show. However, I do not think that the debtor should be committed without further opportunity to answer fully. I think, also, that it would be better, if possible, to have the further examinations before an examiner skilled in the French language.

The order will be that the defendant appear at his own

expense and submit to be examined *viva voce* upon oath touching his estate, &c., and produce books, &c., (as in the statute), and that, upon his paying within a time to be limited the costs of this application, and so appearing and submitting to be examined and producing, the application for committal shall be dismissed, and in the meantime the same will be adjourned to be brought up on certain notice.

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ROBINSON V. SUTHERLAND. 164

Before BAIN, J.

Half-breed Lands Act—Conveyance by infant—Consent of husband of illegitimate infant—Construction of Man. Stat. 46 & 47 Vic. c. 29, s. 1—Infant, conveyance by, voidable—Champerty.

The Statute of Manitoba 46 & 47 Vic. c. 29, s. 1, which was passed to remove doubts as to the proper interpretation of section 3 of the Half-Breed Lands Act in the C. S. M., did not apply to married illegitimate children, so as to obviate the necessity of procuring the consent of the husband or wife of such child to a conveyance made during minority.

Held, also that a conveyance to the defendant made by an infant was not binding on her when she came of age, and was voidable at her option, and that she effectually avoided such conveyance by a conveyance of the lands to the plaintiff, executed a few months after she came of age.

Held, also, that although the plaintiff knew of the former sale to defendant and the transaction on his part was disreputable, it was not champerty for him to purchase the land as he did.

ARGUED: 18th July, 1893.
DECIDED: 25th July, 1893.

Issue under the Real Property Act.

The defendant applied to bring certain lands under The Real Property Act and for a certificate of title. The plaintiff then lodged a caveat which he followed up with a

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petition, and on the hearing of the petition an issue was directed to determine the ownership of the lands.

The lands were allotted to Marie Cardinall, an illegitimate child of a half-breed head of a family, on the 30th of January, 1880. She was born on the 20th of March, 1861, and was married to Roger Boucher on the 10th of April, 1877.

On the 27th of March, 1879, she executed an assignment of her right to share in the grant of 1,400,000 acres to half-breed children to the defendant Sutherland and appointed W. F. Alloway her attorney to make a conveyance of it when allotted, to the purchaser. In this instrument she is described as Marie Cardinall, and her husband is not a party to or mentioned in it. In the magistrate's certificate the grantor is described as the child of Jeremie and Frances Cardinall; and they are also parties to the assignment. She was not their child, but had been brought up by them.

After the allotment, Alloway, as her attorney, executed a deed of the lands to Sutherland, the deed being dated the 6th of July, 1880. Both the assignment and the deed were registered in the Registry Office for the County of Provencher, shortly after the dates of their execution.

On the 27th of August, 1881, the patent for the lands was issued to Marie Boucher, née Cardinall, and on the 22nd of September, 1892, she executed a deed of them to the plaintiff. She had attained the age of twenty-one years on the preceding 20th of March.

Colin H. Campbell for plaintiff.

J. H. Munson for defendant.

The following cases were referred to:—*Muchall* v. *Banks*, 10 Gr. 25; *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, 19 Gr. 512; *Re Campbell*, 5 M. R. 262; *Sutherland* v. *Schultz*, 1 M. R. 13.

BAIN, J.—The question I have to decide on this issue is, was the plaintiff possessed of and entitled to an estate in fee simple in the lands in question at the date of the filing

of the application of the defendant for a certificate of title?

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(The learned Judge after stating the facts, proceeded as follows:)

When the woman executed the assignment to Sutherland she was under age; and if this instrument is to have any further effect than an ordinary conveyance by an infant, it can only be by virtue of the special legislation respecting half-breed lands. But by the terms of section 3 of "The Half-Breed Lands Act," in the Consolidated Statutes, which enables children of half-breeds of the age of 18 years to make valid conveyances of their grants in the manner pointed out in the section, no sale or authority to sell, made or given by such infant, if she be married and have a husband living, shall have any force or effect unless made and given with the knowledge and consent of her husband; and this knowledge and consent must be shown by deed executed by the husband. And furthermore the section requires that on the infant's conveyance there shall be indorsed a certificate of a Judge or Justice of the Peace testifying to the examination of the infant apart from her husband and her free and voluntary consent to the sale.

Mr. Munson argues however, that the Act 46 & 47 Vic. c. 29, s. 1, the operation of which was made retro-active, validates the assignment. This section provides that, in the case of an instrument executed by a half-breed child of the age of 18 and upwards under the above section of The Half-Breeds' Land Act, "when such child was illegitimate, ... it shall not be deemed necessary that such child should have been examined before any Judge or Justice of the Peace, or that the consent of any person or persons other than such child be required," &c. This statute was passed, it is recited, to remove doubts that had been raised as to the proper interpretation of the section of the former Act; and reading the two Acts together, it seems clear, I think, that the last Act should be construed not to apply to all illegitimate children, but only to such of them as were unmarried and had not a husband or wife living at the time of the execution of the instrument. It could not be open

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to doubt that under section 3 a female infant if married, whether she were legitimate or illegitimate, could make a valid sale and conveyance only with the consent of her husband. There might be a doubt how the requirements of the section could be complied with in the case of unmarried illegitimate children; and I read the explaining Act as applying only to them. The concluding words of the section, declaring that the instrument "shall be deemed to have always been and shall be of full force . . . . as if the consent of its parents were given in accordance with said section," supports the view that it was not intended that the enactment should apply to married illegitimate children.

I must hold, therefore, that the assignment to the defendant, and the power of attorney therein, were not binding on the infant when she came of age and were voidable at her option, and that she has avoided them by her conveyance of the lands to the plaintiff, executed a few months after she came of age.

It appears that before Marie Cardinall married Boucher, her adopted father had made an agreement that she would sell her grant to Sutherland; and the assignment of the 27th of March, 1879, was executed to carry out this agreement. She was married at the time, and her husband says he objected to her executing the assignment, but he was turned out of the room by the persons who were interesting themselves in getting the assignment for Sutherland, and she executed the document in his absence. She herself says she was made to sign it. If this be true, it is not much to be wondered at that both she and Boucher would wish to avoid the sale. Robinson, on the other hand, I have no doubt, knew of the sale to the defendant when he obtained his deed. The price he was to pay was $100; and he says he paid $40 of this amount to the men who brought Boucher and his wife to him. They say, however, that they have not been paid anything on account of the price, and that Robinson tells them, that he will not pay them any money till he secures the land. The transaction on Robin-

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son's part is, of course disreputable, but it is not one, that, as is argued, is void as being in the nature of champerty. If the woman did not see fit to confirm the sale she made before she came of age, she had the right to sell the land, and Robinson or any one else had the right to buy it from her. I could not hold that Robinson's real object in the transaction was otherwise than to acquire the land; and I would not be justified in finding that he was merely speculating in litigation. There is nothing unlawful in purchasing property, even if the purchaser is aware that there are adverse claims to it.

Verdict for plaintiff.

THE QUEEN V. PARKER.

Before DUBUC, J., KILLAM AND BAIN, JJ.

Lottery—Disposing of property by a mode of chance—Criminal law.

The defendant was convicted before a P. M. of an offence under R. S. C. c. 159, s. 2, which prohibits the "selling or offering for sale of any lot, card, ticket or other means or device for selling or otherwise disposing of any property real or personal by lots, tickets or any mode of chance whatsoever."

His *modus operandi* was as follows: He held a kind of concert in the street and having gathered an audience he proceeded to sell boxes of what he called "Parker's Pacific Pens." Before selling the pens, he placed in an empty box 100 envelopes, each containing a $1 bill, 10 envelopes with a $5 bill in each, 5 envelopes with a $10 bill in each, and one envelope with a $50 bill, making altogether $250 in 116 envelopes. He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for one box of pens was entitled to draw one envelope, and persons paying $5 for a box of pens could draw eight envelopes; but he would not take more than $5 from any one person. If the $50 bill was drawn before two-thirds of the pens were sold, he would put another $50 bill in the envelope and 50 envelopes with blank papers. He said he did not sell the envelopes; that he would not take $20 for one of them; but that he sold the pens and distributed the money to advertise the pens.

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Regina v. *Dodds*, 4 O. R. 390, and *Regina* v. *Jamieson*, 7 O. R. 149, distinguished.

ARGUED: 12th July, 1893.
DECIDED: 21st July, 1893.

Statement. The defendant was, on the 17th December, 1892, convicted before the Police Magistrate of an offence against the second section of c. 159, R. S. C., the Act respecting Lotteries, Betting and Pool selling. He applied to a single judge for a rule *nisi* for a writ of *certiorari*, and to have the conviction quashed.

By consent of counsel for the Crown and owing to the importance of the questions involved, the judge directed that the application should be brought before the Full Court, and counsel for the Crown also consented that the whole question of the correctness of the conviction should be disposed of on the application.

The defendant's mode of operation was as follows: He held a kind of concert in the Market Square, Winnipeg, and after some music and singing, he proceeded to sell boxes of what he called "Parker's Pacific Pens." Before selling the pens, he placed in an empty box 100 envelopes, each containing a $1 bill, 10 envelopes with a $5 bill in each, 5 envelopes with a $10 bill in each of them, and one envelope with a $50 bill, making altogether $250 in 116 envelopes. He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for one box of pens was entitled to draw one envelope, and persons paying $5 for a box of pens could draw eight envelopes; but he would not take more than $5 from any person, in order as he said to protect himself, because if one man took 232 envelopes, he would be $18 out of pocket besides the 232 boxes of pens. If the $50 bill was drawn before two thirds of the pens were sold, he would put another $50 bill in the envelope, and 50 envelopes with blank papers. He said he did not sell the envelopes; he would not take $20 for one of them; but he

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sold the pens, and distributed the money to advertise the pens.

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

Isaac Campbell, Q.C., for the Crown.

The following cases were referred to:—*Reg.* v. *Freeman*, 18 O. R. 524; *Reg.* v. *Jamieson*, 7 O. R. 149; *Reg.* v. *Dodds*, 4 O. R. 390; *Taylor* v. *Smetten*, 11 Q. B. D. 207; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; *Reed* v. *Ingham*, 3 E. & B. 889.

DUBUC, J.—The statute prohibits the selling or offering for sale, of "any lot, card, ticket or other means or device, for advancing, lending, selling or otherwise disposing of any property real or personal, by lots, tickets or any mode of chance whatsoever." Was the action of the defendant an infringement of the said statutory provision?

In *Regina* v. *Dodds*, 4 O. R. 390, where prizes were offered by the proprietor of a newspaper for the guessing most approximately the number of beans contained in a glass jar exposed in a window, the number to be written on a coupon to be cut out of the paper; and in *Regina* v. *Jamieson*, 7 O. R. 149, where a prize was offered by a merchant to the person who should guess the number nearest to the exact number of buttons of different sizes contained in a globular glass jar exhibited in his shop window, stipulating that the successful one should buy a certain amount of his goods, the two cases being convictions under the same section of the statute, the Court held that the approximation of the number of beans in the first case, and of the number of buttons in the second case, depended as much upon the exercise of skill, mental effort and judgment, as upon chance, and that was not "a mode of chance," for the disposing of property within the meaning of the Act.

In *Regina* v. *Freeman*, 18 O. R. 524, the defendant had on two shelves cans of tea, in which were in one a gold watch, in another a diamond ring, and in a third one $20 in money. The cans of tea were offered at $1 each, with the

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privilege of choosing any one can. The complainant paid $1 and received a can of tea containing an article of small value; he handed the can back, paid an additional 50 cts. and got another can with the same result, he repeated the operation another time with no better luck. On a complaint made by him before the magistrate, the defendant was convicted of unlawfully selling certain packages of tea, being the means of disposing of a gold watch, a diamond ring and $20 in money by a mode of chance against the form of the statute, &c. On the matter being brought before the Divisional Court, it was held that the transaction came within the terms of section 2 of the Act, so as to make the defendant liable to conviction thereunder.

Rose, J., who delivered the judgment of the Court said: "It was made clear upon the argument that the transaction in question was not a sale of tea, but the sale of a chance to obtain a gold watch, a diamond ring, or $20 in money. It was manifest that he, (the complainant,) purchased one can of tea and three chances of obtaining a valuable prize for $2. It seems idle to discuss the question. Can any one reasonably ask a finding of fact to the effect that the defendant was selling tea, and merely using the prizes as an advertisement or means of inducing the sale of tea? Must not the finding be that the object really sought for, and for the chance of obtaining which the money was paid, was one of the prizes named?"

This case is very much in line with the present case. In his argument, the learned counsel for the defendant tried to establish a distinction in this, that in *Regina* v. *Freeman*, there were boxes of tea, with a gold watch and other articles, and it was a direct sale of the chance to get the valuable article; while here the defendant wanted only to sell his boxes and pens, and not anything else, the purchaser not being bound to take an envelope. But I cannot see any force or weight in the distinction. In the one case it was the selling of tea with a chance to the purchaser of getting a prize; in the other, the selling of a box of pens with a chance of getting a prize. In both

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cases it was a contrivance, means or device for disposing of property by "a mode of chance." There was no skill, no judgment to be exercised as in *Regina* v. *Dodds*, and *Regina* v. *Jamieson*. As stated by Hawkins J. in *Taylor* v. *Smetten*, 11 Q. B. D. 207, a case under 42 Geo. 3rd, c. 119, s. 2, "In making his purchase, he (the purchaser) exercised no choice; what he got he got without the least option or action of his own will, but as the result of mere chance or accident."

As argued by the defendant's counsel, section 2 of the statute in question is, no doubt, peculiarly worded, and a penal statute should be strictly construed. But, at the same time, such construction ought to be put upon it as does not suffer it to be eluded. *Bacon's Abr. Stat.*, I. 10; *Britton* v. *Ward*, Rolle's Rep. 127; *Maxwell on Statutes*, 320.

The contrivance of the defendant here was pretty adroitly conceived. He was avowedly selling pens; and as declared by him, it was optional on the purchaser to take an envelope or not. Selling pens, in itself, could be no offence. Then if the purchaser desired it, he might get an envelope; and, as professedly stated, it was not a necessary part of the transaction. But, in reality, if we look at the inner features of the transaction, what was he doing? He was offering for sale, and selling, a means or device for disposing of his pens, by a mode of chance, or he was selling his pens as a means or device for disposing of his property, viz.; money or valuable security, enclosed in the envelope, by a mode of chance. The box of pens received by sergeant of police Munro, was worth as stated by him, "from five to ten cents at the outside." Both parties to the transaction, the defendant as seller, and the purchaser who bought knew that the $1 was not paid for the pens, and as the intrinsic value thereof, or anything like it. The pens were only the device, and the $1 was paid for the chance of getting one of the prizes contained in the envelopes. That is the transaction in its true light, and the professed declaration of the defendant at the time was only a well conceived scheme to elude the statutory provision above

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referred to; the Court cannot countenance such contrivance, however ingenious it may be, to evade the law.

The application should be refused, with costs to the private prosecutor.

KILLAM, J.—I agree that the rule should be discharged. I need not repeat the circumstances of the case or the terms of the statute, to which my brother Dubuc has already sufficiently referred.

Upon the argument there was some discussion as to the construction of the principal clause. On consideration, I think the offence to consist merely in the selling or otherwise disposing of something, the portion of the clause beginning with, "for advancing," not showing the purpose or object or intent of the sale or other disposition, but describing or limiting the words, "lot, card," &c. That which it is made an offence to sell or dispose of is a lot, card, &c. for advancing &c., any project by a mode of chance. The question whether the boxes of pens were the means of disposing of the money was a question of fact for the magistrate. It does not seem possible for the Court, merely looking at the face of the conviction, to say that boxes of pens were not capable of being such means.

Now, upon the evidence, I am of opinion that the magistrate came to the right conclusion. It does not appear to me that it was material to inquire whether the alleged object of the accused, the advertising of this particular kind of pens, was his real object or a subterfuge. Nor do I think it important whether the means or device disposed of was an article useful or ornamental or otherwise valuable in itself. An act constituting an offence under the statute would appear to be equally an offence if done to attract attention to particular wares, or if the article disposed of had an intrinsic value which might be an inducement to parties to purchase it. It may be quite true that the chances to draw were given as an inducement to purchase such pens, whether for present profit to the vendor or for prospective profit by establishing their

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reputation and gaining further sales, yet for all that, if the article sold was in addition a means for disposing by chance of the money, there would be a breach of the statute. The proper inference, from the evidence, would appear to be that the object of purchasers in buying the pens was to get a right to draw envelopes, and that Parker understood this and was trading upon it for some object. As the box of pens carried with it the right, not otherwise obtainable, to draw an envelope, and thus the chance to get some of the money, each such box appears to have been, in addition to the utility of the pens, a means or device for disposing of the money in the envelopes, and a means or device of a character similar to that of any lot, card or ticket the possession of which might carry a similar right to draw.

It is possible that the whole scheme was intended to be honestly carried out and that there was no direct profit in it, or there may have been some sleight of hand or other trick in contemplation, or a shrewd calculation of direct profit by the insertion of the additional blanks after the drawing of the $50, or there may have been a direct loss contemplated with a view to advertising the pens, but I think none of these possible alternatives material. The sale of lottery tickets would be equally an offence, whether a direct or an indirect profit be intended, or even if no profit be sought or expected.

The decision in *Regina* v. *Freeman*, 18 O. R. 524, strongly supports the conviction and those in *Regina* v. *Dodds*, 4 O. R. 390, and *Reg.* v. *Jamieson*, 7 O. R. 149, are based on grounds wholly inapplicable here. In the Dodds case the additional ground was that no specific article was to be disposed of, but in this instance the specific sums of money were placed in the envelopes in the box.

I think that the rule should be discharged.

BAIN, J., concurred.

Rule discharged.

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MANITOBA AND NORTH-WEST LOAN COMPANY v. MCPHERSON.

Before KILLAM, J.

Practice—Special indorsement on writ—Leave to sign final judgment.

In indorsing a claim on a covenant in a mortgage for the payment of principal and interest it is necessary to allege clearly and distinctly that the claim is made upon a covenant to *pay* the money secured by the mortgage, or leave will not be given to sign final judgment in the action, under section 26 of the Administration of Justice Act. Where the claim is only stated to be one for "money due upon covenants contained in a mortgage," it will not be assumed that these are covenants to pay a liquidated and ascertained amount, and it must clearly appear that the claim is not in any way in the nature of damages or such leave will not be given.

Satchwell v. *Clarke*, 8 T. L. R. 592, not followed. Dictum of the Master in *Munro* v. *Pike*, 15 P. R. 164 dissented from.

ARGUED: 31st July, 1893.

DECIDED: 3rd August, 1893.

Statement. Application by plaintiffs for leave to sign final judgment on a writ of summons specially indorsed as follows.

The following are the particulars of the plaintiffs' claim:—

To amount of principal, interest and compound interest due from defendant to the plaintiffs under covenants contained in a mortgage from the defendant to the plaintiffs, mortgage dated thirtieth March, 1891, secures three thousand five hundred dollars with interest at eight per cent. per annum and compound interest as therein provided, the said principal sum to become due and payable on the second day of January, 1896, with interest at the rate aforesaid, to be paid yearly on each second day of January after the date thereof on so much principal money thereby secured as shall from time to time remain unpaid till the whole of the principal and interest is paid, whether before or after the same becomes due, but after default interest at the rate aforesaid shall accrue and be payable from day to day.

And it is further agreed by and between said defendant and plaintiffs in said mortgage that on default in payment of any instalment of interest, such interest shall at once become principal and bear interest at the rate aforesaid, which interest shall be payable from day to day, and shall itself bear interest at the rate aforesaid, if not paid prior to the next gale day, it being agreed that all interest as well that upon principal as upon interest is to be compounded at each day mentioned for payment of interest.

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And it is further agreed by and between said defendant and plaintiffs in said mortgage that on default of payment of any portion of the moneys thereby secured, the whole of the moneys thereby secured shall become payable and all subsequent interest shall fall due and be payable from day to day and the defendant has made default in payment of interest as set out in the following statement and the plaintiffs therefore claim :

Jan. 2, 1893.	To interest on $2500 at 8 per cent., from Jan. 2nd, 1892	$ 200 00
2, 1893.	To principal	2500 00
June 29, 1893.	To interest on $2700 at 8 per cent. from January 2nd, 1893	105 33
		$2805 33

W. F. Hull for plaintiffs.

G. H. West for defendant.

The following cases were referred to:—*Munro* v. *Pike*, 15 P. R. 164; *Satchwell* v. *Clarke*, 8 T. L. R. 592; *Central Electric Co. v. Simpson*, 8 M. R. 94.

KILLAM, J.—On consideration, I retain my first impression, that the indorsement on the writ is not a sufficient special indorsement to warrant an order for final judgment.

The claim is for "principal, interest and compound interest due from the defendant to the plaintiffs under covenants contained in a mortgage," &c., without definitely stating the nature of the covenants. Very probably, taking the other parts of the indorsement with the portion cited, the plaintiff means to claim on a covenant or covenants for payment of liquidated sums of money, but I do not think that this is made so absolutely clear as to cure the ambiguity in the description of the covenants sued on. It is not impossible that the principal, interest and compound interest may be the measure of damages under some covenants which are not covenants for payment of the money. I cannot assume that the mortgage was made to secure a loan of money to the defendant, or whether the mortgage is of land or of chattels, or of a chose in action, or that it is one containing the covenants usually found in any particular description of mortgage.

As to the cases cited, in *Munro* v. *Pike*, 15 P. R. 164, there

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was a mere expression of opinion by the Master, not necessary to the decision of the motion, and it is not clear that the Judge on appeal intended to affirm the correctness of that portion of the judgment. With all respect for the learned judges of the Court of Appeal, I cannot agree with the view taken in *Satchwell* v. *Clarke*, 8 T. L. R. 592. I am not sure that I should feel bound to follow it even in case of a precisely similar indorsement, and as the indorsement now before me is different, I feel no difficulty in acting on my own opinion.

Application dismissed, with costs to be costs in the cause to the defendant in any event of the cause.

Application dismissed.

NATIONAL ELECTRIC MANUFACTURING CO. v. MANITOBA ELECTRIC AND GAS LIGHT CO.

Before KILLAM, J.

Attachment of debts—Garnishee order—Assignment of future income and profits—Moneys held in trust.

The plaintiffs, by a garnishee order, attached moneys in the hands of the garnishees owing to the defendants. The defendants had previously assigned to trustees for bondholders all the profits and income of the concern, and the trustees therefore claimed the moneys as against the plaintiffs. The deed of assignment provided that the defendants might use the income assigned in carrying on their business until default in payment of the bonds, and the plaintiffs' claim was for goods required by the defendants in the ordinary course of their business.

Held, that the defendants, if the moneys attached had come to their hands, might properly have applied them in payment of the plaintiffs' claim and that the claimants were not entitled to them as against the plaintiffs.

ARGUED: 19th June, 1893.
DECIDED: 7th September, 1893.

Statement. The plaintiffs recovered judgment against the defendants

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for a debt for goods purchased by them for use in carrying on their ordinary business, and issued a garnishee order by which they attached certain moneys owing to the defendants. On a summons to pay over, the garnishees paid the moneys into Court and suggested that the same belonged to the trustees for certain persons, holders of debentures issued by defendants, who claimed to be entitled to the moneys under the terms of their trust deed by which the real and personal property of the defendant Company and also all revenues, rates, tolls, income, rents, issues, profits and sums of money arising, or to arise, from the works and business of the Company were granted and transferred to trustees for the debenture holders. The deed, however, further provided that until default, the Company should be entitled to possess, manage and enjoy the lands, premises and works thus transferred, and the franchises appertaining thereto, and to take and use the rents, incomes and profits, and if such default should continue for three months the trustees, to whom the grant was made, were to be at liberty to enter into possession of the property and carry on the Company's business, and to receive the rents, issues and profits thereof. By the instrument the Company covenanted to assign to the trustees future acquired property, and to apply its net earnings and income, or so much thereof as might be necessary, to the payment of the interest on the debentures.

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

W. E. Perdue for claimants.

The following cases were referred to:—*Re Anglo American Leather Cloth Co.*, 43 L. T. N. S. 43; *Phelps* v. *St. Catherines, &c., Ry. Co.*, 19 O. R. 501; *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Canadian Bank of Commerce* v. *Cranch*, 8 P. R. 437; *In re General Horticultural Co.*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238; *In re Hamilton's Windsor Ironworks*, 12 Ch. D. 707; *Hubbuck* v. *Helms*, 35 W. R. 574, and *Davis* v. *Freethy*, 24 Q. B. D. 519.

KILLAM, J.—The Company, by the terms of the trust

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deed put in evidence, was to carry on its business as a going concern and might incur liabilities in doing so, and it was to be at liberty to receive the profits of the business until default in payment of interest and to apply these first in payment of the necessary expenses, being required to use only the net earnings upon the debentures. It appears to me that the debt due the principal creditors here was one which the defendant Company could have lawfully paid out of these attached moneys, as against the trustees who claim them, and that the trustees have no equity to prevent their being so applied by the compulsory process of attaching orders. On general principles, then, the case appears as a clear one in favor of the attaching creditor.

It appears to me, also, that this view is supported by authority. See *Wheatly* v. *The Silkstone and Haigh Moor Coal Co.*, 29 Ch. D. 715; *Hancock* v. *Smith*, 41 Ch. D. 456; *In Re General Horticultural Co.*, 32 Ch. D. 512; *In Re Hull &c. Ry. Co.*, 40 Ch. D. 119; *Ames* v. *The Trustees of Birkenhead Docks*, 20 Beav. 332; *Wilmott* v. *The London Celluloid Co.*, 34 Ch. D. 147; *Swiney* v. *The Enniskillen &c. Ry. Co.*, 2 I. R. C. L. 338, and the cases there cited.

I have referred to and considered all the cases cited for the claimants, but they do not appear to me opposed to these principles. The latest and, probably, the most important are, *In re Standard Manufacturing Co.*, [1891] 1 Ch. 627, and *In re Opera, Limited*, [1891] 2 Ch. 154, 3 Ch. 260. Both of these were cases in which the contests were between the holders of floating securities and execution creditors; but the companies had been ordered to be wound up and had ceased to be going concerns, so that any right of theirs to deal with the property as against the debenture holders was at an end and the execution creditors could stand in no better position.

Here, however, upon the facts submitted, the Company could receive the moneys and properly apply them on the very debt for which they are attached.

I shall order the moneys to be paid to the attaching creditor. As, however, the point is an entirely new one here,

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the order should not be carried into effect until the claimants, if so desiring, can obtain the judgment of the Full Court upon it, unless the attaching creditor will give security for repayment of the moneys in the event of my order being reversed. The claimants should pay the costs.

Order to pay over—Claimants barred.

WILSON v. DISTRICT REGISTRAR, WINNIPEG.

Before TAYLOR, C.J.

Real Property Act—Action for damages against District Registrar—Pleading—Denial of notice.

In declaring against the District Registrar as nominal defendant in an action under the Real Property Act, to recover damages out of the Assurance Fund for being deprived of one's land by the issue of a certificate of title to another, it is necessary to allege that the action is brought under the statute and that the act complained of was done contrary to the provisions of the statute.

It is not necessary in such declaration to allege that no notice of the proceedings leading to the grant of the certificate had been served upon the plaintiff, or to negative any of the matters which section 168 of the Act says shall be a bar to the action. These are properly the subject of a plea or pleas to the declaration.

ARGUED: 5th May, 1893.

DECIDED: 13th October, 1893.

Statement.

THIS was an action brought under the provisions of the Real Property Act, against the District Registrar, as nominal defendant, for the purpose of recovering certain damages out of the Assurance Fund.

The declaration alleged that one Andrew E. Wilson, the owner of a certain parcel of land, died in November, 1874, intestate and unmarried, leaving him surviving his mother,

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two sisters, and the plaintiff the son of a deceased brother, the only persons entitled to share in the estate of the intestate; that one Macdonald claiming under the grantee of the mother and the two sisters, in April, 1890. applied for a certificate of title under the Real Property Act; and that on 30th July, 1891, a certificate was issued to him as owner of the land, free from all encumbrances, liens and interests.

The declaration also alleged that Macdonald was a purchaser in good faith, not guilty of any fraud, or misrepresentation in bringing the land under the Act; that the plaintiff was not deprived of his estate in consequence of any error, omission, misdescription or wrongful act of any person other than the defendant; that there was no person against whom the plaintiff could bring an action for damages; and that he was barred from bringing any action of ejectment. or other action for the recovery of the land.

To this declaration the defendant demurred because, "It does not appear that the plaintiff was not served with notice under the provisions of the Real Property Act, nor, not being served with notice he had no knowledge that the defendant was about to commit the acts complained of, nor, that having been served or having such knowledge, he took and prosecuted proper proceedings to establish his claim to the lands in said declaration mentioned so as to avoid the bar to the bringing of this action as provided for by section 168 of the Real Property Act, R. S. M. chapter 133." Upon the argument other grounds of demurrer were argued and stated.

J. S. Hough for the demurrer. The plaintiff should bring himself within the Act, and should negative all matters which the Act says shall be a bar to his action. This is an action against a public officer, under a statute, and the declaration should have alleged that the action was brought under the statute, and that what is complained of was done contrary to its provisions. *Lee* v. *Clarke*, 2 East, 332; *Fife* v. *Bousfield*, 6 Q. B. 100; *Drake* v. *Preston*, 34 U. C. R. 257.

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Argument.

George Patterson for plaintiff, *contra*. There is nothing in the ground set forth in the demurrer as filed. A plaintiff is not bound to look beyond the section of the statute which gives him his right of action. Anything which by another section wonld be a bar to the action must be pleaded by defendant. *Stephen on Pleading*, p. 290; *Archbold's Criminal Pleading*, p. 67. As to the objection now taken for the first time, this is not an action for a penalty, and the defendant is only a nominal defendant The declaration fully shows that the action is brought under the statute. There is no analogy between this and the cases cited, which were all cases under penal statutes. *Bullen & Leake*, pp. 232-3.

TAYLOR, C.J.—The plaintiff brings his action under section 159 of The Real Property Act, which provides that any person sustaining loss or damage through any omission, mistake or misfeasance of the District Registrar or any of his officers or clerks, in the execution of their respective duties under the Act, and who is barred from bringing action of ejectment or other action for recovery of the land, in case the action for recovery of damages on account of fraud or misrepresentation in bringing the land under the Act is barred, may bring such an action as the present. He has alleged that Macdonald was not guilty of any such fraud or misrepresentation, so he is barred from bringing any action of damages against him, or any action for the recovery of the land. But it is said the plaintiff should have further alleged that he was not served with notice of the proceedings and that he had no knowledge of them, or, if he was so served, or had such knowledge, that he took and prosecuted the proper proceedings to establish his claim, or to prevent the action taken by the District Registrar, for under section 168, being so served, or having such knowledge, or failure to take proceedings to establish his claim bar him from bringing this action. In other words, it is said that the plaintiff should have alleged that he is not barred from now suing. Now had the provisions of section 168 appeared as a pro-

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viso or exception to section 159 and as part of that section, it may be that this plaintiff should have so framed his declaration. But that is not the case. Section 168 is an independent section, and it says that certain things shall in all cases be a bar to the bringing of any action against the District Registrar, or the Assurance Fund. That section provides for what shall be a defence when such an action is brought, and therefore it is for the defendant to plead that defence, if he thinks it is available.

It is further objected that this being an action under a statute, against a public officer, it must be brought distinctly within the statute, and the declaration should have alleged, which it does not, that the action is brought under the statute, and that the act complained of was done contrary to the provisions of the statute. In this respect it seems to me that the declaration is defective. *Lee* v. *Clarke*, 2 East, 332; *Fife* v. *Bousfield*, 6 Q. B. 105; *Drake* v. *Preston*, 34 U. C. R. 257, are all authorities which support this objection, and show it to be well founded.

The demurrer must therefore, on this ground, be allowed.

Demurrer allowed.

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WINNIPEG STREET RAILWAY COMPANY

v.

WINNIPEG ELECTRIC ST. RY. CO. & THE CITY OF WINNIPEG.

Before TAYLOR, C.J., DUBUC AND KILLAM, JJ.

Street Railway—Exclusive right to use of street for tramway purposes—Powers of Municipal Councils—"Portion of street."

Municipalities in Manitoba are the creatures of the Legislature and have only such powers as are expressly conferred upon them by the Legislature, or implied as incident thereto, or necessary to be exercised in order to carry into effect the powers expressly given; and, therefore, without express legislative sanction, such a municipality has no power to confer upon any person or corporation an exclusive right to operate street railways on any of its streets or highways.

The City of Winnipeg, by by-law passed in 1882, assumed to grant to the plaintiffs, for twenty years, "the exclusive right to such portion of any street or streets as shall be occupied by said railway," and the plaintiffs claimed an injunction to prevent the defendants from operating a competing line of street cars on tracks parallel to them on the same streets.

The Charter of Incorporation of the City, c. 36 of the statutes of Manitoba passed in 1882, gave it no express power to grant any exclusive rights or monopoly of the use of the streets, but provided that the Council might pass by-laws "for authorizing the construction of any street-railway or tramway upon any of the streets or highways within the City," and the plaintiffs' Act of Incorporation, c. 37 of the statutes passed in the same year, gave them "full power and authority to use and occupy any and such parts of any of the streets or highways of the City as may be required for the purposes of their railway track, the laying of the rails and the running of their cars," subject to the terms of any agreement between the plaintiffs and the City relating to the same.

Held, that there was nothing in either statute enabling the City to grant the exclusive rights claimed by the plaintiffs; and, also, that even if the City had such power, it had failed to confer such rights upon the plaintiffs by the by-law above referred to, the exclusion intended having no application laterally across the whole width of the streets in question, but only longitudinally as far as the plaintiffs' tracks extended.

ARGUED: 9th February, 1893.
DECIDED: 13th May, 1893.

Statement.

Injunction suit. The plaintiffs were incorporated in 1882 by statute of Manitoba, 45 Vic. c. 37, for the purpose

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of constructing and operating street railways in Winnipeg and adjoining parishes.

The following are among the material provisions of the statute:—

"9. The Company shall have full power and "authority to use and occupy any and such parts of any "of the streets or highways aforesaid as may be "required for the purposes of their railway track, the "laying of the rails and the running of their cars and "carriages; Provided always that the consent of the "said City and municipalities respectively, shall be first "had and obtained, who are hereby respectively author-"ized to grant permission to the said Company to con-"struct their railway as aforesaid, within their respective "limits, across and along, and to use and occupy the "said streets or highways, or any part of them, for that "purpose, upon such condition, and for such period or "periods as may be respectively agreed upon between "the Company and the said City, or other municipalities "aforesaid, or any of them.

"17. The Council of the said City and of any of "the municipalities in which said parishes, or in which "any of them, or any part of one or more of them "are or is situated; and the said Company are "hereby respectively authorized to make and to enter "into any agreement or covenant relating to the "construction of the said Railway, for the paving, "macadamizing, repairing and grading of the streets or "highways, and the construction, opening of and "repairing of drains or sewers, and the laying of gas and "water pipes in the said streets and highways, the "location of the Railway and the particular streets along "which the same shall be laid, the pattern of rails, the "time and speed of running the cars, (the amount of "licenses to be paid by the Company annually,) the "amount of fares to be paid by passengers, the time "within which the works are to be commenced, the "manner of proceeding with the same and the time for

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"completion, and generally for the safety and convenience "of passengers, the conduct of the agents and servants "of the Company, and the non-obstructing or impeding "of the ordinary traffic."

In the same session and three days afterwards, namely on the 30th of May, 1882, the Consolidated Act of Incorporation of the City of Winnipeg was passed, being c. 36 of the Statutes of Manitoba (1882).

The following are the material provisions of this statute:—

"Sec. 154. The Council may pass by laws.

"Sub.-sec. 7. For authorizing the construction of "any street-railway or tramway upon any of the streets "or highways within the City, and for regulating and "governing the same, and for fixing the rates to be "charged thereon.

"Sec. 155. Every public street, road, square, lane, "bridge, or other highway in the City shall be vested in "the City, subject to any rights in the soil which the "individuals who laid out such road, street, bridge, or "highway reserve."

On the 12th of June, 1882, the Council of the City, acting under the above authorities, passed a by-law, No. 178, in favour of the plaintiffs, granting them the right to lay and run street railways within the City. This by-law was subsequently, on the 7th of July, 1882, carried into effect by an Indenture entered into between the City of the one part and the plaintiffs of the other part, containing substantially identical provisions. The most material provisions of the by-law (which were embodied in the Indenture) are the following:—

"1. The Winnipeg Street Railway Company are "hereby authorized and empowered to construct, "maintain, complete and operate, and from time to time "remove and change a double or single track railway, "with the necessary side tracks, switches and turnouts for "the passage of cars, carriages and other vehicles "adapted to the same, upon and along any of the streets

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"or highways of the City of Winnipeg, and to run "their cars, take, transport and carry passengers upon "the same, by the force or power of animals or such "other motive power as may be authorized by the said "Council of the said City, and on the terms and under "the conditions and relations hereinafter contained in "this by-law, and subject to the same, and such railway "shall have the exclusive right to such portion of any "street or streets as shall be occupied by said railway, "and shall be worked under such regulations as may be "necessary for the protection of the citizens of said "City.

"3. The roadway between and at least eighteen "inches outside of each rail shall be kept in proper "order and at the expense of said Company; but when-"ever the said City of Winnipeg decide to pave, gravel or "macadamize the street, streets or highways traversed "by the Winnipeg Street Railway Company the said "Company shall pave, gravel or macadamize the "portion occupied by the track or tracks, and a "portion extending eighteen inches on each side "thereof, and at their own expense, and also be "bound to construct and keep in repair crossings of a "similar character to those adopted by the said City of "Winnipeg, and at the intersection of every such "railway track with the streets along or across which "such track passes.

"7. The said Company shall place and continue on "said railway tracks good and sufficient cars for the "convenience and comfort of the passengers, and shall "run the same at such times and intervals as the public "need may require. Each car shall be numbered on "the outside and inside.

"8. The said cars shall be run on Main Street, from "Broadway to Point Douglas Avenue, during and at "such times as the Council may direct, and at intervals "each way of not more than thirty minutes, and on all "cross and other streets and extensions where tracks

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"may be laid, at such intervals and at such times in the "interests of the citizens as the Council by resolution "may direct.

"9. The said Company shall have their cars running "between Broadway and Point Douglas Avenue on "Main Street, within six months from the date of the "agreement with the said City of Winnipeg.

"12. Whenever it shall be necessary to remove any "snow, ice or dirt from any of the tracks of said "Company, the same shall be removed by the said "Company in such a manner as not to obstruct the "ordinary traffic, and in the case of snow it shall be "spread as evenly as possible over the street, so as not "to interfere with the passage of other vehicles along "and over the same."

"16. The cars and sleighs of said Company shall be "entitled to the right of way on the tracks of said rail-"way. All vehicles, however, may travel on, along or "across said track, but any vehicle, horseman or foot "passenger upon the track shall turn out on the approach "of any car, so as to leave the track clear. Any person "or persons refusing to so turn out, or in any way or "manner obstructing the free passage of said cars on "and along said track, shall be liable, upon conviction "before the city police magistrate, the mayor, or any "justice or justices of the peace having jurisdiction, to a "fine not exceeding $20 and costs for each offence, or in "default of payment of said fine and costs, to imprison-"ment in any lock-up house in said City for a period not "exceeding thirty days, unless such penalty or costs be "sooner paid.

"23. The privileges granted by the present agree-"ment shall extend over a period of twenty years from "the date of the agreement, but at the expiration thereof "the Corporation may, after giving six months' notice "prior to the expiration of said term of their intention, "assume the ownership of the railways and all real and "personal property in connection with the working

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"thereof, on payment of their value, to be determined by "arbitration; and in case the Corporation should fail in "exercising the right of assuming the ownership of said "railways at the expiration of twenty years as aforesaid, "the Corporation may, at the expiration of every five "years to elapse after the first-twenty years, exercise the "same right of assuming the ownership of the said "railways, and of all real and personal estate thereunto "appertaining, after one year's notice to be given "preceding the expiration of every fifth year, as afore-"said, and on payment of their value, to be determined "by arbitration.

"25. In the event of any other parties proposing to "construct street railways on any of the streets not "occupied by the parties to whom the privilege is now "to be granted, the nature of the proposal thus made "shall be communicated to them, and the option of "constructing such proposed railway on similar "conditions as are herein stipulated shall be offered, but "if such preference is not accepted within two months, "then the Corporation may grant the privilege to any "other parties."

Acting under this Indenture, the plaintiffs in the same year laid down their railway tracks along a portion of Main Street two miles long, and commenced running cars propelled by horse power thereon, which they have since continued to do. The plaintiffs, subsequently, with the approval of the City authorities, constructed various extensions of their line on Main Street and other streets of the City and operated the same.

On the 1st of February, 1892, the City passed a by-law, No. 543, whereby they purported to grant to James Ross and William Mackenzie, contractors, but "subject to the present rights and privileges now possessed by the Winnipeg Street Railway Company," the exclusive right and privilege to construct and maintain and operate double and single track railways over and along any of the streets of the City of Winnipeg, crossing, where necessary, the lines

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of the plaintiffs, and to run their cars for hire by electric power or such other power (to be approved by the City Council) as might be found practicable. The by-law contained clauses providing for the event of possible litigation with the plaintiffs and binding the contractors in that case to indemnify the City against all liability in respect thereof. The by-law was set out in a schedule to the Act of Parliament next hereinafter mentioned.

On the 20th of April, 1892, an Act of the Legislature of Manitoba, 55 Vic. c. 56, was passed, incorporating the defendant Company, and providing that they should be entitled to all the rights and privileges under by-law 543 aforesaid. The Act, which was opposed by counsel on the part of the plaintiffs, contained the following section:—

"33. Nothing contained in this Act or in the schedule "thereto shall in any way affect or take away any right "held by, vested in or belonging to the Winnipeg Street "Railway Company, if any such there be; but any such "right may be held and exercised by the Winnipeg "Street Railway Company as fully and effectually as if "this Act had not been passed; but nevertheless the "Winnipeg Electric Street Railway Company shall have "power to cross, build and operate its line of railway "across the lines of the Winnipeg Street Railway Com-"pany, subject to the provisions of the Manitoba Railway "Act."

The defendant Company, on 15th June, 1892, obtained from Ross & Mackenzie an assignment of their rights under the by-law and commenced laying down rails in various streets of the City, claiming under their Act of Incorporation and the said by-law the right of laying down rails and working cars along all streets of the City, including those in which the plaintiffs' lines were in operation, and that the City had sanctioned such claim.

The plaintiffs, thereupon, after serving upon the defendants a notice to desist, filed their bill against the defendants in which they claimed a declaration that their right

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to use the streets of the City for street railway purposes was exclusive as to all streets already occupied by them, and an injunction to prevent the defendants from continuing to run street cars on said streets and for other purposes.

The cause was set down for Hearing and Examination of witnesses, and was tried before Mr. Justice Bain on 14th November, 1892, and following days.

H. M. Howell, Q.C. and *T. D. Cumberland* for plaintiffs.

J. S. Ewart, Q.C., and *J. H. Munson* for defendants, The Winnipeg Electric Street Railway Co.

Isaac Campbell, Q.C. and *C. P. Wilson* for the City of Winnipeg.

BAIN, J.—This suit has been instituted by the plaintiffs with the object, mainly, of obtaining a declaration from the Court that they have the legal right to the exclusive use, for street railway purposes, of the whole of the portions of Main St., Portage Avenue and Kennedy St. in the City of Winnipeg, on which they have been and are now operating their street railway, and for an order or injunction to restrain the defendant Company from operating railways thereon.

The contention of the plaintiffs, as regards these streets, is, that by the by-law of the City of Winnipeg No. 178, and the agreement made between them and the City in pursuance of this by-law, they acquired for the period mentioned therein the legal right to the exclusive use for street railway purposes of the whole of the portions of the streets, laterally as well as longitudinally, which they should occupy with their railway, and that having so occupied the portions of these streets described in the bill the defendant Company must be regarded as trespassers thereon, and should be restrained by the Court from interfering with the plaintiffs' right.

Both the plaintiffs and the defendant Company, relying on the franchises they have obtained from the City, have invested a large amount of money in building and

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operating their street railways on Main Street and Portage Avenue, two of the main thoroughfares of the City; and important interests, both as regards the two Companies and the City of Winnipeg, are involved in the decision of the questions raised by the suit. The main question briefly is, whether or not the plaintiffs have the exclusive right or monopoly of operating street railways on these streets for the period mentioned in their agreement? By the Act, 55 Vic. c. 56, the Provincial Legislature incorporated the defendant Company, and in the same Act validated and confirmed the by-law of the City of Winnipeg under which the Company has built and is now operating railways on the streets of the City. It appears that this Act was passed by the Legislature with the full knowledge that the plaintiffs were claiming to have the exclusive rights to the whole of the streets they occupied with their railway; and the passage of the Act was in fact opposed by the plaintiffs before a committee of the House. It is provided in section 33 that "nothing in this Act or in the schedule thereto shall in any way affect or take away any right held by or vested in the Winnipeg Street Railway Company, (the plaintiffs,) if such there be." But subject to this reservation, the effect of the Act is that the defendant Company has been expressly empowered by the Legislature to construct and operate their street railway on Main Street and Portage Avenue, of which streets the Legislature knew the plaintiffs were in occupation with their railway. The defendants contend that, in the face of the legislative authority which the defendant Company has, the Court cannot, or at any rate should not, by the exercise of its extraordinary jurisdiction prevent the defendant Company from exercising and enjoying the right which has been given to it, and that the plaintiffs, if they have the right they claim, should be left to enforce it in an ordinary action against the City. I am not prepared, however, to say that, if the plaintiffs can establish their right, the jurisdiction of the Court to interfere by injunction is taken away, for I apprehend that the rights given by the

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statute to the defendant Company were in effect given upon the condition that the plaintiffs had not a legal right to prevent the defendant Company operating a railway on these streets. But it is very evident, I think, that before the Court can undertake to render the legislative grant the defendant Company has received wholly nugatory and ineffectual, it will have to be satisfied beyond doubt or question that the plaintiffs have the legal rights they claim.

Before it can be held that the plaintiffs have the exclusive right they claim, it must be established not only that the right has in fact been made over and granted to them by the City, but further, that the conferring of such a right or franchise was within the corporate powers of the City; and the answer of the defendants directly challenges both these propositions. The plaintiffs, they say, have not received from the City the exclusive right they claim, and if the City did undertake to give such a right, it had not power to do so and its grant was invalid.

The expression in the by-law and agreement, "and such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by such railway," is ambiguous, and it may be a question of some difficulty to decide what was the extent of the exclusive right granted; and I think it will be better, before construing the by-law and agreement, to deal with the question of the power of the City to make such an exclusive grant as the plaintiffs contend it did. If I should come to the conclusion that the City did go beyond its powers if it gave the right contended for, then it will not be necessary for me to undertake to construe the by-law and agreement.

Assuming, then, that the City did undertake to confer upon the plaintiffs the exclusive right they claim, the defendants urge that the City could not legally give this right, unless it had express authority from the Legislature to do so. The plaintiffs' reply to this is, that the express authority the defendants demand is found in the City charter and in the plaintiffs' Act of Incorporation; and furthermore, they say, that, as the streets were vested in the

City by its Charter, it could give the exclusive right to use them, and that, at all events, as the Legislature has not expressly or by necessary implication deprived the City of the power to give this exclusive right, the circumstances are such that it must be deemed to have had the power as incident to the power expressly given.

There can be no question of the City having had full power to enter into an agreement with the plaintiffs authorizing them to build and operate street railways on all or any of the streets in the City. The provisions in section 154 of the City Charter would in themselves give this power, and the plaintiffs' Act of Incorporation expressly authorized the City "to grant permission to the said Company to construct their railways as aforesaid . . . . across, along, and to use and occupy the said streets, highways or any part of them for that purpose, upon such condition and for such period or periods as may be respectively agreed upon between the Company and the said City." This is express authority for the City to allow the Company to use its streets; but while the City might have abstained from allowing anyone else to use them for that purpose, I find nothing here, or in the City Charter, that expressly authorizes the City to agree with the plaintiffs, that they are to have the exclusive right to the use of the whole width of the streets, and that enables it to put it out of its power to allow other persons or companies to use other portions of these streets for street railway purposes. The words "upon such condition," to which Mr. Howell referred, certainly cannot be taken either to enlarge the legislative grant to the plaintiffs, or to confer authority upon the City to enter into any agreement with the plaintiffs that would be beyond its corporate powers.

Main Street and Portage Avenue are portions of the old roads known as the "great highways," that were laid out by the Council of Assiniboia before the transfer of the country to Canada, and these streets as they now exist follow, with some slight deviations, the lines of these great highways.

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On the surrender of the country to Canada by the Hudson's Bay Co., the soil in these highways became vested in the Dominion Government; and by chapter 49 R. S. C., it was provided that the Governor-General-in-Council might by order in Council transfer to the Province the public thoroughfares or roads that existed as such at the date of the transfer. It appears that by order in council dated the 3rd of February, 1888, Main Street was so transferred, but it is not shewn that Portage Avenue has ever been transferred. Main Street for about half a mile or so, runs through lot one in the Parish of St. John, usually known as the Hudson's Bay Company's Reserve, and nearly all of the portion of Portage Avenue occupied by the plaintiffs is in this lot; and in the grant from the Crown to the Hudson's Bay Company, neither street is excepted or reserved. This patent was issued before the date of the City Charter of 1882.

By section 155 of the City Charter of 1882, it is provided that, "every public road, street &c., shall be vested in the City, subject to any rights in the soil which the individuals who laid out such road, street, &c., reserve." Then in the following section it is provided that all persons having made any reservation in any street shall apply within six months for a settlement or adjustment of such claim, otherwise such claim shall cease to exist. The effect of these provisions is, it is argued, that the actual ownership of the streets was vested in the City, and therefore, that the City could dispose of them or grant any rights and privileges in them it saw fit.

It is clear enough, I think, that in saying the streets, &c. should be vested in the City, the Legislature intended that some property in the actual soil should vest in the City. But it is equally clear, I think, that whatever that property was, the City acquired and held it only as for a street, and for the use and purposes of the public, and that it could not dispose of or deal with it in any manner not authorized by its Charter. Like most of the provisions of our various Acts dealing with municipalities, this section 155

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was taken from the Ontario Municipal Act, and its effect there was discussed in the case of *Sarnia* v. *Great Western Ry. Co.*, 21 U. C. R., 59 which decided that the plaintiffs, an incorporated town, could not maintain an action of ejectment against the defendants for portions of the streets of the town. If the streets were vested in the town, as was contended, it may be open to doubt, perhaps, if the actual decision in the case was correct, (*Vespra* v. *Cook*, 26 U. C. C. P. 182,) but I refer to the case because I think the following remarks made by McLean, J., very well describe the nature of the property that is vested in a municipality by the section in question. "That section," he says, "I think does vest in the municipalities the several streets and roads within their borders, but it does not necessarily follow that it conveys such a freehold and estate as will enable a municipality to maintain ejectment. Every individual in the community has an equal right to a public street or road, and the municipalities cannot be considered as proprietors, and so entitled to control the possession any more than any other person or corporation or person interested in the streets or highways. The property vested in the municipality is a qualified property, to be held and exercised for the benefit of the whole body of the corporation. . . . They so far may be said to hold the freehold, but it is only as trustees for the public, and not by virtue of any title which confers a right of exclusive possession."

Notwithstanding, then, that the property in the streets, as streets, was vested in the City, I think the power of the City to dispose of or deal with the streets was strictly limited by its corporate powers.

And I cannot say that I find anything that really conflicts with this view in the case of *Coverdale* v. *Charlton*, 4 Q. B. D. 104, which was strongly pressed on me by Mr. Howell. In that case the Court were considering a provision of the Public Health Act, "that all streets shall vest in and be under the control of the urban authority," and what the case decided was, as James, L.J., said in *Rolls*

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v. *St. George*, 14 Ch. D. 785, "that something more than an easement passed to the local board, and that they had some right of property in and on and in respect of the soil which would entitle them as owners to bring a possessory action." The decision, too, was given on a special case stated by two private individuals, and the question whether the grant of the pasturage on the road by the local board to the plaintiff was within the powers of the board as against the public, was in no way raised by the case, or touched upon by the Court. In *Wandsworth Board of Works* v. *United Telephone Co.*, 13 Q. B. D. 904, the Master of the Rolls, speaking of this case and of the section in question said, "My own view at the time was . . . it passed the property so as to enable the local board, as far as any body else than the public was concerned, to do with it what any other owner than the public might do. There might be a breach of their duty to the public, but with regard to anybody else than the public, they could do with it as any other owner could do, that is, without infringing that which was their primary duty, namely, to keep it as a street." The "street" in question was, it appears, a green lane in a rural district, and the exclusive grant that had been made was that of the pasturage along the sides of the lane for a period of seven months; and even if it had been held that the local board had authority to make such a grant, I could hardly consider the case decisive of the one before me.

On this contention of the plaintiffs, I must hold, then, that the property the City had in the streets would not in itself, authorize it to give the plaintiffs the exclusive right they claim, unless it otherwise appears that it was the intention of the Legislature that this was a disposition of the streets that the City should be authorized to make. I have already held that there is no such authority expressly given, and it remains now for me to consider if the intention of the Legislature that the City was to have this authority can be inferred or implied.

The weight of authority seems to shew that, at common

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law, a corporation could bind itself to do anything to which a natural person could bind himself, and deal with its property as a natural person might deal with his own; and in dealing with corporations created by or under Acts of Parliament for definite purposes, and with powers for effecting these purposes, there are evidently two ways in which the powers of such corporations may be measured. One is, that it may be presumed that the transactions of such corporations are valid, and that they will be held to be invalid only if it can be shewn that the Legislature has deprived them either expressly or by necessary implication, of the power to enter into such transactions ; the other is that their transactions will be held to be valid only if it appears they were authorized either expressly or by necessary implication. Mr. Howell urged that the former view is the one that prevails in the English Courts; but as has been pointed out by a learned author, (*Pollock on Contracts*, p. 117,) the decision of the House of Lords in *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653, has made the conflict between the two theories much less sensible in practice than might be expected, and it seems to me, indeed, that this decision goes very far to establish that for all practical purposes, the theory of limited capacity is the one that is to prevail.

In *Attorney General* v. *Great Eastern Railway Co.*, 5 App. Cas. 473, Lord Blackburn speaking of *Ashbury* v. *Riche*, said, "That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited." In the later case of *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, this principle was again affirmed and applied and it was held to apply to all corporations created by statute for particular purposes. As Lord Watson said, p. 362, "Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act and solely with a view to carrying these provisions

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into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived from its provisions."

The principles, then, upon which I must decide the question before me are thus clearly and authoritatively prescribed, but the difficulty in the case lies in the application of the principles to the facts; and it so happens that there are no cases, at least that I have been referred to, in which the English Courts have had to decide a question of this kind upon a state of facts which is at all similar to that presented here.

It is a long established principle of English law that "When the law doth give anything to one it giveth impliedly whatever is necessary for the taking and enjoying the same," *Co. Litt.* 56; and in the case of the *Attorney General* v. *Great Eastern Railway Co.*, that I have referred to, I find Lord Selborne thus defining in what spirit the principle laid down in the *Ashbury* case should be applied; "I agree with Lord Justice James," he says, "that this doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon those things which the Legislature has authorized, ought not, (unless expressly prohibited,) to be held by judicial construction to be *ultra vires*." In the later case of *Small* v. *Smith*, 10 App. Cas. 129, Lord Selborne again said, "I entirely adhere to what was said in this House in the case of *Attorney General* v. *Great Eastern Railway Co.*, that when you have got a main purpose expressed and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done, and against which no express prohibition is found, may and ought *prima facie* to follow from the authority for effectuating the main purpose by proper and general means." But he also points out that the grounds

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of such an implication must be found in the nature of the situation and the reasonable consequences of that situation, and not in what a man, who may do what he pleases with his own, may or may not consider proper to do under such circumstances.

Applying these principles, then, what I must consider is, was there anything in the nature of the situation and in the circumstances of the case, from which it is a legitimate and reasonable inference that, when the Legislature authorized the City to arrange for the construction of street railways and to make an agreement with the plaintiffs to that end, it also intended that the City might agree with the plaintiffs that they alone and that none but themselves should be able to obtain the privilege of using the streets for street railway purposes for the period limited?

The plaintiffs, believing, doubtless, that the right or franchise which they received from the City was an exclusive one for at least twenty years, have invested a large sum of money in the construction of their several lines of railway and in providing and maintaining the necessary rolling stock therefor, and as far as the evidence shews, they have carried out the terms of the agreement and have done nothing to forfeit the rights and privileges the City conferred upon them. The operation of the defendant Company's railway, it also appears, will have the effect of materially diminishing the value of the plaintiffs' property; and as far as the circumstances of the case are presented in the evidence, I see no reason why the Court should hesitate to extend its assistance to the plaintiffs if by legitimate inference it can come to the conclusion that it was the intention of the Legislature that the franchise which the City was authorized to grant should also be an exclusive one. But I am bound to say that, in my opinion, the plaintiffs have not shewn anything in the situation or circumstances that existed when the agreement was made that would make it what has been termed a "potential necessity" that the franchise should be exclusive, or from which I can in any way legitimately infer that it was

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intended by the Legislature that it should be exclusive. At the time the agreement was entered into, Winnipeg was a new and growing town, with a population of about 25,000, and it is well known that at that time it was expected the population would increase much more rapidly than it has. Main Street and Portage Avenue are streets of unusual width, having a uniform width of 132 feet, and the other streets that have been referred to have a width of sixty-six feet. At this time none of the streets had been paved, and it is shewn that in the spring and fall and in wet weather the streets often became almost impassable for ordinary vehicles. These are about the only facts shewn that bear upon the question; and while it may be inferred from them that the City would be desirous of having street railways introduced, they fail to suggest to me any such conclusion as that it was necessary, in order that the City might come to an agreement with the plaintiffs to build and operate street railways, it should be able to give the plaintiffs the exclusive right and to put it out of its power for so long a period as twenty years to agree to give a similar right to others, should it afterwards prove to be to the public benefit to do so. The width of the streets, especially of the two I am immediately dealing with, is such that it is clearly not physically impossible, or even highly inconvenient or necessarily dangerous, for two rival companies to maintain and operate street railways upon them; so it cannot be said that the franchise which the plaintiffs obtained was one that has sometimes been called a natural monopoly, that is, one in which competition would be physically impossible or necessarily destructive. And there is nothing to show, either, that at the time the agreement was made, the City, on account of its inability to induce the plaintiffs or others to undertake the construction of street railways, had either to agree to give the plaintiffs the monopoly, or to do without railways; and I cannot find that, from considerations of this sort or any other, it was necessary the City should have the power to give the exclusive right in order that it might be able to carry into effect the power granted to it.

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Then again the right the plaintiffs claim they acquired from the City is in the nature and savours of a monopoly. It is true that the right of laying down tracks and operating railways on the public streets is not a right common to all, and the right to do this must come directly or indirectly from the Legislature. But others as well as the plaintiffs might wish to acquire this right, and against all such, the plaintiffs, if they have what they claim, have a practical monopoly. Had the Legislature intended that the plaintiffs were to be authorized to obtain such a monopoly in the streets of Winnipeg, it would have been very easy when they were specially dealing with the matter to have said so; but as they have not said so, the intention that they might obtain such a monopoly is not to be imputed without good reason for so doing.

The section of the City Charter that authorizes the City or the Council to pass by-laws for the construction of street railways, also authorizes by-laws for regulating and governing them when they are constructed; and it was argued that this power to regulate implied a power to restrict and limit, and that a by-law limiting the right to use the streets to the plaintiffs alone is not unreasonable, and therefore is not *ultra vires*. It is quite true that a power to regulate must in certain cases involve a power not only to limit, but also to prohibit, because, if it did not, the power would in many cases be found to be nugatory. If the public benefit sought to be obtained in giving a municipality power to regulate can only be attained by prohibition, then a by-law going that length may be held to be reasonable and *intra vires*. *Slattery* v. *Naylor*, 13 App. Cas. 446. But the circumstances here, as we have seen, do not shew any necessity for limiting the right to use the streets exclusively to the plaintiffs. The power to govern and regulate the operation of street railways, after they have been constructed, is one that it is absolutely necessary that the City should have. The word "regulate" in the sub-section has a well defined meaning, and I think the Legislature never intended in using that word that it was

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to be implied from it, that the City might give to one person or company the monopoly of using the streets for a long or indefinite term.

In England, until at least the passing of the Municipal Acts in later years, the powers of incorporated towns and cities rested on an entirely different basis from those of municipal corporations in this Province. Here, and in the Province of Ontario from which our municipal system is closely copied, municipalities have been established directly by the Legislature for the sole purpose of more conveniently carrying out the details of certain portions of civil government specially delegated to them, and municipal corporations exist only for the purposes for which they were created. This is also the theory and system of municipal government that exists in, I think, all the States of the United States, and as has been pointed out by *Mr. Brice* in his work on *Ultra vires*, there is no country in which there are so many corporations, or in which the law as to the powers of corporations, municipal and others, has been so much discussed, as in the United States. Both in this Court and in the Courts of Ontario when questions of municipal law are under discussion, decisions of the Courts in the United States, both Federal and State, have always been recognized as instructive; and I think I may say that, when they do not conflict with principles established by decisions of the English Courts, they have very generally been adopted and followed.

Considering the facts of the case in the light of authoritative principles of English law, I have come to the conclusion that I cannot, by what I would consider a legitimate inference, infer from these facts that it was the implied intention of the Legislature that the City was to have the power to give the plaintiffs the exclusive use of the streets, and it is not necessary, therefore, that I should consider at any length the numerous decisions of the United States Courts, both Federal and State that bear upon the question; and it is the less necessary because Mr. Howell fully conceded on the argument that the whole

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weight of these cases is against the plaintiffs' contention.

The principle of construction that these Courts apply in construing Legislative grants to corporations is thus laid down by the Supreme Court in *Minturn* v. *Larue*, 23 How. 435. "It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favour of the public." And dealing particularly with municipal corporations, Judge *Dillon* in his well known work on *Municipal Corporations*, at s. 89, uses the following language that has more than once been expressly adopted by the Courts; "Municipal Corporations," he says, "can exercise the following powers and no other; First, those granted in express terms; second, those necessarily and fairly implied in, or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." And in such cases as *Minturn* v. *Larue*, above referred to, *Fanning* v. *Gregoire*, 57 U. S. R. 523. *The State* v. *Cincinnati Gas Co.*, 18 Ohio State R. 264. *Parkersburg Gas Co.* v. *Parkersburg*, S. E. R. 650; *Saginaw Gas Light Co.* v. *Saginaw*, 28 Fed. Reporter, and many others that might be cited, the above principles have been applied with the result that claims for exclusive rights in public franchises resting on the implied powers of municipal corporations to grant such franchises have been denied. As was said in one of these cases, nothing will be intended from a legislative grant to a municipal corporation.

If I were able to regard the City as having been in the position of a man who could do with his own as he pleased,

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I cannot say that I could see any thing unreasonable in its undertaking to give the plaintiffs the monopoly of the streets for twenty years in consideration of the plaintiffs undertaking to introduce and operate street railways. But that is a view of the City's position that I am clearly precluded from taking. It could act in the matter only as it was authorized to do by the Legislature, and I cannot find that the Legislature either expressly or by implication authorized it to give the plaintiffs the monopoly of the whole of the streets, or that it was necessary that the City should have given this monopoly in order that it might carry into effect the authority it did receive. If I am right in this view, then the plaintiffs cannot have the legal right they claim; and having failed to establish their legal right they cannot be entitled to an injunction.

I have considered the case as it specially refers to Main Street and Portage Avenue; but if the plaintiffs are not entitled to an injunction as to these streets, they cannot, of course, be entitled to one as to the other streets mentioned in the bill.

Even if it could be held that the City had authority and power to give the plaintiffs the monopoly they claim, they would still have to face the contention of the defendants that the City did not in fact give them this monopoly. The exclusive right mentioned in the by-law and the agreement, the defendants say, is limited to the portion of the streets actually occupied by the railway, and further, to a railway operated by the force or power of animals. However, as I have decided against the plaintiffs on the other branch of the case, it is not necessary that I should express any opinion as to what is the proper construction of the by-law and agreement.

It appears that the line or tracks of the defendant Company's railway cross the plaintiffs' tracks in several places on Main Street and Portage Avenue; and the plaintiffs' bill contains a prayer that the defendant Company may be restrained from crossing the plaintiffs' tracks except for the purpose of crossing the same to run upon

streets which are not occupied by the plaintiffs, and which the plaintiffs do not wish to occupy. But if the defendant Company has the right to lay down and operate its railway on these streets, section 33 of their Act of incorporation gives them power to cross the lines of the plaintiffs' railway, subject to the provisions of the Manitoba Railway Act; and it is shewn that under the provisions of the last mentioned Act, the Railway Committee of the Executive Council has approved of the several crossings, and that the defendant Company has complied with the directions of the Committee in regard thereto.

The plaintiffs' bill is dismissed with costs.

From this decision the plaintiffs appealed to the Full Court, and the application came on for argument in Hilary Term, 1893.

H. M. Howell, Q.C. and *T. D. Cumberland*, for plaintiffs. The bill was filed 27th July, 1892. If plaintiffs have not exclusive right, the bill will not lie. If City had no power to give such rights the plaintiffs must fail. Formerly the Crown granted franchises, and when parties were found exercising franchises, the Courts presumed a Crown grant. The old franchises were always exclusive franchises, such as markets, guilds, ferries &c. The Crown in such cases gave part of its power to a subject. Without the grant no one had right to it. Crown could not afterwards interfere. Only the Legislature could do so. If Crown granted a second franchise which interfered with a former one, the Court would restrain the exercise of it. No one had a natural right to lay tramways or obstruct a public street; what plaintiffs claim interferes with no one's natural right. Did plaintiffs by agreement with City get an exclusive right? That is by agreement as explained by the two statutes. Sections 154 and following sections of City Charter of 1882 gave power to authorize construction of street railway and vests the streets in the City and takes away the common law rights of the owner of the soil and in this

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respect, the City of Winnipeg has rights not given to the general Municipalities of the Province. The plaintiffs' Act of Incorporation, 44 Vic. c. 37, (M. 1882), ss. 8 and 9, also extends the power of the City to contract. The various clauses of the agreement cast onerous burdens on the plaintiffs and confer upon the plaintiffs a franchise with burdens to be performed by the plaintiffs for the public benefit and should be considered by the Court as exclusive. It is therefore a franchise and not a mere license. *Letton* v. *Goodden*, L. R. 2 Eq. 131; *Anderson* v. *Jellett*, 7 A R. 352, 9 S. C. R. 9; *Hopkins* v. *G. N. Ry. Co.*, 2 Q. B. D. 231; *New Orleans* v. *Louisiana*, 115 U. S. R. 650; also cases following in same report. The City imposed onerous burdens; the plaintiffs performed them and so secured a franchise exclusive in its nature. By the terms of the agreement the City granted the exclusive right claimed. The word "occupy" is used in such a way and the provisions of clause 27 show this to be intended. The exclusiveness is not the motive power, but the use of the streets. Aside from legislation the City has made a contract under seal, and this contract is to be read most strongly against the grantor. *Re Stroud*, 8 C. B. 527; *Elphinstone on Deeds*, 95; *Galarneau* v. *Guilbault*, 16 S. C. R. 597; *Hyatt* v. *Mills*, 20 O. R. 357. While horses were used and on part of the system they are still used, there never was any regulation or agreement requiring this, and on part of the system in 1889 the plaintiffs commenced using electricity as a power, and for ten years the right has been treated by the City as exclusive. In the nature of things the right of the plaintiffs is to some extent exclusive as not more than three tracks could be laid down, so some kind of an exclusive right was intended. American Courts have gone to an extreme length in holding such grants as *ultra vires*, but this is owing to the Constitutional limitations prevailing in the various States. *Grand Rapids* v. *Grand Rapids*, 33 Fed. Rep. 72. *Citizen's Street Ry.* v. *Jones*, 34 Fed. R. 579. These cases had their origin in the celebrated case of *Charles River Bridge Co.* v. *Warren Bridge*, 36 U. S. R.

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420. Two judges, Story and another, dissented in this case and it is contended that the dissenting judgment gives the true law. The case is commented on in *Kent*, vol. 3, p. 459, foot note. See also *Newburgh* v. *Miller*, 5 Johns Ch. 110; *Cooley on Constitutional Limitations*, 6th ed. page 486, shows how extreme the American law is. The powers of a municipal corporation are not as restricted as an ordinary trading corporation. *Mayor* v. *Pattison*, *Comyns Dig.* 96; *Brice on Ultra Vires*, 139, Rule 32; *Quinton* v. *Bristol*, L. R. 17 Eq. 532; *Harding* v. *Cardiff*, 29 Gr. 309; *Lindley on Companies*, 164. The difference between English and American law on this subject is pointed out in *Brice on Ultra Vires*, pp. 59 & 516 and rule 188. The powers of trading companies are given in *Sheffield Building Society* v. *Aizlewood*, 44 Ch. D. 412; *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 362; *General Auction Estate Co.* v. *Smith*, [1891] 3 Ch. 433; *Small* v. *Smith*, 10 App. Cas. 129; *Attorney General* v. *Great Eastern Ry Co.*, 5 App. Cas. 478. Both parties treated the contract as within their power and acted and took benefits under it and the Court should presume it to be binding upon them. *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. 331; *Shrewsbury and Birmingham Ry. Co.* v. *North Western Ry. Co.*, 6 H. L. 135; *Exchange Bank* v. *Fletcher*, 19 S. C. R. 287. The streets are vested in the City and therefore the City for this reason has power to deal with them to almost any extent. *Coverdale* v. *Charlton*, 4 Q. B. D. 104; *Board of Works* v. *United Telephone Co.*, 13 Q. B. D. 904; *Rolls* v. *St. George*, 14 Ch. D. 785. The by-law is not repealed and it is submitted that the reasonableness of the by-law is the true criterion whether it is good or not. *Slattery* v. *Naylor*, 13 App. Cas. 446, and whatever the plaintiffs by their charter are empowered to take, the City may give. *Re Bronson*, 1 O. R. 416. Defendants admit plaintiffs have exclusive right to soil on which rails laid and to run on them for twenty years, which was obtained by contract with City. The Act then intended City must grant an exclusive right. No one would lay rails at great expense if

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is to receive that construction which the other party would naturally and fairly be expected to give to it. Contract is to be read as a whole. Verbal criticism is subordinated to intent. Language of doubtful meaning construed most strongly against the person using it and who has caused the doubt and in favor of person who has laid out his money on faith of it and been misled. *McConnel* v. *Murphy*, L. R. 5 P. C. 219; *Wolveridge* v. *Steward*, 1 C. & M. 657. Court will avoid a result unreasonable and impossible. *Reg.* v. *McLean*, 8 S. C. R. 210.

J. S. Ewart, Q.C. and *J. H. Munson* for defendants, The Winnipeg Electric Street Railway Company. The City had no power to give an exclusive right to the plaintiffs over the whole width of the street. Section 9 of the statute enables the City to give a right to occupy such parts of streets "as may be required for purposes of their railway *tracks*." "*Expressio unius exclusio alterius*" applies. *Thomas* v. *Railroad Co.*, 101 U. S. R. 71. The statute contemplated other street railways, for others are referred to in the charter and the plaintiff Company is given power to amalgamate with them. The statute empowers the City to give a right to use the streets "upon such *condition*," as the City thinks proper. The City cannot give some additional thing—an exclusive right—and call it a condition. A condition is a subtraction and not an addition, *Stroud*, 156; *Ex parte Collins*, L. R. 10 Ch. 367; *Ex parte Popplewell*, 21 Ch. D. 73. A power to make *one* agreement does not involve a power to agree *not* to make *another* one. The Municipal Act is not drawn upon the idea that a corporation being erected it has power to do everything; but upon the opposing idea that after a corporation is born, it is necessary to clothe it. Hence we have not a list of limitations, but a list of powers granted. Nor does the agreement with the City purport to give the exclusive right claimed by the plaintiffs. It no doubt gives some exclusive right, but what is it? First, plaintiffs are not to have an exclusive right of running on their own tracks. Express provision is made

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that everyone can use the tracks under liability to turn out. And so any one could have established a line of busses or herdic coaches with flanged wheels in opposition to the plaintiffs. A special statute was needed in England to prevent such a use. *Cottam* v. *Guest*, 6 Q. B. D. 70. Second. If plaintiffs had no exclusive right to use their own tracks, how can it be said that they had an exclusive right over the rest of the street? Third. Plaintiffs had no exclusive right to carry passengers for hire. Fourth. Plaintiffs do not claim to have power to prevent the City putting down tracks for public use or to prevent the City permitting other persons to do so. Fifth. Nevertheless *some* exclusive right is undoubtedly given, and it is an exclusive right to put their tracks upon those parts of the streets which may be assigned to them. By the agreement the "railway" and not the Company is to have the exclusive right. *Blaker* v *Herts Water Works Co.*, 41 Ch. D. 399; *Redfield* v. *Wickham*, 13 App. Cas. 474; *Ackroyd* v. *Smith*, 10 C. B. 164; *Thomas* v. *Railroad Co.*, 101 U. S. R. 83. The agreement and by-law are bad as being unreasonable, if plaintiffs correct in present contention. Under them plaintiffs are given power to run such kind of vehicles as they please, at such time as they please, as slow as they please, and at ten cents a trip. There is never to be any competition; and the agreement is to last forever, for though after twenty-one years the Company agrees to sell out to the City, the City never had power to purchase, and if it had, practically could not for the price is to be fixed by unanimous award of the arbitrators and one of them is to be the appointee of the plaintiffs. Not within ordinary functions of a city to provide means of transport. *Davis* v. *New York*, 14 N. Y. 506. As to Municipal corporations having wider powers than ordinary trading corporations, *Brice on Ultra Vires*, 5; *Exchange Bank of Canada* v. *Fletcher*, 19 S. C. R. 278; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 684. As to monopolies being odious, *Addison on Contracts*, 92; *Brice on Ultra Vires*, 567. Construction of agreement as to exclusiveness, *Newby* v. *Harrison*, 1 J. & H. 393; *Scales*

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v. *Pickering*, 4 Bing. 452; *Charles River Bridge* v. *Warren Bridge*, 36 U. S. R. 605; *Letton* v. *Goodden*, L. R. 2 Eq. 123; *Wilberforce on Statutes*, 245; *Maxwell on Statutes*, 363-5; *Attorney General* v. *Ryan*, 5 M. R. 96; *Thompson on Electricity*, 37; *Packer* v. *Sunbury Ry. Co.*, 19 Penn. St. 218; *Commonwealth* v. *Erie Ry Co.*, 27 Penn. St. 351. Examples of strict construction. Right to run Street Railway by horses not to interfere with right to run by electricity. *Teachout* v. *Des Moines Street Railway Co.*, 38 N. W. R. 145; *Omaha Ry.* v. *Cable Co.*, 30 Fed. Rep.; *Bridge Proprietors* v. *Hoboken Co.*, 68 U. S. R. 116; *Saginaw Gas Co.* v. *Saginaw*, 28 Fed. Rep. 535; *Rorer on Railroads*, 1423; *Fanning* v. *Gregoire*, 57 U. S. R. 523. Municipality cannot give monopoly without express authority from Legislature. *State of Ohio* v. *Cincinnati Gas Co.*, 18 Ohio St. 262; *Chicago* v. *Rumpff*, 45 Ill. 90; *Minturn* v. *Larue*, 64 U. S. R. 435; *Sandford* v. *Railroad Co.*, 24 Penn. St. 378; *Re Bronson and City of Ottawa*, 1 O. R. 415; *Pirie* v. *Dundas*, 29 U. C. R. 407; *Re Nash and McCracken*, 33 U. C. R. 181; *Reg.* v. *Johnston*, 38 U. C. R. 549; *Hinckley* v. *Gildersleeve*, 19 Gr. 216; *Attorney General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34. Corporation has no power to create forfeiture without express authority. *Johnson* v. *Croydon*, 16 Q. B. D. 708; *Slattery* v. *Naylon*, 13 App. Cas. 446. Corporation cannot divest itself of powers by covenanting not to exercise them. *Ayr* v. *Oswald*, 8 App. Cas. 623; *Reg.* v. *Darlington*, 6 Q. B. 681; *Vandecar* v. *East Oxford*, 3 A. R. 149; *Bennet* v. *Cote St. Lewis*, Harrison's Mun. Man. (5th ed.) 522; *Gossler* v. *Georgetown*, 19 U. S. R. 596; *Thomas* v. *Railroad Co.*, 101 U. S. R. 71; *Saginaw Gas Co.* v. *Saginaw*, 28 Fed. R. 535; *Dillon on Municipal Corporations*, 156, 518, 532, *Re British Provident Life Assurance Society*, 4 D. J. & S. 406. Plaintiffs argued that if streets be vested in the City, it may deal with these much as it pleases, but the streets vested as streets are governed by the Municipal Act. *Coverdale* v. *Charlton*, 4 Q. B. D. 104; *Sarnia* v. *G. W. Ry.*, 21 U. C. R. 62; *Attorney General* v. *McLaughlin*, 1 Gr. 41.

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By-law of plaintiff Company never in force. It was not to come into force until a particular agreement based on it had been entered into and executed. No such agreement has ever been made, for under the by-law the plaintiffs alone are permitted to do certain things, while by the agreement power is given to the Company "their *successors or assigns*." Charter to be construed as other charters; *Booth's Street Railway Law*, 10; *Dillon on Municipal Corporations*, 95, s. 56. Liberal construction only when corporation purely public, and no question of private profit enters into it. *Galloway* v. *Corporation of London*, L. R. 1 H. L. 34; *Stourbridge* v. *Whalley*, 2 B. & Ad. 792; *Cornwall* v. *Corporation of West Nissouri*, 25 U. C. C. P. 9; *Pratt* v. *City of Stratford*, 16 A. R. 30; *Maxwell on Statutes*, 363-5; *Elphinstone on Deeds*, 97, 99. Same rule should apply to a by-law. King's grant taken most strongly against the grantee. In all public grants that rule prevails. *Booth on Street Railways*, 40-1; *Purdy* v. *Farley*, 10 U. C. R. 545; *Pierce on Railways*, 154; *Re Toronto Street Railway Co.*, 22 O. R. 374; *People* v. *O'Brien*, 111 N. Y. 1. As to implied powers, *Lindley on Companies*, 891; *Pollock on Contracts*, 119; *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623; *Dillon on Municipal Corporations*, 826. As to Monopoly. How far can corporations give one or an exclusive privilege in the nature of one. They cannot without special powers. *Bacon's Abr.*, vol. 7, 24, 21 Jac. 1, c. 3; *Dillon on Municipal Corporations*, 156, 430 note 429; *Harrison's Municipal Manual*, 215. Legislative powers of municipal corporations cannot be bargained or surrendered away without Legislative authority, express or implied. *Harris* v. *North Devon Ry.*, 20 Beav. 384. Municipal system here different from that in England. Founded on American system. *Harrison's Municipal Manual*, 9; *Wallis* v. *Assiniboia*, 4 M. R. 101; *Cameron* v. *Wait*, 3 A. R. 175. Any interference with rights of public on the highway rigidly dealt with. *North London Ry. Co.* v. *Metropolitan Board of Works*, 28 L. J. Ch. 909. Occupy in statutes coupled with use. "Use and occupy." *Noscitur*

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a sociis. This not a case in which the Court will grant an injunction. The Court has no power to compel plaintiffs to do their part of the agreement. There is therefore no mutuality. Apart from reciprocal duties the plaintiffs have not a sufficient *locus standi* here. *Letton* v. *Goodden*, L. R. 2 Eq. 123. As to question of delay. The bill shows one line completed before bill filed. $20000 expended before bill filed. $40000 between that and service of notice of motion. Large amount after that. No contention of acquiescence by plaintiffs, only delay which will prevent relief by injunction. Court will consider length of time and amount expended in that time.

Isaac Campbell, Q.C. and *C. P. Wilson* for the City of Winnipeg. As to construction of by law. By the first clause permission is granted to plaintiffs to build upon all streets. The fifth clause is merely intended to give the City a voice in deciding what portion of the street should be occupied. If it were not for the 25th clause there would be no restriction upon the powers given by clause 1 to build at any time within 20 years. The plaintiffs need not build themselves and yet the power to do so would practically prohibit others from building. To guard against this, clause 25 was passed, which in effect terminates the plaintiffs' right as to certain streets under certain conditions. This interpretation of the by law is borne out by the agreements under clause 1 by which the plaintiffs' rights are provided for, and all the remaining provisions are covenants on the part of the Company, chiefly modifying the rights given by clause one. The City of Winnipeg is not necessarily a proper party. If defendants were properly on the streets, plaintiffs must fail. If they were not properly there, then they were not acting in accordance with the agreement, and plaintiffs fail as against the City. Not correct that City is estopped by the agreement made in 1882, and allowing it to stand for ten years. If agreement were *ultra vires*, then it was not the contract of the City at all. The consolidated charter

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of the City of Winnipeg was granted three days after the charter to the plaintiffs. If the City then given power to charter companies, it removes the presumption that the City could give plaintiffs an exclusive right. If an exclusive right is given by plaintiffs' charter, then the later act, *i. e.* the City's Charter is a repeal *pro tanto*; *King* v. *Middlesex*, 2 B. & Ad. 818. Private acts are not to be construed as contracts. *York &c. Ry. Co.* v. *The Queen*, 1 E. & B. 864; *City of Winnipeg* v. *Cauchon*, Man. R. *temp.* Wood, 350. As to delay. The work was commenced by the defendants on 29th May, 1892; plaintiffs' notice was served on foreman on 7th June; two miles were completed on 25th July; they were operated and fares collected on that day; the plaintiffs' bill was filed on 27th July, at that time $20,000 had been expended; the east track on Main street was completed on 6th September, the west track about 20th September, the notice of motion for an injunction was served on 22nd September, returnable on 29th September. Over $60,000 had been expended at the date of the service. The motion came on for hearing on 29th September; an enlargement was then asked for by defendants until 10th October, when order made that the case be brought on for hearing at the sittings on 14th November, 1892. The delay on the part of plaintiffs would have prevented an interlocutory injunction being granted; they could have filed the bill when the work was commenced. *Salisbury* v. *Metropolitan Ry. Co.*, 39 L. J. Ch. 433; *Frearson* v. *Loe*, 9 Ch. D. 48; *Gibson* v. *Smith*, 2 Atk. 182. Giving notice on 7th June will not save plaintiffs, *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; *Roper* v. *Williams*, T. & R. 23; *G. W. R.* v. *Oxford &c. Ry. Co.*, 3 D. M. & G. 359; *Eastwood* v. *Lever*, 33 L. J. Ch. 355; *Lehmann* v. *McArthur*, L. R. 3 Ch. 504. An injunction is discretionary, so party claiming it must act promptly or relief will be refused. Where there is delay allowing money to be expended, relief will be refused. *G. W. R.* v. *Oxford &c. Ry. Co.*, 3 D. M. & G. 359; *Attorney General* v. *Sheffield Gas Consumers' Co.*, 3 D. M. & G. 304. *Kerr on*

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Injunctions. Very slight delay and expenditure sufficient in railway cases. Amount expended what is most looked at. *Bankart* v. *Houghton*, 27 Beav. 429; *Archbold* v. *Scully*, 9 H. L. C. 388; *Goodson* v. *Richardson*, L. R. 9 Ch. 223; *Sayers* v. *Collyer*, 28 Ch. D. 108; *Flint* v. *Corby*, 4 Gr. 45. The City cannot be held responsible in any way for the agreement with the defendants, and the by law expressly provides that nothing done under it should prejudice the plaintiffs' rights.

H. M. Howell, Q.C. in reply. The Government may dedicate land for public highway just as a private individual can. *Turner* v. *Walsh*, 6 App. Cas. 636. Main street was dedicated as a public highway before Canada had anything to do with the land. The dedication was to the public represented by the Local Legislature and that body may legislate as to this right. Any person who dedicates a street puts it under the Local Legislature. The Dominion did so by dedicating the streets and lost all control of the land in so far as any power to legislate over it goes. Injunction is the proper remedy. *Fanning* v. *Gregoire*, 57 U. S. R. 524; *High on Injunctions*, ss. 912-6 (3rd ed); *Grand Rapids Electric Light Co.* v. *Grand Rapids Edison Electric Light &c. Co.*, 33 Fed. Rep. 659; *Altman* v. *Royal Aquarium Society*, 3 Ch. D. 228. Had defendant Company been laying rails without consent of City, City could have got an injunction. *Fenelon Falls* v. *Victoria Ry. Co.*, 29 Gr. 4; *Jellett* v. *Anderson*, 27 Gr. 411; *Bell Telephone Co.* v. *Belleville Electric Light Co.*, 12 O. R. 571; *St. Vincent* v. *Greenfield*, 15 A. R. 567. On the question of delay; *Roper* v. *Williams*, T. & R. 18; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Krehl* v. *Burrell*, 11 Ch. D. 146; *Russell* v. *Watts*, 25 Ch. D. 576; *Proctor* v. *Bennis*, 36 Ch. D. 759; *London, Chatham & Dover Ry. Co.* v. *Bull*, 47 L. T. N. S. 414; *Lord Manners* v. *Johnson*, 1 Ch. D. 673. After all the question is one of reasonableness. Statute Jac. 1 against monopolies only forbade monopoly for more than 21 years. *Hopkins* v. *Swansea*, 4 M. & W. 637; *Wade* v. *Brantford*, 19 U. C.

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R. 207. The plaintiff Company has never refused to run on other streets. Whether reasonable or not, the City is the best judge. *Re O'Meara*, 11 O. R. 609; 14 S. C. R. 742. The construction most strongly against corporation is the proper one. *Fertilizing Co.* v. *Hyde Park*, 97 U. S. R. 659. The right to give an exclusive right is recognized in some American cases. *City of Newport* v. *Light Co.*, 8 Ky. Rep. 22.

TAYLOR, C.J.—The Act 45 Vic. c. 36 (M.,) incorporating the City of Winnipeg, passed in 1882, provided by section 154, that the City Council might pass by-laws, among other things:—7. For authorizing the construction of any street railway or tramway, upon any of the streets or highways within the City, and for regulating and governing the same, and for fixing the rates to be charged thereon. The plaintiff Company was incorporated in 1882 by the Act 45 Vic. c. 37, (M.) In the same year, under an agreement with the City of Winnipeg, dated 7th July, 1882, entered into under the authority, and in pursuance, of a by-law of the City Council, No. 178, and passed on the 12th June, 1882, the plaintiff Company constructed a tramway or street railway, upon Main Street in the City of Winnipeg, from the Assiniboine River on the south, to the Canadian Pacific Railway station on the north. A few years after, a branch line was constructed from the junction of Main Street and Portage Avenue, running along Portage Avenue as far as Kennedy Street, and thence along that street as far as Broadway. Still later, the line on Main Street was continued on that street, north from the Canadian Pacific Railway station and on as far as the Parish of Kildonan. The original line and these extensions have ever since their construction, been and now are, operated by the plaintiff Company according to the terms and provisions of the by-law and agreement. The Act of Incorporation, by-law, and agreement, all provide that the motive power used shall be "the force and power of animals or such other motive power as may be authorized by the said Council of the said City."

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In 1892, the City Council passed another by-law, No. 543, which, after reciting that certain persons therein named had applied for the right and privilege to construct and operate a double or single track railway over and along the streets and highways of the City, proceeded to grant the applicants the privilege applied for, the motive power used to be, "Electric power or such other power as may be found practicable." Following upon this, certain persons, including those named in by-law No. 543, were by 55 Vic. c. 56, (M.,) incorporated as The Winnipeg Electric Street Railway Company, and the by-law was thereby validated and confirmed in all respects as if it had been enacted by the Legislature. In pursuance of this by-law the defendant Company have constructed and are now operating by electricity a street railway on its tracks on Main Street and Portage Avenue, laid alongside those of the plaintiff Company, and also upon other streets of the City.

The plaintiff Company claim that they are, under by-law No. 178, and their agreement with the City, entitled to the exclusive use of the whole of the streets upon which they are operating their line for street railway purposes, and have begun this suit to obtain an injunction restraining the defendant Company from operating their line of railway, and for a declaration that they have a legal right to the exclusive use which they claim.

The Act 55 Vic. c. 56, incorporating the defendant Company was opposed by the plaintiff Company before the Private Bills Committee of the Legislature, so it was passed by the Legislature with full knowledge that the plaintiff Company claimed the exclusive right now asserted in this suit. But the 33rd section of the Act provides, that "Nothing contained in this Act or in the schedule thereto shall in any way affect or take away any right held by, vested in, or belonging to, the Winnipeg Street Railway Company, if any such there be, but any such right may be held and exercised by the Winnipeg Street Railway Company as fully and effectually as if this Act had not been passed." The by-law No. 543 is also expressed to be made

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"Subject to the legal rights" of the plaintiff Company. It is, therefore, necessary to enquire what these are, and whether the plaintiff Company have the exclusive rights and privileges claimed. They concede that, if they have no exclusive right, or if, though the by-law and agreement propose to give an exclusive right, it was not in the power of the City Council to grant it, they cannot maintain their suit.

The plaintiff Company insist, that for the period of time mentioned in the by-law and agreement they have acquired the legal right to the exclusive use of such streets in the City as they may occupy with their line of railway, that is, that they are entitled to the exclusive use of the whole width as well as length of the streets so occupied by them.

The Act incorporating the plaintiff Company provides in section 9, that the Company, on obtaining the consent of the City, shall "have full power and authority to use and occupy any and such parts of any of the streets or highways aforesaid, as may be required for the purposes of their railway track." The wording of the by-law, clause one, and of clause one of the agreement is, "Such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by said railway." On these words great reliance is placed. But there are other arguments used in favour of exclusiveness, such as that onerous conditions were imposed upon the plaintiff Company, and they have fulfilled these; that in the very nature of things and the conditions of a railway track there must be an exclusiveness; and that unless an exclusive right had been given no one would have undertaken the risk and expended such a large amount of money, as they have done.

The position taken by the defendant Company is that the plaintiff Company have no such exclusive right as is claimed, and that they having an Act of the Legislature, and the by-law thereby confirmed giving them certain rights, the Court should not interfere by injunction, but should leave the plaintiff Company to enforce against the City any rights they may have. As to this, I agree with

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the learned Judge who heard the case in the first instance, that the Act incorporating the defendant Company having in effect been passed on the supposition that the plaintiff Company have not the right now claimed, the jurisdiction of the Court cannot be said to be taken away. Though I also agree with him that before the Court will interfere so as to defeat the legislative grant to the defendant Company, the plaintiff Company must place the legal right they claim beyond doubt.

The plaintiff Company assert that an exclusive right has been granted to them, and that it was within the corporate power of the City to grant such a right. The defendant Company on the other hand attack both of these propositions, and say the City did not grant an exclusive right, and if it undertook to do so, the grant is invalid, because it exceeded its corporate powers in making such a grant.

The learned Judge at the hearing dealt with the powers of the City, and having come to the conclusion that granting an exclusive right was beyond its authority, it was unnecessary for him to consider whether the City did undertake to confer such a right by the by-law and agreement with the plaintiff Company.

Counsel for the plaintiff Company concede that the American cases dealing with the powers of municipal corporations may be considered as opposed to the position which they take, and that *Cooley* in his work *on Constitutional Limitations*, at p. 231, fairly states the law as expounded by the American Courts. "The general disposition of the Courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them, thus applying substantially the same rule that is applied to charters of private incorporation. The reasonable presumption is that the State has granted in clear and unmistakable terms all it has designed to grant at all."

This doctrine seems to have prevailed from an early period in the United States, though perhaps for the first

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time so distinctly asserted in *Charles River Bridge* v. *The Warren Bridge Co.*, 36 U. S. R. 420, a case in which however, two judges dissented, one of them being the eminent jurist Judge Story. Since then the rule of strict construction as applied to such charters has prevailed, and as a learned judge in the Supreme Court of Pennsylvania once said, "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."

Dillon in his work on *Municipal Corporations* at section 91 says, "The rule of strict construction is not so directly applicable to the ordinary clauses in the charters or incorporating Acts of municipalities, as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or as it may compendiously be expressed any common law right of the citizen or inhabitant." In the *American and English Encyclopedia of Law*, Vol. 15, p. 1055, after stating in the text that a municipal corporation cannot, in the absence of express legislative authority, grant to any person or corporation the exclusive privilege of using the streets for laying gas or water-pipes, street-railway tracks, &c., it is said in a note that the weight of judicial authority supports the statement in the text, although there are several decisions which sustain the contrary doctrine. Two such cases are there cited, one *Newport* v. *Light Co.*, 8 Ky. L. Rep. 22, which was relied upon by Mr. Howell in his argument, the other *Des Moines Street Railway Co.* v. *Des Moines*, 73 Iowa, 513. In that case the Court held that although there was no grant of power in express terms authorizing the council to confer an exclusive privilege in the use of the street, yet under the circumstances of the case, and to procure a better public service the council could grant a valid exclusive right for a limited period, such contract being necessary to secure the service which it might not otherwise be able to obtain. It

would appear, however, that the power there given the City wss somewhat peculiarly worded, as it seems to have been authorized, "to grant or prohibit," the laying down street car tracks within its limits.

It is, however, insisted that under English law the powers of municipal corporations are broader than those of other corporations. For this *Brice* on *Ultra Vires* is relied upon, at page 516, where he says "a wider and more liberal construction will be put upon the powers vested in bodies, such as local government boards, municipal corporations, and sewage commissioners, whose duties are the accomplishments of public improvements." The learned Judge has gone very fully into the consideration of the English authorities bearing upon the manner in which powers given by the Legislature to corporations are to be construed. Applying the principles laid down in these to the present case he held that there was not anything in the nature of the situation, and in the circumstances, from which it is a legitimate and reasonable inference that, when the Legislature authorized the City to arrange for the construction of street railways, and to make an agreement with the plaintiff Company, it also intended that the City might agree that the plaintiff Company alone should be able to obtain the privilege of using the streets for street railway purposes during the time limited. With the conclusion so arrived at by him I quite agree. I also concur with him in the finding that it has not been shown by the plaintiff Company that there was anything in the existing situation and circumstances, when the agreement was entered into, which would make the franchise being exclusive, what has been spoken of as a potential necessity.

Whatever argument may be brought forward as to the broader powers of municipal corporations, there are numerous cases showing plainly, that strict compliance with the provisions of any statute by which the rights of the public to the use of every part of a highway are interfered with, is necessary, and they must be strictly followed. *De Ponthieu* v. *Pennyfeather*, 5 Taunt. 634; *Rex* v. *Justices*

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of Worcestershire, 8 B. & C. 254; *Rex* v. *Justices of Kent*, 10 B. & C. 477; *Rex* v. *Justices of Cambridgeshire*, 4 A. & E. 111; *Rex* v. *Downshire*, 4 A. & E. 698; *Rex* v. *Milverton*, 5 A. & E. 841, may be referred to on this point. In the Province of Ontario the powers of municipal corporations as to dealing with public highways have also been strictly construed, and they have been rigidly confined within the powers given by statute. *Reg.* v. *Great Western Ry. Co.*, 32 U. C. R. 506; *Re Lawrence* v. *Thurlow*, 33 U. C. R. 223; *Cameron* v. *Wait*, 3 A. R. 175; *Re Laplante & Peterborough*, 5 O. R. 634. In *Winter* v. *Keown*, 22 U. C. R. 341, Hagarty, J., said, "The Legislature has given a certain power to the Municipality, and it seems to me that such power must be strictly executed."

On the contention of the plaintiff Company, the City having power to pass by-laws for the construction of any street railway, have done so giving them an exclusive right for twenty years. No doubt the City having once made an agreement with the plaintiff Company, might decline for twenty years to entertain proposals on the part of any other person or corporation to construct any other street railway, and in that way practically give the plaintiff an exclusive right. But it would be for the council of any particular year, in which such a proposal might be made, to consider and deal with it. Here it is claimed that the City has bound itself, that no council shall for twenty years consider any such proposal. In other words the council of 1882 agreed, that they and their successors for twenty years to come should abdicate part of their powers as a council. *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623: *Vandecar* v. *East Oxford*, 3 A. R. 131, are authorities that they could not do so. I also agree with the conclusion come to by the learned Judge that whatever property in the streets, as streets, was vested in the City the power to dispose of, or deal with these streets, was strictly limited by its corporate powers.

But did the City grant or undertake to grant, to the plaintiff Company the exclusive right claimed. I cannot

see that the City made any such grant. It is only in the first clause of the by-law, and in the first clause of the agreement, that any direct mention of exclusiveness is made. Throughout the by-law and agreement there are two distinct things spoken of and dealt with, the "Company" and the "railway." Now, taking the plain language of the by-law and agreement, it seems to me it is not the Company, but the railway that is given any exclusive right. The Company is authorized and empowered "to construct, maintain, complete and operate . . . a double or single track railway . . . upon and along any of the streets or highways of the City . . . and such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by said railway." Now, any grant to a company authorizing the construction of a street railway must confer an exclusive right to a certain extent. Once the track and rails are laid, it is evident no other company can lay a track and rails upon the same space of ground as has been already occupied by the track and rails of the first Company. To permit such a thing would certainly hinder, if not entirely prevent the operation of the railway by both companies. The language used then, seems to me, carefully used to express just that extent of exclusiveness necessarily involved, in the nature of things, in the construction of a street railway.

Then the first part of clause 16 of the by-law and clause 17 of the agreement, show that even this right is a limited one, for it is provided that vehicles may travel on, along or across the track subject only to the obligation to turn out on the approach of any car so as to leave the track free. The plaintiff Company may have such a right to the portions of the streets actually occupied by their tracks and rails as is in the very nature of things involved in their having a railway track at all, but that is something widely different from what they claim, an exclusive right to the whole length and width of every street on which they have a track laid.

Further, section 9 of the plaintiff Company's charter

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shows this limited right to have been all that the Legislature intended should be dealt with. The language used there is, "the Company shall have full power and authority to use and occupy any and such parts of any of the streets or highways aforesaid, as may be required for the purposes of their railway track, the laying of the rails and the running of their cars." That gives no countenance to the claim of the plaintiff Company. To support such a claim one would expect to find some provision that they are to have full power and authority to use those streets or highways on which they may lay their tracks. On the contrary it is only such part of any street as may be required for the purposes of the track, distinctly confining their right within that limit.

The exclusive right of ferries was urged as an argument in support of the claim of the plaintiff Company, but I can see no analogy between their case and that of a ferry. Ancient ferries, and I believe ancient ferries only, are held to have exclusive rights, but they are so for the reason assigned by *Blackstone*, Vol. 3 p. 219, "Where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the King's subjects; otherwise he may be grievously amerced." This passage was quoted with approval in *Letton* v. *Goodden*, L. R. 2 Eq. 132. The same principle, the obligation to maintain the ferry, was remarked on in *Hopkins* v. *Great Northern Railway Co.*, 2 Q. B. D. 224. It is true in *Newton* v. *Cubitt*, 12 C. B. N. S. 32, Willes, J., spoke of the exclusive right as given, because, in an unpopulous place there might not be profit sufficient to maintain the boat without a monopoly. The obligation to maintain the ferry seems, however, the true ground, and on that ground, Kindersley, V. C., put it in *Letton* v. *Goodden*, L. R. 2 Eq. 133. "The only ground" he said, "upon which the owner of an ancient ferry can claim protection is the obligation he is under to keep the ferry always in a fit state for the use of the public; and it is upon this principle alone that the several cases which have been cited, in which the owner of

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the ferry has been protected, have been decided." Now, I can find nothing in the by-law or agreement at all analogous to the obligation to keep the ferry in a fit state for the use of the public. There is nothing in either of them under which the plaintiff Company can be compelled to operate their street railway. They are, it is true, to place and continue on their railway tracks good and sufficient cars. They are to run the cars during and at such times as the council may direct and so on. But suppose they do not comply with their agreement, and wholly cease to operate the railway. What then? There is nothing in the by-law or agreement under which they can be made to operate the railway. Clause 22 of the by-law, clause 24 in the agreement does not seem to provide for a forfeiture of privileges in case of failure to keep the railway in operation. That seems to refer to clause 9 of the by-law, 10 in the agreement. What is provided for is that the Company shall complete their tracks and have cars running within a limited time, and failing that, shall forfeit their privileges and rights. The "do all that is required of it in the manner provided for in this by-law within the time limited therein," must refer to the matters dealt with by such clauses as 2, 4 and 5 of the by-law.

Upon the argument, counsel for the plaintiff Company dealt chiefly with the exclusive right claimed, and the powers of the City and the construction of the by-law and agreement, as bearing upon that question. Little was said as to any rights the plaintiff Company may have under clause 25 of the by-law, 27 of the agreement, but these are referred to in the bill of complaint. They are considered by my brother Killam in his judgment, and as I agree with what he says, I do not dwell upon them.

KILLAM, J.—The plaintiff Company was incorporated by Act of the Provincial Legislature, 45 Vic. c. 37, for the purpose of constructing and operating street railways in the City of Winnipeg and adjacent territory. A by-law was then passed by the council of the City, authorizing the

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Company to construct and operate such railways on the streets of Winnipeg, and an agreement was entered into between the civic corporation and the Company embodying the terms of the by-law. The plaintiff has constructed, and has for several years operated such lines of railway on some of the streets of the City. This Company claims that, under and by virtue of this statute, by-law and agreement it has the exclusive right for a certain period to construct and operate street railways in Winnipeg. It alleges that this right has been infringed by the passage by the council of the defendant corporation, the City of Winnipeg, of a by-law authorizing the defendant Company to construct and operate similar railways, and by the construction of such new lines, partly on the streets on which the plaintiff's railways are, and partly on other streets, and this suit is brought to enforce the right claimed. The suit came up for hearing before my brother Bain, who dismissed the bill on the sole ground that the City corporation had no power to grant such exclusive right. The plaintiff now seeks to have this judgment reversed, and to obtain a decree in accordance with the prayer of its bill of complaint.

The principal prayer of the bill, and the one to which the arguments before us were almost exclusively directed, asked a declaration of such a right as to the streets on which the plaintiff's lines have been built, and an injunction to restrain the defendant Company from constructing or operating such railways on these streets. Two main points were raised and argued on this rehearing:—First, as to the power of the City corporation to bind itself by such an agreement; and secondly, as to the proper construction of the agreement.

In considering the former of these questions it appears to me unimportant to determine the limits of corporate powers generally. For the plaintiff it is contended that the property in the soil of the streets is vested in the City corporation, which may, therefore, bind itself as to the use of that property. But the cases of *Coverdale* v. *Charlton*,

4 Q. B. D. 104; *Rolls* v. *St. George*, 14 Ch. D. 785, and *The Board of Works* v. *The Union Telephone Co.*, 13 Q. B. D. 904, seem to show that this must be regarded as a qualified property. The corporation held the lands for use as streets and highways. Its council had certain powers as to altering or closing these streets; and if it should exercise such powers, some question might arise as to the ownership of any portion thus ceasing to be public highways. With this, however, we have nothing now to do.

I take it that, without statutory authority, the corporation should not authorize the construction and operation of a street railway along and upon a public street. Such a structure would be regarded in law as a nuisance—at least, if so found by a jury. This appears to have been settled in *Reg.* v. *Train*, 3 F. & F. 22; 2 B. & S. 640; 9 Cox C. C. 180. Certainly, without statutory authority, the corporation or its council could give no right of occupation of a portion of the streets as against the public, or compel the public to give way to the vehicles of the railway proprietors. I doubt if it could even grant such a right of occupation for railway purposes enforceable as against the corporation itself. It does not seem possible then to treat the case as one in which the corporation was disposing of some interest in a portion of its lands, and assuming to bind itself not to allow a certain user of the remainder, or some part of the remainder.

By the plaintiff's Act of Incorporation, 45 Vic. c. 37, s. 8, the plaintiff Company was authorized to "construct, maintain, complete and operate and from time to time remove and change a double or single track iron railway, with the necessary side tracks, switches and turn-outs for the passage of cars," &c., upon and along the streets or highways in Winnipeg. And by section 9, the Company was given "full power and authority to use and occupy any, and such parts of any of the streets or highways aforesaid, as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages," with a proviso requiring the consent of the

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City corporation, and authorizing it "to grant permission to the said Company to construct their railway as aforesaid, . . . across and along, and to use and occupy the said streets or highways, or any part of them for that purpose, upon such condition and for such period or periods, as may be respectively agreed upon between the Company and the said City," &c.

At that time the only statutory authority in force, expressly referring to street railways in Winnipeg, was contained in the Act, 38 Vic. c. 50, s. 107, s-s. 5, by which the City council was authorized to pass by-laws "for regulating and governing street railway companies and fixing the rates to be charged thereon." But three days after the passing of the plaintiff's Act, the Consolidated Charter of the city, 45 Vic. c. 36, received the assent of the Lieutenant Governor. And as if the Legislature in the consideration of the question had found it desirable to make the powers of the council upon the subject more clear, the council was by the later Act, s. 104, s-s. 7, empowered to pass by-laws "for authorizing the construction of any street railway or tramway upon any of the streets or highways within the City, and for regulating and governing the same," &c.

I am unable to accede to the argument of the plaintiff's counsel that this gave power to authorize the construction of only one such railway, or one such alone on any particular street. It appears to me that the power thus given was as general as it was possible to make it, and that it enabled the council to authorize as many sets of railway tracks on any particular street, under the management or control of as many different persons or bodies, as the council might deem proper, and the circumstances might admit.

The real question, then, is whether the council, by by-law, or the corporation, by agreement, could deprive the council of the right to exercise any such power. I am of opinion that neither of them could do so, without statutory authority.

The right to use the streets as highways is the right of

the public generally, not that of the inhabitants of Winnipeg alone. In exercising its powers respecting the streets, the City council is not merely the agent or the governing body of the City corporation or of the ratepayers. It is also a public body, having these powers vested in it on public grounds.

Although a railway track may constitute such an obstruction to the free use in some ways of the streets, that if constructed without authority it would be a nuisance, yet experience has shown that the facilities afforded by such a structure are so great, and that the extent of the obstruction occasioned by it may be so minimized, that it is really a valuable aid to the traffic of the streets. In the United States the doctrine seems firmly settled, that the laying down of rails on the street and the running thereon of cars for the conveyance of passengers is only a later mode of using the street as a way—that it is a change in the mode only, and not in the use. See *Briggs* v. *The Lewiston & Auburn Horse R. R. Co.*, 79 Me. 363; *Williams* v. *The City Electric Street Ry. Co.*, 41 Fed. Rep. 556; *Halsey* v. *The Rapid Transit Street Ry. Co.*, 20 Atl. Rep. 859; *Lockhart* v. *The Craig St. Ry. Co.*, 139 Penn. St. 419.

The evidence in this case shews that the railway track, under some circumstances, might even facilitate the ordinary modes of traffic of a street.

The council, then, in the power to pass by-laws upon this subject, was given an important discretionary power, to be exercised in the public interest. Certainly, it was not obliged to authorize the construction of any such railway or to allow any particular applicant to construct one; and it might, by its by-laws, limit the number of such tracks to be laid on any particular street. But, by the Interpretation Act of Manitoba, C. S. M. c. 1, s. 7, s-s. 29. "Where power to make by-laws, regulations, rules or orders is conferred, it shall include the power to alter or revoke the same and make others, if deemed expedient." Any limit thus fixed by the council, therefore, could be changed. Neither the

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council nor the corporation can change this Act of the Legislature, or lessen the authority thus given, unless under other statutory authority.

Any attempt to limit these powers would be an attempt to change the constitution granted by the Legislature. These views appear to be supported by the decisions in *Reg.* v. *The Governors of Darlington School*, 6 Q. B. 682, 717; *Mulliner* v. *The Midland Ry. Co.*, 11 Ch. D. 611; *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623; *Vandecar* v. *East Oxford*, 3 A. R. 131; *Thomas* v. *The Railroad Co.*, 101 U. S. R. 71.

But the express power thus given to alter or revoke by-laws is subject to the limitations in section 6 of the Interpretation Act, "except in so far as the provisions thereof are inconsistent with the intent and object of such Act, or the interpretation which such provisions would give to any word, expression or clause, is inconsistent with the context." Naturally, the power to authorize the construction of street railways involved the granting of a privilege under which money would be expended; and it would seem inconsistent with this that the council should have power to withdraw the authority to construct in the midst of the work, or to render it nugatory by taking away any right of occupation it might give, or by granting other privileges inconsistent therewith. There would, then, apparently be an implied limitation upon the power of the council to pass or repeal by-laws authorizing such construction. But it seems impossible to limit express statutory powers by implication to any greater extent than is absolutely necessary to attain the object of the Act, and any such implied restriction would seem to extend only to the authorizing or doing of acts directly interfering with the construction, maintenance and operation of the railway. It appears to me that, at most, there could not be thus implied any greater limitation upon the powers of the council than is involved in the plaintiff's own Act of incorporation.

Now, that Act gave to the plaintiff Company, subject to a condition precedent, a statutory right to construct and

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operate railways on the streets of Winnipeg, and to occupy and use so much of the streets as might be requisite for the purpose.

The condition precedent was the obtaining of permission from the City, which permission itself could be made conditional and be limited as to time.

The inconvenience involved in any attempt to have different sets of tracks, managed by different persons or companies, upon co-incident or nearly co-incident portions of a street, suggest at once the necessity for some restriction of the powers of the council, and that some such was contemplated by the Legislature further appears from the right of occupation given to the plaintiff and the provisions in the 14th section requiring carriages and vehicles to turn off the track.

But, by the terms of the Act itself, the right to use and occupy the streets is a limited one. It is (s. 9,) limited to so much as "may be required for the purposes of a railway track, the laying of the rails and the running of the cars and carriages." It is well settled that private Acts giving special privileges as against the public are to be construed strictly. *Proprietors of the Stourbridge Canal* v. *Wheeley*, 2 B. & Ad. 792; *Gildart* v. *Gladstone*, 11 East, 685; *Priestly* v. *Foulds*, 2 Sc. N. R. 337, 3 Sc. N. R. 815, 8 Sc. N. R. 653. Upon no principle, then, does it seem possible to imply in the corporation a right to contract its council out of the power to authorize the construction of street railways upon any portion of a street not actually required for the plaintiff's sets of tracks, switches, &c., and for the running of cars thereon.

The plaintiff's counsel relies on the word "condition" in the 9th section, and the power to make "any agreement" conferred on the council of the City by the 17th section of the plaintiff's Act, as giving the necessary authority. But again the principle of strict construction applies. The word "condition" is one so frequently used in a loose sense that it may be very easy to imply from the context a much wider meaning than its proper one, as was done in

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Walker v. *Hobbs*, 23 Q. B. D. 458. But the natural signification of the word is that given to it in *Ex parte Collins*, L. R. 10 Ch. 372, and *Ex parte Popplewell*, 21 Ch. D. 73. Ordinarily it "denotes something which prejudicially affects the interest of the donee." The City was empowered to grant a permission upon condition, which certainly involves no authority to give something beyond a permission. And the agreements that might be made were confined to certain specific subjects, which are of such a nature as to suggest the reserving to the City authorities of certain rights and powers restrictive of the plaintiff's right of occupation, rather than the further limiting of the powers of those authorities. I cannot infer from the power to make any agreement on those subjects a power of the City corporation to bind itself to give, as a consideration for beneficial covenants of the Railway Company on any of these subjects, something otherwise beyond its powers. Could it be said, for instance, that it could pledge itself to establish and carry on the manufacture of rails or railway carriages for the purpose of supplying them cheaply to the plaintiff? Could it bind the council to forego its police or sanitary powers by way of consideration for any such covenant? It is impossible to imply from such a clause authority in the corporation or the council to divest itself of statutory powers to any greater extent than the nature of the subject matter necessarily involves. And the *onus* of establishing such authority must be thrown on the party asserting its existence. In my opinion, there is nothing even to suggest it.

Upon the other question, also, I think that the defendants are entitled to our judgment.

It has been contended that the maxim *Verba chartarum fortius accipiuntur contra proferentem* should be applied in the construction of the by-law and agreement upon which the plaintiff's case depends. So far as relates to the granting of the exclusive franchise claimed by the plaintiff, I am not sure that this would be a correct principle to adopt; that is, with an assumption that the grant of

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privileges is to be taken as in the language of the grantor, the City corporation. Many of the considerations applicable to private Acts of Parliament would seem to be involved. The council is very much in the position of a Legislature assuming to bind the public. A private individual or company has the advantage in dealing with it. There is no one on the other side equally interested to see that the rights of the public are preserved. Even the most honest and most capable members of the council seldom bring to bear in the public interest the same energy and astuteness which they exercise in their private affairs. The grant is frequently, if not usually, made in the language of the applicant, as in case of a private Act of Parliament. In this very case it appears that in the course of the negotiations for the establishment of railways to be operated by electric power, the plaintiff was asked to submit, and did submit, a form of by-law for the consideration of the council.

But, however this may be, it does not appear to me that there is in these documents any real ambiguity which can require the application of the maxim.

The by-law begins with a recital of the plaintiff's Act of incorporation, and the powers thereby given to the City and Company to make an agreement for the construction and operation of a street railway. While this would not exclude the application of powers otherwise derived, it suggests very strongly that the object was the fulfilment of the condition upon which the plaintiff's statutory right to occupy and use the streets for railway purposes depended.

The scheme of both by-law and agreement appears to be this: That the grant of privileges is first made, and then the conditions and limitations of the grant and the burdens upon the Company are set ont. This is the more apparent in the agreement, as the first clause alone purports to emanate from the City corporation; the remainder purports to consist only of the covenants of the Company. This scheme, however, is not logically carried out, as, in the 16th clause of the by-law and the corresponding clauses of the

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agreement, there are a grant of a right of way and provision for the imposition of a penalty for obstructing the passage of cars. Even these, however, are apparently thus placed in connection with the limitation in favor of the public upon the right originally granted, and as if to make more clear the relative rights of the Company and the public.

Now, what do these instruments purport to grant? There is, first, permission to construct, &c., the railway lines and to run cars thereon, &c. Then follows the proviso making this subject to the subsequently mentioned conditions. Then the clause concludes with something not directly expressed in the statute; "and such railway shall have the exclusive right of such portion of any street or streets as shall be occupied by such railway." It is not very easy to determine whether it was intentional or by a mere slip that this right was granted to the railway, and not to the Company. Undoubtedly it should be so read as to give the provision a reasonable effect. It is possible that it was thus put, although clumsily, to show that it was to exclude other railways. It is noticeable, also, that while the statute gave a right "to use and occupy" the streets, or portions thereof, so far as requisite, conditionally upon the grant of permission by the civic corporation, the by-law and agreement grant no such permission in those terms. Apparently, this "exclusive right" took the place of that portion of the statute, and was substituted in order to make it more clear that the right of occupation was to be exclusive as against all but the ordinary public traffic of the streets, or as against other railways. This exclusive right is not an exclusive right to occupy all the streets of the City, or the whole of any street, for railway purposes or otherwise. It is "the exclusive right of *such* portion of any street or streets as shall be occupied by said railway." The grammatical connection of the word "as," is with "such." It is "such portion" . . . . . "as shall be occupied." The exclusive right is, by the very terms of the provision, limited to a portion of a street or streets.

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The first question, naturally, is, "In what sense is this word "occupied" employed? How should the "railway" be said to occupy the street? Or, if by "railway" is meant, in both cases, "Railway Company," how should the Railway Company be said to occupy the street?

In the case of *Pimlico, &c., Tramway Co.* v. *The Assessment Committee of the Greenwich Union*, L. R. 9 Q. B. 9, it was held that the Tramway Company had not a mere easement or right to pass over the streets, but that it was an occupier of the part used. Lush, J., said "The Act of Parliament enables the proprietors of a tramway to appropriate to their own purposes a given portion of the public road for the purpose of laying down the tram rails which are necessary for the conveyance of their cargoes along the line of road; the tram rails occupy a portion of the soil, they are exclusively used by the Tramway Company for the purposes of the tramway, and that, I think, makes them occupiers of that portion of the soil. I do not think they are the less occupiers because the public have the right of passage of the surface of their iron road. The road as a tramway is in their exclusive use, and used for their exclusive benefit; therefore I agree in thinking that they are occupiers." And Quain, J. said, "I am unable to distinguish the iron tram rails from the gas and water pipes; both physically occupy the soil; one is somewhat deeper than the other, the tram rail having the upper surface level with the road; but they both occupy the soil of the road physically, and in exactly the same manner."

By the plaintiff's Act the Company was given power conditionally to "occupy any and such parts of any of the streets as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages." The occupation here referred to is evidently a physical occupation similar to that referred to in the *Pimlico Company's* case.

By the third clause of the by-law and the corresponding clause of the agreement, the Company was bound to pave, &c., the portion "occupied by the track or tracks," and a

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portion extending eighteen inches on each side thereof. Apparently, taking with this the previous part of the clause requiring the Company to keep in order "the roadway between and at least eighteen inches outside of each rail," and the description of the railway in the statute and by-law as a double or single track iron railway, the word "track" covered the two rails necessary to support a car and the space between the rails. In this case, also, the reference was to the physical occupation authorized by the statute.

When the plaintiff's railway was first constructed it consisted of a single track, composed of two lines of rails built upon ties eight feet in length, placed at right angles to the rails. The streets were afterwards paved, and in some portions the Company laid two sets of tracks, but was compelled to pay for paving eight feet in width for one set of tracks only. This space appears to represent approximately the width of street required for the passage of cars and the portion which, in respect of each track and side track, the plaintiff Company was authorized to occupy and use. At any rate, even if more space in width were required, it sufficiently appears that there is ample room for the passage of the plaintiff's cars without interference, except at and near crossings, by the cars of the other Company.

I agree entirely with the contention of the plaintiff's counsel that the agreement is not to be construed by reference to a particular clause alone, but that the whole tenor and object of the agreement and every clause in it must be considered for the purposes of the construction of each clause. So far I have referred to the indications offered by the plaintiff's Act of incorporation, the apparent object of the by-law and agreement, and the language of the particular clause under which the plaintiff's claim mainly arises. The only portion of the by-law or the agreement which can by any possibility suggest that a wider meaning should be given to the first clause, or which, in default thereof, can itself give the right claimed, is the twenty-fifth clause of the by-law and the corresponding one in the agreement. That

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clause reads, "In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now to be granted, the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offered; but if such preference is not accepted within two months, then the corporation may grant the privilege to any other parties." The object of this provision appears clear enough. The statute had given to the plaintiffs a general right to construct railways on the streets of Winnipeg, subject to the condition that permission should be obtained from the civic corporation. The by-law and the agreement granted a general permission as to all streets, not particularizing or excepting any. The only provision made for the revocation of this permission during the original twenty years of the grant, even as to streets not built upon, is that contained in this twenty-fifth clause. With no power to revoke it, there might be great difficulty in getting others to build on streets having no railway. The plaintiff might refuse to build or to renounce its right to do so. On most of the streets it would be so inconvenient as to be practically impossible to operate satisfactorily several sets of railway tracks. This served as a protection to the plaintiff, and at the same time made it desirable that the civic authorities should be able to determine the plaintiff's rights so that the Company could not insist on duplicating lines to the inconvenience of the public.

There is one possible construction of the twenty-fifth clause which may seem inconsistent with the retention of a right to authorize the construction of other lines upon the same street with the plaintiff's. The clause applies to streets not occupied by the plaintiff. This might mean all that are not thus wholly occupied. The expression might possibly include even streets on which the plaintiff's lines are built, but the whole of which those lines do not occupy in the sense which I have already given to the word. This

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would involve the idea that the option had to be given to the plaintiff of constructing other lines alongside its own, in the event of others seeking to do so. I cannot, however, think that this was intended. The evidence shows that, on two streets at least, there was ample room for more tracks than the plaintiff Company had power to construct. The plaintiff's corporate power was, at most, to construct two sets of tracks with switches, &c. Permission was given to construct these. The twenty-fifth clause could not have been intended to extend this. I cannot read it as adding to the plaintiff's rights, but merely as enabling the civic authorities to revoke in certain cases the permission given. It is, apparently, relied on, chiefly as showing that the exclusive rights given by the first clause extended to the whole width of the street. Viewing the object of the clause as I do, I cannot ascribe to it this effect. The use of the word "occupied" is somewhat ambiguous, but I am unable to imply from it, or from the clause as a whole, the necessity for giving to the first clause a wider meaning than that which, for the reasons given, it seems to have.

The plaintiff's counsel contends that the privilege granted to the plaintiff Company is a franchise, which should be deemed to be exclusive, on the principle of a ferry franchise. Properly speaking, a franchise is derived from a grant of the Crown, or exists by prescription which presupposes such grant. 2 Bl. Com. 37; 13 Vin. Abr. tit. Franchise, p. 508. At common law a ferry was unlawful without a license from the Crown. *Blissett* v. *Hart*, Willes, 512; *Anderson* v. *Jellett*, 9 S. C. R. 11. Such a franchise, once granted, was regarded as property of which the grantee could not be divested by a similar grant to another. 13 Vin. Abr. tit., Franchise, 508; 1 Bl. Com. 264. But the case of *Letton* v. *Goodden*, L. R. 2 Eq. 123, shows that the incident of exclusiveness does not necessarily extend to every public ferry.

I concur in the view expressed in *Chicago City Ry. Co.* v. *The People*, 73 Ill. 541, that the grant by the Municipal Corporation in such a case is a grant of a mere license, and

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not of a franchise. The franchise, if the term be a proper one, was granted by the Legislature. It may be doubted, whether any such franchise, except that of incorporation, could have been granted by the Crown. At any rate I know of no authority for the view that a legislative grant of authority to carry passengers on land, whether by rail or other special method, and whether on or off a highway, is *prima facie* exclusive. It seems inconsistent with modern ideas to imply such an incident, as well as with the principles of construing private Acts of Parliament. It appears, however, to be clear that in this instance the Legislature did not intend to grant to the plaintiff Company the exclusive franchise or privilege of constructing and operating street railways in Winnipeg and of taking tolls from all who might desire to use that method of conveyance. Three days after the passage of the plaintiff's Act it gave to the city council extended or clearer powers to authorize such railways generally. These provisions were continued by the City Charter of 1884, 47 Vic. c. 78, s. 149, s-s. 129, and were copied into the Municipal Acts after the City was brought under their operation. See 49 Vic. c. 52, s. 349, s-s. 68 (M. 1886), 53 Vic. c. 51, s. 376, s-s. 41 (M. 1890) and R. S. M. c. 100, s. 605, s-s. (f.) I do not think, then, we can infer an intent to exclude the construction of other such lines on the same or parallel streets with those on which the plaintiffs might build. Although, as I have said, the width of some streets is shown to be such that room was left outside the portions occupied by the plaintiff's lines for the construction of other lines, yet it is doubtful whether such could have been laid down to advantage without crossing the plaintiff's lines at some point. At any rate it appears that the defendant Company has found it necessary or advantageous to make such crossings. These are the only points at which the new Company appears to have directly interfered with the plaintiff's lines, or to have encroached on the portions of the streets occupied by the plaintiff. These crossings are of two kinds, those made for the operating of lines alongside the plaintiff's, and those

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for the purpose of connecting with lines on other streets. Were it not for the statute 55 Vic. c. 56, s. 33, such interference and encroachment would seem unlawful. By that Act, however, the defendant Company was authorized, subject to the provisions of The Manitoba Railway Act, to make such crossings, notwithstanding any rights of the plaintiff Company. The bill distinguishes between the two kinds of crossings mentioned, and asks particularly for an injunction against any but the latter kind. It does not appear to me that it is possible to make any difference in this respect. It is doubtful whether, apart from the statute last referred to, the provisions of the Railway Act, R. S. M. c. 130, ss. 26-30, respecting railway crossings, would apply to such railways as those now in question. But the statute seems now to make these provisions applicable, and to warrant the defendant Company in constructing such crossings, and in operating its railway lines by means thereof, over and across the plaintiff's lines, under an order of the Railway Committee of the Executive Council. It has not been disputed that such an order was made authorizing all these crossings, or that the crossings conform to the order. Upon the argument in chief no question was raised as to the validity of the order, but in reply some such were suggested. Being raised in this way only and not really argued, I do not consider them.

The bill, also, alleges that the plaintiff Company desires to make extensions of its line to certain other named streets, and asks an injunction against the operation by the defendant Company of any street railway on those streets, and also a declaration that the plaintiff has the first right to build and construct street railways on any of the streets of Winnipeg not already occupied by the plaintiff, and that the new Company has no right to occupy such streets until the plaintiff has been offered the privilege of constructing the same and has not accepted the offer within two months, and also that the city corporation may be restrained by injunction from giving any consent to such user of the streets to which the plaintiff desires to extend

its lines until the plaintiff has neglected for two months to accept the offer or proposal to build on the same.

Upon these points some attempt was made by counsel for the defendants to show that, upon the evidence, the prescribed offer had been made to the plaintiff. This, however, appears to me not made out, nor does it appear that any right to such offer has been in any manner waived. On the other hand, it is not shown that the plaintiff Company has submitted to the City engineer or other authorities any plans of location or construction on new streets, or otherwise taken any overt act towards making such extensions. It is, I think, the necessary result of the opinions I have already expressed that the plaintiff Company is entitled to no such relief. I regard the twenty-fifth clause, already discussed, as merely affording a means of revoking in part the original permission given to the plaintiff Company, whose right to so extend its lines appears still to exist, but not yet to be definitely disputed. If it shall see fit to make any attempt in that direction, and it be found that the works of the defendant Company interfere with such extensions, or if that Company or the civic authorities try to prevent the same, then will be the time to consider the plaintiff's rights in that respect.

The bill also asks that it be declared that the City had no authority to deprive itself of, or to contract away, its right to permit the plaintiff to use electricity as a motive power for propelling street railway cars. Upon this point, also, no argument has been attempted, and it does not seem that we should express any opinion upon it.

I wish to add, that although I have made reference to scarcely any of the numerous cases in the American reports, to which we have been referred, I have examined and considered nearly all of those which have any bearing upon the points that I have been discussing, and particularly those cited on behalf of the plaintiff. They are very interesting and instructive, but in any intelligent discussion of them it would be necessary to point out certain distinctions between our constitution and that of the United States, and their effect upon the decisions.

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As this could not alter the result, and as, without this, the case could be disposed of on what has seemed to us to be proper principles, I have thought that no good purpose would be served by undertaking the task.

I agree that the order dismissing the bill should be affirmed with costs.

DUBUC, J., concurred.

Order dismissing bill affirmed with costs.

[An appeal from this decision, direct to the Privy Council, has been heard and stands for judgment.—ED.]

KERR v. DESJARLAIS.

Before KILLAM, J.

Practice—Irregularity—Technicality—Setting aside notice of trial—Service on another than the attorney on record.

Where advantage is sought to be taken of an alleged irregularity, and the application is technical and without merit, the applicant should be treated with the utmost strictness.

The plaintiff moved to set aside a notice of trial of an issue under the Real Property Act, on the ground, among others, that it had been served on an attorney who was not the attorney on the record; although it had been served on the attorneys who then had the matter in hand, and also on the acting Winnipeg agents of the attorney in Portage la Prairie, who had formerly acted for plaintiff in the proceedings prior to the order directing the issue.

Held, that to succeed in such a motion the affidavits filed should have negatived every other possible mode of good service under the rules and practice of the Court, which they did not do, and the summons was dismissed with costs.

ARGUED: 7th March, 1892.
DECIDED: 12th March, 1892.

Statement.

ON the hearing of a petition under the Real Property Act, the Judge directed an issue to be tried and ordered

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that either party might give notice of the trial thereof. Defendant served notice of trial on Messrs Mulock and Robarts, attorneys, who were at that time acting for the plaintiff and also on Messrs Munson and Allan, who had previously been acting as agents for Smith Curtis, the attorney in Portage la Prairie who had filed the petition on behalf of plaintiff, but who were not his booked agents. Smith Curtis had no booked agents in Winnipeg. Plaintiff then moved to set aside the notice of trial on the grounds following:—

First, that a defendant cannot in matters under the Real Property Act serve notice of trial.

Second, that the notice in this case had not been served on the attorney on the record. His counsel contended that the notice could only have been served on the plaintiff himself or on Smith Curtis, and that the service made was irregular.

W. R. Mulock, Q.C. for plaintiff.

C. P. Wilson for defendant.

Held, that under the order directing the issue notice of trial might be given by defendant, as the order specially so provided. That the other ground taken being one of the utmost technicality, the applicant in reference to it must be treated with the utmost strictness, and that as it was not shown that the notice of trial had not been posted up in the Prothonotary's office, which might have been done under the circumstances, and for anything that appeared in the affidavits Messrs Mulock and Robarts might have been persons who were served at the place where the attorney carried on his business and for him, which also would have been a good service, the application must fail. To succeed in such a motion, every method of good service should be clearly negatived and this was not sufficiently shown.

Summons dismissed with costs.

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BONNEY v. BONNEY.

Before DUBUC, J.

Trustee and cestui que trust—Purchase by trustee from cestui que trust—Under value—Family arrangements.

The defendant's brother having died unmarried and without issue the plaintiff his father, became sole heir at law; but, as he lived in Ontario, he consented to the defendant taking out letters of administration and disposing of the estate which consisted solely of a quarter section of land. The defendant represented to the plaintiff that the land in question was worth only about $600, and the plaintiff was induced by such representation to sell and convey the land to defendant at that price. He afterwards filed a bill to set aside the sale on the ground that, as he alleged, the defendant had been guilty of false and fraudulent representations as to the real value of the land. The learned Judge at the hearing came to the conclusion upon the evidence "that the market, or saleable value of the land did not exceed between $650 and $750, or perhaps $800."

Held, that this difference between the market value and the amount which defendant had represented to be the value, was too inconsiderable to be a ground for setting aside the sale, and the plaintiff's bill was dismissed with costs.

ARGUED: 11th April, 1893.
DECIDED: 1st May, 1893.

Statement. THIS was a suit for the purpose of setting aside a conveyance of land by the plaintiff to the defendant. The plaintiff, as father of the late Elijah Bonney who died in 1886, unmarried, and without issue, was the sole heir at law of the said Elijah Bonney. In 1889 the defendant, a brother of the deceased, with the consent of the plaintiff his father, took out letters of administration to his deceased brother's estate, the plaintiff having renounced his right to administer, as he lived in Ontario and could not attend to the matter. In August 1890, the defendant's solicitor wrote a letter to the plaintiff in which he stated that the land in question was the only asset of the estate and was worth about $550 or $600, that there were taxes in arrear to the amount of about $80, and the expenses were about $60, and the claims of creditors about $250 or a total

liability of $390, and offered to pay $200 to the plaintiff for his interest in the said estate. The plaintiff accepted the offer, received the $200, and executed a quit-claim deed to the defendant of all moneys, property, estate and effects of the estate of the deceased. The plaintiff by his bill sought to have the conveyance set aside on the ground that he was induced to execute the same by the false and fraudulent representation of the defendant as to the real value of the estate. 1893. Statement.

T. S. Kennedy, Q.C., and *A Howden* for the plaintiff.

H. M. Howell, Q.C. and *T. D. Cumberland* for the defendant.

The following cases were referred to:—*Ex parte Bennett*, 10 Ves. 385; *Aspland* v. *Watte*, 25 L. J. Ch. 53; *Pearce* v. *Pearce*, 22 Beav. 248; *Munch* v. *Cockerell*, 5 M. & C. 179; *In Re Garnett*, 31 Ch. D. 8; *Hope* v. *Beard*, 10 Gr. 212; and *Fowler* v. *Wyatt*, 24 Beav. 232.

DUBUC, J.—The plaintiff's counsel properly contended that the defendant, as administrator of the estate of which the plaintiff was the heir at law, stood in a fiduciary relation to him as trustee and *cestui que trust*, and that a trustee cannot purchase the trust property from the *cestui que trust* unless he has given full information, and disclosed all the facts of the case to the *cestui que trust*.

The question is, therefore, whether the defendant has done so in this case.

The plaintiff claims that there were, besides the land in question, personal effects of the deceased of which the defendant made no mention. The evidence shows that the deceased was possessed of some articles of personal property at the time of his death, but there is nothing said as to what became of them. It was over three years after the death of Elijah Bonney that the defendant took out the letters of administration, and it is not shewn that there was at the time anything left of such personal property.

The question, then, narrows itself to the representations made as to the value of the lands.

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The evidence of value was, as usual, very contradictory. It was sworn that a quarter section of land in the locality or in the neighborhood, was worth in 1890, from $375 or $400 to $1500 or $1700. Taking into consideration the whole evidence, I should judge that the real value of the lands in question, was at that time, between $600 and $900 or $1000. But it is very doubtful whether a purchaser could have been found for the larger amount. There were arrears of taxes due which had to be paid, and if the defendant had not raised money to pay them by giving a mortgage, the property might have been sold for taxes. And I hardly think that the market or saleable value could be considered at the time to exceed between $650 and $750, or perhaps $800. Then the difference between the representation as to value made by the defendant and the real saleable value, is rather too inconsiderable to be a ground for avoiding the transaction.

There are, besides, some other considerations to be taken into account. It was a transaction between a father and his son. The plaintiff was living in Ontario when the letters of administration were taken out by the defendant, and when the release was executed. It does not appear that he was a man of means; and even if he was, the expenses of coming up here and going to the North Western part of the Province where the land is situated, of employing counsel to obtain letters of administration, of settling the liabilities and charges, and of selling the lands, with the chance of waiting quite a while for a purchaser, would have amounted to a pretty round sum. As there were taxes to pay to save the land from being sold for taxes, he might have been obliged to sell it for a price inferior to its real intrinsic value, as so often occurs in such circumstances. Then, after paying all liabilities and expenses, it is very doubtful whether he would have realized more than the $200 received from the defendant. If he had been here at the time in 1890, it would have been quite different. He came in 1892, but that does not alter the circumstance of his being a resident of Ontario when the transaction took place.

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The defendant, when he made his proposal to his father, might have expected to make a profitable bargain. He might have been more generous or more obliging, in administering and managing the estate solely in his father's interest; but in point of law he was not bound to do so. He was only bound not to deceive the plaintiff, and not to take advantage of his position to the detriment and loss of the plaintiff.

As stated by the Lord Chancellor in *Tweddell* v. *Tweddell*, Turn. & Russ. at p. 13: "The Court will not view transactions between father and son in the light of reversionary bargains; but will regard them as family arrangements, with a reasonable degree of jealousy; and will not look into all the motives and feelings which might actuate the parties entering into such arrangements. There may be considerations in such cases, which the Court could not possibly reach."

I might also mention as to the principles to be applied to family arrangements and transactions: *Cory* v. *Cory*, 1 Ves. Sr. 19; *Kinchant* v. *Kinchant*, 1 Bro. C. C. 369; *Archer* v. *Hudson*, 7 Beav. 560; *Hoghton* v. *Hoghton*, 15 Beav. 288.

Some remarks were made at the hearing as to the conduct of the plaintiff's counsel in taking security for their fees, some time after the suit was commenced; I may say that they have done only what the statute authorizes them to do, and I find nothing improper in their so doing.

In my opinion, the bill should be dismissed with costs.

Bill dismissed with costs.

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MACDONALD v. CORRIGAL.

Before TAYLOR, C.J.

Dominion Weights and Measures Act, C. S. C.-c. 104, s. 21—Void Contract—Measuring grain in bags.

The plaintiff contracted with the defendant to thresh his grain at a price per bushel. At the threshing the threshed grain was run into bags, each supposed to contain two bushels, and the quantity was estimated by the number of bags. It was not ascertained either by measuring with a Dominion Standard Measure or by weighing. Section 21 of The Weights and Measures Act, c. 104, R. S. C. provides that, "Every contract, bargain . . . . . or dealing made or had in Canada in respect of any work . . . . . which has been or is to be done . . . . . or agreed for by weight or measure, shall be deemed to be made and had according to one of the Dominion weights or measures ascertained by this Act . . . . . and if not so made or had shall be void, except when made according to the metric system."

Held, that under this enactment the plaintiff could not recover anything for the work he had done.

Manitoba Electric & Gas Light Co. v. *Gerrie*, 4 M. R. 210, followed.

ARGUED: 30th May, 1893.
DECIDED: 26th July, 1893.

O. H. Clark for plaintiff.

G. H. West for defendants.

Statement. APPEAL from the County Court in an action, by a thresher against a farmer, for the price of threshing a quantity of wheat, oats and barley.

The evidence as to the contract under which the work was done, was simply that the plaintiff was to thresh the grain at so much per bushel. The grain during the threshing was run into bags supposed to contain two bushels each, and the quantity was estimated by the number of bags, but was not ascertained either by measuring with a Dominion Standard measure or by weighing.

The learned Judge of the County Court gave judgment

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for the defendant on his claim for damages for the plaintiffs' negligence in so placing the engine that certain wheat stacks were set on fire and burned.

On appeal the learned Chief Justice concluded that the evidence warranted the verdict for defendant on this point. The defendant's counsel, however, also raised the objection that the grain threshed was not measured and the quantity ascertained by a Dominion Measure as required by s. 21 of c. 104, R. S. C. and that the plaintiff could not recover and cited *Manitoba Electric and Gas Light Co.* v. *Gerrie*, 4 M. R. 210.

Upon this point judgment was given as follows:

TAYLOR, C.J.—There seems really no dispute as to the quantity threshed, or as to the price to be paid.

. . . . . .

But there is an objection not dealt with by the learned Judge, which seems to me fatal to the plaintiff's right to recover. The contract was to thresh the grain for so much a bushel and the claim is for threshing so many bushels at the rate agreed upon. The objection taken by the dispute note is that the grain threshed was not measured and the quantity ascertained by a Dominion measure as required by the statute in that behalf, and the provisions of the Weights and Measures Act, R. S. C. c. 104, are relied on. The evidence proves the objection to be true in point of fact, the grain was run into bags and not measured otherwise. It is said however, that the defence is not properly raised, because it is not said the grain was not weighed. It would seem however, from section 16, that the use of weight to determine the bushel is in the case of contracts for sale and delivery. In other cases the bushel is a measure of capacity. It seems to me, therefore, that having regard to the provisions of section 21, the plaintiff cannot recover, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

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CHARLEBOIS v. G. N. W. C. R. Co.

Before TAYLOR, C.J., DUBUC AND KILLAM, JJ.

Practice—Staying proceedings in action on foreign judgment whilst appeal pending therefrom—Foreign judgment, action on—Terms on which proceedings stayed.

The plaintiff was proceeding to enforce in the Courts of this Province two judgments obtained in Ontario against defendants for a large amount, one of which judgments had been entered by consent; and the Company was at the same time going on with proceedings in the Ontario Court for the purpose of setting aside the judgment on the ground that the consent had been given in fraud of the Company, and that there had been collusion between the plaintiff and the president of the Company, and that there was a good defence to plaintiff's claim on the merits. It appeared that the Company was acting in good faith in their proceedings, that the expenses connected with the same would be very great and would have to be duplicated here if the action in this Court proceeded.

The defendants then applied for a stay of proceedings in this action until the determination of the litigation in Ontario.

Held, that the proceedings should be stayed upon terms securing as far as possible the plaintiff's claim and upon defendants agreeing to abide by the result of their litigation in Ontario.

ARGUED: 4th May, 1893.
DECIDED: 27th May, 1893.

Statement. IN September, 1891, the plaintiff, the contractor for the construction of part of the defendant Company's line of railway, began an action against the defendant Company in the Chancery Division of the High Court of Justice for Ontario, and on the 28th of that month, by consent, a judgment was rendered in his favor for $622,226, to be paid within six months. In February, 1892, an order was made in that action declaring that default had been made by the defendant Company in the deposit of certain bonds according to the terms of the consent judgment, and in consequence they were ordered forthwith to pay the amount of the judgment and to deliver up to the plaintiff possession of the line of railway, and a sale of the railway line and of all the Company's property was ordered.

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In May, 1892, the present suit was begun in this Court to enforce the judgment and order made in the action in Ontario, the plaintiff at the same time setting up and relying on a contract made between him and the defendant Company in September, 1889, under which he claimed to have constructed fifty miles of the railway line.

In December, 1892, another action was begun in Ontario by a Mr. Delap, on behalf of himself and all other shareholders of the defendant Company, against the plaintiff in this suit and a number of other persons. In the statement of claim originally filed in that action Delap alleged that he was the holder of a large number of shares in the Company, and that he had advanced and paid large sums of money to or for it. He also alleged that the judgment was obtained by mis-representation and fraud without the knowledge of the Company, having been consented to, without any authority from the Company, by one Codd, who had a large personal interest in the amount thereby ordered to be paid, the plaintiff and Codd having arranged the terms of the judgment for their mutual advantage without regard to the interests of the Company or the shareholders. The relief prayed was that the judgment might be declared fraudulent and void, and be set aside. Subsequently, upon information said to have been obtained after the action was begun, the statement of claim was amended by alleging that, in connection with the transactions by which Delap became a shareholder and advanced moneys, gross frauds were perpetrated upon him by Codd, in which frauds the plaintiff participated, and also by alleging gross frauds upon himself and the other shareholders in connection with the making of the contract of September, 1889, the contract under which the plaintiff made his claim and in respect of which the judgment was recovered. The prayer in the amended statement of claim was that the contract purporting to be made between the Company and Charlebois for the construction of fifty miles of the railway might be declared a fraud upon the Company and to be void against the plaintiffs, and that the same and the judg-

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ment and order and all the proceedings founded thereon might be set aside.

An application was then made to stay all proceedings in this suit until the determination of the action pending in Ontario, which was refused by the Referee, and on appeal to a Judge his order was affirmed. The defendant Company then had the appeal reheard before the Full Court.

C. W. Bradshaw for the Railway Company.

H. M. Howell, Q.C. and *T. D. Cumberland* for plaintiff.

J. S. Ewart, Q.C. for the Union Bank.

F. S. Nugent for Macdonald and others.

J. H. Munson for the Commercial Bank.

The following cases were referred to:—*Penn* v. *Lord Baltimore*, 1 Ves. Sr. 444; *Huntingdon* v. *Attrill*, 12 P. R. 36; *Scott* v. *Pilkington*, 2 B. & S. 11; *Cox* v. *Mitchell*, 7 C. B. N. S. 55; *McHenry* v. *Lewis*, 22 Ch. D. 397; *Maritime Bank* v. *Stewart*, 20 S. C. R. 105; *Conmee* v. *C. P. R.*, 11 P. R. 356; *Henderson* v. *Henderson*, 3 Ha. 116; *Mutrie* v. *Binney*, 35 Ch. D. 614; *Ewing* v. *Orr Ewing*, 10 App. Cas. 453; *Gildersleeve* v. *Wolfe Island Ry. Co.*, 3 Ch. Ch. 358; *Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. D. 22; and *The Christiansborg*, 10 P. D. 141.

TAYLOR, C.J.—The ground taken, that the plaintiff having brought his action in Ontario has elected his *forum*, and is not now entitled to come before this Court, cannot be maintained. Neither can it be said that he is proceeding vexatiously with two actions, one here and another in a foreign country at the same time.

No doubt where two actions are brought, one here and another in a foreign country, the Court has jurisdiction to stay the action here if a state of circumstances is shown to exist proper for the exercise of that jurisdiction, and it will, as was said by Bowen, L. J. in *McHenry* v. *Lewis*, 22 Ch. D. 397, interfere whenever there is vexation or oppression, to prevent the administration of justice being perverted for an

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unjust end. But the plaintiff cannot be said to have begun his suit here vexatiously. He sued in Ontario where the Head Office of the Company is, where he was entitled to sue, and then having obtained a judgment he proceeded to enforce it here, against property of the Company within the jurisdiction of this Court, and out of which he seeks to realize his claim. In his suit here he seeks to obtain relief beyond what he could obtain in Ontario, relief which it seems to me he could not properly get there. If his suit was not a vexatious or oppressive one when begun it cannot have become vexatious in consequence of other persons having since begun proceedings in Ontario to set aside the judgment upon which it is founded.

Most of the cases cited are cases in which it was sought to stay one of two actions for the same cause, proceeding concurrently in different countries, which is not the case here. The application now before the Court is rather to stay an action upon the Ontario judgment until an appeal against it is disposed of, for the action now pending in Ontario is practically an appeal against the consent judgment. Now, it may be, as stated in *Piggott* on *Foreign Judgments* that the finality of a judgment is not affected by the possibility or likelihood of there being an appeal in the foreign country, nor even by the fact that an appeal is pending, yet the pendency of an appeal may be ground for the equitable interference of the Court. In *Huntington* v. *Attrill*, 12 P. R. 36, proceedings were stayed upon terms, where the defendant intended to appeal, though he had not at the time done so.

Are there any grounds for such equitable interference here?

It is said the defendants can set up by way of defence here, all the grounds on which they rely in Ontario for setting aside the judgment and the original contract. That may be questionable. It is by no means clear to my mind that the objections which they urge to the original contract can be urged here, so long as the judgment upon it stands. Perhaps under our statute, R. S. M. c. 1, s. 39, it may be

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possible to raise them, but at the Bar a doubt was suggested whether that section applies to proceedings on the equity side of the Court. Should that doubt, upon further argument and consideration, prove well founded, then the defendant Company would find themselves hampered in their defence. Certainly these matters of defence can be raised and disposed of quite as well and much more conveniently in Ontario than here. There are witnesses there who can be examined on the spot, documentary evidence is accessible there which could be produced here only with great inconvenience.

That the defendant Company and those who are moving in Ontario, are doing so *bona fide* there can be no question. They have not begun proceedings there simply for the purpose of delay; that they intend to prosecute their action is undoubted. The steps they have already taken, and the expense they have gone to is a guarantee for that. Then, if the suit here to enforce the judgment, and the suit in Ontario to set it aside, are both proceeded with the expense will be simply enormous. The evidence of witnesses in England, and I think it is said, in France also, must be got under commissions. These must all be duplicated at much needless expenditure if both suits proceed. We know how many motions and appeals there have been here already arising out of this litigation. The affidavits and documents used upon these show, that if numerous here, they have been still more numerous in Ontario.

Now, can all this be avoided? It seems to me it can, and that in the interests of justice the Court should exercise the discretion it has and interfere. To permit such a useless heaping up of costs and disbursements as is involved in allowing both suits to proceed, would, it seems to me be a perversion of justice. And the Court can, I think, by imposing terms interfere without prejudicing the plaintiff and others interested in the proceeds of the Ontario judgment.

If the suit in Ontario fails, if the alleged frauds are not proved and the contract and judgment stand, I do

not see what defence the Company can have here. The statement of claim filed in Ontario admits this, saying that while they stand the Company are without defence to this suit. Now the Court may grant the stay of proceedings here upon the defendant Company submitting to be bound by the ultimate decision in the action now pending in Ontario and to an order for payment of the amount of the consent judgment which may be registered against the lands of the Company and upon which execution may be issued, such order, registration and execution being all subject to the further order of the Court. My Brother Killam has in his judgment stated full details of terms which he thinks, and I agree with him, to be reasonable.

If the defendant Company accepts the proposed terms then an order should go staying proceedings in the meantime, the costs before the Referee, on the appeal from him and of the further appeal to the Full Court being reserved to be hereafter dealt with, it may be by a single judge. If the proposed terms are refused, then the order appealed from must be affirmed with costs.

KILLAM, J.—(After referring to the facts, proceeded.)

The first ground taken by the Company is that the plaintiff selected his *forum*, and that it is vexatious for him to proceed to enforce his claim here as well as in Ontario, at least until after the determination of the litigation in the latter Province.

The answer to this objection is that the litigation, so far as the plaintiff was concerned, was determined. He then proceeded to enforce his claim here, in order to get at property which could not be effectually dealt with by the courts in Ontario. The subsequent litigation in the latter Province was raised by the defendant Company and its shareholders. The plaintiff disputes their contentions. It does not appear that we can say that so far he has been acting oppressively or vexatiously in proceeding as he is doing.

Then, stated in several different ways, the Company sets up that the matters in question can be much more

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conveniently and inexpensively determined in Ontario than here, and that the double sets of proceedings involve wholly unnecessary trouble and expense. Here, it appears to me, the application is based on much stronger grounds.

In my opinion this Court has the right to take these circumstances into consideration, and the jurisdiction to stay or not to stay the proceedings here as may appear most in the interests of justice, having regard to the *prima facie* right of the plaintiff to assert in this Court an ostensible claim *bona fide* put forward.

Such a jurisdiction was apparently recognized in *The Phosphate Sewage Co.* v. *Molleson*, 1 App. Cas. 780, and particularly by Lord Selborne, at p. 787. In *Elliott* v. *Lord Minto*, Mad. & Geld. 16, a bill was filed to have an estate in Scotland exonerated from a heritable bond, by the application thereto of personal estate in England; and, on account of some questions of Scotch law being involved, proceedings were stayed until a suit and a cross-suit upon the same subject matter in the Scotch Courts should be decided.

In *Scott* v. *Pilkington*, 2 B. & S. 11, the Court suggested that an order might be made to stay an action on a foreign judgment pending an appeal in the original action. And in *Huntington* v. *Attrill*, 12 P. R. 36, the Master in Chambers, in Ontario, stayed an action on a judgment recovered in the State of New York, upon the defendant showing merely that he intended to appeal, although he imposed strict terms; and this order was affirmed upon appeal.

In *McHenry* v. *Lewis*, 22 Ch. D. 397, the Court of Appeal in England affirmed the jurisdiction to stay an action in England, when the same plaintiff was proceeding upon the same subject matter against the same defendant elsewhere.

The inherent jurisdiction of a Court over its own proceedings to prevent injustice or oppression, has been clearly established of late in such cases as *Willis* v. *Earl Beauchamp*, 11 P. D. 59; *Reichel* v. *Magrath*, 14 App. Cas. 665; *Lawrance* v. *Lord Norreys*, 39 Ch. D. 213, 15 App. Cas. 210, and *Haggard* v. *Pelicier*, [1892] A. C. 60.

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Both judgment and contract are attacked as obtained by fraud. If the plaintiff were bringing an action at law on either, this Court or the Ontario Court might restrain him by injunction from proceeding with such action, at least that Court within whose jurisdiction he was, might do so. It seems to me reasonable that this Court should be able to restrain him from proceeding in this suit upon the judgment until its validity can be ascertained.

I can see no difficulty about the jurisdiction; the only question seems to be as to the propriety of exercising it under the circumstances of this particular case.

The plaintiff's claim, principally, is upon the judgment of the Ontario Court. Apparently, he has not fully executed his contract, so as to be entitled to the full contract price; otherwise, one would not have expected him to accept less. Serious charges of fraud in the obtaining of that judgment are made against him. It is contended that these have been waived by the taking of possession of the railway works. In my opinion such a contention should be strictly scrutinized, and an advantage gained by fraud should not be upheld unless it be absolutely necessary on established principles to do so. There is some question whether the possession was really obtained under the judgment sued on. The judgment is being attacked in the Court in which it was recovered. The evidence in support of or in defence against that attack must be largely, and, apparently, it will be more advantageously, obtained within the jurisdiction of that Court. As is shown to have been the opinion of Chancellor Boyd of the Ontario Court, the statement of claim attacking that judgment presents "a substantial matter of investigation." The allegations of that statement of claim have been verified by affidavits, so far as can be expected for the purposes of the motion under consideration. The shareholder who appears to have contributed nearly all the moneys that have been advanced by the Company under the plaintiff's contract, in the name of himself and the Company, is attacking both this judgment and the contract

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on which it is based, as having been obtained by fraud. *Prima facie*, it appears that the proper *forum* to determine the validity of the judgment is that in which it was pronounced. It seems unreasonable for this Court to enforce it here, so long as serious ground for distrusting its validity exists. At present, I do not feel very deeply impressed with the claim that the contract was *ultra vires* of the Company as being one partly for the purchase of shares in its own capital stock. Although it is not suggested, and it may not be possible to hold, that the contract was void on grounds of public policy, it certainly was one that should not be encouraged. Not only upon the question of the validity of the judgment, but also upon that of the validity of the contract, the evidence would be the same here and in Ontario. A great deal of evidence upon both points would have to be obtained in the latter Province. That the Courts of that Province are not quite as competent as this Court to determine the matters in dispute is not even to be suggested. From the decisions of those Courts and from those of this Court appeals lie to the same jurisdiction, whether it be to the Supreme Court of Canada or to the Queen in Council. If we but glance at the statement of the various motions and proceedings that have already been brought before the Courts in Ontario in this matter and consider what is disclosed in the material filed on this application, apart from what we know individually otherwise, as to those in this Court, and the enormous expense that will be involved in the taking of the evidence of all the witnesses stated to be necessary and material both here and there, we must see the importance to the parties of avoiding this duplication of expense.

Apparently, in *The Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 416, Lord Cranworth, L. C.; and in *The Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. D. 225, Lord Justice Lindley, thought the test as to whether the double set of proceedings is vexatious, is whether they are unnecessary. If we can so far protect the interests of the plaintiff and the other parties entitled to share in the moneys claimed as to render

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the continuance of this suit unnecessary until the matters in question can be decided in Ontario, where the plaintiff elected in the first instance to proceed, I think it will be vexatious in him to prosecute this suit at present. It appears to me that we can do so.

I would propose that an order be made staying, until further order, the proceedings in this cause upon the following terms:

1. The defendant, the Railway Company, to submit to be bound in the Courts of this Province by the ultimate result of the proceedings now being taken by the Company, or by it and its shareholders, in the High Court of Justice for Ontario to set aside the orders or judgments of said last mentioned Court referred to in the bill of complaint in this suit, and by any order, decree or judgment that may be pronounced amending or varying the same or otherwise made or recovered in the action in that Court in which such orders or judgments were pronounced, save in so far as any provision of such order or judgment would not, upon the ordinary principles relating to foreign judgments, be enforceable in this Province.

2. The order for appointment of a receiver in this cause to stand.

3. The order to direct payment by the Railway Company to the plaintiff of the amount adjudged to him by the orders or judgments referred to in the bill, with interest.

4. The plaintiff to be at liberty to issue and deliver to any sheriff or sheriffs in this Province for execution a writ or writs of *fieri facias* against the goods of the Company, and to register certificates of such order in such land titles offices and registry offices as the plaintiff shall see fit, for the purpose of binding the lands of the Company; any moneys made under such writs or otherwise under the order to be paid into court in this cause to abide the order of the Court, and no further proceeding to be taken against such lands under such registered certificates without the leave of this Court.

5. The order to be subject to variation by the order or

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decree of this Court, for the purpose of making the same conform to the final judgment in the action in Ontario in which the orders or judgments referred to in the bill were pronounced, and for the purpose of giving to any of the parties any additional or other relief beyond the powers of the said Court in Ontario to grant in this Province.

6. Liberty to be reserved to any party to apply to remove this stay of proceedings.

7. Any such order or decree as aforesaid, varying this order or removing such stay of proceedings, may be made by a single Judge sitting in Court, subject to review by the Full Court, on rehearing, as in ordinary cases.

8. The costs of the application to the Referee and on appeal and of this rehearing to be reserved, to be dealt with by a single Judge sitting in Court, subject to a review by the Full Court. But if the Railway Company shall refuse to accept the terms imposed, the order of Mr. Justice Bain and of the Referee to be affirmed with costs.

Such an order will be based to some extent on the principle on which a defendant in an action at law, applying for an injunction to restrain the same, is compelled to confess judgment in the action. In *Bushby* v. *Munday*, 5 Mad. 297, an injunction was granted to restrain an action in Scotland upon a bond, upon the terms that the plaintiff should submit to such steps in Scotland, either by judgment or otherwise, as would secure to the defendant the benefit of any preferable lien on lands in Scotland which he might be able to obtain by his suit if he should ultimately establish a demand on the bond.

DUBUC, J., concurred.

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BOYCE V. McDONALD.

Before DUBUC, J.

Conditional sale of chattel—Purchaser for value without notice—Powers of Joint Stock Company—Promissory note of Company—Authority of Manager of Company to sign note.

Plaintiff sold a buggy to the Gold Seal Oyster Company, which was incorporated under the Manitoba Joint Stock Companies Act, for the purpose of carrying on (amongst other things) a retail business in the sale of oysters, fish and poultry in the City of Winnipeg. The sale was a conditional one, and the plaintiff took a note for the amount of the purchase money signed "Gold Seal Oyster Co., T. H. Jones, Sec.-Treas." The buggy was used in the business of the Company for the delivery of goods and soliciting of orders, although it was sometimes used by the manager of the Company for pleasure driving. The note contained the provision that the property in the buggy and the right of possession should not pass from the plaintiff until payment of the amount in full.

The defendant afterwards purchased the buggy from Jones, the manager of the Company. He did not know that plaintiff had any claim on it.

Held, (1), That the purchase of the buggy and the giving of the note for it, were within the corporate powers of the Company. (2) That in the absence of evidence to the contrary it should be presumed that the manager of the Company had authority to purchase the buggy and to sign the note therefor. (3) And that the defence of purchase for value without notice could not prevail against the plaintiff's title.

ARGUED: 14th March, 1893.
DECIDED: 10th April, 1893.

Statement.

APPEAL from the County Court of Winnipeg. Plaintiff sold a buggy to one Jones, the manager of The Gold Seal Oyster Co., for which he took a note signed "Gold Seal Oyster Co., T. H. Jones, Sec.-Treas." The note contained the proviso that the ownership and right of possession of the property for which it was given should remain in the plaintiff until the note or any renewal thereof should be fully paid. Jones subsequently sold the buggy to the defendant, who had it in his possession when the plaintiff made a demand of same, informing defendant that he, plaintiff, had a lien on the

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buggy for the purchase money which remained unpaid. As the demand was not complied with, plaintiff brought this action. At the trial the County Court Judge entered a verdict for plaintiff for $55 and costs. The defendant appealed.

The principal points raised by the defendant were:

(1.) That the Gold Seal Oyster Co., to which the buggy in question in this cause was sold by the plaintiff, did not require the use of a buggy for the purpose of their business, and therefore had no authority to purchase the same.

(2.) That T. H. Jones, the manager of the Company, was not authorized by the Company to purchase the buggy, and that, in fact, Jones purchased the buggy for his own personal use.

(3.) That the Company had no authority or power to give the promissory note produced in evidence and relied on by the plaintiff, and that Jones had no authority to sign the Company's name to the note.

(4.) That the defendant purchased the buggy from Jones for valuable consideration without notice, and should be protected.

T. H. Gilmour for plaintiff.

T. G. Mathers for defendant.

The following cases were referred to:—*In re Simpson's Claim*, 36 Ch. D. 532; *Buckley on Joint Stock Companies*, 179; *Evans on Principal and agent*, 59; *Overton on Liens*, 1; *Barron on Bills of Sale*, 34; *Malcolm* v. *Loveridge*, 13 Barb. 372; *Fleeman* v. *McKean*, 25 Barb. 483; *Wait* v. *Green*, 36 N. Y. 556; and *Sutherland* v. *Mannix*, 8 M. R. 541.

DUBUC, J.—As to the first and second points, the evidence shows that the buggy was used in the Company's business and for the Company's purposes, and that it was driven by Jones and by the boys in the store for the taking of orders and for the delivery of goods. Jones

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was one of the directors of the Gold Seal Oyster Co., the first one named in the charter of incorporation, and the manager thereof. He may have occasionally used the buggy for his own private purposes, but that does not alter the fact that the buggy was purchased for the Company, and was used in their business. So much for the question of fact. As to whether the Company necessarily required a buggy in their business, it cannot be said that the article was an absolute necessity, so that the business could not possibly be carried on without it. But it cannot be denied that a vehicle of some kind to deliver goods to customers, is generally required and ordinarily used in such a business, and the buggy in question could answer the purpose, as was shown in the evidence. I agree with the learned County Court Judge that the Company required a vehicle for the purpose of their trade, and that the purchase of the buggy was within the scope of their authority.

As to the authority of Jones to purchase the article in the name of the Company, there is nothing to show or even to suggest, that his authority to make the transaction was ever disputed or questioned by the Company or any of its members, or by any other person claiming under the said Company. On the contrary, the Company, by allowing the buggy to be used in their business, may be presumed to have authorized the transaction, or at least to have ratified it if done without their previous authorization. And if the authority of the agent is not repudiated or questioned by his principal or any other person claiming under him, I do not see how a third party absolutely unconnected with the principal or his business, can attack such authority.

The same may be said of Jones' authority to sign the Company's name to the note given for the price of the buggy. His authority to give the note is not denied or questioned by the Company, of which Jones was the agent.

As to the Company's power to make promissory notes

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when no such authority is expressly given in the charter, section 62 of the Joint Stock Companies' Act, R. S. M. c. 25, providing that every contract &c., promissory notes and cheques drawn or indorsed on behalf of the Company by any agent, officer or servant of the Company, shall be binding upon the Company, contemplates that companies incorporated under the Act, will be empowered to make promissory notes, unless specially restrained or prevented from doing so by their charters.

As to the last point contended for by the defendant, *i. e.*, that being a *bona fide* purchaser for value without notice, he should be protected against the claim of the plaintiff, the question was raised in *Sutherland* v. *Mannix*, 8 M. R. 541, and decided against the defendant's contention.

The note given here is substantially similar to the one relied on in *Sutherland* v. *Mannix*. Incorporated in said note is an agreement that the ownership and right of possession of the property for which the note is given shall remain in the plaintiff until the note or any renewal thereof is fully paid. It may be said of said note, as of the one in *Sutherland* v. *Mannix*, that it is neither a receipt note, nor a hire receipt, nor an order for chattels, coming within the provision of R. S. M. c. 87, s. 2, because it was not a condition of the bailment that the possession should pass, as contemplated by the said section.

It was urged on behalf of the defendant that a fraud having been committed by Jones, and a loss resulting therefrom, the plaintiff who put Jones in a position which enabled him to commit the fraud, should rather bear the loss than the defendant who was victimized by Jones. Some American authorities were cited in support of the contention. The broad proposition that in a case where one of two innocent persons must suffer, it is better that the loss should fall on him who has been instrumental in the wrong than upon the other who had no power to guard against the fraud is, no doubt, a correct and sound doctrine, but that proposition is qualified in the determination of the cases cited.

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In *Malcolm* v. *Loveridge*, 13 Barb. 372, it was held that a *bona fide* purchaser or mortgagee of goods for a valuable consideration from a person in possession, who obtained them from the owner by false pretences, amounting under the statute to a felony, will hold them against the first vendor provided such vendor voluntarily parted with the possession, and intended to part with the title. Welles, J., speaking for the Court says in that case: "It is a fundamental rule of the law of personal property that no one can transfer a better title than he has himself, and a sale *ex vi termini*, imports nothing more than that the purchaser succeeds to the rights of the vendor."

It was held in *Wait* v. *Green*, 36 N. Y. 556, that on a conditional sale of a chattel, the vendor's right of property remains as against the vendee and his voluntary assignee, but not as against a *bona fide* purchaser for value. But that case was virtually overruled by *Ballard* v. *Burgett*, 40 N. Y. 314, where it was held that a *bona fide* purchaser of personal property other than commercial paper, although from one who has the possession, acquires no better title than that of his vendor.

In the present case, the defendant purchased the buggy from Jones, who had no title whatever to it. He had contracted for and in the name of the Gold Seal Oyster Co., to purchase the said buggy; but by the same contract he had agreed in writing that the right of possession as well as the ownership was to remain in the plaintiff, until the note should be fully paid. He had, therefore, no title and no legal possession to transmit to the defendant.

One of the arguments of the defendant's counsel was that the plaintiff, having suspicions of Jones' probity, should not have allowed him to take the buggy, because by so doing, he enabled him to defraud the defendant. But the agreement which the plaintiff required Jones to sign in the name of the Gold Seal Oyster Co., shows that he wanted to take no risk, and was guilty of no laches. The defendant himself should have been more diligent, and, knowing that Jones was to leave the Province, he

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might have inquired from whom the buggy had been purchased, and ascertained whether it had been paid for; *Vigilantibus non dormientibus subvenit lex.*

I think the judgment of the County Judge should be affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

BRAYFIELD v. CARDIFF.

Before DUBUC, J.

Illegal distress—Damages for—Leave and License—Contract not under seal and without consideration—Nudum pactum.

The defendant attempted to justify a seizure for rent under a warrant of distress, by producing a document signed by the plaintiff, which purported to give him the right to seize the plaintiff's goods for rent before the rent fell due according to the lease. The learned Judge found as a fact that this document was not sealed at the time of its execution, and no consideration was shown for the plaintiff executing it.

Held, that it was a *nudum pactum* and that the defendant could not justify under it.

ARGUED: 27th March, 1893.
DECIDED: 26th April, 1893.

Statement.

THIS was an action for damages for illegal distress tried at the Brandon Assizes in the spring of 1893. The facts appear in the judgment.

G. R. Coldwell, for plaintiff.

W. A. Macdonald, for defendant.

The following cases were referred to:—*Chidell* v. *Galsworthy*, 6 C. B. N. S. 471; *Massey Manufacturing Co.* v. *Perrin*, 8 M. R. 457; *Clowes* v. *Hughes*, L. R. 5 Ex. 160; *Hogg* v. *Brooks*, 15 Q. B. D. 256; *Phillips* v. *Bridge*, L. R. 9 C.

P. 48; *Howell* v. *Listowell Rink Co.* 13 O. R. 476; *Carr* v. *Allatt*, 27 L. J. Ex. 385.

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DUBUC, J.—This is an action of damages for illegal distress, and for trespass to goods and trespass to lands. The rent reserved by the lease was $550, payable in equal portions on the first day of July, and on the first day of December. But the following proviso is found in the lease: "Proviso by the said lessor that on non-payment of rent, or on non-performance of covenants, he, the said lessor may re-enter and take possession, except in the event of non-payment of rent, due on 1st July, when lessor agrees to carry over to the 1st of December." It is clear that by this proviso, no distress for rent could be made under the lease before the 1st December.

The distress complained of took place on the 25th October 1892, and the goods distrained were sold on the 2nd November.

The defendant claims to have had authority to seize and sell the goods of the plaintiff under a certain instrument dated the 26th September 1892, and signed by the plaintiff. By said instrument, it is provided amongst other things, that "if for any reason the lessor should consider his rent insecure, he (the lessor) would have full power to declare his rent and all other notes or securities made by the lessee in the lessor's favor due and payable at any time, and the lessor can take possession of goods and chattels belonging to the said lessee now on the south east quarter of section sixteen, township ten, range eighteen, (the lands leased,) and hold or sell said goods or chattels at any time by public or private sale, the proceeds thereof to be applied on the rent, notes or securities held by the lessor." The instrument speaks of "the lessor" and "the lessee," and refers incidentally to "the lease," but it does not describe any particular lease, nor does it state specifically or even in general terms what connection or relation it has with the said lease. It is, however, easy to see what lease is referred to.

The said instrument invoked by the defendant as a leave

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and licence to seize and sell the plaintiff's goods, has a seal affixed to it opposite the signature of the plaintiff. But the plaintiff swears positively that there was no seal when he signed it, and he says that he pointed out the fact to the defendant at the time. This was denied by the defendant, who stated under oath that the seal was there at the time of the signing of the instrument. But a small particularity shows that the plaintiff's version is the correct one. On one of the duplicates of the said instrument, the seal overlaps the last letter of the plaintiff's signature; this shows conclusively that the document had no seal when the plaintiff signed it, and that the said seal was placed there at some subsequent time.

It was argued by the plaintiff's counsel, and admitted by the defendant's counsel, that leave and license to re-enter must be under seal. The defendant's counsel contended, of course, that said document was under seal, and that under said document the defendant had the right to seize the goods of the plaintiff for the rent and other liabilities of the plaintiff mentioned therein.

He contended further, that on account of the state of circumstances between the parties, the numerous liabilities of the plaintiff to other persons, and the danger in which the defendant was of being unable to get his rent on the 1st December, the instrument, even if not under seal, was sufficient to justify the defendant in seizing the goods of the plaintiff. But, finding as already stated, that the document had no seal when it was signed by the plaintiff, it would become necessary to show a consideration for the extraordinary power and privilege stated in the document to be given by the plaintiff to the defendant. The document itself says at the beginning: "In consideration of value received and accommodation obtained, I, (the lessee), hereby waive" &c.; but no consideration or accommodation is mentioned; and in the evidence no pecuniary consideration, and no accommodation or forbearance of any kind is shown to have been given by the defendant to the plaintiff. The plaintiff had already,

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under the lease, until the 1st December to pay the rent, and no distress could be made until the rent was due; he gained nothing and obtained nothing more in signing the said document. As far as the evidence shows, it was a *nudum pactum*. As he repudiated the contract and protested as strenuously as he could when the defendant came to enforce it and distrain his goods, I cannot see that the defendant had any right to seize the said goods on the 25th October.

I must hold, therefore, that the seizure and the sale of the plaintiff's goods were illegal, and that the plaintiff is entitled to recover the damages caused to him by said seizure and sale.

Verdict for plaintiff.

[The remainder of the learned Judge's judgment relates only to the amount of damages to be awarded, and need not be reported.—ED.]

BURKE V. BROWN.

Before TAYLOR, C.J.

Appeal from County Court—Filing of evidence—Delay in prosecution—Copy of evidence—Transmission of papers by the County Court Clerk.

In filing a copy of the notes of evidence in the County Court for the purpose of an appeal to the Queen's Bench, it is necessary under section 324 of the County Courts Act, that a law stamp should be affixed to the document.

It is essential under section 323 of the Act, that the Clerk of the County Court should transmit directly to the Prothonotary of the Queen's Bench in a sealed package, all the papers and proceedings in his office relating to the suit, and where such papers were handed by the County Court Clerk to the appellant's attorney in an unclosed envelope, and the attorney had them in his possession until the day before the hearing of the appeal, it was dismissed with costs.

ARGUED: 2nd May, 1893.
DECIDED: 8th May, 1893.

THIS was an appeal by the claimant against the decision Statement.

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in an interpleader issue, tried in the County Court of St. Francois Xavier. Several preliminary objections were taken to the regularity of the proceedings on the appeal.

The facts appear in the judgment.

R. R. Sutherland, for the appellant.

J. R. Haney, for the respondents.

TAYLOR, C.J.—It was objected that two orders were made in this case on the same day, and it does not sufficiently appear against which the appeal is taken, and no leave to appeal, under section 316 of The County Courts Act, is shown. But there is produced among the papers the affidavit of intention to appeal filed under section 317, and in that the appeal is stated to be against the order, decision, judgment or verdict of the learned Judge at the hearing of the interpleader issue. Of this it must be presumed the clerk of the Court gave the respondent notice, as required by section 318. There is also an application for leave to appeal on behalf of the claimant, from the judgment given at the hearing of the interpleader issue on 15th March, 1893, and to this there is appended a leave to appeal signed by the learned Judge. The giving of security for the costs of the appeal is also now proved by production of a receipt signed by the clerk of the County Court for $25 deposited with him as such security.

There are, however, other objections. One of these is that the requirements of section 324 have not been complied with. That section provides that within six days after the filing of the *præcipe* to set down the appeal, the appellant is to file with the Prothonotary a statement of the order, decision, or judgment, or a copy thereof if given in writing, and if a trial has been had, a copy of the evidence or notes of evidence taken at such trial, and of all recorded objections and exceptions thereto verified by certificate of the clerk of the County Court. A certified copy has been left with the Prothonotary, but it has not been filed; that

is, no law stamp for filing such a document has been affixed to it. It seems it has never been the practice in the office to require a stamp to be put upon such a document, the statement, or copy of the judgment, and the certified copy of the evidence having always been simply deposited, following, the Prothonotary tells me, the analogy of copies of evidence furnished by the reporter, and put in on motions for new trials in Term. There is, however, a marked difference in the language of the statute, and of the general orders as to evidence on motions in Term. The statute says, the appellant "shall . . . file with said Prothonotary" the documents in question. General Orders, 68, 69, 70 & 71, which refer to evidence upon motions in Term, invariably speak of copies of the evidence being deposited with him. The party moving is to order in writing, through the Prothonotary, copies of the evidence, and when these are made, the reporter, "shall deposit the same, certified by him, with the Prothonotary." Then, the Prothonotary is to keep posted up a list of the causes &c., in which the reporter, "shall have so deposited with him such copies of notes of evidence," and upon the reporter's fees being paid, he is to "deliver to the judges" three copies of the reporter's notes. What these orders deal with is evidence taken in causes already in the Court of Queen's Bench, existing and to be found in the note books of the Official Court Reporter, and all that is needed therefore is, that copies of that evidence in extended form should be made for the use of the judges who are to hear the motion. But in the case of a County Court Appeal it is quite different, for there is no cause pending in the Court of Queen's Bench, and no evidence among the records of that Court. Now there should be some record in the Court of what the Judge acts upon in disposing of the appeal. For that the County Court Act properly makes provision. Section 320 requires the filing of a *præcipe* to set the appeal down, and by section 321 this must set out the nature of the application to be made, and the grounds thereof. Then section 324 requires the filing

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TAYLOR, C.J.

of a statement of the order, decision, judgment or verdict appealed from, or a copy if in writing, and a properly certified copy of the evidence. These documents together form the record of the case on appeal, in this Court. In future, therefore, the requirements of section 324 must be complied with by filing in the proper and strict sense of that term, the documents therein mentioned.

I would not, however, considering the uniform practice which has up to the present time been followed, dismiss the appeal on this ground, but would allow stamps to be affixed now. There are, however, other objections.

The judgment appealed from was given on the 15th of March. The application for leave to appeal, the filing of the affidavit of intention to appeal, and the filing of the *præcipe* to set down the appeal, were proceedings all taken within the times limited on that behalf. The *præcipe* was filed on the 3rd of April. Now it was necessary, under section 324, to file a statement of the judgment, and a certified copy of the evidence within six days after that, which would have been not later than the 9th of April. But this was not done. A copy of the evidence was prepared, to which an imperfect certificate of the clerk was attached, but that seems to have been dated the 12th of April, so plainly the certified copy could not have been with the Prothonotary on the 9th. An attempt is made to excuse this delay by setting up difficulties in getting the Judge's book for the purpose of making a copy of the evidence, but I am by no means satisfied that had due diligence been used, it could not have been got earlier. Taking all the affidavits before me, I cannot come to the conclusion that there was such inadvertence or accident as would under section 328, warrant my extending the time.

Then there is another and most serious objection. Section 323 requires the clerk of the County Court upon request to transmit to the Prothonotary, in a sealed package, all the papers and proceedings in his office. Here the papers were not so transmitted, but were handed by the clerk to the appellant's attorney, apparently open, in

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an unclosed envelope, and he had them in this condition in his possession for sometime. It was from him that they came into the office of the Prothonotary. After the case came up on the first occasion, he again took them away and had them in his possession until the afternoon of the day before it came on before me. Now this provision in the statute is not an unimportant one. On the contrary I regard it as exceedingly important. It is intended to secure that all the papers used in the Court below shall come to this Court on the appeal and none but these, and further that they shall come in their integrity without the possibility of their being tampered with.

Where a clerk requested to transmit papers, fails to do so in the regular way prescribed by the statute, the appellant or his attorney may not be responsible for that and should not be prejudiced, but there can be no excuse here. The attorney took the papers from the clerk, and took them open, so he was clearly a party to and responsible for the irregularity.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

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YOUNG v. HOPKINS.

Before KILLAM, J.

Practice—Money paid into Court by defendant—Impounding for costs taxed against plaintiff—Withdrawal by plaintiff—Time of operation of Judge's order.

The Court cannot go behind the date appearing on the face of an order, inquire when it was pronounced and give it operation as of a prior date.

In general an order is not effective until it is drawn up, signed and served.

The defendant had paid a sum of money into Court, which the plaintiff refused to accept as sufficient. The defendant had a verdict. A person to whom the plaintiff had assigned his interest in the suit then applied for payment out of court of the moneys paid in by defendant, but his application was, on 16th December, 1892, refused on the ground that the money should be impounded to answer the defendant's costs of suit.

No order impounding the money was taken out until 27th December, 1892, and in the meantime the money was taken out of court by the plaintiff on *præcipe*.

Held, that plaintiff had a right to do so, and an application by defendant for an order on the plaintiff's attorney for payment of the defendant's costs was dismissed, but without costs.

ARGUED: 29th June, 1893.
DECIDED: 20th July, 1893.

Statement. THIS was an application by defendant for an order requiring the plaintiff's attorney to repay enough of the money taken out of Court by him to satisfy the defendant's taxed costs of suit, under the following circumstances:—

The plaintiff sued on a promissory note; the defendant pleaded several pleas and paid into Court $359.60. The plaintiff refused to accept this amount in satisfaction of his claim and the case went to trial, when the amount paid into court was found sufficient to satisfy the plaintiff's claim and a verdict was entered in favour of defendant with costs.

The plaintiff assigned the note and the money to O'Brien & Co., who made an application for payment of the money out of court to them. This application the defendant resisted on the ground that the money in court should be

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impounded to answer his costs, and on the argument he asked that this be done. A written judgment on this application was given by Mr. Justice Dubuc on 16th December, 1892, dismissing it on the ground that the money should be impounded to answer the defendant's costs. But the judgment did not contain any positive order impounding the money, and it was not shewn that His Lordship had then made any verbal order actually impounding the money. Afterwards, on 27th December, 1892, the defendant's attorney took out an order bearing that date and signed by Mr. Justice Dubuc that the money in court be impounded for payment of the defendant's costs as taxed, and that the surplus be paid out to O'Brien & Co. The plaintiff's attorney had, however, on the same day the aforesaid judgment was given, taken the money out of Court on *præcipe* in the usual way, being, as he said, under the impression, at the time, that the decision of His Lordship of that date merely dismissed O'Brien & Co.'s application, and claiming that he did not know it was intended that an order was to be made impounding the money.

A summons was afterwards taken out by defendant calling upon the plaintiff's attorney to show cause why he should not be ordered to pay into court the amount of defendant's taxed costs of suit or to pay the same to defendant or his attorneys on the ground that the money in Court had been ordered to be impounded by Mr. Justice Dubuc on 16th December, 1892, and that, although the order was not drawn up and dated until 27th December, 1892, the plaintiff's attorney had no right or authority to withdraw the money from court, under the circumstances.

J. A. M. Aikins, Q.C. for defendant.

C. P. Wilson, for the attorney.

The following cases were referred to :—*Simmons* v. *Rose*, 31 Beav. 1; *In Re Dangars Trusts*, 41 Ch. D. 199; *Slater* v. *Slater*, 58 L. T. N. S. 149; *Cordery on Solicitors*, 133;

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Dixon v. *Wilkinson*, 4 De. G. & J. 507; *Stephens* v. *Hill*, 10 M. & W. 28; *Simes* v. *Gibbs*, 6 Dowl. 310; *Ex parte Jones*, 2 Dowl. 161; *Gray* v. *Kirby*, 2 Dowl. 601; *Re Fenton*, 5 N. & M. 239; *Re Phelps*, 3 Jur. 479; *Queen* v. *Biggs*, 2 M. R. 18; *Kelly* v. *Wade*, 14 P. R. 67; *Hopton* v. *Robertson*, 23 Q. B. D. 126; *Eaton* v. *Dorland*, 15 P. R. 138; *Batten* v. *Wedgwood Coal Co.*, 31 Ch. D. 346; and *Re Spencer*, 18 W. R. 240.

KILLAM, J.—It is apparently conceded by the applicant that until the making of an order impounding the money, the plaintiff was entitled to have it paid out to him on *præcipe* without order. The only written order impounding the money bears date the 27th December, eleven days after it had been withdrawn from court. No authority has been cited to show that the Court can go behind the date appearing on the face of the order, inquire when it was pronounced and give it operation as of a date prior to that appearing on its face. The general rule is that an order does not operate until it is drawn up, signed and served. *Charge* v. *Farhall*, 4 B. & C. 865, 7 D. & R. 422; *Joddrell* v. —— 4 Taunt. 253; *Wilson* v. *Hunt*, 1 Chit. 647; *Belcher* v. *Goodered*, 4 C. B. 472, 16 L. J. C. P. 177; *Sedgewick* v. *Allerton*, 7 East, 542; *Metcalfe* v. *The British Tea Association*, 46 L. T. N. S. 31.

This rule is not, as is claimed, confined to interlocutory orders, for in the last of the cases cited the order was one which, if taken out, would have put an end to the action. In *Sedgewick* v. *Allerton*, one reason assigned for this rule was that "it might otherwise open a door to mistakes and perjury as to the terms on which the order was granted." The conflict of evidence upon this application illustrates this reasoning abundantly.

I cannot interpret the written opinion of my brother Dubuc as directing an impounding of the money. The application was for payment of the money out of Court to the plaintiff's assignee. That application was refused on the ground that the money ought to be impounded. It is true that, as the notes of the learned Judge show and as he

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himself informs me, he intended at the time to order the impounding of the money; but it is not clear, in view of the conflict of evidence, that he pronounced any order except by reading his written judgment. Therefore, even if I could go behind the date on the face of the order and inquire when it was actually pronounced, I am not in a position to say that there was any definite order, verbal or written, on the 16th December, which took away the strict right of the plaintiff to withdraw the money, although it is impossible to approve of its exercise under the circumstances or of the concealment of the fact when the question of the date of the order was raised.

I dismiss the application without costs.

Application dismissed without costs.

HARVIE v. SNOWDEN.

Before DUBUC, J.

Trial by Jury—Action for malicious prosecution—Application for a Jury.

Since the statute 54 Vic. c. 1, s. 33, which enacted that all issues of fact in civil cases, except in actions of libel and slander, shall be tried by a judge without a jury, but provided that an application may be made to a judge in Chambers in any case to have the issue tried by a jury, special circumstances must be shown in order to have an action for malicious prosecution tried by a jury. By the repeal of the former statute the Legislature showed that they considered that an ordinary action for malicious prosecution should be tried by a judge without a jury.

ARGUED: 16th March, 1893.
DECIDED: 10th April, 1893.

Statement.

ACTION for damages for malicious prosecution. The plaintiff applied to have the issue in the cause tried by a jury.

T. D. Cumberland, for plaintiff.

J. H. Munson, for defendant.

DUBUC, J.—Under 48 Vic. c. 15, s. 23, all issues of fact in civil cases were to be tried by a jury, or by a judge without a jury, and where a jury notice had been duly

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given by either the plaintiff or the defendant, the Court or a Judge might, on the application of the other party, order the jury notice to be struck out, and the issue to be tried by a judge without a jury; certain actions, however, specifically mentioned, were directed to be tried by a jury, unless the parties waived their right to such trial. Among those actions was that for malicious prosecution.

That provision was repealed by 54 Vic. c. 1, s. 33, which enacts that "all issues of fact in civil cases in actions and proceedings at law shall be tried by a judge without a jury, provided that an application may be made to a judge in chambers to have the issue tried by a jury."

Under the former statute, the *onus* was on the party desiring the issue to be tried without a jury to show that such issue would be more properly tried by a judge. By the latter statute it is for the party requiring a jury to show that the issue would be more properly tried by a jury. The actions of libel and slander are excepted from the operation of the said provision; but the action of malicious prosecution is not. This shows that the Legislature intended that ordinary actions for malicious prosecutions should be tried by a judge without a jury, unless there would be some complicated questions of fact, or special circumstances to be investigated, which would render the issue more properly triable by a jury than by a judge.

I cannot see that such is the case here. There are no doubt some questions of fact to be investigated, as there always must be in an action for malicious prosecution; but they do not appear to be particularly complicated or to offer special difficulty. It seems to me an ordinary action for malicious prosecution based on simple and ordinary grounds. If the issue herein should be ordered to be tried by a jury, I see no reason why a jury should not be ordered in every action for malicious prosecution, and this would be contrary to the letter and spirit of the statute above referred to.

I think the summons should be dismissed with costs.

Summons dismissed with costs.

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ARCHIBALD MCDONALD V. MCQUEEN.
MARY JANE MCDONALD V. MCQUEEN.

Before DUBUC, J.

Interpleader issue—Sale of lands to daughter of judgment debtor—Family transactions—Fraudulent conveyance.

The judgment debtor having received notice of the judgment creditor's intended suit against her went to Winnipeg where her daughter was living, and sold her farm to her for the purpose of defeating her creditor's claim, but the daughter was not aware of her mother's purpose in selling, and not being informed of the threatened suit, paid her money in good faith and received a conveyance of the land. The daughter then leased the land to her brother, and the Judge found that this lease was also in good faith. The brother cropped the land for himself and afterwards the crops were seized in execution against the mother.

Held, that any such crops must be deemed to be the property of the son and not of his mother as against the execution creditor. Although family transactions by which creditors are defeated are ordinarily looked upon by the Court with a good deal of suspicion, yet when the evidence is clear and satisfactory they will not be set aside.

ARGUED: 14th November, 1893.
DECIDED: 25th November, 1893.

Statement.

THESE were two interpleader issues tried together, and the same evidence applied to both.

Under deed dated the 17th May, 1883, Christina McDonald, mother of both plaintiffs, was the owner of the S. W. ¼ of section 17, township 14, range 11, west of the principal meridian in this Province.

By deed dated the 21st February, 1893, she conveyed the land to her daughter Mary Jane McDonald.

By an agreement intended to be a lease, dated the 1st April, 1893, the land was leased by Mary Jane McDonald to her brother Archibald McDonald, who cropped the same, the rent agreed to being one third of the grain grown on the same.

Some time in August, 1893, the Sheriff under an execution, at the suit of Annie McQueen against Christina

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McDonald, seized the grain in question. Both plaintiffs having made claim to the grain, the Sheriff interpleaded.

W. J. Cooper, for plaintiff.

E. Anderson, for defendant.

The following cases were referred to:—*Ripstein* v. *British Canadian Loan Co.*, 7 M. R. 119; *Wallbridge* v. *Hall*, 4 M. R. 341; *Bank of B. N. A.* v. *Rattenbury*, 7 Gr. 383; *Bank of U. C.* v. *Beatty*, 9 Gr. 321; *Buchanan* v. *Dinsley*, 11 Gr. 132; and *Stevenson* v. *Franklin*, 16 Gr. 139.

DUBUC. J.—The question to be determined is whether the sale and lease in question were merely colorable, or *bona fide* valid transactions.

It appears clearly enough from the evidence that the intention of Christina McDonald, when she came to Winnipeg to sell her land, was to prevent Annie McQueen from enforcing her claim against her. She had not been sued yet, but McQueen had threatened to bring an action against her. The writ was issued on the 20th March, judgment signed on the 1st April, and execution placed in the Sheriff's hands on the 8th April.

But was that intention communicated to Mary Jane McDonald or Archibald McDonald, or otherwise known by either of them? Both swear to the contrary. Mary Jane McDonald was a servant, having been in service for over eight years in Winnipeg at wages from $15 to $20 a month. As stated by herself and corroborated by her brother, she had, within the last two or three years loaned her mother $350, she paid her $100 more at the time of the transaction, and $207 since: making altogether $657 of the purchase money paid; the consideration was $1500 over and above a mortgage of $1000, existing on the land. She swore most positively that her mother never told her that she wished to sell the land to protect her against her creditors, and being absent from home, she had no knowledge whatever of the threatened suit of McQueen; and she did not buy the land to help her mother to defeat

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her creditors, but for the purpose of getting her own out of it. Though she was submitted to a severe cross-examination, her evidence was not shaken in any way.

The evidence of Archibald McDonald was to the same effect. Having heard that his sister had purchased the farm, he wrote to her asking to lease it, and the lease was prepared and executed. He purchased part of the seed grain, and he had some left from the previous year when he had rented and cropped 175 acres of land from one McCaskill. His evidence, which was not weakened by the cross-examination, showed that the land was cropped by himself and for himself, and not for his mother.

Family transactions by which creditors are defeated, are ordinarily looked upon by the courts with a good deal of suspicion. Two cases in our own Court were cited. In *Ripstein* v. *The British Canadian Loan & Investment Co.*, 7 M. R. 119, the question was as to the ownership of the goods between husband and wife, and the uncorroborated statement of the wife was found insufficient to establish that she was the real owner thereof. *Wallbridge* v. *Hall*, 4 M. R. 341, was an action of trespass for wrongful seizure after the execution creditor had abandoned under the interpleader proceedings, and has no application to this case.

The following Ontario cases were referred to: *The Bank of British North America* v. *Rattenbury*, 7 Gr. 383; *The Bank of Upper Canada* v. *Beatty*, 9 Gr. 321; *Buchanan* v. *Dinsley*, 11 Gr. 132 and *Stevenson* v. *Franklin*, 16 Gr. 139. But in those cases the Court came to the conclusion, on the evidence, that the transactions, the validity of which was questioned, were colorable or fictitious sales, and were fraudulent.

In this case, whatever may have been the intention of Christina McDonald in selling her land, the facts brought out in evidence show that Mary Jane McDonald purchased the said land without knowing of any fraudulent intention of her mother, or even that she was threatened to be sued, and gave a *bona fide* consideration for the said

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land; that Archibald McDonald rented the land from his sister and cultivated it on his own account, and not for his mother. The evidence is complete to establish that, so far as both plaintiffs were concerned, both were *bona fide* transactions. Against that there is only a suspicion that the transactions, being between members of the same family, might be colorable instead of *bona fide* ones. Under such circumstances the mere suspicion cannot be given effect to in avoiding transactions supported by direct and unshaken evidence.

Verdicts should be entered for the plaintiffs in both cases.

Verdicts for plaintiffs.

WILSON v. SMITH.

Before TAYLOR, C.J., DUBUC AND BAIN, JJ.

Attachment—Setting aside for irregularity—Term of bringing no action for damages—Costs, refusal of.

In suing out a writ of attachment against defendant, plaintiff had omitted to state in his affidavit whether the defendant was a corporation or not. The defendant, being therefore entitled *ex debito justitiæ*, to have the writ set aside,

Held, Dubuc, J., dissenting, that the Court could not impose the term of bringing no action against the plaintiff as a condition of setting the writ aside, but that costs should be refused unless defendant would consent to such term being imposed.

Ashdown v. *Dederick*, 2 M. R. 212, followed.

Per Dubuc, J.—The Court has jurisdiction to impose the term of bringing no action in a proper case, and in this case such term should be imposed.

ARGUED: 29th November, 1893.
DECIDED: 20th December, 1893.

Statement. THE plaintiffs sued out a writ of attachment against the defendant, which was afterwards set aside by the Referee in Chambers, on the ground that the affidavit on which the

writ issued omitted to state whether or not the defendant was a corporation, and his order was affirmed on appeal by Mr. Justice Killam. They then appealed to the Full Court, contending that they were entitled to the writ, or that if it should be set aside, they should be protected against any action being brought against them by the defendant.

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

W. H. Culver, Q.C., for defendant.

The following cases were referred to:—*Reg.* v. *Stewart*, 8 P. R. 297; *Green* v. *Hammond*, 3 M. R. 97; *Robertson* v. *Coulton*, 9 P. R. 18; *Scott* v. *Mitchell*, 8 P. R. 523; *Ashdown* v. *Dederick*, 2 M. R. 212; *Lorimer* v. *Lule*, 1 Chitty, 134; *Stockbridge* v. *Sussams*, 6 Jur. 437; *Rhodes* v. *Hull*, 26 L. J. Ex. 265; *Higgins* v. *Brady*, 10 U. C. L. J. O. S. 268; *Bartlett* v. *Stinton*, L. R. 1 C. P. 483; *Abbott* v. *Greenwood*, 7 Dowl. 534; *In re Wray*, 36 Ch. Div. 138; and *Golding* v. *Wharton Saltworks Co.*, 1 Q. B. D. 374.

TAYLOR, C.J.—Upon the argument it appeared that the affidavit for the order under which the writ issued did not, as required by section 7 of The Attachment Act, state whether or not the defendant is a corporation. It was therefore impossible to support the writ and counsel were directed to confine their argument to the question, whether the plaintiffs should be protected from an action. The question is, has the Court the jurisdiction to impose the condition that no action shall be brought.

In the oldest case cited *Lorimer* v. *Lule*, 1 Chitty, 134, in which judgment was signed by mistake, the defendant having appeared, the judgment and execution were set aside, and an order for the protection of the plaintiffs being asked, the judgment of the Court is thus reported: "When a defendant applies to us to set aside a judgment for irregularity, we have a discretionary power of imposing upon him just and equitable terms as a condition or qualification of our interference; and we shall not suffer a party so applying to prosecute an action of trespass, merely on account of such a slip in practical accuracy.

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When a case of malicious injury or undue execution of process is laid before us, we will impose no such restraint, but this is not a case of that description." In a note to that case two cases are mentioned. *Wilson* v. *Kingston*, in which a defendant was discharged from a *ca. sa.*, because illegal, and *Simmons* v. *Johnson*, in which a *fi. fa.* was set aside because a writ of error had been allowed before it was issued, and in both it is said the term of not bringing an action was imposed. In *Hart* v. *Ruttan*, 23 U. C. C. P. 613, in which an attachment was set aside because the plaintiff had not sworn that the defendant was a resident in Ontario, the rule by way of appeal from the Judge in Chambers was discharged with costs, and the term imposed of bringing no action. In *Higgins* v. *Brady*, 10 C. L. J. O. S. 268, where the affidavit had the same defect as in the last case, Wilson, J., set aside the attachment and all proceedings upon it with costs, no action to be brought for anything connected with such proceedings. In neither of these two cases in Ontario does any objection seem to have been taken to the Court imposing terms.

As to the case of *Lorimer* v. *Lule*, if it has not, as I rather think it has, been overruled by *Cash* v. *Wells*, 1 B. & Ad. 375, it has not been followed in England in more recent cases. In that case of *Cash* v. *Wells*, a judgment was set aside as having been entered contrary to good faith, and the plaintiff's counsel asked for protection, relying on affidavits which attributed plaintiff's proceedings to mistake, and on the authority of *Lorimer* v. *Lule*, but the Court said they could not impose terms without the defendant's consent, because his application was *ex debito justitiæ*, to have proceedings set aside which were against good faith. It was said, however, they were not compelled to give costs, and they would refuse these unless he consented not to bring an action. The principle laid down in that case was approved of by Patteson, J., in *Abbott* v. *Greenwood*, 7 Dowl. 534. So, in *Adlam* v. *Noble*, 9 Dowl. 322, where a judgment and execution were set aside for irregularity, it

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was held that the Court had no power to enforce the term of bringing no action. In *Stockbridge* v. *Sussams*, 6 Jur. 437, the term of bringing no action was imposed on setting aside a judgment and execution, but as Patteson, J., said, "This is not an irregularity on account of which the defendant was entitled as a matter of right to come to the Court and have the judgment set aside; and therefore we may impose the terms of not bringing an action."

In our own Court in *Ashdown* v. *Dederick*, 2 M. R. 212, it was held that as the defendant was entitled to the order, the only thing the Court could do was to refuse him costs unless he undertook to bring no action, which he declined to do, and therefore the order was made without costs.

It seems to me on a review of the cases that where the defendant comes to the Court *ex debito justitiæ*, terms cannot be imposed without his consent, although he may be deprived of costs if he does not consent.

It was argued that where the defendant moved his rule or summons with costs, he subjects himself to the liability of having terms imposed without his consent. I do not think so. It seems to me that the references to the rule not asking costs, in *Rhodes* v. *Hull*, 26 L. J. Ex. 265, and in some other cases amount only to this, that where no costs are asked, and so the Court has not that question to deal with, as one learned Judge expressed it, the screw is taken away which might have been used to extort consent. In *Cash* v. *Wells* the rule was moved with costs, but it does not seem to have occurred to any one that on that account, the Court acquired jurisdiction to impose terms without consent.

The appeal must be dismissed. As in *Ashdown* v. *Dederick*, 2 M. R. 212, we cannot interfere with the disposition of the costs made by the learned Judge on the appeal from the Referee, but we can dismiss this appeal without costs unless the defendant consents to our imposing the term that no action shall be brought.

DUBUC, J.—The writ of attachment issued herein was set aside by the Referee, on the ground that the plaintiffs

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had omitted to allege in their affidavit that the defendant was not a corporation as required by section 7 of The Attachment Act. The plaintiffs appealed from the order of the Referee before my brother Killam, and the appeal was dismissed with costs. On their appealing to the Full Court, it was held that the affidavit did not comply with the requirement of the statute, and that the writ of attachment was properly set aside.

The only question remaining to be determined is whether there should be, in the order setting aside the attachment, a protecting clause declaring that no action for damages should be brought against the plaintiffs by reason of the attachment of the defendant's goods.

It seems conceded that, in such cases, if the defendant does not ask for costs in his summons to set aside the proceeding alleged to have been improperly issued, there is no power to impose upon him the condition that he shall bring no action against the plaintiff. But if he asks for costs, the Court or Judge may in its discretion, impose said condition. *Stockbridge* v. *Sussams*, 6 Jur. 437; *Rhodes* v. *Hull*, 26 L. J. Ex. 265; *Higgins* v. *Brady*, 10 U. C. L. J. O. S. 268; *Hart* v. *Ruttan*, 23 U. C. C. P. 613.

In this case the defendant did ask for costs. But the Referee while granting them, did not insert the protecting clause in the order setting aside the attachment; and the learned Judge simply dismissed the appeal against the order. It is now argued that, it being a matter of discretion, the Court should not interfere. Courts, in general, are disinclined to interfere with orders within the discretionary power of a judge sitting in first instance. It is not, however, an absolute and inflexible rule by which the Court should consider itself actually debarred from interfering, when the circumstances justify its interference.

In *Steele* v. *Tiernan*, 23 L. R. Ir. 583, the Vice-Chancellor expressed himself as follows: "I may point out that nothing is more liable to be misunderstood than the term discretion when applied to the exercise of its power by a legal tribunal. The conferring of such a discretion

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does not enable the Court arbitrarily to refuse to a party the relief which the law says he is entitled to. The discretion given to a judge must be exercised with a due regard for the legal rights of the parties, and the decisions bearing upon the case."

It cannot be contended here that the Court has not the power to make the order which, in our opinion, the Referee should have made. We may, therefore, examine whether the plaintiffs are entitled to be protected as claimed herein.

The writ of attachment was set aside because an allegation required by statute was omitted in the affidavit. That allegation, in this particular instance, appears to have been a matter of form rather than of substance. The substantial part of the affidavit was sufficient. Some of the allegations of the affidavit were contradicted by the affidavits filed by the defendant; but on the cross-examination of the parties making them, I think the material statements of the plaintiffs' affidavit were fairly corroborated. The natural result and conclusion to be drawn from the affidavits and cross-examinations filed is that the plaintiffs had reasonable grounds for obtaining the writ of attachment. Under such circumstances, and when the defendant escapes the consequences of the attachment proceedings only because of an omission more formal than really substantial, I see no reason why the plaintiffs should not be protected against the chances and expenses of an action to be brought against them by the defendant. I think the order setting aside the attachment should be varied by the insertion of the usual protecting clause.

BAIN, J.—The affidavit of the plaintiff Wilson, on which the order for the issue of a writ of attachment was made, did not comply with what must be deemed to be the imperative requirements of the Attachment Act, and for this reason, apart from any question of merits, the defendant was entitled to have the order set aside. Some of the grounds specially taken in the summons on the

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application to set aside the order were that the affidavit was defective; and I cannot at all agree with Mr. Ewart's contention that material filed by the plaintiffs in reply to this application can be looked at to supply the omissions in the original affidavit. I think, then, that the attachment was irregularly issued, and that the defendant was entitled as a matter of right to have it and all proceedings under the writ set aside.

In setting aside the attachment, the Referee refused to impose the term on the defendant, that he should not bring an action against the plaintiffs; and the plaintiffs urge that the order should be varied or amended by making this a term of it. Now, even if it had been in the discretion of the Referee to impose this condition, the Court would not interfere with his decision unless it appeared that he had acted upon a wrong principle. But in my opinion, the Referee had no discretion in this particular. The defendant was entitled to have the attachment set aside as a matter of right, and that being the case, neither the Referee nor the Court has power to make the relief to which he is entitled in any way conditional, unless by his own consent.

It is true that in *Lorimer* v. *Lule*, 1 Chitty, 134, the Court is reported to have said that where a defendant applies to have a judgment and execution set aside for irregularity, the Court has a discretionary power of imposing on him fair and equitable terms as a condition of relief. The later cases, however, shew that this statement is altogether too broad; and they establish that, if the irregularity complained of is such that the defendant is entitled as of right to have the proceedings set aside, the Court cannot, without his consent, impose terms on him. Of course when the granting of the application is not a matter of right, but of judicial discretion, then any terms that the Court thinks fair and just may be imposed. As Patteson, J., said in *Stockbridge* v. *Sussams*, 6 Jur. 437, "This is not an irregularity on account of which defendant was entitled to come to the Court as a matter of right and

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have the judgment set aside; and, therefore, we may impose the terms of not bringing an action either against the plaintiff or the sheriff." Of the other class of cases, *Cash* v. *Wells*, 1 B. & Ad. 375, is an example, and shews not only what the principle is, but the use that the Court can make of its control over costs, when it thinks the defendant should agree to terms. In reply to the plaintiffs' application that, as the proceedings in question had been taken by mistake, terms should be imposed on the defendant in setting them aside, Bayley, J., said, "We cannot impose them without the defendant's consent. He applies to us *ex debito justitiæ* to have proceedings set aside which are against good faith. We are not compellable, however, to give him the costs of his rule, and unless he will consent not to bring any action, we make the rule absolute without costs." In *Ashdown* v. *Dederick*, 2 M. R. 212, the circumstances were somewhat similar to those in *Cash* v. *Wells*. The Court acted on the principles laid down in that case, and while it thought the defendant should agree not to bring an action, all it could do was to refuse him the costs of the appeal, if he would not consent.

The defendant in his summons asked that the order, &c., should be set aside with costs; and I understood Mr. Ewart to argue that by asking for costs the defendant submitted himself to the discretion of the Court, which could, therefore, impose on him such terms as it thought just. In support of this view, we are referred to the case of *Bartlett* v. *Stinton*, L. R. 1 C. P. 483. On principle, however, I cannot see why the asking for costs in an application the granting of which is a matter of right, should make the application one to the discretion of the Court; and I am inclined to think that if in the case cited, the Court did not consider that apart from the asking of costs, the case was one in the discretion of the Judge, there were special circumstances on account of which the Court would not interfere with the order made. At all events the Court did not intend to question the decision in

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Cash v. *Wells*, above referred to; and in that case although the rule asked for costs, it did not occur to the Court that that fact enabled it to impose terms on the defendant further than it was able to constrain him by dealing with the costs themselves.

From the material before the Court in the present case, I see no reason to think either that the plaintiffs acted maliciously in procuring the issue of the attachment, or that the defendant has suffered any substantial damage from what they did. I do not think the Court should interfere with the disposition of costs that has been made by the Referee and the learned Judge in Chambers; but, unless the defendant will agree not to bring any action against the plaintiffs, I would not allow him the costs of this application.

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CANADA SETTLERS LOAN CO. V. FULLERTON.

Before TAYLOR, C.J., DUBUC AND KILLAM, JJ.

Practice—Special indorsement on writ—Leave to sign final judgment—Alleging performance of conditions precedent.

In a special indorsement of a writ of summons under the Common Law Procedure Act, for the purpose of an application for leave to sign final judgment after appearance entered, it is unnecessary to allege performance of conditions precedent, although such seems to be required under the Judicature Acts in England. *Wyld* v. *Livingstone*, 9 M. R. 109, overruled in that respect.

It is also unnecessary to show by the indorsement, that a claim for interest arises under a contract express or implied, and it will be left to the defendant to show, if he can, that such claim does not so arise.

The special indorsement on the writ in this case showed a claim for an amount due under a covenant contained in a mortgage made by the defendant to the plaintiffs, dated 22nd of July, 1892, whereby the defendant covenanted to pay to the plaintiffs $3150.00, with interest at 8 % per annum, and went on to give the dates when the principal and interest should be payable, and contained the following paragraphs:—

"To interest on $3,150 at 8 per cent. per annum from 22nd July, 1892, to 3rd October, 1893, due under covenant in said mortgage—the covenant is to pay interest yearly; - - - - - - - - - $249.30

To amount paid by the plaintiffs to insure the buildings on the said land in accordance with a covenant contained in the said mortgage which insurance money the defendant by the said mortgage covenanted to repay to the plaintiffs with interest thereon at 8 per. cent. per annum until paid; $45.00

And the plaintiffs claim interest on $3444.30 the amount due as aforesaid from 3rd October, 1893, until judgment, at 8 per cent. per annum."

Held, that, taking the indorsement as a whole, it sufficiently appeared that the interest was claimed under the covenant for payment of interest, and that the indorsement in that respect was sufficient.

Held, also, that under the rule laid down in *London and Canadian L. & A. Co.* v. *Morris*, 7 M. R. 128, the description of the claim for insurance premiums was sufficient.

Rodway v. *Lucas*, 24 L. J. Ex. 155, followed.

ARGUED: 30th November, 1893.

DECIDED: 20th December, 1893.

Statement.

THE defendant appeared to a writ of summons specially indorsed as follows:—

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To amount due under a covenant contained in a mortgage made between Isaac Francis Fullerton, the defendant and Canada Settlers' Loan & Trust Company, Limited, the plaintiffs, dated 22nd day of July, 1882, whereby the defendant covenanted to pay to the plaintiffs, at the office of the Company, in the City of Winnipeg, $3,150 with interest at 8 per cent. per annum, the said principal sum to be repaid on the first day of August, 1895, and the interest at the rate aforesaid on the first day of August in each year, the first payment of interest to be made on the first day of August, 1893, which said mortgage is made pursuant to the Act respecting Short Forms of Indentures and which contains a clause that in default in payment of the interest secured thereby the principal secured thereby shall be payable when and under which mortgage default has been made in and still continues in the payment of such interest; $3,150.

To interest on $3,150 at 8 per cent. per annum from 22nd July, 1892, to 3rd October, 1893, due under covenant in said mortgage—the covenant is to pay interest yearly; - - - - - - - - - - $249.30.

To amount paid by the plaintiffs to insure the buildings on the said land in accordance with a covenant contained in the said mortgage which insurance money the defendant by the said mortgage covenanted to repay to the plaintiffs with interest thereon at 8 per cent. per annum until paid; $45.00.

And the plaintiffs claim interest on $3444.30 the amount due as aforesaid from 3rd October, 1893, until judgment at 8 per cent. per annum.

Plaintiff then applied for an order for leave to sign final judgment on the usual affidavit. The defendant opposed the application and raised the following objections:

(1.) That the portion of the indorsement claiming for the interest did not show that the claim was under any covenant for the payment of interest.

(2.) That as to the last part of the interest claimed, it was not payable until the expiration of the next semi-annual period.

(3.) That the claim for insurance premium did not show that such premium was payable by defendant at any specified date prior to the issue of the writ.

The plaintiff's application was allowed by the Referee and his order on appeal to a Judge was affirmed.

The defendant then appealed to the Full Court.

C. P. Wilson, for defendant.

F. H. Phippen, for plaintiffs.

The following cases were referred to:—*Manitoba & N.*

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W. Loan Co. v. *McPherson*, 9 M. R. 210; *London & Canadian Loan Co.* v. *Morris*, 7 M. R. 128; *Stewart* v. *Richard*, 3 M. R. 310; *Wyld* v. *Livingstone*, 9 M. R. 109; *Sheba Gold Co.* v. *Trubshawe*, 61 L. J. Q. B. 219; *Walker* v. *Hicks*, 3 Q. B. D. 8; *Stewart* v. *Niagara &c. Ry. Co.*, 12 U. C. C. P. 404; *Rodway* v. *Lucas*, 24 L. J. Ex. 155; *Hay* v. *Johnson*, 12 P. R. 596; *McKenzie* v. *Ross*, 14 P. R. 299, and *Mearns* v. *G. T. R.*, 6 U. C. L. J. O. S. 62.

DUBUC, J.—I think the special indorsement is quite sufficient. It conveys to the defendant all the information he may require to know correctly what is claimed from him by the action, and the different items appear to be described as fully and minutely as those of similar nature given in the forms annexed to the Common Law Procedure Act, if not more so. In my opinion the appeal should be dismissed with costs.

KILLAM, J.—I agree that the special indorsement in this case was sufficient in form to warrant the order allowing judgment.

I still adhere to the views which I expressed in *Stewart* v. *Richard*, 3 M. R. 610, and *M. & N. W. Loan Co.* v. *McPherson*, 9 M. R. 210; but I find it necessary to retract what I said upon one point in *Wyld* v. *Livingstone*, 9 M. R. 109, although that point did not of itself determine the result in that case. There I held a special indorsement of a claim upon a cheque invalid, because it was not shown that notice of dishonor had been given. This holding was based upon a case decided under the English Judicature Act, and without my distinguishing between the forms authorized by The Common Law Procedure Act and those required by the Judicature Acts.

Here it is sufficient to follow the forms given by the Common Law Procedure Act, and to act by analogy to these when the claim is one for which no form is there given. Under that Act it appears unnecessary to show, as is considered to be required under the Judicature Acts, performance of conditions precedent.

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Under the decision in *Rodway* v. *Lucas*, 24 L. J. Ex. 155, it appears also to be unnecessary to show by the indorsement that a claim for interest arises under a contract express or implied. The case of *The Sheba Gold Mining Co.* v. *Trubshaw*, 61 L. J. Q. B. 219, arose under the Judicature Act. If a claim for interest not so payable is indorsed, the true remedy is for the defendant to show that it does not so arise or the facts which make it improper for indorsement, and then he could be allowed to defend.

The principal objection here is that the portion of the indorsement claiming for interest does not show that the covenant was for payment of interest. It appears to me, however, that, taking the indorsement as a whole and considering that the claim is for interest due under a covenant, it is necessarily implied that the plaintiff is asserting a covenant for payment of interest. The description of the claim would not be proper, if it were one for interest in the nature of damages for non-performance of a covenant. The indorsement in that respect seems even more full than that which was held sufficient in *Rodway* v. *Lucas*. I think that, under the rule laid down by us in *The London & Canada L. & A. Co.* v. *Morris*, 7 M. R. 128, the description of the claim for insurance premiums is sufficient.

The form of the indorsement being unobjectionable, there was jurisdiction to make the order for judgment. If there was a defence, whether on the merits or on the ground that any claim was not a proper one to be included in a special indorsement, the facts should be shown and a defence to the whole or to a portion of the claim might be allowed; but to show such a defence as to a portion of the claim would not deprive the Referee of the jurisdiction to make the order in respect of the remaining portion. My decision in *Wyld* v. *Livingstone* applies only to the case of an indorsement partly objectionable in point of form.

As to the contention that, under the terms of the mortgage, the interest was not payable until the expiration

of the next semi-annual period, I am not inclined at present to consider the point, but would be willing to allow the defendant, if he deems it of importance, to defend for that portion of the claim. 1893. Judgment. KILLAM, J.

The defendant should pay the costs of this application.

TAYLOR, C.J., concurred.

Appeal dismissed with costs.

THE CANADA PERMANENT LOAN & SAVINGS COMPANY

v.

THE SCHOOL DISTRICT OF EAST SELKIRK.

Before TAYLOR, C.J., DUBUC AND BAIN, JJ.

Garnishing order—School taxes not attachable by creditor of School District—Public Schools Act—Effect of repeal—Interpretation Act, R. S. M. c. 78, ss. 11 & 12, construction of—Public Policy.

The plaintiffs having recovered a judgment against a School District sought to attach the amount levied on the garnishee for rates or taxes imposed for school purposes for the years 1884 to 1892, inclusive, in respect of lands of the garnishee within the school district.

Held, that these rates or taxes did not constitute a debt, obligation or liability which could be attached under the Garnishment Act, R. S. M. c. 64, to answer a claim against the School District.

Per TAYLOR, C.J.—The repeal of all former School Acts by the Public Schools Act of 1890, put an end to the right of a school district to collect any arrears of such taxes, and since the passing of the latter Act, School Districts in Manitoba have no power to levy or collect taxes, but it must be done for them by the municipal councils. The Interpretation Act, R. S. M. c. 78, ss. 11 & 12, cannot be relied on to save the right of collecting arrears of taxes, because trustees have not under the repealing Act any such right.

Per DUBUC, J.—It would be against public policy to allow the taxes levied by a School District to be intercepted by an attaching order in favor of a creditor, because the trustees might thereby be prevented from carrying on the work for which the corporation was created, especially since the

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Act provides by section 234 an adequate remedy enabling a creditor to issue an execution with an indorsement directing the Sheriff to levy an additional rate on property owners to pay off the judgment.

Per KILLAM, J.—Without an express provision in the statute to that effect, a public corporation cannot sue in a Court of law to recover taxes levied on a ratepayer under the powers conferred by the statute, and although the former School Acts enabled the trustees to take proceedings before certain tribunals to enforce payment of the taxes, the ordinary relation of debtor and creditor was not thereby created, nor were the taxes thereby constituted a debt obligation or liability within the meaning of section 8 of the Garnishment Act, such as can be attached in the hands of a ratepayer to meet a debt of the corporation.

ARGUED: 29th November, 1893.
DECIDED: 20th December, 1893.

Statement.

THIS was an appeal by a judgment debtor from an order of the Referee in Chambers, directing the trial of an issue as to whether, on a date named, any sum of money was owing from a garnishee to the judgment debtor, and for payment to the judgment creditor of any sum so found owing. The objection to the order was that there was not an attachable liability of the garnishee to the judgment debtor.

The judgment was recovered against a corporation of school trustees existing under the provisions of the Act relating to the Public Schools, 44 Vic. c. 4, and the Acts amending the same, and, apparently, continued under The Public Schools Act, 53 Vic. c. 38.

It was shown by affidavit, and not disputed, that the only liability of the garnishee to this corporation was for rates or taxes imposed for school purposes for the years 1884 to 1892, both inclusive, on lands of the garnishee within the school district. It was admitted that the district was what was known as a Union School district, composed of the territory comprising a town municipality and a portion of a rural municipality, and that the town had then no council or other officers through whom the rates could be collected.

The appeal was heard by Mr. Justice Killam, by whom the following judgment was pronounced.

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KILLAM, J.—On behalf of the plaintiff, it is claimed that the judgment debtor has no *locus standi* to object to the order, which concerns the creditor and the garnishee alone. I cannot concur in this view. In my opinion the judgment debtor should always be brought before the Court on an application to make a garnishee pay over the moneys sought to be attached, and should always be allowed to set up any facts shewing that an order for such a payment should not be made.

The real question is whether under the Acts mentioned, and particularly 44 Vic. c. 4, ss. 26, 27, 61, and 48 Vic. c. 27, s. 10, s-s. (e), and s. 17, s-s. (e.), there is an attachable liability from the owner of lands to the school corporation for the school rates.

The terms of The Garnishment Act, R. S. M. c. 64, are very wide. By section 8, "all debts, obligations or liabilities due, owing, payable or accruing due to the defendant or judgment debtor," may be attached.

The original Act, 44 Vic. c. 4, ss. 25-33, provided for assessments upon the real and personal property within a school district, with certain exceptions, for the purpose of supplementing the legislative grants for school purposes. Where a school district comprised territory within different municipalities, the trustees of the district were required to make an assessment of the district and to transmit to each municipality the portion of the roll affecting such municipality, and the municipalities were required to collect the school taxes and pay them over to the trustees, but school trustees were to be allowed to collect the rates by their own machinery in districts lying outside of municipalities, or when a municipal council refused or neglected to do so. These provisions were amended by the Acts, 46 & 47 Vic. c. 46, s. 9, (M. 1883,) and 47 Vic. c. 37, s. 9, (M. 1884), and 48 Vic. c. 27, s. 10, (M. 1885.) It is the provisions of the last mentioned Act that are of particular importance.

But, first, I should refer to the 27th section of the original Act, which was never amended to any material extent.

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That section provided that "The school assessment shall be laid equally according to valuation, upon rateable real and personal property in the school district, and shall be payable by and recoverable from the owner, occupier or possessor of the property liable to be rated and shall, if not paid, be a special mortgage . . . . . on all real estate," &c. And by section 61, "The school trustees of any school district may institute suits or prosecutions for the school assessments, assessment for school houses, and for all arrears of the said assessments and monthly fees, and such suits or prosecutions may be instituted before the County Court, or before two justices of the peace of the County, and the justices may after judgment cause the amount of the judgment together with the costs thereof to be levied under warrant, by the seizure and sale of the goods and chattels of the defendant."

Then, in 1885, the provisions of the Act, 48 Vic. c. 27, s. 10, were finally substituted for those of 44 Vic. c. 4, s. 26. This last amendment repeated with numerous variations and more in detail the provisions of the Act of 1881 for assessments and levies of rates by the trustees themselves or by the municipalities, and in s-s. (e.) it was provided that "the trustees may, employing their own lawful authority, bring suit in a court of competent jurisdiction for the collection of such arrears, whether they had been assessed by the said trustees or by the council of the municipality."

It appears to me that the primary object of all these provisions is the imposition of rates or taxes upon the property in a school district for school purposes, and the collection thereof; and in my opinion, while in providing for this general object the Legislature makes the rates payable by and recoverable from individuals and authorizes certain proceedings against them personally, it does not create the relation of debtor and creditor between the property owner and the school corporation, or constitute a debt, obligation or liability, within The Garnishment Act.

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In *West* v. *Downman*, 14 Ch. D. 111, and *In re Boor*, *Boor* v. *Hopkins*, 40 Ch D. 572, it was held that, under the Public Health Acts of 1848 and 1875, and the Local Government Act, 1858, the relation of debtor and creditor was not created between a property owner and a Local Board for expenses incurred by the Board and payable by the property owner, and that while a liability was created it was one enforceable only by the methods which the Acts prescribed, and not by a claim in the administration of the estate of the property owner after his decease.

It is true that by the first of these Acts, originally the only method of enforcing the claim was by summary proceedings before justices of the peace, and that in both cases cited the amounts in question were greater than, under subsequent amendments, could be recovered by action in a county court; yet there was no suggestion that a liability for an amount which could be recovered in a county court would be of a different nature from a liability for a larger amount. And there could be, in the use of the words "debtor" and "creditor," no intention to make a distinction of a technical character between "debts" and liabilities of another kind; for liabilities not technically to be termed debts might be the subjects of valid claims upon the estates of deceased persons. The principle of the decisions, as I understand it, was this, that the statutes merely intended to provide for the distribution of the expense of certain improvements, and that this expense should be borne by the owners of certain property benefited thereby, and for the purpose of thus distributing such expense it gave certain methods of recovery. Originally, in addition to the charge on the property, there was a personal liability of the owner enforceable by a summary proceeding before justices of the peace. This did not create a legal liability otherwise enforceable, for, as Lord Justice Cotton pointed out in *West* v. *Downman*, 14 Ch. D. at p. 121, in that case the action could have been brought in the County Court without further provision.

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Judgment.

KILLAM, J.

Under our statutes, the original methods of recovery, in addition to proceedings against the assessed property, were by proceedings in a county court or before justices of the peace. Then was given the right of suit in any court of competent jurisdiction. There may be some question as to whether this amendment extended the jurisdiction to any other court, but even if it did I cannot think that it altered the nature of the liability. The position still was, I think, that there was no liability except to a proceeding of a particular kind.

In my opinion, to constitute a debt, obligation or liability within The Garnishment Act, there must be a relation analogous to that of debtor and creditor, between the garnishee and the judgment debtor, and not a mere statutory liability to an action by a public body established only as an instrument for the more convenient distribution of public burdens among property owners.

I do not refer to the Act of 1890, as it is not claimed that under that any further liability arose; nor is it necessary to discuss the effect of the repeal by that Act of the former ones.

The appeal must be allowed with costs, the order of the Referee rescinded, and the summons for the garnishee to pay over dismissed, and the garnishee attaching order set aside with costs to the judgment debtor, all these costs to be set off against and deducted from the judgment debt.

From this decision the plaintiffs appealed to the Full Court.

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

T. G. Mather, for defendants.

The following cases were referred to: *West* v. *Downman*, 14 Ch. D. 111; *In re Boor*, 40 Ch. D. 742; *Mayor of Folkestone* v. *Brooks*, [1893] 3 Ch. 22; *Booth* v. *Traill*, 12 Q. B. D. 10; *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53; *Reg.* v. *Stepney Union*, L. R. 9 Q. B. 383; *Township of London* v. *G. W. R.*, 16 U. C. R. 500; *Berlin* v. *Grange*, 1 E. & A.

279; *Macarthur* v. *Dewar*, 3 M. R. 72; *Eastern Judicial District* v. *Winnipeg*, 4 M. R. 323. 1893. Argument.

TAYLOR, C.J.—The learned Judge held, that while the Legislature by several Acts has made the rates payable by and recoverable from individuals, and has authorized certain proceedings against them personally, it did not create the relation of debtor and creditor between the property owner and the school corporation or constitute the taxes a debt obligation or liability within The Garnishment Act, R. S. M. c. 64. He so held, mainly, on the authority of two English cases, *West* v. *Downman*, 14 Ch. D. 111; and *Boor* v. *Hopkins*, 40 Ch. D. 372.

The more recent case of *Folkestone* v. *Brooks*, [1893] 3 Ch. D. 22; and the case of *Booth* v. *Trail*, 12 Q. B. D. 8, which do not appear to have been brought to the notice of my Brother Killam, were on the argument of the appeal cited and relied on as authorities for holding that taxes are a debt obligation or liability, and can be garnished in the hands of a ratepayer.

The Supreme Court of the United States held in *Lane County* v. *Oregon*, 7 Wall. 71, that taxes are not debts in the ordinary sense of the word, for which actions may be maintained. The same has been held by some State Courts, as in *Peirce* v. *Boston*, 44 Mass. 520; *Shaw* v. *Pickett*, 26 Vt. 486; *Camden* v. *Allen*, 2 Dutch. 398, but in some States taxes have, by express legislative enactment, been declared to be debts.

The cases of *London* v. *Great Western Ry. Co.*, 16 U. C. R. 500; and *Berlin* v. *Grange*, 1 E. & A. 279, can scarcely be relied on as authorities here, as they were both decided under the Upper Canada Act, 16 Vic. c. 182, s. 45. That section after providing for the collection of taxes by distress and sale, contained these words, "and if in any case the taxes payable by any party cannot be recovered in any special manner provided by this Act, they may be recovered with interest and costs as a debt due to the City, Town, Township or Village in a competent Court in this Province."

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The words of our Act are no doubt much wider than those of the English Act, and the question whether taxes are a debt obligation or liability which may be garnished in the hands of a ratepayer is one of importance, and no little difficulty. But I do not see how the plaintiffs can, even if they are so, maintain their order in this case. They began their action on the 17th Oct. 1891, and judgment was entered on the 30th of the same month. The garnishing order was issued on the day the action was begun and was served on the garnishee two days afterwards. Any rights the plaintiffs can have, must depend upon the provisions of the various School Acts, from the 44 Vic. c. 4, down to and including the 52 Vic. c. 5, and c. 21, or some of them. Now all these Acts were entirely and absolutely repealed by section 182 of the Public School Act, 53 Vic. c. 38. I cannot find in that Act any reservation to the trustees of school districts of taxes then due or in arrear, or any provision made by which they can collect any such arrears.

The only provisions for raising money for school purposes in that Act, were contained in sections 89 to 96, now R. S. M. c. 127, ss. 114 to 127. It is now, and since 1890, has been the duty of the Municipal Council to levy and collect the moneys required for school purposes. The only reference to arrears of taxes was in sections 180 and 181, which are now sections 243 and 244 of R. S. M. c. 127, and these sections relate only to arrears due to Catholic School Boards. The Municipal Council may have power to collect arrears due to other school districts, but certainly the trustees of these districts have none. Section 3 does not continue their powers, even if arrears should be included under the word assessments for that section makes everything subject to the provisions of this Act, and Municipal Councils alone can by the Act raise money for school purposes.

The provisions of the Interpretation Act, R. S. M. c. 78, do not assist the plaintiffs. Section 11 cannot apply, for, if that should be invoked, it is plain that school trustees acting

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under the old law, can now act only as if appointed under the new law, and the new law gives them no power to levy and collect money. No proceedings seem to have been taken under the old law by the trustees of this district to collect these arrears of taxes, but even if they had they could not be continued under the new law because they would be inconsistent with it, and its provisions for the collection of money for school purposes by municipal councils. Section 12 cannot help the plaintiffs because they had acquired no right and had commenced no proceedings under the repealed Acts. They were repealed in March, 1890, and the plaintiff's action was begun only in October, 1891.

Leaving therefore entirely untouched the question whether arrears of taxes are a debt obligation or liability which may be garnished in the hands of a ratepayer, I am of opinion that this appeal must be dismissed with costs.

DUBUC, J.—The question is whether school taxes imposed by a regularly organized school district, come within the provisions of The Garnishment Act, R. S. M. c. 64, and can be attached by a judgment creditor of the School District.

Section 8 of that Act says that, upon a proper affidavit being filed, any judge may order that all debts, obligations or liabilities due, owing, payable or accruing due to the judgment debtor, shall be attached to answer the judgment of the plaintiff. Can school taxes payable by a ratepayer be held to constitute a debt or liability due or owing by the ratepayer to the school trustees, within the meaning of the said section?

It seems that when a rate is imposed by statute on property owners to meet expenses incurred by a corporate body for public purposes, and a mode is provided by the Act for levying and collecting said rate, the payment cannot be enforced in any other manner. That doctrine is laid down in *Maxwell on Statutes*, p. 496, and he says that that rule should prevail though the statutory provision be

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not contained in the same section as that in which the duty was created. He gives for example the 43 Eliz. c. 2, which authorizes by the second section the imposition of a poor-rate, and empowers the parochial officers by the fourth to levy the arrears from those who refuse to pay, by distress; he says that the statute limits the officers to this remedy, and gives no right of action for a poor rate.

Drake on Attachment, s. 516, speaks of two cases, one in Louisiana and the other in Tennessee, where it was attempted to subject to attachment, taxes due from individuals to a municipal corporation, and he says that, on high principle of public policy, it was held that the proceeding was unauthorized and inadmissible.

The following language is used in *Dillon on Municipal Corporations*, s. 100: "The revenue of a public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law that not only the public property, but also the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or when in transit to it." In section 101 he says, "Upon similar considerations of public policy, municipal corporations and their officers have usually, though not uniformly, been considered not to be subject to garnishment, although private corporations, equally with natural persons, are liable to this process."

In this case the taxes are imposed, under the provisions of the statute, by a public corporation for a public purpose. If the school trustees are deprived of the taxes, which are their regular revenue, they will be unable to carry on the work for which they have been created. Different modes were provided by statute for collecting the taxes. They could lay before the Council of the municipality or municipalities in which the school district was comprised, an estimate of the sums required for

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school purposes, and the Council would have to levy and collect the said sums. Until the Public Schools Act of 1890, the school trustees themselves could also bring suit or prosecution for the collection of said taxes; but there is no such authority reserved to them in the last mentioned Act. There are also provisions for enforcing judgments recovered against the school trustees. The amending Act of 1889, c. 21, s. 2, enacts that any writ of execution against the school trustees may be indorsed with a direction to the sheriff to levy the amount thereof by rate, and the proceedings which are pointed out in the following sub-sections are about the same as those in force for executions against a municipality. The same provisions appear in the Public Schools Act of 1890, c. 38, s. 175. It is clear, therefore, that there is a remedy provided for enforcing judgments recovered against school trustees, and as in case of an execution indorsed to the sheriff, the amount is made up by a special rate to be levied on all the ratepayers, which remedy does not interfere with the regular revenue of the school district.

There being such a specific remedy, I think it should be held, on principle of public policy, that the school taxes sought to be attached herein, are not attachable under the provisions of The Garnishment Act.

I think the appeal should be dismissed with costs.

BAIN, J., concurred.

Appeal dismissed with costs.

IN RE THE COMMERCIAL BANK OF MANITOBA.

Before KILLAM, J.

Appointment of liquidators of insolvent bank—Choice between several nominees—Canvassing for votes—Nominee indebted to bank—Chief liquidator should be a banker—Costs—Remuneration of liquidators.

Under the provisions of the Winding Up Act, R. S. C. c. 129, s. 101, as amended by the Act, 52 Vic. c. 32, s. 17, whilst the Court is confined to a selection between the persons nominated at the meetings of creditors and shareholders, for the office of liquidator, it is not bound to adopt the choice of the majority, but must exercise its own discretion.

The Merchant's Bank of Canada, the petitioning creditor, its claim being amply secured, held not entitled as of right to have its nominee appointed.

If the creditors nominate one person and the shareholders another, the Court will *ceteris paribus* have particular regard to the wishes of the latter if the Company is solvent, and of the former if it is not.

But when it is not absolutely clear that the Bank is solvent, the interests of creditors in the liquidation are entitled to greater consideration than those of the shareholders.

It is important that the chief liquidator should be a man of experience in banking, and well acquainted with the methods of bank book-keeping.

The candidate who received the largest vote as chief liquidator amongst the unsecured creditors, and by far the largest vote amongst the shareholders, was indebted to the Bank in a considerable amount, and although it was claimed that this debt was fully secured on real estate, yet the Court deeming the securities uncertain and unsatisfactory,

Held, that on this ground amongst others, it was not desirable to appoint him.

It is objectionable for a candidate to canvas in any way for the appointment or to send out proxies to secure votes, or to vote for himself on proxies sent to him, or to advocate his own claims before the meeting; and it is especially objectionable for a provisional liquidator seeking appointment as permanent liquidator to send out letters signed by him as such liquidator, asking managers of branches of the Bank employed under him, as well as other parties, to pay attention to the correspondence of his solicitors as to proxies; and the Court intimated that in future such practices would be regarded in a more serious light.

The remuneration to be allowed to the liquidators cannot be fixed at the time of their appointment, as notice of an application for that purpose seems to

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be required, and it would in any case be difficult to decide such a matter in advance; but the Court adopted the suggestion of the meetings as to the proportions in which the several liquidators should share the remuneration to be allowed.

As to the costs of the contest the learned judge, following the rule laid down in *Re London and Northern Insurance Co.*, 19 L. T. N. S. 144, *Held*, that one set of costs should be allowed to the shareholders and one to the creditors appearing on the petition, not including however, any costs occasioned by the contest, and that costs must also be allowed to the Bank and to the petitioning creditor, those of the latter to include all reasonable disbursements connected with the holding of the meetings.

ARGUED: 31st August, 1893.
DECIDED: 7th September, 1893.

Statement.

A petition having been filed for the winding up of the above Bank, and it appearing that it ought to be wound up, provisional liquidators were appointed, the application was adjourned and directions were given, under section 98 of The Winding Up Act, R. S. C. c. 129, for the summoning of meetings of the creditors and shareholders of the Bank for the purpose of ascertaining their respective wishes as to the appointment of liquidators. These meetings were held, various parties were proposed as liquidators, votes were taken upon these nominations, and the result of the voting at each meeting was certified to the Court.

The matter then came on for the making of the winding up order, and the selection of liquidators by the Court from among the persons nominated.

W. J. Tupper for petitioners.

J. H. Munson for the Bank.

H. M. Howell, Q.C., W. H. Culver, Q.C., T. H. Gilmour, J. Martin and *W. E. Perdue* for several shareholders and creditors.

The following cases were referred to:—*In re Gold Co.*, 11 Ch. D. 701; *Buckley on Joint Stock Companies*, 266; *Re Gooch*, L. R. 7 Ch. 211; *Re Northumberland and Durham Banking Co.*, 2 D. & J. 508; *In re Johannisberg Land Co.*, [1892] 1 Ch. 583; *Re Alpha Oil Co.*, 12 P. R. 298; *Re Central Bank*, 15 O. R. 309; *In re Association of Land Financiers*, 10 Ch. D. 269.

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KILLAM, J.—It appears that neither of the meetings confined itself to the nomination of persons as liquidators, but at both meetings resolutions relating to the number of liquidators and their respective duties and rates of remuneration and other details were adopted. While in some respects the creditors and shareholders may have exceeded the functions assigned to them by the statute, their views upon matters of such importance and in which they are deeply interested are entitled to the respectful consideration of the Court.

The scheme unanimously proposed at both of these meetings was that there should be three liquidators, one of whom to be the manager and the other two advisers; that it should be incumbent upon the manager to consult with the advisers in all important matters involving the realization of assets and the payment of claims, and that in the event of a difference of opinion it should be decided by a majority.

By The Winding Up Act, R. S. C. c. 129, s. 101, as amended by the Act 52 Vic. c. 32, s. 17, the Court is required to appoint one or more liquidators, not exceeding three; by section 23 of the former Act, "If more than one liquidator is appointed, the Court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators;" and by s. 28, "If there is more than one liquidator, the remuneration shall be distributed amongst them in such proportions as the Court directs."

While there is no direct statutory authority for such a scheme as the creditors and shareholders present or represented at these meetings have proposed, it appears to me that the scheme is a very reasonable one and that indirectly such provisions can be made as will ensure its being practically carried out.

At each meeting there were proposed as managing liquidator F. W. Ferguson, Henry Fisher and S. A. D. Bertrand, and advisory liquidators J. S. Ewart, Israel M. Ross, William Hespeler and J. H. Brock. Some votes,

also, were cast at the meeting of creditors for D. MacArthur and S. A. D. Bertrand as advisory liquidators, although, apparently, they were not formally nominated.

At the meeting of shareholders the following resolution was passed:—

"That in estimating the value of the votes of the shareholders, regard should be had to the fact that the liquidator appointed by the Court having reported, after full investigation, that the assets of the Bank, apart from the existing large liability of the shareholders, are, in their judgment, ample to pay the creditors in full and to leave a large surplus for the shareholders, it becomes evident that the shareholders alone are the parties interested in making that surplus as large as possible, and that therefore a controlling power in the liquidation should rest with them."

Counsel representing various of the shareholders and creditors have appeared before me and have advocated the appointment of the different nominees respectively. By section 101 of The Winding Up Act, as amended by the Act 52 Vic. c. 32, s. 17, "The chairman of each meeting shall report the result thereof to the Court, and if a winding up order is made the Court shall appoint one or more liquidators, not exceeding three liquidators, to be selected in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively."

I have been referred by counsel to numerous reported cases, as well as to several text-books, for the purpose of ascertaining the principles upon which, in case of a contest, the Court should act in selecting the liquidators. I have examined all of these and some others. So far as I am aware, there has never previously been a contest of the kind before this Court, and the only one in Canada under these provisions relating to banks was one concerning the appointment of liquidators of The Central Bank of Canada, reported in 15 O. R. at p. 309.

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It appears to me that, under the statutory provisions mentioned, the Court is not only not bound by the result of the voting at these meetings, but that, while it is confined to those nominated at the meetings, the Court is bound to exercise its own discretion in the selection of liquidators. Certainly the meetings are not intended for amusement only, and a preponderance of votes in favor of one nominee or another must be an important factor in determining the selection, but I should be shirking the responsibility imposed upon me by the statute, and my duty to all interested in this Bank, if I were to confine myself to a computation of the amounts represented by the various parties or combinations of parties at the meetings and to making a selection on that basis alone.

It is claimed on behalf of The Merchants Bank of Canada, the petitioning creditor, that *prima facie* a preference should be given to its nominees. Undoubtedly some learned Judges in England have expressed themselves very strongly in favor of such a principle of selection, other things being equal, while others seem to have been quite as strongly opposed to the rule. See *Re The General Provident Assurance Co.*, 19 L. T. N. S. 45; *In re Albert Average Assurance Association*, L. R. 5 Ch. 597; *In re Northern Assam Tea Co.*, L. R. 5 Ch. 644; *In re Hoyland &c. Colliery Co.*, W. N. 1884, p. 13.

I deem it unnecessary to express an opinion upon the propriety of acting on such a rule in any case. The learned Judges who have favored it have themselves confined it to cases *cæteris paribus*, and in the present instance, not only are there many important circumstances to be considered, but the petitioning creditor is the least interested of any, its claim being shown to be fully and absolutely secured.

In *Buckley on Joint Stock Companies*, at p. 268, after referring to the difference of opinion upon the principle, the author proceeds, "The rule thus stated, is that which is now generally followed, but subject to this qualification that, according as the assets are or are not more than

sufficient to pay the debts and costs, the question will be treated as one in which the wishes of the shareholders in the former case, and the creditors in the latter, are to be first considered." And in *Emden on The Winding Up of Companies*, p. 92, it is said, "The Court will generally have particular regard to the wishes of the creditors or contributories according to the question whether the Company is solvent or insolvent." It is to be observed that Buckley treats this last principle as merely a qualification of that first referred to, while Emden treats it as a principal rule. For my part I prefer the latter view.

According to the estimate of the provisional liquidators the liabilities of the Bank to the public on the 8th August, 1893, amounted to $1,234,349.42 and the nominal value of the assets was $1,843,830.21, which would leave a surplus of over $600,000 for division among the shareholders, less the costs of the liquidation proceedings. The provisional liquidators also report that they have subjected the assets to a very careful analysis, and estimate the bad and doubtful debts at $395,374.60, and they also suggest that 50 per cent. of the doubtful debts may possibly be recovered, which would reduce this loss to $330,750.75; and on this basis they estimate that creditors will ultimately be paid in full and 40 or 50 per cent of the original capital be realized for division among the shareholders.

Now this statement must be treated as an estimate only, though certainly as against the individuals who are provisional liquidators, and those asking their appointment as permanent liquidators, it must be regarded as a reasonable estimate under existing circumstances.

No decision has been cited, and I have found none, in which the Court has given the preference to nominees of stockholders on the ground of the solvency of the concern being wound up, and I am left without any guide as to the test of solvency to be applied or the degree of evidence of solvency to be required under this rule.

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The petition for the winding up of the Bank was presented by a creditor. Indeed, it may be doubtful whether, even under the amending Act, 52 Vic. c. 32, s. 4, a bank could be wound up on the petition of any one but a creditor. The ground of the petition is that the Bank is insolvent within the meaning of The Winding Up Act, ss. 5,6. The petition sets forth a resolution of the directors of the Bank, admitting its insolvency within the meaning of that Act, and its inability to meet its liabilities, and this petition is verified by affidavit. No objection whatever is made to the winding up order, and the petition and this affidavit are not disputed otherwise than as this report of the provisional liquidators may show.

It is a matter of common experience that assets usually shrink in value in the hands of assignees in insolvency or liquidators, and many unforeseen circumstances may materially affect the result of the winding up. The note holders are entitled to interest and probably many, if not all, of the other creditors will be so. It appears to me, then, that *prima facie*, the first interest to be consulted is that of the creditors. They are largely, after disposing of the preferential claims, depositors who had a right to expect their money on demand, and who never intended to lend it to the Bank for the convenience of the latter. Their interest is in a speedy realization of the assets, while that of the shareholders may by some be considered as best served by delay. I do not mean to suggest that assets should be recklessly sacrificed without any regard to the interests of shareholders, but to indicate that it is not absolutely clear that the Bank is solvent and that the creditors have interests which may turn out to be opposed to those of the shareholders and which I deem to be entitled to the greater consideration. Again there are likely to be opposing interests among the shareholders. Many of those who voted with the majority of the shareholders have not paid up in full for their stock, and there may yet be a contest between them and the holders of fully paid up shares over any surplus, and even an attempt

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to enforce contribution from those who have not paid up in full. It is also important to notice in this connection, that the holders of a large portion of the paid up shares of the Bank were not represented at the meeting.

I do not pay any attention to the questions raised respecting proxies, as most, if not all, of those objected to appeared by counsel on the motion; and as the votes at the meetings do not absolutely determine the result, I feel myself at liberty to consider, along with the other matters, the wishes expressed by these parties through their counsel. See *In re English, Scottish and Australian Chartered Bank*, W. N. 1893, p. 126. I shall remark presently on the nature of the support of the principal nominee of the majority at the shareholders' meeting.

I have already referred to the objection to the vote on behalf of The Merchants Bank. I doubt very much the strict applicability of ss. 62-5 of the Winding Up Act, respecting secured creditors, to the voting at a meeting for nominating a liquidator, particularly in view of section 19; but the fact of a creditor being secured, and the degree of his security are important factors in estimating the weight to be attached to his vote in favor of a particular nominee.

Then we come to the question of the position of note-holders. These notes are, by The Bank Act, 53 Vic. c. 31, s. 53, a first charge upon the assets of the Bank. The claims upon them are, however, to be considered rather as preferential than as secured. It is true that, under section 54 of the last mentioned Act, they are secured also by a fund in the hands of the Receiver General, but after exhausting the portion of that fund supplied by the suspended Bank the Receiver General may claim as holder of any notes redeemed out of the fund. Upon the estimates before the Court, it is, I am glad to say, almost certain that all the notes of the Bank in circulation will be redeemed in full, and thus the interest of other unsecured creditors must be considered as higher than that of note-holders, though it is impossible to say that the latter have no interest in the liquidation proceedings. Their

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votes, I take it, are entitled to be reckoned, but the Court should take into consideration as an important factor: the position of the noteholders and the probability of there being a fund for distribution among other creditors. All of these circumstances help to show how impossible it is to select the liquidators by a mere computation of the votes given at these meetings.

I will then estimate the respective circumstances favoring the selection among those proposed as the principal or managing liquidator.

The debts of the Bank unsecured, on the 8th August, amounted to $1,234,349.42. Of this $103,323 was for loans from other banks in Canada, secured, which I deduct, leaving $1,131,026.42. Of this latter sum $400,260 was for notes of the Bank, which temporarily I deduct, leaving $730,766.42 and a balance due the Provincial Government, also preferred, amounting to $84,294.20. Deducting this latter amount, the unsecured and unpreferred debts amount to $656,472.22. Out of this amount there was voted on:

For	Fisher	155,999.05
"	Bertrand	120,764.07
"	Ferguson	67,961.65

Making a total of $344,724.77

a little over one half the total amount of the unsecured and unpreferred claims.

The subscribed shares of the Bank number 7407, of which 4913 are fully paid up. The votes cast for the principal liquidators were respectively

For	Paid up	Partly paid up	Totals
Fisher	1952	1819	3771
Ferguson	876	1	877
Bertrand	57	None	57

Thus, while Fisher has the support of unsecured and unpreferred creditors representing an amount in excess of either of the others alone, he has in his favor a little less than half of the amount represented at the meeting, and

less than one fourth of the whole amount of such claims. And while he has the support of the holders of a trifle over half of the subscribed shares, his supporters hold only about two fifths of the fully paid up shares. And while, if the note-holders are considered, Ferguson has the votes of creditors representing over double the amount represented by the creditors supporting Fisher and considerably more than that represented by the supporters of both his opponents, yet this amount is only about one third of the whole of the unsecured liabilities, including bank notes.

In this view of the case, even holding that the preference should be given to the nominee of the creditors, it would be very difficult to make a selection on the basis of these figures alone.

When this application first came before me, I held that, as the selection was to be made from among those proposed in the manner mentioned, I would not require affidavits of fitness; but in choosing among them the circumstances disclosed must necessarily affect the judgment of the Court as to the relative fitness of the nominees.

While the Merchants Bank has so little interest in the appointment that I should give little importance to its claim in a computation of amounts, it is a matter worthy of attention that Mr. Ferguson has been for many years an employee of that institution in various important positions, and that he was recommended as a liquidator by the local manager of that Bank as well as by an association of local bankers, and that he appears to have a large support from other banks holding claims, though chiefly upon bank notes. There is no suggestion that there are likely to be any disputes over the securities held by the Merchants Bank, or that that institution has any interest adverse to the interests of the other creditors or the shareholders which should make the Court regard its nominee with suspicion. As provisional liquidator, he has already

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acquired much knowledge of the affairs of the Bank, and a new liquidator would reach the same position only after the lapse of considerable time and at additional expense. Mr. Fisher is also shown to have had long experience in banking, both in England and in Manitoba. Mr. Bertrand is not shown to have had such experience and it is practically admitted that he has not; but the principal claim put forward on his behalf is that he has been for many years an official assignee in this Province, that he has had great experience in winding up insolvent estates, and in that capacity he has the entire confidence of the principal business men of the community. While no proof of these statements has been offered, I believe them to be true and for present purposes I accept them. If necessary, I would still allow evidence of them to be given.

It appears to me, however, that it is of importance that one of the liquidators, and particularly the one who is to have the chief management of the details, should be a man of direct and large experience in the management of banking business. This may not be so important for the mere work of collecting debts and realizing upon securities, though to some extent it would probably be useful in dealing with debtors of the Bank. My experience, however, is that in the investigation of many of the past transactions of a bank, an intimate acquaintance with the methods of book-keeping in a bank is particularly important. Many questions respecting the accounts between the Bank and others, the renewal of bills or notes, the appropriation of payments, the dealing with securities, &c., are apt to arise continually in the liquidation of a bank, which it will require a banker of experience to investigate. There is much also in the material before me to suggest that it may be found important to investigate fully the past management of this Bank. It is true that Mr. Bertrand could have the assistance of experts, but I think it would tend both to economy and to efficiency that the principal liquidator should supply the active brains for

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such work. It is true that a large number of creditors appear not to regard this as of so great importance as I do; but I venture with all respect to suggest that these may not fully appreciate the position, and that upon this point experience in the Courts is of greater value than that of business men. It is to some extent probable, also, that most of the creditors and shareholders take the same view as I do upon this point, as two of those proposed for principal liquidators have had the experience which I deem so important.

But, as against these advantages, it is necessary to consider the objections to the various nominees. I must here say at once that those offered to the appointment of Mr. Fisher are by far the most serious. The chief of these is his indebtedness to the Bank. It is claimed that this is fully secured, but I am not at all satisfied with the account given of the securities. They are exceedingly unsatisfactory and undesirable securities for a bank to hold. They are undoubtedly valuable, but I cannot consider it at all certain that they will be found sufficient to secure the full payment of the debt. The amount of the debt is considerable, and the liquidators should be in a position to deal fully and independently with this as with other assets of the Bank. It is stated that Mr. Fisher, if appointed liquidator, will allow a portion of his remuneration to be applied on the debt, and that he will give some further security, but I cannot consider the former of these propositions as one proper to be entertained. Such an arrangement would be very unlikely to prove satisfactory, and I consider it highly improper for the Court to enter upon any such negotiation with a party proposed as a liquidator. And the further security suggested does not strike me as very valuable, in view of the prior charge upon it. Even if it were accepted, there would still be the undesirable conflict between duty and interest in a liquidator having to realize a claim from himself. It appears by the minutes of the creditors' meeting, that both Mr. Hespeler and Mr. Brock refused to act with a debtor

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of the Bank as a liquidator.

Having these views upon this objection, I shall not delay to consider the circumstances of Mr. Fisher's transactions of the 30th of June last. I shall only say of this objection that I am not fully satisfied with the explanations offered. It is unnecessary, also, that I should remark at length upon the fact of Mr. Fisher's previous connection with the Bank and his relations with the President, or upon the circumstance of his principal support being from those connected with the former management of the Bank. I shall simply say that, in case of such a contest as this, I deem it undesirable that the candidate of the former officials should be selected. I say this upon general principles, and without intending to prejudge the charge against Mr. MacArthur, the President of the Bank, or to adopt any of the accusations or insinuations suggested against him, all of which I hope will be found wholly unwarranted by the facts.

Next in importance are the objections to Mr. Ferguson. I cannot regard with favor his action in sending out the letters respecting proxies. The meetings were called solely for the purpose of proposing liquidators, and the proxies could be sought only with a view to that purpose. Canvassing of any kind for the position of liquidator is highly objectionable, but the action here taken was more objectionable than ordinary canvassing. A provisional liquidator sent out letters signed by him as such liquidator asking managers of outside branches of the Bank employed under him, as well as other parties, to pay attention to the proposed correspondence of his solicitors as to proxies. He was thus lending the influence of his position to induce such parties to send in these proxies to an agent who has turned out to be one of his strongest supporters. I regret that no explanation of these circumstances has been offered. It is only fair to add that the letters appear to have had little practical effect in gaining supporters.

In this Province, however, these liquidation proceedings are comparatively new. No similar case has been brought

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before the Court, and attention has not previously been directed here to the objectionable nature of such a course.

It might have been entered upon thoughtlessly, even on the part of the solicitor who advised it, and I cannot regard it as so heinous as I should if it occurs again. I deem it important, however, to remark upon the matter, that it may be understood that the Court will not look with favor upon such a course or upon canvassing by applicants for the position of liquidator.

To a less extent objectionable, but still in bad taste, was the appearance of Mr. Fisher upon the platform to advocate his own appointment, and his voting for himself upon proxies obtained by him. I regret to find that Mr. Bertrand, too, went so far as to vote for himself on proxies, though on claims for small amounts.

The charge against Mr. Ferguson, of discourtesy to the customers of the Bank is too indefinite to warrant attention, and the complaint about the deposit of the moneys is unimportant in the absence of any settled rule here upon the point and in view of the explanation offered.

The most serious objection is that, by the appointment of Mr. Ferguson, the loss of the assistance of Mr. MacArthur in the liquidation proceedings will be entailed. I can well understand that Mr. MacArthur's feelings towards Mr. Ferguson are not such that he would wish to be in constant personal communication with him. But Mr. MacArthur appears to realize that he owes to those interested in the Bank a moral duty to assist in making any loss as small as possible, and he has a large personal interest in the same direction. If the liquidators do not find it necessary to take further action antagonistic to Mr. MacArthur, I think that they will be able to obtain from him such assistance or information as may be found important, though it may be less conveniently than if the liquidator was friendly to him. If, however, further action antagonistic to him be found necessary or advisable, it would be equally so if other liquidators were appointed,

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and the same strained relations would probably again arise. Such complications are apt to occur in the liquidation of any corporation, and it would be an undesirable thing that the Court should allow itself to be deterred from a free choice of liquidators by any suggestion of this kind from those having the former management of the business.

It would be different if the proposed liquidators were shown to have personal ill will towards the former management, which might bias their acts. But here it appears that Mr. Ferguson was asked by Mr. MacArthur to become a provisional liquidator, and there is nothing to suggest that Mr. Ferguson's action towards Mr. MacArthur has been dictated by aught but a sense of duty.

I am confined to a choice among those named. Apparently none of those named as advisory liquidators are prepared to devote the necessary time and attention to the work which will be required of the chief liquidator, and none of them has the banking experience which I deem so important. Even, then, if the objections were more important, I might feel obliged to decide, as I do, in favor of Mr. Ferguson's appointment. I wish to add that, from personal acquaintance with that gentleman, I have every confidence in his ability and integrity; and any reflection upon him which may be found in my remarks is made with regret, and because I deem the practice referred to one which should be checked at the outset, although in this instance I cannot look upon it so harshly as I should hereafter.

As to the other liquidators, the appointment of Mr. Hespeler should clearly be made. Not only has he the support of the large body of creditors, but he has also the confidence of the shareholders.

In view of the objection made to Mr. Ross as a shareholder and a former director, I cannot appoint him. Questions might arise between different classes of shareholders in which his interest would be involved.

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Personally it would be difficult to choose between Mr. Ewart and Mr. Brock. I think, however, that I should appoint the former as being the only nominee of the shareholders whom I can select. While, as I have said, it appears that Mr. Hespeler has the confidence of those present at the shareholders' meeting, he is distinctively the nominee of the creditors. It is true that it may be found necessary to take action against shareholders, but Mr. Ewart is sufficiently well known to relieve me of any apprehension that he will act with partiality towards any class of those interested.

I think that all the liquidators should give security, Mr. Ferguson to the amount of $20,000 and the others in $5000 each.

There should be a direction for payment of the moneys into The Imperial Bank, and as to the signing of cheques. They should be signed by two liquidators, of whom one should be Mr. Ferguson. I am prepared to receive any suggestions from counsel as to the assigning of any particular acts or class of acts to the principal liquidator, but I do not think that this can be done by styling one a manager and the others advisers.

I have given some consideration to the question of remuneration. I feel its importance and the desirability of avoiding such a result as was reached in the case of the Central Bank. In that case, however, Chancellor Boyd remarked upon the difficulties occasioned by fixing this in advance. In any event, as I have said, I could not fix it now, as notice of an application to that effect seems to be required. I do not think that I could even ask the liquidators to bind themselves to a particular rate of remuneration as a condition of the appointment.

When the remuneration comes to be fixed, some creditors or shareholders may deem it in the interest of all that a higher rate be paid. Where I have such a limited choice, it seems impossible to make this a determining ground of selection; but I fancy that, after what has

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occurred, the Court will see that a moderate scale is settled upon.

I think, however, that I may now fix the relative rates of remuneration of the respective liquidators as suggested by the meetings in the manner decided on by the meetings.

As to the costs of the contest, I think I should follow the rule laid down in *In re London and Northern Insurance Co.*, 19 L. T. N. S. 144. The danger of running up costs in such contests was remarked on by Jessel, M. R., and Lindley, L. J., in *In re General Financial Bank*, 20 Ch. D. 278, as a reason for making the appointment of the liquidators in chambers, rather than on the hearing of the petition for winding up. Here, it is true, the liquidators are appointed on the making of the winding up order, and in the case of Banks the Court is confined in its selection; but it would, I think, be unwise to disregard the results of the great experience in these matters of the English Chancery Judges; it seems to me quite as important here as in England to discourage these contests and to avoid expense in connection with them, and the fact that the contest begins one stage earlier seems unimportant.

There will be one set of costs allowed to the shareholders and one to the creditors appearing on the hearing of the petition, save and except so far as these costs have been increased by the contest respecting the appointment of liquidators, and costs must also be allowed to the Bank and the petitioner. In the latter's costs may be included reasonable disbursements for procuring a place for the meeting of creditors and for secretaries and scrutineers, and otherwise properly incurred, in the opinion of the Master, in and about the meetings of creditors and shareholders.

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MASSEY MANUFACTURING CO.

v.

CLEMENT.

Before DUBUC, KILLAM AND BAIN, JJ.

Action against Sheriff—Negligence in not levying under execution—Sheriff bound to levy on chattels though mortgaged—Sheriff bound to see whether chattel mortgage valid on its face—Duty of Sheriff as to threshing grain seized in stack—Chattel mortgage—Affidavit of bona fides made by "accountant" of mortgagees.

In an action against a Sheriff for not levying under an execution, it appeared that he had abandoned the seizure and refused to do anything further on finding that there were three mortgages on the debtor's goods and chattels, prior to the execution; being of opinion that the aggregate amount apparently secured by them would exceed what he could realize by sale of the chattels after payment of expenses.

One of the mortgages had, in fact, been satisfied and the Sheriff could have ascertained this on inquiry. Another was not proved at the trial to be valid under The Bills of Sale Act; it was in favor of the Canada North-West Land Company, and the affidavit of *bona fides* upon it was made by one Campbell, who only described himself as "Accountant of the mortgagees," and there was no other evidence that he was an agent of the Company authorized to take the same.

The debtor realized out of his grain, which might have been levied upon, more than sufficient to satisfy both the latter mortgage and the remaining valid and unsatisfied mortgage besides the plaintiffs' judgment.

Held, that the defendant was liable for the full amount of the plaintiff's claim against the judgment debtor.

If for any reason of which the Sheriff has notice, or by reasonable inquiries could discover, a chattel mortgage is not entitled to priority over a

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writ of execution in his hands, he cannot rely on it as a justification for not levying under the writ.

Per KILLAM AND BAIN, JJ.. (*Dubuc, J. dubitante*). The Sheriff could not rely on the mortgage to the Canada North West Land Company, as it was plainly invalid unless Campbell was the agent of the Company, and there was no evidence that he was such agent.

Per DUBUC, J.—The Sheriff having seized grain in stacks, is not bound to have it threshed and marketed, but may sell it in the stacks, but as no evidence was given to show that such a sale would have realized less than the actual value, the Court cannot presume that it would, although such would probably be the case.

It is clearly the Sheriff's duty, notwithstanding the use of the word "may" in the statute, to seize and sell the equity of redemption in mortgaged chattels when such equity is valuable.

ARGUED: 1st May, 1893.

DECIDED: 31st July, 1893.

Statement.

THIS was an action against the Sheriff of the Western District for not levying upon the goods and chattels of one Cooper under a writ of *fi. fa.* goods issued upon a judgment for $394.08 recovered by the plaintiffs against him. The defence was that, owing to incumbrances upon the goods of the execution debtor, the Sheriff was justified in withdrawing, and the plaintiffs had not sustained any damage by reason of his doing so.

The Sheriff received the writ on the 22nd July, 1891. He went himself to the place where the execution debtor resided, but did not call on him personally. Having received information about incumbrances, he made a search at the proper office, and found out the three chattel mortgages below mentioned.

Nothing further was done in the matter until the 23rd of September following. On the 21st of September, the plaintiffs' attorneys wrote the Sheriff that they had been informed that the money could be made if the writ was attended to. On the 23rd, the Sheriff sent his bailiff to Cooper's place, and the bailiff found there eight stacks of

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wheat and one of oats, and three horses, several head of cattle and pigs, and some farm implements. He also learned that some of the wheat had been threshed, and that a quantity of it had been taken to the elevator or mill at Souris. The bailiff made a formal seizure of the stacks, but made no special inquiries about or attempt to seize the wheat at Souris. Then a day or two afterwards, Cooper went to see the Sheriff himself, and told him that all his goods and crop were covered by two chattel mortgages to one Smith and a mortgage to the Canada North West Land Company, and he stated that he distinctly explained to the Sheriff the actual facts with reference to the two mortgages to Smith. As the result of this conversation and of some inquiries that the Sheriff afterwards made, he came to the conclusion, he stated, that if he proceeded with the execution of the writ, he would not realize sufficient to pay the mortgages and his own costs, and he therefore abandoned the seizure and returned the writ.

The debtor the same year had about 100 acres under crop, between 80 and 90 wheat, the remainder oats. When the crop was threshed he had 2097 bushels of wheat and 660 of oats. In addition there were two stacks of oats not threshed, but fed to stock, also a number of animals and some farming implements. Against these, three chattel mortgages had been registered in the proper office prior to the receipt by the Sheriff of the plaintiffs' writ of execution. The first was in favor of John E. Smith, securing $275, and was filed in February, 1891. The second was also in favor of John E. Smith for a like amount and was filed in April, 1891; and the third was to the Canada North West Land Company, securing $520, also filed in April, 1891.

The first mortgage to Smith was given to secure the payment of $275, which was the price of three horses that Cooper had bought from Smith, and the property described in the mortgage was the three horses, and some other stock and all the wheat crop to be grown on Cooper's quarter section in the year 1891. In April, 1891, Cooper returned these

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three horses to Smith and took in place of them two other horses for the same price, apparently, as he had agreed to pay for the three; and then he gave the second mortgage to secure Smith for the payment of their price. This mortgage was on the two horses and on all the wheat crop. The first mortgage was not, however, discharged, for the reason, it was said, that Cooper intended to buy another horse from Smith later in the season, if his crop turned out well, and it was agreed that the mortgage should be kept on foot as security for the payment of this horse. Cooper got the third horse in August, but in the meantime the plaintiffs' execution had been placed in the Sheriff's hands.

The mortgage to the Canada North West Land Company covered all the mortgagor's crops to be grown during the season of 1891. The affidavit of *bona fides* upon it was made by one F. C. Campbell, who described himself in it as "the accountant of the mortgagees."

There was no other evidence, either in the mortgage or otherwise, of Campbell being the agent of the Company for the purpose of taking the mortgage.

It appeared from Cooper's evidence that he had realized nearly $1300 for his wheat and oats that year.

At the trial, before the Chief Justice, a verdict was entered in favour of the plaintiffs for the full amount of their claim, less a sum of money which they had realized by the sale of some implements.

Defendant then moved before the Full Court to set aside the verdict and enter a verdict for him, or a non-suit, or for a new trial.

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

J. S. Ewart, Q.C. and *G. R. Coldwell*, for plaintiffs.

The following cases were referred to:—*Warne* v. *Housley*, 3 M. R. 547; *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; *Reg.* v. *Barlow*, Salk. 608; *Fonseca* v. *Schultz*, 7 M. R. 463; *Carlisle* v. *Tait*, 7 A. R. 10; *Union Bank of*

Scotland v. *National Bank of Scotland*, 12 App. Cas. 53; *Squair* v. *Fortune*, 18 U. C. R. 547; *Smith* v. *Cobourg &c. Ry. Co.*, 3 P. R. 113. 1893. Argument.

DUBUC, J.—The plaintiffs, in their action against the defendant as Sheriff of the Western Judicial District, claimed damages for a false return to a writ of *fi. fa.* against the goods of C. W. Cooper placed in his hands, and for negligence in the execution of the writ, and recovered a verdict of $362. The defendant asks to have the verdict set aside, and a verdict entered in his favor, or for a non-suit.

The question of negligence is particularly one of fact, and the learned Chief Justice, before whom the action was tried, has carefully and minutely discussed and considered all the facts of the case. His findings appear to me well supported by the evidence, and I am prepared to adopt them, except perhaps in one particular; but this would not have the effect of altering the final conclusion.

The goods and chattels to be seized and sold under the execution consisted of growing crops, stock and farming implements. Against these, three chattel mortgages were registered, two in favor of John E. Smith, and one in favor of The Canada North West Land Co.

It has been shown by the evidence, that only one of the Smith mortgages was really due. Then counting the quantity of grain threshed, the amount realized by the sale thereof, less expenses of threshing and carrying to market, the value of the stock and farming implements, and deducting therefrom the amounts due on the two other mortgages, the learned Chief Justice found that the balance would have been sufficient to pay the plaintiffs' judgment and leave $228.96 to meet the poundage and other contingencies.

It has been assumed in the argument of plaintiffs' counsel that the Sheriff should have seized the grain while in stacks, and should have himself seen to the threshing, the carrying to market and the sale, and the learned Chief

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Justice has made his calculation on that basis, adding one third to the expenses incurred, as it would have cost more to the Sheriff to have the same work done.

I have no doubt that the Sheriff might have done all that, if he had been willing to undertake the task; but I do not think he was bound to do so, and I can find no authority for the proposition that it was his duty to perform such work.

This brings the question under a different aspect, and under particular circumstances, might have led to a different conclusion. If the Sheriff was not bound to do more than seize the grain in stacks, and to sell it in stacks as seized, would he have realized as much, or nearly as much, as was done here by the farmer who did the work himself? The point does not appear to have been brought up in the evidence, and was not raised in the argument. If the amount realized, after paying the incumbrances and expenses, would have left a very small balance to apply on the plaintiffs' judgment, and if it could be shown that the sale of the grain in stacks would have realized so much less that no balance at all would have been left, the plaintiffs herein could not have shown a pecuniary damage, and under *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642, their action against the Sheriff for negligence in not levying, could not have been maintained. But there is nothing in the evidence to show that a different result would have been attained, had the Sheriff seized and sold the grain in stacks; on the contrary, the inference is that the conclusion arrived at by the learned Chief Justice would not have been altered.

It has been contended on behalf of the plaintiffs and to strengthen their case, that the chattel mortgage of the Canada North West Land Co. was not valid, because the affidavit of *bona fides* was not shown to be made by a person duly authorized to make it. The affidavit was made by one Frederick C. Campbell, who describes himself as accountant of the mortgagees. The statute

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requires that the affidavit be made by the mortgagee or his agent. It may be that such affidavit would be found defective; but the point does not appear to be so clearly settled, and it seems to me doubtful if the Sheriff, in such circumstance is absolutely bound to assume the responsibility of deciding it one way or the other, and to incur the risk of being mulcted in heavy damages for negligence, if his decision is not sustained by the Court. If on its face, the affidavit suggests a reasonable doubt as to its validity, the safer course for the Sheriff would be to refer the matter to the attorney of the execution creditor, and to endeavor to get instructions from him, or ask for an indemnity. Such an act of diligence on his part might be, on that point at least, an answer to the charge of negligence brought against him.

In this case the Sheriff was repeatedly requested by the plaintiffs' attorney to make a levy; but relying on his own view of the situation, and being satisfied in his own mind that nothing would be made to apply on the plaintiffs' execution, he refrained from levying; and the evidence showing, as found by the learned Chief Justice, that the seizure and sale of the goods and chattels of the execution debtor would have realized enough to satisfy the plaintiffs' judgment, he must be held responsible for the damages sustained by the plaintiff on account of his failure to levy.

The verdict should be affirmed and the motion refused with costs.

KILLAM, J.—In my opinion this application should be dismissed.

It must be taken, upon the evidence, that there were goods of the debtor within the bailiwick of the Sheriff, upon which he might have levied under the writ in his hands. It is true that the interest of the debtor in these goods was not absolute and was not a legal interest. But in a court of equity the goods would be regarded as the property of the debtor, subject only to a charge or charges in favor of the mortgagee or mortgagees. That

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interest, known as an equity of redemption, was liable to seizure by the 21st section of The Executions Act, R. S. M. c. 53. I quite agree with the view which the learned Chief Justice took of the effect of this clause. The statute itself does not command the Sheriff to seize such an interest, but it enables him to do so. The writ of execution, then, commands him, of the goods and chattels in his bailiwick of Christopher W. Cooper, to cause to be made a certain sum adjudged to the present plaintiff. It became the duty of the Sheriff, upon receipt of this writ, to cause the amount to be made out of any goods of the debtor which it was within the power of the Sheriff to take in execution.

The bulk of the crop, but for the mortgages, was clearly liable to seizure under the execution, and to sale upon its being harvested or taken and removed from the ground. See R. S. M. c. 53, s. 49.

By virtue of the mortgage to Smith, the legal interest in the goods was vested in him, but under the authority of *Dederick* v. *Ashdown*, 15 S. C. R. 227, the right to possession was in the debtor until default or the happening of one of certain other events. None of the mortgage moneys were to fall due until December, 1891, and none of the events mentioned had happened prior to the visit of the Sheriff's bailiff to the debtor's farm, on the 23rd September, 1891. All of the mortgages contain clauses giving to the mortgagees a right to take possession, if the mortgagor should suffer or permit the goods to be taken in execution. It may be doubtful whether this proviso is applicable to a seizure of the equity of redemption of the debtor, as distinguished from an assumed absolute seizure of the goods themselves; but in any event it does not apply until actual seizure. It is true that, a few days before the 23rd September, Smith made or assumed to make some sort of seizure of the remaining portion of the crop; and it may be that the goods were thereby so far transferred to his possession that the Sheriff would have

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been rendered liable to an action of trespass by any manual interference with them, even though avowedly made for the purpose of seizing the mortgagor's interest only. However this may be, the cases of *Ward* v. *Macauley*, 4 T. R. 489, and *Dean* v. *Whittaker*, 1 C. & P. 347, show that, before the mortgagee had assumed to take possession, the Sheriff would not have been liable either in trespass or in trover for taking possession of the goods for the purpose of seizing the mortgagor's interest only; and, therefore, he could have done so with perfect safety, provided he in no way damaged the goods. At present, I am not impressed with the suggested difficulty in the way of a seizure of the equity of redemption, even after the mortgagee had acquired possession, without such an act as would have rendered the Sheriff liable to an action of trespass; but it is unnecessary to consider the method of doing this, or whether a seizure of the equity of redemption would be within the provisoes in the mortgages, entitling the mortgagees to possession. All that it is necessary to find is that, before the mortgagee assumed to take possession, there was property of the debtor, his equity of redemption in these goods, which might, but for negligence on the part of the Sheriff, have been taken in execution, and that the plaintiff has been damnified by neglect to take it.

I cannot interpret the clause authorizing the mortgagees to retake possession as rendering the mortgage moneys payable upon their doing so, at least until they should assume to make a sale; but, even so, the equity of redemption would remain until actual sale by a mortgagee under the power contained in his mortgage. See *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

Then, what was the action of the Sheriff? He received the writ on the 22nd July, 1891. Before giving the warrant to his bailiff on the 22nd September, he appears to have done nothing under it, beyond making some inquiries of a party living a few miles from the debtor's

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farm. Sitting as a jury, the learned Chief Justice might well consider that the 22nd September was later than the usual time for harvesting, and that, even if the Sheriff were satisfied that there was nothing except the growing crop liable to seizure, and that it was not reasonable to make a seizure in July and incur the expense of watching it until harvest, when it could not be sold before that time, there was great negligence in delaying until harvest was probably long over, before attempting to execute the writ.

Then, when the bailiff went to the debtor's premises, he found there a quantity of grain apparently in possession of the debtor and *prima facie* his. The Sheriff accepted the statements of the debtor and his wife as to the mortgages, and the instruments found in the office of the Clerk of the County Court, as showing the property to be subject to such incumbrances as to render a seizure unlikely to produce any beneficial result for the creditor and he assumed on his own responsibility to refrain from seizing and to make a return of "*nulla bona*." It appears to me that in such a case, upon the principles of the cases of *Dewey* v. *Bayntun*, 6 East, 257; *Warmoll* v. *Young*, 5 B. & C. 660, and *Dennis* v. *Whetham*, L. R. 9 Q. B. 349, the Sheriff must stand or fall by the mortgages, and be prepared to justify his course by showing the existence of such documents or transactions as rendered the goods not liable to seizure or the debtor's interest therein so small that the judgment creditor cannot prove himself to have been damnified by a failure to seize.

Now, by The Bills of Sale Act, R. S. M. c. 10, s. 3, a mortgage of chattels takes effect only from the time of its being filed, accompanied by a certain affidavit of the mortgagee or his agent. The Sheriff has failed to show that the affidavit accompanying the mortgage to the Canada North West Land Co. was made by an agent of the Company, and he has, therefore, failed to show that that mortgage had operation and effect to pass an interest in the goods prior to the receipt by him of the execution.

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As to the mortgages to Smith, I entirely agree with the view of the Chief Justice that only one sum of $275 is to be deemed as secured thereby, at least in priority to the execution.

Without, then, considering the effect of the exemptions or the principle upon which the damages were computed, it appears to me that the verdict must stand for the full amount, and that the application should be dismissed with costs.

BAIN, J.—The learned Chief Justice, who tried this action, held that the defendant, the Sheriff of the Western Judicial District, had been guilty of negligence in not executing the plaintiffs' writ, and that the plaintiffs had been damnified by his negligence to the full amount due on the writ. I agree in both these conclusions, though I arrive at the latter of them from considerations somewhat different from those on which the learned Chief Justice proceeded.

The authority given to the Sheriff by section 27 of the Act respecting Executions to seize and sell the equity of redemption of execution debtors in any goods and chattels, is in form permissive; but the power is given, not for the benefit of the Sheriff, but for that of execution creditors, and I agree that it is the imperative duty of the Sheriff to act upon the power whenever a proper occasion for its exercise arises. *Fonseca* v. *Schultz*, 7 M. R. 458.

An action against a Sheriff for not levying under a writ of *fi. fa.* against goods or for a false return of *nulla bona*, will not lie unless the plaintiff has suffered actual and pecuniary damage by the Sheriff's neglect; and it is for the tribunal trying the case to decide whether or not, if the writ had been executed, the plaintiff would have derived any benefit from it. *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175. If the Sheriff has been guilty of neglect, and the plaintiff has suffered loss by the neglect, then he is entitled to be

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placed in the same position, by means of damages, as if the Sheriff had done his duty.

The writ in question was placed in the Sheriff's hands on the 22nd of July, 1891, with instructions that the money was to be made as soon as possible. The plaintiffs say, however, that they do not complain of any negligence there was in not executing it prior to the 23rd of September following.

It appears from Cooper's evidence that he realized from his crop that year 2097 bushels of wheat and 660 of oats, and that when the bailiff seized, all this grain was in the stacks, except 401 bushels of wheat that were in the mill at Souris. This wheat, it appears, had been taken possession of by Smith, one of the mortgagees, the day before the bailiff seized, and he had placed it in the mill. Including these 401 bushels, Cooper sold 1906 bushels of wheat, realizing $1261.60, and he also sold 120 bushels of oats for $23.70. Then the remaining wheat and oats would much more than cover what would be exempt from seizure.

The chattel mortgages on which the Sheriff relies to show that the plaintiffs have not suffered loss by his not having proceeded with the seizure, are three, two to Smith and one to the Canada North West Land Co. These mortgages were all filed in the proper office prior to the plaintiffs' writ being placed in the Sheriff's hands; but it is clear, following the principle acted upon in such cases as *Imray* v. *Magnay*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Ex. 160; *Lovick* v. *Crowder*, 8 B. & C. 132 and *Dennis* v. *Whetham*, L. R. 9 Q. B. 345, that if for any reason of which the Sheriff had notice, or by reasonable inquiries could have discovered, the mortgages were not entitled to priority as against the plaintiffs' writ, he cannot rely on them as a justification for not executing the writ. Now the plaintiffs contend that neither the first mortgage to Smith, nor the one to the Canada North West Land Co., is entitled to priority.

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As the first mortgage was in fact satisfied when Smith took back the three horses for the price of which it had been given, and as the Sheriff had notice of all the circumstances under which Smith appeared to hold two mortgages, I think he cannot rely on the first of them.

The mortgage to the Canada North West Land Co. is dated the 23rd of April, 1891, and covered all the mortgagor's crop to be grown during that season. The affidavit of *bona fides* is sworn to by F. C. Campbell; and the only evidence that there is before us, either in the mortgage or otherwise, of his relations with the Company is that he describes himself in the affidavit as "the accountant of the mortgagees." Now, under the Bills of Sale Act, chattel mortgages operate and take effect as against executions only from the date of their being filed, "with the affidavit of the mortgagee or his agent, that the mortgagor therein named is justly and truly indebted," &c.; and the plaintiffs claim that this mortgage cannot take effect as against them, because it does not appear, and it has not been shewn, that the affidavit of *bona fides* has been made by the agent of the mortgagees. The agent referred to in the Act must, at any rate, mean one who has been authorized by the mortgagee expressly or by implication to make the affidavit required; and he must, of course, that he may be able to swear to the affidavit, be aware of the circumstances of the transaction. From the fact that Campbell has sworn to the affidavit, it is proper to assume that he was aware of the circumstances, but I do not think it possible to infer or presume from the mere statement that he is the accountant of a company such as the mortgagees are, that he was authorized, or that it came within the scope of his duties, to act as their agent in making the affidavit.

It is the defendant who is seeking to show that the mortgage was a charge on the debtor's goods prior to the plaintiffs' writ, and I think it lay on him to shew, *prima facie*, that the mortgage was one that under the Act

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would take priority of the writ. If on the face of the mortgage or the affidavit, there was anything to shew that Campbell was the agent, then, I should think, there would be a presumption in favor of the fact that he was the agent, and the burden of proof would be changed; and it may be that in such a case, the Sheriff could rely on the mortgage, even if the plaintiffs could shew that the statement in the mortgage or affidavit was untrue in fact. But there is no presumption of Campbell's authority here, and as no evidence was given to shew that he was in fact the agent of the mortgagees, I think it has not been shewn that this mortgage was a charge on the debtor's goods as against the writ of execution.

Mr. Howell relied altogether on the case of *Carlisle* v. *Tait*, 7 A. R. 10, in arguing that the mortgage should be held to be valid, although there was no evidence that Campbell was the agent of the mortgagees. The Ontario statute requires the mortgage to be filed with an affidavit of the mortgagee or his agent, "if such agent is aware of all the circumstances connected therewith, and is properly authorized in writing to take such mortgage," (in which case a copy of such authority shall be registered therewith.) The full authority to the agent who made the affidavit was duly filed, but it was contended that the mortgage was not valid as against a subsequent execution, because the agent did not swear that he was acquainted with the circumstances. The Court of Common Pleas held that the fact that the agent was acquainted with the circumstances, must appear either from the mortgage or the affidavit or the papers filed therewith, and that the mortgage was invalid as against the execution. The Court of Appeal, however, reversed this decision, taking the view that the affidavit swore to all the facts the section required. As Burton, J. A. said, "There is nothing in terms requiring that he, (the agent,) should state that he is acquainted with the circumstances, and this is not surprising as without such acquaintance he could not truthfully make the

affidavit." This decision turns altogether on the question of what under the Ontario Act the affidavit shall contain, and does not, I think, when closely examined, lend any support to the contention for which it was cited. It might be relied on to shew that the agent's authority need not appear on the face of the affidavit or the mortgage, but that point is not now in question. The mortgage put forward, is entitled to priority only if the affidavit were made by the agent of the mortgagees, and there is no evidence whatever, presumptive or direct, to shew that it was.

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The only mortgage then that the defendant has proved to have been a charge on Cooper's goods, prior to the execution, was the second mortgage to Smith for $275 and interest at one per cent. per month. The property covered by this mortgage was the stock and the crop of wheat, and the amount secured fell due on the 1st of December, 1891.

The section of the Act respecting Executions says the Sheriff may seize and sell the interest or equity of redemption of the execution debtor "in any goods and chattels." Probably, however, this means in any goods that themselves would be liable to be seized if they belonged to the debtor; and if this be the proper view of the effect of the section, then it is necessary to leave out of account in estimating the value of the debtor's interest that could have been seized, all the property in the mortgages that would have been exempt from seizure in the debtor's own hands.

The crop of oats was not covered by the mortgage to Smith; and so much of it as was not exempt might have been seized and sold outright.

Prima facie the measure of the plaintiffs' damage in an action of this kind is the value of the goods that might have been seized; and the *onus* is on the Sheriff to shew that if he had seized and sold, the plaintiff would not have benefited to the full amount of their nominal value. In *Hobson* v. *Thelluson*, *supra*, Blackburn, J., said, that all the

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BAIN, J.

facts that would probably occur as against the execution creditor's *prima facie* presumption that the damages are the full value of the goods, may be taken into consideration. Quite consistent with this, is the decision in *Donnelly* v. *Hall*, 7 O. R. 581, that when a Sheriff in neglect of his duty abandons a seizure he has made of goods of sufficient value to satisfy the plaintiffs' execution, he is not entitled to the benefit of doubts that may be raised as to the goods realizing enough if sold to pay the execution. *Moore* v. *Moore*, 25 Beav. 8; *Dennis* v. *Whetham*, L. R. 9 Q. B. 345.

In the present case it is clear that, even if everything but the wheat be left out of consideration, the plaintiffs have suffered damage by the defendant's neglect to the full amount due on their execution. The wheat that Cooper sold realized over $1200; and all this might have been seized and sold, subject only to a chattel mortgage, on which there could not be more than $300 payable for principal and interest. Making all allowances for the fact that a purchaser at the Sheriff's sale would have acquired only the debtor's interest in the wheat, and that he would have had to buy this interest subject to all the mortgagee's rights and remedies under the mortgage, it would be unreasonable to infer anything else than that, if the seizure and sale had been proceeded with, enough would have been realized to pay the plaintiffs in full. They, at all events, would then have had the opportunity of protecting their own interests; and the Sheriff himself says in his evidence that he came to the conclusion that if he proceeded with the sale of the goods the bailiff had seized, he would have realized from eight to nine hundred dollars.

Application dismissed with costs.

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COBURN v. McROBBIE.

Before KILLAM, J.

Sheriff—Action for money had and received by Sheriff as such, for the use of plaintiff—Money paid by debtor to be applied on second execution, leaving first unsatisfied—Priority of executions.

A debtor, against whom there were several executions in the hands of a Sheriff, paid him a sum of money expressly to be applied on the plaintiffs' writ, which was not entitled to priority. Afterwards, on the money being claimed both by the plaintiffs and the first execution creditor, the Sheriff returned the money to the debtor.

Held, that the plaintiffs were entitled to recover the amount from the Sheriff as money had and received for their use.

ARGUED: 15th November, 1892.
DECIDED: 24th January, 1893.

Statement.

THIS was an action on the common money counts, brought by execution creditors against a Sheriff, to recover moneys claimed to have been paid to the Sheriff upon the plaintiffs' execution.

The evidence showed that the Sheriff had in his hands two executions of different creditors against the goods of one Peel, of which the plaintiffs' was the second received by the Sheriff; that the Sheriff gave to his bailiff warrants to levy the amounts of both writs; that the bailiff called upon Peel, who promised him to raise and pay $400 on the plaintiffs' execution, intimating that he wished to pay the plaintiffs', and that he would pay the other as soon as he could; that Peel subsequently sent to the bailiff, through the post office, $400, for which the bailiff gave him a receipt as paid on the plaintiffs' execution; that the bailiff paid the amount over to the Sheriff, informing him that the debtor wished it applied on the plaintiffs' execution; and that the Sheriff's clerk then wrote to the attorneys who had issued the writs, both having been issued by the same

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attorneys, informing them of the $400 having been received by him and of the debtor's wish as to the application of the amount, but stating that the Sheriff had applied the money on the first execution. The Sheriff stated that, although the letter was written by his directions, the statement of his application of the money was incorrect and unauthorized by him, but that, in fact, he made no application of the money and in the end, by legal advice, both creditors having made claim to it, returned it to the debtor.

W. H. Culver, Q.C., and *George Patterson*, for plaintiffs.

J. Martin, for defendant.

KILLAM, J.—In my opinion the proper inference from the evidence is that the debtor paid the money on the plaintiffs' execution and it was so received and applied by the bailiff, and I think that the plaintiffs are entitled to recover the amount received by the Sheriff to their use.

That moneys levied by a Sheriff under execution may be recovered in such an action is clear. *Thurston* v. *Mills*, 16 East, 274; *Morland* v. *Pellatt*, 8 B. & C., 725.

It is true that in the former of these cases the plaintiff failed, but it was because the Sheriff had in fact made the money by a sale under the second writ, and not under the plaintiff's. That decision appears to me to support the case of the present plaintiffs.

I shall enter a verdict for the plaintiffs.

Verdict for plaintiffs.

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THE LONDON AND CANADIAN LOAN AND AGENCY CO.

V.

THE RURAL MUNICIPALITY OF MORRIS.

Before DUBUC, J.

Mandamus against Secretary-Treasurer of Municipality—Production of Assessment rolls—Clerical error in copy—Who should apply for mandamus—Alteration of boundaries—Delay in making application for mandamus—Inability to obey the writ—Remedy must be effective—Municipal Act, R. S. M., c. 100, ss. 663 and 664.

The Sheriff having in his hands an unsatisfied execution against the defendant Municipality, proceeded under s. 663 of the Municipal Act, R. S. M., c. 100, and served a copy of the writ of execution on the Secretary-Treasurer of the Municipality on 12th June, 1893. On the 25th July following he demanded the production of the assessment rolls for the purpose of striking a rate to satisfy the execution, but the Secretary-Treasurer refused to comply with the demand. On the 27th October following, the Sheriff made a similar demand, and having met with another refusal, he applied for a *mandamus* to compel the Secretary-Treasurer to produce the rolls.

In the copy of the writ served on 12th June, there was a clerical error, the year 1893 being written in two places instead of 1890, but enough information appeared in the copy to show that the error could not mislead any one.

Held, (1) that the application was rightly made by the Sheriff and not by the plaintiffs.

(2) That in view of the express wording of ss. 663 and 664 of the Act, the proceedings were properly directed against the Secretary-Treasurer, instead of against the Municipal Council.

(3) That an addition of territory to the Municipality since the recovery of the judgment made no difference in the liability of the defendants; for, by section 38 of the Municipal Act, the Municipal Commissioner is exclusively charged with the adjustment of the assets and liabilities of the municipalities whose boundaries are in any way changed.

(4) That the application was not too late, although the collector's rolls had been made up and completed, the tax notices sent out, and some taxes had already been paid. The first steps taken by the Sheriff were in ample time to enable the Council to make the required levy themselves, and they cannot take advantage of their own laches and neglect to prevent the law being carried out.

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(5) That even if the Sheriff would have been unable to strike the rate and arrange for the necessary levy the same year as required by the statute, that would be no reason for refusing the writ, for mere inability to obey the writ has not in all cases been considered a sufficient reason for refusing it.

Regina v. *Birmingham, &c., Ry. Co.*, 2 Q. B. 47; *Regina* v. *Great Western Ry. Co.*, 1 E. & B. 253; *Regina* v. *York, Newcastle, &c., Ry. Co.*, 16 Q. B. 886, relied on.

ARGUED: 21st November, 1893.
DECIDED: 7th December, 1893.

Statement.

ON the 6th August, 1890, the plaintiffs recovered a judgment against the defendants for the sum of $15,873.87.

Execution was issued and placed in the sheriff's hands on the 29th August, 1890.

Under the provisions of section 663 of the Municipal Act, R.S.M. 100, the sheriff, on the 12th June, 1893, caused a copy of the writ of execution to be served on H. R. Whitworth, secretary-treasurer and collector of taxes for the defendants, and on the 25th July, 1893, the sheriff called personally on Whitworth and demanded the production of the assessment rolls of the defendants for the purpose of striking a rate sufficient on the dollar to cover the amount due on the writ of execution, which demand was refused.

On the 27th October, 1893, the sheriff called again on Whitworth, and reiterated his demand for the production of the assessment rolls. He was again met with a refusal.

On the 31st October, the sheriff obtained a rule *nisi*, calling upon Whitworth as secretary-treasurer and collector of taxes of the defendants to show cause why a *mandamus* should not issue against him, commanding him to produce to the sheriff the assessment rolls of the defendants, and permit the sheriff to examine the same for the purpose of striking a rate sufficient in the dollar to cover the amount due on the execution, with interest and costs, and to permit the sheriff to do all things necessary to be done under the execution.

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Argument.

W. H. Culver, Q.C., and *W. E. Perdue* for plaintiffs.

H. E. Crawford for defendants.

The following cases and authorities were referred to: *Van Whort* v. *Smith*, 4 M. R. 421; *Waterous* v. *Orris*, 6 M. R. 177; *Atkinson on Sheriffs*, 199; *McIntyre* v. *Union Bank*, 2 M. R. 305; *Trustees of Roman Catholic School of Belleville* v. *School Trustees of the Town of Belleville*, 10 U. C. R. 469; *Reg.* v. *Prudhomme*, 4 M. R. 259; *Short on Informations*, 247; *School Trustees of Otonabee* v. *Casement*, 17 U.C.R. 275; *Robson* v. *McGowan*, 2 P.R. 323; *Harrison's Municipal Manual*, p. 318.

DUBUC, J.—On the argument of this rule, several objections were raised by the defendants' counsel.

The first objection is that the rule is too broad in its language, and that it should have asked only the production of the assessment rolls and nothing more. I think there is nothing in that objection. What follows the demand for the production of the assessment rolls is the corollary of the said demand, and is only incidental to it.

It is further objected that there was no proper copy of the writ of execution served on the defendants' treasurer, as required by sub-section *a* of section 663 of the Municipal Act, the paper purporting to be a copy of such writ having wrong dates. The said copy refers to the judgment as having been recovered on the 6th August, 1893, and the *teste* is dated the 29th August, 1893, while the year should have been 1890. But this appears on the face of the said copy served as a mere clerical error. The *teste* concludes thus: "This twenty-ninth day of August, A.D. 1893, in the fifty-fourth year of our reign." August, *1890*, would correspond with the 54th year of Her Majesty's reign, while August, *1893*, would be in the 57th year of the reign. But there is more to show that the figures "1893" must be an error. At the bottom of said copy the following is written: "Renewed for two years from the 27th day of August, A.D. 1892. (Signed) Augustus Mills, Dep.

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Prothonotary." This shows clearly that the word "three" in the body of the writ and the figure "3" in the *teste* is merely a repeated clerical error which could mislead no one. The copy served is a substantial copy of the writ, and I do not think such an objection should be maintained.

The next objection is that there was no proper statement of the sheriff's fees served with the writ, because the statement left with Whitworth on the 12th June has not all the itemized particulars which appear in the form given by *Atkinson on Sheriffs*, p. 199. The statement is composed of four items—the principal, the interest, the costs of writ, of renewal, and the sheriff's fees. While the fees might properly have been stated in a detailed form, I cannot consider the objection as a serious one. It would be very difficult for the sheriff to state very accurately the exact items he might feel bound to charge. Sub-section *e* of section 663, already referred to, seems to have that in view, when it provides for any surplus which might have been received by the sheriff.

The item as to interest is also, I think, sufficiently explicit. It is a mere matter of calculation, which can be easily adjusted, and it is not even suggested that the amount placed in the statement does not correspond with the true amount calculated to some day as near as convenient to the day of the service, as required by the statute.

Another objection is that this application should have been made by the plaintiffs themselves and not by the sheriff, who has no beneficial interest in this money. This is answered in *Harrison's Manual*, 4th ed., p. 318, where he says: "If the corporation withhold the assessment rolls from the sheriff, his remedy would be to apply to the Court by *mandamus* to compel them to submit the rolls to him." The case of *Grant* v. *Hamilton*, 2 U.C.L.J.N.S. 262, is given as an authority for said proposition. It seems reasonable that the *mandamus* should be applied for by the sheriff. In every case where an execution is placed in

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the sheriff's hands, he has to exercise his discretion in seizing and selling the goods of the execution debtors, and does it generally under his own responsibility. But when the Municipal Corporation is the execution debtor, he has to do special things and perform special duties which are defined and pointed out by the statutes. If he is interfered with in the performance of those duties, as he is an officer of the Court, he should be empowered to ask the assistance of the Court in order to be able to perform those duties.

It is also contended that the proceedings taken herein should be directed against the Municipal Council, and not against their officer, the secretary-treasurer and tax collector. But the statute provides for that. Section 664 of the Municipal Act declares that the clerk, assessors and collectors of the corporation shall, for all purposes connected with the duties of the sheriff in such matters, be deemed to be officers of the Court out of which the writ issued, and as such shall be amenable to the Court, and may be proceeded against by attachment, *mandamus* or otherwise, in order to compel them to perform the duties thereby imposed upon them. Whitworth is the collector of taxes, and as such is supposed to have in his possession the assessment rolls. If he refuses to produce them to the sheriff, as required by the statute, he is the proper party to be proceeded against for such refusal. After being appointed by the council, the collector as well as the clerk and assessors become officers of the Court for the purpose of permitting and assisting the sheriff to carry into effect the provisions of the Act with respect to such execution. These are the very words of the statute, and the objection that the proceedings should have been directed against the council instead of against the secretary-treasurer and collector cannot be maintained.

Another point raised is that the Rural Municipality of Morris has now boundaries different from what they were in August, 1890, when the judgment herein was recovered; that a certain portion of what was previously the Munici-

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pality of Youville has been added to it by chapter 55, section 28 of the statutes of 1890, which statute was assented to on the 31st of March, 1890, but was only to come into force on the 1st of November of that year. I think this is a matter with which the Court has nothing to do in an application like the present one. Section 38 of the Municipal Act provides for the adjustment, by the Municipal Commissioner, of the assets and liabilities of municipalities when the boundaries are altered by an addition or subtraction of territory, or when the territory of a municipality is wholly or partially added to another municipality, and sub-section *l* of said section 38 takes away altogether the jurisdiction of the Court and its power to interfere in any manner with any order or decision of the Municipal Commissioner in such matters. The execution creditors have the right to be paid the amount of their judgment recovered against the defendants; the sheriff is authorized and bound to enforce the writ of execution placed in his hands in the manner pointed out by the statute; and if some complications or difficulties arise as to the adjustment of the liabilities of the Municipality of Morris in respect of some territory added to it since the judgment was recovered, this is a matter for the Municipal Commissioner to decide, as provided by said section 38. The Court is relieved by the statute of the responsibility of seeing to the adjustment of such difficulties.

It is further argued against the granting of the *mandamus* that this application was made too late, as the assessment rolls had already been made up and completed, the tax notices sent, and some taxes had already been received. Whitworth states in his affidavit that prior to the 27th July, when the first demand was made for the production of the assessment rolls, the by-law levying the rates for the current year had already been passed by the council, and the tax notices had been mailed, and that prior to the 27th October, when the second demand for the assessment rolls was made, many of the ratepayers had paid their taxes for the year. He does not deny, however, that, on the

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12th June, when the writ of execution and statement of the sheriff were served on him, in compliance with sub-section *a* of section 663 of the Municipal Act, no by-law had been passed, no tax notices sent, and nothing done to inform the ratepayers what amount of taxes would have to be paid for the current year. The serving of the writ and statement of the sheriff were the initiatory proceedings, under section 663, to enforce the judgment recovered against the municipality. This was a proper notification to the secretary-treasurer and to the council; they were bound to take notice of it, and to govern themselves accordingly. Was the sheriff really guilty of laches and delay in the matter? By the provisions of the Assessment Act, c. 101 of the R. S. M., the assessor has to return the assessment roll on the 1st March, or the time may be extended till the 1st April. Twenty-five days should elapse before said roll is revised by the council, and the Court of Revision may adjourn from time to time and has until the first of July to complete the revision. Then any ratepayer has ten days to give notice of appeal from said revision before the County Judge, who gives notice of the day when he shall hear the appeal, and the County Judge has until the 15th August to make his return of the appeal cases heard before him.

In this case, the sheriff made his first move on the 12th June, when he caused the writ and statement to be served on the secretary-treasurer. Then he had to wait one month before asking for the production of the assessment rolls. He did so on the 25th July. He repeated his demand on the 27th October, and moved for a *mandamus* four days after. The sheriff might have, no doubt, acted a little more promptly after his first move, on the 12th June; but by giving a few days more to the defendants to comply with the requirements of the statute, before taking the second and third steps, he had no reason to suppose that they would claim to have been prejudiced, and would take advantage of that against him. He, however, made his

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first demand for the production of the assessment roll, before any taxes were received. And if the secretary-treasurer, Whitworth, or the Council, after due notification of the action of the sheriff to enforce the judgment of the plaintiffs, by the initiatory step of serving the writ and statement on the 12th June, have chosen to ignore altogether the said notification, and to go on with the collection of the taxes, without any regard to the proceedings taken against them, they have very bad grace now to come and claim that the sheriff did not act promptly enough. If they failed to comply with the requirements of the statute and neglected their duty in refusing to produce the assessment rolls when the sheriff asked to see them, they cannot be allowed to invoke and take advantage of their own negligence and failure, and pretend now that the proceeding of collecting the taxes is too far advanced to enable the striking of a rate to cover the amount due on the execution; otherwise municipal councils or their officers would have only to neglect their duties in order to be absolved from their responsibilities and to be protected against the judgments or orders of courts of justice.

Special rules are to be observed before a *mandamus* should be granted. (1) The applicant must have a legal right to the performance of some duty of a public character; (2) there must be no other effective lawful method of enforcing the right; (3) the Court must be convinced that *mandamus* will be effective to secure the object aimed at; (4) there must have been a demand and a neglect or refusal.

The defendants do not pretend that the sheriff had not a legal right to demand the production of the assessment roll. They do not suggest any other effective method of enforcing his right. Their only ground can be under the third rule, viz.: That the remedy may not be effective because notices have been sent and some taxes received.

In the first place, if they find themselves in that position, it is because of their own neglect and failure to comply

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with the requirements of section 663, after being notified to do so by the service upon them, on the 12th June, of the writ and statement of the sheriff. It is not a meritorious ground on their part.

In the second place, it does not clearly appear that they cannot do now what is ultimately aimed at by the *mandamus*, *i. e.*, to levy the rate required to satisfy the execution; but it appears clearly that what is immediately and primarily sought for by the *mandamus*, viz., the production of the assessment rolls, can be accomplished without any difficulty whatever. As to levying the rate, it is true that sub-section *c* of section 663 says that the sheriff, after examining the assessment rolls and striking the rate, shall, by his precept, command the collectors to levy such rate at the time, and in the manner by law required in respect of the general annual rates; but sub-section *d* says that the collectors shall levy the amount of such execution rate, and shall, within the time they are required to make the returns of the general annual rate, return to the sheriff the precept with the amount levied thereon. And, as we have seen before, the collectors have until the 15th day of March to make their said returns. It seems, therefore, that there is ample time yet to levy and collect said rate. The fact that a few ratepayers have paid their general taxes some months in advance of the time allowed them to do so, does not, in my opinion, make much difference.

Supposing it is held too late to levy the rate this year, and the sheriff goes through the same process next year, he would have to observe the delays prescribed by the statute. What, then, would prevent the municipal council from rushing the matter through as fast as the statute would allow them? And, on the notices being sent, one or two ratepayers might purposely pay their taxes immediately. Then the same difficulty would be met and the same grounds urged against the *mandamus* being granted.

Short on Informations, p. 247, says that mere inability to obey the writ of *mandamus* has not been, in all cases, considered a sufficient reason for refusing it.

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In *Reg.* v. *Birmingham and Gloucester Ry.*, 2 Q. B. 47, the defendants were bound by statute to make approaches on a turnpike road as convenient for passengers and carriages as the former road was. The approaches made were narrower than the former road. On *mandamus* to the railway company to make and restore such part of the turnpike road according to the statute, it was held to be no sufficient return to the *mandamus* to state that the company could not now widen the approaches without taking and purchasing more land; that their compulsory powers of purchasing under the Act had expired before they were called upon to widen; and that they had not then, nor have since had, the power to take or purchase land for such purpose. Lord Denman said, at p. 61: "With respect to the rest of the return to which we have referred generally, that the company cannot now obey the writ for the reasons therein specified, we have had frequent occasions to observe that we consider such an excuse inadmissible."

In *Reg.* v. *The York, Newcastle and Berwick Ry. Co.*, 16 Q. B. 886, on a rule for a *mandamus*, the defendants alleged that if the rule were made absolute, there would not be time, before the compulsory powers expired, to give notices and purchase lands within the provisions of the statute. It was held that the writ ought to issue, though the compulsory powers might expire before a return could be made. Coleridge, J., said: "As to sufficiency of time, the construction will be rigorous against them, because they might have proceeded at first, and are bound to make out very strictly that they have been unable . . . . . There being no laches, the question is simply on the possibility of compliance, and the impossibility is not made out."

This was followed in *Reg.* v. *The Lancashire & Yorkshire Ry. Co.*, 16 Q. B. 906 (note).

In *Reg.* v. *The Great Western Ry. Co.*, 1 E. & B. 253, it appeared on the record that the period for the exercise of the compulsory powers had expired, since the return and before the judgment. It was held that a peremptory *mandamus* must be awarded, though, since the return, compli-

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ance had become impossible. Lord Campbell, C. J., says at p. 260: "We must now assume that, when the writ issued, there was ample time to obey it. But in consequence of this bad return the time has passed. And now the Solicitor-General argues that the defendants may take advantage of their own wrong in disobeying the writ. It is a good writ, and a bad return, and we are bound to award a peremptory *mandamus*."

In the present case, I consider that no sufficient ground of inability to obey the *mandamus* has been shown. The writ of execution and statement of the sheriff were served upon the defendants at the proper time. They knew perfectly well what was required from them by said service, and it was their duty to govern themselves accordingly. When the sheriff demanded the production of the assessment rolls on the 27th July, tax notices had been sent, but no taxes had been paid, and it would have been easy then to comply with the demand of the sheriff, and produce the assessment rolls. No difficulty could have arisen in notifying the ratepayers of the special additional rate which would have to be levied to satisfy the execution. If, as already said, they have chosen to ignore the said service and demand, and have neglected to do what was required from them under such process, they must be held to have done so at their peril, and if, by such neglect of duty, they find now some difficulty in complying with the requirements of the statute, they cannot take advantage of their own negligence and invoke that as a ground why the writ of *mandamus* should not issue.

Under all the facts and circumstances of this case, I can see no valid reason why the said Whitworth should not be ordered to produce the assessment rolls for the examination of the sheriff, as required by the statute, and why a writ of *mandamus* should not issue commanding him to do so.

I think the rule should be made absolute with costs.

Rule made absolute with costs.

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ALLAN v. MANITOBA & N. W. RY. CO.

Re GRAY, ET AL.

Before KILLAM, J.

Practice in Equity—Hearing of petition—Evidence in support of.

When persons interested in the subject matter of a suit in equity, who are not parties to the suit, petition the Court for an order or decree which, if granted, would establish finally their alleged rights, and bring on their petition formally for hearing, it must be supported by direct, and not merely by hearsay or secondary evidence, unless the Court, as a matter of indulgence, allows further evidence, either upon inquiry before the Master or before the Court itself.

Gilbert v. *Endean*, 9 Ch. D. 260, followed in this respect.

It is otherwise in case of a motion or petition, pending investigation of a claim put forward by the petitioners, to have certain directions given to the Receiver in possession of the property claimed.

ARGUED: 9th August, 1893.
DECIDED: 12th August, 1893.

Statement.

PETITION presented by trustees for bondholders, alleging that the first 180 miles of the railway had been conveyed to the petitioners by mortgage to secure bonds issued by the Company, and that payments were overdue.

The petition asked that the Receiver appointed in this suit might be directed to keep separate accounts of monies received in respect of the operation of the 180 miles in question, and that he be further directed not to expend any monies received in respect of the operation of that portion of the line, upon other parts thereof, and that he might be further directed to apply the net earnings and income to be from time to time derived from the 180 miles or from any part thereof, in payment to the petitioners of the amount overdue, in respect of the interest upon the bonds.

The petition was brought on formally for hearing before the Court and was supported by an affidavit of the petit-

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ioners' solicitor, verifying a copy of the petitioners' mortgage, and setting forth the facts relied on, on information and belief.

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

J. Stewart Tupper, Q.C., and *F. H. Phippen*, for plaintiffs.

Isaac Campbell, Q.C., for the Railway Company.

The following cases were referred to:—*Law* v. *London Indisputable Life Policy Co.*, 1 K. & J. 223; *Re Athenæum Life Assurance Society*, Johns. 633; *Robson* v. *McCreight*, 25 Beav. 277; *Re State Fire Insurance Co.*, 1 H. & M. 457; *Kearns* v. *Leaf*, 1 H. & M. 681; *Allgood* v. *Merrybent Ry. Co.*, 33 Ch. D. 571; *Gilbert* v. *Endean*, 9 Ch. D. 268; *Gardner* v. *London, Chatham & Dover Ry. Co.*, L. R. 2 Ch. 212; *Bird* v. *Lake*, 1 H. & M. 120; *Evelyn* v. *Lewis*, 3 Ha. 472.

KILLAM, J.—It appears to me that I can only regard the petition as one which seeks to establish finally the alleged rights of the petitioners.

Mainly, it seeks two things: (1) to prevent the Receiver from applying receipts from one portion of the defendant's railway to defraying expenses incurred upon another portion; (2) that the Receiver be ordered to pay to the petitioners the surplus receipts from the first mentioned portion. It asks also, but I regard this as incidental only, that the Receiver be directed to keep the accounts in a particular manner. It is not a case of a motion or petition, pending investigation of a claim put forward by the petitioners, to have certain directions given to the Receiver, but the petition as a whole is brought on formally for hearing.

It appears to me that, on the principles enunciated in *Gilbert v. Endean*, 9 Ch. D. 268, that on such a hearing this petition should be supported by direct, and not merely by hearsay, evidence. The only question upon which I thought it desirable to reserve my decision was that suggested by myself, as to whether, upon this evidence,

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Judgment.

KILLAM, J.

there might be a reference to inquire into the petitioners' claim and directions in the meantime as to disposal of the moneys. On the examination which I have made, I find no authority for such a method of procedure and none has been cited to me.

While, as a matter of indulgence, I might possibly be warranted in permitting the petition to be supported by further evidence either upon inquiry before the Master or before the Court itself, yet as a matter of right the petitioners cannot be entitled to such a reference without some evidence of a proper character where the petition is brought on for formal hearing.

As I intimated before, I do not think there is such evidence of probable injury to the petitioners by delay as to warrant immediate interference with the actions of the Receiver under the decree. In the first place, the evidence that there is any considerable loss from the operation of the outside portion of the railway is unsatisfactory, and there is no evidence to show that the mortgaged property is not sufficient security for the amount alleged to be secured by the petitioners' mortgage.

I can, therefore, find no reason for taking any but the ordinary course where a case is not supported by proper evidence, and I dismiss the petition with costs, without prejudice to the filing of another petition, or the making of another motion, seeking the same relief as this or any portion thereof.

Petition dismissed with costs.

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THE DEAN AND CHAPTER OF ST. JOHN'S CATHEDRAL

v.

MACARTHUR.

Before TAYLOR, C. J., DUBUC AND KILLAM, JJ.

Merger—Subsequent incumbrance—Mistake—Release of equity of redemption.

When the owner of an estate in fee pays off a charge, or the owner of a charge acquires the equity of redemption, the result is that the charge merges and lets in any subsequent incumbrance, unless an intention to keep the charge alive is expressed in some way, and the onus of proving such intention rests on the party contending that there has been no merger.

The plaintiffs held a mortgage on certain lands for a large amount, and arranged with the mortgagor to take a quit claim deed from him, and to release him from all liability on the mortgage, acting in the belief that they would thus acquire the whole estate free of incumbrances. Their solicitor, however, having overlooked a registered judgment in favor of the defendant, the latter claimed that there was a merger, and that his judgment was now a first lien on the lands.

The plaintiffs filed a bill to enforce the execution of a release of this judgment.

Held, that a merger had taken place, and the relief asked for could not be granted, but that the plaintiffs were entitled, on the ground of mistake, to a decree declaring that the amount due under their mortgage should be a charge on the land in priority to the defendant's registered judgment.

ARGUED: 8th February, 1893.
DECIDED: 4th April, 1893.

Statement.

THIS was a rehearing, at the instance of the defendant Duncan MacArthur, of a decree made by Mr. Justice Bain.

The defendant David MacArthur, in 1883, made a mortgage upon certain lands in favor of the plaintiff The Bishop of Rupert's Land, for securing payment of $28,000 and interest thereon. In August, 1886, the Bishop conveyed to the plaintiffs the Dean and Chapter an undivided two-

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thirds of the lands comprised in the mortgage, but the conveyance then executed did not assign the mortgage debt or any part thereof. Default having been made in payment, the plaintiffs, in 1890, took steps to exercise a power of sale contained in the mortgage, and thereupon David MacArthur filed a bill to have an account taken and the amount remaining due ascertained. This suit proceeded so far that it was set down for hearing, and then, after some negotiations, a settlement of all matters in dispute between the parties was come to, by which David MacArthur was to release to the plaintiffs the equity of redemption in the lands, and they were to release him from liability on his covenants in the mortgage. In pursuance of this arrangement David MacArthur was released from his liability, and by two quit-claim deeds executed in April, 1891, the equity of redemption in the lands was vested in the plaintiffs.

At the time the settlement was come to, there were in existence two judgments, one recovered by a person named May against David MacArthur, M. A. Maclean and Thomas H. Gilmour, the other by the defendant Duncan MacArthur against David MacArthur alone. The existence of these two judgments was undoubtedly known to the plaintiffs and their legal adviser before the settlement was made. The May judgment had been assigned to, and was then held by, The Commercial Bank of Manitoba and Jane Gilmour, and these parties executed a quit-claim deed in favor of the plaintiffs which had the effect of releasing that judgment. No release was, however, got of the judgment of Duncan MacArthur against David MacArthur. The clerk of the plaintiffs' solicitor, entrusted with the carrying out of the settlement, and the preparing and getting executed the various conveyances necessary to do so, sought to account for this by saying he was misled by a statement made to him by David MacArthur's solicitor that this judgment had expired.

About a year after, when it was found that this judgment had not been allowed to expire, but on the contrary had

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been regularly renewed and kept on foot, the defendant Duncan MacArthur was applied to by the plaintiffs' solicitor and asked to release his judgment which he declined to do. Thereupon the present suit was begun to enforce the execution of a release. The bill contained allegations that the defendant David MacArthur undertook to procure a release of the Duncan MacArthur judgment, and that Duncan MacArthur agreed with David MacArthur not to renew it. But there was no evidence that Duncan MacArthur took any part in, or had anything to do with, the negotiations for the settlement, or with the carrying of it out. Nor was there any evidence that David MacArthur agreed to procure a release from Duncan MacArthur, although the undertaking appeared to have been that the plaintiffs were to get a clear and unincumbered title.

The position taken by Duncan MacArthur was that, by the dealings between the plaintiffs and David MacArthur, there had been a merger of the mortgage debt, and he was then, by virtue of his registered judgment, entitled to priority, and was the first incumbrancer on the lands. The learned Judge found against the plaintiffs on this question of merger, but held they were entitled to relief on the ground of mistake. Accordingly he made a decree, the practical effect of which was to undo the settlement and place all parties back in their original position.

W. H. Culver, Q.C., and *T. H. Gilmour* for defendant Duncan Macarthur. The decree was made on the ground of mistake; defendant contends that on the evidence there was no mistake, *Barron* v. *Isaac & Son* [1891] 1 Q. B. 417; *Watson* v. *Dowser*, 28 Gr. 479; *Brown* v. *Maclean*, 18 O.R. 533; *Abell* v. *Morrison*, 19 O. R. 669. As to merger, *Emmons* v. *Crooks*, 1 Gr. 159; *Finlayson* v. *Mills*, 11 Gr. 218. Intention must be gathered from both parties. The proceedings of the parties all show a merger, *Elliott* v. *Jayne*, 11 Gr. 412; *Barker* v. *Eccles*, 18 Gr. 440; *Hart* v. *McQuesten*, 22 Gr. 136; *Weaver* v. *Vandusen*, 27 Gr. 477; *North of Scotland Mortgage Co.* v. *German*, 31 U. C. C. P.

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355. Merger is a question of fact; the findings of fact here were in favor of defendant, *North of Scotland Mortgage Co.* v. *Udell*, 46 U.C.R. 517; *British and Canadian Loan Co.* v. *Williams*, 15 O.R. 369; *Toulmin* v. *Steere*, 3 Mer. 224. The law was changed by the Imperial Act, 36 & 37 Vic. c. 66, s. 25, s-s. 4, *Stevens* v. *Mid-Hants Railway Co.*, L.R. 8 Ch. 1064. Duncan Macarthur was under no obligation to forego the legal rights he had acquired. Plaintiffs were not entitled to relief if they had other remedies.

J. S. Ewart, Q.C., and *T. D. Cumberland* for plaintiff. There was no merger. Merger depends upon intention, and if there be no intention, upon the interest of the party taking the estate. Here there was clearly no intention to merge as against the judgments, and the interest of the plaintiffs was clearly to keep priority. *Grice* v. *Shaw*, 10 Ha. 77; *Davis* v. *Barrett*, 14 Beav. 542; *Adams* v. *Angell*, 5 Ch. D. 645; *Stephens* v. *Mid-Hants Railway Co.*, L.R. 8 Ch. 1069; *Barber* v. *Eccles*, 17 Gr. 631; *Hart* v. *McQuesten*, 22 Gr. 136. Although the debt is released and gone, yet the charge upon the land may remain. *Phillips* v. *Gutteridge*, 4 D. & J. 521; *Adams* v. *Angell*, 5 Ch. D. 645; *North of Scotland Mortgage Co.* v. *Udell*, 46 U.C.R. 517. In any event, upon the ground of mistake the plaintiff is entitled to have the settlement set aside and the parties relegated to their true position.

TAYLOR, C. J.—It seems to me doubtful if the plaintiffs can have the relief which has been given them in the form in which it has been given, upon the pleadings as they stand. Leave might perhaps be given to amend, but that could only be done by giving the defendants full leave and opportunity to answer the amendments. This may be exceedingly important for David MacArthur, because, the decree putting all parties back in their original position, he remains liable upon all his covenants in the mortgage.

At the hearing the learned Judge found against the plaintiffs on the question of merger. The law on this subject seems to me not in a very satisfactory state, as

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there are cases which cannot be easily reconciled the one with the other. In some cases it is laid down that where the owner of an estate in tail or in fee pays off a charge, or the owner of a charge acquires the estate, there is a merger, unless there is a declaration or an expressed intention that the charge shall be kept alive, while in others, sometimes indeed in the same case, language is used to the effect that, in the absence of expressed intention one way or the other, merger or no merger depends upon what is most for the benefit of the owner of the estate.

In *Heney* v. *Low*, 9 Gr. 265, Esten V. C., stated the rule thus: "It is quite clear that the owner of a charge acquiring the estate, or the owner of the estate acquiring the charge, can merge or continue the charge at his option. If his intention be expressed, and clearly shown, no difficulty arises. In the absence of evidence of actual intention he is presumed to have intended what was most for his advantage." Then, having remarked upon a case cited by counsel where the question was as to a union of the legal and equitable interests, so as to entitle a widow to dower, he proceeded to say: "This, however, is very different from a mortgagee purchasing the equity of redemption where the charge certainly merges unless an intention to the contrary be shown." A statement which does seem inconsistent with the previous one that, in the absence of evidence of intention he will be presumed to have intended what is most for his advantage. In *Adams* v. *Angell*, 5 Ch. D. 634, given in Brett's Leading Cases in Equity, as now the leading case, or a leading case, on this subject, Sir George Jessel, M. R., in the Court of Appeal, used language very similar to that of V. C. Esten, and so far as I can see, quite as inconsistent.

The weight of authority, however, seems to be that, where the owner of an estate in fee pays off a charge, or the owner of a charge acquires the estate, the result is that the charge merges, unless an intention to keep it alive is

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expressed in some way, and the onus of proving such intention rests on the party contending that there has been no merger.

The case of *Toulmin* v. *Steere*, 3 Mer. 210, has often been questioned, but it has never been overruled, and while it stands, the rule must, in my opinion, be taken to be as I have stated it. Here the plaintiffs cannot show an intention that the charge should not merge, for their case is, that when they carried out the settlement with David MacArthur, they were not aware that the judgment against which it is for them important that their charge should be kept alive, was still subsisting. They believed, whether on sufficient evidence or not, still as a fact, that it was no longer in force.

But even where there has been a merger, Courts of Equity have relieved against it upon equitable considerations, and where it appeared that consequences resulting from the mode of dealing with the estate in charge, were not foreseen. They have done so where there has been mistake in the carrying out of the transaction, although the mistake was not such as would justify the setting aside the whole of the original transaction. In *Kirkham* v. *Smith*. 1 Ves. Sr. 258, a tenant in tail paid off a debt secured by a mortgage term for years, but took no assignment of the term for himself. He then made a settlement of the estate, but after his death the plaintiff claimed the estate under provisions in the will of his father, and insisted that it was discharged from the debt. There could be no doubt the debt had merged but Lord Chancellor Hardwicke had no hesitation in relieving against the merger. So in *The Earl of Buckinghamshire* v. *Hobart*, 3 Swans. 186, Lord Eldon found that the intention was not to maintain the charge but to destroy it, still as there had been a mistake as to what estates it was primarily a charge upon, he considered it would be inequitable to hold it merged, and made a decree declaring it still subsisting. A similar conclusion was come to by Lord Langdale in *Burrell* v. *Earl of Egremont*, 7 Beav. 205.

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There are also a few cases in Ontario in the same line, among which, *Howes* v. *Lee*, 17 Gr. 459; *Smith* v. *Drew*, 25 Gr. 188; *Brown* v. *McLean*, 18 O. R. 533; *Abell* v. *Morrison*, 19 O. R. 669; may be referred to. But this subject and the cases bearing upon it have been fully dealt with by my brother Killam, so that I need not further enlarge upon it. In the conclusion he draws from them, I fully concur.

The authorities, in my opinion, fully warrant the Court in giving the plaintiffs relief against the merger which seems to have taken place in this case. That relief should not, however, be by setting aside the settlement and placing all parties back in their original position. The proper decree to make, as it seems to me, is one declaring the plaintiffs, in respect of the amount due under the mortgage from David MacArthur to the Bishop of Rupert's Land dated 7th April, 1883, entitled to a charge upon the lands comprised in the said mortgage and in the quit-claim deeds from David MacArthur to the plaintiffs dated April, 1891, except block 21, (which had been released from the mortgage) in priority to the judgment recovered by Duncan MacArthur against David MacArthur in the pleadings mentioned.

The plaintiffs will thus be placed in the position in which they understood they were being placed by the settlement; David MacArthur preserves unimpaired the benefit he was to derive from the settlement in being released from all liability on his covenants in the mortgage; and Duncan MacArthur, who was no party to the settlement, is in no way injured but stands in exactly the same position as he did before the settlement between the plaintiffs and David MacArthur was come to.

The decree may also contain proper provisions for redemption and foreclosure. The plaintiffs are entitled to have their costs of the suit added to their debt but to no personal order for payment. There should be no costs of the rehearing to any of the parties.

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KILLAM, J.—With all respect, I cannot concur in the disposition which my brother Bain has made of this cause. The decree sets aside the respective releases and relegates the parties to their former positions. This was not done on any ground set up in the bill, but upon the ground that the transaction was carried out without the release of the judgment of Duncan MacArthur, owing to the plaintiffs or their solicitors being under a mistake as to the fact of the continued existence of this judgment as a charge upon the equity of redemption, and that this mistake was occasioned largely by an erroneous representation of the solicitor for David MacArthur. It appears to me that the learned Judge erred in assuming that all the evidence that could be offered upon these points had been given. The defendants were only concerned in meeting the case made by the bill. There was, it is true, an alternative prayer for this relief, though it is difficult to see upon which of the allegations a title to such relief could be based. Certainly the evidence failed to show any ground for such a decree except that upon which the decree was based. Whatever may be the effect of the evidence upon the question of the extinguishment of the plaintiffs' charge, the defendants were not called on to meet a case of mistake or misrepresentation as ground for avoiding the settlement. As it is, the decree leaves David MacArthur open to an action upon the covenant in the mortgage, whereas, if the mistake and misrepresentation had been charged, he might have offered evidence to meet that of the plaintiffs. If the bill is to be amended on these points, the defendants should be given an opportunity to answer and to adduce further evidence.

The most important questions, however, are those which relate to the alleged merger or extinguishment of the plaintiffs' mortgage. Now here, I want to distinguish between merger and satisfaction. If a party entitled to a charge on an estate becomes the owner of the estate by devise or inheritance, in the absence of reason to the contrary, the charge is deemed in equity to merge in the inheritance

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and to be thus extinguished. But that charge is not satisfied. So the mortgagee or owner of a charge on an estate may acquire the equity of redemption only. This is not necessarily a satisfaction of the charge, although it may *prima facie* create a merger. But if the mortgagee agrees with the mortgagor for the purchase of the whole estate for a price which includes the mortgage money, and the conveyance and a settlement are made under this agreement, the mortgagee retaining the mortgage debt out of the purchase money, in such a case the charge, *prima facie* at least, is satisfied. Or it may be satisfied in some other way.

In my opinion, a great deal of confusion has arisen from a failure to observe this distinction. I would venture also to suggest that the question of satisfaction is a question of the agreement of the parties, but that the question of merger is a question of the intention of the owner of the charge alone. The following were cases of what I should call satisfaction rather than merger: *Toulmin* v. *Steere*, 3 Mer. 210; *Parry* v. *Wright*, 1 Sim. & St. 369, 5 Russ. 142; *Otter* v. *Lord Vaux*, 6 D. M. & G. 638; *Brown* v. *Stead*, 5 Sim. 535; *Smith* v. *Phillips*, 1 Keen, 694; *Emmons* v. *Crooks*, 1 Gr. 159; *Buckley* v. *Wilson*, 8 Gr. 566; *Finlayson* v. *Mills*, 11 Gr. 218. The following were cases of merger purely: *Mocatta* v. *Murgatroyd*, 1 P. W. 393; *Astley* v. *Milles*, 1 Sim. 343; *Allen* v. *Knight*, 5 Ha. 272; *Hood* v. *Phillips*, 3 Beav. 513; *Grice* v. *Shaw*, 10 Ha. 77; *Lord Compton* v. *Oxenden*, 2 Ves. 261; *Donisthorpe* v. *Porter*, 2 Ed. 162.

Now, let us consider what was the transaction in the present case. By two separate instruments David MacArthur, for an expressed consideration of one dollar, granted, released and quitted claim to the plaintiffs all his estate, right, title, claim and demand in and to certain lands previously granted by him in fee by way of mortgage to one of the plaintiffs, with covenants for payment of a large sum of money. And, by a third instrument reciting a suit in equity by David MacArthur against the present plaintiffs for the purpose of fixing the amount due on the

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mortgage, a judgment at law in favor of one of the plaintiff corporations against him, a transaction relating to the release of a portion of the land under which Duncan MacArthur had given some bond to such corporation, and an agreement in consideration of that and the two first-mentioned conveyances for settlement as therein set out of the differences between the parties, David MacArthur, in consideration of the premises and of a further sum of one dollar, granted, etc., to the plaintiffs all his estate, right, etc., in the portion of the mortgaged lands so released from the mortgage. The instrument then proceeded with a release by David MacArthur of all actions, causes of action, and claims on his part against the plaintiffs, and then the plaintiffs released David MacArthur of and from all claims, actions, judgments, executions, or causes of action, and the instrument concluded with a proviso for keeping alive the liability of Duncan MacArthur on his bond, and declaring that, if necessary for that purpose, the plaintiffs reserved the right to treat their release as a covenant not to sue. In point of form, then, there was no attempt at a release of the plaintiffs' charge on the lands, but merely a release of such interest as David MacArthur still retained, and of his claims against the plaintiffs in consideration of a release of his personal liability. At law, the plaintiffs held the land for the original consideration. In equity, they were to be regarded as having only a charge upon the lands. The plaintiffs in no way assumed to part with this legal interest or equitable charge. They merely released their claims against MacArthur personally. Even that release was qualified; for, although the nature of the bond of Duncan MacArthur is not shown, the plaintiffs stipulated that for the purposes of that bond even the debt was to remain alive. Upon the construction of the documents I cannot find that there was a satisfaction of the charge, but merely a conveyance to the plaintiffs of the mortgagor's remaining interest for a qualified release of his personal liability. In *Phillips* v. *Gutteridge*, 4 D. G. & J. 531, Sir J. L. Knight Bruce, L.J., said: "The deed is so constructed as to render

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it possible that the payment to the original mortgagee operated as an extinguishment of the original mortgage debts as debts. But the existence of them independently as debts was not essential to the continuance of the security. The mortgagees had a right to hold the property till the debts were paid, and the debts were secured by a legal estate, which could not be recovered by the mortgagor or his representatives without payment of the debts."

Then, let us consider the question of merger in equity apart from that of satisfaction. In *Grice* v. *Shaw*, 10 Ha. 77, Turner, V. C., said: "The general rule, indeed, is clear that where a party has an estate in fee or in tail, and at the same time a charge upon the estate, the charge will merge. . . . But the law does not, of course, prevent the party entitled to both the estate and the charge from keeping alive the charge; and the rule, therefore, yields to intention, whether it is expressed or to be presumed." In *Tyler* v. *Lake*, 4 Sim. 358, Shadwell, V. C., said: "The rule of law is that when a person is seized in fee of an estate, and is also entitled to a charge upon it, if he does no act which will have the effect of keeping the charge on foot, it must be considered as perishing in the inheritance."

In *Garnett* v. *Armstrong*, 2 Con. & Law. 458, 4 Dr. & W. 182, Lord Sugden, L.C., said: "I apprehend . . . that the cases establish that if you, with a prior incumbrance, buy the estate which is subject to a subsequent incumbrance, you let in the second incumbrance to the injury of your prior incumbrance; that, in fact, you lose your incumbrance." In *Hatch* v. *Skelton*, 20 Beav. 453, Lord Romilly, M.R., said: "When a mortgagee becomes entitled in fee to the estate on which his mortgage is charged, the presumption in the first instance, and in the absence of evidence, is that the mortgage has merged in the estate."

Now, such merger in equity does not depend upon the position of the legal estate. The charge may be supported by an outstanding term or other separate legal estate, and

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yet, *prima facie*, it merges in equity, except in so far as the continuance or creation of such separate legal estate gives evidence of an intention to keep the charge alive and distinct.

In *Forbes* v. *Moffat*, 18 Ves. 384, Sir Wm. Grant, M.R., said: "It is very clear that a person being entitled to an estate subject to a charge for his own benefit may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged."

In *Astley* v. *Milles*, 1 Sim. 343, Sir Jno. Leach, V. C., said: "It may now be considered that . . . the rule of the Court is settled that there is no difference between a charge merely equitable and one that is supported by an outstanding legal estate." In *Donisthorpe* v. *Porter*, 2 Ed. 162, Lord Henley (afterwards Lord Northington) L.C., said: "I do not think it a rule that a charge on an estate which can only be got at by trustees, and so be prevented from merging at law, shall be distinct in equity and go to the administrator, while the whole estate goes to the heir; but I think that, where the owner has an absolute interest in the estate and the charge, the charge is annihilated for the benefit of the estate and the heir. The Court does not consider the subtleties of mergers, but discharges the estate from the incumbrance."

In *Purcell* v. *Purcell*, 5 Ir. Ch. 510, Brady, L.C., said: "In some of the earlier cases it appears to have been held that the existence of a term of years for the purpose of raising the charge made a difference. However, since then the doctrine that a legal estate would prevent a merger has been overturned, and it is now settled that it makes no difference."

And in *Keogh* v. *Keogh*, I. R. 8 Eq. 195, Sullivan, M. R. said: "Equity, in relation to the merger of charges, does not pursue or follow the law. Courts of Equity often hold

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that charges are merged where they exist at law, and on the other hand that they exist in equity where they are merged at law." See also *Horton* v. *Smith*, 4 K. & J. 624, and *Hood* v. *Phillips*, 3 Beav. 513.

Prima facie it is the intention of the owner of the estate and the charge which governs, *Forbes* v. *Moffat*, 18 Ves. 384; *Grice* v. *Shaw*, 10 Ha. 77; *Lord Compton* v. *Oxenden*, 2 Ves. 261; *Astley* v. *Milles*, 1 Sim. 343; *Bailey* v. *Richardson*, 9 Ha. 734; *Watts* v. *Symes*, 16 Sim. 640, 1 D. M. & G. 240; *Jones* v. *Morgan*, 1 Bro. C. 218; *Hood* v. *Phillips*, 3 Beav. 513; *Byam* v. *Sutton*, 19 Beav. 562; *Pitt* v. *Pitt*, 22 Beav. 294; *Hatch* v. *Shelton*, 20 Beav. 453; *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244; *Richards* v. *Richards*, Johns. 766; *Stevens* v. *Mid-Hants Ry. Co.*, L.R. 8 Ch. 1064; *Adams* v. *Angell*, 5 Ch. D. 634.

These cases also establish that usually, in the absence of a contrary intention, there is a merger, and that the onus is on the party asserting a different intention. See also *Davis* v. *Barrett*, 14 Beav. 542; *Hart* v. *McQuesten*, 22 Gr. 133.

In some of the cases there are expressions which appear to mean that the interest of the owner will determine whether there is or is not a merger. And such has been argued in the present case. But it is clear that it is not the mere fact of an interest one way or the other that settles the question, but merely that, in attempting to arrive at an intention where there is no distinct evidence, a presumption that a party has intended what is for his interest is frequently admitted and acted on. See *Forbes* v. *Moffat*, *Grice* v. *Shaw*, *Lord Compton* v. *Oxenden*, *Adams* v. *Angell*, *Pitt* v. *Pitt*, *Davis* v. *Barrett*, *Hatch* v. *Skelton*, *supra*.

In the present case there is certainly no evidence that the plaintiffs intended to keep the charge alive. Any evidence that there is tends to the contrary conclusion. They contracted to acquire the equity of redemption free from incumbrances. They evidently supposed they had done so. Applications were subsequently made to bring

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portions of the land under The Real Property Act, and in each application it was stated that the applicant was the absolute owner free from incumbrances. It has been suggested that the conveyance to the plaintiffs jointly, when they held the fee in unequal proportions, showed an intention not to merge. But they were entitled to the mortgage money in the proportions in which the fee was held, and as the consideration for the release of the equity of redemption was thus furnished in those proportions, the presumption in equity would be that the conveyance was for the benefit of the grantees in the same proportions. It was an equitable interest that was being released and the release would take effect according to the presumption of equity. The interest which the plaintiffs had in keeping up the charge cannot here determine the intention, as they were under the belief that no intermediate charge remained.

But equity will relieve from merger, apart from the intention of the party.

In *Brandon* v. *Brandon*, 9 W. R. 825, where property had long been dealt with as if there was no merger, and it had thus been rendered difficult, if not impossible, to replace parties in their original positions on the basis of a merger, it was held, apparently apart from the question of intention, that it would be inequitable to decree in favor of a merger. In *Burrell* v. *The Earl of Egremont*, 7 Beav. 205, where a tenant for life had paid off charges, and had acted as if he had no security on the estate therefor, it was held that as there was no evidence that he knew his rights he should not be bound by the apparent intention to exonerate the estate. I need not repeat the circumstances of the other cases to which the Chief Justice has referred.

The authorities to which I have already referred, as well as the reports of the cases themselves, show that the decisions in *Kirkham* v. *Smith* and *Earl of Buckingham* v. *Hobart* did not proceed on the basis of there being no merger in equity when there was none at law, but upon the ground that a Court of Equity would not interfere to give a party the

benefit of the legal estate except upon terms of his doing equity.

In *Howes* v. *Lee*, 17 Gr. 459; *Smith* v. *Drew*, 25 Gr. 191; *Buchanan* v. *McMullen*, 25 Gr. 193 (*a*); *Brown* v. *McLean*, 18 O.R. 533, and *Abell* v. *Morrison*, 19 O.R. 669; the Courts in Ontario went much farther in relieving from unilateral mistakes to which the other side had in no way contributed.

Here, the plaintiffs have the legal estate. There can be no doubt that, if they intended not to preserve their original charge as a separate thing, they acted under the belief that they had acquired the whole estate, free from incumbrances. Duncan MacArthur had no claim, legal or equitable, to have the plaintiffs' mortgage discharged or extinguished for his benefit. Such cases as *Toulmin* v. *Steere*, *Brown* v. *Stead* and *Parry* v. *Wright* are entirely distinguishable on the ground that the agreements were such that satisfaction of the charges was clearly intended. The wider statement of principle in the first of these cases has been so often disapproved, and is so clearly unsupported by the cases cited in support of them, that it needs no further discussion. See *Stevens* v. *The Mid-Hants Ry. Co.*, L. R. 8 Ch. 1064; *Adams* v. *Angell*, 5 Ch. D. 634; *Watts* v. *Symes*, 1 D. M. & G. 240; *Otter* v. *Lord Vaux*, 6 D. M. & G. 638; *Gregg* v. *Arrott*, Ll. & G. t. Sugd. 246.

The bill shows the conveyance of the legal estate, by way of mortgage, to one plaintiff and a partial transfer to the other plaintiff and their acquisition from the mortgagor of the equity of redemption, that Duncan MacArthur asserts that the original charge is merged and extinguished as against him, while the plaintiffs deny this, and seek accounts and foreclosure. Such a bill, it appears to me, enables the plaintiffs to prove the circumstances under which the equity of redemption was acquired, for the purpose of showing that it would not be equitable to hold the charge extinguished and to take from the plaintiffs their priority at law without the judgment creditor having first to do equity by paying off the charge.

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In my opinion the plaintiffs are entitled to the full protection of their legal estate, to the extent of the mortgage debt, as against the defendant Duncan MacArthur, and he can take it from them only on terms of paying what is due them thereon. I concur in the order which the learned Chief Justice has proposed.

DUBUC, J., concurred.

Decree varied without costs by declaring that plaintiff's mortgage has priority over Duncan MacArthur's judgment.

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RUDDELL V. GEORGESON.

Before DUBUC, KILLAM AND BAIN, JJ.

Crown lands—Taxation of, before issue of patent—Sale of same for taxes—Estate or interest held by purchaser of lands from Crown before full payment.

B., in 1881, agreed to purchase Dominion lands and paid a great part of the purchase money. By successive transfers, the defendant acquired B.'s interest in the lands, and in 1891 he paid the balance of the purchase money to the Dominion Government and received a patent for the lands. Meantime the lands were, in 1887, sold by the Municipality for several years arrears of taxes to the plaintiff, who, in 1889, obtained a tax deed for the same.

He then, in this suit, sought to obtain a decree declaring that the defendant held the lands as trustee for him, and, offering to pay the defendant the amount he had paid the Crown to complete the original purchase, asked to have the defendant ordered to convey the lands to him.

Held, that the lands in question were not liable to be assessed and sold for taxes until the issue of the patent, or at least until the Crown had received full payment for the same.

Held, also, that, by the contract in question, B. acquired no interest or estate in the lands which could be made subject to assessment and taxation by the Provincial Legislature, or in any way enforced against the Crown.

Whelan v. *Ryan*, 20 S. C. R. 65, and *Cornwallis* v. *C. P. R.*, 19 S. C. R. 702, considered.

ARGUED: 12th July, 1893.
DECIDED: 20th December, 1893.

Statement

Demurrer to the plaintiff's amended bill of complaint. The bill, as originally filed was demurred to, and the demurrer allowed, (see *ante*, p. 43,) on one of the points raised, viz.; on the ground that the plaintiff could not ask that the defendant be ordered to convey the legal estate to him, unless and until he had paid, or tendered to the defendant, the amount that he had paid to acquire the legal estate.

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The plaintiff amended his bill to cover the point, alleging that he was ready and willing, and offered to pay to the defendant the money so paid by him to the Crown to complete the purchase of the lands, and he prayed: (1,) that it might be declared that the defendant held the legal estate in the lands as trustee for the plaintiff; (2,) that it might be declared that the plaintiff had a right to a conveyance of the lands upon payment of the moneys paid by the defendant to the Crown; (3) that the defendant might be ordered to convey the lands to the plaintiff.

On the demurrer coming on for argument before Mr. Justice Bain, he referred the same to the Full Court.

H. M. Howell, Q.C., and *J. A. Machray*, for plaintiff.

J. Stewart Tupper, Q.C. and *F. H. Phippen* for defendant.

The following cases were referred to:—*Leprohon* v. *City of Ottawa*, 2 A. R. 552; *Boulton* v. *Jeffrey*, 1 E. & A. 111; *Simpson* v. *Grant*, 5 Gr. 267; *Crotty* v. *Vrooman*, 1 M. R. 151; *In re Irish*, 2 M. R. 370; *C. P. R.* v. *Cornwallis*, 7 M. R. 7; *South Norfolk* v. *Warren*, 8 M. R. 489; *Ferguson* v. *Ferguson*, 16 Gr. 309; *Wiggins* v. *Meldrum*, 15 Gr. 377; *Keating* v. *Moises*, 2 M. R. 47; *Grant* v. *Eddy*, 21 Gr. 568; *Richardson* v. *Jenkin*, 10 P. R. 292; *Abrey* v. *Crux*, L. R. 5 C. P. 37; *Jones* v. *Imperial Bank*, 23 Gr. 267; *Windsor & Annapolis Ry. Co.* v. *The Queen*, 10 S. C. R. 357: 11 App. Cas. 615; *Craig* v. *Templeton*, 8 Gr. 483; *Thomas* v. *The Queen*, L. R. 10 Q. B. 31; *Reg.* v. *Wellington*, 17 O. R. 619; *Quirt* v. *The Queen*, 19 S. C. R. 510; *People* v. *Supervisors of Orange Co.*, 17 N. Y. 241; *Re Wellington*, 17 Pick. 87; *Fletcher* v. *Peck*, 10 U. S. R. 128; *Ogden* v. *Saunders*, 25 U. S. R. 213.

DUBUC, J.—The prayer shows that the bill is one for specific performance. Is the plaintiff entitled to the conveyance asked for, even on offering to reimburse the defendant the amount paid by him to acquire the legal estate? The plaintiff claims title to the lands in question under a tax sale deed; and the defendant, under conveyances from Beech and under a Crown patent.

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The bill shows that the said lands, which were originally Crown lands, were in October, 1881, purchased by one William Beech, who paid a portion of the purchase money, and acquired an estate and interest therein. By divers mesne conveyances, the title and interest of Beech in the said lands became vested in the defendant. And the defendant, in October, 1891, paid the balance of the purchase money, and obtained a Crown patent for the same.

The said lands were assessed by the municipality in which they were situate, and taxes being due on them for the years 1883, 1884, 1885 and 1886, they were in July, 1887, sold for arrears of taxes for those years, and were purchased by the plaintiff, who in July, 1889, obtained a tax deed for the same.

The principal question to be considered is, whether the said lands were liable to be taxed and to be sold for non-payment of taxes, when the plaintiff purchased the same in 1887.

By the British North America Act, Crown lands belonging to the Dominion or to any Province, are not liable to taxation. In this case, by his purchase and paying a portion of the purchase money, Beech had acquired an interest in the said land, but the fee remained in the Crown.

By the different Municipal Acts passed between 1880 and 1886, unpatented lands have been declared liable to taxation for municipal purposes, saving however the rights of Her Majesty in said lands; and the deeds given to purchasers at tax sales were held to convey only such interest as the Crown may have given or parted with, or may be willing to recognize or admit. Municipal Acts of 1883, s. 286; of 1884, s. 302; of 1886, s. 650.

The plaintiff claims that the interest acquired by Beech was an interest given or parted with by the Crown, and that such interest became taxable and liable to be sold for non-payment of taxes. But he cannot show what

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DUBUC, J.

particular or specific interest has been parted with. It may be that, by the agreement entered into by Beech with the Department of the Interior, the portion of the purchase money already paid was to be forfeited in case of failure to pay the balance, and in granting the patent on the payment of the balance in 1891, it may have been an act of indulgence of the Crown rather than the recognition of a right in the defendant to obtain the same; or the Government may have issued the patent to the defendant as a *bona fide* purchaser of the estate and interest of Beech in the lands, while they might have refused the same privilege to Beech, because of his failure to comply with the terms of the agreement entered into by him, in not paying the balance of the purchase at the time or times agreed to. These are mere surmises, but it may be inferred from them that the plaintiff has failed to show in his bill that the said Beech had any particular estate or interest in said lands, which the Crown had given or parted with, and which might be taxable under the Municipal Acts.

It appears that in the United States, lands purchased from the Federal Authorities may be liable to taxation by the particular States, before the patent is issued, if the purchaser has paid the purchase money in full and his right to the patent is complete. *Carroll* v. *Safford*, 3 How. 440; *Railway Co.*v. *Prescott*, 16 Wall. 603.

In *Re Irish*, 2 M. R. 361, the construction of section 28 of the Real Property Act, came before the Court for consideration. In the sentence that all lands, when alienated from the Crown, shall be subject to the provisions of the Act, the words "when alienated," were held to mean completely alienated, wholly and entirely parted with, that is, by patent.

Blackwell on Tax Titles, section 813, says that any vested interest in U. S. lands, legal or equitable, residing in a private party is taxable; but the land must be set apart so as to be identified, or no taxes can be levied on it, and the

interest must be a vested one. A mere contingent interest dependent for its creation on the performance of some as yet unfulfilled condition is not taxable.

In *Whelan* v. *Ryan*, 20 S. C. R., Gwynne, J., said at p. 73; "Upon a true construction of the British North America Act in connection with the Manitoba Act, 32 Vic. c. 3 (D. 1869,) lands in the Province of Manitoba do not, in my opinion, become subject to municipal taxation until the issue of letters patent therefor."

In this case, when the said lands were assessed and sold for taxes, Beech had paid only a portion of the purchase money; he had no right to a patent; the lands were not wholly alienated from the Crown; the estate and interest acquired by Beech was not a specific and complete interest; it was a contingent interest dependent upon the performance of an unfulfilled condition.

Under such circumstances and in view of the above authorities, I am of opinion that the lands in question were not liable to be assessed and to be sold for taxes at the time they were purchased by the plaintiff.

The question may also be considered under another aspect. Supposing the estate and interest of Beech in the said lands would be held liable to taxation, would the plaintiff be entitled to the relief asked for in his bill?

By holding a tax deed of the lands assessed against Beech and sold for arrears of taxes, the plaintiff claims to be substituted as to the rights and interest of Beech in the said lands, just as much as if he was the assignee of Beech. As such, he asks that the defendant, who has the legal estate in the said lands, be declared to hold the said legal estate in trust for him, and that he may be ordered to convey the said lands to him. But Beech, under whom the plaintiff claims, could not compel the Crown to grant him a patent for such lands. No specific performance can be ordered against the Crown. *Boulton* v. *Jeffrey*, 1 E. & A. 111; *Simpson* v. *Grant*, 5 Gr. 267; *Clarke* v. *The Queen*, 1 Ex. R. Can. 182.

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If Beech could not compel the Crown to convey the said lands to him, the plaintiff, assuming him to be the substitute and assignee of Beech, could not have more right than his assignor.

The defendant, beside being the assignee of Beech, and tracing his title as such assignee by conveyance under the signature of Beech, is moreover, in respect of said lands, the grantee of the Crown. In *Boulton* v. *Jeffrey*, *supra*, it was held that the Court of Chancery has no authority, when no fraud appears in obtaining the patent, to declare the grantee of the Crown a trustee of any portion of the lands granted for the opposing party, on the ground that he had previously acquired an equitable interest therein. It is not suggested here that the patent was granted to the the defendant by fraud or mistake. Both parties here claim title under Beech; but the defendant has had his said title recognized by the Crown and confirmed by a Crown patent. The plaintiff must stand by the right he had acquired and was possessed of when he purchased the said lands and got his tax deed. At that time, as already mentioned, the fee was in the Crown, and the estate and interest of Beech which he claims to have acquired, was only an undefined and uncertain estate. No specific performance could be enforced against the Crown, nor against Beech or his assignees.

The applying for and obtaining the patent subsequent by the defendant, could not have the effect of conferring on the plaintiff a greater right than the one possessed by him previously. He acquired only what he acquired, and there never was any agreement by or duty of Beech or his assignees to convey the lands to him on obtaining the patent. If he could not then obtain the specific performance prayed for in his bill, I do not see how he can be entitled to it now.

I think the demurrer should be allowed with costs.

KILLAM, J.—We have now to determine the point left undecided by our former judgment in this case, (*ante*, p. 43,)

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whether, by the contract of sale between the Crown and Beech, and payment of a portion of the purchase money thereunder, Beech acquired an interest in the lands as against the Crown which could be made subject to assessment and taxation by the Provincial Legislature. I adhere to the view which I have previously expressed in this case, 9 M. R. at p. 55, and in *C. P. R.* v. *Cornwallis*, 7 M. R. 24, that the Provincial Legislature has the power to impose taxation upon any interest in Dominion lands, legal or equitable, which the Crown has really conferred upon a subject; but I am of opinion that by making such a contract of sale the Crown conferred no interest or estate in the lands. In this respect The Dominion Lands Act of 1879, as amended by the Act, 44 Vic. c. 16, s. 14, (D. 1881,) did not go so far as the statutes of Upper Canada, to which Mr. Justice Gwynne referred in *Church* v. *Fenton*, 28 U. C. C. P. 384. In the case of *C. P. R.* v. *Cornwallis*, 7 M. R., at pp. 22-3, I made some remarks upon the question of enforcing specific performance of an executory agreement for the disposal of lands as against the Crown. These I shall not now repeat. Further consideration only strengthens the opinion which I then held, that this cannot be done. In *Clarke* v. *The Queen*, 1 Ex. R. Can. 182, the late Chief Justice of the Supreme Court took the same view, and though, since that decision was pronounced, amendments have been made in the Acts relating to petitions of right and to the Exchequer Court, I can find nothing in any of these to give such a power. The decision of the Supreme Court in the Cornwallis case appears to have been based on the assumption that the contract had been completely executed, so far as it affected the lands then in question, by the Railway Company.

It appears to me, therefore, that the purchaser under such an agreement, having no means of enforcing as against the Crown any claim to the land itself, cannot be considered to have acquired from the Crown any interest or estate in the land.

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It is true that, in *Craig* v. *Templeton*, 8 Gr. 483, Esten, V. C., held that the widow of a deceased purchaser from the Crown was entitled to dower in unpatented lands, on the principle that the infallible justice of the Crown was equivalent to the right to compel specific performance in ordinary cases. It is unnecessary to consider how far we should adopt such a principle here for a similar case. The Confederation Act positively exempts from taxation all property of the Dominion Government. However strongly a purchaser can rely on the performance by the Crown of its agreement to sell Dominion lands, I do not think that we can treat the certainty, if there be such, that the contract will be performed as transferring in the meantime, from the Dominion to the individual, an interest which thus ceases to be property of the Dominion and which becomes subject to taxation by Provincial authority.

On these grounds I agree that the demurrer should be allowed with costs.

BAIN, J.—In *Whelan* v. *Ryan*, 20 S. C. R. 65, Mr. Justice Gwynne expressed a decided opinion that public lands in this Province cannot be made liable to municipal taxation until the Crown patents have been issued therefor. This question was not settled, however, by the decision in *Whelan* v. *Ryan*; and until there is an authoritative decision of the question by the Supreme Court, this Court, I think, is committed to the view that, when once rights or interests in these lands have been parted with by the Crown, such rights and interests become property and rights subject to Provincial laws and may be made liable to municipal taxation. Such taxation cannot, nor does the Legislature propose that it shall, affect any rights of the Crown in the lands. The bill sets out that the "lands" in question here were duly assessed and taxed, and that the taxes thereon being in arrear, they became liable to be sold for such arrears, subject to the rights of the Crown, and that accordingly they were included in the treasurer's list, and that the treasurer offered the said lands for sale at public

auction, and that the same were knocked down to the plaintiff, who became the purchaser thereof. While it is admitted that the lands were only liable to be sold subject to the rights of the Crown, they were, as far as the bill shews, advertized and sold in the ordinary way and without any reservation of the Crown's interest. Now the most the municipality could tax and sell would be Beech's interest, if he had any; and it is certainly open to argument that if the Municipality assumed to tax and sell the lands themselves, and not merely Beech's interest in them, the taxation and sale were altogether invalid. In *Cornwallis* v. *C. P. R.*, 19 S. C. R. 702, Patterson, J., in holding that when, under a contract with the Railway Company, a purchaser acquires an interest in their lands, that interest is liable to taxation, held also, that, "because the Municipality had assumed to sell the *corpus* of the land itself and not merely the rights, if any rights there were, which existed under the agreements with the Company," the sale for taxes by the Municipality was invalid. If the sale was invalid on this account as against the Railway Company, I cannot at present see why the sale here is not also invalid as against the Crown. However, Mr. Justice Patterson's remark was only *obiter dictum*, and as this view was not discussed on the argument in the present case, I prefer to rest my decision on other grounds.

The bill alleges that the Crown agreed to sell an estate in fee simple in the lands to Beech, and that he became the purchaser thereof and paid a portion of the purchase money, and that thereby he became entitled to an estate and interest in the lands and to the immediate possession of them. The agreement for sale by the Crown would have been made under section 30 of the Dominion Lands Act of 1880, which directs that surveyed unappropriated Dominion Lands "shall be open for purchase at such prices and on such terms and conditions regarding settlement or otherwise as may be fixed from time to time by the Governor in Council." It is not a necessary effect of

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an agreement for the sale of lands that the purchaser becomes entitled to an estate and interest in, and to enter into possession of, the lands agreed to be sold; and if this was the effect of the agreement between Beech and the Crown, it would be because it was a special agreement under an order in council authorizing the sale of public lands on special terms. But the bill does not allege that any such an order in council had been passed or that there was such an agreement; and these allegations are conclusions of law, and the facts on which they depend are not alleged. It was urged that it would be the duty of the Court to assume that an order in council, under which the purchaser from the Crown would be entitled to a beneficial estate or interest in the land, had in fact been passed. But it is not a reasonable or necessary inference from what is alleged in the bill that an order in council was in fact passed; and the plaintiff wants us to assume not only the fact that there was such an order, but that the legal construction that he places on its terms is the correct one. I think, then, that Beech must be deemed to have been in the position of an ordinary purchaser under an agreement for the sale of land which remains executory except as to payment of part of the purchase money.

In the Provincial Municipal Acts, under which these lands were taxed and sold, the words "land" and "lands" are defined to include "all rights thereto and interests therein." But at law, by his agreement with the Crown Beech cannot be said to have acquired either a right to or an interest in the lands. All that he really acquired were such personal rights of action as are enforceable against the Crown on a petition of right. The doctrine of equity is indeed, that, as between the parties to a valid contract of sale, the beneficial ownership passes to the purchaser, and the vendor retains only a charge or lien on the property for securing the payment of the purchase money. But this fiction of the Courts of Equity, as was pointed out by my Brother Killam in *C. P. R.* v. *Burnett*, 5 M. R. at

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p. 427, applies only as between the parties to the contract, and cannot be asserted or set up by outside parties who are strangers to the contract. It appears to me then that, as far as the plaintiff's bill shews, Beech acquired no estate or interest in or right to the lands under his agreement with the Crown, and that consequently their immunity from taxation continued as it was before the agreement was made.

The provision in our Municipal Acts directly making unpatented land vested in Her Majesty, which may be sold or agreed to be sold, &c., liable to taxation is first found in 46 & 47 Vic. c. 1, s. 271, and this section was copied, *verbatim*, with the exception of the date, from an Act of the Legislature of Canada passed in 1863. But in considering the provision in the Manitoba statute, and in trying to apply to it decisions of the Ontario Courts, such as *Ryckman* v. *Van Voltenburg*, 6 U. C. C. P. 385; *Charles* v. *Dulmage*, 14 U. C. R. 585, two things have to be borne in mind. In the first place the Provincial Legislature in legislating as to unpatented lands vested in the Crown is in a very different position from the old Parliament of Canada as regards such lands; and in the second place the provisions of the Dominion Lands Act as regards the sale and disposition of lands are not at all the same as were those of the Act in force before Confederation respecting the sale and management of public lands. The section in the Assessment Act of Upper Canada was worded with a full knowledge of, and with the definite intention that it should operate upon, certain interests created by the Public Lands Act; but considering the section now with reference to the Dominion Lands Act, the same wording is in some respects entirely without meaning. The course of the legislation, as the result of which it came to be held by the Courts in Upper Canada that a deed under a sale for taxes would prevail against a patent subsequently issued to the original purchaser or locatee, or his assignee, is fully traced in the cases of *McGillis* v. *McDonald*, 1 U. C. R. 432 and *Church* v. *Fenton*, 23 U. C. C. P. 384. The result,

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stated shortly, was that purchasers or locatees of public lands were, as Mr. Justice Gwynne says in *Church* v. *Fenton*, "as against all the world but the Crown, upon the footing of full and beneficial owners to the same extent as if the land was granted to them by letters patent;" and the same Legislature which created this full and beneficial ownership enacted also that it should be liable to municipal taxation. In *Street* v. *Kent*, 11 U. C. C. P. 255, the agreement for the sale of the lands by the Crown was one from which this beneficial interest did not arise, and it was held that the lands were not liable to be taxed.

As I think the bill does not shew that the Crown has parted with any estate or interest in the land, I do not consider it necessary to consider what would be the nature or extent of the plaintiff's remedies if it had been shewn he had acquired an estate or interest.

I think the demurrer should be allowed with costs.

Demurrer allowed with costs.

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CRUMBIE V. McEWAN.

Before TAYLOR, C. J.

Contract—Rescission of—Suing on quantum meruit—One action by two persons, not partners, for different claims.

The plaintiffs, husband and wife, brought this action in the County Court for the value of their services under a contract made by the defendant with the husband, to pay him $425 for the services for a year of both husband and wife. Plaintiffs were, as they claimed, wrongfully dismissed and sued before the end of the year for a proportionate part of the $425, giving credit for certain payments.

Plaintiffs had a verdict and defendant appealed. On the argument of the appeal, plaintiffs' counsel admitted that under the circumstances they could not sue on the contract, but claimed that they were entitled to recover on a *quantum meruit*.

Held, that the husband and wife could not join in one action their separate claims for their work and labour done for the defendant, even if the dismissal was wrongful.

ARGUED: 30th January, 1894.
DECIDED: 20th March, 1894.

THIS was an action for wages brought in the County Court of Belmont by Robert Crumbie and Emily Crumbie, his wife. Statement.

The particulars of plaintiffs' claim were thus stated: "To amount of wages due to plaintiffs for working for defendant from the 18th day of November, 1892, to the 6th day of October, 1893, less 14 days lost time by Emily Crumbie, and 1 day lost time by Robert Crumbie, ten months, two and a half days, at $425 for twelve months, as agreed, $357.05." Then three items of credit were given, amounting to $188.90, and a balance of $168.15 was claimed with interest on that amount at six per cent. from 6th Oct., 1893, until judgment. When the action was tried, the de-

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fendant was absent from the Province, and the learned Judge refusing an adjournment, it was disposed of on the evidence of Robert Crumbie, no other witness being called. The plaintiffs had a verdict for $168.15, and from this the defendant appealed.

According to the evidence of Robert Crumbie, the hiring was under a written agreement, but that was not produced. He stated he was to work for the defendant for $425 a year from 17th Nov., 1892, to 17th Nov., 1893, and he was to have a free house and free fire. "He was to pay me $20 a month as we went along." "The contract," he stated, "was with me for the services of myself and wife. . . . . She did the work in defendant's house, I worked on the farm. . . . . I was to do the farm work, my wife the house work." The plaintiffs were dismissed, as they claimed wrongfully, on the 6th of October, 1893.

C. W. Bradshaw, for defendant. Under the particulars sued on there was a special hiring for a year, commencing 18th November, 1892; this action was commenced on 19th October, 1893. Until the expiration of the term there could be no action on the special contract, the services must be performed and the term expired. If the contract be put an end to by the master, the servant may sue for wrongful dismissal; that affirms the contract and is a claim under it; or he may sue for work and labour under an implied contract. If the servant be properly dismissed, there is no implied contract; the special contract is in existence. *Planche* v. *Colburn*, 8 Bing. 14. If suing for work and labour, plaintiff must show special contract was improperly put an end to, and that the work was done. The onus is on him, defendant need not set out the grounds of justification. *Boston Deep Sea Fishing, &c., Co.* v. *Ansell*, 39 Ch. D. 339. If the action is on *quantum meruit*, the onus is on plaintiffs to show a wrongful dismissal, merely showing that the defendant dismissed them is not sufficient. If plaintiffs sue on *quantum meruit*, the claims of husband and wife cannot be joined in this action; the special contract

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was that both should work for defendant; even on that the husband was the person to sue. There are two distinct causes of action now and the action is improperly brought; the contract was made with the husband, so he was the person to bring the action, the wife should not have been joined. *Pearce* v. *Forrester*, 17 Q. B. D. 536. Disobedience of any lawful order is a ground for dismissal. *Turner* v. *Mason*, 14 M. & W. 112; *Lilley* v. *Elwin*, 11 Q. B. 942; *Churchward* v. *Chambers*, 2 F. & F. 229; *McEdwards* v. *Ogilvie Milling Co.* 5 M. R. 77.

O H. Clark, for plaintiffs. The facts alleged as warranting a dismissal were not proved; even if proved, they were not sufficient. As to plaintiffs suing on *quantum meruit*, it is not open to defendant to object; he did not do so in the dispute note; he did not set up misjoinder.

TAYLOR, C. J.—On the argument of the appeal, the question was raised, whether the action was brought upon the contract or not, and thereupon counsel for the plaintiffs stated that they were suing upon a *quantum meruit*. The plaintiffs then treat the contract as at an end, for while a special contract is in existence and open they cannot sue on a *quantum meruit*. *Planche* v. *Colburn*, 8 Bing. 14. In *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 364, it was said that a servant properly dismissed cannot recover on the special contract, nor can he recover on a *quantum meruit* because he cannot take advantage of his own wrongful act to insist that the contract is rescinded. As regards himself the contract is still open although he has chosen to break it. If that be so, the onus must be on the plaintiffs to show that their dismissal was wrongful. Suing on a *quantum meruit* they must show that they are not taking advantage of their wrongful act in insisting that the contract is at an end. The evidence is solely that of Robert Crumbie, and no doubt he puts it as favourably as possible for himself, but even on that my inclination is to hold that there were good grounds for dismissal. I cannot see that there was any condonation of misconduct.

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TAYLOR, C. J.

But apart entirely from any consideration of that question, I do not see how the plaintiffs can maintain the present action. According to Robert Crumbie, the contract was with him for the services of himself and his wife, and any action on that contract could have been brought by him. However, they do not sue on that contract. There are then two separate and distinct causes of action. Robert Crumbie was to do the work of the farm and if he has under the circumstances a right to sue, it must be for the value of his services in working the farm. Then Emily Crumbie was to do the work of the house and any claim she may have must be for that. How can they join these in one action? The defendant has in his dispute note said that he never was indebted to the plaintiffs as in their particulars of demand claimed. So it is quite open to him to take the objection that they cannot sue jointly.

Then there is no evidence whatever as to the value of their respective services, even if one action could be brought for both.

The appeal must be allowed with costs, and a non-suit entered in the County Court with costs.

Appeal allowed with costs.

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CLIFFORD V. LOGAN.

Before TAYLOR, C. J., KILLAM, and BAIN, JJ.

Chattel mortgage—Execution—Priority—Mortgage of crops to be grown.

A chattel mortgage covering growing crops or crops to be grown does not come within the provisions of The Bills of Sale Act, R.S.M. c. 10, so as to need filing under the Act to preserve its validity.

Such a mortgage cannot prevail over a prior execution in the hands of the Sheriff against the goods of the mortgagor.

ARGUED: 6th February, 1894.
DECIDED: 10th March, 1894.

THIS was an interpleader issue to determine the ownership of crops seized by the Sheriff of the Central District under the defendant's execution against the goods of one Huntley. The plaintiff claimed under a chattel mortgage, and the defendant as execution creditor. Statement

The writ of execution was issued on the 8th of August, 1892, and placed in the hands of the Sheriff on the same day. The chattel mortgage under which the plaintiff claimed was dated the 23rd of March, 1893, and filed in the proper County Court on the 31st of the same month.

It purported to cover the entire crop of whatsoever description sown, or to be grown, within the year 1893 on the mortgagor's lands which were in the Central District The grain or crop seized was the product of the land described in the mortgage, and the case was argued upon the assumption that the crop was not sown when the mortgage was given.

The issue was tried before Mr. Justice Dubuc upon documentary evidence and admissions made by counsel, no oral evidence being given, and a verdict was entered for the plaintiff.

Defendant then moved before the Full Court, in Hilary Term, 1894, to have the verdict entered for the plaintiff set

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aside, and a verdict entered for defendant, on the following amongst other grounds:

That the evidence disclosed that the plaintiff's chattel mortgage was subsequent to the defendant's execution; that the plaintiff's chattel mortgage was invalid as against the defendant's execution, the same not being in compliance with the Chattel Mortgage Act; that the plaintiff's chattel mortgage did not show what crop was intended to be covered by it.

H. M. Howell, Q.C., for defendant. The case is argued upon the assumption that the crop was not sown when the mortgage was given, *McAllister* v. *Forsyth*, 12 S. C. R. 1. The mortgage has not a sufficient description of the crop. Assuming the description good, and that the mortgage could not be registered, what right did the mortgagee get? Only an equity of some kind, *McAllister* v. *Forsyth*, *supra*. When the crop came into existence Huntley was the owner. Clifford had to come to a court of equity to perfect his title; he had to do something, to take possession or proceedings to perfect his title An execution is good against a prophetic mortgage, though the opposite has been held, *Perrin* v. *Wood*, 21 Gr. 507; *Brantom* v. *Griffits*, 1 C.P.D. 349, 2 C.P.D., 212; *Clements* v. *Matthews*, 11 Q.B.D. 808. At what stage did the property pass to the mortgagee? It passed whenever it became *in esse*, if it passed at all; then it became subject to The Bills of Sale Act. When a chattel comes into existence, then something has to be done to satisfy the Chattel Mortgage Act, *McMillan* v. *McSherry*, 15 Gr. 133; *Ex parte National Mercantile Bank. In re Phillips*, 16 Ch. D. 105; *Belding* v. *Read*, 3 H. & C. 955; *Short* v. *Ruttan*, 12 U.C.R. 79. The mortgage is within the statute; if not, it is void for uncertainty. Is a mortgage of an unsown crop more than a license to enter, seize and sell any crop the mortgagor may sow? *Congreve* v. *Evetts*, 10 Ex. 297; *Lunn* v. *Thornton*, 1 C.B. 379.

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W. J. James for the plaintiff. The question is whether the crop, which was not in the ground when the execution was placed in the Sheriff's hands, was bound by the writ or whether it did not spring into existence under the chattel mortgage, subject to the title the plaintiff derived from the chattel mortgage. The writ binds the goods of the debtor; it can bind only what actually exists, and cannot bind prospective property. The grain, directly it came into existence, was the property of the plaintiff, the mortgagee, subject to the mortgagor's equity of redemption therein. This equity of redemption was all the property the execution debtor, as mortgagor, ever had in the crop, and, consequently, that was all that was seizable under the execution in the Sheriff's hands. As to mortgaging unsown crop, *Bryans* v. *Nix*, 4 M. & W. 774; *Howell* v. *Coupland*, 1 Q. B. D. 258; *Perrin* v. *Wood*, 21 Gr. 506; *Grass* v. *Austin*, 7 A. R. 511; *Hamilton* v. *Harrison*, 46 U. C. R. 127; *Steinhoff* v. *McRae*, 13 O. R. 546; *Mowat* v. *Clement*, 3 M. R. 585; *Brown* v. *Bateman*, L. R. 2 C. P. 272.

TAYLOR, C. J.—In my opinion a mortgage of a growing crop, or of a crop to be grown, does not come within the provisions of The Bills of Sale Act, R.S.M. c. 10, therefore I do not consider the objection taken to the affidavit of *bona fides*, and on account of which the mortgage is claimed to be void.

It is true that section 4 says, that a mortgage of personal property, made, executed, and filed in accordance with the Act, shall, if therein so expressed, bind, comprise, and apply to growing crops or crops to be grown within one year from the date of such mortgage. But that can be regarded only as extending the common law effect of such a mortgage. It is not said that unless filed under the Act it shall be void. The second and third sections do so provide as to sales or mortgages of goods and chattels, not accompanied by an immediate delivery, and not followed by an actual and continued change of possession. But

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unless the mortgagee enters into actual occupation of the land, growing crops, and a crop to be grown, are incapable of immediate delivery, or of an actual and continued change of possession. Our Act has no definition of what is meant by goods and chattels, such as the Imperial Act 17 & 18 Vic. c. 36, had of "personal chattels," which were defined to be "Articles capable of complete transfer by delivery," but the wording of the second and third sections shows that they apply only to goods and chattels of which there can be an immediate delivery, followed by an actual and continued change of possession. It is only instruments coming under these sections which are declared void if not filed under the Act. It was under the Imperial Act that *Brantom* v. *Griffits*, 1 C.P.D. 349, 2 C.P.D. 212, was decided, but that case was followed in Ontario in *Hamilton* v. *Harrison*, 46 U.C.R. 127, where Hagarty, C. J., said he was unable to see any practical distinction between the Ontario Act and the Imperial Act. So, in *Grass* v. *Austin*, 7 A. R. 511, it was held that a mortgage or sale of growing crops need not be registered, because the possession of them cannot, while growing, be changed without changing the possession of the land also upon which they are growing. There is not, that I can see, any difference between the wording of the Ontario Act and our Act.

What interest did the plaintiff acquire under his mortgage? In *Clements* v. *Matthews*, 11 Q.B.D. 808, a case respecting an assignment of future crops, Bowen, L. J., said, "At law the Bill of Sale would pass no property in crops not in existence, but at most it would give a right to enter and take them should they come into existence, but in equity it would confer a right on the grantee to the property when it should come on the farm." At most, then, the plaintiff got under his mortgage an equitable interest in the crops to be sown, which, to use the language of Baggallay, L.J., in *Hallas* v. *Robinson*, 33 W.R. 426, "by taking possession of the goods, could be ripened into a legal interest if there was no intervention." But here, before the plaintiff could take possession of the crop, before

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even it came into existence, there was the writ of execution in the Sheriff's hands.

The case of *Congreve* v. *Evetts*, 10 Ex. 298, in which a question came up between a chattel mortgagee of crops and an execution creditor, was cited during the argument. There the mortgagee contended that, having actually taken possession of the crops before the delivery of the writ to the Sheriff, he was lawfully in possession of them, and his title ought to prevail, and he was held so entitled. But Parke, B., said, "If the authority given by the debtor by the bill of sale had not been executed it would have been of no avail against the execution." In that case, however, the bill of sale was of crops then growing on the farm. It did not profess to assign crops to be grown, but merely declared that it should be lawful for the mortgagee to seize and take possession, among other things, of all crops which should or might from time to time be substituted for the crops &c., covered by the bill of sale. It was, too, a case at law, while this is an interpleader issue in which the Court can consider the equitable rights of the parties. But here the plaintiff has apparently only a right in equity, the defendant having an equal equity, in addition to which he has a legal right under his execution. And the equities being equal, a court of equity would not interfere with the defendant's legal right.

A writ of execution against goods and chattels, at and from the time of its delivery to the Sheriff, binds all the goods and chattels, or any interest in all the goods and chattels, of the judgment debtor within the bailiwick of the Sheriff. It binds, not merely the goods and chattels which the debtor has at the time it is placed in the Sheriff's hands, but, I have no doubt, all the goods and chattels he acquires and has while the writ is current and unsatisfied. When the crop here came into existence, the property in it, the legal title to it, was in the debtor. The mortgage passed no property in the crop, or, at most, a right to it in equity. It gave the plaintiff an equitable right to enter and take the crop, should it come into existence. But the moment

1894. Judgment. it came into existence, the property in it, and the legal title to it, became bound by the execution.

TAYLOR, C. J. By The Mercantile Law Amendment Act in England, a change was made as to the effect of executions, so that they should not prejudice the title to goods acquired by any person, *bona fide* and for a valuable consideration, before actual seizure, provided such person had not, when he acquired title, actual notice that the writ was in the hands of the Sheriff unexecuted. Our Act, R.S.M. c. 53, s. 20, contains a similar provision, but not so wide. The first part of the section states the law as it then was, and goes on, not to protect a *bona fide* purchaser for valuable consideration, as the English Act does, but to declare that a *bona fide* sale, followed by an actual and continued change of possession without notice, shall enable the purchaser to hold the goods and chattels. The section also provides that every writ of execution shall take priority to any chattel mortgage executed by the judgment debtor after the receipt by the Sheriff of the writ. I can see no reason why that should not apply to a chattel mortgage, in the case of after-acquired chattels, or chattels afterwards to come into existence, as to chattels in the debtor's possession at the time of the delivery of the writ to the Sheriff. The mortgage here was not executed until seven months after the Sheriff received the writ.

In my opinion, the motion to set aside the verdict for the plaintiff should be granted with costs. The verdict should be set aside, and a verdict entered for the defendant.

KILLAM, J.—The main question in this case is whether an instrument purporting to bargain, sell and assign, by way of mortgage, crops to be thereafter sown and grown on the lands of the assignor binds those crops when they come into existence, in priority to a writ of execution against the goods of the assignor received by the Sheriff before the making of the instrument.

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The mortgagee claims that his mortgage takes effect at law, by virtue of the 4th section of The Bills of Sale Act, R. S. M. c. 10, or otherwise, or, if not, that a court of equity would enforce his claim and recognize him as having an equitable charge as against the mortgagor and the execution creditor.

It appears to me unimportant to determine his exact position in these respects. Usually a bill of sale of goods not possessed by the assignor operates, when he acquires the goods, in equity only, and gives no legal title. But the equitable interest thus acquired will avail as against a subsequent execution creditor, unless avoided by the provisions of The Bills of Sale Act. See *Holroyd* v. *Marshall* 10 H. L. C. 191; *Leatham* v. *Amor*, 38 L. T. N. S. 785; *Lazarus* v. *Andrade*, 5 C. P. D. 318. Here, however, we have to deal with a prior execution.

Now the mortgagee evidently can take no legal title until the property comes into existence. The land, and seed presumably, are the property of the mortgagor. The mortgagee can take title only through and from the mortgagor. But, at law, the instant the property comes into existence the execution binds it, and it must go to the mortgagee subject to the execution.

On the other hand, the maxim of courts of equity is *Qui prior est tempore, potior est jure.* On the equity side of this Court we constantly recognize writs of execution as creating charges upon the property of the execution debtors. If there were two mortgages of goods to be acquired, equity would give priority to the first in point of time of execution. The interest recognized by a court of equity as created by an assignment of goods to be acquired is considered to attach only from the time when the goods are acquired by the assignor. See *Holroyd* v. *Marshall*, 10 H. L. C. 191.

At that moment the two charges—that under the execution and that created by the mortgage—would attach, and upon ordinary equitable principles priority should be given to that which was first created.

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An execution creditor is not considered to be a purchaser for value, and therefore, a court of equity gives effect as against him to a transfer of goods executed before receipt by the Sheriff of the execution but subsequently acquired by the transferor; but there is no authority to show that such a court would disregard the legal charge and give effect to the transfer, as against it, where the latter came after the execution. To do this would seem inconsistent with the regard paid to legal rights in courts of equity, as well as with the maxim which I have mentioned.

But if there could be any doubt upon the point, it appears clearly settled by the 20th section of The Executions Act, R.S.M. c. 53, which enacts that the writ shall bind the goods of the debtor from the time of its receipt by the Sheriff and shall take priority over any chattel mortgage, bill of sale, &c., executed by the debtor after receipt by the Sheriff of the writ. These provisions do not appear, however, to have been intended to make new law. The whole object of the section is found in the last portion, which restricts the first portion in favor of certain purchasers. The method of accomplishing the object was by re-enacting the previous law as to the general effect of an execution, and then making an exception somewhat narrower than that provided by The Mercantile Law Amendment Act in England.

I express no opinion as to the sufficiency of the description, the necessity for filing, or the form of the affidavit of *bona fides*.

I agree that the verdict should be set aside and a verdict entered for the defendant, with costs of the application.

BAIN, J., concurred.

Verdict for plaintiff set aside, and verdict entered for defendant.

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THE LONDON AND CANADIAN LOAN AND AGENCY CO. LTD.

V.

THE RURAL MUNICIPALITY OF MORRIS

AND

H. R. WHITWORTH, GARNISHEE.

Before TAYLOR, C.J.

Garnishing order—Municipal taxes—Moneys of a municipality in the hands of its treasurer not attachable for its debts.

The treasurer of a municipality is not, as such, a "third person indebted or liable" to it within the meaning of section 8 of the Garnishment Act, R. S. M., c. 64, and its funds in his hands cannot be attached to answer a debt of the municipality.

Seymour v. *Brecon*, 29 L. J. Ex. 243, not followed.

ARGUED: 17th November, 1893.
DECIDED: 2nd January, 1894.

Statement.

THE plaintiffs, as judgment creditors of the defendant Municipality, having obtained a garnishing order against Whitworth, its treasurer, applied for payment over by him of moneys claimed to be in his hands, or, in the alternative, for an issue to determine what funds were in his hands, liable to be garnished. No claim was made that Whitworth was indebted to the Municipality as an individual or otherwise than in his official capacity of treasurer.

W. E. Perdue for plaintiff.

H. E. Crawford for defendants.

The following cases were referred to: *Stobart* v. *Axford*, 9 M. R. 18; *Mayor of Newcastle* v. *Attorney-General*, [1892] A. C. 568; *Clarke* v. *Palmerston*, 6 O. R. 616; *Streetsville Plank Road Co.* v. *Village of Streetsville*, 19 U. C. R. 62; *Peers* v. *Oxford*, 17 Gr. 472; *Cababé on Attachment*, 39;

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Wade on Attachment, s. 429; *Drake on Attachment*, s. 465; *Seymour* v. *Corporation of Brecon*, 29 L. J. Ex. 243; *Re Monkman and Gordon*, 3 M. R. 145, 254; *French* v. *Lewis*, 16 U. C. R. 547; *Cotton* v. *Vansittart*, 6 P. R. 96; and *Ex parte Turner*, 30 L. J. Ch. 92.

TAYLOR, C.J.—The judgment debtors oppose this motion upon a number of grounds. They claim that taxes cannot be garnished, and in support of this they rely upon *The Canada Permanent Loan Co.* v. *School District of East Selkirk*, 9 M. R. 331, in which my brother Dubuc expressed his agreement with my brother Killam, whose decision was appealed from, holding that taxes cannot be garnished, and, as I understand, holding that they cannot be so either in the hands of a ratepayer or after they have reached the treasury of the Municipality. But that case can scarcely be relied on as an authority, for the other members of the Court declined to decide that question and dismissed the appeal for other reasons.

That being the case, I do not propose to deal with the question either, but dismiss the motion upon another ground.

I cannot see that the treasurer of a Municipality is, as such, a third person indebted or liable to the Municipality within the meaning of section 8 of the Garnishment Act, R. S. M., c. 64. His possession of funds of the Municipality is simply the possession of the Municipality itself. He is not in any sense a debtor to the Municipality, he is only the custodian of its funds. The corporation can hold its funds in no other way than by having them in the possession or under the control of its treasurer. The law on this subject seems to me correctly laid down in such text books as *Drake on Attachment*, s. 465 *a*, and *Wade on Attachment*, s. 429. The law as stated by these writers is amply supported by such cases as *Pettingill* v. *Androscoggin Rail. Co.*, 51 Me. 370; *Sprague* v. *Steam Navigation Co.*, 52 Me. 592; *Fowler* v. *Pittsburgh Rail. Co.*, 35 Penn. St. 22. I feel so satisfied upon this point that I cannot

share the doubts expressed in *Seymour* v. *Corp. of Brecon*, 29 L. J. Ex. 243, and decline to follow the course taken there. 1894. Judgment. TAYLOR, C. J.

The motion must be dismissed with costs, which may be set off *pro tanto* against what is due to the plaintiffs.

Motion dismissed with costs.

In re CURSITOR.

Before TAYLOR, C. J.

Trustees—Remuneration—Commission on amount handled.

Where there has been nothing special in the management or winding up of an estate, a percentage on the gross amount come to the hands of the executors or trustees will generally be allowed to them as remuneration.

In this case the value of the estate realized by the executors was $39,348, of which they had properly paid out and disbursed $21,814, leaving $17,534 still in their hands which could not all be paid out before nine years. On the application of the executors for interim remuneration, the Court allowed them 4 per cent. on the $21,814 and 2 per cent. on the $17,534 not yet paid out, in addition to the sum charged for the services of a book-keeper, giving them leave to apply for a further allowance at the final winding up of the estate.

ARGUED: 11th January, 1894.
DECIDED: 5th February, 1894.

Statement.

The executors and trustees of the will of one David Cursitor applied, under R. S. M. c. 146, s. 40, to have a fair and reasonable allowance made to them for their care, pains and trouble and their time expended in and about the trust estate.

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The testator died in November, 1882; the estate had ever since been managed by them, and it appeared to have been exceptionally well managed. It also appeared that it would be about nine years more before the trusts of the will could all be fulfilled. The value of the estate which had come to the hands of the executors and trustees was $39,348.53, and they had properly paid out and disbursed $21,814.39, leaving in their hands and under their control $17,534.14.

J. A. Machray for executors and trustees.

TAYLOR, C.J.—When an estate has been fully wound up, and the trustees are prepared to close their accounts, it has been usual to make them an allowance upon the gross amount come to their hands—that is, when a percentage is a proper mode of remunerating them. In the present case there is no evidence before me of anything special in the management of the estate which would, as in *Thompson* v. *Freeman*, 15 Gr. 384, require another mode of remuneration to be adopted. But when an estate is only partially administered, then it is usual to make the full allowance only upon that part of the estate which may, so to speak, be regarded as closed, and to make a smaller allowance upon so much of the estate as remains still to be dealt with and administered. Then, when the final winding-up comes, the trustees can apply to have some allowance made them for their management of that part of the estate.

In an estate such as the present, five per cent. has been a not unusual amount to allow upon so much of the estate as has been both received and disbursed. I observe, however, that the executors here, while no doubt their management of the estate has been good, have had the assistance of a bookkeeper, who kept the accounts for them, a small sum being charged annually in their accounts for this. This circumstance it is proper should be taken into account.

The allowance I make is four per cent. on the $21,814 received and paid out, and two per cent. on $17,534 still

in the hands of the executors. When they are at the conclusion of their labors and prepared to close the trusts, they can apply for a further allowance in respect of their management during the time after this date.

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HOWLAND v. CODD.

Before TAYLOR, C.J.

Application for leave to sign judgment—Action on foreign judgment—Appeal pending against same when application made here—Finality of judgment—Railway Company — Power to assign judgment—Power of attorney—Judgment is a security for money.

The plaintiffs sued as assignees of judgments for costs recovered against the defendant in actions brought by a Railway Company and one Delap in the High Court of Justice for Ontario. The defendant having entered an appearance, the plaintiffs applied to strike it out and sign judgment on the usual affidavit. Defendant opposed this application, claiming that he was appealing against the Ontario judgments, also that the power of attorney under which the assignment by Delap was executed did not authorize such an instrument. The power gave authority to sell and dispose of, among other things, "bonds, mortgages and other securities for money."

Held (1) That the pendency of an appeal against a foreign judgment would be no defence to an action upon it here, although the Court might stay execution on proper terms.

(2) That there is nothing to prevent a Railway Company from assigning a judgment recovered by it.

(3) That a judgment is a security for money, and that the assignment executed by Delap's attorney under the power above referred to, was sufficient.

ARGUED: 15th March, 1894.
DECIDED: 21st March, 1894.

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THE defendant appealed from an order, made by the Referee in Chambers, striking out the appearance and allowing the plaintiffs to sign final judgment for the amount claimed by the statement served with the writ of summons.

The plaintiffs sued as assignees of a judgment for costs recovered against the defendant in an action brought against him and others by The Great Northwest Central Railway Co. in the High Court of Justice for Ontario, and also as assignees of another judgment and several orders for costs in an action, in the same Court, against the same defendants, brought by the Company and one Delap.

The affidavit upon which the summons to strike out the appearance and sign judgment was obtained, was objected to as insufficient, because it did not show the indebtedness of the defendant.

W. Redford Mulock, Q.C., for defendant.

C. W. Bradshaw, for plaintiffs.

TAYLOR, C. J.—The defendant appeared to a writ specially indorsed, or with which a statement was served, showing fully the nature and amount of the claim sued for, such as is required in a special indorsement. Where a defendant appears to such a writ, all that is necessary to obtain a summons to sign final judgment is an affidavit by the plaintiff or any other person who can swear positively to the debt or cause of action, and stating that, in his belief, there is no defence to the action. Here there is an affidavit by one of the plaintiffs, who swears to the judgments sued upon, to the assignments of them, that the moneys payable under them are justly and truly due to himself and his co-plaintiffs, and that, in his belief, there is no defence to the action. It seems to me that the affidavit fully complies with the requirements of the statute.

The next ground of objection, that the Court had no jurisdiction to make the judgments and orders, was not referred to by the defendant's counsel on the argument of the appeal.

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Another objection is that in the actions in which the judgments were recovered, appeals are now pending. As to this, the evidence is conflicting. An affidavit from the partner of the defendant's attorney says that the defendant has given instructions to defend on several grounds, one being that the orders and judgments are appealed against. The plaintiffs' affidavit is that the time for appealing against each and every of the judgments has, according to the practice of the Court, long since elapsed, and no appeal is pending against any of the judgments. But even if an appeal should be pending, that is no reason why the plaintiffs should not be allowed to have judgment here. The accepted doctrine of the English Courts is that the finality of a foreign judgment is not affected by the possibility or likelihood of there being an appeal in the foreign country, nor even by the fact that an appeal is pending. The pendency of an appeal may afford ground for the equitable interposition of the Court to prevent the possible abuse of its process, and on proper terms to stay execution, but it cannot be a bar to the action itself, *Piggott on Foreign Judgments*, 52.

It is also objected that the assignments were illegal, because the Company could not assign the judgments. For this proposition no authority was given, nor was there any argument urged to support it beyond the general statement that railway companies are not like other corporations. I cannot find anything which would prevent a railway company from assigning a judgment. These judgments are debts due to the Company, and the Company is, as the assignment recites, indebted to the plaintiffs in this action, and as a means of paying that indebtedness, or part of it, the judgments have been assigned. In *Pickering* v. *Ilfracombe Railway Co.*, L.R. 3 C.P. 235, a question arose as to an assignment by the Company of a call made upon stock, and Bovill, C.J., said: "The primary object for the application of the Company's property is the payment of its debts, and I cannot understand why an assignment for that purpose of

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a debt due to the Company should be held to be invalid. There is no authority, that I am aware of, for such a proposition. It clearly is not contrary to the powers of the Company."

The other objection is that the assignment of the judgment and orders in the action by the Company and Delap is invalid because the assignment is executed by Delap by his attorney, and the power under which the attorney acted, and which is produced, gives him no power to assign a judgment. But the power gives the attorneys named in it authority to sell and absolutely dispose of, among other things, bonds, mortgages, and other securities for money; and in *Guardians of West Ham* v. *Ovens*, L.R. 8 Ex. 37, a judgment was held to be a security for money. As Cleasby, B., said: "The difficulty is finding any reasons why it should not be so held."

I cannot see that it lay on the plaintiffs to prove that the assignments were before the Board of Directors. They produce assignments, with the corporate seal affixed, signed by the Vice-President and Secretary of the Company, and that is sufficient for their purpose.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

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BANK OF MONTREAL V. BLACK.

Before TAYLOR, C. J.

Parties to suit in equity—Bill to set aside fraudulent conveyance—Grantor should not be made a party—Allegation that grantor has no other means.

To a bill by a judgment creditor to set aside a fraudulent conveyance made by his debtor before judgment and to have the land sold to pay the debt, the debtor is neither a necessary nor a proper party.

In such a bill it is sufficient to allege that an execution in the District in which the debtor resides, has been returned *nulla bona* by the Sheriff, and it is unnecessary to set up that the debtor has no other property but the lands fraudulently conveyed.

ARGUED: 21st February, 1894.
DECIDED: 20th March, 1894.

Statement.

THE plaintiffs filed their bill against George Black and James Black, alleging that they had recovered a judgment against George Black and Edward Condon, that an execution against goods had been returned *nulla bona*; that the judgment had been registered in the Land Titles Office, Portage la Prairie; that George Black was the owner of a parcel of land which was described; that after the action was begun, but before judgment, George Black, with intent and design of defeating, delaying and hindering the plaintiffs and his other creditors, conveyed the land to the defendant James Black, his son; and that no money or valuable consideration was given for the conveyance. The bill prayed that the plaintiffs might be paid the amount of their judgment; in default that the lands might be sold; the conveyance to James Black declared fraudulent and void; and for further and other relief. The defendant George Black demurred for want of equity.

H. M. Howell, Q.C., for defendant George Black. There is no allegation in the bill that the debtor was the owner

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of the property in fee. There is no allegation that defendant has no other property; the mere allegation of the return of the *fi. fa. nulla bona* by the Sheriff is not sufficient. The debtor may have had ample property in another District. If there is other property the Court will not set the deed aside. As to question of parties, the grantor and grantee are both parties, but the judgment was against two persons, and if George Black is a necessary party, then Condon the co-judgment debtor is also a proper party. *Pyper* v. *Cameron*, 13 Gr. 131. George Black is not a necessary party, *Leacock* v. *Chambers*, 3 M. R. 645. The conveyance is not void but voidable; the grantor cannot get the title back; no conveyance from him is necessary; *Cornish* v. *Clark*, L. R. 14 Eq. 188; *Reese River Mining Co.* v. *Atwell*, L. R. 7 Eq. 347. As to the form of decree, it should declare the land subject to the judgment; *Bank of Upper Canada* v. *Thomas*, 2 E. & A. 502. Suppose a mortgage is not registered; then a fraudulent conveyance is made, and a bill filed for relief, the mortgagor is not a proper party.

J. Martin, for plaintiffs. Plaintiffs have the right to register their judgment and sell the lands of the debtor; to sell any land he has. It is not necessary to allege or prove that he has no other land than that in question. The grantor may not be a necessary party but he is not an improper one; *Leacock* v. *Chambers*, 3 M. R. 645; *Weise* v. *Wardle*, L. R. 19 Eq. 171. It was the invariable practice in Ontario to make the grantor a party; *Leggo's Forms*, 46, 54; *McMaster* v. *Clare*, 7 Gr. 550; *Whiting* v. *Lawrason*, 7 Gr. 603; *McLaren* v. *Fraser*, 15 Gr. 239. If all matters in the bill should be disposed of in the suit then a demurrer will not be allowed; *Longeway* v. *Mitchell*, 17 Gr. 190. Suing on behalf of all creditors does not affect the question. *Commercial Bank of Canada* v. *Cooke*, 9 Gr. 524; *Scott* v. *Burnham*, 19 Gr. 234; *Boustead* v. *Whitmore*, 22 Gr. 222. In this Province it is necessary to file a bill to sell under a judgment, so the grantor is a necessary party here. A

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judgment is a charge, so the person creating a charge is a necessary party. But for the conveyance impeached plaintiffs could file a bill against George Black, and sell the land. He can, at most, demur for multifariousness. The Court will dispose of all matters in one suit where possible. *Campbell* v. *McKay*, 1 M. & C. 602; *McLaren* v. *Fraser*, 15 Gr. 239; *Young* v. *Wright*, 27 Gr. 324; *Campbell* v. *Campbell*, 29 Gr. 252; *Frontenac Loan Co.* v. *Morice*, 4 M. R. 442; *Brimstone* v. *Smith*, 1 M. R. 302. If debtor not a party then a second suit to sell the land is necessary; he has a right to say whether the land should be sold under the judgment. *Bank of Rochester* v. *Stonehouse*, 27 Gr. 327; *Morphy* v. *Wilson*, 27 Gr. 1. There is no demurrer for want of parties, so there is no question as to Condon being a defendant.

TAYLOR, C. J.—The first objection to the bill is that it contains no allegation that George Black has no other property. It is argued that the mere allegation that an execution had been returned *nulla bona* is not sufficient, as the defendant may have ample property in another District, and if he has other property the Court will not set aside the deed.

This was disposed of adversely to the defendant's contention long ago by Lord Hardwicke in *Taylor* v. *Jones*, 2 Atk. 603, where he held that it lies on the defendant to prove what his circumstances were at the time of making the deed, as he may be supposed to know it much better than the plaintiff. The same thing was held in Ontario by Spragge, V. C., in *Brown* v. *Davidson*, 9 Gr. 439. There the plaintiff, having proved that executions had been returned *nulla bona*, the learned Judge said: "If voluntary it would not necessarily be with intent to delay or defraud creditors, for the father might have had ample property besides to satisfy his debts, but who is to prove this? Is the plaintiff to prove the negative, that the debtor had not other property? He has proved that his debtor had no other property in the County in which he lived which he

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could reach by the ordinary process of law. I think that is sufficient *prima facie*, and that it lies upon those supporting a voluntary conveyance to show the existence of other property available to his creditors." I so held following these cases in *Leacock* v. *Chambers*, 3 M. R. 645, and more recently it was so held by the Full Court in *Osborne* v. *Carey*, 5 M. R. 237. See also on this point, *Crossley* v. *Elworthy*, L. R. 12 Eq. at p. 164; *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 119.

The next objection is that George Black should not have been made a party defendant. The deed it is said is not void, but voidable, he cannot get the title back, and no conveyance from him is necessary.

A number of Ontario cases were cited for the plaintiffs to show that the usual practice there is to make the grantor a party, and that although he may not be a necessary party, he is not an improper party. Many of the cases cited cannot be regarded as authorities on the subject. *McMaster* v. *Clare*, 7 Gr. 550, is reported upon a motion to continue an *ex parte* injunction against Clare, the grantee. Hutchinson, the grantor, was a party to the bill, but was not, to all appearance, represented on the motion, which did not affect him, and we do not know whether he afterwards demurred or not. In *Whitney* v. *Lawrason*, 7 Gr. 603, the grantor was a party but he allowed the bill to be taken *pro confesso* against him, and if he did not raise the objection that he should not be a party, I suppose the Court did not raise it for him. In the cases of *Goetler* v. *Eckersville*, 15 Gr. 82, and *McLaren* v. *Fraser*, 15 Gr. 239, it is clear that for part of the relief sought the grantors were proper parties. *Pyper* v. *Cameron*, 13 Gr., 131 is not an authority. There, as here, the plaintiff had a judgment against two parties and the bill was filed to set aside a fraudulent deed made by one of them and he was a defendant. He filed a demurrer that his co-debtor should be a defendant also and that was allowed. But Mowat, V. C., there goes no further than this, that if the one was a proper party, and the plaintiff had made him a party, then the other was also.

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The case of *Gibbons* v. *Darvill*, 12 P. R. 478, is one since the Judicature Act, and the language of Rose, J., shows that until that Act was passed it was not, in Ontario, considered proper to make the grantor a defendant.

In two cases the objection was taken that the grantor was not a necessary party, and in both the objection was sustained. These cases are *Commercial Bank* v. *Cooke*, 9 Gr. 524, and *Scott* v. *Burnham*, 19 Gr. 238. The English case of *Weise* v. *Wardle*, L. R. 19 Eq. 171, goes further and decides that he is not a proper party.

It was said that if the debtor is not a party then a second suit will be necessary, to sell the land, as he has the right to say whether it shall be sold under the judgment or not. That is not the case. It is the grantee who is now interested in the land and whether it is to be sold or not. The debtor has parted with the land by his conveyance to the grantee.

The demurrer should be allowed with costs. The plaintiffs may have leave to amend upon payment of the costs.

Demurrer allowed with costs.

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MILLER v. DAHL.

Before TAYLOR, C. J., DUBUC and KILLAM, JJ.

Specific performance of agreement—Mistake by one party, when ground of relief.

Specific performance of an agreement will not be refused on the ground of a mistake of one of the parties to it, where the mistake was not known to the other party, and there was nothing in the language or conduct of the other party which led or contributed to the mistake, unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to hold him to it, or give the other party an unconscionable advantage.

Tamplin v. *James*, 15 Ch. D. 215, followed.

ARGUED: 30th November, 1893.
DECIDED: 5th February, 1894.

Statement

REHEARING of an order amending the decree on further directions in an administration suit. When proceeding in the Master's office under the decree on further directions, a question arose as to what arrears of income the widow, the original plaintiff, had been entitled to. After some negotiations an agreement on this subject, dated 13th March, 1893, was come to between Mr. Monkman, the administrator of the widow's estate, and the solicitors for Alexander J. Dahl, one of the defendants. When this agreement was brought before the Master he declined to proceed under it, unless the decree on further directions was amended so as to admit of his doing so. A petition to amend the decree accordingly was then presented to the Court by Mr. Monkman. This was opposed by Alexander J. Dahl, but Mr. Justice Bain, who heard the petition, made an order granting the relief prayed for. This order was then reheard at the instance of Alexander J. Dahl.

A. Monkman, for plaintiff.

F. C. Wade and *A. Whealler*, for defendant.

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The following cases were referred to:—*Malins* v. *Freeman*, 2 Keen, 25; *Manser* v. *Back*, 6 Ha. 443; *Wycombe Ry. Co.* v. *Donnington Hospital*, L. R. 1 Ch. 268; *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100; *Swaisland* v. *Dearsley*, 29 Beav. 430; *McDonell* v. *McDonell*, 21 Gr. 342; *Needler* v. *Campbell*, 17 Gr. 592; *Omnium Securities Co.* v. *Richardson*, 7 O. R. 185; *Bray* v. *Briggs*, 20 W. R. 962; *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Jones* v. *Rimmer*, 14 Ch. D. 588; *Calverley* v. *Williams*, 1 Ves. 210; *Harnett* v. *Yielding*, 2 Sch. & Lef. 554; *Webster* v. *Cecil*, 30 Beav. 62; *Paget* v. *Marshall*, 28 Ch. D. 255; *Wright* v. *Goff*, 22 Beav. 207; *Trigg* v. *Lavellee*, 15 Moo. P. C. 270; *Crooks* v. *Davis*, 6 Gr. 317; *Metropolitan Counties Society* v. *Brown*, 26 Beav. 454.

TAYLOR, C. J.—Three grounds of objection to the amendment of the decree so as to admit of the Master proceeding under the agreement are taken. First, the agreement was not assented to by both parties. Second, the petition is to obtain specific performance of an agreement, and the evidence shows no *assensus ad idem* when it was signed. And third, the evidence shows that a misapprehension as to the meaning and effect of the agreement existed in the mind of the solicitor for Alexander J. Dahl when he signed it. There is no evidence, and no argument was offered, to show that as a matter of fact the agreement was not assented to. It is upon the second and third grounds that the opposition to the order which was made is based.

A number of cases were cited to show that the Court will not grant specific performance of an agreement entered into under mistake of one of the parties to it. And it is said that this is so even although his being under a mistake was unknown to the other party, and although there was nothing in the language or conduct of the other party which led or contributed to the mistake, under which it is claimed the agreement was made. But in a number of cases cited, the conduct of the party seeking to enforce the agreement was the reason why the Court refused to do so.

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or was at least an important element in its coming to the conclusion not to do so. Certainly that was so in such cases as *Manser* v. *Back*, 6 Ha. 443; *Moxey* v. *Bigwood*, 4 D. F. & J. 351; 10 Jur. N. S. 597; *Bray* v. *Briggs*, 20 W. R. 962; *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100; *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Jones* v. *Rimmer*, 14 Ch. D. 588.

No doubt some of the cases go a long way in giving relief on the ground of mistake by one party not contributed to by the other. Speaking of these, James, L. J., said in *Tamplin* v. *James*, 15 Ch. D. 215, "Perhaps some of the cases on this subject go too far; but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it." Or as Bacon, V. C. put it in *Burrow* v. *Scammell*, 19 Ch. D. 175, the Court has relieved against honest mistakes in contracts where the literal effect and the specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake, and also where not to correct the mistake would be to give an unconscionable advantage to either party.

Now what is the case here? Was the agreement entered into under a mistake or under a misapprehension as to its meaning and effect? If there was any mistake on the part of the solicitor for Alexander J. Dahl was it such that relief should be given against it? Would there be hardship amounting to injustice in holding him to it, or would the plaintiff, by relief being refused, be given an unconscionable advantage?

[The learned Judge, after a full discussion of the affidavits, came to the conclusion that under the authorities there was no ground for giving relief against the agreement, and that the order of Mr. Justice Bain should be affirmed with costs.]

DUBUC, J.—The principal point contended for by the solicitors for Alexander J. Dahl is that the agreement

sought to be enforced was signed by them under mistake or misapprehension as to its true meaning and effect. It is not shown, however, that they were led into this mistake or misapprehension by the fraud of Mr. Monkman, the other party to the agreement, or by anything said or done by him by which they were deceived. They only claim that there was not the *assensus ad idem* required to make an agreement valid and binding. Relief is not unfrequently granted against errors or mistakes of that kind, but as held by some eminent judges, it is particularly done in cases where the enforcement of the agreement executed under mistake or misapprehension would cause hardship and injustice to one party, and procure an unconscionable advantage to the other.

In this case, it is not shown that the additional claim for income to which Elizabeth Miller is alleged to have been entitled under the will of Alexander Dahl, her first husband, is unreasonable or inequitable in itself, but it is contended that the solicitors for Alexander J. Dahl understood when the agreement of the 15th March, 1893, was signed, that the itemized account of $602 then put in was the only amount to be claimed for income, and that the administrator should now be limited to the same.

The grounds, therefore, urged against the relief sought for by the petition are not broadly based on the strict justice and equity of the matter, but more particularly on the contention that the rights of the parties should be held to have been concluded by what was understood, at the time of the signing of the agreement, by those who represented Alexander J. Dahl.

It seems that, under such circumstances, there is no valid reason why the relief sought for by the petition should not be granted; and, on the different grounds advanced by the learned Chief Justice, I agree with him that the order appealed from should be affirmed with costs.

KILLAM, J., concurred.

Rehearing dismissed with costs.

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CHARLEBOIS

v.

THE GREAT NORTH-WEST CENTRAL RAILWAY CO.

Before DUBUC, KILLAM and BAIN, JJ.

Practice in equity—Filing answer without signature or seal of corporation—Consent of plaintiff's solicitor required.

The Court has no jurisdiction to dispense with the signature of a natural person or the seal of a corporation to an answer in an equity suit without the consent of the plaintiff, and such consent must either be given by plaintiff's solicitor in writing or by counsel before the Court.

Counsel for the plaintiff, in a suit in another Province, had agreed that the plaintiff would consent to the filing of the answer of the Company in this suit without the seal of the corporation.

Held, that this would not dispense with the consent required by the practice of the Court, and the application of the Company to have their supplemental answer filed without the corporate seal, the plaintiff opposing same, was dismissed with costs.

ARGUED: 2nd May, 1893.
DECIDED: 27th May, 1893.

Statement. THIS was a rehearing, before the Full Court, of an appeal from an order of the Referee in Chambers, giving to the defendant the Railway Company leave to file a supplemental answer to the plaintiff's bill, without seal or signature.

The appeal was allowed by Taylor, C.J., and the application to file such answer was dismissed by him.

The application was based on a consent claimed to have been given before the High Court of Justice of the Province of Ontario by counsel representing the present plaintiff in an application to stay the proceedings in an action in that Court in which was recovered the judgment which the plaintiff's bill in this suit sought to enforce. The fact of counsel having given such consent was proved by affidavit

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and by production of an order of the Ontario court verified by affidavit, which order recited the giving of such consent.

The application to file such a supplemental answer was opposed by the plaintiff in this suit, he claiming that the counsel appearing for him in the Ontario action had no authority to bind him by an agreement as to the method of conducting a suit in this Court, that the consent must be in writing and signed by his solicitors in this suit or be given by counsel in open court here, and also, that the retainer of the solicitors who filed the original answer on the part of the Company had been revoked, and that this application was not the application of the Company, or the proposed supplemental answer the answer of the Company, but only of a dissentient minority of the shareholders.

H. M. Howell, *Q. C.* and *T. D. Cumberland* for plaintiff.

A. E. Richards and *C. W. Bradshaw* for the Railway Co.

J. S. Ewart, *Q.C.*, for the Union Bank.

The following cases and authorities were referred to: *Carey* v. *Wood*, 2 M.R. 290; *Daniell's Chy. Pr.*, 134, 639; *Gildersleeve* v. *Wolf Island Ry. Co.*, 3 Ch. Ch. 361; —— v. *Lake*, 6 Ves. 171; *Bayley* v. *De Walkiers*, 10 Ves. 441; *Codner* v. *Hersey*, 18 Ves. 468; *Chisholm* v. *Sheldon*, 1 Gr. 294.

KILLAM, J.—There seems nothing in the rules of practice, as laid down in *Smith's Chancery Practice*, 2nd ed. pp. 263-7; *Daniell*, 5th ed., vol. 1, pp. 134, 638, or in the General Orders of this Court, to warrant the contention of counsel for the Company that the Court has a discretionary power to dispense with the signature of a natural person, or the seal of a corporation aggregate, without consent of the plaintiff.

So far as the counsel who appeared before the Court in Ontario is concerned, he can in this Court be regarded only as an agent of the plaintiff. Assuming that he had authority to bind the plaintiff by giving such consent, it goes no farther than the consent of the plaintiff himself or of some

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authorized agent of the plaintiff other than his solicitor in the cause. Our own General Orders would not justify the officer receiving the answer to inquire as to a consent alleged to have been given by the plaintiff or such an agent. The English practice would not seem to have recognized a consent thus informally given, but to have required latterly the written consent of the solicitor or the formal consent in open court of counsel for the plaintiff. The formalities in the earlier practice for obtaining the corporate seal to be affixed, or a consent to dispense with seal or signature, seem to have been even greater. There seems to be no authority warranting the Court, on an application to dispense with oath, signature, or seal, in inquiring into the fact of a consent evidenced otherwise than as mentioned, or into the authority of an agent, other than the solicitor in the cause, to give such consent. The difficulties surrounding such an inquiry appear, to some extent, in this case. Two different sets of solicitors and counsel assumed to represent the Company, one to support and the other to oppose the application. There is a conflict as to whether the shareholders desiring the making of the order hold or are entitled to a majority of the shares of the Company's stock. It is stated, in an affidavit filed against the motion, that the Company had no notice of the application in the Ontario Court in which the alleged consent was given, and was not represented on the making of the order, and is not bound thereby. If this be so, there was no consent given to the Company, and the Company could not avail itself of the consent, whatever might be the remedies of those to whom it was given. Without, then, considering the question of the authority of the counsel in Ontario to bind the plaintiff, or the right of the original solicitors of the Company in this cause to represent the Company, I think that we must lay down the rule that a consent warranting the filing of an answer without oath or signature, or, in case of a corporation aggregate, without the corporate seal, must be a formal consent of counsel in open Court or

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of the solicitor in writing, and that the order of the Chief Justice should be affirmed with costs.

BAIN, J.—The answer of an individual defendant in equity must be signed and sworn to by him, unless an order has been obtained dispensing with either or both of these formalities. In the case of corporations aggregate, affixing the common seal of the corporation to the answer takes the place of the signature and oath; and the practice as regards dispensing with the seal will be the same as it is in regard to dispensing with the signature and oath. Now the practice has been long settled that the Court will not make an order dispensing with the signature of an individual defendant unless it is consented to by the plaintiff. *Anon*, 1 L. J. Ch. 4.

What the defendants rely on here as the plaintiff's consent is an order made at the hearing of a petition in two suits in the High Court of Justice in Ontario in which the plaintiff and the defendants appear to be parties, adjourning the hearing of the petition upon "Alphonse Charlebois, by his counsel hereby consenting that The Great Northwest Central Railway Company be at liberty to set up by supplemental answer without seal or signature any defence which the Company may be advised in the action . . . now pending in the Queen's Bench in Equity in Manitoba, between Alphonse Charlebois, plaintiff, and The Great Northwest Central Railway Co. and others, defendants."

The plaintiff through his counsel in this suit declined to be bound here by the consent of his counsel given in another suit in Toronto, and the defendant Company's motion for an order allowing a supplemental answer to be filed without seal or signature was opposed by the plaintiff. It is open to argument if it was within the scope of the authority of the plaintiff's counsel in the action in Ontario to give a consent referring to a matter collateral to the cause in which it was given, that is binding on the plaintiff, but whether the consent is legally binding or not, it is not, I think, such a consent as this Court must have

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before it can make an order, on the motion of the defendant, that the answer may be filed without seal or signature. In *Smith's Practice* p. 266, it is said, "The plaintiff may dispense with the oath, or with the oath and signature, of all or any of the defendants. If so disposed, an order of course is obtained either on the petition or motion,"—that is on the plaintiff's own petition or motion. "If the defendant moves, the plaintiff must consent by counsel, if he petitions, by his clerk." And in *Daniell* at p. 639, it is laid down that "Where the defendant applies, the plaintiff's solicitor must instruct counsel to consent to the motion, or must subscribe his consent to the petition, as the case may be."

To do away with the necessity of moving or petitioning for an order that could be made only on consent, our order No. 111 provides that "An answer may be filed without oath or signature by consent without order." If the defendants had the consent of the plaintiff or his solicitor, in this suit, it would not be necessary for them to come to the Court for an order; and the practice seems to be clear that without the consent of the plaintiff's counsel or solicitor, in the suit in which the application is made, the order cannot be made by the Court. In all the cases to which we have been referred in which the motion was made on behalf of the defendant, the plaintiff's consent was given by his counsel attending on the motion. No authority has been cited by the defendants to show that the practice can in any case be otherwise than as above stated.

The application is refused with costs and the order appealed from affirmed.

DUBUC, J., concurred.

Application refused with costs.

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Re MOORE AND THE CONFEDERATION LIFE ASSOCIATION.

Before DUBUC, KILLAM AND BAIN, JJ.

Real Property Act—Certificate of title final at each stage—Trusts and powers not appearing on the certificate.

A certificate of title for certain lands had been issued to M., (described therein as sole surviving executrix and devisee under the will of B.,) which stated that M. was seized of an estate in fee simple in the lands subject to the following incumbrances: 1st, a mortgage made by B. to C.; 2nd, a lien or charge for $5,000 in favor of M. B. under the said will; 3rd, a mortgage made by M. herself to C., attaching upon M.'s interest as such devisee only. Afterwards M. sold part of the land to D. and executed a transfer thereof to him, and the District Registrar holding that M. had a power of sale as executrix under B.'s will, which enabled her to sell the land for the purpose of paying debts and legacies, and finding, as the fact was, that the sale was necessary for that purpose, decided to issue a new certificate of title to D., free and clear of all incumbrances except the mortgage made by the testator.

To this C. objected, and the matter was referred to the Court on appeal from the District Registrar.

Held, that it was not competent for the District Registrar to go behind his former certificate, and find in the registered owner a power inconsistent with the title stated in it, and thus cut out two of the incumbrances therein set forth.

Re Massey and Gibson, 7 M. R. 172, followed.

Held, also, that, even if the former certificate could have been corrected by the District Registrar as erroneous, such power of correction was in him and could not be exercised by the Court on the appeal.

The 122nd section of The Real Property Act applies where the holder of a certificate of title has died or become bankrupt and there is a transmission of his interest, but has no application where the land transmitted had not been brought under the Act.

ARGUED: 11th July, 1893.
DECIDED: 20th December, 1893.

Statement.

THIS was a rehearing of an appeal from a decision of a District Registrar under The Real Property Act.

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In 1882 William Beall was the owner of the land in question, subject to a mortgage which he had made on the 12th July, 1881, in favor of the Confederation Life Association. He died in April, 1882, after making his will, by which he appointed his wife, afterwards Mrs. Moore, and one William Pearson his executors, directing them to pay all his just debts, funeral expenses and legacies out of his estate. He also bequeathed, after payment of the debts and funeral expenses, to his infant daughter, a legacy of $5,000 to be paid her at the age of 21. He then gave his wife all his real estate and all his chattels and household furniture, with the exception of paying the above named legacy, and directed his executors to educate and provide all necessaries for his infant daughter until she became 21, over and above the legacy of $5,000. The will was duly proved by the executrix and executor, but the latter died in September, 1883.

In September, 1882, the widow executed a mortgage on the land in question in favor of the Confederation Life Association for securing repayment of $2,000, then borrowed by her. Some years afterwards a suit was begun to foreclose this mortgage, in which a decree was made whereby it was declared that the legacy in favor of the infant and the provision for her education and maintenance were a charge on the land in priority to the mortgage of September, 1882, and the usual accounts and inquiries were directed. (See 6 M. R., at p. 162.) This decree was followed in 1891 by a final order of foreclosure. Subsequently the infant filed a bill for redemption of the mortgage made by the testator dated 12th July, 1881, and thereupon a decree for redemption was made, under which the amount due was paid and a discharge of the mortgage executed.

In October, 1891, before the making of the final order of foreclosure in the first suit, and before the redemption of the mortgage in the second suit, a certificate of title to the land in question under The Real Property Act was issued to

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Mrs. Moore, sole surviving executrix and devisee under the will of William Beall, expressed to be subject to the mortgage of the 12th July, 1881, the charge in favor of the infant, the mortgage of 1st Sept., 1882, and a writ of *fi. fa.* lands in favor of the Confederation Life Association, the last two being declared to attach upon the interest of Mrs. Moore as devisee only.

In the month of November following, Mrs. Moore executed a transfer of part of the land in question to one Curzon and mortgaged the remainder of it to the executors of the late Sir John A. Macdonald.

Upon the transfer and mortgage being brought to the District Registrar for registration, that officer, finding as a fact that the sale and mortgage were necessary for the purpose of paying debts of the estate of William Beall, and also of providing for the maintenance and education of the infant in accordance with the terms of the will, determined to issue a certificate of title to Curzon free and clear from the charge in favor of the infant, the mortgage of the 1st September, 1882, and the writ of *fi. fa.*, and also, upon being satisfied that the mortgage of the 12th July, 1881, had been paid off, to issue a certificate of charge on the remainder of the land declaring the mortgage to the executors of the late Sir John A. Macdonald to be the first charge upon it.

To this the Confederation Life Association objected and required the Registrar to set forth in writing the ground of his decision, which he did.

From this decision the Association appealed. The appeal came on for hearing before the Chief Justice, and was dismissed by him. It was then brought before the Full Court for rehearing.

H. M. Howell, Q.C., and *A. Dawson*, for The Confederation Life Association. The executrix, as such, alone cannot convey, but the executrix and devisee together can. If she had never transferred her interest to the Confederation Life she could. If land devised subject to a legacy, a

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purchaser must see to the application of the purchase money; but if charged with debts also, the purchaser need not. These lands could be sold by someone to pay debts, *Corser* v. *Cartwright*, L.R. 8 Ch. 974, 7 H.L. 731. 22 & 23 Vic. c. 35, ss. 14–18, may be considered to apply, but whether it does or not does not appear to matter. It is the vesting of the estate that gives power to convey. If land is charged, and there is no devise, the executor can convey. *Robinson* v. *Lowater*, 17 Beav. 592, was before the Act. The sale in that case was to the party who had the legal estate. In *Wrigley* v. *Sykes*, 21 Beav. 337, there was no one who could convey. *Cook* v. *Dawson*, 29 Beav. 123; *Re Wilson*, 34 W. R. 512; *Colyer* v. *Finch*, 5 H. L. C. 905; *In re Tanqueray-Willaume & Landau*, 20 Ch. D. 465; *West of England, &c., Bank* v. *Murch*, 23 Ch. D. 138; *Hodkinson* v. *Quinn*, 1 J. & H. 309. The proceeds of sale and mortgage in question were not used for the purpose of paying debts within the meaning of the Wills Act; they were used to pay a mortgage on the lands given by testator before his death; and such a debt was not one an executor is called on to pay. If an executor is directed to pay debts, and afterwards land is devised, the land is not charged with the debts. It should be implied from there being a mortgage on the land that a purchaser and subsequent mortgagees had notice that money was to be used to pay it off. If estate has passed out of trustee, the conveyance must be made by assignee of trustee, Lord St. Leonard's Act, 22 & 23 Vic. c. 35, s. 15. Executrix, even if such, cannot derogate from her grant as devisee. *Yost* v. *Adams*, 13 A. R. 146. *Confederation Life* v. *Moore*, 6 M. R. 164, shows what was determined in that case; it gave priority only to the legacy, not to debts. *Dickenson* v. *Dickenson*, 3 Bro. C. C. 19, shows that when a legacy is to be paid when the legatee attains 21, the purchaser is bound to see to the application of the purchase money. There was really no charge of debts; the evidence showed there were no debts except the mortgage, *Mason* v. *Mason*, 13 O. R. 725.

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J. D. Cameron, for the executrix, the infant and Curzon, the purchaser, referred to the following cases: *Bentham* v. *Wiltshire*, 4 Mad. 44; *Shaw* v. *Borrer*, 1 Keen, 559; *Forbes* v. *Peacock*, 12 Sim. 528; *Gosling* v. *Carter*, 1 Coll. 644; *Robinson v. Lowater*, 17 Beav. 592; *In re Bailey*, 12 Ch. D. 268; *Storey* v. *Walsh*, 18 Beav. 569; *Cook* v. *Dawson*, 29 Beav. 123; *Corser* v. *Cartwright*, L. R. 7 H. L. 736; *West of England, &c., Bank* v. *Murch*, 23 Ch. D. 138; *Cumming* v. *Landed Banking Co.*, 19 A.R. 447.

C. P. Wilson, for the Attorney-General and the District Registrar. The purchaser is protected whether debts are due or paid. *Re Massey and Gibson*, 7 M.R. 172, shows that a purchaser, on the execution of a transfer, obtains an equitable estate. Where there is a charge to pay debts the executor is the proper party to sell, *Greetham* v. *Colton*, 34 Beav. 619. Here there was a special direction to the executors to pay debts, which is a specific authority to them to sell. The executrix and devisee being the same person, a good title can be given notwithstanding the foreclosure of the personal interest of the devisee. Persons made trustees must execute trusts, *Robson* v. *Flight*, 4 D. J. & S. 613; *Austin* v. *Martin*, 29 Beav. 532; *In re Morton & Hallett*, 15 Ch. D. 145. There was never any intention of the District Registrar to free the property from the charge under the will. His report showed he considered it necessary to sell to pay debts.

F. H. Phippen, for executors of Sir J. A. Macdonald, mortgagees. The Wills Act does not alter the power to sell; it only prevents a devisee from throwing a charge on the estate. The Wills Act of 1882 does not apply. There is no presumption of notice.

The judgment of the Court was delivered by

KILLAM, J.—A great deal of the argument before us was upon the question of there being an implied power of sale where debts or legacies are charged on lands devised to parties other than executors or not devised at all. It does not

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Judgment.

KILLAM, J.

appear to me that such a question arises at all in the present case. Upon the principle of the decision in the case of *The Confederation Life Association* v. *Moore*, the will must be construed as effecting a charge of the debts upon the realty. It is clear that in such case, where the real estate is devised to the executors, they have a power of sale for the purpose of paying debts, and the purchaser is not obliged to inquire as to the existence of debts or to see to the application of the purchase money. *Wrigley* v. *Sykes*, 21 Beav. 337; *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; *West of England, etc., Bank* v. *Murch*, 23 Ch. D. 138; *Corser* v. *Cartwright*, L.R. 7 H.L. 731. And the last of these cases appears to show that this power can be exercised by one of several executors where the devise is to such one separately.

Now, at the death of William Beall, he could sell only the equity of redemption. His executors or devisees, immediately after his death, could do no more. But when the mortgage fell due it was quite competent for Mrs. Moore, then the devisee and sole surviving executrix, to make such sale and to compel the mortgagee to take the mortgage money and discharge the first mortgage. Mr. Beall had covenanted to pay the mortgage money, which then formed one of his debts, to pay which, as well as the legacy and the charge for maintenance and education, the power could properly be exercised.

These considerations, however, by no means dispose of the case. First, there is the question whether the power of sale was extinguished *pro tanto* by Mrs. Moore's mortgage to the Association, or whether she can still exercise it to the prejudice of that mortgage and so as to defeat her own grant. I did think at one time that the limitation stated in the certificate of title, that this mortgage is one upon her interest as devisee only, settled this point. But on further consideration this appears only to raise further difficulties. It may be that creditors or the daughter could enforce their claims and insist on a sale as against the second mortgage, but this view would not necessarily

involve the conclusion that Mrs. Moore can now do so. Further we have in *Re Massey Manufacturing Co. and Gibson*, 7 M.R. 172, expressed the opinion that the District Registrar cannot divide the legal and the beneficial interest, and there is great difficulty in construing the memorandum as to incumbrances as so dividing these interests, and in holding that the District Registrar can go behind his certificate, distinguish between these two interests and find a power of sale in the holder of the certificate which enables her to defeat a charge which the certificate states to exist to some extent against her title. If this can be done, it would seem necessary to qualify in some degree the opinions which we expressed in the case just cited.

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Then, there may be a question as to the application and effect of the 122nd section of The Real Property Act, R. S. M. c. 133. It may be important to determine whether that section applies in cases in which the deceased owner was not registered as such under the Act, or where the land does not go to the executor by virtue of the Act, and what should be done by the District Registrar, when he finds such equitable charges as in the present instance, upon lands being brought under the Act.

These questions do not appear to have received from counsel the attention which their importance deserves. Though, to some extent, they were suggested during the argument, it was evident that they had not previously been considered. In view of the importance of some of these questions, not merely with reference to this case itself, but particularly in the working of The Real Property Act, we deem it best not to attempt their determination without some further argument. We shall, therefore, cause the case to be entered on the list for next Term for further argument on these points.

In Trinity Term following, the appeal was accordingly re-argued by the same counsel.

H. M. Howell, Q.C., and *A. Dawson*, for The Confederation Life Association, referred to *Colyer* v. *Finch*, 5 H.L.C.

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Argument.

921; *Re Bedingfield*, 9 T.L.R. 355; *Cooper* v. *Slight*, 27 Ch. D. 565; *Burt* v. *Truman*, 6 Jur. N. S. 721; *Johnson* v. *Kennett*, 3 M. & K. 624; *Watkins* v. *Cheek*, 2 Sim. & St. 199; *Fausset* v. *Carpenter*, 2 Dow & C. 232.

C. P. Wilson, for the Attorney-General and District Registrar. As the certificate states the title to be in "Emma Moore, sole surviving executrix and devisee under the will," it shows that she holds in a representative capacity, and the will should be looked at to ascertain her powers. The judgment already pronounced shows that the executrix could sell to pay the mortgage debt created by William Beall. The certificate on its face shows that this debt is still in existence. Again, the District Registrar has power to correct an erroneous certificate, and his action in this matter should be considered as such correction. All parties had appeared before him and discussed the matter upon the assumption that the charge for debts was still in existence. The matter was argued on the same lines before the Chief Justice, and the point now under discussion was raised by one of the Judges in Term. Reference was made to *Williams on Real Property*, 223; *Sugden on Powers*, 46, 47, 588; *Lewin on Trusts*, 676.

J. D. Cameron, for the executrix, the infant and the purchaser, referred to the cases cited on the former argument as to powers of executors, also *Williams on Executors*, vol. 1, p. 661; *White & Tudor's Leading Cases*, vol. 1, p. 101.

F. H. Phippen, for the mortgagees, referred to *Holdsworth* v. *Goose*, 29 Beav. 113; *Eisdell* v. *Hammersley*, 31 Beav. 255; *Hole* v. *Escott*, 4 M. & C. 189.

The judgment of the Court was delivered by

KILLAM, J.—We are of opinion that the order of the Chief Justice should be reversed and the appeal from the decision of the District Registrar allowed.

The certificate of title stated that Emma Moore, of the City of Winnipeg, in Manitoba, married woman, sole

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Judgment.

KILLAM, J.

surviving executrix and devisee under the will of William Beall, deceased, was seized of an estate in fee simple in the described lands, subject to certain incumbrances which were as follows:

1. A mortgage from William Beall to The Confederation Life Association.

2. A lien or charge in favor of May Winifred Hodgson Beall, for $5,000, under the will of William Beall.

3. A mortgage from Emma Beall to The Confederation Life Association, upon the interest of said Emma Moore as such devisee only.

4. A writ of *fieri facias de terris*, in favor of The Confederation Life Association, against Emma Beall, attaching upon the interest of said Emma Moore as such devisee only.

The District Registrar has assumed to go behind this certificate and find that Mrs. Moore had a power of sale as executrix, which enabled her to sell the property for the purpose of paying debts and legacies and thus to cut out the two latter of these incumbrances. In *Re Massey and Gibson*, 7 M.R. 172, we held that the Registrar General, under the old Acts, could not inquire into the existence of a beneficial interest, apart from the registered title, in order to ascertain whether a writ of execution against the registered owner bound the lands as against the alleged beneficiary. Here the District Registrar has found in the registered owner a power inconsistent with two of the incumbrances named, which seems to us wholly opposed to the principles of The Real Property Act, as that Act makes a certificate of title final at each stage. It is true that the two incumbrances are shown to affect only the interest of Mrs. Moore as devisee, but it does not show that she has any estate or power inconsistent with that interest or enabling her to override these incumbrances. She is described as executrix and devisee, but such a description does not show a power to nullify the incumbrances stated to exist.

It is argued that, in this view, the certificate was

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KILLAM, J.

erroneous and might be corrected by the District Registrar, and that his action is, in effect, such a correction; but, without considering the question of the power to correct under such circumstances, we cannot treat it as having been exercised. That power is in the District Registrar, and is not one which the Court can exercise on this appeal. The District Registrar has not determined that the former certificate was erroneous and he has not assumed to correct it, and we cannot now presume that he intended to do so.

The 122nd section of the Act, to which reference was made in our former judgment in this matter, applies only to a case in which the holder of a certificate of title has died or become bankrupt, and there is a transmission of his interest, and it has no application in the present instance.

No costs will be allowed to any of the parties.

NOTE.—The following are the minutes of the order made by the Court:—

Order that the order of the Chief Justice, dismissing the petition by way of appeal from the District Registrar, be discharged.

Declare that the holders of the transfer from Emma Moore to Arthur Curzon, of a portion of the lands mentioned in the petition of The Confederation Life Association, and the mortgage from Emma Moore to Hon. Edgar Dewdney and others, executors of the will of the late Sir John A. Macdonald, of the remaining portion of said lands, which said transfer and mortgage are referred to in said petition, are not entitled to have the same registered except as subject to the mortgage from Emma Beall to The Confederation Life Association and to the writ of *fieri facias* against the lands of Emma Beall referred to in the certificate of title, and order the same accordingly.

Declare that the foregoing declaration and order are made without prejudice to the power of the District Registrar, the Court or a Judge, to correct or cancel the certificate of title.

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BRYDON V. LUTES.

Before TAYLOR, C. J., KILLAM and BAIN, JJ.

Mechanic's Lien—Building contract—Substantial completion—Deviations from specifications—Performance of contract must be exact—Provision inconsistent with lien—Costs.

Where work is to be done in a specified manner and to be paid for on completion, and it is done in a different manner, or so defectively as to justify an allowance for the defects, and the party for whom it is done refuses to acquiesce in the variations or defects or to accept the work, but simply takes the position that the workman must perform it according to the express stipulations and perfectly, and interposes no obstacle to this being done, the workman cannot recover anything before this is done.

At the hearing of a suit to realize a mechanic's lien for the balance of the contract price of the erection of a dwelling house, the Judge found that there were defects and variations in the construction requiring a deduction of $40 from the total sum of $1400, and made a decree in favor of the plaintiff for payment of the balance of the contract price with a deduction of the $40.

The evidence, however, showed that the defendant had not acquiesced in the changes and had complained of the defects.

Held, by the Full Court on rehearing, that under such circumstances the plaintiffs could only recover that portion of the price which was to be paid as the work progressed.

The contract contained a provision that if the defendant should fail to pay the balance of the price, $1000, on completion of the building, the plaintiffs were "to become the sole owners of the property until the said $1000 be paid."

Held, that this was not inconsistent with a lien for that part of the contract price which was payable as the work progressed.

The plaintiffs having recovered only $110 by the suit, for which they might have sued in the County Court, and the defendant having disputed the whole claim throughout and raised a number of untenable objections, the Court allowed no costs to either party up to and including the decree, but gave the defendant the costs of the rehearing to be set off against the plaintiff's verdict.

ARGUED: 17th July, 1891.
DECIDED: 25th July, 1891.

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Statement.

THIS was a suit to enforce a lien claimed by the plaintiffs, under the Mechanics' Lien Acts, for the price of the work and materials supplied in the erection of a dwelling house for the defendant, under a contract in writing, by which the plaintiffs agreed to supply all material and labor necessary to complete the dwelling in every respect according to the full meaning of a plan and specifications, the labor to be performed in the most workmanlike manner and in strict accordance with the full meaning of the plans and specifications to the satisfaction of the proprietor, and the defendant agreed "in consideration of the strict and faithful fulfilment and performance of the agreement," to pay to the plaintiffs $1400, as follows:— $400 as the work progressed and $1000 on completion of the building. There was a further provision that, if the defendant should fail to pay the $1000 on completion, the plaintiffs were "to become the sole owners of the property until the said one thousand dollars be paid." The specifications also were in writing. The plaintiffs erected a dwelling in general accordance with the plan and specifications, but departed from them in a number of particulars. In one particular at least, that of a walk to be built from the front to the rear door, there was, in addition, non-completion of the work; and some of the plastering was injured by frost while being put on.

The defendant, being dissatisfied with the work in some respects, refused to pay the remainder of the contract price. Thereupon the plaintiffs registered a lien, and began the present suit to enforce it. They also, under the special clause in the contract, held and continued to hold possession of the house.

The cause was heard before Mr. Justice Dubuc, who found that the principal variations from the specifications were not detrimental to the building, and were authorized by verbal instructions of the defendant, or waived by the defendant's husband, who watched the progress of the work closely in the interest of the defendant, and that there was in other respects a substantial performance of the contract,

although there were some slight defects and variations. 1891.

As the result of the evidence, the learned Judge estimated the total cost of restoring the injured plaster, together with the difference in favor of the plaintiffs, and against the defendant, on account of the variations from the specifications, at $40. He therefore made a decree in favor of the plaintiffs for the full contract price, after deducting $290 paid on account and the $40. Statement.

The case was then reheard before the Full Court.

J. S. Ewart, Q.C., and *F. H. Phippen*, for defendant. The agreement was in writing, the work was to be done "to the satisfaction of the proprietor." These are very strict words. *Dallman* v. *King*, 4 Bing. N. C. 105; *Andrews* v. *Belfield*, 2 C. B. N. S. 779; *Walker* v. *L. & N. W. R.*, 1 C. P. D. 518. It is admitted that some of the work was unfinished. The reply that the amount is small is insufficient. What amount can be knowingly left unfinished, and yet a bill be filed for payment of the contract price and a lien? There can be no lien, for the agreement excludes it. If the $1,000 was not paid, the plaintiffs were to be *owners* of the property until payment. The contract does not contemplate a lien; ownership is inconsistent with a lien. As to the form of the lien, there is no statement of the reputed owner.

H. M. Howell, Q.C., and *L. McMeans*, for plaintiffs. The affidavit filed with the lien states that the defendant is the owner, and this read with the lien complies with the statute. Under the statute the plaintiffs have a lien, unless there is an agreement that there shall be none. An agreement for security is cumulative to a lien, *Kinsley* v. *Buchanan*, 5 Watts, 118; *Angus* v. *McLachlan*, 23 Ch. D. 330. A substantial compliance with the terms of the contract is sufficient. The absence of a lock or other trifling requirement can only be urged in reduction of price.

TAYLOR, C. J.—Under the contract all work and material must be in full accordance with the intent and meaning of the plans and specifications to the satisfaction

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of the proprietor. Now were the work and material, at the time this suit was begun, to the satisfaction of the proprietor? It is quite clear they were not, and I think no one can say, after reading all the evidence, that the defendant in declining to be satisfied, acted otherwise than *bona fide* and not capriciously.

Had the plaintiffs begun an action at law upon the agreement, they must on the evidence have been non-suited on the ground that when they began their action they had not completed the work to the satisfaction of the defendant, *Andrews* v. *Belfield*, 2 C.B. N. S. 779. They had no more right to file a bill to enforce the claim they had made, at the time they did, than they had a right to begin an action at law. It is not a question whether the work has been done substantially in accordance with the contract; but was it done to the satisfaction of the defendant? Was it done so that she should have been satisfied and so that her refusal to be satisfied was unreasonable and capricious. In *Smith* v. *Briggs*, 3 Denio, 73, the work was to be done "in strict accordance and conformity in all respects with the specifications," and was to be paid for upon the owner receiving from the architect a certificate that the work was fully and completely finished according to the specifications. It was there held that the plaintiff could not recover on a certificate that the houses were finished, "and they are done in that manner that, was I the owner, I would accept them for myself. . . . I, therefore, on the work and materials taken as a whole, certify that I am satisfied."

But the agreement provides for the payment of $400, as the work progresses. What is meant by the expression, "as the work progresses?" It is capable of bearing, and probably should bear the construction that that amount should be paid on what are known as progressive estimates, that as work was done up to or exceeding that amount, payment to the extent of $400 should be made. No doubt work was done and material supplied to an amount exceeding that sum, while only $290 was paid. The plaintiffs

were then entitled to take proceedings to enforce payment of the difference, $110. Had they done so, I cannot say what the defendant would have done, but to the bill claiming that the work has been completed and claiming $1,110, an answer has been filed in which it is alleged that no part of the contract price was to be paid until the plaintiffs had erected the house in accordance with the contract and specifications. The parties then went to an examination of witnesses and hearing, taking evidence for several days at great expense. The greater part of this evidence was upon the question of whether the contract had been completed so that the defendant was, or ought to have been satisfied; in truth, as it turns out, upon a bill, or so much of a bill, as the plaintiffs were not entitled to file, when they did file it.

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TAYLOR, C. J.

All the plaintiffs are entitled to, at present, is a decree in their favour for $110. As they have failed upon what was their main contention, they should not have any costs. As the defendant filed the answer she did and has contributed to the incurring of such unnecessary costs, she also should not have any costs. The costs of each party should just be set off against those of the other party.

The proper decree to be made, as it seems to me, upon this rehearing is, that the decree made at the original hearing be varied and should declare that, as to the sum of $1,000 payable under the contract in the pleadings mentioned, on completion of building, the bill has been filed prematurely, and the plaintiffs are not, at present, entitled to receive that amount from the defendant, but that the plaintiffs are entitled to a lien for the sum of $110, the balance remaining unpaid in respect of the $400 payable under the contract in the pleadings mentioned as the work progresses, with consequential directions, and that the Court does not think fit to give either party any costs up to and including the decree.

As the defendant has substantially succeeded on her rehearing, she is entitled to the costs of such rehearing. The order now to be made should therefore provide for

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such costs being taxed to her and set off *pro tanto* against the $110 payable by her to the plaintiff, the party against whom the balance may be found upon such setting off to pay the same to the party in whose favour it may be found forthwith after the Master has made his certificate of taxation, by which he will also ascertain and certify such balance.

KILLAM, J.—The defendant objects to the decree upon these three grounds. 1. There could be no lien under the contract, as the provision for the plaintiffs' ownership of the property is inconsistent with such a lien. 2. The statement of claim registered did not comply with the statute. 3. The contract was not completed so as to entitle the plaintiffs to recover the final payment. I will take up the last of these points first. The defendant has clearly never accepted the work as complete. That she has did not appear to be seriously claimed by the plaintiffs' counsel upon the hearing before us. The defendant's husband did object strongly to the plastering, and notified the plaintiffs, during the progress of the work of putting it on, that it was being damaged by frost, and that it would not be accepted. The report of the architect who, by consent of the parties, has examined the work since the rehearing, strengthens the evidence in two respects. It shows clearly that in parts, not only the last, but the first coat also of plaster was injured by frost; and it shows that the allowance made by the learned Judge for the defects was very nearly, if not quite, enough.

It appears to me that the correct principle applicable to such contracts is that set forth in *Leake on Contracts*, 2nd ed. p. 68: "In the case of buildings under a contract, which the builder fails to complete or which he completes in a manner not conforming with the contract, so that the employer cannot be charged with the contract price, the mere fact of the buildings remaining on the land is not such an acceptance as imports a new promise to pay for them, but some positive acquiescence in the incomplete or

existing state of the building is necessary to render him liable to pay according to measure and value." These remarks are supported by such cases as *Munro* v. *Butt*, 8 E. & B. 738; *Ellis* v. *Hamlen*, 3 Taunt. 52.

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The plaintiffs rely on the statement in *Addison on Contracts*, 8th ed. p. 396: "When a contract has been entered into for the building of a house, for a certain sum of money to be paid upon completion of the building in accordance with certain plans and specifications, it is not essential to the maintenance of an action that there should be an exact performance of the contract in every minute particular. This is not, in general, a condition precedent to the liability to make some remuneration; but if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it, the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract. In every contract for work there is a condition implied by law that the work shall be done in a proper and workmanlike manner, but this is not a condition going to the essence of the contract."

No authority is cited for these propositions, except some incidental remarks of Tindal, C. J., in *Lucas* v. *Godwin*, 3 Bing. N. C. 737 and *Stavers* v. *Curling*, 3 Sc. 755, neither of which supports them in their unqualified sense. The latter case related to a different subject matter, and turned upon its own circumstances. In the former the remark relied on is: "If it be said that the condition that the work shall be done in a proper and workmanlike manner, is of that nature—that is a condition which is implied in every contract of the same kind—and if it were a condition precedent to the plaintiffs' remuneration, a little deficiency of any sort would put an end to the contract and deprive the plaintiffs of any claim for payment; but under such circumstances it has always been held that *where the contract has been executed* a jury may say what the plaintiff really deserves to have." The work in question had there been accepted, and the real point in issue in the case was whether

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Judgment.
KILLAM, J.

the provision for completion by a certain date was a condition precedent. The contract was distinctly held to be an executed contract. But if there is a distinct failure to comply with an express stipulation of the contract, although in a small matter, or if there is a substantial defect in work or material, the special contract remains open, and unless there is acceptance or acquiescence such as will waive the objection or raise a new contract, how can there be an executed contract?

I know of no English or Canadian decision which recognizes a difference in these respects between building contracts and contracts for the supply or for the repair or improvement of chattels. All the decisions which I have found, in which, notwithstanding defects, the defendant has been obliged to pay, have been in cases in which there have been some acts of acceptance or acquiescence. Such are the cases of *Chapel* v. *Hickes*, 2 Cr. & M. 214; *Cutler* v. *Close*, 5 C. & P. 337; *Burn* v. *Miller*, 4 Taunt. 745; *Lucas* v. *Godwin*, 3 Bing. N. C. 737; *Thornton* v. *Place*, 1 Moo. & R. 218. In *Sinclair* v. *Bowles*, 9 B. & C. 92, although the jury found that the defendant had received benefit from the plaintiff's work upon the defendant's chattel, it was held that the plaintiff could not recover, as the contract was an entire one for a payment to be made upon completion, and there was not completion.

The decision which most nearly supports the position of the plaintiffs in this case is an American one, *Hayward* v. *Leonard*, 7 Pick. 181, where it was distinctly held that under building contracts, "where there is an honest intention to go by the contract and a substantial execution of it, but some comparatively slight deviations as to some particulars provided for," even in the absence of acceptance the builder can recover upon a *quantum valebant*. This was supported principally upon the remark in *Buller's N. P.*, 139, that "if a man declare upon a special contract and upon a *quantum meruit*, and prove the work done, but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all."

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Judgment.
KILLAM, J.

The learned Chief Justice who pronounced the decision admitted that one learned writer disputed this doctrine, and claimed that it could not be law unless the incomplete work be accepted; and he admitted that in case of chattels there must be a qualification, and himself qualified it in cases of building contracts by limiting it to the case I have mentioned. And it is shown also in *Jackson* v. *Rosevelt*, 13 Johns. 97, that Mr. Buller's statement was not intended to be taken without qualification, and neither, I think, can Mr. Addison's be.

It appears to me to be absolutely against both principle and authority to admit the proposition that, where work is to be done in a specified manner, and to be paid for upon completion, and it is done in a different manner or so defectively as to justify an allowance for the defects, and where the party for whom it is done refuses to acquiesce in the variations or defects or to accept the work, but simply takes the position that the workman must perform it according to the express stipulations and perfectly, and interposes no obstacles to this being done, the workman can recover before this is done.

What is the effect of a different conclusion? A builder, if he understands his business, can in ordinary contracts have the specifications clearly framed. In unusual cases he can insist upon an architect or skilled surveyor being appointed to determine moot points, and accept or reject his work as it proceeds. In small contracts, such as that now before us, where the owner does not desire an architect, and where the specifications are usual ones about which there need be no question, if there were variations or defects the owner would be placed in a most difficult situation. He must either accept defective work or materials, or some change in detail which he does not desire, or he must estimate what should be a proper allowance, usually at the expense of getting an expert to value it, and then, if the builder differ or refuse any deduction, the owner would become involved in an expensive litigation in which he would be at the mercy of the opinion of

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judge or jury upon the question whether the difference was material or of the proper compensation, both matters of opinion only, with grave danger of having to pay all costs.

It appears to me that the simplest plan is to say that the builder who contracts to build according to certain distinctly specified particulars should perform his contract before he should be entitled to say that the building is completed.

At any rate, under the strong wording of the contract, I think that strict compliance with the specifications was necessary to completion within the meaning of the contract. But even if we were to adopt the principle laid down in *Hayward* v. *Leonard*, it does not appear to me that there can be said to have been "an honest intention" within the meaning of that principle "to go by the contract" when there was such an obvious defect pointed out, for the evidence appears to show distinctly that the plaster was injured by frost, the plaintiffs were notified of it, and that reasonable inquiry should have convinced them of it.

Then, without entering into the questions whether the defendant or her agent authorized or acquiesced in any variations for which the learned Judge did not see fit to make allowance, or whether the approval of the defendant was a condition precedent to the right to recover, I think that there was such a substantial failure to comply with the terms of the contract that the plaintiffs could not have maintained an action at law for the portion of the price which was payable upon completion, and that, consequently, they were not entitled to file their bill for that portion.

I am, however, of opinion that they could have recovered at law for the unpaid portion of the $400, that the final stipulation in the contract was not inconsistent with a lien for that; that the statement of claim combined with the affidavit sufficiently complied with the statute to support the lien; and that to this extent the plaintiffs should succeed.

Now the defendant, by her answer, disputed the whole claim and has maintained that attitude throughout, and at

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the hearing she raised some clearly untenable objections and others which, in view of the findings of the learned Judge, I think that upon the question of costs we should hold to have been untenable. At least, if the defendant had confined herself to the points upon which we find for her, much expense would have been saved. The defendant also, upon rehearing, objects to the whole decree and asks to have it reversed although the principal portion of the argument was directed to the right to the last payment.

The plaintiffs might have proceeded in the County Court under C.S.M., c. 53, s. 8, to enforce the lien for $110, and if we were to allow the defendant the costs of the issue on which she succeeds, her costs would probably much exceed any costs which should properly be allowed to the plaintiff. Under the circumstances, I think that it would be reasonable to allow to the defendant the costs of rehearing, to be set off against the $110 due, and that the decree should be in other respects as proposed by the Chief Justice.

BAIN, J., concurred.

Decree varied, with costs of rehearing to defendant.

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GIBBONS v. CHADWICK.

Before BAIN, J.

Practice—Order for payment of costs—Effect of, as judgment—Entering upon judgment roll—R. S. M., c. 80, s. 3.

Although the rules and orders at law for the payment of money or costs, referred to in R. S. M, c. 80, s. 3, "constitute judgments and have all the force and effect of judgments at law," yet there is nothing in the statutes or the practice of the Court to warrant the making up and entry of judgment rolls upon them as in the case of ordinary judgments, and what purported to be a judgment roll entered herein upon such an order was ordered to be taken off the files of the Court.

ARGUED: 29th June, 1893.
DECIDED: 19th July, 1893.

Statement. APPLICATION to set aside a judgment. Two orders had been made on an application for a writ of prohibition, one dismissing the application for prohibition, the other dismissing an appeal against such order. Both orders contained directions for payment of costs by the defendant. On these orders a judgment roll was entered up, reciting the orders and directing payment of the costs in the usual way. An application was made to set this judgment aside as not being warranted by the statute or the practice. The Referee refused to set aside the judgment, and dismissed the application on the ground that, at most, the judgment was irregular and the defendant was barred by his laches. The defendant appealed to a Judge.

J. D. Cameron, for defendant, referred to *Dickenson* v. *Eyre*, 7 Q.B. 307; *Herr* v. *Douglass*, 4 P.R. 102; *Archbold's Pr.* 1474, 1595.

G. A. Elliott, for plaintiff.

BAIN, J.—If the judgment roll in question is not one that is authorised by the statute or the practice of the Court, it

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is a proceeding that is more than irregular, and the Referee should not have disposed of the application to set it aside on the ground of Chadwick's laches in making the application.

Section 78 of chapter 37 of the Con. Stats. Manitoba, 1881, provided that "rules and orders at law, whether of the Court or of a Judge, shall, when filed and docketed, constitute a judgment, and shall have all the force and effect of judgments at law." The Prothonotary tells me that it became the practice under this section to make up a roll and enter judgment on such rules and orders, as has been done in the present case, and this practice has always since been continued.

In the Administration of Justice Act, 1885, s. 101 was taken from the above section of the Consolidated Statutes, but the words "when filed and docketed" were left out.

The provision on the subject that is now in force is section 3 of The Judgments Act of the Revised Statutes. This section is a re-enactment of the latter part of the above section 101, and simply says that such rules and orders "shall have all the force and effect of judgments at law, and writs may issue thereon and proceedings be had and taken thereunder that might be had or taken on a judgment recovered in the ordinary way at law."

When orders are made for the payment of costs, the costs have to be ascertained before proceedings can be taken to enforce payment; and when the matter first came before me, I was inclined to think it might be a convenient practice, in order that there should be a full record of the proceedings, that there should be a judgment roll made up as was done here. I find, however, that it never was the practice in the English Courts, under the 1 & 2 Vic. c. 10, s. 18, which is practically the same as our section, to enter judgments in this form. The practice then was, as I make out, that when the rule or order was for the payment of costs, the Master indorsed his *allocatur* for the amount taxed on the rule, and then, when the rule was filed,

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execution could be issued at once for the amount. In *Wallis* v. *Sheffield*, 7 Dowl. 793, Parke, B., speaking of these rules and orders, said, "The Act of Parliament gives them the same effect as judgments; then all you have to do is to issue the proper writs."

There is also another objection to judgments being entered in this form. Under the English Act, as was pointed out by Tindall, C. J., in *Farmer* v. *Mottram*, 1 D. & L. 781, a rule of Court is not a judgment for all purposes. The section in our Act is not worded quite the same as section 18 is in the English Act; but, presumably, rules and orders under our Act will not be held to have any wider or other effect as judgments than they have under the English Act. If, however, judgment in these cases were to be entered as it was here, it is possible that *prima facie* a wider effect might be given to the enactment than was intended by the Legislature.

I think, therefore, that the appeal should be allowed, and that what purports to be the judgment roll herein should be taken off the files of the Court. There will be an order accordingly, but without costs.

Appeal allowed, without costs.

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DOUGAN V. MITCHELL.

Before KILLAM, J.

Pleading in equity—Parties to suit—Demurrer—Multifariousness—Setting aside release given by trustee in fraud of cestuis que trustent—Allegation that release under seal—Fraud, if relied on, must be sufficiently alleged.

A number of creditors of defendant M., having assigned their claims to defendant S. so that he might sue upon all in one action at law, filed a bill in equity to set aside a release of their claims given by S. to M., and to prevent M. from setting up the release as a defence in the action at law. The plaintiffs alleged that it had been procured by M. in collusion with S., with knowledge of S.'s position, and with the intent and design of defeating and defrauding the plaintiffs. The alleged release was set out *verbatim* in the bill, and purported to have been executed under seal, but there was no specific allegation that the release had been executed under seal. The bill also asked for payment by M. of the plaintiffs' several claims.

Held, on demurrer,

(1) That the bill was not multifarious.

(2) That there is jurisdiction in equity to set aside such a release for fraud, even if the same relief could have been obtained by motion in the action at law; and although the Court now has power to give equitable relief in actions at law, the plaintiffs are not confined to seeking it there.

(3) But that the demurrer should be allowed, because the bill did not sufficiently allege that the release complained of had been executed under seal, and there were no sufficient charges of fraud or breach of trust to warrant the interference of a court of equity.

ARGUED: 7th March, 1894.
DECIDED: 19th March, 1894.

Statement.

DEMURRER to the plaintiff's bill, which was filed by twenty-three plaintiffs against two defendants, asking to have a certain instrument, styled a release, made by one defendant in favor of the other, set aside and declared fraudulent and void as against the plaintiffs, and also for payment of certain alleged claims of the several plaintiffs against the defendant Mitchell.

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The bill alleged that the several plaintiffs and the defendant Sparks were employed by the defendant Mitchell as laborers, and that they did certain work for him, for which he became indebted to them severally in various sums; that to avoid multiplicity of suits the several plaintiffs assigned their various claims to the defendant Sparks, to enable him to sue the defendant Mitchell for the aggregate amount of all in one action; that Sparks brought an action at law against Mitchell on these claims, including one of his own; that Sparks took a bare trust in the several claims of the plaintiffs and never had any beneficial interest in them; that Mitchell, with notice of such trust, with the intent and design of defeating the plaintiffs and defrauding them of their just right, colluded with the defendant Sparks and caused a release to be prepared and to be submitted to that defendant, and the same was executed by Sparks and given over to his co-defendant, and was being relied on by Mitchell and set up by him in the action at law as a binding release and settlement of the plaintiffs' several claims, in fraud of the plaintiffs' rights; that Sparks did not consult or advise with his attorney in the action as to the release, but the same was conceived and carried out between these defendants contrary to the wishes of the plaintiffs.

The demurrer was on the two grounds of want of equity and multifariousness.

W. E. Perdue, for defendant Mitchell. The bill is multifarious. It sets up a number of causes of action, and asks for payment of these. *Jones* v. *Garcia del Rio*, Turn. & R., 297. There is no sufficient equity shown. The case set up is that all the parties interested assigned their claims to Sparks to enable him to sue Mitchell. All the claims could have been dealt with in a common law action. *Mountstephen* v. *Brooke*, 1 Ch. 390; *Hickey* v. *Burt*, 7 Taunt. 48; *Payne* v. *Rogers*, 1 Doug. 407; *Wright* v. *Borroughes*, 3 C. B. 344; *Dicey on Parties to an Action*, 71; *Snell's Equity*, 675-6; *Knox* v. *Travers*, 23 Gr. 41; A. J. Act, ss. 11-12. Words "bare trustee" mean a party who has fulfilled all duties and

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has only to hand over the estate. *Christie* v. *Ovington*, 1 Ch. D. 279. The trusts are not declared specifically; they should be set out clearly. The bill does not set out the assignment or show its nature; it does not sufficiently show fraud. The release is not sufficiently pleaded; it is not shown to be under seal. The Court will not decree payment of a demand, even if it sets aside a release. *Pascoe* v. *Pascoe*, 2 Cox, 109. As to power to compromise. *Vaudon* v. *Vaudon*, 6 O. R. 736. There are no trusts set out of which there has been a breach.

N. F. Hagel, Q.C., for plaintiffs. The defendant Sparks had a right to release his own claim; plaintiffs could not object at common law. The jurisdiction of equity and common law is concurrent in such a case as the bill makes. *Story's Equity Pleading*, s. 221. Mitchell's duty was not to join Sparks, to facilitate the doing of a dishonest act. As to multifariousness, see *Campbell* v. *McKay*, 1 M. & C. 603; *Attorney-General* v. *Wright*, 3 M. R. 199. The word "release" imports a seal. The release is set out *verbatim*.

KILLAM, J.—On the argument, I expressed the opinion that the bill is not multifarious, and I adhere to that view. That one kind of relief is asked against one defendant, and another as against both, is not multifariousness. See *Manners* v. *Rowley*, 10 Sim. 470.

True, a bill by all these plaintiffs, merely seeking payment by Mitchell of their respective claims, would be multifarious. Formerly it would have been bad, also, for want of equity, as the plaintiffs' claims would have been wholly legal. But, assuming that sufficient ground is shown for avoiding the release, the bill would have been good on that ground, and the addition of the prayer for payment would not have made the bill bad. All the plaintiffs are together interested in having the release set aside. The allegations as to their respective claims are necessary to their case for that purpose. To that extent the bill presents one case. It is claimed that, as incidental to their right to have the

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release set aside, they can be given the additional relief sought. At present, I am not inclined to agree with that view, though it is unnecessary to decide upon it. If so, the bill is not multifarious. If not, it could hardly have been multifarious before the legislation which authorizes parties to sue in equity for legal demands; and it does not seem that, under the peculiar practice which we now have, it becomes so.

Several objections are taken under the other ground of demurrer.

First, it is argued that the plaintiffs have ample relief at law. Under such cases as *Mountstephen* v, *Brooke*, 1 Ch. 390; *Payne* v. *Rogers*, 1 Doug. 407; *Hickey* v. *Burt*, 7 Taunt. 48; *Wright* v. *Burroughes*, 3 C. B. 344; and *Innell* v. *Newman*, 4 B. & Ald. 419, possibly the Court might, on motion of the plaintiffs, set aside a plea setting up the release. Possibly, even the release itself might be set aside in the original action. The principle upon which this might be done is that stated in *Hickey* v. *Burt*. A court of law could not compel a trustee to authorize the use of his name in an action to enforce the rights of his *cestui que trust;* but if he allowed the action to be brought in his name, he could not compromise or release it without the leave of the Court or the consent of the *cestui que trust*. Some question might be raised as to the applicability of the principle in such case as the present, as the assignee of a *chose in action* can only sue at law if he is entitled to give an effectual discharge of the cause of action.

But it is unnecessary to determine the point, as I am of opinion that there is jurisdiction in equity to set aside the release for fraud, even though the same relief could be obtained by motion at law. Fraud is one great branch of equity jurisprudence, under which the jurisdiction is frequently concurrent with that of courts of law. Particularly is this a case for equity, as the fraud attempted to be set up is that of a trustee towards his *cestuis que trustent*, to which fraud the demurring defendant is claimed to be a

party. If there is any dispute as to the facts, that can better be determined in a substantive suit than upon a motion.

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It is further argued that, under the legislative provisions giving power to the Court to give equitable relief in actions at law, the plaintiffs are confined to seeking it there. I cannot take that view. The general principle is that "if, originally, the jurisdiction has properly attached in equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases when they formerly rejected it. . . . The jurisdiction of equity, like that of law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction, dependent upon external changes. Being once legitimately vested in the Court, it must remain there until the Legislature shall abolish or limit it; for without some positive act, the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations." See *Story's Equity Jurisprudence*, § 64 *i*.

These plaintiffs are not parties to the action at law, and could not put in a replication on equitable grounds to the plea of the release. I doubt if Sparks could set up his fraud upon his *cestuis que trustent* as an equitable answer to the plea. Certainly the plaintiffs are not to stand by and take their chance of his doing so. It may be that the plaintiffs could severally sue Mitchell, and, if met by the release, reply the fraud, but this would involve twenty-three separate actions, whereas, if entitled, one suit in equity is sufficient for all as far as regards the release.

The second objection is that the trusts are not sufficiently disclosed. This also appears to me untenable. Some technical definition of the words "bare trust" is put forward as the basis of this argument. It may be that the expression is not technically correct in the bill, but the real relation of Sparks and the plaintiffs appears to be indicated sufficiently.

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Two other objections, however, appear to me to be fatal to the bill in its present form, viz., that the release is not shown to have been under seal, and that fraud is not sufficiently shown.

The alleged release is set out *in hæc verba*, and it concludes "In witness whereof I hereunto set my hand and seal this," &c, and the word "Seal" appears after the name of the defendant Sparks at the end, and there are also the words "Signed, sealed and delivered in the presence of" with another name, presumably that of a witness. But, while this may be evidence of a sealed instrument, as a matter of pleading it is insufficient to show that Sparks gave a release under seal. The word "release" itself does not necessarily import a sealed instrument, though it would be of no weight, except as evidence, unless under seal. It does not, then, sufficiently appear that the interposition of a court of equity is required.

The assignee of a *chose in action* who can sue at law is defined by s. 2, s-s. (*f.*) of The Administration of Justice Act, R. S. M., c. 1, as "any person now being or hereafter becoming entitled, by any first or any subsequent assignment . . . . to a debt or *chose in action*, and possessing at the time the action or suit is brought the right to receive the subject matter thereof and to give an effectual discharge thereof."

It must be assumed, then, as against these plaintiffs that Sparks was authorized to receive the moneys claimed by them and to give an effectual discharge of their claims. It does not appear that this authority was revoked. Then, the mere fact that he gave a release is of itself no breach of trust. It may be that he could not properly give such a release without receiving payment in full, though he might, perhaps, do even that if acting in good faith. The alleged release purports to be made in consideration of one hundred dollars in full settlement of the suit. But this does not appear to me to show sufficiently that payment was not made in full or that there was any breach of trust

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or excess of authority in executing it. As a matter of evidence, the presumption would be that the full consideration received by Sparks was one hundred dollars; but instruments do not always state their true consideration and it would be open to the defendants to prove that this was not the true consideration. In pleading, and especially in charging fraud or breach of trust, it is not sufficient merely to raise such a presumption. There is to some extent a charge of a fraudulent intent on the part of Mitchell, but even that is not explicit—it is alleged in the vaguest possible way. There is no direct charge or allegation of any fraud or breach of trust on the part of Sparks.

On these grounds I think that the bill fails.

The plaintiffs may have a week to amend, without costs; and, in default of amendment within that time, the demurrer must be allowed and the bill be dismissed with costs.

Demurrer allowed, with leave to the plaintiff to amend, without costs.

Re CAREY AND LOT 65, SUB-DIVISION OF LOT 39 E., ST. JOHN.

Before KILLAM, J.

R. S. M. c. 101, s. 193 — Sale of land for taxes — Forfeiture of surplus purchase money remaining in the hands of the treasurer for six years — From what time the six years begin to run.

Where lands have been sold for taxes under the Assessment Act, and the price amounts to more than the taxes due, and the purchaser at the end of two years from the day of sale pays the surplus purchase money to the Treasurer of the Municipality, the same cannot be claimed by the Municipality as forfeited until after the lapse of six years from the receipt thereof by the Treasurer, although the language of Section 193 of the Act is ambiguous and speaks of the money remaining in the hands of the Treasurer for six years from the day of sale of the land of which it formed part of the purchase money.

ARGUED: 8th January, 1894.
DECIDED: 16th January, 1894.

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Statement.

THIS was an application by way of summons for payment out of Court of moneys paid in by order of a District Registrar, being surplus proceeds of a sale of the applicant's lands for taxes. The lands were situated in Winnipeg, and the moneys were claimed by the City to be forfeited to it as having "remained in the hands of the treasurer for six years from the day of sale of the land, of which it formed part of the purchase money," under section 193 of The Assessment Act, R.S.M. c. 101.

The parties were agreed upon the facts, and the only dispute was respecting the interpretation of the clause declaring such moneys, after the expiration of a certain period, forfeited to the Municipality.

The lands were put up for sale and knocked down to the purchaser on the 27th June, 1887, the time for redemption expired on the 27th June, 1889, and subsequently thereto the surplus moneys were paid by the purchaser, and the deed was issued to him by the officers of the Municipality.

Isaac Campbell, Q.C., for the City of Winnipeg, showed cause and referred to The Assessment Act, R.S.M. c. 101, ss. 151, 3, 9, 160, 4, 5, 7, 170, 5, 180. *Donovan* v. *Hogan*, 15 A.R. 432; *Smith* v. *Midland Ry. Co.*, 4 O.R. 494; *Lyttle* v. *Broddy*, 10 O. R. 550; *Claxton* v. *Shibley*, 10 O. R. 295; *Deverill* v. *Coe*, 11 O. R. 222; *Hutchinson* v. *Collier*, 27 U. C. C. P. 249; *Church* v. *Fenton*, 28 U.C.C.P. 384.

O. H. Clark, for applicants.

KILLAM, J.—Counsel for the City claims that the day of the auction is to be considered as the day of sale, and, though some violence must be done to the word "remained" for the purpose, the six years must be computed from that day. In support of this argument, reliance is placed on the general use of the word "sale" throughout The Assessment Act, and especially on sections 167, 170, 175, 180, and on the interpretation of the expression "day of sale" in section 183.

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On the other hand, the applicant contends that the "day of sale" must be deemed to be the day of conveyance or of completion of the purchase by payment of the balance of the purchase money, and he relies strongly upon the use of the word "remained." He argues also that, by R.S.M. c. 101, s. 200, the rights of the parties are governed by section 674 of The Municipal Act of 1886, 48 Vic. c. 52, and that this section in the 7th and 8th lines, treats the date of "sale" and that of the "receipt of said balance" as one. He also relies strongly on several cases in the Ontario Courts, holding that, under enactments declaring conveyances on sales for taxes valid if not questioned within two years from the time of sale, the time counts only from completion of the sale by conveyance. See *Hutchinson* v. *Collier*, 27 U. C. C. P. 249; *Church* v. *Fenton*, 28 U. C. C. P. 384; *Carroll* v. *Burgess*, 40 U. C. R., 381; *Donovan* v. *Hogan*, 15 A. R. 432. See, also, *Smith* v. *Midland Ry. Co.*, 4 O. R. 494; *Lyttle* v. *Broddy*, 10 O. R. 550; *Claxton* v. *Shibley*, 10 O. R. 295; *Deverill* v. *Coe*, 11 O. R. 222.

From the reports of these cases it appears that the Judges in Ontario have been very much divided upon the point, although the Court of Appeal, in *Donovan* v. *Hogan*, has settled it in favor of the view that the date of sale is that of completion of the sale and not that of the auction.

In view, not only of the difference of opinion among the Judges, but also of the language of the statutes under which these decisions were given, I cannot consider them of weight except as showing how reasonable it may be in many instances to consider the date of sale as that of the completion and of the perfecting of the purchaser's title, and not of the auction. The language of the enactments almost drove the Judges to the former view.

If our statute provided that the money was to be forfeited to the Municipality upon the expiration of six years from the day of sale, I should have little hesitation in holding that the day of sale was that on which the sale was advertised to take place, having reference to 49 Vic. c. 52, s. 668 and

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R.S.M. c. 101, s. 183. But it appears to me that the main requirement is that the surplus money shall remain for six years in the hands of the treasurer, the reference to the day of sale being made for the purpose of fixing the date from which the six years are to be computed. The attempt to do so instead of assisting the construction, introduces an ambiguity; but as, in case of ambiguity, that construction should be adopted which is most against a forfeiture, I do not think that one can modify the sense of the word "remained" in order to hasten the forfeiture. The owner of the land becomes entitled to this surplus only from the time when it reaches the hands of the treasurer, and to count the six years from that time is to proceed by analogy to the Statute of Limitations, which was most probably intended by the Legislature.

The money should be paid to the applicant.

Application granted.

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TEMPLETON V. STEWART.

Before BAIN, J.

Title to lands in Manitoba before the Transfer—Sale of land by married woman prior to 1870—Effect of Crown Patent for land not vested in the Crown at the time—Husband and wife—Statute of Limitations—Amendment of bill by alleging conveyance from true owner obtained after suit commenced—Parties.

The plaintiffs claimed title to the land in question under an alleged sale from the defendant, a married woman, made verbally in 1863 to their mother, E. T.

E. T. was married in 1861, and her husband, A. T., then went to live with her on the land. They continued to reside on and occupy it up to 1882 when E. T. died intestate, after which A. T. and the plaintiffs remained in possession up to the filing of the bill.

The Judge found as a fact that some time prior to 1866 the defendant had agreed to sell the land to E. T., and that E. T. and A. T. thereafter continued to occupy it under the belief that it belonged to E. T., but

Held, that according to the Common Law of England, in force down to 1870, which was then the law of this country, such a sale by a married woman of land which was in no way separate estate, was wholly void and incapable of being enforced against her, although a verbal sale by a person *sui juris* might at that date have been good, according to the decision in *Sinclair* v. *Mulligan*, 5 M. R. 17.

The plaintiffs also claimed title by length of possession held by their mother under said sale since 1863, and by themselves since 1880, but their father, A. T., had lived on the land all that time, and farmed and occupied it in the same way as any other head of a family would.

Held, that on the evidence, A. T. was the person who had acquired the title by possession under the Statute of Limitations, and as he had not conveyed his title to the plaintiffs, and was not a party to the suit, the bill must be dismissed.

The defendant had obtained a patent from the Crown for the land in 1891, but it appeared that the land was not then vested in the Crown, having been granted by the Hudson's Bay Company in fee simple many years before to the defendant's father.

Held, that the existence of such patent would not have prevented relief being granted if A. T. had brought the suit, and that the defendant might have been ordered to convey to him.

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An objection for want of parties was taken by defendant's counsel, who claimed that defendant's husband should have been a party to the suit.

Held, that as the husband had not, prior to the coming into force of the Married Woman's Property Act, taken possession of the land, it then became her separate property, and she might be sued in respect of it as a *femme sole*.

The Judge at first inclined to the opinion that it would be proper to allow the plaintiffs to obtain a conveyance from their father and then to amend the bill by alleging the conveyance, and upon proof thereof to make a decree in their favor, but after hearing further argument,

Held, that such amendment could not be allowed, and that the bill must be dismissed, but without costs.

ARGUED: 14th October, 1892.

DECIDED: 24th April, 1893.

Statement.

THE defendant Robina Stewart as patentee from the Crown of the north 3½ chains in the inner, and the north 3 chains in the outer two miles of lot 19 in the Parish of Kildonan, having made application for a certificate of title under The Real Property Act, the plaintiffs filed a caveat, and the petition thereunder having come before Mr. Justice Dubuc, he ordered that proceedings should be stayed in order that the plaintiffs might file a bill in equity to establish their title. The bill herein was then filed in pursuance of this order.

Lot number 19 in the survey of the Dominion Government of the river lots in the Parish of Kildonan, 10 chains in width, was formerly known as lot number 203 in the survey of the Hudson's Bay Co.; and in the Company's Land Register, one Robert McKay appears as having been entered for it. McKay lived on and occupied the lot for a number of years, and died in 1853, leaving a widow and three daughters. By his last will and testament he devised the lower or northern three and one-half chains, the land in dispute, to the defendant Robina Stewart, and another portion of the lot, the middle 3½ chains, he devised to his daughter Elizabeth. After Robert McKay's death, his widow and the three daughters all lived together in the house on Elizabeth's portion of the lot until 1856, when

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the defendant Robina married one James Stewart and went to live with him at Fort Garry. The mother and Christina continued to live with Elizabeth, and in 1861 Elizabeth married Alexander Templeton, and he went to live with her in her house. Mrs. Templeton became insane in 1877, and died in 1882 intestate, leaving her husband and six children surviving. All the children were born on the lot, and all of them were still living on it, except Robert, who left it, when he got married, about four years before.

Alexander Templeton, the husband, was an engineer by trade, and for a year or two after his marriage seems to have worked as an engineer on a steamboat and in sawmills, but he lived at home with his wife; and during the time he was working as an engineer, and afterwards as long as she lived, took charge of the place and occupied and farmed it, just as he would have done had the house and land belonged exclusively to himself, the children living at home with their parents, and assisting with the work in the ordinary way.

In the year 1885, the executors of Robert McKay made application to the Dominion Government for a Crown patent for the $3\frac{1}{2}$ chains for Robina Stewart. The grant was opposed by the Templetons, who claimed that Mrs. Stewart had sold the land to her sister Elizabeth Templeton prior to the Transfer, and that she had held possession of it until her death in 1882. An investigation was held by the Land Board, who took evidence under oath on both sides, and in February, 1891, the patents for the land both in the inner and outer lots were issued to Mrs. Stewart.

The plaintiffs were the children of Elizabeth Templeton. Alexander Templeton, the plaintiffs' father, was not a party in interest to the suit, and appeared only as next friend of two of the plaintiffs, who were infants.

H. M. Howell, Q. C., F. S. Nugent and *A. Martin* for plaintiff. There was a contract to sell the land in question, and apart from contract there was undisturbed possession.

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Argument.

It must be admitted that if the old Common Law was in force defendant could not make a contract, with two exceptions, (a.) unless she complied with the old Fines and Recoveries process; or (b.) with the Act abolishing Fines and Recoveries. This Court being bound by *Sinclair* v. *Mulligan*, 5 M. R. 17, the statute 3 & 4 Wm. 4, c. 74, was not in force. There has never been a decision that English feudal law was introduced into a colony under the general principle. The following cases show this:—In Upper Canada the Courts held that the Mortmain Act was introduced. This is not now the view of the law. *Jex* v. *McKinney*, 14 App. Cas. 80; *Cooper* v. *Stuart*, 14 App. Cas. 291; *Reg.* v. *Doutre*, 9 App. Cas. 751; *Gardiner* v. *Fell*, 1 J. & W. 27; *Lauderdale case*, 10 App. Cas. 745; *Reid* v. *Whiteford*, 1 M. R. 19. If Fines and Recoveries Act in force, married women could not convey. Assuming the contract cannot be enforced, the case is one like a verbal one under the Statute of Frauds, when the party has been let into possession. The Court will take a married woman's estate from her for fraud, *Savage* v. *Foster*, 9 Mod. 35; *Sharpe* v. *Foy*, L. R. 4 Chy. 35. But, assuming the married woman when she entered into a contract was under a disability, she was removed from any disability in 1875 by the Married Woman's Act. The contract was made before 1870 and the Statute of Frauds did not apply. Plaintiffs claim possession under the Statute of Limitations and under the Manitoba Act, s. 32. As to the Statute of Limitations, the question is, What possession is sufficient? If a trespasser goes into possession the statute will give him only what he actually occupies adversely. But when one enters into possession under colour of right he gets the whole property. *Mulholland* v. *Conklin*, 22 U. C. C. P. 372; *Davis* v. *Henderson*, 29 U. C. R. 344. Plaintiffs were in possession in 1863, or before that, and in 1885 the title became absolute. Payment of taxes is evidence of possession. *Davis* v. *Henderson*, 29 U. C. R. 344. Plaintiffs were not trespassers, they were acting as owners; as they

were in possession for 30 years it should be presumed they were owners in fee.

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Argument.

W. H. Culver, Q.C., and *R. R. Sutherland*, for defendant. The father, Alexander Templeton, is no party to the suit in his own right; there is no allegation that he has any interest in the property. Assuming that anyone is entitled under the Statute of Limitations, it is Alexander Templeton; he was married on 23rd January, 1861, and lived in the house ever since; he was master of the household. *Brittlebank* v. *Gray-Jones*, 5 M. R. 33; *Lett* v. *Commercial Bank*, 24 U. C. R., 552; *McArthur* v. *Egleson*, 3 A. R. 577. Assuming there was an agreement which was invalid, the joint possession of husband and wife was the possession or occupation of the husband, and he would have title under the Statute of Limitations. *Vincent* v. *Murray*, 15 N. B., 375. But no one was entitled to succeed under the Statute of Limitations; patents were issued 5th February, 1891; the fee was in the Crown until the patent issued; and the statute did not begin to run till then, *West* v. *Howard*, 5 O. S. 462. Even where the Crown holds land in trust, the statute does not run. *Reg* v. *Williams*, 39 U. C. R., 397; *Attorney General* v. *Midland Ry. Co.*, 3 O. R. 511; *Dowset* v. *Cox*, 18 U. C. R. 594; *Jamieson* v. *Harker*, 18 U. C. R., 590. Assuming plaintiffs are entitled to a title by possession, they are only entitled to the portions they actually possessed and used. If the married woman's law of 1670 was in force, the contract of the married woman alleged was incapable of being enforced against her. *Nicholl* v. *Jones*, L. R. 3 Eq. 696. There was no fraud, both sides knew they were dealing with a married woman. The wife, in law, made no contract. *Cahill* v. *Cahill*, 8 App. Cas. 425; *Williams* v. *Walker*, 31 W. R. 120; *Avery* v. *Griffin*, L. R. 6 Eq. 606. As to ratification, *Palliser* v. *Gurney*, 19 Q. B. D. 519; *In re Shakespear*, 30 Ch. D. 169; *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Moore* v. *Jackson*, 16 A. R. 431. In no event can plaintiffs have relief without the husband being a party, *McMicken* v. *Ontario Bank*, 5 M. R. 152; *Pruyn* v. *Soby*, 7 P. R. 44.

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H. M. Howell, Q.C., in reply. As to possession, plaintiffs now offer to make Templeton a party, defendant or plaintiff, and make all such allegations as will cut out his title and vest it in plaintiffs. Templeton acknowledged he was acting for the wife. There was an absolute and valid bargain and the possession was in Mrs. Templeton. Possession is *prima facie* evidence of seizin in fee. *McDonald* v. *McMillan*, 23 U. C. R. 302.

BAIN, J.—The contention of the plaintiffs is that in February, 1863, the defendant Mrs. Stewart and her husband James Stewart, sold the 3½ chains to her sister, Elizabeth Templeton for the sum of £25, which was paid, and that shortly after the sale, the defendant and her husband placed Elizabeth Templeton in possession of the land; that she was in possession and occupation of it, with the sanction and under the license and authority of the H. B. Co. on the 8th of March, 1868, and on the 15th of July, 1870; that she continued the occupation and possession of it until she was removed to the asylum in 1880, and that having died intestate, leaving the children her sole heirs at law, the plaintiffs are entitled to a grant of the land in fee simple under the Manitoba Act. The plaintiffs also claim that they are entitled to the land by length of possession and under the Statutes of Limitation; and they charge that the defendant, Robina Stewart, obtained the patents from the Crown by fraud and misrepresentation, and by concealing the fact of the sale to Elizabeth Templeton; and the Court is asked to declare the defendant Robina Stewart to be a trustee for the plaintiffs, and to order her to convey the lands to them according to their respective interests.

The contract which the plaintiffs set up for the sale of the land from Mrs. Stewart to Mrs. Templeton, is alleged to have been made in February, 1863. The contract was not reduced to writing, but, according to the decision of this Court in *Sinclair* v. *Mulligan*, 5 M. R. 17, a verbal bargain and sale was then sufficient to pass the title to real

estate. The laws that were in force down to 1870, the Court held, were the laws of England of the date of the Charter to the Hudson's Bay Company, 1670, and it was after 1670, that the Statute of Frauds was passed. But the contract set up was made by a married woman with a married woman, and was made with reference to real estate that in no way was separate estate. And according to the Common Law of England, as it was in 1670, such a contract of a married woman was wholly void and incapable of being enforced against her. The legal existence of the wife was deemed to be merged in the husband, and consequently she was under a total disability to contract; and, as Lord Selborne said in *Cahill* v. *Cahill* 8 App. Cas. at p. 428, "there is no case in the books before the Acts for the abolition of Fines and Recoveries, in which a married woman was held bound, on the footing of contract, (without fine,) to alienate her freehold lands or hereditaments not settled to her separate use." And in *MacQueen on Husband and Wife*, p. 64, it is said, "an agreement for the sale of her real estate, which is not her separate property, or settled to her separate use, or subject to her general power of appointment, cannot be enforced; and even when entered into for valuable consideration and acted on by the other party, it does not acquire validity by reason of part performance." *Emery* v. *Wase*, 5 Ves. 846. *Nicholl* v. *Jones*, L. R. 3 Eq. 696.

To support his case under the contract alleged, Mr. Howell had to take the benefit of *Sinclair* v. *Mulligan*, so far as it held that the Statute of Frauds was not in force, but, admitting that by the Common Law of England, the contract alleged would be ineffectual as far as Mrs. Stewart was concerned, he was forced to contend that the law of England in this respect was not applicable to the Red River Settlement, and that married women here were not subject to the disabilities of the Common Law. But this rule of disability was an essential part of the Common Law, and expressed the spirit and policy of the English people and English Law on the legal status of married

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women; and it seems to me to have been applicable wherever English subjects were living subject to English law, and quite independent of local conditions.

I think, then, the plaintiffs cannot succeed if they have to rely wholly on the contract they allege; but it still seems necessary to consider if there was in fact a contract made by Mrs. Stewart to sell the land to her sister, and if it was under or by virtue of that intended contract the Templetons held possession of the land.

[The learned Judge here discussed the evidence on this point and then proceeded.]

I have come to the conclusion that sometime prior to 1866, Mrs. Stewart agreed to sell the land to Mrs. Templeton, and that Mrs. Templeton and her husband continued to occupy the land under the belief that it belonged to Mrs. Templeton.

Holding possession as they did under a void contract of bargain and sale, they were tenants at will of Mrs. Stewart.

The bill alleges that Robert McKay was seized in fee simple of the lot to his own use. No evidence, however, was given directly in support of this allegation, but it was shewn that he was in possession and occupation of the land for a number of years before his death. The Hudson's Bay Company's Register says nothing as to the estate McKay had in the lot for which he appears to be entered, but I think I must presume on this state of facts that he was owner of the land in fee simple as alleged. (*Taylor on evidence*, s. 123.) I speak, of course, only of the lot in the inner two miles. Presuming, then, that the lands had been granted by the Hudson's Bay Company to McKay in fee simple, there was no estate left in the Crown for it to grant; and the patent can have had no further effect than to confirm the grant in fee already made by the Hudson's Bay Company. If this be so, then Mr. Culver's objection that the Statute of Limitations could not begin to run before the patent was issued, does not seem to be well founded.

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By chapter 89, section 4, of the R. S. M., no person shall bring any action or suit to recover any land, but within ten years after the time at which the right to bring such action or suit first accrued to the person bringing the same; and by section 17, "At the determination of the period limited by this Act for making any entry or distress or bringing any action or suit, the right and title of such person to the land, ... shall be extinguished." Clearly, then, if the Statute of Limitations is applicable to the case, as I think it is, the right of Mrs. Stewart and of her husband to part of the land at all events, was extinguished long ago; and I have to consider if the plaintiffs have established that they have acquired under the statute the title that it has extinguished in the Stewarts, and also to what portion of the land the new statutory title extends. Dealing with the last question first, I have no hesitation in holding that the possession that has divested the title from the Stewarts, extended to the whole of the lot in the inner two miles. As I have said, the possession and occupation was not that of a mere trespasser or squatter dishonestly entering on land to which he knows he has no right, but of one entering with the knowledge and assent of the owner, and under the belief that he had acquired the ownership. And as Burton, J. A., says in *Harris* v. *Mudie*, 7 A. R. 414, "It has been settled by a long current of authorities as the general rule, that, when a party having colour of title, enters in good faith upon the land proposed to be conveyed, he is presumed to enter according to his title and thereby gains constructive possession of the whole land embraced in his deed, ... and when a person so enters, purchasing or intending to purchase under what he believes to be a good title . . . . as under a deed from a married woman defectively executed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with his supposed title, and come within the class of cases intended, in my opinion, to be protected by the statute." In the present case, Mrs. Templeton, or her husband for her, went

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into and continued in possession as owner of the whole 3½ chains, and occupied portions of the land by fencing and farming it, and gradually extended the actual occupation by bringing more of the land into cultivation. I have no difficulty, then, in holding that some one was in possession of the whole of the lot in the inner two miles as against the Stewarts, but some difficulty arises in deciding who it was that was thus in possession.

In framing the bill, the plaintiffs have probably been relying more on their being able to establish their title under the contract they set up than by possession. For the evidence of their own witnesses, and indeed, of Templeton himself, shows that ever since his marriage in 1861, he has been the one who has actually occupied and farmed the land. By his marriage, he acquired an estate in freehold in his wife's land, the effect of which was to give him the actual ownership of the land during the coverture. And he was the one who, as the head of the family, carried on the farming operations, working himself and hiring assistance, selling the produce and using the proceeds for himself and the family. I do not think the evidence shews that Mrs. Templeton had any more to do with the management of the place than farmers' wives generally have; and I am sure that any ordinary observer, knowing nothing more of the position of matters than what he saw, would have said at once that Templeton himself was the one who was in possession. And I think it is the rule too, as Mr. Culver argued, that under ordinary circumstances when a man and his wife are living together and occupying land, the presumption is that the occupation is that of the husband and not of the wife. In *Vincent* v. *Murray*, 15 N. B. 375, it was expressly held that when there was a parol gift of land to a married woman, and the land was occupied and worked by her husband, she residing on the property with him as his wife, the title acquired by length of possession was that of the husband and not of the wife.

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Both the legal presumption and the evidence, then, point to the conclusion that it was not Mrs. Templeton or her children, but Templeton who was in possession, and that it is in him, therefore, that the statute has vested the title. And if a claim for a patent were being made under a "title by occupancy" under s-s. 3 of s. 32 of the Manitoba Act, I should say on the evidence before me that it would be Templeton and not the plaintiffs who would be entitled to the patent.

Templeton himself, however, sets up no claim to the land; and if I am right in thinking that the defendant has lost her title, it will be most unfortunate if the bill should have to be dismissed, merely because the statutory title is not in the plaintiffs but in Templeton, who says that he does not claim and never claimed to hold the land for himself, but only for his wife and children. In the course of the argument it was seen that this difficulty might arise, and in his reply Mr. Howell offered to make Templeton a party to the suit in his own interest, and to amend the bill by making all such allegations as would be necessary to divest him of the title for the benefit of the plaintiffs. If the title is in him, I do not see what allegations he can make that will vest it in the plaintiffs; but at all events, I could not allow this to be done. If the plaintiffs have no title, then they should not have been plaintiffs at all; and what is asked is not to amend by adding a plaintiff, but really to substitute a new plaintiff for the present ones, and if the present plaintiffs have no title, they have no *locus standi* that can entitle them to make the application. If the title is in Templeton, and he is willing to convey to the plaintiffs the application they should have made would be, having obtained a conveyance, for leave to amend by alleging the conveyance and by putting it in evidence. If the defendant has lost the title, it cannot matter much to her, except as regards the question of costs, whether the plaintiffs or Templeton have acquired it; and as I cannot see that there can be any surprise worked by such an amendment, I am inclined to think that I should still

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allow it, rather than that the great expenses that have been incurred in the suit should go for nothing. By filing the bill as next friend for his two children, Templeton shewed that he was willing and intended to give up to the plaintiffs any interest he had in the land, and in allowing a conveyance from him to be now put in, I would only be allowing the intention that was manifest from the beginning of the suit to be formally carried out. Still I am aware that it is unusual to allow such an amendment at this stage of the cause, and I could allow it only with a good deal of hesitation and doubt.

At an early stage of the hearing, Mr. Culver took the objection that the plaintiffs could not succeed against Mrs. Stewart on the contract they alleged, without having her husband a party to the suit, as he had an interest in the land at the time of the alleged sale, and that, at all events, as the defendant was shewn to be a married woman, the husband had to be a party. To overcome the objection on the ground of interest, the plaintiffs amended their bill by alleging a sale from Mrs. Stewart and her husband, and I allowed the hearing to proceed subject to the objection that the husband as such was a necessary party. If the husband is not a necessary party, it must be because the necessity of joining him has been removed by the Married Womens' Property Act. Before that Act, "it was well settled in Chancery," as Lindley, J., said in *Hancocks* v. *Lablache*, 3 C. P. D. 197, "as a rule to which there were only special exceptions, that a suit could not be instituted by or against a married woman without the husband being a party." But it is shewn that the defendant married before the Married Womens' Property Act took effect, and without a marriage settlement; and as her husband down to the time the Act took effect, had not taken possession of the land, I think it was then her separate property, and that whatever interest the patent conveyed to her would also be separate property. If it was her separate property, then I take the effect of the Act to be that she may be sued in respect of it as a *femme sole* and without her

husband. A good deal can be said, however, in support of the objection.

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The objection is also taken that the Crown having, after due investigation, issued the patents to Mrs. Stewart, this Court has not jurisdiction to grant the relief that is asked in the bill, and that, at all events, the Attorney General of the Dominion should have been a party to the suit.

What the bill asks is that the defendant, the patentee from the Crown, be declared by the Court to be a trustee for the plaintiffs, and that she be ordered to convey the land to them. Now if the land in question had been ordinary Crown land, that is, had it been land vested in the Crown, it seems very clear on the authority of *Bonton* v. *Jeffrey*, 1 E. & A. 111, and *Crotty* v. *Vrooman*, 1 M. R. 151, and the cases referred to therein, that this Court would not have any jurisdiction to entertain the suit. The patent is not shewn to have been issued through fraud, error or improvidence, and it is shewn that it was issued after a full investigation into all the circumstances. But the fact that the land in question in the lot in the inner two miles was not in any way vested in the Crown when the patent issued, seems to me to distinguish the case from those above referred to. The estates and interests of the several parties in the land were acquired independently of and prior to the issue of the patent; and in my opinion the patent has not really affected the legal interests and rights that were acquired in the property under laws in force in the Province. These interests and rights, whatever they were, come under the head of "property and civil rights," and this Court is bound to recognize and enforce them. If the view I take of the case is correct, then for sometime previous to and at the time the patent was issued, the legal and beneficial title to the land in the inner lot was vested in Alexander Templeton. By some means the defendant has obtained a Crown patent for the land that apparently vests the legal estate in it in her: and I think the Court has jurisdiction to declare and decree that, notwithstanding this Crown

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patent, the land is not hers, and to order her to execute conveyances of the land to the real owner.

In *Keating* v. *Moises*, 1 M. R. 47, the learned Chief Justice made a decree declaring a patentee from the Crown of land that had been disposed of before the Transfer by the Hudson's Bay Company, a trustee for a party who satisfied the Court that he was beneficially entitled to a portion of the land; but the relief there was granted on the ground that the case was one in which the patent might have been set aside for fraud on the part of the patentee. The Dominion Act, 48 Vic., relating to the investigation of conflicting claims to land arising under section 32 of the Manitoba Act, referred to by Mr. Culver, does not appear to me to affect the case.

If the amendment can be allowed, then upon the plaintiffs putting in a release to them from Alexander Templeton of his interest in the 3½ chains in the inner lot, there will be a decree declaring the defendant Robina Stewart to be a trustee of these 3½ chains for the plaintiffs according to the several interests they shall appear to have, and directing her to execute conveyances of the respective shares.

If the plaintiffs do not wish to, or cannot put in the release from Templeton, the bill will be dismissed without costs. If the release is to be put in, I will decide when it is in, how the question of costs is to be disposed of.

24th April, 1893.—Since writing the foregoing, and after having heard the question of the amendment to the plaintiffs' case, that I proposed to allow, spoken to by counsel, I have come to the conclusion that I cannot allow the amendment. The plaintiffs must stand or fall by the title which they had when they began the suit. The bill will, therefore, be dismissed without costs.

Bill dismissed without costs.

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FERRIS v. THE CANADIAN PACIFIC RAILWAY CO.

Before TAYLOR, C.J., KILLAM and BAIN, JJ.

Railway Company—Liability for animals killed on railway track—Obligation to fence—Adjoining land, where animals might properly be—Permission of owner of land contiguous to railway.

The plaintiff's horses were being wintered on his own land adjacent to the property of his father, through which the defendants' railway ran. In March, 1893, the horses strayed along a private road across the father's land, through a broken gate on this road, and on to the railway track, where they were killed by a train of the defendants.

According to the evidence of the plaintiff and his father, the latter had several times in previous years given the plaintiff permission to pasture and water his stock on the father's land, or to allow them to run there, but there was no special permission asked or given for that winter, nor was there sufficient evidence of a general permission for the plaintiff to allow his stock to run there.

Held, that it could not be said that the horses got upon the railway track from land where they might properly be, and therefore the defendants were not, under The Railway Act of Canada, 51 Vic. c. 29, s. 194 (as amended by 53 Vic. c. 28, s. 2) and ss. 196 and 198, liable for the loss.

The Westbourne Cattle Co. v. *M. & N. W. Ry. Co.*, 6 M. R. 553, followed.

ARGUED: 8th February, 1894.
DECIDED: 10th March, 1894.

Statement.

THIS was an action in a County Court against the defendants for killing, on their line of railway, three horses belonging to the plaintiff.

The plaintiff owned no land adjoining the Railway, but his land, part of Sec. 5, Tp. 12, R. 8, lay to the northwest of land owned by Matthew Ferris, his father, being the W. ½ of Sec. 33, Tp. 11, R. 8. The father also owned the north 80 acres of the S.E. ¼ of Sec. 33 and 10 acres on the southwest corner of the N.E. ¼ of Sec. 33. The railway track ran east and west across section 33, between the north and

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south halves of the section. On the east side of the north-west quarter, a private road led from the public road on the north of the section to and across the railway track, and on that road, at each side of the track, there was a gate. The horses were said to have got upon the railway track in consequence of the gate on the north side having been broken down.

The action was tried by a jury, who found that the animals when killed had got on the track from the land of Matthew Ferris, plaintiff's father; that they were there by his permission; that they had got on the railway track by reason of the defendants' negligence in not re-erecting a proper gate at the farm crossing in place of the gate that had been broken down; and that they had been killed by a train of the defendants.

The plaintiff had a verdict for $250. An appeal by the defendants to a Judge of the Court of Queen's Bench was heard before Mr. Justice Dubuc, who dismissed the same with costs. Defendants then reheard the appeal before the Full Court, and asked to have the plaintiff's verdict set aside and a non-suit entered, or that a verdict be entered for the defendants, or for a new trial, on the following amongst other grounds:—

That the evidence disclosed no negligence on the part of the defendants resulting in damage to the plaintiff.

That the defendants were not, under the circumstances, responsible for the maintenance of the gate, or under any obligation to keep same closed as against the plaintiff.

That the evidence disclosed contributory negligence on the part of Matthew Ferris, and the plaintiff had no greater right against the defendants than Matthew Ferris would have.

That the evidence did not show that the horses in question were properly on the land adjoining the Railway, from which they escaped thereto.

J. A. M. Aikins, Q.C., for defendants, referred to *The Westbourne Cattle Co.* v. *Manitoba & N. W. Ry. Co.*, 6

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M. R. 553. There had been a change in the wording of the statute since that case was decided, but the principles of the law were not changed, and the horses injured escaped to the railway from a place where they had no right to be. The Railway Act had been amended by 53 Vic., c. 28, s. 2. *Duncan* v. *C. P. R.*, 21 O. R. 355, indicates that "might properly be" means might lawfully be. He also cited *Nixon* v. *G. T. R.*, 23 O. R. 124; *Davis* v. *C. P. R.*, 12 A. R., 728; *Auger* v. *Simcoe & Ontario Ry. Co.*, 16 U. C. R. 97; *McIntosh* v. *G. T. R.*, 30 U. C. R. 606; *Kilmer* v. *G. W. R.*, 35 U. C. R. 595; *Wilson* v. *Northern Ry. Co.*, 28 U. C. R. 274. If there were privity between plaintiff and Matthew Ferris, the latter could give no greater rights than he had himself, and under the circumstances Matthew Ferris could have no claim even if the horses were his. *Kilmer* v. *G. W. R.*, 35 U. C. R. 600; *Shearman & Redfield on Negligence*, vol. 2, § 661; *Corry* v. *G. W. R.*, 7 Q. B. D. 325. The onus was on the plaintiff to show that the horses were lawfully on the land. *Dunsford* v. *Michigan Central Ry. Co.*, 20 A.R. 577; *Eames* v. *Boston Railroad Corp.*, 96 Mass. 151; *McMichael* v. *G. T. R.*, 12 O. R. 547.

J. Martin for plaintiff. Plaintiff did not derive his right of action through Matthew Ferris, so he is not limited by the rights of the latter; he derives his rights from the statute. If he were the owner of horses which might properly be on the land, then he has a right of action. If plaintiff had a lease he could have recovered though the landlord had been guilty of negligence. *Beach on Contributory Negligence*, §§ 73 & 4; ch. 4, § 32. *Corry* v. *G. W. R.* 7 Q. B. D. 321. There was no contributory negligence here. The jury found that the animals were on Matthew Ferris' land by his permission.

TAYLOR, C.J.—The liability of the defendants as to erecting and maintaining fences and gates is governed by section 194 (as amended by 53 Vic. c. 28. s. 2) and sections 196 and 198 of The Railway Act, 51 Vic. c. 29 (D). By that Act the duty of erecting and maintaining fences and gates

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seems cast absolutely upon the defendants. What the extent of their liability may be, where a fence or gate is pulled down or injured by the fault of the owner of the land need not be considered. In the present case, in November 1892, a man was driving cattle over the railway track, and after the gates had been shut behind them his dog started a number of horses in an adjoining field, and they made a rush for the gate. The owner of the land, Matthew Ferris, who is the father of the plaintiff, succeeded in opening one gate before the startled animals reached it, but before he could open the other—the gate in question—they passed over it and broke it down. He straightened it up as well as he could, but it was no longer sufficient, and some cattle soon after broke it down worse than ever. After that it was never closed, as it was, in fact, quite useless. This happened four or five months before the accident which has caused the bringing of this action, and the defendants had notice and knowledge of the gate having been broken, because their section foreman knew of it. I do not see how Matthew Ferris can, under the circumstances, be held responsible for the breaking down of the gate, or how it can be said that it was in an unsafe or insufficient condition through any neglect or default of his, so as to relieve the defendants from any statutory duty of maintaining a sufficient gate at the crossing in question.

The only question for consideration seems to me to be, Did the animals killed get upon the railway track from an adjoining place where, under the circumstances, they might properly be?

The language of section 194, sub-sec. 3, has, by the amendment made by 53 Vic. c. 28, s. 2, been somewhat altered since *The Westbourne Cattle Co.* v. *The M & N. W. Ry. Co.*, 6 M. R. 553, was decided. But, except perhaps as to animals allowed by law to run at large, I do not think the liability of the defendants has been extended by the amendment. I adhere to the conclusion I then came to, that their liability to fence exists only in favour of the owners or occupants of lands adjoining the railway.

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The jury have found that the animals killed were on the land of Matthew Ferris by his permission. If so, they were on an adjoining place where, under the circumstances, they might properly be.

Now what is the evidence to support this finding of the jury? The plaintiff says: "I had my father's permission to allow my stock to run on his land at any time. The horses very seldom left my place in the winter. * * * I was wintering them; they were not being wintered on my father's place; nor was there any intention of having them wintered there; nor was there any arrangement by which they were to be wintered or fed at my father's place that winter. I did not intend that the horses should go away as they did; they strayed away. The last time I spoke to father about my stock being on his place was a year ago last summer. I asked him if they (my stock) would be any trouble pasturing on his property, and he replied that they would be no trouble to him, and that they would be all right. I also spoke to my father previously on the subject. I have had stock at my father's previous winters by arrangement with him. I always had his permission whenever I asked him about having my stock at his place. * * * The last time I spoke to father about the subject he said it would be all right to allow my cattle to pasture on his place." Matthew Ferris, the father, says: "I told my son it would be all right to have his stock on my land, that is on my grass land. * * * He spoke to me several times and I told him it would be all right. * * * My son spoke to me on several occasions about pasturing his stock on my land. He asked me if his stock might run in my pasture. I said it could. Sometimes there was grass and they came to pasture, and when no pasture they frequently came to water which flows over nearly all winter. The creek is close to my house south of the track. There was no arrangement that winter that I remember, about wintering his stock at my place. I have seen the horses come down my lane other winters, but I could not say

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that I saw them come down it that winter." That is the whole evidence as to the circumstances under which the plaintiff's stock were, or could be, on the land of his father.

From all this it is, to my mind, clear that the plaintiff from time to time got permission from his father to pasture stock on the land of the latter. But that permission was only temporary, not permanent. Otherwise why did he ask several times, and why does he say he always got permission when he asked for it? If he had it once for all, and for all time, why the repeated asking? The last time he asked it was in 1892, and then it was that the stock might run on the grass land, which was the W ½ of 33. He says he was wintering the stock at his own place, and he did not intend the horses should go away when they did; they strayed away. Then he and his father both say there was no arrangement for their wintering at his father's place that winter. The plaintiff says he has had stock at his father's previous winters by arrangement, again showing that any permission was temporary, and just renewed from time to time. Besides, even if his horses had a right to be on the father's place, it was to be on the pasture, the S. W. ¼ of 33. The evidence shows that the way for them to go there would be by the section line west of section 33. Now it was not from that, but from the private road, they got upon the railway track, and on that private road they were plainly trespassers.

I cannot see that there is a tittle of evidence to warrant the finding of the jury, that the animals were on the land of Matthew Ferris by his permission. Unless they were so, the plaintiff cannot recover against the defendants.

It is, however, doubtful whether the Court can, under the County Courts Act, R. S. M., c. 33, s. 325, enter a verdict for the defendants, the case having been tried by a jury. Indeed, I think it cannot. The Imperial Act 51 & 52 Vic., c. 43, s. 122, gives the Court power "to order judgment to be entered for any party," but there is nothing of that kind in our Act.

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As however there is not, in my opinion, any evidence upon which a jury, as reasonable men, might find a verdict for the plaintiff, I think a non-suit should be ordered. The appeal now before the Court should be allowed with costs. The order made on the appeal to a single Judge should be reversed with costs, and a non-suit should be entered in the action in the County Court with costs.

KILLAM, J.—The question is whether there was sufficient evidence to be submitted to the jury that the plaintiff's horses got upon the defendant's railway from an adjoining place where, under the circumstances, they "might properly be."

I concur with the Chief Justice in thinking that, so far as it affects this case, the amendment in The Railway Act, 51 Vic., c. 29, made by 53 Vic., c. 28, s. 2, has not materially altered the law as declared in *The Westbourne Cattle Co.* v. *M. & N. W. R. Co.*, 6 M. R. 553.

The horses got upon the railway from the private road of Matthew Ferris. They wandered from the plaintiff's yard along a public road until they came to this private road, and then along it to and upon the railway, where they were injured. The evidence does not disclose any right in or authority to the plaintiff, to have or allow his cattle to run upon this road, which was merely a way used by Matthew Ferris over his own land.

Then, although the plaintiff's first statement made the permission a very wide and general one, to allow his stock to run on his father's land at any time, his other evidence and that of his father, who was called as a witness on the plaintiff's behalf, show that it was really a permission to allow the stock to pasture on his grass land, with, perhaps, a right to resort to the creek for water. The plaintiff himself states that the pasture land was on the southwest quarter of the section, and the father shows that the creek was south of the track. The proper and usual course for the horses to take in going to pasture on Matthew Ferris' land, was that along the public road west of the section.

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They could not get there by the private road unless they found the gates at the crossing open or broke them down. It might possibly be open to be inferred that the plaintiff had an implied permission to drive the horses to pasture by the private road, but there is no pretence that he had permission to allow them to wander there and find or make for themselves a passage across the railway.

Even if it could possibly be considered that there was some evidence from which it might be inferred that the permission to pasture continued to the time of the injury, which happened in March when there was snow on the ground, still I think the evidence so weak that the verdict could not be allowed to stand.

In that view, however, I doubt whether the Court could do anything but direct a new trial. But I think it impossible to say that there was any evidence of a permission to allow the horses to wander on or along the portion of the land of Matthew Ferris from which the animals got upon the railway, or that in any sense the animals were "properly" upon that part of the land.

On this ground, then, I concur in reversing the order of my brother Dubuc, and in entering a non-suit in the action, with costs of the original appeal and of this re-hearing, as well as of the original action.

BAIN, J.—The defective gate, through which the plaintiff's horses strayed on to the railway, was not on the plaintiff's own land but on that of his father, Matthew Ferris; and the adjoining land on which the horses were when they strayed through the gate was also Matthew Ferris'. The obligation of a railway company to maintain fences along its track is entirely a statutory one; and the liability of the Company in this case depends upon whether or not the plaintiff is entitled to rely on sub-section 3, of section 194 of The Railway Act, 51 Vic. c. 29, (D. 1888,) as amended by 53 Vic., c. 28, s. 2. This sub-section provides that if, in consequence of the omission or neglect of the Company to maintain the fences and cattle guards that it is bound to

erect and maintain, "any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the Company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the Company's trains or engines."

Now, assuming that the defendant Company was under an obligation to maintain the gate as regards Matthew Ferris, the owner of the land, the plaintiff could not make the Company chargeable with the killing of his animals unless he showed that they had been properly on the adjoining land of Matthew Ferris, from which they got upon the track. The jury has found that the horses were on Matthew Ferris' land by his permission, and if they were, they were there properly; but, in my opinion, there is no evidence at all that justifies this conclusion, and the jury must have failed altogether to appreciate the nature of the permission there would require to be, before it could be said the horses were properly on Matthew Ferris' land.

It was not enough for the plaintiff, to entitle him to claim the benefit of the sub-section, to show merely that the owner of the adjoining land from which his animals got upon the track, would not have objected to their being on his land, and would not have treated them as trespassing had he known they were there. He must go farther than this. He must adduce evidence from which it can be reasonably found or inferred that the animals were on the adjoining land with the prior leave and consent of the owner, and under such circumstances that the owner could not say they were there unlawfully and trespassing.

The plaintiff lives on Sec. 5, Tp. 12, R. 8, west, and his horses were killed on the night of the 25th of March last. They strayed away from the plaintiff's place that evening. They got on to the road allowance, and from the road they went down a lane or private road leading from the road to Matthew Ferris' house. The defective gate was in the Railway Company's fence on the north side where this lane crosses the track, and getting on to the track over the broken gate, they strayed westward along the track

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and three of them were struck by a passing train. The private road or lane, the adjoining land from which the horses got on the track, belonged to Matthew Ferris, and it lay on the plaintiff to prove that at the time in question the horses were there properly.

In his examination the plaintiff said he had his father's permission to allow his stock to run on his land at any time. But he also said that he was wintering these horses himself at his own place, and that there was no arrangement or intention that they were to be wintered or fed at his father's place and that he did not intend that they should be there. The last time, it appears, that he spoke to his father about his stock being on the latter's place was over eighteen months before the time when they were killed, and the father himself also says: "There was no arrangement that I remember about wintering his stock at my place."

I cannot consider that this evidence, on any reasonable and justifiable view of it, will support the finding that the horses at the time in question were on Matthew Ferris' land properly, in the sense in which that word is used in the statute. The fact is, as the evidence shows clearly enough, they got on to his land simply as strayed animals; and neither the plaintiff, nor Matthew Ferris, intended or expected they would be there, and they had no right to be there. I think the appeal must be allowed with costs. The verdict should be set aside and a non-suit entered with costs.

Appeal allowed. Verdict for plaintiff set aside and a non-suit entered.

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Re BRANDON CITY ELECTION.

Before TAYLOR, C.J., DUBUC and KILLAM, JJ.

Election petition—Preliminary objection—Status of petitioner—Proof of right to vote, what it depends on—What list of electors must be produced.

A petitioner against the election of a member of the Provincial Legislature, who was not a candidate, being required, under The Controverted Elections Act, R.S.M. c. 29, s. 14, to prove his right to vote at the election in answer to a preliminary objection, may do so by showing that his name appears on the list of electors for the whole constituency, prepared and revised under The Election Act, R.S.M. c. 49, s. 148, and need not show that his name was on the list of voters supplied to the deputy returning officer for use in the polling division in which the petitioner would have the right to poll his vote. (Taylor, C.J., dissenting.)

The Richelieu Election Case, 21 S.C.R. 168, considered and distinguished.

ARGUED: 8th February, 1894.
DECIDED: 10th March, 1894.

Statement.

THIS was a petition against the return of Charles W. Adams as a member of the Local Legislature for the Electoral Division of Brandon City. A number of preliminary objections by the respondent were overruled by Mr. Justice Bain, and from his order an appeal was taken to the Full Court. Upon the appeal, only one objection was pressed, viz., that the petitioners were not electors who had a right to vote at the election, or persons who had a right to present the petition.

The argument for the respondent was that the right of the petitioners to vote at the election depended upon their names being found upon the list of electors supplied by the returning officer to the deputy returning officer for use in the polling division in which they claimed to have had the right to vote, and that the list so used must be produced and proved. The decision of Mr. Justice Bain was in accordance with the contention for the petitioners, viz., that they had the right to vote if their names were upon the list

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of voters prepared and revised under the Election Act, which was proved to be the case. They also claimed to have produced and proved the lists actually used at the respective polling places where they said they had a right to vote, and did vote, but whether this was sufficiently proved or not the learned Judge did not deem it necessary to decide, nor did the Full Court decide this point.

C. P. Wilson, for respondent. The onus of proving their status is upon the petitioners. *Re Cypress Election*, 8 M. R. 581. The *Richelieu Election Case*, 21 S.C.R. 168, decides that the best proof must be given. That case was a decision upon the Dominion Act, but a comparison of the local Act (which provides both for the preparation of the list and the carrying on of the election) with the Dominion Elections Act and Electoral Franchise Act, shows that they are substantially the same.

The gist of the decision in the *Richelieu Case* is that one "who had a right to vote at the election to which the petition relates," means one who would have been permitted to cast his vote had he presented himself at one of the polling sub-divisions. If his name was not on the list the deputy is prohibited from giving him a ballot and he therefore has no *right to vote at the election to which the petition relates*. He no doubt had a right to be placed on the deputy's list and could maintain an action for being omitted, but he certainly could not bring an action against the deputy for refusing him a ballot.

The inception of an election is the issue of the writ of election addressed to the returning officer and fixes the nomination day. The election proper begins on nomination day, and if only one candidate is nominated also ends on that day. With the writ there is transmitted to the returning officer a sufficient number of lists of electors, or extracts therefrom, duly certified for use in the respective polling sub-divisions. (See sections 78 and 121 of the Elections Act.) On receipt of the writ and certified lists, the returning officer is to forthwith fix a poll for each of

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the sub-divisions for which he has a list. Section 86. All this must be done before nomination day, thus clearly showing that whether the election be by acclamation or contested the lists or extracts sent to the returning officer with the writ of election, would contain the names of those, and those only, entitled "to vote at the election to which the petition relates."

It is evidently these certified lists that are referred to in section 148. That section comes under the heading, "The Poll-Voting." It only provides that certain persons shall be admitted to vote. The following section provides that certain persons, though their names appear on the list of electors in force at the time of any election, shall be disqualified and incompetent to vote and includes "any person refusing to take either of the oaths provided in section 156 of this Act." This oath provides that the person taking same must be named or purported to be named on the list shown to him, which list is the one originally sent with the writ of election and delivered by the returning officer to his deputy for that particular sub-division.

It is therefore clear that one may be disqualified from voting at a particular election although his name appears on the list of electors in force, and that the true test is as decided in the *Richelieu Case*, whether the name appears on the list sent to the returning officer for use at the particular election.

J. A. M. Aikins, Q.C., and *C. H. Campbell*, for petitioners. The Supreme Court, not being an appellate Court in Provincial controverted election cases the *Richelieu Election Case* is not an authority binding upon the Court in this case. Even if the principle of decision in that case be right it should not be followed in this case, as the provisions of the statutes relating to Dominion and Provincial elections are essentially different. Further, the evidence put in to prove the status of the petitioners in the *Richelieu Case* is materially different from the evidence adduced in this case. The petitioners are persons who had a right to vote at the elec-

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tion. The list which is to determine the right to vote is the revised list returned to the Clerk of the Executive Council. The Manitoba Controverted Elections Act and The Manitoba Elections Act must be construed together and the interpretation clause of the latter Act can be looked at for the purpose of determining who is an elector having the right to vote. Section 40 of the Elections Act provides that the decision of the revising officer shall be final. As to the right to vote, the list of electors as returned to the Clerk of the Executive Council has been proved. The list sent by the Clerk of the Executive Council for the polling division containing the names of the petitioners and returned by the returning officer, has also been put in evidence. The petitioners by their affidavits state they had a right to vote at the election and voted at the same. The judgment of Mr. Justice Strong in the *Richelieu Election Case* on this point can be usefully looked at. It may be assumed that a petitioner who voted had a right to vote. It can also fairly be assumed that the copies used by the deputy returning officer were true copies of the revised list. The production of the documents returned being public documents sufficiently proves them. The following cases were also referred to :—*Van Omeron* v. *Dowick*, 2 Camp. 42; *Montgomery* v. *Graham*, 31 U. C. R. 57; *McLean* v. *McDonell*, 1 U. C. R. 13; *Molson* v. *McDonell*, 5 O. S. 441.

TAYLOR, C. J.—Neither of the petitioners was a candidate at the election. The onus of proving their status rests upon them, and they must prove it by the best evidence the case admits of. *Stanstead Election*, 20 S. C. R. 12; *St. Boniface Election*, 8 M. R. 474; *Cypress Election*, 8 M. R. 581.

That the petitioners' names are on the list of registered electors, prepared and revised under the Election Act, has been proved. Is that sufficient?

In the *Richelieu Election Case*, 21 S. C. R. 168, which was the case of an election to the Dominion House of Commons, the Supreme Court, by a majority of the Judges, held that

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the best evidence of a voters' status is the production and proof of the list of electors actually used at the polling division where he claims to have the right to vote. The learned Judge who disposed of the preliminary objections, did not consider that case applicable in the present one, as he held that the provisions of our Provincial Act affecting the question are different from those in the Dominion statute. There being no appeal to the Supreme Court from a decision of this Court in the case of an election to the Provincial Legislature, a decision of the Supreme Court may not be binding upon this Court when dealing with such a case. But unless the provisions in our Act are so different as to render the reasoning of the Supreme Court Judges wholly inapplicable, their opinions are entitled to great weight, and should be followed, if only for the sake of uniformity.

Are the statutes of the Dominion and the Province so different? So far as I can see, taking all the various sections together, the provisions of our Act are as strong, if not stronger, against the contention of the petitioners.

By the Controverted Elections Act, R. S. M., c. 29, s. 14, "An election petition may be presented,— (*a.*) By one or more electors who had a right to vote at the election to which the petition relates, or (*b.*) By one or more candidates at such election." By the Dominion Controverted Elections Act, R. S. C., c. 9, s. 5, a petition may be presented by, (*a.*) A person who had a right to vote at the election to which the petition relates; or (*b.*) A candidate at such election. By the Election Act, R. S. M., c. 49, s. 148, "Every person whose name appears as an elector on the list made as hereinbefore provided, and in force at the time of any election, . . . shall be admitted to vote at such election." By section 2, sub-section (*i.*), Elector, "means a person registered on any list of electors for the election of members of the Legislative Assembly of this Province under the provisions of this Act"; and by sub-section (*j.*) the "list of electors" means "the list of registered electors to be pre-

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pared and revised under this Act for each electoral division."

In the Dominion Elections Act, R. S. C., c. 8, s. 41, it is provided that "All persons whose names are registered on the list of voters for polling districts in any electoral district, in force, ... on the day of the polling at any election for any such electoral district shall be entitled to vote at any such election." And by section 2, sub-section (*e.*) the expression "list of voters" or "voters' list" means "the certified copy of the list, or corrected list of voters for a polling district furnished to the returning officer or any deputy returning officer."

There would seem then to be a difference between the Provincial and Dominion Acts in this, that while in the one "list of electors" means the list prepared and revised by the revising officer, in the other it means the list supplied to the returning officer for use at the election.

But while in this Province the legislative provisions for the registration of voters, and the revision of voters' lists are included, together with the provisions for holding elections and polling votes, in one Act, there are in the Dominion Statutes two Acts, the one already referred to, the Dominion Elections Act, and another, the Electoral Franchise Act, R.S.C. c. 5, which refers to the making up and revision of voters' lists. By section 2, sub-section (*s.*), of the latter Act, the "list of voters" means "the list of voters to be revised and completed under the provisions of this Act . . . . when finally revised." That is an interpretation of the meaning of the words list of electors or list of voters, which quite agrees with the interpretation of these words in our Act. Then section 22 says, "Those persons only whose names are entered upon such lists . . . shall be entitled to vote at any election in the polling districts and electoral districts for which such lists are respectively made; and the said lists shall be binding on every Judge, and other tribunal appointed for the trial of any petition complaining of an undue election, or return of a member," &c. Surely, under such a provision as that, any elector whose name is

found on a list of electors, revised by the revising officer, has as good a right to vote at an election of a member to the House of Commons as any elector whose name is found on a revised list for a Provincial election has to vote for a member of the Legislative Assembly. It is certainly as strong in support of the petitioners' contention as anything to be found in our Act. The attention of the learned Judge does not seem to have been called to these provisions, but they were before the Supreme Court in the *Richelieu Election Case*. They are referred to in the argument of counsel, and in the judgments of Gwynne and Patterson, JJ. Yet the majority of the Judges evidently did not consider them sufficient to out-weigh arguments based upon the other and inconsistent provisions of the Election Act.

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Now look at the other provisions of our Election Act. When the day of the polling arrives, and a poll has been opened, section 156 provides that every elector before he shall be permitted to vote, shall state his name, occupation and residence to the deputy returning officer, "and if such name be found on the electoral list," the elector shall, if required, take certain oaths. If the name be found upon what list? Surely upon the list with which the deputy returning officer has been supplied by the returning officer for use at the election, and which he has before him. To what other list can he refer, to ascertain whether the name of the person proposing to vote is on it or not? The Act makes no provision for his having any other. Then the same section gives the form of oath to be taken, when a voter is required to be sworn, and the first clause is, "That you are the person named, or purported to be named, on the list of voters now shown to you." What list can be shown, except the one supplied to the deputy returning officer? As already said, the Act provides for no other being in his hands. That one of the forms of oaths given in the Dominion Elections Act is similarly worded, was remarked on in the *Richelieu Election Case*, by the present learned Chief Justice of the Supreme Court, who said, "This demonstrates that the

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right to vote depends upon a voter's name being upon the list delivered to the deputy returning officer."

Section 159 says, the deputy returning officer shall then proceed to ascertain "that the name of such person is entered, or purports to be entered, upon the list of electors for the polling division for which such deputy returning officer is appointed to act." Again, how is the officer to ascertain this, except by referring to and examining the list supplied to him, the only list which, so far as appears from the Act, he has anything to do with.

These various provisions taken together show, to my mind, beyond question that the right of an elector to receive a ballot and to vote must depend upon his name being found on the list supplied by the returning officer to the deputy returning officer for use at the polling place.

But if anything more is required to prove that, reference need only be made to two sections which were not, to the best of my recollection, ever referred to upon the argument. These are sections 238 and 240. There is nothing like them to be found in the Dominion Elections Act.

If the petitioners' contention is correct, then upon a man presenting himself at a polling place and asking for a ballot, even if the deputy returning officer does not find his name on the list with which he has been supplied, yet he is entitled to vote, and, of course, to receive a ballot, if his name stands upon the list of electors prepared and revised under the Act. Under section 148, on the petitioners' contention, every person whose name appears as an elector on that list "shall be admitted to vote," and the deputy returning officer is obliged to give him a ballot, for section 238 says: "No person shall," among other things, "if a deputy returning officer . . . . . refuse to give a ballot to a properly qualified elector." And section 240 makes a deputy returning officer, guilty of a contravention of that section, punishable by a fine of not less than $500, nor more than $1,000, and in default of payment, by imprisonment for any term not less than six months, nor more than one year. That is the penalty to

which he is liable if he refuses to give a ballot to a properly qualified elector; that is, according to the petitioners' contention, if he refuses to give a ballot to any elector whose name is on the list of electors prepared and revised under the Act. Now read section 238, sub-section (*f.*), in full: "No person shall . . . . (*f.*) If a deputy returning officer, give or supply any person with a ballot, unless such person's name appears on the list of electors supplied to such deputy returning officer by the returning officer, or refuse to give a ballot to a properly qualified elector." He is liable to a penalty if he refuses a ballot to a properly qualified elector, and he is liable to the same penalty if he gives it to a person whose name does not appear on the list of electors in his hands. I cannot see how any other conclusion can be come to than that the properly qualified elector, the person who has a right to vote, and so entitled to a ballot, must be a person whose name is on the list of electors supplied to the deputy returning officer by the returning officer.

The Legislature has required that the deputy returning officer shall, on being applied to for a ballot, ascertain that the name is on the list of electors, and it has provided for only one list of electors being supplied to him from which he can ascertain that fact. It has required an elector, to whom objection is taken, to swear that he is the person whose name is on the list of electors then shown to him, and it has provided for only one list that can be shown to him. And while requiring a deputy returning officer, under penalty, to give a ballot to every properly qualified elector, it has, at the same time, under the same penalty, forbidden him to give a ballot to any person whose name is not found on the list of electors supplied to him by the returning officer.

By section 148, every person shall be admitted to vote—that is, shall receive a ballot for the purpose of voting—whose name appears on the list of electors, that is, say the petitioners, on the list prepared and revised under the Act.

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By section 238, no person shall receive a ballot, that is, be admitted to vote, unless his name appears on the list supplied to the deputy returning officer by the returning officer. That, then, must be the list which determines and governs the right to receive a ballot and the right to vote.

The Legislature has made no provision for giving a ballot to, or receiving even in a qualified way, the vote of a person claiming to vote as being on the list prepared and revised, but whose name has, intentionally or accidentally, been left off the list supplied for use at the polling place. It has, by section 172, provided for the case of an elector, whose name being on that list, applies to vote after another person has voted as such elector, and for his being admitted to vote. The Legislature, no doubt, assumed that with lists sent out, certified by a responsible and careful officer like the Clerk of the Executive Council, there is no danger of any name found on the revised list being left off.

The hardship and injustice of a man being deprived of the right to vote, or of the right to petition against an improper return, by his name being fraudulently, or even by accident, left off the list sent out for use at the poll, is spoken of. It may be a hardship and injustice. It is no greater hardship and injustice in his case, than in the case of a man in every way qualified to be an elector, whose name has been, by the fraud or neglect of a registration clerk, or revising officer, left off the list prepared and revised under the Act. That man would be equally deprived of the right to vote. In either case, if a name is not on the list on which it should appear, the person deprived of any right he may have to vote has some remedy. I am not aware that *Ashby* v. *White*, 2 Ld. Raym 938, has ever been overruled or even questioned.

Looking at all the sections of the Act, I have no doubt whatever that the right to vote must depend upon the elector's name being found on the list of electors supplied to the deputy returning officer by the returning officer.

As was said by the present learned Chief Justice of the Supreme Court in the *Richelieu Election Case*: "To hold

otherwise and permit deputy returning officers to enter upon inquiries as to the right of persons whose names do not appear upon the list to vote, would be to set at naught the whole scheme of the statute, and to restore the evils and inconveniences which it was the especial object of the Legislature to obviate by providing for a system of registration."

The objection that, so holding, there can be no petition in the case of a member returned by acclamation, has no foundation, at least so far as an election to the Provincial Legislature is concerned. Section 78 requires the Clerk of the Executive Council to transmit with the writ of election a sufficient number of copies of the list of electors certified by him, and the list so sent for the polling division at which the petitioner claims to vote would be the proper one to refer to for his qualification.

The petitioners have entirely failed to prove that their names are found upon the lists supplied by the returning officer to the deputy returning officers at the respective polling divisions where they claim to have had the right to vote. To prove their status, they were, in my mind, bound to do so. Having thus failed, this motion should be allowed with costs. The order made overruling the preliminary objections should be reversed, the objections allowed, and the petition dismissed with costs.

DUBUC, J.—The only objection urged was that the two petitioners had not sufficiently proved their status as electors.

Section 14 of the Controverted Elections Act, R. S. M. c. 29, says that an election petition may be presented by one or more electors who had a right to vote at the election to which the petition relates. The question to be determined is what proof should be required to establish the status of the elector entitled to vote at the election.

The *Richelieu Election Case*, 21 S.C.R. c. 168, was relied on in support of the objection. The proof adduced in that case was the evidence of the returning officer, who pro-

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duced a copy of the list of electors which had been used at the election, and who swore that he knew the petitioner, and that he was the person of the same name who was entered on the copy of the list produced. That copy had been certified by the revising officer, but it was not shown that it had been examined with the list which had been used at the election. This was found to be an insufficient proof, and it was held by a majority of the Court that the voters' list actually used at the election, or a copy thereof certified by the Clerk of the Crown in Chancery, should have been produced.

By our Election Act, R. S. M. c. 49, the lists of electors, when finally revised, are sent to the Clerk of the Executive Council (s. 56), who, when an election takes place, transmits copies thereof, certified by him, to the returning officer (s. 78), and the returning officer delivers to each deputy returning officer a copy or extract from the list of electors for the electoral division, which contains the names of electors registered for the polling division for which he is appointed (s. 121). After the close of the poll the deputy returning officer places the list of electors in the ballot box, and delivers it to the returning officer (ss. 180, 181), and the latter, after recount, or the time for recount has expired, transmits the same to the Clerk of the Executive Council (ss. 183 to 196).

The petitioners in this case, to establish their status as electors, have brought evidence consisting of affidavits and oral testimony, which, it appears to me, is ample and sufficient to prove that their names were on the lists of electors used at the particular polling divisions where they respectively reside, and have thereby established their status as electors entitled to vote at said election.

I think that upon this point two important features distinguish the present from the *Richelieu Election Case*. In the latter case the voters' list produced was only a copy of the list of electors kept by the revising officer and certified by him, but not even compared with the voters' list used at the election; while here

the list produced is the list sent by the Clerk of the Executive Council to the returning officer for use at the election by the deputy returning officer, and returned by said deputy returning officer, through the returning officer, to the said Clerk of the Executive Council. There is also the fact proved that the petitioners have voted at the election. This last point is adverted to by the learned Chief Justice of the Supreme Court in the following words: "It is to be remembered in connection with this point that the appellant does not prove, nor does he even allege in his petition, that he actually voted at the election."

But, considering the different provisions of the statutes in that behalf, I am not prepared to hold that, in order to establish his status as an elector entitled to present a petition, a petitioner must necessarily prove that his name is on the list of electors used at the particular polling division where he resides, and where he is entitled to poll his vote.

Under section 14 of the Controverted Elections Act, a petition may be presented by one or more electors who had a right to vote at the election to which the petition relates.

The Election Act determines who has a right to vote at an election. Section 148 enacts that "every person whose name appears as an elector on the list made as herein before provided, and in force at the time of any election to which this Act applies, shall be admitted to vote at such election, provided that at the time of such election such person is not disqualified under the provisions of the next following section."

It is contended that a man, although his name is on the list of electors finally revised and kept by the Clerk of the Executive Council, as required by law, cannot be allowed by the deputy returning officer to vote if his name does not appear on the list received by said deputy returning officer for the purpose of the election, and used by him at the polling division for which he is appointed. That is perfectly true. And from that it is argued that in such circum-

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stance the man has no right to vote; and, therefore, that such a man cannot present an election petition. I do not see that this is the necessary conclusion to be derived from the premises. There is, in my mind, a broad distinction between having a right, and being prevented by accident or otherwise from being able to exercise that right.

If a person has his name on the list of electors finally revised, as provided by the statute, and has incurred none of the disabilities referred to in section 149, that person must be said to have a right to vote. If his name does not appear on the list used by the deputy returning officer, I would call that an accident by which he is deprived of the power to exercise his right. Such an accident might be caused by inadvertence or by the wrongful act of some designing person, and would prevent the elector from enjoying the benefit of the right possessed by him, but I would not consider that it has annihilated his right. I would think that his right to vote still exists as a right, *in se*, as a right which he holds under the law, but which he is by accident prevented from exercising. An elector might thus, in many ways, be deprived of the power or opportunity of exercising his right to vote. If, for instance, he was, on going to the poll, arrested on a false charge, and kept in custody until after the closing of the poll, that would be an accident which would prevent him from exercising his right to vote. Would it be said in that case that, because he could not go and poll his vote, he had not the right to vote?

In this case it is abundantly proven that the petitioners had their names on the list of electors as finally revised and kept by the Clerk of the Executive Council, and that they were under none of the disabilities mentioned in section 149 to render them incompetent to vote. If, therefore, it could be surmised that their names might not be on the lists used by the deputy returning officers at the polling divisions in question, and they might eventually have been prevented from casting their votes, it could only be by an accident of which they would have had to bear the conse-

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quence; but their right *in se*, their inherent right to vote would still remain in them, though they would be unable to exercise it. It can, perhaps, be objected that this principle, carried to its fullest extent, would equally apply to a person whose name has been omitted from the original list as finally revised; but in that case such a person would not be an elector entitled to vote under section 148, while a person whose name appears on the list finally revised and delivered for custody to the Clerk of the Executive Council, would be, under said section 148, an elector having an inherent right to vote, and qualified, under section 14 of the Controverted Elections Act, to present an election petition.

Under the above grounds I think the order of my brother Bain should be affirmed, and the appeal dismissed with costs.

KILLAM, J.—This is an application to reverse an order of Mr. Justice Bain overruling a preliminary objection to a petition under The Manitoba Controverted Elections Act, R. S. M. c. 29.

By the 14th section of that Act, "An election petition may be presented, (*a.*) By one or more electors having a right to vote at the election to which the petition relates; or, (*b.*) By one or more candidates at such election." The qualification set up by the petitioners is that they were electors having a right to vote at the election to which the petition relates, and the only preliminary objection insisted on was that "the petitioners were not and are not electors who had a right to vote at the election, or persons who have a right to present a petition."

The statute mentioned does not afford any guide for ascertaining who are "electors having a right to vote," etc., or what evidence of such qualification must be furnished, and for that purpose resort must be had to The Manitoba Elections Act, R. S. M. c. 49, and its amendments.

That Act provides for the making up and revision of lists of persons entitled to be electors, as well as for the mode of electing members of the Legislative Assembly.

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By section 2, sub-section (*i.*), the expression "elector" in the Act is defined as "a person registered on any list of electors for the election of members of the Legislative Assembly of this Province, under the provisions of this Act;" and by sub-section (*j.*), the expression "list of electors" is defined as "the list of registered electors to be prepared and revised under this Act for each electoral division."

Section 12 shows who are entitled to be registered as electors for any electoral division.

Sections 26–8 provide for the making up of lists of such persons by a registration clerk appointed for an electoral division.

Section 37 provides for the printing and distribution of such lists.

Then there is provision for the appointment of a revising officer for each such division, and for the revision by him of these lists in case of complaint of the improper insertion or omission of names, or of other errors in the same.

By sections 52, 53, if no complaint is made, the registration clerk is to transmit his list, in triplicate, to the revising officer, with a certificate and a declaration, and the revising officer is to retain one of the copies, transmit one to the Clerk of the Executive Council, and return the third to the registration clerk.

By sections 54, 55, in case of complaints being made, the registration clerk is to produce at the Court of Revision three copies of his list, and after revision the revising officer is to make and certify in triplicate a statement of the changes made, one copy of the list and statement he retains, one he sends to the Clerk of the Executive Council, and one he hands to the registration clerk. Section 56, then, as amended by 55 Vic., c. 12, ss. 6, 7, provides for the printing and distribution of copies of the statement of changes.

By section 40 "The decision of the revising officer under this Act in regard to the right of any person to be an elector shall be final as regards such person."

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Then, with section 67, begin the provisions for holding the elections.

By section 78, with the writ of election, the Clerk of the Executive Council is to transmit to the returning officer "a sufficient number of copies of the list of electors certified by him."

By section 95, a nomination paper is to "be signed by at least twenty-five electors registered on the list and duly qualified to vote for the electoral division for which the election is being held."

By section 121, the returning officer is "to furnish each deputy returning officer with the list of electors for, or such copy of or extract from the list of electors for the electoral division as contains the names of electors registered for the polling division for which he is appointed," each such copy or extract to be certified by the Clerk of the Executive Council.

By section 159, the deputy returning officer is obliged to see that the name of a person offering to vote is on the list, copy or extract furnished to him, before he can give him a ballot paper; and by sections 156, 7, 9, an elector may be required to take a certain oath that he is the person named on the list of electors shown to him, which should, of course, be the list, copy or extract, furnished to the deputy returning officer, and if such person refuses to take such an oath, he is not to be allowed to vote.

By section 238, sub-section (*f.*), the deputy returning officer is forbidden to supply a ballot to any person whose name is not on the list supplied to him, and section 240 imposes a penalty for his doing so.

By section 148, "Every person whose name appears as an elector on the list made as hereinbefore provided, and in force at the time of any election to which this Act applies, shall be admitted to vote at such election, provided that at the time of such election such person is not disqualified under the provisions of the next following section."

If the expression were "list of electors" instead of "list," the interpretation clause would *prima facie* determine to

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what list reference is made in this section. But while it is not positively applicable, as the list referred to is some list of electors, it should naturally be construed as if the full expression were used. That such was intended appears by a consideration of the context.

The clause comes after that which requires a list, copy or extract to be furnished to each deputy returning officer; and it might be possible, if the context supported that view, to construe the word "list" as referring to such list, copy or extract. But the expression is "list made as hereinbefore provided." A large part of the Act is devoted to prescribing the steps to be taken for the purpose of preparing, revising and authenticating a certain list of electors; and the first impression on reading the 148th section is that this list, and not the list, copy or extract furnished to a deputy returning officer, is what is referred to. If the latter were meant, it would have been easy and more natural to distinctly so describe it.

Then, the provision is that every person whose name appears as an elector on the list made, etc., and "in force at the time of any *election*," etc., "shall be admitted to vote at such *election*." By section 2, sub-section (*f*.), the expression "election" means "an election of a member to serve in the Legislative Assembly." This election is for a whole electoral division, usually divided into several polling divisions. The word "election" describes the whole process by which the member is selected. It includes and may stop with the nomination and return of one individual, and it includes all the steps involved in case of a contest. But the 148th section deals with the qualification for voting at that "election," and not at a particular poll. It refers to *one* list—and that, a list in force for the whole election; while the deputy returning officers may have only extracts showing the names of those entitled to vote at their respective polling-places, and these they may not receive until after several of the steps in the "election" have been taken.

It appears impossible, then, to construe the 148th section as referring to any but the original list prepared by the registration clerk and revised by the revising officer.

In the present case the petitioners have proved that their names were on the list so prepared and revised, and transmitted to the Clerk of the Executive Council, but it is claimed by the respondent that the petitioners cannot be said to be electors who had a right to vote at the election within the meaning of the 14th section of The Manitoba Controverted Elections Act, unless their names appeared on one or other of the lists actually furnished to the deputy returning officers and used at the polls. I cannot adopt that view. The first statute of this Province which gave this Court jurisdiction to determine the validity of the returns of members of the Legislative Assembly was passed in 1875, 38 Vic. c. 1. At the same session, a new Act, c. 2, provided for the carrying on of elections. Through all the subsequent statutes the language of the section determining the qualifications enabling parties to petition against such returns has remained unchanged, while the Acts regulating the elections have been frequently repealed and altered. It would be interesting and instructive to examine these various statutes and point out where, under each, the right to vote arose; but I deem it unnecessary, as it appears sufficiently clear under the present law without this comparison, which, however, appears to me to confirm the view I take. *Prima facie*, when section 148 of the Election Act expressly provides that certain persons shall be admitted to vote at an election, those persons have a right to vote. This enactment constitutes a direction to admit all such persons to vote. That direction is to all the officers engaged in the elections. By it all are bound to take the steps required of them to enable the elector having a right to vote to poll his vote. If any of them by act or default prevent the elector so entitled from polling his vote, they interfere, not with the right, but with the exercise of the right.

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The Election Act provides for the appointment of a judicial officer who is to determine the right to be registered as an elector. His duties are performed openly and publicly, and great precautions are taken to ensure their being properly performed. His decision as to the right to be so registered is final. Once so registered the party is an elector.

But under the present law, as under the various other statutes to which I have referred, it is one thing to be an "elector," and another to be an "elector having a right to vote."

The Controverted Elections Act constitutes a court to try certain questions relating to elections. In doing this the Court may have to determine, for the purpose of deciding on the qualifications of petitioners, or for other purposes, the right of certain electors to vote, and whether they have been allowed to exercise that right. On its face, this 148th section appears to give the right to vote to all registered electors, unless they are disqualified under the provisions of the 149th section. In the proceedings under an election petition where a question arises as to the right of a particular elector to vote, judicial inquiry can be made into the existence of the right under these sections. The Clerk of the Executive Council, the returning officer and his deputies, are ministerial officers, bound merely to carry out the duties imposed by the statute. They perform their functions, in making up, certifying and transmitting these lists privately, without notice to any one. Is it reasonable to suppose that the Legislature meant that a right so sacred as that of an elector to cast his vote should be determined by such officers, and that to such an extent that their acts might preclude him even from complaining against the result of an election thus procured?

Certainly, by the omission of the name of an elector from the list furnished to the deputy returning officer, the elector would be precluded from casting his vote. If his name is not on that list he cannot well take the prescribed oath. The deputy returning officer is forbidden to give

him the necessary ballot paper. But in that case he is deprived, not of the *right*, but of the *opportunity*, to vote.

The returning officer may, by accident or design, omit to furnish a deputy with any list for his division. Still those whose names are on the original list have a right to have a copy of that portion of the list furnished to the deputy that they may vote under it.

An elector may not go to the poll; he may remain away voluntarily or involuntarily; he may even be forcibly prevented from appearing there. He cannot vote unless he appears there. But who would say that he had not the right to vote because he did not appear at the place where alone he could exercise the right?

The opening and holding of the poll are necessary to enable an elector to cast his vote, but the failure to open and to hold the poll would surely never be considered to deprive an elector of the *right* to cast his vote at that election, though it might deprive him of the opportunity to do so.

The votes are cast by means of ballot papers furnished to the deputies and handed by them to the electors. If the deputy have none, or if he do not provide the elector with one, the latter cannot cast his vote. But he has the right to receive a ballot paper, to mark it and to deposit it in the ballot box.

So an elector applying to vote must take the oath, if so required. He cannot, it is said, take the oath, owing to its form, if the list furnished to the deputy returning officer does not contain his name. But he cannot take the oath any the better if the list, though containing his name, is not shown to him, or if the officer refuses to administer it. But who would suggest that the right to vote is dependent upon the discharge of the duties of the officer in these respects?

I think that I have suggested a number of circumstances under which a party might be prevented from casting his vote, but under which it would be admitted at once that

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the right exists, though the exercise of it alone is prevented. In these cases the right to vote includes the right to have the polls opened and kept open, to have the proper list as well as the proper ballot papers furnished to the deputy, to be furnished with the ballot, to mark and deposit it, and, if required to take the oath, to be shown the list and to have that oath administered. The existence of the right is antecedent to and independent of the performance by the election officers in these respects, though subject to be defeated by the elector bringing himself within one of the grounds of disqualification set out in the 149th section. Some of these grounds may exist even before the election, though the party is registered on the list of electors; some may cease before the day of polling, though existing before; some may arise after the revision of the list. But there does not appear to be one which could arise or cease after the preparation of the list, except by act, omission or consent of the elector occurring before or after such preparation or revision.

This view makes the right to vote a real one, not dependent on the acts or defaults of any person except the elector himself, and one that can be established by judicial inquiry at the proper time. As in the case of other rights, its exercise may be prevented, in which case there is a remedy. The opposite view appears to me to make the right to vote not really a right in the true sense of the word.

Under The Controverted Elections Act there may be ground for a petition even when no poll has been held, and the right there referred to as giving a status to petition would seem to be a right existing independently of the holding or method of holding the poll, and in the largest sense that can be given to the word under the Election Act.

I fully agree with the view which my brother Bain took of the *Richelieu Election Case*, 21 S.C.R. 168. The differences between the Dominion and the Manitoba statutes are such that, even if it were binding upon us in a case in which

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the return of a member of the Provincial Legislature is in question, I do not feel at liberty to apply the decision here.

The learned Judge who, in that case, expressed the reasons which prevailed with the majority of the Court, considered the right to vote as determined by section 41 of The Dominion Elections Act, R. S. C. c. 8, by which, "Subject to the provisions hereinafter contained, all persons whose names are registered on the lists of voters for polling districts in the electoral district, on the day of the polling at any election for such electoral district, shall be entitled to vote at any such election for such electoral district, and no other persons shall be entitled to vote thereat."

Prima facie, this very clause, on its face, makes the appearance of a name upon the list furnished to a deputy returning officer for his polling division the test of the existence of the right to vote. And, to make this construction the more imperative, we find that the expression "list of voters," in the Act, by section 2, sub-section (*e*), means, *prima facie*, "the certified copy of the list or corrected list of voters for a polling district furnished to the returning officer or any deputy returning officer," etc.

To appreciate, then, the force of the decision, we must consider that the point of view from which the Court had to approach the case was entirely different from that from which we approach the present. There, the learned Judges had to take the natural meaning of the clause, unless the nature of the subject matter or other enactments obliged them to read it differently. Here, we find a clause which, if my reasoning be correct, *prima facie* makes entry on the original list the test of the right to vote. I quite admit that the reasoning of Mr. Justice Strong and Mr. Justice Fournier does carry us some distance towards the modification of the *prima facie* meaning of the 148th section of our Act, or the addition of another condition to the existence of the right to vote, but I cannot feel sure that they would have felt bound to go so far if they had been dealing with legislation like ours, and two eminent Judges, even under

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the Dominion statutes, felt themselves at liberty to take the contrary view.

Under these circumstances I cannot take the decision as relieving this Court from the responsibility of deciding this application according to its own interpretation of the Provincial legislation.

The application should be dismissed with costs.

Application dismissed with costs.

BRAUN v. DAVIS.

THE NORTHERN ASSURANCE COMPANY ET AL, GARNISHEES.

Before TAYLOR, C.J.

Garnishment—Attachment of debts—Debts due to defendant and another jointly—Jurisdiction, what corporations are within it.

Moneys due to the defendant and another person jointly, cannot be attached under The Garnishment Act, R. S. M., c. 64, to meet the plaintiff's claim.

Where it is sought to attach moneys in the hands of a corporation, it must be shown that the Company has an office in this Province, and is carrying on business through some branch or agency here.

In the case of The Northern Assurance Company, garnishees, it appeared that the head office was in Montreal, and that it had no office in this Province, although there were persons here who received applications for insurance, and pending the reference of these to Montreal, were empowered to grant temporary insurance for 30 days, but all applications had to be sent to the head office, where they were accepted or rejected; the policies were issued at Montreal, the premiums were payable there, and the amount assured was, in case of loss, payable there also.

Held, that this Company could not be said to carry on business in this Province, or to be within the jurisdiction, so as to admit of moneys due by them being garnished. 1894.

McArthur v. *Macdonell*, 1 M. R. 334, and *Parker* v. *Odette*, 15 P. R. 69, followed.

ARGUED: 22nd March, 1894.
DECIDED: 28th March, 1894.

THIS was an appeal from an order of the Referee in Chambers dismissing a summons to set aside a garnishing order. The garnishees were The Northern Assurance Company and The United Fire Insurance Company, and the moneys garnished were payable on a loss by fire of property insured by them. The garnishing order was obtained upon the usual affidavit, made by the plaintiff, that he had reason to believe that the garnishees were indebted to the defendant, and that they carried on business and were within the jurisdiction of the Court. The grounds upon which it was sought to set aside the order were, first, that the moneys garnished were not payable to the defendant alone, but to him and another person; and second, that the Companies did not carry on business in this Province, and were not within the jurisdiction. Statement.

J. S. Hough, Q.C., for plaintiff. As to the policy in the United Fire Insurance Co., the loss is payable to the assured, jointly and individually, as their respective interests may appear. The policy was drawn up in Winnipeg, dated there and signed by the General Manager and the local agent; it had the statutory conditions indorsed. As to the policy in the Northern Assurance Co., it recited that the loss is payable, jointly and individually; it is dated at Montreal, the conditions are not the statutory ones. The renewal receipt annexed is signed by the agents. It is not shown that debts under the policies are not due to the defendant; the moneys are payable jointly and individually. The defendant, G. Davis, could sue for the losses; he could, at the trial, show that he alone was interested. *James* v. *Emery*, 8 Taunt. 245. There was not a joint covenant even

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on the face of it; the loss is payable as the interests may appear. *Marsh* v. *Robinson*, 4 Esp. 98; *May on Insurance*, § 447 *b*; *Pacific Insurance Co.* v. *Catlett*, 4 Wend. 76. Where there is an insurance by two, if one assigned to the other, then he alone could sue. There is no allegation here that G. Davis has not assigned. As to the objection that no action can be brought here; *McArthur* v. *Maadonell*, 1 M. R. 334. The agents here have power to insure for thirty days. Defendant has given reasons why the companies could not be sued, but has not gone far enough: *Leslie* v. *Foley*, 4 P. R. 246; *Rutherford* v. *Bready*, 9 M. R. 29. There is no affidavit from defendant, nor from G. Davis, only from solicitor. Defendant cannot take the objection that the moneys are payable to a third person, the garnishees only can set that up. *Ontario Bank* v. *Haggart*, 5 M. R. 204.

W. E. Perdue, for defendant. The policies are payable to two persons jointly. Two persons are named and the covenants are with them jointly. As to the form of covenant; *Rawle on Covenants*, pp. 557-8; *Keightley* v. *Watson*, 3 Ex. 716. As to the Northern Assurance Co., this was not a thirty day policy; there was no agency in this Province; the receipt ends with the name of the Montreal agent. Defendant was not bound to show that the Company had not $200 in assets here, plaintiff should show that it has; *Dick* v. *Hughes*, 5 M. R. 259. The loss is payable at the City of Montreal. There is no pretence of any debt being due, except on the policies; plaintiff should show there is another debt if he claims there is one.

TAYLOR, C. J.—In the case of The Northern Assurance Company, it is sworn that the head office of the Company is in the City of Montreal, and it has no office in this Province. There are persons here who receive applications for insurance, and who may, pending the reference of these to Montreal, grant temporary insurance for thirty days, but all applications must be sent to the head office, where they are accepted or rejected. The policy was issued at Mon-

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treal, the premiums are payable there, and the amount insured is, in case of a loss, payable there also. This case comes within the case of *McArthur* v. *Macdonell*, 1 M. R. 334, and the very recent case decided in Ontario, *Parker* v. *Odette*, 15 P. R. 69.

The policy recites that "Mrs. Rose Davis and Ghent Davis, jointly and individually as their interest may appear (hereafter called the assured)," have paid a certain premium. The renewal receipt is for a premium paid by Mrs. R. Davis only. By the terms of the policy the Company agrees with the assured to pay the amount insured in case of loss. That seems an agreement to pay them jointly. A debt due to a defendant and another cannot be attached, *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q.B.D. 535.

As to The United Fire Assurance Company, the second objection cannot be held to apply. The policy of this Company seems to have been issued in Winnipeg; to be valid it must be countersigned by the agent of the Company at Winnipeg, and it purports to be so. Then a condition indorsed speaks of notice to the Company, in a certain event, being addressed to their principal office in Manitoba. But I think the first objection must prevail in this case also. The policy recites the payment of the premium by Mrs. Rose Davis and Ghent Davis, and the agreement on the part of the Company is, that it shall be subject and liable to pay unto the insured, their executors or administrators, the amount insured. I do not think that the distinct and positive agreement for payment to the insured, their executors or administrators, which is an agreement to pay them jointly, can be controlled and varied by finding, at the end of the description of the property insured, and a reference to other insurance and to a cancelled policy, the words, "Loss, if any, payable to assured jointly and individually as their respective interests may appear," without something more.

It seems to me that before the plaintiff can hold, under a garnishing order, the moneys due from either of these

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Companies, it should be shown that the defendant could, for himself or individually, enforce payment of them. The cases relied on by the plaintiff do not, as I read them, support the contention that he could do so.

In *James* v. *Emery*, 8 Taunt. 245, several persons having separate interests in an estate, three of them made an agreement, which stated these separate interests, for a sale of the estate; and the purchaser covenanted with the three jointly to pay a moiety of the purchase money to one, and the other moiety to the other two. The two sued for the amount payable to them, and were held entitled to do so, Gibbs, C. J. saying, that if the interest be several, the covenant will be several, although the terms of it be joint. But there the several interest distinctly appeared on the face of the instrument under which the parties claimed, and it is not so here. In *Marsh* v. *Robinson*, 4 Esp. 98, a ship was insured in the name of Elizabeth Marsh & Son, and upon a loss the son sued alone. Evidence being given as to his acts in controlling and managing the ship, which the Judge held were *prima facie* evidence of, and from which the jury might infer, sole ownership, a non-suit was refused, but the case went off on an objection that he was not registered as owner under the Shipping Acts.

The Pacific Insurance Co. v. *Catlett*, 4 Wend. 75, was a case in which the owners of five-sixths of a cargo valued at $90,000 insured their interest for $30,000, and on a total loss were held entitled to recover the whole sum insured, and not five-sixths only.

Section 21 of The Administration of Justice Act cannot apply to the case of The Northern Assurance Company, for under the authority of such cases as *McArthur* v. *Macdonell*, 1 M. R. 334; *Parker* v. *Odette*, 15 P. R. 69; *Minor* v. *London & N. W. Ry.*, 1 C.B. N.S. 325; *Brown* v. *London & N. W. Ry.*, 4 B. & S. 326, that Company is not transacting or carrying on business through any branch or agency within the Province. If it is sought to invoke the aid of section 24, it was, I think, incumbent on the plaintiff

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TAYLOR, C. J.

to show in answer to this application that the case can be brought under sub-section (*e.*) of that section.

None of the facts sworn to in supporting the summons to set aside the order are contradicted. And there is no claim that the Companies are, or that either of them is, indebted to the defendant in any amount unless they are so under the two policies. That neither Company is otherwise indebted is sworn on the part of the defendant.

The appeal should be allowed with costs, the order of the Referee set aside with costs, and the garnishing order set aside with costs. These to be costs in the cause to the defendant in any event.

Appeal allowed with costs.

BRAUN v. DAVIS.

THE NORTHERN ASSURANCE COMPANY ET AL, GARNISHEES.

Before DUBUC, KILLAM and BAIN, JJ.

Appeal from order of single Judge—Leave to appeal after time elapsed—Mistake of attorney—Evidence to set aside garnishee order—Affidavit on information and belief not sufficient.

An appeal by the plaintiff from the order of the Chief Justice made in March, 1894, setting aside a garnishee order obtained by the plaintiff herein, (see *ante* p. 534) was set down for hearing before the Full Court one day too late, and was therefore struck out, leaving the plaintiff to make a substantive application under rule 66 for an extension of time for entering the appeal.

Such an application was then made supported by the affidavit of the plaintiff's attorney, accounting for the delay through a misapprehension and mistake made in good faith, when the Court allowed the appeal to be set down within two days on payment of costs.

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On the argument of the appeal it appeared that the garnishee order had been set aside on the strength of an affidavit of the partner of the defendant's attorney based on information and belief.

Held, following *Gilbert* v. *Endean*, 9 Ch. D., 259, that as the application to set aside the garnishee order was one that affected and disposed of the rights of the parties and was not merely interlocutory, it should not be granted on the material put in, which was mere hearsay evidence, and at best of no more weight than the evidence on which the original order was made, and that the appeal should be allowed with costs.

ARGUED: 18th May, 1894.
DECIDED: 18th May, 1894.

Statement.

IN this case judgment was given by the Chief Justice on 28th March, 1894, allowing an appeal from the Referee, and setting aside a garnishing order obtained by the plaintiff, *ante* p. 534.

The order was signed by the Chief Justice, and dated on 30th March. On 31st March plaintiff obtained an order from a Judge that all proceedings under or by virtue of the order made by the Chief Justice be stayed for fourteen days from that date, and if notice of appeal to the Full Court be given within that period, then such stay of proceedings to continue until the hearing or other disposition of the appeal.

The præcipe to enter and set down the appeal was filed with the Prothonotary on 14th April.

Defendant then moved before the Full Court to strike out the plaintiff's appeal, on the ground that it was not entered with the Prothonotary, nor notice thereof given to the defendant, within 14 days from the date and service of the order appealed from.

PER CURIAM. The appeal must be struck out. Costs to be to the defendant in the cause in any event.

Subsequently plaintiff moved before the Full Court to extend the time to appeal, supported by the affidavit of his attorney that he was under the impression at the time that the order for a stay of proceedings distinctly gave the plaintiff leave to appeal from the order of 30th March at any time within 14 days from the date of the stay of pro-

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Statement.

ceedings, and if such were not the case it was through his error and misconception of the terms of the order staying proceedings, and not through any fault or delay or misconduct on the part of the plaintiff.

The following cases were referred to: *Robertson* v. *Wigle*, 15 S. C. R. 214; *Sievewright* v. *Leys*, 9 P. R. 200; *Dederick* v. *Ashdown*, 4 M.R. 349; *In re Manchester Economic Building Society*, 24 Ch. D. 488; *Whitfield* v. *Merchants' Bank*, Cassels' dig. 681: and *Cusack* v. *L. & N. W. R.*, [1891], 1 Q. B. 347.

PER CURIAM. That, as the other side had not been prejudiced, and the mistake was one made in good faith, under misapprehension of the attorney, the appeal might be set down within two days, on payment of the costs of the application.

The appeal was then set down to be heard.

On the same coming on for argument an objection was taken by plaintiff that the application to set aside the garnishee order was made on the affidavit of the partner of the defendant's attorney, based on information and belief. Plaintiff filed no affidavit in answer. The affidavit on which the garnishing order was obtained was made by the plaintiff on information and belief, and was sufficient under the statute. It was contended that the application to set aside the garnishing order was not an interlocutory application; it was one that affected and disposed of the rights of the parties, and the evidence should have been the same as at a trial. *Gilbert* v. *Endean*, 9 Ch. D. 259, was relied on. The same objection to the sufficiency of the material had been taken before the Referee and the Chief Justice.

PER CURIAM. That as the affidavit on which the plaintiff obtained the garnishing order was sufficient under the statute to entitle him to the order, that order should not be set aside on evidence that was merely hearsay, and that was, at best, of no more weight than the evidence on which the order was made.

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Appeal allowed. and order appealed from set aside, with costs both of the appeal from the Referee and of this application.

J. Stanley Hough, Q.C., for plaintiff.

W. E. Perdue, for defendant.

FARMERS' AND MECHANICS' BANK

v.

DOMINION COAL, COKE AND TRANSPORTATION COMPANY.

Before BAIN, J.

Promissory note—Onus of proof where illegality set up without plea of illegality—Note of corporation—Holder in due course.

The plaintiffs sued the defendants on a promissory note executed in proper form, given in favor of one Yates, and indorsed by him to the plaintiffs. The defendants proved that the giving of the note to Yates was for his accommodation and entirely unauthorized, and argued that the plaintiffs were then bound to prove that they were holders in due course, under sections 30 and 88 of The Bills of Exchange Act, but there was no plea of illegality or fraud on the record.

Held, that without such plea such defence could not be maintained, and it was unnecessary for the plaintiffs to prove that they had given value or were holders in due course.

ARGUED: 23rd May, 1893.
DECIDED: 27th May, 1893.

Statement.

THE defendants were a corporation, incorporated under the Canada Joint Stock Companies' Act, for the purpose of selling and dealing in coal, coke, etc. The plaintiffs brought this action against the defendants upon a promis-

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sory note, signed by the president and secretary-treasurer of the Company, and sealed with the Company's corporate seal, payable to the order of one Yates, and indorsed by Yates to the plaintiffs. The only plea on the record was a denial of the making of the note. The plaintiffs proved the making of the note by the defendants' secretary-treasurer, but the defendants, on his cross-examination, showed that the note had been given for the accommodation of Yates, that the Company had received no consideration for the note, and that it had been made and issued without the authority of the directors. The plaintiffs gave no evidence to show that they had given value for the note, or that they were holders in due course.

W. E. Perdue, for defendants cited *Attwood* v. *Munnings*, 7 B. & C. 278; *Stagg* v. *Elliott*, 12 C. B. N. S. 373; *D'Arcy* v. *The Tamar, &c., Ry. Co.*, L. R. 2 Ex. 158.

W. Redford Mulock, Q. C., for plaintiffs referred to *Daniel on Negotiable Instruments*, §§ 386, 388, 389; *Morawetz on Private Corporations*, § 65.

BAIN, J.—I must hold that the note, on its face, purports to be that of the defendants, and not the personal note of Walsh and Adams, the president and secretary-treasurer of the Company, who signed the note as such officers. The indorsement, presentment and non-payment of the note were admitted.

The plaintiffs gave no evidence to show that they gave value for the note, and a non-suit was moved for on the ground that, as the note was issued for accommodation without the authority of the directors, it was issued illegally, and the illegality having been proved, the plaintiffs were bound to show that they gave value. It is to be observed that if the burden of proof was cast on the plaintiffs, then under section 30 of The Bills of Exchange Act they were bound to prove not merely, as the defendants contended, that they gave value, but that they were holders in due course—that is, that they gave value in good faith without

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notice of the fraud or illegality. *Tatam v. Haslar*, 23 Q. B. D. 345. Before The Bills of Exchange Act, the rule was that when fraud or illegality was alleged and shown, a plaintiff had only to prove that he gave value for the note; then the onus was again on the defendant to show, if he could, that the plaintiff took the note with notice of the fraud or illegality.

If, as I am assuming, the note sued on is, on its face, that of the Company, the case seems to involve some questions of considerable perplexity. The case was but inadequately argued, and no cases were cited bearing on the questions on which the decision turns, and I have had no assistance from counsel in considering these questions.

The authority of Walsh and Adams, as president and secretary-treasurer of the Company, to act for the Company in making and issuing promissory notes is, the defendants say, contained in a by-law or resolution passed at the annual meeting of shareholders, and this resolution is put in evidence. It is open to question if this note is made in the form in which the resolution authorizes them to make notes, but on this point I will hold that the note was made in general accordance with their authority, and that it is a note that would be binding on the Company in the hands of a holder in due course. But while Walsh and Adams had authority to make notes for the Company, they had no authority to issue them for the accommodation of Yates or anyone else, and the issuing of this note was, therefore, I think, affected with fraud or illegality. Then the question arises, does the evidence that was given of this illegality put the plaintiffs to proof that they are holders in due course, or that they acquired title through some one who was such a holder. Under The Bills of Exchange Act, s. 30 (which section 88 makes applicable to promissory notes), every holder of a note is, *prima facie*, deemed to be a holder in due course until it is admitted or proved that the making, issue or negotiating of the note is affected with fraud, illegality, etc., and then the burden of proof is placed

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on the holder to show that he is a holder in due course. But I apprehend that, before a defendant can take advantage under this provision of evidence that shows fraud or illegality in the making or issuing of the note, there must be a plea on the record under which such evidence would be admissible. If the evidence of the illegality or fraud were such that the note, whether in the hands of a holder in due course or not, could not be binding on the Company, then such evidence would be admissible under the plea of *non fecit*. But this plea puts in issue merely the fact of the note having been made by the defendants; and as I am holding that this note in the hands of a holder in due course might be binding on the Company, the issue raised on the plea is decided against the defendants, and I do not see how the evidence of the fraud or illegality is admissible under it. Unless the evidence is admissible under *non fecit*, there is no other plea under which it is, and I am inclined to think that it would be admissible only under a plea specially setting up the alleged illegality. There is no evidence, of course, in any way affecting the plaintiffs with notice of the illegality.

Giving effect to what are only first impressions, I enter a verdict for the plaintiffs for the amount of the note and interest, and leave the defendants to renew their motion for a non-suit before the Court in Term.

Verdict for plaintiffs for $3,342.07.

Verdict for plaintiffs.

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STRIEMER v. MERCHANTS BANK.

Before DUBUC, J.

Interpleader—Husband and wife—Married Women's Property Act—Ownership of crops raised by husband on wife's land.

The crops seized under the defendants' execution were raised on the land of the plaintiff, the wife of S. the execution debtor, chiefly by the labor of S. and the children under S.'s superintendence.

The horses and implements used in doing the work were the property of S. At the close of the previous season S. had had the crops on his own farm seized and sold under execution, and the farm was taken from him for a mortgage debt. The plaintiff then arranged to purchase, on credit, the land on which the crops now in question were raised, and to carry on farming operations on her own account, in order, as the Judge found, to support the family and with no intention of defrauding her husband's creditors, as they had nothing left that would be available for the latter under execution.

Held, nevertheless, following *Ady* v. *Harris*, 9 M. R. 127, and *Parenteau* v. *Harris*, 3 M. R. 329, that the crops in question must, under all the circumstances, be held to be the property of the husband and not of the plaintiff as against the execution creditors of the former.

ARGUED: 20th February, 1894.
DECIDED: 10th March, 1894.

Statement.

INTERPLEADER issue to determine whether a certain quantity of grain seized in September, 1893, under executions at the suit of the defendants against J. Striemer, was the property of the plaintiff, Helena Striemer, or of her husband, J. Striemer.

In the fall of 1892, J. Striemer had his crop seized and sold under executions for debts due by him, and his farm which was mortgaged to a Loan Company was also taken from him for the mortgage debt.

The family, composed of the husband, the wife and nine children, had to live during the following winter on some unsaleable wheat left to them from the crop of 1891, and by assistance from relations.

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In April, 1893, the plaintiff purchased a quarter section of land from one John Penner, on credit, with the understanding that the deed was to remain in the hands of the conveyancer and not to be registered until the first payment of $300, to be made in the following fall with interest on the purchase money, $1800, would be paid to the vendor.

The plaintiff admitted that she had no money and no property, except, as she claimed, a calf, some chickens and an old plough. She went on, however, to crop the land; the seed grain being partly purchased with $5 obtained by the sale of an old threshing roller belonging to the husband, and wages earned by one of the daughters, and partly borrowed from relatives and neighbors. The work of cultivating the farm and harvesting the grain was done by J. Striemer, his daughter aged 15 and his son aged 10 years, with a little assistance in stacking the grain by the plaintiff herself.

It was shown in the evidence that J. Striemer was sickly and unable to do heavy work, but he directed the children and did work himself with them. The work was conducted exactly as on his own farm in previous years, except that he did a little less and the children a little more.

The bargains for the purchase of the land and the obtaining of seed grain were made by the plaintiff with her husband present, but taking no part in the transactions. The implements used in cultivating the farm, except the old plough claimed as her own by the plaintiff, were all the property of the husband, and consisted of a sulky plough, a seeder, a harrow, a mower, a horse-rake, a binder and a wagon. They had also three horses brought from the old farm, two of them not paid for and subsequently taken away by the vendor, and an old mare belonging to J. Striemer.

After harvest, the crop was seized under execution as above stated and was claimed by the plaintiff as her own property.

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Argument.

Colin H. Campbell and *H. E. Crawford*, for plaintiffs, cited *Meakin* v. *Samson*, 28 U. C. C. P. 366; *Doll* v. *Conboy*, 9 M. R. 185; *Dominion Loan and Investment Co.* v. *Kilroy*, 14 O. R. 468, and *Ady* v. *Harris*, 9 M. R. 127.

A. J. Andrews and *I. Pitblado*, for defendants, cited *Merchants Bank* v. *Carley*, 8 M. R. 261; *Ripstein* v. *British Canadian Loan and Investment Co.*, 7 M. R. 119; *Lett v. Commercial Bank of Canada*, 24 U. C. R. 552; *Harrison* v. *Douglas*, 40 U. C. R. 410; *Ingram* v. *Taylor*, 46 U. C. R. 52; and *Parenteau* v. *Harris*, 3 M. R. 329.

DUBUC, J.—On the evidence in this case I cannot say that the plaintiff was guilty of moral fraud in trying, under the circumstances, to work a farm in her own name. Her primary object was, no doubt, after being left penniless, with a sickly husband, to provide for and support her family. She very likely expected that the produce of the farm would be saved from her husband's creditors, but I do not think she purposely meant to defraud them of anything they would be lawfully entitled to get, because she and her husband had then nothing which could be reached by their execution; and, as her husband could not obtain anything on credit, had she not taken the farm in her own name, there would have been still less to satisfy their judgments. If, therefore, the crops raised under such circumstances are to be sold under execution for the husband's debts, it is certainly a case of great hardship.

But the law has to be administered as it is found in the statute books, and construed by the Courts.

According to the decisions under the Married Women's Act, in the Ontario Courts, commencing with *Lett* v. *The Commercial Bank*, 24 U. C. R. 552, followed by *Irwin* v. *Maughan*, 26 U. C. C. P. 455; *Harrison* v. *Douglas*, 40 U. C. R. 410; *Meakin* v. *Samson*, 28 U. C. C. P. 355; and in our own Court by *Parenteau* v. *Harris*, 3 M. R. 329; *Merchants Bank* v. *Carley*, 8 M. R. 258; and *Ady* v. *Harris*, 9 M. R. 127, I consider myself bound to hold

that the grain in question in this case is not the separate property of the plaintiff.

In *Dominion Loan and Investment Co.* v. *Kilroy*, 14 O. R. 468, the goods which had been sold to the wife upon her own credit and responsibility, her husband being insolvent, were held to be her own separate property, not liable to be seized under execution against her husband. I followed particularly the principles laid down in that case in *Doll* v. *Conboy*, 9 M. R. 185, where the facts and circumstances were almost identical.

In *Plows* v. *Maughan*, 42 U. C. R. 129, the land was the absolute property of the wife, and the hay raised on it by the husband who cultivated also a farm of his own, was held to belong to the wife, as owner of the land.

In *Ingram* v. *Taylor*, 46 U. C. R. 52, the land also belonged to the wife, and was cultivated by men hired by her; while the husband did some little work about the place. The Court held she was not carrying on any occupation or trade separate from her husband, nor were the crops raised on the said land her wages or earnings within sec. 7 of the Married Womens' Property Act, R. S. O. 125; but that she was entitled to such crops as owner of the land, for the husband could not be said to be working the farm as head of the family.

In *Murray* v. *McCallum*, 8 A. R. 277, the hotel business was carried on by the wife with two partners, and the husband was employed as bar-keeper at a salary of $15 a month. The goods and chattels of the hotel, having been seized by creditors of the husband, were, in an interpleader issue, held to be the wife's property.

In *Parenteau* v. *Harris*, the farm belonged to the wife, and she had paid for part of the seed grain; the crop was held to belong to the husband.

In *Ady* v. *Harris*, my brother Killam assumed that the transfer of the land to the wife was valid as against the creditors of the husband. The farm work was done by

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the husband and by a man hired and paid by the wife. The crop was held to belong to the husband.

In the above cases, the wife actually owned the property or had in the business some money of her own, or the goods were sold to her on her own credit and responsibility by merchants who would not deal with the insolvent husband.

In the present case, Penner, the vendor, sold the land to the wife; he was not asked to sell to the husband; he heard from the wife that her husband was in debt; he did not refuse to sell to the husband, because, as he says, the matter was never discussed. It is even doubtful whether the sale to her was really completed, because the deed was kept by Long, the conveyancer, not to be delivered until the first payment would be made.

The land was cultivated and the crop harvested by the work of the husband and his children, and with the implements belonging to him. Two of the three executions under which the grain was seized were upon judgments obtained against J. Striemer for the price of the very implements used by him on that farm to raise the crops in question. Under such a state of circumstances, and in view of the above-mentioned authorities, I do not see it possible to hold that the said crops are the exclusive property of the plaintiff as against the execution creditors of her husband.

I think a verdict should be entered for the defendants.

Verdict for defendants.

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MONTGOMERY V. HELLYAR.

Before TAYLOR, C. J., DUBUC and BAIN, JJ.

Distress for rent—Illegal distress—Estoppel in pais—Fraudulent removal of goods to avoid distress—Landlord and tenant.

Some of the plaintiff's goods having been seized and sold along with those of his wife under a distress warrant issued by the defendant H. to his co-defendant, for the purpose of levying an amount due by the wife for rent of certain premises, from which, before the seizure, all the goods had been removed with the fraudulent intention of evading payment of the rent, the plaintiff brought this action for damages. When the bailiff made the seizure the plaintiff forbade him to do so, but he did not at any time inform H. or the bailiff that he claimed some of the goods to be his; and after the seizure his attorney wrote several letters to H., demanding that the goods be given up, and referring to them as belonging to the plaintiff's wife.

Counsel for defendants contended that the plaintiff was estopped by his silence as to his ownership of some of the goods, and by the language of the attorney's letters, from setting up the present claim.

Held, (Dubuc, J., dissenting), that the defendants had failed to prove that they had been induced to do anything, or to abstain from doing anything, by reason of what the plaintiff had said or done, or omitted to say or do, and that the plaintiff was entitled to recover.

Pickard v. *Sears*, 6 A. & E. 469, distinguished.

ARGUED: 9th December, 1893.
DECIDED: 10th March, 1894.

Statement.

THIS was an action of trespass and trover, tried at the Western District Assizes by Mr. Justice Killam, without a jury, when the plaintiff had a verdict for $215. The defendants then moved to set this verdict aside, and to enter a verdict for them, or for a non-suit or for a new trial.

The plaintiff's wife was the tenant of certain premises in Brandon under a lease from Mrs. Johnson, dated 1st May, 1893, for a term of one year, at a rent of $780 payable in equal portions on the first day of each month in advance.

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On these premises she carried on business as John A. Montgomery & Co. There seemed to be no dispute that the rent for the month of September was unpaid, but it was alleged that, although by the terms of the lease the rent was payable in advance, there was an agreement that it should not be paid until the first of the next month. On the morning of the 25th of September, it was found that everything had been removed from the premises, and on the same day the defendant Hellyar, as agent of the landlord, signed a distress warrant addressed to his co-defendant Aylesworth, directing him to "Distrain the goods and chattels of Mrs. Edith Montgomery, the tenant in the house he now dwells in, or upon the premises in his possession, situated corner 9th Street and Rosser, or where removed to, for the sum of $520, being the amount of rent due to me on the same on the 1st day of May, 1894." Under that warrant, Aylesworth on the same day seized a large quantity of chattels and effects then in the rear of a shop occupied by a firm of Gray & Davidson, and distant about one hundred feet from the premises comprised in the lease. From there the goods seized were, in the evening, removed to auction rooms on an adjoining street. Next day the defendant Hellyar received a letter from the attorneys of the plaintiff, in which they notified him that he would be held responsible in damages for the illegal seizure of the goods and chattels of John A. Montgomery & Co., under an alleged claim for rent. On the same day the attorneys wrote a letter to Aylesworth the bailiff, stating that they had been consulted by the plaintiff in reference to the legality of the seizure of certain goods and chattels under an alleged claim for rent, and had advised that the seizure having been made off the demised premises, he and the party issuing the warrant to him were liable to an action for damages on account of the seizure, and that unless the seizure was at once abandoned an action would be brought. The next day the attorneys wrote another letter to Hellyar, asking if he intended releasing the seizure of Mrs. Montgomery's chattels, stating that the seizure

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was illegal for several reasons, and that a writ would be issued against him and the bailiff unless the goods were given up that night. On the 28th of September the writ beginning this action was issued, and after that part of the goods seized were sold by auction. But before this, the claim for rent had been reduced to $65. This amount apparently would have been paid, had payment of the costs of the distress not been insisted upon. Some of the goods seized were proved to have been the property of the plaintiff and not of his wife, the tenant of the demised premises, but the plaintiff did not inform the defendants of this at any time before the issue of the writ nor until after the goods had been sold.

Clifford Sifton, A. G., and *O. H. Clark*, for defendants, referred to *Ferrier* v. *Cole*, 15 U. C. R. 561; *Lewis* v. *Read*, 13 M. & W. 834; *Freeman* v. *Rosher*, 13 Q. B. 780; *Miles* v. *Furber*, L. R. 8 Q. B. 77; *Dederick* v. *Ashdown*, 15 S. C. R. 227; *Crowther* v. *Ramsbottom*, 7 T. R. 655; *Etherton* v. *Popplewell*, 1 East, 139; *Bell* v. *Irish*, 45 U. C. R. 167; *Trent* v. *Hunt*, 9 Ex. 14.

J. S. Ewart, Q. C., for plaintiff, referred to *Lambert* v. *Marsh*, 2 U. C. R. 39; *Pullen* v. *Palmer*, 3 Salk. 206.

TAYLOR, C. J.—It is urged that as against the defendant Hellyar a nonsuit should have been entered, because there is no evidence connecting him with any seizure of the plaintiff's goods, or showing that he had a knowledge that any goods of the plaintiff had been seized by his co-defendant until after the issue of the writ in this action. Now it appears that when the bailiff found the goods he went to Hellyar, told him where they were, and asked him to send someone or his clerk to see if he could identify them. Hellyar then sent his clerk with the bailiff, and on arriving at the place where the goods were, they found the plaintiff, who, in answer to a question put by the bailiff, admitted that the goods were those which had been in the shop in question, but forbade the bailiff to seize them. In his evidence Hellyar says the bailiff was acting under his

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authority and according to his instructions when he seized these particular goods in the rear of Gray & Davidson's shop. Then he received from the bailiff out of the proceeds of the sale the $65 which was the amount of rent claimed to be due. As is said in *Woodfall's Landlord & Tenant*, 459 (13th ed.), a slight recognition by the landlord of what has been illegally done on his behalf may amount to an adoption and ratification of such illegal acts, and so render him personally liable for them. In *Haseler* v. *Lemoyne*, 5 C. B. N. S., 530, where, a bailiff having made a seizure, the tenant's attorney wrote complaining, the landlady sent for her agent who had signed the warrant, and on being informed that the goods had been seized and were about to be sold, said she would leave the matter in his hands, she was held liable.

It is quite clear that the defendants cannot justify under the lease made by Hellyar and Mrs. Sifton to Gray & Davidson, and under which they subsequently issued a distress warrant. The evidence entirely fails to show that the goods in question were seized upon any part of the premises comprised in that lease. It is merely shown that they were seized in rear of the shop of Gray & Davidson, and what property was demised by the lease to that firm is left quite uncertain.

I cannot see that the plaintiff is in any way estopped from asserting the claim he now makes. He positively forbade the bailiff to seize the goods when he was first about to do so, and Hellyar was informed of this. He was under no obligation to state then the nature or ground of his objection to the seizure.

It is true letters were written by his attorney, the first stating that the defendant Hellyar would be held responsible in damages for the illegal seizure of the goods and chattels of John A. Montgomery & Co., under an alleged claim for rent, while the other spoke of the goods seized as Mrs. Montgomery's chattels. But these letters were both written after the seizure, after the wrong complained of had been done. I cannot see how the defendants were,

by the plaintiff's silence at first as to the reason for his objecting to the seizure, or afterwards by these letters, induced to do, or misled into doing anything. When the bailiff was about to seize, the plaintiff objected to his doing so, yet, apparently without any inquiry, the seizure and then the sale were proceeded with.

Several cases on this point were cited for the defendants, but in all of these there was something more than mere silence. *Pickard* v. *Sears*, 6 A. & E. 469, was an action of trover in which machinery having been sold by the sheriff under an execution, the plaintiff claimed it under a mortgage from the execution debtor. He had a verdict, but a rule for a new trial was made absolute. It appeared that when he knew of the seizure and intended sale, he went along with the mortgagor to the attorney of the execution creditor, consulted him about the state of affairs and the course to be taken, and spoke of his being a creditor, but said nothing about his mortgage. Lord Denman, C. J. said, "The rule of law is clear that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Or, as the same learned Judge put it in *Gregg* v. *Wells*, 10 A. & E., 90, "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has himself assisted in deceiving." In that case the plaintiff stood by, allowing a man to get credit as the owner of the goodwill and fixtures of a business, the plaintiff being himself the true owner. So in *Miles* v. *Furber*, L.R. 8 Q.B. 77, a company was held estopped from distraining upon goods warehoused on premises owned by them, and they were so because they had allowed themselves to be held out as the persons with whom the goods had been warehoused. In *Niven* v. *Belknap*, 2 Johns. 573, Belknap

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owned a farm which he mortgaged to Brush, the mortgage containing a power of sale. The plaintiff desired to buy the farm, but was told by Belknap that he could not sell, as he had made it over to Brush in satisfaction of a mortgage, although he had been allowed to remain in possession until he could get another place. He, however, offered to go, and did go, with the plaintiff to Brush, and advised him to sell. Brush sold and conveyed to the plaintiff, who went into occupation and spent large sums in improvements. Belknap and his son then set up a claim that the plaintiff was only a mortgagee in possession, but they were held estopped from asserting such a claim. In *Lines* v. *Grange*, 12 U.C.R. 209, the sheriff seized an engine. The evidence was conflicting, whether Lines said to the bailiff he could take it, or whether he said that if he did take it he would do so on his own responsibility. At the sheriff's sale his partner and co-plaintiff bid on the engine, and it was held that they were not estopped from bringing an action of trespass.

I cannot, upon the evidence, find that the defendants were induced to do anything, or to abstain from doing anything, by reason of what the plaintiff said or did, or omitted to say or do. Unless that is proved he cannot be estopped from now averring the truth or asserting a demand.

In my opinion the verdict entered by my brother Killam should stand, and the present motion be dismissed with costs.

BAIN, J.—There is no doubt that the plaintiff and his wife removed the goods with the fraudulent intention of trying to evade payment of the rent. The seizure, however, was made off the demised premises; some of the goods seized and sold belonged to the plaintiff and not to his wife, who was the tenant; and, as I think the evidence shows that the seizure was made by Aylesworth by Hellyar's authority, I see no ground for questioning the correctness of the verdict that my brother Killam entered against both defendants.

As the distress was made elsewhere than on the demised premises, the provisions of the 11 Geo. 2, c. 19, s. 1, do not apply; and if the defendants intended to rely on the fact that there was rent due on the Gray & Davidson premises, on which the goods were when they were seized, as justification for the seizure, they should have pleaded the defence specially. *Furneaux* v. *Fotherby*, 4 Camp. 136. But at all events the facts on which the defendants would have had to rely for this defence would not be justification for the seizure that was made.

I do not think the evidence would justify any other conclusion than that the defendant Hellyar was legally responsible for the illegal seizure that was made by the bailiff. A principal is not responsible for a trespass committed by his agent unless he gave prior authority or subsequent assent. But here, I think there is ample evidence of both authority and ratification. Looking at the matter in the most favorable view that it is possible to take of Hellyar's position, it is clear that after he knew the plaintiff had forbidden the bailiff to interfere with the goods, he left it to the bailiff to decide whether he would proceed with the distress or not. The bailiff did go on with it; and had it turned out that the seizure was valid, Hellyar would have taken, and certainly intended to take, the benefit of it; and now that it turns out that the seizure was illegal, he cannot say that it was made without his authority. But Hellyar himself has to admit in his cross-examination that Aylesworth was acting under his authority and according to his instructions when he seized the goods on the Gray & Davidson property, and this admission is decisive of the question of Hellyar's liability. Doubtless when he authorized and instructed Aylesworth to seize the goods he did not know that some of them belonged to the plaintiff, and he did not intend to authorize him to commit a trespass. That, however, has nothing to do with the question. He authorized the seizure and he is as much responsible for the consequences of his bailiff's action as if it had been his own.

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Then it is argued that the plaintiff is estopped from asserting the goods belonged to him, because in two or three letters written by his solicitor to Hellyar, the goods are spoken of as Mrs. Montgomery's. But these letters were written after the seizure had been made, and could not, I think, possibly amount to an estoppel. At most they were only admissions to be taken into consideration along with the other evidence of the ownership of the goods. It is true that the plaintiff does not appear to have told the bailiff at the time the seizure was made that some of the goods belonged to him. But he forbade him to seize the goods, and having done this, he was under no legal obligation that I can see to explain that he claimed some of the goods as his own. Neither by words nor conduct does he seem to have given the bailiff cause to infer or suppose that the goods were not his but his wife's; and under the circumstances there was no estoppel from his mere silence.

I agree with the Chief Justice that the verdict should be affirmed with costs.

DUBUC, J.—The plaintiff's goods would have been answerable for the rent had they been seized on the leased premises, but the lessor who can follow and seize his tenant's goods clandestinely removed from the leased premises, has no such right over goods belonging to any other party.

At the trial, the defendants attempted to justify under another lease in which Hellyar and Mrs. Sifton were lessors and Gray & Davidson were lessees. But, in the first place, it was not clearly shown that the goods, when seized, were on the property leased by Hellyar and Sifton to Gray & Davidson. In the second place, it was proved beyond doubt, that the seizure was in fact made under the distress warrant given by Hellyar to distrain the goods of Mrs. Montgomery for the rent due by her, which he could not do under the lease to Gray & Davidson, and that they were seized under no other authority. My brother Killam held

that under *Dederick* v. *Ashdown*, 15 S. C. R. 227, such justification could not be allowed, and I think he was quite right in so holding.

In *Crowther* v. *Ramsbottom*, 7 T. R. 654, it was held that in trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process if he had it in fact at the time, although he declared then that he entered for another cause.

In *Lambert* v. *Marsh*, 2 U. C. R. 39, the Court held that where a party assumes to act as principal in making a distress for rent he cannot afterwards justify as bailiff on the subsequent confirmation of the party entitled to the rent.

The defendant Hellyar contends that he only authorized the bailiff to seize the goods of Mrs. Montgomery, his tenant, and that he is not responsible for the trespass committed by his agent in exceeding his authority. *Lewis* v. *Read*, 13 M. & W. 834, and *Ferrier* v. *Cole*, 15 U. C. R. 561, were quoted in support of that proposition. In the first of these cases, it was held that the landlord would not be liable unless he had ratified the act of his bailiff, with knowledge of the irregularity, and in the second case, it was shown that the act was done without the landlord's knowledge, and there was no evidence of his having adopted the act. The same doctrine is found in *Freeman* v. *Rosher*, 13 Q.B. 780, where it was held that a principal is not liable in trespass for the act of his agent, unless he authorized it beforehand, or subsequently assented to it with knowledge of what had been done.

In this case, Hellyar was made aware that the plaintiff had forbidden the bailiff to seize the goods, but he adopted the act of his bailiff in the seizure of them.

Another point, however, was urged at the argument which does not appear to have been raised before my brother Killam at the trial. The defendants contend that the plaintiff should be estopped from claiming the goods as his, or from claiming damages for their value, because,

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by his words and acts, he did not make known to the bailiff or Hellyar that the goods in question belonged to him, but, on the contrary, led them to believe that his wife was the owner thereof. The doctrine of estoppel is well laid down by Lord Denman in *Pickard* v. *Sears*, 6 A. & E. 469, where he says: "The rule of law is clear that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The plaintiff's conduct in connection with the matter was anything but straightforward, and there were two things by which the defendants were led to believe that the goods belonged to Mrs. Montgomery. In the first place, he forbade the bailiff taking the goods, but never said or intimated to him that he claimed them as his property. He knew the goods were seized for the rent of the building leased to his wife; he saw the notice of sale which set out that the goods were Mrs. Montgomery's goods, and, although he had several communications with the bailiff in regard to the matter between the seizure and the sale, he admits that not a word was said by him as to his being the owner of any of the goods. In the second place, he caused his solicitors to write three letters which were produced, two to Hellyar and one to the bailiff. In one of them the goods are referred to as the goods and chattels of John A. Montgomery & Co., and he states in his evidence that John A. Montgomery & Co. is the style of the business carried on by his wife; in another, the goods are mentioned as being Mrs. Montgomery's chattels; and in a third one the solicitors say that they have been consulted in reference to the legality of the seizure of certain goods and chattels under an alleged claim for rent, and the illegality mentioned is that the seizure was made off the demised premises. There is nothing there intimating that the plaintiff claimed to be the owner of any of the goods;

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on the contrary, every thing seems to convey the idea that the goods were the property of Mrs. Montgomery.

The plaintiff knew perfectly well that the goods were seized for the rent due by Mrs. Montgomery, and as being Mrs. Montgomery's goods. He could not be mistaken as to that. Was it not his duty then to correct the mistake, and notify or inform the bailiff or Hellyar that some of the goods were his? I should think so. But he stands by and allows the bailiff to proceed to the sale of the goods without saying a word to represent to him the true state of things as to his ownership of some of the chattels. The bailiff was forbidden to take and sell the goods; but assuming, as he had a right to assume from the words and conduct of the plaintiff himself, that they were Mrs. Montgomery's goods, he was justified in disregarding the plaintiff's pretention that the seizure was illegal because the goods were seized off the demised premises. It may be reasonably surmised that the plaintiff could have prevented the sale of his goods if he had only stated they belonged to him; but, as he misled the bailiff in giving a wrong ground to oppose the seizure and sale, the bailiff could properly treat such bad ground as of no avail, and go on with the sale. When a bad reason was given, the bailiff could not suppose that there was some other good reason withheld from him.

The plaintiff's conduct was very objectionable on another ground. The lease was for one year, and had still seven months to run. The plaintiff, without any notice or intimation to the landlord, assisted his wife in removing the goods from the premises, at an early hour in the morning, when there was one month's rent due and unpaid. When asked at the trial his reason for doing so, he did not give any. Here is what he says on that matter:

Q.—Why did you decide to remove the goods between the hours of seven and nine in the morning?

A.—Well, I don't know that there was any particular reason. I wanted to get them off the premises.

Q.—You had no other reason?

A.—No other reason under the sun.

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The reason, however, is very obvious. He says that on several occasions he had asked Hellyar to try and get another tenant for the place; but he admits that he never notified him that he was going to leave. It is manifest that he could have no honest purpose in removing the goods as he did; if he had had one he would likely have mentioned it. His intention was clearly to get rid of the lease, and thereby avoid paying the rent which the landlord was justly entitled to receive.

It is, of course, for the landlord, who has distrained on goods removed from the demised premises, to show that they were removed with an intention to defraud him of his remedy by distress; and the mere removal of goods by the tenant from the premises demised, when rent is in arrear, is not of itself fraudulent as against the landlord so as to justify him in pursuing them. He must show that they were removed with a view to elude distress. *Inkop* v. *Morchurch*, 2 F. & F. 501; *Parry* v. *Duncan*, 7 Bing. 243. But the admissions of the plaintiff and the circumstances under which the goods were removed show conclusively, to my mind, that the thing was done with a fraudulent intent.

By recovering damages herein the plaintiff is getting, it seems, the benefit of his own fraud. As, by his conduct and by the letters which he caused to be written by his solicitors, he led the defendants to be deceived as to the true ownership of the goods seized, I think he should be estopped from claiming the said goods as his property and recovering damages because they were sold under distress for rent.

In my opinion, the verdict should be set aside and a non-suit entered.

Verdict for plaintiff sustained and motion dismissed with costs.

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MCWILLIAMS V. BAILEY.

Before KILLAM, J.

Practice in Equity—Stop order—Charging order—Set off of costs—Stay of proceedings to enable creditor to procure a charging order.

A stop order in Equity gives no charge on a fund in court in favor of the party obtaining it, and he is not entitled to an order for payment out of court as against his judgment debtor without first getting a charging order on the fund.

The application of the judgment debtor for payment out to him of the fund in court to which he had been found entitled was, however, enlarged a week to enable the judgment creditors to apply for a charging order, and their stop order was continued meantime.

A set-off of costs of a former application against those of a later one, can only be allowed as part of the order made on the later application, or upon a special application after both sets of costs are taxed.

ARGUED: 22nd February. 1894.
DECIDED: 19th March, 1894.

Statement.

THE plaintiff and defendant were in partnership, when a bill was filed and a decree made dissolving the partnership. The Master's report found that McWilliams was entitled to the assets of the concern, except a trifling amount. Morrison and Smith, execution creditors of McWilliams, having obtained a stop order on the fund in Court, applied for payment out. The plaintiff also applied for payment out to him.

J. Martin, for plaintiff.

T. G. Mathers, for execution creditors.

KILLAM, J.—It appears to me that the practice of charging moneys in the hands of the Accountant-General of the Court of Chancery under 1 & 2 Vic., c. 110, and 3 & 4 Vic., c. 82, applies to moneys paid into this Court on its equity side.

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There is no trace in the English reports or text-books, so far as they have been cited to me, or as I have examined them, of the doctrine enunciated in *Dawson* v. *Moffatt*, 11 O. R. 484, that the Court has inherent jurisdiction to grant equitable execution against a fund in Court and direct payment of it to the judgment creditor of the party entitled, without proceeding under these Acts. I do not think that I should adopt that doctrine. It is true that in *Courtoy* v. *Vincent*, 15 Beav. 486, the Master of the Rolls continued a stop order upon the fund, and that in *Widgery* v. *Tepper*, 6 Ch. D. 370, Lord Justice Cotton spoke of this as "something like an equitable execution." But nowhere was it suggested that the Court could go farther than stay payment until the judgment creditor could apply for a charging order. In *Miles* v. *Presland*, 2 Beav. 300, a charging order was refused by the Master of the Rolls on the ground that it could be granted only by a judge of one of the courts of law, and no suggestion was made that any other relief could be given by him.

A stop order gives no charge; it operates only as notice to the Court of a claim or as an injunction to prevent payment.

The application of the judgment creditors should be dismissed with costs, to be set off against the judgment debt.

The application of the plaintiff will be enlarged a week to enable the judgment creditors to apply for a charging order or take such other step as they may deem proper, the stop order to continue.

As to the application for set-off of costs of a former application, I think this should have been done when the order was made, or be postponed until the costs are taxed, which, I am told, has not been done. It is only when the costs are taxed that there is a final judgment for their payment, to which the principle of setting off cross-judgments can be applied.

I do not decide that there should be such a set-off when the costs are taxed, but merely refuse that part of the applica-

tion without costs, without prejudice to any application after taxation of the costs. 1894. Judgment. KILLAM, J.

Application dismissed with costs.

MARTIN V. MORDEN.

Before TAYLOR, C.J.

Real Property Act—Caveat—Description of land.

A caveat filed under the Real Property Act must contain a proper description of the land in question, and it is not sufficient that such description is given in the affidavit verifying the caveat which is filed with it.

The petition of the caveators, following a caveat which was defective in this respect, was dismissed with costs.

Jones v. *Simpson*, 8 M.R. 124, and *McKay* v. *Nanton*, 7 M.R. 250, followed.

ARGUED: 11th January, 1894.
DECIDED: 15th January, 1894.

THIS was a petition under the Real Property Act presented by the caveators. The caveatee appeared and filed a duly verified copy of the document lodged as a caveat with the District Registrar. He took the objection that no caveat had been lodged because the document contained no description of the land in question. The caveators contended that the land was sufficiently described, and that in any event, it was fully described in the affidavit which supported the caveat and which was annexed to it. Statement.

Section 135 of the Act provides for any person claiming any estate or interest in land described in an application to bring the same under the new system, lodging a caveat "in the form in schedule O to this Act." The form in schedule O is a notice to the District Registrar, that the person lodging the caveat, giving his name and addition, claims a particular estate or interest, which must be set out, "in the land described as (*description of land*) in the application of," &c. The document here was headed "Application No. 8071," and stated that the caveators, naming and describing them properly, "claim to have an interest in the

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lands described in the application of James Alfred Morden, under and by virtue," &c. It contained in itself nothing to show what the lands were.

J. Martin, for caveators.

W. H. Culver, Q.C., for caveatee.

TAYLOR, C.J.—I must hold that the caveat is defective and the defect is not cured by a description of the land appearing in the affidavit. In *Jones* v. *Simpson*, 8 M. R. 124, the objection was that the addition of the caveator was not set out in the caveat. It did appear fully in the affidavit. There my Brother Bain held that the direction in the statute, that the caveat itself shall state the name and addition was explicit, and was not complied with by stating these in some other document. The statute is just as explicit in requiring a description of the land to be given. It does not say that the caveator claims an interest in the land described in the application of the caveatee, but that he claims an interest "in the land described as," giving the description, "in the application of" the caveatee. In such a matter as a caveat, accuracy in the description of the land is most important, and the direction of the statute in regard to it is, in my opinion, imperative. See also *McKay* v. *Nanton*, 7 M. R. 250.

If giving in the affidavit the addition of the caveatee did not cure the defect arising from the omission of it in the caveat, *a fortiori* the defect as to describing the land cannot be thus cured. Section 172 of the Act does not get over the objection, even if it applies to caveats, which it does not seem to do. If the caveat is, as I hold it is, defective, it is so for more than an informality or technical irregularity. And if it is defective, there is no caveat, and I have no jurisdiction to entertain the petition. The filing of a caveat which complies with the directions of the statute, is a condition precedent to the Court having any jurisdiction in the matter. *McArthur* v. *Glass*, 6 M. R. 224.

The petition must be dismissed with costs.

Petition dismissed with costs.

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MARTIN v. MORDEN.

Before BAIN, J.

Real Property Act—Issue between caveator and caveatee—Who should be plaintiff.

The caveators, by their petition under the Real Property Act, claimed a charge on the land in question by virtue of a writ of execution against the lands of one Andrew Morden, whom they alleged to have been the owner of the land when their writ was placed in the Sheriff's hands.

The caveatee, who had applied for a certificate of title, claimed the land under a tax sale deed, and in answer to the petition further set up that the land was exempt from seizure under execution as having been the homestead of Andrew Morden, also that he was advised and believed that the caveators' writ had not been kept in force by renewal, but these matters were not sufficiently proved by his affidavit.

Held, that the burden of proof was on the caveatee, and that he must be the plaintiff in the issue directed on the petition.

ARGUED: 1st March, 1894.
DECIDED: 7th March, 1894.

Statement.

THE caveators, by their petition, claimed to have a charge on the land for which the caveatee had applied, by virtue of a writ of execution against the lands of one Andrew Morden, who, they alleged, was the owner of the land when the writ was placed in the Sheriff's hands. The caveatee shewed cause in the first place by setting up title and possession under a tax sale deed, and then he alleged in his affidavit that the land was the homestead of Andrew Morden and was the exemption of 160 acres allowed him under the statute in force in Manitoba, and also that he was advised and believed that the caveator's writ of execution had not been kept renewed and that it was not then in force.

J. Martin, for caveators.

W. H. Culver, Q.C., for caveatees.

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Judgment.
BAIN, J.

BAIN, J.—It is clear that if the caveatee were relying wholly on his tax sale deed, the burthen of proof to establish his title would lie on him. He does not deny that Andrew Morden was the owner of the land, as is alleged in the petition; and the caveators, claiming a charge under the writ of execution against Morden, are claiming under his title, and in privity, as it were, with him, and I do not see that the position is changed by the other grounds taken. Of course, if the caveatee had proved conclusively that the caveator's execution had expired, or that this land was free from seizure under it, he would have completely answered the petitioner's claim, and there would be no object in directing an issue. The caveators have not met the caveatee's allegation of his information and belief that their writ has expired, but I cannot consider that either allegation has been proved, nor did the caveatee's counsel argue that they were. His contention was that they had the effect of shifting the burthen of proof. But in the absence of proof to the contrary, I must assume the caveators have the charge they assert, and on account of having which they were served with notice of the application. The caveatee is entitled to a certificate of title as against Morden and those claiming under his title, only if the sale of the land to him for arrears of taxes was valid, and it is for him to shew that the sale was valid.

The caveatee should therefore, I think, be the plaintiff in the issue.

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SMITH V. SMYTH.

Before KILLAM, J.

County Court—Appeal from—Application for new trial or to reverse judgment at trial—Weight of evidence.

An application by the defendant for a new trial, or to reverse or vary the judgment of one County Court Judge in favor of the plaintiff, having been made to another County Court Judge under section 308 of The County Courts Act, R. S. M., c. 33, the latter ruled that it should not be granted unless the verdict appeared to be unreasonable or unjust, or a perusal of the evidence showed that the trial Judge must, in arriving at his decision, have omitted, through oversight, to consider some undisputed fact, or that some undisputed fact or some plain principle of law applicable to the facts and favorable to the defendant could not have been brought to his attention, and the application was dismissed. Defendant then appealed to a Judge of the Queen's Bench against this decision.

Held, that the principles thus laid down were correct, and that the appeal should be dismissed, although, in the case of an appeal under section 315 of the Act, the verdict would have to be reviewed upon the facts in so far as the Court above could do so without having the witnesses before it.

ARGUED: 7th November, 1893.
DECIDED: 16th January, 1894.

Statement.

APPEAL from a decision of Judge Cumberland, of the County Court of Brandon, dismissing an application to reverse a judgment of Judge Walker, formerly of the same Court.

The action was brought for commission on a sale of land for the defendant, and the learned Judge gave judgment for the plaintiff. An application was then made for a new trial or for a reversal of the verdict. This motion came before Judge Cumberland, who had in the meantime become Judge of the County Court for the district in the place of Judge Walker. Judge Cumberland proceeded upon the principle that he should not reverse the verdict unless it appeared to him unreasonable and unjust, or unless, from

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a perusal of the evidence it appeared to him beyond all doubt that the trial Judge could only have arrived at his verdict by omitting, through oversight, to consider some undisputed fact or that some undisputed fact or some plain principle of law applicable to the facts and favorable to the defendant could not have been brought to his attention. The application was made under s. 308 of The County Courts Act, R. S. M., c. 33, which provides that "A new trial or re-hearing may be granted or a judgment reversed or varied in any action or suit, or in any matter or proceeding, upon sufficient cause being shown for that purpose."

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

W. H. Culver, Q.C., for respondent.

KILLAM, J.—Under the clause above referred to, it appears to me that, where a verdict has been entered for a plaintiff by a Judge of a County Court, upon evidence insufficient to be submitted to a jury, it should be reversed, but where the question is only one of the weight of evidence or of the inferences to be drawn from the evidence, the principle adopted by the learned Judge is applicable.

If this were an appeal from the original decision under s. 315 of The County Courts Act, I should be obliged to review it upon the facts in so far as I could do so when I had not had the witnesses before me. But it is an appeal from a decision on the application for a new trial or to reverse or vary the verdict, and that, I think, should only have succeeded if there had been no sufficient evidence for the plaintiff to warrant his case being submitted to a jury, or if the verdict of the trial Judge had been arrived at by some wrong interpretation of the law or some unreasonable inference of fact or oversight.

In my opinion, the verdict of the learned Judge of the County Court was in no way unreasonable or unjust, and there is nothing to suggest that it was given through any oversight or misconception of the evidence. It was reasonably open to a jury to find as he did upon the evidence, and

I cannot see that Judge Cumberland could have acted otherwise than as he did upon the application before him. I must, therefore, dismiss the appeal with costs.

1894. Judgment. KILLAM, J.

Appeal dismissed with costs.

An appeal to the Full Court from the above decision was heard in Easter Term following and dismissed with costs, the Court holding that, under the circumstances disclosed on the evidence, the County Court Judge appeared to have been justified in giving a verdict for plaintiff.

Re RAPID CITY FARMERS' ELEVATOR CO.

Before BAIN, J.

Company—Winding up—Petition for winding up order—Allegation of insolvency—When Company insolvent within the meaning of The Winding Up Act—Pleading assignment of a chose in action.

In a petition for an order against a company under The Winding Up Act, R. S. C. c. 129, the petitioner alleged that the Company "is insolvent and utterly unable to pay your petitioner's said debts and its other debts."

Held, that this was not equivalent to stating that the Company was "unable to pay its debts as they became due," and was not a sufficient allegation of the Company's insolvency within the meaning of section 5, subsection *a* of the Act, and that the petition must be dismissed with costs.

The petitioner's claim was based on a judgment alleged to have been recovered by another person, and acquired by the petitioner, of which he "is now the *bona fide* holder and owner."

Held, a sufficient statement of the claim of the petitioner, without an allegation that the judgment had been assigned by an instrument in writing.

ARGUED: 29th January, 1894.
DECIDED; 1st February, 1894.

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Statement.

PETITION presented, for the winding up of the above named Company, by a judgment creditor.

The objections taken to the petition were that it did not shew that the Company was insolvent within the meaning of The Winding Up Act, and that the petitioner, Walterhouse, was a creditor who had a right to file a petition.

G. A. Elliott, for petitioner.

O. H. Clark, for execution creditor, cited *Ex parte Blanchett*, 55 L. J. Q. B. 327, and *In re Paris Skating Rink Co.*, 5 Ch. D. 959.

BAIN, J.—The petition must, of course, make out a case that *prima facie*, would justify the Court in making a winding up order, and if it does not, evidence cannot be received or looked at to remedy or supply its defects.

The second objection must, I think, be overruled. The judgment against the Company, on which the petitioner bases his petition, was not recovered by the petitioner himself; but he alleges that he acquired it, and that he is now the *bona fide* holder and owner of the judgment debt. He does not allege an assignment of the judgment debt to him in writing, but I think the rule should be the same on a petition of this kind as in ordinary pleadings, *i. e.*, as I said in *West* v. *Lynch*, 5 M. R. 167, that when it is stated generally in a pleading that there is an agreement, or assignment or other contract, and it does not appear on the face of the pleading that it is invalid, the Court will assume that it is valid and leave its validity to be established at the trial or hearing. From what is alleged in the petition, it is reasonable to infer that the debt has been legally assigned to the petitioner, and in this respect, I think the petition is sufficiently particular.

But The Winding Up Act applies only to companies which are insolvent in the sense in which the word is used in the Act, and I think that, before the Court can entertain the application, the petitioner must allege that the Company is insolvent for one or more of the reasons for which

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BAIN, J.

a company is to be deemed insolvent. As Jessel, M.R., pointed out in *In re Langham Skating Rink Co.*, 5 Ch. D. 669, if a petition, when fairly read, does not state a case which could authorize the Court to make a winding up order, it should be dismissed. *In re Wear Engine Works Co.*, L. R. 10 Ch. 188.

From the statement that the Company "is insolvent and utterly unable to pay your petitioner's said debts and its other debts," I suppose the petitioner wishes to shew that the Company is insolvent under sub-sec. *a*, of sec. 5, *i. e.*, that it is unable to pay its debts as they become due, and if he does, it is a pity that he was not content to use the words that Parliament found sufficient to express what it meant when it said that a company is to be deemed insolvent on this account.

But in a particular like this, a petition must be precise and definite, and I do not think it is reading it with unfair strictness to hold that it does not shew that the Company is insolvent. It may be unable to pay all its debts if called on for immediate payment. But what must be shown is that it is unable to pay its debts as they become due; and the debts the petition speaks of may, or may not, have become due.

Section 86 gives the Court wide powers in the way of allowing amendments, and I gave Mr. Elliott an opportunity to ask for leave to amend. He was satisfied, however, that the petition was sufficient, and now the only order I can make is that the petition be dismissed with costs.

Petition dismissed with costs.

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Re RAPID CITY FARMERS' ELEVATOR CO.

Before TAYLOR, C.J,

Winding up—Company—When company deemed to be insolvent—Proof of insolvency under The Winding Up Act.

In supporting a petition for an order against a Company under The Winding Up Act, R. S. C., c. 129, it is not sufficient to show that several demands of payment have been made by the creditor without success, unless a demand in writing has been served on the Company in the manner in which process may legally be served on it, under section 6 of the Act; nor can the Company be deemed to be insolvent within the meaning of the Act, because an execution has been returned *nulla bona* by a County Court bailiff.

The provisions of sections 5 and 6 of the Act are exclusive, and a petitioner for a winding up order must strictly prove the existence of one or more of the circumstances there set forth, or his petition will be dismissed.

Re Qu'Appelle Valley Farming Co., 5 M. R. 160, followed.

In re Flagstaff Mining Co., L. R. 20 Eq. 268, and *In re Globe New Patent Iron Co.*, L. R. 20 Eq. 337, distinguished.

ARGUED: 5th March, 1894.
DECIDED: 20th March, 1894.

Statement. PETITION by a creditor of the above named Company, who alleged that he had been unable to obtain payment of a debt due to him, and who prayed for an order to wind up the Company. It was claimed that the affidavit showed the Company to be insolvent under both clause *a* and clause *h* of section five of The Winding Up Act.

It was shown that an execution against the Company's goods had been returned *nulla bona* by a County Court bailiff; there was also evidence of several demands for payment having been made without success.

It was not shown, however, that any of these were written demands served upon the Company in the manner in which process might legally be served upon it, or that sixty days had elapsed during which the

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Company had neglected to pay or secure or compound the debt to the satisfaction of the creditor. It was argued that this was not necessary, that section six was only an enlarging provision, and that the creditor might show in any other way he chose that the Company was unable to pay its debts as they became due.

G. A. Elliott, for petitioner.

O. H. Clark, for execution creditor, cited *In re Gold Hill Mines*, 23 Ch. D. 210.

TAYLOR, C. J.—In *Re Qu'Appelle Valley Farming Co.*, 5 M. R. 160, I held that section six of The Winding Up Act declares when it is that a company is to be deemed unable to pay its debts as they become due, and that a creditor who seeks to bring a case within clause *a* of section 5 must show that he has proceeded in the manner provided for in that section. It is after failure to pay upon a demand served as there pointed out that a company is to be deemed unable to pay its debts as they become due. In that case a demand had been served upon two directors of the company, and the debt had been neither paid, secured nor compounded. This was, however, held not sufficient evidence of inability to pay, because the demand had not been served in the manner in which process might legally be served on the company. The view I then took and now take of the meaning and intent of this section seems supported by the language of the Lord Justices in the *Catholic Publishing Co.*, 2 D. J. & S. 116.

Has the case been brought within clause *h*? There is no evidence that the Company has permitted an execution under which a seizure has been made, to remain unsatisfied till within four days of the time fixed for a sale thereunder, or for fifteen days after the seizure, but it is sworn that an execution has been returned *nulla bona* by a County Court bailiff. In *Re Qu'Appelle Valley Farming Co.* already referred to, I held that executions having been so returned, was not sufficient to bring a company under clause *h*. It

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may be within the spirit of the clause, but it is not within the letter of it.

It was argued that a literal compliance with section 5 is not necessary and in support of this two cases were cited. *In re Flagstaff Mining Co.*, L.R. 20 Eq. 268, was a case in which, the debt having been paid after service of the petition, the question of costs came before the Court. The petitioner, a judgment creditor, had not issued an execution, and the objection was taken that under section 80, sub-sec. 2, of the English Act, the Company could not be deemed unable to pay its debts, unless execution had actually been issued and returned unsatisfied in whole or in part. In answer to this it was shown, as the reason for not issuing execution, that the Company's solicitor had informed the petitioner that there was no property of the Company on which he could levy. Hall, V. C., held such a statement evidence of the Company's inability to pay its debts, so as to relieve the creditors from the necessity of issuing execution. But section 79 of the English Act provides that a company may be wound up, (4) whenever the Company is unable to pay its debts, and section 80 says it shall be deemed to be unable to pay its debts, (4) whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts, and Hall, V. C., took the statement made to the petitioner that the Company had no property which could be levied upon, as satisfactory evidence that it could not pay. So in *In re Globe New Patent Iron Co.*, L. R. 20 Eq. 337, the dishonor of a bill of exchange was held by Sir George Jessel evidence to the satisfaction of the Court of the inability of a company to pay its debts. Now there is no such provision in our Winding Up Act.

These cases were not, as suggested during the argument, decided under the clause of the Act dealt with in *In re Agriculturist Ins. Co.*, 1 Mac. & G. 170. The clause remarked on in that case was a clause in the old Winding Up Act, 11 & 12 Vic., c. 45.

It seems to me the petitioner, to succeed, must bring himself strictly within the terms of the statute. He has failed to do so, and the petition must be dismissed with costs. 1894. Judgment. TAYLOR, C. J.

Petition dismissed with costs.

THE VULCAN IRON WORKS CO.
v.
THE RAPID CITY FARMERS' ELEVATOR CO.

Before TAYLOR, C. J., KILLAM and BAIN, JJ.

Fixtures—Conditional sale of machinery afterwards affixed to freehold of third party—Right of unpaid vendor to recover possession—Estoppel by taking proceedings under Mechanics' Lien Act.

W. & Co., having a contract to build an elevator for the defendants, purchased an engine, boiler and other machinery from the plaintiffs on the terms that the ownership was not to pass until payment in full of the price which was to be paid in cash on delivery, and that in case of default in payment the plaintiffs were to be "at liberty, without process of law, to enter upon our premises and take down and remove the said machinery." Plaintiffs were aware that the machinery was to be placed in the defendants' elevator.

It was built into the elevator in such a manner that it would have become part of the freehold if both had been owned by the defendants, but the evidence showed that it could be removed without doing serious damage to the building.

Plaintiffs first took proceedings under the Mechanics' Lien Act to realize the amount of their claim, but afterwards abandoned them. In the present suit the plaintiffs asked that the defendants might be ordered to deliver up the machinery, and to permit the plaintiffs to enter the elevator and take down and remove the machinery, and for further and other relief.

Held, that the plaintiffs were entitled to relief, but without deciding whether they should have permission to enter the defendants' premises and remove the machinery or not, as they were willing to accept a decree for payment of the value of the machinery, to be ascertained by a reference to the Master, and it was so ordered.

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Polson v. *Degeer*, 12 O. R. 275; *Stevens* v. *Barfoot*, 13 A. R. 367; and *Waterous Engine Co.* v. *Henry*, 2 M.R. 169, followed.

Held, also, that the plaintiffs were not estopped by having commenced proceedings under the Mechanics' Lien Act, as they had not gone on to judgment.

Priestly v. *Fernie*, 3 H. & C. 977, distinguished.

ARGUED: 2nd December, 1893.
DECIDED: 5th February, 1894.

Statement.

The defendants, a company incorporated 7th November, 1891, under the laws of the Province, before incorporation, and on 7th October, 1891, entered into a contract with one Moberly for building an elevator with which to carry on business. This contract was assigned by Moberly to the firm of J. Williams & Co., by whom the work was done. In October, 1891, Williams & Co. bought from the plaintiffs an engine, boiler and smoke stack, with other machinery and materials proper for the fitting up and working of an elevator for the price of $1333.50. By the terms of the purchase, payment was to be cash on delivery; the property was not to pass until payment in full; and in case of default in payment, Williams & Co. agreed that the plaintiffs should be "at liberty, without process of law, to enter upon our premises and take down and remove the said machinery." The place of business of Williams & Co. was at the City of Winnipeg, but the machinery and material were shipped by the plaintiffs to them at Rapid City where the elevator was being built. The purchase price was not paid before this was done, because, as the manager of the plaintiffs stated in his evidence, the usual understanding of the term "cash" in a transaction of that kind was any time within thirty days, and Williams & Co. promised that if he would allow the machinery to go to Rapid City they would obtain an estimate on it, and pay the cost on its arrival there. After its reaching Rapid City the machinery was placed in the defendant's elevator, and was still there. Williams & Co. did not pay the plaintiffs, and in September, 1892, a demand for the return of the

machinery was served upon the President of the defendant Company. In the December following the present suit was commenced by filing a bill which prayed that the defendants might be ordered to deliver up to the plaintiffs the machinery and articles, and to permit the plaintiffs to enter the elevator and take down the machinery and other articles and remove the same; that the defendants might be ordered to pay costs, and for further and other relief. To this bill the defendants filed an answer, and issue having been joined the case came on for hearing, when a decree was made by Mr. Justice Dubuc in favor of the plaintiffs. This decree ordered that the defendants deliver up the machinery and articles to the plaintiffs, and that the plaintiffs be at liberty to enter upon the land, premises, elevator and buildings of the defendants where the machinery was, and take down and remove the same without any hindrance from the defendants. It also provided that the expenses of the removal of the machinery, and in pulling down so much of the wall of the elevator or buildings as might be necessary for such removal, and for placing the wall in as good condition as before, were to be borne and paid for by the plaintiffs. It further gave the defendants the option of retaining the machinery by paying the actual value thereof, to be ascertained by the Master, and gave them a month within which to elect whether they would retain, or permit the plaintiffs to remove it. This decree was re-heard at the instance of the defendants.

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J. S. Ewart, Q.C., and *C. P. Wilson*, for defendants. The Court has no jurisdiction to permit plaintiffs to enter upon defendant's land. The Administration of Justice Act does not extend the jurisdiction of the Court in cases of injunction, *Day* v. *Brownrigg*, 10 Ch. D. 294; *Gaskin* v. *Balls*, 13 Ch. D. 329; *North London Ry. Co.* v. *G. N. Ry.*, 11 Q.B.D. 30; *Stannard* v. *St. Giles*, 20 Ch. D. 196; *Marsh* v. *Huron*, 27 Gr. 623; *Re Napanee*, 29 Gr. 397. Complete remedy by trover or replevin if machinery still goods, and in such case no extraordinary relief by injunction, *Gray* v.

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Maclennan, 3 M. R. 345; *Monkman* v. *Babington*, 5 M. R. 254; *Archibald* v. *Youville*, 7 M. R. 478, 481. No injunction as to goods except where of special value or fiduciary relationship, *Joyce*, 352-4; *Dowling* v. *Betjeman*, 2 J. & H. 552. Plaintiff estopped:—*Mason* v. *Bickle*, 2 A. R. 299; *Johnson* v. *Credit Lyonnais Co.*, 3 C.P.D. 39; *Ex parte Dixon*, 4 Ch. D. 133; *Ramazotti* v. *Bowring*, 7 C.B.N.S. 851; *Smith* v. *Grouette*, 2 M. R. 315. Cases where a mortgagor attaches machinery purchased under hire receipt as *McDonald* v. *Weeks*, 8 Gr. 297; *Thomas* v. *Inglis*, 7 O. R., 588; and *Waterous* v. *Henry*, 2 M.R. 169, and cases where a tenant acts in similar way as *Minshall* v. *Lloyd*, 2 M. & W. 450; *Cumberland* v. *Maryport*, [1892,] 1 Ch. 415; *Hall* v. *Hazlett*, 8 O. R. 465; 11 A. R. 749; *Polson* v. *Degeer*, 12 O. R. 275, are inapplicable because in the present case it was the plaintiff's intention to attach the machinery. Relief in trover cannot be given under the prayer for general relief, *Gaughan* v. *Sharp*, 6 A.R. 417; *Daniel*, 313. Trover does not lie for fixtures, *Oates* v. *Cameron*, 7 U. C. R. 228; *Polson* v. *Degeer*, 12 O. R. 283; *McDonald* v. *Weeks*, 8 Gr. 319; *Hall* v. *Hazlitt*, 11 A. R. 750. There was no refusal, *Stannard* v. *St. Giles*, 20 Ch. D. 195. The demand was not under the plaintiffs' seal. The plaintiffs' mechanic's lien was in full force at that time, and defendants could not remove, R. S. M. c. 97, s. 16. By filing a mechanic's lien plaintiffs have elected to treat the property as having passed to defendants, *Bigelow*, 673, 678; *Gardner* v. *Kleopfer*, 7 O. R. 603; *Sherboneau* v. *Beaver*, 30 U. C. R. 472; 33 U.C.R. 1; *National Bank* v. *United Co.* 4 App. Cas. 498. An election once made cannot be changed, *Denison* v. *Maitland*, 22 O. R. 166. The machinery was erected in an elevator upon land which is alleged by the plaintiffs to be the defendants' land. By allowing the machinery to be placed in defendants' building they have deprived themselves of the right to claim it. The case will be still stronger in defendants' favor where the machinery has been so affixed as to show the intention of making same fixtures. *Adamson* v. *McIlvanie*, 3 M. R. 29; *Dickson* v. *Hunter*, 29

Gr. 73; *Sun Life* v. *Taylor*, 9 M. R. 89; *Ewell on Fixtures*, 32.

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W. H. Culver, *Q.C.*, and *W. E. Perdue*, for plaintiffs. The contract on its face was with the defendant Company, though it was not then existing. Plaintiffs made their agreement with Williams & Co. on 13th October, 1891; there was no provision that the material supplied was to become the property of the defendants; under the agreement the contractors were tenants at will. There was no evidence that plaintiffs knew the terms of Moberley's contract. The evidence of McKechnie, plaintiffs' manager, did not show any intention to vary the agreement that the property was not to pass until paid for. If right of property not reserved by agreement, then plaintiffs cannot succeed, *Polson* v. *Degeer*, 12 O.R. 280. The bulk of the machinery was manufactured by plaintiffs. If Williams & Co. affixed material, they did so without plaintiffs' consent, *Stevens* v. *Barfoot*, 13 A. R. 366. If a stranger puts my goods on the land of A, A acquires no title to them. If defendants had bought machinery from plaintiffs under such an agreement as the present, they could not have made it a fixture. Detinue is for the return of goods, and if not, for damages. The prayer of the bill is for general relief. *Serrao* v. *Noel*, 15 Q.B.D. 550; *Cutton* v. *Wyld*, 32 Beav. 266. The plaintiffs could file a bill in detinue here. There was a demand made; that was admitted. As to demand and refusal, see *McDonell* v. *Bank of Upper Canada*, 7 U. C. R. 252; *Blackley* v. *Dooley*, 18 O. R. 381; *Clarke* v. *Bates*, 21 U. C. C. P. 351. As to election, the plaintiffs have a claim and are seeking to enforce it. There can be no election without a knowledge of the facts. The mechanics' lien suit was never prosecuted. *Curtis* v. *Williamson*, L. R. 10 Q.B. 57; *Priestly* v. *Fernie*, 3 H. & C. 977; *Scarf* v. *Jardine*, 7 App. Cas. 350; *Kendal* v. *Hamilton*, 4 App. Cas. 504. There was no intention to elect; the officer of the Company thought he had a right to proceed as he did. To prove the machinery was a fixture, defendants should have proved

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their title to the property. On the question of estoppel, defendants were not prejudiced; no representation was made by plaintiffs. There was no evidence that defendants advanced any money to Williams & Co. on the strength of this machinery. *Walker* v. *Hyman*, 1 A. R. 345; *Mason* v. *Bickle*, 2 A. R. 291. An action will lie for depriving plaintiffs of the use of fixtures. *London and Westminster Loan Co.* v. *Drake*, 6 C. B. N. S. 798; *Saint* v. *Pilley*, L. R. 10 Ex. 137.

The judgment of the Court was delivered by

TAYLOR, C. J.—The objection is raised that the plaintiffs could not bring an action of detinue or trover for this machinery, because there is no evidence of a demand and refusal, but that a demand was served on defendants, in 1892, was admitted on the original hearing by counsel for the defendants. There is, however, no evidence of a refusal to deliver it to the plaintiffs. But the answer filed in this suit alleges that the machinery in question is built into and forms a part of the elevator, and that it would be impossible to remove it without pulling down a part of the elevator, and doing large damage to it. That seems to me an assertion of a claim to the machinery, and a denial of the plaintiffs' right to it; such as was held in *Blackley* v. *Dooley*, 18 O. R. 381, to be evidence of a conversion before action, there having been in that case no demand at all. In *McDonell* v. *Bank of Upper Canada*, 7 U. C. R. 252, one of the plaintiffs demanded the possession of the steamboats from the president and cashier of the bank, who referred him to the solicitor, who, when a demand was made upon him, said he was not authorized to give any answer, immediately after which the action was brought. Robinson, C. J., said he must assume that the corporation in due time knew of this demand that had been made upon their officers, and if they were willing to give up the property they would have given proof of their willingness to do so by passing a resolution to that effect, and giving the necessary directions.

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Then the evidence shows a possession and using of the machinery by the defendants in a manner inconsistent with the plaintiffs' rights as owners of it. And as Channel, B., said in *Burroughs* v. *Bayne*, 5 H. & N. 296, "Whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel, is a conversion." In the same case Martin, B., quoted with approval the language of Alderson, B., in *Fouldes* v. *Willoughby*, 8 M. & W. 540, that any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for the simple reason that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.

It is also objected that trover cannot be brought for the machinery, because it is a fixture. It is, however, doubtful if the defendants can set this up, as they have given no evidence that they own the freehold.

Besides, can the defendants stand in any better position than Williams & Co.? And as to the latter, would not the language of Burton, J. A., in *Hall Manufacturing Co.* v. *Hazlitt*, 11 A. R. 750, be applicable? If Williams & Co. "had placed these wheels on their own property, could they have successfully resisted a claim by their vendor on the ground that they had converted them into freehold, although the vendor must be held to have known that it was intended so to use the property that it would be annexed to the freehold? He would be entitled to rely on the agreement between him and his vendee that, as between them, it should under all circumstances be regarded as personal property."

In my opinion the plaintiffs could maintain an action of detinue, and if so, then by the Administration of Justice Act, s. 16, the Court has jurisdiction to entertain this suit, even although brought on the equity side of the Court. The cases cited for the defendants on this branch of the case, such as *Day* v. *Browning*, 10 Ch. D.

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307; *Gaskin* v. *Balls*, 13 Ch. D. 329; *North London Ry. Co.* v. *Great Northern Ry. Co.*, 11 Q.B.D. 37, do not seem to me to bear upon it. In these cases it was held that the words in the Judicature Act as to the Court granting an injunction in all cases in which it shall appear to be "just and convenient" do not alter the principles on which the Court acts. Here the Court is simply entertaining on the equity side jurisdiction in a matter which before the Administration of Justice Act it had jurisdiction over on the common law side, and that is what the statute says it may now do.

The authorities referred to and remarked upon in the judgment of the learned Judge who tried this case, such as *Cumberland Banking Co.* v. *Maryport &c. Steel Co.* [1892], 1 Ch. 415; *Thomas* v. *Inglis*, 7 O. R. 588; *Traders' Bank* v. *The G. & J. Brown Co.*, 18 O.R. 430; and *Waterous* v. *Henry*, 2 M. R. 169, warrant a decree being made in favor of the plaintiffs.

It is true the plaintiffs sold the machinery knowing that it was intended for the purpose of being used in an elevator which Williams & Co. were building, but it was not placed in the elevator by the plaintiffs. I cannot find from the evidence that it was, as claimed by the defendants, placed there by the plaintiffs' men. A member of the firm of Williams & Co. did apply to the manager of the plaintiffs to get men capable of erecting machinery, but no men of the plaintiffs were sent for that purpose. The most that can be said is that some days after, the manager saw a man who could do such work, and sent him and his partner to Williams & Co., so that they might employ them if they wished to do so.

In addition to the cases quoted by the learned Judge, *Stevens* v. *Barfoot*, 9 O.R. 692, 13 A.R. 367, is an authority for the plaintiffs. In that case the plaintiffs sold a boiler and machinery, under an agreement that the title, ownership and right of possession should not pass until payment, to Overton & Kennedy, who placed them in a mill on land

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which they claimed to have bought from the Canada Co. Overton & Kennedy gave the defendant a mortgage on the land and, a few days after, a chattel mortgage on the mill and machinery. Then Overton & Kennedy exchanged for another boiler the one bought from the plaintiffs, who at first objected, but agreed to exchange on being given a chattel mortgage on the new boiler. The title of Overton & Kennedy proved defective, and the defendant bought the land from the Canada Co. The plaintiffs then demanded the boiler and machinery, and brought an action to recover them. At the trial Cameron, C. J., held that the defendant's chattel mortgage was void owing to a defect in the affidavit of *bona fides*, and he entered a verdict for the plaintiffs. From this the defendant appealed as to the boiler, but not as to the machinery supplied by the plaintiffs to Overton & Kennedy, and the appeal was allowed. The Court of Appeal held that the boiler being the property of Overton & Kennedy who affixed it to the land, the Canada Co., owners of the land, could claim it, and they having sold the land to the defendant he thereby acquired a title to the boiler. But Hagarty, C. J. said "If they," Overton & Kennedy, "had annexed the chattel property of another person to the freehold, I do not think that person would be precluded from reclaiming it if it could be severed without substantial damage to the freehold," and Patterson, J. A. speaking of the other machinery supplied by the plaintiffs, said, "That machinery, although affixed to the freehold, remains the chattel property of the plaintiffs." In that case, as Cameron, C. J., said in *Polson* v. *Degeer*, 12 O. R. 275, the Court of Appeal recognized and affirmed the principle that the affixing of the property of a stranger to the freehold of another does not operate to deprive the stranger of his right to the property when it can be removed without serious damage to the property.

Now that is just the case here. The machinery in question was the property of the plaintiffs, and Williams & Co. have affixed it to what is alleged to be the freehold of

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the defendants. The plaintiffs should then have the right to remove it, if this can be done without serious damage.

It was argued that the plaintiffs registered a mechanics' lien, and began a suit to enforce that lien, so they have elected to treat the machinery as having become the property of Williams & Co., or of the defendants, and are thereby estopped from bringing this suit. Some question was raised as to whether the proceedings in respect of the mechanics' lien were the acts of the plaintiffs, or the unauthorized acts of their manager. I do not stop to consider that, because I do not think the plaintiffs are estopped by what was done from bringing this suit.

The bill upon the mechanics' lien was never proceeded with. It was filed, served and then dismissed by the plaintiffs themselves. It does not seem to be the having begun a suit which estops the plaintiff from bringing another; it is the suing to judgment in the first suit that has that result. That was the ground on which *Priestly* v. *Fernie*, 3 H. & C. 977, was decided. So in *Curtis* v. *Williamson*, L. R. 10 Q. B. 57, where the plaintiffs filed an affidavit of proof against the estate of an insolvent agent of an undisclosed principal, even after the principal was known to the creditors, that was held no obstacle to the plaintiffs suing the principal. And Quain, J., speaking of *Priestly* v. *Fernie*, said it was clear, that whilst it was considered that judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect. In this connection a passage in *Bigelow on Estoppel* was cited, where at p. 673, it is said, "Where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election, if made with knowledge of the facts, is in itself binding—it cannot be withdrawn without due consent; it cannot be withdrawn, though it has not been acted upon by another by any change of position." The learned author cites a number of authorities in support of his text. I have

examined all of them to which I had access, *Morris* v. *Rexford*, 18 N. Y. 552; *Bank of Beloit* v. *Beale*, 34 N. Y. 477; *Rodermund* v. *Clark*, 46 N. Y. 354; *Steinbach* v. *Relief Ins. Co.*. 77 N. Y. 498; and *Fields* v. *Bland*, 81 N. Y. 239. They are all cases in which the plaintiff had, in his first proceeding gone on to final judgment, before he began his second.

Sherboneau v. *Beaver Ins. Co.*, 30 U. C. R. 472, 33 U. C. R. 1, was a case in which the plaintiff having insured a barn as part of the freehold owned by him, and having upon a loss claimed payment as owner of the land, it was held that after it had been decided, in a suit pending at the time of the loss, that he was not owner of the land, he could not then claim that the barn was a chattel owned by him. *Gardner* v. *Kleopfer*, 7 O. R. 603, was a case in which the wellknown principle was applied that a creditor who had not only assented to an assignment for the benefit of creditors, but had accepted the position of trustee under it, could not after that repudiate the assignment and sue the debtor.

The only question that seems to remain is, can the machinery be removed without doing serious damage to the freehold? The evidence upon that given for the plaintiffs, is that it can, and this is not contradicted by the defendants.

As to the form of the decree which has been made, counsel for the plaintiffs admits that it perhaps goes too far in ordering that plaintiffs have leave to enter defendants' premises and remove the machinery. In *Polson* v. *Degeer*, 12 O. R. 275, the form of the judgment was, that the machines there in question were the property of the plaintiffs, that the defendants detained the same, and that they do permit the plaintiffs by themselves, their servants or agents to remove the same on demand, and failing to do so, that the plaintiffs should recover for the wrongful detention the amount which the judge at the trial assessed as the damages. As the learned counsel expressed his willingness

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to take a decree for payment of the value of the machinery to be ascertained by a reference to the Master, the decree which has been made may be varied and modified accordingly. But the defendants having failed in what they contended for, they must pay the costs of the rehearing.

Decree for plaintiffs affirmed.

MACARTHUR

v.

THE TOWN OF PORTAGE LA PRAIRIE.

Before TAYLOR, C.J., DUBUC and BAIN, JJ.

Corporation—Borrowing money without a by-law—Town Corporations Act, C.S.M. c. 10—Municipal loan—Corporate seal.

The defendants were incorporated under the Manitoba Town Corporations Act, C. S. M. c. 10. Section 377 of that Act provided that town loans, whether by issue of debentures or otherwise, should only be made on a by-law of the council to that effect.

The defendants being indebted to the Ontario Bank, which was pressing for payment, the town council passed a resolution referring the matter to the Finance Committee with power to act. As the plaintiffs held in their hands for sale a large amount of the debentures of the town, the Committee arranged to give the Bank an order on the plaintiffs for the amount of the debt. The order was accordingly prepared and signed by the mayor and secretary-treasurer, sealed with the seal of the corporation, and sent to the Bank manager. The action of the Committee was duly reported to the town council, and the report was adopted. The plaintiffs afterwards accepted the order, and paid the amount to the Bank. They then brought this action to recover the amount of the order from the defendants.

Held, that the transaction was in the nature of a loan of money, and that the plaintiffs could not recover without proof of a by-law having been passed, signed and published in accordance with the provisions of sections 208, 213 and 211 of the said Act, and no such proof having been given, that the plaintiffs must be non-suited.

Bernardine v. *North Dufferin*, 19 S.C.R. 581, distinguished.

ARGUED: 6th February, 1893.
DECIDED: 4th May, 1893.

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Statement.

THIS was an application of the defendants to the Full Court to set aside a verdict obtained by the plaintiffs, and to enter a non-suit.

The facts are sufficiently stated in the head-note and judgment.

The grounds on which the application was made were as follows :—

1. That the defendants had no power to draw the bill of exchange sued on, unless and until a by-law of the Town council had been passed authorizing a loan, and that there was no evidence given that any such by-law had been passed.

2. That the said bill of exchange was, in law simply an order to the plaintiffs to pay to the Ontario Bank the amount thereof, out of moneys to be realized by the plaintiffs from the sale of certain debentures placed in their hands by the defendants for sale, and that no request from the defendants to the plaintiffs to pay any moneys for them other than out of the proceeds of the sale of said debentures was proved.

3. That when the debentures were sold by the plaintiffs on or about 30th June, 1885, there were sufficient moneys in the hands of the plaintiffs to pay the order in favor of the Ontario Bank, and that no authority was shown, from the defendants to the plaintiffs, to apply said moneys in any other manner, except in payment of said order.

4. The verdict for the plaintiffs should be reduced by the amount of money which was in the hands of the plaintiffs at the time of the sale of the debentures, after payment of the claim of the plaintiffs against the Town on a promissory note, and on an overdrawn account, if said amount was not sufficient to wholly pay said order.

5. The finding of the Judge at the trial of this cause that the entries in the book kept by the secretary treasurer of the defendants were *prima facie* evidence against the defendants was erroneous in law and could not be supported; the defendants could not be made liable by reason of entries

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made in a book, by an officer of theirs, unless it was shown that such entries were made by order of the council of the defendants.

H. M. Howell, Q.C, and *J. Martin,* for defendants. There was no liability in the defendants to pay the bill, *Spencer* v. *Parry,* 3 A. & E. 338; *Bullen & Leake,* 43; *Bagnall* v. *Andrews,* 7 Bing. 217. The municipality had no power to draw the bill. Town Corporations Act, Con. Stat. c. 10, s. 377. The Town had no power to borrow except by by-law, passed by the council and published in the manner provided in section 213 of the Act.

W. H. Culver, Q.C. and *T. H. Gilmour,* for plaintiffs. Nothing in the Town Corporations Act, Con. Stat., c. 10, requires a by-law to be under seal as does section 54 of the Town Corporations Act, 1885, c. 26. Sections 18 and 174 in the Act in the Con. Stat. allows indebtedness without submitting the by-law to the ratepayers. The contract was executed. *Bernardine* v. *Dufferin,* 6 M. R. 88; 19 S. C. R. 626; *Waterous Engine Co.* v. *Palmerston,* 19 A. R. 47; *Pratt* v. *Stratford,* 16 A. R. 5. It was necessary for the Town to borrow money to pay the Ontario Bank, and there was no necessity for any by-law. *Pim* v. *Mun. Council of Ontario,* 9 U. C. C. P. 304.

The judgment of the Court was delivered by

BAIN, J.—Whenever one man has paid and expended money for the use of another at his request, or by his authority, the law implies from the person on whose account and for whose use the money has been paid a promise of repayment or indemnity. On this principle I think it is clear that the plaintiffs here must be entitled to recover from the defendants the amount they paid the Ontario Bank for the use and at the express request of the defendants, unless the defendants are able to escape legal liability on the ground that the plaintiffs have failed to prove that the transaction in question was authorized by a by-law of the town council.

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It appears that the defendants were indebted to the Ontario Bank in the sum of $3,530; and by the order of the 23rd January, 1885, they requested the plaintiffs to pay the amount to the Bank. The plaintiffs did so, and claim that they have never been repaid by the defendants. At the time the order was given, the plaintiffs held for sale on account of the defendants $37,000 of their debentures; and the terms in which the plaintiffs accepted the order show that they intended that it was to be paid out of the proceeds of the sale of these debentures. The plaintiffs sold the debentures in the month of June following, but instead of taking part of the proceeds to pay to the Ontario Bank, they applied the whole of the proceeds to pay off a large amount that the defendants owed them directly, with interest thereon, and to reimburse themselves the amount they had paid to take up certain overdue coupons of other debentures of the defendants amounting to $2,610. At this time the plaintiffs were the bankers and financial agents of the defendants, but it does not appear that they had any authority from the defendants to pay their overdue coupons. On the 3rd July, 1885, however, the plaintiffs sent to the secretary-treasurer of the defendants a statement of their account, showing the receipt of the proceeds of the debentures and the various items that had been charged against this credit; and the account showed a balance due by the defendants to the plaintiffs of $506.49. On the receipt of this account the secretary-treasurer, who, by the statute, was the proper person to keep the defendants' books, and who was the custodian of their papers and vouchers, gave the plaintiffs credit in their account in the defendants' ledger for all the various items they had charged the defendants against the proceeds of the sale of the debentures, and he wrote for and received from the plaintiffs all the coupons that they had charged as having been paid, and he deposited them with the defendants' other papers in their vault in the Town Hall. By section 170 of the Town Corporations Act, all the secretary-treasurer's books and papers were open to the inspection of the

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members of the council and all rate-payers of the corporation. Then in the auditor's report on the accounts of the corporation for the year 1885, every item charged by the plaintiffs against the defendants is audited and approved of as having been paid by the defendants during the year. This report was presented to and received by the council in February, 1886, and the council passed a resolution directing the auditor to be paid for his services. Until the question was raised in this action, it does not appear that the defendants ever notified the plaintiffs or did anything to show that they questioned the plaintiffs' right to charge them with the payment of the coupons and the other items in their account.

Now it was clearly the duty of the defendants' council to make itself acquainted with the accounts of the corporation as they appeared in the books of the secretary-treasurer and in the auditor's report. In the latter, notice was brought home to the council that all these various items had been charged against and paid by the defendants, and if the members of the council did not actually know that this had been done, it could only be because they wilfully shut their eyes.

It is not questioned that the defendants were legally liable to the plaintiffs in the amount of the over-drawn account and the promissory note for $27,000 charged against them in the plaintiffs' account, and I did not understand that the defendants' counsel questioned the plaintiffs' right to charge these amounts, with interest not exceeding 6 per cent., against the proceeds of the debentures. What was objected to were the charges for the coupons that the plaintiffs paid without having had the authority of the defendants for so doing. But the defendants were liable for the payment of these coupons, and it was their duty to pay them. Since 1886, at any rate, the council has known that the plaintiffs had used some of the defendants' money they had in their hands to pay these coupons, and the defendants have had the coupons in their possession; and it seems very clear that the defendants must be held to have

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adopted and acquiesced in the payment, and that they cannot now be allowed to say that the plaintiffs are not entitled to charge what they paid for the coupons. All the coupons are payable to bearer, but the plaintiffs' right to recover on the coupons themselves has doubtless been barred by the Statute of Limitations, and it would be inequitable to hold otherwise now than that it must be implied that it was at the defendants' request the plaintiffs paid the coupons as well as made the other charges shown in their account.

If I am right in this view, then the objections taken in the 2nd, 3rd, 4th and 5th grounds of the defendants' motion can be no answer to the plaintiffs' action. But the defendants take the further objection "that the defendants had no power to draw the bill of exchange upon the plaintiffs, unless and until a by-law of the council of the town had been passed authorizing a loan, and that there was no evidence given that any such by-law had been passed."

It appears that in January, 1885, Mr. Porter, the manager of the Ontario Bank in Winnipeg, wrote to the defendants, pressing for payment of what they owed the Bank. At a meeting of council held on 26th January, a resolution was passed "that the communication of E. Porter, Esq., be referred to the Finance Committee, with power to act on it." Then the next day the Finance Committee reported, recommending that the Ontario Bank should be given an order on the plaintiffs for the amount of their claim, and that the mayor and secretary-treasurer be authorized to give, sign and seal the same. On 31st January the secretary-treasurer wrote to the manager of the Ontario Bank, enclosing the order in question, which, however, is dated on 23rd January. On 7th February the above report of the Finance Committee was submitted at a meeting of the council and adopted. It is not explained how the order came to be dated before the Finance Committee had even recommended that it should be given, but nothing turns on the date, because, as appears from my brother Killam's notes at the trial, the defendants' counsel admitted that the order was drawn by the mayor and secretary-treasurer, and

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sealed with the corporate seal under the authority of a report of the Finance Committee adopted by the council. He also admitted that the defendants were legally indebted to the Ontario Bank in the amount mentioned in the order.

At the time the defendants gave the order on the plaintiffs, the plaintiffs had no funds of the defendants in their hands. On the contrary, the defendants, as their own books showed, had over-drawn their account over $4,000. Nor, as we have seen, had the plaintiffs any money of the defendants in their hands when they paid the money to the Ontario Bank. The order is payable on demand; and in asking the plaintiffs to pay the money to the Bank, the defendants were in effect, it seems to me, asking them to advance and lend them that amount for the purpose of paying off the indebtedness to the Bank. There is nothing in the evidence to show that the defendants thought the plaintiffs had sold their debentures at this time. They knew the plaintiffs were trying to sell the debentures; and they doubtless thought that the plaintiffs, holding these debentures, and trusting to be able to repay themselves when the debentures were sold, would be willing to advance the amount of the order. The plaintiffs paid the Ontario Bank not out of the moneys of the defendants, but with their own funds; and in paying the Bank at the defendants' request, it seems to me they lent the money to the defendants just as they would have done had they paid it at the defendants' request to their own secretary-treasurer. Instead of selling the debentures to a third person, the plaintiffs bought them themselves, and in this and other respects things turned out differently from what both parties expected they would when the order was drawn and accepted. In effect, however, the transaction seems to resolve itself into what it really was intended to be by the defendants when they gave the order—a borrowing of money for the purpose of paying off an existing indebtedness. If it was not this, the whole transaction would seem to be without the scope of their corporate powers.

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It does not appear, I think, that it was formally proved that the Town of Portage la Prairie received a charter of incorporation under the Manitoba Town Corporations Act, Con. Stat. c. 10, but it was assumed that it did, and the case was argued by both sides as if the defendants' corporate powers were those contained in that Act. Section 371 of this Act authorizes the council to borrow from time to time various sums of money for objects within the scope of its authority. But in section 377 there is the express direction that "town loans, whether by the issue of debentures or otherwise, shall only be made on a by-law of the council to that effect."

Now if proof of a by-law authorizing the transaction be a condition precedent to the plaintiffs' right to recover, such proof has not been given, for the resolutions of the council that have been put in cannot be taken to be by-laws. It is true that there is nothing in the statute requiring that by-laws of the corporation must be under seal; but section 208 provides that the original of every by-law, to be authentic, shall be signed by the presiding officer at the time of the passing of such by-law, and by the secretary-treasurer; and section 213 directs that all by-laws shall be published in the manner pointed out in the section; and by section 211, by-laws only come into force, unless otherwise provided in the by-law itself, fifteen days after the day of publication. It is clear that had the statute contained a direction that all by-laws should be under the seal of the corporation, that direction would be held to be imperative, and that without the seal a by-law would be invalid, *In re Croft*, 17 U. C. R. 269; *In re Mottashed*, 30 U. C. R. 74. The above directions as to signing and publication are just as important and imperative as would be one that all by-laws should be under the seal, and it has not been shown that they have been complied with.

The contract, however, between the plaintiffs and defendants, if it was one of borrowing, was within the scope of the defendants' authority, and it is a contract that has been

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executed by the plaintiffs, and the defendants have had the benefit of it in being released from their liability to the Ontario Bank. On this ground, and on the ground that it was necessary that the defendants should raise money to pay off the judgment that the Ontario Bank was threatening to enforce against them, Mr. Culver argues that the contract is binding on the defendants, whether there was a by-law or not; and he relies specially on the decision of the Supreme Court in *Bernardine* v. *North Dufferin*, 19 S. C. R. 581. Now, had the provisions of the statute here been the same as those that were applicable in that case, it may be that it would have to be held that, as the contract has been executed by the plaintiffs, and as the defendants have obtained the benefit of it, they would be liable notwithstanding that the plaintiffs have failed to show that there was a valid by-law authorizing the loan; for the decision seems to be as applicable to the case of money lent to and received by a corporation as in the case of a bridge having been built for and accepted by one. But the decision in the *Bernardine* case proceeded, as I understand it, expressly on the ground that there was no statutory provision in the Municipal Act prohibiting the corporation from exercising its jurisdiction otherwise than by a by-law or contract under seal, and the Court held, therefore, that the case was governed by the common law; and the common law rule was declared to be that a corporation is liable on an executed contract for the performance of work within the scope of its power, when it has adopted and taken the benefit of the work, though the contract was not under its corporate seal. In *Pim* v. *Mun. Council of Ontario*, 9 U. C. C. P. 304, which was approved of and affirmed by the *Bernardine* case, nothing was said in the statutes under consideration there as to the manner in which the corporation was to contract.

But here we have the Legislature expressly declaring that "town loans, whether by the issue of debentures or otherwise, shall only be made on a by-law of the council to that effect," and this provision at once, it seems to me, distin-

guishes this case from the *Bernardine* one, and brings it within the principle of the decisions in *Hunt* v. *Wimbledon*, 4 C. P. D. 48 and *Young* v. *Leamington*, 8 App. Cas. 517. These cases, as Mr. Justice Strong said in the *Bernardine* case, p. 585, "decide absolutely and unequivocally that when a statutory power is conferred upon a corporation to make contracts in a particular form, that form must be followed, and no dispensation with the requirements of the statute is admissible upon the ground of part performance or because the corporation has taken the benefit of the contract; and this is so held apart from the vexed question of the general liability of corporations upon contracts not under seal which have been executed by the other contracting party." Mr. Justice Strong's judgment was a dissenting one, but the majority of the Court differed from him, not because they thought this statement of the law and of the effect of these two cases was incorrect, but because they thought that there was nothing in the Manitoba Municipal Act which prohibited the council from exercising its jurisdiction over roads and bridges in other ways than by a by-law or contract under the seal of the municipality. At page 613 of his judgment, Mr. Justice Gwynne points out that the two cases referred to by Mr. Justice Strong turned on a special statutory enactment, and that therefore they had no application. Mr. Justice Patterson also remarks, p. 631, "It should be noticed * * * that the Manitoba Statute does not prescribe the method by which the council is to act."

In entering a verdict for the plaintiffs, my brother Killam was inclined to think, he says, that the transaction between the plaintiffs and defendants was not a loan in the meaning of the section in the statute. In this view, however, for the reasons I have stated, I am not able to agree. If the plaintiffs are entitled to recover, then the result of the transaction, as far as the rate-payers are concerned, is the same as if the council had formally borrowed the amount from the plaintiffs under a by-law, and the council will have been able to do in a roundabout way the very

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thing the Legislature said it should not do. In directing that all town loans should be incurred only by by-law, the Legislature plainly wished to protect the rate-payers against the results of hasty action on the part of the council, and intended that the council should only exercise its borrowing powers after the publicity and deliberation that is necessarily involved in formally passing a by-law. Enactments of this kind for safe-guarding the interests of rate-payers are made by the Legislature because it knows that they are required; and as Lord Bramwell remarked in one of the cases above mentioned, the Courts should not allow them to be frittered away. In its terms the section applies to all town loans; and if this transaction was a loan, the fact that the money was borrowed to pay off an existing indebtedness did not, I think, make it any the less necessary that it should have been authorized by a by-law.

The statute having made a by-law necessary to enable the council to effect a loan chargeable on the rate-payers, the plaintiffs were, of course, bound to inquire if the statute had been complied with, and if they chose to accept the order and pay the money without inquiring, the blame is their own. From its somewhat peculiar circumstances, however, the case does seem to be one of hardship for the plaintiffs. But I think the verdict must be set aside with costs, and a verdict of non-suit entered. The defendants are entitled to the costs of this application.

Verdict for plaintiffs set aside, and non-suit entered.

[The plaintiffs gave notice of appeal to the Supreme Court of Canada from this decision but the case was afterwards settled between the parties.—ED.]

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LEACOCK v. McLAREN. SHIELDS v. McLAREN.

Re KENNEDY.

Before TAYLOR, C.J., DUBUC and KILLAM, JJ.

Solicitor's lien for costs—Property recovered or preserved—Solicitors' Act, Imp. Stat. 23 & 24 Vic., c. 127.

The petitioner had been retained by John Shields, one of the defendants in *Leacock* v. *McLaren*, which had been brought for the purpose of winding up the partnership composed of the plaintiff and defendants in that suit, and he had conducted it to the termination of an appeal to the Supreme Court of Canada, whose decision was in favor of his client, and resulted in establishing his rights as a partner in certain moneys in Court and in certain other assets of the partnership. The other defendants then appealed to the Privy Council, but pending that appeal, a settlement was arrived at between the parties without the knowledge of the petitioner (Shields having retained another solicitor in his place), by which the moneys in Court were all applied in payment of the debts of the firm. Meantime, John Shields married, and made a settlement on his wife of all his interest in the partnership assets, and the trustee of the settlement, William Shields, the plaintiff in the suit of *Shields* v. *McLaren*, afterwards commenced that suit for the purpose of working out the settlement of the former suit. In this latter suit, the old partnership was wound up, the assets realized, and a considerable sum of money was paid into Court.

Held, that the petitioner was entitled to a lien on this money for his unpaid costs of the first suit, as being property preserved within the meaning of the Solicitors' Act, Imp. Stat. 23 & 24 Vic., c. 127, but subject to the prior lien of the solicitor for William Shields, notwithstanding that the money was actually realized in another suit; and that the fact of his client having parted with his interest before the commencement of the second suit, was no objection to his claim.

Berrie v. *Howitt*, L. R. 9 Eq. 1, not followed.
Foxon v. *Gascoigne*, L. R. 9 Ch. 657, distinguished.

ARGUED: 10th February, 1894.
DECIDED: 10th March, 1894.

Statement

APPEAL by John Shields, William Shields and Matilda Esther Shields, against an order obtained by the solicitor under Imperial Act, 23 & 24 Vic., c. 127, charging

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moneys in Court in the suit of *Shields* v. *McLaren*, to which they, or some of them, were entitled, with costs due him in these suits.

The bill in *Leacock* v. *McLaren* was filed in May, 1884; a decree was made in June, 1885; this was reheard in July, 1887; and the case was then carried to the Supreme Court, where a decree was made in April, 1889. In June, 1889, there was an order changing the solicitor, and the solicitor who had obtained the charging order ceased to be the solicitor for John Shields. From the judgment of the Supreme Court an appeal was taken to the Judicial Committee of the Privy Council, but before the case was heard there, a compromise or settlement was effected between the parties. To this the solicitor was not a party. To carry out the settlement then come to, the suit of *Shields* v. *McLaren* was begun in August, 1892, and a decree was made in September following, under which the timber limit in question was sold, and the purchase money was paid into court. In November, 1884, John Shields was married to Matilda Esther Shields, and a marriage settlement was executed, which covered his interest in the subject matters of these suits, one Alexander Shields being the trustee. He having died, William Shields was, in June, 1892, appointed trustee in his place. The retainer of the solicitor was by John Shields who lived in Ontario, before the marriage settlement, and the solicitor had no notice or knowledge of that until August, 1892, long after he had ceased to be the solicitor.

W. Redford Mulock, Q. C., for John Shields, M. E. Shields and William Shields. The solicitor was not entitled to a charging order as no property was recovered or preserved. The order giving the solicitor the charge, gives it subsequent or subject to the new solicitor's lien, and gives him a right of assignment from the new solicitors to him, in case of a deficiency and this is not authorized. The solicitor must prove that he recovered or preserved the property. The solicitor was retained by John Shields

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personally, not by the trustees of the settlement. There must be an actual recovery or preservation through the instrumentality of the solicitor. *Foxon* v. *Gascoigne*, L. R. 9 Ch. 654; *Pinkerton* v. *Easton*, L. R. 16 Eq. 490; *In re Keane*, L. R. 12 Eq. 115. No charging order can be made on an interest in timber limits. A *bona fide* compromise defeats any lien. *In re Sullivan* v. *Pearson*, L. R. 4 Q. B. 153. A lien can only be on the balance ultimately due; *Westacott* v. *Bevan*, [1891] 1 Q. B. 774. There was no fruit of the solicitor's work, *Bellamy* v. *Connolly*, 15 P. R. 87. The solicitor has been guilty of great delay in taking these proceedings. *Roche* v. *Roche*, 29 L. R. Ir. 339. Mrs. Shields is the owner of the property under the marriage settlement. John Shields had no right to charge the *corpus* of the estate; the retainer being personal, he had no power to bind the estate. The debt under the retainer could only be collected from John Shields and he could do nothing to affect the rights of Mrs. Shields; her position is that she owns the property exempt from any charge. The solicitor must prove that but for his exertions the property would never have been realized at all.

T. S. Kennedy, Q. C., and *J. S. Hough* for respondent. The suit of *Leacock* v. *McLaren* became an administration suit, and in such a suit the solicitor is entitled to a lien for his costs. *Foxon* v. *Gascoigne*, L. R. 9 Ch. 654, referred only to an easement and the Court could not see that the property was recovered or preserved. The decree in the Supreme Court which the solicitor was instrumental in getting preserved a great deal of Shields' interest. In any case in which a solicitor recovers or preserves a property, he is entitled to a lien on the funds in Court, the proceeds of that property, whether they are the same parties or not, if they take the benefit of the services of the solicitor. *Cordery on Solicitors*, 313, 316; *Morgan & Wurtzburg on Costs*, 567; *Greer* v. *Young*, 24 Ch. D. 545; *Twynam* v. *Porter*, L. R. 11 Eq. 181; *Bulley* v. *Bulley*, 8 Ch. D. 479.

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If the solicitor is entitled to a charge against John Shields, it must be a charge against the wife's interest in the property. If John Shields had no right to continue the solicitor's retainer, he had no right, concealing the marriage settlement, to make the settlement of the suit which he did, and had no right to take the money out of Court. The solicitor did recover and preserve the property, were it not for his exertions John Shields would have no interest in the concern and there would be no money in Court, and John Shields would have been left with a liability of $40,000. *Charlton* v. *Charlton*, 52 L. J. Ch. 971; *Guy* v. *Churchill*, L. R. 35 Ch. D. 489. If the solicitor succeeded in getting John Shields out of a difficult position, and put him into a good one he not only preserved the property but recovered it.

The judgment of the Court was delivered by

TAYLOR, C.J.—The question is, was any property recovered or preserved within the meaning of the statute, so as to entitle the solicitor to a charging order. The appellants insist there was not. The interest of John Shields in the timber limit, the proceeds of the sale of which is in court, was, they say, never in question in the suit.

Unless there was property recovered or preserved, the solicitor is not entitled to an order. If there was, he is entitled to an order against that property, or the proceeds of it, even although William Shields and Matilda Esther Shields have become interested in it. *Bailey* v. *Birchall*, 2 H. & M. 371; *Pinkerton* v. *Easton*, L. R. 16 Eq. 490. That a solicitor cannot have a charging order on the property of persons who have not employed him was held by Lord Romilly in *Berrie* v. *Howitt*, L. R. 9 Eq. 1, but that decision was questioned by Sir George Jessel in *Bulley* v. *Bulley*, 8 Ch. D. 479; it was not followed by North, J., in *Charlton* v. *Charlton*, 52 L. J. Ch. 971, and is said to have been overruled by the Court of Appeal in *Greer* v. *Young*, 24 Ch. D. 545.

The cases on this subject are numerous. In *Foxon* v. *Gascoigne*, L. R. 9 Ch. 657, Sir George Jessel said that

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where the plaintiff claims property and establishes a right to the ownership of the property in some shape or other, there the property has been recovered. And where a defendant's right to the ownership of property is disputed, and that right has been vindicated by the proceedings, there the property has been preserved. In that case the solicitor's application was refused, and the order of the Master of the Rolls was affirmed on appeal. But what was in question there was only an easement. The suit was for an injunction to restrain the defendant from building so as to interfere with the plaintiff's right to light. And as Mellish, L. J., said: "All that can by any possibility be said to be recovered or preserved, which ever word you choose to employ, is the right to the light. How is it possible to make a charge upon the right to the light. A charge can only be made upon the property itself, which is recovered or preserved. . . . It seems to me impossible to make a charge upon an easement." In *In re Keane*, L.R. 12 Eq. 115, the solicitor was given a charge upon an annuity, but his application for a charge upon the corpus of the property out of which it was payable, was refused. There the property out of which the annuity was payable was in no way in question, the sole object of the suit being to set aside a marriage settlement under which it became payable. In *Pinkerton* v. *Easton*, L. R. 16 Eq. 490, a charging order was refused. That was in a suit by a residuary legatee against a sole surviving trustee, in which a decree for administration and for appointment of a trustee was made, but no further proceedings were ever taken.

In *Scholefield* v. *Lockwood*, L. R. 7 Eq. 83, the plaintiff and one Durant were, in certain shares, entitled to a moiety of an estate subject to mortgages. The plaintiff, claiming also a charge on the other moiety in respect of judgments, filed a bill for foreclosure and redemption, to which Durant was a defendant. The decree made charged certain sums on the moiety of the plaintiff and Durant, but, on an appeal by the latter, the decree was varied in his favor, and in

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working out the decree he succeeded in resisting claims put forward by the plaintiff. He then became bankrupt, and his solicitors were given a charge upon what, if anything, was coming out of the estate to him. Lord Romilly said the interest was clearly not recovered, but it might fairly be said to be preserved. So in *Twynam* v. *Porter*, L. R. 11 Eq. 181, a *cestui que trust* began a suit against a trustee for an account, and a reconveyance, and a receiver was appointed. The plaintiff then, without consulting his solicitor, compromised the suit, receiving a sum in cash, and it was agreed that certain mortgages should be paid off. Bacon, V. C., holding that by the appointment of the receiver the property was effectually preserved, considered the case as clearly within the provisions of the statute, and granted a charging order. *Catlow* v. *Catlow*, 2 C.P.D. 362, was a case in which the administrator of his mother, sued his brother and sister in detinue, for recovery of goods belonging to the estate, and got a judgment, but was unable to recover, the goods being concealed. Afterwards the brother and sister took proceedings for administration of the estate, and brought into court the proceeds of the goods. The solicitor of the administrator was held entitled to a charging order upon the fund in court as property recovered or preserved through his instrumentality. In *Guy* v. *Churchill*, 35 Ch. D. 489, an action was dismissed with costs which the plaintiff paid, and then, on appeal, the judgment was reversed with costs, and the defendants ordered to repay the costs they had received. The plaintiff became bankrupt. The solicitor was held entitled to be paid the costs of the appeal, and to receive out of the costs to be repaid the difference between the taxed costs and the plaintiff's costs taxed as between solicitor and client. Cotton, L. J., said the question was governed by the principle that a solicitor has a lien on what is recovered in an action, although the recovery of the fund was not the direct result of the action.

In the present case Leacock filed a bill against three persons, McLaren, Haggart and Shields, alleging that

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the four had formed a partnership for lumbering purposes on certain terms, that a mill had been put up, and a quantity of logs got out, but that McLaren and Haggart had failed to carry out their part of the agreement or to contribute their share of the capital, and he prayed the appointment of a receiver and the taking of the partnership accounts. McLaren and Haggart answered, charging Leacock and Shields with improper and fraudulent conduct, with having formed a partnership between themselves for the purpose of excluding their co-partners, with getting out logs from the timber limits belonging to the original firm, and converting the same and the lumber produced from them to their own use, and with incumbering the property and incurring large liabilities, against which they asked to be indemnified. Shields answered, claiming that the business was carried on under different names with the knowledge and consent of McLaren and Haggart. A decree was made in that suit, which was, on rehearing, varied by declaring that the business was, after a certain date, that of Leacock and Shields only, and the decree was also varied so as to work out on this basis the liabilities between Leacock and Shields on the one part, and McLaren and Haggart on the other. Under that decree, as I understand it, Leacock and Shields would have been liable to pay all the debts which had been incurred. On an appeal to the Supreme Court by Shields, that decree was changed into an ordinary decree for taking the accounts and winding up the affairs of a partnership. The decree so framed gave effect to the contention of Shields, and gave him all the relief he claimed by his answer. McLaren and Haggart in turn appealed to the Judicial Committee of the Privy Council, and had they been successful, or had the decree on the rehearing been affirmed, Shields would have been liable to pay the debts. But a settlement was come to, and that was worked out in the suit of *Shields* v. *McLaren;* the partnership has been wound up, and the assets realised. Out of moneys got in by the receiver in *Leacock* v. *McLaren*, the debts have been paid, and there is now in

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Court, in *Shields* v. *McLaren*, a considerable sum of money, the proceeds of a sale of the timber limits, in which Shields, or his assignee, the trustee under the marriage settlement, is entitled to share. The case, in some of its features, is not unlike *Scholefield* v. *Lockwood*.

It may be that there has been no property recovered by the proceedings, but has there not, by the exertions of the solicitor in carrying on successfully the appeal to the Supreme Court, been property preserved within the meaning of the Act? But for his exertions the fund now in court would not be there, with a right in John Shields, or his assignee, to share in it. The solicitor was retained by John Shields before the marriage settlement was executed, and the parties interested under that settlement now benefit by his exertions. Besides the cases already referred to, which decide that a solicitor is entitled to a lien on a fund in which other persons than his clients are interested, reference may be made to *Pilcher* v. *Arden*, 7 Ch. D. 318, in which it was held that the client having, with the knowledge of the solicitor, assigned his interest was no bar to the solicitor getting a charging order. So in *Birchall* v. *Pugin*, L. R. 10 C.P. 397, where a judgment creditor of the client had garnished his interest, the solicitor was held entitled to an order.

There is no delay on the part of the solicitor to disentitle him to an order. He seems to have moved as soon as there was any fund against which he could get a charge The case of *Roach* v. *Roach*, 29 L. R. Ir. 339, was a very different case.

That the solicitor has recovered a judgment for his costs is no answer to an application for a charging order. In a number of the reported cases the solicitor had got a judgment before applying under the Act. The clause, however, in the order providing that if, by reason of payment to the new solicitor of costs to which he is entitled in priority over the petitioner, the fund in Court is not sufficient to satisfy the petitioner's claim in full, then the new solicitor is to assign to the petitioner the right or cause of action

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he now has to recover from John Shields, William Shields and Matilda Esther Shields, the moneys due him for costs in relation to the suit, cannot be upheld. It was conceded by the petitioner that he could not claim that as of right, but that it was agreed to. That does not seem to be shown satisfactorily, and the clause should be struck out.

The order should be varied accordingly, but in other respects it should be affirmed with costs.

WRIGHT V. JEWELL.

Before TAYLOR, C.J.

Demurrer—Multifariousness—Jurisdiction of Court of Queen's Bench over wills—Mental capacity of testator—Undue influence—Evidence—Onus of proof.

A bill is not necessarily multifarious becauseit seeks to set aside a deed as against one defendant and a will executed by the same person in favor of another defendant, when the latter relief is merely incidental to the former, and the defendants had set up the will as a bar to the plaintiff's claim.

The Court of Queen's Bench on its equity side has jurisdiction to try the validity of a will, or to pronounce it void for fraud or undue influence. R. S. M., c. 36, s. 11.

Where the evidence as to the mental capacity of the testator or grantor is conflicting, and the execution of the instrument was procured by parties who were in a position to exert an undue influence over him, and who take a benefit under it, the onus is thrown upon them of proving that the transaction was a righteous one and that there was no undue influence exerted. *Baker* v. *Batt*, 2 Moo. P. C. 321; *Barry* v. *Butlin*, 2 Moo. P. C. 482; *Fulton* v. *Andrew*, L. R. 7 H. L. 448.

In the present case the evidence as to the condition in which the deceased was on the day the deed and will were executed, though favorable to the defendants' contention, came entirely from those interested in supporting the instruments; whilst the evidence of disinterested outsiders, who had seen him shortly before, was distinctly unfavorable, and tended to show that he was childish, unable to speak intelligibly, and could not understand what was said to him.

Held, upon the evidence, which is fully set out in the judgment, and applying the principle above stated, that the deceased had not at the time he executed the deed and will in question, mental capacity sufficient for the

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transaction of any business, and that both instruments should be declared void and set aside.

ARGUED: 7th June, 1893.
DECIDED: 16th September, 1893.

Statement.

BY his original bill the plaintiff sought to set aside a deed made by the late John Thomas Wright to the defendant Burk Jewell. The defendants were Burk Jewell and Catherine Wright, and in their answer they set up the will of the deceased in favor of Catherine Wright as a bar to the plaintiff's right to maintain his suit. The plaintiff then amended his bill, and asked to have the will also set aside for the same reason as the deed, namely, that the deceased was, at the time he executed both instruments, of unsound mind, and incapable of transacting any business.

The defendants demurred *ore tenus* for multifariousness because plaintiff was seeking one kind of relief against one defendant and a different kind as against the other; also for want of parties in case it were held that the will could not be impeached in this suit, and for want of jurisdiction, contending that the Court had no jurisdiction on its equity side to try the validity of a will or to pronounce it void for fraud or undue influence.

The Court reserved these questions, and heard the evidence as to the mental incapacity of the deceased. The facts are fully set out in the judgment and need not be repeated here.

A. Monkman and *J. E. Porter* for defendants Burk Jewell and Catharine Wright. We demur for multifariousness, want of jurisdiction and want of parties. The bill seeks to have the will and probate set aside, and for administration of the estate, also to set aside a deed executed by deceased. Defendant Burk Jewell has nothing to do with the will, he is interested only under the conveyance; that is a distinct transaction. *Salvidge* v. *Hyde*, Jac. 151; *Bouck* v. *Bouck*, L. R. 2 Eq. 19; *Jerdein* v. *Bright*, 2 J. & H. 325. There is no allegation of collusion between Burk Jewell and Mrs. Wright. *Percival* v. *Blower*, 1 L. J. Ch.

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1; *Cole* v. *Glover*, 16 Gr. 392; *Haffield* v. *Nugent*, 6 M. R. 547; *Devonsher* v. *Newenham*, 2 Sch. & Lef. 199. There is no jurisdiction, R. S. M. c. 37, s. 16. Section 18 recognizes the Court of Q. B. as a Court of Probate. As to jurisdiction of Court of Q. B., R. S. M. c. 36, ss. 8, 9, 11. Imperial Act, 20 & 21 Vic. c. 77, s. 3; *Gingell* v. *Horne*, 9 Sim. 539; *Jones* v. *Gregory*, 4 Giff. 468; *Meluish* v. *Milton*, 3 Ch. D. 27. As to want of parties, the bill should have been filed by the executor or administrator, that is if the bill stands only for setting aside the conveyance to Jewell. Probate is conclusive as to the testamentary character of the instrument, capacity included. The evidence of W. Jewell showed the testator was of perfectly sound mind. *Mountain* v. *Bennett*, 1 Cox 353. If the testator comprehended the nature of the transaction at the time, he was then of disposing mind. The following cases were cited:— *Swinfen* v. *Swinfen*, 1 F. & F. 584; *Martin* v. *Martin*, 15 Gr. 586; *Ingoldsby* v. *Ingoldsby*, 20 Gr. 131; *Menzies* v. *White*, 9 Gr. 590; *Freeman* v. *Freeman*, 19 O. R. 141; and *Rhodes* v. *Rhodes*, 7 App. Cas. 192.

J. S. Ewart, Q.C., and *David Forrester* for plaintiff, referred to the Queen's Bench Act, R. S. M. c. 36, s. 11, s-s. (*o.*) *Wood* v. *Wood*, 1 M. R. 317; *Frontenac* v. *Morrice*, 3 M. R. 21. The onus of proving the capacity of the testator is on the defendants; it would be so in the Surrogate Court; it is the same here. *Baker* v. *Batt*, 2 Moo. P. C. 319; *Harwood* v. *Baker*, 3 Moo. P. C. 309; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; *Wilson* v. *Wilson*, 22 Gr. 84; *Thompson* v. *Torrance*, 9 A. R. 3; *Russell* v. *Lefrancois*, 8 S. C. R. 335. Where a party is instrumental in getting documents prepared in his own favour, the onus is on him of showing their righteousness, *Fulton* v. *Andrew*, L. R. 7 H. L. 471; *Hogg* v. *Maguire*, 11 A. R. 520. As to amount of sanity required, *Banks* v. *Goodfellow*, L. R. 5 Q. B. 565; *Russell* v. *Lefrancois*, 8 S. C. R. 335. As to answering questions put to the deceased, *Thompson* v. *Torrance*, 9 A. R. 22. There was no evidence of such capacity in the testator as

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these cases show to be necessary. As to deed being set aside in part, *Attorney General* v. *Fonseca*, 17 S. C. R. 612.

TAYLOR, C. J.—At the hearing the defendant Burk Jewell demurred to the amended bill for multifariousness, want of parties, and want of jurisdiction. The defendant Catharine Wright demurred for the same reasons, and also on the ground of another suit pending.

The objection of multifariousness is taken, because the bill seeks to set aside a deed made by the late John Thomas Wright to Burk Jewell, and also to set aside a will made by the same person in favour of Catharine Wright. But these defendants by their answers to the bill as originally framed, seeking to set aside the deed only, set up the will as a bar to the plaintiff's right to maintain his suit. Then the bill was amended by attacking the will also, which was part of the same transaction as the execution of the deed. I do not see how, when the will was thus set up the plaintiff could maintain his suit without attacking it also. His doing so is only incidental to the principal relief which he seeks.

The demurrer for want of parties can be urged only in the event of its being held that the will cannot be impeached in this suit, and so it need not be further considered.

By the demurrer for want of jurisdiction these defendants contend that the Court has not, on its equity side, any jurisdiction to try the validity of a will, or to pronounce it void for fraud or undue influence. The question raised is not, having regard to the wording of section 11 of the Queen's Bench Act, R. S. M. c. 36, without difficulty, but I think I should follow the judgment of my Brother Dubuc in *Wood* v. *Wood*, 1 M. R. 317. He had there to deal with a similar question arising under Con. Stat. Man. c. 31, s. 6, s-s. 16.

The objection of another suit pending cannot prevail. That a plaintiff has already begun, and has pending, another suit for the same purpose, may perhaps be a

ground of demurrer. But I do not see how the fact that another person has also brought a suit can be so. That the plaintiff in the second suit can get in the first one all the relief he seeks by the second one, may be a ground for staying his proceedings, but it cannot be a ground of demurrer.

Dealing with the merits of the case, there seems some exaggeration on both sides. All admit that the old man was feeble physically, but they do not agree as to his mental condition. According to the defendants' contention, his intellect was clear, and he was quite capable of transacting any business, while the plaintiff insists that he was hopelessly imbecile.

At the time of the execution of the deed and will, about four months before his death, he was nearly 74 years of age. About two years before that he had fallen from a load of hay and injured his head. The medical man who saw him then says he was a weak man, old for his age. For a considerable time before that his speech had been affected, so that there was difficulty in understanding what he said. After the accident his speech became so much worse that practically no one but his wife could make out what he said, except perhaps a few words. She knew, or professed to know, what he said. But neighbors who came to see him could not keep up any conversation with him, although some of them think they could occasionally make out a word from sounds he tried to make. Some of them, as Mr. Caldwell, the clergyman, John Seydore and Alexander Seydore, doubt if he understood them when they spoke to him. Mr. Caldwell says there were no signs such as would show that he understood, but he thought he understood to some extent. Alexander Seydore, an old acquaintance, says, "Could not decide if he understood me. Do not think he did." Dr. Patterson, after hearing the evidence as to the old man's condition, expressed the opinion that he was suffering from *senile dementia* and paralysis of the throat and tongue, extending to the limbs.

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There are two witnesses who naturally favor the defendants' contention, the one being the daughter of Catharine Wright by her first marriage, and wife of Burk Jewell; the other, the wife of his brother. The latter, who saw him almost every day, says he was intelligent, acted quite sensibly, and was capable of transacting business up to a week before he died. His mind was, she says, perfectly sound until then. Yet, she says, he acted childishly. She took things to amuse him with, and says she devoted herself to him as she would to a child. He had, according to her, the free use of his hands, and yet his wife, she admits, had to feed him. Mrs. Burk Jewell also speaks of his mind being clear, but says he was childish. He cried a great deal, which she attributed to his being old and childish. According to her, he could speak so as to be understood until about a week before he died. Yet the way in which they communicated with him was, that when he seemed to want something, he was not asked what he wanted, but one thing after another was named over to him until he made some sound which they took for yes. His wife, she says, would talk to him and coax him like a child.

The evidence as to the condition in which the old man was on the day the deed and will were executed comes entirely from those interested in supporting these documents. The will is one in favor of Mrs. Wright, and the deed is to the husband of her daughter by her first marriage. The money said to have been produced and paid by Jewell was handed to Mrs. Wright, and the note professing to secure payment of the balance of the purchase money signed by Jewell some days afterwards was also handed to her and is payable to her order. Porter, who was brought from Emerson to draw the deed, seems to have got all his instructions from Mrs. Wright or Jewell. He said he understood some words the old man said, but in another part of his evidence he says he could not understand what he was saying.

In estimating the value to be given to any evidence in favor of the old man's competency when the deed and will

were made, the previous conduct of Mrs. Wright cannot be overlooked. She seems to have been determined to secure the property for herself by any means in her power. The will then made was the third will she had got executed, all in her favor.

On the occasion of the accident in 1889, and within a few hours after it happened, she got a neighbor named Purdy to prepare a will in her favour. When Purdy came the old man was lying in bed, he made no motion nor did he in any way recognise Purdy, who made no attempt to converse with him. Yet the will was drawn up, and read over to the old man who still made no sign. Purdy and Mrs. Wright raised him up in bed and the latter supported him there. Then Purdy wrote his name, put a pen in his hand, and a mark was made, Purdy holding and guiding the hand. So helpless was the poor man that Purdy does not know if even his eyes were ever open while all this was being done.

About two months after that another will was drawn up by a Mr. Moore, who says he took his instructions from both Mr. and Mrs. Wright, but did not talk so much with him as with her. He says that after he had prepared the will, he gave the old man the contents of the will, said shortly he was leaving everything to his wife, and got the reply, Yes. Moore says Purdy and Seydore were the witnesses, or Purdy and himself. Seydore says he did not witness that will. Purdy says he did, but did not see the old man sign it. He says he signed it as a witness because he was asked to do so. He knew it was a will, and he supposed his so signing it was all right. He says he did not see the old man's signature on the will, though he won't say it was not there. About the sufficiency of the will there seems to have been some doubt for Moore says he submitted it to some lawyer in Winnipeg who said it was a good will. Mr. Mathers who was then engaged securing the right of way for the Northern Pacific Railway and was at the old man's house or at Jewell's sometime between November, 1889, and February, 1890, says Mrs. Wright then showed him

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a will and asked if it was properly executed. On examining it he found there was only one subscribing witness and told her she must get it re-executed.

The onus of supporting this deed and will rests upon the defendants, as they procured them to be prepared and executed. In *Baker* v. *Batt*, 2 Moo. P.C. 321, the late Lord Wensleydale said: "There is also another principle upon which the Court below has acted, and which has long prevailed in the Ecclesiastical Courts, which is this—that if the person benefitted by a will himself writes, or procures it to be written, the will is not void as it would have been by the Civil Law, but the circumstance forms a just ground of suspicion, and calls upon the Court to be vigilant and jealous, and requires clear and satisfactory proof that the instrument contains the real intention of the testator." The same learned judge, in *Barry* v. *Butlin*, 2 Moo. P. C. 482, dealt with the same subject thus: "If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased." In *Mitchell* v. *Thomas*, 6 Moo. P. C. 150, the Court was of opinion that the law as laid down in these cases should be strictly adhered to; and in *Fulton* v. *Andrew*, L. R. 7 H. L. 448, Lord Cairns quoted these rules at length as declaring the law. So in *Scouler* v. *Plowright*, 10 Moo. P. C. 445, the law was thus referred to: "Where a will has been prepared for the testator by the party principally benefitted by it, and executed under his supervision, proof, if the circumstances are suspicious, must be given that the testator was cognizant of the contents of such will and executed it freely without undue control." In *Donaldson* v. *Donaldson*, 12 Gr. 431, a lease and a will made by an old man in favor of his son were set aside, Mowat, V.C., saying, "I have no doubt that he

understood the general nature of the papers that he executed, and that he was not in a state of mind that rendered him incompetent for the transaction of ordinary business. But between parties so situated as these parties were, this is not enough. The defendant was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from or influence by the defendant, as the recipient of the benefit, and these things the defendant has not established."

In addition, it seems that in such a case there is thrown on the parties seeking to support the instrument, the onus of proof that the transaction was a righteous one. Thus in *Fulton* v. *Andrew*, Lord Hatherley said, "There is one rule that has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will . . . and who obtains a bounty by that will, is placed in a different position from other ordinary legatees, who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator, and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction." Here the deed is in favour of the husband of Mrs. Wright's daughter by her first marriage, while under the will the purchase money which purports to be payable and everything else pass to Mrs. Wright, the second wife. The old man's son and daughters are wholly passed over.

The rules of law referred to were approved of and followed in *Hogg* v. *Magnire*, 11 A. R. 507, and in that case the evidence of the solicitor who prepared and was present at the execution of the will, was quite as strong in favour of supporting it, if not even stronger, than that of Mr. Porter in the present case.

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As to the extent of capacity necessary to be shown, this was considered in *Harwood* v. *Baker*, 3 Moo. P. C. 282, where, in the case of a will executed by a testator in favour of a second wife, to the exclusion of other members of his family, he being in a state of weakened and impaired capacity from disease producing torpor of the brain, and rendering his mind incapable of exertion unless roused, the judgment of the Court was thus expressed: "Their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and more especially, when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration." This language was quoted with approval by Cockburn, C. J. in *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549. Reference may also be made to *Greenwood* v. *Greenwood*, 3 Curt. App. 30; *Boughton* v. *Knight*, L. R. 3 P. & D. 64; *Burdett* v. *Thompson*, L. R. 3 P. & D. 72 (n.); *Wilson* v. *Wilson*, 22 Gr. 39.

These are, it is true, all cases of wills, but I do not see why the same rules should not apply to the deed also, especially in a case like the present, where the deed and will were executed at the same time, and both as part of the same transaction.

The evidence satisfies me that the old man had not, at the time he executed these documents, mental capacity sufficient for the transaction of any business and therefore they must be declared void and set aside. The decree doing so must be with costs against the defendants, Burk Jewell and Mrs. Wright.

Decree for plaintiff.

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Re TAIT.

Before TAYLOR, C.J., KILLAM and BAIN, JJ.

Descent of Real Property—Law of Primogeniture in force in Manitoba up to 3rd May, 1871.

The Legislature of Manitoba passed the first Intestacy Act in May, 1871, and before that time the law of descent applicable in England to estates in lands and tenements, should be held to have been in force in Manitoba, and therefore where a person died intestate in April, 1871, being the owner in fee simple of a parcel of land, the Court

Held, that the land descended to the eldest son to the exclusion of the other children.

ARGUED: 8th December, 1890.
DECIDED: 8th December, 1890.

Statement.

APPLICATION under The Real Property Act, in which the question raised was, whether the law of primogeniture as it existed in England was in force here before the passing of the Intestacy Act by the Provincial Legislature in May, 1871.

John Tait was, at the time of the Transfer, 15th July, 1870, owner in fee of lot 43 of the parish of St. James. He died intestate in April, 1871, leaving a widow and five children.

James Richard Tait, the eldest son, claimed the whole of the land as the heir-at-law of his father, and the patent issued to him on that ground.

DUBUC, J.—The law of primogeniture in England arose out of the feudal system established by William the Conqueror. Under the old Saxon rule, the inheritance was divided equally amongst all males of the same degree, and that rule prevailed as to all lands not actually the subject of feudal tenure until the early part of the thirteenth century, when, under Henry III, the feudal law, introduced by the Normans, of descent to the eldest son or eldest brother was established. *Stephen's Commentaries on the*

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Laws of England, 404; *Broom's Commentaries, &c.*, 385; *Williams on Real Property*, 99.

That law has been the general law of England up to the present time. But in the County of Kent, and some other places, the ancient tenure of gavel kind, or socage tenure, by which the descent of the estate is, not to the eldest son, but to all the sons in equal shares, has always prevailed.

Now, was that law of primogeniture established here when the country was taken possession of in the name of the British Sovereign?

In *Blankard* v. *Galdy*, 2 Salk. 411, it was held that, where an uninhabited country is found out and planted by English subjects, all laws in force in England are immediately in force there; but in the case of an inhabited country conquered, not till declared so by the conqueror.

The same doctrine was followed in 2 P. W., 75, where it is said: "If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them; and therefore such new found country is to be governed by the laws of England."

It has been contended that the law of primogeniture was a part of the feudal system, and as that system was not introduced into this country, that feature of the feudal tenure was no part of our laws. I think, however, that the law of primogeniture, though it grew out of the feudal system, was not an essential part thereof; and as it prevails generally in England even in regard to estates held in tenure quite different from the feudal tenure, I am not prepared to say that, from the fact that the feudal laws and feudal customs were not imported into this country, it should be held conclusively that the law of primogeniture was not introduced as part of our laws.

But another point remains to be considered in regard to the law respecting the descent of land in this country.

In the charter of the Hudson's Bay Company, the lands to which the said charter is to apply are described as "All the lands and territories upon the countries, coasts, and

confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid" (stated in the preceding part to be those which lie within the entrance of the straits, commonly called Hudson's Straits, in whatsoever latitude such bays, etc., should be) "that are not already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian prince or state, with the fishing of all sorts of fish, etc. . . . and that the said lands shall be from henceforth reckoned and reputed as one of our plantations or colonies in America, called Rupert's Land. And further, we do by these presents, for us, our heirs and successors, make, create and constitute the said Governor and Company, for the time being, and their successors, the true and absolute lords and proprietors of the same territory, limits, and places aforesaid, and of all other the premises hereby granted as aforesaid, with their and every of their rights, members, jurisdictions, prerogatives, royalties and appurtenances whatsoever, to them, the said Governor and Company, and their successors forever, to be holden of us, our heirs and successors, as of our Manor of Greenwich, in our County of Kent, in free and common socage."

If the Governor and Company of Hudson's Bay are constituted the lords and proprietors of the said lands, and if the said lands are to be held by them as in the County of Kent, where the law of primogeniture does not prevail, does it not follow that the law of primogeniture was never introduced into this country? I think so, otherwise why should such restriction be found in the charter?

As this was the only question submitted to me on this application, I refrain from deciding any other points which might be raised in connection therewith.

This decision was afterwards reheard before the Full Court.

Colin H. Campbell, for J. R. Tait. Primogeniture the law of England before H. B. Company's charter. That was a law which would be carried to the colonies. *Broom &*

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Hadley's Commentaries, vol. 1, p. 19; *Burge's Colonial and Foreign Laws*, vol. 4, pp. 122-6. It is contended this was altered by the Council of Assiniboia, see Charter of H. B. Co.; but the King could not, by charter, alter the Common Law, or the laws of the Realm. *Broom's Constitutional Law*, 371; *In re Natal*, 11 Jur. N. S. 353. It is claimed that under the Manitoba Act there were no estates in fee simple, and no lands to which primogeniture was applicable, but it would appear there were estates in fee simple, Manitoba Act, ss. 32, 3. *McKenny* v. *Spence*, M. R. *temp.* Wood, 11.

C. P. Wilson, for the Attorney-General and District Registrar. By 1 & 2 Geo. IV c. 66, the Courts of Upper Canada were given civil jurisdiction within the Indian Territory and the laws of Upper Canada were made applicable in all subjects save in relation to lands or to any claims in respect of lands which were to be decided according to the laws of England. This would mean the laws of England so far as they were applicable to the condition of the colony; *Anderson* v. *Todd*, 2 U. C. R. 83. At the time of the Transfer the country now known as Manitoba was very sparsely settled and the inhabitants were chiefly occupied in hunting and trading. In the adjoining Province of Ontario, whose laws were applicable in all other matters, lands had for many years descended to all children equally, *Leith's Blackstone*, 503. In Ontario by common consent the laws of England had been assumed to be in force in regard to descent, mortmain and a number of other subjects not applicable, but as to descent this was abolished in 1862, and as to mortmain it was held that the law was not applicable, but by reason of having received legislative recognition it must be taken to have been introduced; *Anderson* v. *Todd*. The laws of Assiniboia, which are specially recognized by the Manitoba Act and later legislation are themselves evidence of a state of affairs inconsistent with a complete introduction of all the English laws regarding land. Par. 38 makes provision for the management of an estate where there was no

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"written" will — clearly implying that parol wills were recognized. The fact that at the first session of the Legislature provision was made for equal distribution, is legislative recognition of the fact that that is what was applicable to the condition of the people. The reason for passing it was, no doubt, owing to a practice which is said to have grown up whereby everything was given to the widow. Again the charter of the H. B. Co. grants them the land to be holden "as of our Manor of Greenwich in our County of Kent in free and common socage."

J. T. Huggard, for Christina Tait.

J. A. M. Aikins, Q.C., for the Attorney-General of Canada. If Tait were merely an occupant of the lands and the fee simple outstanding in the Crown, by the death of Tait no estate would be transmitted to the heir. If, however, he were entitled under the provisions of the Manitoba Act to an estate in fee simple, or equivalent to fee simple, and so recognized by the statute, and had an additional right to the issue of the patent merely as confirmatory of his estate, then it is submitted on his death those persons would be entitled to his rights in the same manner who would be if he were actually seized of the estate which the confirmatory letters patent would give him. The form of the grant in the patent always has been one in fee simple. The Act of 1875 respecting the appropriation of certain lands in Manitoba, was not intended to enlarge, but merely to confirm the rights of persons claiming under the provisions of the Manitoba Act, and the practice of the Crown under both Acts has been the same, except perhaps as to the evidence. It is not correct as appears to have been assumed by Mr. Justice Dubuc, that all lands in the county of Kent, were held according to the custom of Kent. *Elton on Tenures of Kent*, pp. 9, 10, 243, 6, 344, 79, 82, 85, 90 and 407. Gavelkind tenure was purely local, p. 157. *Wharton's Law Lexicon*, 'Socage." *Challis on Real Property*, p. 9. *Broom & Hadley's Commentaries*, vol. 2, pp. 167-70. The land in question

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was a direct grant from the Crown. Gavelkind was never direct from the Crown. Common Law not presumed to be changed, except by express enactment. *Wilberforce on Statutes*, p. 20.

The judgment of the Court was delivered by

KILLAM, J.—In my opinion, in case of any land being held in Manitoba between the 15th July, 1870, and the passing of the first Intestacy Act on 3rd May, 1871, for such an estate of such character and tenure that by the law of England it would descend to the eldest son upon the death of the holder, such lands would so descend here. Whether any lands were so held, or what estate parties would take under the Manitoba Act, it is in my opinion not necessary to decide for the purpose of answering the question submitted. I can see no principle upon which we can hold that the law was such that there could be such estates granted, and yet that there did not attach to them the incident of descent in the mode prevailing in England. It may be that for reasons of policy, or because they did not consider estates of the kind that would so descend to be applicable to the conditions of the country or desirable, none such were granted by the Company. But without delaying to consider the nature of the tenure by which the Hudson's Bay Company held, or whether it held lands in Assiniboia by its charter, it seems that it was always possible that some could be in some way granted which would be of the requisite tenure; at any rate, such could have been done by the Crown immediately after the surrender of the Hudson's Bay Company. Even if none were granted until then, there could be no reason why the heir should not be the same as in England, notwithstanding that no such estate had ever previously been granted.

This is sufficient to enable us to answer the question in the affirmative, otherwise I should prefer to delay in order to pronounce a more carefully considered opinion before reconsidering the question of the tenure of the Hudson's Bay Company upon which my brother Dubuc proceeded.

Question answered in the affirmative.

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MERCHANTS' BANK v. DUNLOP.

Before KILLAM, J.

Promissory note—Statement of consideration for which note given—Condition attached to promise to pay—Executory consideration.

Plaintiffs sued as indorsees of two promissory notes made by defendant, payable to the Watson Manufacturing Company, which stated on their face that they were given for a binder, and that the property therein should remain in the payees until payment of the note in full; also that the payees were to provide all repairs required for the binder, and any improvements that might be added to their binders before the maturity of the note.

Held, that these instruments were negotiable promissory notes, notwithstanding the special provision at the end, which should be construed as a memorandum to show that the payees had promised to provide the things mentioned as part of the consideration for the defendant's promise to pay the notes, and not as a condition attached to the absolute promise to pay.

Drury v. *Macaulay*, 16 M. & W. 146, and *Shenton* v. *James*, 5 Q. B. 199 distinguished.

ARGUED: 16th January, 1894.
DECIDED: 29th January, 1894.

Statement.

APPEAL from a County Court. The plaintiff Bank claimed to sue as indorsee of two promissory notes made by the defendant, and obtained judgment. The only question raised on the appeal was as to whether the instruments were negotiable promissory notes. The first ran as follows:

"$65.00. WINNIPEG, 22nd Oct., 1889.

On the 1st of January, 1891, I promise to pay The Watson Manufacturing Co., Limited, or order, at their office in Winnipeg, Man., the sum of sixty-five dollars, for value received. Given for 6-foot binder.

The title, ownership and right to the possession of the property for which this note is given shall remain in Watson Manufacturing Co., Limited, until this note or any renewal thereof is fully paid. The Watson Manufacturing Co. shall provide all repairs required for this binder also any improvements that may be added to their binders before the date the accompanying notes are payable.

(Signed) ADAM DUNLOP."

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The other instrument differed from the above only in being payable on the 1st January, 1892.

W. A. Macdonald for defendant, cited the following cases: *Siegel* v. *Chicago Trust and Savings Bank*, 23 N. E. R. 417; *McRobbie* v. *Torrance*, 4 M. R. 426; *Hall* v. *Merrick*, 40 U. C. R. 566; *Carlon* v. *Kenealy*, 12 M. & W. 139; *Elliott* v. *Beech*, 3 M. R. 213; and *Hartley* v. *Wilkinson*, 4 M. & S. 25.

I. Pitblado, for plaintiffs, cited *Jury* v. *Barker*, E. B. & E. 459; *Wise* v. *Charlton*, 4 A. & E. 786; *Chicago Railway Equipment Co.* v. *Merchants' Bank*, 136 U. S. R. 268; *McLeod* v. *Snee*, 2 Str. 762; and *Thomas* v. *Grace*, 15 U.C.C.P. 462.

KILLAM, J.—It was argued, for the defendant, that the memorandum at the end of the notes sued on, should be construed as attaching a condition to the absolute promise at the beginning of each instrument, or that it showed the consideration for the promise to be partly executory, which, it was claimed, rendered the instrument not negotiable.

The first argument is clearly untenable. The instrument begins with an absolute promise to pay on a certain date. The date or dates of payment of what are styled "the accompanying notes" do not appear. The promise referred to at the end does not go to the whole consideration for the promise to pay. Thus, upon the usual principles of interpretation of written instruments, the two promises would be independent.

My view of the interpretation is that the clause at the end should not be construed as a promise on the part of the Co., but as completing the statement of the consideration for the promise to pay. There is the clause, "Given for 6-foot binder." This would be calculated to suggest a sale of the binder as constituting the consideration. But then there is the qualification that the title, etc., are to remain in the payee until payment. This does not

necessarily import that the only consideration was a completed sale of the article. We know that promissory notes are frequently given upon the making of agreements for the sale of various articles, when the agreements are that the title shall remain in the vendor's possession until payment, and the true consideration is the vendor's promise to complete the sale upon payment. Then, apparently to prevent any inference that what the promisor is to get is the binder as it then was alone, there is the addition of words showing that some incidental things are to be furnished as well.

Clearly, before The Bills of Exchange Act, 1890, 53 Vic. c. 33, D., a bill or note was not the less a negotiable instrument because the consideration for which it was given was stated in it. See *Shenton* v. *James*, 5 Q.B. 199; *Daniel on Neg. Instr.* §§ 51, 108, 797. And by s. 3, s-s. 3, of the Act, "an unqualified order to pay, coupled with . . . . . a statement of the transaction which gives rise to the bill, is unconditional." By s. 88, this provision is equally applicable to promissory notes.

But in *Chalmers on Bills*, 1st ed., at page 16, it was laid down that "A bill must not be expressed to be given for an executory consideration." But in the 3rd and 4th editions, at p. 10, this statement is changed, so as to read, "The expression of an executory consideration on the face of a bill may, perhaps, make it conditional." In all the editions reference is made at this point to *Drury* v. *Macaulay*, 16 M. & W. 146, and in the later editions to the section of the English statute corresponding to sub-sec. 3 of sec. 3 of our Act. This renders it somewhat doubtful whether the learned writer intended to suggest that possibly the statute had made a change in the law.

The true position of the former law appears to me to be illustrated by comparing *Shenton* v. *James* with *Drury* v. *Macaulay*. In the former the promise was to pay "in consideration of foregoing and forbearing an action at law" on a certain claim for damages. This was held to consti

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KILLAM, J.

tute a promissory note, as it was assumed that there was a corresponding promise to forego and forbear action. In the second case, the instrument was headed "Drury v. Vaughan" and the promise was that "in consideration of Mr. Drury not taking any further proceedings in the above actions I do hereby undertake," etc. This was held not to be a promissory note, Alderson, B., saying "It is not certain that any money will be paid by virtue of it. If the plaintiff does not forbear proceedings against the Vaughans, none will be paid."

The distinction between the two cases was that in the one the promise to forbear constituted the consideration for the promise to pay, and in the other the proposed actual forbearance. At least such appear to have been the constructions placed by the Court on the respective documents. This distinction is further illustrated by the case of *Siegel* vs. *The Chicago Trust and Savings Bank*, 23 N. E. R. 417.

Again in *Jury* v. *Barker*, E. B. & E. 459, where the promise was to pay a certain sum at a certain date, with the addition of the words "as per memorandum of agreement," this was held to constitute a promissory note, as there was nothing to show that the other agreement qualified the absolute promise. On the other hand, in *Cholmeley* v. *Darley*, 14 M. & W. 344, the instrument was in form an absolute promissory note, but bore an indorsement showing that it was given to secure floating advances. This was held not to be a promissory note, as the amount to be paid or whether any sum would be payable was rendered uncertain.

In the present case, I think it may well be inferred that there was a collateral promise of the payee constituting the consideration for the promise of the defendant, and that there is nothing in the instrument showing that such was not the true consideration or that the liability to pay was uncertain.

I must, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

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McMILLAN v. WILLIAMS.

Before TAYLOR, C. J.

Statute of Frauds—Title to land—Jurisdiction of County Court—Pleading—Objection taken for the first time on appeal—Specific performance.

In order to oust the jurisdiction of the County Court on the ground that some right or title to land is in question, it must be shown that there is a *bona fide* dispute, and when the judge has found a verdict for the plaintiff, it will be assumed that he had inquired into the matter and decided that there was no such dispute.

A common law action for a balance of the purchase money of land sold under a verbal agreement cannot be maintained, although the deed has been delivered.

Cocking v. *Ward*, 1 C. B. 858 followed.

The objection of the Statute of Frauds can be raised under the defence of never indebted, and can be insisted on before the Appellate Court, although it did not appear whether it had been raised at the trial or not.

A County Court judge, having no jurisdiction to decree specific performance of an agreement for the purchase of land, cannot take notice of the doctrine that equity looks upon that as done which ought to be done, and give relief accordingly. *Foster* v. *Reeves*, [1892] 2 Q. B. 255.

ARGUED: 27th February, 1894.
DECIDED: 9th April, 1894.

Statement.

THE plaintiff sued in the County Court of Deloraine for a balance of purchase money of real estate sold under a verbal agreement. The defendant had paid $200 on account, and was to pay the remaining $100 when plaintiff furnished the title; but the parties differed as to the nature of the title that defendant was to accept for a portion of the land, five feet frontage.

In his sworn dispute note defendant denied his indebtedness, and also set up his version of the agreement and that the plaintiff had not completed the title for the five feet. He also claimed that the County Court had no jurisdiction, owing to the disputed question of title to land.

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At the trial in the County Court each party swore to the truth of his version of the agreement as to the title for the five feet, and defendant admitted that the rest of the land had been duly conveyed to him.

At the trial, before His Honour Judge Cumberland, the plaintiff had a verdict for $117, and against that the defendant appealed.

The following were the grounds of appeal stated. First—That the said County Court had no jurisdiction to try this action, because the right or title to land came in question in this action. Second—This action being for the recovery of alleged unpaid purchase money of land, the plaintiff could not succeed without proving that the agreement upon which this action was brought, or some memorandum or note thereof, was in writing signed by the defendant, or some other person thereunto by him lawfully authorized, and no evidence of any such agreement was given by plaintiff at the trial of this action. Third—The plaintiff's claim being disputed, it was necessary for him at the trial, to prove that he had conveyed the land referred to in the alleged agreement to the defendant, and that he had a good title to the same, and no such evidence was given by the plaintiff at the trial of this action. Fourth—The evidence given at the trial showed that the sum of $100 sued for by the plaintiff was to be withheld until the plaintiff should complete title in the defendant for five feet of the frontage of lot 12 in block 2 in the village of Deloraine, and that the plaintiff never did procure title for defendant for said piece of land, and that the defendant was compelled to purchase the whole of said lot 12 in order to avoid the necessity of removing his stable off the said five feet, and the plaintiff was not entitled under these circumstances in equity to require the defendant to pay said balance of purchase money without taking off the defendant's hands the remainder of said lot 12, which the defendant did not wish to purchase or hold, and the plaintiff should have offered to take over from the defendant

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such remainder of said lot 12 at the amount which the defendant was compelled to pay for it, before requiring the defendant to pay the said sum of one hundred dollars.

It did not appear from the notes of the evidence whether or not the defendant had raised the objection under the Statute of Frauds at the trial.

George Patterson for defendant. This action was not within the jurisdiction of the County Court, the question of title to land being raised, County Courts Act, R.S.M. c. 33, s. 59. Under Imperial Statute, 19 & 20 Vic. c. 108, s. 25, even where the title to land only arises incidentally, the consent of the parties is necessary to jurisdiction, *Young* v. *Seabrook*, 14 A. R. 97. If there is a color of right there is no jurisdiction, *Price* v. *Guinane*, 16 O. R. 264; *Worman* v. *Brady*, 12 P. R. 618; *McNeill* v. *Haines*, 13 P. R. 115; *Foster* v. *Reeves* [1892], 2 Q.B. 255. It is only where the Judge can find on the evidence that there is no *bona fide* question of title, that he has jurisdiction, *Sewell* v. *Jones*, 1 L. M. & P. 525; *South Norfolk* v. *Warren*, 8 M. R. 481. The evidence in this case showed a *bona fide* dispute, *Re Ardagh*, 4 M. R. 509. There was no agreement in writing as required by the Statute of Frauds, so no action will lie, and there can be no action for purchase money of land without proving that, *Cocking* v. *Ward*, 1 C. B. 858. At Common Law this could be raised under the general issue. As to objection that point not taken in County Court, *Ex parte Firth*, 19 Ch. D. 419; *Page* v. *Austin*, 7 A. R. 1; *Garrett* v. *Roberts*, 10 A. R. 650; *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 382; *Bicknell & Seager on Division Court Act*, 218; *Rhodes* v. *Liverpool Commercial Investment Co.*, 4 C. P. D. 425. No evidence could have been given here to get over the objection; plaintiff's own evidence proves it.

A. Haggart, Q.C., for plaintiff. The true test is whether the Court has to try the title—that is, decide upon it in trying the case. *Annual County Court Practice*, 1889, 416; *O'Brien on Division Courts*, 42; 6 L. J. O. S. 146; *Re*

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Crawford v. *Seney*, 17 O. R. 74. There was no question of title on which the County Court Judge had to adjudicate. Defendant admits the contract, but says it should have included part of the adjoining lot. Equity looks upon things agreed to be done as performed. Part performance is sufficient to take the case out of the statute. There was delivery of the deed, and payment of part of purchase money; these took the contract out of the statute, *Taylor's Equity*, 568.

TAYLOR, C. J.—Where there are formal pleadings in the County Courts, as there were at one time in England, and as there still are in Ontario, the jurisdiction of the Court seems to be at once ousted by a defendant filing a plea raising a question of title to land, Comyn's Dig. County, c. 8; *Cannon* v. *Smalwood*, 3 Lev. 203; *Tinniswood* v. *Pattison*, 3 C. B. 243; *Lilley* v. *Harvey*, 12 Jur. 1026; *Powley* v. *Whitehead*, 16 U. C. R. 589; *Worman* v. *Brady*, 12 P. R. 618. But it has been held that a dispute note filed under the practice in our County Courts does not stand in the same position, *South Norfolk* v. *Warren*, 8 M. R. 481; *Re Crawford* v. *Seney*, 17 O. R. 74.

If then, the filing of a dispute note, or a mere suggestion that the title to land is in question, does not at once oust the jurisdiction, the judge must inquire into the circumstances. He must be satisfied that it is in question, and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point, *Lilley* v. *Harvey*, 12 Jur. 1026. The judge must inquire into the matter, and ascertain whether the liability of the defendant is contingent upon the decision of a question of title upon which there is a real dispute, *Morton* v. *Grand Junction Canal Co.*, 6 W. R. 543.

In the present case, there was a matter to be inquired into and determined before the judge could say whether the question of title to land arose or not. If so, it was his duty to inquire into and determine that first, *Montnoy* v. *Collier*, 1 E. & B. 630; *Re Emery and Barnett*, 4 C. B. N.

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S. 423. In the latter case, a landlord sued for rent, and the defence was that the tenant had given up possession to a person claiming to be owner of the land. It was claimed that the title to the land came in question, and the Judge conceiving that it did so, declined to proceed with the case. A rule calling on the Judge and defendant to show cause why the Judge should not hear and determine the plaint, was made absolute. The Court held that the Judge should have gone on and inquired as to the circumstances under which the tenant went out of possession. If he went out voluntarily, and by arrangement with the claimant, then no question of title could arise, for the landlord's title could not be disputed. But if he had been evicted by the claimant, then the question did arise, and the case would have come to a point at which the jurisdiction of the County Court ceased.

In this case, what the agreement was, is a matter in controversy between the parties, and it seems to me, that must be determined first, or before it can be known whether a question of title arises or not.

The defendant contends that what he bought was lot 11 in Block 2, with five feet in frontage of lot 12 adjoining lot 11, and that the balance of purchase money now sued for was not to be paid until the plaintiff should complete the title to the five feet of lot 12. This, it is said, he has not only never done, but the defendant, to secure the five feet, has had to buy lot 12 from another person and pay a considerable sum therefor. If this be the true story of the bargain a question of title may arise. But the plaintiff says, what he agreed to sell was lot 11 and a stable, which stood partly on 11 and partly on 12, for $300. As to lot 12, he says, a man named Smith held it under an agreement with the Canadian Pacific Railway Company, and had agreed, upon getting a deed from the Company, to give him a deed of the five feet, but Smith not being prepared to pay for the lot, he agreed to settle with the Company for it. This had not been done when lot 11 was sold, and the plaintiff says he proposed that defendant should take his place as to lot

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12, dealing with the Company as he was about to do, and to this the defendant agreed. According to him the price of lot 11 and the stable was $300, of which $200 was paid, and the $100 now sued for was retained by defendant, not until a title was completed to the five feet of lot 12, but until a deed of lot 11 was given, and this has been done. If this was the true agreement, I do not see how any question of title arises. The defendant has got a deed of lot 11, that is admitted, and in the dispute note and grounds of appeal no question is raised about the title to that lot. The defendant has also got lot 12 by a dealing with the Canadian Pacific Railway Company, and that is just what, according to the plaintiff, he was to do. The plaintiff's account of the agreement is corroborated by production of an entry in the day book of a deceased solicitor who drew a transfer of lot 11 from the plaintiff to the defendant, and by the evidence of Perrin, who was at the time a clerk in the office of the solicitor.

There is no written note by the learned Judge of the County Court, showing the grounds on which he based his judgment, but from his finding in favour of the plaintiff, it is evident that he accepted his account of the transaction as the true one. I agree with the conclusion to which he came.

But the defendant relies on the ground of appeal, which sets up that only a verbal agreement for the sale of the land has been proved, so the Statute of Frauds is a bar to the plaintiff recovering in this action. It is said in answer, that he cannot now urge this defence, because the objection of the Statute of Frauds is not set up by the dispute note, nor was it raised at the trial.

By the dispute note the defendant says, that he was never indebted as alleged, so the defence of the statute is open to him, *Buttemere* v. *Hayes*, 5 M. & W., 456; *Fricker* v. *Thomlinson*, 1 M. & G. 772.

Whether this defence was raised at the trial or not, there is nothing to show. That it does not appear as an objection on the record of the evidence certified by the clerk,

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under section 324 of the County Court Act, is not conclusive that it was not taken. Such an objection is not one which, in my opinion, is dealt with by that section which requires the clerk to certify the evidence with all recorded objections and exceptions thereto. This objection of the Statute of Frauds, is not an objection to the evidence, it is one which would naturally come to be taken by counsel when, after the closing of the evidence, he is proceeding to argue the case.

The propriety of permitting objections to be raised on an appeal, which were not raised before, seems an unsettled question. The practice seems different in different courts. *Rhodes* v. *Liverpool Commercial Co.*, 4 C. P. D., 425; *New Zealand Co.* v. *Watson*, 7 Q. B. D. 374 and *Ex parte Firth*, 19 Ch. D. 419, were cited as English authorities against permitting such a course, although in *New Zealand Co.* v. *Watson*, the reason for refusing to hear the objection seems rather to have been, that no case for it had been made by the statement of claim, and no ground laid for allowing an amendment. Permission to raise a new ground was refused for the same reasons in *Lash* v. *Meriden Britannia Co.*, 8 A. R. 689.

In favour of allowing a new ground to be taken, the Ontario cases of *Page* v. *Austin*, 7 A. R. 1; *Ellis* v. *Midland Ry. Co.*, 7 A. R. 464; and *Garrett* v. *Roberts*, 10 A. R. 650, were relied on. In all these cases appeals were allowed on grounds raised in the Court of Appeal for the first time, but no costs were given because so raised.

As the defence of the Statute of Frauds is one which could be raised under the dispute note, and it cannot be said it was not raised at the trial, I do not think the defendant should be precluded from raising it now.

The only agreement proved was a parol one, but it is now an executed contract, so far as anything is to be done on the part of the plaintiff. The defendant has received from the plaintiff a deed of lot 11. That was admitted at the trial. Can then the plaintiff sue for the balance of purchase money remaining unpaid? In *Browne on Statute of*

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Frauds, s. 117, it is said that when, in pursuance of a verbal contract, a conveyance of land is executed, an action may be maintained for the price of the land. But the cases there cited, as I read them, do not, except perhaps one, go the length of supporting the statement so broadly made. The case which is an exception is an American one, *Cagger* v. *Lansing*, 43 N. Y. 550. That is a case in which land was sold by parol, after which a deed was executed by the vendor which was delivered, not to the purchaser, but to his brother as an escrow, to be delivered on payment of the purchase money. It was held, that the deed not having been delivered, an action could not be maintained for an unpaid balance of the purchase money. But the Judge who delivered the judgment of the Court, while holding there could be no recovery, because until delivery of the deed no title passed, said, "That purchase money agreed by parol to be paid for lands conveyed may be recovered by action is shown by an unbroken current of authority in this State."

Where a purchaser has received a deed of land, and then refuses to pay the purchase money, it does seem as if he should not be allowed to set up the Statute of Frauds in answer to an action for the money. But I do not see how the case of *Cocking* v. *Ward*, 1 C. B. 858, can be got over. That case has been commented on, but never overruled. In that case, the plaintiff succeeded on a count upon an account stated, it being proved that after the purchaser obtained possession, he acknowledged his liability and promised to pay. But the verdict in his favor upon the first count, which was a special one upon the agreement itself, was set aside, the Court holding that an agreement respecting the transfer of an interest in land, required by the Statute of Frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected, and nothing remains to be done but to pay the consideration. Tindal, C. J., said,

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"As the special count in this action is framed upon the very contract itself, to enforce the payment by the defendant of the sum stipulated to be paid as the price of the interest in the land which the plaintiff gave up, and to which the defendant succeeded, we think the contract itself cannot be considered as altogether executed, so long as the defendant's part remains to be performed. . . . . We think the case of *Buttemere* v. *Hayes*, 5 M & W., 456, is an authority in point, that the present contract, though executed on the part of the plaintiff, yet, not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds." The plaintiff here sues upon the agreement, and that case is a direct authority against his succeeding in the action.

It was argued that the agreement having been partly performed, a Court of Equity would decree specific performance of it, and that as equity looks upon that which ought to be done as done, the County Court Judge could give effect to it notwithstanding the objection of the Statute of Frauds. *Foster* v. *Reeves*, [1892] 2 Q. B. 255, is an authority against that position. There, the defendant made an agreement for a lease for three years, and so on from year to year until determined, but it was not by deed, and therefore under the Statute of Frauds and 8 & 9 Vic. c. 106, it was void. The defendant took possession, then gave notice to quit and went out at the end of the first year, and the plaintiff sued for a quarter's rent which accrued after the abandonment. The County Court Judge held the agreement one of which specific performance would be ordered, although he had no power to grant that, and gave judgment for the plaintiff. His judgment was set aside by the Divisional Court, and the order then made was affirmed by the Court of Appeal. It was held, that as the County Court Judge could not decree specific performance, he could take no notice of the equitable doctrine, nor entertain any inquiry as to its effect.

The result then is that this appeal must be allowed with

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costs, the verdict for the plaintiff in the County Court set aside, and a non-suit entered with costs.

Appeal allowed and non-suit entered with costs.

END OF VOLUME IX.

APPENDIX.

In the case of *Winnipeg Street Railway Co.* v. *Winnipeg Electric Street Railway Co.*, 9 M. R. 219, on appeal to the Judicial Committee of the Privy Council, the judgment of the Court of Queen's Bench in favor of the defendants was affirmed, 1894, A. C. 615.

RULES AND ORDERS.

116. When any party enters an application or motion to the Full Court to review, set aside, reverse or vary, or by way of or in the nature of an appeal from any verdict, decree, rule, order, judgment or other decision of a Judge, whether final or interlocutory, and whether given or made in Court or in Chambers, such applicant shall, at least three days before the commencement of the then next ensuing Term, furnish to the Prothonotary, for the use of the Judges, three copies of any grounds of or reasons for the decision complained of which may have been given in writing by the Judge and made accessible to the party, as well as three copies of the decree, rule, order or certificate made or issued in pursuance of such decision, and three copies of the præcipe to enter such application or motion, and, if the decision be upon a demurrer, three copies of the pleading relevant to the demurrer.

117. If the application or motion be entered within three days before the commencement of a Term, or during any Term, such copies shall be furnished with the præcipe to enter the same.

118. If the applicant shall not have been able to obtain or make any such copy in sufficient time to furnish it as required by the two last preceding rules the same shall be furnished as soon as, by the exercise of due diligence, it can be obtained or made.

119. Failure to comply with the three last preceding rules may be punished by striking out or adjourning the application or motion with or without costs, or by imposing or refusing costs, or otherwise, as the Court shall deem proper.

120. General rule numbered 29, made in Michaelmas Term, 1880, is hereby abrogated and repealed.

121. Where any party is appealing from Her Majesty's Court of Queen's Bench for Manitoba, or from any Judge thereof, to the Supreme Court of Canada, or to Her Majesty-in-Council, upon any printed case, proof sheets of any charge or directions to a jury, and of the judgments or reasons for or grounds of any decision forming part of such case shall be submitted to the respective Judges who may have pronounced or given the same, or, where this is not reasonably practicable, then to some other Judge of the Court of Queen's Bench; and the Prothonotary shall not certify or transmit to the Registrar of the Supreme Court of Canada or to the Clerk of Her Majesty's Privy Council, any such printed case until he shall be satisfied that such proof sheets have been so submitted, and that the printed case conforms to any corrections made by such Judges respectively.

THE WINDING-UP ACT.

The Judges of the Court of Queen's Bench for Manitoba do hereby, in pursuance of the powers conferred upon them by "The Winding-Up Act," order and direct as follows:

Rule number fifteen (15) of the General Rules and Orders made and passed on the 27th day of March, 1886, under the authority of the Act of the Parliament of Canada, 45 Victoria, Cap. 23, is hereby amended by adding thereto the following words, "or the Court or Judge may accept the security of any guarantee company or society established by charter or by Act of Parliament of Great Britain and

Ireland or of the Dominion of Canada, for such sum and in such form as the Court or a Judge may approve."

Dated this 14th day of July, 1894.

T. W. TAYLOR, C. J.
J. DUBUC, J.
A. C. KILLAM, J.
JNO. F. BAIN, J.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME,

BEING DECISIONS IN THE

COURT OF QUEEN'S BENCH FOR MANITOBA.

ACTION AT LAW.

See CONTRACT.

ACTION, TRANSITORY OR LOCAL.

Domicile of defendant out of jurisdiction—Personal service within jurisdiction.

See JURISDICTION, 1.

ADJOINING LAND.

Where animals might properly be.

See RAILWAYS, 1.

ADMISSIONS IN ANSWER.

See PLEADING IN EQUITY, 1.

AFFIDAVIT.

Having served purpose for which filed.

See EXAMINATION.

Evidence to set aside garnishee order—Affidavit on information and belief not sufficient.

See LEAVE TO APPEAL.

AGREEMENT FOR SALE OF LAND.

See COVENANTS.

AMENDMENT OF BILL.

See PLEADING IN EQUITY, 1.

See TITLE TO LAND.

AMENDMENT OF INDORSEMENT ON WRIT.

See SUMMARY JUDGMENT, 2.

ANIMALS KILLED ON RAILWAY TRACKS.

See RAILWAYS, 1.

ANSWER OF CORPORATION.

Filing without signature or seal.

See PRACTICE IN EQUITY, 1.

APPEAL FROM COUNTY COURT.

1. *Application for new trial or to reverse judgment at trial—Weight*

of evidence.]—An application by the defendant for a new trial or to reverse or vary the judgment of one County Court Judge in favor of the plaintiff having been made to another County Court Judge under section 309 of The County Courts Act, R. S. M., c. 33, the latter ruled that it should not be granted unless the verdict appeared to be unreasonable or unjust, or a perusal of the evidence showed that the trial Judge must, in arriving at his decision, have omitted through oversight to consider some undisputed fact, or that some undisputed fact or some plain principle of law applicable to the facts and favorable to the defendant could not have been brought to his attention, and the application was dismissed. Defendant then appealed to a Judge of the Queen's Bench against this decision.

Held, that the principles thus laid down were correct, and that the appeal should be dismissed, although, in the case of an appeal under section 315 of the Act, the verdict would have to be reviewed upon the facts in so far as the Court above could do so without having the witnesses before it. *Smith* v. *Smyth*, 569.

2. *Filing of evidence—Delay in prosecution—Copy of evidence—Transmission of papers by the County Court Clerk.*]—In filing a copy of the notes of evidence in the County Court for the purpose of an appeal to the Queen's Bench, it is necessary, under section 324 of the County Courts Act, that a law stamp should be affixed to the document. It is essential, under section 323 of the Act, that the Clerk of the County Court should transmit directly to the Prothonotary of the Queen's Bench in a sealed package all the papers and proceedings in his office relating to the suit, and where such papers were handed by the County Court Clerk to the appellant's attorney in an unclosed envelope, and the attorney had them in his possession until the day before the hearing of the appeal, it was dismissed with costs. *Burke* v. *Brown*, 305.

APPEAL FROM REFEREE.

Computation of time—Last day Sunday—Pleas—Application to strike out—Demurrer.]—G. O. 97 provides that "Appeals from the order or judgment of the Referee in Chambers shall be made by summons, such summons to be taken out within four days after the order or judgment has been pronounced," etc.

Held, that where the last day happens to fall on a Sunday, the time should be reckoned exclusively of that day.

Where pleas are clearly bad they should be struck out, and the plaintiff not put to the expense of a demurrer. *Bank of B. N. A.* v. *Munro*, 151.

APPEAL FROM ORDER.

See LEAVE TO APPEAL.

APPEAL PENDING.

Action on foreign judgment—Appeal pending against same

when application for leave to sign judgment made here.

See SUMMARY JUDGMENT, 1.
See STAYING PROCEEDINGS.

APPLICATION FOR A JURY.

See TRIAL BY JURY.

ARBITRATION.

See MUNICIPALITY.

ASSESSMENT ACT.

(R. S. M. c. 101, s. 193.)

Sale of land for taxes—Forfeiture of surplus purchase money remaining in the hands of the treasurer for six years. From what time the six years begin to run.]—Where lands have been sold for taxes under the Assessment Act, and the price amounts to more than the taxes due, and the purchaser at the end of two years from the day of sale pays the surplus purchase money to the treasurer of the Municipality, the same cannot be claimed by the Municipality as forfeited until after the lapse of six years from the receipt thereof by the treasurer, although the language of section 193 of the Act is ambiguous and speaks of the money remaining in the hands of the treasurer for six years from the day of sale of the land of which it formed part of the purchase money. *Re Carey and Lot 65, &c.*, 483.

ASSESSMENT AND TAXATION.

See TAX SALES, 2.

ASSIGNMENT OF CLAIMS SUED ON.

See SECURITY FOR COSTS, 2.

ASSIGNMENT OF FUTURE INCOME.

See GARNISHMENT, 1.

ASSIGNMENT OF JUDGMENT.

See SUMMARY JUDGMENT, 1.

ATTACHMENT.

Setting aside for irregularity—Term of bringing no action for damages—Costs, refusal of.]—In suing out a writ of attachment against defendant, plaintiff had omitted to state in his affidavit whether the defendant was a corporation or not. The defendant being therefore entitled, *ex debito justitiæ*, to have the writ set aside.

Held, Dubuc, J., dissenting, that the Court could not impose the term of bringing no action against the plaintiff as a condition of setting the writ aside, but that costs should be refused unless defendant would consent to such term being imposed.

Ashdown v. *Dederick*, 2 M. R. 212, followed.

Per Dubuc, J.—The Court has jurisdiction to impose the term of bringing no action in a proper case, and in this case such term should be imposed. *Wilson* v. *Smith*, 318.

ATTACHMENT OF DEBTS.

See GARNISHMENT.

ATTORNEY ON RECORD.

Service on another than the attorney on the record.

See PRACTICE, 2.

AUTHORITY OF MANAGER OF COMPANY.

See CONDITIONAL SALE, 1.

BANKS AND BANKING.

See WINDING UP, 1.

BILLS OF SALE.

Sale of horse by owner to his employee—Bills of Sale Act—Immediate delivery—Change of possession — Seizure of horse under execution against vendor—Claim by vendee—Interpleader issue.]—Interpleader issue respecting the right to a stallion. D. H. acquired the horse in question in March, 1891. During 1891 and 1892 printed notices were put up advertising the horse, in which it was stated that reference for particulars was to be had to D. H., although there was no statement of the ownership of the animal. H. did not himself travel with or personally take care of the horse, but arrangements were made in his name with the persons at whose places the horse was put up, and printed forms were used on which was the heading, "D. Hope, proprietor." On 20th June, 1892, plaintiff bought the horse from H., giving his note at six months for the amount of purchase money, and H. gave him an absolute receipt acknowledging payment of the whole of the purchase money, and an order for delivery of the horse. The horse was then away in the country, and was not brought back to Winnipeg until 23rd June, when plaintiff presented the order to C., who took care of the horse and told him he had bought it; he told C. to change the book containing the forms of contracts by substituting the plaintiff's name for that of H.; he gave C. charge of the horse, and told him to tell everybody that the horse was his, plaintiff's.

Held, that the transaction must be treated as a real agreement for the sale of the horse to the plaintiff. The plaintiff's note was apparently accepted in payment, and there was such a delivery and acceptance as satisfied the Statute of Frauds.

But that the sale was void as against the defendant, because of its not having been accompanied by an immediate delivery, and the possession of the plaintiff could not avail to give him a title, which the sale did not give as against the defendant in the issue. *Jackson* v. *Bank of Nova Scotia*, 75.

BREACH OF WARRANTY.

See WARRANTY.

BUILDING CONTRACT.

Mechanic's lien—Building contract — Substantial completion—Deviations from specifications — Performance of contract must be exact—Provision inconsistent with

lien—Costs.]—Where work is to be done in a specified manner and to be paid for on completion, and it is done in a different manner, or so defectively as to justify an allowance for the defects, and the party for whom it is done refuses to acquiesce in the variations or defects or to accept the work, but simply takes the position that the workman must perform it according to the express stipulations and perfectly, and interposes no obstacle to this being done, the workman cannot recover anything before this is done. At the hearing of a suit to realize a mechanic's lien for the balance of the contract price of the erection of a dwelling house, the Judge found that there were defects and variations in the construction requiring a deduction of $40 from the total sum of $1,400, and made a decree in favor of the plaintiff for payment of the balance of the contract price with a deduction of the $40. The evidence, however, showed that the defendant had not acquiesced in the changes and had complained of the defects.

Held, by the Full Court on rehearing, that under such circumstances the plaintiffs could only recover that portion of the price which was to be paid as the work progressed.

The contract contained a provision that if the defendant should fail to pay the balance of the price, $1000, on completion of the building, the plaintiffs were "to become the sole owners of the property until the said $1000 be paid."

Held, that this was not inconsistent with a lien for that part of the contract price which was payable as the work progressed.

The plaintiffs having recovered only $110 by the suit, for which they might have sued in the County Court, and the defendant having disputed the whole claim throughout and raised a number of untenable objections, the Court allowed no costs to either party up to and including the decree, but gave the defendant the costs of the rehearing to be set off against the plaintiffs' verdict. *Brydon* v. *Lutes*, 463.

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People's Loan and Deposit Co. v. *Grant*, 18 S. C. R. 262 distinguished.....70

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CERTIFICATE OF TITLE.

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CHAMPERTY.

See HALF-BREED LANDS ACT.

CHARGING ORDER.

Solicitor's lien for costs—Property recovered or preserved—Solicitors' Act, Imp. Stat. 23 & 24 Vic., c. 127.]—The petitioner had

been retained by John Shields, one of the defendants in *Leacock* v. *McLaren*, which had been brought for the purpose of winding up the partnership composed of the plaintiff and defendants in that suit, and he had conducted it to the termination of an appeal to the Supreme Court of Canada, whose decision was in favor of his client, and resulted in establishlishing his rights as a partner in certain moneys in Court and in certain other assets of the partnership. The other defendants then appealed to the Privy Council, but pending that appeal, a settlement was arrived at between the parties without the knowledge of the petitioner (Shields having retained another solicitor in his place), by which the moneys in Court were all applied in payment of the debts of the firm. Meantime, John Shields married, and made a settlement on his wife of all his interest in the partnership assets, and the trustee of the settlement, William Shields, the plaintiff in the suit of *Shields* v. *McLaren*, afterwards commenced that suit for the purpose of working out the settlement of the former suit. In this latter suit, the old partnership was wound up, the assets realized, and a considerable sum of money was paid into Court.

Held, that the petitioner was entitled to a lien on this money for his unpaid costs of the first suit, as being property preserved within the meaning of the Solicitors' Act, Imp. Stat. 23 & 24 Vic., c. 127, but subject to the prior lien of the solicitor for William Shields, notwithstanding that the money was actually realized in another suit: and that the fact of his client having parted with his interest before the commencement of the second suit, was no objection to his claim.

Berrie v. *Howitt*, L.R. 9 Eq. 1, not followed.

Foxon v. *Gascoigne*, L. R. 9 Ch. 657, distinguished.

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See PRACTICE IN EQUITY, 3.

CHATTEL MORTGAGE.

Execution—Priority—Mortgage of crops to be grown.]—A chattel mortgage covering growing crops or crops to be grown does not come within the provisions of The Bills of Sale Act, R.S.M. c. 10, so as to need filing under the Act to preserve its validity.

Such a mortgage cannot prevail over a prior execution in the hands of the Sheriff against the goods of the mortgagor. *Clifford* v. *Logan* 423

See SHERIFF, 1.

CHOSE IN ACTION.

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COMPANY.

Powers of.

See CONDITIONAL SALE, 1.

COMPUTATION OF TIME.

See APPEAL FROM REFEREE.

See MUNICIPAL ELECTIONS.

CONDITIONAL PROMISE TO PAY.

See PROMISSORY NOTE, 3.

CONDITIONAL SALE.

Purchaser for value without notice — Powers of Joint Stock Company — Promissory note of Company — Authority of Manager of Company to sign note.]—Plaintiff sold a buggy to the Gold Seal Oyster Company, which was incorporated under the Manitoba Joint Stock Companies Act, for the purpose of carrying on (amongst other things) a retail business in the sale of oysters, fish and poultry in the City of Winnipeg. The sale was a conditional one, and the plaintiff took a note for the amount of the purchase money signed "Gold Seal Oyster Co., T. H. Jones, Sec.-Treas." The buggy was used in the business of the Company for the delivery of goods and soliciting of orders, although it was sometimes used by the manager of the Company for pleasure driving. The note contained the provision that the property in the buggy and the right of possession should not pass from the plaintiff until payment of the amount in full.

The defendant afterwards purchased the buggy from Jones, the manager of the Company. He did not know that plaintiff had any claim on it.

Held, (1) That the purchase of the buggy and the giving of the note for it, were within the corporate powers of the Company. (2) That in the absence of evidence to the contrary it should be presumed that the manager of the Company had authority to purchase the buggy and to sign the note therefor. (3) And that the defence of purchase for value without notice could not prevail against the plaintiff's title. *Boyce* v. *McDonald*..... 297

Machinery afterwards affixed to freehold of third party.

See FIXTURES.

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CONSIDERATION.

Contract not under seal and without consideration.

See DISTRESS FOR RENT, 2.

CONSIDERATION FOR NOTE.

See PROMISSORY NOTE, 3.

CONSTRUCTION OF AGREEMENT.

See STREET RAILWAY.

CONTRACT.

Rescission of—Suing on quantum meruit—One action by two persons, not partners, for different claims.]—The plaintiffs, husband

and wife, brought this action in the County Court for the value of their services under a contract made by the defendant with the husband, to pay him $425 for the services for a year of both husband and wife. Plaintiffs were, as they claimed, wrongfully dismissed and sued before the end of the year for a proportionate part of the $425, giving credit for certain payments.

Plaintiffs had a verdict and defendant appealed. On the argument of the appeal, plaintiffs' counsel admitted that under the circumstances they could not sue on the contract, but claimed that they could recover on *quantum meruit*.

Held, that the husband and wife could not join in one action their separate claims for their work and labor done for the defendant, even if the dismissal was wrongful. *Crumbie* v. *McEwan* 419

Infant—Action for maintenance of—No contract to pay.

See INFANT, 1.

CORPORATION.

1. *Borrowing money without a by-law—Town Corporations Act, C.S.M. c. 10—Municipal loan—Corporate seal.*]—The defendants were incorporated under the Manitoba Town Corporations Act, C. S. M. c. 10. Section 377 of that Act provided that town loans, whether by issue of debentures or otherwise, should only be made on a by-law of the council to that effect.

The defendants being indebted to the Ontario Bank, which was pressing for payment, the town council passed a resolution referring the matter to the Finance Committee with power to act. As the plaintiffs held in their hands for sale a large amount of the debentures of the town, the Committee arranged to give the Bank an order on the plaintiffs for the amount of the debt. The order was accordingly prepared and signed by the mayor and secretary-treasurer, sealed with the seal of the corporation, and sent to the Bank Manager. The action of the Committee was duly reported to the town council, and the report was adopted. The plaintiffs afterwards accepted the order, and paid the amount to the Bank. They then brought this action to recover the amount of the order from the defendants.

Held, that the transaction was in the nature of a loan of money, and that the plaintiffs could not recover without proof of a by-law having been passed, signed and published in accordance with the provisions of sections 208, 213 and 211 of the said Act, and no such proof having been given, that the plaintiffs must be nonsuited.

Bernardine v. *North Dufferin*, 19 S.C.R. 581, distinguished. *Macarthur* v. *Portage la Prairie* 588

Note of corporation.

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Jurisdiction — What corporations are within it.

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Jurisdiction of.

See JURISDICTION, 2.

County Courts Act, R. S. M. c. 33, ss. 308, 315.

See APPEAL FROM COUNTY COURT, 1.

County Courts Act, R. S. M., c. 33, ss. 323-4.

See APPEAL FROM COUNTY COURT, 2.

COVENANTS, CONSTRUCTION OF.

Whether dependent or independent. — Contract of sale.] — An agreement for sale contained the following provision: "The said party of the second part, for himself .... doth covenant, promise and agree to and with the said party of the first part, his heirs, ... that he or they shall and will well and truly pay or cause to be paid to the said party of the first part ..... the said sum of money, together with the interest thereon, on the days and times and manner above mentioned, and also shall and will pay and discharge all taxes, ... *In consideration whereof and on payment of the said sum of money with interest* as aforesaid and in manner aforesaid, the said party of the first part doth covenant, promise and agree to and with the said party of the second part to *convey and assure* or *cause to be conveyed and assured* to the said party of the second part, his heirs and assigns ..... the said pieces or parcels of land ..... and shall and will suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default," &c. Then followed a provision that time was to be of the essence of the contract and that unless the payments were punctually made, the plaintiff might re-enter on and re-sell the lands, and all payments made were to be forfeited.

Held, that the covenants were independent covenants.

The purchaser was bound, on his covenant, to pay the purchase money before the vendor could be compelled, on his covenant, to convey the property agreed to be sold.

The intention of the parties, as far as it can be gathered from the wording of the covenant, must be given the greatest weight. *Macarthur* v. *Leckie* 111

Covenant for benefit of third party.

See PARTIES, 1.

CRIMINAL LAW.

Lottery—Disposing of property by a mode of chance.]—The defendant was convicted before a P. M. of an offence under R. S. C. c.

159, s. 2, which prohibits the "selling or offering for sale of any lot, card, ticket or other means or device for selling or otherwise disposing of any property real or personal by lots, tickets or any mode of chance whatsoever."

His *modus operandi* was as follows: He held a kind of concert in the street and having gathered an audience he proceeded to sell boxes of what he called "Parker's Pacific Pens." Before selling the pens, he placed in an empty box 100 envelopes, each containing a $1 bill, 10 envelopes with a $5 bill in each, 5 envelopes with a $10 bill in each, and one envelope with a $50 bill, making altogether $250 in 116 envelopes. He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for one box of pens was entitled to draw one envelope, and persons paying $5 for a box of pens could draw eight envelopes; but he would not take more than $5 from any one person. If the $50 bill was drawn before two-thirds of the pens were sold, he would put another $50 bill in the envelope and 50 envelopes with blank papers. He said he did not sell the envelopes; that he would not take $20 for one of them; but that he sold the pens and distributed the money to advertise the pens.

Held, following *Regina* v. *Freeman*, 18 O. R. 524, that the conviction was right.

Regina v. *Dodds*, 4 O. R. 390, and *Regina* v. *Jamieson*, 7 O. R. 149, distinguished. *The Queen* v. *Parker* 203

CROPS—OWNERSHIP OF.

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CROWN PATENT FOR LAND.

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DAMAGES.

Recovery of from Municipality.

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Measure of.

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DEBTOR AND CREDITOR.

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DELIVERY OF POSSESSION.

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DEMURRER.

Mortgagee's remedies.

See MORTGAGE, 1.

For want of parties.

See PARTIES, 1.

For multifariousness.

See PLEADING IN EQUITY, 2.

See PROMISSORY NOTE, 1.

See TAX SALES, 1.

See WILLS.

DESCENT OF LAND.

Law of primogeniture in force in Manitoba up to 3rd May, 1871.]—The Legislature of Manitoba passed the first Intestacy Act in May, 1871, and before that time the law of descent applicable in England to estates in lands and tenements, should be held to have been in force in Manitoba, and therefore where a person died intestate in April, 1871, being the owner in fee simple of a parcel of land, the Court

Held, that the land descended to the eldest son to the exclusion of the other children.

Re Tait 617

DESCRIPTION OF LAND.

See REAL PROPERTY ACT, 2.

DEVIATIONS.

Building contract—Deviations from specifications.

See BUILDING CONTRACT.

DEVOLUTION OF ESTATES.

See DESCENT OF LAND.

DISCHARGE OF SURETY.

See SURETY.

DISHONORED CHEQUE.

See SUMMARY JUDGMENT, 2.

DISPUTE NOTE.

See JURISDICTION, 2.

DISTRESS FOR RENT.

1. *Illegal distress—Estoppel in pais—Fraudulent removal of goods to avoid distress—Landlord and tenant.*]—Some of the plaintiff's goods having been seized and sold along with those of his wife under a distress warrant issued by the defendant H. to his co-defendant, for the purpose of levying an amount due by the wife for rent of certain premises, from which, before the seizure, all the goods had been removed with the fraudulent intention of evading payment of the rent, the plaintiff brought this action for damages. When the bailiff made the seizure the plaintiff forbade him to do so, but he did not at any time inform H. or the bailiff that he claimed some of the goods to be his; and after the seizure his attorney wrote several letters to H., demanding that the goods be given up, and referring to them as belonging to the plaintiff's wife.

Counsel for defendants contended that the plaintiff was estopped by his silence as to his ownership of some of the goods, and by the language of the attorney's letters, from setting up the present claim.

Held, (Dubuc, J., dissenting), that the defendants had failed to prove that they had been induced to do anything, or to abstain from doing anything, by reason of what the plaintiff had said or done, or omitted to say or do, and that the plaintiff was entitled to recover.

Pickard v. *Sears*, 6 A. & E. 469, distinguished. *Montgomery* v. *Hellyar*.....551

2. *Illegal distress—Damages for—Leave and License—Contract not under seal and without consideration—Nudum pactum.*]—The defendant attempted to justify a seizure for rent under a warrant of distress, by producing a document signed by the plaintiff, which purported to give him the right to seize the plaintiff's goods for rent before the rent fell due according to the lease. The learned Judge found as a fact that this document was not sealed at the time of its execution, and no consideration was shown for the plaintiff executing it.

Held, that it was a *nudum pactum* and that the defendant could not justify under it. *Brayfield* v. *Cardiff* 302

DISTRICT REGISTRAR.

See REAL PROPERTY ACT, 1, 3.

DOMICILE.

See JURISDICTION, 1.

DRAINAGE WORKS.

See MUNICIPALITY.

ELECTION PETITION.

Preliminary objection — Status of petitioner—Proof of right to vote, what it depends on—What list of electors must be produced.]—A petitioner against the election of a member of the Provincial Legislature, who was not a candidate, being required, under The Controverted Elections Act, R.S.M. c. 29, s. 14, to prove his right to vote at the election in answer to a preliminary objection, may do so by showing that his name appears on the list of electors for the whole constituency, prepared and revised under The Election Act, R.S.M. c. 49, s. 148, and need not show that his name was on the list of voters supplied to the deputy returning officer for use in the polling division in which the petitioner would have the right to poll his vote. (Taylor, C. J., dissenting).

The Richelieu Election Case, 21 S.C.R. 168, considered and distinguished. *Re Brandon City Election* 511

EQUITABLE RELIEF.

See MERGER.

See PLEADING IN EQUITY, 2.

ERROR IN COPY.

See MANDAMUS.

ESTOPPEL.

See FIXTURES, 1.

ESTOPPEL IN PAIS.

See DISTRESS FOR RENT, 1.

EVIDENCE.

See EXAMINATION OF JUDGMENT DEBTOR, 1.

See LEAVE TO APPEAL.

See PRACTICE IN EQUITY, 2.

See WINDING UP, 3.

EVIDENCE ON APPEAL.

See APPEAL FROM COUNTY COURT, 2.

EVIDENCE ON MOTION.

See EXAMINATION OF JUDGMENT DEBTOR, 1.

EXAMINATION.

Affidavit having served purpose for which filed—No motion pending—Order to examine on—Ex parte order—Deponent refusing to attend on examination.]—Plaintiff brought an action by a writ issued under The Summary Procedure on Bills of Exchange Act, and defendant Company obtained, on an affidavit of D., its president, an *ex parte* order giving it leave to appear. The plaintiff then obtained *ex parte*, from the Referee in Chambers, an order directing D. to appear before a special examiner and submit to be examined *viva voce* on his affidavit. In support of this application there was filed an affidavit of plaintiff's attorney that it was plaintiff's intention to move to rescind the order giving leave to appear. This order, with the examiner's appointment, was duly served and conduct money paid, but D. did not appear. A motion was then made before the Referee to strike out the defence or set aside the order allowing appearance. The Referee made an order directing D. to appear for examination at his own expense and in default that the defence should be struck out.

From this order defendant appealed to a Judge in Chambers, who reversed the order and dismissed the application. Plaintiff then appealed to the Full Court.

Held, That the order for examination should not have been made, on the grounds that the affidavit had served its purpose and there was no motion pending.

Held, also, that the Court was not obliged to enforce the order, although it had been made and had not been rescinded. *Long* v. *Winnipeg Jewelry Co*.....159

EXAMINATION OF JUDGMENT DEBTOR.

1. *Fraudulent judgment—Interpleader—Evidence for use on motion or summons.*]—Under section 46 of the C. L. P. Act, 1854, a judgment creditor who claims that prior judgments are fraudulent and void and is called upon by interpleader summons issued at the instance of the Sheriff to maintain or abandon his claim, may examine the judgment debtor as to the nature of his dealings with the other judgment creditors, and as to the indebtedness on which such other judgments were obtained, and such examination may be used upon the return of the interpleader summons. *Carscaden* v. *Zimmerman* 178

2. *Refusal to answer—Certificate of examiner—Reading over letter before acknowledging signature—Discretion of examiner in taking down answers.*]—A certificate of the examiner, as to what took place upon the examination

of a judgment debtor, is proper evidence on a motion to commit for refusal to answer, and it is not necessarily an objection that such certificate was settled and given *ex parte*.

It is improper for defendant and his counsel during the examination to converse together, and especially in another language.

A witness, when shown a document and asked whether the signature is his, is not entitled to read over the document before answering the question. If he really cannot answer the question without reading over the document or some part of it, he should say so.

Semble, The judgment debtor under examination is not entitled to have every word or sentence he uses taken down by the examiner. The latter may use his discretion and only put down relevant answers or explanations. *Brock* v. *D'Aoust* 196

3. *Return by sheriff necessary before order made.*]—A judgment debtor is not examinable until the judgment creditor has placed a *fi. fa.* in the sheriff's hands, and it has either been returned *nulla bona*, or the sheriff has notified the judgment creditor, that, if called upon to return the execution, such would be his return.

Ontario Bank v. *Trowern*, 13 P. R. 422, followed. *Carscaden* v. *Zimmerman* 102

4. *Company—Winding Up—Orders for contributories to pay, judgments of the Court—Liability of contributory to examination as a judgment debtor.*]—Orders to pay, under section 78 of the Winding Up Act, R. S. C. c. 129, are judgments of this Court.

An order to examine a judgment debtor should not be granted, unless the creditor shows that execution has been issued, placed in the sheriff's hands, and returned *nulla bona*, or that if called upon to return the *fi. fa.* the sheriff would return the same *nulla bona*.

Query, whether contributories ordered to pay money can be examined under A. J. Act, R. S. M. c. 1, s. 64. *Re Bishop Engraving and Printing Company* 62

EXCLUSIVE PRIVILEGES.

See STREET RAILWAY.

EXECUTION.

See CHATTEL MORTGAGE.

See MANDAMUS.

See SHERIFF, 1.

EXECUTIONS, PRIORITY OF.

See SHERIFF, 2.

EX PARTE ORDER.

See EXAMINATION.

FAMILY ARRANGEMENTS.

See TRUSTEE AND CESTUI QUE TRUST.

See FRAUDULENT CONVEYANCE.

FENCE, OBLIGATION TO.

See RAILWAYS, 1.

FIXTURES.

1. *Conditional sale of machinery afterwards affixed to freehold of third party—Right of unpaid vendor to recover possession—Estoppel by taking proceedings under Mechanics' Lien Act.*]—W. & Co., having a contract to build an elevator for the defendants, purchased an engine, boiler and other machinery from the plaintiffs on the terms that the ownership was not to pass until payment in full of the price which was to be paid in cash on delivery, and that in case of default in payment the plaintiffs were to be "at liberty, without process of law, to enter upon our premises and take down and remove the said machinery." Plaintiffs were aware that the machinery was to be placed in the defendants' elevator.

It was built into the elevator in such a manner that it would have become part of the freehold if both had been owned by the defendants, but the evidence showed that it could be removed without doing serious damage to the building.

Plaintiffs first took proceedings under the Mechanics' Lien Act to realize the amount of their claim, but afterwards abandoned them. In the present suit the plaintiffs asked that the defendants might be ordered to deliver up the machinery, and to permit the plaintiffs to enter the elevator and take down and remove the machinery, and for further and other relief.

Held, that the plaintiffs were entitled to relief, but without deciding whether they should have permission to enter the defendants' premises and remove the machinery or not, as they were willing to accept a decree for payment of the value of the machinery, to be ascertained by a reference to the Master, and it was so ordered.

Polson v. *Degeer*, 12 O. R. 275; *Stevens* v. *Barfoot*, 13 A. R. 367; and *Waterous Engine Co.* v. *Henry*, 2 M. R. 169, followed.

Held, also, that the plaintiffs were not estopped by having commenced proceedings under the Mechanics' Lien Act, as they had not gone on to judgment.

Priestly v. *Fernie*, 3 H. & C. 977, distinguished. *The Vulcan Iron Works Co.* v. *Rapid City Farmers' Elevator Co*.....577

2. *Machinery—Mortgagee and execution creditor—Interpleader—Question whether machinery part of realty.*]—In the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purpose of a manufacturing business for which the freehold is occupied, and to which it is devoted, become part of the freehold, even though the mode of affixing them is such that they can easily be detached without injury either to themselves or to the freehold.

In the absence of evidence of a contrary intention, similar pieces of machinery standing on the freehold, but not affixed to it, except by the leathern bands communicating to them motive

power, retain the character of chattels, notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is devoted.

A fastening by cleats affixed to the building only, and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient, in itself, to make the machine a part of the realty.

Longbottom v. *Berry*, L. R. 5 Q. B. 123, followed. *Sun Life Assurance Company* v. *Taylor*. 89

FOREIGN JUDGMENT.

Action on—Embarrassing pleas—Application to strike out—Pleas which might have been pleaded to the original cause of action.]—To a count on a foreign judgment the defendant pleaded nine pleas which might have been pleaded in the foreign country to the original cause of action. There was no evidence that they were untrue.

Held, that these pleas could not be struck out on the ground of embarrassment or delay, and the fact that the plaintiffs might be put to great expense about procuring evidence in the foreign country to meet, by way of anticipation, what was set up in the pleas, was no ground for striking them out. *International &c. Corporation* v. *Great North West Central Railway Company* 147

Staying proceedings in action on foreign judgment whilst appeal pending therefrom.

See STAYING PROCEEDINGS.

See SUMMARY JUDGMENT, 1.

FORFEITURE.

See ASSESSMENT ACT.

FRAUD.

See PLEADING IN EQUITY, 2.

FRAUDULENT CONVEYANCE.

1. *Interpleader issue—Sale of lands to daughter of judgment debtor — Family transactions.*]—The judgment debtor having received notice of the judgment creditor's intended suit against her went to Winnipeg where her daughter was living, and sold her farm to her for the purpose of defeating her creditor's claim, but the daughter was not aware of her mother's purpose in selling, and not being informed of the threatened suit, paid her money in good faith and received a conveyance of the land. The daughter then leased the land to her brother, and the Judge found that this lease was also in good faith. The brother cropped the land for himself and afterwards the crops were seized in execution against the mother.

Held, that any such crops must be deemed to be the property of the son and not of his mother, as against the execution creditor. Although family transactions by which creditors are defeated are ordinarily looked upon by the Court with a good deal of suspicion, yet when the evidence is clear and satisfactory they will not be set aside. *McDonald* v. *McQueen* 315

Parties to bill to set aside.

See PARTIES, 2.

FRAUDULENT JUDGMENT.

See EXAMINATION OF JUDGMENT DEBTOR, 1.

FRAUDULENT RELEASE.

See GARNISHMENT, 4.

See PLEADING IN EQUITY, 2.

GARNISHMENT.

1. *Assignment of future income and profits—Moneys held in trust.*]—The plaintiffs, by a garnishee order, attached moneys in the hands of the garnishees owing to the defendants. The defendants had previously assigned to trustees for bondholders all the profits and income of the concern, and the trustees therefore claimed the moneys as against the plaintiffs. The deed of assignment provided that the defendants might use the income assigned in carrying on their business until default in payment of the bonds, and the plaintiffs' claim was for goods required by the defendants in the ordinary course of their business.

Held, that the defendants, if the moneys attached had come to their hands, might properly have applied them in payment of the plaintiffs' claim and that the claimants were not entitled to them as against the plaintiffs. *National Electric Manufacturing Co.* v. *Manitoba Electric and Gas Light Co*.....212

2. *Debts due to defendant and another jointly — Jurisdiction, what corporations are within it.*] Moneys due to the defendant and another person jointly, cannot be attached under The Garnishment Act, R. S. M., c. 64, to meet the plaintiff's claim.

Where it is sought to attach moneys in the hands of a corporation, it must be shown that the Company has an office in this Province, and is carrying on business through some branch or agency here.

In the case of the Northern Assurance Company, garnishees, it appeared that the head office was in Montreal, and that it had no office in this Province; although there were persons here who received applications for insurance, and pending the reference of these to Montreal, were empowered to grant temporary insurance for 30 days, but all applications had to be sent to the head office, where they were accepted or rejected; the policies were issued at Montreal, the premiums were payable there, and the amount assured was, in case of loss, payable there also.

Held, that this Company could not be said to carry on business in this Province, or to be within the jurisdiction, so as to admit of moneys due by them being garnished.

McArthur v. *Macdonell*, 1 M. R. 334, and *Parker* v. *Odette*, 15 P. R. 69, followed. *Braun* v. *Davis* 534

3. *Money in Bank on trust account — Onus of proof where account a mixed one—What can be garnished.*]—Defendant F. A., was at one time carrying on business in partnership with his brother, and plaintiffs recovered

a judgment against the firm. He was also a county court clerk, and acted as an agent for two insurance companies and two loan companies. In connection with these employments he opened an account in a bank which was styled, "Frederick Axford, trust," in which were deposited trust moneys or moneys representing trust moneys. Plaintiffs, judgment creditors, obtained an order garnishing the amount at the credit of the account, and then applied to have the money paid over to them. The evidence showed that F. A. drew out from this account moneys for his own purposes, or moneys to repay other trust moneys received by him before the opening of this account, which he had used.

Held, that the improper withdrawal by a trustee of moneys from a trust account, and the improper use by him of moneys so withdrawn, can never deprive other trust moneys lying at the credit of the account of their trust character.

Unless the money is money with which the debtor can deal as his own, it cannot be garnished.

Where the account is a mixed one, the onus is on the party seeking to attach it, to show that the money is the debtor's with which he can deal, and in the absence of proof that the account or so much of it is his, the money will be treated as all trust money.

In the absence of clear evidence that the balance in the account did not consist of trust moneys, it should be held to be so. *Stobart* v. *Axford*.....18

4. *Chattel mortgage—Fraudulent discharge given to defeat creditors—Discharge not under seal—Debt not paid.*]—I. B. was indebted to J. B. in the sum of $500. More than six years after the cause of action arose, and when the debt was barred by the Statute of Limitations, I. B. executed a chattel mortgage under seal in which he covenanted to pay J. B. the $500 with interest. Afterwards I. B. learned that this debt could be garnished by J. B's creditors, and with a view of preventing this, he induced J. B. to execute a discharge of the mortgage, but no money was paid. The discharge was in the statutory form but not under seal.

The plaintiffs obtained a judgment against J. B. and garnished I. B. On the return of a summons to pay over, an interpleader issue was directed to determine the validity of the discharge.

On the trial of the issue,

Held, that the discharge was fraudulent and void as against creditors. *Manitoba & Northwest Loan Co.* v. *Bolton*.... 153

5. *Municipal taxes—Moneys of a municipality in the hands of its treasurer not attachable for its debts.*]—The treasurer of a municipality is not, as such, a "third person indebted or liable" to it within the meaning of section 8 of the Garnishment Act, R.S.M., c. 64, and its funds in his hands cannot be attached to answer a debt of the municipality.

Seymour v. *Brecon*, 29 L. J. Ex. 243, not followed.

London & Canadian L. & A. Co. v. *Morris* 431

6. *School taxes not attachable by creditor of School District—Public Schools Act—Effect of repeal—Interpretation Act, R.S.M. c. 38, ss. 11 & 12, construction of—Public Policy.*]—The plaintiffs having recovered a judgment against a school district, sought to attach the amount levied on the garnishee for rates or taxes imposed for school purposes for the years 1884 to 1892, inclusive, in respect of lands of the garnishee within the school district.

Held, that these rates or taxes did not constitute a debt, obligation or liability which could be attached under the Garnishment Act, R. S. M. c. 64, to answer a claim against the School Board.

Per TAYLOR, C. J.—The repeal of all former School Acts by the Public Schools Act of 1890, put an end to the right of a school district to collect any arrears of such taxes, and since the passing of the latter Act, school districts in Manitoba have no power to levy or collect taxes, but it must be done for them by the municipal councils. The Interpretation Act, R. S. M. c. 78, ss. 11 & 12, cannot be relied on to save the right of collecting arrears of taxes, because trustees have not under the repealing Act any such right.

Per DUBUC, J.—It would be against public policy to allow the taxes levied by a school district to be intercepted by an attaching order in favor of a creditor, because the trustees might thereby be prevented from carrying on the work for which the corporation was created, especially since the Act provides by section 234 an adequate remedy enabling a creditor to issue an execution with an indorsement directing the sheriff to levy an additional rate on property owners to pay off the judgment.

Per KILLAM, J.—Without an express provision in the statute to that effect, a public corporation cannot sue in a court of law to recover taxes levied on a ratepayer under the powers conferred by the statute, and although the former School Acts enabled the trustees to take proceedings before certain tribunals to enforce payment of the taxes, the ordinary relation of debtor and creditor was not thereby created, nor were the taxes thereby constituted a debt, obligation or liability within the meaning of section 8 of the Garnishment Act, such as can be attached in the hands of a ratepayer to meet a debt of the corporation.

Canada Permanent v. *East Selkirk* 331

GROWING CROPS.

See CHATTEL MORTGAGE.

HALF-BREED LANDS ACT.

Conveyance by infant—Consent of husband of illegitimate infant—Construction of Man. Stat. 46 & 47 Vic., c. 29, s. 1—Infant, conveyance by, voidable—Champerty.]—The Statute of Manitoba 46 & 47 Vic. c. 29, s. 1, which was passed to remove doubts as to the proper interpretation of section 3 of the Half-Breed Lands Act in the C. S. M., did not apply to married illegitimate

children, so as to obviate the necessity of procuring the consent of the husband or wife of such child to a conveyance made during minority.

Held, also, that a conveyance to the defendant made by an infant was not binding on her when she came of age, and was voidable at her option, and that she effectually avoided such conveyance by a conveyance of the lands to the plaintiff, executed a few months after she came of age.

Held, also, that although the plaintiff knew of the former sale to the defendant and the transaction on his part was disreputable, it was not champerty for him to purchase the land as he did. *Robinson* v. *Sutherland*.....199

HOLDERS IN DUE COURSE.

See PROMISSORY NOTE, 2.

HUSBAND AND WIFE.

1. *Interpleader—Married Women's Property Act—Ownership of crops raised by husband on wife's land.*]—The crops seized under the defendants' execution were raised on the land of the plaintiff, the wife of S. the execution debtor, chiefly by the labor of S. and the children under S.'s superintendence.

The horses and implements used in doing the work were the property of S. At the close of the previous season S. had had the crops on his own farm seized and sold under execution, and the farm was taken from him for a mortgage debt. The plaintiff then arranged to purchase, on credit, the land on which the crops now in question were raised, and to carry on farming operations on her own account, in order, as the Judge found, to support the family and with no intention of defrauding her husband's creditors, as they had nothing left that would be available for the latter under execution.

Held, nevertheless, following *Ady* v. *Harris*, 9 M. R. 127, and *Parenteau* v. *Harris*, 3 M. R. 329, that the crops in question must, under all the circumstances, be held to be the property of the husband and not of the plaintiff as against the execution creditors of the former. *Striemer* v. *Merchants' Bank*.....546

2. *Interpleader—Married Women's Act—Separate property of wife—Ownership of goods in business carried on by wife living with husband.*]—In August, 1890, the judgment debtor. who carried on a jewelry business was sold out under execution, and he remained indebted and ceased carrying on business. In March, 1891, his wife opened a jewelry store in her own name. All goods purchased for the business were sold to her and the wholesale dealers would not have sold on credit to the husband. The invoices, drafts, receipts, etc., were all made, and the correspondence conducted, in the name of the wife. She was the tenant of the premises, and paid the rent. The husband was employed in the store, attending to the correspondence and the financial part of the business, under a power of

attorney from his wife, and he did most of the repairing and assisted in the selling and buying.

The wife was in the shop most of the time, selling, buying and doing some of the repairing. She claimed to have been sixteen years in the jewelry business and to have had a good deal of experience, and she had abandoned keeping house to attend to the business.

Held, that under these circumstances the goods in the shop were the property of the wife as against execution creditors of the husband.

Dominion Savings Co. v. *Kilroy*, 15 A. R. 487, followed.

Doll v. *Conboy* 185

3. *Separate business—Farming business—Land owned by wife—Ownership of crops—Onus of proof.*]—*Held*, that where the husband ostensibly carries on upon the land of his wife the work of farming, it should be presumed, in the absence of evidence to the contrary, that his wife allows him the use of her land for the purpose and that the crops are his, and that when he does the work with the assistance of a hired man, the onus is upon the wife, notwithstanding her ownership of the land, to establish that the husband is her servant, and the farming business really hers.

Held, also, that such evidence as was presented in this case (being that of the husband and wife solely) not corroborated by independent evidence, and contradicted by the independent and written evidence, as far as it went, ought not to be taken as sufficient to establish that the farming business was carried on by the wife, although if the onus of establishing this were not upon the wife, it would not sufficiently show that it was the business of the husband.

Ady v. *Harris* 127

Custody of Child.

See INFANT, 2.

Sale of land by married woman prior to 1870.

See TITLE TO LAND.

ILLEGALITY.

Note for liquor supplied on premises.

See PROMISSORY NOTE, 1.

Onus of proof of.

See PROMISSORY NOTE, 2.

ILLEGAL DISTRESS.

See DISTRESS FOR RENT, 1, 2.

ILLEGITIMATE CHILD.

See HALF-BREED LANDS ACT.

IMPOUNDING MONEY IN COURT.

See PRACTICE, 3.

INCUMBRANCES.

See REAL PROPERTY ACT, 3.

INFANT.

1. *Action for maintenance of—No formal promise to pay—Request—Implied agreement.*]—Action for maintenance of infant. Defendant's wife having died, defendant requested plaintiff's wife to take charge of the child, which she did for over three years, when the child was returned to her father. There was no formal promise by the defendant to pay for the keeping of the child.

Held, that if there was no formal promise to pay by the defendant, there was no formal promise to keep the child without remuneration, and as there was a request, an agreement to pay should be implied.

Per KILLAM, J.—The mere fact of the maintenance by one person of the child of another, does not imply a contract to pay for such maintenance.

Per BAIN, J.—Apart from contract, a father is under no obligation, that can be enforced in a civil action, to support his children. *Munro* v. *Irvine*..121

2. *Habeas Corpus—Application by father for custody of child—Misconduct—Onus of establishing.*]—It is *prima facie* the right of a father to have the custody of his infant child, and the care of its education and bringing up.

The onus of proving him unfit for such a charge rests upon the person who seeks to take the child away, or to keep it away from him.

The Court is always unwilling to interfere with the common law rights of the father.

That the conduct of a husband is such that his wife cannot live happily with him, is not a sufficient cause for interfering with his right to the custody of the children. *Re Foulds*.....23

See HALF-BREED LANDS ACT.

INSOLVENCY OF COMPANY.

See WINDING UP, 2, 3.

INSOLVENT PLAINTIFF.

See SECURITY FOR COSTS, 2.

INTEREST.

See MORTGAGE, 3.

INTEREST AS DAMAGES.

See SUMMARY JUDGMENT, 4.

INTERPLEADER.

1. *Form of order—Power to direct sale of goods in default of claimant giving security—Discretion in Referee.*]—Under an execution against the defendant, the Sheriff seized certain goods which were claimed by D. H. & Co.

Thereupon the Referee, on the application of the Sheriff, made an order that upon the claimants paying into court $100, or giving security for that amount, the Sheriff should withdraw from possession, but in default of making such payment, or the giving of such security, that the goods should be sold and the proceeds, after deducting expenses, paid into court to abide further order.

Held, that the Referee had jurisdiction to make the order, and that the discretion vested in him was properly exercised.

Bank of Nova Scotia v. *Hope*. 37

2. *Goods seized in possession of mortgagee—Who should be made plaintiff in issue.*]—In April, 1892, the plaintiff placed a writ of *fi. fa.* against the goods of defendant in the Sheriff's hands. The Sheriff seized certain goods as the property of defendant, but they were claimed by the Commercial Bank. They had been mortgaged to the Bank in January, 1892, and were taken possession of by the Bank a few days before the seizure, and at that time were in the actual possession of the Bank. An interpleader issue was directed and the question was, which party should be made plaintiff in the issue.

Held, that the execution creditors should be made plaintiffs.

Union Bank of Canada v. *Tizzard*..... 149

See BILLS OF SALE.

See EXAMINATION OF JUDGMENT DEBTOR, 1.

See FRAUDULENT CONVEYANCE.

See HUSBAND AND WIFE.

INTESTACY.

See DESCENT OF LAND.

INTRA VIRES.

See PROMISSORY NOTE, 1.

IRREGULARITY.

See ATTACHMENT.

See PRACTICE, 1, 2.

JUDGE OF QUEEN'S BENCH, POWERS OF.

See TUESDAY TRIALS.

JUDGMENT.

Application to set aside.

See PRACTICE, 1.

Order having effect of judgment.

See PRACTICE, 4.

JURISDICTION.

1. *Action on promissory note—Domicile of defendant out of jurisdiction—Personal service within jurisdiction.*]—An action on a promissory note is transitory, and a defendant may be sued thereon in Manitoba, although the cause of action arose, and the domicile of the defendant be out of the jurisdiction, provided he be personally served with process within the Province.

McKay v. *Barber*, 3 M. R. 41, followed. *Rigby* v. *Reidle*.. 139

2. *Statute of Frauds—Title to lands — Jurisdiction of County Court—Pleading—Objection taken for the first time on appeal—Specific performance.*]—In order to oust the jurisdiction of the County Court on the ground that some right or title to land is in question, it must be shown that there is a *bona fide* dispute, and when the judge has found a ver-

dict for the plaintiff, it will be assumed that he had inquired into the matter and decided that there was no such dispute.

A common law action for a balance of the purchase money of land sold under a verbal agreement cannot be maintained, although the deed has been delivered.

Cocking v. *Ward*, 1 C. B. 858 followed.

The objection of the Statute of Frauds can be raised under the defence of never indebted; and can be insisted on before the Appellate Court, although it did not appear whether it had been raised at the trial or not.

A County Court Judge, having no jurisdiction to decree specific performance of an agreement for the purchase of land, cannot take notice of the doctrine that equity looks upon that as done which ought to be done, and give relief accordingly. *Foster* v. *Reeves*. [1892] 2 Q. B. 255. *McMillan* v. *Williams* 627

What corporations are within it.

See GARNISHMENT, 2.

JURISDICTION OF COURT OF Q. B.

See WILLS.

JURISDICTION OF REFEREE.

See INTERPLEADER, 1.

LANDLORD AND TENANT.

See DISTRESS FOR RENT, 1.

LEAVE AND LICENSE.

See DISTRESS FOR RENT, 2.

LEAVE TO APPEAL.

Appeal from order of single Judge—Leave to appeal after time elapsed—Mistake of attorney—Evidence to set aside garnishee order—Affidavit on information and belief not sufficient.]—An appeal by the plaintiff from the order of the Chief Justice made in March, 1894, setting aside a garnishee order obtained by the plaintiff herein (see *ante* p. 534) was set down for hearing before the Full Court one day too late, and was therefore struck out, leaving the plaintiff to make a substantive application under rule 66 for an extension of time for entering the appeal.

Such an application was then made supported by the affidavit of the plaintiff's attorney, accounting for the delay through a misapprehension and mistake made in good faith, when the Court allowed the appeal to be set down within two days on payment of costs.

On the argument of the appeal it appeared that the garnishee order had been set aside on the strength of an affidavit of the partner of the defendant's attorney based on information and belief.

Held, following *Gilbert* v. *Endean*, 9 Ch. D., 259, that as the application to set aside the garnishee order was one that affected and disposed of the rights of the parties and was not merely interlocutory, it should not be granted

on the material put in, which was mere hearsay evidence, and at best of no more weight than the evidence on which the original order was made, and that the appeal should be allowed with costs.

Braun v. *Davis*..... 539

LIEN.

See RAILWAYS, 2.

LIEN OF SOLICITOR FOR COSTS.

See CHARGING ORDER.

LIMITATIONS.

See ASSESSMENT ACT.

LIQUIDATED OR ASCERTAINED CLAIM.

See SUMMARY JUDGMENT, 3.

LIQUIDATORS.

See WINDING UP, 1.

LIQUOR LICENSE ACT.

Promissory note given for liquor supplied on premises.

See PROMISSORY NOTE, 1.

LIST OF ELECTORS.

See ELECTION PETITION.

LOTTERY.

See CRIMINAL LAW.

MACHINERY AFFIXED TO THE FREEHOLD.

See FIXTURES, 1, 2.

MAINTENANCE OF INFANT.

See INFANT, 1.

MALICIOUS PROSECUTION.

See TRIAL BY JURY.

MANDAMUS.

Against Secretary-Treasurer of Municipality—Production of Assessment rolls—Clerical error in copy — Who should apply for mandamus—Alteration of boundaries—Delay in making application for mandamus—Inability to obey the writ—Remedy must be effective —Municipal Act, R. S. M., c. 100, ss. 663 and 664.]—The sheriff having in his hands an unsatisfied execution against the defendant Municipality, proceeded under s. 663 of the Municipal Act, R. S. M., c. 100, and served a copy of the writ of execution on the secretary-treasurer of the Municipality on 12th June, 1893. On the 25th July following he demanded the production of the assessment rolls for the purpose of striking a rate to satisfy the execution, but the secretary-treasurer refused to comply with the demand. On the 27th October following, the sheriff made a similar demand, and having met

with a similar refusal, he applied for a *mandamus*, to compel the secretary-treasurer to produce the rolls.

In the copy of the writ served on 12th June, there was a clerical error, the year 1893 being written in two places instead of 1890, but enough information appeared in the copy to show that the error could not mislead any one.

Held, (1) that the application was rightly made by the sheriff and not by the plaintiffs.

(2) That in view of the express wording of ss. 663 and 664 of the Act, the proceedings were properly directed against the secretary-treasurer, instead of against the Municipal Council.

(3) That an addition of territory to the Municipality since the recovery of the judgment made no difference in the liability of the defendants; for, by section 38 of the Municipal Act, the Municipal Commissioner is exclusively charged with the adjustment of the assets and liabilities of the municipalities whose boundaries are in any way changed.

(4) That the application was not too late, although the collector's rolls had been made up and completed, the tax notices sent out, and some taxes had already been paid. The first steps taken by the sheriff were in ample time to enable the Council to make the required levy themselves, and they cannot take advantage of their own laches and neglect to prevent the law being carried out.

(5) That even if the sheriff would have been unable to strike the rate and arrange for the necessary levy, the same year as required by the statute, that would be no reason for refusing the writ, for mere inability to obey the writ has not in all cases been considered a sufficient reason for refusing it.

Regina v. *Birmingham, &c., Ry. Co.*, 2 Q. B. 47; *Regina* v. *Great Western Ry. Co.*, 1 E. & B. 253; *Regina* v. *York, Newcastle, &c., Ry. Co.*, 16 Q. B. 886, relied on. *London & Canadian* v. *Morris* 377

MARRIED WOMEN.

Next friend—Appointment of—Property qualification—Incumbered property—Joint ownership.]—Where a proposed next friend for a married woman was shown to be possessed of property worth more than double what was necessary, but it consisted of real estate heavily incumbered and personal property, both kinds of property being owned jointly with another person.

Held, that the appointment as next friend should be refused on the ground of the nature of the property.

Held, also, that a next friend should, at least, be shown to be possessed of such property as would formerly, had he been a plaintiff resident abroad, have relieved him from the necessity of giving security for costs.

Carscaden v. *Philion* 135

MARRIED WOMEN'S ACT.

R. S. M., c. 95.

See HUSBAND AND WIFE, 1, 2, 3.

MEASURING GRAIN.

See WEIGHTS AND MEASURES ACT.

MECHANICS' LIEN.

See BUILDING CONTRACT.

MENTAL CAPACITY OF TESTATOR.

See WILLS.

MERGER.

Subsequent incumbrance — Mistake — Release of equity of redemption.]—When the owner of an estate in fee pays off a charge, or the owner of a charge acquires the equity of redemption, the result is that the charge merges and lets in any subsequent incumbrance, unless an intention to keep the charge alive is expressed in some way, and the onus of proving such intention rests on the party contending that there has been no merger.

The plaintiffs held a mortgage on certain lands for a large amount, and arranged with the mortgagor to take a quit claim deed from him, and to release him from all liability on the mortgage, acting in the belief that they would thus acquire the whole estate free of incumbrances. Their solicitor, however, having overlooked a registered judgment in favor of the defendant, the latter claimed that there was a merger, and that his judgment was now a first lien on the lands.

The plaintiffs filed a bill to enforce the execution of a release of this judgment.

Held, that a merger had taken place, and the relief asked for could not be granted, but that the plaintiffs were entitled, on the ground of mistake, to a decree declaring that the amount due under their mortgage should be a charge on the land in priority to the defendant's registered judgment.

Dean and Chapter of St. John's Cathedral v. *MacArthur*.... 391

MISTAKE.

Specific performance of agreement—Mistake by one party, when ground of relief.]—Specific performance of an agreement will not be refused on the ground of a mistake of one of the parties to it, where the mistake was not known to the other party, and there was nothing in the language or conduct of the other party which led or contributed to the mistake, unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to hold him to it, or give the other party an unconscionable advantage.

Tamplin v. *James*, 15 Ch. D. 215, followed.

Miller v. *Dahl*..... 444

See MERGER.

MISTAKE OF ATTORNEY.

See LEAVE TO APPEAL.

MORTGAGE.

1. *Mortgage suit — Mortgage repayable by an annuity—Mortgagee's remedies—Right to foreclosure.*]—A mortgage contained a proviso for redemption as follows :—"Provided this mortgage to be void upon payment of $900 of lawful money of Canada, with interest at eight per centum per annum as follows :—Firstly, the said principal sum to bear interest at the said rate from the date hereof until the first day of December next, to be then paid : and thereafter, secondly, the said principal and interest thereon to be payable by an annuity of $91.80 per annum for twenty years, being composed of the interest on the said principal at the said rate of eight per centum per annum, and a sum for the progressive sinking of the debt, of $2.20 per centum per annum, such annuity to be paid in half yearly payments of $45.90 each on the first days of June and December in every year, the first of such payments to be made on the first day of June next."

Held, on demurrer, that the instrument was simply a mortgage securing repayment of a sum of money advanced by the plaintiffs in instalments extending over a period of twenty years.

The fact that the plaintiffs had a power of sale did not prevent an application to the Court for foreclosure which is the appropriate remedy. *Credit Foncier-Franco Canadien* v. *Andrew* 65

2. *Mortgage suit—Mortgagees in possession — Commission on rents received by agent of mortgagees—Manifest error in report—Costs.*] — A mortgagee cannot have any allowance for his personal care or trouble in receiving rents.

Where the property is at a distance, or where the circumstances are such that the mortgagee would, if himself the owner, employ a bailiff or collector, an allowance may be made.

The Master, in making his report, made an error in the calculation of interest, manifest on the face of it. Defendant gave notice of appeal. Plaintiffs' solicitor on being served with the notice of appeal, having had his attention directed to the error, at once wrote offering to attend in chambers and consent to an order amending the report, but the appeal was proceeded with.

An order was made amending the report, without costs to either party. *Freehold Loan Co.* v. *McLean* 15

3. *Rate of interest after maturity of mortgage—"To be paid on all and any payment in default."*]—A mortgage under the Act respecting Short Forms of Indentures contained the usual clauses, but, in addition thereto, there was the following :—

"The said mortgagor covenants with the said Company that the mortgagor will pay the mortgage money and interest, and observe the above proviso, and in the case of default, at the said rate, compounded with rests each half-year, to be paid on all and any payment in default, whether of principal or interest or both."

Held, that interest was payable

after maturity, at the rate of eight per cent. per annum.

The following cases distinguished :

People's Loan and Deposit Co. v. *Grant*, 18 S. C. R. 262.

Freehold Loan Co. v. *McLean*, 8 M. R. 116.

Manitoba and N. W. Loan Co. v. *Barker*, 8 M. R. 296.

Credit Foncier Franco-Canadien v. *Schultz* 70

MOTION PENDING.

See EXAMINATION.

MULTIFARIOUSNESS.

See PLEADING IN EQUITY, 2.

See WILLS.

MUNICIPAL COUNCIL.

See STREET RAILWAY.

MUNICIPAL ELECTION.

Prohibition — Resignation of Reeve—Subsequent withdrawal of resignation — Petition to declare seat vacant—Time for presenting petition — Powers of clerk.]—S. was elected Reeve of a rural municipality in December, 1892. On 18th March, 1893, he resigned his seat in the council in writing pursuant to the statute. Afterwards, on the 6th day of May, 1893, S. attended a meeting of the council, proceeded to take part in the proceedings and voted on a motion to amend the minutes of the previous meeting declaring that the council accepted the withdrawal of his resignation, and declared the motion carried by his casting vote, the other members of the council being evenly divided.

A petition was then filed to have the seat declared vacant. On the hearing before the County Court Judge, the respondent took two preliminary objections— 1. That the provisions of section 178 of the Municipal Act do not apply to the case of a member of the council who has resigned his seat. 2. That the petition was not presented within the time prescribed by the statute. These objections were over-ruled. S. then applied in the Queen's Bench for a prohibition.

Held, 1. That, under the circumstances alleged in the petition, the remedy by petition provided for in section 178 was the proper remedy.

2. That the 21 days mentioned in section 197, within which a petition must be presented, began to run at the time the act complained of was done, and that the petition was presented in time.

3. That, as there was a *bona fide* dispute on a doubtful legal question concerning the vacancy of the seat, the Clerk was right in not assuming to determine it by issuing a writ for a new election.

Sexsmith v. *Montgomery*. 173

MUNICIPAL LOAN.

See CORPORATION, 1.

MUNICIPALITY.

Right of action against—Legislative authority — Recovery of damages from Municipality — Negligence in exercising Statutory powers—Municipal Act—Powers of Municipality limited to its own territory.]—No action will lie for doing that which the Legislature has authorized to be done, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently.

And if by a reasonable exercise of the powers either given by the statute or existing at common law, the damage could be prevented, it is, within this rule, "negligence," not to make such reasonable exercise of the powers.

In the absence of such negligence, a party injured by the acts of a Municipal Council can only resort to the arbitration provided for by the Municipal Act.

In declaring against a municipality for damages to plaintiff's land arising out of the construction of drainage works by defendants, it is necessary to allege that such ditch or drain was within the territorial limits of the municipality. *Atcheson* v. *Portage la Prairie* 192

See GARNISHMENT, 5.

See MANDAMUS.

NEGLIGENCE.

See MUNICIPALITY.

See SHERIFF, 1.

NEW TRIAL IN COUNTY COURT.

See APPEAL FROM COUNTY COURT, 1.

NEXT FRIEND.

See MARRIED WOMEN.

NUDUM PACTUM.

See DISTRESS FOR RENT, 2.

OBJECTIONS, TAKING AT TRIAL.

See JURISDICTION, 2.

ONUS OF PROOF.

See HUSBAND AND WIFE, 3.

Where illegality set up.

See PROMISSORY NOTE, 2.

Undue influence.

See WILLS.

OPERATION OF ORDER.

See PRACTICE, 3.

ORDER FOR PAYMENT OF COSTS.

See PRACTICE, 4.

OWNERSHIP OF CROPS.

See HUSBAND AND WIFE, 1, 3.

OWNERSHIP OF GOODS.

See HUSBAND AND WIFE, 2.

PARENT AND CHILD.

Maintenance of infant.

See INFANT, 1.

Custody of child.

See INFANT, 2.

PARTIES.

1. *Pleading—Demurrer for want of parties—Suit to enforce agreement to pay creditors—Creditors not necessary parties.*]—The plaintiff filed a bill to enforce the provisions of a chattel mortgage, by which the defendants agreed with the plaintiff to pay her creditors. The creditors were not parties to this agreement. The prayer of the bill was in the alternative—that the money found due under the agreement should be paid to the plaintiff, to be applied by her in paying the creditors, or that it should be paid into Court for the benefit of the creditors.

On demurrer for want of parties on the ground that the creditors should have been parties to the suit,

Held, that the creditors were not necessary parties on the grounds, (1) That in case the plaintiff should succeed, if the money were paid into Court the creditors' interests would be amply safeguarded, and the defendants protected against any future demand by them. (2) That, as the creditors were not parties to the agreement on which the suit was brought, their rights against the plaintiff could not be barred by this suit.

Gillies v. *Commercial Bank of Manitoba* 165

2. *Parties to suit in equity—Bill to set aside fraudulent conveyance—Grantor should not be made a party—Allegation that grantor has no other means.*]—To a bill by a judgment creditor to set aside a fraudulent conveyance made by his debtor before judgment and to have the land sold to pay the debt, the debtor is neither a necessary nor a proper party.

In such a bill it is sufficient to allege that an execution in the district in which the debtor resides, has been returned *nulla bona* by the sheriff, and it is unnecessary to set up that the debtor has no other property but the lands fraudulently conveyed.

Bank of Montreal v. *Black*. 439

Bill to enforce lien.

See RAILWAYS, 2.

One action by two persons, not partners, for different claims.

See CONTRACT.

See PLEADING IN EQUITY, 2.

See TITLE TO LAND.

PERFORMANCE OF CONDITION PRECEDENT.

See SUMMARY JUDGMENT, 4.

PERFORMANCE OF CONTRACT.

See BUILDING CONTRACT.

PETITION.

Evidence in support of.

See PRACTICE IN EQUITY, 2.

PETITION FOR WINDING UP.

See WINDING UP, 2.

PETITION UNDER MUNICIPAL ACT.

See MUNICIPAL ELECTION.

PETITIONER—STATUS OF.

See ELECTION PETITION.

PLAINTIFF IN ISSUE.

See REAL PROPERTY ACT, 4.

PLEADING.

Action against District Registrar.

See REAL PROPERTY ACT, 1.

Assignment of a chose in action.

See WINDING UP, 2.

Jurisdiction of County Court.

See JURISDICTION, 2.

Onus of proof where illegality set up without plea of illegality.

See PROMISSORY NOTE, 2.

PLEADING IN EQUITY.

1. *Amendment of Bill—Departure in replication — Costs.*] — When a plaintiff is not entitled to relief on the case made by his bill, but may be so entitled on facts set up or partly set up in the answer, he should amend the bill instead of making admissions in the replication.

The plaintiffs sought relief at the hearing on a case or state of facts different from that set forth in their bill of complaint, but which was partly set up in the answer. In their replication they admitted these allegations in the answer, but did not amend their bill, and brought the case on for hearing. The evidence failed to establish the case made by the bill, and the plaintiffs did not ask leave to amend.

Held, without deciding whether the plaintiffs were entitled to any relief on the evidence submitted, that the bill should be dismissed with costs unless the plaintiffs wished leave to amend, which they might have on payment of costs. *Boyle* v. *Wilson* 180

2. *Parties to suit—Demurrer—Multifariousness — Setting aside release given by trustee in fraud of cestuis que trustent — Allegation that release under seal—Fraud, if relied on, must be sufficiently alleged.*]—A number of creditors of defendant M., having assigned their claims to defendant S. so that he might sue upon all in one action at law, filed a bill in equity to set aside a release of their claims given by S. to M., and to prevent M. from setting up the release as a defence in the action at law. The plaintiffs alleged that it had been procured by M. in collusion with S., with knowledge of S's position, and with the intent and design of defeating and defrauding the plaintiffs. The alleged release was set out *verbatim* in the bill, and purported to have been executed under seal, but there was no specific

allegation that the release had been executed under seal. The bill also asked for payment by M. of the plaintiffs' several claims.

Held, on demurrer,

(1) That the bill was not multifarious.

(2) That there is jurisdiction in equity to set aside such a release for fraud, even if the same relief could have been obtained by motion in the action at law; and although the Court now has power to give equitable relief in actions at law, the plaintiffs are not confined to seeking it there.

(3) But that the demurrer should be allowed, because the bill did not sufficiently allege that the release complained of had been executed under seal, and there were no sufficient charges of fraud or breach of trust to warrant the interference of a court of equity.

Dougan v. *Mitchell*..... 477

Bill to set aside fraudulent conveyance—Parties.

See PARTIES, 2.

POSSESSION.

Recovery of, by unpaid vendor.

See FIXTURES, 1.

PRACTICE.

1. *Judgment — Application to set aside—Irregularity—Want of merits—New material not to be used on appeal.*]—Action against two defendants commenced in May, 1883. Judgment signed in September, 1883, for want of appearance. There was an affidavit of personal service filed.

Defendant P. in October, 1892, applied to set aside the judgment on the ground that he had never been served with the writ, and had only lately learned of the judgment. He swore positively that prior to the date given in the affidavit as that of the service of the writ he had left the Province, and did not return for some years afterwards, and never was served with the writ or any papers of any kind relating to the suit; some other person was served by mistake for defendant. Defendant did not swear to merits, nor did he show that the writ had never come to his knowledge.

Held, that the fact that defendant never was served with the writ of summons or a copy thereof, constituted an irregularity only and not a nullity. In order to take advantage of such irregularity, defendant must show, not only that he was not served with the process, but that such process did not come to his knowledge or into his possession.

On a summons by way of appeal from an order of the Referee, no affidavits can be looked at except those that were before the Referee. *Rutherford* v. *Bready*.....29

2. *Irregularity—Technicality—Setting aside notice of trial—Service on another than the attorney on record.*]—Where advantage is sought to be taken of an alleged irregularity, and the application is technical and without merit, the applicant should be treated with the utmost strictness.

The plaintiff moved to set aside a notice of trial of an issue under the Real Property Act, on the ground, among others, that it had been served on an attorney who was not the attorney on the record; although it had been served on the attorneys who then had the matter in hand, and also on the acting Winnipeg agents of the attorney in Portage la Prairie, who had formerly acted for plaintiff in the proceedings prior to the order directing the issue.

Held, that to succeed in such a motion the affidavits filed should have negatived every other possible mode of good service under the rules and practice of the Court, which they did not do, and the summons was dismissed with costs. *Kerr* v. *Desjarlais*.....278

3. *Money paid into Court by defendant—Impounding for costs taxed against plaintiff—Withdrawal by plaintiff—Time of operation of Judge's order.*]—The Court cannot go behind the date appearing on the face of an order, inquire when it was pronounced and give it operation as of a prior date.

In general an order is not effective until it is drawn up, signed and served.

The defendant had paid a sum of money into Court, which the plaintiff refused to accept as sufficient. The defendant had a verdict. A person to whom the plaintiff had assigned his interest in the suit then applied for payment out of court of the moneys paid in by defendant, but his application was, on 16th December, 1892, refused on the ground that the money should be impounded to answer defendant's costs of suit.

No order impounding the money was taken out until 27th December, 1892, and in the meantime the money was taken out of court by the plaintiff on *præcipe*.

Held, that plaintiff had a right to do so, and an application by defendant for an order on the plaintiff's attorney for payment of defendant's costs was dismissed, but without costs. *Young* v. *Hopkins*.....310

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4. *Order for payment of costs—Effect of, as judgment—Entering upon judgment roll—R.S.M. c. 80, s. 3.*]—Although the rules and orders at law for the payment of money or costs, referred to in R.S.M., c. 80, s. 3, "constitute judgments and have all the force and effect of judgments at law," yet there is nothing in the statutes or the practice of the Court to warrant the making up and entry of judgment rolls upon them as in the case of ordinary judgments, and what purported to be a judgment roll entered herein upon such an order was ordered to be taken off the files of the Court.

Gibbons v. *Chadwick* 474

See EXAMINATION OF JUDGMENT DEBTOR, 1, 4.

Appeals—Computation of time.

See APPEAL FROM REFEREE.

See SECURITY FOR COSTS, 1.

Master's report—Amendment of error.

See MORTGAGE, 2.

Special indorsement—Leave to sign final judgment.

See SUMMARY JUDGMENT, 3, 4.

Who should be plaintiff in issue.

See INTERPLEADER, 2.

PRACTICE IN EQUITY.

1. *Filing answer without signature or seal of corporation—Consent of plaintiff's solicitor required.*]—The Court has no jurisdiction to dispense with the signature of a natural person or the seal of a corporation to an answer in an equity suit without the consent of the plaintiff, and such consent must either be given by plaintiff's solicitor in writing or by counsel before the Court.

Counsel for the plaintiff, in a suit in another province, had agreed that the plaintiff would consent to the filing of the answer of the Company in this suit without the seal of the corporation.

Held, that this would not dispense with the consent required by the practice of the Court, and the application of the Company to have their supplemental answer filed without the corporate seal, the plaintiff opposing same, was dismissed with costs.

Charlebois v. *Great North-West Central Railway Co*..... 448

2. *Hearing of Petition—Evidence in support of.*]—When persons interested in the subject matter of a suit in equity, who are not parties to the suit, petition the Court for an order or decree which, if granted, would establish finally their alleged rights, and bring on their petition formally for hearing, it must be supported by direct, and not merely by hearsay or secondary evidence, unless the Court, as a matter of indulgence, allows further evidence, either upon inquiry before the Master or before the Court itself.

Gilbert v. *Endean*, 9 Ch. D. 260, followed in this respect.

It is otherwise in the case of a motion or petition, pending investigation of a claim put forward by the petitioners, to have certain directions given to the Receiver in possession of the property claimed. *Allan* v. *Manitoba & N. W. Ry. Co. Re Gray*....388

3. *Stop order–Charging order–Set off of costs—Stay of proceedings to enable creditor to procure a charging order.*]—A stop order in Equity gives no charge on a fund in court in favor of the party obtaining it, and he is not entitled to an order for payment out of court as against his judgment debtor without first getting a charging order on the fund.

The application of the judgment debtor for payment out to him of the fund in court to which he had been found entitled was, however, enlarged a week to enable the judgment creditors to apply for a charging order, and their stop order was continued meantime.

A set off of costs of a former application against those of a later one, can only be allowed as

part of the order made on the later application, or upon a special application after both sets of costs are taxed. *McWilliams* v. *Bailey*.....563

PRELIMINARY OBJECTIONS.

See ELECTION PETITION.

PRIMOGENITURE.

See DESCENT OF LAND.

PRINCIPAL AND SURETY.

See SURETY.

PRIORITY.

See CHATTEL MORTGAGE.

PROHIBITION.

See MUNICIPAL ELECTIONS.

PROMISSORY NOTE.

1. *Liquor License Act—Hotel-keeper—Promissory note given for liquor supplied on premises—Illegality of—Actions on—Ultra Vires.*]—The Liquor License Act, R.S.M. c. 90, s. 134, provides that, "If any hotel-keeper receive in payment or as a pledge for any liquor supplied in or from his licensed premises, anything except current money or the debtor's own cheque on a bank or banker, he shall for each such offence be liable to a penalty of twenty dollars and in default of payment, to one month's imprisonment."

Declaration on two promissory notes made by defendant payable to plaintiff.

Pleas to each count.

1. That plaintiff was a licensed hotel-keeper, and that part of the consideration for which the note was given was for liquor supplied by plaintiff to defendant in his hotel.

2. That the note was received from plaintiff as a pledge for liquor supplied by him to the defendant in his hotel.

On demurrer to these pleas,

Held, 1. That they were good on the ground that by the imposition of a penalty for taking anything but money in payment, or as a pledge, for liquors supplied in licensed premises, the Legislature had clearly intended to make it unlawful to take anything but money.

2. That the above provision was *intra vires* of the Legislature.

Hodge v. *The Queen*, 9 App. Cas. 117, and *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, applied. *Benard* v. *McKay*.156

2. *Onus of proof where illegality set up without plea of illegality—Note of corporation—Holder in due course.*]—The plaintiffs sued the defendants on a promissory note executed in proper form, given in favor of one Yates, and indorsed by him to the plaintiffs. The defendants proved that the giving of the note to Yates was for his accommodation and entirely unauthorized, and argued that the plaintiffs were then bound to prove that they were holders in due course, under

sections 30 and 88 of The Bills of Exchange Act, but there was no plea of illegality or fraud on the record.

Held, that without such plea such defence could not be maintained, and it was unnecessary for the plaintiffs to prove that they had given value or were holders in due course. *Farmers' and Mechanics' Bank* v. *Dominion Coal, &c., Company* 542

3. *Statement of consideration for which note given—Condition attached to promise to pay—Executory consideration.*]—Plaintiffs sued as indorsees of two promissory notes made by defendant, payable to the Watson Manufacturing Company, which stated on their face that they were given for a binder, and that the property therein should remain in the payees until payment of the notes in full; also that the payees were to provide all repairs required for the binder, and any improvements that might be added to their binders before the maturity of the note.

Held, that these instruments were negotiable promissory notes, notwithstanding the special provision at the end, which should be construed as a memorandum to show that the payees had promised to provide the things mentioned as part of the consideration for the defendant's promise to pay the notes, and not as a condition attached to the absolute promise to pay.

Drury v. *Macaulay*, 16 M. & W. 146, and *Shenton* v. *James*, 5 Q. B. 199, distinguished. *Merchants' Bank* v. *Dunlop*..623

Note given by Company.

See CONDITIONAL SALE, 1.

PUBLIC POLICY.

School taxes not attachable by creditor.

See GARNISHMENT, 6.

PURCHASE BY TRUSTEE.

See TRUSTEE AND CESTUI QUE TRUST.

PURCHASER FOR VALUE WITHOUT NOTICE.

See CONDITIONAL SALE, 1.

QUANTUM MERUIT.

Suing on.

See CONTRACT.

RAILWAYS AND RAILWAY COMPANIES.

1. *Liability for animals killed on railway track—Obligation to fence — Adjoining land, where animals might properly be—Permission of owner of land contiguous to railway.*]—The plaintiff's horses were being wintered on his own land adjacent to the property of his father, through which the defendants' railway ran. In March, 1893, the horses strayed along a private road across the father's land, through a broken gate on this road, and on to the railway track, where they were killed by a train of the defendants.

According to the evidence of the plaintiff and his father, the latter had several times in previous years given the plaintiff permission to pasture and water his stock on the father's land, or to allow them to run there, but there was no special permission asked or given for that winter, nor was there sufficient evidence of a general permission for the plaintiff to allow his stock to run there.

Held, that it could not be said that the horses got upon the railway track from land where they might properly be, and therefore the defendants were not, under The Railway Act of Canada, 51 Vic. c. 29, s. 194, (as amended by 53 Vic. c. 28, s. 2) and ss. 196 and 198, liable for the loss.

Westbourne Cattle Co. v. *M. & N.W. Ry. Co.*, 6 M. R. 553, followed.

Ferris v. *C.P.R. Co.*..... 501

2. *Lien on railway, equipment and land grant—Power of Company to grant—Parties.*]—The plaintiff's bill alleged that the defendant Company was a duly incorporated company, with its head office at Ottawa, Ontario; that the plaintiff entered into an agreement with the defendant Company, to build and equip fifty miles of the railway in Manitoba for £200,000, which the Company agreed to pay him; that he built and equipped the fifty miles of the railway according to the terms of the agreement; that under the terms of the agreement he was entitled to a lien on and to hold possession of the fifty miles of the railway and the franchise, rolling stock, land grant, etc., as security for the amount due him; and that in September, 1891, there was due him over $600,000. It also alleged that he obtained a judgment by consent in Ontario, by which it was declared that he had a lien on the railway, land, grant, &c., for $622,226, and it was ordered that the defendant Company should, within six months, pay the said sum with interest; that the judgment also declared, at the request of plaintiff, that certain specified amounts of the said sum should be paid to certain named third parties, and the fund was charged with these payments as a first charge, ; that the defendant made default in payment, and the plaintiff obtained a second judgment in Ontario to enforce the first judgment; that by this judgment, it was ordered the Company should pay the $622,226, and should forthwith deliver up possession of the railway, land grant, &c., to the plaintiff, and the Company was perpetually restrained from selling or negotiating the bonds of the Company, making and issuing bonds, and from dealing with the land grant. The bill prayed amongst other things that the Company be ordered to pay the $622,226 and interest, and forthwith to deliver possession of the said railway, rolling stock, &c., and that it be restrained from interfering with the plaintiff in his possession thereof, and also that the Company be restrained from alienating or incumbering the railway, land grant, &c., and from issuing bonds, &c. The defendant Company demurred to

so much of the bill as sought payment of the money to persons other than the plaintiff, and to so much of the bill as sought to obtain an order for delivery of the possession of the railway, &c., on the ground that these third persons were necessary parties to the suit. It also demurred for want of equity to so much of the bill as sought to restrain the defendants from alienating or otherwise disposing of the railway, land grant, rolling stock, &c.

Held, that at this stage of the proceedings, the third parties did not appear to be necessary parties, and that if it should prove to be necessary at the hearing, a decree could be made saving their rights.

Held also, that the clause in the contract giving the plaintiff a lien and first charge on the fifty miles of the railway, land grant, rolling stock, &c., until he was paid, was *intra vires*. A railway company has a general power to give securities for purposes within the scope of the power conferred upon the company to construct and operate the railway, unless this power is expressly negatived in the Act of Incorporation, and express power to borrow and give specified securities, will not exclude the general power.

Bickford v. *Grand Junction Railway Company*, 1 S.C.R. 696, followed.

Charlebois v. *The Great North West Central Railway Co...* 1

Power of Railway Company to asssign a judgment.

See SUMMARY JUDGMENT, .1

REAL PROPERTY ACT.

1. *Action for damages against District Registrar—Pleading—Denial of notice.*]—In declaring against the District Registrar as nominal defendant in an action under the Real Property Act, to recover damages out of the Assurance Fund for being deprived of one's land by the issue of a certificate of title to another, it is necessary to allege that the action is brought under the statute and that the act complained of was done contrary to the provisions of the statute.

It is not necessary in such declaration to allege that no notice of the proceedings leading to the grant of the certificate had been served upon the plaintiff, or to negative any of the matters which section 168 of the Act says shall be a bar to the action. These are properly the subject of a plea or pleas to the declaration. *Wilson* v. *District Registrar, Winnipeg*.....215

2. *Caveat — Description of land.*]—A caveat filed under the Real Property Act must contain a proper description of the land in question, and it is not sufficient that such description is given in the affidavit verifying the caveat which is filed with it.

The petition of the caveators, following a caveat which was defective in this respect, was dismissed with costs.

Jones v. *Simpson*, 8 M. R. 124, and *McKay* v. *Nanton*, 7 M. R. 250, followed.
Martin v. *Morden* 565

3. *Certificate of title final at each stage—Trusts and powers*

not appearing on the certificate.]—A certificate of title for certain lands had been issued to M., (described therein as sole surviving executrix and devisee under the will of B.,) which stated that M. was seized of an estate in fee simple in the lands subject to the following incumbrances: 1st, a mortgage made by B. to C.; 2nd, a lien or charge for $5,000 in favor of M. B. under the said will; 3rd, a mortgage made by M. herself to C., attaching upon M.'s interest as such devisee only. Afterwards M. sold part of the land to D. and executed a transfer thereof to him, and the District Registrar holding that M. had a power of sale as executrix under B.'s will, which enabled her to sell the land for the purpose of paying debts and legacies, and finding, as the fact was, that the sale was necessary for that purpose, decided to issue a new certificate of title to D., free and clear of all incumbrances except the mortgage made by the testator.

To this C. objected, and the matter was referred to the Court on appeal from the District Registrar.

Held, that it was not competent for the District Registrar to go behind his former certificate, and find in the registered owner a power inconsistent with the title stated in it, and thus cut out two of the incumbrances therein set forth.

Re Massey and Gibson, 7 M. 172, followed.

Held, also, that even if the former certificate could have been corrected by the District Registrar as erroneous, such power of correction was in him and could not be exercised by the Court on the appeal.

The 122nd section of The Real Property Act applies where the holder of a certificate of title has died or become bankrupt and there is a transmission of his interest, but has no application where the land transmitted had not been brought under the Act. *Re Moore and The Confederation Life Association*.....453

4. *Issue between caveator and caveatee—Who should be plaintiff.*]—The caveators, by their petition under The Real Property Act, claimed a charge on the land in question by virtue of a writ of execution against the lands of one Andrew Morden, whom they alleged to have been the owner of the land when their writ was placed in the sheriff's hands.

The caveatee, who had applied for a certificate of title, claimed the land under a tax sale deed, and in answer to the petition further set up that the land was exempt from seizure under execution as having been the homestead of Andrew Morden, also that he was advised and believed that the caveators' writ had not been kept in force by renewal, but these matters were not sufficiently proved by his affidavit.

Held, that the burden of proof was on the caveatee, and that he must be the plaintiff in the issue directed on the petition. *Martin v. Morden*.....567

RELEASE OF EQUITY OF REDEMPTION.

See MERGER.

REMUNERATION.

See TRUSTEES.

REPEAL OF FORMER STATUTE.

See GARNISHMENT, 6.

REPLICATION.

See PLEADING IN EQUITY, 1.

RESCISSION OF CONTRACT.

See CONTRACT.

RESIGNATION OF REEVE.

See MUNICIPAL ELECTION.

RIGHT TO VOTE—PROOF OF.

See ELECTION PETITION.

SALE OF CHATTELS.

See BILLS OF SALE.

See WARRANTY.

SALE OF LAND.

See FRAUDULENT CONVEYANCE.

By married woman.

See TITLE TO LAND.

For taxes.

See TAX SALES, 1, 2.

SALE OF LIQUOR.

See PROMISSORY NOTE, 1.

SCHOOL TAXES.

See GARNISHMENT, 6.

SEAL.

Allegation that release under seal.

See PLEADING IN EQUITY, 2.

SECURITY FOR COSTS.

1. *Application for further security—What must be shown.*]—Although an order for security for costs has been made and complied with, an order for further security can be granted upon a proper case being made.

On an application for further security defendants must show that they could not have foreseen that the cause was one in which security to a larger amount than that usually ordered would have been proper.

In this case the defendants failed to show that costs already incurred, and to which they were entitled, had exhausted the security already given.

Application refused.

Bell v. *Landon*, 9 P. R. 100, followed.

Charlebois v. *Great North-West Central Ry. Co.*..... 60

2. *Insolvent plaintiff—Assignment of claim sued on—Practice.*]—A plaintiff or petitioner will not be ordered to give security for costs on the ground that

he is insolvent and has assigned the claim, if the assignment was only given as security and he is still interested in the collection of the money.

Shields v. *McLaren* 182

See MARRIED WOMEN.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 1, 2, 3.

SERVICE OF NOTICE OF TRIAL.

See PRACTICE, 2.

SERVICE OF WRIT.

Domicile of defendant out of jurisdiction. — Personal service within jurisdiction.

See JURISDICTION, 1.

See PRACTICE, 1.

SETTING ASIDE JUDGMENT.

See PRACTICE, 1.

SETTING ASIDE PROCEEDINGS.

See ATTACHMENT.

See LEAVE TO APPEAL.

See PRACTICE, 2.

SET OFF OF COSTS.

See PRACTICE IN EQUITY, 3.

SHERIFF.

1. *Action against sheriff—Negligence in not levying under execution—Sheriff bound to levy on chattels though mortgaged—Sheriff bound to see whether chattel mortgage valid on its face—Duty of sheriff as to threshing grain seized in stack–Chattel mortgage—Affidavit of bona fides made by "accountant" of mortgagees.*]— In an action against a sheriff for not levying under an execution, it appeared that he had abandoned the seizure and refused to do anything further on finding that there were three mortgages on the debtor's goods and chattels, prior to the execution ; being of opinion that the aggregate amount apparently secured by them would exceed what he could realize by sale of the chattels after payment of expenses.

One of the mortgages had, in fact, been satisfied and the sheriff could have ascertained this on inquiry. Another was not proved at the trial to be valid under The Bills of Sale Act ; it was in favor of the Canada North-West Land Company, and the affidavit of *bona fides* upon it was made by one Campbell, who only described himself as "Accountant of the mortgagees," and there was no other evidence that he was an agent of the Company authorized to take the same.

The debtor realized out of his grain, which might have been levied upon, more than sufficient to satisfy both the latter mortgage and the remaining valid and unsatisfied mortgage besides the plaintiff 's judgment.

Held, that the defendant was liable for the full amount of the plaintiff's claim against the judgment debtor.

If for any reason of which the sheriff has notice, or by reasonable inquiries could discover, a chattel mortgage is not entitled to priority over a writ of execution in his hands, he cannot rely on it as a justification for not levying under the writ.

Per Killam and Bain, J.J. (*Dubuc, J. dubitante*). The sheriff could not rely on the mortgage to the Canada North-West Land Company, as it was plainly invalid unless Campbell was the agent of the Company, and there was no evidence that he was such agent.

Per Dubuc, J.—The sheriff having seized grain in stacks, is not bound to have it threshed and marketed, but may sell it in the stacks, but as no evidence was given to show that such a sale would have realized less than the actual value, the Court cannot presume that it would, although such would probably be the case.

It is clearly the sheriff's duty, notwithstanding the use of the word "may" in the statute, to seize and sell the equity of redemption in mortgaged chattels when such equity is valuable. *Massey Manufacturing Co.* v. *Clements* 359

Action for money had and received by sheriff as such, for the use of plaintiff—Money paid by debtor to be applied on second execution, leaving first unsatisfied—Priority of executions.]—A debtor, against whom there were several executions in the hands of a sheriff, paid him a sum of money expressly to be applied on the plaintiffs' writ, which was not entitled to priority. Afterwards, on the money being claimed both by the plaintiffs and the first execution creditor, the sheriff returned the money to the debtor.

Held, that the plaintiffs were entitled to recover the amount from the sheriff as money had and received for their use.

Coburn v. *McRobbie* 375

SPECIAL INDORSEMENT ON WRIT.

Leave to sign final judgment.

See SUMMARY JUDGMENT, 3, 4.

Sufficiency of.

See SUMMARY JUDGMENT, 2.

SPECIFIC PERFORMANCE.

See JURISDICTION, 2.

See MISTAKE.

STATUTES.

Administration of Justice Act, R.S.M. c. 1, s. 26.

See SUMMARY JUDGMENT, 3.

Assessment Act, R.S.M. c. 101, s. 193.

See ASSESSMENT ACT.

Bills of Exchange Act, ss. 30 and 88.

See PROMISSORY NOTE, 2.

Bills of Sale Act, R.S.M. c. 10.

See BILLS OF SALE.

See CHATTEL MORTGAGE.

City of Winnipeg, Act of Incorporation of, 1882.

See STREET RAILWAY.

Common Law Procedure Act, 1854, s. 46.

See EXAMINATION OF JUDGMENT DEBTOR, 1.

Controverted Elections Act, R. S.M. c. 29, s. 14.

See ELECTION PETITION.

County Courts Act, R.S.M. c. 33, ss. 308 and 315.

See APPEAL FROM COUNTY COURT, 1.

County Courts Act, R.S.M. c. 33, ss. 323 and 324.

See APPEAL FROM COUNTY COURT, 2.

Election Act, R.S.M. c. 49, s. 148.

See ELECTION PETITION.

Frauds, Statute of.

See JURISDICTION, 2.

Interpretation Act, R. S. M., c. 78, ss. 11 and 12.

See GARNISHMENT, 6.

Judgments Act, R. S. M., c. 80, s. 3.

See PRACTICE, 4.

Limitations, Statute of.

See TITLE TO LAND.

Liquor License Act, R. S. M. c. 90, s. 134.

See PROMISSORY NOTE, 1.

Lotteries Act, R.S.C., c. 159, s. 2.

See CRIMINAL LAW.

Manitoba Town Corporations Act, C. S. M., c. 10.

See CORPORATION, 1.

Married Women's Act, R. S. M., c. 95.

See HUSBAND AND WIFE.

Municipal Act, R. S. M., c. 100, s. 178.

See MUNICIPAL ELECTIONS.

Municipal Act, R.S. M., c. 100, ss. 663 and 664.

See MANDAMUS.

Queen's Bench Act, R. S. M., c. 36, s. 11.

See WILLS.

Railway Act of Canada, 51 Vic. c. 29, s. 194 (as amended by 53 Vic., c. 28, s. 2) and ss. 196 and 198.

See RAILWAYS, 1.

Real Property Act.

See REAL PROPERTY ACT.

Real Property Limitation Act, R.S.M. c. 89.

See TITLE TO LAND.

Solicitors' Act (Imp.), 23 and 24 Vic. c. 127.

See CHARGING ORDER.

Weights and Measures Act, R. S.C. c. 104, s. 21.

See WEIGHTS AND MEASURES ACT.

Winding Up Act, R. S. C. c. 129.

See EXAMINATION OF JUDGMENT DEBTOR, 4.

See WINDING UP, 1, 2, 3.

54 Vic. c. 1, s. 33.

See TRIAL BY JURY.

STAYING PROCEEDINGS.

Staying proceedings in action on foreign judgment whilst appeal pending therefrom—Foreign judgment, action on—Terms on which proceedings stayed.]—The plaintiff was proceeding to enforce in the Courts of this Province two judgments obtained in Ontario against defendants for a large amount, one of which judgments had been entered by consent; and the Company was at the same time going on with proceedings in the Ontario Court for the purpose of setting aside the judgment on the ground that the consent had been given in fraud of the Company, and that there had been collusion between the plaintiff and the president of the Company, and that there was a good defence to plaintiff's claim on the merits. It appeared that the Company was acting in good faith in their proceedings, that the expenses connected with the same would be very great and would have to be duplicated here if the action in this Court proceeded.

The defendants then applied for a stay of proceedings in this action until the determination of the litigation in Ontario.

Held, that the proceedings should be stayed upon terms securing as far as possible the plaintiff's claim and upon defendants agreeing to abide by the result of their litigation in Ontario.

Charlebois v. *G. N. W. C. R. Co.* 286

See PRACTICE IN EQUITY, 3.

STOP ORDER.

See PRACTICE IN EQUITY, 3.

STREET RAILWAY.

Street railway—Exclusive right to use of street for tramway purposes—Powers of Municipal Councils—"Portion of street."]—Municipalities in Manitoba are the creatures of the Legislature and have only such powers as are expressly conferred upon them by the Legislature, or implied as incident thereto, or necessary to be exercised in order to carry into effect the powers expressly given; and, therefore, without express legislative sanction, such a municipality has no power to confer upon any person or corporation an exclusive right to operate street railways on any of its streets or highways.

The City of Winnipeg, by by-law passed in 1882, assumed to grant to the plaintiffs, for twenty years, "the exclusive right to such portion of any street or streets as shall be occupied by said railway," and the plaintiffs claimed an injunction to prevent the defendants from operating a competing line of street cars on tracks parallel to them on the same streets.

The Charter of Incorporation of the City, c. 36, of the statutes of Manitoba passed in 1882, gave it no express power to grant any exclusive rights or monopoly of

the use of the streets, but provided that the Council might pass by-laws "for authorizing the construction of any street railway or tramway upon any of the streets or highways within the City," and the plaintiffs' Act of Incorporation, c. 37, of the statutes passed in the same year, gave them "full power and authority to use and occupy any and such parts of any of the streets or highways of the City as may be required for the purposes of their railway track, the laying of the rails and the running of their cars," subject to the terms of any agreement between the plaintiffs and the City relating to the same.

Held, that there was nothing in either statute enabling the City to grant the exclusive rights claimed by the plaintiffs; and, also, that even if the City had such power, it had failed to confer such rights upon the plaintiffs by the by-law above referred to, the exclusion intended having no application laterally across the whole width of the streets in question, but only longitudinally as far as the plaintiffs' tracks extended.

Winnipeg Street Railway Company v. *Winnipeg Electric Street Railway Company*..... 219

STRIKING OUT PLEAS.

See APPEAL FROM REFEREE.

See FOREIGN JUDGMENT.

SUBSEQUENT INCUMBRANCE.

See MERGER.

SUMMARY JUDGMENT.

1. *Application for leave to sign judgment — Action on foreign judgment — Appeal pending against same when application made here — Finality of judgment—Railway Company—Power to assign judgment—Power of attorney—Judgment is a security for money.*]—The plaintiffs sued as assignees of judgments for costs recovered against the defendant in actions brought by a railway company and one Delap in the High Court of Justice for Ontario. The defendant having entered an appearance, the plaintiffs applied to strike it out and sign judgment on the usual affidavit. Defendant opposed this application, claiming that he was appealing against the Ontario judgments, also that the power of attorney under which the assignment by Delap was executed did not authorize such an instrument. The power gave authority to sell and dispose of, among other things, "bonds, mortgages and other securities for money."

Held (1) That the pendency of an appeal against a foreign judgment would be no defence to an action upon it here, although the Court might stay execution on proper terms.

(2) That there is nothing to prevent a railway company from assigning a judgment recovered by it.

(3) That a judgment is a security for money, and that the assignment executed by Delap's attorney under the power above referred to, was sufficient.

Howland v. *Codd*..... 435

2. *Special indorsement on writ—Sufficiency of—Cheque dishonored—Notice of—Amendment of indorsement after summons for judgment taken out.*] — In an action on a dishonored cheque final judgment will not be ordered, unless the indorsement on the writ contains either an allegation that notice of dishonor was given to the drawer, or a statement of the facts excusing the giving of such notice.

The indorsement on a writ cannot be amended by striking out objectionable particulars, after a summons for final judgment has been taken out, in order to support the summons.

Wyld v. *Livingstone*..... 109

3. *Special indorsement on writ—Leave to sign final judgment.*]—In indorsing a claim on a covenant in a mortgage for the payment of principal and interest, it is necessary to allege clearly and distinctly that the claim is made upon a covenant to *pay* the money secured by the mortgage, or leave will not be given to sign final judgment in the action, under section 26 of the Administration of Justice Act. Where the claim is only stated to be one for "money due upon covenants contained in a mortgage," it will not be assumed that these are covenants to pay a liquidated and ascertained amount, and it must clearly appear that the claim is not in any way in the nature of damages or such leave will not be given.

Satchwell v. *Clarke*, 8 T. L. R. 592, not followed. Dictum of the Master in *Munro* v. *Pike*, 15 P. R. 164 dissented from.

Manitoba, &c., Loan Co. v. *McPherson* 210

4. *Special indorsement on writ—Leave to sign final judgment—Alleging performance of conditions precedent.*]–In a special indorsement of a writ of summons under the Common Law Procedure Act, for the purpose of an application for leave to sign final judgment after appearance entered, it is unnecessary to allege performance of conditions precedent, although such seems to be required under the Judicature Acts in England. *Wyld* v. *Livingstone*, 9 M. R. 109, overruled in that respect.

It is also unnecessary to show by the indorsement, that a claim for interest arises under a contract express or implied, and it will be left to the defendant to show, if he can, that such claim does not so arise.

The special indorsement on the writ in this case showed a claim for an amount due under a covenant contained in a mortgage made by the defendant to the plaintiffs, dated 22nd of July, 1892, whereby the defendant covenanted to pay to the plaintiffs $3150.00, with interest at 8% per annum, and went on to give the dates when the principal and interest should be payable, and contained the following paragraphs :—

"To interest on $3,150 at 8% per annum from 22nd July, 1892, to 3rd October, 1893, due under covenant in said mortgage—the covenant is to pay interest yearly; - - - - - $249.30

To amount paid by the plaintiffs to insure the buildings on

said land in accordance with a covenant contained in the said mortgage, which insurance money the defendant by the said mortgage covenanted to repay to the plaintiffs with interest thereon at 8 per cent. per annum until paid; - - - - - - $45.00

And the plaintiffs claim interest on $3444.30, the amount due as aforesaid from 3rd October, 1893, until judgment, at 8 per cent. per annum."

Held, that taking the indorsement as a whole, it sufficiently appeared that the interest was claimed under the covenant for payment of interest, and that the indorsement in that respect was sufficient.

Held, also, that under the rule laid down in *London and Canadian L. & A. Co.* v. *Morris*, 7 M. R. 128, the description of the claim for insurance premiums was sufficient.

Rodway v. *Lucas*, 24 L. J. Ex. 155 followed.

Canada Settlers Loan Co. v. *Fullerton* 327

SUNDAY.

Computation of time—Last day.

See APPEAL FROM REFEREE.

SURETY.

Discharge of surety—Concealment of dishonesty of servant—Default by servant before bond of suretyship executed.] — Declaration in two counts on a bond of the defendant, conditioned for the fulfilment by an agent of the plaintiff Company of its regulations, and for payment to the Company, monthly, of such sums as the agent should receive for the use of the Company, and, at the expiration of his agency, of all moneys belonging to the Company. One count alleged the receipt by the agent of divers sums and non-payment of the same monthly or at all. The other count alleged a termination of the agency, receipt by the agent during its continuance of large sums of money and non-payment thereof.

Pleas on equitable grounds.

7. That, before the faults alleged and before the execution of the bond, the agent had been the plaintiff's agent in a like capacity and, while such agent had, as such, committed divers other defaults of the same kind, and that the plaintiff, well knowing these defaults, neglected to inform the defendant thereof, but retained the agent as such, and that the defaults sued for occurred during such continuance.

9. That, while the agent was so acting and before the defaults complained of, the agent had committed during his service divers other defaults of the same kind, and for which the Company might lawfully have dismissed him, yet the plaintiff, well knowing thereof, omitted to inform the defendant thereof and continued the agent in the service, and that the defaults complained of were committed during such continuance.

On demurrer to these pleas,

Held, 1. That the seventh plea was bad on the ground that the

party in whose favor a contract of suretyship is made is not necessarily bound to communicate to the surety every fact material to the risk, as in the case of an applicant for insurance, but that the non-communication must occur under such circumstances as to be fraudulent towards the surety.

North British Insurance Co. v. *Lloyd*, 10 Ex. 523, followed.

2. That the ninth plea was good on the authority of *Sanderson* v. *Aston*, L. R. 8 Ex. 73.

British Empire &c. Assurance Co. v. Luxton..... 169

SURPLUS TAX SALE MONEY.

See ASSESSMENT ACT.

TAX SALES.

1. *Crown Lands—Sale of, for taxes before patent issued—Subsequent issue of patent to assignee of original purchaser from the Crown.*]—B. agreed to purchase Dominion lands, and paid a large proportion of the purchase money; by divers assignments B's interest became vested in defendant. The land was subsequently bought by plaintiff at a tax sale; he obtained a deed therefor, and defendant after payment to the Crown of the balance of the purchase money obtained a patent for the land.

Plaintiff filed his bill praying for a declaration that defendant held the legal estate in the land as trustee for the plaintiff.

Held, on demurrer, that the plaintiff could not ask that the defendant be ordered to convey the legal estate to him, until he had paid, or tendered to the defendant, the amount that he paid to acquire the legal estate. The Municipality was empowered, on the tax sale, to convey only such interest in the lands as the Crown might have given or parted with, or might be willing to recognize or admit. The Crown was free to recognize such right as the plaintiff acquired under the tax deed or to disregard it and recognize the defendant as the person entitled to the patent. Having done the latter, the fact that thereby the defendant was enabled to hold the land free from the taxes which had been imposed, and from the consequences of the non-payment of these, was no ground for the Court interfering.

Ruddell v. *Georgeson* 43

2. *Crown lands — Taxation of, before issue of patent—Sale of same for taxes—Estate or interest held by purchaser of lands from Crown before full payment.*]—B., in 1881, agreed to purchase Dominion lands and paid a great part of the purchase money. By successive transfers, the defendant acquired B.'s interest in the lands, and in 1891 he paid the balance of the purchase money to the Dominion Government and received a patent for the lands. Meantime the lands were, in 1887, sold by the Municipality for several years arrears of taxes to the plaintiff, who, in 1889, obtained a tax deed for the same.

He then, in this suit, sought to obtain a decree declaring that

the defendant held the lands as trustee for him, and, offering to pay the defendant the amount he had paid the Crown to complete the original purchase, asked to have the defendant ordered to convey the lands to him.

Held, that the lands in question were not liable to be assessed and sold for taxes until the issue of the patent, or at least until the Crown had received full payment for the same.

Held, also, that by the contract in question B. acquired no interest or estate in the lands which could be made subject to assessment and taxation by the Provincial Legislature, or in any way enforced against the Crown.

Whelan v. *Ryan*, 20 S. C. R. 65, and *Cornwallis* v. *C. P. R.*, 703, considered.

Ruddell v. *Georgeson* 407

TAXATION OF UNPATENTED LANDS.

See TAX SALES, 1, 2.

TECHNICALITY.

Setting aside notice of trial for.

See PRACTICE, 2.

TERMS, IMPOSITION OF.

See ATTACHMENT.

TITLE TO LAND.

Title to lands in Manitoba before the Transfer—Sale of land by married woman prior to 1870—Effect of Crown patent for land not vested in the Crown at the time—Husband and wife—Statute of Limitations—Amendment of bill by alleging conveyance from true owner after suit commenced—Parties.]—The plaintiffs claimed title to the land in question under an alleged sale from the defendant, a married woman, made verbally in 1863 to their mother, E. T.

E. T. was married in 1861, and her husband, A. T., then went to live with her on the land. They continued to reside on and occupy it up to 1882 when E. T. died intestate, after which A. T. and the plaintiffs remained in possession up to the filing of the bill.

The Judge found as a fact that some time prior to 1866 the defendant had ageed to sell the land to E. T., and that E. T. and A. T. thereafter continued to occupy it under the belief that it belonged to E. T., but

Held, that according to the Common Law of England, in force down to 1870, which was then the law of this country, such a sale by a married woman of land which was in no way separate estate, was wholly void and incapable of being enforced against her, although a verbal sale by a person *sui juris* might at that date have been good, according to the decision in *Sinclair* v. *Mulligan*, 5 M. R. 17.

The plaintiffs also claimed title by length of possession held by their mother under said sale since 1863, and by themselves since 1880, but their father, A. T., had lived on the land all that time, and farmed and occupied it in the

same way as any other head of a family would.

Held, that on the evidence, A. T. was the person who had acquired the title by possession under the Statute of Limitations, and as he had not conveyed his title to the plaintiffs, and was not a party to the suit, the bill must be dismissed.

The defendant had obtained a patent from the Crown for the land in 1891, but it appeared that the land was not then vested in the Crown, having been granted by the Hudson's Bay Company in fee simple many years before to the defendant's father.

Held, that the existence of such patent would not have prevented relief being granted if A. T. had brought the suit, and that the defendant might have been ordered to convey to him.

An objection for want of parties was taken by defendant's counsel, who claimed that defendant's husband should have been a party to the suit.

Held, that as the husband had not, prior to the coming into force of the Married Woman's Property Act, taken possession of the land, it then became her separate property, and she might be sued in respect of it as a *femme sole*.

The Judge at first inclined to the opinion that it would be proper to allow the plaintiffs to obtain a conveyance from their father and then to amend the bill by alleging the conveyance, and upon proof thereof to make a decree in their favor, but after hearing further argument,

Held, that such amendment could not be allowed, and that the bill must be dismissed, but without costs.

Templeton v. *Stewart*.....487

Jurisdiction of County Court.

See JURISDICTION, 2.

TOWN CORPORATIONS ACT, C. S. M., c. 10.

See CORPORATION, 1.

TRIAL BY JURY.

Trial by jury—Action for malicious prosecution—Application for a jury.]—Since the statute 54 Vic. c. 1, s. 33, which enacted that all issues of fact in civil cases, except in actions of libel and slander, shall be tried by a judge without a jury, but provided that an application may be made to a judge in Chambers in any case to have the issue tried by a jury, special circumstances must be shown in order to have an action for malicious prosecution tried by a jury. By the repeal of the former statute the Legislature showed that they considered that an ordinary action for malicious prosecution should be tried by a judge without a jury. *Harvie* v. *Snowden*.....313

TRUST MONEYS.

Moneys in bank on trust account.

See GARNISHMENT, 3.

TRUSTEE AND CESTUI QUE TRUST.

Purchase by trustee from cestui que trust—Under value—Family arrangements.]—The defendant's brother having died unmarried and without issue the plaintiff his father, became sole heir at law; but, as he lived in Ontario, he consented to the defendant taking out letters of administration and disposing of the estate which consisted solely of a quarter section of land. The defendant represented to the plaintiff that the land in question was worth only about $600, and the plaintiff was induced by such representation to sell and convey the land to defendant at that price. He afterwards filed a bill to set aside the sale on the ground that, as he alleged, the defendant had been guilty of false and fraudulent representations as to the real value of the land. The learned Judge at the hearing came to the conclusion upon the evidence "that the market, or saleable value of the land did not exceed between $650 and $750, or perhaps $800."

Held, that this difference between the market value and the amount which defendant had represented to be the value, was too inconsiderable to be a ground for setting aside the sale, and the plaintiff's bill was dismissed with costs.

Bonney v. *Bonney*.....280

TRUSTEES.

Remuneration—Commission on amount handled.]—Where there has been nothing special in the management or winding up of an estate, a percentage on the gross amount come to the hands of the executors or trustees will generally be allowed to them as remuneration.

In this case the value of the estate realized by the executors was $39,348, of which they had properly paid out and disbursed $21,814, leaving $17,534 still in their hands which could not all be paid out before nine years. On the application of the executors for interim remuneration, the Court allowed them 4 per cent. on the $21,814 and 2 per cent. on the $17,534 not yet paid out, in addition to the sum charged for the services of a bookkeeper, giving them leave to apply for a further allowance at the final winding up of the estate.

Re Cursitor.....433

TRUSTS AND POWERS.

See REAL PROPERTY ACT, 3.

TUESDAY TRIALS.

Powers of judge sitting at—Issues on record—Action—Tender before action — Payment into Court.]—Declaration on the common counts.

Pleas 1. Except as to $42.15, never indebted and payment.

2. Except as to $42.15, tender before action and payment into Court.

Plaintiffs filed two replications.

1. Accepting the money paid into Court in satisfaction.

2. Traversing the tender before action.

The record having been entered for Tuesday trial, the defendant objected that no judgment could be entered upon it.

Held, that the Judge had the powers and authorities of a Judge of Assize and *Nisi Prius*, and was bound to try the issues on the record.

Wells v. *Abrahams*, L. R. 7 Q. B. 554, considered.

Winnipeg Jewellery Company v. *Perrett* 141

ULTRA VIRES.

See CORPORATION.

See MUNICIPALITY.

See STREET RAILWAY.

UNDER VALUE.

See TRUSTEE AND CESTUI QUE TRUST.

VENDOR'S LIEN.

See FIXTURES, 1.

VOID OR VOIDABLE.

See HALF-BREED LANDS ACT.

VOID CONTRACT.

See WEIGHTS AND MEASURES ACT.

WARRANTY.

Sale of goods—Agreement for—Action for breach of—Property passing — Damages — Measure of—Bailment.]—Plaintiff sued in a County Court upon a promissory note given to him by defendant upon an agreement for the sale of a horse.

A condition of the agreement was that the property was not to pass to defendant until payment. Defendant filed a counter claim for breach of an alleged warranty that the horse was sound. The horse was delivered to defendant and used by him for some time, but died before maturity of the note from a cause not connected with the unsoundness complained of. At the trial, the jury found that there was a warranty, that the horse was unsound, and that the difference in value between the horse as it was, when delivered, and as it would have been if sound, was $90, for which amount a verdict was entered for defendant on the counter claim.

The plaintiff appealed to the Court of Queen's Bench.

Held, 1. That the consideration for the note was in part the bailment, and in part the promise of the vendor to sell.

2. That an action lay for the breach of warranty, and that the purchaser should recover as general damages, for the period of the bailment and for the proposed sale together, the same amount as if there were an immediate sale.

3. That the right of action for the breach of warranty arose at once, just as in the case of an absolute sale of a specific chattel.

Frye v. *Milligan*, 10 O. R., 609 and *Tomlinson* v. *Morris*, 12

O. R., 311, not followed. *Copeland* v. *Hamilton* 143

WEIGHTS AND MEASURES ACT, R. S. C., c. 104, s. 21.

Void Contract--Measuring grain in bags.]—The plaintiff contracted with the defendant to thresh his grain at a price per bushel. At the threshing the threshed grain was run into bags, each supposed to contain two bushels, and the quantity was estimated by the number of bags. It was not ascertained either by measuring with a Dominion Standard Measure or by weighing. Section 21 of the Weights and Measures Act, c. 104, R. S. C., provides that, "Every contract, bargain . . . . or dealing made or had in Canada in respect of any work . . . . . which has been or is to be done . . . . or agreed for by weight or measure, shall be deemed to be made and had according to one of the Dominion weights or measures ascertained by this Act . . . . and if not so made or had shall be void, except when made according to the metric system."

Held, that under this enactment the plaintiff could not recover anything for the work he had done.

Manitoba Electric & Gas Light Co. v. *Gerrie*, 4 M. R. 210, followed.

Macdonald v. *Corrigal* 284

WILLS.

Demurrer—Multifariousness—Jurisdiction of Court of Queen's Bench over wills—Mental capacity of testator—Undue influence—Evidence—Onus of proof.]—A bill is not necessarily multifarious because it seeks to set aside a deed as against one defendant and a will executed by the same person in favor of another defendant, when the latter relief is merely incidental to the former, and the defendants had set up the will as a bar to the plaintiff's claim.

The Court of Queen's Bench on its equity side has jurisdiction to try the validity of a will, or to pronounce it void for fraud or undue influence. R.S.M., c. 36, s. 11.

Where the evidence as to the mental capacity of the testator or grantor is conflicting, and the execution of the instrument was procured by parties who were in a position to exert an undue influence over him, and who take a benefit under it, the onus is thrown upon them of proving that the transaction was a righteous one and that there was no undue influence exerted. *Baker* v. *Batt*, 2 Moo. P.C. 321 ; *Barry* v. *Butlin*, 2 Moo. P.C. 482 ; *Fulton* v. *Andrew*, L.R. 7 H.L. 448.

In the present case the evidence as to the condition in which the deceased was on the day the deed and will were executed, though favorable to the defendants' contention, came entirely from those interested in supporting the instruments ; whilst the evidence of disinterested outsiders, who had seen him shortly before, was distinctly unfavorable, and tended to show that he was childish, unable to speak intelligibly, and

could not understand what was said to him.

Held, upon the evidence, which is fully set out in the judgment, and applying the principle above stated, that the deceased had not at the time he executed the deed and will in question, mental capacity sufficient for the transaction of any business, and that both instruments should be declared void and set aside.

Wright v. *Jewell*..... 607

WINDING UP.

1. *Appointment of liquidators of insolvent bank—Choice between several nominees—Canvassing for votes—Nominee indebted to bank—Chief liquidator should be a banker—Costs—Remuneration of liquidators.*]—Under the Provisions of the Winding Up Act, R. S. C., c. 129, s. 101, as amended by the Act, 52 Vic., c. 32, s. 17, whilst the Court is confined to a selection between the persons nominated at the meetings of creditors and shareholders, for the office of liquidator, it is not bound to adopt the choice of the majority, but must exercise its own discretion.

The Merchant's Bank of Canada, the petitioning creditor, its claim being amply secured, held not entitled as of right to have its nominee appointed.

If the creditors nominate one person and the shareholders another, the Court will *cæteris paribus* have particular regard to the wishes of the latter if the Company is solvent, and of the former if it is not.

But when it is not absolutely clear that the Bank is solvent, the interests of creditors in the liquidation are entitled to greater consideration than those of the shareholders.

It is important that the chief liquidator should be a man of experience in banking, and well acquainted with the methods of bank book-keeping.

The candidate who received the largest vote as chief liquidator amongst the unsecured creditors, and by far the largest vote amongst the shareholders, was indebted to the Bank in a considerable amount, and although it was claimed that this debt was fully secured on real estate, yet the Court, deeming the securities uncertain and unsatisfactory,

Held, that on this ground amongst others, it was not desirable to appoint him.

It is objectionable for a candidate to canvas in any way for the appointment or to send out proxies to secure votes, or to vote for himself on proxies sent to him, or to advocate his own claims before the meeting; and it is especially objectionable for a provisional liquidator seeking appointment as permanent liquidator to send out letters signed by him as such liquidator, asking managers of branches of the Bank employed under him, as well as other parties, to pay attention to the correspondence of his solicitors as to proxies; and the Court intimated that in future such practices would be regarded in a more serious light.

The remuneration to be allowed to the liquidators cannot be

fixed at the time of their appointment, as notice of an application for that purpose seems to be required, and it would in any case be difficult to decide such a matter in advance; but the Court adopted the suggestion of the meetings as to the proportions in which the several liquidators should share the remuneration to be allowed.

As to the costs of the contest the learned judge, following the rule laid down in *Re London and Northern Insurance Co.*, 19 L. T. N. S. 144,

Held, that one set of costs should be allowed to the shareholders and one to the creditors appearing on the petition, not including, however, any costs occasioned by the contest, and that costs must also be allowed to the Bank and to the petitioning creditor, those of the latter to include all reasonable disbursements connected with the holding of the meetings.

Re The Commercial Bank of Manitoba 342

2. *Company—Petition for winding up order—Allegation of insolvency—When Company insolvent within the meaning of The Winding Up Act—Pleading assignment of a chose in action.*]—In a petition for an order against a company under The Winding Up Act, R.S.C. c. 129, the petitioner alleged that the Company "is insolvent and utterly unable to pay your petitioner's said debts and its other debts."

Held, that this was not equivalent to stating that the Company was "unable to pay its debts as they became due," and was not a sufficient allegation of the Company's insolvency within the meaning of section 5, sub-section *a* of the Act, and that the petition must be dismissed with costs.

The petitioner's claim was based on a judgment alleged to have been recovered by another person, and acquired by the petitioner, of which he "is now the *bona fide* holder and owner."

Held, a sufficient statement of the claim of the petitioner, without an allegation that the judgment had been assigned by an instrument in writing.

Re Rapid City Farmers' Elevator Co. 571

3. *When company deemed to be insolvent—Proof of insolvency under The Winding Up Act.*]—In supporting a petition for an order against a company under The Winding Up Act, R.S.C. c. 129, it is not sufficient to show that several demands of payment have been made by the creditor without success, unless a demand in writing has been served on the Company in the manner in which process may legally be served on it, under section 6 of the Act; nor can the Company be deemed to be insolvent within the meaning of the Act, because an execution has been returned *nulla bona* by a County Court bailiff.

The provisions of sections 5 and 6 of the Act are exclusive, and a petitioner for a winding up order must strictly prove the existence of one or more of the circumstances there set forth, or his petition will be dismissed.

Re Qu'Appelle Valley Farming Co., 5 M.R. 160, followed.
In re Flagstaff Mining Co., L.R. 20 Eq. 268, and *In re Globe New Patent Iron Co.*, L.R. 20 Eq. 337, distinguished.
Re Rapid City Farmers' Elevator Co. 574

See EXAMINATION OF JUDGMENT DEBTOR, 4.

WORDS

"*Securities for money.*"

See SUMMARY JUDGMENT, 1.