THE MANITOBA

LAW JOURNAL

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VOLUME II.

WINNIPEG:
ROBERT D. RICHARDSON, PUBLISHER.
1885.

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THE

MANITOBA LAW JOURNAL.

VOL. II. JANUARY, 1885. No. 1.

JUDICIAL KNOWLEDGE.

MR. JUSTICE ROSE (Ontario), held that he had no judicial knowledge that beating, and playing, a drum were the same thing, and discharged a prisoner because the fact had not been proved. *4 C. L. T. p. 31.*

Mr. Justice Moss, on the other hand, did not account himself judicially ignorant of the fact that an accommodation endorser usually, after endorsement, hands the note to the maker in order that it may be put in circulation. "I do not feel bound," said that exceedingly able judge, "wholly to shut my eyes to the notorious fact, with which every member of the community, who is concerned in, or has had occasion to observe the dealings of merchants, brokers, and bill discounters with their customers, is perfectly familiar, that such transactions are of every day occurrence, and are entered into under the belief that the law warrants the assumption that the endorser has lent his name to enable the maker to use the note in the money market." *Cross* v. *Currie, 5 Ont. App. 31.*

Lord Campbell, C. J., was still bolder, and asserted that common law judges were judicially informed of the doctrines of the Court of Chancery, and resented somewhat savagely the imputation that he knew nothing at all about equitable principles. "I have no doubt," he said, "that the judges of a common law court take judicial notice, not only of the doctrines of equity, but of those of every branch of English law, when they incidentally come before them. When a

question of ecclesiastical law arose, it used to be the practice to send for two doctors. Those learned persons, when they came, were treated with great respect; but they came as advocates to argue the law, not as witnesses to state it, It has sometimes been said that we know nothing of parliamentary law; but, if a question of parliamentary law does come before us incidentally, in a matter over which we have jurisdiction, we must decide it, and must inform ourselves as best we can. So in a question of equity. If we do not know the doctrine of equity, we are supposed to have the means of learning it." *Sims* v. *Marryatt, 17 Q. B. 291.*

Our own court has lately decided that an Imperial order-in-council published, and bound up with, the Dominion statutes, must be judicially notice. *Re Stanbro, 2 M. L. R. 1.* The propriety of this last decision we propose to examine.

Mr. Justice Smith is reported to have said: "Up to the year 1875 the necessity of proving orders-in-council undoubtedly continued, but in that year the statute 38 Vic. c. 1, was passed, and this seems to have placed these orders-in-council on a different footing." That statute provides that such of the Acts of the Parliament of Canada, "and such orders-in-council and proclamations or other documents, and such Acts of the United Kingdom as the Governor-General-in-Council may deem to be of a public and general nature or interest in Canada" shall be published in the first volume of the statutes. Passing by the question whether this statute applies to Imperial orders-in-council, there can be no doubt that it does not, in terms, at all events, provide that documents so published may be proved by production of the volume in which they are printed, nor that, after such publication, they shall be judicially noticed; but it is held that, upon the true construction of the statute, not only, if it were necessary, could an order-in-counil be proved by the production of the volume of the statutes, but that, without such production, judicial notice of the document must be taken by the Court.

If this were the true construction of the statute there would have been no necessity for the passage of the subse-

quent Act, 44 Vic. c. 28. This statute, which, by the way, does not appear to have been alluded to either in the argument or in the judgments of the court, provides that "*prima facie* evidence of any proclamation, order, regulation or appointment . . . may be given . . . in all or any of the modes hereinafter mentioned, that is to say:—1. By production of a copy of the *Canada Gazette* purporting to contain a notice of such proclamation, order, regulation or appointment; 2. By the production of a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer for Canada."

A means, therefore, is provided whereby the existence of Dominion orders-in-council *may be proved*. It does not relate to Imperial orders-in-council, and does not provide that judicial notice shall be taken even of Dominion orders. Before, therefore, a judge can know anything judicially of a Dominion order-in-council its existence must be proved before him; for it can hardly be contended that a statute was passed providing an easy means of proving documents of which the judges had judicial notice before the Act was thought of.

But we think that the decision in *Re Stanbro.* although not supportable upon the grounds mentioned in the judgment, is good upon another ground. Under the Imperial Act 31 & 32 Vic., c. 37, "The Documentary Evidence Act, 1868," proof may be made of Imperial orders-in-council, "by the production of a copy of such proclamation, order or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession." The order in question was printed under the authority of the Dominion parliament. It could, therefore, have been proved by the production of the volume of the statutes in which it appears, and that volume was produced. The Imperial Act, just quoted, was cited upon the argument of the case, but the judges seem to have overlooked it, or not perceived its applicability.

VENDOR AND PURCHASER—RETURN OF DEPOSIT.

THE decision of the Lords Justices, in *Howe* v. *Smith*, *27 Ch. D. 89*, determines an important point. Upon a contract for the sale of land, the purchaser paid to the vendor £500 "as a deposit and in part payment of the purchase money." The contract provided that the purchase should be completed on a named day, and that, if the purchaser should fail to comply with the agreement, the vendor should be at liberty to re-sell, and to recover any deficiency in price as liquidated damages. The purchaser made default, and afterwards the vendor re-sold the property for the same price. The purchaser then sued for specific performance, and in the alternative asked for a return of the deposit. The court held that he was not entitled to either relief.

If a purchaser pay a deposit and the contract falls through because of his own conduct, it is clear (apart from the terms of any special contract) that he has no cause of action. He cannot sue for money had and received to his use, upon a consideration which has failed, because the vendor received the money rightfully, and the rescission of the contract by the purchaser can give him no cause of action. Moreover, it may be that a deposit on a purchase is a pledge, from the purchaser to the vendor, that the contract will be duly performed and, by an implied term of the agreement, it is to be forfeited unless the contract is fulfilled.

The vendor has at law (apart from the terms of any special clause in the contract) a perfect right to sell the property to another after default by the first purchaser. In equity, however, the purchaser has a reasonable time after the day fixed for completion, unless time be made of the essence of the contract. After this reasonable time has elapsed the vendor is in no way bound by the contract,

the contract is at an end, and he holds the property as though it had never been made. He can sell the land for his own benefit, or he may, if he choose, keep it.

Then, does the special agreement in this case make any difference? May not the vendor's position be affected by a clause which provides that in case of default the vendor may sell, and, if there be a deficiency on re-sale, the vendee is to make it good. In such a case it may, very well, be urged that, in case of default, the contract was not to be at an end at all, that the agreement provides for the *continuation* of the relationship of vendor and purchaser, and that the vendor is given a power of sale over property that by the contract belongs to the purchaser. In other words, that the parties placed themselves in the relationship of mortgagor and mortgagee, the equitable estate being in the purchaser and the legal, with a power of sale, in the vendor.

This seems to be a very reasonable view to take of the matter, but it does not appear to have been presented upon the argument of the case, and we have not the benefit of the opinion of the judges upon it. The court held that when the vendor sold he did so as owner of the property; that the contract not having been performed by the purchaser, but on the contrary, by long delay, having been, in effect, repudiated by him, was at an end; and that the vendor did not require the assistance of the power contained in the contract in order to effect a sale. This view gives no effect to the special clause at all; in fact, one of the judges disposes of it summarily by saying: "we may pass by that special clause, for I think it does not really deprive the deposit in this case of the character which it would bear if there were no special clause."

If there be no provision in the contract governing the relationship of the parties after default, the law terminates the agreement, but *Expressum facit cessare tacitum;* and where the contract does provide for the continuation of the relationship of the parties after default, why should that clause be struck out of the agreement?

The principle of *Palmer* v. *Temple*, *9 Ad. & El. 508*, appears to be applicable. In that case £300 was paid by way of deposit and in part payment of the purchase money, and the agreement stipulated that if either party should refuse to perform the agreement he should pay to the other £1,000 as liquidated damages. It was held that there was no other remedy for a breach of the agreement but that provided by the contract, and consequently, although the purchaser had made default, and the vendor might have sued for the penalty, and recovered damages, yet, as he had sold the estate to another, the purchaser was allowed to recover his deposit. Lord St. Leonards, in referring to this case (*Sugden on Vendors and Purchasers*, *14th Am. Ed. 58*,) uses it as an authority for the proposition that "when there is no specific provision, the question whether the deposit is forfeited depends on the intent of the parties, to be collected from the instrument." In comparing *Palmer* v. *Temple* with *Smith* v. *Howe*, it will be observed that, in both of them the money was paid as a deposit and in part of the purchase money, and that, in both provision is made for the consequences of default; and we submit that in the latter, as in the former, such provision must govern the rights of the parties.

If *Howe* v. *Smith* be good law, it must be remembered that it does not, at all events, determine what the rights of the purchaser would have been in case the sale had taken place before the lapse of a reasonable time after the day fixed for completion. In that case, the court might hold that inasmuch as the purchaser would at that time have been entitled to performance of the agreement, the sale was in pursuance of the agreement; that the provisions of the agreement should determine the right to the deposit; and that in such case the vendor could not retain more than enough to satisfy the deficiency on re-sale.

Nor does it cover the case of a purchaser merely making such delay as would disentitle him to specific performance, if his conduct do not amount to a repudiation on his part of the contract. Cotton, L. J., said, "In order to enable

the vendor so to act (that is, to retain the deposit), in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation, on his part, of the contract." This statement detracts largely from the value of the decision and introduces an element of most perplexing uncertainty. If by delay the right to specific performance is gone (and consequently the right to sue for breach of the contract at law), there may still remain the right to recover the deposit, if the purchaser's conduct does not "amount to a repudiation, on his part, of the contract!" The facts of the case itself render this statement all the more perplexing, for there was no conduct on the part of the purchaser showing a repudiation other than mere delay. On the contrary, he was always anxious to carry out the contract, but being short of money was never able to do anything but apply for more time, and finally he filed a bill for specific performance. Mr. Justice Fry's decision is more satisfactory: "In a word, the purchaser has, in my opinion, been guilty of such delay, whether measured by the rules of law or equity, as deprives him of his right to specific performance, and of his right to maintain an action for damages—and, *under these circumstances*, I hold that the purchaser has no right to recover his deposit." Bowen, L. J., however, agrees with Cotton, L. J., in his statement of the application of the rule, and the result must be deemed to be uncertain and disappointing

One other point which remains for settlement, in various other suits is, whether money expressed to be paid "as a deposit and in part payment of the purchase money," is in every case to be subject to forfeiture upon such default of the purchaser as mentioned in *Smith* v. *Howe*. If the purchase money be $1,000, and $750 be the amount paid, is this sum a deposit—a pledge for the performance of the contract; or does not its very proportion show that it was not intended to be a pledge. Of course it may be said that the parties have called it a deposit, and the law says a

deposit is a pledge. But parties may provide in other ways for a forfeiture of money, and even provide that the amount named is to be recoverable as liquidated damages, and yet the courts give effect to what must have been the intent of the parties, and do not always bind them by the actual words of their bargain. *Per Bramwell, B.*, in *Betts* v. *Burch*, *4 H. & N. 511; 28 L J. Ex. 271*; and *see per Lord Coleridge, C. J.*, in *Magee* v. *Lavell*, *L. R. 9 C. P. 115; 43 L. J. C. P. 135*. And it is said to be clearly settled "that whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument." *Per Wilde, C. J.*, in *Sainter* v. *Ferguson*, *7 C. B. 716*.

Re Dagenham Dock Co., *L. R. 8 Ch. 1022*, is very much in point. In that case a sale of an estate was made upon the terms that half the purchase money should be paid at once, and the other half on a stated day, and that if the whole were not paid off by that day, the vendor should retain the estate, and all the money then paid should be forfeited. This provision was held to constitute a penalty, because the forfeiture was to occur if any part of the purchase money, however small, remained unpaid. In this case the court had not to construe a deposit into a pledge, for the parties themselves had agreed that it was to be a pledge, and that the pledge was to be forfeited upon non-performance, and yet the court refused to permit the forfeiture to take place.

Robertson v. *Dumble*, *1 M. L. R.* 321, is the only case in our own court upon the subject.

NON-SUITING AT THE TRIAL.

IN the recent libel suit of *Adams* v. *Coleridge*, Mr. Justice Manisty non-suited the plaintiff after the jury had returned a verdict in his favor of £3,000. The defendant is the son of Lord Chief Justice Coleridge, and Mr. Justice Manisty has been vigorously denounced for overruling the jury—the defendant's relationship to a brother judge being assigned as the reason for the unusual act.

The alleged libel was contained in a letter written by the defendant to his sister who was engaged to be married to the plaintiff. It contained many statements which were beyond doubt libellous, and which were at the trial proved to be untrue. The defendant pleaded that the letter was a privileged communication, and placed his whole defence upon that ground.

At the close of the plaintiff's case a non-suit was applied for, but the judge refused to express an opinion, and determined to allow the case to go to the jury. The closing part of the charge, as reported in *The Times* (Eng.), was as follows:—"In conclusion, he told the jury that if they were satisfied that the defendant wrote the letter honestly, and from no bad motive, then they ought to find for the defendant; but if they were satisfied that he wrote it maliciously and from some bad motive then they would find for the plaintiff."

When the jury returned from deliberation the foreman said—"We think that the defendant not having retracted when he was offered the opportunity, there must have been some vindictiveness in his mind, that having the opportunity once offered to him he did not accept it."

"The learned judge.—Do you say that upon that ground you find for the plaintiff?

"The foreman.—We judge from that there must have been some vindictiveness.

"The learned judge."—And you find malice?

"The jury.—Yes, malice.

The damages assessed were £3,000.

"Attorney General.—Now, my Lord, I ask your judgment on the question of law I submitted to you—whether there is any evidence to warrant a verdict for the plaintiff.

"The learned judge.—I am of opinion that there was no evidence on which such a verdict could be given; and I therefore direct judgment to be given for the defendant."

This method of proceeding would certainly be said to be unusual in Manitoba, and it strikes one, at first, as not only anomalous but unfair—if the verdict is for the defendant he gets it, but if for the plaintiff the defendant wins all the same. But let the learned judge defend himself. Several days after the trial he took occasion to explain his action, and is reported as follows:—"There seems to be a general misunderstanding as to the course I took on Saturday. It seems to have been thought that it was an unusual and improper course to take. But it is a course I had taken before, which other judges have also taken, and which I shall take again under similar circumstances. The reasons upon which I have so acted are, that it is decidedly for the interests of both parties, and tends to bring the litigation between them to as speedy an end as possible. It is a course, I think, especially in the interest of the plaintiff. I think, however, it is in the interest of both parties, and for this reason—that if I am wrong the Court of Appeal will say so, and will then be in a position finally to dispose of the case, having a verdict for the plaintiff. If they think I was wrong, they will hold the verdict right, and so the case will be brought to an end without putting the plaintiff to the delay and expense and risk of a second trial."

We own ourselves entirely convinced, by this statement, of the propriety of the course taken at the trial. If the

judge had non-suited before verdict, and it turned out that he should not have done so, the plaintiff would have had much more reason to complain. The delay attendant upon a new trial and a repetition of term and appeal proceedings, might have rendered his judgment but a barren victory. Change in the defendant's circumstances might have enabled him to defy the sheriff, and the judge whose erroneous ruling caused the delay might then fairly be looked upon as the cause of the plaintiff's loss.

STATISTICAL LITERATURE.

WE find from the Toronto newspapers that there were 23,151 writs issued out of the three Divisions of the High Court of Justice in Ontario, between August, 1881, and December, 1884.

During the same period there were issued out of the Court of Queen's Bench, in Manitoba, in the Eastern Judicial District alone, 12,554. (We have not at hand the figures for the other two Districts.) To this must be added the number of bills filed in equity, amounting to 1,835, for in Ontario both suits and actions are commenced by writ. The figures, therefore, stand as follows:—

Ontario	23,151.
Manitoba—Writs	11,534
" Bills	1,835—13,369.

To dispose of this work Ontario has 14 judges and a Master in Chambers (who does all the Chamber work), or 15 judicial officers; Manitoba has 4 judges and a Referee who attends to equity chamber matters only, or less than one-third of the entire chamber work, and we may, therefore, estimate the judicial staff at 4⅓. In Ontario, therefore, there is one judge for every 452 writs issued in a year; and in Manitoba, one for every 903!

But the inequality is still greater. We have said that the writs issued in the Central and Western Judicial Districts are not included in the above figures. Nor is any account taken of all the speedy criminal trials which the judges have to dispose of in the absence of the county judge. In addition to these, the Court of Queen's Bench here is a Court of Appeal for the whole of the North West Territories; a branch of jurisdiction involving the study of the Ordinances of the Territories.

In view of these figures, and considerations, it is not surprising that our court feels itself wholly unable to keep pace with the work; that if a persistent attack is made upon the assize list, equity and term work are necessarily neglected and allowed to accumulate; that if term, on the other hand, is prolonged for a month, then the lists of cases awaiting trial struggle for hanging-room in the Prothonatory's office; that the strength of judges, from time to time, fails them under the stress of unremitted labor, and ever and anon, one or another completely breaks down; that lawyers are nearly torn to pieces by their clients for the unavoidable delays; that clients are ruined by being unable to obtain decisions; and that fraudulent debtors bid defiance to any creditor, who, forgetting the impossibility of coercion, throws off for the moment the attitude of respectful consideration for his master—his debtor.

At the last assizes 164 cases were upon the docket. Almost every one of these involved a contest more or less prolonged; undefended issues being now almost obsolete, owing to the practice of striking out time defences in chambers. But with us the assize lists exhibit only a small proportion of the cases actually tried. Every Tuesday is set apart for trying non-jury cases, and the judges, in their endeavour to cope with the arrears, devote every other day of the week, not otherwise occupied, to hearing such cases as parties consent to bring before them. Interpleader issues rarely go to the assizes. Provision is made for their disposition in chambers, upon oral evidence, and many a day is taken up with these trials.

The docket for last Term shewed a list of 111 rules for argument, in addition to which were North West appeals and habeas corpus proceedings. Term sat for a month—up to the close of the week preceding Christmas—and succeeded in clearing off the rules of Easter Term, leaving those taken out in Trinity and Michaelmas untouched!

A short Chancery sittings was held last November, Mr. Justice Taylor giving the time between his Brandon circuit and Term to the work. The next sittings are fixed for the 13th January. Already 44 cases are entered for hearing, and we may safely count upon 20 or 25 being added before the list closes. Term commences again upon the 2nd February, and many of the Chancery suitors, therefore, will have to possess their souls in patience until another chance opportunity is afforded them of spending another $100 in gathering their witnesses together again.

Last long vacation we had to chronicle the ill-health of Mr. Justice Dubuc, attributable directly to over-work. This vacation witnesses the prostration of Mr. Justice Smith, with the prospect of but slow recovery to working strength. Day after day in the face of advancing weakness Mr. Justice Smith held to his work. Every day for a month (and that immediately following a long assize) he sat in Term from 12 to 6 p.m., o'clock, buoying himself with stimulants and the resources of a resolute will, but being steadily worsted in the unequal contest. Now that vacation has come, the reaction, we regret to say, finds him in the hospital, extremely weak, and with some serious ailments and complications to combat. Let the Society for the Prevention of Cruelty to Animals expend a share of its sympathy and protection upon over-worked judges, instead of lavishing it all upon horses. Our Governor General the other day appeared at the Police Court against a man whom he had caused to be arrested upon a charge of abusing a horse. Is his Government not chargeable with a greater crime?

INSOLVENCY.

OPINION as to the advantages and disadvantages of an insolvency law seems to be governed by that impulse which leads men to grasp at any possible relief from present difficulty. When the law is in force it seems to legalize fraud, and when it is repealed nothing seems to bid more fair than a provision for equal division of an insolvent's estate. At present, opinion is strongly in favor of another attempt at legislation, and we may, within a year or two, expect to be compelled to furbish up our rusty knowledge of the former Acts, and to study the new one.

Meanwhile, it is proposed that the local legislature should take the matter in hand. *Le Manitoba* advocates the introduction, here, of the provisions of the Civil Code of Quebec, and speaks thus favorably of its provisions:—

"A Manitoba et à Ontario, les créanciers qui arrivent les premiers dans le bureau du Shérif prennent tout, et les autres, si le débiteur refuse de faire cession, perdent leur créance en entier. C'est bien le cas de répéter: "Tarde venientibus ossa." Puisque les biens du débiteur sont le gage commun de ses créanciers, pourquoi n'amenderions nous pas nos lois de manière à autorsier une distribution judiciaire équitable entre tous les créanciers? Cette loi aurait encore pour bon résultat de diminuer les poursuites contre les débiteurs insolvables et de leur substituer une simple réclamation sous serment. Cette distribution est peu dispendieuse, équitable et se fait avec la sanction des tribunaux. Elle prévient les abus, peut atteindre et empêcher les fraudes et régler définitivement toutes les questions litigieuses qui peuvent se présenter. La preuve que cette loi est excellente c'est que dans la Province de Québec, le rappel de la loi de banqueroute n'a produit aucun change-

ment considérable dans la liquidation des affaires commerciales. Le code civil contient une loi complète de faillite, plus parfaite, plus expéditive et beaucoup moins dispendieuse que celle qui avait été adoptée à Ottawa La chose vaut la peine d'être essayée."

It must be remembered, however, that insolvency is a subject of legislation exclusively within the jurisdiction of Parliament, and that while Quebec may enjoy the provisions of its Code (they having become law prior to confederation), it does not follow that our local legislature would have power to enact similar provisions. It is inadvisable also (even if it were possible) that the insolvency laws should differ in the various provinces. An effort is being made in the United States to remove this subject of legislation from the State legislatures to Federal jurisdiction, on account of the extremely close trade-relationship of the States, and we think it would be a mistake to establish the contrary principle in Canada. It will be better to wait until opinion becomes sufficiently strong to compel a Dominion Act.

MR. JAMES BETHUNE, Q.C.

IT is with the greatest regret that we notice the announcement of the death of Mr. Bethune. He has been cut down in the very height of a most prosperous and brilliant career at the bar.

Mr. Bethune combined in himself almost all the essentials of the ideal advocate—some of them in more, and some in less, perfect degree. He was always enthusiastic and industrious; possessed a good voice, impressive presence,

and frank and truth-expressing face; in his speech there was no hesitation; and his utterance, although rapid, was clear and distinct. In these qualities, and in his rapid grasp of facts, he had no superior at the Ontario bar. Combined with them, but in less perfect degree, he possessed a good memory, a large and comprehensive knowledge of the law, and an instinctive astuteness in his methods of argument.

His very frankness of disposition, however, and his impetuosity sometimes prevented his discovery of some less apparent but valuable point. He lacked the detective suspicion of honest-looking facts, which, with some other counsel is so fruitful of success. His attacks were as open as his nature was honest. He always attacked directly in front, and seldom prepared pit-falls or torpedoes for his opponents. With his mind set upon the main issue he drove straight at it, and neglected the aid or shelter of irregularities by the way. But his attack was always strong and vigorous, and frequently carried the day against heavy odds and many cunning devices and ambuscades carefully set for his humiliation.

Mr. Bethune was a general favorite, and was on good terms with himself and everybody else; always buoyant and hearty; always cheerful and sure to win—if not here, in the Court of Appeal, the Supreme Court, the Privy Counsel, wherever it should be necessary to go for the establishment of his opinion. His clients and the junior bar, from whence he received his greatest employment, held him in the very highest estimation, and reposed in him the completest confidence,—a confidence to which his numerous successes most justly entitled him. His removal will leave a place at the bar that no other can fill, and a blank in the hearts of his many friends who have been drawn towards him through many years of friendship by his genial, generous, and manly bearing and character.