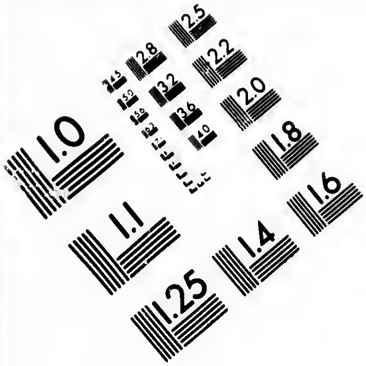

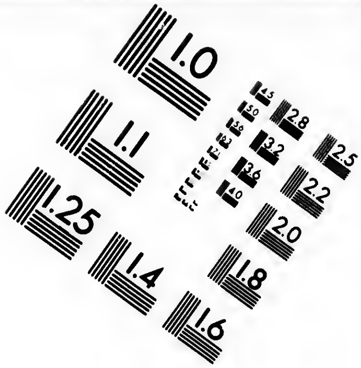

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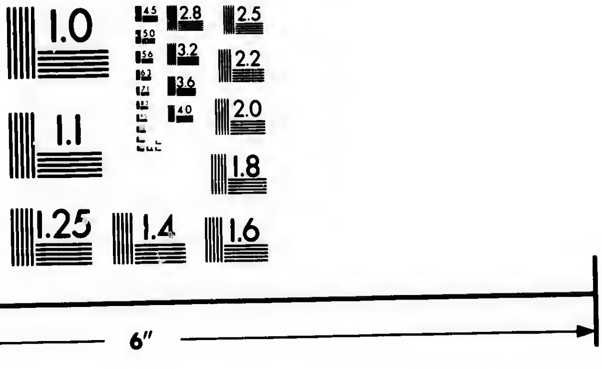

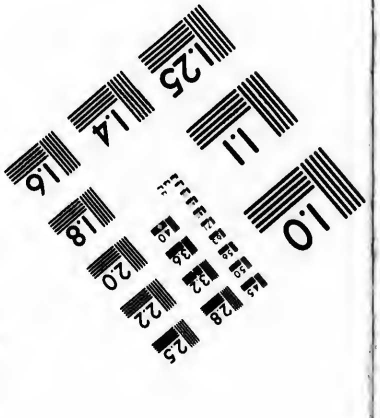

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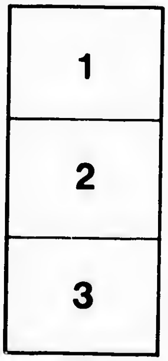

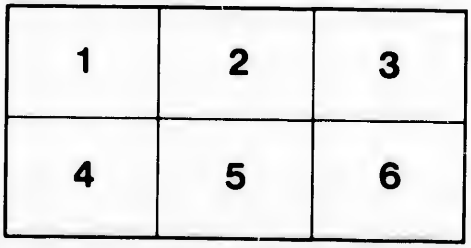

IN THE SUPREME COURT

— OF —

CANADA

APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

GEO. EMERSON AND J. H. ASHDOWN, (DEFENDANTS,) APPELLANTS.

— AND —

JAMES BANNERMAN, (PLAINTIFF,) RESPONDENT.

CASE.

E. P. DAVIS, ADVOCATE FOR APPELLANTS.	SMITH & WEST, ADVOCATES FOR RESPONDENT.

1890.

PRINTED BY THE TRIBUNE POWER PRESS,
CALGARY, N. W. T.

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INDEX.

IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES. NORTHERN ALBERTA JUDICIAL DISTRICT.

BETWEEN:

James Bannerman (Plaintiff).

AND

George Emerson and J. H. Ashdown (Defendants).

INTERPLEADER ISSUE.

For trial pursuant to the order of Mr. Justice Rouleau, dated the 1st day November, 1889.

WHEREAS the above named James Bannerman affirms and the above named George Emerson and J. H. Ashdown deny that at the time of the seizure on the 19th day of October, 1889, by the Sheriff of the Northern Alberta Judicial District, under and by virtue of two writs of fieri facias, issued out of the Supreme Court of the North-West Trrritories. Northern Alberta Judicial District, at the instance of the Defendants in this issue, respectively, against the goods of one A. C. Sparrow, on the 14th day of September, 1887, and the 4th day of September, 1888, respectively, or the renewals thereof, of one stack of grain upon the property of said A. C. Sparrow, the said stack of grain was the property of the said James Bannerman, as against the said George Emerson and J. H. Ashdown, and it has been ordered by the said order of Mr. Justice Rouleau, dated the first day of November, 1889, that the said question shall be tried without a Jury. Therefore let the same be tried accordingly.

Delivered this 12th day of November, 1889, by Messieurs Smith & West, of the Town of Calgary, in the District of Alberta, Advocates for the Plaintiff.

NOTES OF EVIDENCE.

Mr. West for Plff. and Mr. McCarthy, Counsel.
Mr. Davis for Defendant.

PLAINTIFF CLAIMS UNDER A BILL OF SALE.

A. C. Sparrow, being on Oath states: It is my signature at foot of Bill of Sale, 24th Sept,, 1889 and reg. 24th Dec., 1889. (Objection taken to filing of Bill of Sale as not properly proven.) Was at home when Sheriff came to seize and he told me he seized for Emerson. He

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seized the stack of oats mentioned in the Bill of Sale. It was an absolute Bill of Sale and a truthful document. There was not a word said about a repayment to Mr. Bannerman, the Plff. Was not to pay any interest on that money. It was an actual purchase and payment. Bannerman gave me a note at three months for $400.00, payable at my own order. Discounted the note at Le Jeune & Smith's Bank. Got the cash on it. Was indebted to Bannerman. Mrs. Sparrow was. I believe the account was in Mrs. Sparrow's name. It was $136.00. Paid that account to Bannerman and spent the balance. The stack of oats was mine. There was no agreement that Bannerman was to pay me anything back. T. B. Lafferty did the conveyancing. Bannerman saw Lafferty, I was present. (The following evidence taken under objection.) Told Lafferty I had sold a stack of oats to Bannerman and to draw a Bill of Sale. The Bill of Sale was drawn accordingly under instructions. Had to thresh it and deliver it to Bannerman. Had no interest in it whatsoever after the Bill of Sale. Bannerman was to pay the note when it became due. We considered that there was 1000 bushels of oats in the stack, at 40 cents a bushel. There was no other agreement in it. Bannerman took his chances about the 1000 bus. of grain. Told Bannerman I wanted some money, that I wanted to use it before I threshed the oats and that I would sell him the said stack of oats for 1000 bushels of oats. He knew the amount of grain contained in the stack as well as I knew, as he is a farmer as well as a grain merchant. He saw the stack of grain every day as he passed by. Bannerman said then he was short of cash and that he would give me his note for three months. I agreed to pay him his account out of it. The oats were seized before I had an opportunity of threshing.

X.-Ex: Am the A. C. Sparrow against whom the execution was issued. The judgment of Emerson was for $1,600.00 for cattle sold to me. The judgment of Ashdown was for $150.00. There was nothing paid on account of those judgments. I also owed in 1887 some 3 or $4,000. besides. In September, 1889, I had not paid my debts in full and was unable to pay them in full. No mention made that I was to keep the straw of that stack of oats. I first asked Bannerman to advance $300.00 on the oats, and he refused unless I paid the account out of it. I told Bannerman that I needed about $300.00 but that if he could make it $400.00 I would pay the account out of it. The goods bought of Bannerman were all used in the house where I am living now. It was got sometimes by me, sometimes by my wife and sometimes by Mooney. Before the Bill of Sale was given, Bannerman asked me for my account two or three times. Bannerman could compel me to deliver more than 1000 bushels or if there was less, he was not to get any more.

T. B. LAFFERTY, Advocate, being on Oath says: Saw the Bill of Sale. I drew it myself. Got instructions from Sparrow and Bannerman. On 24th Sept. Sparrow came to my office and told me he had sold a stack of oats to Bannerman for $400.00 and to draw a Bill of Sale of it. This Bill of Sale was drawn according to instructions. A Chattel Mortgage was never mentioned. (Objected to as illegal.)

No Cross Examination.

JAMES BANNERMAN, being on Oath, says: Am Plaintiff in this Interpleader Issue. Am grain and commission merchant and a farmer as well. Part of my business is buying and selling grain. Got stack of oats, subject of this Interpleader Issue, from A. C. Sparrow. On 24th Sept. last, A. C. Sparrow called at the store and he asked me if I would advance him $300.00 on

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a stack of oats, I said I would if he would pay the amount of their account. He said that he required that amount and that if I would advance $400.00 he would pay the account of Mrs. Sparrow, $136.00. The account was charged to Mrs. Sparrow, (objected to as the books are not produced). Gave Mrs. Sparrow credit as she was carrying on the business (same objection). I made the change immediately after A. C. Sparrow gave up his business in town, about 1886. Since that time I gave credit to Mrs. Sparrow. As a result of the above agreement Sparrow and I went to T. B. Lafferty. We took the acreage of land and the probable yield would be about 1000 bushels. I gave him my note for $400.00 at three months. I was to pay it when it matured. No agreement of any kind by which Sparrow was to repay me those $400.00. Don't hold Sparrow any way for the $400.00. No arrangement except that I was to get the oats. Nothing said about the interest on the money. Nothing said about Sparrow having any interest in the oats at all. It was certainly a purchase of the grain. If the grain had been destroyed I could not come on Sparrow as it would have been my loss. There was nothing said about the surplus of 1000 bushels, I was under no obligations to Sparrow. I signed Bill of Sale and the affidavit of bona fides, after Sparrow had given instructions, in my presence, to T. B Lafferty to draw the Bill of Sale. Any allowance I might have made to Sparrow over the 1000 bushels would have been entirely voluntary.

X.-Ex : (Objection taken to all conversation which took place between the parties where Defendants were not present.) When I speak of Mrs. Sparrow doing business in her own name, I mean that is what I heard. Don't know personally myself. No understanding about the straw but when I bought the stack I supposed I was to get it. Between man and man, if the oats, when delivered, were worth 50cts, I would have given credit to Sparrow for the surplus, but there was no agreement to that effect.

THOMAS CHRISTIE, being on oath, states : Am partner of Le Jeune, Smith & Co. Saw the note produced. We are holders of said note. A. C. Sparrow endorsed said note.

Copy of same allowed to be fyled.

No Cross-Examination.

JAMES BANNERMAN, recalled : The note produced is the note I gave and which I signed. Had an acc. against A C. Sparrow and entered at page 32, in 1886, until November of same year, showing a balance of $7.17 still due. It was never paid. (Objected to as irrelevant.) Had an acc. against Harriet Sparrow which commences on folio 28, on 3rd January, 1887. There is a balance entered on folio 179, which was brought forward in Ledger B. The acc. in Ledger A, the account is entered in the name of Mrs. Sparrow. It commences in Oct. 29th 1886. The balance was carried in Ledger B. The account in Ledger A was the last account charged against A. C. Sparrow. The amt. $136.00, was the sum due by Mrs. Sparrow at that time.

X.-Ex : The advance of $400.00 which the consideration for the Bill of Sale was made under the condition that the $136.00 should be paid.

This closes the Plff's case.

The Defendant declares he has no evidence to adduce.

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EXHIBIT "A."

BILL OF SALE.

THIS INDENTURE made in duplicate the twenty fourth day of September, in the year of our Lord one thousand eight hundred and eighty nine.

Between Angus C. Sparrow, of the District of Alberta, in the Northwest Territories of Canada, Farmer, of the first part,

And James Bannerman, of the Town of Calgary, in the said District of Alberta, Merchant, of the second part.

Whereas the said party of the first part is possessed of the Personal Property hereinafter set forth described and enumerated, and hath contracted and agreed with the said party of the second part for the absolute sale to him of the same, for the sum of four hundred dollars.

Now this Indenture Witnesseth, that in pursuance of the said Agreement, and in consideration of the sum of four hundred dollars of lawful money of Canada, paid by the said party of the second part to the said party of the first part, at or before the sealing and delivery of these Presents, (the receipt whereof is hereby acknowledged), he, the said party of the first part HATH BARGAINED, sold, assigned, transferred, and set over, and by these Presents DOTH BARGAIN, sell, assign, transfer and set over unto the said party of the second part, his executors, administrators and assigns

All those, the said Personal Property described as follows, that is to say : One stack of oats in the straw and containing about one thousand bushels, said stack being now situated on the south west quarter of Section three, Township twenty-four, Range one, west of the 5th principal meridian, in said District of Alberta, and being the entire crop of oats taken off said Quarter Section.

The said Sparrow hereby undertakes and agrees to thresh the said oats and deliver the same in Calgary to the said Bannerman as soon as possible.

And all the right, title, interest, property, claim and demand whatsoever, both at law and in equity, or otherwise howsoever, of him, the said party of the first part, of, in, to, and out of the same, and every part thereof :

To have and to hold the said hereinbefore assigned property and every of them and every part thereof, with the appurtenances, and all the right, title and interest of the said party of the first part thereto and therein, as aforesaid, unto and to the use of the said party of the second part, his executors, administrators and assigns, to and for his sole and only use FOREVER:

And the said party of the first part DOTH hereby, for himself, his heirs, executors, and administrators, COVENANT, PROMISE and agree with the said party of the Second Part, his ex-

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ecutors and administrators, in manner following, that is to say: THAT he, the said party of the first part, is now rightfully and absolutely possessed of and entitled to the said hereby assigned property and every of them, and every part thereof:

AND that the said party of the first part, now has in himself good right to assign the same unto the said party of the second part, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these Presents: AND that the said party hereto, of the second part, his executors, administrators and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, possess and enjoy the said hereby assigned property and every of them, and every part thereof, to and for his own use and benefit, without any manner of hindrance, interruption, molestation, claim or demand whatsoever of, from or by him, the said party of the first part, or any person or persons whomsoever; AND that free and clear, and freely and absolutely released and discharged, or otherwise, at the cost of the said party of the first part, effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges and incumbrances whatsoever:

AND, moreover, that he, the said party of the first part, and all persons rightfully claiming, or to claim any estate, right, title or interest of, in, or to the said hereby assigned property and every of them, and every part thereof, shall and will from time to time, and at all times hereafter, upon every reasonable request of the said party of the second part, his executors, administrators or assigns, but at the cost and charges of the said party of the second part, make, do and execute, or cause or procure to be made, done and executed, all such further acts, deeds and assurances for the more effectually assigning and assuring the said hereby assigned property unto the said party of the second part, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these Presents, as by the said party of the second part, his executors, administrators or assigns, or his counsel shall be reasonably advised or required.

IN WITNESS WHEREOF, the said parties to these Presents have hereunto set their hands and seals, the day and year first above written.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

[Sd.] A. C. SPARROW.

{SEAL.}

[Sd.] M. NICOLL.

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SEAL.

CANADA :
NORTH-WEST TERRITORIES
TO WIT :

I, James Bannerman, of the Town of Calgary, Merchant, in the forgoing Bill of Sale, named, make oath and say :

THAT that the sale therein is bona fide, and for good consideration, namely :—Four hundred dollars and not for the purpose of holding or enabling me. this deponent, to hold the goods mentioned therein against the creditors of the said bargainor,

SWORN before me at Calgary in the District of Alberta, this 24th day of September, A. D. 1889.

[Sgd.] T. B. LAFFERTY,
A Commissioner.

[Sgd.] JAMES BANNERMAN.

CANADA :
NORTH-WEST TERRITORIES
TO WIT :

I, Michael Nicoll, of the Town of Calgary, in the District of Alberta, Gentleman, make oath and say :

THAT I was personally present, and did see the within Bill of Sale duly signed, sealed and executed by Angus C. Sparrow, one of the parties thereto ; AND that I, this deponent, am a subscribing witness to the same : AND that the name " M. Nicoll," set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent ; and that the same was executed at Calgary aforesaid, on the date of the date thereof.

SWORN before me, at Calgary, in the District of Alberta, this 24th day of September, in the year of our Lord 1889.

[Sgd.] T. B. LAFFERTY,
A Commissioner for taking Affidavits.

[Sgd.] M. NICOLL.

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EXHIBIT "B."

D730 CALGARY, Sept. 24th, 1889.

$400.

Three months after date I promise to pay to the order of A. C. Sparrow, Four hundred 00 Dollars at the Bank of Le Jeune, Smith & Co. Value Received.

[Sgd.] JAMES BANNERMAN.

T. N. C.

Pay Le Jeune, Smith & Co.
order
[Sgd,] A. C. Sparrow.

EXHIBIT "C."

Calgary, Alberta, March 6th, 1890.

MRS. A. C. SPARROW,
BOUGHT OF JAMES BANNERMAN,
Wholesale and Retail Dealer in
PRESSED HAY, FLOUR AND FEED, FISH, BACON, BUTTER, ETC.

Folio 133.

Terms Strictly Cash.

1889.					$ 178 20
June	1	To	Bal. on ac't.	120	2 40
"	1	"	2 lbs. carrots	18	2 50
"	1	"	14 lbs. B. Bacon		3 80
"	6	"	1 Sack Hungarian		3 75
July	2	"	1 do do		1 00
"	12	"	Oatmeal		1 90
"	13	"	½ Sack Hungarian		3 75
"	26	"	1 " "	12	4 05
Aug.	17	"	270 lbs. Shorts	10	20
"	17	"	2 Sacks		3 65
"	20	"	1 Sack Hungarian	2	2 00
"	24	"	100 lbs. Chopfeed		10
"	24	"	1 Sack	2	3 50
"	30	"	175 lbs. Chopfeed		

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				10	20	
"	30	"	2 Sacks		15 00	
Sept.	7	"	Cheque		3 65	
"	14	"	1 Sack Hungarian Flour	12	4 10	
"	14	"	275 lbs. Shorts	10	20	
"	14	"	2 Sacks		100 01	
"	4	"	Cheque to retire Note		2 05	
"	4	"	Dis. on Notes		400 00	
"	24	"	Note 3 mos.			
						$ 736 00
					$ 100 00	
June	1	By	Note 3 mos.		75 00	
Sept.	4	"	do		25 00	
"	4	"	Cheque		136 00	
"	24	"	do		400 00	
Sept.	24	"	Bill of Sale			
						$ 736 00

JUDGMENT.

Under and by virtue of several writs of fi fas issued against A. C. Sparrow, the Judgment Debtor of the said Defendants, the Sheriff of the Northern Alberta Judicial District seized, amongst other goods and chattels, a certain stack of grain, which the Plaintiff in this cause claims under and by virtue of a certain Bill of Sale, by the said A. C. Sparrow to the Plaintiff, dated the 24th day of September, 1889 The Sheriff then duly applied for an interpleader order to this Court which was granted on the 1st day of Nov., 1889, and an interpleader issue for trial pursuant to the said order was fixed between the parties, by which interpleader issue the said James Bannerman was made Plaintiff, and the said George Emerson and J. H. Ashdown were made defendants. Upon the following issue, to wit :—that the said stack of grain is the property of the said James Bannerman as against the said George Emerson and J. A. Ashdown, execution creditors of A. C. Sparrow, the case was tried.

It is contended by the Defendants that the Bill of Sale, under which the Plaintiff claims the property in this case, is void as against the Defendants, on account of the defect in the affidavit of bona fides. The whole question seems to be on the words used in the affidavit of bona fides—instead of the words "any creditors," as Section 5 of Chapter 47 of the Revised Ordinance mentions, the words "the creditors" were used.

Ordinance No. 5, of 1881, the Revised Statutes of Manitoba, 1880, p. 661, Sect. 1 and the Revised Statutes of Ontario, 1887, p. 8 use all the words ; "The Creditors" and "Creditors," and the only means I have, to come to a proper conclusion, is by an analogy in consulting the precedents.

The principal case cited in support of the Defendants' contention is that of Boynton vs.

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Boyd et al, 12 U. C. C. P. 334. A great stress has been placed on the opinion of Chief Justice Draper, in his Judgment, that the affidavit of the bargainee does not state that the sale is bona fide and for good consideration, but that the "Bill of Sale was executed in good faith and for good consideration." It seems to me that the Judgment would have been different, if the affidavit had contained only the following words "that the sale is in good faith and for good consideration," instead of saying that the Bill of Sale was executed in good faith and for good consideration. The learned Judge considered the words used in the affidavit a departure from those words in the Statute, which are the very substance of the affidavit. The same principal was followed in Boulton vs. Smith, 17 U. C. Q. B. 400; Harding vs. Knowlson, 17 U. C. Q. B. 564; Olmstead vs. Smith, 15 U. C. Q. B. 421; Squair vs. Fortune, 18 U. C. Q. B. 547.

But I think the cases which have the most analogy with this present case are those of Fraser vs. Bk., of Toronto, 19 U. C. R. 385. "Creditors" was held sufficient without adding "or either of them," on the maximum that "omne magnus continet in se minus." In Taylor vs. Anslie, 19 C. P. 84, it was decided that the words "creditors of the said Mortgagors" include the creditors "of any or either of them," on the same maximum that "omne magnus continet in se minus."

Are the words used in this affidavit sufficient in substance to meet the fact that they include the enactment of the Ordinance, to wit: Sect. 5 of Chap 47, of the Revised Ordinance. In other words, do the words "the creditors" include the words "any creditors" or "either of them."

Basing myself on the maximum which I have already quoted and on the case of Farlinger vs. McDonald, 45 U. C. Q. B. 233: I cannot come to any other conclusion than that the affidavit is sufficient and that the objection is not well taken.

The second objection taken by the Defendants is that there is no Bill of Sale proven at all and consequently the Plaintiff has not established his claim to the property in question. I am of opinion that under our Ordinance no attesting witness is required to prove a Bill of Sale. It only says that such conveyance shall be accompanied by an affidavit of a witness thereto of the due execution thereof and an affidavit of the barginee, etc. Besides it is an instrument under seal and the signatures of the parties themselves are sworn to by themselves before this Court. How can I have any doubt as to the due execution of the same?

The third and last objection is that the Bill of Sale, even if proven, is void as against the Defendants, under Chapter 49 of the Revised Ordinances. Sect. 2 of Chap. 49 of the Revised Ordinances gives a very important exception to the general rule as provided by Sect. I of the same Chapter. I think this case comes under the exception. There was a bona fide sale of goods and payment made of the same by the Plaintiff. The Plaintiff at the time was not a creditor of A. C. Sparrow, except for a small amount of about $7.00, which A. C. Sparrow still owes him. The credit, since 1886, was given to Mrs. Sparrow, and the account was charged to her. I am of opinion, besides, that Bannerman was in good faith when he bought the stack of grain from A. C. Sparrow, and did not do so to enable Sparrow to defraud his creditors. And Ban-

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nerman showed undoubtedly his good faith in the transaction by not charging Sparrow with his old account of $7.00 which he had against him at the time of Sparrow's insolvency.

Therefore Judgment must be entered for the Plaintiff and costs

Calgary, 17th Feb., 1890.

"CHAS. B. ROULEAU,"
J. S. C.

NOTICE OF APPEAL.

TAKE NOTICE that the Defendants herein hereby appeal to the Supreme Court of the Northwest Territories in banc, from the whole Judgment pronounced in this action by the Honorable Mr. Justice Rouleau, on the 17th day of February, A. D. 1890, whereby he found that the stack of grain in dispute herein was the property of the Plaintiff as against the Defendants, upon the following grounds :

1. That the said Judgment is contrary to law in as much as the learned Judge should have held that the Bill of Sale, referred to in the evidence herein, was void as against the Defendants, under Chapter 47 of the Revised Ordinances of the North-West Territories.

2. That the said Judgment is contrary to law in as much as the learned Judge should have held that the said Bill of Sale was void, as against the Defendants, under Chapter 49 of the Revised Ordinances of the North-West Territories.

3. That the said Judgment is contrary to law in as much as the learned Judge should have held that the said Bill of Sale was not duly proven and that therefore there was no evidence whatever of the said stack of grain being the property of the Plaintiff.

And take notice that the Defendants will move the said Court at its next session, to be holden at Regina in the North-West Territories, on the 2nd day of June, A. D. 1890, to reverse the said Judgmeat and enter Judgment for the Defendants.

Dated at Calgary, this 1st day of March, A. D. 1890.

E. P. DAVIS,
Defts'. Adve.

TO MESSRS. SMITH & WEST,
Plff's Adves.

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JUDGMENT OF McGUIRE, J.

EMERSON et al. Defendants (Appellants),

AND

BANNERMAN, Plaintiff (Responent).

This is an appeal from a Judgment of Rouleau, J., in an interpleader action tried by him without a Jury.

One Angus C. Sparrow had, prior to some time in 1886, been in some business in Calgary, and becoming financially involved and unable to pay his debts in full, he, in or about that year, gave up his business, the nature of which does not appear. He had been a customer of the Respondent, who was a merchant at Calgary, but on Sparrow "giving up his business in town" the Respondent, who says he heard that Mrs. Sparrow was now carrying on the business, decided that he would make a "change," and, thereafter, gave credit, not to Angus C. Sparrow but to Mrs. Sparrow, his wife. This credit was for goods got sometimes by Angus C. Sparrow, sometimes by Mrs. Sparrow and sometimes by "Mooney," whether a servant or not does not appear. On 24th September, 1889, the account of Bannerman against Mrs. Sparrow as appeared from his books, amounted to $136. On that day A. C. Sparrow called at Bannerman's store and asked him to "advance" him $300 on a stack of oats. This Bannerman refused to do unless he would pay the account of Mrs. Sparrow. He said "he required that amount" ($300), and that if Bannerman would advance $400 he would pay the $136, Mrs. Sparrow's account. Bannerman agreed to this, gave his note for $400 and took a Bill of Sale of the stack of oats, which was duly registered. Subsequent to this the stack of oats was seized by the Sheriff under executions in favor of the Appellants, respectively. The interpleader issue was to try the right of Bannerman to the stack under the Bill of Sale.

The Appellants raised their objections to that instrument.

1. That it was void under Revised Ordinances, Chap. 47, Sec. 5, because the affidavit of bona fides used the words "creditors" instead of "any creditors," as employed in Sec. 5.

2. That the Bill of Sale was not proven because there was a subscribing witness who was not called or his absence accounted for, and that the only evidence of it was taken subject to objection.

3. That it was void under Chap. 49, R. O.

The learned Judge found against the Appellants on all these points. They now appeal on the same grounds. As to the first objection I agree with the trial Judge that the words "the creditors" being used instead of "any creditoas." is not fatal. It was strongly urged that the Legislature, in altering the words "the creditors" (used in the Ordinances of 1881) to "any creditors," evidenced an intention to change the *meaning* of the sentence as well as its phraseıim

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ology, and that WE must, therefore, take it that, in the view of the Legislature, there is a material difference between the meaning of the two words "any" and "the," as used here. But, as laid down by Hagerty, C. J., in Molsons Bank vs. Halter, 16, Ont. App. Repts., "It is a well known principal in construing statutes not to impute to the Legislature the intention of altering existing laws unless the language used admits of no other reasonable interpretation."

I submit, moreover, that a change in the language is only prima facie evidence of such intent, and that this may be rebutted by various circumstances apparent in reading the ordinance, as for example: if the word substituted is meaningless or evidently a typographic error. Other internal evidence may also be considered. If it is contended that the intention was to make a material, as distinguished from a mere grammatical, alteration, it is fair to expeet such an intention to be carried out in other corresponding parts of this Ordinance. Now, there are three sections which deal with the contents of an affidavit of bona fides. S. 3 deals with ordinary chattel mortgages, S. 4 with mortgages for future advances or endorsements of promissory notes and S. 5 (the one under consideration) dealing with bills of sale In all three cases the object of requiring an affidavit of bona fides is in every way precisely the same, but we find that in sections 3 and 4 the words "the creditors" are used. This, to my mind, is evidence that the change to "any" in S. 5 was not intentional or with any purpose in view so as to make the affidavit more precise and severe, because we are not lightly to attribute inconsistency to the Legislative mind. So that, unless we assume that "any" got into the section through an error of the printer, we are warranted, I think, in assuming that "the creditors" was, in the minds of the Legislature, equivalent to and interchangeable with "any creditors," since they themselves have used in the same Ordinance both expressions, where it is incontestable that they meant precisely the same thing. Had the change occurred in S. 3 and not in S.'s 4 and 5 it might be urged that it was a case of an intentional change which, by oversight, was not carried out in the succeeding sections, but here the change, if any, is in the latest of the three sections. There is, perhaps, not much weight in such a suggestion but it is at least a circumstance to be considered in ascertaining whether the change was material and deliberate or not.

Now this use of "the creditors" twice and of "any creditors," once to attain exactly the same end, not only rebuts the prima facie evidence which the mere change affords of an *intentional* change in the section, but does more,—it is evidence that the Legislature deemed the two expressions as meaning the same thing, so that even if we were of opinion that there is some substantial and material difference, are we to set up our opinion in opposition to the manifest intention of the Legislature? If they say that "the creditors" means "any creditors," are we to say it does not? If they say that "the creditors" is sufficient, are we to say it is not? The Legislature has not seen fit to prescribe a "form" of such affidavit but only describes what the affidavit shall assert. Had it given a certain form of words to be employed, the argument that no departure from the exact words is permissable would be stronger, but even then the Legislature has taken the precaution to provide that "slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them" (Interpretation Ord., S. 8, sub-S. 32).

But is there, apart from the argument that the Legislature has treated the expressions as synonymous, any ground for holding that there is a material difference, such as would vitiate the affidavit? It is argued, properly, that if language other than that prescribed is used the

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person using it does so at his peril, and that it is not so much a question as to the extent of the departure from the prescribed language as a question whether it opens the door to a deponent being thereby enabled to take such affidavit under a state of facts which would prevent him from taking it if the prescribed language had been used ; that it is not a question would he not have taken the affidavit in either form ? but, " is it not *possible* that he might not have done so ?" It was argued that "the creditors" means "all the creditors," and that a deponent not over scrupulous but anxious only to avoid a prosecution for perjury—might so construe it, and if he knew the intention was to defraud only *some* and not *all* the creditors, might swear to an affidavit containing " the creditors," when he would not do so if " any creditors " had been used. If the answer " yes," to this question, would be fatal to the affidavit, then Mason vs. Thomas, 23, U. C. R. 307, was wrongly decided. There the Statue required that the deponent should swear that the instrument was not intended to enable him to hold " the goods mentioned therein, &c.," but the affidavit, instead of " goods," used the words " estate and effects." How this expression includes more than " goods,"— Draper, C. J., in giving judgment, said " The words used are the most comprehensive, and when realty and debts and choses in action are assigned as well as goods and chattels, they seem to us to comply with and fulfill the objects of the Legislature." Now, as as it would seem, this instrument in that case assigned realty, debts and choses as well as goods. It might be argued that a deponent, knowing that the intention was to protect only the " goods," could not have taken an affidavit denying an intention to protect " goods," but he might have felt able to deny an intention to protect the " estate and effects," i. e., lands, debts and choses in action, and goods, all taken together, since, by hypothesis, the fraudulent intent existed only as to the goods; so that by departing from the language of this Statute he enabled himself to make an affidavit which he would not otherwise have dared to make. This is the line of argument taken here. It is said " the creditors " means or may mean " all the creditors," and when the intent was to defraud only *some,* a barginee might stretch his conscience enough to deny an intent to defraud " *all* the creditors." As I have said, the same reasoning applied in Mason vs. Thomas, would, if adopted, have brought about an opposite decision. I am not prepared, however, to say that Mason vs Thomas was wrongly decided. In Farlinger vs. McDonald, 45 U. C. Q. B. 238, the affidavit used the words " him, * * the said mortgagor," instead of " them, * * * the said mortgagors. A hypercrite might contend that the deponent might possibly have a secret reservation in his mind enabling him to swear that the intent was not to defraud the creditors of " him, * * the said mortgagor," whereas, he might not have been willing to say the same as to the " creditors of them, * * * the said mortgagors." Manifestly, " the creditors of A " may be persons quite different from the creditors of A and B." But will it be said that this case, too, was wrongly decided ? In Fraser vs. The Bank of Toronto, 19 U. C. R. 381, it was concluded that the Legislature might have thought that the words " the creditors of the said mortgagors " would include the creditors of any or either of them. In Mathers vs. Lynch, 28 U. C. R. 363, the words the " liability of the mortgagor," were used instead of " for the mortgagor." Taken strictly, the former phrase meant the liability, not of the *deponent* for the mortgagor but the liability of another man, viz., the mortgagor himself. Was there not then a *possibility* of a dishonest deponent pervaricating ? Yet here, Wilson, J., said " The desire, no doubt, is to sustain the mortgage if it can be reasonably done, but this cannot be done * * in case there should be an irreconciliable and material difference between the two expressions, we think this equivalent language may be received instead of the plainer language of the Statute.

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The learned counsel endeavored to show by syllogistic illustrations that the use of the words "the creditors" entirely changed the meaning of the affidavit, overlooking the fact that in cases of universal negatives the logicians say that both subject and predicate are distributed. I do not know that Mr. Bannerman was a logician, or, if so, to what school he belonged, whether to an ancient or a modern school, whether he is to be classed as an Aristotlelian, an Epicurean, or a Heraclitic-Protagorean ; whether his mind is of the Rhetorico-Sophistical or Spenozistic-Metaphysicial, or simply Transcendental-Asthetic order, or is he, like so many in these Territories, a lover of Bacon ? The evidence does not enlighten us on any of these points, nor do I think the omission material

The power of being able to

"Divide
A hair twixt south and south-west side,"

may be interesting to Sophistical-Rhetoricians who have leisure and taste for such subtleties. I do not think we should avoid a Bill of Sale by reason of the possibilities suggested here.

As to the second objection, that the Bill of Sale was not proved because there being, in fact, a subscribing witness, he was not called or his absence accounted for, and that in such cases no other evidence could be admitted. I agree with the finding of the learned Judge that the Ordinance does not prescribe that there shall be an *attesting* witness and consequently it is not necessary to call the witness thereto.

As to the third ground of appeal tha learned Judge, sitting as a Jury, has found as a fact that Bannerman was not a creditor of A. C. Sparrow. There was evidence on which he might reasonably come to that conclusion. Bannerman swore that he had given credit to Mrs. Sparrow, and his books supported him in that statement. True the nature of the goods mentioned in the accounts and the use to which they were put would have raised a prima facie liability in A. C Sparrow to pay for them, since they were principally supplies used for the support of himself and his family,—but Bannerman, at the commencement of the account, had, in effect, said : "You are insolvent, you have gone out of business, I understand Mrs. Sparrow is carrying on the business ; for these, and it may be other, proper reasons I choose not to credit you, A. C. Sparrow, but I will credit Mrs. Sparrow, and I will charge the items in my book accordingly." It may well be that Bannerman could not recover as against her, owing to her having no separate estate, but could he say that his contract was with A. C. Sparrow, when he had himself deliberately elected to contract with Mrs. Sparrow? This was a question of fact—whether we would have arrived, on the evidence, at the same conclusion, is not the question. If there was evidence on which a Jury might fairly have come to the conclusion they did come to, a Court of Appeal will not ordinarily review their finding of the facts. Sec. 1 of Chap. 49, Rev. Ord., is divisible into two parts,—the first dealing with transactions between the debtor and any one else, done with intent to defeat, &c., creditors ; the second with transactions between the debtor and a creditor (or creditors) with intent to *prefer* such creditor (or creditors) to his other creditors, or which has the "*effect*" of giving such creditor such a preference. Molsons Bank vs. Halter, 16, Ont. App.—To avoid a transaction under the first part, the fraudulent intent must be mutual and not confined to the debtor. The learned Judge has negatived the fact of a fraudulent intent on the part of Bannerman, so that the first part does not affect this instrument. The second part

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applies only to transactions between the debtor and one or more creditors, and as Bannerman has been found not to have been a creditor, then the second part does no apply to him. The learned Judge has further found as a fact, that the sale was bona fide and made in the ordinary course of trade or calling. to an innocent purchaser. There was evidence on which he might so find.

The appeal will be dismissed with costs, to be paid by the Appellant to the Respondent.

JUDGMENT OF WETMORE, J.

I agree that there was evidence in this case which would warrant the trial Judge in finding that Bannerman was not a creditor of A. C. Sparrow, and I have nothing to add to the Judgment of my brother McGuire. as respects that point.

It was conceded by the learned counsel for the Appellant that it was necessary for him, in order to establish that the Bill of Sale was void as against the Defendants, under Chapter 49 of the Revised Ordinances, to prove that Bannerman was a creditor of A. C. Sparrow. As to the point that the Bill of Sale was not duly proved, because the subscribing witness to it was not called, I have always understood the terms "attesting witness" and "subscribing witness" to be synonymous, as Burns, J., in Armstrong vs. Ausman, 11 U. C. R. 505, states them to be. The document in question in that case was a chattel mortgage. The language of the Ontario Act requiring the conveyance to be accompanied by an affidavit "of a witness thereto," is the same as the language of our Ordinance. In that case there was no subscribing witness to the mortgage. The majority of the Court held that it was not necessary that the person making the affidavit should be a subscribing witness ; it would be sufficient if it were made by a person who witnessed the execution, although he did not subscribe to it. If that is good law, attestation is not requisite to the validity of a Bill of Sale executed under the Ordinance, and, therefore, it was not necessary to call the subscribing witness to prove the Bill of Sale in question in this case ; it could be proved aliunude. I think to lay down a rule contrary to this decision would, in many cases, be creative of great difficulty and inconvenience in proving instruments of this nature, and I am, therefore, prepared to follow that case.

I have great doubts, however, as to the validity of the affidavit of *bona fides*, made by the Plaintiff. This question turns upon the language of Section 5 of Chapter 47 of the Revised Ordinances. which provides that the conveyance shall be accompanied by "an affidavit of the "bargainee * * * that the sale is * * * not for the purpose of holding "or enabling the bargainee to hold the goods mentioned therein against *any* creditors of the "bargainor" The first Ordinance I can find on the subject is No. 5, of 1881. Section 3 of that Ordinance, is the section corresponding to Section 5 of Chapter 47, above referred to. The language of the two sections, so far as the provisions which I have included in the quotation marks are concerned, is the same, word for word, except that in Section 3 of the Ordinance of 1881, the word occurring immediately before the word "creditors" is "the," instead of "any." Ordinance No. 5, of 1881, and amending Ordinances were amended and consolidated by Ordin-

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ance No. 7, of 1887, and in Section 5 of that Ordinance the change of the word "*the*" to "any" occurs for the first time. This last mentioned Ordinance and also Ordinance No. 5, of 1881, were repealed by the Revised Ordinances and Chapter 47 substituted therefor, and the change referred to, that was made by the Ordinance of 1887, was retained.

If Section 5 of Chapter 47 stood alone I would have no hesitation in arriving at the conclusion that the affidavit is bad, as not being in accordance with the provisions of the Section. Moreover, if I was satisfied that the change of the word "the" to "any" was deliberately made by the Legisiature, I would have no hesitation in deciding that the affidavit is bad, notwithstanding the fact that no change was made in the language of provisions of a similar nature relating to mortgages in Sections 3 and 4.

I can perceive a wide difference between a bargainee swearing *that the sale is not for the purpose of holding or enabling him to hold the goods against the creditors of the bargainor* and his swearing *that the sale is not for the purpose of holding or enabling him to hole the goods against any creditors of the bargainor.*

He could not swear to the latter upon any possible construction of it if it was the intention to hold the goods against *all* the creditors of the bargainor. He might be induced to take it, however, if the intention was to hold the goods against one creditor.

He might, however, be induced to swear to the other statement if the intention was not to defeat *all* the creditors but to defeat one or more of them, but not including all. For instance, we will assume A to be a person of small means who is indebted, but able and willing, as a rule, to pay his debts ; he purchases a horse from B on credit or partly on credit ; he discovers afterwards that B has, as he believes, taken him in ; he thinks he has sold him a worthless horse, or one nearly so ; he has taken no warranty of soundness, however, and B can force him to pay as soon as he recovers a judgment, if he can find property to satisfy it ; A makes up his mind he will not pay B ; he goes to a friend, C, and induces him to take a Bill of Sale on all his property liable to seizure. I can readily understand how he might induce C to make affidavit that the sale is not for the purpose of holding or enabling him to hold the goods against *the* creditors of A. He might reason as follows : I do not make this Bill of Sale to you to enable you to hold the goods against my creditors but only against one of them.

I do not say his reasoning would be correct but, to say the least, it has *some* degree of plausibility. It must be remembered that persons who contemplate perpetrating a fraud are, as a rule, as astute in endeavoring to evade the requirements of a Statute to prevent their doing so, as a Statute ought to be in endeavoring to prevent them. I can, therefore, see a substantial reason for the change. I do not think that the maxim, "*omne magnus continet in se minus*," is applicable. Fraser vs. The Bank of Toronto, 19 U. C. R. 381, and Taylor et al vs. Ainslie, 19 U. C. C. P. 78, does not, to my mind, bear out that proposition.

We must bear in mind what the Courts in those cases had before them ; the affidavits then in practice followed the words of the Act, and in view of that fact they held that the *Legislature (not the Court) assumed* that the maxim would, under the circumstances, be applied in cases

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arising under that Act. They did not pretend to lay down the general rule that the word "the" included " any."

However, with all this, there is the fact that this same Chapter 47, of the Revised Ordinances, in Sections 3 and 4, providing for cases of mortgages of chattels, and that it is provided therein that an affidavit shall be made by the mortgagee negativing the fact that the sale is made to hold the goods against creditors, and in both sections the words " the creditors " are used. If the change from " the " to " any " was made in Section 5 of Ordinance No. 7, of 1887, with the deliberate intention of narrowing the chances for perpetrating frauds, it is difficult to understand why the change should not have been made in Sections 3 and 4. Sections corresponding to 3 and 4 were in Ordinance No. 5, of 1881, and were carried forward to No. 7, of 1887, without any change in this respect, The bare fact that the latter Statute uses language varying from that of a former Statute on the same subject, may not always indicate a change of intention on the part of the Legislature.

See cases collected by Maxwell on Statutes (2nd ed.) p. 391. I have inspected the cases there cited and they bear out the doctrine they were cited in support of. I must confess, however, that in all these cases something appears to have been omitted in the later Statute which was in the older enactment, and it seems to have been held that the prior enactments would have been open to the same construction, if the words in question had been omitted.

I cannot find a case just like this, where the language of the older enactment was struck out and something else substituted.

However, in view of the facts that " the creditors " were the words used in the Ordinance of 1881. both in the Sections relating to mortgages and the one relating to absolute assignments, that the same words are carried forward in the Ordinance of 1887, and in the Revised Ordinances so far as mortgages are concerned, that those are the words used in similar enactments in other Provinces of Canada—at any rate in Ontario and Manitoba, and especially in view of the fact that my learned brethren have unanimously arrived at the conclusion that there was no intention on the part of the Legislature to make a change, I have, with very great hesitation, arrived at the conclusion that the reason why the change was made in Section 5 of Ordinance No. 7, of 1887, was that the person who copied this Ordinance committed a clerical error which was not detected and it has been since carried forward without being detected, and the Legislature, therefore, had no intention to make any change.

I think I can find authority for arriving at this conclusion, in the remarks of C. J. Kelly at the end of his judgment in The Queen vs. Ruttle, L. R. 1, C. C. R. 251.

I, therefore, but as stated before, with very great hesitation, concur that the appeal should be dismissed e"

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES.

BETWEEN :

JAMES BANNERMAN, Plaintiff (Responent).

AND

GEORGE EMERSON and JAMES H. ASHDOWN, Defendants (Appellants),

TAKE NOTICE that George Emerson and James H. Ashdown, the above named Defendants (Appellants), hereby appeal from the Judgment pronounced in this cause by this Court, on the 10th day of July, A. D. 1890, whereby the appeal of the said Defnedants (Appellants), from the Judgment of the Honorable Mr. Justice Rouleau, delivered herein on the 17th day of February, A. D. 1890; was dismissed.

E. P. DAVIS,
Deft's Adve.

TO MESSRS. SMITH & WEST,
Adves. for Plff.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES.

BETWEEN :

JAMES BANNERMAN, Plaintiff (Respondent)

AND

GEORGE EMERSON and JAMES H. ASHDOWN, Defendants (Appellants).

Upon the application of the Defendants, and upon reading the Notice of Appeal from the Judgment of the Court in banc, herein, and the admission of service endorsed thereon :

I do order that the security to be given by the Defendants, as security for the said appeal, be the payment into Court in cash of the sum of Five hundred dollars ($500.00), and that the Defendants have one week to give such security ; And that upon the giving of such security that all proceedings other than relating to the said appeal be stayed.

DATED this 25th day of July, A. D. 1890.

[Sgd.] CHAS. B. ROULEAU,
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