4648

# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## Court of Queen's Bench, Manitoba,

WITH

## TABLE OF CASES AND PRINCIPAL MATTERS.

EDITED BY

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VOLUME IV.

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ERRATA.

Page 443, line 23, read Taylor and Ewart, Jud. Act, 185, 186.

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## VOLUME IV.

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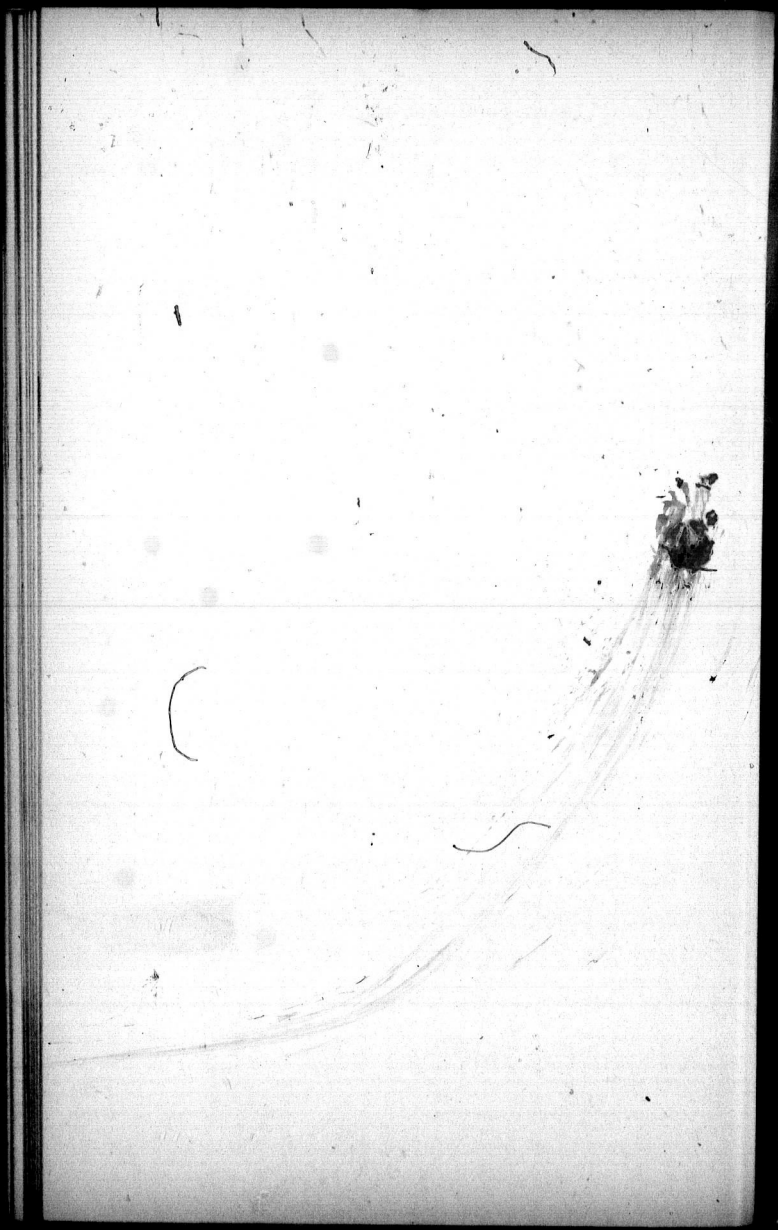

# MANITOBA LAW REPORTS.

## VOLUME IV.

### McEDWARDS v. THE OGILVIE MILLING CO.

(IN APPEAL.)

*Wrongful dismissal. — Hiring not under seal. — Dismissal.— Power of Directors.—Drunkenness.*

The defendants, a company chartered under the Joint Stock Companies Act Con. Stat. Man., c. 9, div. 7, through its officers who usually made such contracts, hired by parol the plaintiff to manage their elevator and business at M.

*Held*, The contract need not have been under seal— sec. 269 of the statute— if made by an officer in general accordance with his powers "under the by-laws or otherwise."

*Per Taylor, J.* The plaintiff having been hired by those officials who hired all the persons holding positions similar to that of the plaintiff, there was evidence to go to the jury as to whether the contract had not been made "by an agent, officer or servant of the company in accordance with his powers as such officer, under the by-laws of the company, or otherwise."

*Per Killam, J.* From the mere fact of acquiescence in the exercise of such powers (by the official) or from the acquiescence of the company in the plaintiff's appointment, it may be inferred that all formalities necessary to give the official authority to make the appointment had been duly observed.

2. Acquiescence of the directors in the act of an official in dismissing the plaintiff coupled with the substitution of another employee also acquiesced in by the directors, which official had authority to hire the plaintiff, is evidence of authority to dismiss.

By sec. 47 "The directors shall from time to time, elect from among themselves a president of the company; and shall also appoint and may remove at pleasure all other officers thereof."

*Held*, 1. That this clause did not apply to the plaintiff.

2. Such power of removal must be strictly pursued, and only at a regular meeting of the directors.

*Per Killam, J.* A dismissal in such manner must be pleaded.

The proper question to be left to the jury upon a justification of the dismissal for drunkenness would be: "Was the plaintiff so conducting himself that it would have been injurious to the interest of the defendants to have kept him; did he act in a manner incompatible with the due and faithful discharge of his duty; did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master."

*N. F. Hagel, Q. C.*, and *G. Davis* for plaintiff.

*J. S. Ewart, Q. C.*, and *C. P. Wilson* for defendant.

[*23rd October, 1886.*]

TAYLOR, J.—The plaintiff sues the defendants for wrongful dismissal and has recovered a verdict for $450 damages. The defendants have obtained a rule calling upon the plaintiff to show cause why the verdict should not be set aside and a non-suit entered pursuant to leave reserved, upon the ground that the directors only had power to dismiss, and if they dismissed they had the right to do so, or why there should not be a new trial on the ground of mis-direction in a number of particulars.

I do not think we can order a non-suit to be entered.

The defendant company is one incorporated under Con. Stat. Man. c. 9, division 7. As section 269, dealing with contracts binding on the company, provides that, "In no case shall it be necessary to have the seal of the company affixed to any such contract," no question arises as to the contract of hiring not being under the seal of the company. The plaintiff was hired by McGaw and John Ogilvie, the two directors of the company in this province, for a term of nine months, at a salary of $90 a month. After that he received a letter signed by "W. A. Hastings, Manager," directing him to proceed to Manitou to take charge of an elevator there, the salary and term, which had previously been agreed on, being mentioned in the letter. A few days afterwards Mr. John Ogilvie and the plaintiff were at Manitou together, when Mr. Ogilvie handed him the keys and put him in charge of the elevator. He was hired as the evidence shows, by the persons who managed and transacted all the business of the defendants in this province. While he was in charge

of the elevator he was recognized by the company as being in their employment and properly in charge there, for they made complaints about his not making out and sending to the Winnipeg office certain returns or statements which they claimed it was his duty to make out and send in. Then after a time he was, he says, dismissed by McGaw and another person placed in charge of the elevator.

The plaintiff having been hired by those officials connected with the company, who according to the evidence, hire all the persons holding positions similar to that which the plaintiff held, there was evidence to go to the jury as to whether the contract with him was made, in the words of the statute, by an agent, officer or servant of the company, in accordance with his powers as such officer under the by-laws of the company or otherwise. That another person was put in charge of the elevator to perform the duties the plaintiff had been performing, was evidence to go to the jury upon the question of whether the plaintiff was dismissed or not.

I am of opinion, however, that there should be a new trial on the ground of mis-direction.

The defendant's sixth plea justifies the dismissal of the plaintiff, on the ground that he "mis-conducted himself in the said service, by becoming so intoxicated and under the influence of liquor as to interfere with the proper performance by him of his said duties under said contract."

To determine what degree of mis-conduct justifies dismissal is not always easy. It is a question for the jury, and in answering it they should take into account the nature of the employment and the position of the parties. *Martin* v. *Lane and Churchwardens of All Saints*, 3 Man. L. R. 314. Thus it has been said a common sailor will not, though a mate or other person in authority might, forfeit his wages for being once drunk.

In *Macdonnell on Master and Servant*, p. 212, it is said, "Habitual drunkenness, if it interfered with the due discharge of a servant's duties, would justify dismissal." *Smith* in his work on *Master and Servant*, states the rule thus, at p. 115, "Drunkenness would also be a justifiable cause of discharge if pleaded."

In *Lacy* v. *Osbaldiston*, 8 C. & P. 80, Vaughan, J., expressed himself thus as to the degree of mis-conduct which will justify

dismissal, "It is a question of fact whether the plaintiff was so conducting himself as that it would be injurious to the interests of the defendant to have kept him."

*Wise* v. *Wilson*, 1 C. & K. 662, was a case in which the defendant, a surgeon, had dismissed a pupil, an assistant, for having been drunk on several occasions. His mother, by whom he had been placed with the defendant, sued for wrongful dismissal and Denman, C. J. directed the jury in this language, "If you think that, from this conduct of the plaintiff's son, real danger was occasioned to his master's business, you ought to find your verdict for the defendant, as the defendant was then in my opinion justified in dismissing him."

In *Fillieul* v. *Armstrong*, 7 A. & E. 557, the judges of the court seem to have thought that in order to justify the dismissal of a servant he must be guilty of either moral mis-conduct or behaviour involving his master in loss.

The most recent case on this subject is *Pearce* v. *Foster*, 17 Q. B. Div. 536. There the clerk had been for many years in the employment of the defendants, and they entered into a written agreement engaging him as their principal clerk for ten years at a large salary. Two years after, they discovered that he had been for many years speculating in differences on the Stock Exchange for very large amounts, and they dismissed him. Upon the trial of an action for wrongful dismissal, Grove, J., who tried the case without a jury, held that the dismissal was lawful and gave judgment for the defendants. This judgment was upheld in the Court of Appeal. Lord Esher, M. R., said "The rule of law is, that where any person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him." He added, "What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also fall within the proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be discharged by the master, and if the servant's conduct is so grossly immoral that

all reasonable men would say he cannot be trusted, the master may dismiss him." Lopes, L. J., thus expressed himself, "If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies instant dismissal. That misconduct according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or likely to be prejudicial to the interests or to the reputation of the master."

In the present case the jury may have been misled by the learned judge so frequently referring to habitual drunkenness as a good ground for dismissal. The statements "They say they dismissed him for drunkenness, and my duty is to tell you that habitual drunkenness is a cause for dismissal, and you are to find whether there was that habitual drunkenness which justified a dismissal," and "If you find that he was habitually drunk that is a good cause for dismissal," must, it seems to me, have misled the jury. It is quite true that when speaking of the plaintiff's drinking the learned judge said, "What would make him capable of dismissal, would be his inaptness for business," but that again is very soon after followed up by this statement, "Now you have to consider was there the habitual drunkenness and disobedience of orders," &c.

As the proper question to leave to the jury would seem to be something like this, was the plaintiff so conductiug himself as that it would have been injurious to the interests of the defendants to have kept him, did he act in a manner incompatible with the due and faithful discharge of his duty, did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master, and they have not been so charged, I am of opinion there should be a new trial. As this is granted on the ground of mis-direction, the rule for a new trial will be made absolute without costs.

KILLAM, J.—I concur in the conclusions of my brother Taylor, but desire to add a few remarks on some of the points raised.

I think that there was ample evidence that the contract of hiring, assumed to be made with the plaintiff by Hastings and McGaw, was one which could be made by those officers in gen-

eral accordance with their powers as such officers, "under the by-laws of the company or otherwise."

The plaintiff was warranted under the circumstances in acting upon the belief, that the contract was one which those officers had power to make. The acquiescence of the company in the employment of the plaintiff, affords evidence that the contract was properly made.

In *The Royal British Bank* v. *Turquand*, 6 E. & B. 327, Jervis, C. J., laid down the principle that, "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document appears to be legitimately done."

It is true that, in that case, the document under which the party claimed was under the seal of the company, but the case has frequently been recognized and adopted in support of contracts assumed to be made by officers of joint stock companies without the corporate seal, where under the constitution of the company they might be so empowered and the contracts were within the apparent scope of their authority. *Totterdell* v. *Fareham Brick Co.*, L. R., 1 C. P. 676; *Browning* v. *Great Central Mining Co.*, 5 H. & N. 856; *Reuter* v. *Electric Telegraph Co.*, 6 E. & B. 646; *Re County Life Association*, L. R. 5 Ch. 288; *Smith* v. *Hull Glass Co.*, 11 C. B. 896.

In *Angell and Ames on Corporations*, § 283, it is said, "The authority of an agent to bind a corporation need not be shown by a resolution or other written evidence, but may be implied from circumstances;" and at § 284, "Not only the appointment, but the authority, of an agent of a corporation may be implied from the adoption or recognition of his acts by the corporation or its directors."

In this case, of course, the plaintiff must be taken to have notice of all the provisions of the Joint Stock Companies Act,

under which the defendant company was incorporated; and it may be, also that he must be taken to have notice of the contents of the letters patent incorporating the company, as he could become acquainted with them by search in the office of the proper department; but farther than that he could not be expected to go.

Whether by the words "or otherwise," in the 269th section of the Joint Stock Companies Act, are meant to be included only resolutions or other corporate acts somewhat similar in nature to by-laws, or whether they are intended also to include the giving of authority by tacit acquiescence in its exercise, is of no importance. From the mere fact of acquiescence in the exercise of such powers generally, or from the acquiescence of the company in the plaintiff's appointment, we are entitled to infer that all the formalities necessary to give McGaw authority to make the appointment had been duly observed, whether by the passing of a by-law or in any other way in which the authority might be conferred.

In the same way there is evidence of his authority to dismiss the plaintiff, which is shown to have been brought to the knowledge of, and to have been acquiesced in by, all the directors resident in Manitoba, where the head office is.

In *Smith* v. *Hull Glass Co.*, 11 C. B. 896, the knowledge and acquiescence of the directors are treated as the knowledge and acquiescence of the company, and that without any action by the directors as a board.

*Jones* v. *Heuderson*, 3 Man. L. R. 433, is not opposed to the view now taken, as there was in that case nothing to show under what authority the company in question was incorporated, and also as there was no evidence that the officer in question was in the habit of exercising the power assumed by him to hypothecate goods of the company as a security for a debt of the company, or that the directors had adopted or acquiesced in his act.

*Armstrong* v. *The Portage, Westbourne & N. W. Ry. Co.*, 1 Man. L. R. 344, relied upon for the defence has no application, as the judgment distinctly turns upon the want of a corporate seal, and, as pointed out by Mr. Justice Smith, it was not contended "that there was any statutory authority enabling the defendants to contract without a seal."

It is true that in that case and other cases, some of which are cited in the judgment, a distinction is taken between the liability of the company to actions for wages accrued for work done under the contract of hiring and to actions for damages for wrongful dismissal, but the distinction is based upon the view that in such cases the company is not liable at all upon the alleged contract assumed to be made on its behalf, but only upon a different contract, implied from the acceptance of the work, to pay for the services actually performed. The party suing must be taken to know whether the contract was under seal and whether the company had authority by law to contract without a seal; but in the present instance there may be a binding contract without seal, if the company has so conducted its internal management as to have given the necessary authority to the party assuming to make the contract for it. The cases to which I have referred as adopting *Royal British Bank* v. *Turquand*, do not proceed upon the view that there is a liability upon a different contract to be implied from circumstances, though in some of them the fact of the company having taken the benefit of the alleged contract, is taken as some evidence that the alleged agents had authority to make the contract set up.

I am of opinion that there is evidence to show both that the contract declared upon was assumed to be made on behalf of the company, and that the assumed agent in making it was acting in general accordance with his powers as an officer of the company. This being so, the company must be liable for any breach of the contract.

It is contended that because sub-section 6 of section 247 of the Joint Stock Companies Act provides that, "The directors shall, from time to time, elect from among themselves a president of the company; and shall also appoint and may remove at pleasure all other officers thereof," this plaintiff was subject to dismissal at will even without cause.

Now, in the first place, it does not appear to me that this is intended to apply to a party in the position of this plaintiff. The connection in which the clause is found, being in a section relating to the election and term of office of directors and to the election of a president, seem to indicate an intention just there to deal with the principal officers usually found with a joint stock

company, such as vice-president, secretary, &c. The clause is one that must be narrowly construed, as while the law will impute to everyone contracting with such a corporation knowledge of the contents of this statute, yet this very fact, in view of the great probability that few entering into the employ of the company would really ever learn of the provision, should naturally lead the legislature to be cautious in inserting clauses that might introduce into the contract of hiring a provision not contemplated by the employee.

I incline therefore also to the view that the clause is not to be taken as importing a condition into or affecting such a contract with *any* officer. It empowers the directors to put an end to the employment, but this action may still, if not taken on proper ground, be a breach of the contract between the company and the employee.

Then, there is no evidence that there has been a removal under this clause. The power thus to remove from office at pleasure, if it be as unlimited as contended for, would be plainly not one that could be delegated, any more than could the power of electing a president; if a dismissal were made under it, the authority must be strictly pursued; it could be exercised only at a regular meeting of directors. There might, however, apart from this clause be an officer empowered to appoint and dismiss officers, servants or agents, taking the word "officers" in the loose sense which it evidently has in many parts of the Act; and if he should dismiss wrongfully, the company would be liable to an action, just as an individual would be for the wrongful dismissal of his employee by an agent having authority from him to dismiss. Here the acquiescence of directors in the act of the agent in dismissing, coupled as it is with the substitution of another employee for the plaintiff, by an officer having *prima facie*, upon the evidence, authority to make such appointment and with the acquiescence of directors in that substitution, is evidence of the authority of the officer to dismiss for the company. But with all this there is no evidence of the regular exercise by the directors of what would be in some sense a judicial discretion, if they have the power contended for. It appears to me that this would require to be pleaded and proved.

I agree that there should be a new trial upon the ground stated by my brother Taylor, and with his view of the nature of the direction that should have been given to the jury.

DUBUC, J., concurred.

*Rule absolute for a new trial.*

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## IRWIN v. BEYNON.

[IN APPEAL.]

*Mechanics lien.—Construction of statutes.—Retrospective.—Time for filing lien.—Completion of work.—Amendment of bill.*

By Con. Stat. Man. c. 53, s. 5, no lien shall exist unless a statement of claim verified &c., is filed &c., within &c., which statement "shall state"—then followed a number of items. This section was repealed by 46 & 47 Vic., c. 32, s. 6, and re-enacted with some slight variations. The words "shall state" however, were omitted although all the items appeared as before.

*Held*, That after this second statute the items need not appear in the statement.

The Act 47 Vic., c. 14 is prospective as well as retrospective.

The work (the building of a house) was completed on the 18th of August, with the exception of putting up an iron cresting, which by the contract, was to be placed on the verandah. The cresting was put upon the top of the house on the 29th of October, the plaintiff asserting as a reason for the delay, that he had no money to pay for the cresting, the defendant having refused to pay him. The statement of claim was not filed within thirty days from the 18th of August, but was within that period after the 29th October. There was no evidence of any variation of the contract as to the place where the cresting was to be placed, nor of its acceptance by any act of the defendant,

*Held*, (Killam, J., dissenting) That the statement was filed within thirty days from the completion of the work.

The bill was amended after the lapse of the time given for filing a bill.

*Held*, That the bill was within the prescribed time, it having as originally filed been sufficient for asserting the lien, and the amendment having been occa-

sioned only by the defendant's claim for cross relief in consequence of the work not having been completed within the contract time.

*W. R. Mulock* and *E. H. Morphy* for plaintiff.

*J. S. Ewart, Q. C.*, and *W. E. Macara* for defendant.

[*23rd October, 1886.*]

TAYLOR, J.—This is a rehearing of a cause in which a decree was made by my brother Dubuc in favor of the plaintiff, enforcing a mechanic's lien.

The defendant takes a number of objections to the statement of claim filed in the registry office. He objects to its stating the work to have been done "on and before the 8th day of November, 1884," the time of commencement not being mentioned, and this being necessary to comply with the Act the words of which are, "the period within which the same was or was to be done," that the name of the reputed owner of the property to be charged is not given, the statement merely alleging that a lien is claimed "upon the estate and interest" of the defendant "in the lands hereinafter described in respect of the work and materials hereinafter mentioned, which said works and materials were done and supplied under contract with and at request of" the defendant. Further that it does not say on what kind of building, the work done or materials furnished not being sufficiently stated, and the statement of claim not clear without the plans and specifications being annexed. The statement having set out that the claim is under a contract with the defendant, the language used as to the work and materials is, "The work done and materials supplied are as follows: Carpenter work, woodwork, and joinery, painting, glazing, tinsmithing and ironmongery, as per plans and specifications for the same, prepared by Head & Dewar, architects, for the said George William Beynon and necessary materials for same and for which progress certificates and a final certificate have been issued by the said architects."

These objections are all based upon the assumption that by the statute the statement of claim must contain certain particulars and set out certain facts, but this is not the case.

Section 5 of Con. Stat. Man., c. 53, provides that no lien should exist, unless a statement of claim verified by the affidavit of the person entitled thereto was filed in the proper registry office within a limited time after the completion of the work, and

the statute said this statement of claim "shall state" certain particulars which were all set out. By the 44 Vic., c. 11, s. 65, an alteration was made in the time for filing this statement. Then by the 46 & 47 Vic., c. 32, s. 6, the 5th section of the Con. Stat. Man., c. 53 and the amending section were both repealed, and two new sections substituted for section 5, of the Con. Stat. The first of these is exactly the same as section 5, except that the time for filing the statement is altered to thirty days, provision is made for its verification by any one of the persons entitled if there are more than one entitled, and the words "and shall state," are left out. The original roll in the custody of the clerk of the Legislative Assembly has been referred to and it agrees with the printed copy of the statutes. It is true that the 46 & 47 Vic., c. 32, s. 6, sets out the particulars which by section 5 of the Con. Stat. Man., c. 53, are required to be stated n the statement of claim, but it nowhere says that the particulars so set out shall be stated. All that the statute as it at present stands requires, is that there shall be a statement of claim filed in the registry office within 30 days after the completion of the work, verified by the affidavit of the person entitled, or of one of the persons if more than one. Now here there is a statement of claim filed, and if that statement is properly verified and was filed within the time limited it seems sufficient.

It is, however, objected that it is not verified as the affidavit is sworn to before a deputy registrar and the defendant alleges that such an officer had no power to take the affidavit. His right to do so, if any, is under the provisions of 47 Vic., c. 14. That Act the defendant contends is only retrospective. It makes good, affidavits sworn before the passing of the Act and does not authorize the swearing of affidavits in the future, before the persons named in it. The Act contains two sections. By the first "any affidavit taken under and by virtue of an Act respecting mechanics' liens or any amendments thereto before any * * * registrar, deputy registrar * * * shall be held to have been properly taken." By the second section, "The above shall be held and construed to apply to all affidavits heretofore taken." Now the first section of the Act as it stands is not retrospective, not necessarily so. It simply provides that any affidavit taken before certain named persons shall be held to have been properly taken. The words used may have the appearance of applying to what

is past and as intended to make good, affidavits sworn to before the passing of the Act, but as was said by Parke B. in *Vansittart* v. *Taylor*, 4 E. & B., at p. 910, it is a clear rule of law that the language of a statute is *prima facie* to be construed as prospective only. Or as Cockburn, C. J., put it in *The Queen* v. *Ipswich Union*, 2 Q. B. D. 266, "It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act." And in *The Midland Railway Co.* v. *Pye*, 10 C. B. N. S. at p. 191, Erle, C. J., said, "Wherever it is possible to put upon an Act of Parliament a construction not retrospective, the courts will always adopt that construction." Then so far from the language used being contrary to the Act having a future application, the second section seems to put it beyond doubt that the first section is of future application. If not and the first section was intended to apply to the past only, why do we find the second section saying that the Act shall be construed to apply to affidavits already taken.

The other objection is, that the statement was not filed within thirty days from the completion of the work. It was filed on the 21st day of November, 1884, the plaintiff's contention being that the work was completed on the 8th of the same month. The defendant contends that the last work done was on the 18th of August, except the putting up of some iron cresting on the 29th of October, and this he avers was done only to save the lien.

The putting up of this cresting was part of the work called for by the contract. In the United States it has been held that if the labor done within the thirty days was done in good faith for the purpose of completing the contract and not colourably to revive the lien, the thirty days will begin to run from the time the labor was performed. *Turner* v. *Wentworth* 119 Mass. 464 So it was held that if after a contract for building a house has been substantially performed, and a bill rendered for the work done, further work is done which the proper performance of the contract calls for, and not for the purpose of fixing a later date from which to compute the time allowed for filing a lien, the time of performing such further labor may be taken as such date. *Hubbard* v. *Brown*, 90 Mass. 590.

Whether the last work done by a mechanic was part and parcel of the original job or not depends on evidence, and upon the

finding of that fact the lien depends. *Holden* v. *Winslow*, 18 Penn. 160; *Bartlett* v. *Kingan*, 19 Penn. 341.

In Massachusetts the court held in *Turner* v. *Wentworth*, 119 Mass. 459, that the question whether the certificate required by statute was filed within thirty days after the work was completed or materials furnished under the contract, or whether work was done within the thirty days colourably for the purpose of reviving the lien, is a question of fact upon which the finding of the judge, who tries the cause without a jury, is final.

In the present case the putting up this cresting was part of the original contract, a reason for its not being put up sooner is given, and there is nothing in the evidence from which the conclusion can be drawn that the work was done, when it was, colourably for the purpose of reviving a right to file a lien.

The bill was filed on the 15th of January within the ninety days given by the statute. The amendment of it on the 23rd of June following, cannot carry down the time of filing to that date. The bill as originally filed was sufficient in form for asserting the lien, and the amendment was occasioned entirely by the claim of the defendant in his answer, that he was entitled to damages by way of cross relief, in consequence of the work not being completed by a certain time.

The plaintiff seems to me entitled to a decree in his favor, but the decree is made too wide in giving him a lien upon lot one as well as upon lot six.

The house is built upon lot six, the contract is for building a house on that lot. The statement of claim describes the land as lots one and six, and the bill alleges that the lands described in the claim are occupied by and usually enjoyed with the said house or dwelling.

The plaintiff contends that the second paragraph of the answer contains a sufficient admission of this, but all that that paragraph contains is an admission of the truth of the first paragraph of the bill, which is that the defendant is the owner in fee simple of the lands mentioned in the claim or lien. The third paragraph of the answer alleges that the said lot one is not in any way occupied by the house, or enjoyed therewith. There is no evidence to disprove this, only a general statement that lot one lies between

the lot on which the house stands and the street, so the allegation in the answer must prevail.

The decree should be affirmed with the variation of the lien being on lot six only. Except in this respect the appeal is dismissed with costs.

KILLAM, J.—I agree with the conclusions of my brother Taylor on all but one of the points raised.

I am not satisfied that the putting up of the cresting was a part of the work called for by the contract. It was not put up in accordance with the contract, but on a different part of the house. The defendant had long before taken possession of the house, and was living in it with his family when the cresting was put up. It is not, however, shown whether he was at home when this cresting was put up, or when he learned that it was put up, or of the change of its location. There is no evidence of any consent by him to the change, or of any adoption of it, or acquiescence in it. The architect had no power to make the alteration.

Although, in these building contracts, the work may not be required to be completed strictly according to contract, in every minute detail, to entitle the builder to recover for it, especially when the owner takes possession without objection, yet it appears to me that the putting upon one part of the house, of a piece of work not called for on that part but on another part, cannot, in the absence of evidence of acquiescence by the owner in the change, be deemed to be a part performance of the contract so as to preserve the lien.

DUBUC, J., concurred.

*Appeal dismissed with costs.*

The following is the judgment of DUBUC, J., appealed from.—

It appears that the bulk of the work was completed about the 18th of August, but on the 29th October the plaintiff went with his man and put some iron crest work on the house. The reason he did not do it sooner, as he says, is because the defendant did not pay him as agreed on the 10th of November, 1883, and he had no money to pay for said iron cresting, the tinsmith refusing to let him have it without money. The contract says that the carpentry work comprises joinery, painting, glazing, tinsmithing and iron

mongery &c., so that in fixing this cresting upon the building the plaintiff was acting within the contract, though it was put at a place different from that called for in the specifications.

On the 8th November, 1884, the plaintiff obtained from the architect a final certificate showing him entitled to $520.70, balance due him under the agreement including extras, $7.80 being deducted and retained for two small items which had to be done, one of the items being for five panes of glass broken $6 80, and the other for fixing plaster in bedroom $1.

The defendant lived in the kitchen with his family from the spring of 1884, and took possession of the house as soon as it was completed and has lived in it since.

The plaintiff filed and registered his lien on the 21st November, 1884.

Several points were raised by the defence against the relief claimed by the plaintiff.

The first point was that the statement of claim in stating that the work was done and the materials supplied on or before the 8th November, 1884, did not comply with the statute which requires it to state the time or period within which the same was or was to be done or finished. I think that *for the purpose of this case the variation is immaterial,* and the statute has been substantially complied with. Our statutory provision in regard to this (Con. Stat. Man., c. 53, s. 5, amended by 46 & 47 Vic., c. 32,) is the same as the one in the R. S. Ont., c. 120, and the statement of claim here is in the correct form given in the schedule to the Ontario Act.

Objection is also taken to the description of the residence of the claimant, which should state in what part of the Town of Minnedosa he resides, but I hold that when he describes himself as of the town of Minnedosa it is quite sufficient.

It is also argued that the statement of claim does not sufficiently state who is the reputed owner of the property, and also the person for whom the work was done.

But the statement of lien registered states that the plaintiff claims a lien upon the estate and interest of George William Beynon, barrister at law. I think this is sufficient, and it is also in accordance with the form given in the Ontario Statute.

The work done was also sufficiently stated in the document. As to the description of the land, it appears that the house is erected on lot 6 in block 31, while the statement of claim describes the land as lots one and six. The evidence shows that lots six and one are adjoining, are owned by the defendant, that there is no fence between them or anything to divide them and that lot one stands between the front of the house and the street. The statute says that the lien for the work and materials upon the building shall apply to the *lands occupied thereby or connected therewith.*

In this case I think it might fairly be stated that the two lots form one piece of land connected with the house in question.

It is contended that the affidavit of the plaintiff verifying his lien was taken before the deputy registrar, and there is no authority given to that official to take said affidavit, and the statutes 46 & 47 Vic., c. 48, s. 2, and 47 Vic., c. 7, mentions the persons before whom affidavits may be sworn, and the deputy registrar is not mentioned, but the 47 Vic., c. 14, which applies specially to mechanics' lien, says that such affidavits may be taken before a deputy registrar. It was also argued that this applies only to affidavits taken before the said Act was passed. But I think there can be no doubt as to the applicability of the Act to future affidavits as well as to those already taken.

Another more important ground taken by the defendant is that the statement of claim was not registered within the thirty days required by statute, as the real substantial work was completed about the 18th August, and the fixing of the iron crest work was of such a trifling character that it cannot bring the completion of the building to the 29th October, and the case of *Neill* v. *Carroll* 28 Gr. 30, is quoted in support of the contention. But in that case the whole of the work and materials supplied had been done and considered completed and the later work done of which the plaintiff tried to avail himself to bring his lien within the time prescribed by statute, was only the remedying of some piece of machinery which did not work satisfactorily, while the iron cresting to be done, was effectually a part of the contract entered into by the plaintiff. The reason given by the plaintiff for having so delayed in doing this, to complete the building, is a meritorious one. He had no money to pay for the said iron crest because the defendant had failed to pay him according to agree-

ment, although he had requested him to do so a great many times. The fact that two small items amounting to $7.80 were deducted by the architects from the contract price, being for something that the plaintiff should have done, is not sufficient in my opinion to deprive the plaintiff of his lien under the statute.

These were only repairs to portions of the work which had already been done, and required to be repaired before the whole would be finally accepted. But they are so unimportant and the defendant having taken possession of the building and occupied it, and having ever since had the benefit of the plaintiff's work, I cannot hold that he should be exempted from paying the plaintiff on account of such a trifling thing left undone. Besides, the defendant has never had grace to object on such flimsy ground, that the plaintiff has failed to fulfil his contract, when he has himself so materially failed to do his part of the said contract.

The final certificate of the architect is, in my opinion, conclusive in this case. And I think the plaintiff should have the relief prayed for.

*Appeal dismissed with costs.*

## *Re* LOGAN TRUSTS.

[IN APPEAL.]

*Specific or pecuniary legacy.—Conversion.—Interest.—Capital or Income.*

In a will there was the following bequest: "I bequeath to my dear wife Sarah the interest on £1,000, out of the moneys invested by me in the Montreal Bank in Canada, to be annually paid to her by my executor hereinafter mentioned, and for her sole use and benefit during her life, and at her death the above £1,000 to be equally divided among all my children surviving share and share alike."

At his death the testator was possessed of a considerable number of shares in the capital stock of the bank, the dividends upon which were payable half yearly.

After the death, for the purpose of carrying into effect the bequest, the executors transferred to one of their number twenty-two shares of the stock, and he executed a declaration of trust, by which he declared he held the same in trust for the widow and her children upon the terms that he was annually to pay to the widow, in satisfaction of the interest appointed to be annually paid to her, all such dividends or interest on the twenty-two shares as should accrue to him, and in the event of the death of the widow he was to surrender the shares for the purpose for which the sum of £1,000 was bequeathed.

Afterwards the capital stock of the bank was increased, and four shares of the new issue were in effect added by the process to the twenty-two old shares.

*Held*. 1. The bequest was demonstrative and not specific.

2. The assignment of stock and declaration of trust did not amount to a conversion and investment, or an appropriation amounting to payment.

3. The twenty-two shares and the four shares always remained part of the estate.

4. The widow was entitled to interest at 6 per cent. from the expiration of one year after the testator's death.

Form of order for payment out of court of money paid in under the Trustee Acts.

Judgment of KILLAM, J., 3 Man. L. R. 49 followed.

This was a petition for payment out of court of money paid in under the provisions of the Trustee Acts.

The questions argued were the same as those determined upon an application made by the trustees for advice. See 3 Man. L. R. 49.

*J. S. Hough* for executors.

*H. M. Howell, Q. C.*, for Mrs. Logan.

*W. R. Mulock* for children of Robert Logan.

*J. H. D. Munson* for children of deceased children of Robert Logan.

[*3rd April, 1886.*]

WALLBRIDGE, C. J.—Whether this bequest is what in law is called specific, demonstrative or general is it seems to me the principal if not the only question we are called upon to decide. The executors did not as a matter of fact, convert these shares at the expiration of a year from the testator's death, and the money so invested remains as much at the disposal of the executors now as at the expiration of the year. The judicious management and fortunate turn in events having largely increased the fund, the question of conversion hardly becomes necessary to form a subject of inquiry.

The clearest and best definition of the different description of legacies which I have been able to find is given in *Re Young, Trye* v. *Sullivan*, 62 L. T. N. S. 757, where it is laid down by Pearson, J., that legacies are divided into three classes, specific, demonstrative and general. A specific legacy is the gift of something which the testator intends his legatee should enjoy and possess to the exclusion of every other thing, however much that other may resemble it. By a demonstrative legacy is meant a gift which the testator intends to be paid in the first instance out of the fund which he designates as the fund for payment of it, but not to the exclusion of its being paid out of any other fund, if that fund which he intended to be the primary source of payment is not forthcoming. By a general legacy we understand a legacy with regard to the payment of which the testator expresses no intention beyond the intention that it should be paid. There is no residuary clause or bequest in the will. In respect to such gain as incidentally arises called sometimes appreciation, if the corpus from which the interest to the life estate is to arise is to bear loss when loss does happen the rule seems to be the corpus

shall enjoy the benefit of that gain when gain happens, upon that view the four new shares fall to and go with the corpus.

The executors should have been guided by the rules laid down for investment, but not having done so, the money to-day is simply money in their hands as part of the testator's estate.

A gift of money out of specific money or of stock out of specific stock, as for instance, money out of dividends of stock, or money out of money invested in stock, is specific. *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623. *Morley* v. *Bird*, 3 Ves. 628. *Hosking* v. *Nicholls* 1 Y. & C. c. 478. *Badrick* v. *Stevens*, 3 Bro. C. C. 431. *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

But money out of stock is not specific but demonstrative. *Kirby* v. *Potter*, 4 Ves. 748. *Deane* v. *Test*, 9 Ves. 146.

The persons entitled in remainder after the widow's death will therefore get the specific £1,000. The widow the interest for life at the rate of six per cent., which for the reason shown in brother Killam's judgment, I think is her legal right.

There is an intestacy as to the four new shares and the interest received above that to which the widow is entitled, which must be administered in due course.

There will be the usual directions to the master to inquire what the widow has received and what is due her, an inquiry as to next of kin, and further directions.

TAYLOR, J.—The executors of the will of the late Robert Logan made an application to the court for advice under the recent Act 48 Vic., c. 21.

The judgment of my brother Killam given on that application is reported 3 Man. L. R. 49. The securities having been realized and paid into court, under the Imp. Act 10 & 11 Vic., c. 96, a petition is now presented under the 2nd section of that Act for payment out of the money to the parties entitled.

Upon the argument of this petition the same questions were raised and discussed before the full court, which were raised and discussed before my brother Killam, on the executors petition for advice.

As I concur in the construction he put upon the particular clause of the will in question it is not necessary to give any lengthened judgment.

That a legacy, given as the one now in question is, of so much money out of stock, is a demonstrative and not a specific legacy was decided by Lord Thurlow in *Ashburner* v. *Macguire*, 2 Bro. C. C. 108, and this decision has ever since been followed and approved of. The judgment of my brother Killam refers to numerous cases to this effect.

I agree also in the conclusion he arrived at, that there was no proper appropriation of the fund, or investment of it to meet this particular legacy.

Counsel dwelt upon the difficulty of investing the money otherwise than was done at the time of the testator's death, but before that, the Council of Assiniboia had passed the law of 7th January, 1864, which introduced here the laws of England subsequent to the date of Her Majesty's accession. In *The Canadian Bank of Commerce* v. *Adamson*, 1 Man. L. R. 3, we held that thereby the English Bills of Exchange Act was introduced here. If so, then the Imperial Act 23 & 24 Vic., c. 38, was also introduced.

Under the Imperial Act 22 & 23 Vic., c. 35, trustees, where not expressly forbidden by the instrument creating the trust, were authorised to invest trust funds in the stock of the Bank of England or Ireland, or in East India stock. By the 23 & 24 Vic., c. 38, s. 10, the Court of Chancery was empowered to issue general orders, from time to time, as to the investment of cash subject to its jurisdiction, "either in three per cent. Consolidated, or Reduced, or New Bank annuities, or in such other stocks, funds or securities," as the court should think fit. By the 11th section, trustees, executors or administrators, having power to invest their trust funds upon government securities or upon parliamentary stocks, funds or securities may invest "in any of the stocks, funds or securities in or upon which by such general order" cash may be invested by the court. It has been held in *Re Wedderburn*, 9 Ch. Div. 112, that under this Act trust funds may be invested in any securities permitted by the general order, even although the instrument creating the trust forbids an investment in such securities.

On the 1st of February, 1861, the court, under the provisions of that Act, made a general order that cash under the control of the court might be invested upon, among other securities "bank

stock" and "mortgage." It may be a question whether the expression "bank stock" in an order of the English Court of Chancery can mean anything except Bank of England stock, although in the note to this order in *Morgan's Orders*, p. 630, the general statement is made, "Bank stock is now one of the recognized investments of the court."

But even if the words should be held wide enough to cover the stock of any chartered bank, still it would not authorize an investment such as is assumed to have been made here, in stock of the Bank of Montreal, for that, to executors and trustees in the Red River settlement in 1866, was a foreign bank just as much as a bank in New York or Louisiana would have been.

Investment on mortgage was, however, open to the trustees and would, under the Imperial Act and the order made pursuant to that, have been a proper investment.

The Statute of this Province, Con. Stat. Man., c. 47, ss. 9 & 10, originally 36 Vic., c. 15, ss. 1 & 2, which after providing that trustees and executors may lend the money belonging to the estate "to the best advantage," says that nothing in the Act shall be deemed or understood to empower any administrator, executor, guardian or trustee to purchase any bank or other stock with moneys entrusted to him, was not passed for many years after the testator's death.

The conclusion of the whole matter is, that the widow, the tenant for life, is entitled to 6 per cent. upon £1,000 from one year after the death of the testator and to have £1,000 set apart to purchase the annuity, payable to her during her life, that sum being on her death equally divisible among all the testator's surviving children, and the remainder of the fund in court, there being no residuary legatee named in the will, is divisible among the next of kin of the testator, as in the case of an intestacy.

The proper order now to be made is one declaring the widow entitled to receive six per cent. upon the sum of £1,000 from one year after the death of the testator, and entitled to have the sum of £1,000 set apart and invested, and the interest arising therefrom paid to her annually during her life, the principal being on her death divisible equally among the surviving children of the testator, also directing a reference to the master:

(1.) To inquire whether there are any creditors of the testator remaining unpaid, and to take an account of the amounts due them.

(2.) To take an account of the amount to which the widow is entitled, having regard to the foregoing declaration, and of all payments made to her on account of her annuity.

(3.) To inquire who are the next of kin of the testator, in what shares or proportions they are entitled, and who of them are of full age.

(4.) To tax to all parties their costs of this application and of the enquiries directed.

The order should then provide for payment out of court (1) of the amounts, if any, due to the creditors, (2) of the amount, if any, due to the widow, (3) of the costs taxed to the different parties, and then, after retaining or setting apart £1,000 to meet the annuity of the widow, for payment out of the remainder, now, to the next of kin who are of full age, the shares or proportions to which they may respectively be found entitled; also for payment to such of the next of kin as are not now of full age, of the shares or proportions to which they may respectively be found entitled on their respectively attaining full age, to be verified by affidavit.

The order should also provide that, in the event of the widow being found overpaid, then the amount found to be so shall be retained out of any moneys still coming to her.

It should also reserve liberty to apply from time to time, to a judge in chambers, respecting the investment of the amount set apart to answer the annuity to the widow, as to the investment or other disposition of the shares of any of the next of kin who may not be of full age, and as to the distribution of the amount set apart to answer the annuity to the widow, upon her death.

As it is nearly twenty years since the death of the testator, it is extremely improbable that there are any creditors remaining unpaid, the master should therefore, on making the inquiry as to them, be satisfied with an affidavit from the executors, and the insertion of a short advertisement published, say once, calling upon any creditors to come in and prove their claims.

DUBUC, J., concurred.

## CALDER v. DANCY.

*Notice of trial by defendant.—Non-suit where plaintiff does not appear.*

A defendant may pass and enter the record, and give notice of trial for the Assizes, as well as for any Tuesday.

Where the plaintiff does not appear at the trial a non-suit may properly be entered. The defendant is not, in such case, entitled to a verdict.

The defendant entered the record for trial at the assizes without a jury, and served notice of trial. When the case was called on, counsel for the plaintiff took objection, that although a defendant may give notice for trial at a sitting of the court upon a Tuesday, yet he cannot enter a record and give notice of trial at the Assizes. Upon Killam, J., deciding that he would follow *Moore* v. *Fortune*, 2 Man. L. R. 94, the plaintiff's counsel stated that he withdrew from the case, and that plaintiff did not appear. Thereupon the plaintiff was called, and not appearing, the defendant's counsel moved for a non-suit, which was entered by the learned judge.

*J. W. E. Darby* for the plaintiff, now moved to set aside the non-suit, contending, as he had done at the trial, that a defendant cannot enter the record and serve notice of trial for the Assizes. Also that the entering of a non-suit was irregular, as a plaintiff cannot be non-suited without his consent, and here no consent was given, the plaintiff having withdrawn he did not appear at all. He produced from the prothonotary's office a record entered by the plaintiff for trial on a Tuesday, which the book containing the entries of Tuesday trials kept by the prothonotary showed had in February, 1886, been ordered to stand over, and contended that the case was, when the defendant entered the record for trial at the assizes, standing to be tried at a Tuesday sitting of the court. He cited *Tidd's Practice*, 718, 716; *Archbold's Practice* 1493; *Day's* C. L. P. A. 137; *Dennis* v. *Dennis*, 2 Wm. Saund. 336, and *Levy* v. *Halifax and Cape Breton Railway*, Cassels Dig. 316.

*W. H. Culver* for the defendant, objected to the record produced from the prothonotary's office and the book containing the entries of proceedings on Tuesday trials being used on this application, these not having been before the court when the non-suit moved against was entered. He urged that the only question open for decision by the court was, Had the defendant a right to enter the record and serve notice of trial for the assizes? He cited the Queen's Bench Act, 1885, s-s. 24, 26; *Reg. Gen.*, 31; *Archbold's Practice*, 1493; *Moore* v. *Fortune*, 2 Man. L. R. 94; *Robinson* v. *Hutchins*, 1 Man. L. R. 122; *Plaxton* v. *Monkman*, 1 Man. L. R. 371; *McCaw* v. *Ponton*, 11 Ont. Pr. R. 328.

[*1st December, 1886.*]

TAYLOR, J.—The Queen's Bench Act, 1885, s. 24, provides, that all civil actions on the common law side of the court, may be entered for trial at the sittings of the Court of Assize and *Nisi Prius*, according to the practice in that behalf. The section then goes on to provide, that either party to an action may, as soon as the action is ripe for trial, give to the other party, whether plaintiff or defendant, the usual notice of trial to take place by and before a judge sitting under the provisions of the 26th section of the Act. That 26th section provides for a judge sitting each Tuesday, except during vacation. The Act nowhere says that it is only for the sittings under that 26th section that either party may give notice of trial. The words in the earlier part of section 24, that cases may be entered for trial at the Court of Assize, "according to the practice in that behalf," must mean the practice which obtains in the court, either the English practice, or any modification of that by rules of our own court. Section 7 of the Queen's Bench Act, 1885, provides, that the modes of practice and procedure shall be those which obtained in England on a particular day, but it also provides that the judges may change or alter that practice by rules or orders of court.

They have by *Reg. Gen.* 31, changed the practice and provided that "when a cause is at issue either plaintiff or defendant may give notice of trial." These words are wide enough to cover notice of trial for the assizes, as well as for a sitting of the court on Tuesday, which indeed was already provided for by the statute. It was so held by my brother Dubuc in *Moore* v. *Fortune*, 2 Man. L. R. 94. It seems to me, that in so holding he was

right, and that under *Reg. Gen.* 31, a defendant may, if the cause is at issue, serve notice of trial for the assizes.

The rule giving a defendant leave to serve notice of trial necessarily implies that he may pass and enter the record. In this court, as all the pleadings are filed with the prothonotary, the passing a record is a very formal affair. It is simply that the attorney makes out a copy of all the pleadings, which is compared by a clerk in the prothonotary's office with the pleadings filed there, so that there may be a correct copy of them for the use of the judge upon the trial.

Even if the record said to have been entered by the plaintiff for trial on a Tuesday, and the book containing the entries of the proceedings at the Tuesday sittings of the court, can be looked at, I do not see that they show that there was, as alleged, when the defendant entered the record for trial at the assizes, a record entered by the plaintiff standing for trial at a Tuesday sitting of the court. There was no doubt a record entered for trial on a Tuesday by the plaintiff, and under date of 2nd of February, 1886, there is an entry that the following cases set down as Tuesday trials for to-day are not taken and stand, the present case being one of them, but after that nothing further, so far as appears, was done with it.

A record entered for trial on a Tuesday, is not entered for trial generally, but for trial on a particular Tuesday. Section 26 of the Queen's Bench Act, 1885, says that a judge shall sit each Tuesday, except in vacation, for certain business, "including the trial of all issues which may be entered for trial on that day." When a cause is entered for trial at the assizes, if neither party appears, it is struck out, it does not just stand for trial at a subsequent sitting of the Court of Assize. So where a record entered for trial on a particular Tuesday, is not dealt with, either tried or adjourned to another day, it does not stand in the prothonotary's office as a record waiting to be tried, it must be again entered for trial before it can be tried.

There is nothing in the objection that the entering a non-suit when the plaintiff did not appear was irregular.

The case of *Levy* v. *Halifax and Cape Breton Railway Co.* Cassel's Dig. 316, was one in which the notes of the learned judge who tried the case merely showed that a non-suit was

moved for, that the plaintiff's counsel replied and that a non-suit was entered. The Supreme Court of Nova Scotia held that the non-suit was voluntary and discharged a rule obtained to set it aside, but on appeal to the Supreme Court of Canada it was held that as there was a doubt as to what took place at the trial the parties were entitled to the benefit of the doubt, and the rule to set aside the non-suit was made absolute. The ordinary rule undoubtedly is that a plaintiff, appearing at a trial, cannot be non-suited without his consent, but the question now raised is, can a non-suit be entered where the plaintiff does not appear?

In *Archbold's Practice* 381, it is said, "the attorneys for the plaintiff and defendant should take care to be in court with their evidence and witnesses in readiness, when the cause is called on, otherwise if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be non-suited."

In *Anderson* v. *Shaw*, 3 Bing. 290, it was held, that where a plaintiff does not appear, a verdict cannot be taken against him. The question mainly discussed in that case was, as to a defendant obtaining a non-suit after a plea of tender, but in speaking of the practice as to entering a non-suit, Best, C. J., said, "It was the practice to call the plaintiff in every case; if he did not answer, no verdict could be given against him. At this day, if the plaintiff's counsel informs the court, whilst the jury are considering the verdict, that the plaintiff does not appear, a non-suit is entered. Can there then be anything but a non-suit, when, instead of disappearing just before the end of the cause, he does not appear at all?"

*Stowell* v. *Brown*, 1 F. & F. 256, was a case in which the plaintiff, when called, did not appear, and the officer of the court was about to strike the case out, when counsel for the defendant said, as the plaintiff does not appear I am entitled to have a non-suit entered, to which Wightman, J., replied, "I believe that is the usual practice," so a jury was then sworn and a non-suit entered.

In Ontario this has long been the practice. In *Falls* v. *Lewis*, Dra. 269, it was held that where a cause is called on for trial and neither counsel nor attorney appears for plaintiff, a jury may be sworn and a non-suit entered.

In *Crofts* v. *Middleton*, 3 Ont. Pr. R. 121, defendant's counsel was ready to proceed, but plaintiff's counsel was not, and the

cause was struck out. It was held that defendants were not entitled to costs for not proceeding to trial according to notice, they should have insisted upon a non-suit.

The motion to set aside the non-suit must be dismissed with costs.

WALLBRIDGE, C. J., and DUBUC, J., both concurred.

*Motion to set aside nonsuit dismissed with costs.*

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## UNION BANK v. McKILLIGAN.

[IN APPEAL.]

*Promissory note.—Presentment.—Notice of dishonor.—Post office box.*

The plaintiffs were the holders of a note endorsed by the defendant, payable at the plaintiff's bank on the 15th of September.

On the 13th of September a change of managers of the bank had taken place and the new manager, although the note was in the bank during the whole of the 15th, knew nothing of its existence until the afternoon of the 16th. He then caused the note to be protested and a notice addressed to the defendant put in the post office. This notice was placed in a box rented by the defendant from the post-office authorities before six o'clock on the same afternoon.

*Held*, That there had been sufficient presentment and notice of dishonor.

*H. M. Howell, Q. C.*, and *J. W. E. Darby* for plaintiffs.

*J. F. Bain* and *W. R. Mulock* for defendants.

[*1st December, 1886.*]

Taylor, J.. delivered the judgment of the court.(*a*)

At the trial of this action a verdict was entered for the defendant, with leave reserved to the plaintiffs to move to enter a verdict for them for $7,800. The declaration contains one count upon a promissory note endorsed by the defendant, another upon

(*a*) Present: Wallbridge, C. J.; Dubuc, Taylor, JJ.

a promissory note made by the defendant, and the common counts. On the argument in Term, counsel for the plaintiffs stated that they claim only upon the note set out in the first count, being a note dated 9th of September, 1884, for $7,253.33 made by A. W. Ross by his attorney, Alexander Haggart, payable to the order of the defendant, three days after date, at the Union Bank of Lower Canada, Winnipeg, and endorsed by the defendant. Two questions were argued before the court. Was the note duly presented for payment? and Had the defendant due notice of dishonor?

The note bears date the 9th of September, and being payable three days after date, became due on the 15th of September. On the 13th of September, the manager of the bank, who took the note, was removed from his position, his place being filled by a new manager. This officer looking through the securities of the bank on the 16th of September, found the note in question, among what were known in the bank as "call loans," and which are not entered in the diary as the notes payable on specific days are. He then had a protest made out by the notary of the bank, and on the same day, the 16th, shortly before six o'clock in the afternoon, a notice of protest properly addressed to the defendant was deposited in the general post office in Winnipeg. The evidence is quite clear that on the 15th, the day upon which the note fell due, neither the maker nor the defendant, the endorser, had in the bank any funds with which to pay the note. Can the note then be said to have been presented for payment?

The note was in the bank, the place at which it was payable, on the day upon which it fell due. That was held to be sufficient presentment in *Saunderson* v. *Judge*, 2 H. Bl. 509, and that case has ever since been followed in England and in the United States. *Bailey* v. *Porter*, 14 M. & W. 44; *United States Bank* v. *Smith*, 11 Wheaton 172; *Bank of U. S.* v. *Carneal*, 2 Peters 543; *Jenks* v. *Doylestown Bank*, 4 W. & S. 505; *Merchants Bank* v. *Elderkin*, 25 N. Y. 178; *Nichols* v. *Goldsmith*, 7 Wend. 160; *Woodin* v. *Foster*, 16 Barb. 146.

It is sought to limit this and it is argued that it must be shown that the note was in the bank in the hands of some officer of the bank ready to be delivered up upon tender of the amount. Some of the cases on the subject are expressed so as to countenance

this view. Thus in the *Berkshire Bank* v. *Jones*, 6 Mass. 524, the language used was, "If the plaintiffs can show that on the day of payment the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours to receive payment and give up the note, they will be entitled to recover."

So in *Troy City Bank* v. *Grant*, Hill & Denio 119, it is said, "Where the note is payable at a particular place a personal demand is not essential, if the holder or any one for him is there with it so that he may be in a situation and ready to receive the money and give up the note it is sufficient." The law on the subject is summed up in *Daniel on Negotiable Instruments*, s. 656 in accordance with the view expressed in these cases.

Some American cases have, however, gone further, and have stated the law more broadly. In 3 *Meyers Fed. Dec.* s. 1202, this statement is found, "As to demand the law is, that on a note made payable at a particular bank, it is sufficient to show that the note had been discounted and become the property of the bank, and that it was in the bank not paid at maturity." *Folgar* v. *Chase*, 35 Mass. 63, fully bears out that statement of the law. That was an action against an endorser and the language used in disposing of the case is, "These notes, however, were made payable at the Phoenix Bank, and were the property of the bank. No demand was necessary except at the bank, and although there was no express proof that the notes were there and some officer of the bank in attendance at the time the notes fell due, yet this must be presumed, and it was for the defendants to show that the makers called at the place appointed for the purpose of making payment."

Here the note was the property of the bank, it was in the bank when it matured, neither the maker nor indorser had any funds in the bank with which to meet it and there is no evidence that the maker called with funds to take it up.

The defendant's counsel rely very strongly upon the case of the *Chicopee Bank* v. *The Philadelphia Bank*, 75 U. S. 641, but that was a very different case from the present. There the Philadelphia Bank holding a note payable at the Chicopee Bank sent it to the latter bank for collection some days before it matured. The letter enclosing the note was placed on the desk of the cash-

ier or teller, where it slipped through a crack out of sight and was not found until some days after the note matured. When the note matured no one in the Chicopee Bank knew of the existence of the note, and it was not the property of that bank. Parties to the note, being discharged from liability for want of notice of dishonor, The Philadelphia Bank brought an action to recover the amount they had lost, on the ground of the negligence of the Chicopee Bank, and were held entitled to recover. There the court, no doubt, held that the mere presence in the bank of the particular piece of paper on which the note was written, no one knowing that it was there, was not a sufficient presentment.

Here it cannot be said that the plaintiff bank did not know of the existence of the note in question and that it was in the bank on the day when it matured. True, the person who was manager of the bank on the day on which it matured did not know of its existence, but it was the property of the bank, it had been discounted by the former manager, so he knew of its existence, and his knowledge was the knowledge of the bank. The bank had, through him, imputed notice of everything connected with the discounting of that note.

The first question, was there a sufficient presentment of the note, must, I think, be answered in the affirmative.

The other question to be considered is, Had the defendant sufficient notice of dishonor? The note was payable at a bank in Winnipeg, and the defendant lives in Winnipeg. The notice of dishonor was sent to him through the post office. It was argued that it should not have been so sent, but should have been delivered by a special messenger.

There are numerous authorities which decide that where both parties live in the same town notice must be given in time to be received in the course of the day following the day of dishonor. *Smith* v. *Mullett*, 2 Camp. 208; *Hilton* v. *Fairclough*, 2 Camp. 633; *Jameson* v. *Swinton*, 2 Taunt. 224; *Fowler* v. *Hendon*, 4 Tyrw. 1002: *Dobree* v. *Eastwood*, 3 C. & P. 249.

In *Daniel Neg. Inst.*, s. 1009, it is said, "It must be proved, when the penny post is used, that the letter containing notice was deposited in the post at a time that, according to the course of

the post, it would be delivered to the party to whom it is addressed on the day he was entitled to receive notice of dishonor."

That the notice of dishonor may be sent through the post even when the party to be notified resides in the same town, has been settled by the *Merchants Bank of Halifax* v. *McNutt*, 11 Sup. C. R. 126. In that case the note was payable at a bank in Summerside, Prince Edward Island, and the defendant an endorser lived in the same town. It was decided upon Dominion Statute 37 Vic., c. 47, s. 1, which is as follows: "Notice of the protest or dishonor of any bill of exchange, or promissory note, payable in Canada, shall be sufficiently given if addressed in due time to any party to such bill or note entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature on such bill or note, designated another place where such notice shall be sufficiently given if addressed in due time to him at such other place; and such notice so addressed shall be sufficient, although the place of residence of such party be other than either of such before mentioned places."

In the present case the notice of dishonor was mailed in the general post office shortly before six o'clock in the afternoon. The defendant has there a locked box for the purpose of receiving his letters. When letters are taken from the receiver and stamped, according to the evidence, those addressed to the holders of such boxes are at once placed in them. From these boxes they are not taken by the post office clerks, but the holders of the boxes can at any time with keys given them for the purpose open these boxes and take out any letters which may be in them.

The envelope in which the notice was enclosed is produced. It bears a stamp with the words "Winnipeg, Canada," making a circle—in the centre "Sp. 16, '84," and over the "Sp. 16" is the figure "2." Post marks are *prima facie* evidence of when a letter was mailed. *Taylor on Evidence*, 197; *Arcangelo* v. *Thompson*, 2 Camp. 620. From the evidence it appears that the stamp in the post office is changed three times each day. From 5 o'clock and on until 12 noon, the figure "1" appears. At 12 noon, the "1" is removed and "2" substituted, and again at 6 p. m. the "2" is removed and "3" substituted, which then continues to be used until 5 o'clock the next morning.

A number of post office officials have been examined, and they all agree that the stamp on this envelope, bearing the figure it does, shows that it was taken out of the receiver before six on the evening of the 16th and stamped, and that it would be at once placed in the defendant's box. Not only do they speak of the general practice of the office, but it appears that on the evening in question the mails from the east and west, which usually arrive about six, were late, so that the clerks in the office were not pushed, but had ample time on their hands so that there is the more probability of the receiver being emptied and the letters in it disposed of before six o'clock.

There can, I think, be no doubt but that the notice in question was in the defendant's box by six o'clock on the afternoon of the 16th of Sept. When placed in that box it was in the place where he desired his letters to be delivered, it was in his possession and under his control just as much as if it had been placed on his office desk, or delivered at his house. Of this there seems to me there can be no possible question. Whether he actually received it on that day or not there is no evidence, but if he did not it was from no fault or neglect on the part of the plaintiffs. They took the proper steps to have it delivered to him on that day, and it was delivered accordingly at the place appointed by him for the delivery of his letters, within the time required by law for the giving of notice of dishonor.

Both the questions argued before us must be answered in the affirmative. The verdict for the defendant must be set aside and a verdict for the amount agreed upon entered for the plaintiffs.

*Rule absolute to enter verdict for plaintiffs.*

## HOOPER v. COOMBS.

*Illegal contract.—Sale of whiskey to be taken to Northwest Territories.*

Although it is illegal to import whiskey into the N. W. Territories, except by permission of the Lieutenant-Governor, yet a contract made in Manitoba for the sale and purchase of whiskey is not illegal even although the vendor was aware that the purchaser intended to smuggle it into the Territories.

To an action for goods sold and delivered, and for not accepting goods sold, defendant pleaded as follows :—

And for a fifth plea to part of the first count of the plaintiff's declaration and the whole of the second count, the defendants say that the cause of action set forth in the first or common count of the plaintiff's declaration, in which the plaintiff claims for goods bargained and sold and goods sold and delivered by the plaintiff to the defendants is the same cause of action as that referred to in the second count of the plaintiff's declaration, and that the agreement for the same was made in the following manner and on the following terms and not otherwise, to wit: The plaintiff being desirous of selling and the defendants of purchasing certain intoxicating liquors for the purpose of bringing the same into the Northwest Territories of Canada from the Province of Manitoba, clandestinely and without any permission from the Lieutenant-Governor of the said Northwest Territories of Canada it was agreed that the said plaintiff should sell to the defendants and they should purchase from the plaintiff suffi cient potatoes, which, added to the said intoxicating liquors, which are set forth in the said second count of the plaintiff's declaration, would fill a car, and that the said intoxicating liquors should be concealed in and amongst the said potatoes and that the whole of the said goods including the said potatoes, whiskey, brandy, lager and gin, should be shipped as a car load lot of potatoes and so the said intoxicating liquors might be brought into the Northwest Territories of Canada clandestinely and without any permission of the Lieutenant-Governor of the said Northwest Territories of Canada, in breach of and for the purpose of evading the laws and enabling the said defendants to evade the laws and contrary to the form of the statute.

The plaintiff replied as follows :—

And for a further replication to the defendants' fifth plea the plaintiff says :—

That the said goods were sold by the plaintiff to the defendants to be shipped to Donald which is in the Province of British Columbia and not in the Northwest Territories and is a station on the Canadian Pacific Railway and the said goods were merely to be carried through the Northwest Territories to

the said Donald in a closed car on the said line of railway, and were not to be brought into the Northwest Territories for any unlawful purposes within the meaning of the statute in that behalf as in the plea alleged.

Defendant demurred upon the ground that the bringing of intoxicating liquor into the N. W. Territories without the permission &c., is illegal.

*H. M. Howell, Q. C.*, for plaintiff.

*W. E. Perdue* for defendant.

[*21st October, 1886.*]

WALLBRIDGE, C. J.—The statute, 43 Vic., c. 25, the N. W. Territories Act, 1880, section 90, is in these words: "Intoxicating liquors and other intoxicants are prohibited to be manufactured, compounded or made in the said Northwest Territories, except by special permission of the Governor-in-Council, or to be imported or brought into the same from any Province of Canada or elsewhere, or to be sold, exchanged, traded or bartered, or had in possession, except by special permission in writing of the Lieutenant-Governor of the said Territories."

Sub-section 3 provides a penalty on persons contravening the above provisions of not more than $200 nor less than $50.

This section 90 refers wholly to things to be done in the N. W. T. and not in Manitoba.

There is no place alleged in the declaration or pleading where it is contended the contract was made, but the venue in the margin being laid in the Western Judicial District of Manitoba, the contract must be understood to have been made there. The suit is brought for goods sold and for not accepting the goods sold.

The plaintiff on the argument excepts to the defendant's plea.

If the plea be not a good defence, then the declaration is not answered, and the plaintiff is entitled to judgment.

The plea does not expressly state that the contract is illegal or immoral, but states that it was agreed between plaintiff and defendants that the defendants should purchase from the plaintiff, potatoes, which with the intoxicating liquors in the second count, would fill a car, that the intoxicating liquors should be concealed amongst the potatoes, and the whole shipped as a car of potatoes and so that the intoxicating liquor might be brought into the N. W. T. clandestinely, and without permission of the Lieutenant-Governor, for the purpose of enabling the defendants to evade

the laws and contrary to the form of the statute, thus leaving the court to infer illegality from the facts stated.

Assuming, therefore, the contract to have been made in Manitoba, such contract for sale and purchase was legal, the goods were to have been delivered to the defendants on board a car at Brandon in Manitoba, and there the control of the plaintiff over the goods ceased, the plaintiff was then to be paid. There was no obligation on the defendants to take these goods into the N. W. T., and if they did so, it would be entirely at their own risk. It is alleged that plaintiff knew defendants intended to take the goods into the N. W. T. contrary to the N. W. T. Act, 43 Vic. c. 25, s. 90. But it was no part of the bargain that the plaintiff was only to be paid in the event of success in the venture. This knowledge does not render the contract illegal. *Holman* v. *Johnson*, Cowper. 341.

In the case of smuggling it requires that the seller should do more than sell the goods, knowing the intention to smuggle them. He must do something actively to aid in the act of smuggling, and so be party to the breach of the revenue laws, per Buller, J., in *Clugas* v. *Penalula*, 4 T. R. 468.

In *Forster* v. *Taylor*, 5 B. & Ad. 895, the law is thus laid down: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

This state of the law applies evidently to a contract made where the thing is prohibited or made unlawful, and would apply to such contracts made in the N. W. T.

In this case the contract was made in Manitoba and so does not fall within the rule. If this action had been brought in the N. W. T. I have no doubt the defence would have prevailed. This statute 43 Vic., c. 25, is a Dominion Act and as such the courts are obliged to take judicial notice of it, but the Act is local in its operation and applies only to the N. W. T. and not to the Province of Manitoba.

This sale and purchase was legal in Manitoba, not forbidden here by any Act of Parliament or Legislature.

The sale was made in Manitoba, delivery there, and payment agreed to be made on such delivery. The plaintiff's control over the goods then ceased, and the defendants were at liberty to direct their destination independently of the plaintiff, either to the N. W. T. or elsewhere.

In no aspect in which I can view the case do I see that a plea could be drawn under that Act, which would be an answer to an action brought in Manitoba. No law that a Manitoban is bound to observe in his own province has been broken or breach contemplated.

Besides it comes with a bad grace from these defendants to set up their own complicity in an illegal adventure, as an excuse for non-payment of their debt or performance of their contract. They have no merits, whatever may be said as to the morality of the dealing.

In my opinion the plea does not answer the declaration and is thus bad in law.

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## WAY v. MASSEY MANUFACTURING CO.

[In Appeal.]

*Fraudulent conveyance.—Grantor remaining in possession.*

A lease made by a debtor, of his farm property, under the terms of which the debtor was to remain in possession, and out of the crop pay himself $1500, declared void as against creditors although there was no evidence of financial embarrassment or inability to pay debts in full.

This was an interpleader issue to try the title to certain wheat, oats, barley, &c.

The claimant claimed under a lease of the farm, the provisions of which are referred to in the judgment.

The only evidence as to the debtor's financial condition at the date of the execution of the lease was, that the debtor owned 640 acres of land, of which between 400 and 500 were broken. He also owned several horses, oxen, &c. As against this the issue showed that there three executions against his goods, two of

which had been four months and the third three months in the hands of the sheriff. The amounts did not appear. There was no proof of any execution against lands.

At the trial Killam, J., entered a verdict for the defendants, the execution creditors.

The plaintiff obtained a rule to show cause why the verdict should not be set aside, and a verdict entered for the plaintiff.

*T. M. Daly* for the defendants showed cause.

*J. S. Ewart, Q. C.*, for the plaintiff, urged that financial embarrassment should have been proved. For all that appeared the debtor may have been worth ten times the amount of his debts.

[*23rd October, 1886.*]

TAYLOR, J., delivered the judgment of the Court. (*a*).—

This was an interpleader issue directed to determine the ownership of a quantity of grain, seized by the sheriff of the Western District, under three writs of execution at the suit of the defendants against one Johnstone. The plaintiff claims the grain as lessee from Johnstone, of the land upon which it was grown. The issue was tried by my brother Killam without a jury at the autumn assizes of last year, for the Western District, and he entered a verdict for the defendants, holding the lease to be fraudulent and void against creditors.

On the argument of the rule obtained by the plaintiff, I entertained some doubt as to whether anything was, by means of the lease, withdrawn from creditors to which they could have resorted for payment of their claims, but a consideration of the case has satisfied me that the verdict which my brother entered was the proper one.

The lessee Johnstone, the judgment debtor, was indebted to the plaintiff and has given him a chattel mortgage for the debt. Then the defendant's executions came into the sheriff's hands and shortly after, the lease in question was made for one year, by which the lessee, a creditor, was to pay the lessor, his debtor, a rental of $1500. The lessee does not reside in this province, he was not here when the lease was made and it is not executed by him. Under its provisions the lessor was to continue in possession of the property, and work it as manager or agent of the

(*a*) Present: Wallbridge, C. J., Dubuc, Taylor, JJ.

lessee. In the lease all covenants by the lessee for payment of taxes, and for farming the land in a proper and husbandlike manner have been struck out. Then certain special provisions have been inserted as follows: The lessor shall, as the agent of the lessee, manage, occupy and cultivate the said land during the "currency" presumably of the lease. "The said lessor shall purchase all the stock, implements, farming tools and fresh seed and other necessaries for effectually cultivating all the land under cultivation upon the said premises. The lessor shall harvest thresh and market all marketable grain raised upon said land during the currency hereof, and shall, after paying all his necessary disbursements in and about the said operations and for operating the said lands, pay the balance of the proceeds thereof to the lessee."

Under this plainly the lessor was to continue in possession and to carry on the farm for his own benefit, in the first instance, so far as being paid for all outlay and for the season's work went. The grantor continuing in possession and deriving a benefit are two of the elements spoken of in Twyne's case as going to show that the impeached conveyance was fraudulent. Plainly here the intention in granting this lease was to enable the lessor to carry on his farming operations for the year, without danger of being interfered with by his creditors.

A slight attempt was made to support the transaction on the ground of pressure, in this that the plaintiff threatened to take possession of the farm stock and other articles covered by his chattel mortgage unless further security was given and in consequence this lease was executed. The only witness called for the plaintiff, except the sheriff called to show that the grain seized was grown upon the land in question, was the debtor Johnstone, and I learn from my brother Killam that his manner when under examination impressed him unfavorably. The attorney, who acted as the agent of the plaintiff in exercising the pressure, was not called as a witness. The letter which he wrote and which was put in in evidence has not so much the appearance of bonafide pressure, as of having been written with an ulterior object, to be used should the transaction be afterwards impeached.

The rule should be discharged with costs, and the verdict for defendants should stand.

*Rule discharged. Verdict entered for defendant.*

## THE MANITOBA INVESTMENT ASSOCIATION v. MOORE.

*Disclaimer in Mortgage case—Costs.*

One of two defendants in a mortgage case who was entitled to a one half-interest in the equity of redemption, filed a disclaimer as follows:—"After the service of the bill of complaint herein upon me, I offered to quit claim any right or interest that I had in the matters in question in this suit to the plaintiff, and the plaintiff refused to accept said offer, and I disclaim all right, title and interest, legal and equitable, in any of the said lands and premises, and I claim to be hence dismissed with my costs of suit incurred subsequently to said offer."

*Held*,—Upon a hearing upon bill and answer, that the disclaiming defendant was not entitled to costs.

*W. E. Perdue*, for plaintiffs.

*J. J. Curran*, for defendant.

[*16th December, 1886.*]

KILLAM, J.—This is a mortgage suit in which the plaintiff company, assignee of the mortgagees, asks a sale of the mortgaged premises. The only defendant in the original bill was Thomas Moore, the mortgagor, but the bill was subsequently amended by adding as a party defendant James H. Ashdown with allegations that subsequently to the making of the mortgage, by deed duly registered on a date before the filing of the bill, the defendant Moore conveyed to the defendant Ashdown a one-half interest in the mortgaged premises, and that Ashdown is now the owner of that half interest, and that the defendants Moore and Ashdown are the owners of the equity of redemption. The bill prays no relief against Ashdown personally, but contains only the usual prayer for payment or sale, and for an order against Moore for payment of the mortgage debt.

The bill has been taken *pro confesso* against the defendant Moore, but Ashdown has filed an answer and disclaimer, in in which he says that "After the service of the bill of complaint herein upon me, I offered to quit claim any right or interest that

I had in the matters in question in these suits of the plaintiffs, and the plaintiff refused to accept said offer, and I disclaim all right, title and interest, legal and equitable, in any of the said lands and premises, and I claim to be hence dismissed with my costs of suit, incurred subsequently to said offer."

The plaintiff has brought the cause to a hearing, upon bill and answer as against the defendant Ashdown and *pro confesso* against the defendant Moore. The only question raised is as to the right of the defendant Ashdown to be paid his costs incurred since the offer mentioned.

The rules as to costs in cases of disclaimer are thus laid down by Lord Romilly, M. R., in *Ford* v. *Lord Chesterfield*, 16 Beav. 520: "In my opinion the effect of all the later authorities is this:—First, that in suits for foreclosure or redemption of mortgages, where a defendant disclaims in such a manner as to show that he never had and never claimed an interest, at or after the filing of the bill, then he is entitled to his costs. Secondly, if a defendant having an interest shows that he disclaimed or offered to disclaim before the institution of the suit, there also he is entitled to his costs. Thirdly, that where a defendant having an interest allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, in that case he is not entitled to his costs."

These rules were approved in *Bellamy* v. *Brickenden* 4 K. & J. 670, where V. C. Sir W. Page Wood said, "It is quite clear that in suits for foreclosure or redemption of mortgages, where a defendant after the filing of the bill, or after he is made a defendant, disclaims in such a manner as to show that he never had and never claimed an interest he is entitled to his costs."

And in *Tipping* v. *Power*, 1 Ha. 409, V. C. Sir Jas. Wigram put it thus, "Lord Redesdale says that if the defendant disclaims the court will in general, dismiss the bill against him with costs; and that is true in this sense, if his disclaimer shows that he never had any interest, or having had any that he parted with it, or disclaimed or offered to disclaim before the bill was filed, he would be entitled to his costs because he was improperly made a party. But if he was interested at the time of the filing of the bill, and no special circumstance occurs in the case, the mere fact of his saying on the record in effect that he finds his interest

worth nothing and therefore repudiates it, does not prove that he was improperly made a defendant, and therefore does not bring him within the scope of the general rule to which Lord Redesdale adverts."

In *Maxwell* v. *Wightwick* L. R. 3 Eq. 210, V. C. Sir W. Page Wood said, "When a person by any solemn instrument or by the act of law becomes invested with an estate, the plaintiff is not obliged to make any application to him in order to ascertain whether he is entitled to an interest or not, but he is entitled to a disclaimer from him if he claims no interest in the subject matter of the suit." He expresses some what similar views in *Ridgway* v. *Kynnersley* 2 H. & M. 566.

Here it appears that the defendant Ashdown was properly made a party; and he seeks to bring himself within an addition to or implied exception from the third of the rules laid down in *Ford* v. *Lord Chesterfield*, and would, in effect, set up the offer to "quit claim," as a "special circumstance" under Sir Jas. Wigram's rule in *Tipping* v. *Power*.

Exactly what Lord Romilly meant by a defendant disclaiming or offering to disclaim before putting in his answer or disclaimer is not very clear to me. It may be that he intended to use the word disclaimer in its technical sense, or he may have intended to include a disclaimer by deed or otherwise. Nor does he state what is to be the effect of a defendant disclaiming or offering to disclaim before putting in his answer or disclaimer. My impression is that he might have held that if, either before or after the delivery of interrogatories, the defendant should disclaim, or he having offered to do so the plaintiff should refuse to accept a disclaimer, and if, there being no special circumstances calling for an answer, one should be insisted upon instead of a mere disclaimer the defendant should be allowed his costs. I do not fancy that he intended to imply more than this, and I think that both he and Sir W. Page Wood intended that there should be a disclaimer placed upon the record. Neither of them however, clearly states this, and neither do they nor Sir James Wigram give any indication of the nature of the special circumstance that would vary the general rule.

Counsel for the defendant Ashdown relies upon *Ward* v. *Shakeshaft* 1 Dr. & Sm. 269, and *Waring* v. *Hubbs* 12 Gr. 227.

In the latter case the defendant offered a release of his interest before the suit was begun, and he had thus brought himself within the second of Lord Romilly's rules, and was allowed his costs. In the former of these cases a defendant, after suit begun and before appearance, notified the plaintiff that he disclaimed all interest in the subject matter of the suit and was willing that the bill should be dismissed against him without costs. This was refused and the defendant answered stating that he did not claim *and never had claimed* any interest in the subject matter of the suit, or the mortgaged premises and had always been ready to disclaim, and asked his costs, which were allowed to him. The distinction between that case and the present is, however, well exemplified by the case of *Talbot* v. *Kemshead*, 4 K. & J. 93. The bill was filed to establish an equitable mortgage of lands from the defendant Walker to the plaintiff, and it alleged that three other defendants claimed an interest in the premises under an alleged conveyance from the defendant Walker to them. After the bill was filed these defendants notified the plaintiff's solicitors that since the filing of the bill Walker had revoked the conveyance and that they did not claim any interest in the premises. "But," the reporter says, "they did not go on to offer to have the bill dismissed against them without costs."

V. C. Sir Page Wood in that case said, "Where a defendant merely says by his answer, 'I do now disclaim,' not 'I never did claim,' which is the true form of disclaimer, but 'Now, after bill filed, I disclaim,' in all such cases the court has said that if he seeks to have the bill dismissed as against him he must bear his own costs. And the rule must clearly be the same whether he says this by his answer, as in the cases cited, or as here by notice given to the plaintiff after bill filed." He held that these defendants should have offered, with their notice to allow the bill to be dismissed as against them without costs, and that it was not incumbent on the plaintiff to ask this when the notice was given, and he refused the defendants their costs.

In *Howkins* v. *Bennett*, 2 H. & M. 567, n, certain defendants, who were registered judgment creditors of the mortgagor, had assigned the benefit of their judgments before the institution of the suit, but no suggestion of the assignment had been entered on the register and the plaintiffs had no notice of it. It was held that the plaintiffs were right in making these defendants

parties; but, upon an affidavit of the defendant's solicitor that before answer, he had written the plaintiff's solicitor and explained fully the position in which the defendants were placed, and had offered to allow their names to be struck out of the bill, and that the plaintiff's solicitor had required an answer, the bill was dismissed as against these defendants with costs incurred subsequently to the date of the letter of the solicitor.

*Dillon* v. *Ashwin*, 10 Jur. N. S. 119, is another instance of a disclaiming defendant properly made a party being allowed his costs when he had before answer notified the plaintiff that he had parted with his interest and offered to consent to a dismissal as against him without costs, or to his name being struck out.

It appears to me, then, that the defendant Ashdown should have done more than offer a release; he should have offered also to consent to a dismissal without costs. If the release had been given the plaintiff could not safely have dismissed the bill as against him without such a consent.

In *Coote* v. *Macbeth*, 1 Ont. Ch. Ch. 200, where the plaintiff took out an order dismissing his own bill, but did not provide in it for the costs of three defendants who had been served but had not answered, his order was set aside, V. C. Esten thinking that he could not say that those defendants had incurred no costs for they might have instructed solicitors.

In *Bissett* v. *Strachan*, 8 P. R. 211, where the plaintiff had dismissed his own bill with costs before service, and it was shown that no answer had been drawn up, but that the defendant had instructed his solicitor, the defendant was allowed to tax costs of instructions and of taxation of his bill.

It appears to me that these two cases were properly decided, and I think that if the plaintiff had dismissed his bill without providing for the costs of the defendant Ashdown, the order might have been set aside, and if he took an order dismissing the bill as against Ashdown with costs he would be exposed to the risk of having some costs taxed against him.

Ashdown was properly made a party, and the plaintiff has merely proceeded regularly with his suit. These authorities show that the plaintiff was not obliged to step out of the regular path and ask the defendant to consent to a dismissal without costs, or to have Ashdown's name struck out, but that he was entitled, under

the circumstances, to continue his proceedings unless some such offer should be made by the defendant.

I think that the usual decree should be made for redemption or sale of the lands in question, for payment by Moore of the mortgage moneys and for delivery of possession, without providing for payment of any costs of the defendant Ashdown. Under *Perkin* v. *Stafford*, 10 Sim. 562, it is not even necessary that the bill should be dismissed as against the defendant Ashdown.

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## WRIGHT v. THE CITY OF WINNIPEG.

[IN EQUITY—FULL COURT.]

*Expropriation.—Damages in lieu of specific performance.—Presumption against holder of unproduced document.—Dedication.*

Defendants took proceedings to expropriate lands of the plaintiff. The commissioners awarded to the plaintiff $21,455, but the award was not confirmed by a judge, as required by the defendant's charter.

*Held* (overruling DUBUC, J.), that the award could not be enforced.

After the award the defendants agreed to give to the plaintiff, in exchange for the same land, two other pieces of land and $12,000. The plaintiff thereupon removed certain buildings, the defendants used the land for a street, and the defendants paid the $12,000, but refused to convey the two parcels of land, alleging that they formed portions of streets.

*Held* (affirming DUBUC, J.), 1. That a bill might be filed to recover damages for the breach of the contract, the deed from the plaintiff to the defendant having erroneously acknowledged receipt of the purchase money.

2. That the damages might fairly be placed at the difference between the $21,455 and the $12,000, without proof of the locality of the two parcels of land or their value, the defendants having had in their custody the documents by which the locality could have been proved, and not having produced them, but alleged their loss.

Filing in the registry office a plan of property shewing a street or lane does not, in the absence of user by the public, amount to a dedication.

The only fact which ought to be noted, in addition to those appearing in the former report of this case (3 Man. L. R. 349) is, with reference to the alleged dedication. There was in evidence a conveyance made by W. R. Ross to Hussack, dated 5th April, 1877, of a lot shewn upon the plan which he had registered. This lot was not, however, upon William Street, but upon Main Street, which crossed the foot of William Street, and was the principal street in the city.

*J. F. Bain* and *W. R. Mulock* for plaintiff.

*J. S. Ewart, Q.C.*, and *D. Glass* for defendants.

(*1st December, 1886.*)

TAYLOR, J., delivered the judgment of the Court:(*a*)—

The plaintiff files his bill alleging that he owned certain land in the City of Winnipeg; that the corporation, desirous of widening William Street, took proceedings under the provisions of the city charter to expropriate a part of his property for that purpose; that commissioners or arbitrators were appointed in manner provided for by the charter, who made a report or award finding $21,455 as the proper sum to be paid him for the part of his property proposed to be taken, together with a sum of $300 as an allowance for the cutting down of a part of one of his buildings, and for the payment of $4,000 to a tenant of his for his interest in part of the property. The bill then goes on to allege that before the necessary steps were taken for the confirmation of this report or award, the corporation opened up negotiations with him for a modification of the terms upon which they could acquire the property, which ended in an agreement being come to that he should convey to the corporation the land proposed to be taken, that the corporation should pay to him the sum of $12,000, to the tenant $4,000, and convey to the plaintiff two parcels of land, the first of which is described in the bill by metes and bounds, and the second generally as the triangular piece of land lying in a particular direction with reference to the first described piece, and should also pay all costs incurred on the expropriation proceedings. The bill

Present: Wallbridge, C. J., Dubuc, Taylor, JJ.

further alleges that the plaintiff conveyed to the corporation the land to be conveyed by him, that they took possession of it, and it is now used and enjoyed by the citizens as a street or thoroughfare. The bill then goes on to allege that the corporation have refused to pay him the sum of $9,755, or to give him a good title to the two parcels of land. It then submits that should the corporation not carry out the terms of settlement they should pay the plaintiff the sum of $9,755, with interest, being the balance remaining unpaid to him under the award and report. The prayer of the bill is that the corporation may be ordered to give him a good title to the two parcels of land, or to pay him the sum of $9,755 with interest.

The defendants by their answer deny the plaintiff's ownership of the lands in question; they admit that certain expropriation proceedings were taken, but not that they were of such a nature as to be binding upon them. They then allege that being wrongly informed as to the plaintiff's title they paid him the $12,000 and $300, the $4,000 to the tenant, and a large amount of costs, and the plaintiff executed a deed to them, but that the lands were in fact part of a public highway, William Street, and that they got no value for the money they paid, and they never accepted the deed; also, that they never agreed to give the plaintiff a good title to the lands which he claims should be conveyed to him; that they never owned the lands, and cannot now convey them to the plaintiff. By way of cross relief they pray that the plaintiff may be ordered to pay them the sums of $12,000, $4,000 and $300, and the costs paid by the defendants, with interest on all these sums.

The plaintiff cannot, in my opinion, rely upon the expropriation proceedings or the report or award made by the commissioners. That award never was confirmed in the manner provided for by the city charter, and was, in fact, superseded by the agreement come to for payment of $12,000, and the conveyance of the two parcels of land. Upon that, it seems to me the plaintiff must stand or fall.

The defendants' contention is that the land proposed to be taken is, they now find, a public street, and a dedication of it to the public by one Ross is set up. That contention, I think, fails; there was no such dealing with the land by Ross as

would amount to a dedication. The mere filing of a plan showing a street or lane does not, in the absence of user by the public, seem to amount to a dedication. Then as to the possession and occupation of the property, the evidence is conflicting. The weight of evidence, however, is in favor of the possession by Bannatyne and the plaintiff. It may be that the possession was not such as would have given a title under the Manitoba Act, according to the judgment of my brother Killam in *Hanover* v. *Schultz*. It was, however, possession with the sanction and under the license of the Hudson's Bay Company. The plaintiff was undoubtedly in possession when the defendants began to move in the direction of the widening of the street, and had been so for many years. Even if it should be found that the plaintiff had not an absolute title, he had possession, and the right of the defendants to the land as being part of a public highway is by no means so clear that they may not have been willing, and that it may not have been to their advantage, to pay for getting possession, and a conveyance of such title as the plaintiff had. They have got all they bargained for, and after the evidence as to the deed executed by the plaintiff being in the hands of the city clerk, sent by him by a messenger of the city to be registered, it is idle for the defendants to say that they never accepted that deed. The plaintiff conveyed the land and removed the part of his buildings which he was to remove.

The case seems to me, not one of the defendants in ignorance of their rights contracting to purchase and paying for what they have since discovered to be their own property, so much as a settlement respecting property about the ownership of which there might be a question.

The plaintiff seems entitled to have the agreement he made specifically performed. But the defendants say they cannot perform it, for they do not own the land which they agreed to convey to him, and they cannot acquire it, for the purpose of conveying, for it also, they say, forms part of a public highway. If they cannot, then the plaintiff is entitled to damages or compensation. Can he have that in this suit? The Court cannot decree specific performance, for it is conceded by both parties that the defendants cannot give a title. If specific performance cannot be decreed, the Court cannot award damages under the provisions of the Queen's Bench Act, 1885, s. 9, s-s. 14, for that

is no wider than Lord Cairns' Act in England. Properly, I suppose the plaintiff's remedy should be by an action at law for damages. I do not think the 49 Vic. c. 14, s. 1, will help him in this suit, for it was begun before that Act was passed, and the section cannot be construed as having a retrospective effect. I incline to think, however, that he has, in a case like the present, a good ground for bringing his suit on the equity side of the court. Were he to sue on the common law side, he might be met by his own deed, which acknowledges receipt in full of the consideration for it.

The bill as it stands, prays in the alternative for a specific performance of the agreement, or a payment of the $9,755. It is true that is spoken of as the balance remaining unpaid under the award, while properly it should be claimed as compensation for the defendants' failure to give him the two parcels of land. To permit an amendment now, such as will put this bill in that shape, could not in any way prejudice the defendants, and the plaintiff should have leave to so amend.

The question remains—What would be the proper amount of compensation? Because the plaintiff and defendants agreed that instead of proceeding with the expropriation award, which gave the plaintiff $21,755, the defendants should pay $12,000, and convey certain lands, it does not by any means follow that the lands were worth the difference, $9,755. What the plaintiff would properly be entitled to by way of compensation would be the value of these lands which he has not got.

It is argued that there is nothing before the Court by which this can be determined, for the lands are not certainly described; as to part, indeed, it is said, that from the description given the exact locality even cannot be ascertained. But whose fault is this? The defendants have in their possession what would place the exact description and location of the parcels of land beyond a peradventure.

The resolution of 5th February, 1883, passed by the council, plainly refers to some plan or sketch of the property, because the piece to be conveyed by the plaintiff is spoken of as the piece of land set forth on the plan of said property marked red, and the piece to be conveyed to plaintiff by defendants as marked blue. Then the resolution of 27th March, 1883, which is for carrying

out the agreement come to, speaks of proceedings being taken "to vest in the said A. Wright the land described in the hereto-annexed paper-writing." Now, although copies of these resolutions are produced, neither the sketch nor "the annexed paper-writing" is produced. Singularly, both are said to be lost. Under such circumstances, may not the value of the land not conveyed be very fairly put down as equal to the remainder of the amount awarded. The defendants cannot, when they fail to produce the documents which would enable the Court to direct an enquiry, and which might justify a reduction in the amount, consider themselves hardly treated at such value being put upon the lands.

The rehearing should be dismissed and the decree of my brother Dubuc affirmed with costs.

*Rehearing dismissed and decree affirmed with costs.*

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## McINTOSH v. NICKEL.

*Replevin—Action on bond.—Pleading.*

To an action upon a replevin bond for not proceeding with effect, a plea, that the replevin action is still pending, is sufficient.

And a replication to such a plea, disclosing delay is bad, unless the delay itself has terminated the action.

The condition in a replevin bond to prosecute with effect, is separate and distinct from the condition to prosecute without delay.

*T. D. Cumberland*, for plaintiff.

*J. H. D. Munson*, for defendant.

[*16th December, 1886.*]

KILLAM, J.—This action is brought upon a replevin bond in the statutory form, the breach alleged in the declaration being

that the plaintiff in replevin did not prosecute his suit with effect and without delay.

The defendants' fourth plea is pleaded only to so much of the declaration as alleges that Nickel, the plaintiff in replevin, did not prosecute his suit with effect, and alleges that the replevin suit was "at the commencement of this action and still is pending and undetermined."

The replication demurred to is pleaded to this plea, and in substance alleges that the writ of replevin was issued on the 4th day of October, 1883, the declaration filed on the 6th February, 1884, the pleas on 12th February, 1884, and issue joined on the 20th February, 1884, without any demand for a jury, that notice of trial was given by Nickel for the Assizes held on the 4th March, 1884, and the record then entered for trial, but that Nickel did not proceed to trial, but during the Assizes, and more than a year and nine months before the commencement of this suit, Nickel withdrew his record and prevented the trial of the replevin suit at that sitting and that Nickel has not since given any other notice of trial or attempted to take any other step or proceeding whatever in or in connection with the suit, though he might have done so, and no step has in fact been taken in that suit since the withdrawal of the record, and that the defendant in the replevin suit in no way prevented Nickel from proceeding, or delayed him, and there was no stay of proceedings preventing or excusing Nickel from proceeding to trial.

It is contended on behalf of the plaintiff, both that this replication is a sufficient answer to the plea of pendency of the replevin action, and that the plea itself is no answer to the part of the declaration to which it is pleaded.

It appears to me that the case of *Brackenbury* v. *Pell*, 12 East 585, is a direct authority that while the replevin action is pending there is no breach of the condition to prosecute with effect, and that the plea is a sufficient answer to the portion of the declaration to which it is pleaded. I think also that the same case shows that a replication to such a plea must show the replevin action to be terminated, and that this replication does not show it.

This view of *Brackenbury* v. *Pell* was clearly taken by the Court of Queen's Bench of Ontario, in *Welsh* v. *O'Brien* 28 U. C. Q. B. 405.

For the contrary view there is a very strong expression of opinion by Tindal C. J. in the course of the argument in *Rider* v. *Edwards*, 3 M. & G. 207, but though Erskine J. in his judgment in that case appears to imply that he shared the opinion thus expressed by Tindal C. J., yet the learned chief justice and the other members of the court, who gave separate judgments, did not base their decision upon that ground, and the point appears not to have been really involved in the question determined. Besides Tindal C. J. gave as authority for the opinion *Harrison* v. *Wardle*, 5 B. & Ad. 146, 2 Nev. & M. 703. This latter case itself did not involve a decision of the question and did not turn upon it; though during the argument some remarks were made upon the point by Parke J. In 5 B. & Ad. 153 he is reported as having said, "where the breach alleged is that the plaintiff in replevin did not prosecute his suit with effect, it is a sufficient answer to show that the suit is still pending; but it is no answer where the breach also is, as in this case, that he did not prosecute without delay". In 2 Nev. & M. 706, he is, however, reported as having said, "The plaintiff is bound to prosecute with effect. In order to do this he must do all that is necessary to bring the suit to a successful termination. He must take steps to compel an appearance. There are many authorities which show that the plaintiff is bound, if the defendant do not appear, to sue out a *pone per vadios*, *distringas*, and *alias* and *pluries distringas*, Tidd's Pr. 417, 9th Ed". I have examined all the cases cited in Tidd at the reference given to which I have had access, and I have found none which in any way touches the contention that a failure by the plaintiff to take one of these steps is a breach of the condition to prosecute with effect. I can, however, conceive that the failure would be so if the effect of it were that the suit was out of court, and I fancy that it was this idea that Parke J. had in view in the remarks cited. There may be such an explanation as this which would particularly harmonize the two reports. At any rate it is not made clear that Parke J. held a view opposed to that which I take to be determined by *Brackenbury* v. *Pell*, and some of the remarks of Denman C. J. in delivering judgment in *Harrison* v. *Wardle* seem to favor that

view, though, as the breach in question was in not prosecuting without delay, as well as for not prosecuting with effect, the point was, as I have already said, not strictly involved.

*Morris* v. *Mathews*, 2 Q. B. 293, cited for the plaintiff, determines nothing upon this point. It shows only that the defendant's attorney or counsel thought it safe to show that the plaintiff in replevin had proceeded with diligence until death, and the case decides that an abatement by death did not work a breach of the condition to prosecute with effect.

The plaintiff's counsel refers to *Axford* v. *Perrett*, 4 Bing. 586, as determining that the facts set up on this replication really show a termination of the replevin suit. There the breach was for not prosecuting with effect and without delay, and it was shown at the trial that for more than two years previous to the action on the bond the defendant had taken no step in the replevin action, but that shortly before the action on the bond he had applied to the county clerk to enter continuances and proceed with the cause which was refused, the clerk alleging that, after three courts had elapsed without any proceedings being had, the cause was out of court.

A verdict was entered for the plaintiff, the learned judge at the trial being of opinion that the defendant had not proceeded with the replevin suit without delay. On motion to set aside this verdict the court held that "after the time which had elapsed without any proceedings, the replevin cause, by analogy to the practice of the higher tribunals was out of court, and that, at all events, the defendant had not prosecuted his suit without delay."

What was referred to in the practice of the higher tribunals or what was the stage at which the cause had arrived in the inferior court does not appear. I cannot take this as an authority that the replevin action now in question is out of court under the circumstances alleged in the replication. Either party, upon giving the proper notice can have it proceeded with. It may yet, so far as I know, be proceeded with and, perhaps, determined in favor of the plaintiff in the replevin action. The latter contingency may be very unlikely, in view of his evident want of faith in his right of action, but still it is impossible upon this demurrer to say that it may not happen.

I might also refer to the cases of *Balsley* v. *Hoffman* 13 Penn St. 602 and *Perreau* v. *Bevan* 5 B. & C. 300 and the very learned argument of Mr. Gray, counsel for defendant in *Jackson* v. *Hanson* 8 M. & W. 478 as supporting the view which I take. Authorities upon the question are very meagre, probably from the infrequency of bonds in which the condition does not extend to a prosecution without delay, and *Brackenbury* v. *Pell* seems, indeed, the only case decisively in point.

In my opinion it is a sufficient answer to the allegation of a breach of the condition to prosecute with effect to show that the replevin action is still pending, and this seems to me to determine all questions raised on this demurrer. If this be so, mere delay in proceeding, as long as the delay does not put the parties out of court, is not a breach of such a condition, and the condition to prosecute with effect is separate and distinct from the condition to prosecute without delay, just as in *Perreau* v. *Bevan* and many other cases it has been distinctly laid down that the condition to prosecute is entirely distinct from that to return the goods if a return be adjudged.

It must follow, I think, that the defendant could plead separately to the breach of the condition to prosecute with effect; and that the replication, which shows the action to be still pending, is no answer to the plea.

*Demurrer allowed.*

## MACDONALD v. McARTHUR.

*Discovery as to accounts before decree.*

In a partnership bill there were some general charges of misapplication and misappropriation of moneys. The right to a decree for account was conceded but the defendants refused, upon examination, to answer questions based upon the general charges.

*Held.* 1. That the defendants were bound to answer, even though the questions related to matters that would be referred to the master and not determined at the hearing.

(*Elmer* v. *Creasy*, L. R. 9 Ch. 69, approved).

2. Although the charges might not have been sufficiently specific upon demurrer, yet the defendants having answered, they were precluded from refusing to answer fully.

3. Some of the questions were directed to the defendants dealings with the "Pruden Farm." The defendants swore that this farm was not an asset of the firm, but they were nevertheless ordered to give a full discovery respecting the property.

(*Monkman* v. *Robinson*, 3 Man. L. R. 640, distinguished).

*H. M. Howell, Q. C.*, and *T. S. Kennedy* for plaintiffs.

*J. S. Ewart, Q. C.*, and *J. Denovan* for defendants.

[*11th of October, 1886.*]

KILLAM, J.—It appears to me that *Elmer* v. *Creasy* L. R. 9 Ch. 69, is decisive against the defendant's contention that he is not obliged before the hearing to answer questions relating to matters that would be referred to the master and not determined at the hearing. Lord Chancellor Selborne in that case considered and reviewed the practice very fully, and after examination of a large number of other authorities I am prepared not only to submit to, but also to concur in his view. The very admission that the plaintiffs are entitled to a decree for an account distinguishes this case entirely from *Lockett* v. *Lockett*, L. R. 4 Ch. 340, *Merchants Bank* v. *Tisdale*, 6 Pr. R. 51, and other similar cases, from which it would appear that the court *may* relieve the defendant from answering as to accounts under some circumstances where the right to an account is denied, but not even that

in all cases of denial of the right the court will so interfere. Whether the hearing would be postponed to allow the continuance of such an examination is an entirely different question.

Upon the other point raised, an objection to certain charges in the bill not being sufficiently specific, I think that the defendant, by having answered them partially, is precluded from refusing full discovery.

In *Bleckley* v. *Rymer*, 4 Drew. 251, V. C. Sir Richard Kindersley distinctly lays down the principle in these words: "If the matter as to which discovery is sought *may* be directly or indirectly material for arriving at a decision the defendant must give the discovery. If the defendant means to say that, on the face of the bill the discovery is immaterial, he should have demurred. If his case is that the bill omits a material fact and that fact shows the discovery to be immaterial he should have pleaded."

I think that the defendant cannot now be permitted to refuse the discovery on the ground that the bill should be held to be in part demurrable.

*Dickson* v. *Covert*, 2 Ch. Ch. 342, is not applicable, as there are charges in the bill on which the questions are based, the only objection being that they are too generally framed.

It is certainly not necessary for a plaintiff to make a distinct allegation of the existence of every subordinate fact which would go to prove the charges in his bill. I have not considered whether the charges are sufficiently specific to have been found good upon demurrer, but for the purposes of this motion I consider them to be sufficient, and I think the defendants having to some extent answered all, and having demurred to no part of the bill, that the plaintiffs are entitled to discovery of any facts that *may* be material under them without alleging what would be merely evidence of the truth of the allegations which are made.

Questions arising in this way are not to be governed by quite the same principles as I considered in *Monkman* v. *Robinson*, to be applicable to examinations after judgment for the purposes of discovery of assets of the judgment debtor. There the attempt was to examine the debtor as to the affairs of a third party with the mere hope of establishing a personal interest of the debtor in such affairs, and I considered that the questions ought to be such

as to show themselves to be in fact material to the objects of the inquiry, while in *Bleckley* v. *Rymer*, 4 Drew. 251, *Forbes* v. *Tanner*, 9 Jur. N. S. 455, *Hambrook* v. *Smith*, 17 Sim. 209, and many other cases it is clearly shown that it is necessary only that the discovery may be material for arriving at a decision.

It appears to me that such is the case with all the questions here objected to. It is true that it is objected that the Pruden farm is not an asset of the firm and the account not strictly a firm account. I do not think it necessary that it should first be established that every single piece of property in that position is the firm's.

*Hambrook* v. *Smith*, 17 Sim. 269, *Unsworth* v. *Woodcock*, 3 Mad. 432, *Chichester* v. *Donegal*, L. R. 4 Ch. 416, and many other cases show that discovery as to accounts may be allowed before hearing, even where a right to the accounts is denied, and what does in fact appear as to this account is, in my opinion, sufficient to show that the plaintiffs should have full discovery respecting the property and the dealings with it. *Beynon* v. *Morris*, 10 L. T. N. S. 710, supports this view as to the exact nature of the discovery sought.

I think the plaintiffs also entitled to full explanations of the Scott account.

The usual order should be made for the defendant Dexter to attend for further examination at his own expense, the costs of the application to be costs in the cause to the plaintiffs in any event.

## WOLF v. TAIT.

[IN APPEAL.]

*Commission Agent—Variation of Terms—Amount of Commission.*

The plaintiff was employed by the defendant to sell for him certain lands upon certain terms. He found a man willing to purchase upon less advantageous terms.

*Held*, That the defendant, having accepted the purchaser and ratified the variation of the terms, was liable for the plaintiff's commission.

The grounds upon which the finding of a judge upon a question of fact will be reversed, discussed.

An agent is usually entitled to commission upon the whole amount of the purchase money whether paid in cash or secured by mortgage; but where the owner himself conducts a part of the negotiations a verdict calculated upon the cash payment was not disturbed.

*J. S. Ewart, Q.C.*, and *C. P. Wilson* shewed cause. Even if defendant placed his price at $250 per acre, yet defendant accepted the purchaser and made a bargain with him, and is liable upon a *quantum meruit*. *Wycott* v. *Campbell*, 31 U.C.Q.B., 584; *Green* v. *Bartlett*, 14 C. B. N. S. 681; *Bayley* v. *Chadwick*, 36 L.T.N. S. 740; *Wilkinson* v. *Alston*, 41 L. T. N. S. 394.

*H. M. Howell, Q.C.*, and *J. J. Curran*. If there was any agreement it was that the plaintiff should find a purchaser at $250 per acre. The land having been sold at $210 per acre, the plaintiff is entitled to nothing: *Fraser* v. *Wyckoff*, 63 N. Y. 448; *Wylie* v. *Marine National Bank*, 61 N. Y., 416; *Sibbald* v. *The Bethlehem Iron Co.*, 83 N. Y. 378, 381, 3.

[*10th January, 1887.*]

KILLAM, J., delivered the judgment of the Court. (*a*)

This action is brought to recover commission on a sale of lands claimed by the plaintiff to have been effected through his introduction of the purchaser to the defendant. Shortly the

(*a*) Present Dubuc, Taylor, Killam, JJ.

plaintiff claims that the defendant authorized him, as a real estate agent, to find a purchaser for the lands at $250 per acre, there being 361 acres; that he spoke of the land to one Calloway and introduced Calloway to the defendant as owner, took part in one conversation between the defendant and Calloway respecting the sale, and otherwise recommended the purchase to Calloway; that after considerable negotiation between Calloway and the defendant, conducted largely apart from the plaintiff, the defendant himself finally effected a sale to Calloway at $210 per acre, the plaintiff not being present; and that the transaction was completed by the payment of $40,200 and the giving of a mortgage for $35,610.

The plaintiff's evidence as to the introduction of Calloway to Tait and the plaintiff's participation in the preliminary negotiations is corroborated by Calloway, and to a slight extent by one Walter Moore, bookkeeper of the plaintiff.

On the other hand, the defendant positively contradicts the plaintiff's statements of his having employed the plaintiff to find a purchaser for the land, and of the plaintiff having introduced Calloway to him or being instrumental in procuring the sale to Calloway. The defendant's evidence was corroborated to some slight extent by that of Mr. Walker, prothonotary of the Court, who was, as the defendant and himself both say, employed to find a purchaser for the land, and who claimed to have first introduced to Calloway the subject of the purchase and to have brought Calloway and the defendant into negotiation with each other. Walker gives evidence of some circumstances apparently inconsistent with the evidence of the plaintiff and Calloway.

The case was tried before the Chief Justice without a jury when he entered a verdict for the plaintiff for $1,005, being 2½ per cent. on the portion of the purchase money paid, $40,200, reserving to the "plaintiff leave to move to increase the verdict to $1,895.25, if the Court should think him entitled to commission on the whole sale, and to the defendant leave to move to enter verdict for him if the Court think there is no cause of action shown in the evidence."

The defendant obtained a rule *nisi* to set aside the verdict and enter a verdict for the defendant, on the ground that "the verdict was against law evidence and the weight of evidence, and pursuant to leave reserved." The plaintiff also obtained a rule

*nisi* to increase the amount of damages to $2,144.80 or such other sum as the Court should think proper, the excess over $1,895.25 being for interest. Both rules were argued in Trinity term last.

A question of law and two questions of fact are raised upon the former of these rules.

It is contended by the defendant's counsel that even if Wolf's account is correct he is entitled to no commission, as he did not find a purchaser at $250 per acre, the price at which the property was placed in his hands.

It will be convenient first to examine into the law upon the subject.

In *Mansell* v. *Clements*, L.R. 9 C.P. 139, it appeared that the plaintiffs were employed by the defendant to find a purchaser for his house, held as leasehold property, the terms being that the plaintiffs were to have 5 per cent. commission on one year's rent, and 2½ per cent. on the amount received as premium; and if the house were disposed of without the plaintiff's intervention, they were to have one guinea for their trouble. One Upton looking for a house saw a notice upon the defendant's and called at the door when he was told by a servant that a wedding party was going on there, and he left saying that he would call again. Afterward he went to the plaintiff's office and inquired there for houses when he was given cards for several, the defendant's being one. He looked through the house and, after some negotiation with the defendant, effected a purchase at a premium over the rent. Upton stated in his evidence that when he left the house on the first occasion he abandoned all notion of purchasing, but when he learned from the plaintiffs what was asked he went back. It was held that there was sufficient evidence to warrant the jury in finding that the sale was effected through the plaintiffs.

In *Cunard* v. *Van Oppen*, 1 F. & F. 716, an action by brokers for commission on the sale of a ship, it appeared that different brokers had been employed who, unknown to each other, had negotiated with the party who made the purchase. Several brokers testified that under such circumstances the one who first introduced the purchaser to the seller was entitled to receive his commission. Erle, C. J., said, in charging the jury, "No doubt the law is clear that the broker who first introduces the pur-

chaser although the negotiation is completed between the principals, is entitled to commission. * * * Was the purchaser found through their introduction? If so, find for the plaintiff."

In *Green* v. *Bartlett*, 10 Jur N. S. 78, there was an agreement between the plaintiff and the defendant by which the defendant instructed the plaintiff to proceed to a sale by public auction or otherwise of the whole island of Herm, etc., the defendant to pay a commission of £2. 10 s. per cent. on the price obtained. The plaintiff put up the property at auction, but got no bids which he could accept, and no sale was thus effected. The plaintiff then wrote the defendant that he could obtain a loan on the property and would withdraw it from sale at present. A few days after the defendant entered into treaty with a Mr. Hyde for sale of the property to him. Hyde had seen the plaintiff's posters advertising the property for sale and was present at the auction, and when he found it not sold he communicated directly with the defendant who arranged a sale with him without the plaintiff's intervention. A verdict was entered for the plaintiff for the full commission. On an application to set this aside, Erle, C. J., said, "I am of opinion that this rule should be discharged. The agreement states that Green was to have £2. 10 s. per cent. commission if the estate were sold by him. The estate was not sold by him strictly, but after he had used his best endeavor to effect a sale and failed, then Bartlett and the purchaser came to an understanding on the matter. * * * It has always been held that the agent is entitled if he has contributed to bring about the sale." And Williams, J., said, "Whether the sale was effected by the plaintiff was a question of fact, and I am of opinion that the sale was the direct consequence of the acts of the plaintiff."

In *Bray* v. *Chandler*, 18 C. B. 718, the plaintiff claimed from the defendant damages for breach of a contract to employ him for a certain time as agent for the defendant, and also commissions for letting certain houses for the defendant. On the latter claim the evidence was that the tenants were introduced by the plaintiff, but that the agreements for letting were negotiated by another agent. A verdict was obtained by the plaintiff on both claims, and while the amount of the verdict was reduced by the Court, pursuant to leave reserved, by striking out the damages

for breach of the contract to employ, it was allowed to stand for the full amount of the commissions.

In *Curtis* v. *Nixon*, 24 L. T. N. S. 708, Willes, J., said, "The effect of *Green* v. *Bartlett* upon a case of this kind," (an action for commissions for procuring tenants) "is merely to make the landlord liable when no agreement is made by the agent, but when the landlord makes an agreement with a person whom the agent introduced for that purpose." And Keating, J., said, "A house agent can claim only upon the rent of which his intervention has been the proximate cause."

Probably as good a statement of the law as can be found in the line of the cases just referred is that given by Field, J., in *Sibbald* v. *The Bethlehem Iron Co.*, 83 N. Y. 378. "The duty he" (the broker) "undertakes, the obligation he assumes as a condition of his right to demand commissions is to bring the buyer and seller to an agreement. * * * We do not mean that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement though absent when it is completed and taking no part in the arrangement of its final details. In *Lloyd* v. *Matthews* (51 N. Y. 132) the phrase used was that the broker was entitled to reward when the sale was effected through his agency as the procuring cause. And in *Lyon* v. *Mitchell* (36 N. Y. 237) the broad language is used that his efforts must have led to the negotiations which resulted in the purchase of the vessel. But in all the cases, under all and varying forms of expression, the fundamental and correct doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. * * * It follows as a necessary deduction from the established rule that the broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated he

gains no right to commissions. He loses the labor and effort which were staked upon success. And in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to his principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would never have met; he may have created impressions which under other and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation others might be left to some extent to avail themselves of the fruit of his labors. * * * Where no time for the continuance of the contract is fixed by its terms either party is at liberty to terminate it at will subject only to the ordinary requirements of good faith."

The latter part of this quotation brings me naturally to the consideration of some cases in which the agent has failed to recover as having been unsuccessful or having had his authority revoked; but I think it best first to refer to a few cases bearing upon the effect of the change in the price from that first prescribed by the defendant.

In *Rimmer* v. *Knowles*, 30 L. T. N. S. 496, it appeared that the defendant had instructed the plaintiff to sell an estate for him, agreeing to give him £50 if he obtained a purchaser at £2,000. The price he afterwards raised to £3,000. The plaintiff found for the defendant a builder who in his evidence said that he and the defendant agreed that he should purchase the land. He was to take it on interest at £3,000, paying £150 per year, and he signed a lease for 999 years accordingly which gave him occupation and an option to complete the purchase outright within twenty years. The Court of Queen's Bench held this to be substantially a purchase, and that the plaintiff was entitled to his commission.

In *Wycott* v. *Campbell*, 31 U. C. Q. B. 584, the defendant agreed with the plaintiff that if the plaintiff would find a purchaser for his farm at $6,000, not less than $1,000 to be paid down, he would pay the plaintiff $200. The plaintiff found a purchaser at $6,000, who would pay only $500 down, and the de-

fendant made the sale on those terms, and after concluding it he promised the plaintiff the $200. He was held entitled to recover the amount.

In *Keys* v. *Johnson*, 68 Penn. St. 42, the defendant had employed the plaintiff as a real estate broker to sell a farm at private sale, the price fixed being $16,000. One Hazleton called and saw the property in the plaintiff's list, and the plaintiff described it to him. Hazleton wished to exchange city property for it, but the plaintiff said the defendant would not exchange. Hazleton then got the defendant's address from the plaintiff and entered into direct negotiations which, without the plaintiff's intervention, resulted in a sale at $17,000, the defendant taking some property in Philadelphia in exchange. It was held that the plaintiff was entitled to a commission. Sharswood, J., there said, "Brokers are persons whose business it is to bring buyer and seller together. They need have nothing to do with the negotiation of the bargain. A broker becomes entitled to his commissions whenever he procures for his principal a party with whom he is satisfied, and who actually contracts for the purchase of the property at a price acceptable to the owner. He must establish his employment as broker, either by previous authority or by the acceptance of his agency and the adoption of his acts, and also must prove that his agency was the procuring cause of the sale; and when being duly authorized to sell property at private sale he has commenced a negotiation with a purchaser the owner cannot, while such negotiation is pending, take it into his own hands and complete it either at or below the price first limited and then refuse to pay the commission. * * * If the broker procures a person with whom a bargain is made upon any terms he is entitled to his commission unless there is something special in the contract of employment or the circumstances of the case to preclude him."

In *Toppin* v. *Healey*, 11 W. R. 466, the defendant had employed the plaintiff to negotiate a loan for him, the plaintiff to be paid a commission if he obtained the loan, but none if he he did not. Before the plaintiff had done anything in the matter the defendant wrote to him varying the terms on which he would accept the loan. The plaintiff tried to get the loan on the new terms but failed, and he then procured an offer on the original terms which the defendant would not accept. It was

held that he could recover nothing, for the defendant could revoke the authority at any time being liable only for breach of the agreement, but the plaintiff had evidently accepted the variation in the terms of his employment and could not afterward fall back upon the original terms and claim a commission for complying with them.

In *Simpson* v. *Lamb*, 17 C. B. 603, the defendant had employed the plaintiffs to sell an advowson at £15,000. The defendant after the lapse of a considerable time sold it himself without any intervention of or assistance from the plaintiffs. There was no evidence of any specific efforts of the plaintiffs to sell or of their having incurred any expense, and they were held entitled to nothing. Jervis, C. J., there said, "There may be also a qualified employment under which no payment shall be demandable if countermanded. In the present case I think the evidence shows that the employment was of that qualified character—like the case of the house agent or the ship broker—the plaintiffs undertaking the business upon an understanding that they were to have nothing if they did not sell the advowson, taking the chances of the large remuneration they would have received if they had succeeded in finding a purchaser. * * * If the case rested on the plaintiff's right to claim a compensation for work done and money paid, I am of opinion that there was no evidence of that here."

In *Tribe* v. *Taylor*, 1 C. P. D. 505, the defendant had employed the plaintiffs by letter in which he wrote, "In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital of which I shall accept I could pay you a commission of five per cent. on the amount in either case." The plaintiffs introduced one W. to the defendants, and W. advanced £10,000 of capital on which they paid the plaintiffs the agreed commission. Subsequently W. made a further advance to the defendants of £4,000 on which the plaintiffs claimed commission, though admitting that the advance of £4,000 was not contemplated when the other was made. It was held that they could not recover this.

These cases serve to illustrate very well the principles upon which the agent is or is not entitled to his commission.

In *Sibbald* v. *The Bethlehem Iron Co.*, the defendants, after the plaintiffs had made several unsuccessful efforts to effect a sale *bona fide*, revoked his authority, and afterwards they made through another agent a sale to the same parties with whom the plaintiff was negotiating, but the other agent procured the purchaser quite independently of the plaintiffs. In *Toppin* v. *Healey* there was a novation after which the plaintiff could recover only by fulfilling the conditions of the substituted contract. In *Simpson* v. *Lamb* the plaintiff in no way contributed to the sale. In *Tribe* v. *Taylor* the second transaction was one wholly independent of that which the plaintiff had procured, though it may have arisen from the plaintiff having negotiated the first transaction.

*Fraser* v. *Wyckoff*, 63 N. Y. 445; *Wiley* v. *The Marine National Bank*, 61 N. Y. 416; *Pearson* v. *Mason*, 120 Mass. 53; and *Moses* v. *Bierling*, 31 N. Y. 461, are relied on by the defendant's counsel. In *Fraser* v. *Wyckoff*, the ground of decision was that no sale at all had been effected to the party produced by the agent as purchaser, but only a partnership arrangement made with him. *Wiley* v. *The Marine National Bank* really turned upon questions of evidence. These cases as well as *Moses* v. *Bierling* and *Pearson* v. *Mason* are really only relied on for expressions such as that in *Fraser* v. *Wyckoff*, that "a broker to negotiate the sale of an estate is not entitled to his commission until he finds a purchaser ready and willing to complete a purchase on the terms prescribed by the seller and assented to by the broker." And the expressions are really quite correct, so far as they were applicable to the particular cases in which they were used. For general application, however, they require such a qualification as was added by Cockburn, C. J., in *Mason* v. *Clifton*, 3 F. & F. 901, where he said, "If A. employed B. to raise money for him and B. found the money for him, then A. could not, by merely declining to accept it, deprive B. of his commission. But if, on the other hand, B. is employed to procure money upon certain terms and does not procure it upon those terms, then A. will not be liable to him for commission. Nor can B. in such a case claim to recover a reasonable remuneration for trouble and labor for he has not done what he was employed to do. * * * He (A.) would not be liable if

the loans were not procured on the terms he authorized, but on other terms, unless afterwards ratified and accepted."

It is quite clear upon these authorities that the defendant might have refused to accept Calloway as a purchaser when produced by Wolf, as he would not purchase on the prescribed terms; and there would then have been no liability for commission. He might then have revoked the plaintiff's authority to sell and he might, subsequently, if acting quite independently and in good faith, have negotiated with Calloway directly or through another agent without rendering himself liable to the plaintiff. But upon the plaintiff's evidence he did not do this, he accepted the benefit of the plaintiff's efforts, and without revoking the plaintiff's authority he dealt with Calloway, so far as the plaintiff could know whatever may have been his own mental intention, as the party produced by the plaintiff under the authority given to the plaintiff. He would thus ratify and accept any variation in the terms of Wolf's employment, just as the agent in *Toppin* v. *Healey* accepted the variation in the terms prescribed by his employer.

It appears from the form of the terms in which the leave was reserved that it was intended to leave only this legal question and not any question of fact to the Court. The verdict was not entered as a matter of form with the intention that the Court should determine all questions, but the learned Chief Justice considered all questions carefully and gave his verdict as a jury upon the disputed questions of fact.

It is true that under the form of our statute we may in some sense review his decision upon the questions of fact, but it must be borne in mind that this court is not constituted a court of appeal from the verdict of a judge on issues of fact. As, in cases in which it appears plain that a jury has gone wholly upon an erroneous view, the verdict may be the more readily disturbed by the court than it could be if the reasons were unknown, so when a judge as distinctly given the reasons for his verdict it may happen, on the more careful and more discriminating examination that a case generally has upon further argument before this court, that the grounds are to be considered as so far untenable that the decision of the judge on a question of fact would be freely overruled. But the court is not to substitute its own opinion for that of the judge or the jury who gave the verdict; it must first

determine that the verdict cannot reasonably be supported, not merely that the judges of the court would themselves have been of a different opinion upon the same evidence. When the court can find that the verdict entered is clearly untenable then, and then only the court can proceed, in the case of the verdict being that of a judge, to exercise its own opinion and enter the verdict which the judge should have entered.

In this case, we find it utterly impossible to say that the verdict of the learned Chief Justice is wrong. From the memorandum prepared by him, it is clear that he apprehended fully the difficulty of deciding between the two entirely contradictory sets of testimony. It is true that he states that the defendant's appearance impressed him favorably, but he says that he cannot account for the contradictions. It is evident that the plaintiff did not impress him unfavorably. It might be possible that some of the other members of the court might have attached less importance than did the learned Chief Justice to the finding of the second map with Calloway as it was argued we should; but, on the other hand, they might not have happened to be as favorably impressed with the defendant's appearance. There is nothing upon the face of the depositions to indicate that the plaintiff and his witnesses should be taken as unworthy of belief, and we cannot say that the Chief Justice should not have believed them. It appears impossible for us to express the opinion that upon the written notes of the evidence the weight of evidence is very strongly upon either side. Even if we thought it somewhat in favor of the defendant we could not undertake to disturb a verdict founded upon such directly contradictory testimony when there are no important circumstances in favor of the defendant.

I have found more difficulty in dealing with the question of the amount of damages than with the finding upon the main issues, from the fact that I cannot agree with the learned Chief Justice upon the application of the principle on which he based his finding of the amount. The sale was one for $75,810, and the fact that a part of the purchase money was secured by mortgage and was payable *in futuro* does not appear to me to be important in determining the amount of the commission, in the absence of evidence that such was the custom. But upon this point also I think that the reservation of leave must be considered as being for the determination of the legal question and not of

the question of fact. Taking it that, upon the evidence, the usual commission was 2½ per cent, on a sale effected and completed by the agent must it be said that a jury would be ***bound*** to allow commission at the full rate, where the agent does not effect a sale on the terms prescribed, but hands over the purchaser to the principal leaving to him, perhaps, the largest amount of trouble and labor in negotiating the terms of sale.

In *Wycott* v. *Campbell*, where the terms of sale were specifically prescribed and the commission for a sale on those terms fixed, the court held the plaintiff entitled when the sale had been made on somewhat different terms only to *quantum meruit*. This was fixed at $200, as the defendant had promised that amount.

In *Murray* v. *Curry*, 7 C. & P. 584, where one agent had commenced the negotiations with the purchaser and another had closed them, and evidence was given that in such a case the agent who originally found the purchaser should have a commission of two per cent., Lord Denman charged the jury that they were not bound to give the full commission, though what was usually paid was some evidence to regulate the decision of a jury. Here, the plaintiff and the other real estate agents spoke loosely of the usual rate of commission as being 2½ per cent. or 5 per cent, upon a sale, according to the class of property. *Prima facie* this would be for sales completely negotiated by the agent. Whether there is usually any deduction where he does only a portion of the work is not stated. I think, then, that we are not in a position to say whether the amount allowed is absolutely right or wrong. The case appears to be one in which a jury might have allowed the full rate of 2½ per cent. on the whole of the purchase money, or they might not, and in which the damages must be taken as wholly unliquidated with no definite basis upon which a jury could calculate. Looking at it in this light I do not think that we can disturb the verdict as to amount, because we cannot say that it is either very excessive or very much below the amount that should be allowed.

The remarks made in *McKenzie* v. *Champion* upon the question of interest and the circumstance just mentioned that the amount of damages was not necessarily certain show that we cannot increase the verdict by any allowance for interest.

*Both rules discharged without costs.*

## ROBINSON v. HUSTON.

[IN APPEAL.]

*Assignment for benefit of creditors—Business to be carried on—Reservation of property exempt from execution.*

An assignment for the benefit of creditors contained the following clauses: "Provided always that the said trustee shall have power and authority if he shall deem it expedient and for the general benefit of the creditors from time to time and as often as he shall deem it proper out of the proceeds of the sales of the said stock to purchase goods and stock for the purpose of enabling him to assort and sell off the present stock to the best advantage for the benefit of the creditors, but such purchase shall be made with such view only and not with a view of continuing the business beyond a reasonable time. * * * Provided also that the said party of the first part, notwithstanding anything herein contained, shall have the right and privilege if he so elects within a reasonable time to reserve to himself out of the goods and chattels and property hereinbefore conveyed and assigned such property as would be exempt from seizure under execution according to the laws of the Province of Manitoba."

*Held*, That the assignment was not, by reason of these clauses, void as against creditors.

*A. Haggart* for plaintiff.

*J. J. Robertson* for defendant.

[*6th December 1886.*]

WALLBRIDGE, C. J.—The statute, 48 Vic. c. 17, s. 122, (Man.) provides that a person being in insolvent circumstances and giving a confession of judgment, etc., with intent to defeat his creditors or giving one or more of such creditors a preference, any such confession, etc., shall be taken to be null and void against other creditors of the person giving the same.

Section 123 provides that in case any person being in insolvent circumstances makes a gift, conveyance, assignment or transfer of any of his goods, chattels, or effects, or delivers, or makes over any bills, etc., with intent of giving one or more such creditors a preference over his other creditors any su h gift, etc., shall be null and void against the creditors of such person, but

nothing in the said Act contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying rateably and proportionately and without preference or priority all the creditors of such debtor their just debts.

These clauses declare void confessions of judgment and assignments of property therein mentioned when made by persons in insolvent circumstances when so made or done with the intent to defeat his creditors or with intent of giving one or more of such creditors a preference or priority over the other creditors of such person.

The deed of assignment in this case is attacked because it provides that the assignee may give to the assignor those portions of his estate which by law are exempt from execution. This statute is passed for the protection of creditors, and certainly cannot affect the disposal of property over which the creditor could not in any event have a right to look to for the satisfaction of his debt. As early as the reported case *McDonald* v. *McCallum*, 11 Gr. 469, it was permitted under the statute from which this statute is copied, to investigate the fact and see if any class of creditors obtained a preference over the other creditors of the person so assigning or by the particular disposition made of the debtor's property.

This case is cited with approval in *Kerr* v. *Canadian Bank of Commerce*, 4 Ont. 662, in which it was held that a provision for payment of any lien or charge upon the assets assigned did not invalidate the assignment.

The statute was passed in the interest of creditors, and in my opinion no assignment good in other respects, will be rendered void unless the creditors' rights are interfered with. Those exemptions the creditors never could have reached, and to hand them over under an assignment to the creditors would be more than the statute ever intended should be done, and exempting them from the operation of the deed of assignment does not, in my opinion, render the assignment void. It is a reasonable provision which is one of the tests by which such deeds are tried.

It would be against the debtor's interest to assign if he was not allowed that which he is allowed if he suffered his goods to be taken in execution.

TAYLOR, J.—Upon the argument we were of opinion that the defendant's contention, so far as it raised the question of the validity of the assignment to McArthur, failed. In face of the evidence of what occurred when the debtor made that assignment and delivered it to him, and his refusal to accept, the evidence of subsequent conduct and of the statement made to the defendant's attorney of his intention to act under the assignment, was too vague and indefinite to permit of our saying that the judgment of my brother Killam was wrong.

Two questions were raised, however, as to the validity of the second assignment, the one to Ross under which the plaintiffs claim title to the goods seized under defendant's execution. The first of these was that the assignment is a conditional one, as it provides for the assignee carrying on the business which is an unreasonable provision, and one to which creditors cannot be required to submit.

The assignment provides that the assignee shall hold the estate assigned, upon trust to get in and collect the debts or sell and dispose of the same, and to sell and dispose of the real and personal property when and so soon as he shall deem expedient, in such manner, and on such terms, and either together or in lots, and either by auction or private sale, as he shall deem proper. Then, after provision being made for the payment of expenses, of dividends to creditors, and power being given the assignee to settle and adjust claims against the estate and similar matters, the following proviso appears, "Provided always that the said trustee shall have power and authority if he shall deem it expedient and for the general benefit of the creditors from time to time and as often as he shall deem it proper out of the proceeds of the sales of the said stock to purchase goods and stock for the purpose of enabling him to assort and sell off the present stock to the best advantage for the benefit of the creditors, but such purchase shall be made with such view only and not with a view of continuing the business beyond a reasonable time."

*Owen* v. *Body*, 5 A. & E. 28, in which the court held that a provision for carrying on the business and for the purchase of new stock by the trustee was an unreasonable one, was a case in which the creditors taking a benefit under the assignment were required to execute it within a specified time and the court taking

the whole instrument and the provisions it contained into consideration, were of opinion that the carrying on of the business for an indefinite time was contemplated, and that the terms of the deed might make the executing creditors partners in the concern which was an unreasonable provision.

The present case is very like *The Ontario Bank* v. *Lamont*, 6 Ont. R. 147. There the assignment provided for the assignee selling and converting into money, "all such and so much of the personal estate and effects as shall not be necessary to be kept for the purpose of enabling the party of the second part his executors or administrators to carry on the business which the party of the first part has hitherto carried on or winding it up to the best advantage." That was held not an unreasonable provision. Chancellor Boyd said, "The duties of assignees under these instruments are analogous to those of executors and trustees administering estates, and the court will consider that a year is a proper time within which the sale is to be made. If not made within that time, the onus will be cast upon the assignee of satisfying the court of his *bona fides* in seeking further delay. * * * The law will impute to the words used in this assignment the meaning that the trustee shall sell within a reasonable time, and that depends on the circumstances of the case." Also, "It was further objected that the clause for carrying on the business was unreasonable and invalidated the assignment. But clearly this cannot succeed when the terms of the trust are regarded. It is to sell forthwith the personal estate, except such parts as are necessary to be kept for the purpose of enabling the trustee to wind up the business to the best advantage."

The learned judge then quotes with approval the language of Jervis, C. J., in *Janes* v. *Whitbread*, 11 C. B. 406, "The deed contemplates the sale of the property and the winding up of all business; and the power given to the trustees to carry on the trade was evidently intended to be merely subsidiary to the winding up of the concern." That is clearly the case here, the power given the assignee to purchase stock is to be exercised with such view only; that is, of enabling him to assort and sell off the present stock to the best advantage for the benefit of the creditors, and not with a view of continuing the business beyond a reasonable time.

The second objection is that the assignment contains a clause, "Provided also that the said party of the first part, notwithstanding anything herein contained, shall have the right and privilege if he so elects within a reasonable time to reserve to himself out of the goods and chattels and property hereinbefore conveyed and assigned such property as would be exempt from seizure under execution according to the laws of the Province of Manitoba."

This objection was not raised at the trial, and is not taken by the notice of moving against the verdict served upon the plaintiffs, so that properly it is not now open to the defendants to raise it, but I have considered the objection.

The insertion of such a clause has not the effect of withdrawing from the creditors anything to which, had the assignment not been made, they could have resorted by process of law for payment of their claims. To render an assignment or conveyance fraudulent and void against creditors, it must have that effect.—*Nantes* v. *Corrock*, 9 Ves. 189; *Rider* v. *Kidder*, 10 Ves. 368; *Guy* v. *Pearkes*, 18 Ves. 196.

On the question of whether such an exception is valid or not, English authority cannot be found, nor is there any reported case in Ontario. It has, however, engaged the attention of the courts in the United States.

In "*Burrell on Assignments*" it is said at the end of section 202, "The reservation of such property as is exempt by law from levy and sale under execution is consistent with the rights of creditors." And at section 96 it is said, "There are, however, portions of a debtor's property which the law expressly exempts from the process of creditors, and these, of course, he is allowed to except and retain out of the general conveyance."

In *Mulford* v. *Shirk*, 26 Penn. St. 473, such a reservation was objected to as rendering an assignment void. The statute in that State exempted from levy and sale property to the amount of $300. The court, holding that the reservation was not fatal to the assignment, said, "We think not, and that because such a reservation is not within the reason of the rule. Though expressed in the assignment, it is not created by it, but by the Act of Assembly, and it does not tend to delay or hinder creditors, because by law they never could appropriate this part of

their debtor's estate. In all the adjudged cases the reserved interest which has been held to avoid the assignment springs from the instrument itself, but in this case it is created by Act of Assembly and vested in the debtor, and the whole effect of the reservation is that he does not part with it. His creditors are not hindered by his keeping that which they had no right to touch." This decision was followed in *Heckman* v. *Messinger*, 49 Penn. St. 465, and approved of in Blackburne's appeal, 39 Penn. St. 160, in which the court held that the debtor not having made the exception of exempt property, he could not afterwards reclaim it.

The same reasoning applies in this Province where we have a similar exemption law, and the motion to set aside the verdict for the plaintiffs should be refused with costs.

DUBUC, J., concurred.

*Motion to set aside the verdict for plaintiff refused with costs.*

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## McMILLAN v. BYERS.

[IN APPEAL.]

*Collateral agreement as to security for payment.*

The defendant entered into an agreement under seal with A, whereby the defendant for a certain remuneration agreed to cut cordwood on certain lands and haul and deliver it at a certain place. The remuneration not having been paid, the defendant claimed to hold the wood under a collateral parol agreement by which it was stipulated that, in case of default, the defendant should be entitled to such security. In replevin by a purchaser from A of the wood.

*Held*, That evidence of the parol agreement was not admissible, (Dubuc, J., dissenting.)

This was an appeal from the judgment of Dubuc, J., reported 3 Man. L. R. 361.

*H. M. Howell, Q.C.*, and *J. W. E. Darby* for the plaintiff.

The parol evidence should not have been admitted for it is not a collateral agreement, *i.e.*, two separate agreements and separate considerations, within *Morgan* v. *Griffiths*, L. R. 6 Ex. 72, following which the following cases may be arranged: *Angell* v. *Duke*, 32 L. T. N. S. 320; *Erskine* v. *Adeane*, L. R. 8 Ch. 765; *Mason* v. *Scott*, 22 Gr. 620.

The contract is apparently drawn carefully, and is under seal and bears on its face evidence that it was a full and concluded agreement, and so it does not come within *Allen* v. *Pink*, 4 M. & W. 140, and following the principles therein laid down all the following cases may be arranged: *McMullen* v. *Williams*, 5 Ont. App. R. 518; *Laroche* v. *O'Hagan*, 1 Ont. R. 300; *Fitzgerald* v. *G. T. Ry.* 5 Sup. C. 204; *McNeely* v. *McWilliams*, 13 Ont. App. R. 324.

The judgment of C. J. Moss in *Fitzgerald* v. *G. T. Ry.* in 4 Ont. App. R. 601, shows that this case cannot be brought within the principles of *Morgan* v. *Griffith* and the cases following it, and the case of *McNeely* v. *Williams* shows that it cannot come within the principles of *Allen* v. *Pink* and the cases following it.

The case of *Mann* v. *Nunn*, 30 L. T. N. S 526, is discredited by *Angell* v. *Duke*, 32 L. T. N. S. 320, and *Mason* v. *Scott*, 22 Gr. 620.

By the defendant's contention the bargain really was that on the possible happening of a future event the defendant should be the purchaser of cordwood not then in existence and of the value of above £10, and so is within the statute of frauds. There is no payment on account and no writing.

The delivery and actual receipt by a bailee necessary to take it out of the statute must be as in *Taylor* v. *Wakefield*, 6 E. & B. 767. And this delivery must be assented to by the owner, *Godts* v. *Rose*, 17 C. B. 229; *M. & T. Bank of Buffalo* v. *F. & M.* 60 N. Y. 40; *Baker* v. *Cuyler*, 12 Barb. 667; *Smith* v. *Hudson*, 6 B. & S. 430.

*J. S. Ewart, Q.C.*, and *C. P. Wilson* for the defendant. The parol agreement does not in any way contradict or vary the written agreement, nor does it touch the same matter. The written contract regulates the relations of the parties *until* default. It provides for payment, not for default. The parol agreement is

only to take effect if the written one is broken and regulates the relationship *after* default.

[*10th January, 1887.*]

TAYLOR, J., delivered the judgment of the Court. (*a*)

This is an action of replevin, the question at issue being the ownership of several car loads of cordwood. By an agreement entered into between the parties, and proved at the trial, the determination in this suit is to settle the question of ownership as to a much larger quantity.

One Andrews held a permit from the Hudson's Bay Company, to cut cord wood upon several sections of land, and on the 6th of October, 1882, he entered into an agreement in writing and under seal with the defendant, by which the latter agreed to cut upon those sections, and deliver at Sewell Station upon the Canadian Pacific Railway, a large quantity of cordwood at certain prices. Afterwards Andrews by a writing endorsed upon the permit, but undated, assigned it to one Stephenson. On the 4th of January, 1883, by a memorandum, endorsed upon the agreement with the defendant, Andrews assigned to Stephenson, all right and title to the benefits of the contract, Stephenson agreeing to all the terms and conditions, and relieving him of any conditions he might have promised to fulfil in signing the same. On the same day Stephenson assigned to Woodworth and Rousfell the permit to cut wood, and all right and title in the contracts with the defendant, and with a man named McKay, for getting out wood on the sections of land mentioned in the permit. Wood was got out by the defendant and McKay under their contracts, and Woodworth and Rousfell sold a large quantity of it to the plaintiffs, executing a bill of sale, dated 13th August, 1883, by which they purported to convey to the plaintiffs goods and chattels, consisting of 1,200 cords of wood piled up at or near Sewell Station. By another bill of sale, dated 26th September, 1883, and which contains a clause, stating that it is made in lieu of the former bill of sale, and by way of further assurance, and for a balance of goods erroneously omitted from the former bill of sale, Woodworth and Rousfell conveyed to the plaintiffs about 1,300 cords of wood piled up at or near Sewell Station, being all the wood of the parties of the first part situate as aforesaid, except

(*a*) Present—Wallbridge, C. J., Taylor, Killam, JJ.

two lots, 150 cords measured off for the Merchants' Bank, and the most easterly 80 cords, being the portion in dispute between the parties of the first part and other parties.

At the trial the defendant sought to give evidence of a parol contract between Andrews and himself, by which, upon default in payment, on the 20th of March, 1883, of the whole contract price for cutting the wood, the wood was to become his property. The learned judge admitted the evidence of this agreement, and although he considered it a rather unlikely one, yet he held it was proved, and that he must find it was made, that the wood had, under that agreement, become the property of the defendant, and so he was entitled to a verdict.

The plaintiffs have moved to set aside this verdict, and to enter one for them, or for a new trial. On this motion, the principal question argued was the parol agreement set up by the defendant.

The general rule of the common law forbids the reception of oral testimony to contradict, vary or alter a written instrument, but this rule never operated to exclude evidence of a distinct, collateral, independent agreement, although made between the same parties, and at the same time. In *Taylor on Evidence*, it is said at p. 966, "The rule does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter." Was then the agreement here set up by the defendant, an agreement distinct from, and collateral to, the written agreement between the parties. Unless it was, it is incapable of proof by parol.

A number of cases were cited and relied on by counsel, many of which were remarked upon in the judgment of the learned judge who tried the case. The case which goes furthest to support the defendant's contention is, *Mann* v. *Nunn*, 30 L. T. N. S. 526, a decision of the Court of Common Pleas, but it was disapproved of by so eminent a judge as Lord Blackburn, in *Angell* v. *Duke*, 32 L. T. N. S. 320. In *Mason* v. *Scott*, 22 Gr. 592, the late C. J. Moss thought it hardly necessary to consider that case after the discredit cast upon it by *Angell* v. *Duke*.

*Lindley* v. *Lacey*, 17 C. B. N. S. 578, was a case in which the agreement was wholly collateral to, and independent of, the writ-

ten document. The defendant had sublet to the plaintiff a coffee house, and had sold him the furniture and fittings. One Chase sued the plaintiff, who applied to the defendant for assistance, and the latter promised that if the plaintiff would refrain from calling his creditors together, and induce the head landlord not to press for rent then due, and for which the defendant remained liable, he would settle the suit. The plaintiff did not call his creditors together, and the landlord did not press for his rent. As the result of further negotiations, it was agreed that the defendant should repurchase the furniture and retake the premises, and a written agreement as to the repurchase was drawn up, which said nothing as to defendant's promise to settle the Chase suit. Before the agreement was signed, the plaintiff said, "Am I to understand that Chase's bill will be settled, because that is the groundwork of the whole," to which the defendant replied, "Yes, I will see it settled." The defendant having failed to settle it, the plaintiff's goods were seized under execution and sold. The plaintiff then brought an action upon the parol agreement, and was held entitled to recover. Now, this was a bargain entirely unconnected with the agreement. It was a bargain originally founded upon a consideration entirely independent of the defendant's purchase, the subject matter of the writing, and the consideration was executed by the plaintiff refraining from calling his creditors together, and inducing the landlord not to press for the rent.

The often cited case of *Morgan* v. *Griffith*, L. R. 6 Ex. 70, was one in which Griffith hired from Morgan some land, on the terms of a lease to be signed at some future time. After entering upon the land, he found it overrun with rabbits, which did great damage. When the lease was tendered to him for signature, he refused to sign it, if he was to be in the future annoyed by the rabbits, as he had been in the past. When paying his next rent, he complained again, and Morgan promised to destroy the rabbits. The lease was again tendered to him for signature, when he renewed his complaints and refused to sign, or continue holding the land, unless the landlord undertook their destruction. This the landlord again promised to do, but on Griffith making a request to have a term to that effect inserted in the lease, he refused compliance, but repeated his promise, and thereupon Griffith signed the lease. Morgan having failed to fulfil his pro-

mise, Griffith sued in the county court for damages. The jury found that the promise was made, and that the lease was signed upon the faith of it, upon which a verdict was entered for the plaintiff. On appeal, the Court of Exchequer sustained the verdict, holding that the agreement was purely collateral to the lease and founded upon a good consideration, the signing of the lease by the plaintiff. *Erskine* v. *Adeane*, L. R. 8 Chan. 764, is another case relating to game. The tenant was complaining of the quantity of game, the landlord, while he refused to have the lease in any other than the usual form of his leases, reserving the game to the lessor, his friends and servants, agreed not to let the shooting, to discharge all the keeper's except one, that there was not to be an unreasonable quantity of game, only such an amount as one keeper would be able to deal with, and that the hares and rabbits should be dealt with in a particular way not by the tenant, but by a person to be named by the landlord. The landlord having let the shooting, and the game not being kept down, the tenant was, after his death, held entitled to prove damages in a suit for administering his estates. The agreement was regarded as one collateral to the lease, not something intended to be included in it, but as L. J. Mellish said, a stipulation by the landlord that he would behave in a particular way with reference to the powers which were to be reserved to him by the lease. In both these cases the stipulation in question was deliberately omitted from the writing, which therefore was not intended to contain the whole agreement between the parties.

The written agreement between Andrews and the defendant is a formal document, drawn up in correct legal language, and seems to set out the entire bargain made between the parties. The defendant by it agrees to cut so much wood upon a specified section of land, and to deliver it at Sewell Station, for which Andrews is to pay $3 per cord, except for what may be delivered before snow, and for that he is to pay $3.25; the defendant is also to cut so much wood upon another section of land for which Andrews is to pay $3.50 per cord, the wood to be delivered at Sewell Station before the 20th of March, 1883. Then Andrews is to pay the contract price, less twenty per cent., for all wood according to measurement at Sewell Station, and the twenty per cent. is to be paid on the fulfilment of the contract. The verbal agreement set up, was made before, or at the time the

written agreement was reduced into writing. The defendant says, it was made at the time the writing was drawn up, that it was really a part of the same agreement. There does not seem to have been any consideration for the verbal agreement, apart from the consideration for the written one. What the verbal agreement really was, is by no means certain. Sometimes it is spoken of as an agreement that, in the event of Andrews not paying the balance of the contract price, the wood should become the property of the defendant, and at other times, that the defendant should have a lien on the wood, and be entitled to hold it until paid. I cannot see how such an agreement, so closely connected as it is, with the bargain between the parties which was reduced to writing, and with no separate consideration to support it, can be regarded as one, distinct from, and collateral to, the written agreement. The defendant does make a general statement, that his having the wood as security, was what induced him to sign the agreement, but no satisfactory reason is given why the verbal agreement was not embodied in the written one which was being drawn up at the time. In this respect the case is in marked contrast to *Morgan* v. *Griffith* and *Erskine* v. *Adeane*.

There was some discussion as to whether the defendant has been paid in full for the wood cut, and the case was argued as if he was, or might be, entitled to a lien for any amount remaining unpaid. I cannot understand that he had any lien. The court were of opinion, in *Leacock* v. *McLaren, re Crerar*, that a man employed, as the defendant was here, to cut wood, had no lien, though it became unnecessary in that case to decide the question. The case of *McNeil* v. *Keleher*, 15 U. C. C. P. 470, which was cited, is not an authority for his having a lien. There is only an incidental remark by Richards, J., that if plaintiff had a lieu for the price of the wood, he would not probably retain it after having so far parted with the possession, as to place it for another person upon property not belonging to himself, and not under his control. But there the plaintiff was not a man who had cut, and converted into cord wood, timber the property of another, he owned the wood, and had sold a hundred cords of it to the defendant. The learned judge held at the trial in this case, that the defendant had no lien, unless he had under the authority of *Re Coumbe, Cockburn & Campbell*, 24 Gr. 519, a lien on the

wood for hauling it to Sewell Station. I do not think he had any lien even for that. How could the extent of such a lien be ascertained? He was to be paid so much a cord, for cutting the wood and delivering it, and there are no means for estimating how much of the lump sum should be attributed to the hauling, apart from the cutting. As I understand the common law right of lien for the carriage of goods by land, exists only in favor of common carriers. Their right to such a lien was recognized, because, as the law had made it compulsory upon them to carry all goods tendered, if there was room for them, it was but just that they should be entitled to retain them by way of indemnity. *Skinner* v. *Upshaw*, Ld. Ray. 752. Here, even had the defendant been hired simply to haul the wood from the sections upon which it was cut to Sewell Station, he would not have been, by virtue of such a hiring, a common carrier—*Benedict* v. *Arthur*, 6 U. C. Q. B. 204. In *Re Coumbe, Cockburn & Campbell*, Cockburn was held entitled to a lien for freight upon the principle on which carriers by water, not common carriers, are held entitled to such a lien.

Upon the whole case I have come to the conclusion that the verdictfor the defendant should be set aside and a verdict entered for plaintiff.

WALLBRIDGE, C. J., concurred in the judgment of Taylor, J.

DUBUC, J., adhered to his former judgment, 3 Man. L. R. 361.

*Rule to set aside verdict for defendant and to enter verdict for plaintiff.*

## McMAHON v. BIGGS.

*Dismissal for not reviving.—Costs.*

Where one of several plaintiffs dies, the order is that the survivors do revive within a limited time, and in default the bill is dismissed with costs.

In the case of a sole plaintiff the bill is dismissed without costs in case of failure to revive.

*J. J. Curran* for defendant.

[*23rd October, 1886.*]

TAYLOR, J.—In this case, which is a bill by a principal against his agents for an account, the sole plaintiff died, whereupon the defendants according to the usual practice obtained an order that his executrix should revive the suit within a limited time, and in default of her so doing, that the bill should be dismissed. Due service of that order has been proved, the time limited has elapsed and no steps have been taken to revive the cause, so the defendants are entitled to have the bill dismissed. The only question to be considered is, should it be with or without costs? The defendants claim costs, not against the executrix, but as against the estate of the deceased plaintiff.

Where one of several plaintiffs dies, the order is that the surviving plaintiff do revive within a limited time and in default of his doing so, the bill is dismissed with costs. Where the abatement is occasioned by the death of a sole plaintiff it is otherwise, and on default of revivor, the bill is dismissed without costs, *Daniell's Practice*, 719; *Hill* v. *Gaunt*, 9 W. R. 68. In a note to *Chowich* v. *Davies*, 3 Beav. 290, a number of unreported cases are referred to in some of which the dismissal was with costs, and in some without costs, but in *Hill* v. *Gaunt*, V. C. Wood said that the Lord Justices had decided that the dismissal should be without costs. That is the modern practice and following it the bill here will be dismissed without costs.

## BAYNES v. METCALF.

[IN CHAMBERS.]

*Security for costs.—Præcipe order.*

The Clerk of Records and Writs has power to issue, upon *præcipe*, an order for security for costs, where from the bill the plaintiff's residence appears to be without the jurisdiction.

*C. P. Wilson* for plaintiff.

*G. G. Mills* for defendant.

[*6th November, 1886.*]

TAYLOR, J.—The defendant moves by way of appeal from an order of the referee, refusing an order to limit the time within which the plaintiff should give security for costs.

The bill was filed on the 30th of June, 1885, and served on the 17th of September following, the defendant having seven weeks within which to answer.

On the 16th of October, the referee made an order staying all proceedings, until the costs of an action at law, which the plaintiff had previously brought against the defendant, were paid. This order was on the 5th of December set aside on appeal. On the 9th of December an order was issued by the Clerk of Records and Writs, upon *præcipe*, requiring the plaintiff to give security for costs. On the 15th of March, 1886, the defendant moved before the referee for an order limiting the time within which the plaintiff should give the security, or in default, that the bill should be dismissed. This motion the referee refused, on the ground that the Clerk of Records and Writs had no authority to issue, on *præcipe*, an order for security for costs. He at the same time directed the defendant's solicitor to serve notice of motion for security for costs, returnable before him next morning, and he on the return of that motion made the order. From this order the plaintiff appealed, and on the 12th of May my brother Killam, before whom this appeal was heard, allowed the appeal.

On the 26th of June the defendant again moved to limit a time, for giving the security ordered, under the *præcipe* order of

9th of December, 1885, and that motion the referee refused on the 24th of September last, again holding that the Clerk of Records and Writs had no power to issue such an order. He did so directly in the face of the judgment of my brother Killam, reported 3 Man. L. R. 438. It is from this order that the defendant now appeals.

It is urged before me that the opinion expressed by my brother Killam was a mere *obiter dictum*. At all events, the question of the regularity of such an order is now directly before me and I have no hesitation in holding both under the general orders, and the uniform practice of the court for years, that where, as in the present case, the bill shows on its face that the residence of the plaintiff is out of the jurisdiction, the order for security for costs is an order of course, properly issued by the Clerk of Records and Writs.

It is true that in *Morgan & Wurtzburg* on costs, it is said an order for security for costs cannot be obtained as of course, but the four cases cited do not support any such statement of the practice. In two of them, *Ainslie* v. *Sims*, 17 Beav. 57, and *Tynte* v. *Hodge*, 2 J. & H. 692, the plaintiff gave his address as at a particular place in England, the actual residence in the one case being in Scotland, and in the other in France.

The other cases, *Busk* v. *Beetham*, 2 Beav. 537, and *Vale* v. *Offert*, 22 W. R. 629, were cases in which, after the filing of bills, in which the plaintiffs were described as residing in England, they went to reside abroad. In all such cases no order of course, could issue; special applications in Chambers were necessary.

In the 2nd volume of *Daniell's Practice*, among the orders of course issued upon petition of course at the Rolls, is mentioned, "Where the plaintiff's residence abroad appears on the bill or originating summons."

There can be no doubt that where the plaintiff's residence appears on the face of the bill to be out of the jurisdiction, the order for security is an order of course, and if so, it is properly prepared and issued by the Clerk of Records and Writs.

The authority of that officer as to orders of course is not derived from General Order 16 (Ont. Gen. Ord. 25) but from General Order 14, (Ont. Gen. Ord. 23.) That Order says,

"The Clerk of Records and Writs is to perform the duties in relation to the several matters hereinafter mentioned, that is to say, *inter alia* 7, Preparing and issuing writs, commissions and orders of course." Ont. Gen. Ord. 25, which is No. 16 of our General Orders, was never intended to confer upon the officer the power to draw up or issue orders of course. It originally appeared among the orders of the 3rd of June, 1853, as Order 43, s. 9. It will be observed it says nothing about issuing orders, for the point of that order lies in the two words, "upon *præcipe*." The object of the order was to provide that, orders of course should thereafter be drawn up upon *præcipe*, and not, as in England, and until then in Ontario, upon petition.

Mr. Holmestead, in his excellent and generally accurate *Edition of the Rules of Court*, at p. 13, is mistaken when in a note to Ont. Gen. Ord. 25 he refers to Gen. Order 595 as the authority under which the Clerk of Records and Writs issues orders of course. That order was passed in consequence of a doubt which arose whether, in consequence of the words used in Gen. Ord. 37, being that orders of course "may be" drawn up by the deputy registrar with whom the bill is filed, the Clerk of Records could issue such orders even in suits not in his office. See *Dougall* v. *Wilburn*, 1 Ont. Chan. Chan. 155. The order was passed to prevent such a practice springing up.

*Mr. Wilson* argued that it cannot have been considered clear in Ontario that the power to issue orders for security for costs was given by the power to issue orders of course, otherwise after Gen. Ord. 35, Gen. Ord. 36, which gives local masters certain additional powers, among them being, to entertain applications for security for costs, would never have been passed. A reference to that order shows, however, that it does not relate to orders of course at all, but confers on the local masters the powers of a judge in Chambers in certain matters for all of which notice of motion is necessary. The applications for security for costs there dealt with are special applications.

I cannot see that the court in this province, having held that the possession of land is not an answer to an application for security or that a defendant who has admitted the plaintiff's claim is not entitled to security, has made any such change as that the obtaining, on the equity side of the court an order of course is no longer the practice.

I agree with the opinion expressed by my brother Killam, that there has been no waiver by the defendant of his right to security for costs.

It appears that on the 19th of March, long after the order for security for costs was made, the plaintiff noted the bill *pro confesso*, and then on the 22nd of March, after the motion to limit a time for giving security had been refused, and after the referee had given leave to serve notice of motion for security, returnable the next morning, an order taking the bill *pro confesso* was made. I find no difficulty on this score in dealing with the present motion. The order of the 9th of December, 1885, is in full force and the defendant is entitled to an order limiting the time for giving security under it, The order *pro confesso* is not perhaps void, but it is wholly irregular, and must be set aside should the defendant move to set it aside. The order of the 9th of December stayed all proceedings until security should be given.

The appeal is allowed with costs. The order now to be drawn up may limit, say 28 days, as the time for giving the security.

## WALLIS v. THE MUNICIPALITY OF ASSINIBOIA.

[IN APPEAL.]

*Municipal Corporations.—Liability to repair roads and bridges.*

A municipality is not, by the common law, answerable in damages occasioned by defective highways or bridges.

A general statute provided that "all the roads and road allowances within the Province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same, with such assistance as they may receive from time to time from the Government of the Province."

*Held*, That this statute did not impose upon municipalities any liability for such damages.

This was an action for injuries sustained by plaintiff by reason of a defective bridge. The points argued were (1) that the municipality was not liable; and (2) that the plaintiff knew that the bridge was unsafe and might have gone to his destination by another and safer route.

At the trial a verdict was entered for the plaintiff.

Rule to enter a nonsuit or for a new trial.

*H. M. Howell, Q.C.*, and *Isaac Campbell* for plaintiff showed cause. As to statutory duty with regard to roads, see 44 Vic. (2nd sess.) c. 5; 47 Vic. c. 11, ss. 111, 221, 255, 266; *Harold* v. *Simcoe*, 16 U. C. C. P. 43; *Reg.* v. *Yorkville*, 22 U. C. C. P. 439.

Corporation liable at common law, *Hartnall* v. *Ryde*, 4 B. & S. 363; *White* v. *Hindley*, L. R. 10 Q. B. 219; *Bathurst* v. *McPherson*, 4 App. Ca. 269.

If corporations indictable then liable, *Parsons* v. *St. Matthews*, L. R. 3 C. P. 56.

As to contributory negligence, *Toms* v. *Whitby*, 35 U. C. Q. B. 195, 37 U. C. Q. B. 100; *Sherwood* v. *Hamilton*, 37 U. C. Q. B. 410.

*J. S. Ewart, Q.C.*, and *L. G. McPhillips* for defendants.

No action against municipality unless given by statute, *Russell* v. *Men of Devon*, 2 T. R. 667; *McKinnon* v. *Penson*, 8 Ex. 321, 9 Ex. 609.

This is at most a case of *nonfeasance*, for the origin of the bridge is not proved. Difference between *misfeasance* and *nonfeasance*, *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93, 107; *Parsons* v. *St. Matthews*, L. R. 3 C. P. 50; *Wilson* v. *Halifax*, L. R. 3 Ex. 114; *Gibson* v. *Preston*, L. R. 5 Q. B. 218; *Reed* v. *Belfast*, 20 Maine 246; *Hedges* v. *Maddison*, Ill. 1 Gilman 567; *Brady* v. *Lowell*, 57 Mass 121; *Barnes* v. *Columbia*, 91 U. S. 540.

There was contributory negligence. A man cannot run risk because another does not do his duty, and then charge him with it. *Dillon on Municipal Corporations*, ss. 1006, 1007; *Thompson on Negligence*, s. 1206; *Boswell* v. *Yarmouth*, 4 Ont. App. R. 357; *Maw* v. *King*, 8 Ont. App. R. 262; *Durkin* v. *Troy*, 61 Barb. 437; *Wood* v. *Andes*, 18 N. Y. Sup. C. 543.

Notice to councillors not notice to corporation, *Burns* v. *Toronto*, 42 U. C. Q. B. 560.

*H. M. Howell Q.C.*, in reply.

From lapse of time, notice will be presumed, *Maw* v. *King*, 8 Ont. App. R. 360; *Barnes* v. *Columbia*, 91 U. S. 531.

[*10th January 1886.*]

TAYLOR, J., delivered the judgment of the Court. (*a*)

The plaintiff sues the defendants, the Municipality of Assiniboia, for injury to his wife, horse and carriage, occasioned, as he claims, by their neglect to keep in repair a certain bridge. The first count in the declaration avers, that it was the duty of the defendant to keep the roads and public highways, and the bridges which form part of such public highways, within their municipality, in repair, yet they neglected to keep a certain bridge in repair, which bridge was situate within the municipality, and formed part of a public highway within &c., known as the main highway south of Assiniboine river, and suffered the same to get out of repair, and to remain without sufficient protection to persons necessarily travelling over the said bridge with horses

(*a*) Present Dubuc, Taylor, Killam, JJ.

and carriages, and by reason of the negligence and default of the defendants, and while the said plaintiff was lawfully passing along the said highway with his wife and with a horse and carriage and over the said bridge, his said horse fell through the said bridge, overturned the carriage, and injured the said horse and carriage, and wounded and injured his said wife, without any neglect on the part of the plaintiff or his wife, whereby and by reason whereof &c. The second count avers, for that a certain highway known as the main highway south of Assiniboine river, was and is situate within the defendants' municipality, and was and is composed of in part a bridge across a certain stream, and certain embankment and approaches to the bridge, which bridge and embankment were constructed by the defendants, to be used by the public as a highway, and at the time of the committing of the grievances hereinafter mentioned it was the defendants' duty to keep the said bridge and embankments in repair, and to maintain the same so that the said bridge and embankments should be safe and convenient for the public to travel thereon, yet the defendants neglected their duty in that behalf, and negligently allowed and permitted the said bridge and embankment to become dilapidated and out of repair, whereby and by reason whereof the plaintiff, while lawfully driving with his wife in his carriage with his horse, over and across the said bridge and embankment as he lawfully might, sustained loss and damage by his said horse falling through the said bridge, and being thereby greatly injured, and breaking his said carriage, and by his wife being thrown from the carriage and greatly injured, causing the plaintiff &c.

To the first count the defendants pleaded, that it is not their duty to keep the roads and public highways, and the bridges which form part of such public highways within their municipality, in repair, that the bridge mentioned in the first count is not within the defendants' municipality as alleged, that the bridge does not form part of a public highway within the defendants' municipality, known as the main highway south of the Assiniboine river as alleged, and that they did not suffer the said bridge to get out of repair, and to remain without sufficient protection to persons travelling on the same with horses and carriages as alleged. To the second count, the defendants pleaded, that, that portion of a certain highway known as the main highway south of the

Assiniboine river which is situate within their municipality is not composed in part of a bridge across a certain stream and certain embankments and approaches as alleged. That the bridge and embankment were not constructed by defendants as alleged, that at the time of the committing of the alleged grievances mentioned, it was not the defendants' duty to keep the said bridge and embankment in repair, and to maintain them so that the said bridge and embankment should be safe and convenient for the public to travel thereon as alleged, that they did not negligently allow and permit the said bridge and embankment to become dilapidated and out of repair as alleged.

To the whole declaration the defendants pleaded, that the alleged loss and damage in the declaration mentioned was caused by the negligence and improper conduct of the plaintiff, and not otherwise, and not guilty. There were also pleas to the various parts of the different counts denying that the Mrs. Wallis mentioned in them is the wife of the plaintiff, and denying that the horse and carriage mentioned are the property of the plaintiff.

At the trial it was proved, that there is on the main road running on the south side of the Assiniboine, through the defendant municipality, near what is known as Smith's farm a ditch about five feet wide and four feet deep. Over this is a bridge, resting upon three stringers, and covered with plank of lengths varying, it is said, from ten to sixteen feet. This bridge was constructed by Smith before the formation of the defendant municipality. Statute labor has been done, and public money expended upon the road, and some in the immediate neighbourhood of the bridge. On the 5th of September, the plaintiff, crossing the bridge, observed that one of the planks was broken, the two pieces drawn together, so that the one overlapped the other, and the bridge generally in an unsafe condition. He asked a neighbour to speak to the path master, who lived a few miles off, about the matter. There was also evidence that one of the councillors living to the west of the bridge was in the habit of going to Winnipeg by this road, and between the 5th of September and the day when the accident happened, did actually do so, and must have gone over the bridge.

On the 5th of October, the plaintiff going to Winnipeg in a buckboard, along with his wife, crossed the bridge in the morn-

ing, and then considered it unsafe. Returning in the evening, he reached the bridge after dark, and got out of his buckboard. After examining the bridge, he told his wife to sit still, he would lead the horse, and he thought he would get over safely. He then proceeded to lead the horse over, keeping to the north side to avoid the broken plank, which was on the south side, and had got about half way over, when, as he says, the planks tipped over throwing the horse and the buckboard, with his wife in it, into the ditch. The buckboard was not much damaged, the horse was hurt so as to prevent it from working for about a fortnight, but the plaintiff's wife sustained injuries from which she suffered severely, and was for a considerable time laid aside, and unable to engage in domestic duties, which she has been accustomed to perform.

There was also evidence that the plaintiff could travel, and did sometimes travel, between his own home and Winnipeg, by another road on the north side of the river.

The plaintiff had a verdict in his favor for $200, leave being reserved to the defendants to move in Term to enter a non-suit.

The defendants afterwards obtained a rule, calling upon the plaintiff to show cause why the verdict should not be set aside and a non-suit entered, on the grounds that the injuries for which the plaintiff claims damages were caused by his contributory negligence, and that there was not shown any duty in the defendants which would make them liable for damages, or why there should not be a new trial, on the ground that the verdict was contrary to law and evidence and the weight of evidence, and on the ground of misdirection in that the jury were told that the plaintiff had the right to take the south road if he used ordinary care in crossing the bridge, or why the verdict should not be reduced to $100.

The first Act of the Legislature of Manitoba respecting roads and road allowances seems to have been the 44 Vic. (2nd Sess) c. 5, the first section of which provides that "All the roads and road allowances within the Province shall be held to be under the protection of the municipality, within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same, with such assistance as they may receive from time to time from the

Government of the Province." The second section provides, that "In any case where a great highway or a public road passes through one municipality into the territory of another, each such municipality shall be charged with the control and the responsibilities for such part of such road as lies within the limits of each municipality respectively."

The 47 Vic. c. 11, to amend and revise the Acts relating to municipalities, by section 221 enacts that, when any municipality shall deem it expedient to alter the location of any existing road, road allowance, or highway, or open up a main road within the limits of such municipality it shall be lawful for such municipality to proceed to expropriate the lands necessary therefor." The 111th section provides, that "In every city, town or local municipality, the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter mentioned, that is to say: (1) The raising of a municipal revenue, by taxes upon personal and real property, and the mode of collecting the same; (3) Roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality." And section 255 provides, that "The council of each municipality shall, in each and every year, after the final revision of the assessment roll, pass a by-law for levying a rate or rates on all the real and personal property on the said roll, liable to taxation, to provide for all the necessary expenses of said municipality, &c."

By section 43, the amount to be raised annually for all municipal purposes is limited, and shall not exceed one and one half per cent. upon all the taxable property within the municipality; except by by-law approved by three fifths of all voters voting thereon.

In none of these Acts is there any provision that a municipality shall be, either criminally liable, or civilly responsible, for damages sustained by any person, by reason of default in repairing or maintaining any road or road allowances.

In Ontario there is statutory provision for such responsibility. The Con. Stat. U. C. c. 54, enacted under the heading of, Highways in Cities, Townships, Towns, and Incorporated Villages, as follows, section 337, "Every such road, street, bridge and highway, shall be kept in repair by the corporation, and the

default of the corporation so to keep in repair, shall be a misdemeanor punishable by fine in the discretion of the court, and the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default." That section afterwards appeared in almost the same words as R. S. O. c. 174, s. 491.

In *Harold* v. *Simcoe*, 16 U. C. C. P. 43, the question which came before the Court was, as to the liability of two counties for damages alleged to have been occasioned by the negligence of these counties in connection with a bridge, part of a public highway between them. The section of the statute relating to such a road or bridge was Con. Stat. U. C. c. 54, s. 327, which provided, "That in case a road or bridge lies wholly or partly between a county, town or city and an adjoining county, town or city, the councils of the municipalities, between which the road or bridge lies, shall have joint jurisdiction over the same, although the road or bridge may so deviate as in some places to be wholly or in part within one county, town or city." The wording of that section is, in some respects, similar to that of the 44 Vic. c. 5, s. 1, which says that, the road or road allowance shall be held to be under the jurisdiction of the municipality. It was contended in that case, that the defendants were not civilly responsible, because the section 337, which expressly declared other municipal corporations to be both civilly and criminally responsible, did not include counties; but the Court held that there was a clear common law liability resting upon the defendants both civilly and criminally. The cases referred to in the judgment, and relied upon as establishing this, were, *Henly* v. *Mayor of Lyme*, 5 Bing. 91; *Ohrby* v. *The Ryde Commissioners*, 5 B. & S. 743; *Gibbs* v. *The Trustees of the Liverpool Docks*, 3 H. & N. 176; *Clothier* v. *Webster*, 12 C. B. N. S. 790. The case was carried to appeal, 18 U. C. C. P. 9, when the judgment of the Court below was affirmed. Chancellor Vankoughnet dissented, on the ground that the bridge was not one lying wholly or partly between a county and an adjoining county; he however agreed with the law laid down by the Court of Common Pleas, as to the common law liability of a county in consequence of the non repair by it of a road or bridge over which it exercises control.

*Reg.* v. *Corporation of Yorkville*, 22 U. C. C. P. 431, was a case in which the defendants were indicted for non repair of a bridge, and the question upon a case reserved by the Quarter Sessions for the consideration of the Court was, whether they could be so liable, the defence being that the bridge in question was one erected by a private individual, which, although it had been used as a public highway, had never been established and assumed by bylaw. The clause of the municipal act then in force, 29 & 30 Vic. c. 51, s. 339, was the same as Con. Stat. U. C. c. 54, s. 337, already referred to, each of such sections concluding with these words, "This section shall not apply to any road, street, bridge or highway laid out without the consent of the corporation by bylaw, until established and assumed by bylaw." The Court, however, held that the bridge having been for years used as a public highway, and repairs made upon it out of the funds of the corporation, the common law liability existed, and judgment was given for the Crown.

Another case relied on by the plaintiff is, *Hartnall* v. *The Ryde Commissioners*, 4 B. & S. 361. In that case it was held that the defendants being, under a section of the Towns Improvement Clauses Act, 1847, guilty of a misdemeanor in refusing or neglecting to repair, they are liable to an action by a private person who had suffered special damage from the repair not having been done.

*White* v. *Hindley Local Board*, L. R. 10 Q. B. 219, was a different case, and there the defendants were held liable for damage resulting from a defective bridge, not as surveyors of the highway, but as proprietors of the sewer under the highway, for the purposes of which the grid had been placed over an opening in the road.

*The Borough of Bathurst* v. *McPherson*, 4 App. Ca. 256, was an appeal to the Judicial Committee from the Supreme Court of New South Wales. The Municipalities Act provided "That the Council shall within the boundaries of the municipality have the care, construction and management of public roads." The appellants had constructed in a street a barrel drain, into which an open drain ran, and the brickwork of the barrel drain having broken away, and not having been repaired, a hole was caused, into which the respondent's horse fell, and the respond-

ent sustained a fracture of his leg. At the trial the Chief Justice ruled, that if the appellants constructed the sewer properly at first, and it became defective afterwards, they were not bound to repair it. He was of opinion that at common law no liability was cast upon municipalities to keep in repair public roads and drains, and that the words of the Act, "care, construction and management of public roads," created no obligation upon the municipality to keep such roads in repair. The Supreme Court in Term granted a new trial, the other judges holding that the ruling of the Chief Justice was erroneous. From this the municipality appealed. The appeal was dismissed, the Judicial Committee holding, that by reason of the respondents' construction of the drain and their neglect to repair it, whereby, as an indirect, but natural consequence, a dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway, for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff who had sustained direct and particular damage from their breach of duty.

The question of the extent of the liability to repair, under the words of the Municipalities Act, was not dealt with by the Committee, except by commending it to the consideration of the Legislature. The judgment concludes thus, "The question whether it was the intention of the Legislature to throw upon the municipality the obligation to keep all the roads under the care and management of the council in a complete state of repair is, as remarked by the learned Chief Justice, one of extreme importance, not only to the borough of Bathurst, but to all the municipalities which now are, or hereafter may be, incorporated by the same Act. It will be very desirable, in their Lordships' opinion, that the attention of the Legislature should be drawn to the difference of opinion which exists as to the construction of the Act, with reference to the general liability to repair, in order that they may, if they deem it expedient, set the matter of their intention at rest for the future."

The question now before the Court has frequently been under discussion in England and the United States.

The earliest case in England is *Russell* v. *Men of Devon*, 2 T. R. 667. That case has often been spoken of as deciding that the

defendants were not liable, because they were not a corporation, and so could not be sued collectively. No doubt that was the argument chiefly insisted upon, but, as pointed out by Hannen, J., in *Gibson* v. *Mayor of Preston*, L. R. 5 Q. B., at p. 222, the reason relied on by Lord Kenyon and Ashurst, J., was, not so much the technical one referred to, as that expressed in *Brookes, Abr. Tit. action on the case*, Pl. 93, which was explained and paraphrased by Alderson, B., in *McKinnon* v. *Penson*, 8 Ex. 321, thus, "That inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action, but is only ground for the Crown interfering."

In *Young* v. *Davis*, 7 H. & N. 760, the distinction between liability for misfeasance, a positive obstruction of, or nuisance on, a road and mere nonfeasance in neglecting to repair was considered. The action was one against a surveyor of highways, for not repairing, and he was held not liable. In giving judgment Pollock C. B. said, "At common law such an action could not have been maintained against the parish. The rule with respect to persons who travelled on highways was this: a parish was bound to repair the highways within it, and there was a mode of compelling them to do so, but the traveller was expected to take care of himself, and if the road was a little out of repair, to proceed with caution, and not to travel with the same speed as if the road was in repair, and when he met with an accident throw on other persons the blame of that which was owing to his own want of caution."

In *Foreman* v. *The Mayor of Canterbury*, L. R. 6 Q. B. 214, the defendants, who were the Local Board, were held liable for injury arising from an accident occasioned by persons in their employment leaving by the side of the road a heap of stones without light.

*Kent* v. *Worthing Local Board*, 10 Q. B. Div. 118, was a case similar to *White* v. *Hindley*, the defendants uniting in themselves the double character of highway authorities and water works authorities, were held liable for damages occasioned by the plaintiff's horse stumbling upon a valve cover over an iron pipe connecting with the water works, and which projected owing to the wearing away of the road, and against which they should

have taken precautions, as Stephen J. said, "independently of and apart from their duties as surveyors of highways."

In *Atkinson* v. *The Newcastle Water Works Co.*, 2 Ex Div. 441, the Court of Appeal, reversing the decision of the Court of Exchequer, laid it down that whether the breach of a public statutory duty causing damage, does or does not, give the person suffering such damage a right of action, must depend upon the object and language of the statute.

With all respect for the judgment of such an eminent judge as Chief Justice Wilson, the English cases cited by him in *Harrold* v. *Simcoe*, and relied on as establishing the common law liability resting upon the defendants both civilly and criminally, do not as I read them support that proposition. The one of them which goes furthest is *Ohrby* v. *Ryde Commissioners*, 5 B. & S. 743, and in that the court felt bound to follow the previous decision, in *Hartnall* v. *Ryde Commissioners*. As Mellor J. said, "We are bound by the decision of this court in *Hartnall* v. *Ryde Commissioners*. If that authority is questioned it must be in a Court of Error." In *Henley* v. *Mayor of Lyme*, 5 Bing. 91, reported in the Exchequer Chamber, 3 B. & Ad. 77, and in the House of Lords 2 C. & F. 331, the corporation of Lyme was held liable in an action for damages suffered by reason of its neglect to repair certain sea walls, upon the ground, that the royal charter which had been accepted by the corporation, manifested an intention to render the corporation liable to such suits, because the charter showed, that the duty to make such repairs, was the condition and consideration upon which the corporation was granted certain franchises, and acquitted of certain rents. This is distinctly stated in the judgment of Best C. J. in the Court of Common Pleas. Lord Tenterden when giving judgment in Error said, "We think, looking at the whole instrument that the things granted were the consideration for the repairing of the buildings, banks, sea shores, &c., and that the corporation, by accepting the letters patent, bound themselves to do those repairs." In the House of Lords twelve of the judges attended to advise the House, and they were unanimously of opinion, that the charter cast upon the corporation an obligation to repair, which they by accepting the charter had adopted.

Another case was *Clothier* v. *Webster*, 12 C. B. N. S. 790. In that case the defendant was a contractor constructing a sewer,

for and under a contract with The Metropolitan Board of Works. The plaintiff brought his action to recover damages for injury done his oven by negligent performance of work, in not properly filling up an excavation under it, and improperly working a steam engine near it, so as to cause the oven to sink. The Metropolis Local Management Act provided for compensation for any damages done by carrying on any works constructed under the Act, and for the mode in which the amount of compensation should be ascertained. The defence was, that the defendant was a contractor under the board, and that the Acts complained of were under the statutes, the subject of compensation, not of an action. But the court held, that the compensation was only for damages which must have been caused by the carrying out of the works, however, carefully and skillfully those works had been done, not for damages from the negligent construction of the work, and the jury had found negligence and want of skill. Erle, C. J. said "The law requires that the execution of public works by a public body shall be conducted with a reasonable degree of care and skill, and if they or those employed by them are guilty of negligence in the performance of the duties intrusted to them they are responsible to the party injured."

*Gibbs* v. *The Mersey Docks Trustees*, is reported in 3 H. & N. 164, and *Penhallow* v. *The Mersey Docks Trustees*, in 7 H. & N. 329. Both cases were argued together in the House of Lords, and are reported L. R. 1 H. L. 93. The grounds of decision in the House of Lords, holding the trustees liable, seem to have been, that in every case the liability of a body created by statute, must be determined upon a true interpretation of the statute under which it is created. That corporations formed for trading and other profitable purposes, though acting without reward to themselves, yet in their very nature are substitutions on a large scale for individual enterprise, and in the absence of any thing in the statute which create such corporations, showing a contrary intention in this legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals, should to the extent of their corporate funds be co-extensive with that imposed by the general law on the owners of similar works.

*Scott* v. *Mayor of Manchester*, 2 H. & N. 204, where the plaintiff sued for an injury sustained by the negligence of a work-

man employed by the defendants in laying gas pipes, and in which they were held liable, was so decided on the ground, as stated by Cockburn, C. J., "Though the individuals composing the corporation acted gratuitously, yet the corporation and the township derive a profit from the carrying on of the work."

The American authorities upon this subject are instructive, and when the similarity of the circumstances of the country to our own, is taken into account, they are useful guides for us. Some of them may be referred to. They draw the distinction between cities and towns acting under special charters of incorporation, accepted from the State, and towns, or as they speak of them *quasi* corporations, called into existence by general enactments, appliable to all such corporations as governmental or public agencies.

In *Dillon on Municipal Corporations*, it is said in section 962, that in the New England states *Russell* v. *Men of Devon*, has been followed, and there has been a very general recognition "of the doctrine that without a statute giving it, no private action lies against towns in New England or other *quasi* corporations for the neglect of duties enjoined in them by general legislative enactments, applicable to all such corporations, as governmental or *quasi* agencies." The correctness of the law thus stated, was recognized by the Supreme Court of the United States, in *Barnes* v. *District of Columbia*, 91 U. S. 552. Again, Mr. Dillon says, in section 963, "Such organizations as townships, school districts, road districts and the like, though possessing corporate capacity, and power to levy taxes, and raise money have been very generally considered not to be liable in case, or other form of action, for neglect of public duty, unless such liability be created by statute."

In *Hill* v. *Boston*, 122 Mass. 344, after a full and able review of all the leading English and American cases by C. J. Shaw, it was held, that no private action unless authorized by express statute can be maintained against a town or city for the neglect of a public duty imposed upon it as the agent of the public, by general laws for the benefit of the public, and from the performance of which the corporation receives no profit or special advantage."

So in *Hodges* v. *County of Madison*, 1 Gilman 567, the Supreme Court of Illinois held that the duties to be performed by a county

are for the benefit of the public, intimating that the remedy for neglect to perform them must be by public indictment, and that no future action by an individual, claiming to have been injured by the neglect, will lie unless it is given by statute. This case was afterwards followed in *The Town of Waltham* v. *Kemper*, 55 Ill. 346.

In *Reid* v. *Belfast*, 20 Maine 248, and *Brady* v. *Lowell*, 57 Mass. 124, the court held, that towns are liable, for injuries arising from defective ways, to the party injured, by force of the statute alone, and they are liable only to the extent of the provisions of the statute.

The principles enunciated in these cases seem to me sound ones, and they are applicable to the defendant corporation here. It exists as a corporation, not under any special charter of incorporation, but only by virtue of the general legislative enactment. It exists as a governmental or public agency for the purpose of attending to and perform certain duties, which primarily belong to the government, from the performance of these duties it derives no profit or special advantage, and the statute has not imposed on it any civil responsibility for neglect of these duties. To hold the defendants liable, and that the words of the statute, that all roads and road allowances "shall be held to be under the jurisdiction" of the municipality and that the "municipality shall be charged with the maintainance of the same," impose such a liability, would be to impose a tremendous burden upon the municipalities of this Province. It would mean, that with limited powers of raising taxes and with no power to levy tolls, each municipality must at once put in repair, and keep in repair, every road and road allowance within its limits, in fact miles upon miles of roads. It is impossible to conceive that the Legislature ever intended, or contemplated, imposing such a liability, by the words which have been used.

Then the statute has not imposed upon a municipality any civil responsibility for neglect. In this respect our act in force at the time this accident happened differs from that of Ontario.

On a consideration of the authorities I have referred to, and of a great many more which I have examined, I have come to the conclusion that a municipality is not civilly responsible unless made so by statute, and it has not been so in this Province.

Taking the view I do, it is not necessary to consider the other points raised. The authorities cited go a long way to show that the plaintiff, knowing the bridge to be dangerous and having the choice of another road, yet deliberately taking the dangerous one, could not recover on the ground of contributory negligence but I do not express any deliberate opinion upon that.

In any judgment the verdict for the plaintiff should be set aside and the defendants rule to enter a non-suit made absolute.

*Rule to set aside verdict for plaintiff, and to enter a nonsuit.*

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## KILPATRICK v. THE CITY OF WINNIPEG.

[IN APPEAL.]

*Municipal Corporation.—Liability for work ordered by officials.*

The plaintiff contracted under seal to erect for the defendants a building to be used as a police station. The contract contained a clause providing for further agreements in writing, in case of any change or alteration in the plans or specifications

The plaintiff sued for the value of certain work, part being alterations in the building, part additional work in connection with the building in of a boiler for heating purposes, (neither the furnishing of the boiler or its fitting being part of the plaintiff's contract), and part for furnishings for the building, such as benches in the cells, lockers, railings, desk and other articles.

The orders for the work were given partly by the chief of police, and partly by the licence and police committee. The city took possession and made use, by its officials, of the work sued for.

*Held*, That the defendants were not liable for any part of the work.

Oral evidence of that which upon cross examination turns out to have been in writing remains valid as evidence.

The facts sufficiently appear in the head note and judgment.

*J. S. Ewart, Q.C.*, and *L. McMeans*, for plaintiff. Corporation liable although contract not under seal if for the purposes of the corporation. *Clarke* v. *Cuckfield Union*, 21 L. J. Q. B. 349; *Nicholson* v. *Bradfield Union*, L. R., Q. B. 620; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; L. R. 4 C. P. 617; *Pim* v. *Ontario*, 9 U. C. C. P. 304; *Perry* v. *Ottawa*, 23 U. C. Q. B. 391; *Brown* v. *Belleville*, 30 U. C. Q. B. 373; *Silsby* v. *Dunnville*, 8 Ont. Ap. R. 524. Where it is the *duty* of the corporation to provide something, and it has been provided and used by the corporation, no order need be proved, *Robins* v. *Brockton*, 7 Ont. R. 490; *Smith* v. *Hull Glass Co.* 11 C. B. 896. As to ratification by a Company, *Phosphate Co.* v. *Green*, L. R. 7 C. P. 43.

*Chester Glass*, for defendants. Taking possession of building amounts to nothing. Council had to do that or abandon the building.

*Ellis* v. *Hamlen*, 3 Taunt. 52; *Lamprell* v. *Billericay Union*, 3 Ex. 281.

[*10th January 1887.*]

TAYLOR, J., delivered the judgment of the court.(*a*)

The plaintiff was the contractor for the erection, under contract with the defendants, of a police station in the City of Winnipeg.

He now brings his action to recover $2,081.05 with interest for what, in the particulars annexed to the record is described, as extra work and materials. Included in that amount is the sum of $216.05, the amount of a cheque deposited with the defendants, by way of security for the due performance of the work under the contract, and which the plaintiff claims has not been returned to him, but has been cashed by the defendants, or some one to whom they improperly delivered it.

At the trial before my brother Killam without a jury, the plaintiff had a verdict for $235,55, being the amount of the cheque $216,05, with interest $19,50, leave being reserved for the full court to increase the verdict, or to enter a verdict for the defendants.

(*a*) Present, Wallbridge C. J., Dubuc, Taylor, JJ.

The plaintiff moves accordingly to increase the verdict to such sum as the court may deem proper, and the defendants move to enter a non-suit, or to enter a verdict for the defendants.

The plaintiff's claim is for work done, part of it being alterations from the original plans and specifications, such as the substitution of four dormer windows for a large skylight, of slates for iron shingles, and part of it additional work in connection with the building in of a boiler for heating purposes, and furnishings for the building, such as benches in cells, lockers, railing in court room, desk and other articles.

The contract contained a clause, "In case of any alteration or change that may be directed by the said parties of the first part, (the defendants) in the plans, drawings, specifications, and construction of the work hereunder, in case of any omission to the said works being required by the said parties of the first part, the costs and expenses are to be agreed upon in writing, and such agreement is to be signed by the party of the second part, countersigned by the superintendents and architects in charge, and assented or agreed to, in writing, by the said parties of the first part, before the same is done, or before any allowance therefor can be claimed, and in case of any failure so to agree, the same shall be settled by the said Barber & Barber, architects, and their decision shall be final and binding upon both parties."

The plaintiff does not allege that there were in connection with the work for which he now claims, any agreements in writing, such as contemplated by the foregoing clause, but he contends that such were not necessary. The parties could not, as he says, bind themselves so that they could not enter into a new and different contract, and he claims that the work now sued for was ordered by the defendants, or by persons to whom they entrusted the oversight of the work, that it was work about a building which it was the duty of the defendants to provide, and that as they are now using and enjoying the benefit of the work done, they are liable to pay for it. No doubt, such a clause as that in the contract, would not stand in the way of the making a new and different contract, for the parties did not by entering into that agreement, restrain themselves from making other contracts.

The difficulty however is, that I cannot find any evidence that the defendants ever authorized the doing of any of the work

now claimed for. Nor is there any evidence, that the work was ordered by any person who had authority to bind the defendants, or who, in ordering the doing of the work, was acting within the implied scope of his authority. Barber & Barber had not any authority to make the changes without the sanction of the defendants. It is only, if the plaintiff and defendants fail to agree as to the cost and expense of alterations directed by the defendants, that the same is to be settled by Barber & Barber, and that their decision shall be final.

The utmost that can be said as to the ordering the work is, that some of it was ordered by the chief of police, some of the changes it is said came from the license and police committee, and that the alderman, who was chairman of that committee, knew of some of the work being done. Now that is the lowest possible evidence upon which to charge a corporation with a large sum, such as is sued for here. It did not, in any way, come within the scope of the implied authority of the chief of police, to superintend the erection of a building for the city, even although it was a police station. There is no evidence that such superintendence fell within the scope of the duties of the license and police committee, and there is no evidence of any delegation of authority, in this matter, by the defendants to either the committee, or the chief of police.

In this respect the case differs entirely from every case cited for the plaintiff, except perhaps one.

In *Clarke* v. *Cuckfield Union*, 21 L. J. Q. B. 349, the work sued for was ordered by the defendants at a meeting of the board, which it was not disputed had been regularly called. *Haigh* v. *North Bierly Union*, E. B. & E. 873, was a case in which the defendants having reason to suspect that the officer who had charge of the books and funds of the Union, had been guilty of fraud, they, by resolution of the board, employed the plaintiff to investigate his accounts, and pending the appointment of a new clerk, to make up the accounts for the past six months.

In *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620, the defendants advertised for tenders for coal. The plaintiff sent in a tender, which was accepted by a resolution, and he was notified of the acceptance. A formal contract was prepared, but never

really executed by the defendants, although the plaintiff delivered the coal, which was used by the defendants.

All these were cases in which the defendants sought to escape liability, on the ground that there was no contract under seal, although in every case the work was done or material supplied under the direct authority of the corporation. The necessity for a seal was the question argued in each case. In all of them the defendants were held liable, on the ground stated by Wightman J. in *Clarke* v. *Cuckfield Union*. That learned judge there said, "Wherever the purposes for which a corporation is created, render it necessary that work should be done or goods supplied to carry such purposes into effect as in the case of the guardians of a poor law union, and orders are given, at a board regularly constituted, and having general authority to make contracts, for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods are supplied, and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot keep the goods or the benefit, and refuse to pay, on the ground that though the members of the corporation, who ordered the goods or work were competent to make a contract, and bind the rest, the formality of a deed, or of affixing a seal, is wanting, and therefore that no action lies, as they were not competent to make a parol contract, and may avail themselves of their own disability."

The apparently most recent case *Scott* v. *Clifton*, 14 Q. B. D. 500, cannot be relied on as an authority in favor of the plaintiff. There the plaintiff, appointed the architect of the school board, by a minute signed by the chairman and countersigned by the clerk, sued for services rendered, and the defendants resisted the claim because the orders given him were not under their corporate seal, but the defence failed. It is difficult to see how such a defence was raised with any hope of success in the face of the Elementary Education Act, under which the defendants existed as a corporation, and which provided that "The appointment of any officer of the board may be made by a minute of the board signed by the chairman of the board and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board." The plans sued for, were prepared under

orders given by subsequent minutes, so signed and countersigned, and communicated to him.

In *Pim* v. *The Municipal Council of Ontario*, 9 U. C. C. P. 302, there was a contract under seal for building a court house. It contained a provision that if the work was not done by a specified day, the defendants might discharge the contractor, and employ another to do the work. The contractor failed to complete the work according to the contract, and the architect, acting under authority of a building committee of the council appointed by by-law to have the over sight of the work, took it off the hands of the contractor, and employed the plaintiff to finish the building. The building committee reported the whole matter to the council, and their report and the action they had taken, was approved of, and adopted by the council.

In *Perry* v. *Corporation of Ottawa*, 23 U. C. Q. B. 391, the plaintiff was held entitled to recover for plans and reports, on the ground, that he was employed to make them by a duly appointed committee of the council, which committee reported what had been done by them, and by the plaintiff under their orders, to the council, and that body by resolution adopted and approved the actions of the committee. So in *Brown* v. *Belleville*, 30 U. C. Q. B. 373, the plaintiff's claim arose out of an offer to bring a dredge from a distance for the use of the corporation; which offer, a committee of the council reported and recommended for acceptance. The council adopted the report, after which the chairman of the committee concluded the arrangement with the plaintiff. He was held entitled to recover, Richards C. J. saying, "When a contract has been entered into, by the express direction of the corporation, and has been performed by the party, and the corporation has received the advantage of it, the corporation cannot set up as a defence that the contract was not under seal."

In *Robins* v. *Brockton*, 7 Ont R. 481, the plaintiffs were held entitled to recover for work done, under resolutions of the council, though there was none under seal. From that decision Wilson C. J. dissented on the ground that the plaintiffs should have been appointed by by-law to do the work.

I have not in dealing with the question raised here, considered at all those more recent cases, which seem to support the old rule

that a seal is necessary, for the defendants here do not raise the want of the corporate seal as their defence, but take their stand upon the broad ground that they never authorized the work being done.

The only case which favors the plaintiff's contention is *Smith* v. *Hull Glass Co.*, 11 C. B. 897. That was the case of a trading and manufacturing corporation, which was held liable, not only for goods supplied for the purposes of their manufacturies upon orders given by their manager, although there was no express delegation of authority by the directors, but also for goods supplied upon the orders of unauthorized persons, where the goods were, with their knowledge, received upon the premises and used for the purposes of their trade.

The use of the goods, with the knowledge of the directors, which, as Maule J. said, was the knowledge of the company, was the ground upon which Jervis C. J. held the defendants liable. He said, "The ground upon which I am disposed to hold the company liable in respect of the goods supplied on the orders of the chairman, the deputy chairman, and the secretary, is, that these orders were subsequently adopted by the directors." And Maule J. said, "Here are persons found transacting business, and receiving goods upon the company's premises, and using them for the purposes of the company; and all this with the knowledge of the company. What the Lord Chief Justice calls the knowledge of the directors, I call the knowledge of the company. This is the simple case of an individual, or a body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorized by him or them, and acting with his or their knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting house, the customer is not called upon to prove the character or the authority of a shopman or clerk with whom he deals; if he is acting without, or contrary to the authority conferred upon him by his employers, it is their own fault. It seems to me, therefore, that these defendants are bound by the acts of the persons who have taken upon themselves, with their knowledge, to act for them in ordering the goods in question, and receiving them, and using them in their business."

The present csse is a widely different one. There is no evidence that the work here was ordered by the agency of persons

apparently authorized by the defendants, and acting with their knowledge. There is no evidence of any knowledge, on the part of the defendants, that this work was being done at all.

The plaintiff cannot I think urge that the work has been accepted by the defendants, and used by them, so that they have thereby become liable to pay for it. The acceptance of the work by the defendants may be said to have been forced upon them. They had entered into a contract with the plaintiff, to erect upon land belonging to them, a building of a certain kind, for a specified sum. If the plaintiff has put into that building, without orders from the defendants, additional or more costly work than that called for by the contract, what are the defendants to do. They must either, take possession of the building as it stands, with the unauthorized work, tear the building to pieces to get rid of what was not ordered, or abandon it altogether, their own building, upon their own land. I do not see how, under such circumstances, this involuntary use by the defendants of the unauthorized work, can ever be considered as an adoption and ratification of what has been done.

There may be some hardship upon the plaintiff, by holding that he cannot recover. But he is a business man, and he must be assumed to know, that before he does work for either an individual, or a corporation, he must have some authority for doing it. The contract here provided for alterations being directed in writing. The plaintiff might have insisted upon a writing, to warrant any being made, or if he was making a new independent contract, he should have seen that he made it with the corporation, with whom he originally contracted, and not with the chief of police.

If there is hardship on the plaintiff, it is on the other hand, to use the language of Hagarty J. in *Perry* v. *Ottawa*, "All important to prevent claims being advanced against municipal bodies for services rendered at the request or order of any one or more members individually." And much more so to prevent claims being made, for services rendered, not at the request of members of the council, who might be supposed to have some right to give orders, but rendered at the request of, or under orders from subordinate officials, having no authority or pretence of authority whatever.

The defendants' motion, to enter a non-suit, or a verdict for them, has still to be considered. The evidence showed that the cheque was received from the defendants by the then city solicitor, and the question was, had he authority from the plaintiff to receive it. He says he had a claim against the plaintiff for a client, and under instructions from the plaintiff he obtained the cheque, to pay this claim out of the proceeds. This the plaintiff denies. On the cross examination of the solicitor, it came out, that the order to receive the cheque was in writing. My brother Killam believed the solicitor in preference to the plaintiff, and in his judgment says, he would have found in favor of the defendants on this item, if the verbal evidence of the solicitor, as to his authority to receive the cheque, could be received, but he held that the proper proof of the authority was the written order which was not proved, so he found in favor of the plaintiff.

I think the verbal evidence of the solicitor was properly admissible. He had on his examination stated that he had instructions from the plaintiff to receive the cheque, and that under these he received it. He was not, when giving this evidence, stopped by the plaintiff's counsel, and asked if his instructions were in writing. The fact that he had instructions was proved, and it afterwards, upon cross examination, appearing that they were in writing could not, it seems to me, render worthless the evidence already given. See *Taylor on Evidence*, s. 404.

The result is, that the plaintiff's motion to increase the verdict must be refused with costs, and the defendant's motion to set aside the verdict and enter a verdict for the defendants, granted with costs.

Having come to this conclusion it is unnecessary to consider the questions raised as to the certificate for costs obtained by the plaintiff.

*Rule to enter a verdict for defendants.*

## RICHARDS v. ROWE.

(IN APPEAL.)

*Business name—Change of upon change of ownership—Notice to creditors.*

The defendant carried on business under the style of Rowe & Co. She sold to her husband (stipulating that the name of the firm should be changed) who continued the business under the style of A. Rowe & Co. Before, as well as after, the sale, the husband was the actual manager of the business, and beyond the change of name, there was nothing to indicate a change of ownership. The defendant had dealt with the plaintiffs and her husband continued the account, having agreed to pay the liabilities of the old business.

In an action for the price of goods delivered by the plaintiffs upon the orders of A. Rowe & Co.,

*Held*, That the defendant was not liable.

The defendant's husband, after continuing the business for some time, sold it to The W. T. P. & P. Co., and this company agreed to assume and pay the liabilities of Rowe & Co. Pending this action the plaintiffs recovered judgment against the company for the amount here sued for.

*Held*, That this judgment was evidence of the election by the plaintiffs to look to the company for the old debt.

*Hagel, Q. C.*, and *G. R. Howard* for plaintiffs.

The defendant cannot rely upon the judgment obtained against The Times P. & P. Co., because that was signed after the commencement of this action: *The Delta*, 1 P. Div. 393. *Houstoun* v. *Sligo*, 29 Ch. Div., 448. Judgment having been by default is not an estoppel: *Goucher* v. *Clayton*, 11 Jur. N. S. 107. Everything in controversy in one suit must have been in the other suit, *Moss* v. *The Anglo-Egyptian Nav. Co.*, L.R. 1 Ch. 108. On general question of estoppel: *Ashby* v. *Day*, 54 L. J. Ch. 935; *Drake* v. *Mitchell*, 3 East, 251, 8; *Cornish* v. *Abington*, 4 H. & N. 549; *Swire* v. *Redman*, 1 Q. B. Div. 536. Until notice of dissolution the partnership is presumed to have continued: *Barfoot* v. *Goodall*, 3 Camp. 147. As to the notice to be given, *Gorham* v. *Thompson*, 1 Peeke 60; *Brown* v. *Leonard*, 2 Chitty, 120; *Parkin* v. *Carruthers*, 3 Esp., 248;

*Dolman* v. *Orchard*, 2 Car. & P. 106; *Birkett* v. *McGuire*, 7 Ont. App. 53.

As to appropriation: *Philpot* v. *Jones*, 2 Ad. & E., 41; *Simpson* v. *Ingham*, 2 B. & C. 65; *Cummings* v. *Glassup*, 1 U. C. Q. B., 364; *Bosanquet* v. *Rae*, 6 Taunt., 771. As to novation: *Spencely* v. *Greenwood*, 1 F. & F., 297; *Gough* v. *Davis*, 4 Price, 200; *Powles* v. *Page*, 3 C. B. 14; *Beckett* v. *Ramsdale*, 31 Ch. Div. 177; *David* v. *Ellice*, 7 D. & R, 690; *Kirwan* v. *Kirwan*, 4 Tyr., 491.

*Ewart, Q. C.*, and *C. P. Wilson* for defendants.

Signing judgment against the company is an estoppel by election: *Scarf* v. *Jardine*, 7 App. Ca., 345. The defendant is not liable for goods purchased in the name of A. Rowe & Co. *Kirk* v. *Blurton*, 9 M. & W. 283; *Quebec Bank* v. *Miller*, 3 Man. L. R. 17; *Barfoot* v. *Goodall*, 3 Camp. 147, *Wade on Notice*, 223. As to novation, *Exparte Rivolta* W. N., 1882, p. 76; *Bilborough* v. *Holmes*, 5 Ch. Div., 255. As to appropriation, *Birkett* v. *McGuire*, 19 Can. L. J. N. S., 275.

[*10th January, 1886.*]

TAYLOR, J., delivered the judgment of the Court. (*a*)

I have seen no reason, on a further consideration of this case, to change the opinion I formed at the close of the argument.

A great deal of the law discussed was applicable to the case of a change in a partnership by a partner retiring, or by another coming in, but the present is not such a case at all. It is the case of a person carrying on business under a firm name, selling out the business entirely to another person. When the defendant did so she expressly stipulated that the new business should not be carried on under the old name, but under a new one, and accordingly the change was made, from Rowe & Co. to A. Rowe & Co. Of this change the plaintiffs had ample notice. After the change all orders for goods were sent in that name. It is true that in a few instances of sending orders, paper was used on which the old heading, Rowe & Co., appeared, but there is no evidence that the defendant was a party to this, or even knew of it. It cannot be argued from the evidence that there was any

(*a*) Present Dubuc, Taylor, Killam, JJ.

holding of herself out by the defendant, or any allowing of herself to be held out, as still a member of the firm.

The plaintiffs' manager knew of the change, and their bookkeeper when he observed the change in the name, thought it of sufficient importance to call his attention to it. There was quite sufficient in the change to put the manager upon enquiry, and had he enquired he would have learned that the defendant had nothing to do with the new firm. He chose, however, to treat it as a matter of no consequence. Indeed, so careless does he seem to have been, that not only were all the charges against A. Rowe & Co. posted up in the plaintiff's ledger to the old account which had been opened there for Rowe & Co., but all the charges against the subsequently formed business, The Winnipeg Times were posted up to the same account. The evidence also leads one to believe that the plaintiffs accepted the more recent business of The Winnipeg Times as their debtor for the liability now sued for. The judgment recovered against The Winnipeg Times seems beyond all doubt to be for the same liability as that for which the plaintiffs now sue the defendant. If so, then the entering up of that judgment is evidence of the election to take that new firm for the old debt.

In my judgment the verdict for the plaintiffs should be set aside and a non-suit entered.

*Rule to set aside the verdict and to enter a non-suit.*

## HARRIS v. RANKIN.

[IN APPEAL.]

*Registered judgment.—Form of Certificate.—Agreement to assign homestead.—Voluntary promise to convey.—Patent.—Evidence of parties to impeached transaction.*

The omission by a registrar to endorse upon an instrument registered the certificate prescribed by Con. Stat. Man. c. 60, s. 15, does not prevent the instrument binding the lands.

A certificate of judgment was signed by the deputy prothonotary and was under the seal of the Court of Queen's Bench.

*Held*, Insufficient because the date of the judgment was 18 October, 1883, whereas the certificate referred to a judgment of 18 October, 1884, (the number of the roll not appearing upon the certificate) and because the certificate did not show that the judgment was recovered in the Q. B.

Under the 13th sub.-sec. of the 34th sec. of 42 Vic. c. 31, homesteads cannot be bound by executions in the sheriff's hands prior to patent.

Since that Act a certificate of judgment will bind the homestead of the defendant immediately after recommendation for patent.

A registered judgment attaches upon land acquired subsequent to its registration (per KILLAM, J).

An assignment of a homestead right previous to recommendation is void, not only as between the homesteader and the Crown, but also as between the parties to the transaction, (*overruling* DUBUC, J. and WALLBRIDGE, C. J. *dissenting*.) In such a case the assignee would not be entitled as against the assignor, even to a lien for improvements placed by the former upon the property.

A voluntary promise to transfer land will not be enforced in equity.

Therefore where a homesteader, free from debt, voluntarily promised before recommendation, to convey the land to his wife, and after recommendation did so convey;

*Held*, That such conveyance did not, by virtue of the previous promise, cut out a judgment registered before the execution of the conveyance.

After the registration of a judgment a gainst a homesteader who had obtained his recommendation, he assigned the land to a third party to whom the patent issued.

*Held*, That the land was liable, notwithstanding the patent, to answer the judgment.

Under Con. Stat. Man. c. 37, s. 85, only land actually under cultivation is exempt from execution; but lands upon which houses, stables, &c. are erected are also exempt.

Where a whole farm was chargeable under a registered judgment and only a portion of it under a *fi. fa.*, a reference was ordered to the master to apportion the latter charge (*Warne* v. *Housely* 3 Man. L. R. 547 followed). The costs of the suit were added to the registered judgment and charged upon the whole land.

Form of decree in such a case.

Remarks upon the sufficiency of the unsupported evidence of the parties interested to uphold a transaction attacked as fraudulent.

This was a rehearing of the judgment of DUBUC, J.

The facts appear in the judgments. The certificate of judgment held defective was as follows:—

"In the Queen's Bench.

"I certify that on the eighteenth day of October, in the year of Our Lord one thousand eight hundred and eighty-four, judgment was signed and entered up in favor of A. Harris Son & Company, Limited, plaintiffs and against Edward Rankin defendant for two hundred and twenty-seven dollars and twenty-two cents, damages and costs, and that no satisfaction of said judgment or any part thereof appears of record in this Court. Dated this 30th day of August, in the year of Our Lord one thousand eight hundred and eighty-four.

"Augustus Mills, Deputy Prothonotary."

Exemplification showed date to be 18th day of October, 1883.

*J. S. Ewart, Q. C.* and *L. G. McPhillips*, for plaintiffs. Registration of judgment equivalent to mortgage, Con. Stat. Man. c. 37, s. 83. The patent issuing to assignee of debtor not a difficulty, *Bull* v. *Frank*, 12 Gr. 80; *Garside* v. *King*, 2 Gr. 673; *Mountjoy* v. *Queen*, 1 Gr. E. & A. 429; *Saugeen* v. *Church Society*, 6 Gr. 538; *Dougall* v. *Lang*, 5 Gr. 293; *Plimmer* v. *Wellington*, 9 App. Ca. 699; *Yale* v. *Tollerton*, 13 Gr. 302; *Ferguson* v. *Ferguson*, 16 Gr. 309; *Rae* v. *Trim*, 27 Gr. 374; *Nicholson* v. *Shannon*, 28 Gr. 378. The agreement between the defendants was voluntary and not in writing and cannot be enforced *Penhall* v. *Elwin*, 1 Sm. & G. 258.

*F. Beverly Robertson* and *H. E. Crawford* for the defendants Lands exempt from seizure under execution, not chargeable by

registered judgment, *Maxwell on statutes*, 69; *Roddy* v. *Fitzgerald*, 6 H. L. 877; *Dominion Lands Act*, 1883, s. 33 ss. 4. The certificate of judgment not properly endorsed, Ad. Jus. Act, 1883.

*J. S. Ewart, Q. C.* in reply. Additional cases as to patent being no obstacle, *Goff* v. *Lister*, 13 Gr. 406; *Casey* v. *Jordan* 5 Gr. 467. Debtor had an interest which could have been charged, *Bruyere* v. *Knox*, 8 U. C. C. P. 520; *Brennan* v. *O'Neil*, 4 U. C. Q. B. 8; *Waters* v. *Shade*, 2 Gr. 457.

(*10th January, 1887.*)

KILLAM, J.—This is a suit in equity to enforce registered judgments recovered by the present plaintiff against one of the two present defendants, husband and wife, as being charges upon certain lands held by the wife and to have a transfer from the husband to the wife through a third party declared fraudulent and void as against the plaintiff.

The bill alleged that the plaintiff, on the 18th day of October, 1884, recovered judgment in this court against the husband; that on the 27th day of October, 1884, the plaintiff issued and delivered to the sheriff of the Western Judicial District writs of *fieri facias* against the goods and the lands of the husband under said judgment; that the sheriff had certified to the plaintiff that the husband had not in his bailiwick any goods and chattels whereof he should cause to be made the amount of the judgment or any part thereof; that the writ against the husband's lands still remained in full force and unsatisfied, and the judgment debt remained wholly unpaid; that, prior to the 7th day of December, 1883, the husband, pursuant to the Dominion Lands Act, had made application to obtain a homestead entry for the quarter section of land in question, and, having perfected his entry therefor, had resided upon the lands more than three years from the date of the perfecting of the entry, and had proved to the satisfaction of the local agent appointed under said Act that he had resided upon and cultivated the lands during the term of three years, and such proof had been accepted by the commissioner of Dominion Lands and, on the said 7th day of December, the husband obtained a certificate in the form required by said Act, recommending the issue of a patent from the Crown for the said lands to the husband, signed by such agent and countersign-

ed by the commissioner of Dominion Lands, whereby he became entitled to a patent from the Crown for the lands; that, shortly after the 7th day of December, 1883, the husband assigned and transferred all his estate and interest in the lands to one Hallen voluntarily and without consideration, for the purpose of constituting Hallen a conduit pipe for conveying the lands to the wife; that Hallen accordingly immediately assigned and transferred such estate and interest to the wife, and that on or about the 5th day of March, 1885, a patent for the lands was issued to the wife; that at the time of the assignment to Hallen the husband was indebted to the plaintiff in the amount which formed the subject of the judgment before mentioned, and indebted to various other persons whose demands still remained unpaid; that the husband was not at the time of the transfer, and he had never since been, possessed of any property real or personal, except said lands, out of which such indebtedness could be satisfied; that the plaintiffs were hindered and delayed by the transfers in the recovery of the judgment debt, and were entitled to have them declared fraudulent and void as against them, and to have it declared that the wife held the lands as trustee for the husband; that on the 30th day of August, 1884, the plaintiffs caused a certificate of the judgment to be registered in the Registry Office for the county of Shoal Lake in which the lands lay; that on the 15th day of July, 1884, the plaintiff obtained another judgment against the husband in the County Court of the county of Birtle which still remained unsatisfied, and on the 25th day of July, 1884, a certificate of the latter judgment was registered in the Registry Office for the county of Shoal Lake, and the plaintiff claimed that by reason of the registration of the certificates of the judgments the plaintiff obtained liens or charges on the lands for the amounts thereof, and prayed to have the alleged charges enforced against the lands, and to have it declared that the transfers to Hallen and the wife were fraudulent and void against the plaintiff, and that the wife held the lands as trustee for the husband.

The wife answered, denying all charges of fraud in the bill, and setting up that at the time of her marriage, or shortly thereafter, it was agreed between her and her co-defendant, who was then unable to proceed with or carry on his farming operations through lack of money, that if she would advance him money to

carry on the farm as her agent only, when the patent could issue, it should issue in her name and for her benefit; that she accordingly advanced and had since continued to advance to her co-defendant moneys of her own, and had paid out large sums of money for the improvement of the farm lands in question, and almost all the improvements made on the said lands were made with her moneys, and her co-defendant always continued to be a mere trustee of the lands for her, and it was pursuant to this agreement that the patent issued to her, and she claimed the benefit of subsection 3 of chapter 12 of the Act, 46 Vic. D.

The husband also answered the bill, denying all charges of fraud made against him in the bill, and alleging that shortly after his marriage with his co-defendant he agreed with her that if she advanced to him moneys to assist him in his then difficulties he would hold the lands in question as trustee for her, and that she did advance to him moneys out of her own private means, and he had always acted as her agent merely in carrying on the said farm; that the improvements made upon the said lands since the said agreement had all been made with the wife's moneys, she relying upon the said agreement, and pursuant to the agreement the patent had issued to her. He also claimed the benefit of the exemption clauses of the Administration of Justice Act, and of subsection 3 of section 27 of the Dominion Lands Act of 1883.

Issue was joined upon the answers, and the cause coming on for the examination of witnesses and hearing before my brother Dubuc, he dismissed the bill without costs. The plaintiff brought the cause on for rehearing in Hilary term last.

The plaintiff proved a judgment recovered against the husband on the 18th day of October, 1883, in this court at law, and one recovered in the County Court of the county of Birtle on the 16th day of July, 1884, and the registration of a certificate of the latter judgment in the Registry Office of the division in which the lands lie, upon the 26th day of July, 1884. There was also produced a registered certificate of the deputy prothonotary, "that on the eighteenth day of October in the year of our Lord one thousand eight hundred and eighty-four judgment was signed and entered up in favor of A. Harris, Son and Company (limited), plaintiffs, and against Edward Rankin, defendant, for two hundred and twenty-seven dollars and twenty-two cents damages

and costs." This certificate was under the seal of the Court of Queen's Bench.

It does not appear to me that this certificate is sufficient to effect by its registration a charge upon lands under the judgment recovered on the 18th day of October, 1883. The names of the parties and the amounts are identical, but there is a difference in the dates, the number of the roll is not given, and the certificate does not show the judgment to have been recovered in the Court of Queen's Bench. It might, so far as appears, have been recovered in a county court, the amount being within the jurisdiction of the county courts. That it was recovered in the Court of Queen's Bench is not, in my opinion, to be inferred from the fact that the certificate is signed by the deputy prothonotary, and bears the seal of the Court of Queen's Bench. The issue of writs of execution against the goods and the lands of the husband upon the judgment of this court, and their delivery to the sheriff of the district in which the lands in question are situate on the 29th day of October, 1883, were duly proved. It was also shown that the husband had no property from which the judgment debt could be realized unless the lands in question could be rendered subject to it. The errors in the dates of the judgment and executions as given in the bill were amended at the hearing by order of the learned judge.

The certificate of the county court judgment was in form sufficient to bind the lands of the judgment debtor, if duly registered. Objection is, however, made to the registration because, from the copy filed, it does not appear that the original was endorsed by the registrar with the certificate required by the 32nd section of the Lands Registration Act, Con. Stat. Man., cap 60.

By the County Courts Act, Con. Stat. Man., c. 34, s. 116, "Any person who has obtained a judgment in any county court exceeding forty dollars, may at any time obtain a certificate from the clerk of such court in the form or to the effect of the form for the same, in the schedule of forms to this Act; which certificate shall, on the request of the party obtaining the same, be registered in any county registry office on payment to the registrar of fifty cents; and such registry shall bind all interest or estate of the defendant or defendants in lands and hereditaments situate within the registration division or county in which such

office is situate, the same as though the defendant or defendants had in writing, under his or their hand or hands and seal or seals, charged the said lands and hereditaments with the amount of the said judgment."

By the Lands Registration Act, Con. Stat. Man. c. 60, sec. 15, "Grants from the Crown may be registered by the production thereof to the registrar, with a true copy sworn to by any person who may have compared the same with the original—such copy to be filed with the registrar—all other instruments excepting wills shall be registered by the deposit of the original instrument, or by the deposit of a duplicate or other original part thereof, with all the necessary affidavits."

Section 30—"All instruments that may be registered under this Act," (among which are "any instruments in any wise affecting, in law or in equity, lands in Manitoba,") "shall be registered at full length, including every certificate and affidavit, excepting certificates by the registrar, accompanying the same, upon and by the delivery to the registrar of the original instrument," etc.

Section 32—"The registrar or deputy registrar of the county in which the lands are situate shall, upon production to him of the original instrument, duplicate or other original part thereof, together with an affidavit of execution, * * * enter the said instrument in the registry book in the order in which it is received; and he shall file the same with such affidavit of execution; and he shall endorse a certificate on every such instrument to the effect, etc., * * * which certificate shall be taken and allowed as evidence of such respective registrations in all courts."

It does not appear to me that the endorsement of this certificate of the registrar is a part of the act of registration. In my opinion the registration is complete so as to bind the lands upon the deposit of the instrument with the registrar. The 15th section effects this by providing for that which is to be done by the party producing the instrument for registration. Then the 30th and the following sections contain merely the directions to the registrar as to the acts that are to be performed by him after and consequent upon registration of the instrument by the party producing it. It is the duty of the registrar in the interests of the pub-

lic generally to comply with these directions, but it does not appear to be made the duty of the party producing the instrument to see that they are complied with. In this view I am strengthened by the case of *Laurie* v. *Rathburn*, 38 U. C. Q. B. 255.

The husband took possession of the lands in question, which were then unoccupied and unappropriated Dominion lands, in 1880. There was then no land office for the district in which they lay, but one was opened in September, 1881, and he then immediately obtained a homestead entry in respect of the lands under the Dominion Lands Act of 1879, which was the Act then in force.

By section 34 of that Act—"1. Any person, male or female, who is the sole head of a family, or any male who has attained the age of eighteen years, shall be entitled to be entered for one hundred and sixty acres, or for a less quantity, of unappropriated Dominion lands, for the purpose of securing a homestead right in respect thereof.

"But a person obtaining such homestead entry shall be liable to the forfeiture thereof should he not become a *bona fide* occupant of the land so entered within two months of the date of entry, and thenceforth continue to occupy and cultivate the same as hereinafter provided.

"8. A person applying for leave to be entered for lands with a view to securing a homestead right therein shall make affidavit before the local agent according to the form B in the schedule to this Act.

"10. No patent shall be granted for the land until the expiration of three years from the time of entering into possession of it except as hereinafter provided.

"11. At the expiration of three years the settler, or his widow, her heirs or devisees, or, if the settler leaves no widow, his heirs or devisees, upon proof to the satisfaction of the local agent, that he, or his widow, or his or her representatives as aforesaid, or some of them, have (except in the case of entry upon contiguous lands as hereinbefore provided) resided upon and cultivated the land for the three years next after the filing of the affidavit for entry, or in the case of a settler on unsurveyed land, who may, upon the same being surveyed, have filed his application as pro-

vided in subsection five, upon proof as aforesaid that he, or his widow, or his or their representatives as aforesaid, or some of them, have resided upon and cultivated the land for the three years next preceding the application for patent, shall be entitled to a patent for the land provided such claimant is then a subject of Her Majesty by birth or naturalization.

"13. The title to lands shall remain in the Crown until the issue of the patent therefor, and such lands shall not be liable to be taken in execution until the issue of the patent.

"17. All assignments and transfers of homestead rights before the issue of the patent, except as hereinafter mentioned, shall be null and void, but shall be deemed evidence of abandonment of the right; and the person so assigning or transferring shall not be permitted to make a second entry:—

"Provided that a person whose homestead may have been recommended for patent by the local agent—the conditions in connection therewith having been duly fulfilled—may legally dispose of and convey his right and title therein.

"Any person who may have obtained a homestead entry shall be considered, unless and until such entry be cancelled, as having an exclusive right to the land so entered as against any other person or persons whomsoever and may bring and maintain actions for trespass committed on the said lands or any part thereof."

"FORM B.

"I, A. B., do solemnly swear (or affirm, as the case may be) that I am over eighteen years of age, that I have not previously obtained a homestead under the provisions of the Dominion Lands Act; that the land in question belongs to the class open for homestead entry; that there is no person residing or having improvements thereon; and that this application is made for my exclusive use and benefit, with intention to reside on and cultivate the said land."

Some changes were made in these provisions by the Dominion Lands Act of 1883, but it appears to me that these did not affect the position of these defendants. The husband had acquired his homestead right subject to the conditions imposed by the Act of 1879, and, there being no distinct provision in the Act of 1883 making any new or different conditions under it applicable to those already holding homestead rights, it would seem impossible to

consider the position of such parties as changed. I, therefore, deal with the question without any reference to the Act of 1883.

There is ample evidence that the husband obtained the lands in question to be recommended for patent as his homestead by the local agent, and then conveyed the lands to Mr. George S. Hallen to be conveyed to the wife; that they were then so conveyed to her by Mr. Hallen, and that in pursuance of the right so acquired the patent was issued to her.

Mrs. Rankin's answer, after setting out her version of the agreement with her husband, says that it was in pursuance of that agreement that the patent was issued to her. Mr. Rankin, in his evidence, stated that he always desired to convey the property to his wife, "and was advised that after the recommendation was made and before the patent was issued was the proper time to make it"; he states that he made an affidavit for the purpose of getting the recommendation; he says the deeds were made in pursuance of the agreement in the Queen's Hotel; he says that he thinks he applied for the recommendation for the patent "some little before" he executed the deed to Mr. Hallen; that he applied for the recommendation because he wanted to convey to his wife. Mrs. Rankin, in her evidence, says that she knows that the recommendation did issue; that the land was conveyed by her husband to Mr. Hallen, and by Mr. Hallen to her; that before the recommendation was applied for the husband agreed that the patent should issue to her; that Mr. Hallen was consulted for the purpose of having the land conveyed to her; that she employed Mr. Hallen to get the title for her, and in consequence of this the application for the recommendation was made, and then conveyances were made which were sent to Ottawa, and upon which the patent was issued direct to her.

Mr. Hallen, in his evidence, says that he had a "recommendation for the patent" in his possession at one time. He places its date as in November or December, or perhaps October, 1883; he says he knows that the transfer was not made for some time after that, nearly a year; that he prepared a conveyance from the defendant to himself which was sent to Ottawa; that "it was an ordinary quit-claim deed, and there were some

recitals in it setting forth that moneys were advanced in consideration, it was quit-claimed to me and I quit-claimed back to the wife, I executed a document to that effect"; that this latter deed was executed in November, 1884; that he was first consulted about the subject of the transfer before the recommendation was obtained; that Mrs. Rankin consulted him before the recommendation was obtained about having the title to the land put in her name; that "it was all part of one transaction, the applying for the recommendation and the obtaining of the patent."

Other expressions of the witnesses might be referred to in corroboration. It is a point on which, under the circumstances, very slight evidence would be sufficient.

Mr. Hallen speaks of a recommendation that Mr. Rankin be allowed to purchase the lands, and it is argued that this is what the parties refer to throughout, and that there is no clear evidence that any other recommendation was obtained, Mr. Hallen, however, distinctly speaks of a "recommendation for patent" as having been in his possession, and being a solicitor we must suppose that he did not mean by that expression a recommendation that either party be allowed to purchase the land. It is made quite clear that there was no purchase from the Crown; the parties evidently understood that the time to convey was after the recommendation for patent; that is the time pointed out by the statute, and it is not to be supposed that the patent was issued without the recommendation, or without, at least apparent, compliance with the statute.

Mr. Hallen is not positive of the exact date when the recommendation was obtained, but he puts it as having been in 1883, and he says positively that it was nearly a year before the date of execution of the deeds, which he fixes as in November, 1884. I consider, therefore, that it must be taken as sufficiently proved that the recommendation was issued before, and that the conveyances were made after, the registration of the certificate of the county court judgment. If the lands were unsurveyed in 1880, when Mr. Rankin settled on them, as appears probable from the delay in opening the land office, he might have been entitled to the patent in 1883. In the view which I take these questions of priority of dates are of no importance, but I base my

conclusion upon these deductions of fact from the evidence as their discussion takes less time than would be required in discussing the grounds of my opinion that the registration of the certificate of judgment affects after required lands.

I think that the 13th subsection of the 34th section of the Lands Act of 1879 is effectual to prevent the seizure or sale of the lands under execution before the patent was issued, and that if they were not subject to seizure they could not, before patent, be even bound by executions in the sheriff's hands. It would, therefore, appear that if the conveyances to Mr. Hallen and Mrs. Rankin were valid as against the plaintiff there can be no claim upon the lands by virtue of the execution.

I am not, however, able to accede to the argument of the defendants' counsel that the prohibition against taking the lands in execution is to be considered as including any proceeding or process under which a judgment is attempted to be enforced against the lands, and, therefore, to extend to proceedings in equity upon a registered judgment.

It is to be noticed that the 13th subsection of section 34 has appeared in every Dominion Lands Act from 1872 to the present time, coupled also with some provision, similar to that of the first part of subsection 17 above cited, avoiding assignments of homestead rights before patent, but that the proviso authorizing a transfer after recommendation for patent was not enacted until 1879. It would, then, appear that before 1879, as the title was declared to be vested in the Crown, and as no transfer could be made by the homesteader before the issue of the patent, the land could not be subjected to the involuntary charge ordinarily created by a debtor suffering the recovery and registration of a judgment. The addition of the proviso to subsection 17 appears, however, to have qualified the former provisions and to have had the effect of creating in the homesteader, upon the recommendation for patent being granted, an actual transferable interest in the homestead lands which he could then effectually charge. If it were not that the Act of 1879 is a consolidating Act, re-enacting the provisions of the 13th subsection with the 17th, I would think the provision for the giving of a transferable interest in the land sufficient to partially repeal the former provisions against the taking of the homestead lands in execution,

as it would naturally be supposed that the Dominion Parliament would not intend to give a debtor a transferable interest while keeping it from being subject to satisfy his debts. However, as the two provisions come together in one statute, the latter must be considered to affect the former only so far as it is inconsistent with it. The giving of the transferable interest necessarily modifies somewhat the provision that the title is to remain in the Crown, but it is yet not sufficient to repeal or annul the provision that the lands are not to be taken in execution. But such an exemption from execution of property which the debtor can himself dispose of, must be construed strictly, and I think that we must give to the expression "taken in execution" in the 13th subsection merely its ordinary technical sense. The defendant's counsel refers to the definition of the word "execution" given in *Wharton's Law Lexicon*, "the last stage of a suit whereby possession is obtained of anything recovered," and argues from it that the clause is to be construed so as to include the creation and enforcement of a charge by registration of a certificate of a judgment and proceedings in equity thereon. Even this definition, strictly considered, is not sufficient to sustain the argument, for the proceeding by which possession is obtained of the moneys recovered under a judgment so registered is a new and distinct suit, and not the last stage of the original suit, and all that is effected by the registration is the creation of a charge upon lands, a step which, although it may be called the last stage of the suit, is not of itself one by which possession is obtained of the moneys recovered. But other lexicographers give even more wide meanings as those which in some instances the word "execution" may have, and I would not be satisfied to base a decision upon any such narrow verbal criticism of Mr. Wharton's definition.

In *Bouvier's Law Dictionary* two meanings are given to the word, (1) "the act of carrying into effect the final judgment of a court or other jurisdiction," and (2) "the writ which authorizes the officer so to carry into effect such judgment."

In *Brown's Law Dictionary*, under the word "execution," the author merely refers to the titles "execute" and "writ of execution," and as to the word "execute" he says, "as applied to writs the word denotes the act of the sheriff in carrying out the command of the court contained in the writ," and, after giv-

ing a meaning as applied to deeds and to the putting to death of criminals under sentence of a court, he says, "but in each of these three applications, and in every other application of the word, there is the same meaning, namely, that of completing or performing what the law either orders or validates." This is sufficient to show that the word may have a narrow, or a very extended, meaning, according to circumstances.

Now, the expression "taken in execution" has a technical meaning well known to every lawyer. It would not ordinarily be understood to have any reference to the creation of a charge upon the lands of a judgment debtor by registration of a certificate of the judgment, and the enforcement of the charge by proceedings in equity. In the Dominion Lands Acts prior to 1879, it was unnecessary to give any wider meaning to the expression in order to prevent the creation of such a charge before the issue of the patent, as by our statute the registration of a certificate is to have the effect of the creation of a charge upon his lands by the judgment debtor in writing under his hand and seal, and the prohibition against an assignment or transfer of the lands would prevent the creation of any charge in this way before the issue of the patent. In my opinion then, instead of there being in the addition of the proviso allowing transfers before patent any indication that a wider meaning should be given to the expression, the reasonable inference would rather be in favor of its restriction.

I think that it must be held that, apart from any question of an interest in the wife, the lands became, on the registration of the certificate of the county court judgment, subject to a charge in favor of the plaintiff for the amount of that judgment.

Two questions as to the wife's interest arise. Had she acquired an interest before the registration of the judgment? Was the subsequent transfer to her void as against the plaintiff?

Upon both of these questions several of the same considerations are involved, an affirmative answer to the first involves a negative answer to the second. In reference to each the onus is upon the defendants. Upon the first question this is self evident. It is admitted that no consideration passed upon the making of the conveyances, and the only consideration that is set up is one claimed to have arisen under the alleged agreement referred to

in the answers of the defendants. This agreement or arrangement, whatever it was, must for the purposes of either question be clearly proved.

The only evidence offered in support of it is that of the husband and wife, both peculiarly interested in the result.

In *Douglas* v. *Ward*, 11 Gr. 39, and *The Merchants' Bank* v. *Clarke*, 18 Gr. 594, conveyances from debtors to relatives being attacked as made without consideration, and the only consideration set up in either case being an alleged claim against the debtor for services rendered by the grantee to the debtor while living under the same roof with him, it was held that the unsupported testimony of the parties interested was insufficient to establish the consideration. In *Stevenson* v. *Franklin*, 16 Gr. 141, a similar principle was laid down where the alleged consideration was an indebtedness of a father to his son. Without determining that in no case will such a transaction be upheld upon the unsupported testimony of the parties interested, it is sufficient to say that it must at least be required that their account of the transaction should be clear and definite and that the evidence generally should be peculiarly free from suspicious circumstances.

In *Miller* v. *Hewitt*. 13 U. C. L. J. N. S. 85, where a married woman was making a claim upon her husband's estate in liquidation under the Insolvent Acts, in respect of a transfer to him of certain shares of stock which formed part of her separate estate, upon an alleged promise of repayment by him of their value, it was held by the Ontario Court of Appeal that such a claim should be submitted to the most rigid investigation and must be supported by the most clear and convincing evidence when being proved before the assignee.

In *Tripner* v. *Abrahams*, 47 Penn. St., 227, Thompson, J. said, "I fully concur in the views expressed in this case that transactions about property between husband and wife are to be narrowly scanned, and that the law looks upon them with a jealous eye, but still their *bona fides* is not upon presumptions merely to be placed among impossible things. With the view thus expressed of them they are to be investigated with great care and caution, but with this exception the rules of law and evidence must be mainly the same as in other cases. Equity has often

recognized and maintained the possibility of married women standing in the relation of creditors to their husbands, and when it has been made to appear by clear and satisfactory evidence that conveyances have been made on such a consideration they have been sustained." In *Bump on Fraudulent Conveyances*, p. 306, it is said that settlements of a husband on his wife "are always watched with considerable jealousy, on account of the relative situation of the parties, and the convenient cover they afford to a debtor to protect his property and impose upon his creditors, and the payment of a valuable consideration must be made out by proof of the most unquestionable character."

These remarks are equally applicable to the discussion of both the questions to which I am referring.

There are important differences between the answers of the two defendants in the statements of the agreement relied upon. The wife's answer puts it in this way, "About the time of my marriage with my co-defendant or shortly thereafter it was agreed between myself and my co-defendant who was then unable to proceed with or carry on his farming operations owing to lack of money that if I should advance him money he would carry on the said farm as my agent only, and that when the patent could issue the same should issue in my name and for my benefit." The husband's answer states it in these words, "Shortly after my marriage with my co-defendant I agreed with her that if she advanced me money to assist me in my then difficulties I would hold the lands in question herein as trustee for her."

As put by the wife's answer the promise to her was merely that the patent should issue to her and for her benefit, a promise to be performed only when the patent was to issue; while as put by the husband it was that he would hold the lands as trustee for the wife, apparently a promise of which the performance was to be begun at once.

When we turn to the evidence we find that the wife gives no definite account of the real agreement; and the only definite account of it given by the husband is that the gist of it is contained in his answer.

It appears, however, that no money was advanced to the husband for his own use. About the time of his marriage, according to his own account, he received money of his own from

England, and out of this remittance he paid his debts and the expenses of his wedding trip; he tells also of supplying considerable sums in payment of the household expenses after marriage. Mrs. Rankin speaks of having advanced some money to her co-defendant before their marriage, but she says that there was not much agreement until after marriage, and the agreement which is set up is not in any way one that the lands were conveyed in consideration of money lent by her to him before their marriage. If any debt existed for such advance it was not assumed to be satisfied by conveyance of this land, and, unless discharged by their marriage or otherwise satisfied, it still subsists. Apart from any such small advance, she says, "The first I gave him was after our marriage; I simply had money paid into his account for use on the farm to save me trouble." As put by both defendants there was no real advance of money by the wife to the husband, but, if we adopt their account, he assumed from the commencement of the transaction to place her in possession and to complete the buildings and other improvements as her agent with her money and as her agent to carry on the operations of the farm. There is no proof of any agreement binding the wife to employ the husband for any particular period or at all, or to carry on the farm for any particular period, or to complete the performance of his settlement duties. As they attempt to put it there was an endeavor to transfer the land at once to her, and she then expended the money upon the farm as upon her own land and for her own benefit. Except for the purpose of fulfilling the homestead conditions, in order to get the land from the Crown without payment for it, the presence and agency of the husband was unimportant; the work of superintendence might as well have been performed by another or by herself. It is true that Mrs. Rankin states in her evidence that it was understood from the first that the homestead was to be taken up for her, but this is unimportant except as it might help to rebut any presumption of an intention to defraud, if such were charged apart from the want of consideration. The whole policy of the Act is clearly against the making of homestead entries or the holding of homestead rights by one party for another. By the very affidavit to be made on application for the entry the applicant must state that the application is made for his "own exclusive use and benefit." No agreement of that kind would be enforceable; the

homestead right is in him who makes the entry and in him alone; he cannot transfer it until he has complied with the conditions under which the land is to belong absolutely to him and has obtained it to be recommended for patent. I cannot agree with the view which I understand to be held by the learned chief justice, that the provision against a transfer of the homestead right is intended to operate only as between the Crown and the homesteader. The policy of the Act is to obtain *bona fide* settlers on the public lands and to retain them there. The prohibition against a transfer of the homestead right is evidently made in furtherance of that policy, and this and the other provisions are placed in the Act to prevent the making of entries, or the use of them when made, for purpose of speculation merely. I think it perfectly clear that the entry must be made in right of the settler himself only, and that only in his own right can he hold and cultivate the land and acquire in the land the statutory interest allowed. The provision that assignments and transfers of the homestead right are to be void is contained in a statute, and not in an agreement between parties. It is a clear and positive enactment; and in the sentence which follows, "but shall be deemed evidence of abandonment of the right" I find, not an interpretation of the preceding words, but an exception from them; admitting that the first sentence makes them wholly void, but yet providing that they are to have a certain effect as evidence. The attempted transfer being thus wholly illegal, I cannot think that there would be in the wife even a lien for her improvements claimed to have been made. Assuming then that it can be considered that any agreement between the husband and the wife has been proved, it was at best an attempted transfer to her of the land without consideration before fulfilment of the settlement duties. It was then an uncompleted gift, and a court of equity would render no assistance to compel a completion of the transfer after the husband acquired the land. *Price* v. *Price*, 21 L. J. Ch. 53, 14 Beav. 598; *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Exparte Dubost*, 18 Ves. 140; *Mews* v. *Mews*, 15 Beav. 529. In the latter case it was laid down by Lord Romilly M. R. that, "to constitute a gift between husband and wife there must be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband by which he divested himself of his property and engaged to hold it as a trustee for the separate use of his

wife." Now here, although when the alleged attempt to transfer was made the husband was not indebted and the property was not subject to be taken to satisfy his debts if he had had any, yet he could not divest himself of the property in favor of the wife, and there was no completed gift.

When the husband did acquire a transferable interest in the land he was insolvent. To enable him then to make a transfer based solely on the old arrangement, and which would be binding as against his creditors, it was necessary that there should have been a debt or obligation which could be enforced at law or in equity, (*Penhall* v. *Elwin*, 1 Sm. & G. 268), and it appears to me that there was none.

In my opinion, therefore, there was no interest in the wife at the time of the registration of the certificate of judgment which could prevail against it, and the subsequent transfer was wholly void as against the plaintiff.

It remains to be considered whether the issue of the patent to the wife prevents the plaintiff from enforcing these judgments against the land.

In *Dougall* v. *Lang*, 5 Gr. 292, the defendant while in occupation of Crown lands as tenant of the plaintiff, having been admitted to purchase the lands from the Crown by virtue of the right which his occupancy gave him, and the patent having issued to him, it was held that he took the land as trustee for the plaintiff.

In *Yale* v. *Tallerton*, 13 Gr, 302, it was held that the court would, at the instance of an execution creditor of the locatee of the Crown, direct the interest of the locatee to be sold and order him to join in the necessary conveyance to enable a purchaser to apply to the Crown Lands Department for a patent for the land as vendee or assignee of the locatee.

In *Ferguson* v. *Ferguson*, 16 Gr. 311, where a debtor had bought of the Crown upon terms of paying the purchase money by instalments, and had died being in arrear in his payments, and his heirs had obtained a friend to advance the balance of the purchase money and the patent had issued to the heirs, the court held that it was clear that an interest of the kind in lands could be reached by an execution creditor through that court, and that neither the heirs nor any one for them could intercept the rights

of creditors by advancing what might be due to the Crown as vendor, any more than in the case of a private vendor.

In *Rae* v. *Trim*, 27 Gr. 374, Blake V. C. held that parties in possession of Crown lands before patent could so far bind themselves that, when a patent should issue to them, the lands granted would be bound by any right or easement to which their sanction had been obtained.

I have no hesitation in adopting the principles of these decisions. It would certainly be anomalous that a creditor should not be able to reach property in which the debtor had acquired a transferable interest and to the patent for which he had a clear right, because the debtor should then make a voluntary transfer to a third party and procure the patent to be issued to that party. It might be suggested that under the doctrine of *Rae* v. *Trim*, the husband may be said to have given an interest to the wife or, at least, a lien for the value of her improvements, but it is not until the land is recommended for patent that the locatee of the Crown in respect of lands entered as a homestead under the Dominion Lands Act was in the position of a vendee or locatee in respect of the public lands of Ontario. While occupying by virtue of his homestead entry, the locatee is subject to the prohibition of the Act against transfer and he could neither make any absolute transfer of an interest in the land nor create any lien or easement thereon. But upon the issue of the patent the land must be regarded, as against this plaintiff, as being held for the husband. The prohibition against its being taken in execution ceased to have effect, and it became then at once bound by the plaintiff's execution except in so far as it may have been exempt under our provincial statutes.

The Act in force at the date of this patent under which any real estate was exempt from execution was The Administration of Justice Act as contained in the Consolidated Statutes, cap. 37.

By the 85th section of that Act, the following personal and real estate are thereby declared free from seizure by virtue of all writs of execution issued by any court in this Province, namely:

"(8) The land cultivated by the defendant, provided the extent of the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold, subject to any lien or incumbrance thereon.

(9) The house, stables, barns and fences on the defendant's farm, subject, however, as aforesaid."

Such an Act must be construed strictly and it can, I think render exempt only the lands actually under cultivation, and not the whole of a parcel of one hundred and sixty acres of which a part is under cultivation though the whole parcel may be occupied and treated as one farm. I think, however, that, though it is not distinctly stated, the land on which the house, stables, &c. are situate is exempt with them.

A further question here arises. The land became charged under the county court judgment upon registration of the certificate. It became bound by the execution issued under the judgment of this court when the patent issued. The former was a charge upon all the lands, the latter upon a portion only. In accordance with the views which I lately expressed in *Warne* v. *Housley*, it appears to me that the former charge must be apportioned upon the land exempt and that not exempt from the execution, according to their respective values when the execution first bound the latter, that is at the date of the issue of the patent. The plaintiff's costs of suit, and of the rehearing should be added to the first charge and apportioned with it.

The conclusion to which I have come is that the order dismissing the bill should be vacated, and a decree should be made declaring the conveyances from the defendant Edward Alfred Rankin to George St. John Hallen and from George St. John Hallen to the defendant Harriet Rankin, both of the lands in the pleading mentioned, to be void as against the plaintiff; that these lands are subject to a lien or charge in favor of the plaintiff for the amount due upon the judgment mentioned in the pleadings recovered by the plaintiff against the defendant Edward Alfred Rankin in the County Court of the County of Birtle; and the costs of this suit and rehearing; that these lands excepting such portion as, at the date of the issue of the letters patent there for by the Crown to the defendant Harriet Rankin, were being cultivated by the defendant Edward Alfred Rankin, and the houses, stables, barns and fences then on such lands and the portions of the lands occupied by the same, are subject to a lien and charge in favor of the plaintiff by virtue of the writ of execution against the lands of the defendant Edward Alfred Rankin for the

amount due upon the judgment on which the writ was issued. The decree should also declare that as between these two charges the first one should be apportioned, and that the portion of the lands subject to the second is as between them to be deemed subject to the proportion only of the first charge which the value of those lands at the issue of the patent therefor from the Crown to the defendant Harriet Rankin then bore to the value of the whole of the lands.

There should be the usual reference to the master as to subsequent incumbrances and to take the accounts and fix the time for payment, and also to inquire and ascertain the respective values of the portions mentioned when the patent issued. The lands should be ordered to be sold on default of payment, and the husband ordered to pay the deficiency, if any, after sale. Both defendants should be ordered to pay the costs of the suit and the rehearing.

WALLBRIDGE, C.J.—The defendant, Harriet Rankin, wife of the co-defendant Edward Alfred Rankin, claims the land as hers by purchase from her husband and as her separate estate. The evidence shows that Edward Alfred Rankin took possession of the land in question in 1880, intending it as a homestead; there being then no office open in which he could make a homestead entry, pursuant to 42 Vic. c. 31, s. 34, s-s. 10, 11, 13, 15, 16, 17. This was before his marriage. He was married the same fall, on 26th October, 1881. Mrs. Rankin swears that she could not make the entry in her own name. It was agreed that the entry should be made for her though in his name.

The two defendants were acquainted with one another in England; she came to this country, and he followed her. Besides the agreement that the entry was to be for her, both defendants swear that it was agreed that she should give him £500 for this very land, and they both swear that she did so. It is also proved that she was abundantly able to do it, as she received in all about £1,000 from Scotland, as her part of her father's estate, and the letters proving the remittances to her are produced. The evidence is not given in a satisfactory manner, both defendants being wholly unaccustomed to business. But this, I think, cannot be denied, that she actually received the money from Scotland, that there was a verbal agreement between

them respecting this land, and that she gave him £500 for it. There is no pretence that she ever intended to make him a present of the money, or that it ever went to his hands on any other consideration than as payment for the land. It is argued that this money, or part of it, was afterwards invested in building and otherwise improving the land. It does not appear quite so clearly whether it was this identical money which went towards improving the premises, or whether it was not another part of the £1,000. In any event it does not appear to me to be a valid reason for defeating her purchase, that her husband chose so to invest the money. She was a married woman, evidently knowing nothing of the law or of business, no doubt much under the control of her husband, and his so investing the money, even if considered proved, could not deprive her of the right she had acquired by the payment of her money. He appears to have obtained his recommendation for patent in October, November or December, of 1883. And in November, 1884, they went to Mr. Hallen, a solicitor, to have the transfer made, which he did, by taking a conveyance to himself and giving a quit claim or release to Mrs. Rankin. There does not appear to have been anything urging them to carry out their bargain then, but it seems to have been done in ordinary course. Mrs. Rankin seems to have been the most concerned and active when with Mr. Hallen. Mr. Hallen speaks of it as having been done to give her the title for money before then advanced. There is, to my mind, a total absence of anything like conspiracy or fraudulent design, for there was abundance of time between the recommendation in December, 1883, and the registration of the judgments in July and September, 1884, to have given the conveyance, when it would have been perfectly lawful to have so done.

Taking the view, that the purchase by Mrs. Rankin was real, the money actually paid, her husband had not after such payment any beneficial interest in the land upon which a registered judgment could operate. This view is supported by *The Hamilton Provident & Loan Society* v. *Gilbert*, 6 Ont. R. 439, where it is said, "The Court will look as to who is the true owner of the property in equity, and declare it the property of such owner, and by this means avoid property being seized under execution when the debtor has no beneficial interest in it." This is supported by *Blackburn* v. *Gummerson*, 8 Gr. 331, and

*Bigelow on Frauds*, p. 312. It appears to me impossible to say that one who has the power to sell land and the right to receive the purchase money has not an interest in land. But admitting that, the right of the purchaser to demand title, and of the vendor to demand the purchase money, are correlative rights, and it has been held in *Flint* v. *Smith*, 8 Gr. 339, that a registered judgment did not gain priority over a vendor's lien, and for similar reason should not intercept the title of the purchaser. Besides this, the judge before whom the case was heard found that there was a real sale intended, but from the unsatisfactory manner of the defendants in giving their testimony, refused them costs. That attention is yet to be paid to the finding of the judge is apparent from *Webster* v. *Friedeberg*, 17 Q. B. D. 736, where *Solomon* v. *Bitton*, 8 Q. B. D. 176 is again explained, and the law is again restored to where it has been for many years. Lord Esher, M. R., says, "But it is idle to say that in determining whether a verdict was against the weight of evidence you must not take into a serious consideration the opinion of the judge who tried the case."

To allow the husband's conduct, subsequent to the sale, to affect the wife's title would have the effect of allowing him to improve his wife out of her estate. The husband, or husband and wife, lived upon the land until, by the Act 46 Vic. c. 17, s. 33 D., he became entitled to the land. It is proved that he obtained the certificate (form M.) from the local agent—the certificate was not produced,—but Mr. Hallen, who acted as solicitor for the wife in making the transfer, says that this certificate bore date in October, November or December, 1883. It was not attempted to be proved that it had been countersigned by the Commissioner of Dominion Lands; however, this might be assumed from the fact of the patent having issued, which in fact it did on the 5th March, 1885.

46 Vic. c. 17, s. 27, s-s. 3 declares that the title to the land shall remain in the Crown until the issue of the patent.

When this patent issued it issued to Harriet Rankin. It is contended, however, that as under section 36 of this Act the homesteader had been recommended for patent, the homesteader might legally dispose of his right and title therein.

If the construction contended for here be given the full effect of its words the result would be a contradiction to section

27, sub-section 3, for there it is plainly stated that the title shall remain in the Crown until the patent is issued; and further, that the land should not be liable to be taken in execution. Unless we can say that the Crown impliedly undertakes to give the patent to the assignee of the homesteader.

In my opinion Harriet Rankin has the prior equity and the title also. The bill, I think, should be dismissed with costs.

TAYLOR, J., concurred with KILLAM, J.

*Decree as indicated in judgment by Killam, J.*

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## DEDERICK v. ASHDOWN.

[IN APPEAL.]

*Chattel mortgage.—Mortgagor selling the goods.—Pleading.*

The plaintiffs gave to one of the defendants a chattel mortgage upon his stock in trade. It contained a covenant that in case the mortgagor should "attempt to sell or dispose of, or in any way part with the possession of the goods or any of them or to remove the same or any part thereof out of the store and premises * * * without the consent of the mortgagee * * * to such sale, removal or disposal first had and obtained in writing, it shall be lawful for the mortgagee to take possession," &c. The plaintiffs remained in possession and continued to make sales in the usual course of business.

Shortly afterwards the defendants obtained judgment against the plaintiffs and under *fi. fa.* goods caused the same goods to be seized and sold. The *fi. fa.* was afterwards set aside as having been issued in breach of an agreement.

In an action in trespass and trover the defendants pleaded not guilty, and not possessed.

*Held*, 1. That under the plea of not possessed the defendants might set up the chattel mortgage and the breach of the covenant not to sell.

2. That the covenant not to sell was absolute and not subject to the implied exception, "save in the usual course of business."

3. Trespass may be justified upon any valid ground, and that, although some invalid reason may have been given at the time of the trespass.

*Quære*, If a mortgagee rightfully seize, but unlawfully sell, the mortgaged goods is he a trespasser *ab initio?*

A chattel mortgage provided that upon certain contingencies the mortgagee might seize the goods, and upon, from and after the seizure the mortgagee might sell, &c., and from and out of the proceeds pay and reimburse himself, "all such sums and sum of money as may then be due by virtue of these presents."

*Held*, That the mortgagee having rightfully seized the goods, might lawfully sell them, although the mortgage money might not have been payable. Although not payable it was nevertheless "due."

The facts sufficiently appear from the head note and judgment. The plaintiffs obtained a verdict and the defendants now moved to set the verdict aside and to enter a non-suit.

*S. C. Biggs, Q.C., J. A. M. Aikins, Q.C.*, and *A. E. McPhillips*, for defendants.

Where there is no redemise clause, the mortgagee is entitled to take possession of the goods at once, whether there is default on part of the mortgagor or not, *Porter* v. *Flintoff*, 6 U. C. C. P. 335.

Possession follows the right of property unless otherwise stipulated, *Ruttan* v. *Beamish*, 10 U. C. C. P. 90.

The return of the sheriff proves a levy under the writ on which it is made, *McAulay* v. *Allen*, 20 U. C. C. P. 417, 423; *Samuel* v. *Coulter*, 28 U. C. C. P. 240; *Barron on Bills of Sale*, 51; *Bunker* v. *Emmany*, 28 U. C. C. P. 438; *Bingham* v. *Bettinson*, 30 U. C. C. P. 438; *Paterson* v. *Maughan*, 39 U. C. Q. B. 371; *Whimsell* v. *Gifford*, 3 Ont. R. 9.

A solicitor's retainer ceases at judgment, and does not extend to execution, *Tipping* v. *Johnson*, 2 B. & P. 357; *Butler* v. *Knight*, 36 L. J. Ex. 66; *Woollen* v. *Wright*, 1 H. & C. 554; *Kennedy* v. *Patterson*, 22 U. C. Q. B. 556.

There was no real damage caused to the plaintiff, no injury to the credit proved, *Mayne on Damages*, 368, 349, 362; *Bingham* v. *Bettinson*, 30 U. C. C. P. 451; *Bunker* v. *Emmany*, 28 U. C. C. P. 441; *McAulay* v. *Allen*, 20 U. C. C. P. 419; *Clark* v. *Newsam*, 1 Ex. 131.

The plaintiffs cannot recover special damages unless as for joint damages, *Haythorn* v. *Lawson*, 3 C. & P. 196; *Barrett* v. *Collins*, 10 Moore, 446; *Dicey on Parties*, 432; *Addison on Torts*, 87.

As to the authority to attorney to issue execution, *Smith* v. *Keal*, 9 Q. B. D. 340.

As to whether there was any ratification by Ashdown, *Wilson* v. *Tummon*, 6 Scott, N. R. 894; *Jacobs* v. *Robb*, 10 U. C. Q. B. 276; *Verrall* v. *Robinson*, 2 C. M. & R. 494; *Robins* v. *Clark*, 45 U. C. Q. B. 367; *Leake* v. *Loveday*, 2 D. & D. N. S. 624; *Owen* v. *Knight*, 4 Bing. N. C. 54; *Williams* v. *G. W. R.* 8 M. & W. 855.

*J. S. Ewart, Q.C.*, and *C. P. Wilson*, for plaintiffs.

As to authority of attorney to go on and make money under judgment by execution, *Butler* v. *Knight*, L. R. 2 Ex. 109; *Jarmain* v. *Hooper*, 6 M. & G. 827; *Slaght* v. *West*, 25 U. C. Q. B. 391; *Smith* v. *Keal*, 9 Q. B. D. 343; *Tuckett* v. *Eaton*, 6 Ont. R. 486; *Levi* v. *Abbot*, 4 Ex. 588.

As to damages, *Mayne on Damages*, 513; *Collett* v. *Foster*, 2 H. & N. 355; *Massey* v. *Sladen*, L. R. 4 Ex. 13; *Henry* v. *Mitchell*, 37 U. C. Q. B. 217; *Moore* v. *Shelley*, 8 App. Ca. 285; *Campbell* v. *McDonell*, 27 U. C. Q. B. 343; *Brethour* v. *Bolster*, 23 U. C. Q. B. 317; *Walcott* v. *Stolicker*, 16 U. C. C. P. 555.

As to the redemise clause. The cases quoted by Mr. Aikins are distinguishable, *Albert* v. *Grosvenor*, L. R. 3 Q. B. 123; *Wheeler* v. *Montifiore*, 2 Q. B. 133; *Bingham* v. *Bettinson*, 30 U. C. C. P. 438; *Whimsell* v. *Giffard*, 3 Ont. R. 9; *Paterson* v. *Maughan*, 39 U. C. Q. B. 371; *Herman on Chattel Mortgages*, s. 71; *Jones on Chattel Mortgages*, 432.

A mortgagor who has covenanted not to sell, can nevertheless sell in the ordinary course of his business, *Walker* v. *Clay*, 49 L. J. Q. B. 560; *Taylor* v. *McKeand*, 49 L. J. Q. B. 563; *Payn* v. *Fern*, 6 Q. B. D. 620; *Exparte Helder*, 24 Ch. D. 339.

If plaintiffs could not claim under the chattel mortgage the court can reform the document, 49 Vic. c. 14 s. 7, *Kelsey* v. *Rogers*, 32 U. C. C. P. 624; *Caird* v. *Moss*, 33 Ch. Div. 22.

*S. C. Biggs, Q.C.*, in reply. On question of reforming the contract, *McNeeley* v. *McWilliams*, 13 Ont. App. R. 324.

[*10th January 1887.*]

TAYLOR, J., delivered the judgment of the court. (*a*)

The plaintiffs, who carried on a hardware and tinware business at Pilot Mound, sue the defendants, alleging that they, in October, 1883, seized and sold the plaintiff's stock in trade, under two executions, issued, the one in a suit of Ashdown against the plaintiffs, the other in a suit of Ashdown and Killer, against the plaintiffs, both of which executions were in September, 1884, set aside as having been improperly issued.

The declaration contains three counts, trespass to goods, *trespass de bonis asportatis*, and trover. The defendants have pleaded a number of pleas, not guilty, goods not the goods of the plaintiffs, and that goods were seized under execution in three actions against the plaintiffs. The plaintiffs have replied that the executions were, before the commencement of this action, set aside as having been issued contrary to good faith and in violation of an agreement between the plaintiffs and defendants. To this, the defendants filed a rejoinder, that the executions were not set aside as having been issued contrary to good faith, and in violation of an agreement, and that there was no such agreement. At the trial a large quantity of evidence was given, the seizure and sale of the goods were proved, and also that the executions had subsequently been set aside. The jury, in answer to questions submitted to them, found, that the defendants were responsible for the issuing of the executions, that the value of the goods at the time of the seizure was $986, they allowed $1100 for damages to the defendants' business and credit, $250 for other damages, and then, deducting the amount of a chattel mortgage which the defendant Ashdown had upon the stock, they found a verdict for the plaintiffs for $1484. Against this the defendants move, to set aside the verdict and to enter a non-suit, or to reduce the damages, or for a new trial.

Upon the argument in Term a great many points were raised and discussed. Many of these it is not necessary to consider. The defendants, under their plea that the goods were not the

(*a*) Present, Wallbridge, C. J., Dubuc, Taylor, JJ.

goods of the plaintiffs, set up, that they were the property of Ashdown, under a chattel mortgage, made to him by the plaintiffs on the 12th day of September, 1883. They seem entitled to set up such a defence under this plea, *Isaac* v. *Belcher*, 7 Dowl. 516. They contend that the mortgage containing no redemise clause, the mortgagee was entitled at once to the possession of the goods, and that in any event, there had been a breach of a covenant which entitled him to take possession, and sell the goods. The effect of the presence, or absence of a redemise clause, need not be dwelt upon, if there was a breach of covenant such as would entitle Ashdown to take possession. The mortgage contains a proviso for rendering it void upon payment of the amount secured, on the first day of March, 1884. There is also a covenant for payment of the money, according to the proviso. Then follows a covenant, that in case of default in payment of the money, or in case the mortgagors shall attempt to sell or dispose of, or in any way part with the possession of the goods, or any of them, or to remove the same or any part thereof out of the store and premises, or suffer or permit them to be seized, or taken in execution, without the consent of the mortgagee, &c., to such sale, removal, or disposal, first had and obtained in writing, it shall be lawful for the mortgagee to take possession of, and remove the goods. These are all separate and independent events. Default in payment is one, selling and disposing of, or in any way parting with possession of them, or of any of them, is another. The evidence at the trial showed, that after the making of the mortgage, the plaintiffs continued to carry on their business and to sell goods in their shop, in the ordinary course of their business. The money received upon such sales was not paid over to the mortgagee.

The plaintiffs contend that every chattel mortgage given over goods in a shop, where the mortgagor continues in possession, is on an implied condition that he may continue his business, selling the goods in the ordinary course of his business, and that this is the case even where the mortgage contains, as it does here, a covenant that possession may be taken in case the mortgagor sells or disposes of any of them. In support of this several English authorities are cited.

*Exparte Allard*, 16 Ch. Div. 505, is not a case like the present. There, two partners in trade filed a liquidation petition,

under which a trustee of their estate was appointed; afterwards, the creditors passed resolutions empowering the trustee to accept a composition, payable in four instalments, part of the last one being secured by a surety. One of the debtors, who was to carry on the business alone, agreed to pay the trustee a certain sum weekly until the amount of the composition should be paid, and in case of his default the trustee was to be at liberty to take possession of his stock in trade, assets and effects, and realize them for the benefit of the creditors. After paying the first instalment, default was made, upon which the trustee took possession, and on doing so, he found that the debtors had assigned the book debts of the firm to the surety and another person, as security for moneys advanced to carry on the business, and to pay the first instalment of the composition, and as security to the surety against his liability. The Court of Appeal, reversing an order of the registrar in bankruptcy, held the assignmen ood, so far as it was to secure money advanced to carry on the business, and pay the instalment, but not so, as far as it was intended to indemnify the surety against his liability. James, L. J. held, Brett and Cotton, L.JJ. concurring, that what the parties intended was, that in consideration of the composition, the business was to be carried on by the son alone (not by the mother), in the usual way in which such a business is carried on, and that in carrying it on he was to exercise such a control over the assets as would enable him to raise money for paying the composition. He said, "It would be utterly inconsistent with this intention that the debtors should have no power to deal with the trade debts, which were then outstanding. An implied authority was given to deal with them to that extent. All that it is necessary for us to say is that the implied authority given to the debtors goes to the extent of authorizing any dealing with the assets in the ordinary course of business, or for the purpose of raising money to carry on the business, or to pay the composition." This is just such language as one would expect to be used. The ordinary object and intent of a debtor effecting a composition with his creditors, the payment of which extends over a lengthened period, is, that he may be free to go on with his business. The three cases which go furthest to support the plaintiffs' contention are, *The National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177; *Walker* v. *Clay*, 49 L. J. C. L. 560; and *Taylor* v. *McKeand*, 49 L. J. C. L. 563,

but in every one of these cases the Court was dealing with the question as raised in an action between the mortgagee and a purchaser, not as between the mortgagee and the mortgagor.

In *National Mercantile Bank* v. *Hampson*, the terms and conditions of the bill of sale do not appear. It comprised among other things, all the growing crops and all the goods, chattels and effects, which then were or thereafter should be, on or about the farm, lands and premises, of one Seaman, the mortgagor. The action was brought, alleging that the defendant wrongfully converted to his own use and deprived the plaintiffs of the use and possession of twelve quarters of wheat comprised in the bill of sale. The defence was, that the plaintiffs suffered Seaman to have possession of the goods, and enabled him to hold himself forth as having not only the possession but the property in the same, and that he sold the same to the defendant, who bought them in the ordinary course of his business, without any notice that they did not belong to Seaman. That Seaman was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale, and it was the ordinary course of Seaman in such business, to make sales. On demurrer, judgment was given for the defendant. Lush, J., said, "I think the defence is good, and that the action cannot be supported. Having regard to the terms of the bill of sale, there was an implied license for the grantor to carry on his business and to sell the wheat, and any *bona fide* purchaser from him would have a good title."

The next case is *Walker* v. *Clay*, decided by the Common Pleas Division. One Wilkinson, an innkeeper and horse dealer, to secure money lent, executed a bill of sale to the plaintiff, which covered, with other things, his stock-in-trade and four horses. There was a covenant by the mortgagor, that so long as any money should remain owing on the security the mortgagor would not remove any of the mortgaged property from the dwelling-house without the previous consent in writing of the mortgagee, except for necessary repairs, and would replace any articles damaged or worn out with others of equal value, to be included in the security. It contained the usual covenant for repayment and a power of sale, and also provided that until default should be made in payment of the money lent it should be lawful for the mortgagor to hold, make use of and possess the

premises assigned. The mortgagor sent three of the horses to a repository to be sold, and the defendant bought one of them at auction. The plaintiff claimed it as his property, and on appeal from the county court, *National Mercantile Bank* v. *Hampson* was followed. Grove, J., said, "The object of the bill of sale was to permit the grantor to carry on his business as innkeeper and horsedealer, and it must therefore be taken to have contemplated this sale. In his character of publican the grantor would, of course, be entitled, and the bill of sale must be taken to have intended him to be entitled to sell wine and beer to his customers. To send casks away and sell them by auction would probably not be in the ordinary course of business, and an action might be brought by the grantee to recover them. It is difficult to say where the exact line ought to be drawn. But the object of the bill of sale being to enable the grantor to carry on his business of innkeeper and horsedealer, he ought to have some liberty to carry it on, and he would be greatly hindered if he were not allowed to part with some of the property by selling articles which were of a saleable nature." Lindley, J., said, "The object of the bill of sale is obviously not to paralyze the trade of the grantor, but to enable him to carry on his trade, and the bill would be worthless if we were to construe it otherwise. The covenant not to remove any of the things comprised in the bill of sale without the consent of the grantee is not a covenant not to sell, and it would be to my mind contrary to the intention of the parties to construe that covenant as a covenant not to sell in the ordinary course of business, for it would paralyze the business and destroy the value of the security. I think, therefore, that the covenant not to remove is a covenant that the grantor will not remove or dispose of the goods otherwise than in the ordinary course of his trade. Then follows a proviso that until default in payment the grantor may hold and make use of the premises assigned. Taking all the provisions of this bill together, the object of it is plainly to let the grantor carry on his business in the ordinary way; not that he is to consult the grantee as to everything he requires to sell, but only in case he requires to remove them in any other sense, such as removing them off the premises to another house." After referring to *National Mercantile Bank* v. *Hampson*, he proceeded to say, "It is to my mind an extension of the doctrine

that a *bona fide* purchaser for value without notice is to be protected, but it is a wholesome, though perhaps a bold, decision, and I avail myself of it."

In *Taylor* v. *McKeand*, decided by the Queen's Bench Division, the jury found the sale was made by the plaintiff with a fraudulent intention, and not in the ordinary course of business, but that defendants did not know of this, and bought *bona fide*. A verdict for the plaintiff having been entered, a rule for a new trial was discharged. The court approved of *National Mercantile Bank* v. *Hampson*, but the jury had found the sale not one in the ordinary course of business. The judges used language as to an implied condition that the mortgagor might carry on business, similar in effect, to that made use of in *Walker* v. *Clay*.

With all respect for the learned judges by whom these cases were decided, there are many things which one cannot help remarking upon. It does not appear, upon what they founded their remarks, that the object of the bill of sale was to enable the mortgagor to carry on business, unless possibly, that it was given to secure money advanced and lent at the time of its execution, and that it contained a provision, not found in the chattel mortgage before us, that until default it should be lawful for the mortgagor to hold, make use of and possess the mortgaged property. Lindley, J., does refer to that in his judgment. Then if the Court were following, as they professed to do, *National Mercantile Bank* v. *Hampson*, the observations as to an implied authority to carry on business were unnecessary. That case decided that a *bona fide* purchaser from the mortgagor, left in possession of the goods, had a good title, and if he had in that case, much more had he one in *Walker* v. *Clay*. In the former case the purchase was direct from the mortgagor, but in the latter the purchase was at public auction, at a public repository, where the horses of any person sending them in for sale were disposed of, and where he could know nothing of the owner, and therefore could not, using the utmost diligence, have discovered whether he had given a bill of sale upon the horse or not. Again, Grove, J., thought that if the mortgagor had sold casks of wine at auction the mortgagee could have claimed them as against the purchaser; while he held that in the case of a sale of three of the four mortgaged horses, he could not. But if the reason given by Lindley, J., for the finding of the Court, that it

was a useful extension of the doctrine of purchaser for value without notice, was a sound one, it is hard to see why the purchaser of the wine should not be protected as much as the purchaser of the horses. If that is the correct ground of the decision, it should have secured a verdict for the defendant in *Taylor* v. *McKeand*, for the jury found that he purchased *bona fide*, and in that case the bill of sale had never been registered. But Coleridge, C.J., would not have agreed to that reasoning, for in that case he said, "It has been suggested that this was a case in which there are two innocent parties, and that the one, namely the grantee of the bill of sale, who enabled the fraud to be committed, must therefore bear the loss. But that doctrine does not apply to this case, in which the property was taken out of the person who professed to sell and was vested in another by a bill of sale, an instrument known to the law and recognized by Parliament." If the property being vested in another than the person professing to sell, by an instrument known to the law, prevents the application of the doctrine of purchaser for value without notice, how often the Courts must have been wrong.

To construe the bill of sale, otherwise than as the Court construed it in *Walker* v. *Clay*, would, Lindley, J., said, "paralyze the business and destroy the value of the security." Certainly, if the mortgagor cannot sell and dispose of his stock-in-trade, it will paralyze the business, but one can hardly see how it will destroy the value of the security, the goods themselves will remain as the security to the mortgagee. On the other hand, to permit him to sell and dispose of the stock, and pocket the proceeds, must, beyond all question, destroy the value of the security. Then it seems strange to hear the covenant, not to remove the goods without the consent in writing of the mortgagee, limited to such a removal of them, as from one building to another, while it is held not to apply to an absolute and complete removal of them by sale, placing them entirely and for ever, beyond the reach of the mortgagee.

I have seen only one other case in England which touches this subject, and from the language used there, by Field, J. I do not think that the principle ennunciated in *Walker* v. *Clay*, can be regarded as fully established. The case is *Payne* v. *Fern*, 6 Q. B. D. 620, where the plaintiff had a verdict, the jury having been instructed that they should find in his favor, if they thought

that the sale to the defendant was not a sale in the ordinary course of business. The Court refused a rule for a new trial, the decision of the judge at the trial being in accordance with *National Mercantile Bank* v. *Hampson* and *Taylor* v. *McKeand*; but, Field, J., expressed himself in a guarded way,—"With regard to such part of the property as consists of stock-in-trade, it may be that, according to the cases cited, there is an implied condition that the grantor shall be at liberty to deal with it in the ordinary course of his business."

I can understand how the Courts, dealing with a chattel mortgage which has no redemise clause, but which does provide for the mortgagee taking possession on default in payment, should hold from its being expressed that possession may be taken on the happening of that event that it was intended, that until then the mortgagor should continue in possession. But it seems to me it would be going very far indeed to hold that an express covenant that the mortgagee may take possession in case the mortgagor sells and disposes of the mortgaged property or any part of it, does not mean what it says, and gives the mortgagee no right of taking possession so long as the mortgagor merely goes on selling and disposing of his goods as he was doing before he executed the mortgage. I must, in a case between mortgagee and mortgagor, decline to follow the dicta of the judges in those English cases until I can see better reasons for doing so than are given there.

The mortgage in question does not absolutely prevent the mortgagors from selling and disposing of the goods, it only provides that the mortgagee may take possession if they do so without his consent first had and obtained in writing. No application for such a consent has been proved. Had it been asked, probably it might have been given, upon terms as to the paying over to, or depositing to the credit of, the mortgagee the proceeds of the sales or a proper proportion of these.

The evidence shows that the plaintiffs were, without the written consent of the mortgagee, selling and disposing of the goods covered by the chattel mortgage, retaining the proceeds for their own use, and I am of the opinion that Ashdown was entitled under the terms of the mortgage to take possession. He being entitled to take possession, the plaintiffs cannot main-

tain an action of trespass against him for doing so. Although the defendants did assume to take possession of the goods under executions, which were afterwards set aside, I can see no reason why they may not now justify that taking by setting up another title to the goods. It is not, What title did they say they had? but, What title had they? Where a master dismisses a servant, although he assigns a reason for doing so, he may afterwards, in an action for wrongful dismissal, justify his course by setting up another sufficient ground. There can be no reason why, in a case like the present, the defendants should not justify their taking the goods for another reason than that signified at the time.

It was further contended, that even if the defendant Ashdown was entitled to take possession of the goods under his chattel mortgage, that only gave him a right to hold possession of them until there was default in payment, and that having sold them before the time for payment arrived, he was a trespasser *ab initio*. There might be a difficulty in the plaintiffs recovering in this action for such a trespass against both defendants, for Killer had nothing to do with that trespass. But by selling the property, even before the time at which only, according to the plaintiffs, he might rightfully sell, can it be said that Ashdown became a trespasser *ab initio*. In *Jones on Chattel Mortgages*, at s. 434, it is said, "Although the mortgagee sell the property in a manner not prescribed, he does not become a trespasser *ab initio*, or forfeit his title under the mortgage, and consequently the mortgagor cannot maintain trespass. His remedy is by action on the case or by bill to redeem." The argument urged for the plaintiffs seems founded upon a misconception of the meaning of the word "due." The mortgage provides, that upon and from and after the taking of possession, &c., the mortgagee may sell the goods and chattels, and from and out of the proceeds pay and reimburse himself "all such sums and sum of money as may then be due by virtue of these presents." The argument is, that he could only sell to pay himself the amount then due, that is, which should at that time have been paid, and that as the sale took place in October, 1883, while the time for payment fixed by the mortgage was the 1st of March, 1884, there was nothing then due for the payment of which he could sell. This is to make the amount then due mean, the amount which should by

that time have been paid, to make, in fact, the word "due" mean "overdue." In the Imperial dictionary the word "due" is defined to mean, That which ought to be paid or done to another, owed by one to another, and by contract, justice or propriety required to be paid. That which is owed, that which one contracts to pay to another. The argument used is just the one which was urged, but unsuccessfully, in *Hall* v. *Brown*, 15 U. C. Q. B. 419. The covenant there was, to pay a sum of money in eight instalments, with interest on the principal sum remaining due at each payment. In the County Court this was construed to mean that the covenantor was to pay interest only upon each instalment as it fell due, leaving the interest upon all such portion of the principal as should not at that time be payable to be paid in proportions with the principal as the instalments successively became due. On appeal this was reversed. Robinson, C. J., who delivered the judgment of the Court said, "That a sum may be *debitum in præsenti*, though *solvendum in futuro*, is very clear, and it was in this sense that the word 'due' was used in the instrument. . . . We must construe the agreements of parties according to the common acceptation of the words they use, and we know very well that when a man is asked how much is due on his land, he understands well what is meant by the question, namely, how much of the purchase money he yet owes, which is only a circumlocution for the word 'due.' In a strict sense, and for certain purposes, 'due' is confined to what is payable, as when we speak of a bill or note being due; but that is not its general sense, and certainly not its only sense."

The further provisions of the mortgage in question, as to paying over to the mortgagor any surplus, or the payment by him of any deficiency after the sale, further show clearly that by this such sums or sum of money as may then be due by virtue of the mortgage, is meant, the money, payment of which is secured by the mortgage, not at the time of the sale already paid to the mortgagee.

Holding, as I do, that Ashdown was entitled as mortgagee to take possession of the plaintiffs' stock-in-trade, on account of the breach of covenant by their selling part of the stock; that having taken possession he was entitled under the terms of this mortgage to sell when he did, and that he can now justify the seizure made under the writs which were set aside, by setting up

his title as mortgagee, it is unnecessary to consider the other points raised. The motion to set aside the verdict for the plaintiffs and to enter a nonsuit, should be granted with costs.

*Rule to set aside verdict for plaintiff, and to enter a nonsuit.*

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## MORRIS v. ARMIT.

[In Appeal.]

*Bailee of Chattel.—Liability for loss.*

The hirer of a chattel must restore it in as good plight as it was when received, except for that deterioration which ensues in the course of using, from ordinary wear and tear, and for any injury or loss which may have occurred without culpable negligence or misconduct on the hirer's part. He must answer, also, not only for loss and injury inflicted upon the thing by himself in person, but also for the injurious acts of those whom he voluntarily admits, so to speak, into the use of the thing.

The defendants hired from the plaintiff a team of horses. One of the defendants having control of the horses, shot one of them, alleging that it was diseased. Before the shooting the plaintiff informed this defendant that the horse was not diseased. The defendant acted on his own opinion merely, and the evidence shewed that he was wrong.

*Held*, That the defendants were jointly liable for the value of the horse.

The facts sufficiently appear from the head note and judgment.

*G. Davis* and *W. E. Perdue*, for defendant, showed cause. Hiring horse from livery stable, implied contract to return. If given to a servant and injured from negligence, then hirer liable. If servant wantonly shoot horse, hirer not liable, *Addison on Contracts*, 345, (8th ed.). *Finucane* v. *Small*, 1 Esp. 315; *Foster* v. *Essex Bank*, 17 Mass. 479.

Liability of one partner for acts of co-partner not greater than that of master for servant, *Story on Partnership*, s. 108; *Expte Eyre*, 1 Ph. 227; *Bishop* v. *Countess of Jersey*, 2 Drew. 143.

Partnership not liable, *Addison on Torts*, 86 *et seq*, nothing implied by law, that is not in present contract, *Addison on Contract*, 345.

If law implies what is expressed, then what is expressed amounts to nothing, *Bigge* v. *Parkinson*, 7 H & N. 954.

*N. D. Beck* and *A. E. McPhillips*, for plaintiff.

Construction of words, "subject to wear and tear," *Schouler on Bailments*, 142. 154; *Scaife* v. *Farrant*, L. R. 10 Ex. 358, *Reading* v. *Menham*, 1 M. & Rob. 234.

Partner liable for imprudent act of co-partner. *Moreton* v. *Hardern*, 4 B. & C. 223; *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183; *Mellors* v. *Shaw*, 1 B. & S. 437.

If mare had glanders, duty to destroy it, to prevent injury to other horses, *Dean* v. *Keate*, 3 Camp. 4. See also *Bailey* v. *De Crespigny*, L. R. 4 Q. B. 185; *Story on Partnership*, s. 166; *Durant* v. *Rogers*, 87 Ill. 508; *Atkinson* v. *Ritchie*, 10 East, 533; *Thompson on Negligence*, vol. 2 p. 906.

[*10th January 1887.*]

TAYLOR J. delivered the judgment of the court. (*a*)

I do not consider that the act of the plaintiff, William Morris, in turning the mare loose upon the prairie, when going with her in a sickly condition from Battleford to Swift Current, under orders from the government officer, and against his remonstrances, would relieve the defendants from liability.

That was not the cause of her loss, nor did it in any way conduce to her loss. After being so turned loose, she the next morning returned to, and was again under, the control of the government, the bailees.

The contract between the plaintiffs and defendants having expressed in it, "The said team and wagon to be returned to the said party of the second part, subject to wear and tear," does not exclude every other contingency, and make the defendants insurers against everything but wear and tear.

(*a*) Present, Wallbridge, C. J. Dubuc, Taylor, JJ.

In *Schouler on Bailments* it is said, at p. 154, "Upon termination of the bailment the hirer has to restore the thing back, in as good plight as it was when received, except for that deterioration which ensues in the course of using, from ordinary wear and tear, and for any injury or loss which may have occurred without culpable negligence or misconduct on the hirer's part." And there seems to be no doubt, that, as the same author says, at p. 142. "The hirer must answer not only for loss and injury inflicted upon the thing by himself in person, but also for the injurious acts of those whom he voluntarily admits, so to speak, into the use of the thing." *Addison* in his work on *Contracts*, at p. 345, expresses the law in much the same way. Where the contract, as here, in express terms provides for the return, reasonable tear and wear being excepted, there is notwithstanding the use of that expression, the further implied condition, that the thing shall continue to exist, unless its ceasing to do so is from default on the part of the bailee.

In *Taylor* v. *Caldwell*, 3 B. & S. 826, Blackburn J. in delivering the judgment of the court said, "It may be safely asserted to be now English law, that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee, to return the thing lent or bailed, becomes impossible because it has perished, this impossibility, if not arising from the fault of the borrower or bailee from some risk he has taken upon himself excuses the borrower or bailee from the performance of his promise to redeliver the chattel; * * * The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing, shall excuse the performance. In none of these cases," (those cited in the judgment), "is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing, shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

After referring to the old rule, as laid down in 1 Roll. Abr. 450, *Condition* (*G*), and in the note to *Walton* v. *Walterhouse*,

2 Wm. Saunders, 421, and recognized as the general rule by the exchequer chamber in *Hall* v. *Wright*, E. B. & E. 746, he said, "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done: there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

This case was followed by the Court of Common Pleas in Ontario, in *Chamberlen* v. *Trenouth*, 23 U. C. C. P. 497, where there being a covenant on the part of the defendant, that he would restore the goods and chattels in as good order as they then were, reasonable wear and tear excepted, and the goods were destroyed by fire, without any default of the defendant, he was held not liable in damages, and a verdict for the plaintiff entered by Richards, C. J. was set aside, and one entered for the defendant.

So in *Boswell* v. *Sutherland*, 32 U. C. C. P. 131, an action on a bond, by which the defendant bound himself on a certain event happening, to produce certain goods and chattels, Osler, J, following *Taylor* v. *Caldwell*, and *Chamberlen* v. *Trenouth*, gave judgment for the defendant on a demurrer to a plea, which averred that before breach, and without any default, the goods were destroyed by fire. This judgment was reversed in the Court of Appeal, 8 Ont. App. R. 233, because while all the judges sitting in appeal, approved of the law, it appeared that the plea did not negative default on the part of another person, which was necessary to make it good, and which, in the court below, it was understood it had been amended so as to do. In *Appleby* v. *Myers*, L. R. 2 C. P. 651, the law as laid down in *Taylor* v.

*Caldwell*, was approved of and followed, in the Exchequer Chamber, as it was more recently by the Court of Appeal, in *Howell* v. *Coupland*, 1 Q. B. D. 258, affirming the judgment of the Court of Queen's Bench in that case L. R. 9 Q. B. 462. See also *Reynolds* v. *Roxburgh*, 10 Ont. R. at p. 657.

But did the impossibility of returning the mare arise without default on the part of the defendants. The evidence shows she was shot by the defendant Armit, under a certain state of circumstances. I do not see that the defendants can be held liable for this act of his, on the ground that as partners they are jointly liable for the act of one co-partner, carrying on the partnership, and acting within the scope of his authority as a partner. Armit was not at Battleford as a partner of his co-defendant, nor was he in any sense, so far as I can see, carrying on, or acting there, in the partnership business. He was there, as a government supply officer, and it was while so acting, and as such in charge of a large number of horses engaged in the government transport service, that he shot the mare. That, however makes no difference, practically, in deciding the question of the defendants' liability, if the shooting of the mare was not a wanton malicious act, but merely a negligent and improper one, for as Schouler puts it, the defendants are liable, for the acts of those whom they voluntarily admitted into the use of the mare.

I do not think it could be found upon the evidence that the act of Armit in shooting the mare was wanton and malicious. He shot her because she had, he said, and it must be assumed, because he believed she had, glanders. To shoot an animal so diseased, would have been highly proper, as there were assembled there, where she was, and under Armit's control in the government transport service, about 300 teams, and the risk of such a disease spreading among them, was a most serious one.

It seems to me, clear however, that the shooting of the mare was a negligent and improper act. The evidence does not prove that she had glanders, and the learned judge at the trial very properly found that it was not proved. Now she was turned loose on the prairie on a Saturday afternoon, and returned to the camp on the Sunday morning. Armit asked the witness Railton, a teamster apparently having considerable experience in horses, whose mare it was, and said she had glanders. Railton told him she was the plaintiff's,

and said that she had not glanders. He then explained to Armit that she had some time before, fallen into the Saskatchewan river, and caught cold, which was what she was suffering from. Yet Armit did not call in any veterinary surgeon to examine her, nor, if there was none available, did he get any of the numerous teamsters round, among whom there must have been some men of experience, to express an opinion upon what ailed her, he simply ordered her to be shot, and she was accordingly shot and buried within two hours.

Now, can any one say, that the shooting of that mare upon his own individual opinion, in the face of what Railton told him, and without further enquiry, was anything but a rash, negligent act. I have no hesitation in saying that it was.

As the defendants are in my opinion liable for the acts of those whom they admitted to the use of the mare, and cannot under the circumstances disclosed in the evidence, invoke the benefit of the implied condition as to the thing to be returned continuing to exist, which is available only where the perishing is without default on their part, or on the part of those for whose acts they are liable, the verdict for the plaintiffs should in my judgment stand, and the motion to set it aside be refused with costs.

*Rule nisi discharged with costs.*

## McKENZIE v. CHAMPION.

[In Appeal.]

*Commission on sale of land.*

Where an agent is employed to find a purchaser, he is entitled to his commission upon production of a party ready and willing to complete the purchase by entering *bona fide* into an agreement to purchase upon the terms stipulated; or, if the terms be not fully prescribed, then upon the proposed purchaser and the principal entering *bona fide* into an agreement of purchase and sale.

The owner cannot refuse to pay the commission because no agreement in writing actually was entered into; at all events, when the reason was that he refused to sign it unless some unusual term was inserted, and where the vendor had accepted the purchaser and by various acts shewed that he considered that there was a valid verbal contract.

Nor can the owner refuse to pay merely because the purchaser afterwards makes default and unreasonably refuses to carry out the contract.

An agent to find a purchaser will not disentitle himself to his commission by receiving a deposit and giving a receipt for it; at all events where the vendor accepts the deposit.

Interest will not be allowed upon a commission unless after a demand in writing. And *quære* whether the statute 3 & 4 Wm. 4, c. 42, s. 28 is in force in this province.

The facts sufficiently appear in the judgment.

*N. F. Hagel, Q.C.*, and *J. D. Cameron*, for plaintiff.

A party receiving money is not bound to make and deliver a receipt, *Green* v. *Lucas*, 33 L. T. N. S. 584.

The rate of commission charged is same as charged in England, *Rimmer* v. *Knowles*, 30 L. T. N. S. 496; *Harris* v. *Petherick*, 39 L. T. N. S. 543; *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733; *Doty* v. *Miller*, 43 Barb. 529.

As to leaving facts to jury, *Cohen* v. *Page*, 4 Camp. 96; *Eicke* v. *Meyer*, 3 Camp. 412; *Hamer* v. *Sharp*, L. R. 19 Eq. 108; *Met Ry. Co.* v. *Wright* 11 App. Ca. 152.

*H. M. Howell, Q.C.*, and *Isaac Campbell*, for defendants.

The plaintiffs have not proved any contract which would be of any service to them. Plaintiff did not get a purchaser ready and willing to complete the sale or to bind himself to do it, *Veazie* v. *Parker*, 72 Maine, 442; *Lara* v. *Hill*, 15 C. B. N. S. 45.

No interest allowed at common law for money due for work and labor, *Roscoe's Nisi Prius*, 652; *Spence* v. *Hector*, 24 U. C. Q. B. 277. No notice given such as the statute requires, *Ward* v. *Eyre*, 15 Ch. D. 130.

[*10th January 1887.*]

KILLAM, J., delivered the judgment of the court. (*a*)

The plaintiffs have brought this action on the common *indebitatus* counts, for the work, journeys and attendances of the plaintiffs by them done, performed and bestowed as agents for the sale of lands of and for the defendants and otherwise for the defendants at their request and for commission and reward due the plaintiffs in respect thereof, with the addition of the other common counts.

The particulars charge the defendants with "commission at 2½ per cent. on $39,600.00, amount of sale of 144 acres of land, @ $2.75 per acre, $990.00; and with commission @ 2½ per cent. on $15,000, amount of sale of 10 acres of land @ $1,500 per acre, $375.00 total $1,365.00; and with interest to date of particulars, (10th January 1883), @ 6 per cent., $181.90.

The pleas were never indebted and payment, and a special plea of set off or counterclaim which is unimportant as affecting the application now before us.

The action was tried before my brother Taylor, with a jury at the Winnipeg Fall Assizes of 1885, when the plaintiffs recovered a verdict for $1,689.00.

The plaintiffs claim to have been employed by the defendants to find purchasers for the south half of lot 12 Kildonan, inner and outer two miles, in two parcels; first, for the portion west of Main street, comprising about 144 acres, and secondly, for the

(*a*) Wallbridge, C. J., Dubuc, Killam, JJ.

remaining portion, comprising about ten acres. The plaintiffs after some negotiations procured an offer from five parties for the first portion at $275.00 per acre, which was accepted by the defendants. A deposit of $5000 was received by the plaintiffs on the 13th January, 1885, and a receipt given by them purporting to set out the terms of sale, which were that $12,000 were to be secured on mortgage, and the balance paid in twenty days from the receipt of this deposit. The receipt was signed "McKenzie & Lee, agents for Messrs Trott & Mitchell, H. T. Champion and D. E. Sprague," the defendants. The deposit was paid over to the defendant Champion, who gave the plaintiff a receipt for it, as being a deposit on account of a sale of the land, mentioning the terms. At that time and for some time after the expiration of the twenty days no patent from the Crown for the outer two miles had ever been issued. It was obtained by the defendants in April.

After the first sale was effected the defendants authorized the plaintiffs, as the latter claim, to find a purchaser for the remaining ten acres. and on the 16th January the plaintiffs procured one Barrett, one of the former purchasers, to agree to buy it at $15000, and upon that sale $1500 were paid direct to the defendant Champion as a deposit, and the balance was to be paid and the transaction closed at the time provided for closing the first, 20 days from the 13th January.

The defendants objected to the title, principally on account of the patent for the outer two miles not having been issued, and on the 2nd February they demanded a return of both deposits, though there does not appear to have been any important objection to the title to the ten acres sold separately, but the purchaser contended that the second sale depended on the first. The purchasers brought actions for their deposits. They were nonsuited in the action for the $5,000.00 and on application to the court the nonsuit was upheld, but on notice of appeal to the Supreme Court being given a compromise of both actions was effected by which a portion of the deposits was returned, and the purchasers released their claims to the lands.

The principal contentions of the defendants are that they employed the plaintiffs, not merely to find purchasers but to effect sales, and that the defendants did not accomplish this, as

they took no writings binding the purchasers; and that the proposed purchasers by withdrawing shewed that they were not ready and willing purchasers, or such as the plaintiffs, upon their own version, were bound to obtain.

The action has been twice tried. On the first trial a verdict was entered for the plaintiff, for $1,365, being at the rate of 2½ per cent. on the full purchase money of both parcels. The court ordered it to be set aside and a new trial granted, unless the plaintiffs would accept a reduction of the verdict to the amount of a commission of 2½ per cent. on the aggregate of the two deposits actually paid. The plaintiffs appealed to the Supreme Court and that court ordered a new trial absolutely, on the ground that the proper questions had not been submitted to the jury.

The defendants obtained a *rule nisi* to set aside the verdict entered before my brother Taylor and for a new trial, or for the reduction of the amount of the verdict to a commission of 2½ per cent. on $5000, (the deposit on the first purchase), or to 2½ per cent. on $39,600 (the total purchase price of the first parcel), "On the grounds that the verdict is against law and evidence and the weight of evidence, and that the evidence shewed that the plaintiffs were agents to sell and had a duty greater than that of finding a purchaser thrown upon them, and in that the plaintiffs assuming that the plaintiffs originally undertook only to find a purchaser, yet having gone beyond this duty and having bound the defendants (the then vendors in the transaction out of which this suit arises) without binding the purchasers to carry out the agreement for sale, they the plaintiffs became agents to sell, and in such character did not perform their duty to the defendants. And on the ground that the verdict or damages is excessive in that the plaintiffs if only agents to find a purchaser are only entitled to a commission on the sum actually received by the defendants."

This rule was argued before us in Trinity Term last.

The jury have distinctly found that the plaintiffs were employed merely to find purchasers. Although some expressions of the plaintiff McKenzie in his evidence on the former trial were in favor of their having been employed to effect sales, yet the Supreme Court have determined that even upon the former evidence the question of the nature of the employment was one

for the jury. It is true that, the distinction having been made clear to him the plaintiff McKenzie has in his evidence on the second trial varied somewhat from his former evidence and stated more distinctly that the plaintiffs were only to find purchasers, but such variations could only raise a question of credibility for the jury, and it is impossible to say that they made the case less strong for the plaintiff's contention than it was on the first trial. The circumstances so clearly and forcibly pointed out by Mr. Justice Strong in the Supreme Court, show that the jury could hardly have come to any other conclusion than the one to which they have come upon this point, and the force of his observations in this regard are by no means weakened by the Supreme Court having determined, contrary to his view, that there was upon the evidence a question for the jury as to the nature of the employment.

The real question on which there can be any room for controversy is whether the plaintiffs performed the work stipulated for.

It is abundantly clear that, if the plaintiffs found a purchaser ready and willing to effect a purchase and the defendants then refused to sell or were then unable to sell, either through defect of title or through having made a prior sale, the plaintiffs would be entitled to their commission. *Prickett* v. *Badger*, 1 C. B. N. S. 304; *Green* v. *Lucas*, 33 L. T. N. S. 584; *Lockwood* v. *Levick*, 8 C. B. N. S. 603; *Inchbald* v. *Western Neilgherry Coffee, Tea and Cinchona Co.*, 34 L. J. C. P. 15; *Wilkinson* v. *Alston*, 48 L. J. Q. B. 736; *Harris* v. *Petherick*, 39 L. T. N. S. 543; *Doty* v. *Miller*, 43 Barb. 529; *Frazer* v. *Wyckoff*, 63 N. Y. 445; *Veazie* v. *Parker*, 72 Me. 445; *Moses* v. *Bierling*, 31 N. Y. 463; *McGavock* v. *Woodlief*, 20 How. 221: *Kock* v. *Emmerling*, 22 How. 69.

What must an agent employed to find a purchaser do in order to earn his commission?

In *Fraser* v. *Wyckoff*, 63 N. Y. 445, Allen, J., put it thus:—"A broker to negotiate the sale of an estate, is not entitled to his commission until he finds a purchaser ready and willing to complete a purchase on the terms prescribed by the seller and assented to by the broker."

In *Veazie* v. *Parker*, 72 Me. 445, Appleton, C. J. said, "Whether the contract is verbal or written, the bringing of the parties together entitles the broker to his compensation."

In *Short* v. *Millard*, 68 Ill. 293, where the defendant had employed the plaintiff on the terms that if the plaintiff would find a purchaser of lands for the defendant, he would pay him $500, it was held that as soon as the agent procured the purchaser his agency ceased.

In *Higgins* v. *Moore*, 34 N. Y. 424, Wright, J. said, "A broker for sale is a mere negotiator or middleman between the seller and purchaser; his duty in general is ended and he has fulfilled his contract when he has found a purchaser and brought the parties together; and he is then entitled to his commission whether the property is actually delivered and the money paid or not."

In *Moses* v. *Bierling*, 31 N. Y. 463, Porter, J. says, "A broker employed to make a sale, under an agreement for the exclusion of all other agencies, is entitled to his commissions when he produces a party ready to make the purchase."

In *Haydock* v. *Stow*, 40 N. Y. 368, Hunt, C.J., said, "A giving of power and authority in law, creates an agency, but the defendant and Peck & Co. were not content with the declaration of law to that effect, but take the pains to allege that in fact Peck & Co. are the agents of the defendent to sell his property. They stand, then, as agents employed to sell, and not simply as brokers or middlemen acting for both parties, and whose duty is ordinarily limited to bringing together the parties upon an agreement, without power to execute the contract itself."

In *McGavock* v. *Woodlief*, 20 How. 221, the Supreme Court of the United States laid down the principle that, "A broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale."

And in *Kock* v. *Emmerling*, 22 How. 69, the same court put it thus, "Where the vendor is satisfied with the terms made by himself through the broker to the purchaser, and no solid objection can be stated in any form to the contract, it would seem clear that the commission of the agent is due, and ought to be paid."

Although some expressions in some of the opinions which I have just cited would seem to involve the idea that the commission is not earned if the purchase money be not paid and the conveyance made, unless such a completion as this is prevented by the default of the vendor, yet I do not think that such is their meaning.

If the purchase were to be a purely cash purchase, not to depend upon an intermediate contract of sale, this would probably be the case; but if the purchase is not to be wholly for cash and there is to be at first an agreement of purchase and sale, it would seem that, upon production of a party ready and willing to complete the purchase by entering *bona fide* into such an agreement, the duty of the agent would be completed and his commission payable forthwith.

In most cases only a portion of the purchase money would be payable at once, and very often the balance would be payable in instalments extending over a long period of time. Sometimes the balance not payable at once would be secured by mortgage, the property being first conveyed to the purchaser, and the circumstances might point in many cases to the making of the mortgage as being the completion of the purchase; but in many other cases it would not be the intention that there should be such a conveyance until the whole or, at least, several deferred instalments of the purchase money should be paid, the parties being left to depend in the meantime for their mutual security upon an executory agreement between them. Now in case of such an agreement on which instalments would be long deferred, it would never be contended, in the absence of a special agreement to that effect, that the agent's commission should only be payable, on payment of the last instalment, or proportionately on payment of each instalment; that the agent should, for the whole period over which the payments were deferred, be responsible for the acts or default of the purchaser found by him. If the agent is not to be thus bound by the acts or default of the purchaser, in case of an executory agreement having been entered into, it would appear unimportant as a matter of legal liability whether the agreement be for a long or a short period of credit. It appears to me that the agent has fulfilled his duty and has earned his commission, when he has procured and brought to his

principal a party ready and willing to contract with him for the purchase of the lands upon the terms stipulated for, or if the terms be not fully prescribed when the agent is employed, then upon the proposed purchaser and the principal entering *bona fide* into an agreement of purchase and sale.

Now it is perfectly obvious in the first case that the proposed purchaser should be willing to make a contract which would be binding upon him, whether under the Statute of Frauds or otherwise; and in the second case, that although a contract should be in form entered into, yet this might not be done *bona fide* by the purchaser whose subsequent conduct might well show that he reserved it to himself to claim not to be bound under all circumstances, and in such case he could not be considered to have been a ready and willing purchaser.

I have thought it convenient to pause thus after reference to a number of American authorities to explain the meaning which I think must be attached to certain expressions which I have cited, and I will now refer to a few other authorities, English and American, which appear to me to show the correctness of the interpretation which I have thus placed upon those first cited, and of the principles of law which I have laid down as applicable to the present case.

In *Green* v. *Lucas*, 33 L.T. N. S. 584, it appeared that the defendant had applied to the plaintiff in writing "to procure me on loan the sum of £20,000 upon the security," &c., adding "I undertake upon your procuring me that or any other amount agreed upon to pay you a commission of 2 per cent. upon the amount so procured by you." The plaintiff then applied to a company which agreed to advance the money, and he brought the parties together leaving it to them to complete the transaction; they agreed upon the terms of the advance, and the matter was left to the solicitors to look into the title to the lands proposed as the security. The lands were held as leasehold property, and in consequence of certain covenants being contained in the lease, which were claimed by the company's solicitors to be unusual and objectionable, the company refused to make the loan. The plaintiff sued for his commission and recovered a verdict for the full amount. The Court of Common Pleas refused to grant a rule *nisi* for set-

ting aside the verdict, and the defendant appealed to the Court of Appeal where the verdict was sustained.

The court considered that under the defendant's application the plaintiff was not to be bound to see that the money was actually advanced, but that his sole duty was to procure and bring to the defendant a party ready and willing to make the proposed advance. Lord Chancellor Cairns there said, "It appears to me that the plaintiff had done everything which agents in this kind of work are bound to do, and it would be forcing their liability if they were to be held answerable for what happened after. If the contract afterwards were to go off from the caprice of the lender or from the infirmity of the title, it would be inmaterial to the plaintiff * * * Either it was a sufficient reason to justify the company in refusing to go on with the loan or it was not. If they were not justified the defendant ought to have proceeded against them, and if they were justified then the failure of the loan was owing to the defendant's own default or the failure of the security he had proposed. In either view, therefore, the title of the plaintiffs to their commission ought not to be interfered with." And Kelly, C. B. said, "The plaintiffs apply to the company who are willing to advance. The parties come together, and the company by resolution show themselves ready and willing to advance the money * * * I agree with the dilemma put by the Lord Chancellor. If the company are justified in their refusal to complete the loan, it is because of the defendant's default in proposing a security that failed, and if they are not justified the defendant has his remedy against them."

In *Wilkinson* v. *Alston*, 48 L. J. Q. B. 736, Brett, L. J. said, "As to the cancellation of the plaintiff's authority, the letter relied on, in my opinion, does not amount to any such thing, and it was too late for any such cancellation after the plaintiff through White had done the act which entitled him to his commission, if in consequence of that act there was a contract for the sale or purchase of the vessel between the defendant and Learoyd."

In *Horford* v. *Wilson*, 1 Taunt. 12, it appeared that the defendant had promised to pay the plaintiff £5, "If he would provide a tenant for certain premises, and get him £350 for his lease." The plaintiff procured one Stevens, with whom the defendant entered into an agreement and from whom he received £50 as a

deposit. Stevens being unable to complete the engagement, the defendant consented to release him, but retained the £50. It was held that the plaintiff had performed his duty, and was entitled to his whole commission. Lord Mansfield, C. J. there said, "The plaintiff procured a person who offered to take the house upon the stipulated terms. The defendant made no objection; he accepted Stevens, entered into an agreement with him and received £50 as a deposit. A compromise afterwards takes place. The defendant does not renounce the agreement but retains the £50 and dispenses with the further performance of it. This, upon every principle of fair construction must be considered as a fulfilment of the contract on the part of the plaintiff." And Chambre, J. there said, "The defendant might, if he had thought proper, have rejected Stevens. He did not do so, and the plaintiff must therefore be considered as having fulfilled his part of the agreement."

In *Fisher* v. *Drewett*, 48 L. J. Ex. 32, Bramwell, L. J. said, "Now the current of modern opinion is to the effect that those who bargain to receive commissions on introductions have a right to their commissions as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced."

In *Knapp* v. *Wallace*, 41 N. Y. 477, the plaintiff sued as assignee of one Messmore, who had been employed by the defendant to purchase for the defendant certain lots and houses. By aid of Messmore, the defendant entered into a valid contract in writing, with another party for the purchase of the property; but the purchaser was subsequently found to be unable to give a good title and the transaction fell through on that account. The action was for Messmore's commission, and the plaintiff was held entitled to recover notwithstanding the default of the vendor found by him on the ground that the broker had not undertaken to procure a good title.

I might also refer to *Glentworth* v. *Luther*, 21 Barb. 145; *Keys* v. *Johnson*, 68 Penn St. 42, for definite statements of similar principles.

The only two cases that would appear to be, or are relied upon as being, definitely opposed to these views are, *Lara* v. *Hill*, 15 C. B. N. S. 45, and *Pearson* v. *Mason*, 120 Mass. 53. In the

former case it is not quite clear whether in the expression of doubts as to the commission being payable upon the adjustment of the terms between the vendor and the purchaser reference was intended to ordinary cases of the employment of an agent to find a purchaser, or whether it was merely to cases of contracts similar to that there in question. In the latter case it would seem, although the opposite is stated in the headnote, that the Court was of opinion that it was necessary to the earning of the commission that the agreement of exchange (which was the one then in question) should be fully carried out. In both cases, however, the question was considered as not being directly involved, and both decisions were based upon the particular terms of the agreements and the special circumstances proved. Neither case, therefore, can be taken as being an authority of any great weight as opposed to the others to which I have referred.

It is, however, urged that the defendants are not liable in this instance because there was no agreement binding upon the proposed purchasers. Now, in the first place, it must be observed that it was the fault of the defendants that none such was entered into, they having refused to execute an agreement which was drawn up, solely on the ground that it should provide for forfeiture of the deposits paid at first by the purchasers, in case of default in carrying out the transaction. The purchasers would not assent to such a provision, and it appears that if the parties had agreed upon this point a binding agreement would have been signed.

It does not appear to me that the defendants were entitled to insist upon such a provision being included. There is no doubt that it is a very common provision, but there is no evidence that it is a usual provision, and I cannot say that it is so generally found in contracts of sale of land that the Court should assume it to be a usual provision. No authority for the defendants' right to insist upon it has been cited. From my own experience I can say that a very large number of contracts of sale of lands in this Province contain no such provision. Without express stipulation, such a term would not be implied in a contract, and it seems impossible then to imply from the mere employment of the agent, in the absence of a special stipulation

or of a custom to that effect, that he was to obtain a customer who would agree to such a condition.

In the second place, it is evident that the defendants accepted the purchaser, and considered that in fact there was an agreement of sale and purchase between them. They accepted the deposits made, not as being made pending agreements being entered into, but as upon actually existing agreements.

When the purchasers sought to recover back their deposits, their contention was, not that no agreement had been entered into, but that the defendants had not complied with the implied terms of agreement by showing a good title to the lands. The defendants themselves must be presumed to have taken the ground that there were agreements entitling them to retain the deposits. If there was no agreement for the sale the deposits should have been returned.

In coming to the agreement of compromise, the parties placed themselves in exactly the same position as was found to be the case in *Horford* v. *Wilson*. They certainly did not thereby show that there never had been an agreement of sale and purchase.

Now the 4th section of the Statute of Frauds does not operate to make a contract void, it only prevents a party having a remedy upon it unless certain conditions are fulfilled.

It was definitely determined by this Court in *Slater* v. *Ross*, that a contract which does not comply with that section is not on that account so far void as that the purchaser is entitled to recover back his deposit so long as the vendor is ready and willing to carry out the sale, and lately again, in *Lagemodiere* v. *The Hudson's Bay Co.*, the Court refused to treat the question as even arguable.

If, then, the defendants chose to rely upon the promise of the purchasers, though not enforceable by legal process, and upon their right to retain the deposits so long as they held themselves ready and willing to carry out the sale, and any other rights which they might have under a verbal contract, they should not be allowed, as against these plaintiffs, to insist upon the necessity of a contract in every respect binding, to entitle the plaintiffs to their commissions. It may be that they were not in as favorable a position to indemnify themselves for breach of contract by the

purchasers as was the borrower in *Green* v. *Lucas*, the vendor of the lease in *Horford* v. *Wilson*, or the purchaser in *Knapp* v. *Wallace*, but for this the plaintiffs could not be held responsible. It must at least be said that the jury having found the plaintiffs to be employed merely to find purchasers, they were justified in finding that the plaintiffs did find purchasers ready and willing to purchase, notwithstanding that the defendants did not exact fully binding contracts in writing, but chose to insist upon the existence of contracts of some kind on which they were content to rely.

It was argued that the judgment of the learned Chief Justice of Canada, upon the appeal to the Supreme Court in this case, must be taken as determining that if the proposed purchasers were not justified in withdrawing from the purchase the plaintiffs cannot recover, and that in such case the jury could not find that the plaintiffs had found such purchasers as entitled them to their commissions.

To some extent it does seem as if the learned Chief Justice was of opinion that the question whether the sale went off through the fault of the purchasers, or that of the defendants was a determining ground of the the plaintiff's right to recover. If this opinion had been distinctly expressed we would have felt entirely freed from the difficulty and responsibility of being obliged to decide the question for ourselves upon other authority, as the judgment of the learned Chief Justice was adopted by the majority of the Court. The principal point, as I read the judgments delivered in the Supreme Court, upon which the learned judges of that Court thought there should be a new trial was that the jury had not been distinctly asked to find on the first trial, as they should have been, the exact nature of the plaintiff's employment. Other questions were suggested as subsidiary questions to the main one whether, in either case, the plaintiffs had fulfilled the terms of their employment, but none of the learned judges expressed the opinion that if the purchasers were wrong in their objections to the title the plaintiff could not recover. I would venture to suggest that, if the question whether the title offered was a good one was to be raised, it was a question of law, the nature of the title and the fact of the non-issue af the patent of the outer two miles being shown, and I would have expected a definite decision as to the plaintiff's right if it were

to depend upon the defendant's title being good or bad. No objection was raised to the title to the ten acres, and it does not appear that there could be any claim that the purchasers could withdraw from the purchase of that portion; and if the Supreme Court had thought that, as to that portion of the property, the plaintiffs could not recover, the opinion would naturally have been expressed. I think, then, that we cannot relieve ourselves from the responsibility of deciding the question which I have been discussing by assuming that it has been decided by the Supreme Court.

The seventh question put to the jury was, "Was a purchaser found who was willing to carry out the purchase?" To this question the jury answered "Yes." No objection was made to the leaving of this question to the jury as a matter in question upon the evidence, and even in the rule the ground is not distinctly taken that the finding of the jury upon this question was against the evidence, or that the question was not open to the jury; but I have discussed the question thus fully as being really the main question now left and as the one which was principally considered upon the argument of the rule. It does, however, incidentally arise under the rule *nisi* upon the objections to the amount of the verdict, the contention of the defendants being that the plaintiffs should in any event be limited to a commission upon the deposit actually paid, or at any rate to a commission upon the price of the portion the title to which was objected to. It seems, however, necessarily to follow from the authorities to which I have referred that the jury were warranted in giving a commission of two and a-half per cent. on the full purchase price of the two portions.

The other objection to the plaintiff's right to recover any commission taken in the rule *nisi* is that, if the plaintiffs were agents merely to find a purchaser they assumed to bind the defendants by a memorandum in writing which they had no authority to give, and were thus guilty of such misconduct as to disentitle them to charge a commission.

So far from repudiating the plaintiff's authority to receive a deposit for them the defendants accepted the first deposit. If there was any misconduct in this it was waived. The writing given by the plaintiffs was merely a receipt for the deposit paid to them.

The cases of *Hamer* v. *Sharp*, L. R. 19 Eq. 108, and *Haydock* v. *Stow*, 40 N. Y. 368, show that an agent to find a purchaser could not bind the principal by a contract of sale, and so no injury could be done to the principal by the giving of the receipt; and it appears impossible to say that there was any misconduct in so ordinary an act as the signing of an acknowledgment of the payment of money. It could not have the effect of changing the nature or terms of the plaintiff's employment.

There remains, however, one further question which was argued before us,—one with reference to the amount of damages awarded.

One of the questions submitted to the jury was, "What damages do you find, if any?" A written memorandum stating specific questions upon which the jury were to find was given them, and upon this they wrote down their findings, and returned it to the judge with their answers, but they put down upon it no answer to the question as to the amount of damages, though they found that two and a-half per cent. was the ordinary commission charged by real estate agents at the time of this transaction. Taking the aggregate of the prices of the two parcels the commission upon this at two and a-half per cent. would be only $1,365.00. The amount of the verdict is $1,685.00. How or why the extra $320.00 were allowed is not very clear. It is claimed by the plaintiff's counsel as being for interest in the nature of damages. The learned judge before whom the case was tried does not himself recollect the circumstances under which the amount of the damages was found, and neither his notes nor those of the reporter show whether the calculation was made by the counsel, the jury or any officer of the court.

The learned judge did not, in his charge to the jury, instruct them to allow, or that they might allow, anything for interest. Under these circumstances, although no objection appears to have been taken at the trial to the amount of the verdict, it does not appear that we can hold the defendants to be estopped from raising the objection now.

At common law interest could be allowed only upon an express or an implied agreement to pay it. It was not allowed on money due for work and labor. *Trelawney* v. *Thomas*. 1 H. Bl. 303.

By statute 3 & 4 Will. 4, c. 42, s. 28, "Upon all debts or sums certain payable at a certain time or otherwise, the jury on the

trial of any issue or inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sum certain be payable by virtue of some written instrument at a certain time; or if payable otherwise then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment."

Many important questions must arise in determining whether this act can be considered as in force in this Province. At present it does not appear necessary to decide upon them. It is sufficient to say that we are of opinion that the plaintiffs have not brought themselves within the statute. There is no contract in writing between the plaintiffs and the defendants. No proof has been given of any demand of payment accompanied by notice that interest would be charged from the date of the demand. The particulars attached to the record claim interest to their date but contain no such notice with reference to further interest as the statute specifies. Thus, whether the amount of damages is based upon a miscalculation or upon an addition for interest, the plaintiffs were equally disentitled to the excess over $1,365.00.

As to the claim that the rule *nisi* raises no objection to an allowance for interest, I do not think that it should prevail. While a new trial should not be granted to enable a party to raise at a second trial an objection not previously raised, yet the stating of a ground of objection in a rule *nisi* is made to give notice to the opposite party that he may be prepared to meet it. In the present instance there is certainly no objection taken in such a way that the plaintiffs could have expected the point to be raised; but the question was argued subject to the objection to its not being raised by the rule *nisi*; and it appearing that the plaintiffs were not legally entitled to the excess over $1,365 and that no injustice can be done by amending the rule *nisi*, we think that it should be amended by adding the objection to an allowance for interest or any amount in excess of $1,365.00. The plaintiffs are insisting upon their pound of flesh notwithstanding the failure of both sales, and they should not be allowed anything more than they are absolutely entitled to.

As no leave was reserved under which we can reduce the amount of the damages assessed, we can only give the plaintiffs the option of accepting the reduction. As the point last referred to was not taken in the rule *nisi*, and was only raised as a subsidiary point upon the argument of the rule, no costs on that account can be allowed to the defendants. If the plaintiffs consent to the reduction of the amount of the verdict to $1,365.00 the rule will direct that reduction, costs to be costs in the cause; but if the plaintiffs will not accept the reduction the rule must be absolute granting a new trial, costs to abide the event.

*N.B.—The plaintiffs consented to the suggested reduction in the amount of the verdict, and the rule issued accordingly.*

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## DEDERICK v. ASHDOWN.

(IN CHAMBERS.)

*Privileged communications between solicitor and client.*

Certain questions put to the defendant as to communications between himself and his attorneys with a view to shewing his responsibility for their action in issuing and enforcing a *fifa* goods,

*Held*, To be privileged.

Summons to show cause why the defendant should not be ordered to attend at his own expense and make answers to the questions refused to be answered by him upon his examination upon his pleas.

The action was one brought in trespass and trover being for an alleged wrongful entering and taking of the plaintiff's goods under writs of execution issued upon judgments obtained by the defendants.

The questions objected to by the defendants, and intended to elicit facts as to the responsibility of the defendants for the action of their attorney in issuing the executions, were as follows:—

Q. What did you communicate to Mr. Dawson? (Mr. Dawson was one of defendant's attorneys.)

A. I decline to answer.

Q. What was the information your solicitors gave you?

A. I decline to answer.

Q. Did your solicitors tell you that the plaintiffs' goods had been seized under your execution or anything to that effect?

A. I decline to answer.

Q. Did you write any letter or letters to Mr. Donald relating to the seizure or judgment upon which the execution issued?

A. On advice of counsel I decline to answer the question in that form, part of it being irrelevant. I cannot find that I have any letters to Donald relating to an agreement with the plaintiffs that execution was not to issue till the first of March, 1884.

*A. E. McPhillips* showed cause and cited *Macdonald* v. *Putman*, 11 Gr. 258; *Wilson* v. *Rastall*, 4 T. R. 754; *Parkhurst* v. *Lowten*, 2 Swans. 216; *Gillard* v. *Bates*, 6 M. & W. 547; *Cromack* v. *Heathcote*, 4 Moore, 357; *Shellard* v. *Harris*, 5 C. & P. 592; *Turquand* v. *Knight*, 2 M. & W. 98; *Herring* v. *Clobery*, 1 Ph. 91; *Gresley* v. *Mousley*, 2 K. & J. 288; *Friend* v. *London, Chatham & Dover Railway Co.*, 2 Ex. D. 437; *Mostyn* v. *West Mostyn Coal and Iron Co.*, 34 L. T.N.S. 531; *Wilson* v. *N. & B. Ry.*, L. R. 14 Eq. 477; *Bullock* v. *Corry*, 3 Q. B. D. 356; *Minet* v. *Morgan*, L. R. 8 Ch. 361; *Turton* v. *Barber*, L. R. 17 Eq. 329; *Greenough* v. *Gaskell*, 1 Myl. & K., 98.

*C. P. Wilson* supported summons and referred to the following cases: *Walsingham* v. *Goodricke*, 3 Hare 122; *Paddon* v. *Winch*, L. R. 9 Eq. 666; *Walton* v. *Bernard*, 2 Gr. 344.

TAYLOR, J.—The conclusion I have come to, though I confess with some hesitation, is that the defendant cannot be compelled to answer the questions objected to.

Several cases were relied on by the plaintiffs. Of these, *Paddon* v. *Winch*, L. R. 9 Eq. 666, was not a case of correspondence between a party and his solicitor at all, but one in which the production was sought of a correspondence between the purchaser at a sale under the mortgage and the solicitor of the mortgagee. *Walton* v. *Bernard*, 2 Gr. 344, was a case in which no doubt the head-note shows that where a defendant expressed to her attorney her desire that a certain course should be adopted in reference to a writ in the hands of the sheriff, which course was in consequence pursued, it was not a privileged communication, but the learned judges who gave judgment in that case seem to found their judgment on that point on the fact that the communication to the attorney was made for the purpose of its being made known to the opposite party.

The case of *Lord Walsingham* v. *Goodricke*, 3 Ha. 122, was spoken of by Lord Selborne in *Minet* v. *Morgan*, L. R. 8 Chan. 361, as a case which would not bind, and as one which was decided as it was by Sir James Wigram against his own opinion, and because he thought the dicta of other judges compelled him to do so. In *Wilson* v. *Northampton & Banbury Junction Ry.*, L. R. 14 Eq. 477, V. C. Malins spoke in the same way of *Lord Walsingham* v. *Goodricke*, and refused to follow that case or *Hawkins* v. *Gathercole*, 1 Sim. N.S. 150. The latter case, he said, was not considered by Lord Cranworth, but was decided simply because that judge thought Sir James Wigram had disposed of the point. V. C. Malins protected "directions or communications to or from the solicitors or directions to them or their agents with reference to the litigation."

Lord Selborne in *Minet* v. *Morgan* quoted with approval the language of V. C. Kindersley in *Lawrence* v. *Campbell*, 4 Drew. 490, when speaking of communications between a client and his solicitor, "It is sufficient if they pass as professional communications in a professional capacity." The same expression is approved of by the House of Lords in the latest case I have seen, *Lyell* v. *Kennedy*, 9 App. Ca. 81.

The summons must be discharged, costs to be costs in the cause to the defendant.

## DOWN v. LEE.

[IN APPEAL.]

*Master and servant.—Negligence of servant.—Action for damage to goods by mortgagor against the mortgagee.—Redemise.—Amendments.—Evidence.—Statements of agent.*

A master is liable for a wrong committed by his agent when such wrong is committed while the agent is acting within the scope of his authority.

The defendant's son lighted a smudge near a stable to keep away mosquitoes from his father's horses. The fire spread to the stable and consumed some wheat of the plaintiff stored therein. The jury gave a verdict for plaintiff and the court refused to set it aside, (KILLAM, J., *dissenting*).

In such a case the defendants held a mortgage upon the wheat executed by the plaintiff. The mortgage was not due at the time of the fire. There was no redemise clause in it. After the fire and the maturity of the mortgage, the defendant realized the money secured by the mortgage by sale of other property comprised in it. The wheat had been stored by the plaintiff in the defendant's stable while, previously, tenant to the defendant, and the defendant had not in any other way taken possession than by occupation of the land and stable and by refusing to allow the wheat to be removed until he was paid.

*Held*, That the existence of the mortgage was no defence to the action for the destruction of the wheat, (KILLAM, J., *dissenting*).

*Per* KILLAM, J. In the absence of a redemise clause in the mortgage, no action could be brought for the loss of the goods whether it occured before or after the expiration of the time for redemption.

2. If there could be held to be an implied redemise clause (as to which *quære*), the plaintiff could only recover for the loss of enjoyment of the goods between their destruction and the time fixed by the mortgage for payment.

3. Amendments can be allowed only where they are "necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties," and for the purpose of meeting "any formal objection * * * to the end that in all things substantial justice may be done." A count disclosing a cause of action entirely distinct from those upon the record, under the circumstances, should not be allowed.

4. A principal is not bound by the statements of his agent, after the happening of the act sued upon, unless the agent has authority to make such statements.

This was an action for the destruction by fire of the plaintiff's wheat through the negligence of the defendant's agent. At the trial the plaintiff had a verdict. The present motion was by the defendant for a nonsuit or new trial.

*N. F. Hagel, Q.C.*, and *G. Davis*, for plaintiff. On the point that unless an objection to evidence is taken at the trial, it cannot be taken in Term, *Abbot* v. *Parsons*, 7 Bing. 563; *Henn* v. *Neck*, 3 Dowl. 163.

The act complained of, lighting a smudge, was an act in the course of the agent's employment. *Seymour* v. *Greenwood*, 7 H. & N. 354.

The smudge was for the protection of the horses not for the agent's protection. *Bayley* v. *Manchester &c. Ry. Co.*, L. R. 8 C. P. 148; *Burns* v. *Poulsom*, L. R. 8 C. P. 568.

*J. A. M. Aikins, Q.C.*, and *W. J. Cooper*, for defendant.

As to right to amend by adding common counts, *Hammond* v. *Heward*, 20 U. C. Q. B. 36.

The statute does not authorize the judge to add to the record a new and dissimilar cause of action, *Bradworth* v. *Foshaw*, 10 W. R. 760; *Jacobs* v. *Seward*, L. R. 4 C. P. 328; 5 H. L. 464; *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 382; *Wilkin* v. *Reed*, 15 C. B. 204; *Holden* v. *Ballantyne*, 6 Jur. N. S. 451.

The objection to the amendment being overruled, the defendant had no option but to go on with the case as made out. *Olcott* v. *Tioga R. R. Co.*, 40 Barb. 180, 27 N. Y. 546, *Ring* v. *Neale*, 114 Mass. 111; *Jones on Chattel Mortgage*, s. 1, 4, 697.

The agent was contradicted by five people as shown on affidavits; the defendant should have brought that evidence at the trial, but he could not conceive that the agent would tell such a concocted story, the defendant was not prepared to meet that. *Jackson* v. *Hyde*, 28 U. C. Q. B. 294; *Jackson* v. *Met Ry. Co.*, 3 App. Ca. 193.

The agent put the horses in the stable and then kept the smudge for his own protection. *Williams* v. *Jones*, 3 H. & C. 602; *Stevens* v. *Woodward*, 6 Q. B. D. 318; *Underhill on Torts*, 44; *McAulay* v. *Allen*, 20 U. C. C. P. 417; *Chamberlain* v. *Green*, 20 U. C. C. P. 304.

[*10th January 1887.*]

WALLBRIDGE, C.J.—There are several counts in the declaration charging the defendant as bailee of a certain quantity of wheat of the plaintiff, averring want of care in plaintiff in keeping it, and its consequent loss by fire. There are also counts charging the plaintiff with negligently setting fire to the granary in which the wheat was situate, by means of a smudge, lighted for the purpose of keeping mosquitoes from the defendant's horses, then in his stables, and the negligent management and care of the fire, by which the fire spread from the stables to the granary in which the wheat was stored, and the destruction of the same by the negligence of the defendant and his servants.

The plaintiff had been tenant of the defendant, and had grown the wheat on the defendant's farm. By the terms of the lease the total crop raised on the land demised, it was agreed, should stand and be security for the rent, that the lessee should not move any of it for the purpose of defeating the landlord, this defendant, of his rent. The rent was not for an ascertained sum, but was to be at the rate of seven dollars per acre for new breaking, six dollars an acre for stubble land, and three and a-half dollars an acre for land broken, but not back-set. The plaintiff and defendant do not seem ever to have come to an exact understanding as to how much land there was of each description. The rent, therefore, was not clearly ascertained. The plaintiff, however, paid the defendant $298 in cash, and gave him a chattel mortgage on the wheat grown.

As to the quantity of wheat, there was evidence both ways, not entirely satisfactory, but it was a fit case for a jury, and it is not contended that the evidence would be any more conclusive at another trial. There is evidence, in my opinion, sufficient to justify the verdict for the plaintiff, on the the ground of negligence in the defendant's son (in law, his servant), a servant acting within the scope of his authority, and in so acting, if he commit a wrong upon another person or upon his property, the master is responsible for it.

It is proved that the defendant's son, on the evening of the fire, did light a smudge for a lawful purpose, for keeping the mosquitoes from the defendant's horses. The place where he had it is differently accounted of. The son says it was 50 feet

away from the stable. Is that reasonable? The cause for which he lighted the smudge would not be served at all by a smudge at that distance. Other evidence is that he had it in the stable, where one would suppose he naturally would require it. This was a proper question for a jury, and they have found it for the plaintiff. There is no evidence of any other fire being near them, or any way suggested of this fire happening, except through and by means of this smudge. There was evidence which it was proper to submit to the jury, and I cannot say they were wrong. The damages are not excessive, looking at it from the account given of the quantity threshed by the man who threshed it, and deducting the quantity sold from that threshed, the verdict is within what may fairly be called a reasonable verdict.

The defendant seeks to enter non-suit upon leave reserved and for new trial, verdict being contrary to law and evidence. I have disposed of the latter grounds first, and think that the verdict as to them should stand. As to the motion for non-suit, it was argued in Term that the mortgagee being in possession the plaintiff had no right of property or possession upon which he could maintain an action.

I cannot find that any such ground was taken at the trial. It certainly was never stated as a ground of defence, that the plaintiff had neither property nor possession, the defence rested on the ground that defendant was not liable as bailee, and it was upon this that the cause was defended. The objection was first taken by Mr. Aikins in supporting the rule.

It appears to be difficult to define exactly the relation in which mortgagor and mortgagee stand to each other in any other words than that of mortgagor or mortgagee in possession, as long as the mortgagor is not treated as a trespasser his possession is not hostile to the mortgagee's right. *Hitchman* v. *Walton*, 4 M. & W. 416 (n) and cases there referred to. In *Court* v. *Holland*, 29 Gr. 23, the Chancellor admits that there may be a possession in the mortgagee, not technically that of "mortgagee in possession," by nature of the mortgage title, but by a special agreement and refers to *Moroney* v. *O'Dea*, 1 Ball. & B. 109-117.

In the case of *Noyes* v. *Pollock*, 32 Ch. Div. 53, it is thus laid down, "The question whether the mortgagee is mortgagee in possession depends upon whether he has taken out of the mort-

gagor's hands the power and duty of managing the estate and dealing with the tenants." I find here that after the plaintiff had left the defendant's farm he was still endeavoring to sell the wheat. I cannot find that the defendant ever did so attempt. The wheat remained in the granary where the plaintiff left it up to the time of the fire, 19th June. The most that can be said was that it remained where the plaintiff left it without anything done by any one; it was simply there, covered by the mortgage. Plaintiff had not abandoned it, and the defendant had not formally taken possession of it, or notified plaintiff to that effect. On the contrary, before or after the happening of the fire (not clearly stated which) the defendant made his money, and plaintiff contends more than his money, by the sale of other of the plaintiff's property in the mortgage to satisfy his debt. The law, I understand, is this,—after the mortgage is due the mortgagee may treat the mortgagor either as tenant or trespasser. *Hitchman* v. *Walton*, 4 M. & W. 409-416. What did he do in this case? Nothing more than to guard the property being spirited away without getting his mortgage-money. He did nothing actively. *Parkinson* v. *Hanbury*, L. R. 2 H. L., pp. 10-14. The plaintiff, therefore, had such title as would enable him to maintain this action. Besides, until the mortgagee sell the property the mortgagor may redeem it although the mortgage be due. Here the mortgagor has since the fire made his money by the sale of other property and the plaintiff would in such case be entitled to redeem. The defendant's conduct shows he did not assume the rights or power of mortgagee in possession. His subsequent conduct especially is to that effect.

Wigram, V.C., in *Faulkner* v. *Daniel*, 3 Hare, 220, says, that it is not every interference with the management of an estate by a mortgagee that will make him for all purposes a mortgagee in possession.

How should the defendant account? Could he be called upon at all to account? Is his possession sufficient for that?

The right of redemption exists in the mortgagor until foreclosure, statute of limitations, or until extinguished by a *bona fide* contract, subsequent to the mortgage. *Jason* v. *Eyres*, 2 Ch. Ca. 33; *Bell* v. *Carter*, 22 L. J. Ch. 933.

In my opinion the verdict for the plaintiff should stand, and the rule be discharged with costs.

DUBUC, J., concurred.

KILLAM, J.—There were originally four counts in the declaration:—the first charging the defendant as voluntary bailee of goods for the plaintiff, with keeping them in a negligent manner, whereby they were lost to the plaintiff; secondly, charging the defendant with having the plaintiff's goods in his possession, and with starting, by his servant, a fire near where the goods were stored, and with negligence in the case of the fire whereby the goods were destroyed; thirdly, charging that the plaintiff's wheat was lawfully stored in a certain granary on the defendant's land and the defendant by his servant started a fire near the granary and so negligently cared for and watched the fire that it extended to and destroyed the wheat; fourthly, a count similar to the third except that the fire is charged to have been set by the defendant, without mention of his servant.

At the trial the plaintiffs were allowed to add a count charging the defendant as bailees of the goods for reward and with their loss by the defendant's negligence and the common counts. It did not appear on what grounds the amendments were asked, and no particulars under the common counts are given.

The defendant's original pleas were to all the counts the general issue, and to the various appropriate counts denials of the bailments and of the plaintiff's property in the goods.

The evidence showed that on the 20th March, 1884, the defendant let to the plaintiffs certain lands for one year from the 1st April, 1884, at a rental of $7 per acre for land newly broken and backset, $6 per acre for ploughed stubble land, and $3.50 per acre for land broken but not backset, including unploughed stubble. The rent was payable on the 1st December, 1884. The lease contained a provision that the crop raised on the lands demised should "remain and be as security for the payment of the above mentioned rent," and that the lessees should not "put away or remove to any place for the purpose of concealing the said grain or for defrauding the said lessor of or out of the aforementioned rent."

The plaintiffs were unable to pay the full amount of the rent when it fell due, and on the 6th December, 1884, they paid $298 on account and gave to the defendant a bill of sale of certain horses, cattle and hogs and "all the wheat now stacked and in the granary threshed and unthreshed" on the demised premises,

by way of mortgage to secure payment of $461, and interest at 10 per cent. per annum payable on the 1st July, 1885. This mortgage was intended to be for the balance of rent payable to the defendant which was the sole consideration for it.

The mortgage was under seal; it purported first to transfer the goods absolutely to the mortgagee and contained the usual receipt clause, and the usual provisoes for redemption and for taking possession and sale by the mortgagee upon default in payment or in the event of the mortgagors attempting to sell or dispose of the goods or to remove them out of the municipality where they were, and in these and other respects it was in the ordinary printed form commonly used in this Province, and the Province of Ontario. After its maturity the defendant sold other goods comprised in the mortgage realizing within a few dollars of principal, interest and costs.

One of the plaintiffs stated that before and at the time when he gave the mortgage he claimed that there was not as large a quantity of ploughed land as the defendant was charging for, and that when the mortgage was given a dispute as to the quantity arose and the defendant then told him to measure it and that he did not want the plaintiffs to pay for more than there really was, and that the mortgage was made upon this understanding.

The defendant stated that at the time of the mortgage being given, this plaintiff put the quantity of ploughed land at 125 or 126 acres, and that it was computed at 126 acres. The defendant neither admitted nor denied the plaintiff's statement that he told him to measure it, but admitted that he told the plaintiff that he did not wish him to pay for more than there really was. The plaintiff claimed that he measured the ploughed land afterward with the school-master, who took down the measurements and made the computations from them of the numbers of acres of the respective quantities of land. The schoolmaster was not called as a witness and the plaintiff did not give the measurements but only the results of the computations made by the schoolmaster as told to him, which would make the total rent come to $706.

On the determination of the lease the plaintiffs left the premises and the defendant took possession. There was then a considerable quantity of wheat in the granary upon the lands, and the defendant insisted upon its being allowed to remain there, to

which the plaintiffs made no objection as they would thus be saved the trouble and expense of moving it before they wished it marketed. Early in the morning of the 19th day of June, 1885, the granary and its contents were destroyed by fire. The plaintiffs claimed that the fire spread from one kindled by the defendant's son, for the purpose of a smudge for cattle, in the course of the son's duties as servant of the plaintiff, and that the consumption of the granary and contents was the result of the son's negligence in the lighting and care of this fire.

The principal witness called by the plaintiff was a lad who, at the time of the fire was in the defendant's employ, and his evidence was principally directed to a conversation which occurred between the defendant and the son on the morning after the fire. The son was called as a witness for the defendant and gave his own account of the lighting of the fire for the smudge and its purpose, of the care which he took and other circumstances within his knowledge to show the origin of the fire which destroyed the granary, the contention of the defendant being that it did not originate with the smudge. Some other witnesses were called who came to the fire when the granary was partially destroyed, and who testified to other circumstances which might assist in drawing inferences as to the origin of the fire which destroyed the granary.

The jury gave a verdict for the plaintiff for $647.

The grounds on which the defendant moved against the verdict were that it was "against law, evidence and the weight of evidence," that "the defendant was not shown to be guilty of any negligence;" that "it was not shown the servant was guilty of any negligence for which the defendant was responsible; that the evidence of Marsh," (the lad who testified to the conversation between the defendant and his son) "is of an exceptional kind and is contradicted by two witnesses, and the evidence of the defendant as to the fire not being caused as alleged is positive and not contradicted;" "for the improper admission of evidence as appears from the notes taken at the trial, and, without limiting such, for admitting the evidence of Marsh respecting an alleged statement of the defendant's son;" and "that the defendant was surprised at the trial by the evidence given by Marsh and had not his witnesses ready to meet such evidence;" "and on the

ground of the discovery of new evidence, and on the grounds disclosed in the affidavits and papers filed." Affidavits of other members of the family were filed for the purpose of showing that they could contradict the evidence of Marsh as to the particulars of the conversation mentioned.

The defendant objected to the amendments made at the trial when moved for, but in applying to set aside the verdict no objection was taken on this ground. However, upon the argument of the motion to make absolute the rule *nisi*, the defendant's counsel asked to be allowed to add to his grounds of objection to the verdict, one setting up that counts were improperly added at the trial, setting up an entirely new cause of action. The parties were allowed to argue the question of the propriety of that amendment of the pleadings with the other questions raised, the court reserving the question of allowing the addition of that ground of objection to the other grounds taken by the rule.

I think it advisable to consider the questions thus raised before entering upon the discussion of other points.

If, upon the evidence under the added counts there had been fairly a question of liability for the jury, as there is nothing to show that the defendant was placed at any disadvantage by the amendments, I would not think that the rule *nisi* should be now amended in order to enable the defendant to raise an objection to the addition of the new counts; but as there was really no evidence of the alleged error in the amount of rent secured by the mortgage, and as it was left to the jury to allow or not allow $53 for an overcharge on this account, and it is not clear that they did not so allow it, I think that the defendant should be given every opportunity to show that the amendment should not have been made.

The record originally contained no count upon which the $53 could have been recovered. Upon the record as amended the amount could only be claimed under the common counts added at the trial. No such amendment could have been allowed under the old common law practice. Any authority for it must be given by statute or, perhaps, in this Province, by rule of court. We have grown so accustomed to the free making of amendments that we are apt to overlook the origin of the power to make them, and forget to consider whether there are any limits imposed upon the exercise of the power.

The real statutory authority for amendments of pleadings upon a trial is found in the 222nd section of the Common Law Procedure Act, 1852, which virtually superseded the prior enactments. That section provides that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceeding in civil causes * * * * and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

In *Wilkin* v. *Reed*, 15 C. B. 206, Maule, J., said of this section, "I think it was intended by the C. L. P. Act, to limit the power of amendment to the introduction of matters which the parties hoped and intended to try in the cause, and not to authorize amendments which might raise questions which never were contemplated before. There was nothing here to show that the matter sought to be introduced by the proposed amendment ever was a question in controversy between the parties. On the contrary there was strong ground for presuming that no such controversy existed at all." And Cresswell, J., on the same occasion said, "I am clearly of opinion that the amendment asked for upon this occasion was properly refused, in as much as it sought to introduce a matter which was not in controversy between the parties at the time."

It appears to me that no words could be found more applicable to the present case. According to the plaintiff's own statement, when the mortgage was made the defendant said that the plaintiff could measure the ploughed land, and that he (the defendant) did not want the plaintiffs to pay for more than there really was. It does not appear that any question of the quantity was ever raised between the parties again; certainly there is nothing to show that it was ever a matter of controversy between the parties that the defendant levied for and received under his chattel mortgage more than the rent and interest to which he was entitled. We can even use a stronger expression than that of Maule, J., that "there was strong ground for presuming that no such controversy existed at all." It is very clear that none such did until raised by the plaintiffs upon the trial of this action.

Before the amendment there was no defect or error in the record or the declaration. They showed definitely and com-

pletely the cause of action for which the plaintiffs were proceeding, the damage caused by the loss of the wheat. The defendant's liability to the plaintiffs for that was the matter in controversy.

*Hammond* v. *Heward*, 20 U. C. Q. B. 36, is a further distinct authority against an amendment setting up an entirely new cause of action.

The only other authority for such an amendment must be found in the 9th General Rule of this court of the 10th February, 1875, "No proceeding shall be defeated by any formal objection, but it shall be in the discretion or a judge or the court in all matters of practice and procedure to order all necessary amendments with or without costs, to the end that in all things substantial justice may be done."

Here there was no question of defeating the plaintiff's proceedings by any formal objection. They had brought the defendant to the trial of a particular matter of controversy between them, and their proceedings for the purpose were complete in every respect so far as they could be made so in a court of law. There was no necessity, in order to the doing of substantial justice, that the plaintiffs should be allowed to add an entirely different cause of action upon which there was nothing whatever to prevent them from suing independently. They had previously elected to sue on only the one cause of action, and would be placed at no disadvantage whatever if left to rely wholly upon that. It is only such amendments as are *necessary* to the doing of substantial justice that the rule of court authorizes.

If the verdict were in other respects satisfactory I might think that the plaintiffs should now be given the option of withdrawing the common counts and reducing the amount of the verdict by $53; but, under the circumstances of this case, it does not appear to me that the court would be justified in dealing with the matter in that way.

Leave was not reserved to enter a nonsuit, and that could not now be done, even if upon the evidence the plaintiffs should not be considered entitled to recover.

There does not appear by the notes of the learned Judge before whom the cause was tried, or by those of the reporter, to have been any objection to the reception of the evidence of the conversation referred to, although it is stated by the defendant's

counsel that he made objection to it at the trial, and a new trial is now asked for on the ground of the improper reception of this evidence.

But I do not think that this evidence could have been excluded. It related to a conversation with respect to the fire in question in which the defendant took part. It is true that the statement of an agent after the fact is not in itself evidence of the fact as against his principal, but before the evidence was given it was impossible to say whether the defendant himself might not make some important admission; and after it was fully given the objection should not have been to its reception, but to the weight attached to it. Besides, the conversation was important in its bearing upon the question whether the son was acting within the scope of his employment in making a smudge for the cattle.

But, with all deference to the opinion of my learned brother Taylor, I cannot agree with him in the importance which he attached at the trial to the evidence of the conversation between the defendant and his son. It even appears to me that, upon the evidence for the plaintiffs, a nonsuit should have been entered, as the statement of the son was no legal evidence either of the occurrence of the fire or of the circumstances which led to it. The plaintiffs, for any circumstances from which any inference of the cause of the fire or of negligence can be drawn, must depend upon the evidence offered by the defendant. I cannot help thinking that the view that a principal is not bound by the statements of his agent after the fact was not urged at all at the trial, and that this accounts for the course which the trial took and the mode in which the case went before the jury. It was evidently made a question of veracity between Marsh on the one side and the defendant and his son on the other, instead of its being left to the jury to determine whether from what they might believe of the evidence of the son and the other witnesses for the defendant they would infer that the fire was started by the son, and that it was through his negligence that it spread to the granary.

While the defendant should not be entitled to the benefit of an objection not urged at the trial, yet a verdict obtained in this way is not entitled to the amount of consideration which one given upon a fair inference from proper evidence should have.

Besides, the defendant furnishes affidavits of additional members of his family to show that they also can contradict the evidence of Marsh upon which the plaintiffs case so largely turned. Of course, as the plaintiff had some notice beforehand of the intended evidence of Marsh, he is not strictly entitled to a new trial for the purpose of having these other parties examined as witnesses; but, as in my opinion the case did not go before the jury in the proper way, as the plaintiff's case was erroneously made to depend so completely on the evidence of Marsh, and as so many contradict his statements, I think that the defendant should be allowed to avail himself of the objection to the amendment of the pleadings by insisting upon a new trial, and that the new trial should be granted.

I regret, however, that I feel obliged to express a dissent from the view of the learned Chief Justice upon the question of the defendant's right of action against the mortgagee. In the view which I take it is unnecessary to discuss the sufficiency of the objection taken at the trial in this respect to enable the defendant to insist now that the property in the goods had passed by the mortgage to the defendant and that the plaintiffs could have no right of action at law against the defendant for their loss. I refer to the matter merely because I entertain a very strong opinion against the right of action at law by mortgagor against mortgagee for such loss, in the absence of a redemise clause in the mortgage, whether the loss has occurred before or after the expiration of the time for redemption.

By the mortgage, apart from there being a redemise, the whole title to the goods passed to the mortgagee. Thereafter, at law, the plaintiffs had no interest whatever in them; they were until redemption as fully and entirely the defendant's goods as if the mortgage had been an absolute bill of sale.

It is true that the interest of the defendant was defeasable, and that the plaintiffs had a right to acquire the goods again by redemption at the appointed time, but in the eye of a court of law the mortgagor in such a case has no property in the mortgaged goods.

It was even held in *Roscarrick* v. *Barton*, 1 Ca. Ch. 217, that in a court of equity a right of redemption of lands mortgaged was not an interest in the land itself, though of course this view is not now a tenable one.

In *Simpson* v. *Smyth*, 2 U. C. R. O. S. 194, Robinson, C.J., said, "In the view of a court of law an equity of redemption is nothing belonging to the debtor which it can recognize."

In *The Marquis of Cholmondeley* v. *Lord Clinton*, 2 Jac. & W. 178, Sir Thomas Plumer, M.R., said, "In a court of law the mortgagor is nothing; in a court of equity he is everything."

In *Westerdell* v. *Dale*, 7 T. R. 312, Lord Kenyon, C.J, said, "As to the cases respecting the mortgagee, whether in or out of possession, he is the legal owner and must be so considered in a court of law, notwithstanding his title is subject to equitable interests."

In *Williams* v. *Bosanquet*, 1 Brod. & B. 238, Dallas, C.J., said, "The assignment of a lease for the whole term, whether absolute or subject to a proviso for reassignment in a certain event is, as far as concerns the interest to be transferred, precisely the same."

In *Webb* v. *Russell*, 3 T. R. 393, Lord Kenyon, C.J., said, "Here Stokes," (mortgagor) "had no interest in the land of which a court of law could take notice, though he had an equity of redemption, an interest of which a court of equity would take notice."

In *Pope* v. *Biggs*, 9 B. & C. 253, Littledale, J., said, "When a mortgage is created the mortgagee becomes the legal owner of the land."

In *Doe d. Barney* v. *Adams*, 2 Cr. & J. 232, Bayley, B., said, "There is no instance in which the mortgagor and mortgagee have been held to have a joint interest."

In *Doe d. Pryor* v. *Ongley*, 20 L. J. C. P. 26, it was held that an underlease by a mortgagor of a term passes no legal interest.

In *Goodtitle d. Jones* v. *Jones*, 7 T. R. 47, a term of years having been created by way of mortgage which was satisfied and the term having been conveyed to a trustee for the owner, it was held that the owner could not maintain ejectment while this term appeared outstanding, as the legal right to possession was in the assignee of the mortgagee.

In *Viner's Abridgement*, Vol. 15, p. 441, it is said "If lands be mortgaged to one the interest at law in these lands is in the mortgagee before the forfeiture of them; for he hath purchased the lands upon a valuable consideration as the law will intend."

In *Gilman* v. *Wills*, 66 Me. 273, it was held that an action will not lie by a mortgagor of lands against his mortgagee for entering and harvesting the crops, even before default, unless the mortgagor is occupying under an agreement as tenant of the mortgagee.

An action at law will not lie by mortgagor against mortgagee for waste, *Vin. Abr.* Vol. 15, p. 440, *Bac. Abr.* Vol. 7, p. 55; *Evans* v. *Thomas*, Cro. Jac. 172; *Witherington* v. *Banks*, Coop. t. King 30.

If then an action will not lie even for the wilful injury of the mortgaged property by the mortgagee, how can one lie for this destruction of the goods by the negligence of the mortgagee's servant?

I would refer also to *Bethune* v. *Corbett*, 18 U. C. Q. B. 498.

If any distinct authority can be considered necessary to show that the party thus suing for injury to goods by negligence must have as against that other a legal interest in the injured goods, I would refer to *Dawes* v. *Peck*, 8 T. R. 330, where it was held that the consignor of goods delivering them to a particular carrier by order of the consignee cannot sue for injury to them, as the title has passed to the consignee, and the consignor's right of stoppage *in transitu* is equitable only. Lord Kenyon, C.J., said, "The question must be governed by the consideration in whom the legal right was vested for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured."

Grose, J., said, "It is true that, while the goods remained in the hands of the carrier there was a latent right in the plaintiff to stop them *in transitu* but that is in its nature an equitable right though now grown into law; but the legal right was by the delivery to the carrier vested in the consignee by whose order they were so delivered."

With all respect for the opinion of the learned Chief Justice I would submit that the principles upon which a court of equity acts in deciding whether a mortgagee should be chargeable, as mortgagee in possession, with rents and profits, cannot determine the right of action at law in a case like the present; and that what the authorities show is that even while a mortgagee may have a legal

possession he may not be chargeable in equity as mortgagee in possession.

If, however, there can be considered to have been under this mortgage an implied redemise, there would be a legal interest in the mortgagor until default, and in respect of that interest he could maintain the action, and the point being taken merely on motion for nonsuit would be properly overruled. But, at law, the interest would be but a limited one, to continue until the maturity of the mortgage. As that period was very near when the fire occurred, and as the property destroyed was such that it was not capable of beneficial enjoyment while retained *in specie*, the damages which the plaintiffs would have suffered in the eye of a court of law would have been but nominal.

To avail himself of the point the defendant should have asked the learned judge to charge the jury to allow only the value of the limited interest, or he should have objected to the charge of the learned judge in leaving it to the jury to find damages equal to the full value of the destroyed grain. Not having done this, the contention would not be open to him on this motion.

As the question of there being an implied redemise under the terms of such a mortgage is one on which very conflicting opinions have been expressed in the courts, and as I think that it cannot yet be considered as fully settled, I would prefer not to be obliged to express an opinion upon it except after hearing full argument.

In the present instance, no argument of the question was attempted, it appearing to be conceded by the plaintiff's counsel that there was no implied redemise.

Unless the defendant were strictly entitled, by making the objection at the proper time, I would not think that a new trial should be granted on the mere ground that the plaintiffs should have sought relief by a suit in equity; but for the reasons which I gave before entering into the consideration of the legal right of the mortgagor, I think that in this case the verdict should be set aside and a new trial had between the parties.

*Rule discharged with costs.*

## WILSON v. THE CITY OF WINNIPEG.

(IN APPEAL.)

*Corporation.—Malicious prosecution.*

A municipal as well as a trading corporation may be liable for malicious prosecution.

The mayor of the city assuming to act as an officer of the city laid an information against the plaintiff; and a firm of solicitors assuming to act for the city advised him in the matter, prepared the information and attended upon its return on behalf of the prosecutors. The solicitors reported the matter to the council and the city paid for the solicitors' services.

*Held*, That the city was liable for the action taken by the mayor.

Where the facts are distinct and uncontradicted and there is no inference of fact the question of reasonable and probable cause is one wholly of law. But where any fact or inference of fact is involved the question must be determined by the jury under proper direction from the judge.

Opinion of counsel will not protect from an action for malicious prosecution unless the party uses reasonable care to ascertain the facts and lays them before counsel.

Damages reduced from $3000 to $500 no express malice having been proved, very little if any damage to reputation having been sustained and the plaintiff's arrest having lasted but a few hours.

This was an action for malicious prosecution under circumstances appearing in the judgment. The plaintiff had a verdict for $3000. The rule was to enter a nonsuit or for a new trial.

*H. M. Howell, Q.C.*, and *Isaac Campbell*, for plaintiff.

A solicitor employed at a yearly salary, is *prima facie* acting, in what he does, within his authority, though a solicitor is only a general agent, *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 323; *Eager* v. *Dyott*, 5 C. & P. 4; *McSorley* v. *St. John*, 6 Sup. C. 531.

Receiving money is evidence of ratification, *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526.

As to whether a corporation can be guilty of malice, *Burley* v. *Bethune*, 5 Taunt. 583; *Heath* v. *Heale*, 26 L. J. M. C. 49; *Abrath* v. *N. E. Ry. Co.*, 11 App. Ca. 248; *Quartzhill Gold*

*Mining Co.* v. *Eyre*, 11 Q. B. D. 694; *Bank of New South Wales* v. *Owston*, 4 App. Ca. 270; *Edwards* v. *Midland Ry. Co.*, 6 Q. B. D. 287; *Stevens* v. *Midland*, 10 Ex. 352; *Walker* v. *S. E. R. Co.*, L. R. 5 C. P. 640.

As to reasonable and probable cause, *Young* v. *Nichol*, 9 Ont. R. 560; *Hicks* v. *Faulkner*, 8 Q. B. D. 167.

Suspicion is not sufficient to sustain an arrest, *Busst* v. *Gibbons*, 30 L. J. Ex. 75; *Henderson* v. *Midland Ry.* 24 L. T. N. S. 887.

As to a corporation being liable for an action of this nature, *Edwards* v. *Midland*, 6 Q. B. D. 287; *Folkard's Starkie*, 471; *Angell & Ames on Corporations*, s. 388; *Reed* v. *Home Savings Bank*, 130 Mass. 443; *Eastern Counties Ry.* v. *Broom*, 6 Ex. 323.

*D. Glass*, for defendants.

Instructions must be shown to do this particular act, *Stevens* v. *Midland Ry. Co.*, 10 Ex. 352; *Freeborn* v. *Singer Manufacturing Co.*, 2 Man. L. R. 253.

As to ratification, *McSorley* v. *St. John*, 6 Sup. C. 531.

The mayor is not an officer of the corporation, *Roe* v. *Birkenhead Ry. Co.*, 7 Ex. 36.

The act was *ultra vires*, no power in charter to mayor to do such an act, *Dillon on Municipal Corporations*, 29; *Reed* v. *Home Savings Bank*, 130 Mass. 443.

There is not sufficient to show the termination of the action. The plaintiff should have produced the record, but a copy only has been produced, *Dillon on Municipal Corporations*, 29, 80, 88; *Arnould on Corporations*, 20, 22.

[*10th January, 1887.*]

KILLAM, J., delivered the judgment of the court. (*a*)

This is an action on the case for malicious prosecution of the plaintiff through the procurement of the defendant corporation.

The action was tried before my brother Taylor and a jury at the Winnipeg Spring Assizes of last year when a verdict was entered for the plaintiff for $3000.

The prosecution complained of was upon a charge, laid by Alexander Logan, mayor of the city, that the plaintiff conspired

(*a*) Present: Wallbridge, C.J., Dubuc, Killam, JJ.

with E. M. Wood, then solicitor of the city, to obtain money from the city by false pretences with intent to defraud. At the close of the plaintiff's case the defendant's counsel moved for a nonsuit on grounds which may be shortly stated as follows:—(1) that the action would not lie against a corporation, and particularly against a municipal corporation; (2) that there was no evidence that the mayor was authorized to institute the prosecution on behalf of the city; (3) that there was no evidence of a want of probable cause; (4) that there was no evidence of malice.

Leave was reserved to enter a nonsuit in term. The defendant obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, or for a new trial on objections to the charge of the learned judge who tried the cause, and on the ground that the verdict is against the weight of evidence, and of excessive damages.

In our opinion the objection that the action will not lie against a corporation cannot now be successfully raised. The reasons given and authorities cited by Fry, J., in *Edwards* v. *The Midland Ry. Co.*, 6 Q. B. D. 287, appear conclusive upon the question.

The opinions expressed by Alderson, B., in *Stevens* v. *The Midland Ry. Co.*, 10 Ex. 352; and by Bramwell, L. J., in *Henderson* v. *The Midland Ry. Co.*, 24 L. T. N. S. 887, and in *Abrath* v. *The North Eastern Ry. Co.*, 11 App. Ca. 248, were evidently not shared in either of those cases by their brother judges, although they did not deem it necessary to decide the point. The Judicial Committee of the Privy Council, in *Owston* v. *The Bank of New South Wales*, 4 App. Ca. 270, by suggesting circumstances from which it might be possible to show the liability of the bank, and by granting a new trial to enable the plaintiff to offer further proof of liability, impliedly expressed an opinion in favor of the view that the action would lie against the corporation. In *Reed* v. *The Home Savings Bank*, 130 Mass. 443, it was distinctly decided that the action would lie. We are unable upon this point to distinguish between a municipal and a trading corporation. The nature of the corporation may be very important in determining what are to be considered as the implied powers of its officers, but each kind of corporation must equally be held liable for the acts of its officers when acting within the scope of their authority.

Here it is shown that Mr. Blanchard, assuming for the purpose to act as solicitor of the corporation, advised the mayor upon the propriety of laying the information and drew the information for him; that his partner, Mr. Bain, assuming the same position, attended at the police station when the plaintiff was arrested, and upon the giving of bail, and appeared also on behalf of the prosecutor before the police magistrate. Mr. Logan assumed to act in the matter merely as an officer of the city, the charges for the services of Mr. Blanchard and his partner were made against the city, and, after investigation of the bill including these charges by a committee of the city council, the council ordered payment of the bill and the bill was paid. Mr. Blanchard made a verbal report to the council respecting the proceedings after the charge had been dismissed. It is plain that the council as fully as possible ratified and adopted the action of the mayor as being properly taken by him on behalf of the city. It appears to us, therefore, that the city must be held liable for his acts in instituting and proceeding with this prosecution.

The question of reasonable and probable cause is a mixed question of law and fact. Where the facts are distinct and uncontradicted, and no inference of fact is required to be drawn the question becomes one wholly of law, but it is seldom that the question arises in this simple form. Where its decision depends upon disputed questions of fact or inferences of fact it must be given by the jury under proper direction from the judge.

There was no evidence of anything which could justify the making of this charge against the plaintiff. There was nothing to show to the mayor and the solicitors, even if the mortgage in question could never be found, that the money had been obtained from any of the officers of the city upon a representation that the mortgage had been in fact executed, or that either the plaintiff or Wood had ever intended that such a representation should be made for the purpose of procuring the moneys. The evidence in possession of the officials of the city was rather that the money was paid over to Wood with the expectation that the mortgage was thereafter to be executed. There was thus no ground whatever to charge the alleged conspiracy.

It is plain from the Abrath case, without citing further authority, that to be protected by the opinion of counsel a party must

use reasonable care to acquaint himself with the necessary facts, and lay them all fully and fairly before counsel.

There can be no doubt that the parties here, mayor and solicitors or counsel, acted too precipitately in taking the course which they did, and we think that upon all the facts there was room for the jury to find that they did not take reasonable means to inform themselves of the true state of the case, and that upon such finding, the plaintiff must be considered to have sufficiently made out the want of reasonable and probable cause.

From the want of it and from the unreasonableness in every view of the course taken the jury would be warranted in implying malice. There could be no nonsuit under the circumstances.

These remarks are sufficient also to show that there should not be a new trial on the ground that the verdict is against the weight of evidence. They also, answer the only objections taken by the defendant's counsel at the trial to the charge of the learned judge to the jury.

We are, however, of opinion that the amount allowed by the jury for damages was grossly excessive. There is no evidence of express malice, even if it could be imputed to the defendant corporation. Very little if any damage to his reputation can have been sustained by the plaintiff, he having been so completely exonerated from the charge. He was only detained a few hours, and that was done in the most considerate way. We think that a new trial should he allowed on this ground, costs to abide the event, unless the plaintiff shall be willing to accept a reduction to $500 when the reduction can be made. The plaintiff in the latter case should have the costs under the rule *nisi*, he having succeeded on the principal points raised and on those which really involved lengthened argument.

*The plaintiff consented to reduce his verdict, and the rule issued accordingly.*

## BELCH v. THE MANITOBA & NORTH-WESTERN RAILWAY COMPANY.

(IN APPEAL.)

*Company.—"Permanent" official.—Seal.*

By resolution the defendants appointed the plaintiff their "permanent land commissioner," at a certain salary. The secretary of the company wrote a letter to the plaintiff informing him of the appointment and at his request affixed the corporate seal to the letter.

The plaintiff sued in assumpsit for wrongful dismissal.

*Held*, That by his pleading he was estopped from setting up the hiring as under seal.

*Quære*, As to the meaning of the word "permanent."

*Quære*, Whether as a matter of law the hiring was under seal.

Upon the evidence,—

*Held*, That the original agreement had been superseded and terminated by a subsequent agreement.

This was an action for wrongful dismissal. At the trial the plaintiff obtained a verdict for $1,500. The defendants now moved to enter a non-suit or for a new trial.

*H. M. Howell, Q.C.*, for plaintiff.

Resolution not required to be in writing, *Nevill* v. *Ross*, 22 U. C. C. P. 487.

A contract cannot be in force if there be no mutuality of covenant, *Mayor of Kidderminister* v. *Hardwick*, L. R. 9 Ex. 13.

On question of damages, *Guildford* v. *Anglo French Steamship Co.*, 9 Sup. C. 306; *Down* v. *Pinto*, 9 Ex. 327; *Beeston* v. *Collyer*, 4 Bing. 309.

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

As to permanent employment, *Elderton* v. *Emmens*, 17 L. J. C. P. 277.

Such an employment as plaintiff's should be under seal, *Armstrong* v. *Portgage, Westbourne & N. W. R.*, 1 Man. L. R. 344.

[*10th January, 1887.*]

TAYLOR, J., delivered the judgment of the court. (*a*)

This is an action for wrongful dismissal of the plaintiff from the employment of the defendant company, formerly The Portage Westbourne & North-Western railway. The defences mainly relied on are, that the defendants were entitled to dismiss the plaintiff upon giving reasonable notice, which they gave, and that by mutual agreement between the plaintiff and defendants, the contract of hiring was determined and rescinded.

At the trial the plaintiff had a verdict for $1500, leave being reserved to the defendants to move to enter a nonsuit. Subsequently the defendants obtained a rule calling upon the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered pursuant to the leave reserved, or why there should not be a new trial, upon the grounds that there was no legal hiring of the plaintiff whereby he could maintain an action for wrongful dismissal,—that there was ample evidence of a recission of the original contract of hiring (if any), and the plaintiff left the defendants' service pursuant to such recission of the contract,—that there was no evidence of dismissal of the plaintiff and that the verdict was excessive and unreasonable.

The original appointment of the plaintiff was by a resolution of the board of directors, passed on the 14th of September, 1882, "That Mr. A. J. Belch be appointed permanent land commissioner of the company, at the salary of $3000 per annum, to report direct to the board."

On the same day, a letter was written by the secretary of the company, to the plaintiff, informing him of his appointment. The secretary says he gave the letter to the plaintiff in a room adjoining that in which the board was met, when plaintiff said, "Should not the seal be put on it," and then he went back to the board office, and asked the directors about it: "I said Belch wants the seal put on it, and they said, put it on: I know I laughed, and I put it on." At this time the directors seem to have been still sitting as a board. The secretary says "the meeting was still going on."

The plaintiff contends, that he was thus appointed under the seal of the company, and counsel placed some reliance, though he

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

did not press it very strongly, upon the work "permanent," used in both the resolution and letter, as perhaps meaning more even than a yearly hiring. He contends that at all events there was a yearly hiring. It is further urged that as the contract of hiring was under seal, it could only be rescinded by an agreement under seal, as a deed can be altered only by the same solemnities as those by which it was made. The defendants on the other hand claim that the contract of hiring is not under the seal of the company, the resolution appointing the plaintiff not being so. That, they say, was his appointment, the letter contained no appointment, it conferred upon the plaintiff no authority, and did not profess to do so, but was merely an intimation to him of something having been done. The seal of the company being impressed upon that letter did not, they contend, render the appointment, which had previously been made by resolution, an appointment under the seal of the company, any more than if, immediately after, or at the time of the passing of the resolution, the seal had been affixed to a piece of blank paper.

There is nothing to be inferred in the plaintiff's favor from the use of the word "permanent."

In *Elderton* v. *Emmens*, 4 C. B. 479, in the Exchequer Chamber, 6 C. B. 160, and in the House of Lords, 4 H. L. 624, the plaintiff who sued for wrongful dismissal had been appointed by an Insurance company, of which he was the founder, "permanent solicitor to the institution." By a resolution, passed more than four years afterwards, it was resolved "to allow him as solicitor a salary of £100 in lieu of his rendering, as at present, an annual bill of costs for general business"; and plaintiff for, "such salary of £100 per annum," was to advise and act for the company on all occasions with the exception of suits, bonds, and securities for advances by the company.

The chief point discussed in that case, in all the courts, was the sufficiency of the second count in the declaration, after verdict, but the meaning of the agreement was touched upon. In the Common Bench, Wilde, C.J., said, whether the expression permanent solicitor meant employment for life, or so long as the company shall exist, the court had no means of judging, but he inclined to think it meant no other than a general employment, as distinguished from an occasional employment in particular

matters. Crompton, J., thought the retainer, so far permanent, that the company were not to be at liberty to dismiss the plaintiff without some adequate cause, Maule, J., said, "The evidence does not show any contract on the part of the company to retain and employ him as their attorney, any longer than they should think proper. In fact permanent attorney means no more than enduring engagement, than standing counsel . . . I do not think the agreement amounts to a contract to employ the plaintiff even for one year." The judges in the Exchequer Chamber, were of opinion, that the effect of the agreement to give a certain salary for one year at least, to a person who engages for it to give his services, if required, amounted to a promise to continue that relation for at least a year. In the House of Lords nine judges were called in to advise the House, and they differed, although the majority no doubt, agreed with the decision in the Exchequer Chamber.

The argument that the contract could not be rescinded except by an instrument under seal, does not strike me as in point here. The case cited, of *West* v. *Blakeway*, 2 M & Gr. 729; and *The Thames Iron Works* v. *The Royal Mail &c. Co*, 13 C. B. N. S. 358, and other cases are authorities for what plaintiff's counsel argued, but can an agreement like the one in question here, even assuming that the seal being on the letter, was a sufficient affixing of the seal of the corporation to the agreement, be said to be a deed. A contract of hiring is not by law required to be by deed, and such a contract was one which the defendants could make.

In *Aggs* v. *Nicholson*, 1 H. & N. 195, the court seem clearly to have been of opinion, that if the corporation could make a promissory note, and the language was suitable, the putting the seal to it would not change its character, and make it a specialty instead of a note. See also *Halford* v. *Cameron's Coalbrook Co.*, 16 Q. B. 442; *Edwards* v. *Cameron's Coalbrook Co.* 6 Ex. 269; *City Bank* v. *Cheney*, 15 U. C. Q. B. 400. The seal is an essential part of a deed, for without a seal the instrument is not a deed at all. But *Bryce* in his work on *Ultra Vires*, says at p. 461, "It is fairly arguable that the seal is not an essential part of the contract *per se*, which may exist without it, but is an essential part of the proof of the contract, when sought to be enforced against the corporation." His reasoning is, that under the Statute of Frauds there are contracts, to enforce which no

action can be brought unless they are in writing, and signed by the party sought to be charged, yet the statute does not make such contracts void. So there are contracts of corporations which are not void, although no proceedings can be taken to enforce them, because they have not the seal of the corporation to testify that they were assented to by the corporation.

An agreement in writing, even one required by the Statute of Frauds to be so, may be varied, discharged and determined by a subsequent verbal agreement, *Mulgrew* v. *Pringle*, Dra. 269; *James* v. *Cotton*, 7 Bing. 266.

In the present case the contract was not by deed, this the plaintiff has in fact admitted, and he cannot properly be heard to use the argument which has just been dealt with, for he has sued not in covenant but in *assumpsit*. Not being by deed it could be determined by parol by mutual consent, and there is, I think, ample evidence that it was so determined and a new agreement substituted.

In September, 1884, a year after the making of the original agreement, the defendants were carrying on negotiations for raising money, and it was not improbable that if they were successful, the land grant of the company would pass from under their control. If it did, the services of a land commissioner would no longer be required. On the 24th of September, 1884, a letter was written to the plaintiff, informing him that his services as land commissioner would not be required after the end of that month, but that the company would like to procure his services during the month of October, at his then salary of $250 per month, and would like to be informed if he could continue beyond October on these terms, provided they required his services.

To this letter the plaintiff replied to the secretary, on the 25th of September, and in his reply said, "Wishing to facilitate as far as possible the objects of the company, I accept the situation with the understanding however expressed to Mr. Boyle and yourself, and concurred in by each of you,—that should the land grant not pass out of the control of your company, I am to continue to occupy the position of land commissioner, in pursuance of the resolution appointing me, passed by the late company, and ratified by the present company." He then added, "I accept your offer of $250 per month for October and following months as you pro-

pose." Now, in that letter, while the plaintiff does say he "accepts the situation," meaning thereby, as I understand it, that he recognizes the necessity or propriety, of the change in his relations with the company under the circumstances, with an understanding as to his continuing in office in a certain event, he does not set up, the permanence of his appointment, or his yearly hiring, and that consequently the company cannot remove him as they propose doing. On the contrary he in express terms, accepts the offer made, not of a reduction in salary, or any thing of that kind, but of a change in the terms of his engagement, and thereby entered into a new arrangement quite inconsistent with the continuance of the original one. Then on the 31st of October, the secretary again wrote to him, informing him that the company would continue his services until the end of the year at the same salary, after which his engagement would cease. To this the plaintiff replied, saying that his connection with the company seemed not to be clearly understood. He gave an extract from the letter informing him of his original appointment, and referred to the position in the civil service which he had resigned to enter the company's service. He did not even then take the position that his services could not be dispensed with as proposed, on account of the terms of his original employment. What he said was "I respectfully submit that should the land grant continue under the control of the company after the first of January next I am fairly entitled to remain with it as land commissioner . . . In the meantime I accept the arrangement you propose till the end of the present year, but I am not in a position to decide at present upon what you say in reference to selling the company's land on commission when my present engagement terminates." The plaintiff then continued in the service of the defendants, receiving his salary, until the 31st of December, when his employment ceased.

I cannot see that the plaintiff's acceptance of the new arrangement, was a conditional one. He spoke of an understanding, but he without reservation accepted the proposal of the defendants to change the yearly hiring into a monthly one. He assented to that monthly hiring continuing until the end of the year. That engagement was wholly inconsistent with the continuance of of the original one, and was a variation of that original agreement and substitution of another by mutual consent. The evidence

for the plaintiff clearly shows that the original agreement was determined by the new agreement, and the plaintiff cannot maintain his present action. The verdict in his favor should be set aside and the rule made absolute to enter a nonsuit.

*Rule to set aside verdict for plaintiff, and to enter a nonsuit.*

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## TODD v. THE UNION BANK OF CANADA.

(IN APPEAL.)

*Bank.—Refusal of cheque.—Reasonable time.—Damages.*

The plaintiffs Todd & Armstrong carried on business in partnership and had an account with the defendants. On a Friday the bank was served with an order attaching all moneys due by the bank to the plaintiff Todd and one Poulin. On Saturday two of the plaintiff's cheques aggregating $401 were presented and refused, the bank not having by that time determined what position it should assume.

In an action for damages for such refusal the trial judge told the jury that if they were of opinion that the bank had exceeded a reasonable time for making all necessary inquiries for their protection that the damages should be substantial but temperate. The jury found a verdict for the plaintiff for $1000.

*Held*, 1. That there was no misdirection.

2. That the bank had acted with proper, reasonable despatch; that this was a question for the jury; but that, as the jury had misconceived the rights of the parties, there should be a new trial.

3. That the damages were unreasonable and unjust.

*G. Davis* and *A. Howden*, for plaintiff.

The funds of a partnership cannot be attached for the debt of one of the partners, *MacDonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535.

*J. S. Ewart, Q.C.*, and *J. W. E. Darby*, for defendants.

Taking time to look into a question is not a refusal to pay, *Gilpin* v. *Royal Canadian Bank*, 27 U. C. Q. B. 310.

True rule as to reasonable time, *Brown* v. *C. P. R.* 3 Man. L. R. 500.

Time cannot be said to commence pending litigation between adverse claimants. The bank could have paid into court, *Armit* v. *H. B. Co.*, 3 Man. L. R. 529.

As to damages, *Marzetti* v. *Williams*, 1 B. & Ad. 415.

The bank should not be bound to decide at once important questions of law, *Re Cowans' Estate, Rapier* v. *Wright*, 14 Ch. D. 638.

As the decision in *MacDonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535, stood at the time of the alleged refusal the interest of a partner in a fund could be attached. It was *afterwards* reversed upon appeal.

[*10th January, 1887.*]

WALLBRIDGE, C.J., delivered the judgment of the court. (*a*)

This is an action against the defendants as bankers for refusing to pay the cheques of the plaintiffs when there were funds in the defendants' hands sufficient to cover the amount for which the cheques were drawn.

The plaintiffs are carrying on business in Winnipeg as partners, in purchasing, bottling and selling ale, beer, &c., and the defendants are bankers in the same city.

The plaintiffs had, on the 1st day of September, 1883, deposited with the defendants $3,500, of which there was more than sufficient to meet the cheques, hereinafter mentioned, drawn against the deposit, unless covered by the garnishing order hereinafter mentioned. On the 19th day of September, 1883, the plaintiffs under the name and style of H. O. Todd & Co., per C. F. T., drew a cheque in favor of R. D. Paterson for the sum of $17.50; and on the 22nd day of September drew a cheque on the defendants in favor of J. E. Owen, or order, for $200.

The plaintiffs drew another cheque for $250 on the defendants in favor of defendants for the purpose of obtaining the money thereon. The cheque was presented and refused, and it is alleged as a consequence that the Phillip Best Brewing Company refused to deal with the plaintiffs.

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

It was proved at the trial that Mr. Todd, the husband of one of the plaintiffs, and the agent of both the plaintiffs, and by whom the cheques were drawn, had, before the formation of the present partnership, been in business with one Pierre Poulin. Mrs. Todd had bought out Pierre Poulin's interest in the business, and for some time carried on the business, (her husband being manager of it), and in her own name signed cheques with her own hand. She continued the business until she met Mrs. Armstrong, her co-plaintiff, with whom she formed a partnership.

Both the husbands of Mrs. Todd and of Mrs. Armstrong were to manage the new business; but as Mr. Todd was to have the management of the cash and to be allowed to cheque it out, Mrs. Todd gave Mrs. Armstrong a mortgage on the personal property with which the new business was to be carried on, thus securing her against the loss of her money by any misconduct or unfair dealing of Mr. Todd. When coming into the firm, Mrs. Armstrong brought in, in cash, $3,500, by cheque on Imperial Bank. This was on the 1st September, 1883, at which date the plaintiff's firm commenced. Mrs. Todd's capital was $5,000. The $3,500 was deposited in defendants' bank. On the 21st September, 1883, a garnishing order was issued in the case of Alex. Haggart and Robt. F. Manning, against Pierre Poulin and Harriet O. Todd (the latter being one of these plaintiffs), the Union Bank of Lower Canada (these defendants) being therein named as the garnishees, by which all debts, obligations and liabilities due or owing from the Union Bank to the defendants Pierre Poulin and Harriet O. Todd, to the extent of $3,000, were attached to answer a judgment to be obtained against the defendants. This order was served on Mr. Boxer, the agent of the Bank at Winnipeg, on Friday afternoon of 21st September, 1883.

This order was given to the ledger-keeper with instructions not to mark the cheques of Harriett O. Todd & Co. until it was disposed of.

On the next day the two cheques to Patterson and Owen respectively, were presented and refused payment. The sum then to these plaintiffs' credit was covered by the garnishing order and remained in the bank. No detention however is complained of, except as to the two cheques and a sum of $133.50 for which a cheque had been made payable to the bank to retire Phillip Best Brewing Co.'s draft on the plaintiffs.

By Con. Stat. Man., c. 37, s. 44 it is enacted that upon an *exparte* application and upon the affidavit of the plaintiff, his attorney, solicitor or agent that action is pending, time of its commencement, when judgment will likely be rendered, nature of the cause of action and the actual or probable amount which will be recovered, that the debt, claim or demand is justly due and owing to the plaintiff by the defendant after making all just discounts and some third person or corporation is indebted or liable to the defendant, any judge may order that all debts, obligations or liabilities owing or accruing to the defendant shall be attached to answer the judgment. The garnishee may pay the money into Court, &c. Under this section the order attaching the monies was obtained, served upon the bank as debtors, of H. O. Todd and P. Poulin and by reason thereof the refusal to honor the cheques took place.

It appears the garnishing order issued for $3,000; this was for a sum greater than was at the credit of the plaintiffs in this suit, on deposit in the bank. The bank was then called upon to decide whether they would pay the checks and disregard the garnishing order or would consider the money as bound by the garnishment. The law in such cases allows the debtor (the bank) a reasonable time to enquire before deciding upon what cause they will pursue, and this reasonable time must be determined upon a view of all the circumstances and in all cases to which we have been referred or that I can find, is a question for the jury. *Whitaker* v. *Bank of England.*, 6 C. & P. 700; and *Marzetti* v. *Williams*, 1 B. & Ad. 415.

Upon this question of reasonable time the evidence itself is not all one way. The account of the bank manager, Mr. Boxer, is that he was served with the order on Friday afternoon, saw his solicitors that evening or on Saturday, and that he informed Mr. Todd, the husband, on Monday morning that he would pay the money into court and thus relieve the bank of all embarrassment. That Mr. Todd asked him not to do so, but to retain the money. Mr. Todd admits this conversation, but fixes it on a different day.

The bank was not bound to drop all other business and bend their whole energies upon this single case. In *Grant on Banking*, p. 45, it is said, " The general magnitude and extent

of the business at the bank, the pressure of business at the time or on the previous part of the day in question . . . is all to be taken into account." In *Pott et. al.* v. *Clegg*, 16 M. & W. 328, it is said that money in the hands of a banker is merely money lent with the superadded obligation that it is to be paid when called for by draft of the customer, and I may add by cheque presented during banking hours. This case is cited and acted upon in *Jones* v. *Bank of Montreal*, 29 U. C. Q. B. 448. The bank could know nothing of the merits of the case as instituted, that is of the suit brought by Haggart and Manning against Pierre Poulin and Harriet O. Todd, and were not bound to act or judge at all, whether there was such a debt, they were to take the garnishing order as it read as shewing a debt. The only question which they could have been called upon to decide was whether the money of Harriet O. Todd & Co., that is of Mrs. Todd and Mrs. Armstrong could be held for the debt of Harriet O. Todd and Pierre Poulin; this, too, in a case of a garnishing order before judgment. The order is dated 21st September, 1883, and at that time in England under a similar statute (but after judgment) it was held that money so situated might be attached, as appears from the report of the case, *Macdonald* v. *Tacquah Gold Mining Co*, 13 Q. B. D. 535, but which holding was reversed in appeal, 1st May, 1884—see same case. If the bank had acted upon the law as in England at the date of the attachment they would have considered the money actually bound. Following this case in appeal the bank might have treated the garnishing order as not affecting the deposit—but the appeal had not then been heard—this was an additional cause of embarrassment to the bank.

We are bound to review the decision of the jury.

Can we say that the bank has not been held to too sharp an accountability by the jury.

From the time Mr. Todd told the bank manager to hold the money, no fault could be found. Moreover, as he did tell him to hold it and not to pay it into court, this may be looked upon as some indication of the course Mr. Todd wished the bank to pursue from the beginning.

The bank does not appear to have taken any step not absolutely necessary for their own protection. They did nothing by

which they could be said to have taken part against these plaintiffs. They simply desired to protect themselves, and should have been allowed a reasonable time to make all necessary inquiries under all circumstances. They did, in my opinion, act with proper and reasonable despatch. But this is a question for the jury, and unless we can say that the jury acted under the influence of undue motives or of gross error or misconception we should not disturb their verdict. *Chambers* v. *Caulfield*, 6 East, 244; *Edgell* v. *Francis*, 1 Scott N. R. 118. Considering that payment of these cheques, if the garnishing order were binding would have been final, and the bank have been the loser of the sum paid, the jury, in my opinion, have misconceived the rights of the parties.

The sums for which the cheques were refused, at the outside, was only for $401, and the jury have given damages $1,000. This amount, as said by Cassell, J., in *Rolin* v. *Stuart*, 14 C. B. 607, is a very large sum. He was then contrasting the refusal to pay £476 6*s*. 1*d*., with damages assessed by the jury at £500.

I am of opinion the damages are unreasonable and unjust.

Upon the question of misdirection, the charge is, that if the jury were of opinion that the bank had exceeded a reasonable time for making all necessary inquiry for their protection, that the damages should be substantial but temperate. This charge, I think, is fully borne out by the case last cited as well as by *Marzetti* v. *Williams*, 1 B. & Ad. 415.

The verdict, in my judgment, should be set aside, and a new trial granted; costs to abide the event.

*Rule to set aside verdict and for a new trial.*

## THE MANITOBA ELECTRIC & GAS LIGHT CO. v. GERRIE.

(IN APPEAL.)

*Illegal Contract.—Uninspected gas meter.*

A statute, after reciting that it was expedient "that the measurement of gas sold and supplied . . . should be . . . regulated by one uniform standard, . . . and that all gas meters should be inspected and stamped," provided that it should "not be lawful to fix for use any gas meter which has not been verified or stamped as hereinafter provided," and imposed a penalty for so doing.

In an action by a gas company for the price of gas supplied though an uninspected and unstamped meter.

*Held*, That there must be implied from the prohibition against fixing a meter for use, a prohibition against supplying gas through it, and that the plaintiff could not recover.

This was an action for the value of gas supplied by the plaintiff to the defendant. The plaintiff obtained a verdict for $170.20 for gas supplied after 22 January 1885; but failed to recover for the gas supplied previous to that date upon the ground that the meter through which it passed had not been inspected and stamped. The plaintiffs now moved to set aside the verdict and for a new trial upon the ground of misdirection as to the gas supplied previous to the date mentioned.

*J. F. Bain*, for plaintiff.

Supposing that the plaintiffs could not recover under the statute for part of the gas supplied, the defendants could not take advantage of that ground unless specially pleaded, *Bullen & Leake*, 599; *Roscoe's Nisi Prius*, (12 ed.) 258; *Potts* v. *Sparrow*, 1 Bing. N. C. 594.

An illegality on which defendant wants to rely must be pleaded, *Martin* v. *Smith*, 4 Bing. N. C. 436; *Fenwick* v. *Laycock*, 1 Q. B. 414; *Maxwell on Statutes*, 490; *Cundell* v. *Dawson*, 4 C. B. 400; 36 Vic. c. 48, is the statute referring to gas meters; amended by 38 Vic. c. 37.

*N. F. Hagel, Q.C.*, and *T. H. Gilmour*, for defendant.

The objection as to the deduction of the amount claimed was not taken at the trial, *Forster* v. *Taylor*, 5 B. & Ad. 887.

The statute was made for the protection of the public, it was not a revenue act, *Baker* v. *Atkinson*, 11 Ont. R. 752.

*J. F. Bain*, in reply.

If defendant had pleaded illegality of contract, plaintiffs might not have gone further with the action. He cited further, *Walker* v. *McMillan*, 6 Sup. C. 241; *Spears* v. *Walker*, 11 Sup. C. 113.

[*10th January, 1887.*]

KILLAM, J., delivered the judgment of the court:—(*a*)

This is an action brought to recover the price of gas claimed to have been supplied by the plaintiff company to the defendant in the months of November and December, 1884, and January, February and March, 1885. The action was brought on the common counts. The pleas are never indebted, payment, and some special pleas of set off or counter claim which were withdrawn at the trial, leaving only the first two pleas mentioned. The action was tried before my brother Taylor with a jury, at the Winnipeg Spring Assizes of last year, and a verdict was entered for the plaintiff for $170.20. The defence raised was that the gas was supplied through an uninspected and unstamped meter furnished by the plaintiff, and that the contract to pay for the gas was illegal under the Act 36 Vic. c. 48, D. This defence applied only to the gas supplied previous to 22nd January, 1885, on which date a proper meter was put in. The learned judge instructed the jury that the company was "not entitled to recover for prior to the time of the new meter being put in." The total amount claimed was $759.60, less $135 credited as having been paid in two sums, $35 in December, 1884, and $100 in April, 1885. The amount of the verdict was arrived at, under the direction of the learned judge, by deducting from $295.60, the amount payable for the gas supplied through the new meter, $135 for both payments credited, thus leaving $160.60, and adding $9.60 for interest which the learned judge left it to the jury to allow if they should see fit. The plaintiff applied to have this

(*a*) Present: Wallbridge, C.J., Dubuc, Killam, JJ.

verdict set aside and a new trial granted, and the application was heard in Michaelmas Term last. The plaintiff's objections to the verdict are four:—(1) That the learned judge was in error in holding that the Act had the effect of making the contract illegal; (2) That the defence of illegality should have been specially pleaded; (3) That there was no evidence that the plaintiff company fixed for use the first meter: (4) That the payment of $35 should be taken as made for gas supplied under the old meter and could not be allowed to the defendant on account of that supplied through the new meter.

The statute in question, 36 Vic. c. 48, D., is intituled "An Act to provide for the Inspection of Gas and Gas Meters." It begins with the recital, "Whereas it is expedient that the measurement of gas sold and supplied for lighting, heating and other purposes, should be hereafter regulated by one uniform standard; that the illuminating power of such gas and the purity thereof, should be regulated by certain rules and tested; and that all gas meters should be inspected and stamped." The second section of the Act provides that "After the date fixed by the proclamation to be issued under this Act, the only standard or unit of measure for the sale of gas by meter, shall be the cubic foot, containing," &c., (giving the standard), "except as relates to contracts made before the passing of this Act," &c. Then follow sections providing for the procuring of apparatus for testing meters and for the appointment of inspectors of gas and gas meters. The fifth section provides that, "So soon as the models and apparatus herein mentioned have been obtained and approved, the governor in council may issue a proclamation fixing a day not less than six months from the date of such proclamation upon which the provisions of this Act respecting inspection shall go into operation." The 13th section provides that, "After a period of six months from the day fixed by proclamation as aforesaid, it shall not be lawful to fix for use any gas meter which has not been verified and stamped as hereinafter provided." By the 21st section, "In every case, the owner of the meter, whether such owner is the buyer or seller of the gas for the measurement whereof the meter is used, shall keep every such meter in good repair, and shall be responsible for the due inspection thereof." Then follow rules to govern the inspector's proceedings and mode of testing meters, and for stamping those found or made correct

according to the standard provided. By the 35th and 36th sections fees are payable for the inspection and stamping of the meters, these to be fixed by the governor in council and "regulated so that they will as nearly as may be meet the cost of carrying this Act into effect." By the 41st section, "Every person who, after the period fixed by proclamation, under authority of this Act, fixes for use, or causes to be fixed for use, any meter before it has been verified and stamped as herein required shall, on conviction, incur a penalty of twenty-five dollars for every such unverified or unstamped meter." The Act came into force by proclamation on the first day of July, 1875.

It is claimed by the plaintiff that there was no inspector of meters appointed for Winnipeg until sometime in the summer of 1884, and that after his appointment the company proceeded as rapidly as possible to get its meters verified and stamped and that it was not until January, 1885, that the one in question could be replaced by one duly stamped. It does not, however, appear that this is of importance, as if the effect of the Act is to make the supply of gas through unverified or unstamped meters illegal the company should not have entered upon the business of supplying gas until it could obtain proper meters.

The company appears to have begun supplying gas to the Grand Union Hotel, where that in question was consumed, in January, 1884. The defendant became lessee of the hotel and began to use the gas there in the latter part of 1884. Mr. Bathgate, managing director of the company, in giving his evidence was asked, "What was the number of the meter that was used in the first instance? I think you keep them by numbers, don't you?" He replied, "Yes, the first meter that was used was number 69,909." He was then asked, "Was that in use at the hotel all the time that the hotel was using gas up to the time when it was changed?" and he replied, "That was the meter that was put in when the company reorganized up to January 22nd." He was then asked, "During all this time we have been speaking about?" and he replied, "Yes, up to the 22nd of January from the beginning." He was further asked, "The meter that had been put first in this hotel was never inspected until the 26th of March," and he replied "No;" and further, "It was taken out the 22nd of January?" to which he replied "Yes." He was further asked, "Now you have been

managing this company from the time they began to supply the Grand Union hotel?" and replied, "Yes;" and further, "There had been a supply at a former period, to which he replied, "Yes;" and further, "And the supply began about what month?" to which he replied, "I think it was January, 1884." He further stated that the consumption for January, 1884, was not charged for a full month as it began after the beginning of the month. It appeared that the company took out the old meter, got it inspected, kept it and supplied its place with a new one. From all this there was ample *prima facie* evidence that the first meter belonged to the company and was fixed for use by the plaintiff or by its procurement.

The only objection to the charge of the learned judge was in these words, "Your Lordship should not have directed the jury that the plaintiffs cannot recover for the time prior to the use of the new meter on the 22nd of Jauuary, 1884." This objection appears to be directed only to the construction placed upon the statute by the learned judge; it was in no way calculated to draw his attention to a defect in pleading. An objection to be available should be reasonably calculated to suggest the point intended to be raised. I have no doubt that the plaintiff's counsel intended to direct his objection solely to the question of the construction of the statute. Evidently the question of pleading did not occur to him. In no other way was it raised at the trial, though a great deal of evidence was clearly directed to the question of illegality.

Similarly the objection to the allowance of credit for the $35 was not made at the trial. The learned judge distinctly fixed the amount to be allowed at $160.60, and left it to the jury only to say whether any addition should be made for interest; and no objection on this point was made to his charge.

It is clear that a new trial cannot be granted to enable the plaintiff to raise on another occasion the questions its counsel did not see fit to raise before. The really important question involved is whether the supply of gas through an unverified and unstamped meter was illegal.

The plaintiff relies mainly upon the third of the rules laid down in *Benjamin on Sales*, p. 526, as deducible from the authorities discussed in that work. These rules are:—

(1) "Where a contract is prohibited by statute it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. It is enough that parliament has prohibited it, and it is therefore void."

(2) "When the question is whether a contract has been prohibited by statute, it is material in construing the statute to ascertain whether the legislature had in view solely the recovery and collection of the revenue, or had in view in whole or in part the protection of the public from fraud in contracts or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts, in the latter that it was."

(3) "In seeking for the meaning of the law giver it is material also to inquire whether the penalty is imposed once for all on the offence of failing to comply with the requirements of the statute, or whether it is a recurring penalty repeated as often as the offending party may have dealings. In the latter case the statute is intended to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention and the contract will be enforced."

Now it must be observed that the latter two rules will not necessarily be true together under all conceivable circumstances without qualification. If this Act now in question be intended for the protection of the public from fraud in contracts or for the promotion of some object of public policy, then under the second rule the contract in question would be void; but if the plaintiff's contention be correct and the penalty is not to be taken as imposed for each offence within the third rule, then under that rule the contract would not be void.

That the circumstances pointed out in the second of these rules furnishes an important test in many cases is established by a large number of authorities.

In *Johnson* v. *Hudson*, 11 East, 180, different statutes having provided that all persons dealing in tobacco should before dealing therein take out a licence under penalty of £50, and secondly that no tobacco should be imported either wholly or in part manufactured, by such dealer not having such licence under a penalty of forfeiture of the tobacco, the packages and the ship, the plaintiffs not having been previously dealers in tobacco, had

imported tobacco manufactured into cigars, entered it at the custom house and sold it to the defendant without taking out a licence. It was held that the action could be maintained, because "there was no fraud upon the revenue, on which ground the smuggling cases had been decided, nor any clause making the contract of sale illegal, but at most it was the breach of a mere revenue regulation which was protected by a specific penalty."

In *Brown* v. *Duncan*, 10 B. & C. 93, the statutes in question provided that no distiller should under a penalty deal in the retail sale of spirits within two miles of the distillery, and also that in taking out a license for distilling the names of all the parties taking out the license should be inserted. The name of one of the partners in a distillery was, it appeared, intentionally omitted from the license. He lived and carried on a retail business within two miles of the distillery. The partners appointed an agent to sell their liquors in London and the defendant guaranteed the fidelity of the agent. In an action to enforce this agreement the defence of illegality was set up. The court, however, held that the action could be maintained under the authority of *Johnson* v. *Hudson*, saying, "there has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations which it has been thought wise to adopt in order to secure as far as may be the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue . . . These cases are very different from those where the provisions of the Acts of Partiament have had for their object the protection of the public, such as the Acts against stock-jobbing and the Acts against usury. It is different also from the case where a sale of bricks required by Act of Parliament to be of a certain size was held to be void because they were under that size. There the Act of Parliament operated as a protection to the public as well as to the revenue securing to them bricks of the particular dimensions. Here the clauses of the Act of Parliament had not for their object to protect the public but the revenue only."

In *Cope* v. *Rowlands*, 2 M. & W. 149, it was held that a City of London broker could not maintain an action for commission in buying and selling stock unless duly licensed according to the statute 6 Anne c. 16, s. 4, which provided that if any person should act as broker in making sales, &c., without the license required by the Act he should forfeit £25 for every such offence.

The decision went upon the ground that the object of the Act was in part the protection of the public as well for revenue purposes.

*Cundell* v. *Dawson*, 4 C. B. 376, was an action for the price of coals sold and delivered, and the defence was that the plaintiff had violated the Act 1 & 2 Vic. c. 10, prescribing that the dealer should deliver with the coals a certain ticket stating the quantity and description of coals delivered and imposing a penalty of £20 for each offence. It was held that the plaintiff could not recover, and the decision was put upon the ground that the object of the Act was the protection of consumers. Wilde, C.J., said, "The statutes which give rise to the question of the right to recover the price of goods by sellers who have not complied with the terms of the statute are of two classes,—the one class of statutes having for their object the realizing and protection of the revenue; the other class of statutes being directed either to the protection of buyers and consumers or to some object of public policy."

*Ritchie* v. *Smith*, 6 C. B. 462, turned on the same distinction.

These cases serve to show the importance of considering the object of the statute as furnishing a test for determining whether it intended to prohibit a particular transaction. It is well to notice, however, that in each case the decision would have been the same if the third of Mr. Benjamin's rules were the one applied, though in only one case, *Johnson* v. *Hudson*, was the point taken.

This third rule is chiefly based upon some remarks of Baron Anderson in *Smith* v. *Mawhood*, 14 M. & W. 463, an action for goods sold and delivered in which the defence was that the goods were tobacco and the plaintiff had not complied with the law requiring him to have his name painted on the house in which he carried on business. Parke, B., delivered judgment for the plaintiff on the ground that the sole object of the Act was the protection of the revenue and that the penalty was imposed only in that view, and all the judges including Alderson, B., expressed concurrence in the ground of his decision. Alderson, B., in addition, however, pointed out that the penalty was "for carrying on the trade in a house in which the requirements were not complied with, and that there is no addition to the criminality if he makes fifty sales of tobacco in such a house." These remarks appear, however, to have been made more for the purpose of add-

ing an argument in favor of the view of Parke, B., as to the object of the statute, than for that of directly and independently showing that the particular transaction was not prohibited.

But I do not think it important to determine whether either or which of the two rules is to be qualified, or, if so, in what way, or whether the plaintiff's construction of the third rule is that intended. The principle upon which all these decisions are based is laid down by Lord Chief Justice Holt, in *Bartlett* v. *Vinor*, Carthew, 252:—"Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so but only inflicts a penalty on the offender because a penalty implies a prohibition though there are no prohibitive words in the statute."

Three cases may be cited which bear more closely on the application of this principle to the present than any to which I have just referred.

In *Bensley* v. *Bignold*, 5 B. & Ald. 335, it was held that a printer who had omitted to affix his name to a book in violation of 39 Vic. c. 79, s. 27, which provided for such omission a penalty of £20 for every copy published, could not recover for his work done and materials used in publishing it.

In *Law* v. *Hodson*, 11 East, 301, bricks were sold and delivered to, and used by the defendant. They were not of the size prescribed by a statute which imposed a penalty for the making of such bricks under a particular size for sale. It was held that the price could not be recovered.

And in *Forster* v. *Taylor*, 5 B. & Ad. 887, a farmer was held not entitled to recover for butter sold and delivered by him, but not in firkins marked as required by the statute 36 Geo. 3, c. 88. That statute required every cooper or other person making a vessel for packing butter in to brand on the bottom of the vessel his name and the tare or weight of the vessel; it also required every farmer, dairyman, seller of butter or other person who should pack any butter for sale to pack it in vessels so made and marked, and also to put on certain marks showing his name and the tare or weight of the vessel; and it provided penalties for offences against the statute.

Now, all of these cases were decided upon the ground that the statutes had in view the protection of the public in some way. In the printer's case there was no penalty for his doing the work of printing or furnishing the materials for the book, it was merely for the publication afterward. In the brick case, the penalty was only for manufacturing the bricks for sale, not for selling them. In the butter case, the penalty was for packing the butter for sale in prohibited vessels not for selling it.

In the present case, it is clear that the sole object of the statute is the protection of the public. It contemplates no revenue but such as shall be necessary to the carrying out of the Act itself. It is found between two other Acts, one for the inspection of weights and measures, and the other for the inspection of flour, wheat, beef and pork, butter, and other staple articles of commerce, all apparently passed on grounds of public policy, none being for revenue purposes. There is a penalty for each offence of fixing for use an unverified or unstamped meter. There could not well be one for each act of supplying gas, as the supply is to a great extent continuous. The only alternative would have been to impose fresh penalties at recurring periods of its use, and probably this was thought too onerous.

I think that we must imply from the prohibition against fixing for use a gas meter, a prohibition against supplying gas through it, just as in the brick case the prohibition of a sale was implied from that of the manufacture for sale, and in the butter case it was similarly implied from the prohibition of packing for sale. This brings the present case within the principle laid down by Lord Holt, and the plaintiff upon that principle cannot recover for the gas supplied throngh the prohibited meter.

The rule must be discharged with costs, to be set off against the plaintiff's verdict and costs.

*Rule discharged with costs, to be set off against plaintiff's verdict and costs.*

## McMILLAN v. THE MANITOBA & NORTH-WESTERN RAILWAY COMPANY.

(In Appeal.)

*Railway.—Fences.—Cattle killed by train.*

A railway company is under no obligation to erect fences along their line where the land adjoining is unoccupied.

Cattle straying upon the line across such unoccupied land are trespassing and if injured there by accident without negligence the railway company is not responsible.

In such case the *onus* as to negligence is upon the party asserting it.

Plaintiff's cattle having been in his yard at nine o'clock one evening, were discovered about ten o'clock the next morning lying wounded alongside the defendants' line of railway—one had a hind foot "mashed up," and one had "a big gash in her leg."

*Held*, That it could be fairly inferred that the injury was caused by an engine or cars running upon the defendants' railway, and under the control of the defendants' servants.

In such a case the presence of certain employees of the railway at the killing and cutting up of the cattle or even their participation in these acts would not establish any liability of the company,

This was an action for the killing of the plaintiff's cattle by the defendant's railway. The plaintiff had a verdict and the present motion was to enter a nonsuit or for a new trial.

*Victor Robertson*, for plaintiff.

The jury found wilful neglect, *Campbell* v. *G. W. R.* 15 U. C. Q. B. 498.

As to admission of evidence beyond the value of the cattle, *Mayne on Damages*, 362; *Rose* v. *N. E. R.*, 25 W. R. 205.

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

As to law relating to fencing, see Con. Railway Act, 42 Vic. c. 9, s. 16 and 46 Vic. c. 24, s. 9.

Unless there is reasonable evidence, not only a *scintilla* of evidence, the case should not go to the jury, *Giblin* v. *McMullen*, 17 W. R. 446; *Jackson* v. *Hyde*, 28 U. C. Q. B. 294.

There was here nothing more than a surmise that there was negligence, *Auger* v. *Ontario, Simcoe & Huron R.*, 9 U. C. C. P. 164; *Singleton* v. *Eastern Counties Ry. Co.*, 7 C. B. N. S. 287; *Smith* v. *G. E. R.*, L. R. 2 C. P. 4; *Bridges* v. *North London Ry.*, L. R. 7 H. L. 213; *Met. Ry. Co.* v. *Jackson*, 3 App. Ca. 193.

As to consequential damages, *Brown* v. *Beatty*, 35 U. C. Q. B. 328.

[*10th January, 1887.*]

KILLAM, J., delivered the judgment of the court. (*a*)

This is an action which was tried before my brother Taylor with a jury, at the Assizes for the Central Judicial District in November, 1885.

The plaintiff sues to recover the value of certain cattle alleged to have been killed by one of the defendants' trains in July, 1885.

The declaration contains four counts, the first alleging that the defendants' servants so negligently and unskilfully drove and managed an engine and cars of the defendant on the defendants' railway which the plaintiff's cattle were then lawfully crossing as to drive them against the cattle and kill them; the second, alleging the possession by the plaintiff of a certain piece of land adjoining a highway over and along which the defendant had constructed its railway more than three months previous to the arising of a cause of action, that the defendant failed to erect and maintain fences along each side of the railway, although duly notified so to do, whereby certain of the plaintiff's cattle strayed upon the railway and were killed through the negligence of the defendants' servants in managing a train; the third, alleging the plaintiff's possession of a certain piece of land, the construction of the defendants' railway through and over it, a failure of the defendant to fence it, though duly notified and though three months had elapsed after construction before the cause of action arose, the straying of the cattle on the railway for want of fences and their killing by one of the defendants' trains; the fourth, for conversion of the cattle.

The defendant pleaded, to the four counts, not possessed; to the 1st, 2nd and 4th counts, not guilty; to the 1st and 2nd

(*a*) Present, Wallbridge, C.J., Dubuc, Taylor, JJ.

counts contributory negligence of the plaintiff, to the 3rd count, not guilty by statute.

The plaintiff resides upon the S.-W. ¼ of section 34, in township 13 in the 14th range west of the first principal meridian, having rented the land from one William Howard. He went into occupation of the land on the 18th day of April, 1885.

It does not appear whether Howard or any other person actually occupied and used the land before the plaintiff took possession.

The defendants' railway runs directly through this quarter section, having been constructed through it in 1883, the construction was completed and the railway was put in operation through the land in 1883, after the passing of the Act 49 Vic. c. 24 D. amending the Consolidated Railway Act, 1879, and the defendants' trains have been run over it regularly ever since. No notice to fence was proved.

On the evening of the 24th of July, 1885, from nine o'clock, the plaintiff saw his cattle, now in question, in the yard near his house. The next morning the plaintiff missed the cattle and looked for them a considerable length of time without finding them, but about ten o'clock having started to drive to Gladstone he found them along the sides of the track about a mile east of his land, some being upon a road allowance not used as a highway but crossed by the railway. They were then so severely injured as to be wholly useless alive. Later in the day the plaintiff found two men, one of them being a section foreman of the railway, killing and skinning the animals. One Waters, a road master of the railway was present also. The carcasses and skins were then taken away to Minnedosa upon one of the defendants' trains. The exact nature of the injuries of the cattle when first found are not shown, except that one witness says that one ox had one of its hind feet "smashed up," so that that foot was rendered powerless, and the plaintiff says that one had a "big gash in her leg."

The plaintiff and his witnesses ascribe the accident to a gravel train which passed the place where the cattle were found about eight o'clock of the morning of the 25th of July. The attention of the witnesses was called to the train by hearing it whistling the alarm for cattle. The train which was coming from the west stopped about 100 yards west of where the most westerly of the

cattle were found. The train remained standing and whistling for a short time, during which the witnesses heard "some loud talk and swearing as to cattle being on the track," and then the train started slowly and went on eastward, the engine still whistling, for about three hundred yards at about the rate at which a man could walk, and it then stopped again having in the meantime passed the portion of track along which the injured cattle were afterwards found. The whistling then ceased. The greatest distance between the injured animals when found was about 200 yards, the others being at intervals between. While the witnesses saw the train at each time of stopping, they were not in position to see the track where the cattle were found or the cattle upon it. No witness saw any of the cattle struck by the train; and no witness saw these particular animals from the time the plaintiff saw them in his yard on the evening of the 24th until he found them on the morning of the 25th. From the marks and habits of the cattle the plaintiff says that the cattle went from his yard to the track in the morning of the 25th. The track was not fenced along the plaintiff's land. There is no evidence of the passing of any other train over the railway on the evening of the 24th or morning of the 25th.

The man who killed and skinned the cattle was called by the defendant, and stated that he was sent out to do this work by a butcher in Minnedosa, that all his instructions were from him, that he took the carcasses to him, and that they proved not worth the cost of the work and freight to Minnedosa, though the plaintiff endeavored to show that it was from want of care that they proved worthless.

At the close of the plaintiff's case a nonsuit was moved for, and refused, but leave was reserved to the court to enter a nonsuit.

The learned judge withdrew from the jury the claim of conversion and a verdict was entered for the plaintiff for $500 on the other counts.

The jury found the value of the cattle at $380, and the remaining portion of the amount of the verdict was for loss of the use of the cattle from the time of the injury to the commencement of the action.

Leave was reserved to reduce the amount of the verdict to $380.

The defendant obtained a rule *nisi* calling on the plaintiff to

show cause why a nonsuit should not be entered or the amount of the verdict reduced pursuant to leave reserved, or why a new trial should not be had on the ground that the verdict was against evidence.

The grounds on which the nonsuit is asked are reducible to three,—

(1) That there is no proof that the cattle were injured by defendants' train.

(2) That there is no proof of negligence of defendants' servants causing the injury.

(3) That there was no obligation by the defendant to fence the railway.

The motion to make the rule absolute was argued in Trinity Term last.

The provisions as to fencing applicable to this case are those contained in the sub sections which by the 9th section of the Act, 46 Vic. c. 24, are substituted for sub-sections 1, 2 and 3 of section 16 of The Consolidated Railway Act, 1879, and are the following:—"Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land any part of which is occupied, or within three months after such construction hereafter, or before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon, (and in the last case after the company has been so required in writing by the occupant thereof) fences shall be erected and maintained, over such section or lot of land on each side of the railway, of the height and strength of an ordinary division fence, with openings, gates, or bars, or sliding or hurdle gates, with proper fastenings therein, at farm crossings of the railway, and also cattle guards at all highway crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

2. If, after the expiry of such delay, such fences, gates and cattle guards are not duly made; and until they are so made, and afterwards if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land, in respect of which such fences, gates or

guards have not been made or maintained, as the case may be, in conformity herewith.

3. After such fences, gates and guards have been duly made, and while they are duly maintained, no such liability shall accrue for any such damages unless they are caused wilfully or negligently by the company or by their employees."

Three cases are here mentioned in which fencing is required:—

(1) That of a railway already (*i.e.*, at the passing of the Act) constructed on any section or lot of land *any part of which is occupied*;

(2) That of *such* construction after the passing of the Act;

(3) That of land being taken by the company for the purpose of constructing a railway thereon, if notice to erect and maintain fences be given to the company by the occupant. In the first case the language is distinctly made to refer only to occupied land; in the second and third cases, also, it is plain that the intention is to deal only with occupied lands. The words "such construction," refer clearly to a construction on any section or lot of land any part of which is occupied; and this is the more apparent by the notice in the third case being required to be a notice from the occupant.

There was then no statutory obligation upon the defendant to fence its railway through the plaintiff's land, which was unoccupied when the line was constructed.

It was then the plaintiff's duty to take care of his cattle; in straying upon the defendants' railway they would be trespassing, and if injured there by accident without negligence the defendant would not be responsible. If, however, the cattle were wilfully or negligently injured by the defendants' servants in the course of their employment, though wrongfully on the defendants' railway, the company would be liable.

This was held in *Campbell* v. *G. W. R. Co.*, 15 U. C. Q. B. 498, and the same view was impliedly adopted in *Sharrod* v. *L. & N. W. R. Co.*, 4 Ex. 580, and *Auger* v. *Ont. & Simcoe & Huron R. Co.*, 9 U. C. C. P. 164.

In the leading case of *Davies* v. *Mann*, 10 M. & W. 546, on which the decision in *Campbell* v. *G. W. R. Co.*, was chiefly based, it was shown that the plaintiff's donkey had been illegally left in the highway fettered in the fore feet, and thus unable to

get out of the way of the defendant's wagon by which it was injured, but it was held that the jury were properly directed that the plaintiff could recover if the proximate cause of the injury was attributable to the want of proper care on the part of the defendant.

But the *onus* of showing both that the injury was caused by the defendants' servants, and that it was attributable to their want of proper care is upon the plaintiff.

I am of opinion that it could be fairly inferred that the injury was caused by an engine or cars running upon the defendants' railway, which should be presumed to have been under the control of the defendants' servants. In *Williams* v. *The G. W. R. Co.*, L. R. 9 Ex. 157, where it appeared that the defendants' railway crossed a public footpath on a level, but no gate or style had been erected at the crossing as required by statute, and that the plaintiff, a child aged 4½ years, was found lying in the rails by the footpath with one foot severed from his body, and there was no evidence to show how the child had come there except that he had been sent on an errand a few minutes before from a cottage lying by the roadside at a distance of about 300 yards from the railway and farther from it than the point at which the footpath diverged from the road, it was held that there was sufficient evidence to warrant the inference of injury by the defendants' train as well as of the child having reached the railway by the footpath.

It does not, however, appear to me that it can be inferred that the cattle now in question were injured by the particular train of which the witnesses have spoken in this case. Even if it be taken, as the plaintiff sought to have inferred, that the cattle went down to the railway only on the morning of the day on which they were found injured there would be an interval of five or six hours at any time in which the injury may have been caused. The defendants' trains were being run regularly over the line, and there is no evidence of the hours at which they would pass the spot where the cattle were found. There may have been other gravel or construction trains passing the spot during the interval. I do not think that the inference can be drawn that no other train or engine passed during the interval merely because the witnesses describe the movements of only one, when they do not even say whether they saw or heard any other.

So far as any inference can be drawn from it appearing that cattle were on the track when the gravel train referred to was seen by the witnesses, it would rather be that the injury was not caused by that train.

There is not sufficient evidence to connect the company with the killing or cutting up of the animals. The presence of certain employees at the time, or even the participation of some in the act, would not establish, any liability of the company, as it would be ordinarily beyond the course of the employment of such officials, and there is no evidence to show that in this instance in thus being present at or taking part in the proceedings they were acting in the course of their employment.

We are then left without any evidence of the manner in which the accident occurred, and without any evidence which would involve any admission of responsibility by the company; and in my opinion there is, therefore, no proof whatever of negligence, without which the defendant cannot be held liable.

For this reason I think that the rule should be made absolute for the entry of a nonsuit with costs.

*Verdict for plaintiff set aside, and a nonsuit entered.*

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## WILTON v. WILTON.

*Foreclosure suit.—Disclaimer.—Costs.*

To a foreclosure bill alleging that the defendant C. was the assignee of the equity of redemption, and was entitled to redeem; the defendant C. filed a disclaimer and asked to be dismissed with costs.

*Held*, Upon a hearing on bill and answer the defendant C. was ordered to pay the costs occasioned by the disclaimer.

The bill was for foreclosure alleging that the mortgagor had conveyed the equity of redemption to W. N. Kennedy who had

subsequently conveyed to defendants Carruthers and Chambers, and that the defendants Carruthers and Chambers were entitled to redeem.

The defendant Carruthers filed a disclaimer in the form of an answer under oath. It was as follows:—"I have not and do not claim and never had or claimed to have any right or interest in any of the matters in question in this suit and I disclaim all right, title and interest legal and equitable in any of the said matters and I say if I had been applied to before the filing of this bill I should have disclaimed all such right, title and interest and I submit that the bill ought to be dismissed as against me with costs."

*P. A. MacDonald*, for plaintiff.

*C. P. Wilson*, for defendant Carruthers.

(*1st June, 1886.*)

WALLBRIDGE, C.J.—If the defendant's contention be allowed to prevail, then a mortgagee would always be obliged to apply to the assignee of the equity of redemption to release, before filing bill. I can find nothing to support this contention. In Ontario the practice in the Court of Chancery was as ours now is. If the mortgagor or his assignor had offered to release before bill, and the mortgagee would not accept, on bill filed and disclaimer answered, the defendant was allowed his costs. *Waring* v. *Hubbs*, 12 Gr. 27. Disclaimer without notice, costs not allowed. *Berrie* v. *Macklin*, 1 Ch. Ch. 351; *Hatt* v. *Park*, 6 Gr. 553. In the case of *Drury* v. *O'Neil*, 15 Gr. 123, the point was very fully considered by Mowat, V.C., and the reasons given for the difference between the practice in England and in Ontario fully stated. It is not necessary to repeat them here.

The defendant has asked costs of disclaimer, and I think he should now pay costs.

The bill asks for foreclosure, for which decree will be granted, and reference as to encumbrances, &c.

NOTE.—The above judgment was delivered prior to the decision in *The Manitoba Investment Association* v. *Moore*, *ante*, p. 41, but was held over pending a rehearing. Upon the case coming on for renearing, counsel agreed that the decree should be varied by striking out the order against Carruthers as to payment of costs.—(*Rep.*)

## THE MASSEY MANUFACTURING CO. v. GAUDRY.

(IN APPEAL.)

*Interpleader.—Costs.—Appeal as to costs.*

Although the claimant upon the trial of an interpleader issue succeeds, yet the court may, in its discretion, refuse to give him costs against the execution creditor.

The court cannot, however, in such a case order the claimant to pay the sheriff his costs of taking possession of the goods claimed, or his possession money prior to the date of the interpleader order.

*N. D. Beck* and *A. E. McPhillips*, for defendant, the claimant in interpleader issue.

The English rule is that in interpleader issues each party is entitled to his costs in proportion to the goods he obtains, *Lewis* v. *Holding*, 2 M. & G. 875.

If one party succeeds as to part and the other as to the other part, each party gets the costs for the portion for which he is successful. The costs are thus apportioned, *Bower* v. *Bramidge*, 2 Dowl. 213; *Clifton* v. *Davis*, 6 E. & B. 392; *Janes* v. *Whitbread*, 11 C. B. 406.

Discretion can be reviewed when the judge has made a mistake in the law, on some wrong principle, *Yeo* v. *Tatem*, L. R. 3 P. C. App. 696; *Re City of Manchester*, 5 Prob. D. 221; *O'Brien* v. *Bull*, 9 Ont. Pr. R 494.

The possession money here is prior to the making of the interpleader order. The court has no power to charge it to the claimant, *Segsworth* v. *Meriden Silver Co.*, 3 Ont. R. 413; *Dempsey* v. *Caspar*, 1 Ont. Pr. R. 134; *Dowson* v. *Hardcastle*, 1 Ves. 368; *Manitoba Loan Co.* v. *Routledge*, 3 Man. L. R. 296; *Patterson* v. *Kennedy*, 2 Man L. R. 63.

*W. H. Culver*, for plaintiff.

There is no appeal for costs, whether there is discretion or no discretion, *Wigney* v. *Wigney*, 7 Prob. D. 177; *Robinson* v. *Tucker*, 14 Q. B. D. 371; *Dawson* v. *Fox*, 14 Q. B. D. 377.

*N. D. Beck*, in reply.

All the cases cited by Mr. Culver are cases under the Judicature Act and follow the tendency of the Judicature Act which does not allow appeal for costs in general, *Burnham* v. *Walton*, 2 Man. L. R. 180.

[*10th January, 1886.*]

TAYLOR, J., delivered the judgment of the court. (*a*)

In this case certain cattle and other property were seized by the sheriff of the Eastern Judicial District, under an execution issued upon a judgment recovered by the plaintiffs against Louis Gaudry. Part of the property was claimed by Octave Gaudry, and part by Amable Gaudry. On the application of the sheriff, an order was made for the trial of two interpleader issues, the question to be tried in each being, whether at the time of the seizure, &c., the said sheriff under and by virtue of the said writ had the right to seize and sell the said goods, &c., or any part thereof.

When the issues came on for trial before Killam, J., without a jury, the record in the issue with Octave Gaudry was withdrawn, but the trial of the other was proceeded with. The learned judge, after hearing the evidence, entered a verdict for the claimant. At the time he did so, he entered in his book the following note or memorandum, "I think, however, that if, upon the final disposition of the costs of the interpleader proceedings, it be found proper and possible, the present defendant should not be allowed any costs of the interpleader proceedings, and that he should pay the sheriff's costs."

Afterwards, a summons was taken out in usual course, calling upon the plaintiffs to show cause why they should not be barred from all claim against the goods seized, &c., and why they should not pay to the claimants the costs of, and occasioned by the plaintiff's claim made herein, and upon the issues directed to be tried, &c., and the costs of the order directing said issues and consequent thereon, and of the said issues, and the sheriff's costs, and the costs of the application. Upon the return of that summons, an order was made, directing, among other things, that "the said summons in so far as it asks that the plaintiffs should

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

pay to Amable Gaudry all costs occasioned by their claim herein, and of the issue directed to be tried, the trial of the said issue (upon which the said Amable Gaudry was successful as to all of the goods and chattels claimed by him), and all subsequent costs consequent thereon, be and the same is hereby discharged." The order further directed, that "the said Amable Gaudry do forthwith pay to the said sheriff his costs of, and incidental to, the taking and keeping possession of that portion of the goods seized herein claimed by the said Amable Gaudry."

From this order the claimant appeals, on the grounds that, as the successful party on the trial of the issue he is entitled to his costs of the issue, and of the trial, the granting, or withholding of such costs not being discretionary with the judge, and that the judge had no power to order him to pay the sheriff's costs of, and incidental to, the taking and keeping possession of the goods seized. He admits that the judge had a discretion as to dealing with the costs of the application for the interpleader order, and therefore does not appeal from the order in so far as it deprives him of these.

The Court has already held in *Burnham* v. *Walton*, 2 Man. L. R. 180, that the costs are in the discretion of the judge, but the claimant now argues, and insists, that they are not so.

The plaintiffs contend, that the order being only as to costs, an appeal will not lie. The cases cited strongly support this contention. The only case cited in which an appeal from such an order was entertained is *Teggin* v. *Langford*, 10 M. & W. 555, but there the question was not so much, was the judge wrong in awarding the costs as he did, but was the case one for the exercise of the summary jurisdiction of the court over an attorney by ordering him personally to pay the costs.

The Imperial Act 1 & 2 W. 4 c. 58, s. 1, is almost identical in language with secs. 54, 55 and 56, of The Administration of Justice Act, 1885. Sec. 6 of the Imperial Act, makes provision for the relief and protection of sheriffs, much the same as section 58 of our Act, concluding with the words similar to those which stand as section 62 of our Act, "The costs of all such proceedings shall be in the discretion of the court."

In Ontario the Interpleader Act, as it stood with Con. Stat. U. C., being c. 30, contained sections 1, 2, 3, 6, 8 and 9, which

are practically the same as sections 54 to 58 and 62, of The Administration of Justice Act, 1885, and they stand in the same order.

The case upon which the claimant's counsel rely most strongly in support of their contention that the costs are not in the discretion of the judge is *Bellhouse* v. *Green*, 20 U. C. Q. B. 555, decided upon the Con. Stat. U. C. c. 30. That was not an appeal from a judge's order, but a case in which the judge, when applied to for an order disposing of the costs, entertaining some doubt as to the proper order to make, and whether it was discretionary with the judge to make such order as seemed to him right according to the facts of the case, referred the parties to the court. Judgment was given by two of the judges. Burns, J., seems to hold that the successful party is entitled to his costs on the general principle of law. He followed *Bower* v. *Bramidge*, 2 Dowl. 213, in which the Court of Exchequer laid down the rule, in an interpleader issue, that the party who succeeds is entitled to the costs of the action, and the party who fails must pay them. There was nothing he said to deprive the claimants who had succeeded in the issue "of the rule thus stated in *Bower* v. *Bramidge*, unless the court has the power of discretion over the costs of the action, as well as the other costs. I have not been able to find any authority supporting such a proposition."

McLean, J., came to the conclusion that the claimants having been compelled to proceed to establish their right to the property, and being successful in that object they were entitled to all costs to which they had been put in obtaining the interpleader orders, and all subsequent costs in the suits instituted under these orders. But on the question of a judge having a discretion in dealing with such costs, he seems at all events, not to have held so decided an opinion as Burns, J., if indeed he did not consider that they were in the discretion of the judge. He begins his judgment by saying, "By the 9th section of chapter 30, Con. Stat. U. C., it is declared that the costs of all such proceedings, that is the costs of all proceedings authorized by the preceding sections, shall be in the discretion of the court or judge. Then the question is in what manner that discretion must be exercised in the present case." He concludes his judgment by holding that each party should pay their own costs of the application in Term, "The question

being a new one as to the discretion of the court or a judge with reference to costs, and how such discretion is properly to be exercised." It will be observed that he nowhere speaks of the question as being one of discretion or no discretion, but simply of how the discretion is to be exercised.

In *Melville* v. *Smark*, 3 M. & Gr. 57, the claimants the assignees of a bankrupt having failed, counsel for them urged, that the costs being in the discretion of the court, they should not, under the circumstances of the case, be ordered to pay costs. Tindal, C.J., said however, in cases of interpleader the Court of Chancery always required the unsuccessful party to pay the costs, and the same course had been adopted in practice by the Courts of Common law, acting under the late statutes, "I see no reason for pursuing a different course when the claimants happen to be assignees of a bankrupt." That is language he would scarcely have used had he considered the court in no case to have a discretion over the costs.

*Lewis* v. *Holding*, 2 M. & Gr. 875, was a case in which each party partially succeeded and the costs were apportioned accordingly. On an appeal to the full Court, the judgment of the single judge was upheld. Tindal, C.J., said, "I cannot consider this case as in the nature of an action of trover, in which, by the strict rule of law, founded upon the Statute of Gloucester, the plaintiff is entitled, as of right, to the costs of the cause, if he succeeds as to any part of it. I cannot think that costs under the Interpleader Act were meant to be subjected to so rigorous a rule. * * * It seems to me that we are entrusted with a discretion as to costs, in the exercise of which we ought to be mainly guided by the decision of the jury."

Both Tindal, C.J., and Erskine, J., were of opinion that the court had, under the statutes, the same discretion as to costs in the case of conflicting claims upon executions, as they had in cases falling within the first section of the Imperial Act, (corresponding to sections 54, 55 and 56, of The Administration of Justice Act, 1885), which gave power "to make such rules and orders as to costs and all other matters as may appear to be just and reasonable."

In *Janes* v. *Whitbread*, 11 C. B. 406, it is true Jervis, C.J., said during the argument, in reply to the argument of counsel,

that the costs are discretionary, "That applies to the costs of the interpleader rule only, I apprehend," but the question the court had to deal with there, was, whether a new trial should be granted upon payment of costs, or whether they should be reserved. The verdict of the jury was not satisfactory and the court had no hesitation in granting a new trial, but counsel contended that in interpleader cases, no costs were allowed until the termination of the proceedings. What the court, when finally disposing of the case, were dealing with, was not, whether in interpleader cases the court had a discretion as to costs, so much as, whether the case being an interpleader one the ordinary rule of granting a new trial, only on payment of costs where the jury were in fault, should prevail or not. Thus Jervis, C.J., said, "The verdict in this case was the result of miscarriage of the jury, without the default of either party. The ordinary rule therefore must prevail viz., that the rule must be absolute for a new trial, upon payment of costs." And Maule, J., said, "The verdict was unquestionably against the evidence, I see nothing to take the case out of the general rule as to costs, which applies as well to trials of interpleader issues as to any other cases."

With all respect for the learned judges who have expressed the opinion, that costs in interpleader matters follow the ordinary rule that the successful party should have his costs from the one who is unsuccessful, I cannot on the reading of our statute come to any other conclusion, than that the costs of the proceedings are in the discretion of the court or judge.

The 58th section, under which the present case comes, provides, that "the judge may by rule or order or summons call before the court or judge, as well the party who issued such process, as the party making such a claim, and may thereupon exercise, for the adjustment of such claim and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained." Now what are the powers and authorities hereinbefore contained? Those set out in sections 54, 55, 56 and 57. It is just the same as if the section had read, that the judge may thereupon for the adjustment of such claim and the relief and protection of the sheriff or other officer, upon the return of such rule, order or summons hear the allegations, and so on, using over again the words of sections 55 to the end of 57. Had the section been so worded, could there be any doubt as to

the judge having power, in a case coming under the 58th section, to make such rules and orders as to costs as shall appear reasonable and just. Then the words of section 62, are very wide. "The costs of all such proceedings shall be in the discretion of the Court of Queen's Bench or a judge thereof." What are the "all such proceedings," if not all the proceedings referred to and dealt with in the preceding sections from 54 to 61 inclusive. Among them is included the trial of an issue.

It is said, that if the power in the 56th section to make such rules and orders as to costs as shall appear reasonable and just, cover the power to make such an order as that complained of here, and if the "such proceedings," in the 62nd section refer to any thing beyond the application for the interpleader order, then the 62nd section is mere surplusage. Perhaps it was not needed, and it found a place originally in the Ontario Statute, from which it was copied into ours, I have no doubt because, these words are at the end of section 6 of the Imperial Act, 1 & 2 W. 4, c. 58, although section 1 gave the court power to make such orders as to costs and all other matters as might appear to be reasonable and just.

In England, notwithstanding the cases cited for the claimant, the court has quite recently exercised discretion in dealing with interpleader costs. The passage there of the Judicature Act has not introduced any change in this respect, for by Order I Rule 2, "The proceedure and practice now used by the Courts of Common Law under the Interpleader Acts," is made to apply to all actions and all the Divisions of the High Courts of Justice. In *Hartmont* v. *Foster*, 8 Q. B. D. 82, in which the claimant succeeded in the issue against the execution creditors, he was not only deprived of his costs, but ordered to pay the costs of the execution creditor. From this order the Divisional Court refused to entertain an appeal. Before the Court of Appeal two questions seem to have been argued, the one, that the Divisional Court should have entertained an appeal although only upon a question of costs. The other was, that the summons as to costs having come before Cave, J., at chambers, he had no power to send it, without consent of the parties, as he did, to Hawkins, J., to be disposed of, and that the latter judge had therefore no jurisdiction to make the order. That if he had jurisdiction to deal with

it, he had no discretion as to so dealing with the costs, does not seem to have been argued by the appellant.

The other ground of appeal is, that the learned judge should not have ordered the claimant to pay the sheriff's costs of taking and keeping possession of the goods and chattels seized. In respect of this the claimant is I think entitled to succeed.

Security was given, and the sheriff withdrew from possession, the same day that the interpleader order was made, so any costs of taking and keeping possession dealt with by the order must be those incurred before the making of the order. I do not see how in any case a claimant, even if unsuccessful, can be ordered to pay costs or expenses of possession before the making of the order. They follow and are levied with the debt under the execution, and if the sheriff makes nothing for the benefit of the execution creditor, he can make no claim for any allowance. It is argued that the costs of the sheriff spoken of in section 63, are only the costs of the application. Even if his possession money should be held to be included, certainly all his costs or expenses on that account, cannot be so, for the words of the statute are, "Costs incurred by him in consequence of such adverse claim." Costs prior, at all events, to the making of the claim can never be occasioned in consequence of it. See *Keeler* v. *Hazelwood*, 1 Man. L. R. 31.

Costs incurred by the sheriff in keeping possession during a period of delay on the part of the claimant in giving security, or anything of that kind, might possibly be chargeable against him, but there are none such here.

*Smith* v. *Darlow*, 26 Ch. Div. 605, was cited as a case in which the claimant was ordered to pay the sheriff's possession money. But there an order was made in July, 1881, that upon the claimant giving security within seven days, the sheriff should withdraw and in default the goods should be sold. Security was not given, so the sheriff sold and paid the money into court. A year after an order was made barring the claimant, paying out the fund in Court to the execution creditor, and ordering the claimant to pay, to him and to the sheriff, their costs of the interpleader summons, "including in the costs of the said sheriff his possession money caused by the said claim."

The order complained of should be varied by striking out so much of it as directs Amable Gaudry to pay the sheriff the costs of taking and keeping possession of the goods seized, and to that extent the appeal succeeds.

In so far as the appeal is against the order depriving the claimant of costs it must be dismissed.

The claimant must pay the plaintiff's costs of the appeal for as to everything in which the plaintiff is interested, he fails. The plaintiff has no interest in that part of the appeal which relates to the sheriff's possession money. The claimant's success upon that does not effect him. The sheriff, although duly served, has not appeared to support the order in his favor. He cannot be ordered to pay costs as none have been asked against him by the notice of appeal. Even had they been so, none could have been given against him, as he was no party to the application upon which the order complained of was made.

*Order varied as above and claimant ordered to pay the costs of the appeal.*

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## THE HUDSON'S BAY COMPANY v. MACDONALD.

(IN EQUITY.)

*Bill for Specific performance or for recission.—Parties.—Pleading.—Waiver.—Fixtures.*

Distinction between a specific performance suit and one to rescind a contract in case of failure to perform by a specified time.

The plaintiffs agreed to sell to B. certain lands upon certain terms. B. paid a portion of the purchase money and afterwards conveyed to the defendant. Afterwards the plaintiffs removed certain buildings from the lands. The buildings were large and built upon stone foundations, a portion of which, either originally or by pressure, were beneath the level of the ground. Upon a bill

against the defendant alone for payment or rescission, the defendant claimed repayment of the money paid to the plaintiffs.

*Held*, 1. That *prima facie* the buildings were fixtures.

2. That the purchaser would have been entitled under such circumstances to sue for the return of the purchase money.

3. That the present defendant could not recover the money in the absence of B.

4. That no decree for rescission could be made in the absence of B., the defendant having in no way been substituted for B. as purchaser.

5. To obtain a decree for specific performance by vendor with an abatement from the purchase money by reason of the removal of the buildings, the bill must be so framed.

6. Waiver must be specially pleaded.

The bill was based upon eleven separate agreements for the sale by the plaintiff company to Sedley Blanchard of eleven separate lots of land numbered from 313 to 323, both inclusive, in block 2 according to a subdivision of lot No. 1 St. James, for $12,500 each. By the terms of the agreements one fifth of the purchase money was payable in cash on the making of the agreement and the balance in four equal annual instalments with interest at seven per cent. per annum. The bill alleged payment of the first instalment of one fifth but that the other four instalments were long overdue and unpaid; that after the agreements of sale were made Sedley Blanchard by deed since registered, granted, bargained, sold and assigned all his interest in these lands to the defendant; that by the terms of the agreements of sale time was to be of the essence of the agreements and unless payments of principal and interest should be punctually made the plaintiff was to be at liberty to reenter on and sell the lands, and all payments made on them were to be forfeited. The plaintiff claimed that by registration of the deed of conveyance there was a cloud on the plaintiff's title to the lands, and the bill asked that a time might be appointed for payment of balance of purchase money and interest and in default of payment that the agreements might be declared forfeited and at an end and might be ordered to be delivered up to be cancelled and the conveyance to the defendant declared a cloud on the plaintiff's title.

The defendant answered the bill stating that he had no objection to a decree being made as asked by the plaintiff with reference to all the lots mentioned in the bill except lots 319, 320 and

313, except that he objected to there being any personal order made against him for payment; but as to these three lots he alleged that, after the plaintiff's contract of sale, and after the conveyance to the defendant, and before any default had happened in payment of the purchase money, the plaintiff entered upon the lands and removed therefrom the buildings thereon which were of much value, and in consequence thereof the value of the lots was much depreciated; and the defendant claimed that by reason of these acts the plaintiff became disentitled to specific performance of the agreements as to those lots, and that the defendant was entitled to have those agreements rescinded and to be repaid the amounts paid by Blanchard in respect of those lots.

The plaintiff took issue upon this answer generally.

*J. S. Tupper* and *F. H. Phippen*, for plaintiffs.

Bill not for specific performance, but one seeking to be paid money due under agreement with Blanchard, or on default cancellation and removal of cloud created by registration of conveyance from Blanchard to defendant, *Foster* v. *Deacon*, 3 Mad. 394; *Counter* v. *MacPherson*, 5 Moore P. C. 83; *Fry on Specific Performance*, 599; *Binks* v. *Ld. Rokeby*, 2 Swans. 222; *Minchin* v. *Nance*, 4 Beav. 333.

Defendant took possession and cannot claim rescission; *Ballard* v. *Shutt*, 15 Ch. D. 122; *Fludyer* v. *Cocker*, 12 Ves. 25.

By negotiations for extension of time defendant disentitled himself to the relief asked for, *Fry on Specific Performance*, 455.

Defendant should have acted promptly, *Sugden on Vendors and Purchasers*, 14th ed. Vol. 1 384 n.

*J. S. Ewart, Q.C.*, for defendant.

Buildings *prima facie* realty, *Gray* v. *McLennan*, 3 Man. L. R. 337.

Cross relief asked could be properly granted, *Hurd* v. *Robertson*, 7 Gr. 142.

[*4th February, 1887.*]

KILLAM, J.—The removal of buildings from the three lots, since the making of the agreements of sale, has been proved; and I think that there is sufficient *prima facie* evidence that the removal was made by the plaintiff. The buildings were made of logs and were resting on stone foundations, but whether these

stone foundations were originally let into the ground at all, or were laid on top of the ground and have since sunk into it on account of the weights of the buildings upon them, is not very clear. The buildings were large ones, each about 75 feet long and about 30 feet wide. I think that such buildings must be regarded as *prima facie* intended as fixtures. They could hardly have been built to be moved about, and in the absence of evidence that they were placed there temporarily on the top of the ground, I think that they must be taken to have been part of the realty and that the purchaser would be entitled to them under the agreements of sale of the lands.

There was some discussion by counsel as to the light in which this suit is to be regarded, it being claimed by counsel for the defendant to be really a suit for specific performance of the agreements of sale, and by the plaintiff's counsel to be merely one for rescission of the agreements.

Now, what is usually termed a suit for specific performance is one in which the plaintiff asks that the defendant be *ordered* to specifically perform the contract. It is true that in such a suit, after decree for specific performance, if the plaintiff finds that he cannot enforce the decree, he may apply on motion for rescission of the agreement, (*Henty* v. *Schroder*, 12 Ch. D. 666); but a party is not obliged to proceed in this way. One party to the contract may file a bill asking that a time may be fixed within which the other party *may* perform it and that, in default of such performance, it may be rescinded. *King* v. *King*, 1 M. & K. 442; *Douglass* v. *London & N. W. Ry. Co.*, 3 K. & J. 173; *Lysaght* v. *Edwards*, 2 Ch. D. 506. It is, however, evident that, the subject matter of the two classes of suits being the same many of the same principles must be applicable to both.

It is clear that, at law, the purchaser would be entitled, under the circumstances mentioned, to rescind the contracts relating to the lots from which the buildings were removed, and sue for a return of the portion of the purchase money actually paid. *Magennis* v. *Fallon*, 2 Moll. 588; *Panama, &c. Telegraph Co.* v. *India Rubber, &c. Co.*, L. R. 10 Ch. 532; *Planche* v. *Colburn*, 8 Bing. 14.

The present defendant is not a legal assignee of any such claim for purchase money paid so that he could sue for it at law under

the Act respecting the assignment of *choses in action*. Blanchard simply conveyed to the defendant by an ordinary deed of conveyance, the lots mentioned in the bill "subject to the unpaid balance of purchase money due to the Hudson's Bay Company."

At most, then, the defendant could be only the equitable assignee of Blanchard's rights to the purchase money actually paid. If the defendant, then, were filing a bill upon such a claim, Blanchard, or his representative, would be a necessary party. *Colburn* v. *Duncombe*, 9 Sim. 151; *Cathcart* v. *Lewis*, 1 Ves. 463. I do not see, then, how it is possible to give the defendant in this suit the relief which he asks, even if he were otherwise entitled to it.

But there are several reasons why I cannot make the decree which the plaintiff asks. In the first place, it appears to me that Blanchard is a necessary party to the plaintiff's bill as framed. The agreements sued upon are agreements with Blanchard only; no privity between the plaintiff and this defendant is shown; this defendant has merely a transfer from Blanchard of such title to the lands as Blanchard took under his agreements. How, then, can these agreements be rescinded when the only other party to them than the plaintiff is no party to the suit?

It is sometimes laid down generally that where the purchaser has assigned his rights under an agreement for the purchase of lands he is not a necessary party to a bill by the vendor for specific performance, but upon investigation the cases do not bear out such a principle absolutely. In *Dart on Vendors and Purchasers*, 5th Ed. p. 1011, it is put thus, "And where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit."

The only authorities cited and the only ones bearing upon the question which I have been able to find are *Holden* v. *Hayn*, 1 Mer. 47; *Hall* v. *Laver*, 3 Y. & C. 191; *Hemingway* v. *Fernandes*, 13 Sim. 228; and *Shaw* v. *Fisher*, 5 D. M. & G. 596. In *Holden* v. *Hayn*, the defendant Bacon purchased of the plaintiff and afterward assigned his rights to the defendant Hayn. The plaintiff delivered his abstract of title to Hayn, who paid the first two instalments of purchase money and was admitted to possession of the lands. The bill prayed that Hayn and Bacon, or

one of them, might be directed to pay to the plaintiff the amount thereof, and to secure by mortgage the balance of purchase money on the plaintiff executing to Hayn a proper conveyance, or that in case Hayn should refuse to accept such title as the plaintiff could give, the agreement might be rescinded and Hayn restore the possession, and asked an account against Hayn only. Sir William Grant, M.R., said, "If the bill had been filed against Bacon only it might be a question whether the circumstances amount to a waiver of the original contract and acceptance by the plaintiff of the other defendant as purchaser in his place. But here Bacon has all along been treated as a mere formal party; and the offer made by the bill is to convey to Hayn, or such person as he shall appoint. Not a word of any conveyance to Bacon. It is, therefore, by the act of the plaintiff himself that Hayn is placed in the situation of purchaser and he only." The bill was dismissed against Bacon and Hayn was decreed to specifically perform the contract. The case was treated really as one of novation, Bacon being released and Hayn substituted for him. But, here, Macdonald is not shown by the bill to have done anything to render himself liable to the plaintiff. It may be that the mere filing of this bill against him would be evidence of his acceptance by the plaintiff as purchaser and of the release of Blanchard, but there must be something more. There could, upon the allegations in the bill, be no decree, that Macdonald should pay the plaintiff, as the bill does not show that he has placed himself towards the plaintiff in the position in which Hayn had placed himself. Upon the face of the bill, the agreements still remain agreements between the plaintiff and Blanchard only.

In *Hall* v. *Laver*, the circumstances were much the same as in *Holden* v. *Hayn*, the original purchaser not being a party and his assignees being ordered to pay the purchase money and specifically perform the contract. Objection was made to the nonjoinder of the original purchaser as a party, but it is only from the nature of the decree that we can judge that the objection was overruled, as no distinct ruling upon the point or reason for dispensing with him is stated in the report of the judgment.

In *Hemingway* v. *Fernandes*, the agreement was one to let to J. C. Harter and W. Harter certain lands for the purpose of the construction of a railway to convey coals from the Harter's

colliery, the Harters for themselves, their executors, administrators *and assigns*, covenanting to convey on this railway all the coal to be got from the colliery and to pay the plaintiff two pence per ton on all coal so conveyed. The Harters afterward sold and assigned the colliery, railway and the lands in question to the defendants who covenanted with the Harters to pay the rents and moneys reserved by this agreement and to observe the agreement. The Harters were in possession of the lands and used the railway for several years, and after the assignment the defendants took possession of colliery, lands and railway, and worked and used them for some three years, after which they began to carry away a part of their coals by another railway and refused to pay the two pence per ton on such portion. The bill sought to have the defendants ordered to specifically perform the Harter's agreement and enter into a lease with the plaintiff. It was held that the covenants mentioned ran with the land and that the defendants as assignees were bound by them, and they were ordered to pay the tolls or dues on all coal raised by them, but the court expressly refused to order them to execute a lease containing the covenants, thus plainly treating them as not bound in every respect to assume the position of the Harters, but only to be bound as if there had been a lease to the Harters and the defendants assignees of the lease and liable on the covenants running with the land.

In *Shaw* v. *Fisher*, the plaintiff had sold shares through a broker to a person whose name was not then given to him, and the purchaser resold them through the broker to another whose name was given to the plaintiff as that of the purchaser from him, and the plaintiff executed a deed of transfer to the last purchaser who afterward refused to register for the shares. The plaintiff, having learned all the circumstances, brought a suit for specific performance against the first purchaser, but it was dismissed on the ground that the plaintiff had accepted the second purchaser as purchaser from him, and the original privity of contract between himself and the defendant no longer existed.

None of these cases can warrant the maintenance of this suit as the bill is now framed.

In *Denison* v. *Fuller*, 10 Gr. 498, the plaintiff and the defendant Fuller having entere d into a verbal agreement for the sale of

lands by the plaintiff to Fuller, and the latter having taken possession, received rents and profits and made improvements on the property, and having leased with right of purchase to the defendant Ince who had afterward agreed to purchase of Fuller, the plaintiff was held entitled to a decree for specific performance against Fuller. Ince was held to have so mixed himself up in the matter as to be a proper party, but it was Fuller only who was ordered to make payment to the plaintiff.

If it could be found that this defendant has been substituted for the original purchaser, there might be ground for holding him to be entitled to any purchase money paid in the event of the plaintiff becoming entitled to a rescission without Blanchard being made a party, but here it is shown that the defendant has never paid to Blanchard the full amount which he was to give for the interest in the lands conveyed to him, and the defendant has also stated that he mortgaged the lands back to Blanchard to secure the unpaid portion of this amount. Now, if by the conveyance to the defendant there was assigned the beneficial interest in the purchase money actually paid and the right to rescind the contract and recover that back in case of default by the plaintiff, a reconveyance of the lots by way of mortgage would equally operate to reassign such rights. Of course, so far as there is any claim upon the land by virtue of the mortgage, this might be dealt with by allowing the holder to be made a party in the master's office, but it appears to me that the holder of the mortgage may well have an interest in contesting the plaintiff's right to have the agreements performed either with or without compensation for the buildings, and that it is desirable that any such contest as this should be disposed of once for all, instead of being left to be reopened as between the plaintiff and Blanchard's representatives after decree between the plaintiff and the present defendant.

Under these circumstances I think it best not to dispose finally of the question whether there must be a repayment of the portion of purchase money actually paid. I will say, however, that the cases cited by counsel for the plaintiff to show that the defendant is not even entitled to a deduction from the purchase money by way of compensation for the buildings are cases where the waste or deterioration has occurred without fault of the vendor, and they cannot, therefore, govern the present case. Without expressing an opinion upon the question of the plaintiff's right to

performance with a deduction from purchase money as compensation, I would simply say that in my opinion the plaintiff could not ask this, or that the account be taken on such a basis, on the bill as now framed. Upon this point I refer to *Bowyer* v. *Bright*, 13 Pri. 698; *Ashton* v. *Wood*, 3 Sm. & G. 436.

It is clear also that if the plaintiff relies on a waiver of a right of rescission the circumstances showing this must be alleged in the bill. *Modlen* v. *Snowball*, 31 L. J. Ch. 44.

The cause must stand over with leave to plaintiff to amend as it may be advised, within one month, costs of former hearing and of amendment reserved until further hearing of the cause or further order. Bill to be dismissed without costs if not amended within the time mentioned.

The defendant also should have leave to file a supplementary answer withdrawing consent to decree as far as relates to the fourth lot mentioned in his evidence from which a building was removed, lot No. 318, and setting up such defence as to that lot as he may be advised.

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## HORSMAN v. BURKE.

(IN EQUITY.)

*Quia Timet.—Specific performance of covenant to pay off mortgage.—Parties.—Trustees.—Relief over against cestuis que trustent.—Evidence of parol agreement.*

In a conveyance of land the grantee covenanted "to save harmless and indemnified" the grantor from a mortgage previously executed by him and from all claims and demands in respect thereof.

*Held*, 1. That after demand made by the mortgagee for payment upon the grantor, and before the grantor had paid any money, he could obtain specific performance of the contract.

2. The mortgagee would not be a proper party to such a bill.

3. The grantee must rely upon the covenant and not upon any express or implied agreement to pay off the mortgage.

The answer set up that the defendant purchased not for himself but as the agent and trustee for five other persons. There was no proof of this fact other than a recital in a conveyance to which the defendant and two of the alleged *cestuis que trustent* were parties.

*Held*, 1. That the conveyance was no evidence against the plaintiff.

2. That the answer could not be read as evidence against the plaintiff.

3. That the allegations in the answer might be considered with a view to directing further investigation into particular facts.

4. That as the *cestuis que trustent* lived out of the jurisdiction, the court would not, in its discretion, allow further evidence to be given.

5. *Quære*, Whether, in any case, the defendant would be entitled to have the *cestuis que trustent* made parties.

This was a suit to compel specific performance of an agreement by the defendant to indemnify the plaintiff against a mortgage made by the plaintiff to one Lally of lands afterwards sold by the plaintiff to the defendant.

The purchase price of the lands was $1800, and when the parties came to carry out the agreement of sale, only $1000 were paid by the defendant, the latter then promising, as the plaintiff stated, to assume and pay off the mortgage which was made to secure the principal sum of $800 with interest. As the mortgage was made only a few days before the sale, the interest accrued in the meantime was evidently disregarded. The conveyance was expressed in the deed to be made in consideration of $1800, and to be made "subject to a certain Indenture of Mortgage dated the 14th day of February, 1882, and made between the said John Horsman of the first part and Edmund S. Lally of the other part for securing the payment of the sum of $800 and interest at 10 per cent. per annum." At the end of the deed was this clause, "And the said party of the second part agrees to save harmless and indemnified the said party of the first part from the said mortgage and all claims and demands in respect thereof." The mortgage was really dated the 13th February, 1882, but in other respects it accorded with this description. It contained the usual covenant for payment by the plaintiff.

*J. S. Hough*, for plaintiff.

Mortgagee is not a necessary party, *re Cozier*, 24 Gr. 537.

As to *cestuis que trustent* being parties, *Leacock* v. *Chambers*, 3 Man. L. R. 645; *Campbell* v. *Robinson*, 27 Gr. 634; *Clarkson* v. *Scott*, 25 Gr. 373.

*W. H. Culver* and *G. G. Mills*, for defendant.

Defendant only a trustee, *Ford* v. *Proudfoot*, 9 Gr. 484; *Totten* v. *Douglas*, 15 Gr. 128; *Exchange Bank* v. *Barnes*, 29 Gr. 270; *Hemming* v. *Maddick*, L. R. 9 Eq. 175; *James* v. *May*, L. R. 6 H. L. 328; *Lewin on Trusts*, 551.

Mortgagee should have been a party, *Brandt on Suretyship*, 273; *Adam's Equity Pleadings*, 542; *Story's Equity Jurisprudence*, 639.

Nothing to show defendant assumed or agreed to pay mortgage, *Belmont* v. *Coman*, 22 N. Y. 438.

As to *cestui qui trustent* being necessary parties, *Burt* v. *Dennett*, 2 Bro. C. 225; *Greenwood* v. *Atkinson*, 5 Sim. 419; *Madox* v. *Jackson*, 3 Atk. 406; *Wilkinson* v. *Fowkes*, 9 Ha. 193; *Lloyd* v. *Smith*, 13 Sim. 457.

As to disclosure of trust, *Cowan* v. *Britton*, 3 Man. L. R. 175.

*J. S. Hough* in reply.

Relation of plaintiff and defendant is that of principal and surety, *Waring* v. *Ward*, 7 Ves. 332, *Campbell* v. *Robinson*, 27 Gr. 634.

(*29th January, 1887.*)

KILLAM, J.—The evidence sufficiently connects the mortgage of 13th February with the one referred to in the deed of conveyance, and it appears to me that this error gives rise only to a latent ambiguity which can be explained by the evidence.

Upon the evidence it is clear that this clause was inserted for the purpose of carrying out the agreement as to the defendant assuming the mortgage and, in my opinion the plaintiff must rely on that, and not on any express verbal promise to pay off the mortgage or on any undertaking to pay it or indemnify the plaintiff against it to be implied from the taking of a conveyance expressed to be made subject to the mortgage.

In *Mitford's Equity Pleading*, 5th Ed. pp. 171, 2, it is said, "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill *quia timet*, in an alogyto

proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances."

This langage is adopted by Mr. Justice Story in his work on "*Equity Jurisdiction*," § 730, aud at § 850 he says, "So courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages only, upon the same principles that they will entertain a bill *quia timet*."

In *Lord Ranelagh* v. *Hayes*, 1 Vern. 189, specific performance was in this way decreed of a covenant to indemnify against certain demands of the Crown. This is the leading case upon the subject, and it is accepted as authority by both of the learned writers whom I have mentioned, and by the present Lord Justice Fry in his work on *The Specific Performance of Contracts*, 2nd Ed. p.666, *Champion* v. *Brown*, 6 Johns Ch. N.Y. 398; *Anglo Australian &c. Co.* v. *British Provident Society*, 3 Giff. 521; and *Lloyd* v. *Dimmack*, 7 Ch. D. 398, are authorities for the same principle. In the latter case *Lord Ranelagh* v. *Hayes*, was disapproved on one point, but followed on the general principle.

I do not think it necessary to consider whether an action at law could be maintained on this agreement of indemnity, before payment by the mortgagor. The remarks of Lord Redesdale and of Mr. Justice Story which I have cited show that it is not necessary that actual damage should have been suffered to warrant such a suit in equity. The agreement is to save the plaintiff harmless and indemnified against "*all claims and demands*" in respect of the mortgage. Actual demand for payment has been made upon the mortgagor; there is no evidence that this demand is illusory or that the mortgagee does not look to the plaintiff upon his covenant. The plaintiff has made demand upon the defendant to fulfil his agreement of indemnity but the defendant has failed to do so in the only possible way, by making payment to the mortgagee.

There are, however, two objections for want of parties.

First, it is claimed that the mortgagee, the party to receive the payments, is a necessary party. Now, in none of the cases which I have cited, in which a decree for performance of such a contract has been decreed, has the party to receive the payments been a party. The ordinary principle is that in suits for specific performance only the parties to the contract are to be made parties to the suit. See *Tasker* v. *Small*, 3 My. & Cr. 63, and other authorities cited by me in *Real Estate &c. Co.* v. *Molesworth*, 3 M. L. R. 116. If the suit were for specific performance of an executory contract for sale of the land to the defendant, under which it was expressly provided that a portion of the purchase money was to be paid to the mortgagee, the latter would not, under these authorities be a necessary party. In many cases, in working out a decree for specific performance it may be necessary to pay over portions of the purchase money to incumbrancers who are not parties to the suit.

*Paterson* v. *Wellesley*, 6 L. J. N. S. 191, may seem at first sight opposed to this view. It is, however, to be noticed that although the party to receive the money was not made a party to the contract, he was named to receive payment for the purposes of the contract and would take it as a trustee for the parties to apply it for the purposes of the contract, and not in any way as a payment due to him under a separate contract. In the cases where a surety sues to compel the principal debtor to pay the creditor, there is direct privity of contract between the principal creditor and the surety and there are many authorities which show that the surety can sue the principal creditor to compel him to receive, or even to enforce, payment. In such a case as the present, however, the contract of indemnity is wholly separate and distinct from the original contract under which the principal indebtedness arises, there is no privity whatever between the original creditor and the party giving the agreement of indemnity, and it does not appear to me that the former should be drawn into a litigation in which he has no interest and which he has in no way contributed to cause, except indirectly by seeking to enforce his own rightful claim.

Then, the defendant states by his answer that he purchased not for himself but as the agent and trustee of five other persons who advanced all the moneys paid, that he never had any interest in the purchase and never intended to make himself personally liable

for the mortgage moneys, and that these other parties are liable to indemnify him, and he claims to have them made parties to the suit and ordered to indemnify him. The only evidence offered by the defendant in support of this contention is a deed of conveyance executed some two months after that from the plaintiff to the defendant, made between two of these alleged *cestuis que trustent* for the purpose of conveying the interest of one to the other, the defendant being a party to and joining in the conveyance which recited that he had purchased and held the lands as trustee for those two and others. It is clear that this deed can be of no use as evidence against the plaintiff that this purchase was made in trust for these others. Upon the plaintiff's evidence he dealt with the defendant alone in making the sale and knew nothing of the purchase being made for others.

The defendant's answer is taken under oath, and it is claimed for him that the answer is sufficient evidence of these allegations of fact. The plaintiff filed the usual replication taking issue upon the whole answer.

It was distinctly held in *Barrack* v. *McColloch*, 3 K. & J. 113, that where an answer has been replied to generally, it cannot, except by consent, be read as evidence on the part of the defendant himself. This principle is adopted in *Daniel's Chancery Practice*, 5th Ed. p 743. In *Williams* v. *Williams*, 12 W. R. 663, Sir Richard Kindersley, V.C., is reported to have said that an answer "was evidence in this way; that unless a plaintiff could countervail it by sufficient evidence of two witnesses, or of one witness and of circumstances, which was as good as the evidence of one witness, the defendant's answer had that weight attributed to it that the court would not make a decree against the defendant upon grounds which he by that answer positively denied. Under the new practice the answer might be read as evidence on the mere motion for a decree; but if it was on the cause the answer was no evidence, unless the defendant had himself made an affidavit verifying the truth of it, so that he might be cross-examined on that affidavit which would include all the facts stated in his answer."

Now, under the English practice an affidavit could be used as evidence; but under our practice, although the reason given in *Williams* v. *Williams*, for taking an affidavit, and not the answer,

as evidence does not apply here, the defendant being liable to cross-examination upon his answer, yet the evidence is taken orally at the hearing and an affidavit cannot be used as evidence, except by consent or by order of the court. Gen. Ord. 144, 145, 147. Even, then, if the answer could be treated as an affidavit, there was no such consent and no such order.

It would, however, appear from *Miller* v. *Gow*, 1 Y. & C. C. C. 56, that the court may look at the answer, not as evidence, but as what may regulate its discretion with respect to the further investigation of particular facts. And this appears to be all that was done in *Campbell* v. *Dickens*, 4 Y. & C. Ex. 17, where, though the plaintiff was given leave to amend, it was clearly not upon the ground that there was sufficient evidence of the existence of the claims of third parties whom the defendant sought to have made parties. It is to be noticed that in the last mentioned case the defendant's contention was that third parties had claims adverse to the plaintiff's which would be affected by the suit, and it is evident that the court let the cause stand over for the purpose of getting further information upon that point. But here it is not for the protection of the third parties, but for the benefit of the defendant himself that he seeks to have them added. From the defendant's answer it would appear that these five alleged *cestuis que trustent* reside in Hamilton, Ont. It is impossible to say into what expense and complications the plaintiff might be led by making them parties. I do not think that he should be occasioned even the delay that would be incurred by his doing so. So far then, as the matter is one of discretion, I think that no further opportunity should be given to show the relations of the defendant to these parties. Whether the defendant would be entitled, upon proof of the allegations in the answer, to have these others made parties, I do not think it necessary to consider.

In my opinion there should be a decree declaring the plaintiff entitled to specific performance by the defendant of the contract of indemnity contained in the deed of conveyance from the plaintiff to the defendant, and the decree should order, as in *Lloyd* v. *Dimmack*, payment by the defendant to the mortgagees of all principal and interest payable under the mortgage, and the costs of suit.

## *RE* KILDONAN & ST. PAUL'S ELECTION.

### *Abandoned Petition.—Costs.*

A petition was filed, styled in the Electoral Division of *Kildonan*. After a preliminary objection had been taken on the ground that the name of the constituency was Kildonan and St. Paul's, a new petition was served, together with a notice of abandonment of the former petition. This notice was styled in the Electoral Division of Kildonan and St. Paul's. Upon a motion by the respondent that the first petition should be discontinued and that the petitioner should pay the costs incurred,

*Held*, 1. That such an application could be entertained.

2. That, under the circumstances, the application could not be defeated because the summons was styled in the Electoral Division of Kildonan and St. Paul's.

3. Although the statute requires that two copies of the preliminary objections are to be left with the prothonotary, one for file and one for the petitioner, yet if one copy be filed, and one be served upon the petitioner as provided by Rule 14, the petitioner cannot object.

4. Proceedings upon the second petition not stayed until payment of the costs of the first.

*George Patterson* for petitioner.

*R. G. Macbeth* for respondent.

[*28th January, 1887.*]

DUBUC, J.—At the General Provincial Elections, held in December last, John McBeth was returned for the Electoral Division of Kildonan and St. Paul's.

On the 14th January a petition against his return was filed and served upon him the same day. In said petition the electoral division was referred to as the electoral division of Kildonan.

On the 18th January the respondent filed and served his preliminary objections to said petition.

On the 19th January a second petition against the return of the respondent, purporting to have been filed on the 17th January, was served upon him, with a notice attached thereto that it was substituted for the first petition. On the same day that it was served on the respondent, a notice was served upon

the respondent's attorney, notifying him of the abandonment of the said first petition.

On the 21st January the respondent took out a summons calling upon the petitioners to show cause why the said first petition should not be discontinued, and why the petitioners should not pay to the respondent the costs incurred by him by reason of the filing of the first petition.

On the return of the summons Mr. Patterson, attorney for the petitioners, took objections to the summons on several grounds.—

1. He objected, that the summons was entitled in the Electoral Division of Kildonan and St. Paul's, while the petition against which the preliminary objections were filed was entitled in the Electoral Division of Kildonan.

But the petitioner's attorney having himself, in his notice of abandonment, entitled the matter in the Electoral Division of Kildonan and St. Paul's, and having stated in his notice attached to the said petition that the second petition was substituted for the first, I think the respondent was justified in entitling the summons as he did. The petition or petitions were against the respondent as the returned member of only one electoral division, that of Kildonan and St. Paul's. If the first petition was irregular, as being wrongly entitled, the respondent was the party against whom it was directed, and he could not ignore it. He had to oppose it, and had the right to take advantage of the irregularity. There is no Electoral Division of Kildonan, and there was no election held in such electoral division. The entitling the petitions as in the Electoral Division of Kildonan was an irregularity. And when in the subsequent proceedings the irregularity was rectified and corrected, he had to take notice of the rectification and correction pointed out in the petitioner's proceedings, and entitle his own proceedings in the same manner.

2. It is objected, that no costs can be ordered against the petitioners except when the petition is discontinued or withdrawn in accordance with the Controverted Elections Act, C. S. M. c. 4, ss. 94, 95 and 100. And it is contended that there is no provision in the statute allowing a judge to make an order for costs in any other case.

But these sections make provision only for cases when the petitioner himself applies to the Court for an order to discontinue his petition. And there is nothing in the statute to prevent a respondent making the same application when the circumstances justify it. I cannot see that the respondent should be deprived of his costs on that ground.

3. The next objection is, that the preliminary objections against the petition for which the respondent is now claiming costs were not filed in accordance with the Statute, C. S. M., c. 4, s. 39, which provides that the respondent may produce in writing his preliminary objections, and at the same time file a copy thereof for the petitioner. It is argued that under said provision two copies of the said preliminary objections should have been filed a one for the Court, to remain on record, and the other for the petitioners.

The preliminary objections were filed and served in accordance with Rule 14 of the rules made by the judges of this court to regulate the practice and procedure with respect to election petitions under sections 12 and 13 of the Controverted Elections Act. A copy of said preliminary objections was served upon the petitioners and another copy filed with the prothonotary.

It is submitted that the said rule is not in accordance with the statute and cannot prevail.

What does the 39th section of said statute require? That the respondent should produce his preliminary objections in the prothonotary's office, and also a copy for the petitioner. The rule says nothing else. It rather extends the provisions of section 39 in favor of the petitioner, by stating that the copy to be left for him in the prothonotary's office shall be served on him. This the respondent has done, and the petitioners here cannot complain of the benefit which the rule has conferred upon them. They have had more under the said rule than the statute has strictly provided for, and the rule, by extending in a matter of procedure what the statute contemplated, is clearly within the powers conferred on the judges by sections 12 and 13 of the Controverted Elections Act.

Under the circumstances, I do not see why the respondent should not get his costs, incurred in connection with the first petition which was abandoned as irregular.

The respondent, in his summons, asks also that the proceedings in the second petition should be stayed until the costs in connection with the first be paid.

As to that, as the respondent has his recourse for his costs under the bond filed with the first petition, I do not think he should be entitled to have the proceedings on the second petition stayed, until it has been shown that the said costs cannot be recovered under the bond in question.

Order to go accordingly.

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## PAISLEY v. BANNATYNE.

(In Appeal.)

*Principal and Agent.—Power of agent appointed to receive money.*

B., one of three executors (the defendants), agreed to permit the plaintiff to become assignee of a lease granted by their testator; that the plaintiff should be allowed to deduct from the rent the value of improvements to be placed by him upon the premises to the amount of $1,000; and that the rent should be increased by 13 per cent. of the amount of such allowances.

The improvements were made, but the value was not deducted out of the rent.

In an action against the defendants personally, and not as executors, a verdict was given for plaintiff.

*Held*, 1. That there being no proof of a joint promise, the verdict was wrong except as to B.

2. That the receipt of rent by B. only showed that he had power to receive the rent in money.

3. That an agent authorized to collect a debt, can receive it in money only.

This was an action for the value of certain improvements made by the plaintiff as lessee of the defendants, in reality executors but sued as individuals. The plaintiff relied upon a verbal agree-

ment made with one of the defendants. The plaintiff obtained a verdict and the defendants now moved for a non-suit or new trial.

*W. E. Perdue*, for defendants, showed cause.

An executor has no right to bind his co-executor. *Gore Bank* v. *Meredith*, 26 U. C. Q. B. 237; *Commercial Bank* v. *Woodruff*, 21 U. C. Q. B. 602.

Plaintiff cannot recover on the common counts, he cannot show a receipt from the executors. *Atkinson* v. *Bell*, 8 B. & C. 277.

The agreement should have been in writing, under the statute of frauds. *Re Crowter*, 10 Ont. R. 159.

Trustees have power to manage, deal with and dispose of the real estate, but no power to improve or build upon it. *Vyse* v. *Foster*, L. R. 8 Chy. 309, 7 H. L. 318; *Bridge* v. *Brown*, 2 Y. & C. Chan. 181; *Mason* v. *Scott*, 21 Gr. 629.

If there should be a non-suit against McArthur and Truthwaite, there should be one against all. *Commercial Bank* v. *Hughes*, 3 U. C. Q. B. 361.

*H. M. Howell, Q.C.*, and *G. Davis* for plaintiff.

A joint tenant and a tenant in common are in different positions. *Harrison* v. *Barnby*, 5 T. R. 246; *Robinson* v. *Hofman*, 4 Bing. 564.

If a man stands by and allows another to make certain improvements to his estates, he is bound to pay him. *Ramsden* v. *Dyson*, L. R. 1 H. L. 170.

As to necessity for contract to be in writing. *Frear* v. *Hardenbergh*, 5 Johns. N. Y. 272; *Benedict* v. *Beebee*, 11 Johns. 145.

[*10th January, 1887.*]

WALLBRIDGE, C.J., delivered the judgment of the court. (*a*)

McDermott, in his lifetime had demised to one Johnstone a certain building and premises used as a hotel in Winnipeg. The lease contained a covenant against assigning or sub-letting without the written consent of lessor. Paisley desired to obtain an assignment of the lease, and went to Bannatyne to obtain the required consent. McDermott died between the making of the

(*a*) Present: Wallbridge, C.J.; Dubuc, Killam, JJ.

lease and the date of the assignment, and appointed these defendants executors. The consent in writing giving liberty to assign appears to have been obtained. No question however is raised upon that point. Bannatyne, part of the time, and Blanchard, his solicitor part of the time, appear to have received the rents.

It is contended by the plaintiff that at or about the time he obtained the assignment of the lease it was agreed between him and Bannatyne that he should be allowed to make improvements on the land, not to exceed $1,000; upon any expenditure short of that sum he should pay an increased rent of 13 per cent., and that he, the plaintiff, should be allowed to deduct the rent as it became due from the amount so expended, until he was repaid. The rent was $55 per month, payable monthly. The plaintiff either paid the rent himself or submitted to a distress to recover it without insisting on the right to have it applied as against the improvements. No reason is given for such payment, but he gives us a reason for paying under the compulsion of a distress,—that it was to get the distraining bailiff ont of his house. It is proved he made improvements to the extent of the verdict, yet when he paid the rent it was not increased by 13 per cent., nor when distrained for was the distress for the rent increased by 13 per cent. on the improvements. Mr. Bannatyne, with whom the agreement is said to have been made, expressly denies that such agreement ever was made.

The conduct of the parties immediately following the time when the agreement is alleged to have been made is inconsistent with the existence of such agreement as plaintiff contends for. This was, so far as Mr. Bannatyne was concerned, a fair subject of enquiry for a jury.

This suit is brought against these defendants for the improvements so made, and the jury have found in the plaintiff's favor for $979.

The suit is not brought against these defendants as executors, but as individuals, and before any recovery can be had a joint undertaking of all the defendants must be proved.

The evidence is sufficient to support a verdict against Bannatyne, though conflicting. It was a fit question to be submitted to a jury, and I should not be inclined to disturb the verdict as against him. But I understand the plaintiff to insist

upon a verdict against all the defendants, and to refuse a verdict against Bannatyne alone.

This is an action on a contract. The defendants are sued jointly upon a joint promise. There was no evidence, in my opinion, to be submitted to the jury against all three defendants. Bannatyne had no authority to contract on behalf of his co-defendants, and he expressly denies ever having done so. In order to maintain this action a joint liability must be proved. This was taken as a ground for nonsuit, upon which leave was reserved. If authority were wanting for this justification, it will be found in *Manley* v. *Boycott*, 2 E. & B. 46.

Besides this, the fact of Mr. Bannatyne having received the rent might be held, by the acquiescence of the other defendants, to authorize his continuance so to do. Yet it could not be construed more extensively than to receive the rent in money. An agent authorized to collect a debt can only receive it in money. *Barker* v. *Greenwood*, 2 Y. & C. Ex. 418. *Sweeting* v. *Pearce*, 9 C. B. N. S. 534. It would not, therefore, have been in the power of Mr. Bannatyne, under a general power to collect rents, to have agreed to take payment by improvements.

In my opinion the verdict should be set aside and rule be made absolute for nonsuit.

*Verdict for plaintiff set aside and nonsuit entered.*

# REGINA v. PRUDHOMME.

## *Re* NORTH DUFFERIN ELECTION.

(BEFORE THE FULL COURT.)

*Recount of ballots.—Mandamus to County Judge.—Ballots not objected to before Deputy Returning Officers.*

*Held*, 1. That a mandamus will not lie to a county judge to compel him to consider the validity of ballot papers.

*Re Centre Wellington Election*, 44 U. C. Q. B. 132, followed.

*Per* WALLBRIDGE, C.J. Upon a recount should the county judge consider the validity of ballot papers not objected to before the deputy returning officers, *quære*.

*Per* KILLAM, J. 1. The return of a returning officer is not void when based upon a certificate of the county judge, in proper form, merely because the county judge has not legally or fully discharged his duties upon a recount of ballots.

2. There being another remedy, viz., an application to the House, a mandamus should not be granted.

His Honor Judge Prudhomme a county court judge, upon recounting ballots polled at a provincial election for North Dufferin refused to consider the validity of certain ballots upon the ground that no objection had been made to such ballots when counted by the deputy returning officers at the close of the poll. This was an application for a mandamus to compel him to consider the validity of such ballots.

The principal clauses of the statute 49 Vic. c. 29 referred to in the argument, were as follows:—s. 154 ss. (3) The deputy returning officer shall take a note of any objection made by a candidate, or by his agent, or by any elector present, to any ballot paper found in the ballot box, and shall decide any question arising out of the objections; and the decision of the deputy returning officer shall be final, subject only to reversal on a recount by the county court judge, or on petition questioning the election or return; and—(4) Every objection to a ballot paper shall be numbered, and a corresponding number shall be placed on the

back of the ballot paper, and shall be initialed by the deputy returning officer; and—(5) The deputy returning officer shall endorse "Rejected" on any ballot paper which he may reject as invalid, and shall endorse "Rejection objected to," if an objection be made to the decision. s. 168. At the time and place appointed, the said county judge shall proceed to recount all the votes or ballot papers returned by the several deputy returning officers, and shall in the presence of the parties aforesaid, if they attend, open the sealed packets containing:—(1) The used ballot papers which have not been objected to and which have been counted; and—(2) The ballot papers which have been objected to but which have been counted; and—(3) The rejected ballot papers; and—(4) The spoiled ballot papers, and no other ballot papers or counterfoils, and in recounting the said votes care shall be taken that the mode in which any particular elector has voted shall not be discovered. s. 169 ss. (1) He shall proceed to recount the votes and shall verify or correct the ballot papers account, the count of the votes and statement of the number of votes given for each candidate, by deciding the objections without delay, and as they are made.

From affidavits filed in answer to the application it appeared that the county judge had given a certificate of the result of the recount to the returning officer immediately at the close of the recount and therefore on the day preceding the day upon which the application was made. The Gazette also was produced to show that the result had been advertized as required by statute.

*J. A. M. Aikins, Q.C.*, and *J. H. D. Munson*, showed cause.

There should be no mandatory injunction to command the performance of a judicial duty, it can only issue for the performance of ministerial duties, *King* v. *Justices of Farringdon, Without*, 4 D. & R. 736; *King* v. *Yorkshire Justices*, 34 W. R. 180; *Williamson* v. *Bryans*, 12 U. C. C. P. 275.; *Tapping on Mandamus*, 13.

The court has no power to compel the county court judge to exercise his discretion differently than he has done, *Jenkins* v. *Brecken*, 7 Sup. C. 265; 49 Vic. c. 29 s. 154 ss. 3; also s. 169 ss. 1; *Harrison's Municipal Manual*, 107.

The granting of this mandamus would be nugatory and useless, *Tapping on Mandamus*, 15.

Before a mandamus can issue it must be shown that the duty is clearly established, *Tapping on Mandamus*, 293, 4, 7; *Waite on Action and Defence*, 376.

Formerly all questions affecting elections were decided by the legislature and the legislature has retained all these same powers except those which it has clearly delegated to the courts, *May on Parliamentary Practice*, (9th ed.) 732; *Re Centre Wellington Election*, 44 U. C. Q. B. 132; *Hodge* v. *The Queen*, L. R. 9 App. Ca. 132.

Mandamus will not be granted where there is any other remedy, *Re Hamilton & N. W. Ry.*, 39 U. C. Q. B. 111.

Judge's decision will not be interfered with, *King* v. *Yorkshire Justices*, 34 W. R. 108.

*J. S. Ewart, Q.C.*, in support of rule.

As to jurisdiction to issue mandamus to election officers, *Re Centre Wellington*, 44 U. C. Q. B. 132; *Re Simmons & Dalton*, 6 C. L. T. 588; *Reg.* v. *Holl*, 7 Q. B. Div. 575.

Jurisdiction exists in analogous ecclesiastical matters, *Reg.* v. *St. Margaret*, 8 Ad. & E. 899; *Reg.* v. *Canterbury*, 11 Q. B. 483.

Expiration of time is no objection, *Rex.* v. *Norwich*, 1 B. & Ad. 310; *Rex.* v. *Carnarvon*, 4 B. & Ald. 86; *Reg.* v. *Rochester*, El. B. & El. 1024; *Rex.* v. *Thetford*, 8 East, 270; *Rex.* v. *Carmarthen*, 1 M. & S. 697; *Reg.* v. *Pancras*, 11 Ad. & E. 15; *Reg.* v. *Monmouth*, L. R. 5 Q. B. 251; *Rex.* v. *Bathurst*, 4 U. C. O. S. 340; *McKenna* v. *Powell*, 20 U. C. C. P. 394; *Re Holland*, 37 U. C. Q. B. 214; *Re Allan*, 10 Ont. R. 110.

Although the office may be said to be full that is no objection, *Rex.* v. *Bedford*, 1 East 79; *Rex.* v. *Bedford*, 6 East 356; *Reg.* v. *Leeds*, 11 Ad. & E. 512.

As to the distinction between a judge declining jurisdiction and deciding wrongly, *Reg.* v. *Goodrich*, 19 L. J. Q. B. 413; *Reg.* v. *Monmouth*, L. R. 5 Q. B. 251; *Reg.* v. *Holl*, 7 Q. B. Div. 584; *McCullogh* v. *Leeds*, 35 U. C. Q. B. 449; *Re Holland*, 37 U. C. Q. B. 214; *Re Allan*, 10 Ont. R. 110.

[*24th December, 1886.*]

WALLBRIDGE, C.J.—An election for a member of the Legislative Assembly of Manitoba was held on the 9th day of

December, 1886, for the County of North Dufferin, at which the candidates were The Honorable David Henry Wilson and Redmond Peter Roblin, Esquire. The deputy returning officers, immediately after the close of the polls, counted the votes and examined the ballot papers, as provided by section 154 of the Election Act of Manitoba, 1886, and afterwards, in pursuance of section 155, made up into separate packets, as directed by that section and the sub-sections thereunder, the votes given for each candidate, the rejected ballot papers, the used ballots which had not been objected to and had been counted, the ballot papers objected to but which had been counted, the rejected ballot papers, the spoiled ballot papers, and otherwise complied with the sub-section to said section, placed the same in the ballot boxes, and delivered the same to the returning officer with a statement of the contents of such packets, and with the unused ballot papers entrusted to him, and transmitted the ballot boxes with the ballots and statement to the returning officer.

An application was made to the judge of the County Court who presided over the Court of Revision for the said electoral division for a recount of the ballots, who appointed a time to recount the votes, and gave notice to the candidates of the time and place at which he would proceed so to do. He was then and there attended by the said candidates and their counsel. The judge thereupon proceeded to recount the votes and ballot papers returned by the several returning officers and proceeded to recount the votes and to verify or correct the ballot papers account, the count of the votes and statement of the number of votes given for each candidate, by deciding the objections without delay and as they were made.

Reading this section alone, one would clearly understand that the objections which the judge was to decide were those made on the recount before him, but on referring to an earlier section of this Act, viz., to section 154, sub-section 3, it is there declared that the deputy returning officer shall take a note of the objection made by the candidate or by his agent and he the deputy returning officer shall decide any question arising out of the objections, and the decision of the deputy returning officer shall be final, subject only to reversal on a recount by the County Court judge or on petition questioning the election or return. Other sub-sections direct how the objections shall be numbered and the endorsement

on rejected ballots, &c., with other directions not necessary to consider as no objection has been raised as to his conduct.

Section 155 declares that the deputy returning officer, at the completion of the counting of the votes, after the close of the poll, shall in the presence of the agents of the candidates make up into separate packages, sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals, and after having complied with this section and sub-sections (of which no complaint is made), the deputy returning officers are, by section 156, directed to place such packages in the ballot boxes, and personally deliver the same to the returning officer.

Proceedings were in due time taken to procure a recount before the county judge presiding over the Court of Revision for the electoral division where the election has been held. The parties attended before the judge on the day appointed, at which time the duty of the judge is laid down as follows,—"He shall proceed to recount the votes, and shall verify or correct the ballot papers account, the count of the votes and statement of the number of votes given for each candidate, by deciding the objections without delay and as they are made."

Viewing this section alone, I have no hesitation in saying that every ballot paper returned by the different deputy returning officers should have been recounted, and when objections were taken to any of them the judge should have given judgment on each one. I say this would have been my mode of proceeding. But what do the words, "the objections," mean in the above sub-section? The deputy returning officers are directed by section 154, sub-section 3, to take a note of any objection made by a candidate or his agent or by any elector to any ballot paper found in the ballot box, and shall decide upon any question arising out of the objections, and his decision shall be final, subject only to reversal on a recount by the County Court judge, or on petition, questioning the election or return.

The complaint here is that the County Court judge refused to consider and adjudicate upon the validity of ballot papers objected to before him, but which had not been objected to before the deputy returning officer; in other words, he decided upon the impediment to his counting, and not upon the validity of the vote or ballot. Contrast the duty of the deputy returning

officer as pointed out in sub-section 3 to section 154, which is, to take a note of any objection and to decide any question arising out of the objection; and it is declared that his decision shall be final, subject to reversal in a recount by the County Court judge, or on election petition.

Then turn to head, "Recount of Ballot by County Court Judge." Section 169, sub-section 1, says, the County Court judge shall proceed to recount the votes, and shall verify and correct the ballot papers account, the count of the votes and statement of the number of votes given for each candidate (how?) by deciding the objections, without any delay, as they are made. Can I say, beyond any doubt, the County Court judge was wrong in refusing to adjudicate upon any ballot objected to for the first time before him? Ritchie, C.J., in *Jenkins* v. *Brecken*, 7 Sup. C. R 255, on a section very similar, says that "the Legislature seems to have been very particular to provide that the candidates or their agents should be present, or in their absence that the electors should be represented; and the provision seems to contemplate that matters in reference to the ballots should be then finally settled. Whether any such objection afterwards made is not too late is a question, in the view I take, there is no necessity for investigating or settling. Should the point hereafter arise in a case to render its determination necessary, it will, in my opinion, be worthy of serious consideration."

I think I may well adopt the language above cited in its entirety.

The motion here is to compel the judge of the County Court to resume his recount and to pass judgment upon objections to ballot papers, which he refused at the investigation to consider.

This Court can direct a *mandamus* to inferior courts to give judgment, but will not direct what judgment such court shall give.

It is not, however, upon the ground that the judge has refused to adjudicate upon objections made to ballots, not objected to before the deputy returning officer, that I think the rule must be refused. The Legislature of Manitoba have by "The Election Act of Manitoba, 1886," directed the manner of holding elections, and the officers by whom these elections shall be carried

out, the manner of counting by the deputy returning officer, and of recounting by the judge of the County Court; and this Court might with just as great propriety be called upon to direct the performances of the duties by the other officers named in this Act as to direct the County Court judge in his duty. The Legislature has always jealously guarded the holding of elections, and possesses the power to punish for disobedience or misconduct in those appointed to conduct them. These powers have not been delegated or parted with, except by the Acts passed by the Legislature, and except as in so far as parted with are yet retained. They have not thought proper to make this Court a Court of Appeal in cases of neglect of duty of these officers. They have full power themselves to punish for disobedience, and have not delegated it to us. The jealousy with which they regard the interference of the courts is well laid down in the celebrated case of *Ashley* v. *White* in *Smith's Leading Cases*, vol. 1, 264.

The whole law in this case has been elaborately reviewed in the Court of Queen's Bench in Ontario, under the statute from which the statute of Manitoba was taken, and will be found in 44 U. C. Q. B. 131, in which it was held, that a *mandamus* would not lie to a County Court judge to proceed with a recount of votes under their Statute 41 Vic. c. 6, s. 14, Ontario Act, deciding that it was not within their jurisdiction so to do. And following that decision, I think the rule for *mandamus* must be refused.

As we have arrived at the conclusion that we have no jurisdiction to direct the recount, and our jurisdiction has been invoked by Mr. Roblin, I think the costs should be paid by him.

KILLAM, J.—I concur in the opinion that this rule should be discharged.

Notwithstanding the very able argument of Mr. Ewart, I am unable to accede to the view that the return of the returning officer should be taken as wholly void.

Under sub-section 2 of the 172nd section of the Election Act, the returning officer is to make his return within a certain time, "unless he has received a notice from the county judge of a recount of ballots, in which case he shall delay making his return until he receives a certificate from the county judge of the result of such recount, and upon receipt of such certificate the returning officer shall proceed to make his return."

The statute provides for a reference of the ballots to a judge for recount. He is evidently chosen for the purpose of exercising judicial functions; he is not to be a mere ministerial officer. If he gives to the returning officer his certificate in proper form of the result of a recount, it does not appear to me that the returning officer should be expected to inquire into the legality of the mode of exercise of his jurisdiction by the judge or whether it was fully exercised.

In *Rex.* v. *Bathurst*, 4 U. C. R. O. S. 340, it does appear as if the conviction was treated as wholly void, but the report is very brief and there is no statement of the points discussed or the grounds of the decision. On the other hand, in *Re Holland*, 37 U. C. Q. B. 214, the mandamus directed the Court of Quarter Sessions to reopen the complaint, and in *McKenna* v. *Powell*, 20 U. C. C. P. 394, a mandamus was issued to direct the Court of Quarter Sessions to set aside its order of acquittal the conviction or order being treated as only voidable.

In none of these cases, however, is there any question of the invalidity of anything done under the convictions or orders. It appears to me, upon the authorities and principles upon which my decision in *Beemer* v. *Inkster*, 3 Man. L. R. 534, was based that warrants issued under those convictions would have been sufficient to justify bailiffs in acting upon them, even if the convictions should be treated as wholly void.

The other cases cited do not appear to affect this view, but are principally authorities in favor of the view expressed by the court on the granting of the enlargement of this application that the rule might issue even after the lapse of the four days mentioned in the statute.

There is, however, another reason why it should not in my opinion be proper for this court to interfere, even if it could be considered that the return was illegal and void for want of authority in the county judge to grant the certificate when and as he did.

The writ of mandamus is not a writ of right, but a high prerogative writ; the granting of it is in a certain sense discretionary with the court. The discretion is, however, a judicial discretion; and the exercise of this prerogative of the sovereign being now vested in the judges of her courts, the power must be exercised

even less arbitrarily than an absolute sovereign might feel warranted in exercising it. In this respect, as in others, the court "has no more right to refuse to any of the subjects of the sovereign the redress which it is empowered to administer than to enforce against them powers not confided to it." (*Tapping on Mandamus*, p. 11).

Thus, where the case comes clearly within the principles upon which the court ordinarily grants the writ, it cannot be refused. But when cases arise which to a certain extent involve those same principles, but with which there are new circumstances connected, the court is often justified in considering those circumstances so to modify the cases as to render it improper to apply the principles which would be otherwise applicable. The court is then justified, exercising the prerogative not arbitrarily, but in a judicial spirit, in refusing the writ.

It is ordinarily true that the writ is to be granted to command the performance of a public duty, clearly imposed by statute, in all cases where there exists no legal remedy. In this instance, however, we are asked to interfere in a matter of a kind in which the court, until very lately did not attempt to interfere, and with which it has even lately attempted to interfere only under the circumstances and in the mode provided by the Controverted Elections Acts. No precedent for a direct interference of the court in matters connected with the return of a member of the Legislature, otherwise than under those Acts has been found. All contests respecting matters directly affecting such returns were decided, before those Acts, by the House whose members were being returned. The House of Commons of England has very jealously guarded its claim to the exclusive determination of such matters, and the courts have generally avoided any attempt to encroach upon the jurisdiction and privileges which that House has asserted in this respect. That the authority of the House of Assembly of this Province was originally the same in matters relating to the return of its members as that of the House of Commons of England has not been questioned.

If this court should now declare void the return in question, the House of Assembly might—and, indeed, it probably would—refuse to recognize the jurisdiction of the court. If the mandamus should issue, the returning officer might refuse to pay any attention to any other certificate which the county judge might

give, and it does not appear to me that over him at any rate this court could exercise jurisdiction. Attempts to do so would in the end, almost inevitably lead in some case to a conflict with the House.

I am not prepared to say that I would adopt so far the opinion of the Court of Queen's Bench of Ontario in *The Centre Wellington case*, as to hold that this court would in no case interfere to direct a county judge to make a recount of ballots under the Election Act. There would be very good ground for argument that the county judge is not made an election officer, as the returning officer, his deputies and clerks, but is named as a judicial officer to whom those interested have a right of reference for the purpose of having furnished to the returning officer the data from which to make his return. It may be that he should be considered as no more the officer of the House of Assembly or of the Provincial Legislature or Government for the purposes of the Election Act than for the purposes of exercising his ordinary jurisdiction as judge of the county courts, or of the surrogate court, constituted by the Local Legislature, or of any other duty laid upon him *virtute officii* by a Provincial Act.

I do, however, agree with the view of the learned Chief Justice of Ontario in *The Centre Wellington case*, that The Controverted Elections Act does not in any way operate to affect this application. So far from being a ground for acquiescence by the House of Assembly in any action of this Court based on the assumed total invalidity of the return in question, it would probably be the reverse, as the House might well say that by that Act it, as one branch of the legislature, had pointed out the cases and mode in which this court is to interfere with the elections and returns of its members.

It has been admitted by counsel opposing this application that the court could, upon petition under that Act, entertain the objections now raised to the validity of the return and even revise the recount of the ballots. Whether this is the correct view I would not like at present to decide, as it is not necessary and as no argument for the contrary view has been adduced. When parties find it for their interest to do so, it may be that arguments for the contrary opinion will be found.

But if the legislature has not, by the Controverted Elections Act, combined with the Election Act of 1886, given to this

Court authority to deal with these matters upon petition, then the House of Assembly must itself retain the authority, which apart from the former of these Acts it would have. It may be an unsatisfactory remedy, but in view of its retention by similar legislative bodies, until within a comparatively short period, as the proper remedy, it does not appear that this court would be justified in characterizing it as so far an inefficient remedy as to warrant the court in assuming a jurisdiction which the Courts of England never assumed when the House of Commons itself asserted an exclusive jurisdiction in such matters.

The existence of a specific legal remedy is of itself generally a sufficient reason for refusing to interfere by mandamus, (*Tapping* p. 18).

Cases, such as *The Queen* v. *The Vestrymen of St. Pancras*, 11 A. & E. 15, *Rex.* v. *Leeds*, 11 A. & E. 512, in which the court has considered elections void and has granted writs of mandamus to compel the taking of steps towards new elections, instead of making the parties proceed by *quo warranto* have been thus decided on the ground that there was really no one in office to remove by *quo warranto* and that such a writ was really useless. Here no objection could be made to a proceeding under the Controverted Elections Act, or by the House of Assembly itself, whichever would be proper, on the ground that the assumed return was really, in law, no return at all. Upon such proceeding the duly elected member could be declared elected, or a new election ordered, as might be found proper.

In my opinion therefore, any attempt to assume the authority which the court is asked to assume would be both unprecedented and unwise, unprecedented in view of the subject matter; and unwise as tending to bring this court into conflict with the House of Assembly, which might be found as jealous of its privileges in this respect as was the House of Commons before it transferred any such jurisdiction to the courts, even though the opposition to the action of the court should be based on no higher ground than an objection to the mode of procedure.

The rule should be discharged with costs.

DUBUC, J., concurred.

*Rule discharged.*

## *Re* SHOAL LAKE ELECTION.

*Election Petition without prayer—Amendment.*

An election petition set forth certain corrupt practices and concluded as follows:—"Your petitioner alleges that by reason of one or more of such acts or practices the election of said C. E. H. was void."

*Held*, 1. That these words did not constitute a prayer for relief.

2. That there could be no valid petition without a prayer.

3. That the petition could not be amended by adding a prayer; and it was dismissed without costs.

*J. B. McArthur, Q. C.*, for petitioner.

*J. A. M. Aikins, Q. C., W. H. Culver*, and *G. G. Mills*, for respondent.

(*14th March, 1887.*)

DUBUC, J.—After the preliminary objections to the petition herein had been filed and served, a summons was taken out by the respondent to have them heard and determined.

One of the said objections is that the petition has no prayer.

The said petition goes on to allege certain acts and practices committed by the respondent against the provisions of the Election Act, and concludes with the 14th paragraph, which is as follows:

"Your petitioner alleges that, by reason of one or more of such acts or practices, the election of said Charles Edward Hamilton was void."

Then follows the signature of the petitioner, *T. Renwick*.

On the return of the summons, it was argued by counsel for the respondent that the document purporting to be a petition was not a real petition, as it contains no prayer and asks for no relief.

The counsel for the petitioner, who showed cause, contended that the last paragraph of the petition showed the relief wanted and was sufficient. He claimed that the petition complied with the requirements of section 5 and section 18 of the Manitoba

Controverted Election Act, which sections state what the petition should complain of, and there is no mention of a prayer required.

Let us consider first, what petition is required under the Act and the rules of Court made in pursuance thereof; and second, whether the petition filed herein is one within the meaning of the Statute.

Section 5 says that an "election petition" is a petition complaining of an undue return, or undue election of a member, &c.; and section 18 states that the petition must in all cases complain of the undue election or return of a member, &c.

Section 17 enacts that the petition may be in any prescribed form; but if, or in so far as no form is prescribed, it need not be in any particular form.

Section 12 gives to the Judges of this Court power to make rules to regulate the practice and procedure with respect to election petitions, and section 13 says the rules so made and not inconsistent with the Act shall, until revoked, have the same force as the provisions thereof.

In pursuance of the said sections of the Statute, rules were made by the Judges of this Court. Rule 4 says that "the petition shall conclude with a prayer"; and rule 5 gives a prescribed form for the petition and concludes with a prayer as follows:—"Wherefore your petitioner prays that it may be determined that the said A. B. was not duly elected or returned, and that the election was void, &c.," or as the case may be.

So that there is a prescribed form as contemplated by the Statute, and under said section 17, the petition *may* be in that form, which means, I suppose, that any petition made in that form, or in a form to the like effect, would be sufficient. It does not make it imperative that such exact form should be absolutely followed; but it is a direction that whatever else or whatever more might be included in the petition, this simple form or a similar one with material facts properly stated in it, should be considered sufficient to satisfy the Statute.

But as section 17 of the Act contemplates some given form of petition to be prescribed, and as the rules of Court which, under section 13, having the same force as the provisions of the Statute, have prescribed a particular form, which contains a

prayer; and as rule 4 specially provides that the petition shall conclude with a prayer, I have to hold that the petition must contain a prayer, and that a petition without a prayer is not a petition within the meaning of the Controverted Election Act.

Now, apart from the Statute, what is a petition?

*Bouvier*, in his *Law Dictionary*, defines a petition, "An instrument in writing containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong, &c."

*Wharton*, in the *Law Lexicon*, speaking of petitions to be presented to Parliament, after giving the heading, says the statement of grievances must then follow and the whole must conclude with a specific prayer. He says:—"A petition in chancery is a written document setting forth a series of facts and containing a prayer for the direction or order of the Judge to whom it is addressed."

The word *petition* itself, from the Latin *petere, peto*, to ask, to beg, to demand, means a prayer. And if the whole petition was composed only of a prayer, if the petition had simply said:—"Your petitioner prays that, owing to the acts of corrupt practices committed by A. B., the member returned, his said election may be declared void," it would certainly be a real petition, which would empower the Court to try the issue raised. But a mere allegation or statement of various facts, however damaging to the party charged, without a prayer or demand for relief, cannot make it a petition.

Now, is the petition filed herein one within the meaning of the Statute?

In support of his contention that it is sufficient, Mr. McArthur quoted the *Drogheda Election Case*, 1 O'M. & H. 252, where the allegations of a petition are given without any prayer. But the reading of the case shows conclusively that the questions to be determined in that case were the substantive facts alleged in the petition, and not the prayer. The reporter cited only so much of the petition as he found necessary to show what was adjudicated upon by the Court, and he omitted the rest. The heading of the petition, the Court in which it was presented, the style of the cause, the name of the petitioner, were all omitted from the report, as well as the prayer. So the fact that, after

the allegation quoted in the report, no prayer appears, does not show that said petition had no prayer. No authority has been cited by the counsel for the petitioner, and I have been unable to find any, either in an election or in any other matter before a court, where, in a contested case, a petition without a prayer has been held a good petition. To illustrate that, Mr. Aikins cited the *Westminster Election Case*, reported also in 1 O'M. & H. 89, without any mention of a prayer, while the report of the same case in 19 L. T. N. S. 565, gives the petition in full, and it has a prayer in regular form.

In the petition filed herein, it is evident that there is no prayer. The 14th paragraph claimed to be equivalent to a prayer, is nothing more than an allegation or statement of facts. It commences by the words, "your petitioner alleges," and states that by reason of certain acts of the respondent, the election was void. If it had added that he, the petitioner, asked the Court to so declare it, or any other expression or words implying a prayer or demand for relief, it might have been held sufficient. But it contains none of the elements by which a prayer might even be implied. It only alleges and states certain facts; and it is not for the Court, without being so asked, to find out what conclusions might be drawn, or what result might be derived from such facts, whether the petitioner wants any relief, and what particular relief he may desire, when he has not chosen, or he has omitted to ask for any.

It was also contended that the petition might be amended by adding a prayer, so as to give it the effect intended.

Rule 47 says that no proceedings under the Manitoba Controverted Election Act shall be defeated by any formal objections.

But the deficiency in this petition is not a mere matter of form. It has such a substantive omission that without a prayer the alleged petition is not a real petition.

Under an exactly similar rule in Ontario, the Court held in the *Prescott Election Case*, 9 Ont. Pr. R. 481, that the filing of an election petition in the local Registrar's office, L'Orignal, was not a presentation of the petition within the requirements of the statute, which requires the filing to be at the head office, and that no amendment could be made to validate such petition. Hagarty, C. J., said, "I feel I have no power whatever to make any such

order. If there is no petition legally presented, there is nothing on which any order to amend can operate."

In *Maude* v. *Lowley*, L. R. 9 C. P. 165, the petition, filed against the municipal election, complained of some irregularities which had taken place in the north ward. The petitioner, after the expiration of the 21 days limited for the filing of the petition, sought to amend the petition by adding, "and the other wards." It was held that the Court, (or a judge) had no power to allow the proposed amendment.

In *Aldridge* v. *Hurst*, L. R. 1 C. P. D. 410, the Court seems to have taken a more lenient view towards amendment in the body of the petition, and intimated that amendments might be allowed by striking out, or adding, some allegations; but it refused to amend the petition by striking out, after the time limited for presenting it, that part of the prayer which claims the seat for the petitioner.

With this view, what would the Court have said, if, as in the present case, the proposed amendment had been to add a prayer in full to a petition which had none whatever.

Under these authorities, and for the reasons above given, I must hold that I have not the power to make the amendment asked here, because, by so doing, the document filed herein on the 17th of January last, not being a petition within the meaning of the Act, would become a real petition. It would in effect be to allow a petition to be presented more than fifty days after the time limited by the statute for presenting petitions has expired.

The summons should be made absolute, and the petition filed herein dismissed with costs.

*Petition dismissed.*

## *Re* LORNE ELECTION.

*Election petition—True copy.*

The following variances between the original petition and the copy filed; "person" instead of "persons"; "places" instead of "place"; "John A. McDonell" instead of "John A. McDonald"; "cause" instead of "caused."

*Held*, Immaterial.

The condition of the recognizance was as follows:—"The condition of this recognizance is that John Hall shall *and* well and truly pay,"

*Held*, Sufficient.

In the certificate at the end of the recognizance one of the sureties was referred to as "the above named W. A. Baldwin." It should have been "William Augustus Baldwin."

*Held*, Sufficient.

*T. S. Kennedy*, for petitioner.

*C. P. Wilson*, for respondent.

[*17th March, 1887.*]

DUBUC, J.—This is a summons calling upon the petitioner to show cause why the preliminary objections to the petition filed herein should not be allowed and the petition dismissed.

The objection taken and argued on the return of the summons was that the copy of the petition served upon the respondent was not a true copy of the petition filed in Court, and that there were some variances in the recognizance.

The counsel for the respondent pointed out the following variances in the copy of the petition and in the recognizance:

1. In paragraph I, 3rd line, the original petition has the word "persons," while in the copy served the corresponding word is "person."

2. In paragraph J, 9th line, the word "place" is found in the original, while in the copy the corresponding word is "places."

3. In paragraph K, 14th line, the name of the member returned is referred to as "John A. McDonald," instead of "John A. McDonell."

4. In paragraph Q, 9th line, the word "caused" appears in the original petition, while in the copy the word "cause" is found.

5. The recognizance has the following sentence:—"The condition of this recognizance is that John Hall *shall and well and truly pay*," which is alleged to be incorrect and without meaning.

6. In the certificate at the end of the recognizance, one of the sureties is referred to as "the above named W. A. Baldwin," while it should be "William Augustus Baldwin."

Mr. Wilson, for the respondent, contended that these variances are fatal; and he cited *Brassard* v. *Langevin*, 2 Sup. C. R. 319, and *re James Penrose*, a petition against his election as Alderman for Ward 3, in the City of Winnipeg, decided by the Chief Justice of this Court.

In *Brassard* v. *Langevin*, the petition had been dismissed by a judge of the Superior Court of Quebec, on the preliminary objections, on the ground that no certified copy of the petition had been served on the respondent. On an appeal to the Supreme Court, it was held that the judgment of the Court below on the preliminary objections was final, and that an appeal would lie only from the decision of a judge who has tried the merits of an election petition. But the report does not show what the variance was, whether there was one word, or one line, or one page omitted in the copy, or whether the sense was materially altered by the variance. So that case cannot be an authority in this matter.

As to the *Penrose Election Case*, it appears that in the copy served, a full line had been left out. The following sentence,—"Prior to the said election, your petitioner had been duly nominated," was made in the copy to read:—"Prior to the said election, your———ated as a candidate." It is easy to see that by the said omission the sense was notably altered.

In looking for English authorities, I found the case of *Hodgkinson* v. *Hodgkinson*, 2 Dowl. 535, where, in a writ of *capias*, the word "Middesex" was written instead of "Middlesex," the letter *l* being omitted in the copy served, and the variance was held fatal.

This case, which followed *Smith* v. *Crump*, 1 Dowl. 519, was decided in T. T. in 1834, and in same Term we find two similar

decisions: *Street* v. *Carter*, 2 Dowl. 671, where the words "Sheriff of Warwickshire" were omitted; and *Barker* v. *Weedon*, 2 Dowl. 707, where "Sheriff of London" was written instead of "Sheriffs of London."

But it seems that the Courts were soon inclined to relax from such strictness in regard to variances between copy and original, even in writs of capias, for, in the following Term of same year, M. T., 1834, in *Forbes* v. *Mason*, 3 Dowl. 104, the word "the" and the word "by" were left out in different parts of the same sentence in a writ of capias; and although it was argued that the form of the writ was one given in the schedule of an Act of Parliament, the Court held that the omissions were immaterial, and refused to discharge the defendant.

In same M. T. 1834, the case of *Hodgkinson* v. *Hodgkinson*, was questioned and virtually overruled in *Colston* v. *Berens*, 3 Dowl. 253. In that case the word "Middesex" had also been written instead of "Middlesex," and Baron Bolland, on the authority of *Hodgkinson* v. *Hodgkinson*, having ordered the discharge of the defendant, an application was made to the Court to amend the writ. Baron Parke said the writ could not be amended. But, as he stated, the mistake could not mislead, and he suggested to the counsel for the plaintiff to take a rule *nisi* for setting aside the order of Baron Bolland. The rule was granted, Barons Bolland, Alderson and Guerney concurring. On the return of said rule, no cause was shown, and it was made absolute.

In *Sutton* v. *Burgess*, 3 Dowl. 489, decided in 1835, the following sentence in a writ of capias, "if *she* shall be found in your bailiwick," was found in the copy to read, "if *se* shall be found, &c." It was held that the sense was not altered, and the objection was overruled.

In *Hannah* v. *Wyman*, 3 Dowl. 673, the word "plaintiff" was used in the endorsement of the writ instead of the plaintiff's name, as prescribed in the form. This was held immaterial.

In *McDonald* v. *Mortlock*, 2 D. & L. 963, decided ten years later, the defendant was described in the original writ of capias as "Mortlock," and in the copy served as "Mortlake," An application to have the defendant discharged was refused, and

Coleridge, J. said: "This really seems to me to be carrying the doctrine of variance rather too far."

But the above decisions were before the C. L. P. Act, 1852, and in cases of capias, where the liberty of the subject was in question. The procedure was then very strict and technical in its forms. Since that time, the courts, while still holding to the forms adopted by rules of practice or prescribed by statute, have aimed to regard with less favor such technical strictness, in order to determine the real matters of dispute between the parties. And I have been unable to find cases since the C. L. P. Act, 1852, where proceedings were defeated for similar technicalities.

Let us now consider the variances on which this application is based. The first, second and fourth variances above mentioned, being the mere omission or addition of a letter in certain words, must, under *Forbes* v. *Maston*, *Colston* v. *Berens*, and *Sutton* v. *Burgess*, be held absolutely immaterial, and cannot be entertained.

As to the third one, being "McDonald" for "McDonell," I think that, to give effect to it, would, in the words of Coleridge J., in *McDonald* v. *Mortlock*, be carrying the doctrine of variance rather too far. Besides, there is also, as to that name, a variance in the preliminary objections themselves. The member returned is referred to in said objections as "McDonnell," and he signed his name as "McDonell," with only one *n*.

The same may be said of the sixth variance, "W. A. Baldwin" being written in the certificate of the recognizance instead of "William Augustus Baldwin." Here there is no real variance, no difference in the name or manner of spelling it, but merely an abbreviation, which abbreviation is the real signature of the person referred to. The other two sureties had signed their name in full: Charles Holland and Andrew Colquhoun, which, for aught we know, may be their ordinary signatures. The other surety, Baldwin, signed also his ordinary and genuine signature, with only the initials of his christian names, and the certificate, coming immediately after the said signatures, was as follows:—"Taken and acknowledged before me by the above named W. A. Baldwin, Charles Holland, and Andrew Colquhoun, &c." I do not think this can be considered as a sufficiently

material variance, if a variance at all, to vitiate the proceeding, and to justify me in declaring it void and of no effect.

The other variance to be considered is the fifth one, where the words "shall and well and truly pay," are found in the recognizance, while the form given in Rule 8, of the Rules made in regard to petitions under the Manitoba Controverted Elections Act, says:—"Shall well and truly pay." The only difference is in the word "and" which appears between the word "shall" and the word "well," in the recognizance. Can the interpolation of the word "and" there be said to materially change or alter the sense, or to so vitiate the document that it could not be enforced against the sureties on that account? Does it, as contended by the counsel for the respondent, render the sense meaningless? I do not think so. It is certainly useless, but it does not render the phrase senseless, nor does it really alter the sense. It may be held to be surplusage, or as reduntantly employed. But although very seldom used in that manner, I do not believe it could be held absolutely bad English, as I find an example in the Imperial Dictionary where it was similarly employed in the following expression; "Thrones and civil and divine."

In conclusion, I think I may safely venture to say that these different variances do not alter the sense, cannot be considered material, and, being only formal, are certainly covered by Rule 47, which says that no proceeding under the Manitoba Controverted Elections Act shall be defeated by any formal objection.

The objections raised on the argument should be overruled.

*Objections overruled.*

## *Re* NORTH DUFFERIN ELECTION.

*Preliminary objections.—Recognizance.—Justice of the Peace.—Amendment of security.*

Justices of the Peace have no authority or jurisdiction save that of the old "Conservators of the Peace," and such as have been given to them by statute. They have no power to take a recognizance upon an election petition.

A person voluntarily entering into a recognizance is not estopped from denying its validity.

The practice in England with reference to security for costs has not been introduced into Manitoba.

If the security upon an election petition be imperfect there is no power to permit an amendment of it or the substitution of other security.

Upon a preliminary objection to a petition upon the ground that the recognizance was taken before a Justice of the Peace, the recognizance having been held bad the petition was dismissed with costs.

*J. B. McArthur, Q.C., S. C. Biggs, Q.C.* and *C. P. Wilson*, for petitioner.

*J. A. M. Aikins, Q.C., W. H. Culver* and *J. H. D. Munson*, for respondent.

[*2nd February, 1887.*]

TAYLOR, J.—In this matter the respondent has taken twenty preliminary objections, one of which, the seventh, has been argued. It is as follows:—Because the recognizance filed at the time of the filing of the petition was not taken before, or acknowledged before, a person authorized by law to have the same taken or acknowledged before him. The person before whom it was acknowledged, was a justice of the peace. Neither the Manitoba Controverted Elections Act, nor the Rules of Court made in pursuance of that Act, specify before whom a recognizance may be taken. Counsel for the respondent say it was not necessary to do so, as it could be taken before a judge, or before a commissioner for taking affidavits in the Court of Queen's Bench.

Every judge may take a recognizance as well out of term as in term, *Edgcomb* v. *Dee*, Vaugh. 102; *Hall* v. *Winckfield*, Hob.

195. The Con. Stat. Man. c. 35, s. 7, provides that, "The commissioners heretofore or hereafter appointed to take and receive affidavits and affirmations in the courts of the Province, shall be commissioners to take and receive all and every recognizance and recognizances which any person or persons may at any time desire to acknowledge or make in any action or suit depending in either of the said courts in such manner and form as is according to law." Then section 11, of The Manitoba Controverted Elections Act, says, "The various officers of the Court of Queen's Bench shall, with reference to all election petitions, have the same powers and be subject to the same duties and obligations, as if such petition were an ordinary proceeding within the jurisdiction of the Court of Queen's Bench." Commissioners for taking affidavits are officers of the court, Arch. Pr. 7: *Frost* v. *Hayward*, 10 M. & W. 673. It is, however, not necessary to consider, or to decide, what the powers of a judge, or of commissioners are, for if the recognizance here, taken before a justice of the peace, has been improperly taken, I do not see that the statute gives me any power to allow an amendment, or the substitution of another security in its place.

To support the recognizance, counsel for the petitioner cites the *Hamilton Case*, 10 C. L. J. 170. That case arose on a Dominion election petition, and was decided while the 36 Vic. c. 28, D., was in force. No question as to the power of a justice of the peace to take the recognizance was, or could be, raised in that case, because Rule 23, of the Rules of Court, made in pursuance of that Act, provided that a recognizance might be acknowledged before one of the election judges, or the clerk of the Election Court, or before a justice of the peace in the country. The question discussed and decided was, the power of a county justice of the peace to act within the limits of a city for which a police magistrate had been appointed, in consequence of a section in the Municipal Act which limited the powers of justices of the peace in such a case. It was held, that the taking of the recognizance was not such an acting as was prohibited by that section.

Authorities were referred to in that case, to show that in some instances the acts of justices of the peace, done beyond the territorial limits within which they have jurisdiction, may be valid. Against these *Reg.* v. *Atkinson*, 17 U. C. C. P. 295, might be cited.

There, on an indictment for perjury in an affidavit taken before a justice of the peace under an Act relating to Crown Lands, it was on the argument of a case reserved, urged for the prisoner, that no place was mentioned in the jurat showing where the affidavit was sworn, and it did not appear that it was sworn within the county of Grey, the county for which the justice of the peace had a commission as magistrate. For the Crown it was not only contended, that the evidence showed it to have been sworn in that county, but it was suggested, that the words of the Act being, "any justice of the peace," this gave authority for a justice of the peace to administer the oath anywhere in the province. But Wilson, J., who delivered the judgment of the Court, after holding that the administering the oath was a ministerial act, in dealing with the argument for the Crown, as to the wording of the statute, said, "It only authorized any justice of the peace to administer the oath in the place in which he was a justice of the peace. The power is not conferred on the man personally, but on him where he holds his office, and there only can he administer the oath."

Even if the decision in the *Hamilton Case*, and the authorities there referred to, should be considered as supporting the proposition that certain acts which a justice of the peace may lawfully do within the territorial limits of his jurisdiction, will, under some circumstances, be held valid, even when done beyond these territorial limits, they cannot be considered as sustaining the proposition, that under similar circumstances, acts which he has no lawful authority at all to do, should be held valid when done by him, whether within or without the territorial limits within which he has jurisdiction.

*Viner's Abr.* Vol. 18, p. 165, is also cited, where it is said, that, "Executors are not obliged to enter into recognizances upon writs of error brought by them upon judgments obtained against them," but, "if a man will voluntarily enter into such a recognizance it is good at common law." On looking at the case cited in support of that statement, *Johnson* v. *Laserre*, 2 Ld. Ray. 1459, it will be seen, that what the court was there dealing with was not, whether, a man having entered into a recognizance before a person who had no authority to take it, was bound by it, but whether, a man having entered into a recognizance properly taken, for the due prosecution of a writ of error, could after he failed in the prosecution

of his writ, escape liability on the ground that he might have prosecuted it without entering into any recognizance at all. That a person voluntarily entering into a recognizance, is not estopped from disputing its validity, seems clearly settled by *McFarlane* v. *Allan*, 6 U. C. C. P. 496. There, the defendants, as sureties for a debtor, gave a recognizance of bail to the limits, and upon the debtor absconding, were proceeded against. The defence set up was, that the recognizance had been taken before a person who had no power to take it, and that defence they were held entitled to raise. Draper, C.J., said, he could not subscribe to the argument, that the defendants by going before Joseph Allan, and treating him as a commissioner, were estopped from afterwards denying his authority. See also *Carter* v. *Sullivan*, 4 U. C. C. P. 298, in which a similar defence was set up.

The question then is, has a justice of the peace any authority to take such a recognizance as the one now objected to? Upon the argument, a good deal was said on behalf of the petitioner, as to the powers of a justice of the peace at common law, but no authorities were referred to showing the existence of these powers, or their extent.

I have examined a great deal of old law respecting the powers of justices of the peace, and now state the conclusions which I draw from my reading. The subject is very fully dealt with in the second volume of *Blackstone's Commentaries*, the edition by Christian.

By the common law, there were peculiar officers appointed for the maintenance of the peace, *custodes* or *conservatores pacis*. Some of these officers, were conservators of the peace *virtute officii*. Of these the Sovereign was the chief, and so in our indictments at the present day, a crime is alleged to be "against the peace of our Sovereign Lady the Queen." Other conservators of the peace *virtute officii*, were the lord chancellor, lord high steward, lord high constable, and all the justices of the Court of King's Bench. All these had jurisdiction throughout the whole kingdom. The justices of the other courts, were conservators of the peace only in their own courts. Those who, without any office, were simply and merely conservators of the peace, either claimed the jurisdiction by prescription, or were bound to exercise it by the tenure of their lands, or were chosen by the freeholders in full county court before the sheriff. The powers of those officers who were

conservators of the peace *virtute officii*, continue, it is said, to the present day, intact. The conservators of the peace, simply and merely, have been superseded by justices of the peace. The latter are the creation of the 1 Edw. 3 c. 16, by which, parliament ordained, that, for the better maintaining and keeping of the peace in every county, good men and lawful, no maintainers of evil, or barretors in the county, should be assigned to keep the peace. The assignment of these men was construed to be by the King's commission, see 4 Edw. 3 c. 2; 18 Edw. 3 st. 2 c. 2. It was, however, by the 34 Edw. 3 c. 1. that they first received the style of justices. The power, office, and duty of a justice of the peace, depend, Blackstone says, upon his commission, which gives him all the power of the ancient conservators at the common law, in suppressing riots, and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals, and upon the several statutes which have created objects of his jurisdiction. So far as I can gather from my reading, beyond the powers of the old conservators of the peace, which have just been mentioned, justices of the peace have no authority or jurisdiction except what is given to them by some statute. And the reason for this, plainly is, that they had their origin only in the first year of Edward Third, which is within the time of memory. So in *Reg.* v. *Yarrington*, 1 Salk. 406, the court held, that no indictment lay before justices of the peace for forgery, "for their power is created by Act of Parliament within time of memory, and they have no other authority than what is thereby given them."

In *Burn's Justice*, Vol. 5, (25th Ed.), p. 6, it is said, "Where any statute giveth them, (*i.e.* justices of the peace), power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause, they may take a recognizance. Yea, wheresoever they have authority given them to cause a man to do a thing, there it seemeth they have, in congruity, power given to bind the party by recognizance to do it." Then it is added, quoting from *Dalton's Country Justice*, "But he can take no recognizance but only of such matters as concern his office, and if he doth it seemeth to be void."

That express authority to take a recognizance is necessary, is evident from *Chamberlain & Thorp's Case*, Leon. 130, in which

a recognizance was sought to be upheld as having been taken before the Lord Mayor of London according to established custom, but Gaudy, J., said, "None shall take a recognizance but a judge of record, and a recognizance cannot be taken by prescription." Even the power to take the recognizance of witnesses to appear and give evidence was first conferred by the 1 & 2 P. & M. c. 13 and 2 & 3 P. & M. c. 10. Statutes which enact that recognizances may be taken before certain persons, seem all to go further than merely providing that they may be taken before them, and in terms confer express authority upon the persons named, to take them. Thus, 4 & 5 W. & M. c. 18, which forbade the clerk of the Crown from exhibiting certain informations in the Court of King's Bench, and the issuing of process thereon, before he had taken, or had delivered to him, a recognizance for the effectual prosecution of the information, then proceeds, "which recognizance the clerk of the Crown, and also every justice of the peace of any county, city, franchise, or town corporate (where the cause of any such information shall arise), are hereby empowered to take." The 28 Geo. 3 c. 52, the first statute requiring security to be given on an election petition, provides in the 6th section, "That the said recognizances shall be entered into before the Speaker of the House of Commons, who is hereby authorized and empowered to take the same." The 7th section provides, that where the parties who are to enter into the recognizance, and their sureties, reside at a greater distance from London than 40 miles, they may, "enter into such recognizance before any of His Majesty's justices of the peace, and His Majesty's justices of the peace, or any of them, is and are hereby authorized and empowered to take the same." All the subsequent statutes in England, bearing upon this subject, will be found to contain similar provisions.

The 4 Geo. 4 c. 4, the Act of the Legislature of Upper Canada, to regulate the trial of Controverted Elections, required a recognizance to be entered into before the Speaker of the House of Assembly, "who is hereby authorized and empowered to take the same." Then the 14 & 15 Vic. c. 1, the first Act as to the trial of election petitions passed after the union of Upper and Lower Canada, provided in section 14, for every recognizance being entered into before the speaker or a justice of the peace, "and the said speaker, and also every justice of the peace, is hereby

empowered to take the same." So Con. Stat. Can. c. 9 s. 14, speaking of the recognizance being taken before the speaker or a justice of the peace, says, "and the said speaker, and every justice of the peace, may take the same."

The Rules of Court being silent on this subject, under The Manitoba Controverted Elections Act, by section 15, the principles practice and rules on which election petitions touching the election of members of the House of Commons are dealt with, are to be observed, but no Rules touching such elections have been made in this Province. That being so, the Dominion Act relating to controverted elections, must be resorted to, to find what is, in the absence of rules, to govern the practice. The 37 Vic. c. 10 D., is the act, and the 45th section provides, that until rules are made, "the principles, practice and rules on which election petitions touching the election of members of the House of Commons in England, are at the time of the passing of this Act dealt with, shall be observed so far as consistently with this Act they may be observed by the courts and the judges thereof." By that Act security can be given only by deposit, so any English rules which deal with recognizances, and their execution, are inapplicable, and so cannot be observed by the courts and judges, consistently with the Dominion Act. These need not therefore be considered.

Holding as I do, that a justice of the peace has, in addition to the powers of the old conservators of the peace, which in the matter of taking security, do not seem to have extended beyond taking sureties of the peace, and bail for the appearance of criminals, only such powers as are conferred upon him by some statute, and there being no statute which empowers him to take a recognizance given as security under The Manitoba Controverted Elections Act, I must hold that the recognizance now objected to, has not been taken, or acknowledged, before a person authorized or empowered to take the same, and is therefore void.

*Petition dismissed with costs.*

## *Re* EMERSON ELECTION.

*Election petition.—Recognizance taken before a justice of the peace.—Bond without seals.—Amendment.*

An instrument in the form of a recognizance not under seal, taken before a justice of the peace, was filed as security for costs,

*Held*, 1. Irregular as a recognizance, (*Re North Dufferin Election*, 4 Man. L. R. 280 followed); and invalid as a bond for want of seals.

2. That the court had no power to permit the substitution of other security.

*J. B. McArthur, Q.C.*, and *S. C. Biggs, Q.C.*, for petitioner.

*J. A. M. Aikins, Q.C.*, and *W. H. Culver*, for respondent.

(*28th February, 1887.*)

KILLAM, J. — The petition is filed under The Manitoba Controverted Elections Act, contesting the return of the respondent as the member of the Legislative Assembly of the Province for the Electoral Division of Emerson. A number of preliminary objections to the hearing of the petition have been filed, of which the only ones of importance at present are objections to the validity of the instrument filed as the recognizance or bond required by the 23rd and 24th sections of the statute.

The instrument is in the form given by rule No. 8, of the rules regulating the procedure under the Act. It purports to bear the signatures of the sureties, but not their seals, and to have been acknowledged before "Robert Leslie Vickers, Justice of the Peace." The objections are, in effect, that the instrument is void as a recognizance because not acknowledged before any one having authority to take a recognizance in such a case, and that it is not a bond because of not being executed under seal.

The first point was determined by my brother Taylor in the *North Dufferin Case*, under the authority of which the instrument must be considered to have no effect as a recognizance. Upon the second point I expressed my opinion upon the argument, and I have seen no reason to change it.

By section 23 of the Act, "At the time of the presentation of the petition, the petitioner shall give security for the payment of all costs, charges and expenses that may become payable by him." By section 24, "The security shall be given by recognizance or by bond in the sum," &c.

By Rule No. 8 of the rules of procedure under the Act, "The recognizance or bond shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained, and may be as follows."—Then is given a form, at the end of which are the words, "Signed (*Signature of Securities*). Taken and acknowledged by the above named, (names of sureties), on the day of at before me."

The authority to make rules to regulate the practice and procedure is given by the 12th section of the Act, and by the 13th section, "Any rule made in virtue of the next preceding section and not inconsistent with this Act, shall be deemed to be within the powers conferred by the provisions of this Act and shall, until revoked, have the same force as the provisions hereof."

It is argued for the petitioners that the effect of the statute and the rule is to make the instrument a statutory bond, without its being in fact sealed. It is not pretended that the instrument ever was actually sealed.

In *Blackstone's Commentaries*, Vol. 2 p. 340, a bond is defined as "a deed whereby the obligor obliges himself, his heirs, executors and administrators to pay a certain sum of money to another at a day appointed." In *Bouvier's Law Dictionary*, this definition is adopted *verbatim*. In *Wharton's Law Lexicon*, the definition is "a written acknowledgment or binding of a debt under seal." In *Brown's Law Dictionary*, it is "a contract by specialty to pay a certain sum of money."

In the use then of the word "bond," both the statute and the rule contemplate a deed, not a simple contract—a sealed instrument, not one merely signed by the sureties. Then, when the rule says that the "recognizance or bond" may be as follows, giving a form, it is implied that the instrument is to be either a recognizance or a bond within the ordinary meaning of those words. The rule does not, except by the use of the words "recognizance" and "bond," attempt to point out the method

of acknowledgment or execution or the ceremonies attendant thereon. It would require a much more clear enactment, either in the statute or in the rule, to make a merely signed instrument have the legal effect of a specialty.

There is then no valid instrument of security such as the statute requires.

It has also been very strongly argued for the petitioners that they should now be allowed, in some way, by filing a new instrument or otherwise, to remedy the defect in the security, and it is with the greatest regret that I find myself unable so to construe the statute as to derive from it authority for such a course.

The petitioner's counsel relies principally on the 7th, 8th, 9th and 11th sections of the Act, as showing the authority for such a course.

By section 7, "The Court of Queen's Bench of this Province shall have jurisdiction over election petitions, and over all proceedings to be had in relation thereto, subject, nevertheless, to the provisions of this Act." By section 8 the subject matter is spoken of as a "cause of action." By section 9, "In all proceedings had under the authority of this Act, the judge in term or vacation in chambers, shall have the same powers, jurisdiction and authority as the Court of Queen's Bench sitting in term, subject always to the provisions of this Act." By section 11, "The various officers of the Court of Queen's Bench shall, with reference to all election petitions, have the same powers and be subject to the same duties and obligations as if such petition were an ordinary proceeding within the jurisdiction of the Court of Queen's Bench."

Now, in the first place it is to be noticed that the provisions of the 23rd and 24th sections of the Act are distinctly imperative. The time for giving the security is fixed as the same time as that of the presentation of the petition. The presentation of the petition is to be made by delivering it at the office of the prothonotary. There is no qualification whatever in these provisions, no authority expressed in those sections for altering the time or mode of giving security, no words in those sections themselves from which such authority can in any way be implied.

Then, it is to be observed that in the 7th and 9th sections the powers, jurisdiction and authority given are expressly given

"subject to the provisions of this Act." By the 12th and 13th sections, the power to make rules of procedure is clearly confined to such as are not inconsistent with the Act.

In *Maxwell on Statutes*, p. 456, it is laid down that enactments regulating the procedure in the courts seem usually to be imperative and not merely directory.

A good example of this is to be found in the case of *Re Larocque*, 3 Man. L.R. 274, where our court held that the procedure provided by the statute relating to partition of lands must be followed, and that Equity General Order No. 496, authorizing a different mode of procedure than that prescribed by the statute was *ultra vires*.

The imperative nature of such provisions as to procedure is the more clear in a case like the present, where the jurisdiction of the court is wholly derived from the statute, which at the same time prescribes a certain procedure.

The Controverted Elections Acts in force in Canada and the different Provinces, under which election petitions are now tried and determined in the courts, were plainly modeled on the English Act, 31 & 32 Vic. c. 125. Not only the principle of the change of forum, but also the various details are largely taken from that Act. By the English Act, the security was to be given by recognizance or by a deposit of money at the time of the presentation of the petition or within three days thereafter; the respondent was given five days from service of the petition to object to the recognizance on the ground that the sureties or any of them were insufficient, or that a surety was dead, or that he could not be found or ascertained from want of a sufficient description of him in the recognizance, or that a person named in the recognizance had not duly acknowledged the same. The Act then further provided that if an objection to the security should be allowed it should be lawful for the petitioner within a prescribed time, not exceeding five days, to remove such objection by a deposit of such a sum as the court or officer having cognizance of the matter should deem sufficient.

In *Pease* v. *Norwood*, L. R. 4 C. P. 249, objection was made to the recognizance on the ground that the sureties were also petitioners, and, this objection being allowed, the question was very fully considered and discussed whether this defect could be

remedied. From that report it appears that under the Acts previously in force with reference to the trial of such petitions before Parliamentary Committees, if upon examination by the proper officer the recognizance was found either invalid or insufficient for any cause whatever, the defect could not be remedied and the court seemed of the opinion that unless the objection could be brought within one of the classes specifically mentioned by the Act there was no way of avoiding it. The conclusion come to was that the objection was really one to the sufficiency of the sureties within the meaning of the Act, and on that ground the petitioners were allowed to supply the defect by a deposit of money. While this case is, then, not an express decision that an enlargement of the time for giving the security or an opportunity to supply fresh security in case of a defect cannot be allowed unless distinctly provided for in the statute, yet the reasoning of the learned judges both upon the statute itself and from the law existing before that statute appears to show conclusively that none of the powers of amendment which the court exercises in ordinary suits can be invoked to supply any defect in the security. It is true that Montague Smith, J. points out that, from the giving of the power to supply the defect in certain classes of cases, there may be inferred an intent not to give it in other cases, yet as the case is not relied on as distinct binding authority but only for the arguments of the judges and the light which they throw on the whole question, this does not detract from the value of other portions of his remarks and those of the other judges as bearing upon the whole subject.

Somewhat similar remarks are applicable to *Wheeler* v. *Gibbs*, 3 Sup. C. R. 374, a case under the Dominion Controverted Elections Act. The 48th section of the Supreme Court Act gave an appeal to the Supreme Court from the decision of a judge upon an election petition, requiring the clerk of the court of which the judge was a member, on receipt of a deposit, to make up and transmit the record of the case to the Registrar of the Supreme Court, who was then to set down the matter of the petition for hearing by the court at the nearest convenient time, the section then going on to provide that "the party so appealing shall thereupon within three days, or such further time as the judge who tried the petition may allow, give to the other parties to the said petition affected by the said appeal, or the respective attor-

neys, "&c.," notice in writing that the matter of the petition has been so set down," &c. The appeal was set down but the notice of the setting down was not given within the prescribed three days, and the time for giving it had not been extended by the judge. On motion of the respondent the appeal was struck out of the list of appeals. Then, subsequently, the appellant applied to the judge who had tried the petition for, and obtained from him, an extension of time for giving the notice. Upon motion by the respondent to dismiss the appeal on the ground of delay in the prosecution, and that the judge had under the circumstances no power to make the order for extension of the time, the Supreme Court held the order to be one within the authority of the judge under the statute and that he alone had by the statute the right to determine whether the extension should be given and the Court could not interfere with his order.

Now, of course, there was in the statute an express authority given to one judge to extend the time, which would assist in determining the intention of the legislature to have been to exclude the authority of any other judge or court to interfere; but the decision was put upon the plain ground that the jurisdiction of the court was purely statutory, that no discretion was given by the statute to dispense with its requirements, and that the giving of the notice, either within the three days or within a further time to be fixed by a certain judge, was a condition precedent to the hearing of the appeal.

In *Pease* v. *Norwood*, several of the judges expressed the opinion that the giving of the security in the mode provided by the Act was a condition precedent to the right to proceed upon the petition. It appears to me that *Wheeler* v. *Gibbs*, is a distinct authority that such a condition cannot be dispensed with. In the latter case the appellant endeavored on the first motion to support his appeal upon the 69th Rule of the Supreme Court, providing that "no proceeding in the said Court shall be defeated by any formal objection," but the objection was held not to be a formal one, nor to be one to which the rule could apply as the judges were limited to making rules not inconsistent with the Act. This directly meets the argument that the similar rules of this Court, Rule 47 under the Controverted Elections Act, and General Rule No. 9 can authorize any amendment in the present case.

The fallacy at the bottom of the whole argument for the petitioners upon this point lies in the assumption that the court would, in any case, have an inherent authority to disregard such statutory provisions as to procedure. The matter stands on no different ground because it arises under an Act having reference to the trial of petitions against the return of parties as members of the Legislative Assembly.

The position would be just the same were such a system of procedure distinctly provided with reference to any other cause or kind of action or proceeding which a statute might give the court jurisdiction to entertain. I have asked counsel for the petitioners to furnish me with authority to show that in any other class of cases where a condition precedent was as imperatively imposed in matter of precedure the court could relieve against its non-performance, but none such has been furnished.

In the *Prescott Election Case*, 9 Ont. Pr. R. 481, Hagarty, C.J., said, that if the petition were legally presented and before the court he would willingly make any reasonable order or amendment in his power to enable the matters complained of to be investigated. But he left it wholly undetermined what amendments would be within his power.

In the *Monck Election Case*, 32 U. C. Q. B. 155, the judge at the trial having amended the petition, this was held by the court to be within his powers under a clause similar to the 60th section of our Act. But there was upon the files a petition attacking the return, and in the present case we have a wholly invalid instrument—practically none at all—and the only amendment that could be made would be the substitution of an entirely new one. The objection is one that goes to the very root of it. It is as if a paper had been filed in no way questioning the return of a party as a member and it were sought to call that a petition under the Act and to invoke powers of amendment to make it one.

In the *Stafford Election Case*, 20 L. T. N. S. 237, it was held that orders for certain particulars and for the inspection of certain vouchers could be made, under a clause similar to the 7th section of our Act, Blackburn, J., expressing the opinion that the clause gave the judges power to make orders with respect to election petitions in conformity with the Common Law Procedure Acts. But these orders were made in matters not provided for

by the Controverted Elections Act itself, and were in no way inconsistent with the provisions of the Act.

In the *North York Election Case*, Hodg. Elec. Ca. 749, under the Dominion Controverted Elections Act requiring security to be given by deposit of $1000 in gold coin or Dominion notes with the clerk of the court in which the petition was filed, the deposit was offered to the registrar of the Court of Chancery and by his direction it was made through the accountant of the court according to the usual method of paying moneys into the court, and this was held sufficient. It was as if the registrar had told a clerk in his office to take it or the petitioner to place it on a particular desk in the office of the registrar. It was not important that the registrar should take the notes or coin into his own hands.

In the *Shrewsbury Election Case*, 19 L. T. N. S. 499, a motion was made to strike the petition off the file on the ground that the returning officer, whose conduct was complained of, had not received notice of the petition or the recognizance, and that notice of the name of the town agent had not been given by the petitioner. The statute provided that where the petition complained of the conduct of the returning officer he should be deemed to be a respondent, and it also provided that notice of the presentation of the petition and of the nature of the security and a copy of the petition should be served on the respondent. A rule of court, under the Act required that, with the petition, there should be left at the office of the master a writing giving the name of an agent authorized to act for the petitioner, or an address at which notices addressed to the petitioner could be left.

The objections were overruled by Martin, B., who thought them "formal objections" under a rule such as the 69th Rule of the Supreme Court and the 47th of our Election Rules already mentioned. It is to be noticed, however, that the application was made on behalf of the sitting members, as to whom the first objection was clearly a formal one. If the objection had been taken by the returning officer, who alone would be affected by the omission, no doubt the same effect would have been given to it, so far as he was concerned, as would be given to an objection made by the sitting member whose return was petitioned against for want of service on himself. The case is not an authority

showing what would be the effect of the omission if the objection were made by the party not served, though entitled to be so.

Then the form of the rule requiring the name of the agent or the address of the petitioner to be given showed that the petition should not be dismissed for non-compliance with it, for it went on to state what should be the effect of non-compliance,—that "if no such writing be left, or address given, then notice of objection to the recognizance, and all other notices and proceedings, may be given by sticking up the same at the master's office." The objection might then properly be called a "formal objection," if, indeed, it could be called a valid objection in any respect, whether of form or of substance.

In the present case the objection appears to me to be clearly one of substance, and not in any way one merely of form, though it is one which ought not necessarily to be a fatal one, At present I can, unfortunately, find nothing in the statute warranting me in attempting to do anything but give full effect to it. It is, as I have said, only with the greatest regret that I have come to this conclusion, as I have no reason to doubt that the petitioners have proceeded in good faith to invoke the jurisdiction given to the court to investigate a complaint of great public importance. In saying this I do not mean to suggest that any evidence whatever of the truth of the charges against the respondent has been given or that I have any reason to suppose them to be true. I merely say that it is unfortunate that in any case parties should be prevented from having such complaints fully investigated. All that I can do, however, is to administer the law as I find it. For me to assume, under color of the statute, to exercise a power not given by it would be as reprehensible a breach of the law as any act with which the respondent is charged. I trust, however, that as attention has been drawn to the subject some change will be made in the law, under which the judges may have some discretionary authority to relieve against such defects in proper cases.

There was some discussion as to the effect of the allowance of such an objection. It appears to me that the only logical result is that the petition must be dismissed. The statute requires that, at the same time at which the petitioner presents his petition to the court, he shall give the security. Not having given the

security the court, on this being brought to its notice, must on its part refuse to receive the petition. The order should be that the 5th, 6th, 7th, 8th, 9th, and 10th objections be allowed, and that the petition be dismissed with costs.

*Petition dismissed.*

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## REGINA vs. BLACKSTONE.

*Forgery—Extradition.*

Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. A simple lie, reduced to writing, is not necessarily forgery.

Consequently where a bank clerk made certain false entries in the bank books under his control, for the purpose of enabling him to obtain money of the bank improperly,

*Held*, That he was not guilty of forgery.

*J. B. McArthur, Q. C.*, and *J. Denovan* for the prosecution.
*H. M. Howell, Q.C.*, for the prisoner.

[*18th February, 1887.*]

WALLBRIDGE, C. J.—The prisoner has been charged before me with a number of acts, each of which, it is alleged, constitutes the crime of forgery. The prosecutors have elected to proceed with three and abandon the others.

The prisoner was a clerk in the Canal National Bank of Portland, in Maine, one of the United States of America.

The duty assigned him was that of discount clerk. The directors meet every morning at 11 o'clock and direct what notes or bills, submitted for discount, shall be discounted. These notes and bills, when approved of by the Board, are taken to the discount clerk, and it is his duty to assign a number to each note and to enter this number in his ledger, together with the names of the parties primarily responsible, the endorsers, where

payable, the date of maturity, the number of days the note or bill has to run, the discount taken, and the net proceeds, with other particulars not necessary to be recited. This book is called the discount ledger. The first charge investigated was a case of this description. The entry was entirely fictitious, no such note having been directed to be discounted, and the entry entirely false. It is explained in a letter written by the prisoner to Elias Thomas, Esq., the Vice-President of this Bank, that by carrying the amount of such a note to the credit of a customer and by getting a cheque from such customer under pretence of correcting what he described to such customer as an entry by mistake, the bank books would be balanced.

The second charge consisted in entering in the book called tickler, the particulars as to date, when due, amount, names of parties, to a pretended note. These entries were supposed to be made from the discount ledger, and it was the duty of the prisoner to make the entries both in the ledger and also in the tickler. The particular entry complained of is that the prisoner, in the State of Maine, with intent to defraud, did feloniously make a false entry and account, on page of "Nov. 13, 1886, 6910, note, A. R. Mitchell & Co., A. A. Carter & Co., endorsers, $875.16, due Dec. 13th." This entry was copied again on page Dec. 13. It is this latter entry that is complained of. This is simply an entry showing that this note of A. R. Mitchell & Co., endorsed by A. A. Carter & Co., fell due on Dec. 13.

The next complaint is that the prisoner, on the 4th November, 1886, did feloniously and for the purpose of fraud, forge a certain written instrument, document or thing, written of the tenor following:

$8.14. November 14th, 1886.

In favor of

To Hill, Clarke & Co.,

No. 3403.

This paper is what is commonly called the counterfoil of a check.

Upon these three charges the evidence has been taken. The crime was committed in the State of Maine, one of the United States of America, and the prisoner has been arrested on charges

of forgery committed there. The object being to have him committed to gaol, with a view to his extradition. The question is not whether the prisoner has or has not committed a crime for which he could be punished by our law, if committed here, but whether he has committed a crime for which he can be committed for extradition, and sent out of this country. The crimes for which extradition can be had, unhappily, are too few, but we have the satisfaction of knowing that the objection to increasing their number does not arise from and is not attributable to our Government. Our efforts to increase the number of extradition crimes have not proved acceptable to the United States Government. We must in the meantime deal with the law as we find it. Amongst the crimes for which extradition may be demanded is that of forgery, and it is for a crime of this class committed in the different books called the discount ledger, tickler, and the counterfoil of the check, that the prisoner is in custody, and in respect to which the evidence has been given. The Extraditon Act is c. 25, 40 Vic., cited as "The Extradition Act, 1877." Section 12 of that Act directs that the Judge shall hear the case in the same manner as near as may be, as if the fugitive were brought before him charged with an indictable offence committed in Canada. The evidence which shall justify a committal in case of a fugitive, accused of an extradition crime, must be such as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, in case the crime had been committed in Canada. Evidence for this purpose is sufficient (if a felony) if it be such as to raise a strong presumption of guilt. The true construction of this Extradition Act, however, is not that merely a strong presumption of guilt should be raised, but, in my opinion, the judge must go further and ascertain as a matter of law, as well as of fact, that not only has a crime been committed, but that such a crime has been committed as constitutes an extradition crime.

The crimes here charged throughout are forgery, made a felony by the Act 32-33 Vic. c. 19. Forgery at common law was classed amongst the class of crimes known as misdemeanors. By the statute last referred to, s. 26, it is enacted, "Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged," after describing a great number of instruments, declares that such person is guilty of a felony.

It will be noticed that this Act does not define what constitutes the crime of forgery, but says whosoever forges, &c. Thus we have to look to the common law to ascertain how forgery is defined. There is, however, one section in our Forgery Act, namely, section 45, which defines forgery in respect to the matters contained in that section, in these words:—"And the wilful alteration for any purpose of fraud or deceit, of any such document or thing, or of any document or thing, the forging of which is made penal by this Act, shall be held to be a forgery thereof."

Forgery then is defined by Sir William Blackstone to consist in the "fraudulent making or alteration of a writing to the prejudice of another man's right," and in *East's Pleas of the Crown*, "as a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit."

It is true that these entries are false, and made for the purpose of deceit, and in books which are the property of the bank. We should have no difficulty here in punishing a person who obtained money in the manner described, either as larceny or as obtaining money by false pretences, but these are not extradition crimes, and unless the crime proved is clearly the crime of forgery, it does not come within the charges laid, nor within the extradition crime of forgery.

These entries in the discount ledger, tickler, and on the counterfoil of the check are all false, but that is only one element of forgery. The word false applies as well to writing what is untrue or vulgarly writing a lie, as making a false instrument, whilst it is the latter only which is forgery. It is not a forgery because it covers a falsehood. In *re Windsor*, 6 B. & S. 529, Blackburn, J. says "the charge against the applicant (here prisoner) is that being a clerk in a bank he did embezzle, or steal a large sum of money; that he made an entry in a book stating in his behalf, that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to a forgery. Forgery is the falsely making or altering a document to the prejudice of author, by making it appear as the document of that person. Telling a lie, does not become forgery because it is reduced to writing." The writing made by the prisoner remains just as he originally made it, and not in the words of

section 45 of the Forgery Act c. 19, 32 & 33 Vic. D., wilfully altered. This man has not made a false statement purporting to be on behalf of any other person, but simply has himself stated that which is false, or as it is tersely put in *Re Hall*, 8 Ont. App. 31 "a simple lie reduced to writing does not thereby become a forgery."

One must constantly keep in mind the distinction, in *Regina* v. *Ritson*, L. R. Vol. 1, C.C. Reserved 200, between a false deed and a false statement. How does the act of this prisoner purport to be the act of some other person, this is absolutely necessary, *Re Windsor*, 11 Jurist N. S. 808.

If anything had been done with these accounts by the prisoner after they had been audited, or had he wilfully altered the figures for the purpose of defrauding, then he would have come within the definition in section 45 of the Forgery Act, but he has done nothing more than to make entries not true in fact. The case has been ably argued by Mr. McArthur, Q.C., for the bank and Mr. Howell, Q.C., for the prisoner. I should have given judgment at once, but, Mr. McArthur contended so strongly that the case as proved amounted to forgery, that I took time to consider, exercising however, my own judgment, I cannot agree with him and think the extradition crime of forgery has not been made out.

*Prisoner discharged.*

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## McPHILLIPS v. WOLF.

(IN CHAMBERS.)

*Interpleader.—Security for costs.*

A garnishee admitted his liability to the judgment debtor, but suggested that one B. claimed the money under an assignment made to him by the judgment debtor. Upon settling the form of the order for an issue,

*Held*, 1. That B. the claimant ought to be the plaintiff.

2. That it did not, from this, and from the fact that he resided without the jurisdiction of the court necessarily follow that he should give security for costs, that the court could exercise its discretion, and would not order security unless the applicant showed circumstances warranting that direction.

*A. E. McPhillips*, for plaintiff.

*C. P. Wilson*, for defendant.

(*28th February. 1887.*)

KILLAM, J.—In this case the plaintiff obtained a garnishee order against one Tait, attaching all moneys owing by him to the defendant, against whom the plaintiff has recovered judgment. The garnishee then applied under the 10th section of the statute of 1886, amending the Administration of Justice Act, showing that one Bodwell claimed the moneys sought to be attached, and a summons was issued calling upon Bodwell and the attaching creditor, to come in and state the nature of their respective claims and maintain or relinquish the same. Bodwell put in an affidavit showing his claim to be under an assignment from Wolf to him, the execution of which is sworn to by affidavit put in, and the plaintiff desiring to contest this claim the usual order for trial of an issue between the claimant and the attaching creditor was directed to be issued.

Upon settling the terms of the order it was pointed out on behalf of the attaching creditor that the affidavit filed for the claimant showed him to be resident in British Columbia, out of the jurisdiction of this court, and it was urged that the order should contain a clause directing the claimant to give security for the costs of the attaching creditor.

For the claimant there was then read an affidavit of his attorney, but this does not appear to have been filed, or, at any rate, it cannot now be found, but there was nothing in it that I consider material upon the point in question. It did not state any new fact, not already shown in the material previously filed.

The principle upon which a party to an interpleader issue respecting goods seized under *fi. fa.* by a sheriff is, or is not, to be ordered to give security for costs is very clearly and accurately stated by Bowen, L.J., in *Tomlinson* v. *The Land and Finance Corporation, (Limited)*, 14 Q. B. D. 542:—"The claimant to goods seized under a writ of *fieri facias* is usually bound to prove

his title to them upon the trial of the interpleader issue; but this does not put the execution creditor into the position of an ordinary defendant; and when an interpleader issue has been directed and the sheriff has slipped out of the dispute, the parties who remain, that is, the execution creditor and the claimant, are both plaintiffs; they are not in the position of the parties to an ordinary action. The hand of the court is set free, and it may use its discretion whether security for costs should be ordered . . . the substance and not the form of the proceeding must be looked at."

Now, many cases of interpleader issues upon applications by garnishees must be governed, upon this question, by the same principles as those arising under sheriff's applications. In a case like the present the original indebtedness of the garnishee to the judgment debtor is admitted, and, therefore, but for the subsequent assignment to the claimant, the debt would be attachable. It is, then, fitting that the claimant should ordinarily be called upon to prove his claim in the interpleader issue, and for that purpose he should be made plaintiff in the issue. The affidavit in proof of his assignment is accepted, not for the purpose of positively establishing the assignment as against the attaching creditor, but for the purpose of ascertaining that he has a *prima facie* right to dispute the effect of the attaching order as against him. The creditor is not expected to put in affidavits or other evidence to dispute the assignment. The fact of the assignment or its validity does not directly come in issue upon the interpleader application, and the claimant is ordinarily not the less, on account of his affidavit stating the assignment to have been made, to be put to the proof of an assignment upon the trial of the issue. The form of the issue in this respect may, however, be varied under special circumstances.

The remarks of Bowen, L.J., which I have cited with those of Brett, M.R.. in the same case, and the judgments in *Rhodes* v. *Dawson*, 16 Q. B. D. 548, and *Belmonte* v. *Aynard*, 4 C. P. D. 221, 352, show, however. that the party made plaintiff in an interpleader issue, whether at the instance of a sheriff or at that of a garnishee, is not necessarily to be regarded as in the position of a plaintiff in an ordinary action, for the purposes of an application for security for costs. Whether plaintiff or defendant in the issue

should give security for costs must depend upon the peculiar circumstances of each case.

It seems fitting that upon the party making the application for security for costs should be thrown the burden of showing that the circumstances are such that the order should be made. The attaching creditor in a case like the present might well be asked to show whether he relies *bona fide* upon disputing the existence or execution of the alleged assignment, or whether the case is one that involves an attack by him upon an assignment *prima facie* valid. To do this he need not disclose the evidence upon which he proposes to meet the claim, but only to show what he would be required to show if there were formal pleadings, with the addition that some *prima facie* proof as to what is his real ground of objection to the assignment be offered, just as the claimant is obliged to offer some proof that he has a *bona fide* claim and of its nature. But, in whatever way it is done, the applicant should show the circumstances to be such as to warrant the security being ordered.

Here, the claimant should be made plaintiff in the issue, but that alone is not sufficient to entitle the creditor to the order. Upon this ground, nothing more being shown, I must refuse to embody such a direction in the interpleader order; but I think that, the point being really, as it now comes up, a new one, the attaching creditor should not be debarred from hereafter making a substantive application for security for the costs of the issue if he can show circumstances entitling him to the order.

## GALT v. THE SASKATCHEWAN COAL CO.

(IN CHAMBERS.)

*Winding up.—Money in court made by sheriff before winding up order, awaiting interpleader.—Estoppel.*

Under various executions against the defendant company certain goods were seized.

Upon adverse claims being made the sheriff sold the goods and paid the money into court under the terms of an interpleader order to abide the result of an issue.

Before the determination of the issue the company was ordered to be wound up.

The execution creditors having succeeded in the issue moved for payment to them of the money in court, and were opposed by the liquidator.

*Held*, 1. That the execution creditors were entitled to the money.

2. That they were not estopped from setting up such claim because they had filed claims before the liquidator.

*W. E. Perdue* and *J. S. Hough*, for execution creditors.

*W. R. Mulock*, for liquidator.

(*4th February, 1887.*)

TAYLOR, J.—In the early part of the year 1885, there were in the hands of the sheriff executions at the suit of a number of different plaintiffs against the defendant company. Goods which had been seized under these executions were claimed by the Canadian Pacific Railway Company and an interpleader issue was directed. Under an order made in consequence of the interpleader proceedings the money made by the sale of the goods was paid into court by the sheriff to abide the result of these proceedings. In November, 1885, proceedings were taken under 45 Vic. c. 23, D., for the purpose of winding up the defendant company, an order for that purpose was made and a liquidator appointed.

The interpleader issue has been determined adversely to the claimant and an application is now made for payment out of the money in court, $300 to G. F. & J. Galt, in full of the first two executions, $800.40 to George E. Forsyth on the third execution

and the balance of the money to Bain, Blanchard & Mulock, as the assignees of the fourth execution, that of Manning & Co. The creditors agree among themselves as to the payment of these moneys but the application is opposed by the liquidator who claims that the money should be paid over to him.

The 69th section of the Act, provides that, "No lien or privilege upon either the personal or real estate of the company is created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company . . . . if before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ . . . . the winding up of the business of the company has commenced."

In February, 1886, my brother Killam had the effect of this section under consideration in the course of the interpleader proceedings, and he then held as follows, "When the money was paid into court the sheriff was discharged and the moneys were in effect paid over, and were the moneys of the execution creditors in order of priority as against all parties except the claimants of the goods, as to whom these moneys were retained to stand in the place of the goods if their claim should be found valid as against the executions. Thenceforth the money was held in court for whichever of these parties was really entitled to it, and for no one else."

As the liquidator was not a party to the proceedings, in course of which that judgment was given he is of course not bound by it. He now raises the question and claims the money. His contention is that the actual payment over of the money to the plaintiff is necessary. I agree, however, with the conclusion at which my brother Killam arrived. The statute evidently applies to the case of winding up proceedings before the payment over by the sheriff or other officer of the moneys he has made by a levy under the writ. Here the moneys when paid into court were paid over by the sheriff and he was thereby discharged from all liability. The execution creditors were then, but for the claim set up by the claimants, entitled to the moneys. The court however, retained these moneys until the claim set up that the goods of which they were the proceeds were the property not of the defendant company but of the claimants was decided. As against the defend-

ant company the moneys were the property of the execution creditors. They were absolutely their property against all the world, except the claimants.

I do not think the other objection that these execution creditors filed claims under the winding up proceedings now prevents their claiming the moneys. These were put in, in January, 1886, and their right to these moneys as against the claimants was not decided until January, 1887. Of course when they filed these claims they gave no credit for these moneys, they did not then know whether the claimants might not make out a right to the goods of which they were the proceeds.

It is alleged that the judgments in respect of which G. F. & J. Galt claim have been paid by the company. No satisfactory answer is made to this allegation, but the attorney moving says, he is willing to drop so much of the summons as asks for payment to them. The amount in court is not sufficient to pay the amount due Geo. E. Forsyth and also to pay in full the judgment of Manning & Co., the creditors who stand next in priority to the judgments upon which G. F. & J. Galt claim.

The order should go for payment of $800.40 to Geo. E. Forsyth and of the balance to Bain, Blanchard & Mulock, the assignees of the judgment of Manning & Co.

## MORRIS v. ARMIT.

(IN CHAMBERS.)

*Taxation.—Costs of supplementary material on motion.—Counsel fees.—Brief.*

1. Where the material upon which a party is moving is defective, and he is allowed to amend or supply what is wanting he cannot tax the costs of doing so.

2. The discretion of the taxing officer as to the amount of counsel fees not interfered with.

3. A second term brief allowed at the amount for which a second copy of the evidence could have been got from the short hand writer.

4. Where the defendant succeeds on part of the issues, but the plaintiff obtains a verdict, the defendant is entitled only to such costs as are exclusively applicable to the issues on which he succeeds.

*N. D. Beck*, for plaintiff.

*G. Davis*, for defendant.

(*5th February, 1887.*)

TAYLOR, J.—The defendant has obtained a summons to review the taxation of the plaintiff's bill of costs.

The first objection is to several items, in all $2.20 connected with an affidavit of service. A motion was made to commit the defendant for not attending to be examined pursuant to an order. Upon the return of the summons the only evidence of the service of the order was an admission of service and this being objected to, the Chief Justice allowed an affidavit of service to be filed. It is urged that the defendant has not been put to any additional expense by this affidavit being allowed, but the ordinary rule, as I understand it is, that where the material on which a party is moving is defective and he is allowed to amend or to supply what is wanting he cannot tax the costs of doing so.

The next objection is to the amount of the counsel fees taxed at the trial. About these I have spoken to the learned judge who tried the case. He considers the fees high, higher than he would have allowed, but not so excessive as to warrant any interference with the discretion of the taxing master.

The third and fourth objections are to the counsel fees in Term and to the allowance of brief for second counsel. Two counsel did appear in term and both argued the case. It is somewhat difficult to lay down any rule as to when two counsel should be allowed and when not. In the present case I am not prepared to say there should not have been two counsel. The second brief should be allowed at the amount for which a second copy of the evidence could have been got from the short hand writer.

The plaintiff has also obtained a summons to review the taxation of certain costs allowed to the defendant. The declaration originally contained three counts, and a fourth was added at the trial. The pleas pleaded to the three original counts were not pleaded to any separate counts, but to the whole of them. On the amendment at the trial counsel for the defendant indicated what pleas he would desire to plead to the added count. No pleas were actually pleaded to it. The plaintiff had a verdict on the first and second counts and the defendant had a verdict on the third and fourth. I cannot see however that any of the costs incurred were incurred exclusively in connection with these counts and it seems to be only when they are so and to the extent that they are so that costs can be allowed. This does not seem to be limited merely to the case of witness fees. The rule was thus stated in *Fazakerley* v. *Rogerson*, 1 L. M. & P. 747, where the defendant succeeds on part of the issues but the plaintiff obtains a verdict the defendant is entitled only to such costs as are exclusively applicable to the issues on which he succeeds. That this is the correct rule to be applied appears further from *Lush's Pr.* Vol. 2, p. 903, and *Marshall on Costs*, 297.

The summons of the defendant is allowed to the extent above indicated with costs. The summons of the plaintiff is allowed with costs. The costs on the one should be set off against the costs on the other.

## REG. v. COULTER.

*Keeping liquor without licence.—Information.—Conviction.—Penalty.*

Magistrates have jurisdiction under "The Manitoba Liquor License Act, 1886," upon a charge, under section 73, of keeping liquor for sale without a licence.

The information upon such a charge did not state that the liquor was intoxicating liquor,

*Held*, That such an allegation was not necessary.

An information was laid in proper form. Upon this a search warrant was issued. Afterwards another information was laid which omitted a necessary allegation. This allegation was, however, in the summons served upon the defendant.

*Held*, That the second information might be supplemented by the first; and in any case the information would be amended and not quashed.

A charge that the defendant kept liquor for the purpose of selling, or for the purpose of trading, or for the purpose of bartering, is only one offence.

Upon such a charge it is sufficient to allege that the offence was committed at a certain town without specifying the house or building.

Upon conviction for such an offence magistrates have power to award imprisonment for four months in default of payment of the fine imposed.

Evidence discussed as to whether the liquor was intoxicating.

*H. A. McLean*, for prisoner.

*L. W. Coutlee*, for the Crown.

(*1st April, 1887.*)

DUBUC, J.—The defendant has been committed to the common gaol of The Central Judicial District at Portage la Prairie, for an offence under "The Manitoba Liquor License Act, 1886."

A summons was taken out for a writ of *habeas corpus* and for quashing the commitment and the conviction, on the following grounds:

1. Because the magistrates had no jurisdiction in the matter.
2. Because the information disclosed no offence.

3. Because the conviction and commitment, as well as the information, contains three different charges.

4. Because the place where the offence is alleged to have been committed is not sufficiently stated in the information, conviction and commitment.

5. Because the penalty imposed is a fine and in default of payment, imprisonment, while it should have provided for the issue of a warrant of distress to levy the amount of the fine before imposing the imprisonment.

6. Because the evidence does not show that the liquor in question was intoxicating liquor.

1. It is contended by the counsel for the defendant that the magistrates had no other jurisdiction under the Licence Act than that given by sections 94 and 95; and that by said sections their jurisdiction is limited to offences committed by parties holding a licence under the Act. And the case of *Underhill* v. *Langridge*, 29 L. J. N. S. M. C. 65, was quoted. In that case, it was alleged that the words in the statute which were supposed to cover the offence charged were omitted, and the judges said that they could not take upon themselves the office of the legislature in supplying the missing words.

In the present case, the charge is laid under section 73, which says that, "No person shall keep or have in any house or other place whatsoever, any liquor for the purpose of selling, bartering or trading therein unless duly licenced thereto under the provisions of this Act."

It is true that no special penalty is provided against the violation of the provision contained in said section. But section 91, enacts that, "Every person who shall violate any of the provisions of this Act, for which violation no penalty is herein specially provided, shall incur and pay a penalty of one hundred dollars, or in default of payment, imprisonment for not more than four months."

In my opinion, it is manifest that section 91 completes section 73, in providing a penalty for the violation of its provision. The imposition of a penalty implies prosecution, and the prosecution must be had before a magistrate or two justices of the peace. So, the jurisdiction, though only by implication, is clearly given.

2. The defendant claims that the information discloses no offence under the Act.

The information, which was sworn to on the 14th December, 1886, states that the said W. G. D. Coulter, on the 7th December, 1886, at the Town of Neepawa aforesaid, did keep liquor for sale, barter or traffic, contrary to the form of the statute, &c.

It appears that the proceedings in this matter were commenced by an information upon which a search warrant was issued, under section 71 of the License Act. The said information was sworn to on the 7th December, the day on which the offence is alleged to have been committed, and was in the words prescribed for such offence in Form M. attached to the Act. It charges the defendant with "unlawfully keeping liquor for the purpose of sale, barter and traffic, without license therefor by law required."

On such information, the search warrant was issued, and by the evidence of Robert McLean, and by the minutes of proceedings and certificate of conviction prepared by the justices of the peace, under section 112 of the Act, and returned under their signatures with the writ of *certiorari*, it appears that the said Robert McLean, the constable who received the search warrant for execution, did execute the same and found and seized a keg of whiskey, the property of the defendant, which was at the time claimed by the defendant to be a keg of rye whiskey belonging to him.

The liquor having been so found, the other information was laid on the 14th December, under section 73 of the Act, charging that the defendant did on the 7th December, 1886, at the Town of Neepawa aforesaid, "keep liquor for sale, barter or traffic," &c.

The summons by which the defendant was commanded to appear before the justices, charges the defendant with "keeping liquor for sale, traffic or barter, without being licensed so to do."

It is argued that the last information only, the one sworn to on the 14th December, should be considered, and it is insufficient as it does not allege that the liquor in question was intoxicating liquor, and that the defendant kept the said liquor without a license.

As to the first objection, that the liquor is not stated to be intoxicating liquor, sub-section 11, of section 2 of the Act, states that "the word liquor shall be construed to mean and compre-

hend all spirituous and malt liquors." And then in Form M., which gives the description of the different offences, the word "liquor," is used alone, without any indication that it should be stated to be intoxicating liquor.

As to the other point raised, that the information does not allege that the said liquor was kept by the defendant without a license, I think that the information of the 7th December can be considered in connection with the information of the 14th December, as the first one was the real initiatory proceeding in the matter, and the said information is sufficient under the statute. The description of the offence in said first information is according to the one given in Form M. If such information was sufficient to give jurisdiction to the justices to act in the said prosecution and to issue the search warrant, can it be said that, because a subsequent proceeding is less particular in stating the offence and omitted some words contained in the first, their jurisdiction did immediately cease, and they could not proceed any further? I do not think so.

But, moreover, section 107 says that "no conviction or warrant or any other process or proceeding under this Act shall be held insufficient or invalid by reason of any variance between the information and the conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding, that the same was made for an offence against some provision of this Act, and provided there is evidence to prove such offence." It is evident that said section was made to cover such cases as this; and it would be going against the letter and spirit of the statute to quash the conviction on such variance. And if I thought that the variance between the information and the conviction would be such as to affect the validity of any of the proceedings, I think that, under the circumstances shown and the facts disclosed in the evidence, I would be justified, under sub-section 1 of said section 107, in amending the proceeding so found insufficient, and in affirming the conviction.

3. The defendant's counsel took also the objection that the conviction and commitment, as well as the information contain three different charges, and that the conviction and commitment should be quashed on that account. The case of *Regina* v. *Bennett*, 1 Ont. R. 445, was quoted in support of the contention.

In that case, the information charges that the defendant "did keep, sell, trade and otherwise unlawfully dispose of," &c. That charge includes the offence mentioned in section 72 of our Act, that is to say: "selling liquor," and also the one contained in our section 73, "keeping liquor for sale, &c."

To sell liquor without a license is an offence under the Act; and to keep liquor for sale is made another offence. But to keep liquor for the purpose of selling, or for the purpose of trading, or for the purpose of bartering is, in my opinion, only one and the same offence. It is the offence of keeping it for an unlawful purpose. And the purpose of selling, bartering or trading is really and substantially one purpose. Therefore, the charge as stated in the information, conviction and commitment herein cannot be said to contain three offences.

4. Another point taken is that the place where the offence is alleged to have been committed is not sufficiently stated.

In the information, conviction and commitment, the offence is alleged to have been committed at the Town of Neepawa, in the Province of Manitoba, and in some places it is alleged in addition to be in the County of Beautiful Plains.

It is, as contended, necessary, under section 73 of the Act, that the house, building or other particular place where the liquor is kept, should be stated specifically in the proceedings?

The said section makes it an offence to keep liquor for sale, barter or traffic, in any house or other place whatsoever. It means that if it is kept, it must be kept in some particular place.

If liquor was kept in the middle of the street, or in the open prairie, and found there, the person having so left it could not be convicted. It would not be kept at all; therefore it could not be said to be kept for any unlawful purpose, and there would be no offence.

I suppose also that if the keeping of the liquor was, in the proceedings, stated in general terms as at the Town of Neepawa, without any evidence to show that it was kept at any particular place, the conviction could not be upheld. But the evidence shows that the liquor was on arriving at Neepawa, carried to and kept at the shoemaker, Joseph Buchanan's shop, and was taken from there into Rutledge's kitchen at the moment they heard of the seizure. Rutledge did so, as he says, to screen Buchanan.

So, I think that the evidence shows sufficiently the place where the liquor was kept.

As to the information not stating the particular building or house where the liquor was kept, but alleging only that it was at the Town of Neepawa, I think that, in principle, the main object of stating the plaee where the offence was committed is to ascertain and establish that the justice or justices had jurisdiction to receive the information and try the case; because their jurisdiction is usually limited to a certain territorial district or county. *Paley on Convictions*, 6th Ed., 26, 124, 204; *Regina* v. *Highmore*, 2 Ld. Raymond, 1220; *The King* v. *Jeffries*, 1 T. R. 241.

In the present case, the justices of the peace are stated on the face of the proceedings to be justices of the peace in and for the Province of Manitoba. The laying of the offence at the Town of Neepawa in the Province of Manitoba, was therefore sufficient to give them jurisdiction in the matter.

5. Should the conviction be held bad and be quashed because the magistrates adjudged that, in default of payment of the fine, the defendant should be imprisoned, instead of adjudging that a warrant of distress should be issued to levy the amount of the fine? The statute has to be followed. If the statute provided that in default of payment a warrant of distress should issue, and the justices had disregarded said provision, the conviction would no doubt be invalid. The License Act contains no provision declaring that any fine imposed shall be levied by distress. But in Form P. attached to the Act, there is a provision referring to distress and sale of the goods and chattels of the defendant. But it is only a form, showing in what form it may be provided in the conviction when the magistrate so orders.

I have already stated that the penalty provided by the statute for offences like the one herein was found in section 91 of the Act. And the said section says that the person convicted of such offence shall incur a penalty of one hundred dollars, or in default of payment imprisonment for not more than four months. It is exactly what the justices have adjudged here: a fine of $100, and in default imprisonment for four months. They have in that followed the statute strictly.

6. Is it shown by the evidence that the liquor in question was intoxicating liquor?

The constable Robert McLean says that, in executing the search warrant given to him, he found, in the back kitchen of A. E. Rutledge a keg of liquor enclosed in a tea case, and seized it. He adds: "W. E. D. Coulter, defendant, came with me to the Court House and claimed the keg of liquor, said it was his, defendant's, liquor, that it was rye whiskey seven years old."

Rutledge says that, at the request of the defendant, he took the liquor from the station to the shoemaker, Joseph Buchanan's place. He had it afterwards removed to his own kitchen to screen Buchanan. He states that at the time the constable seized the keg, he believed it was intoxicating liquor.

Buchanan swears he did not know at first that the keg in question contained liquor. He says that he got liquor twice from the defendant. Once was the day before the seizure of the keg. It was intoxicating, defendant called it white rye. He did not pay for it, but did peg a pair of shoes for him and did not charge anything.

Ben. Lyons and Alex. May say they got liquor from defendant. Hugh Campbell states that he got intoxicating liquor from the defendant, in the station at Neepawa. But they did not pay for it. R. Edwards swears he bought liquor from the defendant. Samuel Love says he got liquor from defendant and paid for it, t was intoxicating liquor. John Hockin states that about two days before the election defendant took out of the section house at Arden two parcels containing liquor. He recognized it to be intoxicating liquor, by handling and smelling it.

With that evidence before them, the justices have convicted the defendant. No witness states positively that the liquor in question was intoxicating liquor. McLean says the keg of liquor seized was claimed by the defendant as rye whiskey belonging to him. Buchanan states that the day before the seizure he got from defendant intoxicating liquor, called by the defendant white rye. And, on the other witnesses stating that they got, and bought liquor from defendant, one saying he got intoxicating liquor and paid for it, the said justices came to the conclusion that the liquor seized herein and claimed by the defendant was intoxicating liquor, and that he was guilty of an offence under the License Act.

Can I say that the evidence did not justify their finding, and that their decision should be reversed? I do not think so.

But, even if I had doubts about it, I think that, under section 124 of the Act, the decision arrived at by the justices should be held perfectly justified.

In *Regina* v. *Bennett*, already cited, one witness swore that what he drank on that day was "pop." The judge said, "What pop is, there is no evidence to show, certainly none that it was intoxicating liquor." And the defendant swore that he did not sell intoxicating liquor on the day in question. It was held that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor.

But the evidence in the present case is quite different. The liquor is stated to be rye whiskey. The defendant is proved to have sold intoxicating liquor on various occasions, and he did not rebut under oath that the liquor in question was intoxicating liquor, or that he did not have intoxicating liquor on that occasion.

For the above reasons, I think that the conviction should be affirmed, and the summons herein dismissed.

*Conviction affirmed.*

## *Re* CARTIER ELECTION.

*Election petition.—Preliminary objections.—Status of petitioner.—Notice in Gazette.—"Immediately."—Identity of petitioner.—Vagueness.—Security.—Bond.—Affidavits of justification.*

The status of the petitioner may be enquired into upon a preliminary objection to the petition.

The absence of notice of presentation of the petition in the *Gazette* is not a ground for preliminary objection.

Meaning of the word "immediately."

The absence of the words "Whose name is subscribed," after the name of the petitioner is not a sufficient ground of objection to a petition.

A petition is not insufficient for vagueness or uncertainty because it alleges a number of wrongful acts in the alternative. A petition is sufficient, if it allege merely that the respondent was guilty of a corrupt practice within the meaning of section 198 of The Election Act of Manitoba 1886.

Security for costs may be given by bond to the respondent.

A bond was given to secure certain named costs "and also all *costs* which on the final disposal of the petition the court shall award to be payable as provided by the Manitoba Act." The statute required security for "any and all other *expenses* and *charges*,"

*Held*, That the bond was sufficient, affidavits of justification need not accompany the bond. But if the sufficiency of the security be attacked the absence of such affidavits may be considered.

*J. B. McArthur, Q.C.*, and *S. C. Biggs, Q.C.*, for petitioner.

*W. H. Culver, G. Davis* and *T. Gilmour*, for respondent.

[*27th January, 1887.*]

TAYLOR, J.—On this argument of preliminary objections, I hold that the status of the petitioner can be enquired into. The opposite seems to have been held in some Ontario cases, *Dufferin Case*, 4 Ont. App. R. 420; *North Simcoe Case*, H. E. C. 617, but in the Ontario Act there are no words as in our Act, that the respondent may produce any preliminary objections he may have against the petitioner. In the *Youghal Case*, 21 L. T. N. S. 306, O'Brien, J., seems to have held that the status of the petitioner

was a proper question to be brought before the court by way of preliminary objection, although singularly enough the question had been raised before the Court of Common Pleas, which thinking the objection a proper one for the trial, and not a preliminary objection, dismissed the application with costs, reserving the question until the trial. In *Cunningham on Parliamentary Elections*, 259, among the questions which may be urged on an application to take the petition off the files, is mentioned.—That the petitioner or petitioners or either of them, has or have, no right to petition. By the *Megantic Case*, 8 Sup. C. R. 169, the right to raise an objection to the status of the petitioner is clearly established. I doubt, however, if the petitioner can be objected to for the reason set out in the second objection. As evidence has to be adduced respecting the status, I do not decide the point now, but leave it open for consideration when the objection comes regularly up.

The third objection, that the petitioner did not immediately after the presentation of the petition give notice of it in the *Gazette* and in a local newspaper, and that such notices were not dispensed with by the order of a judge, does not seem to me an objection open to a respondent, at least as a preliminary objection. The publication of these notices is not for information to him. He gets his notice of the proceedings, by the service upon him of the various documents mentioned in the 35th section of the Act. The object of these notices being published is, that the electors and general public may know that proceedings are being taken. If any of them desire to furnish information or give evidence for either party, they can come forward, and they can watch against any collusive settlement being come to between the parties. By the Dominion and Ontario Acts, the clerk of the court is to give notice to the returning officer, and it is his duty to publish the notices. In such cases it is clearly directory, for the petitioner could never be prejudiced in his proceedings by neglect on the part of the clerk to notify the returning officer, or by the neglect of the latter to publish upon being notified.

Then there are cases in which the objection would certainly not be open to a respondent. Suppose a petition filed and served the day after the *Gazette* is published, then the respondent must file his preliminary objections the day before the next *Gazette* issues, clearly in such a case he could not take the objection. Nor could

he obtain further time for filing objections in order to wait and see whether, at a time yet to come, the petitioner may make a slip of which he could take advantage.

The objection here is that the petition was filed on the 10th of January, and that notice was not published in the *Gazette* which appeared on the 15th. *Rex* v. *Justices of Huntingdonshire*, 5 D. & R. 588, in which notice of an appeal after seven days delay was held not to be immediate notice, is relied on. But *immediately* has not always received so strict a construction. Thus in *Dwarris on Statutes*, 686, it is said, "In other cases the word immediately has not received such a strict construction that a thing ought to be made *in ipso articulo temporis*, but is satisfied if it be made in convenient time." So in *McLennan* v. *Brown*, 12 U. C. C. P. 542, where the statute required magistrates to make immediate return, Draper, C.J., said, "A reasonable time, a time to enable them to do it conveniently they may take." And in *Griffith* v. *Taylor*, 2 C. P. D. 194, in the Court of Appeal, Cockburn, C.J., said, "We can only say that immediately ought to be liberally interpreted."

As I have already said, I do not think the objection one for the respondent to take. Even if he could take it, and it can be shown that there was publication in, say the second *Gazette* after the filing of the petition, I should hold that sufficient.

The fifth objection, that the petition does not show that the Thomas Renwick who purports to have signed it, is the Thomas Renwick named in it, cannot be given effect to. It is true the form of petition given in the Rule of Court says, "The petition of, &c., whose names are subscribed," but the Rule says a petition in the following form or one to the like effect shall be sufficient, and a petition can never be dismissed because the words "whose name is subscribed" do not appear in it.

The sixth objection has four sub-sections, the first is the general one that the petition does not charge the respondent with any act which amounts to bribery or corrupt practices within the meaning of the Election Act of Manitoba, 1886, or which would avoid his election. The second is, that it does not charge that respondent gave, &c. to Joseph Lecomte to induce him to refrain from becoming a candidate, &c. The third is, that the acts complained of are not alleged to have been committed by the

respondent at or in connection with the election in question. Now, the petition sets out that an election was held for the Electoral Division of Cartier, naming the days for the nomination and polling. It then alleges that Lecomte both publicly and privately made known his desire and intention to be nominated as a candidate for the said Electoral Division for Cartier, to be holden on the days hereinbefore stated to be appointed for the said election. Also, that he had prepared and signed a nomination paper with the full intention and design of delivering the said paper to the returning officer on the day for the holding of the said nomination, and of doing all other matters and things necessary to be nominated as a candidate for the said election. Then, after allegations that the respondent was also a candidate, it proceeds that the respondent did give, &c. to the said Joseph Lecomte to refrain from becoming a candidate, or to withdraw after having become a candidate as aforesaid. Now, paying money to a man to refrain from doing a thing is certainly paying him money to induce him to refrain from doing it. And "a candidate as aforesaid," clearly refers to what went before, namely the becoming a candidate for the Electoral Division of Cartier at the election to be holden on the days, &c., all as mentioned in the earlier part of the petition. The fourth sub-section is, that the petition is bad for vagueness and uncertainty, in that it does not state with sufficient clearness the wrongful acts of the respondent which the petitioner complains of, but alleges a large number of wrongful acts in the alternative. What the petitioner has done is, he has charged that the respondent did so and so, following the words of section 198 sub-section 1 of the Election Act of Manitoba, 1886. It seems to me it would have been quite sufficient had the allegation in the petition been simply that the respondent was guilty of a corrupt practice within the meaning of section 198 of the Election Act of Manitoba, 1886. That would have been wider than the wording of the petition as it stands, and yet not so wide and indefinite as election petitions which have been held sufficient. In the *Westminster Case*, 19 L. T. N. S. 565, the petition alleged, the holding of the election, gave the names of the candidates, and stated that the returning officer returned the respondent as duly elected. It then proceeded, "Your petitioners say that the said respondent was by himself and other persons on his behalf guilty of bribery, treating and undue influence

before, during and after the said election, whereby he was and is incapacitated from serving in Parliament for the said city of Westminster, and the said election and return of the said respondent were and are wholly null and void." That with a prayer that the election might be declared null and void constituted the whole petition, and the court held it sufficient.

Objections seven, eight and nine, relate to the security given. This has been given by bond, the statute saying that it may be so. It cannot be argued that the legislature used the words recognizance or bond as synonymous terms. Had the words been "by a recognizance or bond," there might have been some ground for so arguing, but the words are "by recognizance or by bond," showing that two distinct things were meant.

One objection to the bond is, that it is not by its terms a security for all the purposes for which section 23 requires security to be given. It is expressed to be conditioned for payment of all costs, charges and expenses that may become payable by the petitioner to any person assigned as a witness on his behalf and to the respondent. These are the first two purposes for which by the statute security must be given. The third purpose mentioned in the statute is not referred to in the bond, but that is said to be unimportant as the conduct of the returning officer is not in any way attacked. The bond after securing the costs, charges and expenses in the two particular cases, then says, "and also all costs which on the final disposal of the petition the court shall award to be payable as provided by The Manitoba Controverted Elections Act." The words of the statute are, "and any and all other expenses and charges." The objection is, that although costs may be secured, there are expenses under the Act which do not come within the description of costs, and the expenses spoken of in various sections of the Act, for a clerk, for providing for the sittings of the court, and in section 5 of the 46 & 47 Vic. c. 13, are referred to as instances of such expenses which are not costs.

Now, the statute nowhere requires that on giving either a recognizance or a bond under section 23, the very words of that section must be used. The question then is, whether by the words used, "All costs which on the final disposal of the petition the court may award to be payable," the expenses spoken of are covered. As the very words of the statute have not to be used, if the words which are used cover all the purposes for which

security must be given that should be sufficient. So far as I can find, in the statute, in every section in which expenses, which would perhaps ordinarily not be taken to be included under costs, are spoken of these expenses are declared to be part of the costs. Thus the expenses in section 47, "shall form part of the costs of the cause." In section 53, which provides for a shorthand writer "the costs incurred thereby, shall be deemed to be costs in the cause." In section 59, the expenses of the sheriff in attending the judge and providing a court, "shall be defrayed out of the costs of the trial." The expenses spoken of in the 46 & 47 Vic. c. 13 s. 5, are "to be defrayed out of the costs of such trial." It is clear therefore that all the possible expenses connected with an election petition and the trial thereof which may not be what are ordinarily known as costs, are by the statute made so, and being so, they are undoubtedly covered by the condition of the bond in question.

The other objection to the bond is, that it is made to the respondent and not to Her Majesty. No form of bond is given in the rules. I do not see how I can hold that the bond being made to the respondent it is therefore void. Had it been to the Soverign she would have been a trustee for all the parties entitled to security, *Rex* v. *Eyres*, 4 Burr. 2118. I presume the respondent stands in the same position as to any parties other than himself whose costs are secured by this bond, and the court can find some way of making it available for their benefit.

The tenth objection was not dwelt on, and really need not be considered.

The thirteenth is not a ground of objection. Affidavits of justification are not essential, though in dealing with costs, even should the objection to the sureties be disallowed, the absence of such affidavits will be taken into consideration. See *Cunningham* 246.

## THE EASTERN JUDICIAL DISTRICT BOARD v. THE CITY OF WINNIPEG.

(IN APPEAL.)

*Judicial District Boards.—Equalized assessments.—Discretion.*

The Judicial District Boards in apportioning among the municipalities the amounts necessary for the purposes of the boards have no discretion as to whether the equalized assessment shall be of the real and personal estate or of the real estate alone. It must be upon the basis of both real and personal estate. (Overruling Taylor, J.)

For the judgment of Taylor, J., see 3 Man. L. R. 537.

*J. H. D. Munson*, for plaintiff.

*D. Glass* and *C. P. Wilson*, for defendants.

(*14th February, 1887.*)

WALLBRIDGE, C.J., delivered the judgment of the court. (*a*)

The first count charges that the plaintiffs on the 29th day of July, 1884 passed a by-law reciting that it was necessary to raise and levy $55,675 from the municipalities, cities and towns within the Eastern Judicial District for the purpose of maintaining the gaol, court house and payment of expenses connected with the administration of justice and for paying interest on debentures for the payment of salaries and fees of the sheriff, Crown witnesses, constables and jurors until such time in the year 1885, as a subsequent levy could be made and the plaintiffs levied the said sum upon the municipalities, cities and towns within said district, and such sum was levied upon the basis of the equalized assessment and valuation of the real property of the same, which was then duly made, and pursuant to the statutes, was duly apportioned and directed to be borne amongst the said several municipalities, cities and towns as therein and by the schedules thereto set forth, of which the proportion to be paid by the defendants was the sum of $2,763.20, and by said by-law the plaintiffs required the defendants to levy the last mentioned sum and pay

(*a*) Present: Wallbridge, C.J., Dubuc, Killam, JJ.

the same over to the plaintiffs on or before the tenth day of December, 1884. Of which defendants had notice yet defendants neglected to pay the same.

The second count recites the by-law of 29 July, 1884, in which it is recited that it was necessary for the plaintiffs to pay the liabilities of the theretofore existing corporations of the County of Selkirk, for which the plaintiffs were then liable, the defendants having with other municipalities formerly constituted said county. The plaintiffs duly levied upon the municipalities, cities and towns of said county the sum of 2,257.44, which was the sum of the said liabilities, at which they had been duly audited and apportioned among the said municipalities, cities and towns in said county on the basis of the equalized assessment and valuations of the real property if the same was then duly made, of which sum the proportion to be paid by the defendants was thereby estimated at $1,900.85, and the plaintiffs required the defendants to levy and collect the last mentioned sum and pay the same over to the plaintiffs on or before the 10th December, 1884, and the plaintiffs transmitted to the defendants before the 1st August, 1884, a statement of the last mentioned sum, yet the defendants neglected to pay the same.

To these counts the defendants demur.

The only question argued before the full court was whether the plaintiffs were at liberty to levy the amount demanded upon the basis of the equalized assessment and valuation of real property of the various municipalities or whether as a matter of law the amount required should not be levied upon the equalized assessment and valuation of the real and personal property.

The by-law recited was passed under the authority of 46 & 47 Vic. c. 1 part 2 s. 25, whereby it is enacted that it shall be the duty of the board (the plaintiffs) to make provision for obtaining all sums required for such purposes, namely those recited in the by-law, from the counties comprised in such Judicial District. The Board are to make an estimate of the amount required during the current municipal year for those purposes, until such time in the following year as a subsequent levy can be made and collected.

Section 26, provides for calling a meeting of the board as soon after the passing of that Act (7 July, 1883), as the secretary-treasurer shall have obtained returns from the several city, town

and other municipalities in the district showing the assessed value of the real and personal property of each municipality, not later than 10th August next after the passing of the Act, it is then enacted that the board shall thereupon apportion the amount so estimated amongst the various municipalities upon the basis of the respective assessments and shall cause to be transmitted to the clerks of the respective municipalities before the 20th August, a statement of the amount required to be raised by each of the municipalities for the purposes aforesaid.

Section 28 provides, that this estimated amount shall be apportioned upon the basis of the equalized and assessed value of the real and personal property; and the statement of the valuation of the personal property of the said municipalities, or of the real and personal property as required, shall be furnished to the boards by the clerks of the municipalities. It is in this section clearly provided that the board shall be furnished with the personal property or with the real and personal property by the clerks of the municipalities.

This was the method provided by the Act 46 & 47 Vic. c. 1 part 2 s. 25, 26 & 28, all these provide for an equalization upon both real and personal property; section 26, specially providing for the manner of levying for the sums so required during the year. This By-law was passed on the 29th July, 1884. And the Act 47 Vic. c. 11, was passed on the 29th April previous. This latter Act, if it change the apportionment, or the basis of the apportionment, must be followed and it provides in respect to assessments.

Section 436, provides for the appointment of assessment commissioners.

Section 437, defines their duties. The first of which in sub-section 1 is to make a valuation of the land in the whole district especially excepting cities and towns.

Sub-section 10 provides, that when they have completed their valuation (which is only as to land), they shall report the result to the chairman of the Judicial District Board.

Section 440 then provides, that the secretary-treasurer of the Judicial District Board shall on receipt of the assessment commissioner's report, furnish the clerk or secretary-treasurer of each municipality with a copy of so much of the report as shall relate

to such municipality, and the said valuation shall form the basis for the equalization of the real property for a period of five years and with the personal property as shown in the assessment roll, if considered necessary.

The words "if considered necessary," are to me of doubtful import where they occur. This furnishing or obtaining in some way, the personal property is an actual necessity in case there is to be an equalization at all—for it is provided in section 441, that, as to cities and towns over which the assessment commissioners have no jurisdiction or authority, to enable the District Board to make such equalization and apportionment, it shall be the duty of the clerk of each municipality (which term includes cities and towns), not later than the first of June in this year, 1884, to transmit to the district treasurer a certificate sealed with the seal of the corporation, giving the aggregate value of the real and personal property of such municipality. When the course pointed out in this section is followed, there may be a proper equalization and apportionment and without it in my judgment there can be none.

The object of the statute is to secure an equalization and apportionment as appears from nearly every section I have referred to. The means of doing so certainly cannot be to adopt the assessment commissioner's valuation of the real estate of rural municipalities, and as against that to attempt an equalization having regard to cities and towns by adding their real and personal property together, (and the District Board are not entitled to have the assessment of cities and towns certified to them in any other way than in the aggregate). Section 442 may be read as explanatory and that section enacts that, the District Board shall at its first meeting in every year settle, as nearly as may be, the amount which shall be required for all county purposes for the current year.

Having done this, this section further enacts that they shall examine the assessment rolls of the different municipalities for the preceding year, or the clerks' certificates together with the statement or return of the assessment commissioners of the value of the real property, and on the basis of the said returns and valuations shall apportion the sum that each municipality shall pay on its proportion of the aggregate amount for all county purposes for the current year.

In my opinion, the method of arriving at the amount for which each municipality shall be valued or rated for the purposes of this equalization is this:—the valuation of the real property in all places, other than cities and towns, and in cities and towns the aggregate value of the real and personal property shall be taken, and to the valuation of the real estate made by the assessment commissioners is to be added the personal property as shown by the assessment rolls. In this manner an equalization can be made.

The statutes, both The Judicial Districts Acts and the Municipalities Act, provide for equalization and apportionment and must be construed so as to give effect to that principle, if it can be done without doing violence to the words of the Act and it can be done in the manner above directed. To have made the valuation upon the value of the real estate alone as the declaration sets out is in my opinion not warranted by either of the Acts referred to, and as that is the method set out in the declaration on which the equalization has been made, I think it cannot be sustained. Even counsel on the argument felt obliged to admit that unless the District Boards had the option of taking as the basis—the values of the real estate alone and equalize and apportion upon that—and he contended they had exercised that option, he must fail.

In my opinion, there is no means provided by statute by which they can legally ascertain the value of the real estate in cities, as separate from the personal estate, they can only get from the cities and towns the aggregate assessment and to make an equalization at all requires the same from the other municipalities, though, as to the real estate they are not obliged to rely on the rolls, but must take the assessment commissioner's report.

## *Re* ASSINIBOIA ELECTION.

*Order not served.—Counsel representing witness.—"Sufficient sureties."*

At law an order must be drawn up and served within a reasonable time otherwise the other party may treat it as abandoned. But the order will not be set aside on the ground of delay unless the other party's position has been affected by it.

In equity only *ex parte* orders require service. The common law prevails as to service of orders in election cases.

An order was made for the examination of witnesses upon a chamber application. The order was not served, but the opposite attorney attended on, and took part in, the examination.

*Held*, That the depositions might be read.

A witness cannot be represented by counsel, nor can counsel engaged in the case be heard in support of any objection the witness may have to giving evidence.

The expression in the Controverted Elections Act "three sufficient sureties," means three sureties *each* of whom is sufficient for the whole amount.

*H. A. McLean*, for petitioner.

*W. H. Culver* and *G. G. Mills*, for respondent.

(*26th March, 1887.*)

TAYLOR, J.—Among the preliminary objections taken in this matter was one as to the sufficiency of the sureties. On the 29th of January last an order was made, in the presence of counsel for both parties, that the respondent should be at liberty to issue a subpœna directed to two of the sureties named in the order, and to such other witnesses as the respondent might be advised to call, requiring them to attend before T. D. Cumberland Esq., special examiner at such time and place as he should appoint and submit to be examined *viva voce* upon oath touching the sufficiency of the two sureties complained of, as sureties.

Evidence has been taken before the examiner, and one of the two sureties is no longer objected to, but it is claimed that the evidence shows the other to be insufficient.

On the part of the petitioners it is objected that the evidence which has been taken cannot be read as against them, the proceedings in connection with the taking of it being it is said irregular in this that no copy of the order of 29th January has ever been served upon their attorney.

According to common law practice an order must be drawn up and served within a reasonable time, otherwise the opposite party may treat it as abandoned, *Arch. Pr.* 1606. And it seems it must be so even although the attorney of the opposite party was present when it was made, *Kenney* v. *Hutchinson*, 6 M. & W. 134. In equity the rule is different, and from 1 *Grant's Practice*, 171, it appears that orders of course must be served, because, being obtained *exparte*, the opposite side have no notice of them but by the service, but it is said, at p. 172, "When special orders are drawn up and perfected by being passed and entered, they are to be served where service is necessary, which it is not (unless for the purpose of bringing a party into contempt for disobeying it), where the opposite side appeared by their counsel at the hearing."

Neither the Controverted Elections Act nor the general orders made in pursuance of the Act say anything about the service of orders, and the Act does not say whether the practice upon election petitions is to be the practice upon the common law or upon the equity side of the court. It may be assumed however, the Act being silent on the subject, that the practice on the common law side should be followed and that therefore, orders should be served. That being so, there is no doubt that in some cases the opposite party may move to rescind an order on the ground of delay in serving it, but where the order is of such a nature that no party is prejudiced by the delay, the practice does not show such delay to be a ground for setting the order aside, *Wilkes* v. *McMillan*, 10 U. C. Q. B. 292. The reason for a party being allowed to move to rescind an order under such circumstances is that the party obtaining it has by not serving it been guilty of such laches as to disentitle him to the benefit of it. In *Gurney* v. *Gurney*, 15 L. J. Q. B. 265, in which an application to discharge a rule for a special jury, on the ground that it had not been served within a reasonable time, was refused, Wightman, J. said, "The whole doctrine of laches depends upon the other

party being put in a worse position than he would otherwise have been, I cannot see that that has happened here."

In *Church* v. *Marsh*, 1 Hare, 653, V.C. Wigram had to deal with a question arising upon the neglect to serve an order of course, which as already said, must according to equity practice be served to render it effectual just as an order at law should be served. There the learned Vice Chancellor held, that this expression, that an order of course is no order until it is served, must be understood in this sense that if the other party takes a step before the order is served, that step being in itself regular the order which had been obtained and not served cannot afterwards be acted upon if it will interfere with the step so taken. So in *Sandford* v. *Alcock*, 10 M. & W. 689, the Court of Exchequer refused to set aside an order, one ground upon which it was sought to do so being want of service, Lord Abinger saying, "As to the other point, it is clear that the defendant could not have taken any fresh step, and therefore I think the plaintiff ought not to be considered as having abandoned the order."

The omission to serve the order did not make it void and the question is, whether the petitioners have, or have not, by their conduct waived the irregularity and prevented themselves from raising the objection.

The order was made on Saturday the 29th of January, and on Tuesday the 1st of February an appointment was obtained from the examiner appointing Thursday the 3rd of February to proceed with the examination of the sureties and another witness. This appointment is on the face of it expressed to be given, "Pursuant to the order made herein on the 29th day of January A.D. 1887," and was duly served upon the attorney for the petitioners. On the 3rd of February the examination was proceeded with, a witness and one of the sureties were examined and the other surety was partially examined. The examination was then adjourned until the 7th of February and an application was made for an order to compel the surety partially examined to answer certain questions which he declined to answer. On the 7th it was again adjourned until the 9th, and on that day it was further adjourned until the 14th, when it was proceeded with. On the 16th of February another appointment was made by the examiner for a further examination on the 18th of February, which was adjourned until the 21st when some evidence was taken. Then on the 21st

of February still another appointment was made returnable on the 25th of February when the taking of evidence was concluded. The appointments of the 18th and 21st of February were both expressed to be made pursuant to the order of 29th January and were both served upon the attorney for the petitioners.

Upon all these examinations Mr. McLean the attorney for the petitioners attended. At the commencement of the depositions taken on the 3rd of February there appears on the margin "Mr. Mills for respondent, Mr. McLean for petitioners," underneath which is written "see correction at page by Mr. McLean." At the commencement of the depositions taken on the 14th of February, the following entry is found in the handwriting of the examiner "Mr. Mills for respondent, Mr. McLean for sureties. Mr. McLean states that the note made by the examiner in the margin that he appeared on former examination for the petitioners is wrong and that he never appeared for petitioners but always for sureties. I note now that nothing was said on former attendance by either counsel as to whom he appeared for, the note in the margin was made by me after the parties had left my office."

Now it seems to me that when the attorney for the petitioners appeared upon the examination, if he did not intend appearing for the clients for whom he was attorney on the record, it was his duty distinctly to have said so and not have allowed the examination to proceed, leaving the examiner and the opposite party under the impression that he was appearing for them. He should have stated that he did not appear for them and have assigned his reason for declining to appear, but it is plain from the note of the examiner that he did nothing of the kind.

Besides on the first day he cross-examined two of the witnesses and opposed the enlargement to the 7th being granted. At the taking of the evidence on the subsequent appointments he cross-examined most of the witnesses and on several occasions had objections to evidence which was being given noted. Now he could take part in the examination by having objections noted and by cross-examining the witnesses only as the representative of the petitioners. The sureties and the other persons under examination were none of them parties to the petition, they were there and were being examined only as witnesses, and therefore had no right to have counsel in attendance on their behalf. Certainly no counsel present in their interest could interfere in

the examination. Counsel could attend for a witness to protect him only against his being called upon to produce documents which were privileged or to answer questions he was not bound to answer. But had any questions of that kind come up the counsel so attending could not have been heard on behalf of the witness. In *Doe Rowcliffe* v. *Egremont*, 2 M. & R. 386, it was held that a witness objecting to produce documents has no right to have the question of his liability to produce argued by counsel retained by him for that purpose. *Doe Egremont* v. *Date*, 3 Q. B. 609, was a case in which a Colonel Wyndham was not a party but in which he was interested because he was bound to indemnify the defendant if the plaintiff got a verdict. Instead of his being called as a witness to produce documents, his attorney was by consent of all parties examined and was, notwithstanding his objections, compelled to produce a particular book. A verdict having been entered for the plaintiff a new trial was moved for on the ground of the production having been improperly compelled, and counsel insisted that Colonel Wyndham was so substantially interested as not to be excluded from complaining of the decision at *Nisi Prius*. The Court held that the case must be disposed of as if Colonel Wyndham had himself been the witness, Coleridge, J., in giving his judgment said: "I recollect a case on the Western circuit in which I was retained as counsel for a witness, to resist his being compelled to produce some evidence. Mr. Justice Park, who was perfectly familiar with the course of procedure at *Nisi Prius*, would not for a moment allow me to appear in that character. He said: 'I must be left to take care of the witness, and I alone; I shall not hear counsel on his behalf.' If counsel cannot be heard for a witness at *Nisi Prius*, certainly he cannot be heard for the witness *in banc*."

If the objection to produce a document must be taken by the witness himself, and neither the counsel engaged in the cause can support the objection, (See *Taylor on Evidence* p. 1233, *Marston* v. *Downes*, 1 A. & E. 31,) nor can counsel retained for the witness be heard however important it may be for the witness not to disclose the document, how much less right has a counsel who says he only appears for the witness, to interfere and cross examine that witness and the other witnesses.

In my opinion by Mr. McLean not stating at the first he did not appear for the petitioners the right to object to the regularity of the proceedings was waived. Most certainly it was waived by his taking part in the examination. The evidence can therefore be read. No injustice is done the petitioners. The attorney on the record for them was present when the evidence was taken and he cross examined the witnesses in their interest.

One of the sureties at first objected to, is not, since the examination as to his property, any longer objected to. The other Gilespie is still claimed to be insufficient. Whether he is so or not must therefore be considered. The expression in section 24 of the Controverted Elections Act "Three sufficient sureties" must, I think, be read to mean, three sureties each of whom is sufficient, that is, each of whom is worth $2,000 over and above what will pay his debts and liabilities.

The surety here claims to be qualified as being the owner of four properties, worth in all on his valuation $14,750. No witness has been called on the part of the petitioners to sustain his valuations. We have the surety's own evidence only. On the other side two witnesses have been called. One, the manager of a Loan Company in Winnipeg, the other, a real estate agent, both men who swear they have a practical knowledge of the value of real estate. The real estate agent places the value of all his properties at $5,120. The manager of the Loan Company was examined as to only one property, upon which his Company has a mortgage. It has been offered for sale without finding a purchaser and he valued it at $1,650, the surety having put it down at $4,950. The other witness gives the same property as worth from $1,000 to $1,200. It is not very important to analyze the valuations given by the two witnesses, for taking even the valuation put on the property by the surety himself, and the petitioners have given no other evidence of value, the incumbrances and the debts equal, if they do not exceed the amount.

From the report of the master made in a suit of the Federal Bank against the surety and dated 29th of Oct., 1886, there is found to be due to the Federal Bank on a mortgage upon one of the properties on which the surety seeks to qualify, $8,380.92, there being included therein six months subsequent interest up to the 29th day of April next, the day appointed for redemption.

There is also due to the Federal Bank upon a judgment $2,642.82, interest to the 29th of April, being included in that sum also.

There are in the sheriff's hands an execution for the Federal Bank for $8,135.92, being the amount due upon the mortgage at the date of the master's report, 29th Oct., last; also an execution for the Federal Bank for $2267.33, with interest from 21st Oct. 1884, being the same judgment as is mentioned in the report. There is also an execution at the suit of the Manitoba Investment Association for $2,372, with interest from 29th Nov. 1884. That is in respect of a mortgage debt, the correct state of the account upon that mortgage being that there is due $2499.48, and for interest $625. The total amount due as found by the master's report in the Federal Bank suit and upon the mortgage of the Manitoba Investment Association with interest and sheriff's fees is $14204.22. To which has to be added a mortgage upon one of the properties for $2200, with $484 arrears of interest, making in all $16888.22 against property worth at the highest valuation, $14750.

It is true that as to the $2200 mortgage the surety says it may be discharged at any time. It was given to a man named Robson to allow him to use it for security, and it has been assigned to one Sinclair. The surety says: "I don't owe Sinclair anything. Not in that sense of the word. I owe in a sense and I don't in another. I have something of his and he holds this as security. When I give that something back to him I am entitled to the mortgage back." Now, that can be said in the case of every mortgage. The mortgagor holds something of his mortgagee's; he holds his money and when he gives that back he is entitled to have the mortgage, or to have it discharged. In the meantime, here, the something which the surety, the mortgagor holds of the mortgagee's has not been given back so the mortgage, is at present a subsisting incumbrance. Then as to the debt due the Federal Bank, part of which is a mortgage upon one of the properties, the surety at first said it was paid off by a settlement with the bank. It was paid off, he says, a year ago last spring. That would be, I presume, in the spring of 1885. At a later stage he said the settlement with the Bank was two years ago past. "I have not paid them anything since then. I was not to pay them anything. I was to withdraw a suit which

I had against them for $13000, which I did." He also said he was not last year served with foreclosure papers in connection with this mortgage. The manager of the Bank when examined said that the surety in 1885 owed the Bank directly and indirectly $19325, and that an arrangement was come to that he should pay the Bank on the 4th of June, 1886, the sum of $4000, which payment should be taken as full settlement. Nothing has, he says, ever been paid on account of that $4000, and the Bank claims the full amount due and has taken proceedings. If the agreement come to in 1885 was one by which the Bank were bound in any event to take $4000 in full settlement, if paid at any time, it is strange that not only should the execution placed in the sheriff's hands in Oct., 1884, be kept alive and renewed in Oct. 1885, but that a bill should be filed on the mortgage in Sept. 1886, claiming $7000 for principal, and $1079.50 for arrears of interest and that the surety should have allowed that bill to be taken *pro confesso*.

Here, if the indebtedness to the Bank should be taken at $4000, and the valuation of the property by the disinterested witnesses should be put at double what they put it, still there would only be a margin of something like $450 in favor of the surety.

I cannot hold upon the evidence that Gilespie is a sufficient surety, and the preliminary objection that the petitioners have not given security with three sufficient sureties must be allowed.

## ATTORNEY-GENERAL v. RICHARD.

(IN EQUITY.)

*Pleading.—Allegations of fraud or error.—Parties.—Fraudulent Vendor.—Attorney-General.—Costs.*

It is not sufficient to allege that a patent was issued through fraud, or in error, or improvidence without setting out in what the fraud or error or improvidence consisted; nor to allege that it was issued upon the faith of certain statutory declarations which were untrue, without showing what the declarations contained.

The original patentee was made a party to an information to set aside a patent, although the information alleged that he had conveyed the land to his co-defendant. The information charged fraud as against the patentee's vendor, but none against himself.

*Held*, That the patentee could not demur for want of equity.

The Attorney-General will not be ordered to pay costs; the Imperial Statute 18 and 19 Vic., c. 90, not being in force in this province.

*W. H. Culver* and *G. G. Mills* for informant.

*J. S. Ewart, Q. C.*, and *C. P. Wilson* for defendant Richard.

[*April 25th, 1887.*]

WALLBRIDGE, C. J.--The information filed in this case is to set aside a patent issued to Richard for the easterly twenty chains of a parcel of forty chains in breadth by two miles in depth, situate on the north side of the Salle River, (said to be partly in sections 19, 21 and 30, in Township 8, Range 2, East, bounded on one side by Octave Ollard, and on the other by Alexander Ollard, running towards the north,) which 20 chains of said land are that part of the north-east ¼ of section 18 lying north and west of Salle River and that part of the south-east ¼ section 19, lying west of Salle River, the west ½ of north-east ¼ of section 19, also lying west of Salle River, and the west ½ of section 30, in Township 8, in Range 2, east of the principal meridian, which patent is dated 23rd January, 1884. It is this patent which the information claims should be set aside, and the information also claims that script to the value of $355, being one dollar per acre

for each acre of land comprised in said patent, which sum was in commutation for the right to cut hay and every other right which the patentee might have under sub clause 5 of sec. 32, of 33 Vic., c. 3. The land patented to Richard was conveyed to the other defendant Bourbeau, who registered the deed to him on the 16th July, 1884, in the proper registry office in that behalf. The information asks for cancellation of the patent and return, or payment of the value, of the scrip.

The first paragraph states that sections 18, 19 and 30, in township 8, Range 2, east of the principal meridian, in the Province of Manitoba were vested in the Crown and known as Dominion Lands.

That in October 1877 Amable Gaudry, Sr., applied to the Department of the Interior for a patent for a certain parcel of land situate on the north side of the Salle River, said to be partly in section 19, partly in section 21, and partly in section 30, in the said township, bounded on one side by Octave Ollard and the other by Alex. Allard, (sic.) said lot containing an area of 40 chains in breadth by 2 miles in depth, running towards the north. Such application was made under the statute passed in the Parliament of Canada in the 33rd year of Her Majesty's reign, c. 3., s. 32, sub. sec. 3, and he supported his application by documents purporting to be the statutory declarations of Amable Gaudry, corroborated by Octave Alard, and Jean B. Boyer, dated 27th Oct. 1887, alleging that the said Amable Gaudry, Sr., had been in possession of the said lands since the year 1866, and that in 1870 he made the following improvements thereon: Planted posts, ploughed and made other improvements there, in accordance with the custom of the country.

It will be observed that the lands in respect of which he made these representations are north of the Salle River, 40 chains in width, two miles in depth, running north, and when described by numbers are said to be partly in section 19, partly in section 21, and partly in section 30.

This section 21 is not one of the lots patented, and the part of lot 18 patented, is not here charged to be any part of the 40 chains by 2 miles, in respect of which these misrepresentations are made; but 18 is included in the patent, with 19 and 30 asked to be cancelled.

It may be consistent with this charge, that the improvements were on 21 charged to be part of the 40 chains, though by what we may know from the statutes regulating surveys this lot 21 could not be part of the same 40 chains in width, of which 18, 19 and 30 are also part.

Is there any charge made in the Bill by which the patent of 18 should be cancelled, or is any reason shown at all for its cancellation. With the aid of plan and proper explanations this part of 18 patented may be part of the 40 chains, and in this way may be said to be embraced within the misrepresentations.

This case, however, is on demurrer, and I cannot go outside the record.

The misrepresentation is that Gaudry represented that he had been in possession of said land since the year 1886, (*sic*) which charge in itself admits of the construction that his possession might have been for a very short period and not a continuance of such possession, whilst the kind of possession which the statute speaks of, is a peaceable possession at the time of the transfer to Canada; that he planted posts, ploughed and made other improvements there in accordance with the custom of the country. Now, 21 is charged as being part of the 40 chains, and it is perfectly consistent with the allegation here made that improvements were made on Lot 21, a parcel of land not sought in any way to be affected by this information. It is argued that paragraph 13 contains a statement that the representations in paragraph 2 are, in fact, false, but upon examination they do not appear to be so, for it is there said that Amable Gaudry was not in actual occupation or possession on or before the 15th July 1870, in such manner as to entitle him to a patent and that he did not prior to 15th July, 1870, make the improvements thereon in said declaration referred to. The representations that he is said to have made are not those alleged to be untrue. It thus stands that his possession and improvements may have been on 21, or in any event it is not charged that the representations are untrue or made to deceive, or that in fact the Crown was deceived. In fact it is not alleged that these misrepresentations are untrue.

It is true that there are general statements that certain allegations contained in statutory declarations, without saying what

those declarations were, were untrue, but this is clearly not sufficient.

The statute under which the Courts are empowered to declare patents void, 46 Vic. c. 17, s. 74, Dom. consolidated in same words in Consolidated Statutes of Dominion, c. 54, s. 57, there the words are: That whenever patents leases or other instruments, respecting lands, have issued through fraud or in error or improvidence, the Court having competent jurisdiction in cases respecting real property are empowered to adjudge such patent to be void.

In this case the charges are fraud or error. I feel I can safely hold that it would not be sufficient to allege that a patent was issued through fraud or in error or improvidence, without setting out in what the fraud, error or improvidence consisted. If that were allowed a defendant would go to trial under most unfavorable circumstances.

In *Wallingford* v. *Mutual Society*, 5 App. Ca. 701, Lord Hatherley thus expresses himself: "Nobody can be expected to meet a case and still less to dispose of a case summarily, upon mere allegation of fraud, without any definite character being given to the charges by stating the facts upon which they rest." This appears to me to be a correct statement of the law, and its justice and convenience recommend it.

The only charges specifically made are those in the second paragraph. These are not charged to be fraudulent and may be literally true.

In *Attorney-General* v. *Garbutt*, 5 Gr. 181, where the error was fully set out it was held that the mere suggesting mistake was not sufficient on the part of the Crown, and that such mistake should be proved by such evidence as to exclude all reasonable doubt. That is, it must be both alleged and proved. In the sixth paragraph it is alleged that Amable Gaudry on the 10th December, 1878, conveyed to one Richard part of the lands called forty chains, containing 20 chains in width by two miles in depth, bounded on the south by the River Salle, on the west by Octave Allard's ten chains claim, to the east by what remained of the vendor's claim, composed of sections 19, 30 and 31, in the said Township 8, and in paragraph 7 it is stated that the land in the preceding paragraph is the westerly 20 chains of the said

40 chains, relying on the statutory declarations and documentary evidence, and believing Amable Gaudry entitled to the said 40 chains, under the provisions of the Manitoba Act, and in error as to the land described therein; that is, in the deed Amable Gaudry to Richard, the Department issued to Richard a patent for the easterly 20 chains, being part of the N.E. ¼ of 18, lying south and west of Salle River, that part of S.E. ¼ of section 19, west of Salle River, the west half of the N.E. ¼ of section 19, west of Salle River, and the west half of the east half of section 30, in the said Township 8. This is also a statement of error or mistake, not setting out in what the error or mistake consists, and upon the authority of *Attorney-General* v. *Garbutt*, 5 Gr. 181, is also bad.

It was further objected that Richard was not a proper party as he was in no way responsible for the scrip. The scrip is said to have been issued in consequence of the right to the land and as an incident to it under the statute 33 Vic., c. 5, s. 32, sub-sec. 35, as commutation for right of cutting hay. There is a common origin both to the land and scrip arising out of the same right both parts of one claim, the land after grant, being conveyed to Bourbeau and the scrip remaining with the grantee of the land from the Crown. The right of the Crown to one of these necessarily carries with it the right to the other. *Werderman* v. *Societe Generale de Electricitie*, 19 Ch. D. 251, shows that since the Judicature Act the presence or absence of parties is no longer ground of demurrer.

It is true as argued by Mr. Ewart, that an insolvent is not a necessary party, when he has parted with his interest, but if fraud is charged it is not a subject of demurrer. *Whiting* v. *Rush*, 2 Y. & C., Ex. 546. *Lloyd* v. *Lander*, 5 Madd. 282. He might be made party for discovery. *Marshall* v. *Sladden*, 7 Hare, 428. The suit appears to me to be properly constituted.

In my opinion the demurrer should be allowed. If the suit were between party and party I should allow costs, but as the Attorney-General is plaintiff, I think the rule that has prevailed in Ontario, laid down in *Rees* v. *Attorney-General*, 16 Gr. 468, and *Reg.* v. *Mainwaring*, 5 O. S. 670, is the law here.

It is contended that the Imperial Statute, 18 & 19 Vic., c. 90, under which costs are allowed in England, was imported into

our law by our Act introducing the law of England, but that Act is local as to England, and required a special Act to make it applicable to the Isle of Mann, besides the manner of obtaining costs pointed out under it could not be applied here. We have not the officers nor the means territorially of enforcing a demand for costs and the Court will not make a decree it cannot inforce.

Allow the plaintiff one month to amend.

*Demurrer allowed.*

## WALLBRIDGE v. HALL.

## WALLBRIDGE v. YEOMANS.

*Wrongful seizure by Sheriff.—No interference with goods.—Damage.—Instructions by Attorney.—Power of.*

Under an execution against B. the sheriff seized goods claimed by the plaintiff. The sheriff did not touch the goods or leave any one in possession, but merely took a list of them, told the plaintiff not to remove them, and took an undertaking from the plaintiff that he would not remove them. The sheriff interpleaded and the execution creditors abandoned. The sheriff then (three or four weeks after the seizure,) gave notice of abandonment to the plaintiff.

*Held* 1. That there was no trespass for which an action would lie.

2. An attorney has no implied authority to give instructions to a sheriff to seize any particluar goods.

3. Taking part in interpleader proceedings is not a ratification by the execution creditor of the seizure.

Remarks upon the *bona fides* of a sale made to a hired man under suspicious circumstances.

*J. S. Ewart, Q.C.*, and *A. M. Peterson*, for plaintiff.

*H. E. Henderson* for defendant.

(*5th April, 1887.*)

DUBUC, J.—These were two actions for trespass for wrongful seizure. The sheriff having two writs of execution against one Baker, one at the suit of the defendant Hall, and the other at the suit of the defendant Yeomans, went and seized the plaintiff's goods. He did not go into possession, nor leave any one in charge of said goods: but took a list of them and told the plaintiff not to remove them until his claim had been put in the sheriff's hands. The plaintiff put in his claim; the sheriff interpleaded, and after the plaintiff had been examined on his affidavit, the sheriff withdrew from the seizure, of which the plaintiff was duly notified. The plaintiff brought his two actions, and at the trial it was agreed that the evidence in one would be used in the other, and both cases were argued at the same time.

The withdrawal of the sheriff took place three or four weeks after the seizure. In the meantime the plaintiff had remained in possessson, use and enjoyment of the goods. He claims, however, that, during those three or four weeks he was delayed in selling his grain and carrying it to the market. But he does not show that he lost on the price of the grain by such delay.

The writ of execution of *Hall* v. *Baker* was placed in the sheriff's hands on the 29th April, 1886, and that of *Yeomans* v. *Baker* on the 24th April. The farm on which the stock, implements and grain were seized was known as Baker's farm; and it was in reality Baker's farm, and the stock and implements were Baker's property, until the beginning of the said month of April. For a year before and up to the 6th April, 1886, the plaintiff had been the hired man of Baker, and had worked as foreman on his farm. It appears that about a week before said date, Baker told the plaintiff that he had sold the farm to one Elvin, whom the plaintiff has never seen in this country. Until he was so told, the plaintiff understood that Baker owned the farm. And Baker, acting as attorney for Elvin, executed a lease of the farm to the plaintiff. The lease is dated the 6th April, 1886. On the same day, Baker also executed a bill of sale of all his stock, implements and grain to the plaintiff, the consideration being $1,730. No money was paid, but the plaintiff gave back a chattel mortgage for the sum of $1,533.55. Under the chattel mortgage the first payment for $766.77 was due and

payable on the 1st November, 1886. But up to the time of the trial of this case, 24th March, 1887, nothing had been paid on it.

The first question to be determined is, whether there was a trespass committed for which the defendant should be held liable. Then, if that is found in the affirmative, what damages is the plaintiff entitled to recover.

The evidence shows that, on the first writ of *fi. fa.* in *Yeomans* v. *Baker*, placed in the sheriff's hands on 24th April, 1886, the sheriff's officer went and seized the goods in question, except the grain, and took an undertaking from the plaintiff that the said goods would not be removed from the place. But nothing further was done on said seizure.

On the 4th October, 1886, the sheriff received the following letter:—

"Dear Sheriff:

"Hall *vs.* Baker. Yeomans *vs.* Baker.

"Have you made any seizure under these executions yet? Hall is anxious that you should make seizure before the grain is disposed of. Please attend to the matter and let us know what you do.

"Yours &c.,

"Henderson & Henderson."

Mr. Henry E. Henderson, barrister, who wrote the letter as member of the firm of Henderson & Henderson, was examined at the trial on behalf of the plaintiff and said that he knew of no other instructions given to the sheriff by his firm but what was contained in the letter of the 4th October. He does not state, and there is nothing in the evidence to show, that in so instructing the sheriff they were acting themselves under any special instructions from the defendant. In the case of *Wallbridge* v. *Yeomans*, Mr. Henderson in explaining his action, or rather the action of his firm in regard to said executions, said he had received no special authority to issue the *fi. fa.* He had received no other authority from his clients than the authority to prosecute the suit to bring the action. He said he did not know "whether he can justify his action in issuing the execution, as it is a question of law whether or not he had implied authority."

As to the question whether there was a trespass committed, the case of *Cameron* v. *Lount*, 4 U. C. Q. B. 275, seems to be very much in point. In that case the bailiff had received from the plaintiff a list of the goods and stock found on the farm, had told the plaintiff that he must not remove it, and took a bond that it should be forthcoming. Robinson, C. J., held that, as the goods were neither removed, nor retained, nor handled, there had been no actual direct injury done to the plaintiff 's goods, for which he could sue in trespass.

In *Pardee* v. *Glass*, 11 Ont. R. 275, it was held that, though there was what constituted a seizure by the sheriff, so as to entitle him to interplead, as he had not interfered with the possession of the goods, he was not liable in trespass, and the verdict in his favor was maintained.

In *Smith* v. *Keal*, 9 Q. B. D. 340, the Court held that it was not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods.

In *Hartley* v. *Moxham*, 3 A. & E. N. S. 701, the defendant had locked up the plaintiff 's goods in a room which he held of defendant, and in which the plaintiff had put them, kept the key and refused plaintiff access to them, saying that nothing should be removed till his, defendant's, bill was paid. It was held that there was not such a taking of the goods as would sustain an action of trespass.

Under these authorities, I think I might properly hold that in the cases before me there was no trespass committed. But if there were any doubt about it, I think I should at least hold that there was no trespass for which the defendant should be held liable. There is no evidence showing any special authority from the defendants to the solicitors, Messrs. Henderson & Henderson, to issue the *fi. fa.* at all ; much less authority to instruct the sheriff to seize any particular goods of the plaintiff. The letter of the 4th October does not directly instruct the sheriff to go and seize that particular grain claimed by the plaintiff. The said grain, though, was no doubt meant in said letter, but there is nothing to show that the defendant Hall, nor the defendant Yeoman authorized their solicitors to so instruct the sheriff.

It may be contended that their attending by attorney at the interpleader proceedings should be considered as a ratification of the seizure. But the contrary was held in *Woollen* v. *Wright*, 1 H. & C. 554, and *Kennedy* v. *Patterson*, 22 U. C. Q. B. 556.

These being my views on the authorities and on the evidence, I am not bound to consider the question of the amount of damages which the plaintiff should recover if a verdict was found in his favor.

I may, however, say, as I said at the close of the trial, that it did not seem to me that there was any *bona fides* in the claim of the plaintiff. My impression was, and is still, that he had no merit whatever.

He swore that when he took the farm and other things on the 6th April, 1886, he did not know of any execution or suit against Baker. But this is hardly to be believed. Up to a week before the 6th April, 1886, he knew of no other person owning the farm but Baker, and, up to that very date, he had been working as the hired man of Baker. He was then told by Baker that he had sold the farm to one Elvin, whom he has, as yet, never known to be in this country. On that same day, Baker executed a lease of the farm to him as attorney for the said Elvin, and gave him a bill of sale of all stock, implements and grain, for which he agreed to pay $1,730. Then he gave back a chattel mortgage for $1,533.55. The difference in the consideration of the two documents looks as if the sum of $196.45 had been paid at the time; but the plaintiff swears that he did not pay anything. Why then such difference in the considerations, if not to make it appear that a certain amount had been paid down? But the plaintiff does not even seem to know of that difference; he swears; "I gave the chattel mortgage for the full amount." He swears also that he understood that the first payment on the goods was to be made one year after the documents were executed, and he does not know what was the amount of that first payment, nor of the last payment to be made one year later.

But the chattel mortgage shows that the first payment for $766.77 was to be made on the 1st November, 1886, less than seven months after the date of the documents. His ignorance of such an important matter as the time of payment and the

amount to be paid, is, to my mind, a pretty conclusive proof that the whole thing was only a colorable, and not a *bona fide* transaction. This was what led me to say at the close of the trial that, if I found that, in law, the plaintiff was strictly entitled to recover, I would only give him the smallest amount of damages which the circumstances would justify. But as above intimated, I think a verdict should be entered for the defendant in both cases.

I will, however, reserve leave to move to enter a verdict for the plaintiff, for whatever amount the court may think reasonable, if he is found in law entitled to recover.

*Verdict for defendant in each case.*

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## *Re* ASSINIBOIA ELECTION.

*Justification by surety.—Cross examination.—Refusing to answer questions.*

Upon the examination as to his solvency, of a surety upon a bond for security for costs;

1. The surety cannot be compelled to produce his title deeds.

2. The examining party has no right to enquire as to all the property which the surety may own. The surety may say "I own a certain property and I claim that to be of sufficient value to qualify me to be a surety."

3. The surety will not be committed because he gives unsatisfactory answers, as that he cannot remember the description of his lands. This is not a refusal to answer.

*H. A. Macleon*, for witness.

*W. H. Culver* and *G. G. Mills*, for respondent.

(*9th February, 1887.*)

TAYLOR, J.—James Gilespie is one of the sureties who has executed the bond put in by the petitioners as security for the costs in this matter. The respondent not being satisfied with his sufficiency as a

surety proceeded to examine him before one of the special examiners of the court. Upon his examination he declined to produce certain title deeds and refused to answer certain questions which were put to him. The examination was thereupon at the request of the respondent's counsel adjourned for the purpose of an application being made to the court to compel production and to enforce answers to the questions objected to.

The respondent has obtained a summons calling upon the witness to show cause why he should not be committed for contempt in not producing the title deeds called for by the subpœna, and asked for on the examination, and in not answering the questions asked him as to his stock, and as to the particular lands owned by him in the Parishes of St. John and St. James, in said examination referred to, or why he should not attend at his own expense and make the production and answer fully and particularly the questions above referred to as in the depositions appear, or why such other order as may seem proper should not be made. To this summons cause has been shown.

During the argument I expressed the opinion that no order could be made to compel the production of the title deeds and this was not pressed, Mr. Culver admitting that he had been unable to find any authority for such an order.

As to the question respecting the stock, I cannot say that the witness was bound to answer it. Upon such an examination as the one which was being held, the examining party has no right to enquire as to all the property which the surety may own. The surety has a perfect right to say, I own a certain property and I claim that to be of sufficient value to qualify me to be a surety. Of course where he does so he runs the risk, and the party putting him forward as a sufficient surety runs the risk, of evidence being given on the other side to reduce the value, so that the court may hold on that other evidence or even upon the evidence of the surety himself, that an excessive value has been put upon the property and that the surety is not really sufficient. But, in my opinion, the surety, the witness, cannot be proceeded against for contempt because he chooses to take his stand upon a particular piece of property as giving him a sufficient qualification and declines to disclose any other property he may have.

As to so much of the summons as asks that the witness should be treated as in contempt for not answering the questions asked him, as to the particular lands owned by him in the Parishes of St. John and St. James, I do not see how I can make any order. The depositions certified to by the special examiner do not show any questions as to these lands which he refused to answer. It is true he says as to some lots in the Parish of St. James, "I can't give the numbers of the lots," and as to a farm which he claims to own near Dominion City he says, "I can't tell the township and range," but, he did not, so far as I can see, refuse to answer any questions put to him as to any of his real estate. The answers given may be unsatisfactory ones but there was not a refusal to answer.

It may be a question whether the information he has given respecting the various properties on which he seems to rely as qualifying him, is such as to describe it with sufficient certainty to enable the respondent to make enquiries respecting it, but that is a question for the petitioners and their counsel to consider. Should the court, when the question of the sufficiency of the security comes to be considered, hold that he has not, the consequences may be serious to them, but that is not what I am at present called on to deal with.

The summons must be discharged, and as it asks for costs it must be discharged with costs.

*Summons discharged.*

## DEDERICK v. ASHDOWN.

(IN CHAMBERS.)

*Extending time for appeal to the Supreme Court.*

In support of a summons to extend the time for perfecting security for costs upon an appeal to the Supreme Court, an affidavit was filed showing that of the two defendants appealing, one resided in Chicago and the other near Pilot Mound; that the trespass complained of had ruined the plaintiff's credit; and "on that account the delay in obtaining the required security can be largely accounted for."

*Held*, That no case had been made for an extension of time.

The principles applicable to such motions discussed.

Residence of the appellant out of the jurisdiction and absence of damage, by the delay to the respondent, are matters for consideration upon such an application.

*C. P. Wilson* for plaintiffs.

*S. C. Biggs, Q. C.*, for defendants.

(*15th February, 1887.*)

KILLAM, J.—This is an application to extend the time for putting in and perfecting security on a proposed appeal by the plaintiff from a judgment of this Court setting aside a verdict for the plaintiff and directing the entry of a non-suit.

By the 25th section of the Supreme Court Act, 38 Vic., c. 11, "Every appeal from the judgment of a court or judge, whereby an election petition has been decided, shall be brought within eight days from the rendering thereof; and every other appeal shall be brought within thirty days from the signing, or entry, or pronouncing of the judgment appealed from."

By section 26, "Provided always that the court proposed to be appealed from, or any judge thereof, may allow an appeal under special circumstances, except in the case of an election petition, notwithstanding that the same may not be brought within the time hereinbefore prescribed in that respect; but in such case, the court or judge shall impose such terms as to security or otherwise as shall seem proper under the circumstances."

By section 28, "No writ shall be required or issued for bringing any appeal in any case to or into the Supreme Court, but it shall be sufficient that the party desiring so to appeal shall, within the time hereinbefore limited in the case, have given the security required, and obtained the allowance of the appeal."

In *Re Blyth & Young*, 13 Ch. D. 418, James, L. J., referring to the time for appealing to the Court of Appeal from an order of the Chancery Division made under the Trustee Relief Act, said that it could not be extended "except under special circumstances." And Baggallay, L. J., in the same case, referring to the language of Jessel, M. R., in *McAndrew* v. *Barker*, 7 Ch. D. 701, where the latter learned judge laid down that the Court of Appeal had "no discretionary power to deprive a litigant of any advantage given him by the General Orders unless there has been on his part some conduct raising an equity against him," said that "this language though applicable to the case then under consideration must, I think, admit of some modification where the circumstances are of a special character."

These remarks appear to make the decisions with reference to the extensions of time for appealing to the Court of Appeal in England, applicable to assist in determining what are the "special circumstances" under which an appeal to the Supreme Court may be allowed after the expiration of the thirty days limited by section 25.

In *Re Blyth & Young*, as mentioned, it was held that these circumstances were not limited to those arising from some conduct on the opposite party raising an equity against him, and James, L. J., there gave as another instance a case of inevitable accident, but he did not pretend to say that this was the only other instance in which the time would be extended.

In *Langtry* vs. *Dumoulin*, 4 Can. L. T. 351, Boyd, C., stated: "There is a clear line of decisions respecting leave to appeal which the courts adhere to. They are of two classes. First, where there is unavoidable accident whereby a party is unable to bring on his appeal; secondly, where some equity is raised on behalf of the appellant from the conduct of the other side."

Now, I do not find any such clear line of decisions as the learned Chancellor there speaks of. As I have shown, the lan-

guage used in *McAndrew* vs. *Barker* is disapproved as laying down a rule of universal application, and in *Re Blyth & Young* there is merely the addition of the second class of cases mentioned by Boyd, C., without an attempt at the limitation he has mentioned.

A much later case is in *Re NewCallao*, 22 Ch. D. 484. There Cotton, L. J., said: "It is not necessary that there should be something in the conduct of the respondent which raises an equity against him, but it is necessary that there should be some equity which raises a case for the person proposing to appeal to gain an extension of time. There must be an equity in his favor either from the act of the other party or from something else recognized as a ground of equity." And Bowen, L. J., after referring to the rules limiting the times for doing certain acts, said: "On the other side there is a further power contained in other rules for the court to prevent injustice being wrought by slips or misadventures, and in dealing with slips or misadventures and in extending its indulgence the court will, of course, be liberal when it sees it necessary to be liberal in order to do justice." Now, here we have to notice that Cotton, L. J., lays down no rules as to the circumstances which will raise the equity he mentions, and Bowen, L. J., in the remarks I have cited brings cases of mere "slips and misadventures" within the category of special circumstances warranting an extension of time, and in some further remarks he distinctly refuses to lay down any definite limitations of this authority.

In *Re Manchester Economic Building Society*, 24 Ch. D. 488, the views stated in *Re NewCallao* were expressly approved, and Brett, M. R., used this language: "I know of no other rule than this, that the court has power to give the special leave if justice requires that that leave should be given," and he expressly deprecated any attempt to limit the power of the Court to deal with new sets of circumstances by laying down positive rules as to the principles on which leave should be given to appeal after the expiration of the ordinary period fixed by the rules of practice. It appears to me that it is wise not to attempt to lay down any more distinct rule than that of Cotton, L. J., in *Re NewCallao*, and that each case of such an application should be determined upon its special circumstances.

It is here shown that the plaintiff has given notice of appeal and intends *bona fide* to prosecute the appeal; that one of the plaintiffs resides in Chicago, in the United States, and the other near Pilot Mound, in this province. The affidavit on which the application is based also states that the plaintiffs are making arrangements to give the security, and that if the time for furnishing the security be extended for two months the defendant believes that such security will be furnished; also that the trespass of which the plaintiffs complain had the effect of ruining the plaintiffs' credit, and "on that account the delay in obtaining the required security can be largely accounted for."

There are then just two grounds on which the plaintiffs rely as raising the necessary equity in their favor. I can well conceive that circumstances might arise under which the parties would be prevented by their distance from each other, and the absence of one from this Province and from Canada, from giving the necessary security within the time provided by the statute, but in this instance it is not shown that such is the case. It is not, as in two applications lately brought before me, absolutely apparent from the distance at which the parties are from Winnipeg that they could not be expected to learn of the judgment against them and perfect their appeal within the period specified; but it is a case in which it may or may not have happened that they have been so prevented. I think that to raise an equity in this way it must appear that the absence of the parties has in fact prevented the perfecting of the security, or has contributed with other circumstances which should themselves also be such as to furnish some equity in favor of the applicant, to prevent it.

Then, as to the other ground, while feeling by no means sure that a party might not, upon showing that poverty has prevented his getting the required security within the thirty days, but coming after he has procured it and within a reasonable time, be still allowed to appeal without any further ground of equity, where the position of the opposite party had not been changed by the delay, I do not think that the plaintiffs have here made a sufficient case. It is stated merely that on account of their loss of credit the delay "can be largely accounted for." This suggests that other circumstances have contributed to cause delay. It does not appear what these are or whether they are such as to raise the equity referred to.

Then it is not at all certain, but mere matter of surmise, upon this affidavit, whether the security will ever be furnished and the additional time named as necessary for procuring it is double that which the Legislature has fixed as being usually sufficient.

It is not to be taken that the conduct of the defendant has raised an equity against him, as upon the judgment now given the Court has decided that there has been no trespass, and until that judgment has been reversed it cannot be assumed that the plaintiffs have suffered any wrong at the hands of the defendant.

Thus it appears to me that to make the order asked would be to exercise a purely arbitrary authority and to substitute for the limit imposed by statute a purely arbitrary one of my own choice, which is not the spirit in which the jurisdiction given by the statute is to be exercised.

The summons must be dismissed with costs.

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After the above judgment a bond was procured by the appellants and an application made to allow it notwithstanding the lapse of time. A further affidavit of the attorney was filed as follows:—

"Judgment was pronounced herein by the Court *in banc* on the tenth day of January ultimo, setting aside the verdict entered herein for the plaintiffs and ordering a non-suit to be entered.

"Within thirty days from the pronouncing of said judgment notice was given to the defendants' attorney as required by the statute on that behalf of an appeal by the plaintiffs to the Supreme Court of Canada from the said decision pronounced by the Court *in banc*.

"It is, and has been since the giving of said notice, the *bona fide* intention of the plaintiffs to prosecute such appeal to the Supreme Court, provided said appeal be allowed.

"The defendant, Abram Dederick, resides some miles out from Pilot Mound, in this province, and the plaintiff, Kenneth

M. Dederick, resides in the City of Chicago, in the United States of America.

"The post office address of the said Abram Dederick is Pilot Mound aforesaid, and in order to get his letters said Abram Dederick has, as I am advised and believe, to send to Pilot Mound for them. In communicating with the plaintiff, Kenneth M. Dederick, relative to this suit, we do so through the said plaintiff, Abram Dederick.

"Owing to the way in which the mails run, and to the fact as I believe of the said Abram Dederick only sending to the post office about once a week, it takes longer to receive an answer from the said Abram Dederick than it does to letters written by our firm to clients in Toronto, and although the said Abram Dederick can both read and write, it is difficult for him to understand all that is written to him. Finding this to be the case after having written three letters to him I caused a messenger to be sent to him so as to explain fully the nature of the security to be given and to assist him in arranging for security, and as a result a bond has been executed which furnishes, I believe, the required security, said bond being now shown to me and marked as Exhibit A. to this my affidavit.

"From the orders made at different times in Chambers upon motions to extend time for furnishing security upon appeals to the Supreme Court of Canada, I believed the practice had been established that where the parties appealing resided in the Province of Ontario, or in places where communication was no easier than with the Province of Ontario, that the time for furnishing security would be extended. In two cases in our own office the time had been extended; in one instance for six weeks, and in another for over two months, to the best of my belief. In the latter case the appellants resided in the City of Toronto, and were wealthy wholesale merchants, and the security finally put up by them was a deposit of five hundred dollars in cash.

"Had I not relied upon such practice I could, by the use of the telegraph and by sending a special messenger in the first instance without writing to the said Abram Dederick have had, I believe, the required security given by the tenth instant and if the appeal of the plaintiffs be not allowed, owing to the delay in furnishing

security, then the plaintiffs will have been deprived of their right to appeal owing to a misapprehension on the practice on my part.

"This action is one for trespass and as shown by the evidence at the trial the trespass had the effect of ruining the credit of the plaintiffs at that time."

*4th March, 1887.*

TAYLOR, J.—The plaintiffs desire to appeal to the Supreme Court from the judgment of this Court setting aside the verdict in their favor and directing a non-suit to be entered. This judgment was given on the 10th of January, 1887, so the time for appealing expired on the 9th February. The present summons for leave to appeal and to allow a bond proposed to be given as security for costs was taken out on the 9th February. The question whether the plaintiffs should have leave to appeal has been argued, leaving open until that is disposed of, any questions as to the sufficiency of the proposed security.

The leave to appeal is opposed and it is contended that all the material now before me setting out reasons why such leave should be given, except that a bond has been executed, was practically before my brother Killam on a previous application which he refused. Such, however, is not the case. That was an application made before the time had expired for an extension of the time for doing so, and was refused for the reasons stated in his judgment.

I agree with the conclusion my brother Killam then arrived at, that there is no definite rule which is to govern such an application as the present, and that each case should be determined upon its special circumstances. Even if there was no other argument which could be urged for allowing an appeal than that there had been a slip or misadventure that may be a special circumstance according to Bowen, L. J., in *Re New Callao* 22 Ch. Div. at p. 492. On much the same principle in *Herbert* v. *Donovan*, Cassell's Dig. 418, where the appellant although he gave security within the time, did not prosecute his appeal as required by section 41 of the Supreme Court Act, and Supreme Court rules 5. and a motion was made to dismiss, on it appearing that the reason for the appeal not being prosecuted was his solicitor

being under the impression that the time of vacation did not count, Henry, J., at once extended the time.

I think the appellants here have shown sufficient special circumstances to warrant the time being extended especially when they are only 9 days late, and the respondent cannot be said to have been in any way prejudiced. The practice hitherto seems always to have been to allow an extension of the time when the appellant is resident out of the Province. I do not say that the mere circumstance of his being absent would be by itself a sufficient special circumstance, but taking that and all the circumstances of the present case into account and there being no delay which can have prejudiced the respondent, the time should be extended.

If the respondent has any objections to the security offered he can proceed to make them.

## THE MANITOBA INVESTMENT ASSOCIATION v. WATKINS.

(IN EQUITY.)

*Homestead.—Conveyance before recommendation.—Estoppel by conduct.*

Defendant C. homesteaded certain land in October, 1880. He was a clerk in plaintiffs' employ, and being desirous of obtaining a loan from plaintiffs upon the land, conveyed it to defendant W. on 1st January 1883. At that time he had no recommendation for patent. On the 26th January 1883, he purchased the land under 42 Vic. c. 31, s. 34, s-s. 15. On the 27th January W. executed a mortgage to the plaintiffs. C. received the money, made payments on account of interest, and asked time for other payments. The patent issued to C. on 9th June, 1883, and afterwards W. reconveyed to C., who was, in reality, always the owner of the land.

Upon a bill to foreclose the mortgage—

*Held*, 1. That the mortgage was not void, for it was made after the land had been purchased from the Crown, and not while it was a homestead.

2. That C. was, by his conduct, estopped from saying that W. had no title at the date of the mortgage, and from claiming title in himself under the patent.

*W. E. Perdue*, for plaintiffs.

Personal order asked only against mortgagor.

Provisions of Dominion Land Act, 42 Vic. c. 31, s. 34 ss. 17, do not apply to mortgage.

Cowie became a purchaser, and had all the rights of such, 46 Vic. c. 17 s. 36.

As soon as lands pass from Dominion Government it has no power to interfere with property and civil rights.

As to estoppel, *Livingstone* v. *Bethune*, 3 Can. L. T. 47.

Even if deed void as transfer of land it is not void for any other purpose, covenants are binding, *Addison on Contracts*, 1169; *Kerrison* v. *Cole*, 8 East. 231; *Mouys* v. *Leake*, 8 T. R. 411.

As to estoppel, *Hennessy* v. *Myers*, 2 O. S. 458; *Tiffany* v. *McEwan*, 5 O. S. 598; *Irwin* v. *Webster*, 2 U. C. Q. B. 224; *Boulter* v. *Hamilton*, 15 U. C. C. P. 125.

As to participation in fraud by Cowie, *Kerr on Frauds*, 64, 101; *Detlor* v. *G. T. R.*, 15 U. C. Q. B. 595; *Bigelow*, 489.

*J. D. Cameron*, for defendants.

Cowie was not a purchaser, *Crotty* v. *Vrooman*, 1 Man. L. R. 153.

No difference now between *malum prohibitum* and *malum in se*, *Pollock on Contracts*, 271; *Bensley* v. *Bignold*, 5 B. &. Ald. 335; *Booth* v. *Bank of England*, 7 C. & F. 509.

Consideration illegal so covenants cannot stand separately, *Collins* v. *Blantern*, 1 Sm. L. C. 404; *Gas Light Co.* v. *Turner*, 6 Bing. N. C. 324.

Void deed cannot work an estoppel, *Chandler* v. *Ford*, 3 A. & E. 649; *Preece* v. *Howells*, 2 B. & Ad. 744; *Stedman* v. *Duhamel*, 1 C. B. 888; *Jones on Mortgages*, § 610, 619.

Deed Cowie to Watkins, clearly void under Dominion Land Act 1879; mortgage founded on that, so it must fail. *Harris* v. *Rankin*, 4 Man. L. R. 132; *Re Irish*, 2 Man. L. R. 361.

*W. E. Perdue*, in reply.

No evidence that advance was upon a homestead entry or that plaintiffs knew that; as soon as money paid Cowie had a good title; date of patent does not affect question. *Doe* v. *Pitcher*, 6 Taunt. 369.

(*4th May, 1887.*)

TAYLOR, J.—This is a suit to foreclose a mortgage made by the defendant Watkins to the Manitoba Investment Association, a Company incorporated by the 40 Vic. c. 45. By the 49 Vic. c. 70. the shares, business assets and liabilities of the Company were transferred to the Dominion of Canada Mortgage Company, Limited. By the 5th section of that Act it was provided that in all suits, actions, and matters pending before any court to which the Manitoba Investment Association are parties the same may be continued under the name of the Dominion of Canada Mortgage Company, Limited, upon their filing with the officer with whom the pleadings or proceedings are filed, a notice, that by this Act the assets and estate of the said The Manitoba Investment Association, are transferred to the Dominion of Canada Mortgage Company, Limited. The bill in this case has accordingly been amended making the new Company plaintiffs.

The mortgage which bears date the 22nd day of January 1883, was made by the defendant Watkins and purports to convey the north-west quarter of section six in the seventh township and the fifteenth range west of the first principal meridian, for securing re-payment of $450 in two years from the date of the mortgage, with interest half-yearly at the rate of ten per cent. By deed dated the 1st day of May, 1884, Watkins conveyed the land to the defendant Cowie. The prayer of the bill is for foreclosure on default of payment of the principal money interest and costs, for a personal order against Watkins the original mortgagor, for payment of the principal money and interest, for delivery of possession of the land by the defendant Cowie, with an alternative prayer that the plaintiffs may be declared entitled to a charge upon the land for the amount of the principal money and interest.

The bill has been taken *pro confesso* against Watkins, but counsel appeared for him under Gen. Ord. 91. The defendant Cowie has answered both the original and amended bill, setting up a defence which has at all events no merits in it. His defence is, that he obtained a homestead entry for the land in question in the first instance, that he purchased the land from the Government on the 26th of January, and on the 9th of June 1883, he received a patent for it. He says that prior to the purchase of the land on the 26th of January, 1883, he assigned and transferred his interest in the land to Watkins, who made the mortgage to the plaintiffs and then re-assigned it to him, all of which instruments are null and void. He claims that being patentee of the land he is entitled to hold it as such discharged from the plaintiff's mortgage, and he prays by way of cross relief that the mortgage may be declared to be a cloud upon his title, and that it may be ordered to be delivered up to be cancelled.

The defendant Cowie was at the time of the making of the mortgage a clerk in the plaintiff's employment. He spoke about obtaining a loan, but the making one to him was declined on the ground of his being in the employment of the plaintiffs. He then brought in an application for a loan upon the land in question in the name of, and signed by Watkins, who is his brother-in-law. This application is dated the day of January, 1883, it says nothing as to the title to the property, and contains no reference to the land as a homestead. The loan having been

accepted, a mortgage was made out, the written parts of which, as well as the written parts of the application, are in the handwriting of a Mr. Jones who was then acting manager of the plaintiff company. The mortgage bears date the 22nd of January, 1883, the affidavit of execution was sworn to on the 27th of the same month, and the mortgage was registered on the 2nd of February following. The deed from Cowie to Watkins is dated the 1st of January, 1883, the affidavit of execution was sworn to on that day, but the deed was not registered until the 6th of February following. It is an ordinary deed in pursuance of the Act respecting Short Forms of Indentures, containing all the usual covenants. On the 6th of February, a cheque was drawn for $435, in favor of Watkins, signed by Mr. McArthur a director of the plaintiff Company, and Jones the acting manager. This would seem to have been issued, or handed over to Cowie, on the 17th of February, for that day a receipt was given for $450, "being the proceeds of my loan from said association." This is signed "P. L. Watkins by attorney Gray Cowie." The difference between the $450 mentioned in the mortgage, and in the receipt, and the $435, for which the cheque issued is said to have been the expenses of the loan. The cheque is endorsed "P. L. Watkins, by attorney Gray Cowie;" and passed into the hands of the Bank of Montreal, on the 19th of February, and was paid by the Merchants Bank, on which it was drawn, on the next day, the 20th. A deposit slip in the handwriting of Cowie, is produced from the Bank of Montreal, dated 19th February, 1883, which shows that on that day a cheque for $435 was deposited to his credit. The Bank ledger shows that on the same day a cheque drawn by Cowie for $150, was charged to his account, and that is the largest cheque charged to his account during the next two months. All the business connected with this loan, on the part of the borrower, was transacted by Cowie, and the company had no communication whatever with Watkins. Mr. Aikins, at the time of this loan a clerk with the plaintiff company, and now the manager at Winnipeg, says, "It was simply a name."

On the 9th of June, 1883, a patent for the land issued to Cowie, and on the 1st of May, 1884, Watkins conveyed the land to him by an ordinary deed, in pursuance of the Act respecting Short

Forms of Indentures, which contains all the usual covenants. This deed was not registered until the 16th of February, 1885.

The defence set up by Cowie is, that the land was a homestead taken up by him on the 18th of October, 1880, and under the provisions of The Dominion Lands Act, the transfer by him to Watkins in January, 1883, was null and void, so the plaintiffs acquired no title under their mortgage. He also urges that the original contract being void, it could not be ratified by any of the circumstances relied on by the plaintiffs, such as his payment of interest upon the loan, requesting an extension of time for payment, and so on, that in fact it was incapable of ratification. So also, he urges there can be no estoppel, for as *Bigelow* says, at p. 281, "It is an essential element to the estoppel by deed, that the deed should be a valid instrument: a void instrument though under seal does not work an estoppel."

The Dominion Lands Act, he says, prohibited the transfer of the land, and there is now no difference between *malum prohibitum* and *malum in se*, quoting the rule stated in *Pollock on Contracts*, at p. 270, "When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between *mala prohibita*, (*i.e.*, things which if not forbidden by positive law, would not be immoral), and *mala in se*, (*i.e.*, things which are so forbidden as being immoral). In support of this rule the language of Best, J., in *Bensley* v. *Bignold*, 5 B. & Ald. 335, is quoted.

Counsel also urged on behalf of Watkins, that the consideration for the mortgage being illegal, the covenants cannot stand separately, and plaintiffs cannot recover against him on the covenant for payment of the mortgage money. In support of this, *The Gas Light Co.* v. *Turner*, 6 Bing. N. C. 324, was relied on, in which the court held that the plaintiffs could not recover under a covenant to pay rent contained in a lease of premises, let, for the express purpose of being used for drawing oil of tar and boiling oil of tar, contrary to the provisions of 25 Geo. 3, c. 77. It seems to me, however, that on this point, *Mouys* v. *Leake*, 8 T. R. 411; and *Kerrison* v. *Cole*, 8 East 231, should be followed. If this mortgage has any illegality attaching to it, it is only by virtue of the Dominion Lands Act. Now, in *Mouys* v. *Leake*, a rector having granted an annuity out of his benefice, was held

liable on his personal covenant to pay it, contained in the same deed, though the 13 Eliz. c. 20, says, that "all chargings of benefices with any pension out of the same, &c., shall be utterly void." So, in *Kerrison* v. *Cole*, which was an action on the covenant in a bill of sale, transferring the property in a ship by way of mortgage, the bill of sale being void for want of reciting the certificate of registry as required by 26 Geo. 3, c. 60, s. 17, it was held that the mortgagor might be sued upon his personal covenant contained in the same instrument for the repayment of the money lent. In that case Lord Ellenborough, speaking of the decision in *Mouys* v. *Leake*, said it was founded on admirable good sense and sound law.

The Dominion Lands Act of 1879, the 42 Vic. c. 31, is the one the provisions of which must apply to the other points taken in this case, as the whole transaction was completed before the 46 Vic. c. 17, was passed. Sub-section 17 of section 34 of the Act of 1879, says, that "all assignments and transfers of homestead rights before the issue of the patent, except as hereinafter mentioned, shall be null and void, but shall be deemed evidence of abandonment of the right . . . . provided that a person whose homestead may have been recommended for patent by the local agent,—the conditions in connection therewith having been duly fulfilled,—may legally dispose of and convey, assign or transfer his right and title therein." In *Harris* v. *Rankin*, 4 Man. L. R. 115, it was held that the registration of a judgment, which by statute has the effect of the creation of a charge upon his lands by the judgment debtor in writing under his hand and seal, would not affect the interest of a homesteader, because the prohibition against an assignment or transfer of the land would prevent the creation of any charge in this way. Following upon that, there cannot be an effectual mortgage of a homestead before recommendation for patent. But, by sub-section 15 of the same section 34, it is provided that, "Any person who has availed himself of the foregoing provisions," that is the provisions for taking a homestead, "may, before the expiration of the three years obtain a patent for the land entered upon by him . . . . on paying the government price thereof at the date of entry, and making proof of settlement and cultivation for not less than twelve months from the date of entry." Now, Cowie availed himself of the provisions of this sub-section. He paid the government

the price of the land and on the 26th of January, obtained a receipt from the proper officer which expresses the money to be received as the purchase money under "the provisions of sub-section 15 section 34, Dominion Lands Act." The homestead entry was never cancelled so as to make the transaction an ordinary sale, though from a certified copy of some entries which were admitted as evidence, there is an entry in the Land Office books opposite the original entry, under the head of remarks, "Application to cancel, " and a red line has been drawn through the entry. When this certificate was given does not appear, for it bears no date, but it is annexed to a letter dated 5th November, 1886. The true transaction, however, as understood by the government, must be found from the wording of the receipt given at the time. That is also supported by a letter from the same office, dated 1st October, 1886, in which it is said, "G. G. Cowie made homestead entry for the N.W. ¼ 6, 7, 15, west, in October, 1880, and purchased the same on the 26th January, 1883, after residence and cultivation for one year." That, as well as the receipt, shows plainly the purchase to have been one under sub-section 15.

The mortgage under which the plaintiffs claim, although bearing on its face the date of 22nd January, 1883, was not in fact executed until the 27th of that month. Mr. Burnet, a commissioner at Milford, before whom the affidavit of execution was sworn, says it was executed on the day on which the affidavit was sworn. He remembers the mortgage being brought to him by Watkins, and that he got the witness Waddell, to come into his office, and then the mortgage was executed, and the affidavit of execution sworn to. Now, a deed must be taken to speak from the time of the execution, and not from the date apparent on the face of it. That date, it is true, is to be taken *prima facie*, as the true time of execution, but as soon as the contrary appears the apparent date is to be utterly disregarded, *Browne* v. *Burton*, 5 D. & L. 292; *Steele* v. *Mart*, 4 B. & C. 272. The mortgage then, was not executed, and had no effect, until after the land had been paid for to the government. If, however, the conveyance, or transfer of the 1st of January, 1883, was void as being contrary to the provisions of sub-section 17 of section 34 of The Dominion Lands Act, then on the 27th of January, Cowie was the owner of the land as purchaser, and in what position does he

stand. In that of a man who has deliberately defrauded the plaintiff company by passing off upon them a mortgage made by Watkins, upon land of which he was himself the owner, and receiving the money advanced for his own benefit. There can be no question that he made use of his position as one of the clerks of the company, to have this transaction carried through without the usual investigation of the title.

That Cowie was the real borrower, is further evident from numerous letters written by him to the plaintiff company. The first payment of interest due on the 22nd of July, 1883, was paid by his cheque. Before the next payment became due he had removed to St. Paul, and on the 10th of January, 1884, he sent a post card, "Please be good enough to notify me when interest on L. P. Watkins mortgage falls due." The interest due on 22nd January, 1884, was paid by him. Then on 22nd July, 1884, he wrote a letter enclosing the interest due that day, the last which has been paid. On the 23rd of July, he wrote acknowledging a receipt for the money, and then went on to say, "When writing you last I forgot to say that I would be much obliged if you could arrange to extend the mortgage for another year. I am unwilling to go to the expense of negotiating a new loan, as this property is quite unproductive, and is only a source of expense in the way of taxes and interest . . . . Trusting you can arrange this for me, I am, &c." On the 16th of August, 1884, he wrote, "With regard to the property covered by the mortgage, I would explain that the land was my homestead. There are 20 acres which are under cultivation and there is a dwelling house which I erected at a cost of $300, besides minor improvements. My brother-in-law, Mr. Watkins, lives on the adjoining quarter-section and looks after the property. He also cultivates the land. . . . . I do not wish to sell until I can realize a reasonable sum for it. I believe I could renew the loan with another company, but for reasons stated in my former letter, that my returns from the property are nominal, I am anxious, if possible, to avoid the expense of a new loan." Whether he had at this time got the deed of the land from Watkins does not appear. The deed bears date the 1st of May, 1884, but the affidavit of execution was not sworn until the 29th of October, following. Again he wrote on the 25th December, 1884, "I wrote you a month or two ago about the mortgage by L. P. Watkins over the above. I notice

the interest becomes due next month. Can you kindly let the principal lie over for some time yet. If you will do this I will guarantee that you will receive principal and interest in full."

Now, a long line of authorities have decided that where a man having an interest in property, stands by and sees another man dealing with that property as owner, with another person who is ignorant of the want of title in the person with whom he is dealing, equity will bind the man who stands by. Among such authorities may be cited *Berrisford* v. *Milward*, 2 Atk. 49; *Beckett* v. *Cordley*, 1 Bro. C. C. 357; *Govett* v. *Richmond*, 7 Sim. 1; *Nicholson* v. *Hooper*, 4 M. & C. 179; *Boyd* v. *Belton*, 1 J. & L. 730; *Thompson* v. *Simpson*, 2 J. & L. 110; *Mangles* v. *Dixon*, 3 H. L. 739; *Oliver* v. *King*, 8 D. M. & G. 110; *Pickard* v. *Sears*, 6 A. & E. 469; *Gregg* v. *Wells*, 10 A. & E. 90; *Freeman* v. *Cooke*, 2 Ex. 654; *Davis* v. *Snyder*, 1 Gr. 134. How much more must this doctrine apply to a case in which the real owner is the active party in procuring the property to be dealt with. *Watts* v. *Cresswell*, 2 Eq. Ca. Abr. 515, p. 3, was a case in which a tenant for life borrowed money on property of which the lender thought that the borrower was owner in fee. The remainder man was the mortgagor's son; he was about twenty years of age at the time; and he had at his father's instance solicited the loan for him, and had not given notice of his own title. Lord Cowper held him liable for the mortgage. In *Cory* v. *Gertcken*, 2 Mad. 366, Sir John Leach cited this case with approval, observing that it was "a very strong case, for the young man did not know, but had only heard, of the settlement under which his title arose."

So in *Re Shaver*, 3 Ch. Ch. R. 379, where a tenant in tail, before the passing of the Act respecting Assurance of Estates Tail, sold the property, and the purchaser accepted the conveyance and paid the purchase money without seeing the will or having the title investigated, the eldest son of the vendor who was not quite twenty-one, but was aware of his interest, was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice of his title, or of the defect in the father's right to convey, it was held that the purchaser was entitled to hold the property against the issue in tail. In *Davies* v. *Davies*, 6 Jur. N. S. 1320, it was held that where upon the occasion of a transaction, money is with the privity, and in the presence of any person paid upon

the faith of a representation which that person understands, he is bound to fulfil the purpose for which it was made.

The principle ennunciated in all these cases applies directly to the present case, and the defendant Cowie cannot set up his title against the mortgage of the plaintiff company. That he has since obtained a patent for the land can make no difference. The plaintiff company had, before he obtained that patent, acquired a good title as against him, and on the authority of such cases as *Doe Hennesy* v. *Myers*, 2 O. S. 458; *Doe Tiffany* v. *McEwan*, 5 O. S. 598; *Doe Irvine* v. *Webster*, 2 U. C. Q. B. 224; and *Boulter* v. *Hamilton*, 15 U. C. C. P. 125, he is estopped from setting up such after acquired title.

In my judgment the plaintiff company is entitled to maintain this suit and to have a decree for the foreclosure of the mortgage on default in payment of the principal interest and costs. They are also entitled to a personal order for immediate payment of the principal and interest and costs as of a decree obtained upon præcipe by the defendant Watkins, and to an order for delivery of possession of the land by the defendant Cowie.

*Decree for plaintiffs.*

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## NIXON v. LOGIE.

[In Equity.]

*Specific performance.—Deficiency in land.—Part taken by Railway.—Sub-purchasers.—Parties.*

On 30th January, 1882, plaintiff agreed to sell lot 33, described as 128 acres, to defendant L. Shortly afterwards, defendant L. agreed to sell the same land, described as 111 acres, to another defendant, who agreed to sell it to other defendants. There were, in reality, about 112½ acres in the lot, and of this 1½ acres were owned by a railway company and used for their track.

The agreements were made during a period of great excitement in real estate. After its abatement neither party took any steps to carry out the agree-

ment, beyond the rendering of an account by the plaintiff to the defendant and a letter threatening proceedings in 1885, and beyond an enquiry by the defendant L. as to the state of the title in 1883.

*Held*, 1. That, under the circumstances, specific performance ought not to be decreed against L.

2. That the proper decree against the sub-purchasers (who had not answered) was to direct a reference to the master to enquire as to title; in the event of his finding a good title, to take an account of the amount due for purchase money and to fix a day for payment; on payment, plaintiff to convey; on default, rescission; if title good at time of filing bill, plaintiffs' costs to be added to purchase money.

*S. C. Biggs, Q.C.*, and *J. J. Curran*, for plaintiff.

Plaintiff entitled to specific performance; he is in a position to carry out agreement; defendant is entitled to possession so he cannot object to delay. High price merely, no ground for refusing specific performance.

*N. F. Hagel, Q.C.*, and *T. S. Kennedy*, for defendant Logie.

As to specific performance with compensation, *Fry on Specific Performance*, 517 8-9.

If title made after bill filed plaintiff pays costs, *Haggart* v. *Quackenbush*, 14 Gr. 701.

As to property being of a speculative character, *Huxham* v. *Llewellyn*, 21 W. R. 570; *Glasbrook* v. *Richardson*, 23 W. R. 51; *Rich* v. *Gale*, 24 L. T. N. S. 745; *Mills* v. *Haywood*, 6 Ch. D. 196.

As to land taken by railway, *Price* v. *North*, 2 Y. & C. 620; *Claydon* v. *Green*, L. R. 3 C. P. 511.

If no decree on account of laches then decree must be as in *Turner* v. *Marriott*, L. R. 3 Eq. 744; *Morin* v. *Wilkinson*, 2 Gr. 157.

*J. H. D. Munson*, for administrator of Dickie.

Sub-purchasers not proper parties, *Tasker* v. *Small*, 3 M. & C. 63. As to costs of sub-purchasers, *Fenwick* v. *Bulman*, L. R. 9 Eq. 167; *Aberaman Iron Works* v. *Wickens*, L. R. 5 Eq. 485.

(*4th May, 1887.*)

TAYLOR, J.—On the 30th of January, 1882, the defendant Logie entered into an agreement with the plaintiff for the purchase of lot 33, in the Parish of St. Vital, described as containing 128 acres, for the

sum of $5120, payable $1000 at the time of the agreement, $2000 on the 1st of August, 1882, and $2120 on the 1st of February, 1883. Logie thereby covenanted to pay the plaintiff the purchase money, with interest at 8 per cent., on the days and times mentioned. The plaintiff covenanted, on payment of the money, to convey the land to Logie by a good and sufficient deed in fee simple, and to suffer and permit him to occupy and enjoy the land until default should be made in payment of the money, or any part thereof. The agreement then contained the following stipulations, "And it is expressly understood that time is to be considered the essence of the agreement, and unless the payments are punctually made the said party of the first part (the vendor), is at liberty to resell the said land, provided always, that if the party of the first part should fail to make good title to the lands aforesaid, then the said sums of money, with interest thereon at 8 per cent. per annum, from the various times of payment thereof, shall be repaid to the said party of the second part."

By an agreement in writing, dated the 2nd day of February, 1882, Logie agreed to sell the land to the defendant McKinnon, the quantity being there given as 111 acres, for $5550, payable $1000 at the time of the agreement, $2000 on the 1st of August, 1882, and $2550 on the 1st of February, 1883. In other respects the agreement is an exact copy of the agreement between the plaintiff and Logie. By another agreement dated 6th February, 1882, McKinnon agreed to sell the land to the defendant Anderson, the agreement being, except as to the date and the names of the parties, an exact copy of the one between Logie and McKinnon. By a further agreement dated the 10th of February, 1882, Anderson agreed to sell the land to Wilcock, Kelland, Telford, Wishart and Dickie, for the sum of $6660, payable $2110 at the time of the agreement, $2000 on the 1st of August 1882, and $2550 on the 1st of February, 1883. In all other respects the agreement was an exact copy of that between McKinnon and Anderson.

The plaintiff, the vendor, has now filed his bill against Logie, McKinnon, Anderson, Wilcock, Kelland, Telford, Wishart and the administrator *ad litem* of Dickie, who is now dead, praying specific performance of the contract entered into by Logie, and an order against Logie personally for the payment of the purchase money beyond the $1000 paid at the time of the agreement being

executed. Logie has answered the bill resisting the plaintiff's demand, and praying by way of cross relief the repayment of the $1000 and interest. The administrator *ad litem* of Dickie has answered submitting the rights of the estate to the court. Against all the others the bill has been taken *pro confesso*.

It appears that the land in question was at one time claimed by one Antoine Heneault, *alias* Canada, how, does not definitely appear, but I presume under sub-sections three or four of section 32 of The Manitoba Act. He had, in 1875, conveyed the land as Antoine Canada to one Audy, who, on the same day conveyed it to one McDonald. These conveyances were not registered until after all the agreements which have been before mentioned. None of the parties dealing with the lands seem to have been aware of their existence, and the plaintiff in November, 1885, obtained a quit claim deed from McDonald.

In January, 1882, the plaintiff, who was then and is still the right of way agent of The Canadian Pacific Railway, purchased from Heneault, for the Railway Co., the right of way across the land, and this was conveyed by deed dated the 7th of January, 1882. On the 9th of January, the plaintiff entered into an agreement with Heneault for the purchase on his own account, of the lot 33, no exception being made in the agreement, of the portion already conveyed to the Railway Co. The purchase money was $2000, of which $100 was to be paid on the execution of the agreement, and the remaining $1900 on the 1st of August, 1882. The plaintiff had also purchased from the daughter of Heneault, her grant as a half-breed child, and as she was not then of an age to convey it effectually, on the same 9th of January, Heneault gave the plaintiff a mortgage upon lot 33, securing the payment of $1500 on the 1st of August 1882, the proviso declaring that should the daughter on that day convey to the plaintiff by a good and sufficient deed the land allotted to her, then the mortgage should be void as fully and effectually as if the money had been paid.

After the plaintiff had entered into the agreement with Heneault, he placed the land in the hands of Ross & Co. for sale. Logie says he negotiated for the purchase of it with one McGuin, a clerk of Ross & Co., and got the refusal of the land for a few days at $5120, the price being calculated at $40 an acre

for 128 acres. With this refusal of the land he succeeded in selling it to McKinnon, for $50 an acre, the difference being his profit, and being included in the last payment, the first two being of the exact amounts which he had himself to pay. Having thus agreed for a resale of the land he closed his bargain with McGuin, and was by him taken to Mr. Biggs' office, where the written agreement was signed and the $1000 paid over to McGuin. The plaintiff had no negotiations himself with Logie, and has no recollection of being present in Mr. Bigg;' office when the agreement was signed, but, says he would not contradict Logie if the latter says he was present. Logie says he was present, as was McKinnon also, and it was the $1000 which the latter was paying, which was handed over to McGuin. Logie says the agreement between himself and McKinnon was signed on the same occasion. In this, however, he must be mistaken, as he left for his home in Montreal the next morning, the 31st, while the agreement with McKinnon is signed by A. W. Ross as his attorney, and is dated the 2nd of February.

In January, 1883, Logie was again in Winnipeg, and saw the plaintiff, who says Logie asked him about the perfecting of the title, and that he replied it was being adjudicated upon by the Department at Ottawa. He also told him that the land had been resold to a syndicate who were strong people. He says Logie was perfectly satisfied, but the latter says he told the plaintiff that he could not made his profit unless the transaction was completed. No patent was in fact issued for the land until the 26th of March, 1886. In the interval several letters passed between the plaintiff's solicitors and Logie. On the 14th of May, 1885, the solicitors wrote threatening proceedings, and saying they had written some time before that the plaintiff was ready to give him a deed, which however, was not the case. In 1885, a statement of the amount due was sent him, it is dated 19 June, 1885, but is made up to the 30th of that month, and would seem from a letter of Logie's dated 9th July, to have been sent with a letter of 2nd July, which however, is not produced. In that statement the quantity of land is given as $112\frac{52}{100}$ acres, and there is deducted as taken by the Railway Co. $1\frac{51}{100}$ acres, leaving $111\frac{01}{100}$ on which the purchase money is calculated at $40 an acre or $4440.40, from which is deducted the $1000 paid, leaving as the unpaid purchase money $3440.40, to which is added interest at 8 per cent. $940.36, mak-

ing in all $4380.76. Logie says, that from this statement he learned, for the first time, that the lot contained less than 128 acres, and that part of it had been taken by the Railway Co. Ross his attorney must, however, have known this, for in the agreement with McKinnon which he executed, the quantity is given as 111 acres, being the proper quantity after deducting the part taken by the Railway Co. The plaintiff has never yet paid Heneault for the land beyond the $100 paid when he purchased, except by applying on this lot a few hundred dollars paid on the daughter's claim, which has never been conveyed to him. Now, how should the case be dealt with?

Plainly the plaintiff could not at the time the purchase money was payable, nor for three years after, have made a good title. It is a question if he can do so, even now, for part having been conveyed to the Railway Co., the master would, on a reference, if *Kronsbein* v. *Gage*, 10 Gr. 572, is to be followed, have to report against the title. At all events, he cannot make title to the part taken by the Railway Co. It was urged that having the patent, the Company have in fact no title, but that is not so. The plaintiff got his patent as assignee of Heneault, acquiring that assignment after the conveyance to the Railway Co., and with full notice of it. Under the authority of such cases as *Doe Hennesy* v. *Myers*, 2 O. S. 458; *Doe Tiffany* v. *McEwan*, 5 O. S. 598; *Doe Irvine* v. *Webster*, 2 U. C. Q. B. 224, and other similar cases, the plaintiff, and every person claiming title under him would be estopped from setting up a title acquired under the patent.

Logie, beyond the enquiry made of the plaintiff in January, 1883, about the title, never demanded any abstract, he never made any tender of the purchase money at the same time calling upon the plaintiff to show his title, nor did he ever limit a time for showing title, or give notice of rescission of the contract. Indeed having assigned his entire interest in the contract it is not easy to say what notice of that kind he could have given. I do not attach weight to the argument that the defendants have had, or must be taken to have had, possession of the land, and therefore cannot object that there has been delay on the part of the plaintiff. Possession is presumed to go with a conveyance of the land, and the person having the paper title is, in the absence of evidence to the contrary, assumed to be in possession. On a mere

agreement the presumption is, I think, that possession is not taken until the transaction is completed. I do not see that the insertion in the agreement of a mere license, or permission to occupy, will alter this. That possession had been actually taken by the defendants should, I think, have been proved, and there is no evidence that they, or any of them, were ever in possession.

The transaction was one clearly of a speculative character. Besides, the evidence of the plaintiff himself, that "Land was then at speculative prices—Inflated time—speculation very wild then," the fact that this land changed hands four times within twelve days, that the price was $40 an acre, then $50, then $60, and $75, on those changes, abundantly proves this. Then there is not the quantity of land supposed to be, when Logie bought, but 16 acres less, and part of it taken by the Railway Co. The deficiency, and the part taken by the Company might perhaps be the subject of compensation and in the statement sent in July, 1885, the price is calculated on the reduced quantity. But beyond that reduction, the fact that the land is cut in two by the railway track, and that no provision is made for crossings or gates, is a serious matter. Looking at the whole case I do not think I should, in the exercise of the direction which the Court has in suits for specific performance, decree specific performance against Logie. Were he now filing a bill against the plaintiff, and demanding performance of the contract, I do not see how he could be given relief. There has been great delay on the part of the plaintiff, the vendor, and a distinction between laches by a vendor, and laches by a purchaser, was said by Lord Romilly to have no existence, *Rich* v. *Gale*, 24 L. T. N. S. 745. The question is not, whether there has been a delay of so many months but as to what is a reasonable time, *Huxham* v. *Llewellyn*, 21 W. R. 570. In the case of a sale of a colliery, a delay of three months and thirteen days in filing a bill, was held fatal. Jessel, M. R., said, a colliery was a property of an extremely speculative character approaching a trade, and the rule of the court had for years been growing more and more strict as to the necessity of diligence in suits of this description, *Glasbrook* v. *Richardson*, 23 W. R. 51.

In *Sanderson* v. *Burdett*, 16 Gr. 119, Mowat, V.C., speaking of lands of a fluctuating value said, "It is in the highest degree essential to the purchaser that he should be in a position to place

his lands in the market at any time, as if his position was prejudiced in this respect, by his title not being what the vendor represented it to be, the vendor could not have specific performance in this Court." Here Logie complains, that by the plaintiff's delay, he has been unable to enforce his agreement with McKinnon.

If the case stood simply as between the plaintiff and Logie, the plaintiff is not entitled to a decree and the bill should be dismissed. But McKinnon to whom he conveyed and those who claim under McKinnon have been made defendants. They, except the administrator of Dickie, who has submitted the rights of the estate to the Court, do not resist the plaintiff's claim as against them, but have allowed the bill to be taken *pro confesso*. The $1000 paid down, and which Logie claims to have repaid, was paid, he says, not by him but by McKinnon, and the latter has made no claim for repayment of it. The English cases cited, as to the making sub-purchasers parties, besides being all cases of purchasers of part only of the property, seem scarcely applicable in this country, and to a case like the present, the agreements with the sub-purchasers being registered. Where a vendor is entitled to a decree for specific performance, and to rescission on default in payment of the purchase money, he would also be entitled to have the registration of these avoided.

The proper decree to make would seem to be, to direct a reference to the master to enquire as to the title, and in the event of his finding a good title, to take an account of the amount due for purchase money, and appoint a day for payment of it by the defendants other than Logie, on payment the plaintiff to convey to the parties making the payment, on default the contract to be rescinded. If it be found that the plaintiff could make a good title before the filing of the bill the master will tax to him his costs to be added to the purchase money. If he could not make a title until after the filing of the bill, then he can have no costs.

The bill should be dismissed against the defendant Logie with costs. The plaintiff must pay the costs of the administrator *ad litem* of Dickie, and add them to the amount to be paid by the defendants for purchase money.

## CUMMINS v. THE TRUSTEES OF THE CONGREGATIONAL CHURCH.

*Death of judge after hearing and before judgment.—Sale of church property.—Con. Stat. Man. c. 50.—Purchaser raising obstacle to completion of title.—Personal order against trustees for repayment of purchase money.—Lien.*

After witnesses had been examined and the cause heard, but before judgment, the judge died. The cause was ordered to be set down for argument before the full court.

Trustees of a church made an agreement for the purchase of three lots. In the agreement they were described as "Trustees of the F. C. Church, Winnipeg," but there was no provision in it as to the appointment of successors in the trust, nor were any trusts set out. The same trustees made a verbal contract for the sale of an adjoining lot. All the lots were intended to be used as a site for a church.

*Held*, That the provisions of C. S. M. c. 50, applied to the property and that the trustees could not sell save in accordance with the provisions of that Act.

After the trustees had contracted to sell and after the purchaser had rescinded the contract because of non-compliance with the Act the trustees applied for legislation confirming the sale. This application was opposed by the purchaser.

*Held*, That the purchaser was nevertheless entitled to insist upon the objection.

After the contract and after payment of part of the purchase money, the purchaser rescinded upon the ground above mentioned and also because of a misrepresentation made to her by one of the trustees. The other trustees were unaware of the misrepresentation. They did not receive any portion of the purchase money. It was applied in the erection of a church upon other land.

*Held*, That the purchaser was entitled to a personal order for repayment against the offending trustee, and to a lien upon both properties, but not to a personal order against the innocent trustees.

Weight of evidence upon question of misrepresentation discussed.

The plaintiff applied upon petition to have the cause set down for hearing before the full court under the circumstances set forth in the following judgment.

*F. Beverley Robertson* and *H. E. Crawford* for the plaintiff.
*H. M. Howell, Q.C.*, for the defendants.

(*4th June, 1885.*)

TAYLOR, J., delivered the judgment of the court.(*a*)

In this case the witnesses were examined and the cause argued before the late Mr. Justice Smith. At the close of the argument he reserved judgment, but died before any was delivered. The day upon which he died he handed to a friend a document for transmission to the registrar, and this came to the hands of the registrar the next day. Upon being looked at it was found to be a partial and incomplete judgment.

The plaintiff now applies to the full court by petition that the court may order the cause to be reheard at the next sittings *in banc* upon the evidence already taken, or that such other order may be made as shall seem just.

The granting the relief prayed is opposed by the defendants, who object that there is no evidence before the court upon which the cause can be heard, and insist upon what counsel called the vested right of parties to have the cause heard and decided by a judge who has heard and seen the witnesses give their evidence.

The only question seems to me to be whether the court should permit an argument of the cause before the full court without its being first heard before a single judge. There is no difficulty about the evidence upon such a hearing or rehearing if the court think proper to grant it.

The Queen's Bench Act provides, that all matters relative to testimony and legal proof in the investigation of fact and the forms thereof and the practice and procedure in said Court of Queen's Bench, may and shall be regulated and governed by the rules of evidence and the modes of practice and procedure as they were, existed and stood in England on the day and year aforesaid (that is on the 15th day of July 1870), except that as they may be changed or altered by any Acts of the Legislature of Manitoba or by any rule or rules, order or orders of court lawfully made.

No Act of the Legislature can be found which affects the question before the court. Orders have been made by the court Gen. Ords. 142, 144 and 145, as to the evidence at the hearing of a

(*a*) *Present:* Wallbridge, C.J.; Dubuc, Taylor, JJ.

cause and how it is to be taken. No order has been made as to what shall be considered evidence upon a rehearing. The only order which appears in any way to relate to that subject is Gen. Ord. 169. "When the evidence in any cause has been taken by a short hand reporter, his copies of the evidence certified and returned into court by the reporter, shall be delivered to the clerk of records and writs when the cause is set down for rehearing." That order does not in explicit terms say that the evidence "certified and returned into court by the reporter," shall be the evidence upon which the court is to act, although for what other purpose can such copies of it be required. If that order does not provide for the case then the English order in force upon the 15th of July, 1870, must govern. Rule 14 of the Chancery General Orders of 5th February, 1861, relative to the taking of *viva voce* evidence at the hearing, must govern and it is as follows, "Upon any appeal, rehearing by way of appeal, or further proceeding, the judge's notes of the *viva voce* evidence shall *prima facie* be deemed to be a sufficient note thereof" So, evidently the notes taken by the judge are regarded as the record of the evidence.

Now, the book of the late Mr. Justice Smith, containing his notes of the evidence is in the possession of the court.

I know of no such vested right as the defendants claim to have that the cause shall be heard by a judge who has heard and seen the witnesses give their evidence. No doubt it is considered an advantage that a cause should be so heard and disposed of, but I am not aware of any right that parties have to require that it shall be so.

There is nothing in our statute, as in the Chancery Act of Ontario, requiring evidence to be given *viva voce*, and the court could pass an order directing all evidence on the equity side of the court to be taken before special examiners, or even if thought desirable return to the old practice of having all evidence taken under interrogatories.

The proper course to take in the present case, under the exceptional circumstances, is to order the cause to be set down for argument before the full court.

In *Wood* v. *Schultz*, the Supreme Court allowed an appeal direct from a single judge of this Court, when as the court was then constituted, his decree could not be first reheard before the full court.

In England the Court of Appeal in Chancery, before the passage of the Judicature Act, consisted of the Lord Chancellor and two Lords Justices. The Lords Justices sat together and the statute provided, that in the event of their being divided in opinion, the decree in the court below should stand. In one case *Blane* v. *Bell*, 2 D. M. & G. 783, where they gave differing judgments, counsel asked that the cause might be heard again with the Lord Chancellor sitting, but the court refused leave because judgment had been given and the statute stood in the way. But Lord Justice Knight Bruce referred to several cases in which finding there would be a difference of opinion they had without giving judgment ordered a rehearing before the three judges.

The plaintiff should have an order giving her leave to set the cause down for argument before the full court, costs of the application to be costs in the cause.

The cause having been set down was argued before the full court.

*F. B. Robertson* and *H. E. Crawford*, for plaintiff.

The three trustees of the church are responsible for the fraud perpetrated by McLean, acting as agent for his co-trustees, as McLean in acting fraudulently, and making false representations was acting within the scope of his authority, *Mullens* v. *Miller*, 22 Ch. D. 194; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265; *Peek* v. *Gurney*, L. R. 6 E. & I. App. 377.

As Pearson and Muir adopted the sale, to the plaintiff, by McLean by means of misrepresentation, they are liable for the fraud so perpetrated, *Turner* v. *Marriott*, L. R. 3 Eq. 744.

The plaintiff claims she should have a lien on the new property on which her money was used to build the church, *Merchants Express Co.* v. *Morton*, 15 Gr. 274; *Jackson* v. *Bowman*, 14 Gr. 156; *Hamilton Provident and Loan Society* v. *Gilbert*, 6 Ont. R. 434.

*H. M. Howell, Q.C.*, and *J. S. Ewart, Q.C.*, for Pearson, Muir and McLean, the trustees of the church.

As to a false representation sufficient to avoid a sale, *Morrison* v. *Earls*, 5 Ont. R. 451; *Haygarth* v. *Wearing*, L. R. 12 Eq. 320.

When a purchaser asks time to pay the purchase money, that is waiving an objection to title, *Margravine of Anspach* v. *Noel*, 1

Madd. 310; *Fleetwood* v. *Green*, 15 Ves. 594; *Burroughs* v. *Oakley*, 3 Swans. 159, 168; *Pegg* v. *Wisden*, 15 Beav. 239; *Simpson* v. *Sadd*, 4 D. M. & G. 665; *Sweet* v. *Meredith*, 8 Jur. N. S. 637.

As to majority of trustees adopting the contract, *Beatty* v. *N. W. Trans. Co.*, 11 Ont. App. 205.

Apparently a company may mortgage its property unless specially prohibited, *Re Patent File Co.*, L. R. 6 Ch. 83.

Plaintiff cannot claim there is no corporation when she, in her bill, calls the church, and treats it as, a corporation, *Brown* v. *Sweet*, 7 Ont. App. 727.

Assuming there is fraud what remedy can be given? Defendants are a *quasi* corporation, or a real corporation, *Trustees Ainleyville Church* v. *Grewer*, 23 U. C. C. P. 533; *Humphreys* v. *Hunter*, 20 U. C. C. P. 465; *Mills* v. *Scott*, L. R. 8 Q. B. 500; *Angell & Ames on Corporations*, 120.

If McLean is responsible, Pearson and Muir are not responsible, *Weir* v. *Bell*, L. R. 3 Ex. D. 229; *Weir* v. *Barnett*, L. R. 3 Ex. D. 43.

*F. B. Robertson*, in reply.

A mere offer stated is not an important representation, *Reynell* v. *Sprye*, 1 D. M. & G. 706.

The trustees could not compel the church to make or ratify the sale, *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101.

As to whether plaintiff should have a lien on the new property, *Jackson* v. *Bowman*, 14 Gr. 156; *Hamilton Provident and Loan Society* v. *Gilbert*, 6 Ont. R. 634.

[*5th March, 1886.*]

TAYLOR, J., delivered the judgment of the court. (*a*)

The bill in this case alleges that the three defendants, McLean, Muir and Pearson, were in April 1882, under an agreement with the Hudson's Bay Company, owners of certain lots in the City of Winnipeg in trust for the congregation of the First Congregational Church of the City of Winnipeg, which lots they advertised for sale by public auction, but the advertisement was not published so as to comply with the requirements of the Act to provide for the holding of land by trustees on behalf of churches

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

or religious bodies, being chapter 50 of the Con. Stat. of Manitoba. The bill then alleges, that the defendant McLean represented to the plaintiff that at the auction sale, had pursuant to the advertisement, the lots had been purchased by one Austin at $250 a foot, which purchase Austin was anxious to carry out, but he was unable to command enough money to do so, and in consequence the lots would come back to the hands of the defendants who were willing to resell at the same price; that McLean, representing himself to be her friend and adviser, strongly assured and advised her that the lots were of much greater value, and the purchase of them would be a very profitable investment; that she at first refused to purchase the whole of the lots, giving as a reason, that she had not means to pay for them, but she expressed her willingness to buy part, being a lot with a frontage of 50 feet at the corner of Princess Street and Notre Dame Street, whereupon McLean assured and advised her, that if she would purchase the whole property he would, during the approaching summer, sell for her all that she did not wish to retain at $400 a foot, and thus make a very handsome profit for her. The bill then goes on to allege, that the plaintiff believed in and trusted to the pretended friendly advice and assurance of the said McLean, and believed and relied upon his said representation, that the said Austin had purchased the said lands as aforesaid, at the price aforesaid, and was thereby induced and persuaded to agree to buy the said property at the said price, payable on the first day of October then next ensuing, the said McLean acting as, and being, as he in fact was the agent of the defendants in the premises, agreed to sell the same to the plaintiff on the said terms, and that the plaintiff relying on statements by McLean that he would protect her interests on having the sale carried out, and a good title given to her, became a party to, and signed a document by which the defendants conveyed or assigned to her their interest in the lands, and has paid $25000 on account of the purchase money, all of which has been expended in the building of a church upon other lands held by the defendants, in trust for the congregation. The bill further alleges, that it was not true, as represented by McLean to the plaintiff, that the lands had been sold to Austin, he having only bought them in for the defendants, that they were never worth $250 a foot, and that the plaintiff has notified the

defendants that she declared the agreement off, and demanded repayment of the $25000 with interest.

The prayer of the bill is, that the defendants, McLean, Muir & Pearson, may be ordered to repay to the plaintiff with interest and the costs of the suit, the sum of $25000 as money received by them to the use of the plaintiff. That it may be declared, that the plaintiff is entitled to a lien or charge upon the lands agreed to be sold to the plaintiff, to secure the repayment to her of the said sum and interest and costs. That it may be declared, that the plaintiff is entitled to a lien or charge, upon the lands on which the church has been built, for securing to her repayment of the said sum and interest and costs. That an account may be taken of the amount due to the plaintiff for principal and interest and costs, that the same may be paid to her, and that in default the lands may be sold to pay for the same.

The defendants Muir and Pearson have filed a joint answer in which, after admitting that they are trustees, that the plaintiff purchased the land and paid $25000, they set up that she has accepted a conveyance of the land; that she has executed a mortgage upon it; that they were in a position to sell, and that Austin was a *bona fide* purchaser. They further set up, that long after the purchase by the plaintiff, some objection having been taken to the title, they made application to the Legislature for an Act to legalize the sale, the passage of which was opposed by the plaintiff, and she thereby prevented the alleged defects in the titles being cured. They deny all fraud and misrepresentation on their part, and submit that even if the allegations of fraud and misrepresentation are true, the plaintiff by her *laches* is not entitled to relief.

The defendant McLean has filed a separate answer, in which, after setting up the same matters as are set up by his co-defendants, he says: "I deny all fraud and misrepresentation alleged in the bill of complaint, and I say that the plaintiff purchased the said property without any undue pressure or misrepresentation, and I deny that I in any way especially undertook or agreed to procure a good title for her or to investigate the title for her. I simply acted in the ordinary way of a vendor, or agent for vendor, to a purchaser." He also denies that he ever agreed to sell the lands for the plaintiff.

There is also on the files of the Court an answer, filed as that of the trustees of the First Congregational Church of the City of Winnipeg, which sets up very much the same defences as those of the individual trustees, and in addition, claims by way of cross relief, payment by the plaintiff of the balance of the purchase money, $12000 or thereabouts, and in default prays a sale of the land, and that the proceeds may be applied in payment of the amount due from the plaintiff, and of the costs of the suit.

A large amount of evidence real and documentary was given, and the depositions of the three defendants, taken on their examination for discovery, were put in at the hearing.

The three defendants, McLean, Muir and Pearson, were elected trustees of the congregation at the annual church meeting, held on the 1st of February, 1882, the resolution appearing in the minute book, being; "Resolved, That the following gentlemen constitute the trustee board of this church: Messrs. Alfred Pearson, Hector McLean and Robert Muir, their term of office and duties being as prescribed in that part of the constitution relating to the trustees." The provision in the constitution with reference to trustees is as follows: "The trustees, three in number, shall be appointed by the church, and shall always be subject to a directing vote of the church. They shall have no power to sell, mortgage or transfer the property of the church without a specific vote of the church. They shall be elected for a term of three years, but the church may cancell or recall the appointment whenever it deems it wise to do so."

The lands in question are lots 10, 11, 12 & 13, in Block 4 of the Hudson's Bay Company's reserve, part of lot 1, in the Parish of St. John. Lot 13 was held by Mr. Silcox, pastor of the church, under an agreement with the Hudson's Bay Company dated the 20th of May, 1881, but he had agreed to assign and transfer his interest in it to the congregation. The other lots, 10, 11 & 12, were held by Muir, McLean & Pearson under an agreement with the Hudson's Bay Company, dated the 12th of December, 1880. Probably that was the date of the purchase of the land, but the agreement cannot have been executed then as it refers to a plan made on the 25th of June, 1881. The affidavit of execution is sworn to on the 18th of February, 1882. In that agreement the parties are described as, Alfred

Pearson, Hector McLean and Robert Muir, trustees of the First Congregational Church, Winnipeg, but there are no trusts declared upon which they hold the lands.

At the same annual meeting at which these gentlemen were appointed trustees, and at which the constitution of the church, defining among other things the powers and duties of the trustees, was adopted, the following resolution was passed: "That the trustees be hereby empowered to sell the church property on the corner of Princess and Notre Dame Streets, and that the trustees, in company with the diaconate of the church, shall have the power to determine the price and terms at which said property shall be sold. The proceeds of the sale to be deposited to the church credit in Merchants Bank of Canada."

Pursuant to the authority thus given, arrangements were made for the sale of the property by public auction on the 25th of March, 1882, but it is admitted that through errors in the published advertisement, the requirements of the Consolidated Statutes of Manitoba, c. 50, were not complied with. Some of the parties entrusted with determining the price and terms seem to have been anxious to place the reserved price at $300 per foot, but after consultation with Mr. Wolf, the auctioneer, this was fixed at $225.

At the auction sale on the 25th of March the property, according to the defendants, was sold to one Austin at $250 per foot, but on account of his inability to carry out his purchase by paying the purchase money, the sale to him was cancelled, and the property afterwards sold to the plaintiff at the same price. The plaintiff's contention on the other hand is, that there never was an actual sale to Austin, that the representation made to her that he had purchased the property was untrue and made to her for the purpose of deceiving her, and inducing her to purchase, and that she was thereby deceived and induced to purchase.

The first question therefore, presented for consideration is, was there an actual *bona fide* sale to Austin? McLean says there was; that before the auction, Austin had spoken to him about buying the property, that at the sale he made a bid on which the property was knocked down to him, that he signed the sale sheet and gave his cheque for $500 as a deposit. Wolf, the

auctioneer, says that at the sale McLean did not bid, but Austin did so, that he was declared the purchaser, signed the sale sheet and gave his cheque. This cheque he says Austin asked him not to present for payment, and he held it for some days at his own risk and on his own responsibility, in the end handing it over to McLean. Muir when examined on his answer, said: "They, (the lots,) were sold to Mr. Austin; I do not know the first name; I was standing in the back part of the room and I did not hear the auctioneer call out any bids except Mr. Austin's. Mr. Austin had no arrangement to make the bid with the trustees. If there had been any I should have known of it." When examined at the hearing, he said: "He was at the auction in the room. I cannot hardly say that I heard any bids. I know the property was knocked down to Mr. Austin. That is all."

Pearson, when examined on his answer, said: "I was present at the auction. The property was sold to a man of the name of Austin. I think it was James Austin. There were no other bids for the property that I heard. Austin's bid was the first bid made." He said further, that he was not aware of any arrangement with Austin, that he was to buy in the property, but was not to be called upon to carry out the purchase. On his examination at the hearing he said: "I was away back in the room at the far end."

Against this, there is the evidence of Austin. He flatly contradicts McLean as to any conversation between them before the sale about his buying the property. His account of the transaction is, that he went to the sale intending to bid, but waited to see if it would go low enough, $175 per foot being the highest he was prepared to offer, that he made no bid, that McLean made a bid on which the property was knocked down, that McLean then said to the auctioneer, "It was Mr. Austin's bid or that Mr. Austin bought it." Then McLean said to him, (Austin,) it was all right, to go to Wolf and give a cheque as deposit. He says he does not remember signing the agreement to purchase. He accounts for his making no objection and acting as he did, by saying, that McLean told him it was necessary that the property should be sold by auction, and he could not buy it being one of the trustees. He says he was friendly with McLean, had had satisfactory business transactions

with him, and considered "when he said it would be all right, that would be a sufficient guarantee that I would not be put to any loss."

Now, neither Muir nor Pearson, say they heard Austin bid at the auction. Wolf does say, Austin gave the bid for the purchase, and he thinks that McLean did not bid, but he was at that time carrying on an immense business as an auctioneer, and was in such poor health from overwork that he had a few days after this sale, to give up business for a time and go away from Winnipeg. Besides in the confusion of an auction room it might well be, that on McLean bidding and then saying that is Mr. Austin's bid, it would remain on the auctioneer's mind that Austin was the actual bidder.

To my mind the whole thing rests on the evidence of McLean on the one side and Austin on the other. Whose evidence is the more probable, when the testimony of the two men is compared? It does certainly seem strange, that Austin should have given a cheque, and made himself liable for such a large purchase, yet we have had in this Court ample proof of the looseness with which things were done during the period of real estate excitement in this city, and of the recklessness with which, apparently shrewd business-men, made themselves liable for large amounts in connection with transactions in which they had no personal interest.

Then he has no interest whatever in telling anything but the truth. After what has occurred and the way in which the defendants have since dealt with the property, he could not now, even if he were really a purchaser, be compelled to take the property. McLean's evidence is exceedingly unsatisfactory, on some points he is directly contradicted by the plaintiff, and in others he directly contradicts himself. He has too, the deepest interest in now saying, that there was an actual sale to Austin, for only by that being found the case, can he be relieved from the imputation of having committed a gross fraud.

He insists that the sale was an actual one, that after it took place, the plaintiff, who had previously declined to buy, became anxious to do so. That to oblige her and at her earnest solicitation he agreed to see Austin. That after frequently pressing Austin to carry out his purchase during two or three

weeks, he at last obtained from him the receipt given by Wolf at the time of the sale, and surrendered to him the cheque for $500. The plaintiff on the contrary says, that what he represented to her was, that the property had been bought by Austin, a real estate agent, a man well acquainted with the value of the property and who knew what he was about, that she had missed the chance of making a large profit, but that Austin might not be able to raise the money and carry out his purchase, in which case it would come back to the hands of the trustees, and that relying on his representations and his assurances that he could resell part of the property for her, at such an advance that she would never feel the paying for it, she was at last induced to buy.

If McLean's story is a true one, it is impossible to account for the letter written to the plaintiff by his confidential clerk on the 1st of April, 1882, and which McLean adopts as written with his sanction. In that letter, written only six days after the date of the auction sale, he says: "I have seen Mr. Austin and got receipt back from him, so that the property is yours now." At that time he says he had not the receipt, but that his clerk, when he wrote it, was expecting Austin to bring the receipt or the money. If he was expected to bring the money, how could the property be the plaintiff's own, for in that case Austin would be carrying out his alleged purchase, and the property would be his. That letter can be accounted for, only on the theory that the sale was not a real one and that McLean knew he had only to hand back the cheque to Austin, and obtain the receipt from him at any moment he chose. The receipt was not got back, McLean says, until the 16th or 17th of April, and perhaps it was not actually in his possession until then, but on the 1st of April after a decent delay, just so much as would keep up the deception practiced on the plaintiff, that Austin had purchased, and would lead her to believe McLean's statement that he was anxious to hold on to this bargain, and was giving it up only because he could not raise so large an amount of cash, the letter was written.

Another strong circumstance to my mind, against the sale to Austin being an actual transaction is, that it was not reported to the congregation until after the sale to the plaintiff. It was on the proceeds of the sale of this land that the congregation

relied for the means to purchase and pay for the new church site, and erect a building on it. The auction was on the 25th of March and on the 29th the regular church meeting was held. At that meeting, at which Mr. McLean appears to have been present, it was reported that the joint committee of the deacons and trustees, the same persons to whom had been intrusted the power to determine the price and terms at which this old property should be sold, had obtained and secured the new site. Not a word was said about the sale of the old property to Austin. On the third of May, the first church meeting held after the date of the sale to the plaintiff, that sale is reported, prefaced with the statement that the property had first been sold to Mr. Austin, who could not carry out the terms of sale.

Austin, it is said, was a man of means, and it is argued that McLean had no interest in doing what he did, and in endeavoring to induce the plaintiff to purchase, but there is no doubt he hoped by the plaintiff being the buyer to have the handling of the property and the selling of the portion she did not wish to keep for her own. He may have, at that time, really believed that he could resell for her, at an advance.

After reading over the evidence several times and carefully considering it, I can come to no other conclusion than that the representations which the plaintiff says were made, were so made to her, and relied on by her. Also that they were untrue, and made by McLean, wilfully and fraudulently, for the purpose of inducing her to purchase. She was therefore justified in rescinding the sale, and is entitled to relief.

So finding, it may not be necessary to deal with other points raised, but they may be referred to.

In my opinion, the provisions of Con. Stat. of Man., c. 50, s. 8, applied to this property. It is true the agreements with the Hudson's Bay Company, under which the trustees held the lots 10, 11 and 12, do not set out any trusts upon which they are held. They are in no way connected with the congregation beyond the grantees being described as "trustees of the First Congregational Church, Winnipeg." Lot 13 was at the time held under an agreement between the Hudson's Bay Company and the Rev. Mr. Silcox, the pastor of the church, as an individual, but he had sold it to the church. The money paid to the Hudson's Bay Company and to Mr. Silcox, however, was

the church's money, so there was a resulting trust for the church, and the members of the congregation could at any time have enforced the execution of the necessary documents for the purpose of having the trusts declared, and the ownership of the congregation put beyond question.

Being church property, the sale to the plaintiff was an unwarranted one. The statute requires such property to be put up for sale at auction, after certain prescribed advertising, subject to a proviso, that the trustees shall not be obliged to complete or carry a sale into effect, if in their judgment an adequate price is not offered for the land. The 9th section of the Act says: "The trustees may thereafter sell the land either by public or private sale; but a less sum shall not be accepted at private sale than was offered at public sale." That section can have application only where the property has first been offered at a public sale such as the preceding section provides for. Here, it is admitted, that through errors and mistakes the property never was advertised for sale according to the requirements of the statute. Even had Austin been an actual purchaser, had the sale to him fallen through, the trustees could not, on account of the erroneous advertising, have taken advantage of that 9th section and sold by private sale to the plaintiff.

There never was an acceptance of the title by plaintiff. The deed prepared by Mr. Perdue, and which was executed by the trustees, was so prepared in connection with the attempt made by the trustees to borrow money from a loan company on a mortgage which it was arranged should be made by the plaintiff, not to the trustees, and by them assigned to the Loan Company, but direct to the Company. When executed it was handed to the solicitors of the Loan Company. The plaintiff was not to get any deed until she paid the purchase money in full, so she was never entitled to it. As a fact, on the negotiations for the loan falling through, it was handed back to the trustees.

The plaintiff was fully justified in resisting the application to the Legislature for an Act to confirm the irregular proceedings of the defendants. Before that Act was introduced she had exercised her right and had rescinded the purchase.

The plaintiff is entitled to a decree for the repayment of the amount she has paid with interest by McLean, who perpetrated

the fraud upon her. I cannot see my way to giving her a decree for repayment against Muir and Pearson. After carefully considering all the evidence as to agency here, I do not think a decree to that effect could be made, consistently with such authorities as *Cargill* v. *Bower*, 10 Ch. Div. 502, and *Weir* v. *Barnet*, 3 Ex. Div. 32, 220. They certainly obtained no benefit from the fraud as all the money paid by the plaintiff went into the church account. The plaintiff is clearly entitled to a lien on the property sold to her. She is also, I think, entitled to a lien on lots 100, 101 and 102, the land into which the money received from her went. As to this, I for some time hesitated, but the *Merchants Express Company* v. *Morton*, 15 Gr. 274; *Jackson* v. *Bowman*, 14 Gr. 156, and especially the recent case decided in Ontario by Mr. Justice Ferguson, of *Hamilton Provident and Loan Society* v. *Gilbert*, 6 Ont. R. 434, seem to warrant relief being given to this extent.

The plaintiff is also entitled to costs as against all the defendants, McLean, Muir and Pearson.

*Decree for plaintiff.*

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## BALFOUR v. DRUMMOND.

(In Equity.)

*Leave to set down after dismissal at hearing, plaintiff being unready.*

14th August, 1884.—Bill was filed.

30th October, 1884.—Bill amended by adding a large number of parties.

January, 1886.—Case was or ought to have been ripe for hearing.

April, 1886.—Set down for hearing and postponed.

June, 1886.—Set down and postponed by plaintiff, defendant D. being a necessary witness and having left the Province although subpœnaed.

September, 1886.—Set down and postponed, D. not having returned.

January, 1887.—Set down and postponed, D. not having returned and B. the plaintiff's agent, also a necessary witness being absent although subpœnaed, and having neglected to attend upon an appointment to take his evidence *de bene esse*.

31st March, 1887.—Set down, postponement refused, although D. and B. absent: D. meanwhile had been in the province.

4th April, 1887.—Question of costs argued.

7th April, 1887.—B. returned to the City.

19th April, 1887.—Defendants, by leave of judge, notified plaintiffs that unless by this date decree agreed to, judge would make decree.

25th April, 1887.—Petition served for leave to set down anew for hearing.

26th April, 1887.—Another sittings held, case, of course, not set down.

Defendants did not show existence of any injury to them by reason of delay.

*Held*, 1. Under all the circumstances set out in the judgment that leave should be given to set down again upon payment of costs of the day and the petition.

2. The engagements of a witness coupled with shortness of notice may form an excuse for non-attendance upon subpœna.

3. The negligence of plaintiff's solicitor in not procuring evidence may form a ground for an extension of time for hearing.

*J. B. McArthur, Q.C.*, and *S. C. Biggs, Q.C.*, for plaintiff.

*J. S. Ewart, Q.C., W. R. Mulock, W. H. Culver, W. E. Perdue, J. S. Hough, G. G. Mills* and *C. P. Wilson*, for several of the defendants.

[*4th May, 1887.*]

TAYLOR, J.—The original bill was filed against C. S. Drummond as the sole defendant on the 14th of August, 1884. In consequence of his claiming by his answer that certain persons were proper and necessary parties, it was amended by adding a large number of defendants on the 30th of October following. It was further amended on four different occasions during the year 1885 and in January, 1886, it was, or ought to have been, ripe for hearing, for on the 30th of that month the plaintiff's solicitor in writing to the solicitor of a defendant who had neglected to answer and was asking leave to be allowed to do so, said he was in daily expectation of being served with a notice of motion to dismiss for want of prosecution.

The cause seems to have been set down for hearing at the sittings in April, 1886, and to have been for some reason or other postponed. It was again set down for the sittings in the month

of June, and was then postponed on the application of the plaintiff on the ground that the defendant was a material and necessary witness on his behalf, and that although served with a subpœna to attend at the sittings, he had left for England the day before they began. The case again came on at the sittings in September and was again postponed at the request of the plaintiff until the next sittings, the costs to be costs in the cause. This postponement was granted on the ground that the defendant Drummond had never returned within the jurisdiction.

At the sittings in January, 1887, the case was again upon the list for hearing and at the request of the plaintiff was again postponed on payment of costs, Drummond not having even then returned, and Boyle the agent in Winnipeg, of the plaintiff, and who is sworn to be a necessary witness for him, being also absent in England, having left Winnipeg about the middle of the preceeding December. The plaintiff is a resident in England, and it is sworn that he has no personal knowledge of the transaction out of which this case has arisen.

On the 19th of March, 1887, one of the defendants set the cause down for hearing at the sittings, beginning on the 29th of that month. Thereupon the plaintiff made an application to the referee to have the case still further postponed. This motion the referee adjourned to come before the Court when the case was called on.

The case came before me on the 31st of March, when I refused the application of the plaintiff to have it again postponed on account of the absence of Boyle and Drummond. It seemed to me on the evidence then before me, that the evidence of Boyle might have been taken under an order which was made for his examination *de bene esse* in December, had he chosen to attend for examination under a subpœna which was served upon him. He being the plaintiff's agent, managing his business here and having the control for him of this suit, made his neglect to attend somewhat different from similar neglect on the part of an ordinary witness. The application to postpone the case over the sittings having been refused, it stood until the morning of the 4th of April, that the plaintiff's counsel might consider what decree they would take under the circumstances. On that morning the question of the costs of a number of the defendants made parties in consequence of the allegations in the answer of C. S. Drummond

was argued and the case again stood until the next morning as to the plaintiff's rights against C. S. Drummond, whose counsel was not then in attendance. The decision of the question of costs I reserved until that other question was spoken to. The next morning, counsel for the plaintiff and C. S. Drummond both appeared when it was stated that consent minutes would likely be agreed upon. No minutes having been put in I gave the solicitor who had set the cause down, leave to serve a notice on the plaintiff's solicitor requiring the minutes to be filed on the 19th of April, or otherwise I would dispose of the case upon the material before me.

On that day I was informed that a petition was about to be presented, praying to have the hearing opened, and that the plaintiff might still be allowed to go into evidence in support of his case.

This petition has been presented, and after an adjournment for the purpose of cross examining Mr. Boyle upon an affidavit he has made, it has been argued and is now to be disposed of.

The petition asks that the order or decree may be vacated and set aside which is of course a mistake as no decree has yet been made. The defendants have not the advantage of urging to that extent that they have acquired a vested right which will be interfered with by opening the hearing. Nor has the plaintiff the obstacle to contend with which a plaintiff has who is seeking to give further evidence to supplement or strengthen the case already made, a proceeding which is always entertained by the court with extreme caution, for here no evidence has been gone into on either side. In the prosecution of the suit, leaving out of view the various postponements for causes which the plaintiff could not control, there has been great delay. But the defendants have not shown any injury which they have sustained on that account beyond the general injury which every defendant may be said to sustain from having a suit undisposed of hanging over his head.

The plaintiff in this suit is resident in England and Boyle is his agent in this Province. The business out of which the suit has arisen was transacted by Boyle and the plaintiff has no personal knowledge of the facts connected with it. In December last, Boyle was expecting to go to England, but the exact time when he would require to do so, he says, he did not know until a few

days before he left. It is said that the fact that he was going was mentioned in the Winnipeg newspapers two or three weeks before he left, but he swears most positively that he did not know he must leave at the time he did until a few days before he actually left. Even when he left it would seem he did not know positively that he would require to cross the Atlantic, as his actually doing so or not depended upon whether a Mr. McLean would exercise his option of purchasing the bonds of a company in this City. It was only if he did not exercise this option that Boyle's going became imperative. When he knew that it was probable he must go he informed the plaintiff's solicitor and steps were taken by the latter to obtain an order to take Boyle's evidence *de bene esse*. He was to leave on Sunday the 20th of December, and the appointment to take his evidence was for 12 noon on Saturday the 19th. The subpœna requiring his attendance for examination was served upon him at midnight on Friday. He then informed the solicitor that it would be impossible for him to attend. A meeting of the directors of the Bell Farming Co., of which he is president, had some days before been called for the same hour as that fixed for the examination, at which business of great importance to the Company had to be transacted. Immediately after that meeting there was to be a meeting of the Manitoba Electric Light and Gas Co., of which he is vice-president, to transact important business in connection with the affairs of the Company, which it was expected would require his going to England. These meetings he says now, he had to attend, they could not be postponed, and had the business then disposed of at them not been attended to it would have caused serious loss if not absolute disaster to both Companies. He says he was engaged all that day from eight in the morning until late at night with such business, and with business of the Commercial Bank, of which he is vice-president. He says that had he got more timely notice he might have been able to manage for some postponement of these meetings and so have attended for examination, but with the notice he received this was impossible. On the 20th he left Winnipeg, remaining a few days in St. Paul to attend meetings of The Minnesota and North Western Railway Co., of which also he is vice-president. So pressed does he seem to have been for time, that making his way to New York to be ready to sail should McLean not exercise his option, the directors of the Company

actually accompanied him to Chicago where they had a final meeting. He then went on to New York, and McLean not exercising his option to purchase, he sailed for England on the 1st of January. When in England his intention was to return by the steamer sailing on the 19th of March, which would have enabled him to be in Winnipeg in time for the March sittings of the court. This he was prevented from doing because the mail steamer taking to England bonds he had sold there and which he had contracted to deliver, was four days late in arriving. He did leave however, on the 24th of March, by the very first steamer which sailed after the 19th, and reached Winnipeg on the 7th of April just three days too late. The defendant Drummond has since come back to Winnipeg also.

A number of cases have been cited for the various defendants in opposition to this hearing being opened, *Cole* v. *Campbell*, 9 Ont. Pr. R. 498, decides simply that where there has been a trial of an interpleader issue directed from the Chancery Division, a motion for a new trial must be made not before a single judge but before the Divisional Court.

In *Sherritt* v. *Beattie*, 27 Gr. 492, the defendant sought to have a case reopened and to give evidence, on the ground that he had been surprised by the evidence given by a witness for the plaintiff, but it was refused because although he knew that the evidence of this witness was going to be used against him he had taken no steps to have witnesses in attendance to meet it. *Donovan* v. *Denison*, 2 Chan. Cham. 284, was a case in which notice of hearing having been served upon a clerk of the defendant's solicitor, he neglected to make an entry of it and the defendant knew nothing of the case being set down until after the decree had been made. V. C. Mowat even after the decree had been drawn up and entered allowed a new hearing upon payment of costs.

The cases of *Woods* v. *Young*, 4 Cranch. 237; *Barrow* v. *Hill*, 13 How. 54; *Thompson* v. *Selden*, 20 How. 195, only decide that the granting or refusing an application to postpone a cause, or as it is called in the United States courts, the continuance of a cause, is a matter of discretion and that where a judge has exercised his discretion, it cannot be assigned as error and reviewed by an appellate court. That seems to me a very different thing from

making an application to the judge himself and asking him to review his own order.

In *Wright* v. *McGuffie*, 4 C. B. N. S. 441, the court refused to grant a new trial on account of the absence of a witness, a sea captain in the employment of the defendant, but he had been guilty of laches in absaining from securing the testimony of the witness when within his power. As Williams, J., said, "It was his duty therefore to take all reasonable steps to secure the testimony of a witness who was under his own immediate control. Instead of doing so, he allows him to go for seventeen months to different parts of the world. * * * * It was the defendant's duty to take steps to procure his attendance. He seems however, to have done nothing, but to have left the matter altogether to chance." In *Woodroff* v. *Campbell*, 5 O. S. 305, it was held to be no ground for a new trial, that a witness who was subpœnaed did not attend, having been engaged on some public works, and in *Kitchen* v. *Murray*, 16 U. C. C. P. 69, a new trial was refused where it was asked on the ground of surprise consisting in the absence of the defendant's witnesses.

There an application to postpone the trial until the next day had been made to the judge at the trial, who refused it on the ground that it did not appear that any one had been subpœnaed to produce the deeds which the defendant said he expected to produce, nor was there any certainty that they would be there on the next day. On the other hand in *Austin* v. *Armstrong*, 28 U. C. C. P. 47, the court granted a new trial to allow points of law to be raised which had not been so at first, in *Turcotte* v. *Dawson*, 30 U. C. C. P. 23, to allow of further evidence being given, that at the first trial being conflicting, and in *Fitch* v. *McCrimmon*, 30 U. C. C. P. 183, a new trial was granted to enable the facts to be more fully considered.

Here no evidence at all has been taken, and the matter I am called upon to decide is has the plaintiff sufficiently excused his failure to be prepared with evidence when the case was called on. He has certainly made a much stronger case now than was made when I refused to postpone the hearing. He could not control Mr. Boyle's movements, even though the latter was his agent he was not his servant whose going and coming he could direct or control, as the defendant in *Wright* v. *McGuffie* could. Then the evidence now before me of the business with which

Boyle was occupied just before he left, and that he was served only at midnight of the day before he was to be examined, after apparently occupation for every moment of his time until he left had been arranged, fully meets any imputation of negligence in his not attending. Even if the failure to have his evidence taken *de bene esse* was the fault of the solicitor, which I do not say it was, *Donovan* v. *Denison*, would be authority for opening the hearing, and so would *Walton* v. *Jarvis*, 13 U. C. Q. B. 616.

So, in *Dove* v. *Dalby*, 5 U. C. Q. B. 457, where the defendant's attorney from a mistake in looking through the docket at the assizes, got a wrong impression as to the time at which the case would be tried, and so lost the opportunity of making a defence, a new trial was granted, the matters to be investigated being important.

On the argument a good deal was said as to the refusal of Boyle when cross examined on his affidavit to answer a number of questions. He did this on advice of counsel. It seems to me he was justified in so refusing. Under the circumstances, the defendants were entitled to something more than a mere statement under oath that he and Drummond are necessary and material witnesses for the plaintiff.

They were entitled to be informed as to the particular points upon which they are so, and they had a perfect right to cross examine Boyle on that head, but I do not think they had any right to go further to obtain discovery of what his evidence upon these points would be. It was only when questions for that purpose were put that he declined to answer.

Looking at the whole facts connected with the failure to be prepared to proceed at the last sittings as now presented to me, and that the defendants have not shown that they will be in any way injured by opening the case, beyond the general injury which a defendant may be said to sustain by having a suit against him pending, I think I ought in the exercise of a sound discretion and in the interests of justice to permit the case to be opened, but it can be so only on payment of costs of the day at the last sittings and of the present application.

The order I make is that upon payment of the costs of the day at the last sittings and of the present application, the plaintiff be at liberty to set this cause down for examination of witnesses and

hearing, but it must be brought on for hearing at or before the next equity sittings. I use the expression at or before the next sittings because I understand my brother Dubuc has adjourned the sittings which began on the 26th of April until the 8th of June for hearing a case. If he is willing that this case should be set down for hearing then, it should then be brought on, otherwise it must be brought on for hearing at the next sittings.

On the argument an affidavit of Mr. Mills sworn on the 20th of January, 1887, and said to have been used when the case came on at the January sittings, was read on behalf of the defendants without objection on the part of the plaintiff. It might have been objected to, as I observe that although among the papers in the office of the clerk of records and writs it has never been filed.

## BROWN v. THE CANADIAN PACIFIC RAILWAY CO.

*Railway.—Pleading.—International law.—Lex loci solutionis.*

To a declaration in contract, against a railway company for loss of baggage, the company, as to $100 of the claim, pleaded that the baggage was carried under a contract whereby "the baggage liability is limited to wearing apparel not exceeding $100 in value." Replication that the contract was made in the State of Maine; that by the law of that State plaintiff (for reasons assigned), was not bound by the limitations.

Upon demurrer the replication was *held* bad.

A contract made in one country to be performed in another, is governed by the law of the latter jurisdiction.

*Semble*, Where there is a contract with a corporation for carriage through several States, with distinct laws, the law of the State where the corporation has its seat and principal office prevails.

*P. A. Macdonald*, for plaintiff.

*J. A. M. Aikins, Q.C.*, for defendants.

[*4th May, 1887.*]

TAYLOR, J.—The plaintiff sues the defendants as carriers of passengers and their luggage upon a railway from the Town of Emerson to the City of Winnipeg, in the Province of Manitoba, and alleges that he became and was received by the defendants as a passenger with his luggage, to be by them as such carriers safely and securely carried in said railway from Emerson to Winnipeg aforesaid, and the said luggage to be delivered to him at Winnipeg aforesaid, within a reasonable time after the arrival of said luggage at Winnipeg aforesaid, and all conditions were fulfilled, &c,, to enable the said plaintiff to have the said luggage so carried and delivered as aforesaid, yet the defendants did not safely and securely carry the said luggage and deliver the same to the plaintiff whereby, &c. The defendants for a seventh plea say that, as to so much of the plaintiff's cause of action the claim for which is in excess of $100, the plaintiff became and was received as a passenger with his luggage, to be carried under a special contract between the plaintiff and defendants, and subject to certain conditions contained in said contract, one of which was in the words and figures following, "That the baggage liability is limited to wearing apparel not exceeding $100 in value," whereby, and by reason of said condition, the defendants are relieved from any and all liability in respect of said luggage over and above $100 in value. To this plea the plaintiff has replied, that the contract in the plea mentioned was made in the State of Maine, one of the United States of America, and by the laws of the said State respecting carriers notice of any special condition limiting the liability of a carrier, must be brought home to the owner of the property carried, in order to enable the carrier to take advantage of such special condition and the plaintiff never had any notice or knowledge of the condition alleged in the said plea. To this replication the defendants demur, and their demurrer should in my opinion be allowed.

The plaintiff sets out by alleging in his declaration a contract in the Province of Manitoba, and then when the defendants admit that contract, but set up that it was made subject to a special condition, he meets that by alleging that the contract on which he sues was made in the State of Maine, and by the law of that State, the special condition is not binding upon him. This, it seems to me is a departure.

Then I do not see what the law of the State of Maine has to do with the question. The contract was to be performed here, within the Province of Manitoba, and it is here that the plaintiff is seeking to enforce it. In *Don* v. *Lippman*, 5 C. & F. 1, it was decided by the House of Lords, that the law of the country where the contract is to be enforced, must prevail in enforcing such contract, though it is conceded that the *lex loci contractûs* may be referred to for the purpose of expounding it.

*Mr. Justice Story* in his treatise on the *Conflict of Laws*, thus expresses himself, in section 280, "Where the contract is either expressly or tacitly to be performed in any other place," that is, another than where it was made, "there the general rule is in conformity to the presumed intention of the parties that the contract as to its validity, nature, obligation and interpretation is to be governed by the law of the place of performance."

And *Wheaton*, in his work on *International Law*, (8th Ed.), at p. 152, thus states his view, "Wherever from the nature of the contract itself, or the law of the place where it is made or the expressed intention of the parties, the contract is to be executed in another country, everything which concerns its execution is to be determined by the law of that country. * * * * If a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, the rules of evidence, and of limitation is to be determined by the law of the State where the suit is pending, not of that where the contract is made." The law was laid down in accordance with these statements of it, by the Supreme Court of the United States, in *Andrews* v. *Pond*, 13 Peters at p. 77, where Chief Justice Taney said, "The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance." see also *De la Vega* v. *Vianna*, 1 B. & Ad. 284, and *Trimbey* v. *Vignier*, 1 Bing. N. C. 151.

If the law of this Province is not to govern the enforcing of the contract in question, then it is most probably the law of Quebec which is to prevail. In *Wharton's Conflict of Laws*, it is said in section 472, "Suppose there is a contract of carriage either for goods or for persons where the line of transport extends

through several States with distinct laws in this relation which law is to prevail? The law of the State where the corporation has its seat and principal office."

The demurrer should be allowed with costs.

*Demurrer allowed.*

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## OSBORNE v. INKSTER.

*Security for costs.—Sufficiency.—Onus as to.—Power of master on reference.—Extension of time.*

An order was made directing security to be given, within a certain time, to the satisfaction of the master.

Plaintiff brought in a bond with one surety who justified in $400 over his just debts, but said nothing about exemptions. The defendant filed an affidavit impeaching the surety's solvency. The master disallowed the bond.

*Held*, 1. That the master had acted properly.

2. That further time should not be given unless upon material sufficiently explaining the delay, &c.

*S. C. Biggs, Q.C.*, for plaintiff.

*H. M. Howell, Q.C.*, for defendant.

[*14th May, 1887.*]

KILLAM, J.—The security was ordered to be given to the satisfaction of the master. I think that this involved a reference as to the sufficiency of the sureties as well as with regard to the amount and form of the security. In *Archibold's Practice*, p. 1420 it is said that "if the parties cannot agree upon the form or sufficiency of the security offered, the plaintiff should obtain an appointment from one of the masters for the purpose of settling the same." No authority has been cited and I have found none which shows whether, on going before the master, the onus, under the old common law practice in England, was upon the plaintiff to satisfy the master of the sufficiency, or upon the

defendant to satisfy him of the insufficiency of the security offered. So far as my experience has gone, it has been usual in this Province to require the plaintiff to bring before the master with his bond an affidavit of justification or some other proof of the sufficiency of the security, and such a practice would seem to arise naturally under the reference as stated by Archibold. On inquiry of the master I find that he corroborates my recollection of what has been the practice here. No doubt the bond is frequently brought before the master for allowance without being first submitted to the other party for acceptance, but if this is done it does not appear that such a course can affect the principle upon which the master has to consider the question of sufficiency. I do not think that cases arising under the Ontario Chancery practice can have any application to the practice at common law upon this point.

Adopting the view that it is the duty of the plaintiff to satisfy the master affirmatively of the sufficiency of the security, it would seem a very reasonable rule that where sureties justify in so small an amount as $400, this should be shown to be for property not subject to exemption from seizure under execution, and that there should be two such sureties. The master informs me that there is no positive rule adopted by him requiring two sureties, but that one very good one would be accepted. The reasonableness of such rules in the abstract is at once apparent. Their reasonableness in any particular case must depend upon the circumstances. Here there is only one surety, and that one justifies only in $400 without reference to the property being or not being exempt from seizure under exemption, and there is an affidavit which serves to show at least that there is a *bona fide* doubt of the sufficiency of the one surety. In view of these circumstances I cannot think that the master would have been justified in allowing the bond.

The master informs me that there is no doubt that the affidavit offered on the part of the defendant was read before him upon the application. There is only a suggestion of counsel for the plaintiff, of a report to him by the attorney's clerk that it was not. There is nothing even to show that better evidence can be supplied of the sufficiency of the one surety. It would be impossible, then, to refer the matter back to the master for further consideration. It is not to be assumed that a party can make a

stronger case than that on which he submitted the question for consideration.

I would favor the view that the practice in limiting time for a plaintiff to put in security for costs should be as liberal towards the plaintiff as possible, and I can see no reason why, after an order fixes one limit, it should not be amended so as to extend the time. If, as is suggested but not proved, judgment has been signed for default in not giving the security, a serious doubt may arise as to the possibility without some excuse being offered for the default, of setting aside the judgment for the purpose of allowing the order to be amended and further time given for perfecting security. In the present case it appears that the time originally given was sixty days, and that this time was extended for fifteen days longer. The only material filed for the plaintiff is an affidavit of the agent of his attorney which, after setting out the facts as to the orders, the disallowance of the bond, and the grounds upon which it is alleged that the master refused to allow it, states that, "immediately after the said master had refused to accept the said bond as aforesaid a letter was sent to the attorney for the above named plaintiffs, advising him of the fact of such bond having been refused, and on the nineteenth instant instructions were received from the said attorney as to how we should proceed in this matter."

There is, then, not even an attempt to make a ground for a further extension of time, not even a suggestion that further security can be obtained or further proof of the sufficiency of the present security can be supplied or that (if it could be held a sufficient ground), the attorney erred through a mistaken view as to the practice. No excuse whatever is offered for the delay or want of better security.

I think that there must be some ground laid for an extension in the material upon which such an application is made, and that it is not sufficient that the plaintiff merely ask for it or that counsel suggest upon argument a possibility that the defect will be supplied if the additional time be granted. I think that it would be exceedingly improper to inaugurate such looseness of practice as would be involved in granting this application without some ground being shown for it affirmatively.

*Application dismissed with costs.*

## CARRUTHERS v. WATEROUS.

*Security for costs.—Delay.*

After defendant had obtained a postponement of the trial, and had applied for and been refused a further postponement, he applied for security for costs, alleging that he had only learned a few days before moving of the fact of the plaintiffs absence.

*Held*, That the application was not too late.

*C. P. Wilson*, for plaintiff.

*A. E. McPhillips*, for defendants.

(*3rd May, 1887.*)

TAYLOR, J.—This case was at issue and entered for trial in February last. When called on it was postponed on the application of the defendant on the ground that a material and necessary witness for him was absent in Australia. A commission for his examination was ordered to issue in March. No steps having been taken to issue the commission the plaintiff again entered the record for trial, and the defendant moved in chambers to again postpone the trial. This application was refused, but without prejudice to its being renewed when the case was called for trial. When the case came on no one appeared for the defendant, and the plaintiff got the case postponed for one week. The defendant then moved for security for costs, on the ground that the plaintiff has ceased to reside within the jurisdiction, a fact which he says he only learned a few days before moving, the application being made as soon as he could get the necessary affidavits. The application is opposed as being made too late. None of the cases cited however, seem to me to bear out the plaintiff's contention.

*Muller* v. *Gernon*, 3 Taunt, 272, and *Steel* v. *Lary*, reported in a note to that case were both cases of foreigners commencing actions and no application made for security until after. in the one case the defendant had undertaken to accept short notice of trial, and in the other notice of trial had been served. In each an order for security was refused as being

made too late. But in both it would appear that the plaintiff was, when he began his action, resident abroad and no reason was given why the application was not made before issue joined as in ordinary cases it ought to be. *Michel* v. *Pareski*, 2 H. B. 593, was also the case of a foreigner resident abroad when he began his action. *Dowling* v. *Harman*, 6 M. & W. 131, is an authority to show that the defendant having obtained an order for time to plead on the terms of taking short notice of trial does not prevent him from obtaining security if applied for before issue joined. *Wainwright* v. *Bland*, 2 C. M. & R. 740, was a case which had been tried, and the jury having disagreed had been discharged; new notice of trial was served and then security was applied for, but refused, not on the ground that it was too late after notice of trial, but because the defendant was aware that the plaintiff had gone abroad before the first trial.

In *Gell* v. *Viscount Curzon*, 4 Ex. 813, the order was made after a verdict, subject to an award, and after proceedings had been taken on the arbitration, the plaintiff having obtained his discharge under the Insolvent Act, and gone abroad shortly before the application. In *Grant* v. *Banque Franco Egyptienne*, 1 C. P. D. 143, a demurrer had been allowed, and plaintiff appealed. The evening before the appeal came on for hearing, notice of motion for security was served. The appeal came on and stood over, an order being made giving the plaintiff liberty to amend. The motion for security was refused as too late, as to costs already incurred, but without prejudice to any application as to future costs.

In *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 68, Mellish, L.J., said, "When there is a case in which security for costs should be given, the court is to order it to be given for such an amount and at such time or times as may be just." *Massey* v. *Allen*, 12 Ch. D. 807, was a case in which security was ordered, the plaintiff having gone abroad. The cause must have been set down for hearing and notice of trial served, for counsel opposing the application said, "The briefs have all been delivered and there will be no further costs in regard to witnesses."

In this case the plaintiff has gone to the United States, his attorney says merely to attend to a railway contract which he has, but the uncontradicted evidence of the defendant is that he saw

him in St. Paul, and he then said he had left this country for good.

The defendant is entitled to an order for security being given to the satisfaction of the master and staying proceedings in the meantime. The order may limit a reasonable time for giving the security. Costs will be costs in the cause.

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## REG. v. SHAW.

*Commitment.—Gaming house.—Poker.—Playing Cards.*

*Held*, 1. That keeping a common gaming house is an indictable offence at common law.

2. That the cards, &c., referred to in section 3 of 38 Vic. c. 41, must be such as are ordinarily used in playing an unlawful game.

3. That a commitment for unlawfully keeping a common gaming house sufficiently describes an offence, so that the party committed cannot be discharged on the ground of there being any defect on the face of the commitment in merely thus describing the offence.

4. That "poker" is not in itself an unlawful game.

5. That a commitment cannot be quashed where the magistrate had such evidence before him as would warrant him in committing.

The prisoner was committed on the charge of "unlawfully keeping a common gaming house."

*F. McKenzie, Q.C.*, moved absolute a rule *nisi* for a writ of *habeas corpus* issued in term by the court sitting in *banc* and returnable before a single judge sitting in court on Tuesday 22nd February, 1887.

It was contended on behalf of the prisoner that he was illegally detained because the chief of police had taken his proceedings under Statutes 38 Vic. c. 41, and 40 Vic. c. 33, and that the police magistrate should have proceeded to hear and determine the case summarily under 32 & 33 Vic. c. 32. *Bac. Abr.* p. 450;

*Re Rogier*, 1 B. & C. 272; that it did not appear from the evidence returned before the court that the house in question was kept by defendant for gain or lucre or that it was a resort of loose or disorderly persons for gambling; but on the contrary that when the police arrived only one person was there besides the prisoner and that no playing was going on; that it did not appear that any unlawful or prohibited game was played in the house. It was also urged that the police magistrate had no jurisdiction and that proceedings should have been under a By-law passed under the provisions of the City of Winnipeg Charter, 1884, and that there was no evidence that the defendant was guilty of a common law offence, *Reg* v. *Matheson*, 4 Ont. 559; *Reg* v. *Howarth*, 33 U. C. Q. B. 537.

*L. W. Coutlee*, for the crown opposed the motion.

KILLAM, J.—(After referring to *Rex.* v. *Rogier*, 1 B. & C. 272, and *Rex.* v. *Dixon*, 10 Mod. 336). It appears to me that keeping a common gaming house is an offence at common law, and that the prisoner can not be discharged on the ground of there being any defect on the face of this commitment. It also appears to me that the cards, &c., referred to in section 3 of 38 Vic. c. 41, must be such as are ordinarily used in playing an unlawful game, but the magistrate having the cards, tables and counters before him may have judged that in this case they were such, although the chief of police in his evidence seems to have regarded them only with reference to the game of "poker" and to have improperly regarded that game as being in itself unlawful. I think then that I cannot say that the magistrate had not before him such evidence as would warrant him in committing the prisoner for trial, and I must discharge the rule.

*Rule discharged.*

## NORTH WEST NAVIGATION CO. v. WALKER.

*Navigable rivers.—Obstructions.—Reasonable use.—Negligence.*

The declaration, set out below, for obstructing the navigation of a river and thus delaying the plaintiff, upon demurrer,

*Held*, Good.

After the judgment upon the demurrer as reported 3 Man. L. R. 25, the plaintiffs amended their declaration. As amended it was as follows:—

The plaintiffs by their said attorney for an added count to the plaintiffs' declaration say that before and at the time of the committing of the grievances hereinafter mentioned there was a certain navigable river and common highway, called and known as the Red River in the Province of Manitoba, and the plaintiffs were engaged in the business of forwarders and carriers and were the owners of certain steamboats and barges with which the plaintiffs during the season of navigation sailed up and down and along the said river, in the natural course thereof, between the City of Winnipeg and the Town of St. Vincent, both situate on the banks thereof, for the carriage of passengers and freight, and the plaintiffs derived great gains in and from the sailing of the said steamboats and barges as aforesaid, and there was no other navigable water and highway between Winnipeg and St. Vincent aforesaid, on or along which the plaintiffs could in the event of the said Red River being obstructed, sail the said steamboats and barges so as to carry the said passengers and freight. And the plaintiffs had entered into contracts with divers persons for the carriage of passengers and freight, by means of the said steamboats and barges sailing between the said City of Winnipeg and the Town of St. Vincent on and along the said navigable river and highway as aforesaid, and just before and at the time of the committing of the grievances hereinafter mentioned were navigating their said steamboats and barges so laden upon and along the said river. And the defendant at the time aforesaid was using the said Red River between St. Vincent and Winnipeg aforesaid, to float logs and timber, to wit upwards of seven million feet thereof, thereupon to Winnipeg aforesaid, and it became and was the duty of the defendant to float the said logs and timber upon said river in such manner that the said logs and timber so floating upon said river should not unnecessarily and unreasonably interfere with, or impede the plaintiffs and others in the use, enjoyment and navigation of the said river. Yet the defendant, not regarding his duty in that behalf, and well knowing the premises and that said Red River was a navigable river and common highway, and that the plaintiffs were forwarders and carriers as aforesaid on and along the said river between the towns afore-

said and entitled to lawfully use the said river in manner aforesaid, so negligently, unlawfully, wrongfully and improperly floated the said logs and timber upon said river when the plaintiffs were so navigating the same within Manitoba, that the said river was thereby blocked up and obstructed with said logs and timber at divers places upon said river between Winnipeg and St. Vincent aforesaid, in the Province of Manitoba aforesaid, in the month of August, one thousand eight hundred and eighty-four, so as to unreasonably and unnecessarily prevent navigation of said river; and by his negligence and wrongful act aforesaid, the defendant obstructed, impeded, hindered and prevented the plaintiffs from navigating the said Red River with the said steamboats and barges so laden as aforesaid, and kept and continued the said river so blocked up and obstructed for a long, unreasonable and unnecessary space of time, whereby during all the time aforesaid, the plaintiffs were obstructed, impeded, prevented and hindered from lawfully using and navigating the said Red River for the purposes aforesaid, and were put to and incurred great expense in and about the maintenance and management of their said steamboats and barges so obstructed and impeded as aforesaid; and whereby their said steamboats and barges were through the act of the defendant broken and injured by said logs and timber; and the plaintiffs were unable to perform their contracts for carriage of passengers and freight aforesaid and were unable to make other contracts therefor that they could otherwise have made, and were subjected to suits and threats of suits for nonperformance of said contracts, and have lost and been deprived of divers great gains and profits which otherwise they would have earned, and have been in other respects greatly damnified and injured.

The defendant again demurred.

*J. S. Ewart, Q.C.*, and *A. Haggart*, for the demurrer, in addition to the cases cited upon the former argument referred to the following upon the question of the necessity of notice: *Pillsbury* v. *Moore*, 44 Maine 156; *Angell on Watercourses*, (7th ed.) 568; *Penruddock's Case*, Coke Pt. 5, p. 101; *Bolton* v. *Calder*, 1 Watts 360.

*H. M. Howell, Q.C.*, and *J. W. E. Darby*, for the plaintiffs. In cases of collision, negligence, and not malice is the test of liability, *The Pladda*, 2 Pro. Div. 34; *The George and Richard*, L. R. 3 Ad. & Ec. 466; *Hancock* v. *York &c. Ry.*, 10 C. B. 348; *Seccombe* v. *Wood*, 2 M. & R. 290. Where a vessel sinks the owner must himself give notice. It is not necessary to give notice to him, *Harmond* v. *Pearson*, 1 Camp. 515; *White* v. *Crisp*, 10 Ex. 312. General law well set forth in *Davis* v. *Winslow*, 51 Maine 264; *Wood on Nuisance*, § 481. A slow traveller must get out of the way of a faster traveller, *Commonwealth*, v. *Temple*, 80 Mass. 76. The cases of *Rose* v. *Miles*, 4

M. & S. 101, and *Crandell* v. *Mooney*, 23 U. C. C. P. 212, are precedents followed by the draughtsman of this declaration.

(*5th February, 1887.*)

TAYLOR, J.—I overrule this demurrer. Whatever may have been the defects in the former declaration, which was successfully demurred to, it seems to me that the present one discloses a good cause of action. It alleges that the defendant using the river for the purpose of floating a large quantity of logs, which was I suppose a lawful use of it, so negligently and improperly floated the logs as to cause injury to the plaintiffs, the owners of steamboats and barges, who were also at the time lawfully using the river for the purpose of navigating their steamboats and barges. Both parties had the right to use the river, a navigable stream, as a public highway, but the declaration alleges that the defendant, in using the river was guilty of negligence which caused special injury to the plaintiffs. For such injury, consequent upon the defendant's negligence, I think the plaintiffs may maintain their action.

*Demurrer overruled.*

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## HOPKINS v. BECKEL.

(IN EQUITY.)

*Registered County Court judgment.—49 Vic. c. 35.—Retrospective Act.*

No Statute prior to 49 Vic. c. 35, made any lands exempt from a judgment registered under the County Courts Act.

A judgment registered before the 49 Vic. may be enforced after its passage.

*J. H. D. Munson*, for defendants.

(1) Farm exempt, and if proceeds of its sale went into lot, that would be exempt. (2) Transaction not fraudulent. (3) Lot in

itself exempt. (4) Bill does not show property not exempt under execution, *Rowsell* v. *Morris*, L. R. 17 Eq. 20.

The land in question exempt at time of registration of certificate of judgment, March, 1886. When registered parties were in possession and husband could have claimed exemption. Ad. J. Act, 1885, s. 117, s.s. 8. 49 Vic. c. 35, s. 1, *Brimstone* v. *Smith*, 1 Man. L. R. 302.

*J. S. Ewart, Q.C.*, for plaintiff.

No exemption under the statute from County Court action. By Ad. J. Act, 1885, no proceedings under County Court Acts referred to. No exemption in favor of fraudulent assignee, *Brackett* v. *Watkins*, 21 Wend. 68.

Plaintiff can have costs although not prayed, as defendant has answered and appeared, *Morgan & Wurtzburg on Costs*, 46.

(*15th January, 1887.*)

KILLAM, J.—The farm could, when the transaction occurred have been made subject to the plaintiff's claim, by registration of a certificate of judgment, and the equity of redemption of the Morden lot must, so far as the plaintiff is concerned, be deemed to be in Jas. Beckel.

No statute before that of 1886, 49 Vic. c. 35, made any lands exempt from a judgment registered under the County Courts Act, and the equity of redemption in the Morden lot, therefore became charged with the plaintiff's first judgment referred to, upon registration of the certificate.

The 4th section of the Act of 1886, does extend so far as to include County Court judgments, but its provision is merely that "judgment debtors in any proceeding in equity to enforce a judgment shall be entitled to all the exemptions provided by this Act and the Act hereby amended."

This does not appear to me to prevent proceedings to enforce a lien which had already attached when the Act was passed. The lot was at the passage of the Act of 1886, charged with a lien in respect of that judgment. The section referred to does not say that such a lien shall cease to exist: and if still existing it would require the clearest expression of a retroactive intent to prevent proceedings upon the already existing lien, and I cannot find that such an intent clearly appears. For this I need only

refer to the authorities cited by my brother Taylor in his judgment in *Irwin* v. *Beynon*, 4 Man. L. R. 13. The Act may be impliedly construed so as to prevent the attaching of a lien under judgments subsequently registered upon lands exempt from execution, but it appears to me that it cannot properly be given a more extended meaning.

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## THE MANITOBA MORTGAGE CO. v. STEVENS.

(IN CHAMBERS.)

*Striking out jury notice.*

A jury notice will not be struck out unless there is some substantial reason for it. The mere assumption that a judge could try it better without, than with, a jury is not a sufficient ground.

*J. W. E. Darby* for plaintiffs.

*J. H. D. Munson*, for defendant.

[*13th January, 1887.*]

WALLBRIDGE, C. J.—Action on the covenant in mortgage; breach, nonpayment of mortgage-money.

Pleas, amongst others, that defendant gave, and plaintiffs accepted, release of equity of redemption in the land in satisfaction and discharge. The release of the equity of redemption was drawn by plaintiffs and sent to defendant, who returned it executed. It was sent back again to defendant. Jury notice given by defendant.

Plaintiffs apply to strike out jury notice upon the ground of expedition, convenience, saving of expense. The jury notice given for delay only.

The Stat. Man. 48 Vic. c. 15, s. 23 enacts, "All issues of fact in civil cases in actions and proceedings at law shall be tried by a jury according to the law and practice in that behalf, or by a

judge without a jury," with a proviso, that when a jury notice has been given the court or a judge may, upon application being made before trial, strike out such notice, and order the issue or issues to be tried and damages assessed by a judge, without a jury. Provided further, that in actions of libel, slander, criminal conversation, seduction, breach of promise of marriage, malicious arrest and malicious prosecution, *all issues and questions of fact* which might heretofore have been tried by a jury, shall be tried by a jury, unless the parties in person or by their attorney or counsel waive such trial.

This section enacts,—

1. That all issues of fact shall be tried by a jury according to law and practice, or by a judge without a jury.

2. That either party may state in his pleading that he requires the case to be tried by a jury; provided that when a jury notice has been given, the court or a judge may, upon application before trial, strike out such notice; provided that in actions for libel, slander, criminal conviction, seduction, breach of promise of marriage, malicious arrest and prosecution, all issues and questions of fact which might heretofore have been tried by a jury, shall be tried by a jury unless waived. This proviso omits false imprisonment, which is found in other statutes.

The right of either party to have the case tried by jury is declared by a positive enactment, and unless cause can be shown to deprive the party giving the jury notice of such right, he must be allowed to insist upon it. In actions of libel, slander and others enumerated, neither judge nor court can deprive the party of the right to trial by jury, except by consent. It is not declared upon what grounds the judge is to act in thus depriving a party of the right so granted, and it is difficult to lay down any positive rule. It may happen that giving a jury notice will delay the trial to the assize, and the notice may be given for that express purpose. A partial protection against an abuse of that kind is found in the fact that the person requiring a jury has to pay $25 in fees.

Here the defendant asserts that he has merits, and his defence is *bona fide*. The plaintiffs assert that they fear they cannot have a fair trial before a jury, as they have a large sum of money invested in farm lands in Manitoba. This would generally be

looked upon as giving them an advantage, and at best would only be a ground for change of venue; besides, any error into which a jury might fall could be corrected by a new trial. From the nature of the action, is there anything which a judge could not try equally as well without as with a jury. If the advantages are equal, the party requiring a jury has the statute in his favor. Upon what ground then can I deprive him of this statutory right. The statute recognizes that there are cases in which the cause will be better tried by a jury: for example, libel, slander, &c., and over these the judge has no control except by consent. Where can the line be fairly drawn between cases which the statute has declared shall only be tried with a jury, and those in which a judge, without a jury, may try it? A person requiring a jury has a right to have their judgment exercised upon the matter to be tried. Upon what ground shall I say he shall not so have it? It certainly ought not to be done without a substantial reason for it. The mere assumption that a judge could do it better will not answer; for even if he could do it better, the choice is not for the judge to make, the statute has given that to the party. I can hardly imagine a case in which the judge could not as well try the case without as with a jury. But the statute has said there are such cases, for example,—libel, slander and enumerated cases. When a statute says there are cases where a jury is the best tribunal, am I to deny the principle? Is there any fact in dispute in which a jury might exercise their judgment, and is the demand for a jury *bona fide* that is not made for delay simply? In this case there is a fact, *i. e.*, the delivery and acceptance in accord and satisfaction. I think I ought to allow the defendant the right to have the judgment of a jury exercised upon the issue he has raised which the statute gives him.

I discharge the summons; costs to be costs in the cause to the defendant in any event.

## KING v. KUHN.

(IN APPEAL.)

*Chattel mortgage not renewed.—Purchaser with notice.*

Defendant held a chattel mortgage upon some oxen. It was filed but after the lapse of two years not refiled. Plaintiff after that period bought the oxen with notice that the mortgage was not paid.

*Held*, That as against the plaintiff the mortgage was valid and effectual.

Appeal from the County Court of Lisgar, in which judgment was entered for the plaintiff.

*W. H. Culver* for defendant. Plaintiff was not a purchaser in good faith. *Lewis* v. *Palmer*, 28 N. Y. 271; *Gregory* v. *Thomas*, 20 Wend. 17; *Hill* v. *Beebe*, 13 N. Y. 561; *Gildersleeve* v. *Landon*, 73 N. Y. 609; *Dunham* v. *Dey*, 15 Johns. 567; *Tiffany* v. *Warren*, 37 Barb. 574.

All creditors are protected, but only certain purchasers. *Coble* v. *Nonemaker*, 78 Penn. St. 505; *Hathorn* v. *Lewis*, 22 Ill. 395; *Paine* v. *Mason*, 7 Ohio, 196; *Jones on Chattel Mortgages*, § 312, 313. *Edwards* v. *Edwards*, 2 Ch. Div. 291. *Richards* v. *James* L. R. 2 Q. B. 285 shows that in England an unregistered bill of sale is good against a subsequent unregistered one.

*Exparte Lemon*, 4 Ch. Div. 23; *Cookson* v. *Swire*, 9 App. Ca. 653; *Edwards* v. *English*, 7 E. & B. 564; *Morrow* v. *Rorke*. 39 U. C. Q. B. 500; *Moffatt* v. *Coulson*, 19 U. C. Q. B. 341.

*N. F. Hagel, Q.C.*, for plaintiff. All cases cited for plaintiff apply only to fraudulent contrivances; plaintiff's *bona fides* shown in this case. *Meach* v. *Patchin*, 14 N. Y. 71; *Thomson* v. *Van Vechten*, 27 N. Y. 568; *Dillingham* v. *Bolt*, 37 N. Y. 198; *Barron on Bills of Sale*, 186; *Jones on Chattel Mortgages*, § 221, 292.

(*25th June, 1887.*)

WALLBRIDGE, C.J., delivered the judgment of the Court.(*a*)

(*a*) Present: Wallbridge, C.J.; Taylor, Killam, JJ.

This is an appeal from the Judge of the County Court of the County of Lisgar.

Plaintiff and defendant both claim the property in dispute under the same person, namely, James Lockhart; the property being a yoke of oxen. The defendant was mortgagee of Lockhart under a chattel mortgage dated 28th July, 1884, to which there are the proper affidavits, this mortgage was filed in the proper office on 2nd of August, 1884, and was not refiled; the mortgagor remained in possession. This plaintiff bought or traded for these oxen, about 20th August, 1886, and then had notice of the existence of the chattel mortgage and that it was not paid. He wrote to the clerk of the County Court at Lisgar and ascertained that the mortgage had not been renewed or refiled, and he then made the trade. The oxen were missing from his place about the 24th August, and he afterwards saw them advertised for sale under the chattel mortgage. Plaintiff saw them on defendant's premises in the yard there, about 11th or 12th September, and afterwards suit was brought on contract, which was allowed to be amended to one of tort, usually called trover. The plaintiff now sets up that he is a *bona fide* purchaser for value. That the plaintiff had notice both from the mortgagor and in writing in answer to his letter that the defendants mortgage was in existence, there can be no doubt.

It is true the mortgage had not been again filed with the necessary statement and affidavit required by the statute within two years from the filing thereof, and the plaintiff claims that he is protected in his purchase and comes within the description of a purchaser in good faith for valuable consideration.

It is clear from the evidence that this plaintiff bought with notice of the mortgage, and that his purchase was direct from the mortgagor.

The object of refiling is simply to give notice and if a purchaser has notice independent of the refiling, it seems to me impossible that he can be said to be a *bona fide* purchaser. And it is only *bona fide* purchasers, not any purchaser, who are protected by the statute. The following passage from the leading case of *Le Neve* v. *Le Neve*, 1 Ambler 446, (3 Atkins 646 s.c.), "The taking a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser, not that he is not a purchaser for a valuable

consideration in any respect. This is a species of fraud and *dolus malus* itself, for he knew the first purchaser had a clear right."

Thus from the mortgagor having notice of the mortgage he cannot be said in the words of the statute to be a purchaser in good faith.

The appeal will be allowed, the verdict for the plaintiff be set aside and verdict entered for the defendant.

*Appeal allowed.*

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## WOOD v. BIRTLE.

(IN EQUITY.)

*Tax sale.—Advertisement.—Injunction.*

Lands were advertised for sale for taxes in two numbers of the Gazette, but those numbers although dated upon certain days did not in fact issue until later dates—dates too late to comply with the statute. Upon a motion for an injunction to stay the sale,

*Held*, 1. That the statute was not sufficiently complied with, but

2. That insufficient advertising would not, under the present statutes, render the sale void, and that therefore no injunction to stay it should be granted.

*J. H. D. Munson*, for plaintiff.

*J. S. Ewart, Q.C.*, and *C. P. Wilson*, for defendants.

(*16th July, 1887.*)

TAYLOR, J.—The plaintiff moves to continue an interim injunction, granted *exparte* by the Chief Justice, on the 29th of April last, staying a tax sale advertised for that day.

The bill alleges three grounds for staying the sale—insufficient advertising—insufficient description of the lands—and that they are advertised to be sold for larger arrears than are actually due thereon. The last ground was not touched upon during the argument.

I am not prepared to say that the descriptions given of the land do not comply with the requirements of section 648 of The Manitoba Municipal Act, 1886, that in a notice of sale, each lot or parcel "shall be designated therein by a reasonable description."

Section 645, requires the treasurer to advertise lands offered for sale for taxes "for two weeks in the Manitoba Gazette and once a week for four consecutive weeks within the two months preceeding the day of sale therein named, in some newspaper published in the county where the lands to be sold are situate," &c. No objection is raised as to the advertising in a newspaper, the advertising in the Gazette is what is complained of as insufficient.

The advertisement appeared in the issues of the Gazette for the 16th and 23rd of April, but it is sworn on behalf of the plaintiff and not denied by the defendants that the issues of the Gazette bearing these dates were not, in fact published until five or six days after the days on which they respectively bear date, that the Gazette of the 23rd was not in fact published until after the 29th.

The defendants have no control over the issuing of the official Gazette, but in *Gemmel* v. *Sinclair*, 1 Man. L. R. 85, it was held that where the Act required a tax sale to be advertised at least three weeks in succession in the Manitoba Gazette, the fact that it was impossible to comply with the requirements, the Gazette being published only each alternate week, was no sufficient excuse for noncompliance with the statute.

The plaintiff urges that a sale of land for taxes being a proceeding which involves a forfeiture, the strictest compliance in every particular with the requirements of the statute is necessary. That the proceeding is to be regarded as one which works a forfeiture is held in the United States courts and in those of Ontario, and that view has been taken by the Supreme Court of the Dominion in *McKay* v. *Crysler*, 3 Sup. Ct. R. 436.

The Ontario courts have, however, in a number of cases considered the question whether the provisions of the various statutes as to advertising are mandatory or merely directory.

In *Jarvis* v. *Brooke*, 11 U. C. Q. B. 299, there seems to have been no advertisement of the sale in any newspaper in the county in which the land was situated, and the court said, "Taking the

fact to have been so, still the sale of such lands would not be invalid." The conclusion the court came to was, that upon general principles such an omission should not affect the validity of the sale, but should be treated merely as a direction of the statute, which the sheriff is to observe at his peril, being subject to an action at the suit of the party injured if he neglects his duty in this respect. This decision was come to "on the principles of the common law, where lands have been sold in execution."

In *Doe d. Moffat* v. *Hall*, Taylor R. 510, it had been said by Sherwood, J., "The statute requiring the sheriff to advertise the lands before he sells them is clearly directory." The same point was also decided in *Osborne* v. *Kerr*, 17 U. C. Q. B. 134, and *Paterson* v. *Todd*, 24 U. C. Q. B. 296.

The next case was *Williams* v. *Taylor*, 13 U. C. C. P. 219, where the Court of Common Pleas held, that the statute being of a penal character, a strict compliance with its terms is necessary to debar the rights of the owners of lands sold for taxes. But that was a case of a somewhat peculiar nature. It was an action of ejectment in which the defendant set up a title under a purchaser at a sheriff's sale for taxes. The sale had taken place many years before under a by-law which imposed a tax of one penny per acre on wild lands, and this by-law the court had in *McGill* v. *Langton*, 9 U. C. Q. B. 91, held to be bad because, among other reasons, the council had no power to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value. Such by-laws had been passed by several district councils and the 16 Vic. c. 183, was passed to provide for the recovery of the rates and taxes intended to be imposed by certain by-laws of the late district councils in Upper Canada. Provision was thereby made for confirming the rates or taxes imposed to a certain extent. The 8th section provided that the treasurer should, within three months after the passing of the Act, advertise, in the manner directed by the Act, a list of all lands which had been sold for arrears of taxes and not redeemed, and by the 9th section, the owner of any land might within one year after the first publication of the advertisement pay to the treasurer the amount justly chargeable on the land with interest, and upon making such payment, he should receive a certificate, the registration of which should annul and make

void the deed formerly executed by the sheriff to the purchaser, of the land for arrears of taxes. Provision was then made for publishing at the end of the year, a list of the lands redeemed, and for payment, on demand of the purchaser and snrrender by him of the sheriff's deed, of the sum for which the land was sold by the sheriff with interest and certain costs. The 11th section further provided, that if any land sold for arrears of taxes should not be redeemed in the manner and within the period provided by the Act such sales should be confirmed and held valid, &c. The defendant contended that under this Act his title had become valid, the owner not having redeemed the land, but it was found that in the list of lands sold, published, as required, in a local newspaper, the land in question had not been included and the court held, that the statute confirmed and made valid, the sale, provided the directions for that purpose were complied with and obeyed, and that the omission of either of the advertisements interposed an insuperable obstacle to the application of the remedial portion of the Act in favor of purchasers. Also that the Act was passed to give effect to a proceeding of a penal character, by enforcing a forfeiture of the party's land, unless he redeemed it as the statute permitted, and that a strict compliance with the provisions intended for the protection of the original owner of the land, should be enforced. During the next term the case of *Hall* v. *Hill*, 22 U. C. Q. B. 578, was decided by the Court of Queen's Bench, in which there had been an omissiom to advertise in a local newspaper, and this the Court were of opinion would avoid the sale, if it were necessary to so hold for the decision of the case, but the rule for a new trial was made absolute upon an objection to the treasurer's warrant. This case was afterwards carried to the Court of Error and Appeal, where the judgment of the Court of Queen's Bench was affirmed.

*Cotter* v. *Sutherland*, 18 U. C. C. P. 357, was a case in which a most exhaustive judgment was given by Mr. Justice Wilson now Chief Justice of the Queen's Bench Division of the High Court of Justice. The sale in that case had taken place while the 6 Geo. 4 c. 7, was in force, and it was held that imperfections in the advertising were merely irregularities, the learned judge saying, "I do not think the objections to the alleged imperfect advertisement should be judged with greater strictness than in cases of sales by execution." He had previously expressed

the conclusion at which he had arrived, as to the light in which statutes as to tax sales should be regarded, thus, "The statutes under consideration should not be construed as statutes creating a forfeiture, but in like manner as the statute by which lands are sold under execution for debt. We should require strict proof that the tax has been lawfully made; but, in promoting its collection we should not surround the procedure with too unnecessary or unreasonable rigors * * * A substantial rather than a literal compliance with the provisions of the statute will more equally, and quite fairly, protect all parties."

*Connor* v. *Douglas*, 15 Gr. 456, was a proceeding under the Act for Quieting Titles. The advertising of the tax sale fell short of the required time, on one construction by one week, upon another construction by one day. Chancellor Van Koughnet held, that it would be in accordance with the course of decisions both in *banc* and at *nisi prius*, during many years, to hold, that the omission of the one additional advertisement for sale, did not render the sale for taxes void, and the title of the sheriff's vendee invalid. From this judgment the claimant appealed, when it was affirmed, Draper, C.J. and Mowat, V.C., dissenting. The judgment of the majority of the court was delivered by Richards, C.J., who expressed his approval of the language used by Wilson, J., in *Cotter* v. *Sutherland*. He remarked upon *Williams* v. *Taylor*, saying, "The effect of that statute was clearly to declare the land which would otherwise be the property of the former owner, the property of the purchaser, under the illegal sale by the sheriff, and in that view it seems to me, the court was quite right in holding that the requirements of the statute must be strictly carried out." The conclusion arrived at was, that the same rule should apply in the case of advertising a tax sale as in the case of a sale under execution, and that *Jarvis* v. *Brooke*, had never been overruled. In *McLauchlin* v. *Pyper*, 29 U. C. Q. B. 526, *Connor* v. *Douglas*, was followed. In *Kempt* v. *Parkyn*, 28 U. C. C. P. 123, the plaintiff claimed under a tax deed, but Paterson, J. A., held it invalid upon certain grounds and entered a verdict for the defendant. Upon an objection as to an alleged irregularity in advertising the sale, he followed *Connor* v. *Douglas* and *McLauchlin* v. *Pyper*, and on a motion for a new trial, which was refused, Gwynne, J., said, "I entirely agree with the judg-

ment of the learned judge who tried this case, upon all the points which have been so fully entered into by him in his written judgment."

The statute now in force in this Province differs in some respects from those in Ontario, under which some of the cases cited were decided. In *Cotter* v. *Sutherland*, Wilson, J., held not only, that the rule which applies to sales under execution should govern tax sales, but that the objection as to defective advertising was healed by the terms of the 6 Geo. 4 c. 7, the Act under which the sale was had, so in *Hall* v. *Hill*, Draper, C.J., made reference to that Act. In the report of *Jarvis* v. *Brooke*, the Land Sales Act of 8 Geo. 4, is mentioned but this must be a mistake for 6 Geo. 4, as I can find no Act on the subject passed during the 8th Geo. 4. Now, the provision of the 6 Geo. 4 c. 7, spoken of, is that contained in the 22nd section. "No omission of any direction contained in this Act, relative to notices, or forms of proceeding, previous to any sale made under this Act, shall extend to render such sale invalid." The Act now in force in this Province provides in section 673, that the deed given on a tax sale, "shall in all suits or proceedings wherein a sale for taxes is questioned * * * be conclusive evidence of the validity of the sale and of all proceedings prior to the same notwithstanding any defect or informality in or preceding such sale, &c." By the 32 Vic. c. 36 s. 155, O. it was provided that a tax deed should be "to all intents and purposes valid and binding, except as against the crown, if the same has not been questioned before some court of competent jurisdiction by some person interested in the land sold, within two years," &c. In *Wapels* v. *Ball*, 29 U. C. C. P. 403; it was held that the two years having elapsed an objection to the advertising could not be taken, Galt, J., saying, "The statute was passed for the express purpose of preventing objections of this description being taken." The same thing had been previously held in *Hutchinson* v. *Collier*, 27 U. C. C. P. 249. The point discussed in that case being from what time the two years was to be computed. Our statute is even stronger than the Ontario one, for the deed is conclusive, not after two years, but as soon as executed. Under The Real Property Act, 1885, as amended by the 49 Vic. c 28, the purchaser may at once deposit with the registrar general his tax deed and obtain a certificate of title under the Act, for all that the

registrar general is to do, before granting such certificate, is, "only to satisfy himself that the sale of the said land was fairly and openly conducted."

If the sale had already taken place the court could not, on an Act expressed as the present is, in my opinion, if such cases as have been referred to are authorities, set aside the sale, so I do not see how I can grant an injunction to stay it from being proceeded with. I should therefore refuse the injunction now asked. I have the less hesitation in doing so that there seems no doubt that taxes are due upon these lands, and the plaintiff can by paying them as he ought to do, stop any sale. Even if some of the lands were sold on the 29th of April before the interim injunction was granted or if the sale now proceeds he has still two years within which to redeem his lands.

*Injunction refused.*

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## VAN WHORT v. SMITH.

(In Appeal.)

*Chattel mortgage.—Mistake in mortgagor's name.—Addition of deponent in affidavit.*

Abram V. Becksted executed a chattel mortgage in which his name appeared as Abram B. Becksted. He signed his name correctly.

*Held*, That the mortgage was void as against creditors.

In an affidavit of *bona fides* of a chattel mortgage the addition of the deponent was stated to be a trader. He was not in fact a trader.

*Held*, Not to vitiate the mortgage.

Motion by defendant to set aside verdict for plaintiff and enter nonsuit.

*S. C. Biggs, Q.C.*, for defendant, referred to *McIntyre* v. *Union Bank*, 2 Man. L. R. 305; *Larkin* v. *N. W. &c. Bank*,

L. R. 10 Ex. 64; *Murray* v. *McKenzie*, L. R. 10 C. P. 625; *Re Hewer*, 21 Ch. D. 871; *Gardner* v. *Shaw*, 19 W. R. 753.

*T. D. Cumberland*, for plaintiff.

No one was misled by the description of the mortgagee, *Barron on Bills of Sale*, 224; *Hewer* v. *Cox*, 3 E. & E. 428.

The evidence shows this mortgagor was the only man of the name in Emerson and the only hotel keeper, *Briggs* v. *Bos*, L. R. 3 Q. B. 268; *Blunt* v. *Harris*, 4 Q. B. D. 603; *Herman on Chattel Mortgages*, 74; *Jones on Chattel Mortgages*, § 63.

(*18th May, 1887.*)

TAYLOR, J., delivered the judgment of the court. (*a*)

The plaintiff claims to be the mortgagee of certain goods and chattels seized by the sheriff of the Eastern Judicial District, under an execution issued upon a judgment recovered by the defendant against one A. V. Becksted. An interpleader issue as to the ownership of these goods has been tried, and a verdict entered for the plaintiff, leave being reserved to the defendant to move in Term to have a nonsuit entered. He moved accordingly on the following grounds. (1) That the grantor in the mortgage to the plaintiff is Abram B. Becksted, while the said mortgage is executed not by Abram B. Becksted but by A. V. Becksted. (2) That the description in the affidavit of *bona fides* is false in fact as shown by the evidence, the plaintiff swearing that he was a trader in the affidavit of *bona fides*, while the evidence shows that for some time previous, and at the time of making said mortgage, and since, the said plaintiff was not a trader. (3) That the goods seized under the execution of the defendant are not identified as the goods claimed under the chattel mortgage. The argument in Term was confined to the first and second objections.

The copy of the chattel mortgage in possession of the plaintiff was produced and proved at the trial, and so was the copy filed in the office of the clerk of the County Court at Manchester. The copy filed purports to be a mortgage to the plaintiff dated the 11th January, 1886, made by Harriet Becksted wife of Abram B. Becksted and the said Abram B. Becksted. In the copy in possession of the plaintiff the names appear as Harriet Becksted,

(*a*) Present: Wallbridge, C. J., Taylor, Killam, JJ.

wife of Abram V. Becksted and the said Abram V. Becksted. Both copies are executed by Harriet Becksted and Abram V. Becksted.

The second objection is not important. The English cases as to errors or omissions in the residence and additions of deponents to affidavits connected with bills of sale are not applicable here. The Bills of Sale Act requires a copy to be filed with "an affidavit of the time of such bill of sale being made or given and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale." The deponent must swear to all these particulars.

Our Act only requires an affidavit of a subscribing witness thereto of the due execution of such mortgage, and the affidavit of the mortgagee or his agent, that the mortgagor therein named is justly and truly indebted to the mortgagee. Must the residence and occupation of the deponent be stated in an affidavit? It is not essential to the validity of the affidavit that they should be stated, otherwise why were the R. G. of M. T. 15 Car. 2 and 138 of H. T. 1833 passed, requiring the time, place of abode and addition of every person making an affidavit to be stated therein. These rules applied only to affidavits sworn in an action. *Jarrett* v. *Dillon*, 1 East, 18: *Polleri* v. *De Souza*, 4 Taunt. 154; and *Collins* v. *Goodyer*, 2 B. & C. 563, are all cases of affidavits in a cause. The omission would be no defence on a prosecution for perjury, *Exparte King*, L. R. 7 C. P. 74. In *Brodie* v. *Ruttan*, 16 U. C. Q. B. 207, an objection to a chattel mortgage, on the ground that the affidavit of *bona fides* did not give the addition of the deponent, was overruled because the Chattel Mortgage Act did not direct that deponent's addition should be inserted, and the rule of court did not apply to an affidavit made for such a purpose as the one in question.

The first objection is a more serious one. The Act requires all chattel mortgages to be filed within a limited time, under the penalty of being, if not so filed, absolutely null and void against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith, for valuable consideration without notice. The clerk of the county court is to number every such instrument or copy filed in his office, and to enter in alphabetical order, in books provided for the purpose, the names of all the parties to such instruments, with the numbers endorsed

opposite to each name. The mortgages are by another section of the Act to be kept for the inspection of all persons interested therein, or intending or desiring to acquire any interest in all or any portion of the property covered thereby.

Plainly the Act intended, in the case of all transactions of the classes dealt with by the Act, to make verbal bills of sale and chattel mortgages bad. Also, that such instruments should contain some description of the grantor, showing who he is, and so described that the name can be set down by the clerk in the book appointed to be kept. The object in requiring the mortgage to be filed is not merely that a person intending to purchase chattel property may have the means of ascertaining whether the owner has encumbered it, but also to enable one person proposing to deal with another to make some enquiry as to his financial standing and to ascertain whether he owns without incumbrance a stock of goods and chattels of which he is the apparent owner. Now, a person making a search for such a purpose is not, in my opinion, bound to examine an instrument, unless the name appearing in the index as that of the person making it, is the name of the person against whom he is making the search. The cases as to what slight departures from accuracy will vitiate a registration are not quite consistent. Where a judgment entered under the 4 & 5 W. & M. c. 20, by mistake gave the name as Compton for Crompton, it was held void as against purchasers, and the court refused to amend the record, *Sale* v. *Crompton*, 2 Str. 1209. In *Proudfoot* v. *Lount*, 9 Gr. 70, where a judgment recovered against Charles Westley Lount, the correct name, was registered as Charles Wesley Lount, Spragge, V. C., held it sufficient, but in *McDonald* v. *Rodger*, 9 Gr. 75, where a confession of judgment had been given by Matthew Rodger, and it was registered under the name of Matthew Rodgers, Esten, V.C. held, that the mistake vitiated the registration. In *Hewer* v. *Cox*, 3 E. & E. 428, a case under the Bills of Sale Act, the mortgagors were described as of "New Street, Blackfriars, in the County of Middlesex, Printers," County of Middlesex should have been "City of London," but the court held the description sufficient for "New St. Blackfriars," would have been so without more, and adding an erroneous addition to a sufficient description did not vitiate it. Blackburn, J., thought adding, County of York,

would have made the description bad, but as the County of Middlesex abuts on Blackfriars no one could be misled.

In *Beavan* v. *Lord Oxford*, 3 Sm. & G. 11, the judgment was recovered in an action against Edward, Lord Harley. The defendant appeared to the action by that name although his proper name was Alfred. It was afterwards docketed thus, Surname Harley, commonly called Lord Harley. Christian name, Alfred, title of cause, *Thos. Brockell* v. *Edward Harley*, commonly called Lord Harley. This was held sufficient, for having appeared, the defendant could not set the judgment aside, and any purchaser or creditor had notice of the real person against whom it had been recovered. V.C. Stuart said, "The material thing is that the creditor or purchaser should have distinct notice of the name of the person against whom the judgment is sought to be made available."

It may be argued that Abram B. Becksted and Abram V. Becksted are so much alike that a prudent person would have made further enquiry. But is a person finding on the index a name somewhat like that for which he is searching, bound to examine the instrument the number of which is opposite that name, to find whether it may not after all be one given by the person against whom he is searching. In *McDonald* v. *Rodger*, V.C. Esten said, "It is true that the close resemblance between the two names would excite the strongest suspicion in the mind of a purchaser; but it is impossible to draw the line between different sorts of mistakes, and it is much better to require a strict adherence to fact."

Suppose a person searching in the county court of a large city for any mortgage made by Jacob Smith and finding on the index a dozen made by John Smith is he bound to examine all these to make certain that none of them is signed Jacob. I should think not. He is in my opinion entitled to rely upon the index.

There was some evidence given that Abram V. Becksted was the only person of the name of Becksted in Emerson, but I do not think this makes any difference. The person searching may be a perfect stranger in the town in which the mortgagor lives, and there must be one definite rule laid down.

Although unwilling to add another to the long list of chattel mortgages set aside on account of mistakes and errors, I think

the objection taken here must be held fatal and the verdict set aside and a nonsuit entered. The motion is granted with costs.

*Verdict set aside and nonsuit entered.*

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## McROBBIE v. TORRANCE.

*Promissory note.—Impossibility of presentment at place named.—Presentment to maker.*

A note was payable at the O. bank at P. Before maturity the O. bank had ceased to do business at P.

*Held*, That an action could be sustained without any demand of payment.

*J. Martin*, for plaintiff.

There is nothing in the contract here requiring a demand for payment, *Douglass* v. *Howland*, 24 Wend. 49; *Brookbank* v. *Taylor*, Cro. (James) 685; *Bullen & Leake*, 592; *Birks* v. *Trippet*, 1 Saund. 33; *Walton* v. *Mascall*, 13 M. & W. 453; *Gibbs* v. *Southam*, 5 B. & Ad. 911.

When a note is payable generally without a particular place of payment, it is for the defendant to seek the plaintiff to pay the note.

*C. P. Wilson*, for defendant cited, *Bank of Montreal* v. *Perth*, 32 U. C. C. P. 18; *Saunderson* v. *Bowes*, 14 East. 500; *Sands* v. *Clarke*, 8 C. B. 751.

When the presentment to the bank cannot be made, it must be presented at the next place where it is likely to reach the debtor, viz. to himself, *Bowes* v. *Howe*, 5 Taunt. 30; *Howe* v. *Bowes*, 16 East, 112.

There is a difference when the subject matter of the contract has been destroyed, and when a particular condition cannot be performed.

(*23rd May, 1887.*)

DUBUC, J.—Demurrer to the defendant's third plea.

The plaintiff declared on an agreement in the following words: "To collaterally secure the payment of the money mentioned in an assignment of mortgage of even date herewith and made between the same parties as the parties hereto, $1000. Portage la Prairie, 13th June, 1883, twenty one months after date I promise to pay to the order of John McRobbie, at the Ontario Bank here, (meaning at the Town of Portage la Prairie), one thousand dollars with interest at the rate of eight per cent. per annum from maturity until fully paid, for value received," and in addition to ordinary allegations as to the default of the defendant, &c., the declaration goes on as follows: "And the plaintiff avers and the fact is, that there was no such bank or place at the said Town of Portage la Prairie, as the Ontario Bank, at the time appointed in and by the said agreement for payment or at any time thereafter, wherefore the plaintiff was excused from and did not, nor could present the said agreement for payment at said bank, and except as aforesaid, all conditions were fulfilled and all things happened, &c. &c."

The third plea states, "that before the commencement of this action no demand of payment of the said sum of one thousand dollars and interest referred to in the said agreement to the order of the plaintiff was made upon him."

The plaintiff demurred to the said plea on the ground that no demand of payment of the sum agreed to be paid by the agreement in question is necessary or required before bringing action upon the agreement.

The contention of the plaintiff is, as averred in his declaration, that there being no such bank or place as the Ontario Bank at Portage la Prairie at the time appointed for payment, he could not make the demand at the proper place and was dispensed from making such demand.

But the defendant claims that if presentment could not be made at the bank, it should have been made to the debtor himself, and the declaration should so allege. And he argues that the defendant's contract was to pay the said amount at the place named in the agreement and not at the plaintiff's place; and that he is not bound to run after the plaintiff from one place to

another, or from one country to another for the purpose of paying him the amount due.

The plaintiff may take the converse, and say that by the agreement he was entitled to receive his money at the Town of Portage la Prairie, at a particular place there called the Ontario Bank, and if the said bank has closed its business in the aforesaid Town, he cannot be called upon to run after the defendant wherever he may be, or in whatever country he may choose to go, in order to make the demand of payment. He was supposed to go to the particular place mentioned in the agreement to get his money; but he never stipulated to make said demand at any other place or to the defendant personally.

If the place appointed does no more exist, it becomes impossible for him to present the agreement there, and in my opinion, the defendant cannot on that account be discharged from his liability to pay.

In *Bowes* v. *Howe*, 5 Taunt. 30, cited in support of defendant's contention, the plaintiff had alleged that the defendant had become insolvent and declined and refused to pay his notes at Workington Bank, the place appointed for payment, and had not alleged presentation; but the bank was there; the plaintiff was not excused from making the demand of payment, as there was no impossibility to make the said demand; the averment amounted only to an allegation of insolvency. In *Saunderson* v. *Bowes*, 14 East. 500, no reason was assigned for not presenting. In *Sands* v. *Clarke*, 8 C. B. 751, the defendant had absconded, but the place of payment, 11 Old Slip, was there and accessible to the plaintiff. The same was held in *Montreal City and District Savings Bank* v. *The Corporation of Perth*, 32 U. C. C. P. 18.

The plaintiff's position herein is fully sustained by *Taylor* v. *Caldwell*, 3 B. & S. 826; *Rhodes* v. *Gent*, 5 B. & Ald. 244; *Gibbs* v. *Southam*, 5 B. & Ad. 911; *Walton* v. *Mascall*, 13 M. & W. 452; *Hitchcock* v. *Humfrey*, 5 M. & G. 559.

On the above authorities, I think the demurrer should be allowed with costs.

*Demurrer allowed.*

## *RE* BISHOP ENGRAVING AND PRINTING CO.

## *EX PARTE* HOWARD.

*Company.—Contributory.—Contract to take shares.—Evidence.*

To constitute the relationship of shareholder there must be a contract between the company and the individual. But this contract need not be sanctioned by by-law.

An application for 50 shares was made by H. before incorporation. After incorporation he was entered in the books of the company as the holder of 50 shares, acted as a director for two years (which he could not have done unless he held at least five shares), and paid calls (upon what number of shares did not clearly appear).

*Held*, That these circumstances were evidence of the existence of a contract to take shares, and that H. was not entitled to have his name struck from the list of contributories.

*G. R. Howard* for liquidator.

The summons is irregular when there is an order settling the list of contributories; the only relief is an application to stay call. *Barned's Banking Co.*, 36 L. J. Chy. 215; *Emden on Winding-up*, 175.

T. Howard was not one of the original shareholders under Letters Patent. In *Re International Contract Co., Levita's Case*, L. R. 3 Ch. 36; In *Re Great Oceanic Telegraph Co., Harward's* L. R. 13 Eq. 30; *Re Disderi & Co.*, L. R. 11 Eq. 242: *Re Arthur Average Association*, 3 Ch. Div. 522; *Sidney's Case*, L. R. 13 Eq. 228; *Duke's Case*, 1 Ch. Div. 620; *Queen City Refining Co.*, 10 Ont. R. 264; *Lake Superior Co.* v. *Morrison*, 22 U. C. C. P. 217.

As to time of making calls. *Re Contract Corporation*, L. R. 2 Ch. 95; *Re Barned's Bank*, L. R. 5 H. L. 28.

Howard is liable, at any rate, to creditors, and cannot evade the liability, which is all that is at present in question.

*W. E. Perdue* for T. Howard the contributory.

The application in its present shape is proper. *Wilson* v. *Natal Investment Co.*, 36 L. J. Ch. 312.

Howard never subscribed to shares in this company. The

subscription was made on the 18th of April, and the company was incorporated on the 8th of May.

(*9th May, 1887.*)

KILLAM, J.—An application has been made by Thos. Howard to have his name removed from the list of contributories settled by my order of the 7th December, 1886. A list of contributories was brought in and filed on the 29th day of April, 1886, and an appointment in writing of a time for settling the list was then made. There were a number of enlargements of this appointment, and on the 15th and 20th May and the 28th October, 1886, counsel appeared on the application for Mr. Howard, whose name was entered on this list as holder of 50 shares of stock of the company, without putting in any affidavit or stating any special ground of objection to his being made a contributory. Counsel would of course, be aware that unless some proper objection was raised Mr. Howard's name would appear on the list when settled. No objection being ever stated, his name appeared on the list as finally settled. It is now claimed that it was all along the intention of Mr. Howard and his counsel to oppose the application to make him a contributory, and that through some oversight his counsel did not appear when the order was finally made. I have no doubt that, under such circumstances, an application to vary the order settling the list of contributories by removing a name from the list is quite proper in form. The authorities cited by counsel for the liquidator against such an application do not affect a case like the present. There having, however, been an adjudication against the applicant, the burden is necessarily thrown upon him of showing that he had a meritorious ground for opposing the original application to make him a contributory.

The affidavit of the applicant states that, "before The Bishop Engraving and Printing Company, Limited, above named, was incorporated, I was induced to agree to take shares to the extent of five thousand dollars in the Company when so formed, and I believe I signed my name in the subscription book for that amount. This was done before the Company was incorporated. I am informed and believe that no by-law was ever passed by the above named Company allotting shares, and no shares in the above Company were ever allotted to me as I verily believe. I have never received any scrip certificates for shares in the said Com-

pany, and I am advised and do verily believe that no shares in the above Company were ever allotted to me or legally held by me in the above named Company."

It is evident that the principal point on which the applicant relies is, that there was no allotment of shares to him by by-law. I do not regard this as necessary. Reliance is placed by the applicant's counsel upon the judgment in the case of the *G. N. W. &c. Co.* v. *Sprague*, on appeal to this court from the judgment of a county court. This decision has not been reported, but having taken part in it I am conversant with all the facts. There the defendant had done nothing, after the Company was incorporated, showing his intention to become a shareholder of the Company. Before the Company was incorporated he signed a paper by which he agreed to take stock in a Company somewhat different in name from that by which the plaintiff Company was actually incorporated. The defendant's name was placed by some one in the books of the Company as a shareholder and when calls were made an officer of the Company sent him a notice, but in no other way was there any allotment of shares to him. There was no offer or consent by the defendant to take shares of the Company's stock; there was no acceptance by the Company of even a supposed offer, no offer by the Company to the defendant of any shares of its stock. In assenting to that judgment I certainly did not intend to lay down the principle that, to constitute a party not named in the letters patent, a shareholder of the Company, there must be a by-law specifically allotting to him shares, and I do not think that the other members of the court so intended.

There must be a contract between the alleged shareholder and the Company to constitute him a shareholder. To effect such a contract there must be an offer by one party and an acceptance of that offer by the other. That this is the position to which the whole question must be reduced is clearly shown in *Nasmith* v. *Manning*, 5 Sup. C. R. 417. But I know of no authority for requiring that the offer of the Company, or its acceptance of an offer, should be by or under a by-law. On the contrary I agree with the views of Hagarty, C.J., in *The Lake Superior Navigation Co.* v. *Morrison*, 22 U. C. C. P. 220.

The subscriptions to the stock of a company are often made before the formation of the company, and they are often treated

in fact as offers for shares continuing after the incorporation of the company. They may well be so regarded in many instances. Here the Company evidently treated Mr. Howard's subscription in this way, entering him upon the books of the Company as the holder of fifty shares, the number subscribed for by him. He was then elected as a director of the Company, and he accepted the office and acted in it for about two years. By the by-laws of the Company, a director was to be the holder of at least five shares of the stock of the Company. He admits having paid calls upon him as a shareholder. I do not say that these circumstances create an estoppel, but they must be taken as some evidence against the applicant that there was the necessary contract between the applicant and the Company.

The subscription list is produced and it is headed, "The Bishop Engraving and Printing Company, Limited, Capital $100,000, 1000 shares of $100 each. Incorporated under the Canada Joint Stock Companies Act, 1877." The applicant does not claim to have signed this list under a misapprehension that the Company was not then incorporated, but one claim he now makes is that when the Company was incorporated, it was under the Manitoba Joint Stock Companies Act, and not under the Dominion Act. It appears, however, that he was at some time informed under what Act the letters patent were issued and that he continued after that to act as a director of the Company. He places the time when he was so informed at "about the year 1885." He admits, however, that he was so informed while a Mr. Flint was secretary-treasurer of the Company, and Mr. Flint ceased to hold that office in December, 1885. It might be that if the applicant had never learned how the Company was incorporared but acted as a shareholder under a misapprehension that the Company was incorporated under the Dominion Act, there would be no binding contract between the applicant and the Company. Upon this point I do not deem it necessary to express an opinion, as I consider that his subsequent conduct can be treated as evidence of acquiescence in the taking of his subscription as a continuing offer to take shares and in its acceptance as such by the Company.

But counsel for the applicant contends that the fact of his having acted as a director is evidence only of his having been a holder of five shares. This is hardly correct as it is shown that

he transferred away five shares and that he still continued to act as a director. Whether there is evidence that he held more than ten shares is unimportant, as the application is based on the ground that he never was a shareholder and not on the ground that he has paid in full for the shares he held, and also as the application is to have the name of the applicant removed from the list of contributories and not to have the amount of his liability as a contributory reduced.

Besides this Mr. Howard states that he has paid calls to the extent of $2500, which would show him to have been the holder of at least 25 shares. He speaks also of an understanding that "fully paid up certificates," should be issued to him on his making the last payment.

The language in which this "understanding" is referred to would point to its having been one for the issue of certificates to which without it the applicant would not be entitled, rather than as any evidence that the shares held by Mr. Howard were fully paid for. Taking this in connection with the fact that it is not relied on as evidence that he ever paid up in full for any shares and that his contention now is not that he is the holder of fully paid up shares, it appears to me to indicate that Mr. Howard was and is the holder of more than 25 shares.

Mr. Howard states also that having heard that the Company was incorporated under the Manitoba Act, "for this reason, when Flint was secretary I asked to see the subscription list." This shows that his idea was that the subscription list was the basis of his connection with the Company and is evidence of his assent to and knowledge of its treatment by the Company as an offer to take stock and of its acceptance as such.

Not only then does the applicant fail to show a *prima facie* case for taking his name from the list of contributories, or even for opening up for further consideration the question of his liability to be made a contributory, but there is in my opinion a strong preponderance of evidence in favor of the view that he was a holder of fifty shares of the capital stock of the Company, on which there was a balance of $2500, remaining unpaid.

The application must be discharged with costs.

*Application discharged.*

## ROSS v. DOYLE.

(In Appeal.)

*Sale of Chattel.—Work and labor.—Estoppel.*

Plaintiff agreed with defendant as follows: "I will put you up building with frame for tent 75 × 24, according to plan, for the sum of $500; starting at once and completing as soon as possible." After completion the plaintiff tore down the building and carried it away without the defendant's knowledge. In an action for the contract price the jury was told that it was the plaintiff's duty to notify the defendant of the completion, and tender it to him.

*Held*, 1. That if the contract was for the sale of a chattel, the charge was right; but if for work and labor, that it was wrong.

2. That although the circumstances might tend to support the view that the contract was for work and labor, yet that the plaintiff having, without the defendant's sanction, pulled down and carried away the building, he could not be heard to say that it was not a sale of a chattel, the property in which had not passed to the defendant.

Motion by plaintiffs to set aside verdict, and for a new trial.

*H. M. Howell, Q.C.*, for defendants.

Vendee must have time to see goods were reasonably fit for the purpose of, or complied with, the contract. *Addison on Contracts*, 393; *Benjamin on Sales*, 687; *Leake on Contracts*, 409, 827.

This was a contract to furnish goods, building would not become realty.

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

There were no pleas to raise the issues now set up. No plea of non-delivery or absence of reasonable time. No plea of want of notice.

[*25th June, 1887.*]

Killam, J., delivered the judgment of the Court.(*a*)

The plaintiffs sue, as assignees of one Balston C. Kenway, for the price of a certain building alleged to have been erected by Kenway for the defendant in the year 1882.

(*a*) Present: Wallbridge, C.J.; Taylor, Killam, JJ.

The declaration contains a special count in *assumpsit* upon the agreement for its erection, and the common counts for goods bargained and sold, and goods sold and delivered, by Kenway to the defendant, and work done and materials provided by Kenway for the defendant at his request.

The action was tried before my brother Dubuc, with a jury, at the Winnipeg Fall Assizes, 1886, when a verdict was entered for the defendant.

The agreement upon which the plaintiffs sue was clearly proved. It was in the form of a letter, in these words,—

"Winnipeg, March 2nd, 1882.

"Mr. D. Doyle,

"Dear Sir,

I will put you up building with frame for tent 75×24, according to plan, for the sum of five hundred dollars ($500), starting at once and completing as soon as possible.

"Yours truly,

"B. C. Kenway,

"G. A."

At the foot was the memorandum—

"Accepted.

"D. D. Doyle."

This signature was that of the defendant.

The evidence for the plaintiffs was, that Kenway proceeded at once to erect the building upon land which had been leased to the defendant; that it was built simply upon blocks laid on the ground, and consisted of merely a frame work on which canvass was to have been spread to form the roof and sides, and a wooden floor was laid in it; that Kenway about the same time built a similar one near it for one Whitehead, who was to use it for boarders, the defendant intending to keep a restaurant in his; that as Whitehead failed to get a license for the sale of liquors in his building, the scheme fell through; that Kenway completed both buildings, but took Whitehead's off his hands, moved it away and sold it, getting paid the balance due upon it; that after completion of the defendant's, the latter did not want it, and not being able to pay for it, Kenway and he entered into an arrangement that Kenway should tear it down and allow for the

materials what he could realize for them upon account. The plaintiffs give credit for $50 as the value of the materials taken back. There were some circumstances brought out from the plaintiff's witnesses which might tend to throw doubt upon the statement that the defendant's building was ever completed.

The defendant stated that he never was informed or knew that the building was completed, and that he never saw Kenway about it after making the contract, and never made any agreement that the building should be torn down and the materials taken back by Kenway. Kenway stated that the defendant absconded shortly after he made the arrangement with him to tear down the building, and did not return for some two or three years. The defendant denied this, and stated that he had never left Winnipeg, but had always continued from about the time of the contract, carrying on a butcher's business here.

The learned judge in substance charged the jury that it was the duty of Kenway to notify the defendant of the completion of the building. and tender it to him, and that if they believed the defendant's statement, that after the making of the agreement he heard nothing about it until he was sued, the plaintiffs could not recover; that if after putting up the building Kenway had looked for the defendant, and really the defendant had absconded, and Kenway could not find him in any way at all, and really learned that he had left the country for good, then he would have been justified in tearing the building down and trying to do the best he could with it, and he would have a claim, but that if of his own accord, after having put the building up, he took it down without seeing the defendant, he could not recover.

Objection was taken that the learned judge should not have charged the jury that "unless there was an agreement as to pulling down the building, the plaintiffs could not recover"; that the learned judge should not have told the jury that "Kenway would have to let Doyle know that the work was finished"; that the learned judge should have told the jury that "if the building was finished the cause of action was complete, and if Kenway subsequently pulled it down without an agreement, that it was only a trespass".

The plaintiff now applies for a new trial upon these exceptions to the charge.

The real difficulty appears to be in the question, whether the claim is properly upon an agreement for the sale of goods, or for the doing of work and supply of materials therefor. If it was one for the sale of a chattel to be manufactured by Kenway, then it would appear that the objections would not under the circumstances be valid. No evidence was given to show how long it was after the completion of the building that it was torn down. Even if a refusal to accept could be inferred from its being left a reasonable time upon the land, or if leaving it there for a reasonable time could be conclusive of such an appropriation of it to the defendant as to pass the property to him, no such contention is here open to the plaintiffs, while the action of Kenway in tearing it down without any assent of the defendant, according to the statement of the latter, would appear conclusive against him that the property had not passed.

On the other hand, if the contract were for the doing of work and supply of materials therefor, the building when completed would be the defendant's absolutely, without any notice or tender, and Kenway would be entitled at once to recover, it being for the defendant to watch the work being done for him upon his own premises. If, after completing the work and becoming entitled to recover, Kenway had then undertaken, without the consent of the defendant, to tear down the building and carry away the materials, this would have been no defence to the action for the work and materials, but the defendant would have been obliged to resort to a cross-action or counter-claim for trespass or conversion.

If the building had been one affixed to the realty, the contract would, without question, have been one merely for work, labor and materials. *Cotterell* v. *Apsey*, 6 Taunt., 322; *Tripp* v. *Armitage*, 4 M. & W. 687; *Clark* v. *Bulmer*, 11 M. & W. 243.

I have not been able to find any direct authority with reference to a building such as the one in question. There is no doubt that under the old authorities, such as *Towers* v. *Osborne*, 1 Str. 506, this would have been a contract for labor and materials, not for the sale of a chattel, and in most of the courts of the United States it would undoubtedly be so held still. Many of the older cases must, however, be taken to be overruled by *Lee* v. *Griffin*, 1 B. & S. 272, which, for the first time, laid down any satisfactory rule upon this point. As was there said by

Blackburn, J., "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."

The difficulty that arises is in the application of the principle. Here the contract is expressed to be to "put up" a building; the materials are, in fact taken to the defendant's premises and appropriated to the construction of that which can possibly, but yet will not probably, be removed by the builder. In these respects it would hardly seem that the contract would result in the sale of a chattel, that is of the building completed. On the other hand, Kenway was in no way bound to put the building together upon the defendant's land. If, as the circumstances would seem to show, though this is not expressly stipulated for in the writing, the contract could only be performed by placing the building completed upon the defendant's land, this could have been as effectually done by putting it together elsewhere and removing it complete to the place of delivery.

While not desiring to pronounce an opinion at present upon the real nature of such a contract in general, I think that if Kenway tore down this building and took away the materials after its completion, without authority from the defendant neither he nor his assignees can now be heard to say that this was anything but a contract for the sale of a chattel, the property in which remained vested in Kenway when he so acted with regard to it. If the contract were for work and labor, the property would be in the defendant and Kenway could have no right, without his authority to tear it down, nor if it were for the sale of a chattel could he have had such a right if the property had once passed. It would seem unreasonable that he should tear it down without consent of the defendant and then be allowed to recover for its erection on the ground that the contract was such that he had no right to do so. His conduct in such a case must, I think, be conclusive against him that he did not put the materials together with the intention of thereby passing the property in them as he did so, but that his intention was to make a chattel the property in which was not to pass as the work went on, or

immediately upon its completion, but still remained in him so as to leave him free to dispose of it as he saw fit.

Looked at in this way the charge of the learned judge would be in substance as favorable to the plaintiffs as they could ask.

The application must be dismissed with costs.

*Application for new trial dismissed.*

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## FRONTENAC LOAN CO. v. MORRICE.

*Costs.—Injunction motion.*

Upon a motion to continue an injunction which was refused, no order was made as to costs. Afterwards the plaintiffs bill was dismissed with costs.

*Held*, That the costs of the motion were taxable as costs in the cause.

In this case the plaintiffs obtained an *exparte* injunction which was afterwards dissolved, the order saying nothing as to the costs. The plaintiffs then took out an order dismissing their own bill with costs. The question of whether the defendant could under the order dismissing the bill, tax his costs of the motion on which the injunction was dissolved as costs in the cause, was spoken to by consent.

*E. H. Morphy*, for plaintiffs.

*J. S. Hough*, for defendant.

(*29th April, 1886.*)

TAYLOR, J.—The costs on the motion dissolving the injunction not having been reserved until the hearing or disposed of in any way, the defendant is, under the order dismissing the bill with costs entitled to tax them as costs in the cause. This seems to be the practice in England under the rules laid down by Sir John Leach, 1 S. & S. 357. And see *Stevens* v. *Keating*, 1 McN. & G. 659, decided by Lord Chancellor Cottenham.

## ONTARIO BANK v. GIBSON.

(In Appeal.)

*Promissory note.—Non-endorsation by co-surety.*

Defendant, sued as endorser, pleaded that he became a party to the note merely for the accommodation of A, and upon the condition that B. should also become an endorser as his co-surety, and that B did not endorse.

*Held*, That the defendant was not liable, even at the suit of an innocent holder for value.

(Judgment of Taylor, J., 3 Man. L. R. 406, affirmed.)

*F. B. Robertson* and *H. E. Crawford*, for plaintiffs.

Defendant having put power in hands of agent is responsible, although that agent exceeded his authority, *Ex. p. Dixon*, 4 Ch. D. 136.

*Awde* v. *Dixon*, 7 Ex. 869, is distinguishable. There the note was imperfect upon its face, and the law merchant did not apply. The true reading of this case may be seen by reference to *Cross* v. *Currie*, 5 Ont. App. R. 31; *Hogarth* v *Latham*, 3 Q. B. D. 643; *Chalmers on Bills of Exchange*, 23; *Byles on Bills*, 103; *Story on Promissory Notes*, 16 (n), 17, 18; *Daniell on Neg. Ins.*, 78.

A *bona fide* holder takes a good title although fraud in former holders, *Rice* v. *Gordon*, 11 Beav. 265; *Marston* v. *Allen*, 8 M. & W. 494.

*J. S. Ewart, Q.C.*, and *C. P. Wilson*, for the defendant.

There are many cases in which the holder of a note for value may have no title; *e.g.* a usurious bill, *Lowe* v. *Waller*, Doug. 735, a gaming bill, *Re Summerfeldt*, 12 Ont. R. 48, a note obtained by fraudulent representation, *Foster* v. *McKinnon*, L. R. 4 C. P. 704. There are other cases in which title will, or will not, pass according as whether, or not, the bill has been issued, *Baxendale* v. *Bennett*, 3 Q. B. D. 525, practically reversing *Ingham* v. *Primrose*, 7 C. B. N. S. 84. In the present case the note was never complete, there was no contract. In this respect there is no distinction between notes and other contracts, *Pym* v.

*Campbell*, 6 E. & B. 370; *Piper* v. *Simpson*, 6 Ont. App. 175; *Confederation Life* v. *O'Donnell*, 10 Sup. C. R. 92; *Toronto B. & M. Co.* v. *Hevey*, 7 *Can. L. Times*, 105. As to negligence in trusting an agent, *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389; *Swan* v. *N. B. A. Co.* 2 H. & C. 181; (approved *Johnson* v. *Credit Lyonnais. Co.* 3 C. P. D. 42;) *Baxendale* v. *Bennett*, 3 Q. B. D. 522.

*Awde* v. *Dixon*, 6 Ex. 869, is directly in point; *Daniell on Neg. Ins.* 813-5; *Chitty on Pleading*, Vol. 2, 345; *Cross* v. *Currie*, 5 Ont. App. 47; *Brown* v. *Howland*, 9 Ont. R. 49; *Story on Promissory Notes*, (7 Ed.) 67.

The present pleas amount to a plea of "did not endorse," *Adams* v. *Jones*, 12 Ad. & E. 455; and under that plea all the evidence could have been given, *Marston* v. *Allen*, 8 M. & W. 494; *Bell* v. *Ingestre*, 12 Q. B. 316; *Austin* v. *Farmer*, 30 U. C. Q. B. 10.

(*25th June, 1887.*)

TAYLOR, J., delivered the judgment of the court. (*a*)

The contention of the plaintiffs would be correct if the facts set out in the plea demurred to showed that the note in question had ever been issued. I think they allege the contrary. The note was endorsed by the defendant and handed to his agent to be issued and made use of when it had been endorsed by another person. His agency to issue the note began only when the event had happened, of its endorsation by the other person. Had the defendant placed the note in his desk with instructions to his clerk or agent to take it out and use it after some one else had called and endorsed it, it is in my opinion clear, that had the clerk taken and used it before it was so endorsed, the person taking it would acquire no title. *Baxendale* v. *Bennett*, 3 Q. B. D. 525, seems to me to place that beyond doubt.

Now what difference can it make that the place of deposit in the interval until the other endorsed was not the desk of the first endorser, but the pocketbook of his agent.

That the agent was also the person who was afterwards to use the note, cannot that I see make any difference. Until the other endorser had actually endorsed it, he was only the custodian of

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

the note not the agent to use it, or a person entitled to use it. In *Cross* v. *Currie*, 5 Ont. App. R. 31, the note was handed to the defendant to use, it was in fact complete and issued when it left the hands of the endorser. That entirely distinguishes that case from the present.

I still, on further consideration, take the same view of *Awde* v. *Dixon*, 6 Ex. 689, which I did when this demurrer was before me. I therefore adhere to the judgment I then gave, that the demurrer should be overruled with costs.

*Demurrer overruled with costs.*

## FRONTENAC LOAN COMPANY v. MORRICE.

(In Appeal.)

*Administration.—Priority of judgment creditors.—Assignment for benefit of creditors set aside, but reference to master as to creditors' liens.*

A decree in a mortgage suit contained no order for payment of money but directed writs of *fieri facias* to issue for the amount due.

*Held*, That the mortgagee was not a judgment creditor and therefore not entitled to any priority in the administration of the assets of the mortgagee.

An administrator executed an assignment of certain assets for the payment of certain scheduled creditors. Upon the evidence the assignment was set aside as between the assignor and assignee, but there was a reference to the master to ascertain whether any of the creditors were entitled to any lien or charge upon the fund assigned.

*John S. Ewart*, Q.C., and *C. H. Allen*, for defendants.

There is no decree for payment at all. Even if former proceedings only irregular this Court will not enforce them, *Wilson* v. *Hodgson*, 14 Gr. 543; *Commercial Bank* v. *Graham*, 4 Gr. 424. At most the decree is but *quod computet*, and not equal to a judgment, *Chadwick* v. *Holt*, 8 De G. M. & G. 504; *Coote on*

*Mortgages*, 74. Decree not a judgment unless filed and docketed Con. Stat. Man. c 37, s. 78. Judgment creditor not entitled to priority unless entered or docketed, 4 & 5 Wm. & M. c. 20; *Hickey* v. *Hayter*, 6 T. R. 384; *Steel* v. *Rorke*, 1 B. & P. 307; *Landon* v. *Ferguson*, 3 Russ. 350; *Hall* v. *Tapper*, 3 B. & Ad. 655; 1 & 2 Vic. c. 110, ss. 18 & 19; 2 & 3 Vic. c. 11, s. 1; 3 & 4 Vic. c. 82; 18 Vic. c. 15 s. 4; 23 & 24 Vic. c. 38, s. 1; Con. Stat. Man. c. 37, s. 78. As there is no allegation in bill that decree docketed it must be taken not to have been docketed, *Pearse* v. *Dobinson*, L. R. 1 Eq. 246. As between creditors of same degree executor may prefer, 32 & 33 Vic. c. 46; *McArthur* v. *Macdonnell*, 3 Man. L. R. 9. The law applicable is that of the country from which the administrator acquired his authority; or where the assignment was made, *Wilson* v. *Lady Dunsany*, 18 Beav. 293; *Pardo* v. *Bingham*, L. R. 6 Eq. 485; *Ewing* v. *Orr Ewing*, 9 App. Ca. 39; *Preston* v. *Melville*, 8 Cl. & F. 12; *Thomson* v. *Advocate General*, 12 Cl. & F. 1; *Enohin* v. *Wylie*, 10 H. L. C. 1; *Lee* v. *Abdy*, 17 Q. B. D. 309; *Walker on Executors*, 158; *Westlake*, § 300-7; *Story's Conflict*, § § 329, 514, 524; *Williams on Executors*, 994, 1667. Policies never were exigible and plaintiff cannot complain, 1 & 2 Vic. c. 110, s. 12; *McArthur* v. *Macdonell*, 1 Man. L. R. 334. The *cestuis qui trustent* ought to have been parties, *Taylor & Ewart, Jud. Act.* Plaintiff should have to pay costs in any case, *Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425. Plaintiffs cannot set aside payment to another creditor. It is only a *devastavit*, *Hutchison* v. *Edmison*, 11 Gr. 477; *Bank B. N. A.* v. *Mallory*, 17 Gr. 102; *Chamberlen* v. *Clark*, 9 Ont. App. 273.

*J. F. Bain* and *W. E. Perdue*, for plaintiffs.

The irregularities in the former suit are of no importance as they do not affect the jurisdiction of the court, *McGoon* v. *Scales*, 76 U. S. Sup. Ct. 23, 30. Judgment at law not impeached in equity by bill, *Tait* v. *Harrison*, 17 Gr. 458; *Fischel* v. *Townsend*, 1 Man. L. R. 99; *Balfour* v. *Ellison*, 8 U. C. L. J. 330. *Dyson* v. *Wood*, 3 B. & C. 451; *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Tolson* v. *Jervis*, 8 Beav. 364; *Drummond* v. *Anderson*, 3 Gr. 150. Delay cures irregularity, *Bank of U. C.* v. *Vanvoorish*, 4 U. C. L. J. 232; *Richmond* v. *Proctor*, 3 U. C. L. J. 202; *Macdonald* v. *Crombie*, 2 Ont. R. 243. The production of the writs of *fi. fa.* are evidence of a judgment, *Batten* v. *Murless*, 6

M. & S. 110. As to priorities, *Walker on Executors*, 157 *et seq*; *Williams on Executors*, 992, 1000. As to docketing. Docketing was finally abolished by 2 & 3 Vic. c. 11, s. 1, and there was no such thing when the Con. Stat. was passed, *Gaunt* v. *Taylor*, 3 M. & G. 886.

The essential point under the statutes is that judgments must be docketed so as to bind lands. In such case they are to have priority in the distribution of assets. A decree in equity is equivalent to a judgment at law, and under 4 & 5 Wm. & M., need not have been docketed, *Searle* v. *Lane*, 2 Vern. 89; *Smith* v. *Eyles*, 2 Atk. 385; *Martin* v. *Martin*, 1 Ves. Sr. 214; *Harding* v. *Edge*, 1 Vern. 143.

It was not possible to comply with English Acts and placing *fi. fa.* in sheriffs hands is equivalent, *Reid* v. *Whiteford*, 1 Man. L. R. 19; *Hambly* v. *Fuller*, 22 U. C. C. P. 140; *Hallock* v. *Wilson*, 7 U. C. C. P. 28; *Mercer* v. *Hewston*, 9 U. C. C. P. 350; *Dougall* v. *Fanning*, 8 U. C. Q. B. 166.

The decree is for payment of money, as *Williams on Executors*, 1009. At all events as soon as the master's report was made, *Duke of Beaufort* v. *Phillips*, 1 DeG. & Sm. 321; *Morrice* v. *Bank of England*, Ca. Temp. Talbot 223; *Smith* v. *Eyles*, 2 Atk. 389.

*Fi. Fas.* can issue upon a decree for payment of amount to be found due, *Holmested's Orders*, 227; *North of Scotland* v. *Beard*, 9 Pr. R. 546.

As to the law under which assets to be administered, *Story's Equity*, 583; *Thorne* v. *Watkins*, 2 Ves. Sr. 36; *Pipon* v. *Pipon*, 1 Amb. 25; *Burn* v. *Cole*, 1 Amb. 414; *Ewing's Case*, 1 Tyr. 91; *Re Lovett*, 3 Ch. D. 198.

Defendants should have pleaded any reason there may be why the court has no jurisdiction over the moneys—such as that they were subject to foreign jurisdiction. Policies were exigible, *Ivey* v. *Knox*, 8 Ont. R. 635. *Onus* was on defendant to shew that plaintiff's security sufficient to pay their debt, *Munson* v. *Hauss*, 22 Gr. 276; *Peny* v. *Barker*, 13 Ves. 205; *Masuret* v. *Mitchell*, 16 Gr. 435.

As to necessity for *cestuis que trustent* being parties, *Leacock* v. *Chambers*, 3 Man. L. R. 645.

Executors are trustees, *Williams on Executors*, 2013-2041; *Story's Equity*, § 575; *Re Marsden*, 26 Ch. D. 783; *Kerr on Injunctions*, 451.

(*28th July, 1887.*)

KILLAM, J., delivered the judgment of the court. (*a*)

This is a suit in equity in which the plaintiff company seeks to have set aside and declared void an assignment by the defendant Macdonnell to the defendant Morice of certain policies of insurance upon the life of John M. Macdonnell, deceased, of whose estate the defendant Macdonnell is administrator, and to have it declared that the plaintiff company is entitled to priority in the administration of the assets of the deceased for certain mortgage moneys under a decree in a suit brought by the plaintiff against the deceased in his lifetime.

The suit brought against the deceased was an ordinary suit for foreclosure of a mortgage of certain lands made by the deceased to the plaintiff company, the bill alleging that the deceased covenanted to pay the mortgage moneys and seeking a personal order against him for payment. A decree was taken out on *præcipe* in the ordinary short form, simply referring it to the master to make all necessary inquiries, take accounts, tax costs, and take proceedings for redemption or foreclosure, but containing no personal order upon the mortgagor for payment. Subsequently, upon petition of the plaintiff, an order was made amending the decree by adding the following clause: "and that writs of *fieri facias* do forthwith issue out of this court against the above named defendant for the amount which may be found due to the plaintiffs by the defendant for principal, interest, and costs." Under this decree as amended the master made a report, finding the sum of $8,587.76 due the plaintiff to the date of the report, and writs of *fieri facias* were accordingly, in the lifetime of the deceased, issued to the Sheriff of the Eastern Judicial District directing him to levy this amount of the goods and chattels and the lands of the deceased, and these remained in force at the time of his death.

After taking out letters of administration of the estate of the deceased, and after proceedings had been taken by a creditor to attach the moneys payable under the insurance policies upon the life of the deceased, the defendant Macdonnell executed an instrument by which he purported to assign the policies and all monies payable under them to the defendant Morice in trust to pay

(*a*) Present: Dubuc, Taylor, Killam, JJ.

certain debts of the deceased named in a schedule attached to the assignment, and to hold the surplus (if any) for the defendant Macdonnell as administrator.

The defendant Morice then gave to the defendant Macdonnell a power of attorney to collect the moneys payable under the insurance policies, which were then paid over to Macdonnell, who still holds them. The attachment proceedings were abandoned.

Witnesses were examined and the cause heard before the learned Chief Justice, who was of opinion that, under the decree in the original cause, as amended, the plaintiff company was entitled to the same priority in the administration of the estate of the deceased as a judgment creditor, and made a decree so declaring, and also declaring the assignment void as against the plaintiff, and ordering administration of the estate under the direction of the court. The defendants brought the cause on for rehearing in Hilary Term last.

It is clear that, by the law of England introduced into this province, judgment creditors are entitled to priority in the administration of the estate of a deceased person, and also that a court of equity will enforce similar priority in respect of its decrees for payment of money. *Martin* v. *Martin*, 1 Ves. Sr. 211; *Mason* v. *Williams*, 2 Salk. 507; *Searle* v. *Lane*, 2 Vern. 88; *Harding* v. *Edge* 1 Vern. 143; *Morice* v. *The Bank of England*, 2 Bro. P. C. 465.

The decrees, however, which are placed on the footing of judgments in this respect are final decrees *in personam* for payment of definite sums of money. *Astley* v. *Powis*, 1 Ves. Sr. 495; *Perry* v. *Phillips*, 10 Ves. 41; *Smith* v. *Eyles*, 2 Atk. 386; *Bligh* v. *Earl of Darnley*, 2 P. W. 621; *Garner* v. *Briggs*, 6 W. R. 378; *Belt's note to Martin* v. *Martin*, 1 Ves. Sr. 211.

In this case the decree as amended does not order payment of any money. Probably the plaintiff was entitled to such a decree but what it obtained was one directing the issue of writs requiring the sheriff to levy the sums to be found due by the master. Such a decree was wholly improper. If a decree for payment had been made the plaintiff was, under the ordinary practice, entitled to issue writs of *fieri facias* to enforce the payment. This right would, however, be incident to the decree for payment and no

specific direction for their issue would be required. Instead, however, of obtaining a decree *in personam* for payment the plaintiff obtained one authorizing a particular method of recovery only, and in my opinion that improper decree cannot be extended to give the plaintiff any greater relief than its express words warrant. The plaintiff must rely on its writs of *fieri facias* and take all its remedies under them.

It does not appear that the policies of insurance were within the bailiwick of the sheriff of the Eastern Judicial District at any time after issue of the writs, and it is unnecessary to consider whether the writs would create any lien upon them before actual seizure. I fail to see, however, that the plaintiff could under them have any claim to insurance moneys collected in the Province of Quebec.

I am, however, of opinion that the evidence shows the assignment to have been originally merely colorable, for the purpose of defeating the attempts of any but some proposed favored creditors to get priority, while the fund was intended to be still held subject to the disposal among such favored ones as the administrator should see fit and could even have been diverted to other creditors. I cannot find that it was ever placed in any different position with regard to the proposed *cestuis que trustent* generally. It is quite probable, however, that by subsequent transactions with some of these creditors charges were created in their favor upon the fund. This has not, however, been set up in the answer and cannot well be determined in the absence of the creditors interested; but it may form the subject of inquiry in the master's office.

The decree must be reversed in so far as it declares the plaintiff under a judgment and execution to be entitled to a first charge on the estate of the late John Milnes Macdonell, but it must be declared that the plaintiff is not entitled to rank as a judgment creditor of the deceased, but only as a specialty creditor for the amount due under the covenant contained in its mortgage. The second paragraph of the decree, declaring void the assignment of the insurance moneys must be limited by adding after the words "is void," the words as between the defendants George M. Macdonell and James D. Morice. The portions of the decree directing administration of the estate under the authority of the court and the references to the master for the

purpose will stand, and there should be a reference to the master to inquire and state whether any and, if so, which of the creditors of the deceased are entitled to any lien or charge on the insurance moneys mentioned in the pleadings and to what amounts.

No costs of the rehearing will be allowed to any party. Costs up to and inclusive of the hearing and of the injunction motion will be reserved until after the master shall have made his report. In other respects the decree is confirmed.

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## REG. v. BARNES.

*Habeas Corpus.—Conviction under Indian Act of 1880.—Defective Warrant of Commitment.*

A warrant of commitment must direct the goaler to receive and retain the prisoner otherwise it will be quashed.

The prisoner, Amos Barnes, was convicted on 21st Feb, 1885, by A. M. Muckle, J. P., and Indian Agent, for selling liquor to an Indian contrary to the provisions of the Indian Act of 1880, c. 28, s. 90.

The warrant of commitment was in the following form:—

Canada. Province of Manitoba. County of Lisgar.

To all or any of the constables or other peace officers in and for the Province of Manitoba and to the keeper of the Common Goal, at the City of Winnipeg, in the said Province of Manitoba:

Whereas Amos Barnes, late of Selkirk East, in the County of Lisgar, in the Province aforesaid, was on this day convicted before the undersigned for that he did sell spirituous liquor on Wednesday evening, the 18th inst., to John Richard Fielding, an Indian at East Selkirk, without a certificate from a medical man or a minister of religion, contrary to the form of the statute in

such case made and provided. And it was thereby adjudged that the said Amos Barnes for such offence should forfeit and pay the sum of $150 to be paid and applied according to law, and should pay to John McLeod, constable, the sum of $13 for his costs in that behalf, and it was thereby further adjudged that as the said several sums had not been paid the said Amos Barnes should be imprisoned in the Common Goal of the said Province, at Winnipeg, in the Province aforesaid, and there kept for the space of three months.

Given under my hand and seal this 21st day of February, A. D. 1885, at Claudeboye, in the Province aforesaid.

(Signed,)

A. M. Muckle, J. P.,
Indian Agent.

On the above warrant of commitment the prisoner was committed to the goal at Winnipeg.

*Chester Glass*, counsel for the prisoner, obtained a writ of *habeas corpus ad subjicendum* and on the return to the same being read and filed, moved for the discharge of the prisoner on the following amongst other grounds:

1. That the alleged warrant of commitment contains no authority or command to the goaler to receive and keep the prisoner, but is simply a recital of facts.

2. That it contains no provision for a release of the prisoner should the fine and costs be paid.

3. That the warrant is bad on its face and the prisoner is entitled to his immediate discharge.

Authorities cited: *Re Timson*, L. R. 5 Ex. 257; *Re Beebee*, 3 P. R. 270.

*Re Slater & Wells*, 9 L. J. O. S. 21.

*Bacon Ab.*, title *Habeas Corpus*.

*Paley on Conviction*, p.p. 338, 349, 410

*J. A. M. Aikins, Q.C.*, contra.

TAYLOR, J.—Held that the warrant of commitment was insufficient authority for the goaler to detain the prisoner. No mandatory words are used directing the keeper of the goal to receive the prisoner into his custody, and there imprison and keep him for a specified time, unless or nntil the fine and costs are paid, as is proper and usual in warrants of commitment.

Order made directing discharge of prisoner.

## CURRAN v. CAREY.

*Partnership suit.—Costs when assets insufficient.*

Usually the costs of a partnership suit are paid out of the assets; that is what remains of the partnership property after payment of debts, including the balance due to any of the partners.

Where the assets are insufficient for the payment of costs then the deficiency must be borne by the partners in proportion to their share of the profits.

*J. J. Curran*, for plaintiff.

*C. H. Allen*, for defendant.

(*22nd March, 1887.*)

TAYLOR, J.—This is a suit to wind up the affairs of a partnership which was a few days ago heard upon. Further directions, when a decree was made, for realizing the assets and paying the liabilities reported by the master. The costs of a particular issue, raised by the defendant's answer and by the consent decree referred to the master, were ordered to be paid by the defendant, the master having found against his contention. The other costs were ordered to be paid out of the assets, and the balance, if any, divided between the parties according to the findings in the report.

The plaintiff has drawn up the decree inserting a clause that the party to whom any balance may be due shall be at liberty to issue writs of execution against the goods, chattels, lands and tenements of the other party who may be found indebted.

To this the defendant objects, and the minutes have been spoken to. The reason alleged for inserting such a clause is, that the assets will not after payment of other liabilities be sufficient to pay the costs. Both parties admit this to be the case.

The question which has to be disposed of is, how is the payment of costs to be provided for, when they are ordered to be paid out of partnership assets, and the assets are not sufficient to pay them?

In partnership suits the general rule as to costs is the same as that which prevails in other suits for administration of an es-

tate, they are payable out of the assets, the assets meaning what remains of the partnership property after the payment of all the partnership debts, including the balance due to any of the partners. If the assets are insufficient for payment of the costs, then such costs must be borne by the partners in proportion to their shares in the profits.

*Austin* v. *Jackson*, 11 Ch. Div. 942. note. That case was decided by Jessel, M. R., who said: "When all the debts have been thus paid, there being no joint assets out of which the costs of the action can be paid, the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and defendant." This decision was approved of and followed by V. C. Hall in *Potter* v. *Jackson*, 13 Ch. Div. 845.

The rule so plainly laid down by Sir George Jessel should be followed in the present case. The clause 6 as it stands in the decree should be struck out and another framed providing for the total amount of the party and party costs of both parties being ascertained, that the plaintiff or defendant, as the case may be, must pay to the defendant or plaintiff the difference between one moiety of the total amount of the party and party costs, and his own party and party costs. See *Austin* v. *Jackson*, 11 Ch. Div. p. 944.

## McDONALD v. DEACON.

(In Appeal.)

*Affidavit of service of specially endorsed writ.*

An affidavit of service stated that the deponent had served defendant with a copy of the writ annexed to the affidavit, upon which, as also upon the copy served was endorsed, "a notice of the name and residence of the attorney by whom the said writ was issued, and English notice of claim, particulars of claim, and notice in case of non-appearance of said defendant according to the statute in that case made and provided." The writ annexed to the affidavit was specially endorsed.

*Held*, That there was sufficient proof that the copy served was also specially endorsed.

This was an appeal from an order made by Ryan, Co.J., under section 34 of "The Queen's Bench Act, 1885, "allowing the plaintiff to sign final judgment.

One of the objections to the order was, that no evidence of the defendant having been served with a specially endorsed writ had been given upon the application. There was produced before the learned judge a writ of summons bearing a special endorsement. To that writ was annexed an affidavit of service in which the deponent swore that he served the defendant with the writ upon which as also on the copy served was endorsed "a notice of the name and residence of the attorney by whom the said writ was issued, and English notice of claim, particulars of claim, and notice in case of non-appearance of said defendant, according to the statute in such case made and provided."

*A. Monkman*, for the appellant.

*J. A. M. Aikins, Q.C.*, for the respondent.

*Per. Cur.* The statute has been construed as requiring evidence to be given that the defendant was served with a specially endorsed writ, but the production of the writ with an affidavit of service in the accustomed form, and which has always been regarded as sufficient for the purpose of allowing a plaintiff to sign final judgment on default in appearance to a specially endorsed writ, is sufficient.

## WISHART v. THE CITY OF BRANDON.

(In Appeal.)

*Municipal Corporation.—Liability for arrest made by police.*

The charter of the defendants provided for the appointment of a police force, the members to be appointed by, and hold office during the pleasure of, a board of police commissioners. The defendants provided the pay of the men. A member of the force arrested the plaintiff for an alleged breach of a by-law of the defendants.

*Held*, In an action for assault and false imprisonment, that the defendants were not liable.

Action for malicious arrest. Verdict for plaintiff for $50.

*H. M. Howell, Q.C.*, for defendants. When a municipal corporation appoints an officer as a policeman to perform a public duty, from which the corporation acquires no emoluments or benefit, but the duty is one simply for the benefit of the public, the corporation is not liable, *Maxmillian* v. *Mayor*, 62 N. Y. 165; *Butterick* v. *Lowell*, 83 Mass. 172; *Kimball* v. *Boston*, 83 Mass. 417; *McSorley* v. *St. John*, 6 Sup. C. R. 563. A foreman appointed and controlled by the city is not such an agent as by his torts would make the city responsible on the principle of *respondeat superior*, *Hafford* v. *New Bedford*, 82 Mass. 297.

If the act complained of is *ultra vires*, the corporation, the City, is not liable for the act of the servant, nor can there be such ratification as will make the corporation liable, *Emerson* v. *Niagara Navigation Co.*, 2 Ont. 534; *Anthony* v. *Adams*, 42 Mass. 284; *Albany* v. *Cunliff*, 2 N. Y. 165; *Wilson* v. *Barker*, 4 B. & Ad. 615.

*N. F. Hagel, Q.C.*, for plaintiff. A corporation in the States is not liable, because it has no control over the officer, exeept to appoint him, but in Manitoba the city has control over the officers, besides appointing them. As to ratification, see *Wilson* v. *Winnipeg*, 4 Man. L. R. 193; *Brice on Ultra vires*, 472. The verdict should be maintained; the following cases support the

contention of the plaintiff, *Buffalo Turnpike Co.* v. *City of Buffalo*, 58 N. Y. 639; *Thayer* v. *Boston*, 36 Mass. 511.

*(25th June, 1887.)*

TAYLOR, J., delivered the judgment of the court. (*a*)

The plaintiff sues the defendants the Corporation of the City of Brandon, for assault and false imprisonment, the declaration containing two counts, the first, alleging that the defendants assaulted and imprisoned the plaintiff; the second, that by their servant they assaulted the plaintiff and imprisoned him in a police station. The only plea upon the record is, not guilty. At the trial before my brother Killam with a jury, the plaintiff had a verdict of $50, leave being reserved to the defendants to move for a nonsuit.

The defendants have accordingly moved to set aside the verdict and to enter a nonsuit or a verdict for the defendants on the grounds that the verdict is against law and evidence and the weight of evidence; that the learned judge should have directed a nonsuit to be entered, as the defendants were and are not liable or responsible for the unauthorized or the unlawful act complained of, committed by the alleged police officer or constable, though done "*colore officii*," (even if he were in the employment of the defendants), he having exceeded the scope of his authority, the principal cannot be liable when the agent did that which would be *ultra vires* the principal, that it was not shown on the trial that the said alleged police officer or constable was ever or at the time of the committing of the grievances complained of, a servant or in the employment of the defendants—and that the defendants, a municipal corporation are not liable for the wrongful acts or assaults of a police constable acting or purporting to act in the discharge of his duty as the officer is appointed to discharge a public duty in which the public alone is interested.

Upon the argument in Term, counsel for the defendants admitted, that the act of the constable in arresting the plaintiff was unjustifiable, and that if there is a cause of action against the defendants, the damages given by the jury are not excessive.

From the evidence it appears that the plaintiff, who resides in the City of Winnipeg, was at Brandon on business, and late one even-

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

ing when he was standing in front of a hotel the constable came up and said to the hotel keeper, who was one of the party, "This is a nice hour of the night to be closing house." On the hotel keeper making some reply the constable threatened to run him in, when the plaintiff said to him he did not think he had any such authority. Thereupon the constable said to the plaintiff you are drunk, put his hand on his shoulder arrested him, took him to the police station, searched him, taking his watch and money from him, and locking him up all night. Next day he was brought before the mayor sitting at the Police Court, when the case was adjourned until the next day, the plaintiff being allowed to go at large on depositing $20 as bail. At two o'clock on the same day, however, the case was proceeded with, when the charge against the plaintiff was dismissed.

The plaintiff's arrest is alleged to have been made under a by-law of the City of Brandon which, as amended by a subsequent by-law, provides that, "Every vagrant, mendicant or person found drunk disorderly or drunk and disorderly in any street, &c., shall be liable to the penalties provided for on infraction of this by-law." By the charter of the City of Brandon, section 101 sub-section 9, the corporation were given power to make by-laws "For restraining and punishing vagrants, mendicants and persons found drunk or disorderly in any street, highway or public place." The constable who arrested the plaintiff was appointed by the council on the 15th of March, 1886, "for one month on trial," but at the time of the arrest the 17th of May, 1886, he was acting as a constable and was in uniform. The question as to his authority was not much argued, the main ground taken for the defendants being that the defendants cannot be held liable for his wrongful acts. To decide this the question to be considered is, was he the servant or agent of the corporation?

No case can be found in England or in Ontario in which such an action as the present has been brought against a municipal corporation. *McSorley* v. *The Mayor of St. John*, 5 Sup. C. R. 559, was a case in which the plaintiff was arrested for nonpayment of money to the City, in respect of an assessment. The City were directly interested and the corporation had clearly adopted the illegal act as their own by receiving and retaining the money paid and authorizing the plaintiff's discharge from

custody only after the money had been paid. In *Wilson* v. *Winnipeg*, 4 Man. L. R. 193, the mayor in causing the plaintiff's arrest was acting in a matter which affected the funds or property of the city. So *Moggs* v. *Winnipeg*, not reported, was a case in which the arrest of the plaintiff was by a person placed in charge of a bridge, the property of the City, and the cause of the arrest was alleged misconduct with reference to such property.

The cases of *Eastern Counties Railway Co.* v. *Broom*, 6 Ex. 314; *Goff* v. *Great Northern Railway Co.* 3 El. & El. 672; *Moore* v. *Metropolitan Railway Co.*, L. R. 8 Q. B. 36, and other similar cases are all cases in which the question was discussed as to the liability of a corporation for the acts of persons employed by the corporation to protect its property and private interests.

The question raised in this case has frequently come before the courts of the United States, and there the weight of authority is in favor of the nonliability of the corporation. Two cases *Buffalo & Turnpike Co.* v. *Buffalo*, 58 N. Y. 619, and *Thayer* v. *Boston*, 36 Mass. 511, were cited by counsel for the plaintiff and relied on as supporting the contrary opinion. *Buffalo & Turnpike Co.* v. *Buffalo*, was a case in which the plaintiffs were owners of a toll bridge over a creek within the City. The City council for the purpose of carrying out a project for the enlargement of the creek, which was under their jurisdiction as a common highway, so as to permit the passage of vessels, directed the street commissioners to remove the bridge unless the plaintiffs removed it within a limited time. Afterwards they caused a notice to be served upon the plaintiffs, requiring them to construct a draw on their bridge. This not being done, the council passed a resolution for carrying out the proposed enlargement project, acting under which the street commissioners proceeded to alter and move the bridge, doing the work so carelessly that it was thrown down and destroyed. The work having been done by agents of the corporation expressly authorized to do the act, the corporation were held liable. In *Thayer* v. *Boston*, the corporation were held liable in damages for special damage sustained by the plaintiffs through an obstruction of a highway, the damage having been done "to the plaintiffs in their states, by the officers of the City having authority over the streets and highways of the City, by acts which they professed to do by virtue of their offices, and for

the use and benefit of the City." These cases are widely different from such a case as the present.

The reason given for holding the corporation not liable is, that though a constable may be appointed by the corporation, yet in discharging his duty he is acting not in the interest of the corporation, but of the public at large.

The law on this subject was thus stated by Chief Justice Bigelow in *Hafford* v. *New Bedford*, 82 Mass. 290, "Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law, for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. The same doctrine was laid down in *Maxmillian* v. *Mayor, &c. of New York*, 62 N. Y. 160, where it was held that where power is entrusted to a municipal corporation as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for user, nor for misuser by the public agents. Where the duties imposed upon municipalities are of the class just mentioned, it was said, "They are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality, which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions."

In the case just quoted from, the expression is used that the officers "are not under the control of the municipality," and it was argued by counsel for the plaintiff, that in the United States,

municipal corporations have no control over constables except their appointment, while the City of Brandon has entire control over them and that therein lay the difference as to liability.

The charter of the City of Brandon in section 123 and several following sections, provides for the appointment of a police force. It is to consist of a chief constable and as many constables and other officers as the council may from time to time deem necessary. The members of the force are to be appointed and hold office during pleasure of the board of police commissioners; that board is to make regulations for the government of the force, and the council is to provide for the payment of the members of that force. But it is not the absence of control over such a force which relieves a corporation from liability, nor does the having such control render it liable. In *Hafford* v. *New Bedford*, already referred to and in which the corporation were held not liable for the acts of members of the Fire department, the corporation had power to establish such a department and by the statute, "The said city council shall have authority to make such provisions in regard to the time and mode of appointment and the occasion and mode of removal of either such officers or members, to make such requisitions in respect of their qualification and period of service, to define their office and duties to fix and pay such compensation for their services and in general to make such regulations in regard to their conduct and government as they shall deem expedient." So in *Elliott* v. *Philadelphia*, 75 Penn. St. 347, in which the corporation were held not liable for the act of a constable which resulted in a horse being killed, the city had the appointment and control of the police force. According to *Mr. Dillon* in his work on *Municipal Corporations*, it is only when the appointment and control of the force rest with the corporation and the duties they are to discharge are for the peculiar benefit of the corporation that the latter can be made liable. He thus states his view of the law in section 974, "If the corporation appoints or elects them, and can control them in the discharge of their duties, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as its agents or servants, and the maxim *respondeat superior* applies."

It was also sought to hold the defendants liable because the constable when he arrested the plaintiff was enforcing, or professed to be enforcing, a by-law of the City, but that seems to make no difference. In *Butterick* v. *Lowell*, 83 Mass. 172, Bigelow, C.J., after laying down the law as to the liability of the defendants, in language much the same as that which he made use of in *Hafford* v. *New Bedford*, proceeded to say, "Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordnance or by-law of the City. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order, and to provide for the welfare and comfort of the inhabitants. In their enforcement therefore, police officers act in their public capacity, and not as the agents or servants of the city."

That the mayor was the presiding magistrate at the Police Court, when the plaintiff was brought up in custody, cannot be regarded as any ratification or adoption, by the defendants, of the act of the constable in arresting him.

We approve of the law laid down in the American authorities holding the corporation not liable in such a case as the present. The defendants' motion to set aside the verdict for the plaintiff and to enter a nonsuit should be granted with costs.

*Verdict for plaintiff set aside and nonsuit entered.*

## FOOTE v. MUNICIPALITY OF BLANCHARD.

(IN APPEAL.)

*Distress for taxes.—Demand.—Pleading.*

The defendant's treasurer served a demand for payment of taxes, upon the plaintiff, in the form set out below. A portion of the total amount demanded was not properly chargeable; but one of the items, viz., the taxes for 1884 was legally due, and appeared separately and clearly specified.

*Held*, 1. That there was no sufficient demand, even for the 1884 taxes.

2. If the demand could have been sustained, a seizure and sale for the whole amount would have given the plaintiff an action for excessive seizure and sale only.

3. Justification for trespass, in such a case, must be pleaded.

*J. S. Ewart, Q.C.*, for plaintiff.

Justification was not open to the defendants upon the pleadings, *McCarthy* v. *Shaw*, 8 U. C. L. J. 49; *Campbell* v. *Elma*, 13 U. C. C. P. 296; *G. W. R.* v. *Rogers*, 27 U. C. Q. B. 214; 29 U. C. Q. B. 245.

If defendants sell for too much the seizure becomes a trespass, *ab initio*, *Six Carpenters' case*; *Hoover* v. *Craig*, 12 Ont. App. R. 72. The seizure conld only be justified if there were a sufficient demand, and there could be none such if the amount were improper, *Municipal Statutes*, 1884 s. 261, 262; *Flanagan* v. *Elliott*, 22 U. C. L. J. 278; *Street* v. *Fogul*, 32 U. C. Q. B. 119; *McGill* v. *Langton*, 9 U. C. Q. B. 91; *Irwin* v. *Harrington*, 12 Gr. 179. It is only the assessment that supports the distress and legal assessment must first be shown.

*N. F. Hagel, Q.C.*, for defendants.

Excess in amount does not make a trespass *ab initio*, unless the correct amount is tendered. *Cotter* v. *Sutherland*, 18 U. C. C. P. 357, shows an assessment may be made for a whole year, if the party, owner, has lands for part only.

(*28th July, 1887.*)

KILLAM, J.—I am of opinion that the learned Chief Justice was wrong in admitting the evidence in justification of the seizure, with-

out a special plea; but I agree that the defendant can have the plea added if the evidence supports it, the case appearing to have been fully tried upon the merits, to the extent of establishing the real position of the parties when this action was begun.

I am of opinion that the evidence failed to establish any taxes to be payable for the year 1882, and that there was included in the sum for which the plaintiff's goods were seized, one amount for which the defendant's collector had no right to make either demand or distress.

I agree entirely with the principle adopted in *Corbett* v. *Johnson*, 11 U. C. C. P. 317, that when taxes are properly imposed and demand made for them so as to entitle a collector to distrain, the distress is not made illegal by being made not only for these taxes but also for additional sums for which there is no right to distrain. It is merely an application of the well known principle that a party having a right to take another's goods does not lose his right to justify for good cause by having assigned, another ground which really gives no such right. This view is supported by *The Governor, &c. of Bristol* v. *Wait*, 1 A. & E: 264. Of course a sale of a greater quantity of goods than would be sufficient for payment of the taxes actually due, would give a right of action, as well as the seizure in the first instance of an excessive quantity, but no such question arises here as the goods did not realize the amount admittedly payable.

After some provisions regulating the mode of making up the collector's roll, the statute, 47 Vic. c. 11, s. 258, provides that, "The said tax roll shall also have a column in which shall be entered any arrears of taxes due on or in respect of any land or other property in the municipality, and said arrears shall be set down opposite the name of the person, or in the nonresident roll opposite the land to be liable therefor; and these arrears of taxes shall be such as shall have been furnished to the clerk of the said municipality by the treasurer of the judicial district board," &c. By section 260, "As soon as the said tax roll is completed, the local treasurer shall, with all due despatch, transmit by mail (registered), a notice containing a statement and demand of taxes to each person whose name appears on said roll, or to the agent of such person if he knows the address of such person or agent, and such statement and demand shall mention the time when such taxes are required to be paid, and when the percentages

herein mentioned shall be allowed and charged." And by section 262, "In case any person resident in the municipality, or who being a nonresident shall have required his name to be placed on said roll, and who personally, or by his duly authorized agent, shall have been served with or shall have received such statement, neglects to pay his taxes for thirty days after such demand, as aforesaid, the treasurer may by himself or his agent levy the same with costs by distress and sale of the goods of the person who ought to pay the same," &c.

The notice given the plaintiff was as follows:—

"Take notice that your taxes for the year

| | |
|---|---|
| 1884, upon N. W. 18 Tp. 14 R. 22 | $4.41 |
| 1882 and 1883 " " | 10.60 |
| Amounting to | $15.01 |

are payable on or before the 1st day of December, 1884. A rebate of five (5) per cent., will be allowed if paid on or before the above date. If not so paid five (5) per cent. will be added to your taxes. Percentage allowed only on the taxes for 1884."

The $10.60 given in the notice as for the years 1882 and 1883, was the amount of arrears furnished by the treasurer of the judicial district board and was really made up as follows:—

| | |
|---|---|
| School and municipal rate for 1883 | $6.89 |
| Amount added under a special resolution of the council of the municipality for expenses of a previous seizure and advertisements for sale for taxes of 1882 and 1883 | 2.75 |
| Interest | 96 |
| Total | $10.60 |

There had been a seizure made for the taxes of 1883, but the goods were not sold and the sum of $2.75 was charged by the former collector for expenses of it. If that seizure were proper there might be room for the contention that it amounted to a satisfaction of the arrears, but that question need not now be discussed. At any rate it is clear that there was no right to distrain subsequently on other goods for such expenses, or even to collect them otherwise than out of the goods in the seizure of which the expenses were incurred. It is then apparent that in the $10 60, was included at least $2.75 not properly chargeable.

It was suggested but not strenuously argued that the collection of the whole $10.60 was warranted, because that was the amount

of arrears stated by the treasurer of the Judicial District Board. I am clearly of opinion that this cannot justify the demand of and distress for the amount. The property owner can never have been intended to be made liable in this way, by any errors of the municipal officers, to have his goods seized for charges that should not be imposed. All the proceedings are taken without his intervention or privity, and being in derogation of his rights of property they must be strictly warranted throughout.

Is then the demand sufficient to justify a distress for the taxes of 1884? In my opinion it is not. It is true that the amount payable for the taxes of 1884, is separately and clearly specified, but, I take it that the sum demanded is $15.01, or rather that sum with a deduction of five per cent. on $4.41, if paid by December 1st or the addition of such five per cent. if payment should not be made before that date.

In *Hurrell* v. *Wink*, 8 Taunt. 369, it is stated that the court held "that the party rated is entitled to a precise demand of the sum actually due for the poor rate previously to the issue of the warrant of distress." And in the report of the same case in 2 Moore 419, Gibbs, C.J., is stated to have said that "in this case it was necessary that the sum actually due from the plaintiff for poor rates should be demanded previous to the levy and that it was distinguishable from a distress for rent; that whatever might be due as the amount of rent might be distrained and although a larger sum were distrained for than was actually due that the lesser might still be supported, as if a distress were made for three years rent and two only were due, still the avowant was entitled to recover for the two. So, if a person bring an action for goods sold and delivered to the amount of £100, still he may only be entitled to recover £40. But in neither of these cases is a precise and previous demand necessary as here, where the party distrained on is entitled to know what sum is actually due for poor-rates previous to the issuing of the warrant under which the levy is made."

The distinction taken in *Corbett* v. *Johnston*, between cases under the Ontario Municipal Act and the English cases does not apply here. The demand was correct in that case. The difficulty I now refer to did not there arise. It seems quite as necessary that there should be a precise demand of the proper amount before a levy under our statute, as under the English statute

before the issue of the warrant. The statement showing how the amount demanded is made up, cannot in my opinion, make the demand the less one demand of the whole excessive amount; though having demanded the proper amount the collector may well, requiring no warrant here, rely on the entries in his roll of the proper amounts to justify a seizure for these amounts.

In *Squire* v. *Mooney*, 30 U. C. Q. B. 531, the distinction is not adverted to, and the precise nature of the demand is not referred to. The question that was raised as to a demand appears to have been whether there was sufficient proof of any demand, and not whether a demand made was insufficient on account of the including of an amount not chargeable.

In my opinion, then, the seizure cannot be justified and a rule should go, pursuant to the leave reserved, setting aside the verdict for the defendant and entering a verdict for the plaintiff for the value of the goods seized $15.60, plaintiff to have costs of application and certificate to prevent set off of full costs.

Dubuc and Taylor, JJ. concurred.

*Verdict for defendant set aside and verdict entered for plaintiff.*

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## CLEAVER v. MUNICIPALITY OF BLANCHARD.

(In Appeal.)

*New trial.—Verdict under £20.*

A new trial will not be granted, on the ground that the verdict was against the weight of evidence, where the verdict is under £20.

*J. S. Ewart, Q.C.*, for plaintiff.

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

Taylor, J., delivered the judgment of the court:—(*a*)

(*a*) Present: Dubuc, Taylor, Killam, JJ.

The plaintiff sues the Municipality of Blanchard for an illegal seizure of his goods for taxes. The case was tried by a jury who gave a verdict in the plaintiff's favor for $25. The defendant now moves for a new trial.

The declaration contains one count, trespass to goods, and there are two pleas not guilty and not possessed.

The defence upon which the defendants rely is, that the goods were never seized for taxes, but that the plaintiff by a private arrangement with Miller the secretary-treasurer of the Municipality, pledged them with him, he paying the taxes, and that afterwards, the advance not being repaid, Miller sold them to repay himself. At the trial the defendants, against the advice of the learned Chief Justice, insisted upon relying on this defence alone. The Chief Justice told the jury "They put themselves upon this one question, was the bargain made or not? If you find that the bargain was made then you must find for the defendants." As the jury brought in a verdict for the plaintiff, they have plainly found this question against the defendants. The evidence as to it is conflicting. (The learned judge then discussed it at some length.)

So far it is only a question of the weight of evidence, and the jury have determined in favour of the plaintiff. The verdict is for $25 only, so the case plainly falls within the rule that a new trial will not be granted on the ground that the verdict is against the weight of evidence when the verdict is under £20. In *Jones* v. *Dale*, 9 Price 591, where counsel on showing cause submitted that the Court would not entertain the application, the rule in the other courts being, that unless the subject matter in dispute was above £20, a new trial would not be granted, it is said, The Court after much hesitation, doubting whether the rule, which was merely one of practice and founded on an order of court, obtained in the Exchequer of Pleas, at length allowed the preliminary objection and discharged the rule. In *Bevan* v. *Jones*, 2 Y. & J. 264, the court followed the same course.

In *Sowell* v. *Champion*, 6 A. & E. 407, Lord Denman said, that inconvenience in a particular case ought not to make the Court depart from the regulation which had been laid down in cases where the damages fall below £20. So in *Arthur* v. *Barton*, 6 M. & W. 138, where the verdict of the jury was under £20,

Lord Abinger, C.B., said, "We should not, even if we doubted as to the propriety of their conclusion, interfere to grant a new trial." This rule does not appear to have been departed from, as counsel suggested it had been, since the provision of the Common Law Procedure Act, that, "When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order." This contention was raised in *Hawkins* v. *Alder*, 18 C. B. 640, but Willes, J. said, "I do not think the 17 & 18 Vic. c. 125, s. 44, has altered the rule upon which the courts have so many years acted, in refusing to grant a new trial on the ground of the verdict being against evidence, where the damages are under £20." In *Bransdon* v. *Didsbury*, 9. Dowl. 199, the amount of the verdict was £8 and a new trial was moved for on the ground that the evidence had taken the defendant by surprise, a rule was refused, Lord Denman, C.J., saying, "Such a case as the present comes within the spirit of the rule adopted by the courts as to new trials, where the motion is made, on the ground of the verdict being against evidence, and the amount of the damages is less than £20. I think therefore that there should be no rule, where the verdict amounts to so low a sum, unless fraud or practice on the part of the plaintiff is shewn." In the report of the same case, 12 A. & E. 631, his lordship is said to have added, "If there be no rule already in such a case, we ought now to establish one." This case was followed in *Watts* v. *Sheriff of Herts*, 5 Jur. 1009. In *Allum* v. *Boultbee*, 9 Ex. 738, where the damages were only £10, a new trial was granted, the majority of the court considering that the evidence before them of misconduct on the part of one of the jurors, took the case out of the ordinary rule. Martin, B, dissented, being of opinion, that even in such a case the rule should prevail. The rule was acted upon in this Court in *Bonneau* v. *Berard*, Mich. T. 1884, and the defendant's rule discharged, the verdict not being perverse, and there being no exception to the judge's charge.

The first plea denies only the taking of the goods by the defendants. That they were taken by Miller is proved, his authority to seize and sell for nonpayment of taxes is proved by the by-law put in evidence, and the collector's rolls, which were his warrant, have been proved. The second plea is disproved.

The defendants having elected to stand upon the question whether the plaintiff made a bargain with Miller or not, and that having been found against them, the question of whether the taxes were such as the council could properly impose does not come up. The defendants rule should be discharged with costs.

*Rule discharged.*

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## BALFOUR v. DRUMMOND.

(IN EQUITY.)

*Motion to vary minutes.*

Upon a motion to vary minutes the later rule is, that the only question to be argued is, What was the actual order made? except in cases where both parties consent, or where it cannot be ascertained what order was pronounced.

By a judgment an indulgence was granted upon payment of costs, but no order for payment in any event was pronounced. Upon speaking to the minutes this latter order was directed to be inserted.

(*27th May, 1887.*)

TAYLOR, J.—The minutes of the order made by me on the 4th of May, have been spoken to at the instance of some of the defendants. The variation which it is sought to make is opposed, on the part of the plaintiff, as being something beyond what can be done upon a motion to speak to minutes.

At one time it seems to have been permitted to raise very important questions upon such a motion as in *Perry* v. *Phelps*, 1 Ves. 251, and *Bootle* v. *Blundell*, 1 Mer. 193, but of late years the practice seems greatly changed. In 1876, the late Master of the Rolls, Sir George Jessel, a most eminent judge, laid down the rule that upon a motion to vary the minutes the only question he would permit to be argued was, what was the actual order made, except in cases where both parties consent to an addition being

made, or where it cannot be ascertained what order was pronounced in which case the matter would be allowed to be put in the paper and reargued.

The question raised on the present case is, however, one which I have no doubt can be raised on such a motion. When disposing of the motion before me, on the 4th of May, I granted the plaintiff as an indulgence that the hearing should be opened, the expression used being that upon payment of the costs of the petition and of the costs of the day, the plaintiff should be at liberty, &c.

I certainly intended that the defendants should have a positive order for the payment of these costs and the order should be so drawn up.

The defendants are also entitled to the costs of the motion made before the referee to postpone the hearing which the referee adjourned to come before me when the case was called for hearing. The case was before me on I think two days at the March sittings, and on the taxation of the costs of the then proceedings, that counsel attended upon two days, should be taken into account. If it is necessary to give in the order directions to the taxing master on such a matter, the order may be so expressed as to show this. I give no costs of the present motion.

## O'DONOHUE v. FRASER.

(IN APPEAL.)

*County Court.—Counterclaim.—Jurisdiction under power to administer according to equity and good conscience.*

Action upon a note given for a binding machine. Counterclaim for non performance of an agreement to furnish repairs. By the written contract provision was made for the case of defective portions of the machine. The evidence did not support a case under the written contract, and the agent who was alleged to have made the verbal agreement had no power to do so.

*Held*, 1. That under Con. Stat. Man. c. 34, s. 41, authorizing "in any case not expressly provided for," the application of "the law and the general principles of procedure or practice in the Court of Queen's Bench," the County Court had jurisdiction to consider a counterclaim sounding in damages.

2. That the defendant having no right acknowledged by the principles of either law or equity, the judge of the County Court had no power to award him damages under the Act, authorizing him "to make such orders, judgments or decrees, thereupon as appear to him just and agreeable to equity and good conscience."

An appellant from the County Court succeeded in his appeal, but the principal points raised and argued by his counsel were decided against him.

*Held*, That there should be no costs of the appeal, or of the application to the County Judge after the trial to reverse his judgment.

Appeal from County Court judgment.

*W. H. Culver*, for plaintiff.

A dispute note was not sufficient to give effect to the defence allowed. The making of the note was admitted and a *prima facie* case was proved, the defence is one of set off for unliquidated damages which is not allowed in the County Court, County Court Act, 1885 s. 21; Con. Stat. p. 459 s. 58, repealed 1884 by 47 Vic. c. 22 s. 8; 44 Vic. c. 11 s. 57. This amendment only of County Court Act. Q. B. Act, 1885 s. 45, the only one in force when this action was brought, *Byles on Bills*, 132.

If the defence is open, then it cannot prevail, as plaintiff was not the vendor of the machine he was only an agent: the order

showed the plaintiff was agent as machine was to remain the property of the company, *Waterman on Set-off*, 3.

There was no evidence of the nature of the damage; in any case it is for loss of grain, not for not making repairs, *Tomlinson* v. *Morris*, 12 Ont. R. 311.

*J. H. D. Munson*, for defendant.

The evidence was not in such a state that the case could be properly tried upon it. The defence was one of failure of consideration.

(*28th July, 1887.*)

DUBUC, J.—This was an appeal from the decision of the County Judge of the County of Selkirk.

The action was brought on a promissory note made by the defendant to the order of the plaintiff, for the sum of $100. The plaintiff was agent for the Globe Works Co. of London, Ontario. As such agent, the plaintiff sold to the defendant through another agent of the Globe Works Co., named Shields, a Globe harvester and twine binder, for the sum of $300, for which he gave the note sued upon as well as other notes.

There was a written contract. It made certain provisions for the case of defective parts and repairs.

The defendant admitted the making of the note. His defence was that the plaintiff guaranteed to supply all repairs free for the first year, but did not do so, and the defendant in consequence sustained damages to the extent of $75, and he claimed such damages as set off. The learned judge allowed the set off and gave a verdict for the plaintiff for the balance, $26.06.

The plaintiff moved before the said county judge to have the verdict increased to the full amount of the note. The learned judge refused the application, but granted a new trial. It was against said decision that the plaintiff appealed to the Court of Queen's Bench.

As to the first point taken, we have to consider whether the defence set up can be raised under the statute, or can be allowed by the judge. Is the plea of set off, authorized by the statute comprehensive enough to allow a counterclaim in damages? I have serious doubt about it. *Wharton*, in his *Law Lexicon* says that set off is a defence created by statute, and has no existence

at common law. It can only be pleaded in respect of mutual debts of a definite character, and does not apply to a claim founded in damages or in the nature of a penalty. The debt must be one in the same right and between the same parties, not a mere equitable demand. The same doctrine is found in *Roscoe's Nisi Prius Evidence*, under the head of Set off, and the several cases stated.

Such defence could be raised under our Queen's Bench Act, by a special provision already mentioned. In the County Court Act, no such provision is found; but the same defence may perhaps be allowed under section 41 of the Act, C. S. M. c. 34, where it is enacted that "in any case not expressly provided for in this Act or by any general rules or orders, the law and the general principles of procedure or practice in the Court of Queen's Bench, may be adopted and applied."

The allowing of such a defence may, I think be considered a question of procedure, and the judge of that court is empowered by sec. 38, sub-section 2, of the County Court Act, to determine all questions of law, fact, practice and procedure, and to make such orders, judgments or decrees as appear to him just and agreeable to equity and good conscience. Under such provision, as well as under section 41, I am not prepared to say that the judge had not the power to allow the defence set up in this case, and I rather think that he had that power.

The other point raised goes to the merits of the case. Is the defendant, under the contract made with the plaintiff, entitled to the damages claimed by him?

The judge found that the machine did not work well, that the defendant did on that account suffer damages to the extent of $75; and, having a jurisdiction founded on equity and good conscience, he thought it was his duty to allow the said damage to be set off against the note sued on.

Let us first consider what was the contract made between the parties. A machine was sold by the plaintiff to the defendant on certain terms and conditions.

If no express warranty had been stipulated, there would be the implied warranty that the machine was fit to do the work it was intended to do. But in this case, there was a special agreement as to warranty. That special agreement provided that the pur-

chaser had one day to give the machine a trial. If found defective, he was to notify the vendor at once of the defect; and if after remedying the defect, the machine could not be made to work, the purchaser was to return it to the place where it was received, and the vendor would furnish him with a new machine of the same description. If the new machine failed because of defects that could not be remedied, then the purchaser on delivering it to the place where he received it, was to be entitled to receive from the vendor the notes or cash given for the machine. Any part of the said machine breaking during the first year by fair usage was to be replaced free of charge when the broken parts are returned to plaintiff or his agent. Retaining possession or failing to give notice as provided shall be conclusive that the machine performs its work satisfactorily. No agent is authorized to change in any way the warranty.

This was the contract entered into by the parties. Under that contract, the defendant applied for and obtained certain repairs. But he never availed himself of the clause providing for the return of the machine in order to have it replaced by a new one. And he never notified the plaintiff that he intended to do so. Then, as agreed by him, by retaining possession of the machine under the circumstance, the defendant conclusively accepted the machine as performing its work satisfactorily. The closing of the agency at Manitou in October, after the season work was completed was no sufficient excuse for the defendant to dispense with giving to the plaintiff the proper notice. He had plenty of time before the next season to properly make known to the plaintiff that the machine was unfit for the work it was intended to do, if such was the fact, and to ask for a new machine. But he did not do so. And he went on using the machine the second season, without making an attempt to avail himself of the clause of the agreement providing for the getting of a new machine in place and stead of the one he had received. He claims to have suffered damage to the extent of $75 in the first, and more in the following seasons. But neither under the contract, nor under equity and good conscience could he be allowed to keep the machine, use it, do his work with it, and then claim that he should not pay for it, on the ground that he suffered damages on account of its not working properly. If such were to be allowed, that would be a great inducement for parties to purchase defective

machines, and do their work with them without paying anything.

The doctrine of deciding according to equity and good conscience is a very proper and a very sufficient one to be applied in a court of limited jurisdiction for the recovery of small claims. And I think it should be given a very wide and extended interpretation, as against any technicalities in form or strictly legal maxims. But that doctrine cannot go so far as to allow a man to entirely disregard his contract, and then claim all sorts of things, including damage for loss sustained through his own carelessness or want of proper diligence. It should be applied in accordance with the well established rules recognized in Courts of Equity. As stated by *Mr. O'Brien* in his work *on the Division Courts Act of Ontario*, p. 46, "There is nothing in the term, 'according to equity and good conscience,' that would warrant a judge in violating any positive enactment, and the more closely he adheres to the principle of equity as administered in the Court of Chancery, the more likely is he to be correct, and certainly, as a consequence, judgments will be more uniform, and therefore more generally satisfactory and beneficial."

And in a case like this, a Court of Chancery would not permit a man to take no notice of his contract duly made, and then grant him all the relief he would have been entitled to if no such special contract had been binding on him.

I think the appeal should be allowed.

KILLAM, J.—I agree that the appeal should be allowed and judgment entered for the plaintiff for the full amount of the defendant's note with interest and costs of suit.

The sole defence is a claim for unliquidated damages for non-performance of an alleged agreement by the plaintiff to furnish, free of charge for the first year, repairs for the machine for which the note was given. It is a general rule, so well known that no authority need be cited for it, that a partial failure of consideration, except in a definite, divisible portion, is no defence to an action on a promissory note. The provision of the County Courts Acts authorizing the judge to "make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience," does not appear to authorize a departure from this rule in actions in the county courts. I am of opinion that the orders, decrees or judgments must be made in accordance

with law, though including the law administered by a court of equity, but such orders, judgments or decrees as are authorized by the law of the land and appear to the judge just and agreable to equity and good conscience are what are intended to be authorized. I am, however, of opinion that under the 41st section of the County Courts Act, Con. Stat. Man. c. 34, authorizing "in any case not expressly provided for" in the Act or by any general rule or order, the application of "the law and the general principles of procedure or practice in the Court of Queen's Bench," the defendant is entitled to raise by way of counterclaim or set off the claim which he makes, although one for a wholly unliquidated amount.

It is true that a set off or counterclaim of a cause of action sounding in damages merely, was only authorized in this Province by the 57th section of the Act 34 Vic. c. 11, which has been repealed and that the similar clause is found only in the Queen's Bench Act, 1885, s. 45; yet as the 41st section of the County Courts Act appears to refer to the practice and procedure of this court from time to time in force, and not merely to that in force at the time of the passing of the County Courts Act, I think that a defendant may avail himself of the same privilege in the county court.

I agree that the Globe Works Co. should be considered as an undisclosed principal and the plaintiff chargeable personally if the counterclaim were established.

The plaintiff seeks to treat the defence as one which attempts to vary the terms of the note. But this does not appear correct, as the real question raised is one of the consideration for the note. Was it given for the machine or for the machine with a promise to furnish repairs superadded? It is the latter alternative for which the defendant contends, and he has a perfect right to set up such a claim and to set off damages in respect of it if the evidence supports his claim. He is obliged, however, to support his demand in the same way as if he were suing the plaintiff upon such an alleged agreement. In the present case, I do not think that this is done. The defendant has not shown that the agent who sold the machine had any authority to make such an agreement. The agent swore at the trial that the plaintiff told him he could guarantee repairs to be kept at Manitou, in stock, but

this was no authority for an agreement to furnish repairs free of charge.

Then the written memorandum produced by the defendant as showing the agreement states only that these repairs are to be so furnished, "if the fault of the material." This is evidently not an agreement to make the machine different from that delivered but merely to repair any injury or to supply any parts that might become defective through fault of the material. For any warranty of the machine as delivered, the defendant must rely on the special memorandum endorsed on the order, which does not become applicable.

The evidence does not show from what cause the injury occurred which necessitated the repairs. The defendant would be required to prove that the breast-plate in question, which he sought to have supplied, was broken in consequence of defect in the material, and upon this point there is no evidence whatever.

I think, however, that as the plaintiff has failed in the principal points raised on appeal and in the court below, no costs of the appeal or of the application to the county judge to reverse his judgment can be allowed, but only the ordinary costs of suit and trial.

TAYLOR, J., concurred.

*Appeal allowed.*

## O'DONOHUE v. SWAIN.

(IN APPEAL.)

*Action on promissory note.—Partial failure of consideration.*

In an action upon a promissory note, defendant shewed that it was given in part payment of a binding machine. He had, however, kept the machine, used it for two years, and not offered to return it. He claimed, moreover, that the plaintiff had agreed to furnish him with repairs for the machine.

*Held*, 1. That the defective character of the machine could be no defence to an action upon the note.

2. That no action for failure to furnish the repairs could be sustained, because the contract contained certain conditions which were not performed by the defendant, and which were conditions precedent to his right to make any claim under it.

*Mr. Culver*, for plaintiff.

*Mr. Munson*, for defendant.

(*28th July, 1886.*)

DUBUC, J.—This is another appeal from the County Court. The plaintiff is the same as in *O'Donohue* v. *Fraser*, and the particulars of the transaction are nearly identical. The plaintiff sold on certain terms and conditions a binder to the defendant, who gave three promissory notes for $100 each, and the machine failed to work properly. The action was on one of said promissory notes, but the defence was different. The defendant pleaded 1st, that he received no value for the note sued on; 2nd, that the machine for which the said note was given did not answer the purpose for which it was sold and warranted.

The evidence is substantially the same. The defendant states that the machine did not work properly, though the agents did several times try to put it in order; and he says he was promised to have repairs made free for the second as well as for the first year. The agent Shields says he promised to do the repairs and he did not get them done. But the machine was not returned, nor offered to be returned. There was a written warranty in the same words as in the other case.

In this case, the judge held that the defence goes to the whole cause of action, and he entered a nonsuit. On the application to set aside the nonsuit and enter a verdict for the plaintiff for the amount of the note sued on, he refused said application and granted a new trial. The plaintiff appeals from said decision.

The evidence establishes that the machine did not work satisfactorily, but it does not show that it failed to work and that it could not be used. The machine was one to cut and bind. It cut well enough, but the binding was wrong. There was not therefore, a total failure of consideration; a partial failure only can be claimed. But is the defendant entitled to raise such a defence, after keeping the machine and using it for at least two years, when he had agreed by his contract with the vendor to return said machine, and ask for a new one if it did not work properly, and that his retaining possession and his failing to give the proper notice would be conclusive that the machine performed its work satisfactorily?

In *Kilroy* v. *Simkins*, 26 U. C. C. P. 281, to an action on a promissory note, the defendant pleaded on equitable grounds that he had given the note in settlement of partnership affairs, and that the plaintiff had failed to perform his part of the agreement, the plea was held had, as shewing only a partial failure of consideration, and the defendant's remedy was by cross action.

In *Stephens* v. *Wilkinson*, 2 B. & Ad. 320, in an action by the payee against the acceptor of a bill of exchange, drawn for the balance of the purchase money of articles bought at a sale, it was held to be no defence that, after the delivery of the goods to the vendee, the vendor forcibly retook possession of them, for the vendee cannot treat the act as a rescinding of the contract, but the remedy of the defendant is by trespass.

In this case, it was not by the act of the plaintiff that the defendant was prevented from getting a proper machine; it was through his want of diligence in taking the means of obtaining one, as provided in his contract.

On the above ground, as well as on the ground stated in the case of *O'Donohue* v. *Fraser*, I think the appeal should be allowed.

TAYLOR, J.—The plaintiff sued in the County Court of the County of Selkirk, on a promissory note made by the defendant.

The latter filed a dispute note alleging as his grounds of defence that he received no value for the note sued on, and that the machinery for which the note was given did not answer the purpose for which it was sold and warranted. At the trial the learned judge of the County Court entered a nonsuit. An application to set aside the nonsuit and enter a verdict for the plaintiff for the full amount of his claim was refused, the learned judge proposing to have a new trial with a jury. From this finding the plaintiff now appeals.

The learned judge seems to have disposed of the case as he did, upon the ground that there was a total failure of consideration.

From the evidence it appears that the defendant purchased the machine from the agent of the Globe Works Company in July, 1884, giving three promissory notes of $100 each, payable on the 1st of March in each of the years 1886, 1887 and 1888. The note sued upon is the one which became due on the 1st of March, 1886. The machine according to the evidence of the plaintiff and another witness, did not work satisfactorily, and certain repairs which it is said an agent of the Company promised to get made were not made. The machine, however, was worked by the defendant during the harvest of 1884 and again during the harvest of 1886. Under such circumstances, although the working of it may not have been satisfactory, I do not see how the defendant can set up a total failure of consideration. Total failure of consideration, it was said by Parke, J., in *Stephens* v. *Wilkinson*, 2 B. & Ad. at p. 326, is where the party has been deprived entirely of all benefit of the thing for which the bill was given; and there he might recover back the money paid, if there had been a money payment. Here there was at most only a partial failure of consideration, and that cannot be pleaded to an action on a promissory note, unless perhaps, in the case of fraud, or where the consideration for the note is divisible, *Morgan* v. *Richardson*, 1 Camp. 40 n.; *Dixon* v. *Paul*, 4 O. S. 327; *Kellog* v. *Hyatt*, 1 U. C. Q. B. 445; *Hill* v. *Ryan*, 8 U. C. Q. B. 443; *Henderson* v. *Cotter*, 15 U. C. Q. B. 345; *Coulter* v. *Lee*, 5 U. C. C. P. 201; *Ayra & Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56.

As to the other ground of defence, the machine was sold with a written warranty, expressed to be the only warranty of the

machine, the document bearing on its face that, "No agent has authority to change in any way the warranty." The defendant attempts in his evidence to set up another verbal guarantee given by the agent when he went for the machine. Then the guarantee contained certain conditions which were not performed by the defendant and which seem to be conditions precedent to his right to make any claim under it.

This ground of defence fails as well as the first, so the plaintiff is entitled to have the appeal allowed with costs, to have the nonsuit in the Court below set aside and to have a verdict entered in his favor for the full amount of his claim with costs.

KILLAM, J.—In this case the defendant does not seek to set up by way of set off or counterclaim, a cause of action for damages as in the case of *O'Donohue* v. *Fraser*, just disposed of. His defence is that he "received no value for the note sued on," and that "the machinery for which the said note was given did not answer the purpose for which it was sold and warranted."

It is shown that the defendant received the machine in question and used it for a certain length of time. It is true that it does not appear to have been what it should have been, but it cannot be said that he received no value for the note. It is simply another case of partial failure of the consideration for the note, which can form no better defence in the County Court than in this Court.

It appears also that the machine was sold under a special warranty with the terms of which the defendant does not appear to have complied and under which he is not shown to have any claim.

In my opinion, this appeal should be allowed with costs, and judgment should be entered in the County Court for the full amount of the note, interest and costs of suit with the costs of the appeal.

*Appeal allowed with costs.*

## HUDSON'S BAY COMPANY v. MACDONALD.

(In Equity.)

*Vendor and purchaser.—Rescission.—Penalty.—Ejectment after default.*

A bill by a vendor alleged that by the contract time for the deferred payments should be of the essence of the agreement, and that upon default the vendor should be at liberty to re-enter upon or re-sell the lands, all payments on account being forfeited; that certain payments on account had been made, (not shewing whether before or after the day fixed for the last instalment); that there had been dealings between the parties and an extension of time given "for payment of some of the instalments," not saying which of them. The prayer was for a declaration that the contract was at an end and void and that it should be delivered up to be cancelled; and for possession.

A demurrer was allowed upon the grounds:—

1. That it was nowhere alleged that the plaintiffs had rescinded the agreement, but on the contrary, they seemed to have continued to deal with, and receive payments from the purchaser.

2. That the right reserved was in the nature of a penalty, and the plaintiffs would not be entitled to rescission without limiting a time for payment.

3. That as to the prayer for possession, the purchaser in possession after default would be a tenant at sufferance and not entitled to a demand of possession, but the bill did not clearly shew that the extension of the time given for payment had elapsed.

*J. Stewart Tupper* and *F. H. Phippen*, for plaintiffs.

*J. S. Ewart, Q.C.* and *C. P. Wilson*, for defendant Macdonald.

(*8th October, 1887.*)

Taylor, J.—This cause came on for hearing before my brother Killam, and his judgment ordering it to stand over for the purpose of adding parties is reported, 4 Man. L. R. 237. Since then the executor and devisee of the late Sedley Blanchard, the original purchaser from the plaintiffs, have been made parties defendants, and the bill has been otherwise amended. To this amended bill the defendant Macdonald demurs for want of equity.

My brother Killam in his judgment, points out that there are two classes of suits, one in which the plaintiff asks that the defendant be ordered specifically to perform a contract, the other in which he asks that a time be fixed within which the defendant may perform it and that, in default of such performance, it may be rescinded. The bill as it now stands is neither the one nor the other.

It sets out the eleven separate agreements under which Blanchard agreed to purchase from the plaintiffs eleven parcels of land and the terms of payment, one-fifth at the time of entering into the agreements and the remainder of the purchase money in four equal annual instalments with interest, that it was expressly agreed that time was to be considered of the essence of the agreements, and that unless the payments were punctually made the plaintiffs should be at liberty to re-enter upon or re-sell the lands, all payments made on account being forfeited. It next alleges the payment of the one-fifth of the purchase money, the entering into possession by the purchaser, and default in the payment of each of the four annual instalments, except of $7,500 on account of purchase money and $1,000 on account of interest, and proceeds to say "by reason of such default and by virtue of the provisions and conditions of the said agreements, the plaintiffs became and were entitled to re-enter upon the said premises and the payments made became and were forfeited and the rights (if any), of the said Sedley Blanchard and those claiming under him were wholly at an end and the plaintiffs became and are entitled to and now hold the said lands and premises freed and discharged from all claim of the said Sedley Blanchard or any one claiming through or under him." The entry into possession by the defendant Macdonald is next alleged, and the registration by him of a deed by which Blanchard purported to grant and assign his estate in the lands to Macdonald, also the registration of three several mortgages upon the lands from Macdonald to Blanchard, the registration of all which instruments it is said forms a cloud upon the plaintiff's title. The twelfth paragraph says, "The plaintiffs submit that they are entitled to have the said instruments cancelled and the registration thereof declared a cloud upon their title to the said lands and to have the same removed from the registry and the possession of the said premises delivered to them." Then after setting out certain claims made

by the defendant Macdonald In consequence of the removal of some buildings, these words occur in the last paragraph, "The said Sedley Blanchard and the defendant Macdonald afterwards continued to deal with the plaintiffs in respect to the said lands and asked for and obtained an extension of time for payment of some of the instalments." The prayer of the bill is, that it may be declared that the eleven agreements are void and at an end, that they be delivered up to the plaintiffs, that the deed and mortgages may be set aside and the registrations of them vacated, that the defendants may be ordered to deliver up possession of the lands, and pay the costs of the suit.

It will be observed that the bill nowhere alleges that the plaintiffs have rescinded the agreements, the most it alleges is that by reason of the default the plaintiffs are entitled to rescind them.

Then in the concluding paragraph there is a statement that the defendant asked for and obtained an extension of time for the payment of some of the instalments. It may be that the extension of time was for payment of the last instalment, and if so the plaintiffs cannot now insist upon a forfeiture for failure in payment of earlier instalments at the times limited. Continuing to deal with a purchaser after knowledge of the breach of an agreement which would entitle the vendor to rescind, is said by Lord St. Leonards, to be a waiver of the right to rescind. Prompt action is necessary on the part of the vendor in asserting his rights. The language of the learned author is, *Sugden, V. & P.* (14 ed.) 271, "If the purchase money is to be paid by instalments, each breach in non-payment is a new breach of the agreement, and gives to the seller a right to rescind the contract, but that right should be asserted the moment the breach occurs." These words are in fact just the words used by V.C. Wigram, in *Hunter* v. *Daniel*, 4 Ha. at p. 432. That learned judge held to the same effect in *Monro* v. *Taylor*, 8 Ha. 62. So the Supreme Court of New York in *McNeven* v. *Livingstone*, 17 John. 437, held that where a party intends to abandon or rescind a contract, on the ground of a violation of it by the other, he must do so promptly and decidedly, on the first information of such breach. If he negotiates with the other party after knowledge of the breach, it is a waiver of his right to rescind the contract.

Then if the plaintiffs are to be looked upon as standing in the position of mortgagees, they are not entitled to have these agree-

ments declared rescinded without the defendant being given an opportunity to pay the money. The stipulation for forfeiture in case of nonpayment would seem to be considered in such a case as the present as in the nature of a penalty. It was so held in the *Dagenham Dock Co.*, L. R. 8 Ch. 1022, where the company had purchased a piece of land, one-half of the purchase money to be paid at once, and the remainder on a day named in the agreement, with a provision that if the whole of the remainder was not paid by that day, in which respect time was to be of the essence of the contract, the vendors might re-possess the land as of their former estate, without any obligation to repay any part of the purchase money. James, L.J., said, "In my opinion this is an extremely clear case of a mere penalty for nonpayment of the purchase money . . . . I agree with the Master of the Rolls that this is a penalty from which the company are entitled to be relieved on payment of the residue of the purchase money with interest." And Mellish, L.J., said, "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in part unperformed, in which case the real damage may be either very large or very trifling, there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." See also *Magee* v. *Lavell*, L. R. 9 C. P. at p. 114.

The bill in so far as it asks that the defendants may be ordered to deliver up to the plaintiffs, possession of the lands, is an ejectment bill. The defendant contends that as the agreement entitled him to take possession, by his actually entering into possession as alleged in the bill, he became a tenant at will, and there should have been a demand of possession before filing the bill while no such demand is alleged. In support of this, *Cole on Ejectment*, 58 and 59; *Lewis* v. *Beard*, 13 East, 210, and *Gray* v. *Stanion*, 1 M. & W. 700, are cited.

In the first case *Lewis* v. *Beard*, it was held, that one put in possession upon an agreement for the purchase of land cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise. There the purchaser was not in default in payment of the purchase money, as he had given the vendor notice of his readiness to pay upon the conveyance being executed. This case was followed in *Newby* v. *Jackson*, 1 B. & C. 448, in which also the purchaser does not seem to have

been in default, and the same doctrine was approved of in *Milburn* v. *Edgar*, 2 Bing. N. C. at p. 504, and *Gray* v. *Stanion*, 1 M. & W. 700. In *Ball* v. *Cullimore*, 2 C. M. & R. 126, it was decided that a person who has been let into possession of land under a contract of sale which has not been completed, is a tenant at will to the vendor, but in *Moore* v. *Lawder*, 1 Stark. 308, where on an agreement for sale to be paid for by instalments, it was stipulated that, in default of payment of the instalments at specified times, the former instalments should be forfeited, and the vendor should not be compelled to convey, and the purchaser was let into possession, Lord Ellenborough held that after default, he was a mere tenant upon sufferance. And in *Leeson* v. *Sayer*, 3 Camp. 8, the plaintiff had bargained to sell the defendant the remainder of a term, part of the purchase money having been paid, and part remaining unpaid, an agreement was come to that the defendant should have possession until a given day, paying rent, and that if he did not on or before that day pay the remainder of the purchase money, he should forfeit the instalments already paid, and should not be entitled to an assignment of the lease, the remainder of the money not being paid, the plaintiff brought ejectment. On counsel for the defendant contending that he could not without notice or demand be treated as a trespasser, it was held that the agreement operated in the same manner as a clause of re-entry on a breach of covenant in a lease, and that the circumstance of interest having been afterwards received upon the instalments remaining due, was no recognition of the tenancy.

The cases in Ontario in which this question as to demand of possession has been discussed, are numerous. *Sheriff* v. *McGillivray*, 6 O. S. 294, was an action of ejectment. The defendant had purchased the land in dispute from the plaintiff, the purchase money being payable by instalments and the agreement provided that the defendant might enter and retain possession until default, the plaintiff to give a good title by a day named if the defendant performed his part of the agreement. One instalment of the purchase money had been paid and the question submitted to the Court was whether a demand of possession was necessary or not, and the Court held that it was not. Robinson, C.J., said the case of *Leeson* v. *Sayer*, 3 Camp. 8, was an express authority for holding that the defendant was to be

looked upon as a tenant at sufferance, and the case of *Lewis* v. *Beard*, 13 East, 210, did not apply. In *Sherwood* v. *Stevens*, 6 O. S. 432, the defendant had purchased land giving a bond and notes for payment of the purchase money by instalments, none of which were paid; on its being contended that a demand at his dwelling house in his absence, in presence of members of his family was not sufficient, the Court said, "The demand of possession proved was sufficient, if a demand was necessary." In *Phillpotts*, v. *Crouch*, 5 U. C. Q. B. 453, the purchaser in possession had made default in payment, and Robinson, C.J., said, "It was not attempted to show that such payment had been made, and we have often had occasion to determine that under such circumstances the owner of the land may bring ejectment without demanding possession." The fact that there had been default was plainly an element in the decision of *Kemp* v. *Garner*, 1 U. C. Q. B. 39; and *Stodders* v. *Trotter*, 1 U. C. Q. B. 310. So in *Robertson* v. *Slattery*, 10 U. C. Q. B. 498, Draper, J., said, "admitting for the arguments sake that the defendant was at one time tenant at will to the plaintiff, under the agreement made in 1847 or 1848, he had failed in making the payments and was therefore liable to be dispossessed without notice." *Robinson* v. *Smith*, 17 U. C. Q. B. 218, is a case to the same effect. These cases were followed by the Court of Common Pleas in *Prince* v. *Moore*, 14 U. C. C. P. 349.

In *Jackson* v. *Miller*, 7 Cowen 747, the Supreme Court of New York held that while notice to quit is necessary before the landlord can bring ejectment against a tenant at will, the case of vendor and vendee was an exception to the general rule, but in that case also the vendee had made default in payments. This case was followed in *Jackson* v. *Moncrieff*, 5 Wend. 26.

In *Luudy* v. *Dovey*, 7 U. C. C. P. 38, the vendor had subsequent to the default received a payment on account, and the Court held that what was done by the plaintiff was a declaration of his will that the defendant was lawfully on the premises after the default or forfeiture, and that plaintiff was not at liberty to turn him off without a demand of possession.

In the present case there has no doubt been default in the payment of purchase money, but a payment on account is alleged and it does not appear that that was not received after the period

fixed for payment of the last instalment and besides it is said an extension of time for payment was granted which also may have been since that period.

I think the demurrer must be allowed with costs, but the plaintiffs should have leave to amend as they may be advised upon payment of the costs.

*Demurrer allowed, with costs.*

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## BROWNING v. RYAN.

(IN EQUITY.)

*Injunction.—Trespass by railway.—Plaintiff a puppet.—Signification of disallowance.*

An Act was passed by the Provincial Legislature providing for the construction of the Red River Valley Railway. In pursuance of this Act a contract was entered into between Her Majesty and two of the defendants, and the contractors thereupon proceeded to build the road.

This Act was disallowed as was also an Act extending the operation of The Public Works Act of 1885.

The plaintiff being aware that the route contemplated would cross certain lands, purchased them with a view of obstructing the building of the road. It was not contended that this would disentitle him to an injunction, but it was alleged that he was acting not for himself but in reality for a rival railway whose hand he was. To shew this, the plaintiff was examined and he refused to answer several proper and material questions. He appeared to have acted hrough the rival railway's officials and to have reported progress to them; to have made some agreement with that company, giving to it certain priviieges in respect of the land purchased, but the nature of this agreement he refused to divulge; and in a letter he referred to "the party for whom I have purchased."

*Held*, 1. That after the disallowance the defendants were without merits or legal rights—The Public Works Act (without the disallowed amendment), not giving the right to expropriate lands for the purpose of the railway.

2. That nevertheless the plaintiff was not entitled to an injunction, he being the representative merely of the rival railway and not acting on his own behalf.

3. That to arrive at this conclusion it was proper to assume as against the plaintiff, the answers he could have given, if he had answered fairly the questions put to him.

The disallowance of the Acts was signified by proclamation in the Gazette, but no reference was therein made to the certificate of the date of the receipt of the Acts.

*Semble*, That the certificate need not be signified, but the disallowance only.

*J. A. M. Aikins, Q.C., S. C. Biggs, Q.C., J. S. Ewart, Q.C., J. F. Bain* and *W. H. Culver*, for plaintiff.

*H. M. Howell, Q.C., N. F. Hagel, Q.C.*, and *G. G. Mills*, for the defendant Norquay.

*F. Beverley Robertson* and *T. S. Kennedy*, for defendant Wilson.

*J. H. D. Munson* and *G. W. Allan*, for defendants Ryan, Haney & Strevel.

(*4th October, 1887.*)

WALLBRIDGE, C.J.—The bill was filed 20th and amended 25th August last, against Hugh Ryan, Michael J. Haney, George H. Strevel, The Honorable John Norquay and The Honorable D. H. Wilson.

The first three defendants being contractors and sub-contractors, for the construction of the railway called The Red River Valley Railway, and the two latter being members of the Provincial Government of Manitoba, the former the Commissioner of Railways, and the latter Minister of Public Works.

The plaintiff alleges, that he is the owner in fee simple of lots 365 and 367, in the Parish of St. Agathe, in this Province, and that the defendants have constructed the earth grade and dump of the said railway, to within two chains of the plaintiff's land, and will unless restrained by injunction, enter upon the plaintiff's land and construct a road bed thereon, and place ties and rails thereon.

The plaintiff had just ground for such apprehension as on the day the bill was filed the defendants did enter upon the land and commence work there.

An *ex parte* injunction was granted until Wednesday, 24th August, and enlarged for two weeks, when a motion was made before me to continue it, until the hearing and the discussion has taken place upon the motion to continue.

An Act was passed by the Provincial Legislature of Manitoba, which received the royal assent, on the 1st June, 1887, providing for the construction of the Red River Valley Railway, and another Act amending the Public Works Act of Manitoba, of 1885. This latter gave power to the Minister of Public Works to undertake in the name of the Province, any public work whatever.

These two Acts were disallowed by the Governor General in Council, on the 6th July, 1887. Another Act was passed in the same session, entitled an Act for "The further improvement of the Law," which received the royal assent on the 10th June, 1887. Section 7 of this Act secured the persons employed in the construction of public works, when employed by the Minister of Public Works or Commissioner of Railways, and afforded them a complete justification in the construction or doing of such public works. This was also disallowed on the 18th July, 1887. By section 90 of the British North American Act, as construed by section 56 of that Act, such disallowance annuls the Act not from the day of the passing of it, but from the day of the disallowance being signified by the Lieutenant-Governor.

The Lieut.-Governor of Manitoba signified such disallowance by Proclamation of 30th July, 1887.

The Acts done between the dates of the passing of the R. R. V. R. Act and the disallowance of 30th July, would thus be lawful. I may cite besides the words of the Act, *Clapp* v. *Laurason*, 6 U. C. O. S. 319.

By the disallowance of the Red River Railway Act, The Act to amend the Public Works Act of Manitoba, and of the Act for further improving the Law, the defendants are left without any direct Legislative authority enabling them to construct the railway crossing the plaintiff's lands.

The defendants however, have set up as a justification of their proceeding and as giving them the right to expropriate the parcel of the plaintiff's land which they had staked out, and since taken possession of, a right so to do, under the Public Works Act of

Manitoba, 48 Vic. c. 6, and have argued that under section 9 of that Act all lands, streams, watercourses and property, real or personal, theretofore or thereafter required for the use of Public Works, &c., and all property theretofore or thereafter acquired, constructed, required, maintained or improved at the expense of the province, and not under the control of the Dominion Government, shall be and remain vested in Her Majesty and under the control of the Department, that is the Department of Public Works of Manitoba.

It is argued that R. R. V. Railway is a public work, and it is expressly declared to be such in the Act authorizing its construction. The annulling of that Act did not deprive the part constructed of its character as such, and that property so situate falling within the words of the Public Works Act, was all that was required to give the Department a title thereto. But, this plaintiff's land never was conveyed to the Public Works Department, nor expropriated and in fact proceedings have been taken under section 26 of that Act, to expropriate the very land which forms the subject of dispute in this suit. The question to be decided in this suit is this, is this land the subject of expropriation within the meaning of the Manitoba Public Works Act, and this can be best determined by reference to the expropriation clauses. This plaintiff refuses to convey, and the Department of Public Works has served the notice pointed out by sections 25, 26 and 27, which sections provide a means of obtaining lands from unwilling owners. Can the Department acquire this land under the proceedings given in those sections. The lands which the department are empowered to take are mentioned in section 23, which section is in these words, "The Minister may acquire and take possession for and in the name of Her Majesty, of any land or real estate, streams, waters, watercourses, fences, walls, the appropriation of which is in his judgment necessary for the use, construction or maintenance of hydraulic privileges made or created by, from or at any public work or for the purpose of draining or for the enlargement or improvement of any public work or for obtaining better access thereto."

These are the only lands which the Public Works Department can acquire by force of the expropriation clauses 25, 26 and 27, before referred to. It is not pretended that this plaintiff's land is taken or required for any such purpose, and whilst section 9

enables the Public Works Department to hold land for public works, no part of that Act enables the Department to acquire them against the will of the owner or without his consent. The only clause under which lands can be taken by expropriation are the lands described in section 23, and these lands can only be taken when required for the construction or maintenance of hydraulic privileges, &c., and as to these, sections 26 and 27 describe the manner by which alone the Department can expropriate them. It is true the notice named in section 27 has been given, but as in my opinion the lands therein described not being such as are required for the purposes of this Public Works Act, the notice given is ineffectual and will not serve the defendants in their attempt to take the same. The defendants therefore stand in my opinion, without merits or legal right on their side, and the plaintiff is entitled to all the ordinary legal remedies to protect his property. This motion, however, is made to continue, to the hearing, the *exparte* injunction granted on the 20th August last.

The remedy by injunction is not one of the ordinary remedies for the redress of injuries or protection of property. It is, with mandamus, one of the extraordinary remedies, and is only granted to those who come in good faith for the protection of their rights and also, without concealment of any material fact.

The defendants have attacked the plaintiff's *bona fides* and to establish the want of *bona fides* have examined the plaintiff upon his bill filed herein, and rely mainly upon his examination to establish his want of *bona fides*. It is my duty to see whether they have made out such to be the case.

I have read over very carefully the cross-examination of Mr. Browning the plaintiff upon his bill filed, and am not at all satisfied with the manner in which he answered such questions as he chose to answer, and express my dissatisfaction at his refusal to answer questions properly put to him by Mr. Kennedy for the defendants, such refusal coupled with the unsatisfactory answers given to many of the questions justifies me in suspecting either that a candid answer would have militated against the case set up by him, or worse still that by his hesitation, partial answers, and want of completeness, he designedly abstained from divulging the truth, as under his oath he was bound to do. I have no hesitation in saying that such refusal to answer these questions

properly and legally put, would have been sufficient cause for his committal for contempt if so done in Court.

In the case of *Filder* v. *London and Brighton R. Co.*, 1 H. & M. 489, Vice Chancellor Wood says, "Is the suit *bona fide* the plaintiff's own suit, or is he merely the hand by which some one else acts," and in *Robson* v. *Dood*, 8 Eq. 301, Sir R. Malins, V.C., in a case somewhat similar to the present one, says, that this suit is not a *bona fide* one, faithfully, truthfully, and sincerely directed to the interests of the shareholders whom he claims to represent and is a mere mockery and an illusory proceeding, and must be treated as an imposition on the Court."

To shew whether this be the position of the plaintiff, I shall make extracts from the plaintiff's own evidence taken on his cross-examination on his bill.

In answer to the questions:

Do you know the property in question and have you ever been over it?

I have been on property adjoining it, in the neighborhood of it, where I could see it, just as well as if I were on it.

He then declines to give his reasons for purchasing. He says he has owned hundreds of thousands acres of land, principally in Quebec, some in Minnesota. Yet it is sworn that he paid double value for this land, and by others that at least the sum paid was exorbitant.

Q. Did you go then (to Manitoba) to purchase the river lots?

A. I thought I might do so if land suited me.

Q. Then you were purchasing on your private account?

A. Yes, the deeds will shew.

Q. Did you go to see what kind of buildings were on it?

A. I could see all I wanted from where I was, there were buildings on it.

The land ran from the river to the roadway on which the C.P.R. had been constructed.

The R. R. V. Road would have to cross this land he purchased. He has not sold any portion of these lots.

Q. Did you not sell 50 feet to the Canadian Pacific Railway?

A. No, the C.P.R. had permission to go on certain portions of it, if they required it, but I made no sale to them. The per-

mission is not in writing, and he declines to answer who came to him to get the permission, and whether he gave this permission before or after he purchased he declines to answer.

And when further questioned as to his giving permission, he says he will stop right here and decline to answer and persists in declining though pressed to do so, and finally declines to give any further particulars as to his arrangement with the C.P.R.

It was intended to shew by those questions that this plaintiff was not the *bona fide* owner of the property and though the questions were fairly and properly put he refuses to disclose his dealings with the C.P.R., and though there is no station within one and a-half or two miles from this fifty feet, he says he gave them permission to occupy it, the object of this is very plain, a small spur or side track shewn on the plan produced, shews that the C.P.R. could effectually keep the R. R. Valley Road from coming upon the highway, on which the C.P.R. itself is built. Did he ever give the C.P.R. this permission or is it all a pretence? He will not tell with whom he negotiated, whether before or after his purchase what if any, price was agreed upon, what quantity of land they are to take, and finally answers, "I decline to answer any further questions in connection with my arrangement with the C.P.R."

Now, this was the very point upon which information was desired, for if this land was really that of the C.P.R. he is not in Court, *bona fide* asking for protection. If it were the money of the C.P.R. that paid for this land, however disguised, it was in equity their land; of the importance of this fact, the plaintiff may have been ignorant. In *Wilde* v. *Wilde*, 20 Gr. 536, Mr. Justice Strong then V.C., says, "There can be no doubt but that a trust results when two or more persons in determined proportions, advance the purchase money of land, which is conveyed to one as was decided in *Wray* v. *Steele*, 2 V. & B. 388, cited and relied upon in *Sanderson* v. *McKercher*, 13 Ont. App. 587, and cases there referred to.

In such case though the deed was in his name it is true, but he was the constructive trustee of the C.P.R. and his answer to the question was most material.

Q. Then you purchased this land on your own private account?

A. "Yes, the deeds will show."

This was a plain question which he could not have misunderstood. He gives an answer which fully answers the question if true, but immediately answers, as if to save his conscience, "the deeds will shew," now the deeds will not and do not shew. The deeds no doubt shew the legal title in him, but do not shew that he purchased on his private account, the very fact thus inquired after is avoided, and when asked if any corporation or person has any interest in this land, he says, "I could answer this question at once, but I decline to go on in this way." Again when asked if he had told or communicated to any one that he had not purchased for himself. He answers, "No, I purchased for myself." He was then confronted with a letter which he had written to the County Registrar enclosing the deeds of this very property, in which letter are the words, "I am particularly anxious to get the papers all complete before I can settle with the party for whom I have purchased."

He never went into possession of the property, but left it in care as he says of Mr. John McTavish the Land Commissioner of the C.P.R.. He himself did not employ the Rowands to look after the land, but Mr. McTavish did so. So little did he seem to know about the care of the property, that he evidently forgot that he had signed two powers of attorney to the Rowands to take care of it, and he confesses at last, that Mr. McTavish selected these care-takers. And again he seems fortunate on all occasions to meet with the officers of the C.P.R. in his troubles Mr. Drinkwater the Secretary of the Railway, assisted him in procuring a patent in Ottawa, the plaintiff says merely because he, Mr. Drinkwater, was better acquainted with the gentlemen he would necessarily meet, but what gives a meaning to his interview with Mr. Drinkwater is the telegram he sent to him after he had secured the patent. He informs him by telegram that he had got the exemplification (patent) and the patent for lot 365 goes to Winnipeg Land Office to-night. He had wired Mr. Aikins, (his solicitor), and would write him from here. This is pretty full information to give to an officer of the Company, respecting land in which the Company had no interest.

Then the plaintiff never saw the Rowands, the care-takers, and plainly refuses to tell who sent the message to Mr. McTavish to employ them. When asked if this suit was not instituted by the

C.P.R. or some of their officials the plaintiff answers, "I decline to state any communication between the C. P. R. people and myself," again "Did the C. P. R. advance any of the purchase money," answer "I decline to go into my private matters, I paid it," "I decline to answer where I get my money from." When pressed again if this were not the suit of the C.P.R. he answers, "I decline to answer any communication I have had with the C.P.R. people."

And he further says, "If I have any letters, telegrams, correspondence or documents of any kind, which passed between me and the C.P.R., I decline to produce them."

It is proved that the price paid was, as said by some grossly extravagant. He never went on the land or looked at the buildings, except looking from a distance. The one requirement he demanded was that he should get a lot extending from the river to the C. P. R. and across this the R. R. Valley Road must necessarily pass. The C.P.R. appear to have acted by their officials, in every respect as if the purchase was in fact theirs, they took possession so far as I can tell without any agreement as to price or quantity without any writing and the plaintiff refuses flatly to give the Court any information as to the person to whom he gave the permission or as to his communications with the C.P.R.

In my opinion it is my duty to assume as against him, the answers he could have given if he had answered fairly the questions thus put to him.

I think his evidence fairly treated shews that he is not in court *bona fide*, asking protection to his property, but, rather that he is here the hand moved by the C.P.R. and calling it his suit is an attempt to impose upon the Court and must be so treated. The case was so fully argued before me that I have gone more fully into the merits than is usually done on a mere motion to continue an interim injunction. I shall treat the case as was done in the case of *Filder* v. *London and Brighton R. Co.*, 1 H. & M. 489, and refuse to make any order, thus not continuing the injunction and leaving the question of costs to the hearing, when perhaps upon further evidence being given, the trial judge may come to a different conclusion.

In my opinion the plaintiff has not come to the Court *bona fide* asking protection to his own rights but is the hand moved

by the C.P.R., or as expressed by Lord Westbury in *Forest v. Manchester, &c., R. Co.*, 4 D. F. & J. 126, "the puppet" of the C.P.R.

Several other questions were discussed before me. The non-liability of the Hon. Mr. Norquay and the Hon. Mr. Wilson, being members of the Government and thus not being amenable to the courts for their doings in that capacity. The fact of the plaintiff's knowledge of the situation and purchasing a suit savouring of maintenance.

The sufficiency of the proclamation, proclaiming disallowance, the latter in my opinion is sufficient, but it is not necessary to discuss or determine these and other questions as my judgment goes on the ground of want of a locus standi in the plaintiff.

*No order made upon the motion.*

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## DULMAGE v. DOUGLAS.

(IN APPEAL.)

*Law stamps.*

The imposition of stamps upon law proceedings is *ultra vires*. The statute 49 Vic. c. 50, makes no difference in this respect.

(Decision of Dubuc, J., 3 Man. L. R. 562, overruled.)

Appeal from order of Dubuc, J., dismissing summons for security for costs on the ground that stamps were not affixed.

*C. P. Wilson*, for defendant.

By B. N. A. Act, s. 92, there are three methods provided of raising revenue, (1) Direct taxation, (2) License fees, (3) Fines. This implies the exclusion of all other modes of raising revenue. *Reed* v. *Mousseau*, 8 Sup. C. R. 430; *Attorney General* v. *Queen Insurance Co.*, 3 App. Ca. 1090.

The Act 49 Vic. c. 50, was merely a means of changing the system of keeping accounts, *Severn* v. *The Queen*, 2 Sup C. R. 70, 88, 89, 96. "Provincial purposes," is the expression used throughout the Act to distinguish from local duties, and includes all subjects of legislation of Provincial Legislatures.

As to this being a direct tax, that point is settled by *Plummer Wagon Co.* v. *Wilson*, 3 Man. L. R. 68; *Attorney General* v. *Reid*, 10 App. Ca. 141.

*J. A. M. Aikins, Q.C.*, for the Attorney General.

Admitting the general principle that stamp duty is generally an indirect tax because the ultimate incidence is unknown, nothing is here provided as to the ultimate incidence, a provision allowing recovery by other suitors, may be *ultra vires*. *Citizens Insurance Co.* v. *Parsons*, 7 App. Ca. 96; *Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31.

Raising revenue for provincial purposes means raising a general fund for the general purposes of the Government, see judgments of Henry, J., and Taschereau, J., in *Reid* v. *Mousseau*, 8 Sup. C. R. 430; *Attorney General* v. *Reid*, 10 App. Ca. 141. This shows the matter to be one of procedure in the provincial courts.

The Dominion and Provincial Legislatures may legislate on the same subject, *e.g.*, Marriage and Divorce, and Solemnization of Marriage.

(*25th June, 1887.*)

TAYLOR, J., delivered the judgment of the court. (*a*)

A summons for security for costs, returnable in Chambers, was discharged upon an objection taken by the plaintiff, that no law stamps had been affixed to it. The judgment of the learned judge, discharging the summons is reported in 3 Man. L. R. 562. From this judgment the defendant now appeals, contending, as he did in Chambers, that the 49 Vic. c. 50, an Act to provide for the maintenance of the Administration of Justice in the Courts, and of the court houses and gaols in Manitoba, is *ultra vires* of the Legislature of Manitoba.

On the argument of the appeal counsel for the plaintiff admitted that apart from the objection of the want of stamps no cause

(*a*) Present: Wallbridge, C.J., Taylor, Killam, JJ.

could be shown to the summons. By leave of the Court, counsel for the attorney general was heard to argue the question of the validity of the Act, and in support of the right of the Legislature of Manitoba to impose fees upon legal proceedings, by means of law stamps.

Upon a careful consideration of this subject we see no reason to alter the conclusion at which we arrived in *The Plummer Wagon Co.* v. *Wilson*, 3 Man. L. R. 68.

The 49 Vic. c. 50, it is true provides, that the fees and charges on legal proceedings, collected and paid to, and the proceeds of the sales of all law stamps received by, the treasurer of the province under the authority of the Acts of the Legislative Assembly of Manitoba, respecting law stamps, or of any other act or acts, order in council or proclamation, shall not pass into the general revenue of the province or become a part thereof, but shall be and are hereby created special funds, to be respectively called "The Administration of Justice Fee Fund," and "The Building Fund." Provision is then made as to "Justice Fund Stamps," that an account shall be opened in a chartered bank to the credit of which the proceeds of the sale of such stamps shall be deposited. The moneys so deposited to the credit of that fund shall not be available as general revenue for general provincial purposes, and shall not be appropriated for any other purposes than are declared by the Act, namely, the administration of justice in the courts of this Province. It is next provided that, the salaries of all the officers and employees in the offices of the courts of this Province, and the travelling expenses of the stenographic reporters, and all other contingencies of the courts shall be paid out of the said fund, from time to time as required, by cheque drawn upon the bank against the said fund, in the same manner as cheques drawn upon the Consolidated Revenue Fund. The 6th section of the Act provides that, "If the said fund shall not be sufficient to pay the salaries, charges and expenses herein charged upon it, the deficiency shall be made up out of the public moneys of the Province, and warrants may be drawn therefor in the manner provided by the Audit Act, 1884, from time to time as required." The Act contains similar provisions as to the "Building Fund Stamps," which are also to be carried to a separate account and when the fund is insufficient for the purposes to which it is to be applied, "the deficiency shall be made up out

of the public moneys of the Province, in the manner hereinbefore provided, and all deficiencies so made up shall be charged against the district for which it has been paid." Now, these provisions do not and cannot in any way alter the nature of the tax imposed. Instead of, as formerly, the proceeds of the sale of law stamps going in the first instance into and forming part of the general revenue of the Province, out of which revenue the salaries of officers and the other expenses of the courts were paid, the proceeds of the law stamps are first used for making these payments, and then the general revenue is drawn upon for any deficiency. All that the Act deals with is simply a matter of book keeping.

The use of the word "maintenance," in sub-section 14 of section 92, of the British North America Act cannot, as the learned judge seems to have thought it did, warrant the imposition of such stamps. That sub-section does authorize the legislature to make laws in relation to the maintenance of the Provincial courts but it must clearly mean laws for their maintenance in such manner and by the exercise of such powers as are within the scope of the authority of the Legislature. By section 91 sub-section 3, "The raising of money by any mode or system of taxation," is within the exclusive legislative authority of the Parliament of Canada. The power of the Provincial Legislatures as to taxation is defined by sub-section 2 of section 92; "Direct taxation within the Province in order to the raising of a revenue for provincial purposes." The only exception to this would seem to be in the case provided for by sub-section 9, which permits the making of laws as to "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes." It is the duty of the Provincial Legislature to provide for the administration of justice within the Province, so that is a provincial purpose for the raising a revenue for which direct taxation may be resorted to. If the legislature can by means of such an Act as the 49 Vic. c. 50, raise a revenue for the maintenance of the courts, then it may by indirect taxation raise a revenue for the maintenance of public and reformatory prisons and of hospitals, asylums, charities and eleemosynary institutions other than marine hospitals. Indeed, by the provisions of that Act as to Building Fund Stamps the attempt has been made to provide for the maintenance of prisons. In other words, if

this Act is one competent for the Provincial Legislature to pass, then the provisions of the British North America Act as to taxation by Provincial Legislatives amount to nothing, and they have unlimited powers of indirect taxation to raise a revenue for the maintenance of all provincial institutions and for carrying on the government of the province.

The appeal must be allowed, the order made in Chambers set aside and an order for security for costs granted. As the case has arisen largely out of the expression of opinion by the Privy Council in *Attorney General* v. *Reid*, that the question now before us is one yet to be considered, we give no costs of the appeal.

*Appeal allowed.*

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## TOUSSAINT v. THOMPSON.

(IN APPEAL.)

*Illegal contract.—Agreement between one creditor and the debtor to purchase debtor's stock from assignee.*

The declaration set out *ante* vol. 3, p. 504, upon appeal to the full court was held good upon demurrer.

*J. B. McArthur, Q.C.*, and *N. F. Hagel, Q.C.*, for the defendants.

The contract alleged is illegal, *Moon* v. *Clarke*, 30 U. C. C. P. 417; *Clark* v. *Ritchey*, 11 Gr. 499; *Higgins* v. *Pitt*, 4 Ex. 312; *Howden* v. *Haigh*, 11 Ad. & E. 1033; *Wetherill* v. *Jones*, 3 B. & Ad. 225; *Haddington* v. *Victoria Graving D. Co.*, 3 Q. B. D. 549; *Jackman* v. *Mitchell*, 13 Ves. 581; *McKewan* v. *Sanderson*, L. R. 15 Eq. 229; *Fuller* v. *Abrahams*, 3 Bro. & B. 116; *Dauglish* v. *Tennent*, L. R. 2 Q. B. 49; *Campion* v. *Brackenridge*, 28 Gr. 201.

*J. S. Ewart, Q.C.*, and *C. P. Wilson*, cited Ex. p. *Burrell*, 1 Ch. D. 537; *Bone* v. *Ekless*, 5 H. & N. 925.

An agreement between two not to bid against one another at auction is not illegal, *Carews Estate*, 26 Beav. 187; *Henry* v. *Burness*, 8 Gr. 345; *Ross* v. *Scott*, 22 Gr. 29.

*(25th June, 1887.)*

TAYLOR, J., delivered the judgment of the court. (*a*)

The declaration does not allege that the plaintiffs were insolvent, nor that there was any agreement to which the plaintiffs were parties, that the arrangement come to should be concealed from the other creditors. It is not necessarily to be inferred from the statements in the declaration that it was to be so, and there is no allegation that the creditors have suffered in any way. The utmost that is alleged as to inducing parties not to bid or offer for the stock, or in the way of a conspiracy to prevent bidding, is that when the plaintiffs were about to get a friend to bid for them the defendants agreed that if they would get their friend not to bid on their behalf, they would bid and buy for them. I cannot see that there was any thing illegal or against public policy in the agreement alleged in the declaration.

The rehearing should be dismissed with costs.

*Rehearing dismissed with costs.*

(*a*) Present: Wallbridge, C.J., Dubuc, Taylor, JJ.

## ACME SILVER COMPANY v. PERRET.

(IN APPEAL.)

*Replevin.—Property passing.—Sale or consignment.*

Defendant ordered certain goods through plaintiff's traveller. Plaintiffs on 12th December wrote defendant that they would consign only, and not sell. This letter was never received, but defendant did receive a telegram as follows:—"Can only fill order forty off hardware, forty and ten flatware, you paying express, answer if satisfactory." Defendant replied, "All right, send goods at once." On the 16th, the goods were shipped. On the same day plaintiffs wrote defendant that the goods were consigned only and not sold, but this letter was not mailed until the 18th, and was not received until after the goods had been received and accepted. The invoice was headed "consigned to" the defendant.

*Held*, (Taylor, J., dissenting). That there was a completed sale to the defendant and that the property in the goods had vested in him.

*H. E. Crawford*, for plaintiffs.

*J. J. Robertson*, for defendant.

(*25th June, 1887.*)

DUBUC, J.—The plaintiffs are manufacturers of silver plated ware in Toronto. A commercial traveller, named Dixon, came to Winnipeg, and took from the defendant an order for goods on the plaintiffs, to be paid by drafts at 4 and 5 months. Some letters and telegrams passed between plaintiffs and defendant and goods were shipped to the defendant, who received them and signed the drafts. This was in December, 1885. In March, 1886, the plaintiffs issued a writ of replevin against the defendant, and such of the goods as were then found in the possession of the defendant, were replevied. A portion of them had already been sold.

The plaintiffs contend that the goods were only consigned to the defendant to be sold on commission, while the defendant claims that they were sold. The real question to be determined is whether the goods were really sold or only consigned, and whether the property in them actually passed to the defendant.

It appears from the evidence that the first orders of the defendant sent by Dixon, were burned on the way, and the first intima-

ation of the matter which reached the plaintiffs, was a letter of Dixon, received on the 18th December, 1885. The plaintiffs then took information about defendant's financial standing, and a letter is produced bearing date the 12th December, written by Parker, president of the plaintiffs' Company, in which he says to the defendant that owing to his circumstances, the plaintiffs would only consign the goods to him to be paid for as sold, and to remain the property of the plaintiffs until paid for. That letter bearing date the 12th December, was never received by the defendant.

On the same day, 12th December, Dixon writes to the plaintiffs from Winnipeg, saying that, owing to the lateness of the season, the goods will have to be shipped by express, the difference between freight and express charges to be paid half by the plaintiffs and half by the defendant. That letter was received by the plaintiffs on the 16th December. On the same day, 16th December, the plaintiffs sent to defendant, the following telegram:—"Can only fill order forty off, hollowware forty and ten flatware, you paying express; answer if satisfactory." The defendant telegraphed in answer on same day as follows:—"All right; send goods at once." In a letter dated also the 16th December, the plaintiffs wrote to the defendant, "Your order was received at 11 a.m., we wired you at noon, your answer came at 3 p.m., your entire order left at 6 p.m. . . . . Owing to your difficulty with the Government, we were not aware how matters stood, so to guard against seizure or any other trouble we made the invoice, "on consignment," this is the same to you, but protects both you and ourselves against surprise; we will draw at the 4 and 5 months as agreed, so that really the consignment does not affect you; and if your trouble comes the wrong way, it will help you. We are disposed to treat you liberally and are, we think, under the circumstances acting in your interest." The whole of that letter is written on the first page of the sheet of paper, as also the signature. On the other side of the paper is found the following memorandum without signature: "Check off your invoice, take copy of it, and write across each sheet that you accept the goods on consignment, and return it to us signed with your firm name."

That letter, although dated the 16th December, and, as sworn to by Parker, written on that day, was not mailed until the 18th.

The defendant swears that he received it after the goods had reached him. He says that the goods came 24 or 48 hours before the invoices. He is not sure of the exact date when he received the goods, or the letter, or the invoices; but he appears to be pretty certain that the goods came before the letter and the invoices. The invoices have the usual heading, "Mr. Wm. Perrett, Winnipeg, Man., to The Acme Silver Co. Dr." But above the words "Mr. Wm. Perrett," are written the words "consigned to."

The defendant's contention is that he gave his orders which were sent by Dixon with a letter embodying the terms of the contract, received the telegram of the 16th, modifying some of the terms, replied at once accepting said modification, received the goods in due time, opened them and put them on his show case, had full possession of them on the 20th or 21st December, that the contract was then fully completed, and that he had not at the time, any intimation that the goods were shipped on consignment. He understood that he had purchased them and that a sale and no other transaction had taken place. The first intimation he had of the consignment was, when his wife observed the words "consigned to," written over his name on the invoices.

The plaintiff on his part contends that his letter of the 12th December, shewed his then intention of sending the goods on consignment; that he considered that the telegram of the defendant of the 16th was in answer to his letter of the 12th as well as to his telegram of same day, that the words "consigned to," written on the invoices and his letter of the 16th clearly indicated to the defendant the conditions and terms on which the goods were sent, and that the property of said goods never passed to the defendant.

There is, no doubt, on the law, that the question whether goods shipped vest in the consignee depends on the intention of the consignor, *Brandt* v. *Bowley*, 2 B. & A. 938; *Benjamin on Sale*, 260, 262, 302.

But in every contract the intention must be expressed to the other contracting party, or must be gathered from his own acts, as he makes them known to the other party or allows him to see them. It would not do for a man in contracting with another to do certain acts having a particular ordinary meaning, or indic-

ating a particular intention, and afterwards to claim that he had in his mind a different intention, or even that he expressed said different intention to another person, or entered it in his own book, or wrote it in a letter addressed to the other contracting party, without sending the letter, or otherwise making his intention known to the other party. That other party is not of course entitled to construe according to his own notions, the acts of the man who is dealing with him. But in the absence of any expressed intention, or of any intention in some manner known to him, he has the right to take the acts, doings and words of the party contracting with him as having the usual meaning they naturally have in ordinary circumstances.

What are the facts of this case? The plaintiffs have goods for sale and authorize Dixon to take orders for sale. The defendant wishes to buy goods and gives his orders to Dixon to purchase them from the plaintiffs. The plaintiffs know that the defendant intends to purchase and receive and entertain the orders sent. They claim to have expressed their intention in the letter of the 12th December; but it is not shown conclusively in the evidence that the letter was mailed, and the defendant swears positively that he did not receive it. The next thing is the letter of Dixon written on the 12th December, and received by the plaintiff on the 16th. From that letter speaking of the order of the defendant and of the terms as to express charges, the plaintiffs could understand only one thing, viz.:—that the orders were for the purchase of the goods, and not for the consignment of them. They at once telegraph to the defendant saying he must pay express charges, and asking if satisfactory. He answers: "All right, send goods at once." The goods are shipped, received by the defendant, opened and placed in his show case before he receives the invoices and the letter of the 16th of December. Whether it was one day or two days before, or on same day may not be so clearly established; but the defendant says positively that it was before, and that he had already the possession of the goods when he received the invoices and the letter. The invoices had on them the words "consigned to," but the defendant says he did not notice that until after he had checked a portion of them. There was also the mention made in the letter of the 16th December, that the goods were only consigned, and the request on the back of it that the defendant should signify his acceptance

of the bargain by writing it across the invoices. The defendant might, no doubt, have complied with the request. But if he had a complete contract of sale by delivery and acceptance before the intimation of the consignment and the request in question, he was not bound to forego his rights then acquired, and accept the new and different bargain thus proposed to or required of him.

It is intimated on the part of the defendant, that the letter of the plaintiffs dated the 12th December, may not have been sent at all, or may, as well as the letter dated the 16th December, have been written later than they appear to be, and that the real idea of only consigning the goods may have originated after the goods had been shipped. The fact that the first letter was never received, and that the second was mailed two days after it appears to have been written, may lead to that surmise. But in presence of the positive evidence to the contrary, that surmise cannot be accepted.

However, if as stated in the letter of the 16th December, the goods were shipped by express on that day, and the letter itself was not mailed until the 18th, it is natural to believe the sworn statement of the defendant, that the goods were received before the letter and before the invoices. This results from some negligence on the part of the plaintiffs, and if through that negligence and through the delay occasioned thereby, matters assumed such a shape that the defendant had the right to consider his purchase of the goods a complete contract, he cannot be deprived of that benefit.

It was argued by counsel for the plaintiffs that the letters and telegrams relied upon by the defendant to make his contract have no reference one to another. But there are more than letters and telegrams as to a contemplated contract. There are the orders for the purchase of goods, the selecting and shipping of said goods, the reception and acceptance of them by the purchaser, before any intimation received by him that they are shipped on some other agreement. And in the absence of any expressed indication to the defendant of the bargain or agreement under which the goods were shipped to him, was it not natural and proper for the defendant to consider that the goods were sold to him? In fact, on his having given the orders for the purchase of them; on the interviews had with Dixon; on the telegrams exchanged with the plaintiffs, and on his receiving the goods, he

could not construe the acts, things and communication connected with the transaction otherwise than a complete contract of sale.

In *Rohde* v. *Thwaites*, 6 B. & C. 388, Holroyd, J., said, "The selection of goods by one party and the adoption of that act by the other, connects that which before was a mere agreement to sell into an actual sale, and the property thereby passes."

I am of opinion that the defendant, when he had received the goods and was in possession of them, had the right to take the sale as completed, and to consider the said goods as his own. And it being so, he could disregard any terms attempted to be imposed on him by communication subsequently received.

He would have shown a better and perhaps a more diligent spirit if he had at once written to the plaintiffs that he did not intend to accept the terms contained in their letter mailed on the 18th December; but the plaintiffs have also shown a lack of diligence in remaining three months without writing, and ascertaining whether the terms on which they intended to ship the goods had been found agreeable to the defendant, or without taking proceedings at all in the matter.

I think the verdict for the plaintiff should be set aside and verdict entered for the defendant..

TAYLOR, J.—This is an action of replevin, tried by my brother Killam without a jury, in which he entered a verdict for the plaintiff company. The defendant has moved to enter a non-suit.

A man named Dixon, was in Manitoba, as traveller for another firm, but also taking orders for the plaintiff company. He obtained an order from the defendant, for the goods in question, and the defendant's contention is, that the order sent on by Dixon in a letter of 12th December, 1885, the telegram from Parker, the manager of the plaintiff company, to the defendant of 16th December, and the telegram from the defendant to the plaintiff company of same date, form a complete contract. He contends that the goods were sent in pursuance of that contract, and that when they were delivered to the carrier, the property in them passed to him, while the plaintiff company contends, that they were sent only on consignment for sale, the property in the good remaining in the plaintiff company.

On the 3rd of December, 1885, Dixon wrote to the plaintiff company, that he forgot to mention on his order sheet yesterday, that Perrett's bill was to be half four months and half five months. This was the first the plaintiff company knew of the order, as the order sent the day before had been lost by the burning of a mail car. On the 12th of December, Dixon wrote to the plaintiff company, "Enclosed you will find Wm. Perrett's order, also Winks & Co., both good men. The orders I sent you have been burned on the mail car Saturday last, but I did not hear of it till today, when I came back from the west. Now these orders are too late to come by freight, so they will have to come by express, but the parties will not pay full express charges. Perrett proposes to pay half of the difference between the freight rate and express charges, or cancel his order, and Winks & Co. say, if you do not pay the difference between freight and express, they will cancel their order. Now, if you think it would be worth your while to send these goods on these terms do so, and I will try and arrange to get our house to take a little less commission on these two orders." On the 16th December, the plaintiff company telegraphed to the defendant, "Can only fill order forty off hollowware, forty and ten flatware, you paying express, answer if satisfactory." On the same day, the defendant telegraphed to the plaintiff company, "All right, send goods at once." These are the several documents relied on as making out the contract.

It will be observed that the telegram from the plaintiff company on the 21st of December, merely says, "Can only fill order," &c., it does not say what order, or whose order. There is nothing in that document to connect it in any way with any particular order given by the defendant. So the telegram sent by the defendant to the plaintiff company, and relied on as a reply to the telegram sent him the same day, does not refer to any other document to which it is an answer, or in any way identify any such other document.

Now, while it is true that all the particulars to make out a complete contract need not be contained in one document, and the signed document may incorporate others by reference to them, yet the reference must appear from the writing itself, and not have to be made out by oral evidence, *Pollock on Contracts*, 175. Or, as it is expressed in *Blackburn on Contract of Sale*, (2nd ed.) 44, "If there be sufficient matter to make a memorandum written on separate pieces of paper, no one of which by

itself contains enough, the question arises, if the memorandum of which the contents of these several papers are evidence is all in writing or not; if the contents of the signed papers themselves make reference to the others so as to show by internal evidence, that the papers refer to each other, they may be all taken together as one memorandum in writing; but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing." This statement of the law was approved of by Williams, J., in *North Staffordshire Railway Co.* v. *Peek*, E. B. & E. at p. 1001. It is also, I think, quite borne out by the cases of *Ridgway* v. *Wharton*, 6 H. L. 238; and *O'Donohoe* v. *Stammers*, 11 Sup. C. R. 358.

But even if there should be a contract held to have been made out, were the goods sent in pursuance of that contract. I think not. The plaintiff company might in that case be liable to an action for breach of a contract to supply the goods, but that is not what we have now to deal with.

The question of whether the property in the goods was to pass or not, is clearly a question of intention. Now the goods were despatched on the 16th of December, and on the same day, a letter was written to the defendant, stating the terms upon which they were sent, namely, upon consignment for sale only. It is true, that owing to some delay, not very clearly accounted for, that letter did not reach the defendant until a day, or two days, after the goods came into his hands, but nevertheless, it stands there as evidence of the intention of the plaintiff company at the time the goods were sent off.

In my opinion, the verdict for the plaintiff company should stand and the defendant's motion be refused with costs.

WALLBRIDGE, C.J., concurred with DUBUC, J.

*Verdict for plaintiffs set aside and verdict entered for defendant.*

## *RE* ARDAGH.

*County Court.—Jurisdiction.—Defendant in Ceylon.—Substitutional service.—Title to land.*

The County Court has no jurisdiction to proceed against a defendant resident in the Island of Ceylon, either upon personal, or by directing substitutional, service.

In an action upon a covenant in a deed against encumbrances,

*Semble*, The title to land would be in question.

*C. H. Allen*, for plaintiff.

*W. E. Perdue*, for defendant.

(*31st October, 1887.*)

TAYLOR, J.—This is a summons calling upon W. D. Ardagh, Esq., Judge of the County Court of the County of Selkirk, and James Jackson, the plaintiff in a certain cause in that Court, against A. M. Vaughan Hughes, to show cause why a writ of prohibition should not issue prohibiting the said judge from further proceeding in the cause, upon the ground that the County Court has no jurisdiction to hear or determine the said cause, for the reason that the title to land is involved in the said suit, and that the cause of action sued upon did not arise within the jurisdiction of the said Court, and that the said Court has no jurisdiction over the said Hughes, and that the said Court has no means of causing a writ of summons to be served upon him in the Island of Ceylon.

It appears that the defendant Hughes has for some years lived and now lives in the Island of Ceylon, that some time ago he sold and conveyed to one Ronaldson a parcel of land in the City of Winnipeg, which Ronaldson has since sold and conveyed to Jackson the plaintiff. The deed to Ronaldson was executed in the Island of Ceylon, and contained the usual short form of covenant against incumbrances. Jackson alleges that he has had to pay $42.93 arrears of taxes, which accrued while Hughes was the owner of the land. The particulars of claim annexed to the

writ are, "$42.93, amount paid by plaintiff for use of defendant."

Messrs Bain, Perdue & Robinson, were the solicitors who acted for the defendant Hughes in preparing the deed to Ronaldson and the learned Judge made an order for substitutional service of the summons upon them and for posting up a copy in the office of the Clerk of the Court.

It appears to me that in the case of a defendant living as this defendant does, in the Island of Ceylon, the County Court has no jurisdiction to proceed in a suit against him. Process of the County Court cannot be served out of this Province, unless some Act provides for it being so served. The County Courts Act, 1887, has made provision for such service in section 53 sub-section 2, as follows, "Writs of summons may be served on a defendant or defendants in any province in the Dominion of Canada, or in the North-West Territories, or any other portion of the Dominion of Canada, or in the United States of America." Service in the Island of Ceylon is certainly not sanctioned by that section.

It is, however, urged that the 54th section covers such a case as the present and that the judge had power to order substitutional service. That section is as follows, "It shall be lawful for any judge upon any proper case made to him for that purpose, to order substitutional service, or to allow any service so already made, of a summons or other process in any action in the County Court." But plainly that section applies only in a case in which a summons may, under the Act, be served, but for some reason personal service cannot be effected. Then, the judge may order service to be made substitutionally, of this there can I think, be no doubt, and Mr. Sinclair, the learned Judge of the County Court of Wentworth, in Ontario, is of the same opinion. In his valuable work on *The Division Courts Act, 1880*, at p. 94, in a note to section 62, which treats of substitutional service, he says, "Substitutional service cannot be ordered in any case if it would have been impossible to have effected personal service. For instance, if a defendant should reside without the limits of the province, and could not be personally served there with a summons from a division court, (for the reason that our Acts do not allow such a summons to run beyond the limits of Ontario),

neither would substitutional service be ordered in such a case." In *Flower* v. *Allan*, 2 H. & C. at p. 694, Bramwell, B., used the expression, substituted service supposes the possibility of actual service.

I incline to think the title to land also comes in question, for if the plaintiff seeks to recover from the defendant under the covenant against incumbrances in the deed to Ronaldson, the learned Judge must determine the question of whether he is now the owner of the land and entitled to the benefit of that covenant. In *Trainor* v. *Holcombe*, 7 U. C. Q. B. 548, it was held that a county court could not entertain an action of trover for grain and turnips, because the judge could not dispose of the case without assuming a jurisdiction, which the Act did not give him, to determine who was the owner of the land. I, however, dispose of the question now before me, on the ground that the Court had no jurisdiction to serve process on the defendant in the Island of Ceylon, and could not supply that want of jurisdiction by ordering substitutional service.

I do not think that it can be seriously argued that the 47th section gives the Court power to serve process in Ceylon, the 53rd section having expressly provided for cases in which service can be effected abroad.

A writ of prohibition must issue prohibiting the judge from further proceeding in the suit.

## HARRIS v. RANKIN.

(In Equity.)

*Registered judgment.—Form of Certificate.—Homestead land prior to patent.*

Homesteads, although prior to patent and subsequent to recommendation exempt from seizure under *fi. fa.*, are subject to be charged by registered judgments.

A certificate of judgment in the form referred to in this case (4 Man. L. R. 115), but having the date correct and its amount such as would shew the judgment to be of record in the Queen's Bench is valid.

*L. G. McPhillips*, for plaintiff.

*W. H. Culver*, for Rowswell.

(*8th October, 1887.*)

Taylor, J.—The Master has by his report settled the priorities of the various parties in the following order,—First, the plaintiffs as to the costs of the suit.—Second, Rowswell, a party added in his office as to his judgment.—Third, the plaintiffs as to their judgment in the Court of Queen's Bench, and Fourth, the plaintiffs as to their County Court judgment.

From this report the plaintiffs have appealed claiming priority for their judgments over Rowswell.

They contend that the registered certificate of Rowswell's judgment, in virtue of which the Master has given him priority, being in exactly the same form as the registered certificate of the plaintiff's Queen's Bench judgment, which the Court on the rehearing of this case, 4 Man. L. R. at p. 120, held not sufficient to effect by its registration a charge upon the land, he could acquire no charge under it. The two cases are not, however, in my judgment, the same. The language used by my brother Killam when dealing with the certificate registered by the plaintiffs was, "The names of the parties and the amounts are identical, but there is a difference in the dates, the number of the roll is not given, and the certificate does not shew the judgment to have been recovered in the Court of Queen's Bench. It might, so far as appears, have been recovered in a County Court, the amount

being within the jurisdiction of the County Courts." It was the concurrence of all these defects which led the Court to hold the registration of that particular certificate, not sufficient to charge the land. Had a party interested desired to make a search as to the judgment, he could not have learned from the certificate, in which court to search, and even had he searched in the Court of Queen's Bench, he would have failed to find any judgment against the defendant, entered on the date given, there being no number of the roll and the date being given as of a wrong year. In the certificate now in question, the day, month and year are correctly given, and the amount of the judgment, which is stated, shows it could not have been recovered in any Court but the Court of Queen's Bench.

The plaintiffs further urged that Rowswell can only claim under his registered certificate what he could have held under a writ of *fi. fa.*, as The Administration of Justice Act, 1885, sec 111, as amended by 49 Vic. c. 35, s. 14, after providing for the registration of certificates of judgment, says, "No proceedings in equity shall be taken on any such certificate of judgment against any real estate exempt from seizure under writs of execution issued by any court in this Province." And by sub-section 2, certificates already registered are to have no greater force and effect than if registered under section 111, unless proceedings had been begun on them before the passing of the Act. It seems to me that real estate exempt from seizure in that section must mean such as is exempt from seizure under the Administration of Justice Act and does not refer to any of the provisions of the Dominion Lands Act. The full court on the rehearing of this case held at p. 128, that by the registration of the plaintiffs' County Court judgment the lands became subject to a charge in favour of the plaintiffs for the amount of that judgment. If so, then by the registration of Rowswell's judgment they became subject to a charge in his favour. The registration of his judgment being earlier in date than that of the plaintiffs, it became entitled to priority over theirs.

## *RE* LAVERANDRYE ELECTION.
## *RE* ST. ANDREWS ELECTION.

(IN APPEAL.)

*Election petition.—Preliminary objections.—Recognizance.—Justice of the peace.*

An objection that the recognizance for security for costs, was taken before a justice of the peace, is a preliminary objection.

Preliminary objections having been filed in proper time, a summons to consider them will not be discharged merely because it has not been taken out within the time limited by statute.

A justice of the peace has no power to take a recognizance in an election case. (*Re North Dufferin Election*, 4 Man. L. R. 280, followed).

A recognizance was taken before R. S., described as a justice of the peace. He was also a commissioner, but nothing appeared upon the recognizance to show that fact.

*Held*, That the recognizance was invalid.

These were appeals from the decision of Wallbridge, C.J., in *Re St. Andrews Election*, and Dubuc, J., in *Re Lavarandrye Election*, (in which he followed *Re St. Andrews Election*.)

TWO APPEALS FROM ORDERS, ALLOWING PRELIMINARY OBJECTIONS.

ARGUMENT IN LAVERANDRYE CASE.

*C. P. Wilson*, and *J. D. Cameron*, for appellant cited, *Reg.* v. *Irwin*, L. R. 9 Ir. Eq. 549; *Reg.* v. *Hurley*, 2 Dr. & War. 445; *Cheney* v. *Courtois*, 13 C. B. N. S. 634; *Exparte Johnson*, 26 Ch. D. 338, 350; *Reg.* v. *Hoodliss*, 45 U. C. Q. B. 558; *Burdekin* v. *Potter*, 6 M. & W. 13; *The People* v. *Van Renssellaer*, 6 Wend. 543.

*J. H. D. Munson*, for respondent.

Parties are not estopped from setting up want of authority, *Macfarlane* v. *Allan*, 6 U. C. C. P. 496.

Important that all should appear on the files of the court, *Nesbitt* v. *Cock*, 4 Ont. App. R. 200; *Rex* v. *Haley*, 1 C. & P. 258, shows affidavits in court are not treated as strictly as under Bills of Sale Act, see also *De Forrest* v. *Bunnell*, 15 U. C. Q. B.

370; *Moyer* v. *Davidson*, 7 U. C. C. P. 521; *Frost* v. *Hayward*, 10 M. & W. 673; *Howard* v. *Brown*, 4 Bing. 393; *Shard* v. *Perkins*, 1 Dowl. N. S. 306.

ARGUMENT IN ST. ANDREWS CASE.

*C. P. Wilson*, for appellant.

Petition may be pending before presentation. *Re Western Assurance Co.*, 6 Pr. R. 86. He further cited, *Schletter* v. *Cohen*, 7 M. & W. 388; *King* v. *Queen*, 14 Q. B. 31.

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

True test whether the recognizance can be recovered upon, *Nesbitt* v. *Cock*, 4 Ont. App. R. 200. Cannot go beyond the record for the capacity of the party before whom it was acknowledged, *Laverty* v. *Duffin*, Alcock & N. 295; *Bulteel* v. *Jarrold*, 8 Price 467; *Burns* v. *Grier*, 5 O. S. 500; *Rex.* v. *Gardner*, 2 Camp. 513.

(*25th June, 1887.*)

KILLAM, J.—These are two cases arising under the Manitoba Controverted Elections Act.

Petitions were filed contesting the elections of members of the House of Assembly for the two electoral divisions of Laverandrye and St. Andrews. Each petition was accompanied by an instrument in the form of a recognizance purporting to have been acknowledged before Andrew Strang, a Justice of the peace for Manitoba. Mr. Strang was described both in the body and in the caption of the instrument in each case as a justice of the peace, but nothing appeared in any part of either instrument to show that he occupied any other official position.

Preliminary objections were filed among which were objections to the recognizances as being invalid.

In the *St. Andrews Case*, argument upon the objections was had before the learned Chief Justice, who considered the recognizance invalid, as not having been acknowledged before an officer having authority to take recognizances in such cases, and allowed the objection.

Subsequently, the preliminary objections in the *Laverandrye Case*, were brought before my brother Dubuc who followed and adopted the decision of the Chief Justice and allowed a similar objection.

During this present term these decisions have been brought before us for review, arguments being had in each case separately before the court in the absence of the judge who pronounced the decision. The judgment which I shall read is the judgment in each case of the members constituting the court in such case, as for convenience only one statement of the reasons for the decisions has been prepared.

The petitioners have not attempted to uphold the authority of a justice of the peace to take such a recognizance. The decision of my brother Taylor in the *North Dufferin Case*, 4 Man. L.R. 280, appears to have been accepted as conclusive upon the point. In both cases, however, evidence was offered to show that Mr. Strang was a commissioner for taking affidavits, and although evidence was offered to dispute this, it was found as a fact by the learned Chief Justice, that he was a commissioner. I have no doubt whatever, of the correctness of such a finding in both cases.

I regret, however, that, notwithstanding the very able arguments that have been addressed to us in both cases by Mr. Wilson, on behalf of the petitioners, that I am unable to conclude that the petitioners can avail themselves of this finding.

It is urged that, if a commissioner has authority to take these recognizances, the acknowledgment before him was sufficient to bind the sureties and that this is all that is necessary to constitute a valid recognizance, however the parties making the acknowledgment and the party taking it may have supposed and understood the latter to be acting. For myself, though I do not know that in this I represent the opinion of all the members of the court, I deem it unimportant that the party before whom the sureties made the acknowledgment assumed to act in a capacity which gave him no authority to take the recognizance, if in fact in another capacity he had the requisite authority. I am of the opinion that though an instrument were made out describing him in the wrong capacity, a subsequent one could have been made out in proper form and signed, without a fresh acknowledgment, and that this if so made out in time to be filed with the petition would have been sufficient. We are all, however, of opinion that the recognizance filed should he authenticated upon its face by the signature of an officer having authority to take such an acknowledgment, and showing his authority.

A recognizance is "an obligation of record, which a man enters into before some court of record or magistrate duly authorized with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt or the like. . . . . This being either certified to or taken by the officer of some court is witnessed only by the record of that court, and not by the party's seal," 2 Bl. Com. 341.

It has not its full effect as an obligation of record until it is enrolled, having before that the force of a bond only, *Bothomly* v. *Lord Fairfax*, 1 P. W. 340, 2 Vern. 751; *Glynn* v. *Thorpe*, 1 B. & Ald. 153; *Hall* v. *Winchfield*, Hob. 195.

The Controverted Elections Act, C. S. M. c. 4, ss. 23, 24, and Election Rule No. 7, have apparently substituted for enrolment the filing of the recognizance with the petition, and by the 125th and 126th sections of that Act the filing of a copy of the recognizance with a statement of costs and the master's allocatur is made equivalent to the signing of a judgment, upon which execution may be issued against the sureties.

It is evident then that there must be something more than the acknowledgement before the officer taking the recognizance. He must give an authentic certificate of the acknowledgment which can be entered of record and which will be available to those who may be awarded costs. This is also borne out by the 35th section of the statute and Rule No. 11, which require that a copy of the recognizance or bond be served with the copy of the petition, and by Election Rule No. 8. which requires the sureties to sign the recognizance.

In *MacFarlane* v. *Allan*, 6 U. C. C. P. 496, it is clearly shown that the enrolment of the recognizance of record does not estop the cognizors from showing that it was entered into before one having no authority to take the acknowledgment and that it therefore, should not have been entered of record.

And this is really all that is shown by the cases of *Reg.* v. *Irwin*, 9 Ir. Eq. 549, and *Reg* v. *Hurley*, 2 Dr. & War. 445, so strongly relied on by Mr. Wilson. In these two cases the full authority of the officers did appear in the captions, though not in the body of the recognizances, and they had therefore been certified in an authentic manner to the officers who had entered them of record.

In both the Canadian and the Irish cases referred to, the authority of the officer to take the recognizances and the propriety of

their entry of record were disputed in proceedings by *sci. fa.* to enforce them. Under preliminary objections such as those now before the court, the respondent can take advantage even of irregularities when, perhaps, in proceedings by *sci. fa.* the parties proceeded against would be limited to showing the instruments to be nullities.

It is true that in *Burns Justice*, 25th Ed. Vol. 5, p. 7, it is said, "And when it, '(the recognizance)' is made up, if the justice shall only subscribe his name without his seal to it this is well enough, and that it may be in either of these sorts, 'Acknowledged before me' J. P., or only to subscribe his name thus, J. P."

This, however, is evidently said with reference to recognizances showing in the body that they are taken before the party subscribing as a justice of the peace and within the limits of his jurisdiction. All the precedents in *Burns*, in *Gude's Crown Practice* and other books of forms show this. It is a universal rule that the jurisdiction of justices of the peace and of all inferior courts must appear upon the face of their proceedings. Where it appears on the face of the proceedings that the inferior court has jurisdiction it will be intended that the proceedings are regular, but unless it so appears—that is, if it appear affirmatively that the inferior court has no jurisdiction or if it be left in doubt whether it has jurisdiction or not—no such intendment will be made, *Dempster* v. *Purnell*, 4 Sc. N. R. 39; *Moravia* v. *Sloper*, Willes, 30; *Titley* v. *Foxall*, Willes, 688; *Barnes* v. *Keane*, 15 Q. B. 75; *Reg.* v. *All Saints*, 7 B. & C. 785.

Upon this principle it has been held in a number of cases in the United States, that a recognizance taken before a justice of the peace must show the grounds on which it is taken so that it may appear that he had jurisdiction to receive it. *The State* v. *Smith*, 2 Me. 62; *Id.* v. *Magrath*, 31 Me. 469; *Id.* v. *Wormell*, 33 Me. 200; *Id.* v. *Hartwell*, 35 Me. 129; *Bridge* v. *Ford*, 4 Mass. 641; *Commonwealth* v. *Downey*, 9 Mass. 521; *Green* v. *Haskell*, 24 Me. 180.

The rule in Maine and Massachusetts is very strict as to the facts to be recited in the recognizance to show jurisdiction to take it. It was as strict at first in New York, *The People* v. *Koeber*, 7 Hill 39; *The People* v. *Young*, Id. 44.

But later cases in that State relaxed it a little, holding that it was sufficient that the recognizance be for the doing of an act for which a recognizance may properly be taken, and that the justice should have authority in law to act, in cases of that general description, though all the facts necessary to show his jurisdiction in the particular case need not be recited, *The People* v. *Millis*, 5 Barb. 511; *Gildersleeve* v. *The People*, 10 Barb. 35; *The People* v. *Kane*, 4 Den. 530. In the later of these cases, however, Beardsley, J., in a very able and learned judgment contended for the earlier and stricter rule. It is perfectly clear that in all these States the recognizance must show upon its face that it is taken before an officer having jurisdiction in a case of the description in which it is taken.

In *Libby* v. *Main*, 11 Me. 344, in the judgment of the court, it is said, "In bail bonds it must clearly appear that the sheriff had authority to act in the premises and nothing further is required in a recognizance. In either case sufficient must be set forth from which it may appear that the individual taking the bond or recognizance acted in an official character and that the act was within his official cognizance."

But, as this alleged recognizance is claimed to have been entered into before an officer of this court, it may, perhaps, be more satisfactory to examine what evidence of authenticity is required in the certificate of similar officers in other matters. In *Simmons Bail*, 1 Ch. 9, application was made by the defendant for time to rectify a mistake in the bail piece, as it did not appear that the person before whom the bail was taken was a commissioner, time was granted, both counsel and the court evidently thinking the objection important.

In *Shaw* v. *Perkin*, 1 Dowl. N. S. 306, an affidavit intituled in the Queen's Bench and appearing by the jurat to have been sworn before a commissioner of the Court of Exchequer was filed in the Queen's Bench on a motion to set aside a *fi. fa.* as having been issued against good faith and in breach of an undertaking. The affidavit was held insufficient and the application on that account was refused. Patterson, J., there said, "I shall make no presumption at all; as it appears that it is an affidavit intituled in the Court of Queen's Bench and sworn before a commissioner of the Court of Exchequer, that is clearly irregular."

In *Frost* v. *Hayward*, 10 M. & W. 673, an interpleader rule having been obtained upon an affidavit which, in the jurat, was stated to have been sworn before J.L. a master extraordinary in the High Court of Chancery, though, as was allowed by counsel opposing the rule, J. L. was a commissioner for taking affidavits in the Court of Exchequer, was discharged as the affidavit was considered bad. Lord Abinger, C.B., there said, "I certainly should be much disposed to disallow this objection if I could, but I think we cannot take judicial notice of the names of our officers."

In *Doe d. Hill* v. *Hill*, cited in 10 M. & W. 674, n, the Court of Queen's Bench discharged a rule upon a similar objection.

In *Rex.* v. *Hare*, 13 East. 189, on an affidavit for a mandamus, an affidavit was not entitled in any court, and the jurat was signed C. H., a commissioner, &c., without stating of what court he was commissioner, and this was held insufficient and the application was refused.

In *Howard* v. *Brown*, 4 Bing. 393, a motion to cancel a bail bond was allowed, on the ground that the affidavit on which the defendent was held to bail did not state the person before whom it was sworn to be a commissioner.

There are some cases which appear to be opposed to these. In *Burdekin* v. *Potter*, 9 M. & W. 13, an affidavit was intituled in the proper court and purported to be sworn before A. B., "a commissioner, &c.," having been filed in proof of the execution of a warrant of attorney, on a motion made to set aside the judgment signed upon the warrant of attorney, it was held sufficient. Lord Abinger, C.B., expressing a doubt whether anything at all need to be added to the name, and saying, "If you go upon any principle it would seem that if the party be named at all, the court may examine to see whether he is one of its commissioners." Parke, B., however, distinguished, *Howard* v. *Brown*, by pointing out that there the party was not described as a commissioner, and it appears that in the latter case of *Frost* v. *Hayward*, when Lord Abinger had to meet the very case of its not appearing that the officer was a commissioner of the Court of Exchequer, he changed his opinion that he could examine to see whether he was one of its commissioners, and his very expression of reluct-

ance in being obliged to hold the affidavit defective, gives additional weight to his later decision.

In *Kennet & Avon Coal Co.* v. *Jones*, 7 T. R. 451, and *Munden* v. *The Duke of Brunswick*, 4 C. B. 321, it was held sufficient that "a commissioner, &c," or "a com'r, &c," be added after the name of the commissioner, and this is now with us and in the Province of Ontario, a common practice. These cases then support the decision in *Burdekin* v. *Potter*, but are not necessarily inconsistent with *Shaw* v. *Perkin*; *Frost* v. *Hayward*; *Doe d. Hill* v. *Hill*; and *Howard* v. *Brown*.

In *Munden* v. *The Duke of Brunswick*, Creswell, C.J., said, "Expand the '&c,' and then it reads 'a com'r for taking affidavits in the Court of Common Pleas,' which is quite unambiguous." And this is evidently the principle upon which the practice must be supported, the expression "a commissioner &c," or "a com'r &c," having come to have a recognized meaning as clear as if the full title were written out."

There is, however, a clear preponderance of authority that where no official title is given, or where one is given which does not authorize the act, the affidavit will not be received in proceedings in the courts.

Great reliance was, however, placed by the petitioners' counsel upon certain cases arising under the Bills of Sale Acts. In *Cheney* v. *Courtois*, 13 C. B. N. S. 634, an affidavit filed with a bill of sale was intituled in the Queen's Bench, and the party taking it was described at the foot as "a commissioner for taking affidavits in the Exchequer of Pleas at Westminister." This was held sufficient.

In *Exparte Johnson*, 26 Ch. D. 338, the commissioner merely signed his name to the jurat of an affidavit filed with a bill of sale, without adding any official name.

*De Forrest* v *Bunnell*, 15 U. C. Q. B. 370, was a case arising under the Upper Canada Bills of Sale Act, in which certain formalities required by rules of court in affidavits were not complied with in the affidavits accompanying the bill of sale.

In all of these cases the ground of decision was that a party should not be deprived of his property, if in fact the affidavit had been duly taken, on any such technical objection, and all

of them distinctly distinguished decisions upon affidavits made to be used in proceedings in court.

Here we are examining a recognizance filed in a proceeding in court for the purpose of being acted upon if occasion require.

It would seem that we should require it to contain as full evidence of its authenticity, as in case of an affidavit put forward for use on any motion or proceeding.

Upon the argument that the form given by the rules does not indicate that the official position shall appear, it need only be pointed out that the form does indicate that a description is to be given, which, in accordance with all precedents, would naturally be understood to be a description by reference to the capacity in which the party taking the acknowledgment acts in doing so. Rule No. 8, specifies the nature of the description to be given of the sureties, evidently leaving the nature of the description of the officer taking the acknowledgment to be given in accordance with the practice usually followed.

And in these cases the parties have themselves clearly so understood the rule, for we can hardly suppose that Mr. Strang would have been so carefully described as a justice of the peace for Manitoba, not only in the body but also in the caption, if it had not been assumed that the office authorized the act.

We must then hold the recognizances invalid, without entering upon the consideration of the authority of a commissioner to take them.

In the *St. Andrews Case*, however, it is claimed that the summons to consider the objections was taken out too late.

It is a little doubtful whether by the words "against any further proceedings thereon," the statute means "against taking any further proceedings on the petition," or "against further proceedings than those specified which have been taken." But, in either case it appears clear that the objection I have been considering is included in the 39th section of the statute as well as in Rule 14. It is a proper objection to the taking of any further proceeding thereafter, that the recognizance is invalid. The filing of the recognizance is a further proceeding than the drawing and filing of the petition, and it is a valid objection to that proceeding, that the recognizance filed is not in proper form.

It is to be noticed, however, that all the statute requires is the production of the objections in writing and the filing of the copy for the respondent. How, or to whom the original is to be produced the statute does not provide. And these sections do not specify clearly the practice to be followed in disposing of the objections, but only that it is to be done "in a summary manner." Whether upon notice or upon summons, upon oral evidence or affidavits, does not there appear.

These are matters of detail which can plainly be provided for by rules under the 12th section of the Act.

Rule No. 14 provides, as a method of production, the filing of the objections in the office of the prothonotary, and as the method of bringing on the objections for consideration that it is to be upon a summons. The rule might have provided that they should be produced to a judge on motion for a summons, instead of to, or at the office of the prothonotary, which would have involved an application for the summons within the five days given by the statute for production. It might have provided that the production be to a judge upon notice of motion for allowance of the objections, when the motion would require to be brought on for hearing within the five days. Neither of these has been done, but the production and the application to the judge are made separate matters, while an additional period of five days is given by the rules for taking out the summons. The objection now made is that the summons to consider this preliminary objection was taken out after the expiration of the five days. It appears that one summons was taken out and discharged, on account of some informality, but without the preliminary objections being either allowed or overruled, and that the learned Chief Justice then granted a fresh summons upon new material. The preliminary objections are, then, still undisposed of except by the order now appealed from. As it appears to me that the time for hearing the objections might have been even more closely limited by the rules than has been attempted by this provision as to taking out a summons, I think that there is very good ground for the argument, that a rule might have been made for overruling or striking out preliminary objections if a summons should not be taken out within the five days. One object plainly aimed at by the Act is the speedy disposition of the petition, and this could well be facilitated by allowing the respondent five days to

take out a summons for the consideration of preliminary objections, imposing as a penalty for his failing in this, the overruling of the objections without further consideration. There could be no injustice in this, while the petitioner might well be placed in a position, if that period expired without the summons being taken out, of having the objections disposed of without the further delay incident to the hearing of evidence or hearing of an argument. An objection in which the respondent has not sufficient faith to bring it up in this way within the time mentioned, might well be taken as of no importance.

We are all, however, of opinion that the effect of the present rule is not that for which the petitioner contends. The objections have been produced and when the summons in question was taken out, they were undisposed of. The effect of the statutes and of the rules is that, when preliminary objections are put in, an answer to the petition cannot be filed until the preliminary objections are disposed of, and that the only modes of getting the petition at issue and proceedings taken to bring it to trial are by taking issue upon the answer or by default of the respondent in answering for five days after the preliminary objections are overruled. So long, then, as these objections are undisposed of, the proceedings upon the petition are effectually blocked. Thus, in *The Bothwell Case*, 9 Ont. Pr. R. 485, it was held that a party could not be examined while these objections were undisposed of, though they had been filed after the expiration of five days from the service of the petition.

It is sufficient for our present purpose to hold, as is evidently the proper view, that the rule does not have the effect of disposing of the objections by the mere delay in taking out a summons. Whether the effect is that the petitioner would have been entitled to have the objections struck out for the default alone upon application for the purpose, or whether the provision of five days is a mere directory provision to which no means of giving effect is provided, we need not now determine.

Both appeals must be dismissed with costs and the orders allowing preliminary objections affirmed.

*Appeals dismissed with costs.*

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CONSTITUTIONAL LAW. STAMPS.—The imposition of stamps upon law proceedings is *ultra vires*. The statute 49 Vic. c. 50, makes no difference in this respect. (Decision of Dubuc, J., 3 Man. L. R. 562, overruled). Dulmage v. Douglas . . . . . 495

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———*Hiring.—Power of directors.—Contract not under seal.*—The defendants, a company chartered under the Joint Stock Companies Act Con. Stat. Man. c. 9, div. 7, through its officers who usually made such contracts, hired by parol the plaintiff to manage their elevator and business at M. *Held*, The contract need not have been under seal—section 269 of the statute—if made by an officer, in general accordance with his powers "under the by-laws or otherwise." *Per Taylor, J.* The plaintiff having been hired by those officials who hired all the persons holding positions similar to that of the plaintiff, there was evidence to go to the jury as to whether the contract had not been made "by an agent, officer or servant of the company in accordance with his powers as such officer, under the by-laws of the company, or otherwise." *Per Killam, J.* From the mere fact of acquiescence in the exercise of such powers (by the official) or from the acquiescence of the company in the plaintiff's appointment, it may be inferred that all formalities necessary to give the official authority to make the appointment had been duly observed. 2. Acquiescence of the directors in the act of an official in dismissing the plaintiff coupled with the substitution of another employee also acquiesced in by the directors, which official had authority to hire the plaintiff, is evidence of authority to dismiss. By section 47, "The directors shall from time to time, elect from among themselves a president of the company; and shall also appoint and may remove at pleasure all other officers thereof." *Held*, 1. That this clause did not apply to the plaintiff. 2. Such power of removal must be strictly pursued, and only at a regular meeting of the directors. *Per Killam, J.* A dismissal in such manner must be pleaded. The proper question to be left to the jury upon a justification of the dismissal for drunkenness would be: "Was the plaintiff so conducting himself that it would have been injurious to the interest of the defendants to have kept him; did he act in a manner incompatible with the due and faithful discharge of his duty; did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master." McEdwards v. The Ogilvie Milling Co. . . . . 1

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need not be sanctioned by by-law. An application for 50 shares was made by H. before incorporation. After incorporation he was entered in the books of the company as the holder of 50 shares, acted as a director for two years (which he could not have done unless he held at least five shares), and paid calls (upon what number of shares did not clearly appear). *Held*, That these circumstances were evidence of the existence of a contract to take shares, and that H was not entitled to have his name struck from the list of contributories. *Re* Bishop Engraving and Printing Co.—*Ex Parte* Howard . . . . . 429

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CRIMINAL LAW.—*Commitment.—Gaming house.—Poker.—Playing Cards.—Held,* 1. That keeping a common gaming house is an indictable offence at common law. 2. That the cards, &c., referred to in section 3 of 38 Vic. c. 41, must be such as are ordinarily used in playing an unlawful game. 3. That a commitment for unlawfully keeping a common gaming house sufficiently describes an offence, so that the party committed cannot be discharged on the ground of there being any defect on the face of the commitment in merely thus describing the offence. 4. That "poker" is not in itself an unlawful game. 5. That a commitment cannot be quashed where the magistrate had such evidence before him as would warrant him in committing. Reg. v. Shaw. . . . . 404

———*Conviction under Indian Act of 1880.—Defective warrant of Commitment.*—A warrant of commitment must direct the goaler to receive and retain the prisoner otherwise it will be quashed. Reg. v. Barnes . . . . . 448

———*Keeping liquor without a licence.—Information.—Conviction.—Penalty.*—Magistrates have jurisdiction under "The Manitoba Liquor License Act, 1886," upon a charge, under section 73, of keeping liquor for sale without a license. The information upon such a charge did not state that the liquor was intoxicating liquor, *Held,* That such an allegation was not necessary. An information was laid in proper form. Upon this a search warrant was issued. Afterwards another information was laid which omitted a necessary allegation. This allegation was, however, in the summons served upon the defendant. *Held,* That the second information might be supplemented by the first; and in any case the information would be amended and not quashed. A charge that the defendant kept liquor for the purpose of selling, or for the purpose of trading, or for the purpose of bartering, is only one offence. Upon such a charge it is sufficient to allege that the offence was committed at a certain town without specifying the house or building. Upon conviction for such an offence magistrates have power to award imprisonment for four months in default of payment of the fine imposed. Evidence discussed as to whether the liquor was intoxicating: Reg. v. Coulter . . . . . 309

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COUNTY COURT.— *Counterclaim.—Jurisdiction under power to administer according to equity and good conscience.*—Action upon a note given for a binding machine. Counterclaim for nonperformance of an agreement to furnish repairs. By the written contract provision was made for the case of defective portions of the machine. The evidence did not support a case under the written contract, and the agent who was alleged to have made the verbal agreement had no power to do so. *Held*, 1. That under Con. Stat. Man. c. 34, s. 41, authorizing "in any case not expressly provided for," the application of "the law and the general principles of procedure or practice in the Court of Queen's Bench," the County Court had jurisdiction to consider a counterclaim sounding in damages. 2. That the defendant having no right acknowledged by the principles of either law or equity, the judge of the County Court had no power to award him damages under the Act, authorizing him "to make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience." An appellant from the County Court succeeded in his appeal, but the principle points raised and argued by his counsel were decided against him. *Held*, That there should be no costs of the appeal, or of the application to the County Judge, after the trial, to reverse his judgment. O'Donohue v. Fraser . . . . . 469

———*Foreign defendant.—Title to land in question.*—The County Court has no jurisdiction to proceed against a defendant resident in the Island of Ceylon, either upon personal, or by directing substitutional service. In an action upon a covenant in a deed against encumbrances, *Semble*, The title to land would be in question. Re Ardagh. . . . . 509

DAMAGES. *See* Bank.

DEDICATION.—Filing in the registry office a plan of property shewing a street or lane does not, in the absence of user by the public, amount to a dedication. Wright v. Winnipeg . . . . . 46

DEMAND. *See* Taxes.

DISCLAIMER.—*Costs.*—To a foreclosure bill alleging that the defendant C. was the assignee of the equity of redemption, and was entitled to redeem; the defendant C. filed a disclaimer and asked to be dismissed with costs. *Held*, Upon a hearing on bill and answer the defendant C. was ordered to pay the costs occasioned by the disclaimer. Wilton v. Wilton . . . . . 227

———*Costs.*—One of two defendants in a mortgage case who was entitled to a one-half-interest in the equity of redemption, filed a disclaimer as follows;—"After the service of the bill of complaint herein upon me, I offered to quit claim any right or interest that I had in the matters in question in this suit to the plaintiff, and the plaintiff refused to accept said offer, and I disclaim all right, title and interest, legal and equitable, in any of the said lands and premises, and I claim to be hence

DISCLAIMER—*Continued.* PAGE

dismissed with my costs of suit incurred subsequently to said offer." *Held*, Upon a hearing upon bill and answer, that the disclaiming defendant was not entitled to costs. The Manitoba Investment Association v. Moore . . . . . 41

DISMISSAL. *See* Corporation. Hiring.

DRUNKENNESS. *See* Corporation. Hiring.

ELECTIONS.—*Abandoned petition.—Costs.—Service of preliminary objections.*—A petition was filed, styled in the Electoral Division of *Kildonan*. After a preliminary objection had been taken on the ground that the name of the constituency was Kildonan and St. Paul's, a new petition was served, together with a notice of adandonment of the former petition. This notice was styled in the Electoral Division of Kildonan and St. Paul's. Upon a motion by the respondent that the first petition should be discontinued and that the petitioner should pay the costs incurred. *Held*, 1. That such an application could be entertained. 2. That, under the circumstances, the application could not be defeated because the summons was styled in the Electoral Division of Kildonan and St. Paul's. 3. Although the statute requires that two copies of the preliminary objections are to be left with the prothonotary, one for file and one for the petitioner, yet if one copy be filed, and one be served upon the petitioner as provided by Rule 14, the petitioner cannot object. 4. Proceedings upon the second petition not stayed until payment of the costs of the first. Re Kildonan & St. Paul's Election . . . . . 252

———*Election petition.—True copy.*—The following variances between the original petition and the copy filed; "person" instead of "persons"; "places" instead of "place"; "John A. McDonell" instead of "John A. McDonald"; "cause" instead of "caused." *Held*, Immaterial. The condition of the recognizance was as follows:—"The condition of this recognizance is that John Hall shall *and* well and truly pay," *Held*, Sufficient. In the certificate at the end of the recognizance one of the sureties was referred to as "the above named W. A. Baldwin." It should have been "William Augustus Baldwin." *Held*, Sufficient. Re Lorne Election . . . . . 275

———*Justification by surety.—Cross-examination.—Refusing to answer questions.*—Upon the examination as to his solvency, of a surety upon a bond for security for costs; 1. The surety cannot be compelled to produce his title deeds. 2. The examining party has no right to enquire as to all the property which the surety may own. The surety may say "I own a certain property and I claim that to be of sufficient value to qualify me to be a surety." 3. The surety will not be committed because he gives unsatisfactory answers, and that he cannot remember the description of his lands. This is not a refusal to answer. Re Assiniboia Election . . . . . 346

ELECTIONS.—*Continued.*

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——— *Petition without prayer.—Amendment.*—An election petition set forth certain corrupt practices and concluded as follows:—"Your petitioner alleges that by reason of one or more of such acts or practices the election of said C. E. H. was void." *Held*, 1. That these words did not constitute a prayer for relief. 2. That there could be no valid petition without a prayer. 3. That the petition could not be amended by adding a prayer; and it was dismissed without costs. Re Shoal Lake Election . . . . . 270

——— *Preliminary objections.—Justice of the peace.*—An objection that the recognizance for security for costs was taken before a justice of the peace is a preliminary objection. Preliminary objections having been filed in proper time, a summons to consider them will not be discharged merely because it has not been taken out within the time limited by statute. A justice of the peace has no power to take a recognizance in an election case. (Re North Dufferin Election, 4 Man. L. R. 280, followed.) A recognizance was taken before R. S., described as a justice of the peace. He was also a commissioner but nothing appeared upon the recognizance to show that fact. *Held*, That the recognizance was invalid. Re Laverandrye Election—Re St. Andrews Election. . 514

——— *Preliminary objections.—Recognizance.—Justice of the Peace.—Amendment of security.*—Justices of the Peace have no authority or jurisdiction save that of the old "Conservators of the Peace," and such as have been given to them by statute. They have no power to take a recognizance upon an election petition. A person voluntarily entering into a recognizance is not estopped from denying its validity. The practice in England with reference to security for costs has not been introduced into Manitoba. If the security upon an election petition be imperfect there is no power to permit an amendment of it or the substitution of other security. Upon a preliminary objection to a petition upon the ground that the recognizance was taken before a justice of the peace, the recognizance having been held bad the petition was dismissed with costs. Re North Dufferin Election . . . . . 280

——— *Preliminary objections.—Status of petitioner.—Notice in Gazette.—"Immediately."—Identity of petitioner.—Vagueness.—Security.—Bond.—Affidavits of justification.*—The status of the petitioner may be enquired into upon a preliminary objection to the petition. The absence of notice of presentation of the petition in the *Gazette* is not a ground for preliminary objection. Meaning of the word "immediately." The absence of the words "Whose name is subscribed," after the name of the petitioner is not a sufficient ground of objection to a petition. A petition is not insufficient for vagueness or uncertainty because it alleges a number of wrongful acts in the alternative. A petition is sufficient, if it allege merely that the respondent was guilty of a corrupt practice within the meaning of section 198 of The Election Act of Manitoba 1886. Security for costs may be given

ELECTIONS.—*Continued.* PAGE

by bond to the respondent. A bond was given to secure certain named costs "and also all *costs* which on the final disposal of the petition the court shall award to be payable as provided by the Manitoba Act." The statute required security for "any and all other *expenses* and *charges*." *Held*, That the bond was sufficient, affidavits of justification need not accompany the bond. But if the sufficiency of the security be attacked the absence of such affidavits may be considered. Re Cartier Election . . . . . 317

——*Recognizance taken before a justice of the peace.—Bond without seals.—Amendment.*—An instrument in the form of a recognizance not under seal, taken before a justice of the peace, was filed as security for costs, *Held*, 1. Irregular as a recognizance, (*Re North Dufferin Election*, 4 Man. L. R. 280 followed); and invalid as a bond for want of seals. 2. That the court had no power to permit the substitution of other security. Re Emerson Election . . . . . 287

——*Recount of ballots.—Mandamus to County Judge.—Ballots not objected to before Deputy Returning Officers.—Held*, 1. That a mandamus will not lie to a county judge to compel him to consider the validity of ballot papers. *Re Centre Wellington Election*, 44 U. C. Q. B. 132, followed. *Per* WALLBRIDGE, C.J. Upon a recount should the county judge consider the validity of ballot papers not objected to before the deputy returning officers, *quære*. *Per* KILLAM, J. 1. The return of a returning officer is not void when based upon a certificate of the county judge, in proper form, merely because the county judge has not legally or fully discharged his duties upon a recount of ballots. 2. There being another remedy, viz., an application to the House, a mandamus should not be granted. Regina v. Prudhomme—Re North Dufferin Election . . . . . 259

——*Sureties.*—The expression in the Controverted Elections Act "three sufficient sureties," means three sureties *each* of whom is sufficient for the whole amount. Re Assiniboia Election . . . . . 328

——*See* Estoppel.

ESTOPPEL.—*Business name —Change of upon change of ownership.—Notice to creditors.*—The defendant carried on business under the style of Rowe & Co. She sold to her husband (stipulating that the name of the firm should be changed) who continued the business under the style of A. Rowe & Co. Before, as well as after, the sale, the husband was the actual manager of the business, and beyond the change of name, there was nothing to indicate a change of ownership. The defendant had dealt with the plaintiffs and her husband continued the account, having agreed to pay the liabilities of the old business. In an action for the price of goods delivered by the plaintiffs upon the orders of A. Rowe & Co. *Held*, That the defendant was not liable. The defendant's husband, after continuing the business for some time, sold it to The W. T. P. & P. Co., and this company agreed to assume and

ESTOPPEL.—*Continued.* PAGE

pay the liabilities of Rowe & Co. Pending this action the plaintiffs recovered judgment against the company for the amount here sued for. *Held*, That this judgment was evidence of the election by the plaintiffs to look to the company for the old debt. Richard v. Rowe . . . . 112

ESTOPPEL BY CONDUCT. *See* Homestead right.

———*See* Sale of goods.

——— —BY FILING CLAIM. *See* Corporation.

———BY PLEADING. *See* Corporation. Hiring.

EVIDENCE. REFUSAL TO ANSWER. *See* Injunction.

———*Privileged communications between solicitor and client.*—Certain questions put to the defendant as to communications between himself and his attorneys with a view to showing his responsibility for their action in issuing and enforcing a *fi. fa.* goods, *Held*, To be privileged. Dederick v. Ashdown . . . . . 174

EXECUTION.—*Authority of attorney.*—An attorney has no implied authority to give instructions to a sheriff to seize any particular goods. Taking part in interpleader proceedings is not a ratification by the execution creditor of the seizure. Wallbridge v. Hall . . . . . 341

EXEMPTIONS.—Under Con. Stat. Man. c. 37, s. 85, only land actually under cultivation is exempt from execution; but lands upon which houses, stables, &c. are erected are also exempt. Where a whole farm was chargeable under a registered judgment and only a portion of it under a *fi. fa.*, a reference was ordered to the master to apportion the latter charge (*Warne* v. *Housely*, 3 Man. L. R. 547 followed). The costs of the suit were added to the registered judgment and charged upon the whole land. Harris v. Rankin . . . . . 115

———*See* Homestead right.

FORGERY.—Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. A simple lie, reduced to writing, is not necessarily forgery. Consequently where a bank clerk made certain false entries in the bank books under his control, for the purpose of enabling him to obtain money of the bank improperly, *Held*, That he was not guilty of forgery. Regina v. Blackstone . . . . . 296

FRAUDULENT CONVEYANCE.—An administrator executed an assignment of certain assets for the payment of certain scheduled creditors. Upon the evidence the assignment was set aside as between the assignor and assignee, but there was a reference to the master to ascertain whether any of the creditors were entitled to any lien or charge upon the fund assigned. Frontenac Loan Co. v. Morrice . . . . . 442

———*Assignment for benefit of creditors.—Business to be carried on.—Reservation of property exempt from execution.* An assignment for the benefit of creditors contained the following clauses: "Provided always

FRAUDULENT CONVEYANCE—*Continued.* PAGE

that the said trustee shall have power and authority if he shall deem it expedient and for the general benefit of the creditors from time to time and as often as he shall deem it proper out of the proceeds of the sales of the said stock to purchase goods and stock for the purpose of enabling him to assort and sell off the present stock to the best advantage for the benefit of the creditors, but such purchase shall be made with such view only and not with a view of continuing the business beyond a reasonable time. . . . . Provided also that the said party of the first part, notwithstanding anything herein contained, shall have the right and privilege if he so elects within a reasonable time to reserve to himself out of the goods and chattels and property hereinbefore conveyed and assigned such property as would be exempt from seizure under execution according to the laws of the Province of Manitoba." *Held*, That the assignment was not, by reason of these clauses, void as against creditors. Robinson v. Huston . . . . . 71

———*Bona fides.*—Remarks upon the *bona fides* of a sale made to a hired man under suspicious circumstances. Wallbridge v. Hall . . . 341

———*Grantor remaining in possession.*—A lease made by a debtor, of his farm property, under the terms of which the debtor was to remain in possession, and out of the crop pay himself $1500, declared void as against creditors although there was no evidence of financial embarrassment or inability to pay debts in full. Way v. Massey Manufacturing Co. . . . . 38

———Weight of evidence upon question of misrepresentation discussed. Cummins v. Congregational Church . . . . . 374

———*See* Homestead right.

HOMESTEAD RIGHT.—*Assignment of, before recommendation.*—An assignment of a homestead right previous to recommendation is void, not only as between the homesteader and the Crown, but also as between the parties to the transaction, (*overruling* DUBUC, J. and WALLBRIDGE, C.J., *dissenting.*) In such a case the assignee would be entitled as against the assignor, even to a lien for improvements placed by the former upon the property. A voluntary promise to transfer land will not be enforced in equity. Therefore where a homesteader, free from debt, voluntarily promised before recommendation, to convey the land to his wife, and after recommendation did so convey; *Held*, That such conveyance did not, by virtue of the previous promise, cut out a judgment registered before the execution of the conveyance. Harris v. Rankin . . . . . 115

———*Conveyance before recommendation.—Estoppel by conduct.*—Defendant C. homesteaded certain land in October, 1880. He was a clerk in plaintiff's employ, and being desirous of obtaining a loan from plaintiffs upon the land, conveyed it to defendant W. on 1st January, 1883. At that time he had no recommendation for patent. On the

HOMESTEAD RIGHT—*Continued.* PAGE

26th January, 1883, he purchased the land under 42 Vic. c. 31, s. 34, s-s. 15. On the 27th January W. executed a mortgage to the plaintiffs. C. received the money, made payments on account of interest, and asked time for other payments. The patent issued to C. on 9th June, 1883, and afterwards W. reconveyed to C., who was, in reality, always the owner of the land. Upon a bill to foreclose the mortgage—*Held*, 1. That the mortgage was not void, for it was made after the land had been purchased from the Crown, and not while it was a homestead. 2. That C. was, by his conduct, estopped from saying that W. had no title at the date of the mortgage, and from claiming title in himself under the patent. The Manitoba Investment Association v. Watkins . . . 357

——Homesteads, although prior to patent and subsequent to recommendation exempt from seizure under *fi. fa.*, are subject to be charged by registered judgments. Harris v. Rankin . . . . . 512

INFORMATION. *See* Criminal Law.

INJUNCTION.—*Puppet plaintiff.*—An act was passed by the Provincial Legislature providing for the construction of the Red River Valley Railway. In pursuance of this Act a contract was entered into between Her Majesty and two of the defendants, and the contractors thereupon proceeded to build the road. This Act was disallowed as was also an Act extending the operation of The Public Works Act of 1885. The plaintiff being aware that the route contemplated would cross certain lands, purchased them with a view of obstructing the building of the road. It was not contended that this would disentitle him to an injunction, but it was alleged that he was acting not for himself but in reality for a rival railway whose hand he was. To shew this, the plaintiff was examined and he refused to answer several proper and material questions. He appeared to have acted through the rival railway's officials and to have reported progress to them; to have made some agreement with that company, giving to it certain privileges in respect of the land purchased, but the nature of this agreement he refused to divulge; and in a letter he referred to "the party for whom I have purchased." *Held*, 1. That after the disallowance the defendants were without merits or legal rights—The Public Works Act (without the disallowed amendment), not giving the right to expropriate lands for the purpose of the railway. 2. That nevertheless the plaintiff was not entitled to an injunction, he being the representative merely of the rival railway and not acting on his own behalf. 3. That to arrive at this conclusion it was proper to assume as against the plaintiff, the answers he could have given, if he had answered fairly the questions put to him. The disallowance of the Acts was signified by proclamation in the Gazette but no reference was therein made to the certificate of the date of the receipt of the Acts. *Semble*, That the certificate need not be signified, but the disallowance only. Browning v. Ryan . . . . . 486

INTERNATIONAL LAW. *See* Contract.

INTERPLEADER. PAGE

INTERPLEADER.—*Costs.—Appeal as to costs.*—Although the claimant upon the trial of an interpleader issue succeeds, yet the court may, in its discretion, refuse to give him costs against the execution creditor. The court cannot, however, in such a case order the claimant to pay the sheriff his costs of taking possession of the goods claimed, or his possession money prior to the date of the interpleader order. The Massey Manufacturing Co. v. Gaudry . . . . . 229

———*Issue.—Security for costs.*—A garnishee admitted his liability to the judgment debtor, but suggested that one B. claimed the money under an assignment made to him by the judgment debtor. Upon settling the form of the order for an issue, *Held*, 1. That B. the claimant ought to be the plaintiff. 2. That it did not, from this, and from the fact that he resided without the jurisdiction of the court, necessarily follow that he should give security for costs, that the court could exercise its discretion, and would not order security unless the applicant showed circumstances warranting that direction. McPhillips v. Wolf. 300

JOINT LIABILITY. *See* Bailment.

———*See* Vendor and purchaser.

JUDGMENT. *See* Administration.

———, REGISTERED.—*Form of Certificate.—Agreement to assign homestead.—Voluntary promise to convey.—Patent.—Evidence of parties to impeached transaction.*—The omission by a registrar to endorse upon an instrument registered the certificate prescribed by Con. Stat. Man. c. 60, s. 15, does not prevent the instrument binding the lands. A certificate of judgment was signed by the deputy prothonotary and was under the seal of the Court of Queen's Bench. *Held*, Insufficient because the date of the judgment was 18 October, 1883, whereas the certificate referred to a judgment of 18 October, 1884, (the number of the roll not appearing upon the certificate) and because the certificate did not show that the judgment was recovered in the Q. B. Under the 13th sub.-sec. of the 34th sec. of 42 Vic. c. 31, homesteads cannot be bound by execution in the sheriff's hands prior to patent Since that Act a certificate of judgment will bind the homestead of the defendant immediately after recommendation for patent. A registered judgment attaches upon land acquired subsequent to its registration (per KILLAM, J.) Harris v. Rankin . . . . . 115

———*49 Vic. c. 35.—Retrospective Act.*—No statute prior to 49 Vic. c. 35, made any lands exempt from a judgment registered under the County Courts Act. A judgment registered before the 49 Vic. may be enforced after its passage. Hopkins v. Beckel . . . . . 408

———A certificate of judgment in the form referred to in this case (4 Man. L. R. 115), but having the date correct and its amount such as would shew the judgment to be of record in the Queen's Bench is valid. Harris v. Rankin . . . . . 512

JUDICIAL DISTRICT BOARDS. PAGE

JUDICIAL DISTRICT BOARDS.—*Equalized assessments.—Discretion.*—The Judicial District Boards in apportioning among the municipalities the amounts necessary for the purposes of the boards have no discretion as to whether the equalized assessment shall be of the real and personal estate or of the real estate alone. It must be upon the basis of both real and personal estate. (Overruling Taylor, J.,) For the judgment of Taylor, J., see 3 Man. L. R. 537. The Eastern Judicial District Board v. The City of Winnipeg . . . . . 323

JURY.—*Striking out jury notice.*—A jury notice will not be struck out unless there is some substantial reason for it. The mere assumption that a judge could try it better without, than with, a jury is not a sufficient ground. The Manitoba Mortgage Co. v. Stevens . . . . . 410

JUSTICE OF THE PEACE. *See* Elections.

LAW STAMPS. *See* Constitutional Law.

MALICIOUS PROSECUTION.—*Corporation.—Reasonable and probable cause.*—A municipal as well as a trading corporation may be liable for malicious prosecution. The mayor of the city assuming to act as an officer of the city laid an information against the plaintiff; and a firm of solicitors assuming to act for the city advised him in the matter, prepared the information and attended upon its return on behalf of the prosecutors. The solicitors reported the matter to the council and the city paid for the solicitors' services. *Held*, That the city was liable for the action taken by the mayor. Where the facts are distinct and uncontradicted and there is no inference of fact the question of reasonable and probable cause is one wholly of law. But where any fact or inference of fact is involved the question must be determined by the jury under proper direction from the judge. Opinion of counsel will not protect from an action for malicious prosecution unless the party uses reasonable care to ascertain the facts and lays them before counsel. Damages reduced from $3000 to $500 no express malice having been proved, very little if any damage to reputation having been sustained and the plaintiff's arrest having lasted but a few hours. Wilson v. The City of Winnipeg . . . . . 193

MANDAMUS. *See* Elections

MASTER AND SERVANT.—*Negligence of servant.—Action for damage to goods by mortgagor against the mortgagee.*—A master is liable for a wrong committed by his agent when such wrong is committed while the agent is acting within the scope of his authority. The defendant's son lighted a smudge near a stable to keep away mosquitoes from his father's horses. The fire spread to the stable and consumed some wheat of the plaintiff stored therein. The jury gave a verdict for plaintiff and the court refused to set it aside, (KILLAM, J., *dissenting*). In such a case the defendants held a mortgage upon the wheat executed by the plaintiff. The mortgage was not due at the time of

MASTER AND SERVANT.—*Continued.* PAGE

the fire. There was no redemise clause in it. After the fire and the maturity of the mortgage, the defendant realized the money secured by the mortgage by sale of other property comprised in it. The wheat had been stored by the plaintiff in the defendant's stable while, previously, tenant to the defendant, and the defendant had not in any other way taken possession than by occupation of the land and stable and by refusing to allow the wheat to be removed until he was paid. *Held*, That the existence of the mortgage was no defence to the action for the destruction of the wheat, (KILLAM, J., *dissenting*). *Per* KILLAM, J. In the absence of a redemise clause in the mortgage, no action could be brought for the loss of the goods whether it occurred before or after the expiration of the time for redemption. 2. If there could be held to be an implied redemise clause (as to which *quære*), the plaintiff could only recover for the loss of enjoyment of the goods between their destruction and the time fixed by the mortgage for payment. Down v. Lee . 177

———*See* Corporation. Hiring.

MECHANIC'S LIEN—*Statement of claim.—Completing work.—Amendment of bill.*—By Con. Stat. Man c. 53, s. 5, no lien shall exist unless a statement of claim verified, &c., is filed, &c., within, &c, which statement "shall state"—then followed a number of items. This section was repealed by 46 & 47 Vic., c. 32, s. 6, and re-enacted with some slight variations. The words "shall state" however, were omitted although all the items appeared as before. *Held*, That after this second statute the items need not appear in the statement. The Act 47 Vic., c. 14, is prospective as well as retrospective. The work (the building of a house) was completed on the 18th of August, with the exception of putting up an iron cresting, which by the contract, was to be placed on the verandah. The cresting was put upon the top of the house on the 29th of October, the plaintiff asserting as a reason for the delay, that he had no money to pay for the cresting, the defendant having refused to pay him. The statement of claim was not filed within thirty days from the 18th of August, but was within that period after the 29th October. There was no evidence of any variation of the contract as to the place where the cresting was to be placed, nor of its acceptance by any act of the defendant. *Held*, (Killam, J., dissenting). That the statement was filed within thirty days from the completion of the work. The bill was amended after the lapse of the time given for filing a bill. *Held*, That the bill was within the prescribed time, it having as originally filed been sufficient for asserting the lien, and the amendment having been occasioned only by the defendant's claim for cross relief in consequence of the work not having been completed within the contract time. Irwin v. Beynon . . . . . 10

MORTGAGE. REDEMISE. *See* Master and servant.

———TRESPASS BY MORTGAGOR AGAINST MORTGAGEE. *See* Master and servant.

MUNICIPAL CORPORATION.—*Liability for arrest made by police.*—The charter of the defendants provided for the appointment of a police force, the members to be appointed by, and hold office during the pleasure of, a board of police commissioners. The defendants provided the pay of the men. A member of the force arrested the plaintiff for an alleged breach of a by-law of the defendants. *Held*, In an action for assault and false imprisonment, that the defendants were not liable. Wishart v. The City of Brandon . . . . . 453

———*Liability to repair roads and bridges.*—A municipality is not, by the common law, answerable in damages occasioned by defective highways or bridges. A general statute provided that "all the roads and road allowances within the Province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same, with such assistance as they may receive from time to time from the Government of the Province." *Held*, That this statute did not impose upon municipalities any liability for such damages. Wallis v. The Municipality of Assiniboia . . . . 89

———*See* Corporations.

NAVIGABLE RIVERS.—*Obstructions.—Reasonable use.—Negligence.*—The declaration, set out in the case, for obstructing the navigation of a river and thus delaying the plaintiff, upon demurrer, *Held*, Good. North West Navigation Co. v. Walker . . . . . 406

NEW TRIAL.—*Verdict under £20.*—A new trial will not be granted, on the ground that the verdict was against the weight of evidence, where the verdict is under £20. Cleaver v. The Municipality of Blanchard. 464

PARTIES.—*Trustee and cestuis que trust.*—An answer set up that the defendant acted not for himself but as the agent and trustee for five other persons. There was no proof of this fact other than a recital in the conveyance to which the defendant and two of the alleged *cestuis que trustent* were parties. *Held*, 1. That the conveyance was no evidence against the plaintiff. 2. That the answer could not be read as evidence against the plaintiff. 3. That the allegations in the answer might be considered with a view to directing further investigation into particular facts. 4. That as the *cestuis que trustent* lived out of the jurisdiction, the court would not, in its discretion, allow further evidence to be given. 5. *Quære*, Whether, in any case, the defendant would be entitled to have the *cestuis que trustent* made parties. Horsman v. Burke . . . . 245

———*See* Vendor and purchaser.

PATENT, EFFECT OF.—After the registration of a judgment against a homesteader who had obtained his recommendation, he fraudulently assigned the land to a third party to whom the patent issued. *Held*, That the land was liable, notwithstanding the patent, to answer the judgment. Harris v. Rankin . . . . . 115

PLEADING. PAGE

PLEADING.—*Allegations of fraud or error.—Parties.—Fraudulent Vendor.—Attorney-General.—Costs.*—It is not sufficient to allege that a patent was issued through fraud, or in error, or improvidence without setting out in what the fraud or error or improvidence consisted; nor to allege that it was issued upon the faith of certain statutory declarations which were untrue, without showing what the declarations contained. The original patentee was made a party to an information to set aside a patent, although the information alleged that he had conveyed the land to his co-defendant. The information charged fraud as against the patentee's vendor, but none against himself. *Held*, That the patentee could not demur for want of equity. Attorney-General v. Richard . . . . . 336

———*Departure.*—To a declaration in contract, against a railway company for loss of baggage, the company, as to $100 of the claim, pleaded that the baggage was carried under a contract whereby "the baggage liability is limited to wearing apparel not exceeding $100 in value." Replication that the contract was made in the State of Maine; that by the law of that State plaintiff (for reasons assigned), was not bound by the limitations. Upon demurrer the replication was *held* bad. Brown v. The Canadian Pacific Railway Co. . . . . 396

———DISMISSAL OF SERVANT. *See* Corporation. Hiring.

———NOT POSSESSED. *See* Chattel Mortgage.

———WAIVER. *See* Vendor and purchaser.

———*See* Navigable rivers.

PRACTICE.—*Affidavit of service.*—An affidavit stated that the deponent had served defendant with a copy of the writ annexed to the affidavit, upon which, as also upon the copy served was endorsed, "a notice of the name and residence of the attorney by whom the said writ was issued, and English notice of claim, particulars of claim, and notice in case of non-appearance of said defendant according to the statute in that case made and provided." The writ annexed to the affidavit was specially endorsed. *Held*, That there was sufficient proof that the copy served was also specially endorsed. McDonald v. Deacon . . . . . 452

———*Discovery as to accounts before decree.*—In a partnership bill there were some general charges of misapplication and misappropriation of moneys. The right to a decree for account was conceded but the defendants refused, upon examination, to answer questions based upon the general charges. *Held*, 1. That the defendants were bound to answer, even though the questions related to matters that would be referred to the master and not determined at the hearing. (*Elmer* v. *Creasy*, L. R. 9 Ch. 69, approved). 2. Although the charges might not have been sufficiently specific upon demurrer, yet the defendants having answered, they were precluded from refusing to answer fully. 3. Some of the questions were directed to the defendants dealings with

PRACTICE.—*Continued.* PAGE

the "Pruden Farm." The defendants swore that this farm was not an asset of the firm, but they were nevertheless ordered to give a full discovery respecting the property. Macdonald v. McArthur . . . . . 56

——*Hearing.—Death of judge.*—After witnesses had been examined and the cause heard, but before judgment, the judge died. The cause was ordered to be set down for argument before the full court. Cummins v. Congregational Church . . . . . 374

——*Non-suit where plaintiff does not appear.*—Where the plaintiff does not appear at the trial a non-suit may properly be entered. The defendant is not, in such case, entitled to a verdict. Calder v. Dancy. 25

——*Notice of trial by defendant.*—A defendant may pass and enter the record, and give notice of trial for the Assizes, as well as for any Tuesday. Calder v. Dancy . . . . . 25

——*Orders, service of.—Order not served.—Counsel representing witness.—"Sufficient sureties."*—At law an order must be drawn up and served within a reasonable time otherwise the other party may treat it as abandoned. But the order will not be set aside on the ground of delay unless the other party's position has been affected by it. In equity only *ex parte* orders require service. The common law prevails as to service of orders in election cases. An order was made for the examination of witnesses upon a chamber application. The order was not served, but the opposite attorney attended on, and took part in, the examination. *Held*, That the depositions might be read. *Re* Assiniboia Election . . . . . 328

——*Revivor.—Dismissal for not reviving.—Costs.*—Where one of several plaintiffs dies, the order is that the survivors do revive within a limited time, and in default the bill is dismissed with costs. In the case of a sole plaintiff the bill is dismissed without costs in case of failure to revive. McMahon v. Biggs . . . . . 84

——*Want of prosecution.—Leave to set down after dismissal at hearing, plaintiff being unready.*—14th August, 1884.—Bill was filed. 30th October, 1884.—Bill amended by adding a large number of parties. January 1886.—Case was or ought to have been ripe for hearing. April, 1886.—Set down for hearing and postponed. June, 1886.—Set down and postponed by plaintiff, defendant D. being a necessary witness and having left the Province although subpœnaed. September, 1886.—Set down and postponed, D. not having returned. January, 1887.—Set down and postponed, D. not having returned and B. the plaintiff's agent, also a necessary witness being absent, although subpœnaed, and having neglected to attend upon an appointment to take his evidence *de bene esse*. 31st March, 1887.—Set down, postponement refused, although D and B. absent; D. meanwhile had been in the province. 4th April, 1887.—Question of costs argued. 7th April, 1887.—B. returned to the city. 19th April, 1887.—Defendants,

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PRACTICE.—*Continued.*

by leave of judge, notified plaintiffs that unless by this date decree agreed to, judge would make decree. 25th April, 1887.—Petition served for leave to set down anew for hearing. 26th April, 1887.—Another sittings held, case, of course, not set down. Defendants did not show existence of any injury to them by reason of delay. *Held*, 1. Under all the circumstances set out in the judgment that leave should be given to set down again upon payment of costs of the day and the petition. 2. The engagements of a witness coupled with shortness of notice may form an excuse for non-attendance upon subpœna. 3. The negligence of plaintiff's solicitor in not procuring evidence may form a ground for an extension of time for hearing. Balfour v. Drummond.. 389

——— *Varying minutes.*—Upon a motion to vary minutes the later rule is, that the only question to be argued is, What was the actual order made? except in cases where both parties consent, or where it cannot be ascertained what order was pronounced. By a judgment an indulgence was granted upon payment of costs, but no order for payment in any event was pronounced. Upon speaking to the minutes this latter order was directed to be inserted. Balfour v. Drummond . 467

PRINCIPAL AND AGENT.—*Admissions.*—A principal is not bound by the statements of his agent, after the happening of the act sued upon, unless the agent has authority to make such statements. Down v. Lee. 177

——— *Power of agent appointed to receive money.*—B., one of three executors (the defendants), agreed to permit the plaintiff to become assignee of a lease granted by their testator; that the plaintiff should be allowed to deduct from the rent the value of improvements to be placed by him upon the premises to the amount of $1,000; and that the rent should be increased by 13 per cent. of the amount of such allowances. The improvements were made, but the value was not deducted out of the rent. In an action against the defendants personally, and not as executors, a verdict was given for plaintiff. *Held*, 1. That there being no proof of a joint promise, the verdict was wrong except as to B. 2. That the receipt of rent by B. only showed that he had power to receive the rent in money. 3. That an agent authorized to collect a debt, can receive it in money only. Paisley v. Bannatyne. 255

PROMISSORY NOTE. *See* Bill of Exchange.

PUBLIC WORKS ACT.—*See* Injunction.

QUIA TIMET.—*Specific performance of covenant to pay off mortgage.* In a conveyance of land the grantee covenanted "to save harmless and indemnified" the grantor from a mortgage previously executed by him and from all claims and demands in respect thereof. *Held*, 1. That after demand made by the mortgagee for payment upon the grantor, and before the grantor had paid any money, he could obtain specific performance of the contract. 2. The mortgagee would not be a proper party to such a bill. 3. The grantee must rely upon the covenant and not upon any express or implied agreement to pay off the mortgage. Horsman v. Burke . . . . . 245

RAILWAY. PAGE

RAILWAY.—*Fences.—Cattle killed by train.*—A railway company is under no obligation to erect fences along their line where the land adjoining is unoccupied. Cattle straying upon the line across such unoccupied land are trespassing and if injured there by accident without negligence the railway company is not responsible. In such case the *onus* as to negligence is upon the party asserting it. Plaintiff's cattle having been in his yard at nine o'clock one evening, were discovered about ten o'clock the next morning lying wounded alongside the defendants' line of railway—one had a hind foot "mashed up," and one had "a big gash in her leg." *Held*, That it could be fairly inferred that the injury was caused by an engine or cars running upon the defendants' railway, and under the control of the defendants' servants. In such a case the presence of certain employees of the railway at the killing and cutting up of the cattle or even their participation in these acts would not establish any liability of the company.—McMillan v. The Manitoba & Northwestern Railway Company. . . . 220

RAILWAY. PLEADING. *See* Pleading, Departure.

REPLEVIN.—*Action on bond.—Pleading.*—To an action upon a replevin bond for not proceeding with effect, a plea, that the replevin action is still pending, is sufficient. And a replication to such a plea, disclosing delay is bad, unless the delay itself has terminated the action. The condition in a replevin bond to prosecute with effect, is separate and distinct from the condition to prosecute without delay.—McIntosh v. Nickel . . . . . 51

SALE OF GOODS.—*Property passing.*—Defendant ordered certain goods through plaintiff's traveller. Plaintiffs on 12th December wrote defendant that they would consign only, and not sell. This letter was never received, but defendant did receive a telegram as follows:—"Can only fill order forty oft hardware, forty and ten flatware, you paying express, answer if satisfactory." Defendant replied, "All right, send goods at once." On the 16th, the goods were shipped. On the same day plaintiffs wrote defendant that the goods were consigned only and not sold, but this letter was not mailed until the 18th, and was not received until after the goods had been received and accepted. The invoice was headed "consigned to" the defendant. *Held*, (Taylor, J., dissenting). That there was a completed sale to the defendant and that the property in the goods had vested in him. Acme Silver Co. v. Perrett. . . . . 501

——— ——— *Work and labor.*—*Estoppel.*—Plaintiff agreed with defendant as follows: "I will put you up building with frame for tent 75 × 24, according to plan, for the sum of $500; starting at once and completing as soon as possible." After completion the plaintiff tore down the building and carried it away without the defendant's knowledge. In an action for the contract price the jury was told that it was the plaintiff's duty to notify the defendant of the completion,

SALE OF GOODS—*Continued.* PAGE

and tender it to him. *Held*, 1. That if the contract was for the sale of a chattel, the charge was right; but if for work and labor, that it was wrong. 2. That although the circumstances might tend to support the view that the contract was for work and labor, yet that the plaintiff having, without the defendant's sanction, pulled down and carried away the building, he could not be heard to say that it was not a sale of a chattel the property in which had not passed to the defendant. Ross v. Doyle . . . . . 434

SECURITY FOR COSTS.—*Delay.*—After defendant had obtained a postponement of the trial, and had applied for and been refused a further postponement, he applied for security for costs, alleging that he had only learned a few days before moving of the fact of the plaintiff's absence. *Held*, That the application was not too late. Carruthers v. Waterous . . . . . 402

——— *Præcipe order.*—The Clerk of Records and Writs has power to issue, upon *præcipe*, an order for security for costs, where from the bill the plaintiff's residence appears to be without the jurisdiction. Baynes v. Metcalf . . . . . 85

——— *Sufficiency.—Onus as to.—Power of master on reference.—Extension of time.*—An order was made directing security to be given, within a certain time, to the satisfaction of the master. Plaintiff brought in a bond with one surety who justified in $400 over his just debts, but said nothing about exemptions. The defendant filed an affidavit impeaching the surety's solvency. The master disallowed the bond. *Held*, 1. That the master had acted properly. 2. That further time should not be given unless upon material sufficiently explaining the delay, etc. Osborne v. Inkster, *ante* . . . . . 399

SPECIFIC PERFORMANCE.—*Deficiency in land.—Part taken by Railway.—Sub-purchasers.—Parties.*—On 30th January, 1882, plaintiff agreed to sell lot 33, described as 128 acres, to defendant L. Shortly afterwards defendant L. agreed to sell the same land described as 111 acres, to another defendant, who agreed to sell it to other defendants. There were, in reality, about 112½ acres in the lot, and of this 1½ acres were owned by a railway company and used for their track. The agreements were made during a period of great excitement in real estate. After its abatement neither party took any steps to carry out the agreement, beyond the rendering of an account by the plaintiff to the defendant and a letter threatening proceedings in 1885, and beyond an enquiry by the defendant L. as to the state of the title in 1883. *Held*, 1. That, under the circumstances, specific performance ought not to be decreed against L. 2. That the proper decree against the sub-purchasers (who had not answered) was to direct a reference to the master to enquire as to title; in the event of his finding a good title, to take an account of the amount due for purchase money and to fix a day for payment; on payment, plaintiff to convey; on default,

SPECIAL PERFORMANCE—*Continued.* PAGE

rescission; if title good at time of filing bill, plaintiff's costs to be added to purchase money. Nixon v. Logie . . . . . 366

———. *See* Vendor and purchaser.

——— OF COVENANT TO PAY MONEY. *See* Quia Timet.

STATUTES. CONSTRUCTION OF. *See* Mechanics' lien.

——— DISALLOWANCE. *See* Injunction.

TAXATION.—*Costs of supplementary material on motion—Counsel fees.—Brief.*—1. Where the material upon which a party is moving is defective, and he is allowed to amend or supply what is wanting he cannot tax the costs of doing so. 2. The discretion of the taxing officer as to the amount of counsel fees not interfered with. 3. A second term brief allowed at the amount for which a second copy of the evidence could have been got from the short-hand writer. 4. Where the defendant succeeds on part of the issues, but the plaintiff obtains a verdict, the defendant is entitled only to such costs as are exclusively applicable to the issues on which he succeeds. Morris v. Armit . . 307

TAXES.—*Distress for.—Demand.—Pleading.*—The defendant's treasurer served a demand for payment of taxes, upon the plaintiff, in the form set out. A portion of the total amount demanded was not properly chargeable; but one of the items, viz., the taxes for 1884, was legally due, and appeared separately and clearly specified. *Held*, 1. That there was no sufficient demand, even for the 1884 taxes. 2. If the demand could have been sustained, a seizure and sale for the whole amount would have given the plaintiff an action for excessive seizure and sale only. 3. Justification for trespass, in such a case, must be pleaded. Foote v. Municipality of Blanchard . . . . . 460

TAX SALE.—*Advertisement.—Injunction.*—Lands were advertised for sale for taxes in two numbers of the Gazette, but those numbers although dated upon certain days did not in fact issue until later dates, dates too late to comply with the statute. Upon a motion for an injunction to stay the sale, *Held*, 1. That the statute was not sufficiently complied with, but 2. That insufficient advertising would not, under the present statutes, render the sale void, and that therefore no injunction to stay it should be granted. Wood v. Birtle . . . . . 415

TRESPASS, JUSTIFICATION. *See* Chattel Mortgage.

———, SEIZURE BY SHERIFF.—*Wrongful seizure by sheriff.—No interference with goods.—Damage.—Instructions by Attorney.—Power of.*—Under an execution against B. the sheriff seized goods claimed by the plaintiff. The sheriff did not touch the goods or leave any one in possession, but merely took a list of them, told the plaintiff not to remove them, and took an undertaking from the plaintiff that he would not remove them. The sheriff interpleaded and the execution creditors abandoned. The sheriff then (three or four weeks after the seizure,) gave notice of abandonment to the plaintiff. *Held*, 1. That there was no trespass for which an action would lie. Wallbridge v. Hall. Wallbridge v. Yeomans . . . . . 341

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VENDOR AND PURCHASER.—*Bill for specific performance or for rescission.—Parties.—Pleading.—Waiver.—Fixtures.*—Distinction between a specific performance suit and one to rescind a contract in case of failure to perform by a specified time. The plaintiffs agreed to sell to B. certain lands upon certain terms. B. paid a portion of the purchase money and afterwards conveyed to the defendant. Afterwards the plaintiffs removed certain buildings from the lands. The buildings were large and built upon stone foundations, a portion of which, either originally or by pressure were beneath the level of the ground. Upon a bill against the defendant alone for payment or rescission, the defendant claimed repayment of the money paid to the plaintiffs. *Held*, 1. That *prima facie* the buildings were fixtures. 2. That the purchaser would have been entitled under such circumstances to sue for the return of the purchase money. 3. That the present defendant could not recover the money in the absence of B. 4. That no decree for rescission could be made in the absence of B., the defendant having in no way been substituted for B. as purchaser. 5. To obtain a decree for specific performance by vendor with an abatement from the purchase money by reason of the removal of the buildings, the bill must be so framed. 6. Waiver must be specially pleaded. The Hudson's Bay Co. v. Macdonald. . . . . 237

———*Breach of contract by purchaser.—Damages.*—Defendants took proceedings to expropriate lands of the plaintiff. The commissioners awarded to the plaintiff $21,455, but the award was not confirmed by a judge, as required by the defendant's charter. *Held* (overruling Dubuc, J.,), that the award could not be enforced. After an award, but before its confirmation, the defendants agreed to give to the plaintiff, in exchange for the same land, two other pieces of land and $12,000. The plaintiff thereupon removed certain buildings, the defendants used the land for a street, and the defendants paid the $12,000, but refused to convey the two parcels of land, alleging that they formed portions of streets. *Held* (affirming Dubuc, J.), 1. That a bill might be filed to recover damages for the breach of the contract, the deed from the plaintiff to the defendant having erroneously acknowledged receipt of the purchase money. 2. That the damages might fairly be placed at the difference between the $21,455 and the $12,000, without proof of the locality of the two parcels of land or their value, the defendants having had in their custody the documents by which the locality could have been proved, and not having produced them, but alleged their loss. Wright v. The City of Winnipeg . . . . . 46

———*Rescission.—Penalty.—Ejectment after default.*—A bill by a vendor alleged that by the contract, time for the deferred payments should be of the essence of the agreement, and that upon default the vendor should be at liberty to re-enter upon or re-sell the lands, all payments on account being forfeited; that certain payments on account had been made, (not shewing whether before or after the day fixed for

VENDOR AND PURCHASER—*Continued.* PAGE

the last instalment); that there had been dealings between the parties and an extension of time given "for payment of some of the instalments," not saying which of them. The prayer was for a declaration that the contract was at an end and void and that it should be delivered up to be cancelled; and for possession. A demurrer was allowed upon the grounds:—1. That it was nowhere alleged that the plaintiffs had rescinded the agreement, but on the contrary, they seemed to have continued to deal with, and receive payments from the purchaser. 2. That the right reserved was in the nature of a penalty, and the plaintiffs would not be entitled to rescission without limiting a time for payment. 3. That as to the prayer for possession, the purchaser in possession after default would be a tenant at sufferance and not entitled to a demand of possession, but the bill did not clearly shew that the extension of the time given for payment had elapsed. Hudson's Bay Co. v. Macdonald. . . . . 480

——*Thwarting title.*—After trustees of a church had contracted to sell and after the purchaser had rescinded the contract because of non-compliance with the Act, the trustees applied for legislation confirming the sale. This application was opposed by the purchaser. *Held*, That the purchaser was nevertheless entitled to insist upon the objection. After the contract and after payment of part of the purchase money, the purchaser rescinded upon the ground above mentioned and also because of a misrepresentation made to her by one of the trustees. The other trustees were unaware of the misrepresentation. They did not receive any portion of the purchase money. It was applied in the erection of a church upon other land. *Held*, That the purchaser was entitled to a personal order for repayment against the offending trustee, and to a lien upon both properties, but not to a personal order against the innocent trustees. Cummins v. Congregational Church . . . . . 374

WILL.—*Specific or pecuniary legacy.—Conversion.—Interest.—Capital or Income.*—In a will there was the following bequest: "I bequeath to my dear wife Sarah the interest on £1,000, out of the moneys invested by me in the Montreal Bank in Canada, to be annually paid to her by my executor hereinafter mentioned, and for her sole use and benefit during her life, and at her death the above £1,000 to be equally divided among all my children surviving share and share alike." At his death the testator was possessed of a considerable number of shares in the capital stock of the bank, the dlvidends upon which were payable half yearly. After the death, for the purpose of carrying into effect the bequest, the executors transferred to one of their number twenty-two shares of the stock, and he executed a declaration of trust, by which he declared he held the same in trust for the widow and her children upon the terms that he was annually to pay to the widow, in satisfaction of the interest appointed to be annually paid to her, all such dividends or interest on the twenty-two shares as should accrue to him, and in the

WILL—*Continued.* PAGE

event of the death of the widow he was to surrender the shares for the purpose for which the sum of £1,000 was bequeathed. Afterwards the capital stock of the bank was increased, and four shares of the new issue were in effect added by the process to the twenty-two old shares. *Held*, 1. The bequest was demonstrative and not specific. 2. The assignment of stock and declaration of trust did not amount to a conversion and investment, or an appropriation amounting to payment. 3. The twenty-two shares and the four shares always remained part of the estate. The widow was entitled to interest at 6 per cent. from the expiration of one year after the testator's death. Form of order for payment out of court of money paid in under the Trustee Acts. *Re* Logan Trusts . . . . . 19

WITNESS, COUNSEL FOR.—A witness cannot be represented by counsel, nor can counsel engaged in the case be heard in support of any objection the witness may have to giving evidence. *Re* Assiniboia Election . . . . . 328

WORDS. "Immediately." *See* Elections."