THE TERRITORIES LAW REPORTS

VOL. VII.

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CONTAINING

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

EDITOR:

T. D. BROWN, REGINA.

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MEMORANDA.

On 8th October, 1906, Thomas Cooke Johnstone, Esquire, and Charles Allen Stuart, Esquire, were appointed puisne Judges of the Supreme Court of the North-West Territories.

On 16th September, 1907, Chief Justice Sifton was appointed Chief Justice, and Justices Scott, Harvey and Stuart were appointed puisne Judges of the Supreme Court of Alberta.

On 16th September, 1907, Honourable Mr. Justice Wetmore was appointed Chief Justice, and Justices Prendergast, Newlands and Johnstone were appointed puisne Judges of the Supreme Court of Saskatchewan.

ADDENDA.

Page 97—Elliott v. Gibson.
The Court was composed of Wetmore, Scott and Prendergast, JJ.

Page 164—Aylwin v. Robertson.
The Court was composed of Sifton, C.J., Wetmore and Prendergast, JJ.

Page 190—Rex v. Thompson (alias Peterson).
The Court was composed of Sifton, C. J., Scott, Prendergast and Newlands, JJ.

TABLE OF CASES CITED

IN THIS VOLUME.

TABLE OF CASES REPORTED

IN THIS VOLUME.

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VOLUME VII

FRASER ET AL. v. EKSTROM AND MASSEY, CLAIMANT.

Practice — Sheriff's interpleader — Notice to execution creditors of claimant's claim—Sheriff interpleading without allowing reasonable time to execution creditor to investigate and admit—Object of sheriff's interpleader—Costs.

It is not sufficient for a sheriff to wait merely the four days allowed by law after giving notice of the claimant's claim, but the sheriff must, before interpleading, allow a reasonable time to the execution creditors to investigate the claim of the claimant and admit or dispute the same.

The object of sheriff's interpleader proceedings discussed.

[WETMORE, J., *April 20, 1900.*

Statement. Sheriff's interpleader. On the return of the summons the plaintiffs' counsel objected that reasonable time had not been allowed to admit the claimant's claims before the deputy sheriff issued the summons.

Argument. *D. H. Cole,* for the deputy sheriff.

E. L. Elwood, for execution creditors (plaintiffs).

J. T. Brown, for execution creditors (plaintiffs).

Judgment. WETMORE, J.—On the 17th March the deputy sheriff at Yorkton mailed to the plaintiff's advocates at Moosomin notice of the claimant's claim. Knowing as I do how the mails are dispatched, and when they arrive at Yorkton, this notice would not leave Yorkton until Monday morning, the

Judgment.
Wetmore, J.

19th. The plaintiff's advocate did not receive it until Tuesday, the 20th. He must have received it after the mail was dispatched from Moosomin to Birtle. It could not be answered by return mail. The four days prescribed by Rule 432 would not commence to run until the 20th, when the notice was received by the sheriff's advocate; they had therefore all of the 24th March to serve the deputy sheriff with the notice prescribed by that rule. The four days could not commence to run from the day the sheriff mailed the notice. Now, assuming that the answer to the notice (if any answer were given) was to arrive by mail, and in view of the fact that no mail arriving at Yorkton after 7 p.m. on Saturdays is delivered until Monday morning, I do not see how it was possible that the deputy sheriff could expect to receive by mail any answer to his notice before the mail was delivered on Monday morning, the 26th March, because the mail would not arrive at Yorkton before 11.30 p.m. on Saturday night. As a matter of fact Mr. Elwood, one of the plaintiff's advocates, promptly on receipt of the notice and on the very day of its receipt, mailed to the deputy sheriff a letter in respect to the claims which I will refer to hereafter, and the deputy sheriff received that letter on the 26th, as he would according to my conclusions in due course; he could not have got it before. I am at a loss to conceive how the plaintiff's advocates could have been more prompt in the matter than they were, unless they used the telegraph; that, however, is a very expensive method of forwarding notice, and in many instances would be a very inconvenient way of doing it. This, I think, may be well illustrated by the circumstances of this case. The deputy sheriff seized a great quantity and variety of stuff; a large portion of it was claimed by the Massey-Harris Co., a large portion was claimed by the defendant, the execution debtor, as exemptions; a large portion was claimed by the execution debtor's wife as her separate property. Two horses and a bull were claimed by Thomas H. Garry & Co., and a filly and pony were claimed by Giffard Elliott. The matter of admitting or disputing such claims I can readily conceive might involve lengthy correspondence which could not conveniently be carried on by wire. The deputy sheriff states in his affidavit in substance that he gave the plaintiff's advocate a reasonable time to dispute or admit the claim before he

Judgment.
Wetmore, J.

instructed his advocate to prepare an affidavit with a view to an interpleader. In my opinion he did not give a reasonable time; he did not even give time to receive an answer by mail, assuming that the advocates acted with the utmost dispatch. When we consider the nature of the claim and the persons by whom some of them were put in and the fact that the deputy sheriff resides at Yorkton, the plaintiff's advocate at Moosomin and the plaintiff somewhere else, it would not have been a matter of surprise if the deputy sheriff had not got a decisive notice until sometime after the 26th March. Possibly in that case it might have been prudent to have written to the sheriff to ask him to stay interpleader application to allow the plaintiff to investigate the claims, the plaintiff in the meanwhile undertaking to be answerable for the possession money. There is nothing in the material before me to show that this property was seized at the instance of the plaintiff or of anyone acting for him. I therefore assume that the seizure was the deputy sheriff's own action under the execution. I do not think that the fact that the deputy sheriff swore to his affidavit to obtain the interpleader summons before the four days had expired invalidates the proceeding. Mr. Elwood might have raised the objection that the affidavit was not sufficient to warrant an interpleader summons being issued because it did not disclose the fact that no notice of admission had been given within the four days, and this might have raised a question for serious consideration, but Mr. Elwood's affidavit with the deputy sheriff's in answer supplied the defect, because it showed that, as a matter of fact, the notice was not given within the four days, because the deputy sheriff only got the notice on the 26th, when he got it out of the post office. But under all the circumstances I think the deputy sheriff acted with too great precipitation in this matter. It is true that he may have been within the strict letter of the law; we must consider in construing this law, however, the object with which sheriff's interpleader proceedings (which are entirely statutory) were provided. They were enacted to protect the sheriff, who before such enactment was between two fires, liable to the execution creditor for returning "*nulla bona*" if there was property of the execution debtor available, liable to a third person if the property seized turned out to be his. So well was this recognized that the rule at one time

Judgment. Wetmore, J.

was not to allow the sheriff any costs "however proper and meritorious his conduct might have been, it being claimed that a sufficient benefit had been conferred on him by allowing him to interplead at all." Cabábe on Interpleader (2nd ed.) 113. And later on, under the English Practice, if the sheriff seized goods without authority from the execution creditor and they were claimed, and the sheriff without authority from the execution creditor to resist the claim interpleaded, and the execution creditor then withdrew, the sheriff had to pay his own costs of interpleader. Cabábe on Interpleader, p. 115. And this seems to be still the practice in Manitoba. *Blake* v. *Man. Milling Co.*[1] But by the enacting of Rules 432 and 433 of *The Judicature Ordinance*,[2] corresponding to marginal Rules 864 (*a*) and 864 (*b*) of The English Rules, a different practice prevails. Still we must not lose sight of the fact that interpleader proceedings for a sheriff originated from the cause I have stated. If that four-day provision is to be insisted on strictly, a very great hardship will frequently arise when the sheriff and the execution creditor live such a distance apart. The sheriff in such cases must exercise some discretion. I cannot see what more Mr. Elwood could have done than he did do; that is, so far as acting with promptness is concerned. Coming now to the contents of his letter of the 20th March. He most distinctly abandons in that letter the claim to the property claimed by Elliott, Thomas H. Garry & Co. and Mrs. Ekstrom and the defendant's exemptions. He does not distinctly admit or dispute the claim of the Massey-Harris Co.; he, however, abandons that conditionally, if a certain state of facts appears in the registry office, which he leaves the deputy sheriff to ascertain. On the 30th March, however, he abandons everything except the hay. Nevertheless the deputy sheriff proceeds on 2nd April to serve every person who claimed with the interpleader summons. If Mr. Elwood had not by his telegram of 30th April partly withdrawn his abandonment as to the claims put in by Ekstrom and his wife as to the hay I might have ordered the deputy sheriff to pay the interpleader costs. I think that if the deputy sheriff had not acted so quickly, that if he had waited until Monday before preparing or making his affidavit when he would have got White, Elwood & Gwillim's letter, these

[1] 8 Man. L. R. 427.
[2] C. O. 1898, c. 21.

interpleader proceedings would never have been necessary. As a matter of fact, probably I ought not to have granted the interpleader summons. The affidavits on these applications are always exactly the same, and my usual practice is to ask the advocate applying if the affidavit is in the usual form, and, if he states the affirmative, to ask him to read the claim and the execution creditor's answer to the notice of claim, if any. I pursued that practice in this case. If the deputy sheriff had not made the affidavit on the 24th, before the time had expired, he could not have made it before the 26th, and before he could make it on the 26th he would have got his mail, and he could not then have possibly made the affidavit he did make. The question of costs of this application is in my discretion, and I think I will do justice under the circumstances of this case by dealing with them in the same way as they would have been dealt with under the old practice, namely, by allowing no costs to any person, and I take that course. Judgment. Wetmore, J.

Order that the execution creditors, having admitted the claim, and the deputy sheriff having withdrawn from the seizure, that no action be brought against the deputy sheriff.

Order accordingly.

CALDER v. NAROVLANSKY ET AL.

Costs—Foreclosure—Brief and instructions for brief.

The advocate for the mortgagee in foreclosure proceedings is entitled to tax against the defendants the fee allowed by the tariff for "Instructions for Brief" and for "Brief," although the defendants do not appear to the suit, nor in any way oppose the proceedings. A fee for perusing an originating summons, and a fee for instructions for pleadings, are also taxable, on foreclosure proceedings.

[WETMORE, J., *April 27, 1900.*

Review of taxation of the plaintiff's costs. The proceedings were commenced by originating summons for foreclosure of a mortgage. None of the defendants appeared at the return of the summons, or in any way opposed the foreclosure proceedings. On the taxation of the plaintiff's costs, pursuant to decree *nisi*, the taxing officer disallowed "Instructions Statement.

Statement. for Brief, $2," and "Drawing Brief, $2." The plaintiff applied to review.

Argument. *E. L. Elwood*, for the plaintiff, supported the review.

J. T. Brown, for R. J. Campbell, a subsequent encumbrancer, *contra*.

Judgment. WETMORE, J.—A "brief" is defined in an old edition of Jacob's Law Dictionary to be "an abridgment of the client's case made out for the instruction of counsel on a trial at law." That definition, however, will not apply to this country, where the advocate is both attorney and counsel, and the tariff of advocates' fees evidently contemplates that an advocate may charge for a brief although no other counsel than himself has been engaged, and when he is entitled to charge for a brief he is entitled to charge for instructions for brief, although he has not instructed any other counsel, for the very next item in the tariff (item 13) provides a fee for instructions "to counsel in special matters when the counsel is not the advocate in the cause," thus indicating that the next preceding item, "instructions for brief," was taxable whether the counsel is the advocate on the record or not. It would almost seem as if the instructions for brief were assumed to come from the client. I conceive, however, that the real object of the tariff was to enable the advocate to obtain or recover from his client, as near as it can be effected, the same fees that could be exacted if the attorney and counsel were separate persons. By the English Practice the solicitor is entitled to charge for instructions, the counsel for brief. See 2 An. Prac. (1895), pp. 180 and 181 (Fees 79 to 83). The definition in Jacobs is also not correct at the present day in limiting it to an abridgment of the case made out for the instruction of a counsel *on a trial at law*. By the English practice, briefs are made out and are taxable for many other purposes; for instance, in the Chancery Division they are taxable on the argument of a demurrer: Dan. Ch. Prac. (6th ed.) 542, note (s); on an application for further consideration: Ib. 1158, note (i); on a motion to the Court; Ib. 1554, note (l); on a petition: Ib. 1567, note (a); on a special case: Ib. 1969, note (i); and in 2 An. Prac. (1895), p. 184 (Fees 96, 97, 98 and 99). I find fees for briefs in a number of cases. I also draw attention to the note to Fee 79, at p. 180.

Judgment.
Wetmore, J.

It would seem, therefore, that in England the fees for briefs are limited to briefs in certain specified cases, but in practice it is usual to allow one shilling per folio for drawing brief observations, notwithstanding there are no special provisions in the particular law. See note to Fee 96 at p. 184; and by Fee 79 at p. 180 a fee is given for instructions for counsel to make *any* application to a Court or *Judge* where no other brief. The provision for a fee for brief in our tariff is more general, it is not limited at all. In view of what I have set forth I do not see how I can put a limited construction on it. I think a fair way of getting at the correctness of the fee would be as follows: In every case where, assuming that the solicitor and counsel were separate persons, the solicitor would be compelled to or reasonably justified in engaging counsel to make the application or attend a brief and instructions therefor are taxable, when he would neither be compelled to engage counsel or reasonably justified in doing so they would not be taxable. And possibly it might be as well for the clerk in that case to insist that the brief shall be produced. This last remark does not apply to briefs on trials or hearings; I have already decided that in such cases it is always assumed that a brief has been prepared, and therefore $2 at least is taxable for it. Applying that test in this case, under ordinary practice a fee for foreclosure is obtained by motion to the Court if the defendant does not appear, and it would be necessary to retain and instruct counsel to make that motion. I cannot see that the practice in this respect is altered by the provision allowing the proceedings to be commenced by originating summons. I therefore am of opinion that the fees claimed are taxable. I notice that the tariff contemplates that counsel may attend as such in Chamber applications (Item 77).

Mr. Brown, who appeared for one of the defendants on the review, claimed that the item of $1 allowed for instructions for pleadings should not be allowed. In *The Merchants Bank* v. *Currie*,[1] I held that a fee for the perusal of a Chamber summons was not taxable under item 43 of the tariff, holding that it was not a pleading within the meaning of the tariff. If I was correct in that holding, the fee for these instructions is not taxable. I was much influenced in *The Merchants Bank* v. *Currie* by the fact that the word "petition" was used

[1] Not reported.

Judgment. Wetmore, J.

in item 43 (as it is in item 4), and was quite unnecessary, if the same definition was to be given to the word "pleading" in the tariff as was given to it in *The Judicature Ordinance*.[2] In view of the fact that this word had been defined by *The Supreme Court of Judicature Act*, 1873 (Imp.), sec. 100, and by The Judicature Ordinance of 1888 and 1893 in practically the same way and included a summons, I have reached the conclusion that I gave too narrow a construction to the word "pleading" in the tariff. I now think it more proper to hold that the Judges, in framing the tariff, used the word in the sense in which it had been for so many years defined by the statutes and by ordinances in force in this country. I therefore overrule *The Merchants Bank* v. *Currie* in this respect, and hold a chamber summons to be a pleading. I more readily do so in view of the fact that it does not include a writ of summons. See *Judicature Ordinance*,[2] sec. 2, subsec. 14, and *Murray* v. *Stephenson*.[3]

The clerk's taxation will be increased by $4.

Order accordingly.

COMMERCIAL BANK v. FEHRENBACH AND BOAKE, CLAIMANT.

Sheriff's interpleader—Costs—Service fees—Review of taxation.

A sheriff is not entitled to any costs for serving an interpleader summons, it being against the policy of the law to allow them.

[WETMORE, J., *May 9, 1900.*

Statement.

Review by the plaintiff of the taxation of the sheriff's bill of costs on interpleader proceedings.

E. L. Elwood, for the plaintiff.

D. H. Cole, for the sheriff.

Judgment.

WETMORE, J.—As to the plaintiffs' items reviewed, I am of opinion that all the items complained of as allowed are correct, except the sheriff's fees for serving interpleader summons. It is against the policy of the law to allow them.

[2] C. O. 1898, c. 21.

[3] 19 Q. B. D. 60; 56 L. J. Q. B. 647; 56 L. T. 720; 35 W. R. 666.

Judgment.
Wetmore, J.

The interpleader proceedings are for the benefit of the sheriff, and he is in the same position as if he was a party to suit. Rule 13 of *The Judicature Ordinance*[1] provides that service of a writ of summons may be made by the sheriff, his deputy or bailiff, or by any literate person other than a plaintiff, but no fees are allowed to such last mentioned person except by order of a Judge. The intention of this rule is that no plaintiff shall be allowed to serve a writ of summons, and, in my opinion, the spirit of that provision is not altered when the sheriff happens to be a party to the action. The definition of the word "sheriff" is given in section 2, sub-section 13, of the Ordinance, and includes coroner or other person performing the duties of sheriff. In cases where the sheriff is interested a coroner performs his duties. In this case the service of the interpleader summons was effected by the sheriff's officer, and there is no Judge's order allowing the fee.

As to sheriff's review; I am of opinion that the letter from the agent advising of enlargement to 27th was, under the circumstances of this case, warranted; also the letter advising that the argument had taken place and that the Judge had taken the matter into consideration. I think that a careful agent would write such a letter, but I do not think it was necessary to attend the client to advise him of that fact. Attending to bespeak and for order would be proper under ordinary circumstances, but as a matter of fact the sheriff's advocate drew the order; he was allowed for that by the clerk, and he attended to get it signed, and that was the only attendance really necessary under the circumstances, and he has been allowed it; he cannot get it twice. The other items complained of were properly disallowed.

The clerk's taxation will be altered by disallowing $6.55 and adding $1.04.

Order accordingly.

[1] C. O. 1898, c. 21.

HIND v. WESBROOK.

Confirmation of sheriff's sale of land under execution—Evidence—Publication of notice — Sufficiency of — Fairness of sale — Inadequate price—Redemption of land.

The production of an abstract of title having an execution noted thereon is *prima facie* evidence that such execution is a valid charge against the land.

Hæsitante (after consultation with the other Judges of the Court), publishing a notice in a weekly newspaper from the 18th January to the 15th March, both inclusive, is a publication for "two months."

An apparent inadequacy of selling price is not of itself evidence of unfairness in the conduct of a sale under execution.

In the absence of fraud a Judge has no power to allow any party to redeem after a sale by a sheriff of land under execution.

[WETMORE, J., *June 12, 1900.*

Statement. This was an application by Abraham Bell to confirm the sale to him of certain lands sold by the sheriff under execution issued in the above suit. The facts sufficiently appear in the judgment.

Argument. *J. T. Brown,* for the applicant.

D. H. Cole, for Herbert R. Sharp, the registered owner.

Judgment. WETMORE, J.—The first objection raised to the confirmation is that there is no material before me to show that the lands were ever the lands of the execution debtor. An abstract of title by the registrar of land titles was produced, by which it appears that the certificate of title to these lands was issued to Sharp on the 19th April, 1900, and that it was subject to this very execution under which the sale was made. That, in my opinion, is *prima facie* evidence that Sharp's title was subject to such execution and casts upon him the burthen of establishing that it was not a valid charge. A copy of this execution was lodged with the Registrar of Land Titles on 1st September, 1894, and therefore before "*The Land Titles Act, 1894,*" came into operation. It must have been lodged, therefore, under section 94 of "*The Territories Real Property Act,*" as enacted by 51 Vic. (1888) cap. 20, sec. 16, and in order to bind the land it ought to have been accompanied with a memorandum in writing of the lands intended to be charged thereby. Section 92 of "*The Land Titles Act,*

Judgment.
Wetmore, J.

1894," provides that the sheriff shall, under the provisions mentioned, forward to the registrar a certified copy of the writ of execution, and that "No land shall be bound by any such writ until the receipt by the registrar . . . of a copy thereof either *prior to this Act under the law then in force* or subsequent hereto, but from and after the receipt by him of such copy no certificate of title shall be granted, and no transfer, mortgage encumbrance, lease or other instrument executed by the execution debtor affecting such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force; and the registrar, on granting a certificate of title . . . shall, by memoranda upon the certificate of title in the register and on the duplicate issued by him, express that such certificate . . . is subject to such rights." As before stated, the duplicate certificate issued to Sharp was issued on 19th April last under *The Land Titles Act*, 1894, and, I assume, contains the memorandum of the charge of this execution as provided in section 92 just cited, because I find this charge set out in the abstract of title. But the matter is set at rest by Sharp's own affidavit and his duplicate certificate of title read on his behalf at the return of the appointment. Because I find that the duplicate certificate has the memorandum of the charge written on it. And his affidavit discloses that he got his title through the execution debtor by purchase in 1895 after the copy execution was lodged with the registrar, that Wesbrook gave him a quit claim deed of the lands which he forwarded to the Department of the Interior and which was returned to him, and that the patent to the land issued to Wesbrook in February, 1900, and he (Sharp) accepted his certificate of title with the memorandum of charge written on it. The material before me therefore abundantly establishes that the execution was a charge on the land.

The sheriff's transfer correctly sets out, according to the material before me, that Wesbrook was for some time prior to the 19th April, 1900, registered as the owner of the land.

It was also urged that the advertising and publication was not proved to have been done according to law. Rule 364 of *The Judicature Ordinance*,[1] provides that the sheriff shall not sell lands under execution "until three months' notice of

[1] C. O. 1898, c. 21.

Judgment.
Wetmore, J.

such sale has been posted in a conspicuous place in the sheriff's and clerk's offices, respectively, and published two months in the newspaper nearest the lands to be sold." The sheriff's affidavit on which the appointment was made was defective in not showing that the publication in the sheriff's and clerk's office was for three months prior to the sale, but that has been remedied by his supplementary affidavit, which I allowed to be read. It was urged that the notice published in the Spectator newspaper was not sufficient, because it was not published for two months immediately preceding the sale. It was published from the 18th January to the 15th March, both inclusive, and was then withdrawn. The last publication was more than a month preceding the date of sale. I must confess that I was much impressed with this objection. The Ontario Rule, 881, provides that the prescribed term for advertising is to be "next preceding" the date of sale. The rule of the Judicature Ordinance does not contain these words. I consulted my brother Judges when at Regina last week on this subject, and they were of the opinion that the Ordinance has been complied with and that that is sufficient. I am inclined to agree with them, not without doubts however.

Objection was taken to the sheriff's transfer on the ground that it did not comply with Form V. to *The Land Titles Act*, 1894. It seems to me to accurately conform to Form V., at page 59, which is the proper form to use in this case. I can see no objection to its being dated on 25th April, and the form does not provide that it shall refer to the debtor's certificate of title or grant.

It was also urged that the sale was not fair, because the land only fetched $216, and Sharp had given in 1895 what was equivalent to $794 for it. This $794, however, was the amount of Wesbrook's indebtedness to Sharp at the time. I do not know what changes may have since then affected the value of the land. Moreover, in view of the fact that it was made over for an indebtedness does not necessarily establish that the land was worth as much as the debt. The sheriff swears that the sale was fair, open and proper. I can discover nothing to cause me to suppose that that is not true; and the requirements of the law have been complied with.

I was asked if I upheld the regularity of the sale to allow Sharp to redeem. I know of no authority which will allow

me to do that in the absence of fraud. Sharp states he had no notice of the intended sale from the sheriff, and only heard casually of it about 1st May. The law does not provide that the sheriff shall give the party interested in the land notice of the intended sale. Sharp must be presumed to have had notice that the execution bound the land and it was his duty, if he intended to do anything in the direction of removing that charge, to make advances to the execution creditor or the sheriff. Although he has been interested in the land since 1895, he has not seen fit to do so, so far as the material before me discloses. Now the purchaser Bell has got rights which I cannot disregard. I have no power to do so. Judgment. Wetmore, J.

Sale confirmed, but as the sheriff's affidavit was defective in the particular mentioned, I make no order as to costs against Sharp.

Sale confirmed without costs.

HARDIE v. HARDIE.

Husband and wife—Action for declaration that marriage is null and void—Jurisdiction of Court to entertain the suit.

The Supreme Court of the Northwest Territories has jurisdiction to entertain a suit for a declaration that a marriage is void *ab initio*. *Lawless* v. *Chamberlain*,[1] approved.

[WETMORE, J., *June 22, 1900.*

This was an argument before trial of two points of law raised on the pleadings by the defendant and set down for hearing. Statement.

D. H. Cole, for the defendant. Argument.

E. L. Elwood, for the plaintiff.

WETMORE, J.:—This is an action brought by the plaintiff against the defendant for a judgment declaring the marriage between him and her to be null and void on the ground that the defendant had before such marriage been married to another person and that such person was alive at the time of such marriage to the plaintiff. The defendant raised two questions of law to the right of action: Judgment.

[1] 18 O. R. 296.

Judgment.

Wetmore, J.

1st. That this Court has no jurisdiction to entertain such a suit.

2nd. That the plaintiff alleged the marriage to be an illegal marriage and one prohibited and declared illegal and a nullity by statute, and therefore no action lies.

I ordered these questions of law to be set down for hearing and disposed of before the trial, and they came on for hearing before me.

The defendant's contention was that *The North-West Territories Act*,[2] sec. 48, only conferred on the Supreme Court the powers and jurisdictions which were, on the 15th July, 1870, exercised and enjoyed by the Courts of Queen's Bench, Common Pleas, Exchequer, Chancery and Probate in England; that none of those Courts had jurisdiction to entertain a suit for nullity of marriage at that date, and that such jurisdiction was by virtue of *The Imperial Act*, 20 & 21 Vic. (1857) cap. 85, sec. 2, vested solely in the Court for Divorce and Matrimonial Causes, which is not one of the Courts mentioned in section 48 of *The North-West Territories Act*.[2]

For the plaintiff it was urged that this Court had jurisdiction to make the declaration asked for.

1st. By virtue of Rule 152 of *The Judicature Ordinance*.[3]

2nd. That the jurisdiction to make such a decree was inherent in the Court of Chancery in England on the 15th July, 1870, and therefore appertains to this Court.

I have reached the conclusion that the plaintiff's contention is correct, and I am very much influenced in doing so by the reasoning of Boyd, C., in *Lawless* v. *Chamberlain*.[1]

There is no doubt that if the facts set out by the plaintiff in his statement of claim are true the marriage was not merely voidable but it was null and void from the beginning, and that being so, I am of opinion that this Court has as much authority to declare such a marriage null and void as it would have to declare one null and void by reason of fraud or by reason of other absence of some essential preliminary. This judgment is not at all at variance with the one I gave in *Harris* v. *Harris*[4] on 25th January, 1895. That judgment went on an entirely different ground. And I do not decide

[2] R. S. Can. 1886, c. 50.
[3] C. O. 1898, c. 21.
[4] 3 Terr. L. R. 289.

Judgment.

Wetmore, J.

that this Court has jurisdiction to dissolve a valid marriage or declare a voidable marriage void or to decree a judicial separation. I merely decide that it has power to make a judgment declaring a marriage void which was void *ab initio*.

As to the second point of law raised, there is nothing in it whatever. The contention is that because the plaintiff's statement of claim alleges facts which, if true, render the marriage void, he cannot bring this action. The answer to it is to be found in the statement of defence wherein the defendant denies a most material statement of fact in the claim, and alleges that the person alleged to be her first husband was not alive when the marriage was contracted between her and the plaintiff. If effect were given to such a contention a person could never get authoritative relief from a bigamous marriage, and if he desired to contract another marriage would have to do so at the possible risk of being prosecuted for bigamy.

There will be judgment for the plaintiff on the questions of law raised by the 4th paragraph of the statement of defence.

I will reserve the question of the costs of this hearing until the final disposition of the case.

Order accordingly.

ABRAMOVICH v. SAIR.

Principal and agent—Promissory note—Chattel mortgage—Authority of agent to deal with his principal's property.

An agent of the plaintiff, holding for collection a promissory note payable to order, and a collateral chattel mortgage made by defendant in the plaintiff's favour, delivered the same to one Thompson, in alleged payment of a certain personal indebtedness of the agent to Thompson. The defendant, *bona fide*, settled with Thompson, and Thompson delivered to the defendant the note and mortgage. The note had not been endorsed by the plaintiff, nor the mortgage assigned in any way.

Held, that the delivery of the note and mortgage to Thompson was outside the scope of the agent's authority, and that, as the instruments were not transferable by delivery, and the plaintiff had not made any representation that they would so pass, the defendant was liable to pay the amount thereof to the plaintiff. Remarks of the Lord Chancellor in *Goodwin* v. *Robarts*,[1] considered.

[WETMORE, J., *July 14, 1900.*

Statement.

This action was brought originally by Jacob Udow to recover an amount claimed to be due upon a promissory note

made by the defendant in favor of Udow, and in the alternative upon a covenant contained in a chattel mortgage made by the defendant to Udow for the payment of the money secured by the promissory note. After action brought Udow's interest in the subject matter of the suit having been assigned to Abramovich, he was by order substituted as plaintiff.

Judgment.

WETMORE, J.—I find the following facts: One Jacob Udow was the assignee of certain debts due to Pierce Bros., who at one time did business at Oxbow, but who had ceased to do business there prior to the transactions hereinafter mentioned. Udow resided at Winnipeg, and Michael Pierce was his agent at Oxbow to collect these debts. His instructions were to collect these debts for Udow, and in cases where he could not get the money at once to give reductions, and in such cases to do the best he could for him and to remit all monies collected to Udow at Winnipeg. Pierce, therefore, was not the general agent of Udow, he was a special agent with respect to these debts for the particular purpose I have mentioned, and he was paid for his services as such by a monthly wage. Michael Pierce had been a member of the firm of Pierce Bros. Among the debts due to Pierce Bros., which Udow had purchased, was a claim against the defendant Sair. Proceedings had been taken on behalf of Udow in the Court to enforce such claim, and as a result thereof the note sued on was made by the defendant and also the chattel mortgage under seal. This note was payable to Udow's order, and was made up of Sair's indebtedness to Pierce Bros. and the costs of the legal proceedings and possibly of a small claim due from Sair to Udow personally. How this latter claim was contracted does not appear. It is not material, however, as the consideration for the note is not disputed. The chattel mortgage was given as collateral for the amount mentioned in the promissory note. The note and mortgage were dated 12th August, 1899, and were payable on 1st October, 1899, with twelve per cent. interest. Pierce Bros. were indebted to one James E. W. Thompson for wages in the sum of $128.09, and in the month of December, 1899, he demanded payment of his claim from Michael Pierce, who, in satisfaction thereof, delivered to him the Sair note and mortgage, representing to him that he was Udow's agent and had authority to deal with the notes, and

Judgment.
Wetmore, J.

that any settlement he might make with Sair's notes would be perfectly satisfactory to Udow, and Thompson agreed to pay Pierce $72, the difference between his claim and the face of the Sair note. The Sair note was not endorsed by Udow or by any person on his behalf, and there was no writing whatever assigning the chattel mortgage. Thompson having so obtained these securities proceeded with one Thomas Baird to the defendant's residence, on 17th or 18th September, and left him (Baird) there. The defendant then made two notes in favor of Baird, one for $128, payable at two months, and one for $72, payable at twelve months (these notes bore interest at twelve per cent). Baird then delivered the $200 note and chattel mortgage to Sair. Thompson, these notes having been obtained, tendered the $72 note to Pierce, who refused it, claiming that he was to have been paid the $72 in cash. I have no doubt that Thompson played a trick on Pierce, but not in the way that Pierce alleged. The trick he played was that he did not pay him the $72 in cash as agreed, but endeavoured to throw him over as to that amount for twelve months with an unsecured note from the defendant. I also find that previous to Baird going to the defendant's place, Michael Pierce had informed the defendant in substance that he intended or had it in view to hand his note and mortgage over to Thompson. The question now arises whether, under these findings, the plaintiff is entitled to judgment? I am of opinion that he is. It is perfectly clear that Michael Pierce had no authority whatever to appropriate Jacob Udow's property to pay the debts of Pierce Bros. No such authority can in any way be spelled out of the evidence. Udow never gave it to him; it was not incidental to the nature of his agency, and Pierce's statement at the time he delivered the instruments cannot avail to perfect Thompson's title. *Goodwin* v. *Robarts*,[1] *Rumball* v. *Metropolitan Bank*,[2] and *The London Joint Stock Bank* v. *Simmons*,[3] were relied on by the defendant. In all these cases the instruments transferred were transferable by delivery, and those decisions went on the ground that they were so transferable. The note in

[1] 45 L. J. Ex. 748; 1 A. C. 476; 35 L. T. 179; 24 W. R. 987.
[2] 46 L. J. Q. B. 346; 2 Q. B. D. 194; 36 L. T. 240; 25 W. R. 366.
[3] 61 L. J. Ch. 723; (1892), A. C. 201; 66 L. T. 625; 41 W. R. 108; 56 J. P. 644.

Judgment.
Wetmore, J.

question in this case was not transferable by delivery, it was payable to Udow's order and was not indorsed by him. If Udow had indorsed the note in blank, or possibly if he had indorsed it to Michael Pierce and Pierce had delivered it to Thompson even in fraud of Udow, the cases above cited would be applicable. So far as Thompson is concerned, he took the note under circumstances sufficient to raise a strong suspicion that it was not being dealt with in a manner duly authorized notwithstanding Michael Pierce's statement to him. He must have known that Michael Pierce was using Udow's property to pay Pierce Bros.' indebtedness, and he ought to have known that it was being passed to him in a manner in which such securities are not usually passed, that is, without the indorsement of the person to whose order it was payable, and that it was not therefore negotiated as provided by section 31, subsection 3 of *The Bills of Exchange Act* (1890), cap. 33; and that the transfer was not according to the usual methods. Moreover, he must have known that the manner of the assignment or transfer of the chattel mortgage was entirely unusual. Sair, the defendant, too must be held to have knowledge of the same facts, and they were sufficient to put him on his guard. It is true that Sair swore that when he signed the $200 note and mortgage he did not know whether it was in favor of Udow or Pierce Bros. I have very great difficulty in believing that. He had been sued in Udow's name, and he must have been apprised that Udow held the claim. There is no charge of fraud or mistake set up in the pleadings. The documents were read or explained to him, and if he did not know in whose name the documents were drawn it was not Udow's fault, it was the defendant's own indifference or negligence. There are some remarks by the Lord Chancellor, in *Goodwin* v. *Robarts*,[1] which might at first reading lead one to the conclusion that even if the instrument had not been negotiable the title would have passed. Upon reading these remarks closely, however, it will be seen that he held that the title would have so passed in that particular case because the appellant was "*in the position* of a person who has made a representation on the face of his scrip that it would pass with a good title to anyone at least taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are in-

Judgment.
Wetmore, J.

duced to alter their position on the faith of the representation so made." The representation the Lord Chancellor refers to is the representation on the face of the scrip that it was payable to bearer, and he brought the case within *Picard* v. *Sears*.[4] I cannot find that the other Judges expressed just the same views, although these remarks of the Lord Chancellor seem to have been quoted as binding by the judgment of the Court in *Rumball* v. *Metropolitan Bank*.[2] However that may be, there was no representation by Udow in this case, or anything under which it could be held, that Udow had put himself in the position of a person who has made such a representation. I have not been able to lay my hands on *Picard* v. *Sears*,[4] and I do not find it cited in Mews' Fisher's Digest (that is, in my edition of that work), but I find a reference to it in the judgment of Park, B., in *Freeman* v. *Cooke*,[5] where that learned Judge states that the rule laid down in *Picard* v. *Sears*[4] was as follows: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act in that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That does not apply to this case. Udow neither by his words nor conduct wilfully caused either Thompson or Sair to believe that Michael Pierce had authority to assign or transfer the note or mortgage. He simply allowed these papers to remain in Pierce's possession without the slightest evidence or indication of any authority in him to assign or transfer them. And under such circumstances Pierce had no more authority to pass a title to a third person than he would to have passed a title to a horse which Udow might have loaned him. Paragraph 4 of section 31 of *The Bill of Exchange Ordinance* will not help the defendant, because Udow was the holder of the note and he never transferred it in any way or authorized it to be transferred.

Judgment for plaintiff.

[4] 6 A. & E. 469; 2 N. & P. 488; 45 R. R. 538.
[5] 18 L. J. Ex. 114; 2 Ex. 654; 6 D. & L. 187; 12 Jur. 777.

THE FAIRCHILD CO. LTD. v. HAMMOND ET AL.

Conditional sale of goods—Repossession and resale—Rescission—Defence arising subsequent to issue of writ.

When a vendor under a conditional sale, repossesses the goods and makes a resale thereof other than that contemplated by the conditional agreement, he thereby rescinds the agreement: *Sawyer* v. *Pringle*,[1] and *Harris* v. *Dustin*,[2] approved and followed, and such result will follow even if the vendor, before repossessing, has instituted a suit under the agreement to recover the purchase price.

A corporation will be bound by its unsealed contracts entered into *bona fide* in the course of its ordinary business within the scope of the objects for which it was incorporated.

[WETMORE, J., *February 7th, 1903.*]

Statement. The defendants Hammond and Buller, by an order in writing dated 6th April, 1901, ordered from the plaintiffs a threshing outfit. This threshing outfit was delivered to the purchasers, who gave their joint and several notes therefor in accordance with the terms of purchase. The order or agreement provided that the ownership and right to possession of this property should remain in the plaintiffs until the purchase money and the notes given therefor were fully paid, and contained a provision that in the event of any one of certain specified contingencies arising, the whole debt and any note or notes given on account thereof should become due and payable and the plaintiffs might take possession of the property and resell the same by public auction or private sale and deduct out of the purchase money such costs, charges, expenses and damages as they might have incurred in consequence of such default, and taking possession and reselling and of necessary repairs, and might recover from the purchasers the balance of the purchase price remaining unpaid as liquidated damages, together with such costs, charges and expenses remaining unpaid in the event of the amount realized at such resale being insufficient to cover the amount thereof. The several notes also contained a memorandum to the effect that the ownership and right of possession to the property for which they were given, should remain in the plaintiffs until the price was paid, and that if default in payment was made the

[1] 20 O. R. 111; 18 A. R. 218.
[2] 1 Terr. L. R. 404.

plaintiffs had power to declare the notes due and payable even before maturity and to take and sell the property, and that the notes should remain payable, but that the amount realized from the sale of the property, less expenses, should be credited on the price. The defendants paid only $15 on account of the purchase price of this property, and this action was brought to recover the balance. None of the defendants defended the action except the defendant Hammond. The action was commenced on 5th July, 1902.

E. L. Elwood, for plaintiffs.

J. T. Brown, for defendant Hammond.

Judgment.

Wetmore, J.

WETMORE, J.—The matter of defence set up by Hammond is that the plaintiffs repossessed themselves of the property in question, and have so dealt with it and otherwise acted in respect to it as to relieve him and his property from liability. The evidence fails to establish that up to the time the action was commenced the plaintiffs had done any act whatever which would serve to relieve Hammond from such liability. On the 1st September last (being some two months after the commencement of this action) however, a different state of affairs was brought about. On that date the plaintiffs wrote Buller a letter, which is as follows:—

"We hereby authorize you to take possession of and operate the threshing outfit which we sold last year to Richard Hammond and yourself; and agree that when you pay the notes which were given for the machine that you are to have the machine as your own property.

"In the meantime we shall try and collect from Mr. Hammond moneys which he earned with the machine in the year 1901.

"Respy yours,
"The Fairchild Company, Limited,
"By I. E. F."

Buller swore that after receiving that letter he "worked on the machine, hired all the crew and took full possession," and shewed the letter to Hammond. I find and hold that this amounted to an acceptance by Buller of the plaintiffs' offer contained in that letter, was a taking possession of the

Judgment.

Wetmore, J.

machinery by the plaintiffs and was a conditional sale thereof to Buller to the entire exclusion of Mr. Hammond. It was the intention of the plaintiffs in writing the letter and of Buller in taking possession and acting under it, to vest the right of property and ownership in the machinery in Buller upon his paying the notes mentioned in such letter. I hold that there was a good and valid consideration for the agreement; that the ownership in the machinery was in the plaintiffs and therefore they had full authority to make the agreement, and that if Buller paid the notes as specified the right of property and ownership would vest in him, and Buller could insist upon it as against the plaintiffs or Hammond. And to clinch the matter, the plaintiffs on the 8th September, wrote Hammond a letter which contains the following: "Mr. Frank Buller has forwarded to us your letter of 27th August, in which you say you intend to return and run the machine this season. We have re-possessed the machine and turned it over to Mr. Buller and do not expect that you will have anything more to do with the running of it." This all took place after the commencement of this action but before Hammond had delivered his statement of defence. The question now arises, how does this state of facts which I have found, affect the plaintiffs' right of action against Hammond? In *Sawyer* v. *Pringle*,[1] the vendors under the agreement of sale retained the ownership of the machine until payment of the price, but it was provided that the vendees should have the right of possession and the right to use it until any default in payment of the purchase price, and in default of payment the vendors had the right to take possession of the property. There was no provision in the agreement authorizing the vendors to sell the machine and apply the proceeds on account of the purchase price, and to have a right of action against the vendees for the balance. The vendees made default in payment of the purchase money, the vendors took possession of the machine and sold it, credited the proceeds on the purchase price and brought the action to recover the balance from the vendees. The Court held that the sale to the plaintiffs being an executory sale only, to be completed when the purchase price was paid, that the plaintiffs by the resale had put it out of their power to fulfil the contract, and that the

vendees might therefore treat such contract as rescinded, and that the plaintiffs could not recover. Judgment. Wetmore, J.

Sawyer v. *Pringle*[1] was considered and approved of by the Supreme Court of the Territories in *Harris, Son & Co.* v. *Dustin*.[2] That was an action brought upon three promissory notes made by defendant in favour of the plaintiffs for the price of certain agricultural implements mentioned in them. These notes provided that the ownership of the property specified should remain in the plaintiffs until the notes were paid. There was no provision that the plaintiffs could take possession on default of payment. The property however was given into the possession of the defendant, who made default in payment. The plaintiffs' agent took possession of the implements and removed them with the intention of selling them to other parties on plaintiffs' behalf. As a matter of fact he did not sell them. But he used both the implements for his own purposes and allowed a third person to use one of them. The implements were not duly and reasonably cared for and were in a more dilapidated condition than, with that reasonable care which a contracting seller was bound to give to property held for his purchaser, they should be. It was urged in that case on the part of the plaintiffs that the cause was distinguishable from *Sawyer* v. *Pringle*,[1] because there was no re-sale. But the Court held that it was not necessary that there should be a re-sale in order to bring the case within the *ratio decidendi* of *Sawyer* v. *Pringle*,[1] that that case was far more far-reaching in its consequences than that; and the appeal was dismissed and the judgment rendered by the trial Judge for the defendant affirmed on the ground that the plaintiffs' conduct in dealing with the implements after they had taken possession was of such a character that the defendant was justified in considering that the plaintiffs had rescinded the contract and in treating it accordingly.

The agreement in this case differs from that in *Sawyer* v. *Pringle*,[1] inasmuch as the last mentioned agreement contained a clause expressly authorising the vendee to retain possession of the article until default. The agreement in this case does not contain this clause in express language, but the provision must be implied, because the provision enabling the vendor to take possession on default coupled with the provision requiring a delivery to the vendee in-

Judgment. Wetmore, J.

volves the right in the vendee to retain such possession until default. There is however a most important and material difference between the agreement in this case and those in *Sawyer* v. *Pringle*[1] and *Harris* v. *Dustin*,[2] inasmuch as the agreement in this case expressly authorizes the vendors on taking possession for default to sell the machinery and after crediting the proceeds of the sale on the purchase price to sue the vendees and recover the balance. The first question that occurs to me is what is the effect of this provision? Is it one entirely for the protection and convenience of the vendors or has the vendee any rights in respect thereof? Have the vendors a right as against him to avail themselves of one portion of the agreement by taking possession and to ignore the provision respecting the selling? Or has the vendee the right to insist that having taken possession the vendors shall go on in accordance with the agreement and sell and so relieve the vendee of his liability by the amount which may be realized at such sale? I do not consider that it is necessary to decide that question in this case. I merely mention it as a question which might possibly be worthy of consideration should it be raised.

In order to consider the effect of this clause for re-sale after taking possession so far as this clause is concerned, I will again call attention to what may happen when the agreement contains no provision for a re-sale. We have seen according to *Sawyer* v. *Pringle*[1] that in such a case if the vendor takes possession and resells, the original vendee may consider the contract of sale rescinded and the vendor cannot recover the balance of the purchase money. We have seen according to *Harris* v. *Dustin*[2] that although there was no resale the vendor may so conduct himself in respect to the property as to warrant the vendee considering that the vendor had rescinded the contract and so preclude the vendor from recovering the purchase price. I find the following in the judgment of the Court in the last mentioned case:[3]

"The question is not whether the vendor has rescinded the contract; or whether or not he had any such intention. The question is has the vendor so dealt with the articles as to justify the buyer in considering that the vendor had

[3] At p. 414.

Judgment.
Wetmore, J.

rescinded the contract and in treating it accordingly. If the vendor wishes to hold the buyer to his agreement and enforce his claim against him for the price, he has simply the right to hold the article, and he is bound to take care of it. The buyer has the right to insist that he shall not use it and that he shall not allow other persons to do so, and that he shall take care of it. If he has got to take it back he has a right to receive it just in the same condition as it was when it was taken out of his possession. . . If not kept in that condition or if used by the vendor or allowed by him to be used the buyer would have the right to say: You have by your conduct rescinded the agreement and I will not pay you the balance of the price." The provision in the agreement in this case authorizing a resale only, to say the least, alters the position of the vendor taking possession for default in case such provision is acted on. In other respects it leaves the parties to it in the same position they would have been in if the agreement contained no such clause. Now I am of opinion and hold that the resale contemplated by this agreement is an acutal, executed sale, not an executory sale, wherein the realization of the purchase price depends on contingencies and may never be realized. The plaintiffs have not therefore availed themselves of the power of resale contemplated by the agreement; they have made a sale of a character not contemplated by the agreement, and moreover they have allowed Buller to use the machine and deal with it in a manner contrary to what was laid down in *Harris* v. *Dustin*,[2] in so far as the rights of Hammond are concerned. There is no doubt that the plaintiffs having repossessed themselves of the machinery had a right to sell the property to Buller or any other person. The ownership of it was theirs, it always had been, the right of possession owing to the vendee's default was theirs, they were therefore in a position to give both the ownership and the right of possession to any person they saw fit. They were not bound in order to do so to make an executed sale, they were perfectly at liberty to make an executory sale or otherwise deal with their own property as they saw fit; the vendees could not stop them. They (the vendees) could however say: You have dealt with this machinery in a manner not contemplated by the

Judgment. Wetmore, J.

agreement between us and so as to enable us to say that you have by your conduct rescinded the agreement and we will not pay you the price of the machinery. It does not affect Hammond's rights that the party with whom the plaintiffs have dealt or acted was his partner. So far as he is concerned he was justified in treating the agreement as rescinded and the plaintiffs cannot recover as against him. I may say that it seems to me that the conclusion I have reached is quite in accord with the trend of the American authorities cited by Hagarty, C.J., in *Sawyer* v. *Pringle*.[3]

The fact that this matter of defence arose after the commencement of the action does not seem to me to affect the question. If the vendor has acted in a manner which would justify a vendee in considering that he had rescinded the agreement, I cannot perceive why the vendee would not be in a position to take advantage of it whether he so acted before or after action brought. Hammond would, had there been no sale to Buller, have had the right to pay the purchase money and have his property returned to him even after action brought until precluded by a decree of the Court. If he attempted to do so and found that the property had as against him been improperly dealt with by the act of the vendor or put in such a position that it could not be restored to him, I cannot see that it would make any difference that this was done after the commencement of the action.

It was urged on behalf of the plantiffs that the agreement for the resale to Buller not being under the seal of the plaintiff company was not binding on them. The letters of 1st and 8th September last upon which that agreement, so far as the plaintiffs are concerned, turns were written by the vice-president of the plaintiff company, and it is not disputed that in doing so he was acting within his authority. It is laid down in *Lindley on Companies*,[4] that, "If a corporation is created for a particular purpose it will be bound by unsealed contracts *bona fide* entered into on its behalf in the course of its ordinary business." Looking at the original contract with Hammond and Buller, I assume the plaintiffs were incorporated among other things anyway for dealing in and selling machinery of the character sold to such de-

[4] 6th Edition, at page 271.

fendants. That being so, I am of opinion that the agreement of sale to Buller was sufficiently proved. Judgment. Wetmore, J.

Judgment for the defendant Hammond with costs.

HOOPER v. SMITH AND HAMILTON.

Injunction—Motion to dissolve—Vendee of land with notice of prior interest—Fraud—Sections 42, 55 and 56 of Land Titles Act, 1894.

An injunction will lie against the registered owner of land which he acquired with intent to defraud one having a prior equity in the land.

M. agreed to sell to H. and S. a block of land, the agreement providing that upon payment of the purchase money H. should have a two-thirds interest in the land. Upon the death of H., S. paid up the balance due on the purchase price, and induced M. to transfer the land to him. S. sold the land to one Hamilton, who had knowledge that deceased had an interest in the property. In an action by the representatives of the deceased alleging fraud on the part of Hamilton, an injunction was granted restraining Hamilton from dealing with the land. Upon an application by Hamilton to dissolve the injunction,

Held, that the right of the representatives of the deceased was a prior one and should prevail over the interest of the vendee S., under section 126 of the Land Titles Act, 1894.

Quære, whether irrespective of the question of fraud, the holder of the certificate of title would, under sections 55 & 56 of the Act, be protected against the deceased's representatives, where the former had notice of the interest of the deceased before he obtained the certificate.

[SCOTT, J., *September 18th, 1905.*]

Motion to a Judge in Chambers to dissolve an injunction. The facts and points involved are set forth in the judgment. Statement

O. M. Biggar, for the motion. Argument.

J. D. Hyndman, contra.

SCOTT, J.—This is an application by defendant Hamilton to dissolve the injunction granted by me herein on 26th June last, restraining him and the Registrar of The North Alberta Land Registration District from dealing with the lands in question herein. Judgment.

By his statement of claim the plaintiff alleges that he is a son and one of the next of kin of William H. Hooper, deceased, who along with defendant Smith entered into an agreement with one Macdonald to purchase from him the lands in question, that the agreement provided that upon

Judgment.
Scott, J.

payment of the purchase money deceased should be entitled to a two-thirds' interest in the property, that deceased died on 13th March, 1905, that at that time there remained due to Macdonald on account of the purchase money certain payments, that shortly thereafter defendant Smith paid Macdonald the balance of the purchase money, and, in fraud of the creditors and next of kin of deceased, induced Macdonald to transfer said lands to him, and on the 1st of April, 1905, he became the registered owner of the lands, that on the 26th of April, 1905, he for a pretended consideration of $9,000, transferred the lands to his co-defendant who on 28th April following became the registered owner thereof, that the latter gave the former no consideration for such transfer, and that, at the time of receiving same, he had notice of the interest of the deceased in the lands and took the transfer for the purpose of enabling the defendant Smith to defraud the legal representatives of the deceased of their interest therein.

Upon the hearing of the application it was admitted by counsel for the applicant Hamilton that at the time he obtained his transfer from Smith he was aware that deceased had an interest in the lands in question.

It was contended by counsel for the applicant that neither upon the application for the injunction nor upon this application is there any suggestion of fraud on the part of the defendant Hamilton beyond the fact that at the time he obtained the transfer from Smith he knew that Smith did not own the whole interest in the land; that, having obtained his certificate of title, he is entitled by virtue of section 55 and 56 of the *Land Titles Act*[1] to hold the lands as against the representatives of the deceased who have no longer any interest therein, and that under section 126 of the Act[1] his knowledge of the unregistered interest of the deceased does not of itself constitute fraud.

In *Gregory* v. *Alger*,[2] it was held by the Supreme Court of Victoria that in the absence of fraud on the part of the holder of a certificate of title, his title will prevail over an unregistered interest even though he had notice of such interest before he obtained his certificate, and that his

[1] The Land Titles Act, 1894, 57-58 Vict. c. 28.
[2] Cited in Hunter, Torrens Title Cases, p. 533.

Judgment. Scott, J.

obtaining the certificate with such notice did not constitute fraud. This was a decision under the *Victorian Transfer of Land Act* similar to section 126 of our Act.[1] It appears, however, that the Courts of New Zealand have taken a different view of the effect of a similar enactment there. See *Duffy* v. *Howland*, p. 285, and *Locker* v. *Howland, Digest of Australian Land Cases*, p. 114. The question of the effect of such notice is therefore not free from doubt.

In the affidavit of defendant Smith filed on this application, it is shewn that defendant Hamilton had notice from him of the interest of deceased in the property before he (Smith) had obtained the certificate of title. Such being the case it is open to question whether defendant Hamilton's certificate of title would protect him against that interest, even though *Gregory* v. *Alger*[2] was rightly decided. (See *Davis* v. *Weakey, Hunter's Torrens Title Cases*, p. 350.)

Apart from these questions there is in the statement of claim a charge of actual fraud on the part of defendant Hamilton. No such actual fraud on his part has been shewn unless his purchasing the land from his co-defendant, knowing that he did not possess the whole interest in it would constitute such fraud, but the plaintiff has sworn to his belief in the existence of such fraud and its existence is a question to be disposed of at the trial of the action. The fact that the defendants have in their affidavits filed, repudiated any fraud on their part would not, I think, justify me in now holding that they were innocent of it, nor would the fact that plaintiff has not proved such fraud at this stage justify me in dissolving the injunction.

In *Davis* v. *Weakey* (above), Moleworth, J., says with reference to the effect of the section of the *Victoria Act* similar to section 126 of our Act.[1]

"The immense power which that Act gives to a proprietor of completely barring clear equities presents, I think, a reason for Courts of Equity readily interfering by injunction."

Application refused.

McLEOD BROS. v. SICKAVITCH.

Practice—Small debt—Abandonment of portion of claim.

A person having a demand exceeding $100 may abandon the overplus so as to bring an action under the Small Debt Procedure.
When the plaintiff's demand, in such a case, consists of several items, it is not necessary to abandon a specific item or items, it is sufficient to abandon in general terms the excess over $100.

[WETMORE, J., *February 3rd, 1903.*]

Statement. Chamber summons on behalf of the defendant, to set aside the writ of summons and the service thereof, on the ground that the action was brought under Part III. of "*The Judicature Ordinance*" relating to "Small Debt Procedure," and that the particulars of the plaintiffs' claim filed shewed an indebtedness of over $100, and that the issuing of the writ of summons therefore was an abuse of the process of the Court. The plaintiffs' claim was on a merchant's account, and the particulars filed shewed an original indebtedness of $104.15, but such claim contained the following memorandum written at the end of it and signed by the plaintiffs: "We hereby waive the above account except the sum of ninety-nine 90/100 dollars ($99 90/100)."

Argument. *E. L. Elwood*, in support of the motion.
J. T. Brown, contra.

Judgment. WETMORE, J.—It was urged on behalf of the defendant that the plaintiffs had no right to abandon or waive a portion of their claim for the purpose of bringing it under the "Small Debt Procedure," and that they could not by so doing give the Court jurisdiction to proceed by that exceptional practice, and if they could do so they ought to have specified the items of the account which they have abandoned and not abandon in the general way which they have adopted. If the plaintiffs had a right to abandon a portion of their claim as contended for, I am of opinion that it was not necessary for them to abandon any specific items; it was quite sufficient to abandon all of their claim above $99.90, as they have done. This was the form of abandonment in *Isaacs* v. *Wyld*.[1] The debatable question is, had they the

[1] 2 L. M. & P. 676; 7 Ex. 163; 21 L. J. Ex. 46; 15 Jur. 1135.

Judgment.
Wetmore, J.

right to abandon a portion of their claim to bring it within the Small Debt Procedure? When I come to carefully consider the language of Rule 602 of "*The Judicature Ordinance*," and the authorities bearing on the question, I am of opinion that it is open to a plaintiff to abandon a portion of his claim so as to bring it within "The Small Debt Procedure," provided of course that the claim or demand is for a debt. Rule 602 provides that: "In all claims and demands for debt whether payable in money or otherwise where the amount or balance *claimed* does not exceed $100, the procedure shall unless otherwise ordered or allowed by a Judge be as follows;" and then by succeeding Rules the Small Debt Procedure is prescribed. Now if a person has a claim or demand against another and files such claim and states upon the record that he abandons a portion of it and brings an action for the balance, the amount or balance he thereby *claims* is the amount after deducting the portion so abandoned. And if he recovers judgment upon such a claim he could not bring another action for the portion so abandoned: *McKenzie* v. *Ryan*;[2] *Winger* v. *Sibbald*.[3] In this connection I draw attention to the fact that so far as the Small Debt Procedure in the Territories is concerned no question can arise respecting the ousting of the Court of its jurisdiction over the subject-matter. Here it is merely matter of procedure, as the Court holds the jurisdiction over the subject-matter, no matter what procedure is adopted. In *White* v. *Machlin*,[4] Abbott, C.J., is reported as saying in *Barnes* v. *Winkle*,[5] "That he saw no reason why a party might not waive a part of his demand and resort to a cheaper tribunal to recover the remainder, provided there be nothing in the Act of Parliament constituting that Court which prevents him." And in *McKenzie* v. *Ryan*,[2] Harrison, C.J., says:[6] "There is nothing according to the general principles of law to prevent a person having a pecuniary demand against another, either wholly or in part, at any time abandoning it." That must be conceded, it seems to me; and, that being so, what principle of common sense or common law intervenes to

[2] 6 P. R. 323.
[3] 2 A. R. 610.
[4] 1 Kerr Rep. (New Bruns.) 94.
[5] 2 C. & P. 345.
[6] At p. 325.

Judgment. Wetmore, J.

prevent a person by abandoning a portion of his claim to avail himself of a cheaper mode of procedure in the same Court? I know of none, and I fail to perceive how in such case anything can happen by which an injustice may be done to a defendant, and I have no hesitation in holding that if a plaintiff attempted in this Court to divide up his cause of action and so bring several actions in order to avail himself of the cheap procedure, a Judge would lay his hands upon his proceedings as being an abuse of the process of the Court. I am of opinion therefore that the proceedings attacked are correct.

Summons dismissed with costs.

THE WATEROUS ENGINE WORKS CO. LTD. v. BALL.

Pleading—Counterclaim and set-off—Statute of Limitations.

The Statute of Limitations is pleadable to a counterclaim in the same way as to a separate action for the same relief.

A set-off can only arise where the action is for a liquidated amount and there are mutual debts between the litigating parties.

[WETMORE, J., *March 2nd, 1903.*]

Statement.

This action was brought on 12th September, 1902, to recover the amount claimed to be due on three several promissory notes made by the defendant in favour of the plaintiffs, two of which were dated 22nd July, 1898, and the other April 5th, 1900. The defendant set up as a defence by way of counterclaim that the plaintiffs are a company engaged in the manufacture and sale of engines and machinery, that the notes in question were given to secure a part of the purchase price of a threshing engine sold by them to the defendant; that the defendant when ordering such engine made known to the plaintiffs that it was wanted for the purpose of threshing grain, that it was to be a straw burner and was to be of 16 horse power; and that the engine was sold and delivered to him accordingly; that he endeavoured to use it for the purpose of threshing grain for a portion of the fall of each of three years, but that it never worked satisfactorily in that it did not generate the power which it was reasonably expected or sold to do, but was

Statement.

useless for threshing purposes; that he on several occasions complained to the plaintiffs about the engine and requested them to re-take possession of it, which they refused to do, and that the defendant was compelled to put it aside as useless, and thereupon requested the plaintiffs to take possession of it, which they refused; that he has from time to time paid plaintiffs on account of the purchase price of the engine $327.77, and he counterclaimed as damages the full amount of the plaintiffs' claim and the moneys so paid by him, amounting in all to $2,508.12. Particulars were ordered to be delivered by the defendant to the plaintiffs by which it appeared that the years in which the defendant endeavoured to use the machine were 1892, 1893 and 1895. The plaintiffs thereupon raised in their reply the point of law that the counterclaim was barred by the *Statute of Limitations*, 21 Jac. I. c. 16, s. 3.

On application of the plaintiffs the question of law was set down for hearing before Wetmore, J., in Chambers.

Argument.

E. A. C. McLorg, for the plaintiffs.

J. T. Brown, for the defendant.

Judgment.

WETMORE, J.—It is quite clear that if the defendant had brought a substantive action against the plaintiffs for breach of the alleged warranty (because it is an implied warranty upon which he relies) his right of action would be barred by the *Statute of Limitations*. The learned counsel for the defendant however urged two contentions in support of his counterclaim:—

1st. That the *Statute of Limitations* cannot be pleaded to a counterclaim at all, it can only be pleaded to an action.

2nd. That the matter of counterclaim is matter of set-off really, and not matter of counterclaim, and the right to rely upon it as a set-off is not taken away because it is stated in the pleading to be a counterclaim, that the cause of counterclaim arises out of the contract on which the notes sued on are based, and the cause of action on the part of the plaintiffs not being barred keeps the subject-matter of the counterclaim alive.

Judgment.

Wetmore, J.

The contention first made is based on the fact that the *Statute of James*[1] neither takes away the right to damages nor even the right to bring the action, it merely creates a bar to enforcing the action. If the statute is not pleaded the party can recover. Then it is urged that the statute provides that all *actions* of the character specified shall be brought within the limited time, and that a counterclaim is not an action. It will be observed that by rule 110 of "*The Judicature Ordinance*"[2] and marginal rules 199 & 249 of the English Rules, from which our rule is taken, it is provided that a counterclaim shall have the same effect as a cross-action. Now, clearly, if a cross-action had been brought in this instance the *Statute of Limitations* could have been pleaded to it. It certainly would be a strange anomaly that the statute could not be pleaded because instead of bringing a cross-action the claim is brought forward by way of counterclaim. If that were allowed the provisions of the rule would to that extent be defeated, because the same effect would not be given to the counterclaim as would be given to the cross-action. And note the consequences if the defendant's contention is correct: A has a cause of action against B which he knows is barred by the statute and he knows therefore that it would be idle to sue, so he refrains; but B happens to have a cause of action against A entirely independent of A's action against him and arising out of transactions entirely foreign to it and brings an action against A. A could then bring forward by counterclaim his cause of action no matter how stale it might be and open up the whole of it, and B would be helpless in so far as the statute is concerned. Moreover, B.'s action might be stayed or discontinued, and under the express provisions of the rules A's counterclaim could be proceeded with notwithstanding the statute. I am quite satisfied that the rules or the practice never contemplated anything of the sort. In *Re Lloyd*,[3] (cited for the defendant), is not applicable because no action was brought at all by the mortgagee or anything which could be construed to be an action; the proceeding was taken by the representatives of

[1] 21 Jac. I. c. 16.

[2] C. O. 1898, c. 21.

[3] (1903), 1 Ch. 385; 72 L. J. Ch. 78; 51 W. R. 177; 87 L. T. 541; 19 Times L. R. 101.

Judgment.
Wetmore, J.

the mortgagor. I am inclined to think with all due deference that that case, to say the least, touched the border-line, and I am not disposed to carry it any further.

As to the other contention, that the matter of counterclaim is a matter of set-off. I am quite free to confess that since I arrived in this country I have until very lately been quite at a loss to understand what was meant by a set-off and my confusion was largely due to what I saw heretofore laid down in the *Annual Practice* as the distinction between a counterclaim and a set-off. I was quite familiar with what was called a pleadable set-off according to the practice in my old province.[4] It meant setting off mutual debts or liquidated demands in actions for liquidated demands, and I had never heard of a pleadable set-off in any other way. But I found on arriving here what was set out in the note to English Marginal Rule 199, beginning say, in the *Annual Practice* of 1897, at page 469, and following pages. I find however that this has been pretty nearly expunged from the *Annual Practice* for 1903, and what appears at page 275 and following pages substituted. This last is quite in accordance with my old conceptions and the subject is now comprehensible to me. I will content myself with this reference to the *Annual Practice* of 1903, and state that in my opinion it is generally correct and supported by authority. The conclusion I draw from it is that a set-off can only arise where the action is for a liquidated amount and there are mutual debts between the litigating parties. A claim sounding in unliquidated damages cannot be set off against a claim for a debt or for any other cause of action. The party claiming the unliquidated damages must counterclaim or bring a cross-action. Neither can a claim for a liquidated amount be set off against a claim for unliquidated damages, it must be counterclaimed or a cross-action brought. In this light I can quite understand the decision in *Ord* v. *Ruspini*[5] That case was decided under 2 Geo. II. cap. 22, and 8 Geo. II. cap. 24, and before the passing of 9 Geo. IV. cap. 14 (commonly known as *Lord Tenterden's Act*), the 4th section of which made the *Statute of James* applicable to any debt on simple contract alleged by way of set-off; and I can also quite understand why that case has

[4] The Province of New Brunswick.
[5] 2 Esp. 570.

Judgment.
Wetmore, J.

not been cited in any text book, at any rate, which is at present available to me. I am of opinion that the *Statute of James* is applicable to the defendant's counterclaim in this action and bars his right to recovery. It was not claimed that the matter of counterclaim could be made available as a defence in any other way than by counterclaim. I have disposed of all the questions urged before me. This matter of an answer to the defendant's counterclaim is admitted to dispose of all defence the defendant has, and the plaintiffs are entitled to judgment on their claim.

Judgment for plaintiffs.

PEASE v. TOWN OF MOOSOMIN AND SARVIS.

Practice—Pleading—Amendment—Right of defendant to plead de novo—Premature application to strike out—Costs.

Where a statement of claim is amended under Rule 179 of the Judicature Ordinance,[1] the opposite party is entitled to plead *de novo* to the whole claim as amended, notwithstanding that he has previously pleaded to the original claim, and a defence delivered to such original claim cannot be under Rule 182,[2] considered as pleaded to the amended claim until the expiration of the eight days allowed for pleading to the amended claim.

[WETMORE, J., *February 23rd, 1901.*]

Statement.

Application to strike out certain paragraphs of the defence as embarrassing.

The statement of defence was delivered on 26th January, and on the 4th February the plaintiff amended his statement of claim under Rule 179 of "*The Judicature Ordinance*,"[1] and on the same day delivered the amendment to the defendant's advocate. The amendment did not interfere in the slightest way with the alleged cause of action or with the grounds upon which relief generally was sought. It merely struck out one of the reliefs prayed for. On the same day that the plaintiff so amended his claim he took out the chamber summons on this application.

Argument.

J. T. Brown, for the defendant: The application is premature because the defendant had under Rule 182[2] eight

[1] "The Judicature Ordinance" C. O. 1898, c. 21.
[2] Of "The Judicature Ordinance" C.O. 1898, c. 21.

days from the delivery of the amendment to plead to the amended pleading and can plead *de novo*. Therefore the statement of defence delivered cannot be considered as pleaded to the amended statement of claim until such eight days have expired.

E. A. C. McLorg, contra.

Judgment.

WETMORE, J. —I have had some difficulty in making up my mind. At one time I was inclined to the view that Rule 182[2] ought not to receive the construction contended for by the defendant's advocate, that it ought to be so construed as to permit the opposite party to plead to the amendment or to amend his pleading so as to make it apply to the amendment, but not to allow him to plead *de novo* to the whole claim, and I was also disposed to read the Rule in this way—that if the opposite party had not already pleaded when the amendment was made he might within the prescribed time plead to the amended pleading; if he had pleaded to the original he might within the prescribed time amend so as to plead to the amendment. But on reading the Rule more carefully I perceive that it contemplates the party *pleading again* even if he has already pleaded to the original. I have reached the conclusion that the opposite party can in such case plead "*de novo*" to the whole claim as amended. This seems to be according to the strict reading of the Rule, and to permit this does no injury. If one party has committed a mistake and rectified it, it simply puts the other party in a position to rectify mistakes on his part. I think the proper way to test this would be to take this very case. Suppose within the eight days after the delivery of the amendment the defendant had filed a new statement of defence to the whole claim as amended, leaving out the alleged objectionable matters, could the plaintiff have obtained an order to have such defence taken off the files. Or made any other application to set it aside? Or suppose he had pleaded new matters of defence altogether apart from any suggested by or arising out of the amendment, would not the Rule justify him in doing so? I am of opinion that it would. I must therefore hold that this application was made too soon; that the defence filed cannot under the circumstances be held as pleaded to the

Judgment. Wetmore, J.

amended statement of claim until after the expiration of the eight days and only then in the event of the defendant not pleading again or amending. This application must be dismissed.

Summons discharged with costs.

THE CANADA SETTLERS LOAN & TRUST CO. v. PURVIS.

Vendor and purchaser—Agreement for sale of land—Agent—Statement of price and terms—Statute of Frauds—Implied contract—Evidence — Damages — Specific performance — Ejectment — Mistake—Mesne profits—Laches.

The plaintiffs in reply to a letter from their agent asking for "the very lowest figure and best terms" at which they would sell "the Lane Place," wired as follows: "Lane Place, $480 on usual terms," and immediately followed this by a letter to the same effect. Upon receipt of the telegram the agent purported to sell the land to the defendant, who entered into possession. In an action to recover possession of the land,

Held, that the agent had not been authorized by the plaintiffs to sell, and that the plaintiffs were entitled to recover.

Held, further, that the defendant having persisted in his possession, with full knowledge that the plaintiffs objected to it, the plaintiffs were entitled to *mesne profits*, and that the defendant could not recover anything for the buildings and improvements placed by him on the land.

[WETMORE, J., *May 30th, 1903.*]

Statement. Action to recover possession of land. The facts are set forth in the judgment.

Argument. *E. L. Elwood,* for plaintiff.

G. Elliott, for defendant.

Judgment. WETMORE, J.—The facts of this case, as I find them, are as follows: The plaintiffs about the 13th June, 1898, were the mortgagees and entitled to the possession of the land in question, which is situated near Saltcoats, and on the 14th March, 1902, became the owners in fee simple thereof. One Thomas McNutt acted as the agent for the plaintiffs at Saltcoats, but he was not a general agent; with the exception of some matters of an unimportant character he always acted in each individual case on special directions from the chief officers of the plaintiff company. He was generally reported in and about Saltcoats to be the agent of the plaintiffs. Negotiations

Judgment.
Wetmore, J.

were opened between the defendant and McNutt with a view of the defendant purchasing the land in question, and on the 13th June, 1898, McNutt wrote a letter to A. D. McLean, the plaintiffs' commissioner, of which the following is a copy:

"Saltcoats, 13th Jan., 1898.

"A. D. McLean, Esq.,

"Dear Sir:—I think I can sell the Lane place to a Northumberland farmer with a large family and some means, if the price is reduced. Will you tell me the very lowest figure and best terms for this place. If not satisfactory he will take a homestead. A message by wire preferred.

"Yours truly,

"Thomas McNutt."

On the 16th June, McLean, whose office was at Winnipeg, caused a telegram to be sent from there to McNutt at Saltcoats, of which the following is a copy:

"To Thos. McNutt,

"Saltcoats.

"Lane place $480 on usual terms.

"Canada Settlers Loan & Trust Co."

On the 17th June McNutt sold the land in question to the defendant, who gave him his cheque, dated 17th June, on the Bank of Montreal, Winnipeg, for $200, payable to the order of A. D. McLean, on account of the purchase money, and the cheque specified that it was an "instalment on N. W. 6-24-1-W. 2nd P.M.," and McNutt gave the defendant the following receipt:

"Saltcoats, 17th June, 1898.

"Received from Mr. John Purvis a cheque for two hundred dollars, being first payment on N. W. 6-24-1-W. 2nd, sold to him for five hundred dollars, on company's usual terms. Agreement in duplicate and official receipt to be given.

"Thos. McNutt,

"Agent C. S. L. & T. Coy."

On the same day McNutt forwarded this cheque to McLean with the following letter:

"Saltcoats, June 17th, 1898.

"A. D. McLean, Esq.,

"Dear Sir:—I enclose cheque for $200, first payment by John Purvis on N. W. 6-24-1, W. 2nd P.M. I sold the place

Judgment.
Wetmore, J.

to him for $500. Your message said $480, but I added $20 as I found that he was willing to pay it. Kindly send agreement distributing the $300 on usual terms, but with privilege to pay sooner if inclined to do so. I sold free of taxes, so please send cheque for school taxes, and credit me with commission.

"Yours truly,
"Thos. McNutt."

On the 20th June and before McLean had received McNutt's letter of 17th June, and of course after the sale or the alleged sale byMcNutt to the defendant, McLean wrote McNutt as follows:

"Canada Settlers Loan & Trust Co., Limited,
"Winnipeg, Man., 20th June, 1898.

"Thos. McNutt, Esq.,
"Saltcoats.

"Re No. 398, Lane:

"Dear Sir:—We beg to acknowledge receipt of your favour of the 13th inst., and in reply I wired on the 16th inst. as follows:

"Lane place $480 on usual terms, which is to say one-tenth cash, balance in nine annual equal instalments with interest at 8%. We will be glad to hear from you further in the matter.

"Yours truly,
"A. D. McLean,
"Commissioner."

There is no direct evidence as to what McLean's duties as commissioner were, but in view of the fact that McNutt who had been acting for a length of time as agent for the company in the way I have stated, communicated with him on the matter of this proposed purchase, and that McLean answered him in the way he did, I feel justified in assuming and find as a matter of fact that McLean was the proper officer of the company to communicate with on the subject, and that he had the authority to write the letters and send the telegram in evidence written by him. There is no doubt that McNutt's mind and that of the defendant were at one when the defendant gave the cheque and McNutt the receipt of the 17th June; they evidently intended to deal with the land in question. But the evidence abundantly satisfies me that McLean, in

Judgment.
Wetmore, J.

sending the telegram of 16th June and the letter of 20th June to McNutt, was under an entire mistake and misconception as to the land covered by McNutt's letter of the 13th June. The plaintiffs had been holding the land in question at $800, and they held at the time an interest in another section of land, namely, the S. W. ¼ of section 34, township 15, range 31, west of the 1st principal meridian, under a mortgage from one George Lane. The company's officers were in the habit of designating the several places in which they were interested by the name of the person to whom the loan was made. The loan on the land in question had been made to one Wright, and the place was therefore known in the company's office as "the Wright place," and the S. W. ¼ of section 34 above mentioned was known as "the Lane place." Now in McNutt's letter of the 13th June he merely described the land as "the Lane place." McNutt so described the place because the company had previously entered into an agreement to sell it to one Harriet Lane. When McLean received this letter he believed that the property referred to in it was the S. W. ¼ of section 34 in township 15 and sent the telegram and the letter of the 20th June under that belief. After sending the letter of the 20th June, McLean received McNutt's letter of the 17th June enclosing the defendant's cheque, and then for the first time became aware that the land McNutt intended to refer to was the land in question, namely, the N. W. ¼ of 6-24-1-W. 2nd P.M. McLean, therefore, immediately wrote McNutt as follows, and with it returned him Purvis' cheque:

"Canada Settlers Loan & Trust Company, Limited,
"Winnipeg, Man., 22nd June, 1898.

"Thos. McNutt, Esq.,
"Saltcoats.

"Dear Sir:—We beg to acknowledge receipt of your favour of the 17th inst. enclosing cheque for $200 from John Purvis. We regret to say that there has been some error in this matter. In your former letter you merely asked the price at which we held Lane's place, and we thought you meant the S. W. ¼-34-15-31, which belongs to G. Lane. But from your last letter we see you meant the N. W. ¼-6-24-1-W. 2nd, which was purchased by H. Lane from this company sometime ago. The price at which we hold this

Judgment. Wetmore, J.

land is $800, and therefore return cheque herewith. If Mr. Purvis cares to buy at this figure we will be glad to hear from you again.

"We regret that this mistake has arisen.

"Yours truly,

"A. D. McLean,

"Commissioner."

McNutt, upon receiving this last mentioned letter, communicated its contents to the defendant and tendered him his cheque, which the defendant refused to accept back. He has refused to deliver up possession of the land and counterclaims for specific performance by the plaintiffs of the alleged agreement of 17th June, 1898.

There is nothing in the nature of an agreement upon which the defendant can rely to support his possession or his claim for specific performance, except McNutt's receipt of the 17th June, 1898, because that is the only document which can, under any pretence, be set up as satisfying the 4th section of *The Statute of Frauds*.[1] And the first question that arises is: Is that writing binding upon the plaintiffs? I am of opinion that it is not. I cannot distinguish this case from *Harvey* v. *Facey*.[2] McNutt's letter of 13th June was merely an inquiry as to the lowest price and the best terms for which the plaintiffs would sell the lot, and McLean's telegram was merely an answer to that question and contained no implied contract that the plaintiffs would sell at that price, and did not authorize McNutt to make any contract of sale, and his letter of the 20th June did not carry the matter any further. Moreover, McLean did not in any reply to McNutt's letter of the 13th June authorize McNutt to negotiate a sale, and so this case is on all fours with *Chadburn* v. *Moore*.[3] The consequences are that the plaintiffs are entitled to succeed in their action and to judgment for possession of the land and for *mesne* profits, and the defendant fails as to his counterclaim. The plaintiffs set up another ground to relief, namely, that owing to the mistake on the part of McLean as to the quarter section that McNutt wrote about, the agreement made by McNutt was void and that there was no *consensus ad idem*.

[1] 29 Car. II. c. 3.
[2] 62 L. J. P. C. 127; [1893] A. C. 552; 1 R. 428; 69 L. T. 504; 42 W. R. 120.
[3] 61 L. J. Ch. 674; 67 L. T. 257; 41 W. R. 39.

Judgment.
Wetmore, J.

This question is one that requires a very great deal of consideration, and I am not prepared to express any opinion upon it. It is not necessary to do so. I rest my judgment entirely upon what I have hereinbefore stated. It was set up on the part of the defendant that he was entitled to succeed both as to the action and the counterclaim by reason of laches on the part of the plaintiffs and delay in bringing the action. I am quite unable to understand why the plaintiffs should be deprived of their property by reason of such delays. The defendant was promptly apprised of the fact that the plaintiffs would not adopt McNutt's agreement. Mr. Smith, the plaintiffs' inspector, interviewed the defendant in 1898, 1899 and 1900, and according to the defendant's own testimony every time objected to his being on the place. The defendant persisted in his possession with the full knowledge that the plaintiffs objected to it and refused to accept any terms whatever, insisting that the McNutt agreement should be carried out by the plaintiffs. The only question remaining is, what are the plaintiffs entitled to recover for *mesne* profits? The evidence of Harold Smith is that the rental of the land is worth $50 a year, and that is not disputed by the evidence, and I am not prepared to say that it is unreasonable. The defendant has, in my opinion, improved the land by fencing, removing stones, cutting down bluffs, building stables and by cultivation. I believe the land is worth, by reason of these improvements, more than it was when the defendant went into possession. Nevertheless (I am bound to state with some feeling of regret) I feel that I cannot take those improvements into consideration. I cannot find any case which, under the English Practice, would support me in doing so, and on principle I am impressed with what is stated in *Mayne on Damages*.[4] I think in making the improvements the defendant went on at his own risk with full knowledge that his rights were disputed. Under such circumstances I am of opinion that he cannot practically compel the plaintiffs to pay him for doing something that they did not ask him to do and which, for all I knew, they did not want done.

Judgment for plaintiffs.

[4] 6th ed., at p. 461.

WATEROUS ENGINE WORKS COMPANY v. HOWLAND AND THE SASKATCHEWAN MUTUAL DEVELOPMENT COMPANY.

Parties—Joinder of causes of action—Rules 26 and 29 of "The Judicature Ordinance" C. O. 1898, c. 21.

The plaintiffs brought action against the defendant Howland for the purchase price of machinery sold and delivered to him, and joined therewith a claim against the defendant company on notes given by it to plaintiff to secure part payment of such machinery; and also a small claim against the defendant company for the price of goods.

Held, that these constituted separate and distinct causes of action and could not be joined.

[WETMORE, J., *August 7th, 1907.*]

Statement. Application by Chamber summons on behalf of the defendant company to strike their name off on the ground of misjoinder, argued before WETMORE, J., 30th July, 1907.

Argument. *T. D. Brown*, for the motion.

E. L. Elwood, for the plaintiff, contra.

Judgment. WETMORE, J.—The statement of claim in the first three paragraphs alleges in substance that by an agreement under seal dated the 23rd April, 1906, the defendant Howland agreed to purchase from the plaintiffs a 20-horse power, second-hand traction engine, for which he agreed to pay the plaintiffs on the 1st December, 1906, $500, and on the 1st December, 1907, a like sum of $500, and to secure the payments of these amounts he gave the plaintiffs his two promissory notes dated April 24th, 1906, for $500 each, with interest as stated, and payable respectively December 1st, 1906, and December 1st, 1907; that it was agreed in such agreement, among other things, that on default of payment of any obligations given for this machinery the whole of the purchase price remaining unpaid, or any obligations therefor, should become due and payable as cash, notwithstanding the deferred times of payment mentioned in the obligation; that the defendant Howland covenanted to pay the same; that the plaintiffs delivered the engine, and the defendant has paid nothing on account of the purchase price or of the

Judgment.
Wetmore, J.

promissory notes. By the 4th, 5th, 6th and 7th paragraphs of the claim it was alleged that by an agreement under seal dated the 18th May, 1906, the defendant Howland agreed to purchase from the plaintiffs a 26-horse power Waterous double-cylinder engine; one 40 x 60 McClosky thresher, with side-fan blower; one 40 Rich band-cutter and self-feeder, 150 feet of 8-inch, four-ply drive belt, one P. D. Moore steam pump and one head-light, for the price of $4,080, which was to be paid for by delivering to the plaintiffs one 20-horse power Case engine, free of all liens, at $950, and the balance by promissory notes payable as follows: two notes for $1,050 each, payable respectively on the 1st November, 1906 and 1907, and one note for $1,030 payable on 1st November, 1908, bearing interest as stated; that the machinery mentioned in the last mentioned agreement was delivered by the plaintiffs to the defendant Howland, and they received the 20-horse power Case engine, and also received the following promissory notes made by the defendants, The Saskatchewan Mutual Development Company, in favour of the plaintiffs, namely, one dated May 26th, 1906, payable 1st November, 1906, for $1,050, with interest as stated; one for $550 dated May 28th, 1906, and payable on November 1st, 1907, with interest as stated; one dated August 22nd, 1906, payable November 1st, 1907, for $500, with interest as stated; and one dated August 22nd, 1906, payable the 1st November, 1906, for $1,030, with interest as stated. And the claim alleged that the last mentioned agreement provided that if default should happen in payment of the purchase price of the machinery the whole of the purchase price remaining unpaid, and all obligations therefor, should, notwithstanding the deferred times of payment mentioned in such obligations, become due and payable as cash forthwith; and it alleged that nothing had been paid on account of this last mentioned agreement or the notes. The 8th paragraph contains a claim against the defendants, the Saskatchewan Mutual Development Company (which I shall hereafter call "the company"), for goods sold and delivered to the amount of $27.23. And the plaintiffs in their prayer for relief claim from the defendant Howland the sum of $4,200.30, and interest from 1st December, 1906, and judgment against the company for $3,185.83, with interest; that is, the plaintiffs ask to recover against the defendant

Judgment. Howland the principal and interest on all the promissory
Wetmore, J. notes set out in the statement of claim, and as against the defendant company the principal and interest due on the notes made by them, and also for the goods alleged to be sold and delivered to them.

Application was made on behalf of the company to strike their name off on the ground that the claim against them could not be joined in one writ with the alleged cause of action against the defendant Howland. It is set up in the first place, on the part of the plaintiffs, that the company had waived their right to take this objection by reason of their advocate having applied for and obtained an extension of time for putting in a defence. I am of opinion that this contention cannot be allowed, the matter complained of here is not a mere matter of irregularity; the question is whether the plaintiffs have the right to mix these parties up in the way they have done in bringing this action. The question really is then whether the plaintiffs had a right to join these parties in this action under Rule 29 of "*The Judicature Ordinance.*"[1]—That rule is as follows:—"All persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment." This rule is word for word the same as Order XVI., Rule 4, of the English Rules, and the authorities are to the effect that this Rule and Rule 1 of Order XIV. should be read one into the other. This last mentioned Rule, before it was amended in October, 1896, was precisely the same as Rule 26 of "*The Judicature Ordinance.*"[1] Whatever my opinion might have been as to the construction to be put upon Rule 29 of "*The Judicature Ordinance,*"[1] I feel that I am bound by authorities which I must follow. The cases to which I refer were decided in the House of Lords, and, although a decision of that Court is not binding upon the Court of which I am a member or upon myself, their decisions are of such a high character (because it is the Supreme Court of Appeal in England) that I would not for a moment venture to go contrary to them. It will be observed that the causes of action set forth in the 1st, 2nd and 3rd paragraphs of the statement

[1] C. O. 1898, c. 21.

Judgment.
Wetmore, J

of claim are really against the defendant Howland, the company are in nowise interested or concerned in them at all; and, on the other hand, the cause of action set forth in the 8th paragraph is entirely against the defendant company, and Howland has no interest whatever in that claim. I cannot therefore see how, under the authorities, these two defendants can be joined with respect to those causes of action, and at any rate, so far as those causes are concerned, the defendants are entitled to succeed or the plaintiffs called upon to elect which cause of action they will proceed with. As to the causes of action set forth in the 4th, 5th and 6th paragraphs, it will be observed that the notes which were provided by the agreement of the 18th May to be given for this machinery were not the notes specified in the claim as given; these notes were payable at a different time and for different sums, and made by other parties; it will be observed that the gross amounts are the same, but that is all. It does not appear that the defendant Howland was a party to these notes that were actually given for the machinery, and how it is expected to make him liable *on the notes given by the defendant company* I am unable to conceive. It may be set up possibly that Howland is liable, not on the notes given by the defendant company, but under the agreement for the purchase price of the machinery, and, especially, in view of the acceleration clause. I do not consider it necessary to express any opinion upon this question, and as a matter of fact I have formed no opinion; but, if Howland is so liable he is liable by virtue of the agreement and not by virtue of the notes, and what liability there is on the part of the defendant company is by virtue of the notes and not by virtue of the agreement; that is, the plaintiff has distinct and separate rights of action against these persons—one against the company by virtue of their notes, and not by virtue of the agreement, and one against Howland by virtue of the agreement and not by virtue of the notes. I may add that it is impossible that the company can be held subject to the acceleration clause in this agreement—an agreement which they were never a party to; and it is not claimed that they were a party to it. They promised to pay these notes at a specified date, that payment cannot be accelerated by an agreement between the plaintiffs and another person—an agreement to which they were not a party at all.

Judgment.
Wetmore, J.

In *Smurthwaite* v. *Hannay*,[2] "bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, the bills of lading being similar. Upon arrival it was found that the number of bales landed fell short of those shipped, and that some of the landed bales could not be identified, their marks having been obliterated. These latter bales were sold and their proceeds distributed proportionately among the several consignees. Sixteen holders of bills of lading, nine being shippers and seven consignees, joined in one action against the shipowners claiming damages for non-delivery of the number of bales specified in their bills of lading respectively." The question was whether the several plaintiffs could be joined. The House of Lords held they could not. Lord Herschell, L.C., at p. 499,[3] states as follows: "In what sense can it be said with accuracy that the different causes of action all arise *out of the same transaction?* The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped." That is practically the case here as I have already stated it. The claim is in each case in respect of a breach of separate contracts. Then at p. 500 he states: "The rule provides that 'all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative.' This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief." Just at this stage His Lordship was dealing with Rule 1 of the Order, but at p. 501 he states: "It cannot be doubted that whatever construction is put upon the Rule I have been considering, must be applied equally to Rule 4 of the same Order." Lord Russell of Killowen, at p. 503, states: "The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another." The last appears to me to be very pertinent to the question I am dis-

[2] (1894), A. C. 494; 63 L. J. Q. B. 737; 6 R. 299; 71 L. T. 157; 43 W. R. 113.
[3] Of (1894), A. C.

Judgment.
Wetmore, J.

cussing in this case. In *Sadler* v. *Great Western Railway Company*,"[4] "The plaintiff, a dealer in cycles, brought an action against two railway companies which had parcel offices adjoining his shop on opposite sides, alleging that each company caused carts to stand on the highway in front of its office for an unreasonable length of time, and that these combined acts prevented all access to his shop by vehicle or cycle, and caused him special inconvenience and loss of trade." An application was made by one of the companies to stay the action on the ground of misjoinder. The Court divided, A. L. Smith, L.J., holding that there was a misjoinder. Rigby, L.J., holding the other way. Smith, L.J., at p. 693,[5] states: "As I read *Smurthwaite* v. *Hannay*,[2] the question of the joinder of two plaintiffs equally applies to joinder of two defendants." This was carried to appeal, and the judgment of Smith, L.J., was upheld. Halsbury, C.J., is reported at p. 453,[6] as follows: "The pleader here has thought proper in some parts of the statement of claim to allege several and separate causes of action. He has set out in terms that the plaintiff has a separate cause of action against each of the two defendants. I believe the true construction of the whole statement of claim is *that*, and that the words which are to be found in the 5th paragraph do no more than expand, with a view to damages, what is referred to in the other paragraphs of the statement of claim." Lord Watson, at p. 454, states as follows: "It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate defendants. I do not think that upon any fair construction of his pleadings there is set forth any joint claim against the defendants. In these circumstances it has been painfully apparent from first to last of the learned argument we have heard that the contention of the appellant is not only unsupported by the authority, but is in the teeth of authority." And Lord Herschell, at the same page, states: "My Lords, I am of the same opinion. It is practically admitted, for it cannot be disputed, that there are in the state-

[4] (1895), 2 Q. B. 688; 65 L. J. Q. B. 26; 73 L. T. 385; 44 W. R. 50; *affirmed*, (1896), A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 11.
[5] Of (1895), 2 Q. B.
[6] Of (1896), A. C.

Judgment.
Wetmore, J.

ment of claim two separate causes of action charged against these two defendants—that either of them might be sued alone, and that the plaintiffs here might recover against either of them alone." I cannot distinguish this case from what is so laid down. This application must be allowed. It is claimed on the part of the plaintiffs by affidavits produced on their behalf that the defendant Howland is the manager of the defendant company, and that the agreements set out in the statement of claim and the promissory notes therein mentioned were executed by him on behalf of the company, and that the liability incurred by Howland is in reality the liability of the company. There is nothing in the statement of claim setting that up, and, in so far as the liability of the parties is concerned, I am inclined to think that it would not affect their rights as between the company and the plaintiffs under the claim as set up by the plaintiffs, but however that may be, I am of opinion that it is not open to me to deal with that question, because the statement of claim sets up no rights against the company by virtue of any such relation or understanding. In disposing of this question I am of opinion that I cannot travel outside of what is set up in the statement of claim. The counsel for the plaintiffs asked for leave, if I should rule against him, to elect. I will allow him to elect, and for that purpose will not make the formal order until the 5th October (after vacation).

Summons made absolute with costs

BROWN v. APPENHEIMER.

Lease—Agreement for lease—Land Titles Act, 1894—Agreement void as lease—Assignment—Breach of agreement to do breaking—Action by assignee of reversion for damages—Chose in action.

By agreement in writing but not sealed, the defendant leased from one McLean certain land, and entered into possession thereof. Subsequently, but during the currency of the term, McLean transferred the demised land to the plaintiff, and also assigned to the plaintiff the agreement of lease. In an action by the assignee against the tenant,

Held that the agreement, although void as a lease, was, nevertheless, valid as an agreement, and the defendant having entered into possession under it, a tenancy was thereby created.

Held, further, that, notwithstanding that the Statute, 32 Henry VIII. c. 24, which confers on a grantee of a reversion a right of action against a lessee for non-performance of conditions in a lease, does not apply when the demise is, as in this case, not by deed, yet the plaintiff was, nevertheless, entitled as assignee under cap. 41 of the Consolidated Ordinances, 1898, to maintain an action against the defendant for his breach of the agreement prior to the date of the assignment thereof to the plaintiff.

[WETMORE, J., *April 30th, 1903.*]

Statement.

On or about the 31st March, 1900, one John McLean and the defendant entered into an agreement of lease of a certain parcel of land, and such agreement was in writing but not under seal. By the terms of this agreement McLean leased the land to the defendant for a term exceeding three years, and the defendant therein agreed to perform certain breaking on said land during the years 1900 and 1901. The defendant in pursuance of such agreement of lease entered into possession of the land and cropped it during the year 1900 and took off the crop, and immediately after left the premises and never again entered into actual occupation. On or about the 7th June, 1900, McLean sold the land to the plaintiff, and a certificate of title thereto was issued to the plaintiff dated 13th June of that year. The defendant almost immediately after the transfer to the plaintiff and before he took the crop off the premises was notified of such transfer. By instrument under seal, dated 24th December, 1901, John McLean assigned to the plaintiff the agreement of lease of 31st March, 1900, and all rights, claims and demands of whatsoever nature and kind which he might have against the defendant by virtue of that agreement. The defendant never did any of the breaking he agreed to do under the agreement of lease, and the plaintiff

Statement brought this action for damages for the defendant's failure so to do. The defendant in addition to defending the action counterclaimed for cancellation of the agreement.

Argument. *Levi Thomson,* for plaintiff.

B. P. Richardson, for defendant.

Judgment. WETMORE, J.—It was urged for the defendant that the agreement in question is void as a lease as it is not in the form prescribed by "*The Land Titles Act,* 1894."[1] It was also contended that it is void under section 3 of 8 & 9 Vic. cap. 106 (Imperial) and sections 1 & 2 of *The Statute of Frauds,* because being for a term over three years it was not made by deed. I am not prepared to state that under "*The Land Titles Act*"[1] it is necessary that a lease should be by deed; it is quite possible that under that Act[1] it is not necessary that it should be under seal. But assuming that this instrument is not in the form prescribed by "*The Land Titles Act*"[1] and is therefore void as a lease, and also assuming that it is void as a lease under *The Imperial Statute* above cited, it is valid as an agreement, and the defendant having entered into possession under it became at least a tenant from year to year to McLean subject to the terms of the agreement: *Tress* v. *Savage.*[2] And that is sufficient for the purposes of this case. It is quite possible that under "*The Judicature Ordinance,*"[3] s. 8, pars. 4 & 5, and s. 10, par. 11, the defendant under the circumstances held under the agreement on the same terms as if the lease had been duly granted under seal: *Walsh* v. *Lonsdale.*[4]

The next question is whether the plaintiff can maintain this action against the defendant for not doing the breaking. The English cases decide that the Statute 32 Henry VIII. c. 34, conferring on grantees of reversions rights of action for non-performance of conditions, &c., in leases on the part of the lessees, does not apply when the demise is, as in this case, not by deed: *Standen* v. *Chrismas,*[5] *Bickford* v. *Parson,*[6] and *Elliott* v. *Johnson.*[7] And the

[1] 57-58 Vict. c. 28.
[2] 4 E. & B. 36; 2 C. L. R. 1315; 23 L. J. Q. B. 339; 18 Jur. 680; 2 W. R. 564.
[3] C. O. 1898, c. 21.
[4] 52 L. J. Ch. 2; 21 Ch. D. 9; 46 L. T. 858; 31 W. R. 109.
[5] 10 Q. B. 135; 16 L. J. Q. B. 265; 11 Jur. 694.
[6] 5 C. B. 921; 17 L. J. C. P. 192; 12 Jur. 377.
[7] 8 B. & S. 38; 36 L. J. Q. B. 41; L. R. 2 Q. B. 120; 15 W. R. 253.

Judgment. Wetmore, J.

Conveyancing and Lease Property Act, 1881,[8] is not in force in the Territories. Possibly then unless there is some statutory enactment here that would assist the assignee of a reversion when the assignor has created a tenancy by parol before the assignment the assignee of the reversion might not have a remedy against the lessee for breach of a condition such as the one in question unless something has taken place between him and the lessee from which the Court could find that a tenancy was created by implication between the assignee and the lessee upon the terms and conditions of the lease from the assignor. But in such a case the original landlord could maintain an action for the breach of the condition: *Bickford* v. *Parson,*[9] and by the instrument of 24th December, 1901, McLean assigned that right of action to the plaintiff, who can maintain an action against the defendant in his own name for such breach under section 1, cap. 41 of the *Consolidated Ordinances,* 1898. In *Torkington* v. *Magee,*[9] the defendant contracted to sell to one Rayner his reversionary interest in certain property. Rayner assigned his interest in the contract to the plaintiff. The defendant refused to perform his contract and the plaintiff sued him for damages for such breach. The Court held that the plaintiff could maintain the action. The question as to the plaintiff's right to maintain such action turned on the construction to be given to the language contained in section 25, sub-section 6, of "*The Supreme Court of Judicature Act,* 1873" (Imperial), which conferred upon the assignee "of any debt *or other legal chose in action*" the legal right of such "debt or chose in action." It was not disputed in that case that a right to recover damages for breach of contract is a chose in action, but it was urged that the expression "debt or other legal chose in action" limited the "other legal chose in action" to a chose in action of a similar character to a debt. It was attempted really to apply the doctrine of *ejusdem generis.* The language of section 1 of cap. 41 of *The Consolidated Ordinances* cannot possibly be so limited. That section provides that "every debt and *any* chose in action arising out of contract shall be assignable." I may state that *Torkington* v.

[8] 44-45 Vict. c. 41 (Imperial).

[9] (1902), 2 K. B. 427; 71 L. J. K. B. 712; 87 L. T. 304; 18 Times L. R. 703, *reversed in appeal on the facts* (1903), 1 K. B. 644; 72 L. J. K. B. 336; 88 L. T. 443; 19 T. L. R. 331.

Judgment. Wetmore, J.

Magee[9] was appealed and the judgment of the Divisional Court was reversed, but only on the ground that the evidence shewed there was no cause of action because neither the plaintiff's assignor nor the plaintiff were ready and willing to carry out the contract with the defendant according to its terms. The Court of Appeal refrained from expressing an opinion upon the question whether the assignment of the contract entitled the plaintiff to sue for damages for breach in his own name: (1903) *Weekly Notes.*[10]

I am of opinion that the plaintiff can maintain this action and that the defendant is liable in damages for the omission to do the breaking in the years 1900 and 1901, which I fix at $125. The agreement of lease does not warrant the defendant to void the lease. That was the privilege of the lessor. As, however, both parties are anxious to have the agreement cancelled, there will be an order cancelling it. I make no order for the defendant delivering up possession. No demand of possession ever was made; but as the defendant has not been in actual possession since 1900 there will be no difficulty about plaintiff taking possession if the agreement is declared cancelled.

Judgment for plaintiff with costs.

YORKTON PRINTING & PUBLISHING CO. LIMITED v. MAGEE.

Pleading—Demurrer—General denial—Sufficiency—Striking out.

A plea by a defendant that the statement of claim is not sufficient in law to sustain the action without setting forth the grounds is bad and will be struck out.

[WETMORE, J., *June 17th, 1897.*]

Statement.

This was an application by the plaintiff by Chamber summons to strike out the first paragraph of the statement of defence. This paragraph merely alleged that the defendant would "object at the trial that the statement of claim was not sufficient in point of law to sustain the action," but did not specify the grounds of the alleged insufficiency.

Argument.

E. L. Elwood, for the plaintiff.

B. Tennyson, Q.C., for the defendant.

[10] At p. 60.

Judgment.

WETMORE, J.—I am of opinion that as a rule it is not a good pleading to plead that a statement of claim is not sufficient in point of law to sustain the action. The grounds upon which it is claimed to be insufficient should be stated. The forms given in the English Rules of Court seem to intend that they should be set out. Such a pleading is merely a demurrer which is abolished.

Section 151 of *The Judicature Ordinance*[1] provides that "any party shall be entitled to raise by his pleading *any* point of law." That means that the point of law is to be raised; that the question of law is to be stated. It is laid down in *Bidder* v. *McLean*,[2] that the point of law must be stated, although under the particular circumstances of that case, an objection in point of law stated in a somewhat general manner was held sufficient. I am of opinion that the first paragraph of the defence is therefore bad, and I am of opinion that it is embarrassing. I practically held in *Foy* v. *Eberts*,[3] decided the other day, that a pleading so framed as to enable the party to spring on the other side something that he might not be prepared to meet is embarrassing. I see no reason to change my mind, and I am of opinion that a pleading so framed as to enable a defendant to spring some question of law which the plaintiff might not be prepared to meet, is equally as embarrassing as a pleading which would enable him to spring some question of fact that he might not be prepared to meet. The pleading should put the party it is pleaded against on his guard. See remarks of Collier in *Phillips* v. *Phillips*.[4]

It is claimed that the grounds of the objection in point of law are stated in the defence specifically. Certainly there are grounds of objection in point of law stated specifically in the defence, but there is nothing to indicate that the defendant intends to limit the operation of the first paragraph of the defence to such points of law so specifically stated. In my opinion this renders the pleading all the more objectionable because it is calculated to lead the plaintiff into the error of supposing that the points of law so specifically stated are the only ones intended to be raised, whereas in point of

[1] "The Judicature Ordinance" No. 6 of 1893.
[2] 20 Ch. D. 512.
[3] Decided on May 27, 1897, not reported.—T. D. B.
[4] 4 Q. B. D. at p. 159.

Judgment. Wetmore, J.

fact it leaves it open to the defendant to raise any other objection in point of law that may occur to him. If there were words limiting the operation of the first paragraph I think it would be good, but as there are not, I hold it to be embarrassing.

Summons made absolute with costs.

SMITH v. CANADIAN PACIFIC RAILWAY COMPANY.

Pleading—"Not guilty by statute"—Other defences—Contributory negligence — Workman's Compensation Ordinance, cap. 13 of 1900.

A plea of "not guilty by statute" under Rule 113 of the Judicature Ordinance (C. O. 1898, c. 21), entitles the party so pleading to raise any defence that he might raise under a plea of "not guilty" at common law.

Evidence of contributory negligence is properly admissible under such a plea.

A general denial of "each and every material allegation" in a statement of claim is a bad plea. *Adkins* v. *North Metropolitan Tramway Co.*, 63 L. J. Q. B. 361, not followed.

The Workman's Compensation Ordinance, 1900, c. 13, is not an Ordinance affecting procedure merely, and is not retroactive.

A question of law cannot be raised by a general allegation in a pleading, but the grounds thereof must be stated.

Yorkton Printing Co. v. *Magee*, 7 Terr. L. R. 54, followed.

[WETMORE, J., *Feb. 6th, 1901.*]

Statement.

Motion by the defendant under Rule 113 of the *Judicature Ordinance*,[1] for leave to plead other defences in addition to the plea of "not guilty by Statute," heard before WETMORE, J., in Chambers, on 25th January and 1st February, 1901. The proposed additional defences are set forth in the judgment.

Argument.

J. T. Brown, for the plaintiff: The defendant should not be allowed to plead any defence unless it is a good defence in law; that is the object of obtaining leave. The plea of "not guilty by Statute" entitles the defendant to raise any defence he might raise at common law under a plea of "not guilty": Rule 113 J. O.[1]: *Ross* v. *Clifton*.[2]

[1] C. O. 1898, c. 21, Rule 113: "Nothing in this Ordinance shall affect the right of any defendant to plead 'not guilty by statute'; but if the defendant so plead he shall not plead any other defence to the same cause of action without the leave of the Judge, and every plea of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had."

[2] 11 A. & E. 631; 10 L. J. Q. B. 233.

Argument.

Paragraph 2 of the proposed defence is too general and therefore bad: Rule 118 J. O. Paragraph 3 is no defence and leave should be refused: Ord. cap. 15 of 1900. That Ordinance is one affecting procedure only, and is, therefore, retroactive. Its words are, "It shall not be a good defence, etc.," that is, the employer shall not be permitted to raise the defence. If it was intended to affect more than matters of procedure other words would have been used, as:—"shall not be liable, etc.": *Maxwell on Statutes* (3rd ed.), 313-318; *Hardcastle on Statutes*, 376-380; *Ruegg's Employers' Liability, etc., Acts* (5th ed.), 33. Paragraph 4 should not be allowed as it is included in the plea of not guilty by Statute: *Doan* v. *Michigan Central Railway Company*.[3] Paragraph 5 is too general: *Odgers on Pleading* (3rd ed.) 195.

E. L. Elwood, for the defendant: The effect of the plea of "not guilty by Statute" is limited in the case of the defendant, by the *Railway Act*, 51 Vict. c. 29, s. 287, and the cause of action in this case does not arise from anything done by the defendant in pursuance of this Statute: *Doan* v. *Michigan Central Railway Co.*,[4] *Reist* v. *Grand Trunk Railway Company*.[5] Paragraph 2 is a good plea: *Adkins* v. *North Metropolitan Tramway Company*,[6] as to paragraph 3, the *Workmen's Compensation Ordinance* affects more than matters of procedure: *Massey* v. *McLelland*,[7] *Fowler* v. *Vail*.[8] In any event existing rights cannot be affected: *Interpretation Ordinance*, sec. 8, s.s. 48. As to paragraph 4, *Doan* v. *Michigan Central Railway Co.*,[3] is not a decided opinion on the point. That case turned on other grounds. Paragraph 5 is a good plea: *Annual Practice*, 1901, page 321 and cases cited: *Burrows* v. *Rhodes*,[9] *Odgers on Pleadings*, 105. Even if not technically right the defendant should be allowed to plead it in proper form.

[3] 17 A. R. 481.
[4] 18 O. R. 482.
[5] 15 U. C. R. 355, 364.
[6] 63 L. J. Q. B. 361, 10 Times Rep. 173.
[7] 2 Terr. L. R. 179.
[8] 4 A. R. 267.
[9] (1899), 1 Q. B. 818; 68 L. J. Q. B. 545; 80 L. T. 591; 48 W. R. 13; 63 J. P. 532; 15 Times Rep. 286.

Judgment.

WETMORE, J.:—This is an action brought by the plaintiff, a brakeman in the defendants' employ, for injuries sustained by him by reason of the negligence and unskilfulness of the defendants' servant. The defendants purposing to plead "not guilty by statute" apply under Rule 113 of "*The Judicature Ordinance*,"[1] for leave to plead other defences. These other defences are in substance as follows:

2. A denial of "each and every material allegation contained in the statement of claim."

3. That the injury, if any, was caused by the negligence of the plaintiff's fellow servants in the common employment of the defendants, and not otherwise.

4. Contributory negligence on the part of the plaintiff.

5. That the statement of claim discloses no cause of action against the defendants."

The plaintiff's advocate objects to the leave being granted. In the first place he sets up that as to the 4th proposed matter of defence it is unnecessary as it can be given in evidence under the plea of "not guilty by statute." As to the 2nd proposed matter of defence, he conceded that there might be allegations in the statement of claim which the defendant would not be allowed to deny under the plea of "not guilty by statute," and therefore the only objection he raised to that proposed plea was that it is too general.

I will first deal with the objection to the 4th proposed matter of defence.

The plaintiff's contention is that whatever could be given in evidence or raised as matter of defence under the plea of "not guilty by statute," before the promulgation of the English rules of Court of 1883, can still be given in evidence or raised now under such plea, and that such construction must be put on Rule 113 of "*The Judicature Ordinance*."[1] This provision was introduced in the first "*Judicature Ordinance*,"[10] and has been copied into each succeeding general Ordinance respecting the administration of justice. With considerable hesitation I have reached the conclusion that this point is well taken. This of course involves the inquiry what could be given in evidence or raised as a matter of defence in an action of this nature under the plea of not guilty by

[10] Ordinance No. 2 of 1886, see s. 81.

Judgment. Wetmore, J.

statute. The defendant could not only raise the special defence authorized by the statute under which it was pleaded but he could also raise any defence which he was authorized to raise at common law under the plea of "not guilty": *Ross* v. *Clifton*,[2] *Eagleton* v. *Gutteridge*.[11] *Williams* v. *Jones*,[12] is also cited in support of that in Roscoe *Nisi Prius Evidence*.[13] In view of the introduction of the new practice it is very difficult to find authorities on the effect at common law of the plea of not guilty. The general issue is abolished and parties have to set out their defences in plain language, and the old text books and digests on the subject have gone out of print; at any rate I cannot lay my hands on any. I have therefore to rely upon my own recollection as to what the effect of the plea was in the early days of my practice. My recollection is that contributory negligence could be raised under the plea of not guilty, and such recollection is supported by *Holden* v. *The Liverpool New Gaslight Co.*,[14] and *Doan* v. *Michigan Central Railway Co.*[3]

I am free to confess that the construction I have put on Rule 113 of the Ordinance[1] seems to me to be utterly at variance with the whole spirit of the Ordinance,[1] but I cannot perceive what other construction I can give to the words "every plea of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had." Moreover, the learned Judge in *Doan* v. *Michigan Central Railway Company*,[3] must have taken the same view of the section that I have, otherwise I cannot understand how under the Ontario Practice they could have held that evidence of contributory negligence was admissible under that plea. Having reached the conclusion therefore that this matter of defence can be raised under the plea of not guilty by statute it is not necessary to plead it specially, and effect must be given to the plaintiffs' contention, and I must refuse the leave asked for as to that matter of defence. It may be as well to state that no objection was raised to the proposed plea of not guilty by statute not being a proper plea or as to its not being properly marked with the references.

[11] 11 M. & W. 465; 12 L. J. Ex. 359.
[12] 11 A. & E. 643.
[13] (16 Ed.), 1190.
[14] 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 833.

Judgment.

Wetmore, J.

I will next deal with the 2nd proposed matter of defence. In my opinion the paragraph as proposed is too general in form and contrary to the provisions of Rule 118 of "*The Judicature Ordinance.*"[1] *Adkins* v. *The North Metropolitan Tramway Company*,[6] was cited in support of the proposed paragraph. I think that that decision is most unsatisfactory. It is admitted in the judgment that the defence in that case was "not strictly in accordance with the form as required by the wording of the rule,"[15] and the matter seems to have gone off because the defendants' counsel expressed himself as willing to amend if desired by the plaintiff's counsel to do so "so far as to specify to him each and every material allegation which they intended to deny." Now it seems to me that if an amendment is necessary or desirable so as to give the opposite party notice of what is intended to be denied it is bad and contravenes one of the intentions of the Rule, namely, that the opposite party shall by the plea have specific notice of what is denied. Rule 118[16] provides that "It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the plaintiff's statement of claim." I quite agree with the judgment in *Adkins* v. *The North Metropolitan Tramway Company*,[6] that the proposed defence "is a long way off the old plea of the general issue," because that plea went further in its effect than a mere denial of the allegations in the statement of claim (or "declaration," as it was called in the old practice) as, for instance, as I have just held, contributory negligence could be set up under it, but it is not necessary that the pleading should go as far as the general issue in effect went under the old practice to be objectionable under Rule 118.[16] I cannot conceive of a denial being more general than the proposed paragraph in question. It certainly would be too general to plead "The defendants deny the allegations contained in the statement of claim" or "The defendants deny all the material allegations contained, &c.," and I cannot perceive that the insertion of the words "each and every" help the pleading in the least. It simply amounts to a general denial. In the first place, what amounts to a "material allegation"? A difference of opinion may arise with respect to that. The plaintiff may consider a

[15] Order XIX. r. 17.
[16] Of "The Judicature Ordinance," C. O. 1898, c. 21.

Judgment.
Wetmore, J.

certain allegation not material and therefore not come to trial prepared to prove it, and the defendant may set up, possibly with success, that the allegation is material, and being put to proof by the denial and having omitted to prove it the action must fail. If however the allegation had been specifically denied in terms the question could be decided if considered advisable by application at Chambers, because if immaterial the defence could be struck out. Moreover one object of the Rule it seems to me is to prevent the necessity of putting a plaintiff to the proof of matters of fact which are true and which are not therefore specifically denied, because by Rule 114,[16] "Every allegation of fact in any pleading . . . if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party shall be taken to be admitted." What allegations in the statement of claim in this cause do the defendants say are untrue? Do they deny that the plaintiff was in their employ as a brakeman? Do they deny that he met with the accident? Do they deny the negligence and unskilfulness of their other servants? If so, let them say so in their pleading. And if they do and put the plaintiff to the proof, and it turns out at the trial that the plea was absolutely untrue, and that they ought to have known it, the defendants might be ordered to pay the plaintiff's costs incidental to such proof, even if they succeeded in the action. I also draw attention that the denial in *Adkins* v. *The North Metropolitan Co.*,[6] was not as general as the proposed defence in question, because there were two denials in that case, and each denial was limited to the allegations in a specified paragraph of the statement of claim. I also draw attention to what is stated by the author in *Odgers on Pleadings*,[17] as to a defendant pleading that "he denies specifically every allegation contained in the statement of claim." No authority is cited for what he states, but I agree with it. It is possible that a plea denying "the allegation contained in a specified paragraph might be good. It would depend on how the paragraph was framed and what the allegation was. Possibly the plea of not guilty by statute may put the plaintiff to the proof of all that the defendants desire to put him to the proof of by the proposed

[17] (3rd Ed.), 195.

Judgment. Wetmore, J.

paragraph, and will enable the defendants to raise all the questions they desire to raise thereby. I am free to confess that my recollection of the effect at common law of the plea of not guilty is in that direction. I do not however decide it; the question has not been raised and I have not been asked to do so. I merely throw out the suggestion in view of what I am about to propose, as possibly the defendants' advocate may on looking into it not consider it necessary to press the proposed paragraph or what is covered thereby by specially pleading it. I do not wish him however to place too much confidence in my suggestion. I merely throw it out in consequence of what I have held as to the 4th proposed matter of defence. I will allow the defendants to plead denials of material matters set out in the statement of claim, but they must in each case specify the particular allegation which they deny, and in some cases they must satisfy me by affidavit that they have or have reason to believe that they have good grounds for the denial. I am of opinion that I ought not to give the defendants leave to put the plaintiff to the proof of facts which are likely to be true to the defendants' knowledge. I will state one or two matters, but only by the way of instance, to shew what I mean. I do not think I ought (without an affidavit shewing cause) to allow the defendants to deny that the plaintiff was a brakeman in their employ, or that he was under the direction and control of C. W. Milestone, or that Mr. Milestone was a divisional superintendent of the defendant company, or that the defendant was struck and knocked down by the locomotive, and such like matters. I would however allow the defendants without such an affidavit to deny that the accident was caused by reason of the negligence and unskilfulness of the defendants' servants, and that the injury was of the serious nature, and produced the consequences stated. If the defendants wish to plead any such matters the draft of the proposed matters must be prepared and submitted to me on Friday, 22nd February, having been first submitted to Mr. Brown, and I will on that day hear the advocates in respect thereto.

As to the third proposed ground of defence, the only objection raised to that is that it is prohibited or not permitted by Ordinance, c. 13 of 1900. The alleged injury in this

Judgment.
Wetmore, J.

case was caused on the 8th December, 1899, and before the Ordinance in question was enacted. The action was brought after the passing of the Ordinance. The contention is that the operation of the Ordinance is retroactive and takes away from the defendants the right to set up the defence of common employment. It is urged that this Ordinance is merely one affecting procedure and is therefore retroactive, also that the language of the Ordinance indicates that it is intended to be retroactive. I cannot agree that the Ordinance merely affects procedure. Assuming that the defence of common employment was a good defence on the 8th December, when the accident occurred, and down to the 4th May, 1900, when the Ordinance was passed, the plaintiff had no cause of action against the defendants because the accident was caused by the negligence of a common employee. If the plaintiff's contention is correct the Ordinance has given him a right of action which did not exist until such Ordinance was passed; surely that is dealing with vested rights, and therefore the Ordinance cannot be given a retroactive operation to affect them, unless it is so expressly provided by the words of the Ordinance or is a necessary implication from the language used: *Martindale* v. *Clarkson*.[18] The language of Jessel, M.R., in *In re Tucker*,[19] is directly in point so far as this case is concerned; he says[20] "It is a general rule that when the legislature alters the rights of parties by taking away or *conferring any right of action* its enactments, unless in express terms they apply to pending actions, do not affect them. It is said there is one exception to that rule, namely, that when enactments merely affect procedure and do not extend to rights of action they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exemption. I am of opinion that it is not. This is an alteration, not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action." And The Supreme Court of Canada in *Ings* v. *The Bank of Prince Edward Island*,[21] lays down the following, at p. 271: "The rule being that an *ex post facto* con-

[18] 6 A. R. 1.
[19] 1 Ch. D. 48.
[20] At page 50.
[21] 11 S. C. R. 265.

Judgment.
Wetmore, J.

struction will never be adopted when substantial rights are affected even in respect of matters of procedure." I also refer to the judgment of the Master of the Rolls in *In re The Phœnix Bessemer Steel Co.*[22] The language of the Ordinance is not of that character to give it a retroactive operation. Leave to plead the 3rd proposed matter of defence will be given.

It was objected to the 5th proposed defence, namely, the one raising the question of law, to the statement of claim, that it is too general, that it should specify the grounds on which it is claimed that the claim does not disclose a cause of action. I considered this question in *The Yorkton Printing & Pub. Co.* v. *Magee*,[23] and held that the grounds must be stated. I have not changed my mind. I will however allow the defendant to raise the question of law, but he must state the grounds.

Costs of this application to both parties to be costs in the cause.

Order accordingly.

KIRKLAND v. HOLE ET AL.

Small Debt Procedure—Pleading—Reply to counterclaim—Necessity for—History of Small Debt Procedure.

It is not necessary to file any reply to a counterclaim under the Small Debt Procedure.

[WETMORE, J., *May 17th, 1902.*]

Statement.

This action was brought under the Small Debt Procedure to recover two months wages for services as an engineer of the defendants' threshing outfit from 16th September, 1901. The defendants filed a dispute note setting up that the plaintiff worked for them from 17th September to 29th October, and no longer, when he was dismissed for incompetency, negligence and insubordination. They also set off $3.75 for money paid for plaintiff's use, and they also counterclaimed for damages done to their threshing machine by the plain-

[22] 45 L. J. Ch. 11.
[23] Ante p. 54.

tiff's negligence. This counterclaim formed part of the dispute note. No reply was filed to this counterclaim. Statement.

E. L. Elwood, for plaintiff.

McLean, for defendants.

WETMORE, J.:—At the trial it was set up on the part of the defendants that the facts set out in the counterclaim must be taken as admitted because no reply was filed, and that the only matter therefore open to enquiry was the amount of damages. I was disposed to agree with this contention, and made a ruling upholding it, but allowed the plaintiff to file a reply *nunc pro tunc,* which he did. Before the case was completed however I, on further consideration, withdrew that ruling and stated I would consider the point of practice and if necessary would order that such reply be filed *nunc pro tunc,* and then heard the further testimony. Upon looking at the Ordinance by which the practice in the Small Debt Procedure was instituted and the subsequent legislation upon the subject I have reached the conclusion that it is not intended that there should be a reply to a counterclaim filed in such cases. The first Ordinance establishing this procedure was No. 21 of 1889, section 6, and subsequent sections. A defendant under that Ordinance, if he wished to dispute a claim, filed a notice that he disputed the claim, but when the subject matter of defence was a set-off or counterclaim the defendant had to file with his dispute note the particulars of such set-off or counterclaim. A reply to a counterclaim in a small debt action was evidently not contemplated by that Ordinance any more than a reply was contemplated to any other matter of dispute, because the Ordinance without providing any more procedure went on to provide that the Judge should appoint a time and place for trial upon the dispute note being filed. There was no special provision making the provisions of "*The Judicature Ordinance,*" when not inconsistent, applicable to such actions. But it was conceded in practice that such provisions when not so inconsistent were applicable and were frequently applied. The provisions of this Ordinance of 1889 were carried forward in "*The Judicature Ordinance*" (1893), section 18, without any alteration affecting the question I am Judgment.

Judgment. Wetmore, J.

now considering except that sub-section 10 of that section provided that the several provisions of the Ordinance respecting striking out defences and examination of parties should apply to small debt actions. That section would seem to have limited the applicability of the general practice to such actions. Nevertheless it was the practice when it was thought desirable to do so to apply the general practice to such cases when not inconsistent with the provisions. It will be noted however that in so far as the necessity of filing a reply to a counterclaim in such actions is concerned the practice remained as established by the Ordinance of 1889. Section 18 of "*The Judicature Ordinance,* 1893," was repealed by Ordinance No. 5 of 1894, section 1, and new provisions were substituted by section 27 and subsequent sections of that Ordinance. That Ordinance made some important changes in the practice respecting Small Debt Procedure. In the first place it provided by section 36 that the defendant must in his dispute note state the nature or grounds of his defence. Section 39 provided that a defendant might set-off or counterclaim. That section is word for word the same as Rule 612 of the present *Judicature Ordinance.*[1]

For the first time we have the provisions of section 49 of the Ordinance of 1894 (corresponding with Rule 620 of the present Ordinance[1]) providing that the general procedure and practice shall be applied to small debt actions when not inconsistent with the special provisions. But it will be noticed that no special provision was made for a reply to a counterclaim by the Ordinance of 1894. Section 40 provided that the defendant should file a prescribed affidavit and take certain steps in case he counterclaimed, and if he did not that he might not be allowed to go into his counterclaim; and sections 41 and 42 provided that after filing the dispute note the plaintiff might take steps to have the cause entered for trial, and if he did so that the cause should be entered for trial as a matter of course, without any reference to whether the counterclaim was at issue or not. Sections 40, 41 and 42 were repealed by Ordinance No. 7 of 1895, section 12, and section 13 of the last mentioned Ordinance provided the method in which the cause should

[1] C. O. 1898, c. 21.

be set down for trial and tried. This section is the same as Rule 613 of the present Ordinance; so we have now the procedure established, so far as the point we are now discussing is concerned, as it now is and the history of it. And it will be again noticed that the cause is set down for trial entirely in view of the dispute note being filed and without regard to the question of whether the counterclaim is at issue or not. I am therefore under all the circumstances of opinion that the legislature did not intend that a reply should be filed to a counterclaim entered in these small debt actions. This I think is further marked by the fact that although section 40 of No. 5 of 1894, provided that a copy of a counterclaim should be left with the clerk to be forwarded to the plaintiff, that provision was repealed as already stated, and nothing was substituted for it, and there is no special provision for serving any reply in such cases on the plaintiff. I may further add that the practice of going to trial when counterclaims have been filed in these actions without any reply being filed has been so generally (and without exception in my experience) followed, even since the small debt procedure practice was introduced, that it is now too late to lay down a different rule.

Judgment. Wetmore, J.

Order accordingly.

IN RE BROWN.

Sheriff's costs of certificate of satisfaction of fi. fa. lands—Duty of sheriff—Land Titles Act, 1894, s. 93.

Upon the satisfaction of a *fi. fa.* against lands, it is the duty of the sheriff to forward to the Registrar a certificate under s. 93 of the Land Titles Act, 1894, whether requested so to do or not, and the fees therefor are properly taxable against the execution creditor.

[WETMORE, J., *June 6th, 1904.*]

This was a review from the taxation of the sheriff's bill of fees against Messrs. Brown & Wylie, a legal firm at Moosomin. Two executions were issued on the same judgment and placed by this firm in the sheriff's hands in an action *Gilmour* v. *Griffis*, one against goods and one against lands. The money was made on the execution against goods.

Statement.

Statement. In *Maw & Co.* v. *Pinki*, two executions, one against goods and the other against lands, were issued in like manner and placed in the sheriff's hands. The money was paid by the execution debtors to the advocates who notified the sheriff.

The sheriff had in both cases sent to the registrar of land titles a certified copy of the writ against lands under section 92 of *The Land Titles Act*, 1894, and on the moneys being so made as above stated he sent to the registrar a certificate as required by section 93 of the Act, as enacted by s. 3 of c. 21 of the Acts of 1900. In neither case was the sheriff requested by the advocates for the execution creditors or any person acting for the execution creditors to forward that certificate. The clerk on taxation allowed the sheriff fees for such services. The advocates for the execution creditors moved to review.

Argument. *J. T. Brown*, for the motion.

The sheriff in person.

Judgment. WETMORE, J.—Rule 386 of *The Judicature Ordinance*[1] provides that if the amount authorized to be made under the writ against goods is made and levied thereunder the person issuing the writ against lands shall not be entitled to the expenses thereof or of any seizure or advertisement under it, and the officer having the execution of the writ against lands must return that the amount has been so made and levied. By virtue of that rule therefore the execution against the lands in *Gilmour* v. *Griffis* was satisfied. So by the act of the advocate in accepting the money in *Maw & Co.* v. *Pinki* the execution against lands was also satisfied. It was therefore the clear duty of the sheriff to forward to the registrar the certificate as required by the Act of 1900. That duty was cast upon the sheriff by the Act to ensure that the cloud registered against the execution debtor's land should be removed, and that he, having satisfied the execution, would not have to be put to the trouble and expense of having that cloud removed. And this is quite in accordance with the rule I have cited. The intention is that a judgment debtor is not to be harrassed with the costs and expenses of a writ against his lands when one against his goods will serve the purpose. If the execution

[1] C. O. 1898, c. 21.

Judgment.
Wetmore, J.

debtor would have to wait until the advocates of the execution creditor removed the cloud he might have to wait sometime, and Parliament therefore cast the duty upon the sheriff. Now, has the sheriff to do this at his own expense, and pay the registrar too? For the registrar is entitled to a fee of fifty cents.

The contention, however, is, that as the substituted section 93 of *The Land Titles Act* provides for no fee, the sheriff and registrar are to perform the services therein for nothing unless the sheriff is requested by the execution creditor or his advocate to forward the certificate therein provided for. And great stress is put on the fact that section 92 of the Act specially provides for a fee to the sheriff for forwarding the certified copy of execution. This suggestion does not impress itself on my mind very strongly. The provision for a fee in that case was intended to protect the sheriff so as to make it clear that he was not compelled to forward the certified copy of the writ unless the party in whose interest it was done paid him for it, and the party in whose interest it was done was the execution creditor, the party who sets the sheriff in motion. In so far as the certificate under section 93 is concerned, the party who set the sheriff in motion would, as a rule, be quite indifferent and not likely very eager to advance the requisite fee. So the Act cast the duty upon the sheriff. But it never intended that he was to perform the service for nothing. There was as a rule no necessity to provide for a fee, because the sheriff having realized the money under the *fi. fa.* goods could take his fee out of these moneys before he paid them over. The execution creditor or his advocate set the sheriff in motion, and the advocate is liable for whatever the sheriff had to do in connection with or on account of the writ. Under Rule 368 the sheriff has to make a return to the execution against lands. He is entitled to a fee for every return. Could it be successfully claimed that he would not be entitled to be paid for that return by the execution creditor? He certainly could not get it from the execution debtor. I have no doubt that the advocate of the execution creditor would be liable. And so the sheriff is entitled to a fee for every certificate required, if under seal, $1.00, if not under seal, 50c: See tariff of sheriff's fees,

Judgment. Wetmore, J.

items 195 & 196. Now, he is entitled to that fee whether required by special request or by the law. If by special request, the party requiring it has to pay; if by law, then the party who set the machinery going out of which the law required it to be done must pay.

Taxation affirmed.

INGS v. ROSS.

Land agent—Sale made through his solicitations—Right to commission.

If the services rendered by a land agent with whom property is "listed" result in bringing the vendor and purchaser together so as to result in a sale, he is entitled to his commission.

The defendant "listed" his farm with the plaintiff, a land agent, to be sold at $10 per acre, and agreed to give him $1,000 if he would make the sale. One M. inspected the farm in company with the plaintiff with a view to purchasing it. As a result thereof negotiations were subsequently entered into between the defendant and M., resulting in a sale to M., not only of the farm, but also of some personal property not previously considered.

In an action for $1,000 commission,

Held, that as the plaintiff had been the means of bringing the defendant and purchaser together, the plaintiff was entitled to the commission.

The fact that the sale included some additional property not "listed" with the plaintiff, was no ground for defeating his right to commission on the property listed.

It was not necessary for the recovery of the commission that the plaintiff should have personally introduced the defendant to the purchaser.

[COURT EN BANC, *July 17th, 1907.*]

Statement.

Appeal by plaintiff from the judgment of HARVEY, J. The facts are stated above.

Argument.

W. L. Walsh, K.C., for appellant.

J. E. Varley, for respondent.

The judgment of the Court was delivered by

Judgment.

SCOTT, J.—This is an action to recover $1,000 for commission upon the sale by plaintiff of defendant's ranch.

The action was tried before HARVEY, J., who, at the conclusion of the plaintiff's case, dismissed the action on the ground that plaintiff had failed to shew that a sale was made upon the terms upon which he was authorized to make it.

Judgment.
Scott, J.

The case disclosed by the evidence for the plaintiff is that he told the defendant that he expected from the other side some parties with whom he had been corresponding and asked him to list his ranch with him. The latter did so, stated the price was $10 per acre, and told plaintiff that there was $1,000 in it for the man who made the sale. One Anderson who was acting as agent for defendant under a power of attorney from him also made a similar statement to the plaintiff and referred him to Mr. Varley, the defendant's solicitor, for the particulars of the property. The plaintiff obtained these particulars from Mr. Varley and shortly afterwards he met at Nanton, where he resided, one Moir from Iowa, who had a letter of introduction from a person there with whom plaintiff had been in correspondence.

Plaintiff with his own team and with a livery team hired by him at Nanton, drove Moir and the others who accompanied him to the defendant's ranch which they then inspected. On the second day afterwards plaintiff saw defendant at High River and told him that the party he had been expecting had been taken by him to defendant's ranch, but it does not appear that he referred to any person by name. Moir and those who accompanied him afterwards opened negotiations with the defendant which resulted in the latter selling his ranch to them at $10 per acre, but there was included in the sale horses and farm implements to the value of $1,000. How these chattels came to be included in the sale of the ranch appears from the examination for discovery of the defendant, who states as follows: "They (the purchasers) asked me, when they talked about buying the place, if there was any commission on this. I said, 'there is no commission. I have an agreement with certain people that I pay so much money if they make a sale for me.' They said, 'There is no commission to be paid if we buy, so throw in these farming implements, and you will be saving your commission.'" It would thus appear that the purchasers were endeavouring to defeat any claim upon the defendant for commission and to obtain the benefit of it for themselves, and that he fell in with their view. That he relied upon the purchasers' statement that no commission would be payable by him appears by his statement of de-

Judgment. Scott, J.

fence, in which he alleges that, upon, the representation of the purchasers that there was no commission due or payable to any one in connection with the sale, he turned over and transferred to them the chattels referred to. The reasonable deduction from the evidence is that the sale of the ranch alone would have been completed at $10 per acre had not the defendant been led to believe by the representations of the purchasers that he would not be liable for any commission on the sale.

Even if there was not a sale of the ranch alone at $10 per acre, it does not appear from the evidence that the plaintiff was not to be entitled to his commission unless a sale was concluded at the price. Plaintiff states that when defendant listed the property with him he stated the price to be $10 per acre, and upon plaintiff asking him what the commission was to be, he replied, "There is no commission, but there is $1,000 for the man who makes the sale of my ranch." And Anderson states merely that the price was to be $10 per acre and $1,000 for the man who made the sale.

In *Mansell* v. *Clements*[1] the owner of a property placed it in the hands of plaintiff for sale at a certain price. One Upton, hearing of the property through the plaintiff, inspected the premises and offered the defendant a sum less than the price at which it had been listed with the plaintiffs. This offer was refused and the negotiations were broken off for a time, but they were afterwards renewed and the defendant accepted Upton's offer, the plaintiff never having interfered or been consulted. It was held that plaintiff was entitled to a commission on the sale notwithstanding that the sale was for a lower price. Keating, J., says at page 143:

"In ninety-nine cases out of the hundred the services performed by a house agent upon these occasions are of the slightest possible kind; it consisted for the most part in merely bringing the vendor and purchaser together so as to result in a sale."

In *Toulmin* v. *Millar*,[2] Lord Watson says as follows:

"If A. had no employment to sell, express or implied, he could have no claim to be remunerated. If he was gen-

[1] L. R. 9 C. P. 139.
[2] 58 L. T. 96; 57 L. J. Q. B. 301; 12 App. Cas. 746.

erally to sell and thereafter gave an introduction which resulted in a sale, he must be held to have earned his commission although he did not make the contract of sale or adjust its terms because he had in that case implemented his contract by giving the introduction, and his employer could not defeat his right to commission by determining his employment before the sale was effected . . . When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment, and should the estate eventually be sold to a purchaser introduced by the agent the latter will be entitled to his commission although the price should be less than the sum named at the time the employment was given."

Judgment. Scott, J.

In my view it was not necessary that the plaintiff should have personally introduced the plaintiff to the defendant. There was no such introduction in *Mansell* v. *Clements*.[1] All that appears to be necessary is that the agent should be the means of bringing the vendor and purchaser together, and the evidence in this case shews that it was through the plaintiff that the purchasers and the defendant were brought together. It is reasonable to assume that the defendant knew this even though the plaintiff admits that, when informing the defendant that he had taken some persons to the ranch, he did not mention their names. The information given by the plaintiff at that time was such as should have put the defendant upon inquiry as to whether the purchasers were those to whom the plaintiff referred.

In my opinion the appeal should be allowed, and a new trial ordered. Plaintiff should have the costs of the appeal, and the costs of the first trial should be costs in the cause.

Upon the hearing of the appeal, plaintiff's counsel applied for leave to amend his statement of claim in manner similar to the amendment allowed by this Court in *Boyle* v. *Grassick*.[2] I am of opinion that such amendment should be allowed.

SIFTON, C.J., WETMORE and STUART, JJ., concurred.

Appeal allowed.

[1] 6 Terr. L. R. 232.

BELL v. SARVIS ET AL. EXECUTORS OF THE LAST WILL OF JANET BELL, DECEASED.

Executors and administrators—Satisfaction of legacy—Construction of will—Evidence—Advancement—Ademption.

The deceased testatrix by her will bequeathed to the plaintiff the sum of $200. At the time of the execution of the will the testatrix was in the position of a debtor of the plaintiff to the extent of $95.47, and between the date of the will and the date of her death she gave to the plaintiff the sum of $125 in goods and chattels.

Held, that the language of the will being plain and unambiguous and indicating an intention to bequeath to the plaintiff the sum of $200, evidence could not be received as to the testator's instructions for the preparation of the will, and that the legacy was not satisfied by the payment of the debt.

Held, also, that following the rule laid down in *Pankhurst* v. *Powell*,[1] and *In re Fletcher*,[2] the advances made by the testatrix after the execution of the will up to the amount of the plaintiff's debt, viz., $95.47, must be applied *pro tanto* in reduction of the legacy.

[WETMORE, J., *August 13th, 1903.*]

The following statement of facts is abstracted from the judgment:

Statement.

The testatrix, Janet Bell, was the mother of the plaintiff. By her will, dated 26th July, 1901, after directing that all her just debts, funeral and testamentary expenses should be paid out of her estate, and devising a certain named quarter section of land to Mary Munro Sarvis, a daughter, she directed that the balance of her estate should be sold by her executors and the proceeds divided as follows: To William Lytle Bell (the plaintiff) the sum of $200. To Alexander Wallace Bell (another son) the sum of $200, and the residue was to be divided equally between certain persons named, and she revoked all previous wills. At the trial the facts established were that the plaintiff some years previously was the owner of the north-east quarter of section 16, township 14, range 30, west 1st principal meridian, and being indebted to various creditors he conveyed it to his father, James Bell, for the consideration expressed in the transfer, viz., $500. The true nature of the transaction was that the father was to pay off certain debts of the plaintiff which were assumed to be somewhere in the vicinity of $200, and the plaintiff, when this land was resold, was to receive whatever it realized over $500. The land was

resold for $1,000, and afterwards in December, 1898, James Bell died, having bequeathed and devised all his property real and personal to his wife, the testatrix, Janet Bell, absolutely. The purchase money for this quarter section had not been paid when James Bell died and Janet Bell promised her husband on his deathbed to give the plaintiff $500. Sometime in or about June or July, 1900, Janet Bell executed a will whereby after bequeathing to the plaintiff $500 she directed the residue of her estate to be sold and equally divided among certain legatees named. Evidence was given to the effect that Janet Bell in giving instructions for this will directed that this legacy of $500 to the plaintiff should be inserted because she had promised her husband to give him that amount, and that was all that he was to get. The evidence was received subject to objection. As a matter of fact at the time that will was executed Janet Bell had on the previous November (1899) delivered to the plaintiff a team of horses valued at $100 on account of this $500, and therefore when this will was executed there was only $400 of the amount remaining unpaid. From time to time after this will was executed she delivered to the plaintiff, on account of this $500, money and supplies including some lumber purchased for him from John Hind in May, 1901, in all amounting to $295, for which the plaintiff gave her his receipt on the 14th June, 1901. Afterwards on the 8th July, 1901, she purchased from Hind for the plaintiff and delivered to him on the same transaction some more lumber to the amount of $9.53. The next transaction in order of time was the execution of another will on the 26th July, 1901, already referred to, which will was admitted to probate. Consequently at the time that this last will was executed the testatrix had paid $404.53 on account of this $500 she had promised her husband to pay the plaintiff, or, in other words, she had paid it all off except $95.47. After the execution of this will and between that and the 18th November, 1901, the testatrix delivered to the plaintiff furniture and household goods to the value of $60, for which he gave her his receipt on the 18th November, and on the 21st of the same month she gave him a horse at the valuation of $65. These various items amounted in the whole to $529.53. Janet Bell died on 24th December, 1901. This

action was brought to recover the legacy of $200, set out in the will.

Argument. *E. L. Elwood*, for the plaintiff.

J. T. Brown, for the defendants.

Judgment. WETMORE, J. (after referring to the facts).—The defendants claim that this bequest of $200 to the plaintiff was merely put in the will as security for the payment of whatever was then unpaid to the plaintiff on account of this $500, and that this $500 being paid the legacy is satisfied. And with a view of supporting that, evidence was given of the instructions given by Janet Bell with respect to putting that bequest in the will. This evidence was received subject to objection, as was evidence of statements made by the testatrix subsequent to the making of the will. Evidence was also received on behalf of the plaintiff as to statements made by the testatrix. I think this evidence serves to illustrate the great caution one should use in receiving testimony to alter the language of a will or instrument required to be executed with so much formality and particular care. For here we have Sarvis, one of the executors, and his wife, one of the residuary legatees, giving testimony pointing in the direction that according to the testator's instructions and conversations her sole intention not only in putting the $500 bequest in the first will but also in putting the $200 bequest in the last will was to secure this $500 to the plaintiff, and on the other hand we have the testimony of the plaintiff and his wife as to conversations by the testatrix pointing in the direction that the legacy was intended to be one over and above and quite independent of this $500 which she had paid all off before she died. I have not struck the testimony out, however, because I am of opinion that under the circumstances of this case it was admissible. But in endeavouring to arrive at the true intention of the testatrix I must consider not only this testimony, but all the surrounding circumstances. In the first place I must look at the language of the will, and I must hold that the intention of the testatrix was to bequeath to the plaintiff $200. The language is quite plain in that respect, and under the authorities I would not be justified in resorting to the instructions given to the person who prepared the will for the purpose of changing it.

Judgment. Wetmore, J.

It is claimed, however, on the part of the defendants that there was a relation existing between the testatrix and the plaintiff, which was in the nature of that existing between a debtor and a creditor. That is, that there was a moral duty or obligation cast upon her by reason of her promise to her husband, which she was in conscience bound to carry out and which she so recognized, and therefore that the rule of equity, that when a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt it shall be presumed in the absence of contrary intention appearing that it was meant by the testator as a satisfaction of the debt, applies. When the last will was made only $95.47 of the amount was unpaid. It is quite impossible for me looking at the language of the will to arrive at the conclusion that the testatrix intended that when this $95.47 was paid it was to operate as a satisfaction of the legacy of $200. That, however, is practically one of the contentions of the defendants. But they also urged that if I held that it was not the intention of the testatrix that when the balance of the sum of $500 was paid that the legacy was satisfied that I should hold that the payments or advances made by her subsequent to the date of the will on account of this $500 should be applied *pro tanto* in reduction of the legacy. Now in order to hold that I must be satisfied that under the circumstances of this case and the weight of evidence a presumption is raised that the testatrix intended that the bequest should be in satisfaction of this claim or *quasi* claim of the plaintiff's. I have come to the conclusion after considerable hesitation that this presumption is raised. The rule is that when a legacy is given for a particular purpose, a gift *inter vivos* for the same purpose satisfies it. See *Pankhurst* v. *Howell*,[1] and *In Re Fletcher*[2] The payments or advances therefore made by the testatrix after the execution of her will on account of this claim must be applied *pro tanto* in reduction of the legacy. I do not think it is correct to call this ademption. That word is hardly applicable. It is more in the nature of satisfaction. Those payments or advances, however, could not for such purpose exceed what was payable in respect of such claim at the time

[1] (1871), L. R. 6 Ch. 137; 19 W. R. 312.
[2] (1888), 38 Ch. D. 373; 57 L. J. Ch. 1032; 59 L. T. 313; 36 W. R. 841.

Judgment.
Wetmore, J.

that the will was executed, and, as stated, that was only $95.47. The evidence of the plaintiff establishes that whatever she so advanced on account of that claim over and above what it amounted to was presented to him as a gift and was not intended to go in reduction of the legacy, it was not in any sense an advance of a portion so as to reduce the legacy. It was an out and out present gift.

I may add here that I am greatly influenced in reaching the conclusion I have on this whole case by the testimony of the plaintiff and his wife, that the testatrix told the plaintiff before she left Moosomin that she had left him in better shape than he thought he was. I believe that testimony to be true, and it presents to my mind a very natural feature in the case. Why should the plaintiff be practically left without any benefit in his mother's estate? For that is the contention of the defendants, if it is given its full scope. Why should he be sent away with simply and only what was fairly in conscience coming to him out of his own property? Why, for instance, should his brother, Alexander Wallace, be entitled to his $200 legacy in that estate and all the other children share in it and the plaintiff get nothing at all? In the absence of any evidence to establish that I think the mother's remarks to the plaintiff and his wife were natural.

Declare that the plaintiff is in respect of the legacy of $200 bequeathed to him entitled to $104.53. Order that the defendants give their assent to such $104.53 portion of the said legacy, and that the plaintiff have judgment for the said sum of $104.53 and costs. Such costs to be paid out of the estate.

Judgment for plaintiff.

FROST & WOOD v. ROE.

Practice—Pluries execution—Application for leave to issue—What must be disclosed.

On an application for leave to issue execution under Rule 349 of the Judicature Ordinance, the affidavits must clearly disclose the amount that is due on the judgment. It is not sufficient under any circumstances for the plaintiff to merely swear that no payment has been made.

[WETMORE, J., *December 24th, 1900.*]

Statement. Application by summons in Chambers for leave to issue pluries executions under a judgment more than six years old.

Argument. *E. A. C. McLorg,* for defendant, objected to the material as insufficient to support the summons.

E. L. Elwood, contra.

Judgment. WETMORE, J.—A Chamber summons was granted upon an affidavit of John Emmanuel Ruby, the plaintiff's manager, and one of Mr. Elwood. Mr. Ruby swears that the plaintiffs recovered judgment in this case against the defendant in this Court on or about the first day of August, 1893, for $134.01 and costs, and that no payment whatever has been made on account of such judgment. It appears from Mr. Elwood's affidavit that on or about 4th November, 1896, alias *fi. fa.* issued against the defendant's lands and goods on this judgment and that neither of such executions have ever been renewed. This was all the information brought under my notice when the summons was granted. I am of the opinion that this material is not sufficient. The affidavit ought clearly to disclose how much, if anything, is due on the judgment; and this has not been done. The only information before me in that connection is contained in Mr. Ruby's affidavit, who, as I have before stated, swears that no payment whatever has been made on account of the judgment. That may be absolutely true and the sheriff may have realized every dollar due on the judgment by virtue of some one or more of the executions issued to him, by selling goods or lands; and moneys realized in that way would not be realized by way of payment at all. As a matter of fact I have no evidence whatever as to what has become of the several executions issued to the sheriff or whether any-

Judgment.
Wetmore, J.

thing was realized under any of them or not or whether they were returned *nulla bona* or *nulla terra* or what has become of them. It has been urged that if the judgment has been satisfied in whole or in part it is incumbent on the defendant to shew it; that he has been served with the Chamber summons, and should inform the Judge. I cannot agree to that. I am of opinion that the plaintiff asking for the leave to issue execution after the prescribed lapse of time must make out a *prima facie* case to establish his right to it. If this is not correct, no affidavit is necessary at all. It would be sufficient merely to prove the fact of judgment, take out the summons and serve it, and leave it to the defendant to prove that the plaintiff is not entitled to the order.

Summons discharged with costs.

SPRUCE VALE SCHOOL DISTRICT No 209 v. CANADIAN PACIFIC RAILWAY COMPANY.

Assessment and taxation—Constitutional law—Land grants to the Canadian Pacific Railway—Exemption from taxation—Grant in praesenti—Equitable principle—44 Vict. (Can.), c. 1, s. 24. (Alberta Act), 4-5 Edw. VII. c. 3.

Lands owned and held by the Canadian Pacific Railway Co. under and by virtue of the sixteenth section of the Contract for the Construction of the Canadian Pacific Railway, are exempt from taxation for twenty years from the date of the issue of the letters patent of grant from the Crown of such lands.

The assessors of the plaintiff school district assessed taxes for the year 1907 against the defendant company upon lands which were part of the original grant made to the company under and by virtue of the contract referred to in and confirmed by 44 Vict. (Can.), c. 1. These lands were patented in 1901 and the whole railway referred to in the contract was completed in 1886.

Held, following *Springdale School District* v. *Canadian Pacific Railway Co.* (1904), 35 S. C. R. 550, that these taxes could not be collected as the land grant to the C. P. R. Co. under 44 Vict. c. 1, was not a grant in *praesenti* and consequently the period of twenty years' exemption from taxation of such lands provided by the sixteenth section of the contract for the construction of the C. P. R. began from the date of the actual issue of the letters patent from the Crown from time to time, after they had been earned, selected, surveyed, allotted and accepted by the company.

Section 24 of the Alberta Act, establishing the Constitution of the Province of Alberta, expressly stipulates that the powers granted to the province must be exercised subject to the provisions of s. 16 of the contract which provides for the exemption, and this effectually prevents the province from saying that it is not bound by the contract.

Quære, whether or not, considering the speculative character and difficulties of the company's enterprise as well as the difficulties of making a selection of the lands to be accepted, the Crown, represented by the Government, in its capacity of trustee of these lands, the beneficial interest of which is in the people, was not so dilatory in actually granting the lands under the provisions of the contract as to estop the beneficiaries from insisting upon the application of the equitable principle that "that must be held to have been done which should have been done," and enforcing the collection of taxes after the expiration of twenty years from the date of the completion of the railroad.

[STUART, J., *July 20th, 1907.*]

Statement.

The Canadian Pacific Railway Company, who were the owners of part of the south-east quarter of section seven (7) in township twenty-four (24) in range one (1) west of the fifth principal meridian and also part of section seventeen (17) in the same township, were assessed in respect of the said lands by the Spruce Vale School District No. 209, within which district the lands are situated. The company appealed to the Court of Revision which confirmed the assessment, and from that decision the company took this appeal. The appeal was heard by STUART, J., at Calgary on July 13th, 1907.

Argument.

W. P. Taylor, for the appellant.

F. S. Selwood, for the respondent.

Judgment.

STUART, J.—It was admitted (1) that the assessor had assessed the appellant in respect of the said lands for the year 1907; (2) that the land described is part of the original grant made to the appellant under and by virtue of the contract referred to in, and confirmed by, 44 Vic. (Dom.) c. 1, and that it is within the 24-mile belt referred to in the said contract; (3) that the patent for the lands in question was issued by the Crown to the appellant on July 1st, 1901; and (4) that the lands have not yet been sold by the appellant and have not yet been occupied.

There was no admission made as to the date of the completion of the railway as referred to in s. 9, s.-s. (b) of the contract, but evidence was tendered which satisfied me that the whole railway referred to in the contract was completed according to the terms of the said sub-section some time in the year 1886.

Judgment.
Stuart, J.

The appellants relied upon the two following cases, viz., *Balgonie Protestant School* v. *Canadian Pacific Railway Co.*,[1] and *Springdale School District* v. *Canadian Pacific Railway Co.*[2] The only possible change in the situation which might conceivably be held to have taken place since the latter case was decided by the Supreme Court of Canada arises from the fact that since the date of that case the North West Territories as they then existed have disappeared and two provinces of confederation have been established covering practically the same geographical area. A large portion of the reasoning upon which the decision in that case was based was referable to the fact that taxation by the Territorial Legislative Assembly being imposed by a delegated legislative authority was really taxation by the Dominion. Had it not been for the clause in the *Alberta Act*,[3] to which I shall presently refer, it might conceivably have been possible to argue that now that a new province has been created which was not a party to the contract, the contract could not bind such province, that, as the provincial Legislative Assembly has permitted the *School Assessment Ordinance of 1901*, under which the assessment was made, to remain in force without interference, the legislation, although originally territorial legislation, has now become in reality provincial legislation and is a provincial law, that, therefore, the province has in that sense legislated and that, the contract not being binding upon it, the exemption imposed by the *Dominion Act* confirming the contract can no longer exist. I doubt, however, very much whether the effect of section 16 of the *Alberta Act*[3] establishing the province whereby all laws in force in the Territories are continued in force subject to being altered, amended or repealed by the Dominion Parliament or the Provincial Assembly according to their respective authorities, is sufficient to convert the assessment ordinance into a piece of provincial legislation. It is unnecessary, however, to say anything as to this because section 24 of the *Alberta Act*[3] establishing the constitution of the province[4] expressly provides that the powers granted to the province must be exercised subject to the provisions of section 16 of the contract which provides for the exemp-

[1] 5 Terr. L. R. 123.
[2] 35 S. C. R. 550.
[3] 4-5 Edw. VII. c. 3.
[4] The Province of Alberta.

tion. This section 24 of the Act establishing the province therefore, it appears to me, effectually prevents the province from saying at any time hereafter that it is not bound by the contract.

There remains, therefore, the simple question whether the period of exemption from taxation has yet expired. On this point I am, of course, absolutely precluded by the authority of the *Springdale Case*[2] from giving any but one decision, which is that the period of exemption did not begin to run until the issue of the patent on July 1st, 1901, and the twenty years not having yet expired that the land in question is still exempt from taxation.

There was some intimation made that this case had been brought before me as a test case for the purpose of proceeding further and, if possible, of securing a decision by the Privy Council, which was not obtained in the *Springdale Case*[2] owing, so it was stated, to delay in asking leave to appeal. I cannot at present understand how this is expected to be done inasmuch as no right of appeal from the Judge's decision is given by the provisions of the *School Assessment Ordinance*. In the *Springdale Case*[2] there was, not an appeal upon the assessment, but a regular action in Court to recover the taxes as a debt from the company, in which case, of course, an appeal could go on. If I allow this appeal, as I am bound to do, there will be no assessment and therefore no action can be brought for the taxes, which could be taken to appeal. It may be, however, that the parties may have some method of going on in mind which does not now occur to me, and in view of that possibility I think it not altogether out of place to mention one possible aspect of the case which was not, so far as I can discover, suggested in the argument of the previous cases. The public lands of the Territories are vested in the Crown in the right of the Dominion of Canada. The beneficial interest is not in the Crown, but only the bare legal estate. The Crown is, therefore, a trustee for the Dominion of Canada and for the people inhabiting it in respect of these lands. This was the situation in 1880, when the contract was made, and in 1881 when it was confirmed by Parliament. Section 9, s.-s. b of the contract, says, "upon the construction of any portion of the railway hereby con-

Judgment. Stuart, J.

tracted for, not less than twenty miles in length, and the completion thereof so as to admit of the running of regular trains thereon together with such equipment thereof as shall be required for traffic thereon, the Government *shall* pay and *grant* to the company the money and land subsidies applicable thereto . . .” There is no doubt that under this clause, as soon as every twenty miles was completed, it became the duty of “the Government,” which, of course, means the Crown, to “grant” the land subsidy applicable thereto. The company at least could have then called upon the Crown to do so. The question then arises whether any person or persons other than the company was entitled, not in a political sense, but in a legal sense, to call upon the Government then to make the grant. The Crown was a trustee. Was there any beneficiary with legal rights recognizable by the Courts? Assume for the moment a parallel case. John Smith holds the fee simple in 500,000 acres of land as bare trustee for a number of beneficiaries. For the benefit of the latter and by their authority he enters into a contract with Richard Brown whereby, in consideration of the latter constructing an irrigation ditch through this tract of land, it is agreed that Brown is to receive 50,000 acres as a bonus, and that Smith shall grant these lands to Brown as soon as the work is completed. It is also agreed that, commencing at a period of twenty years after Smith grants these lands to Brown, the beneficiaries shall be entitled in perpetuity to 2 per cent. of all revenues received from the subsequent purchasers of the lands for water privileges. The bonus is earned by the construction of the work, but Smith, the bare trustee, does not make the grant to Brown until some years afterwards instead of at once as the contract provides. As a result the time at which the beneficiaries are to begin to receive their percentage of the revenue is postponed. It appears to me that in such a case a Court of equity would, in order to protect the beneficiaries, declare that that must be held to have been done which should have been done and would hold that the twenty years should be held to have commenced to run at the moment when Brown became entitled to receive his deeds of grant and when he should have received them. Could any such doctrine be applied where the Crown is the trustee? There is no doubt that the Crown can be a trustee. The only doubt has been on the point as to

whether there can be any remedy applied. It will be observed, however, that there would be no necessity to proceed against the Crown in any way. All that would be necessary would be for the Court, which represents the Crown as to its judicial functions, to declare that the Crown in its administrative capacity had not done what it should have done and, in order to prevent the interests of the beneficiaries being injured, that that must be held to have been done which should have been done, that is, that the grants or patents must be held to have been issued when they should have been issued; or in other words, that the 20-year period of exemption must be held to have commenced when it would have commenced if the contract had been performed according to its terms by the parties to it, one of whom was a bare trustee for other parties whose interests were injured by the delay. The doubt, of course, suggests itself whether the Court would consider the rights of any beneficiaries who could not be made parties to a proceeding in Court and whether this line of reasoning does not lead us quite beyond the boundary between law and politics. In any case, there would still be the question whether the arguments used by Nesbitt, J., in his judgment in the *Springdale Case*[2] in reference to the speculative character and the difficulties of the company's enterprise as well as the difficulties of making a selection of the lands to be accepted, would not be sufficient to make the time at which the patent should have been issued so doubtful as to prevent the Court from arriving at any definite conclusion on the point and, therefore, from saying that the period of exemption should be computed from any definite time other than the date of the patent.

The appeal will, therefore, be allowed and the assessment roll will be amended by striking out the assessment of the company in respect of the land in question. As the assessment was made in the face of a well known decision shewing its invalidity, I think the appellants should get their costs of the appeal.

Appeal allowed with costs.

MEARS v. ARCOLA WOOD WORKING CO. ET AL.*

Practice—Interpleader summons by garnishees—Reasonable discretion of Judge—Rules 392, 393 and 431 of Judicature Ordinance.[1]

Where there are claimants to the amount owing by a garnishee, other than the plaintiff, the garnishee has his rights under Rule 392 of the Judicature Ordinance.[1]

An interpleader summons was taken out by a garnishee in an action which was being defended and had been set down for trial. The garnishee admitted a liability of $2,000 under a policy of insurance upon which there had been a loss, but, claiming to fear that other actions might be brought by interested parties, obtained an interpleader summons.

Held, that the garnishees were not yet shewn to be under liability to the plaintiffs and had no right in law to interplead, their rights not coming within Rule 431 of the Judicature Ordinance,[1] but rather within Rules 392 and 393 of the same Ordinance.

While it is discretionary for the Judge to act under Rule 393 of the Judicature Ordinance,[1] the limits of his discretion must be reasonable, and an arbitrary refusal of a proper application would be a ground for correction upon appeal.

[WETMORE, J., *August 9th, 1907.*]

Statement.

The plaintiff brought an action against the defendants for debt and issued a garnishee summons against the garnishees, the Royal Insurance Company, which was duly served. The defendants effected an insurance upon a building in Arcola with the last mentioned company. The building was destroyed by fire, and at the time of the service of the garnishee summons the appraisement of the loss had not been lodged with the garnishees, and they consequently entered an appearance disputing the indebtedness. Afterwards the appraisement was lodged, and the company admitted a liability under the policy of $2,000 to whomsoever the Court decided were entitled to it. By the terms of the policy, the loss, if any, was payable to the Merchants Bank of Canada to the extent of their interest, and the Merchants Bank claimed to be interested in this amount to the extent of $1,440. On the 20th April, 1907, the defendants assigned all their right, title and interest in the policy of insurance to the Independent Lumber Company. Demands had been made on the garnishees by the plaintiff, the Merchants Bank of

* This judgment was sustained on appeal to the Court *en banc* T.B.D.—

[1] C. O. 1898, c. 21.

Canada, and the Independent Lumber Company, under their claims. The garnishees, therefore, alleging to fear that actions might be brought against them in respect of such demands, applied for and obtained an interpleader summons. The motion was argued before WETMORE, J., in Chambers, on July 19th, 1907. Statement.

E. L. Elwood, for the applicants, the garnishees. Argument.

E. A. C. McLorg, for the plaintiff.

T. D. Brown, for the defendant and the Independent Lumber Co.

WETMORE, J. (after stating the facts as given above):— Judgment.
Objection was taken by Mr. Brown that the applicants had no right in law to interplead, that their proceeding should be under Rule 392 of "*The Judicature Ordinance*."[1] That Rule is as follows: "Whenever it is suggested by the garnishee or any person claiming to be interested that the debt attached belongs to some third person or that any third person has a lien or charge upon it the Judge may order such third person to appear and state the nature and particulars of his claim upon such debt." I am of opinion that this objection is well taken. This is not an interpleader by a sheriff and, therefore, in order to be well taken a party must bring himself within paragraph 1 of Rule 431, which is as follows: "Relief by way of interpleader may be granted where the person seeking relief is under any liability for any debt, money, goods or chattels for or in respect of which he is or expects to be sued by two or more parties making adverse claims thereto." Now, one of the parties interested in this matter is the plaintiff, and the applicants are as yet under no liability whatever to him for any debt of any sort. Therefore there is no possibility that an action can be brought by the plaintiff against the applicants at present; he has not recovered a judgment—as a matter of fact the case is defended and application has been made to set it down for trial. If the matter was merely between the applicants and the Merchants Bank and the Lumber Company the case might be within paragraph 1 of Rule 431, but in so far as the plaintiff is concerned he is entirely outside of it, and I cannot see how the applicants can take advantage of that paragraph under such circumstances. Rule 392 is especially in point, and proceedings under that

Judgment. Wetmore, J.

Rule, taken with the following Rule (393), would effectually protect the applicants, and serve to bring all the parties interested before the Courts. It has been stated that it is discretionary with the Judge to act under Rule 393; that is correct. It was so decided by the Court *en banc* at the last sittings at Regina, in April; but it is a discretion which a Judge has to exercise within reasonable limits, he has no discretion arbitrarily to refuse a proper application, and if a Judge did so he would be corrected upon appeal. This application must be refused with costs to the parties so appearing, to be paid by the applicants.

Summons discharged with costs.

GIBSON v. STEVENSON.

Practice—Review of taxation — Necessary affidavit — Application whether final or interlocutory—Action dismissed.

An order dismissing an action for want of prosecution is a final order, but the application to dismiss is itself interlocutory.

[WETMORE, J., *July 8th, 1905.*]

Statement.

On an application in Chambers to dismiss the plaintiffs' action for want of prosecution, an affidavit of J. D. Murphy, the defendant's advocate, was filed, and also an affidavit of his agent, E. L. Elwood, the agent's affidavit being as follows: "I am agent herein for J. D. Murphy, defendant's advocate, and my office is the address for service of the defendant's advocate herein. No application has been made to set this case down for trial nor has any notice of application been served to set this action down for trial, and this action has not been set down for trial."

On taxation the costs of this affidavit were disallowed on the ground that the statement should have been included in the affidavit of the defendant's advocate filed. The defendant applied to review.

Argument.

E. L. Elwood, for the defendant.

T. D. Brown, for the plaintiff.

Judgment.

WETMORE, J.:—This is a review of taxation of costs on the part of the defendant, the action having been dismissed

Judgment.

Wetmore, J.

for want of prosecution. Now, the question whether Mr. Elwood's affidavit was taxable depends, in my opinion, upon whether this application was interlocutory or final. If it was final I am of opinion that it would be taxable, because under Rule 295 of "*The Judicature Ordinance*,"[1] "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted." If this application was final, as the step which was necessary to keep the action alive might be served upon Mr. Elwood, the agent of Mr. Murphy, Mr. Murphy would not be in a position to state that such step was not taken, and his information and belief would not be sufficient, and Mr. Elwood's affidavit would be necessary. But I am of opinion that this was an interlocutory application. I wish to draw a distinction between what may be called a final order and an interlocutory order. So far as the order is concerned I am inclined to think that it was final, although the decisions in England are not altogether reconcilable; they are rather contradictory. It would be final for the purpose of making an appeal from the decision if it was intended to make an appeal; but an order may be final, it seems to me, and the application may be interlocutory. I take it that an application would be interlocutory where the character of it was such that a final order need not necessarily be made one way or the other. If an application is made, and the result of that application, whether the Judge decides one way or whether he decides the other, would be to put an end to the action, that would be a final application, and not interlocutory. But an application like the present, where it would be only final if the defendant succeeded, and if he did not it would not put an end to the action, and, moreover, where the Judge is empowered expressly to make a contingent order making it final only on the failure of the other side to proceed within a specified time, would be an interlocutory application. I get my idea upon that largely from what was laid down in *Salaman* v. *Warner*,[2] in which Lord Esher, Master of the Rolls, lays down the following rule for the purpose of deciding what constitutes a final

[1] C. O. 1898, c. 21.

[2] (1891), 1 Q. B. 734; 60 L. J. Q. B. 624; 39 W. R. 547; 64 L. T. 598.

Judgment.
Wetmore, J.

order for the purpose of appeal; he says: "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other way, will allow the action to go on, then I think it is not final, but interlocutory."

There is a case, however, a later case, *Bozson* v. *Altrincham Urban District Council*,[3] which lays down this rule, and in which Lord Alverstone, C.J., says: "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order." Now, that decision was given with *Salaman* v. *Warner*[2] cited before them, but the Court preferred following another case, *Shubrook* v. *Tufnell*,[4] which was not cited to the Court in *Salaman* v. *Warner*.[2] Now, while this is so, with respect to the order being final or not, I think the rule laid down by Lord Esher for the purpose of determining whether the motion or application is interlocutory or not is the rule to follow. I hold, therefore, that this motion was an interlocutory motion, and that Mr. Elwood's affidavit was unnecessary, because Mr. Murphy—he did not do so, but he could have done so in his affidavit—could have sworn to the further step not having been taken as he was informed by his agent and verily believed, and that would have been quite sufficient in an interlocutory application according to the rule I have stated.

Taxation affirmed.

[3] (1903), 1 K. B. 547; 72 L. J. K. B. 271; 51 W. R. 337.
[4] 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740.

THE DAKOTA LUMBER COMPANY v. RINDERKNECHT.

Practice—Security for costs—Poverty—Defendant disposing of his property—Suspicious circumstances.

Poverty is generally a sufficient ground to warrant an order for security for costs of an appeal.

Upon an application calling upon the defendant for security for costs of the appeal it was shewn, by the examination of the defendant for discovery, that he had no property against which payment of costs could be enforced by the plaintiff.

Held, that this circumstance was sufficient to warrant an order for security being given under Rule 502 of the Judicature Ordinance.[1]

[WETMORE, J., *August 1st, 1905.*]

Argument.

E. A. C. McLorg, for plaintiffs.

J. T. Brown, for defendant.

Judgment.

WETMORE, J.—This is an application calling upon the defendant for security for costs of the appeal. I am of opinion that this is a case where security ought to be ordered under the provisions of Rule 502 of "*The Judicature Ordinance.*"[1] Leaving the affidavit of Mr. Fred. Elliott sworn on the 4th of July out of consideration insofar as it refers to the defendant attempting to dispose of his property, the examination of the defendant for discovery shews that if he is telling the truth his circumstances are such that he has not any property against which payment of costs can be enforced by the plaintiffs, and that, as stated by the Court in *Whittaker* v. *Kershaw*,[2] is sufficient to warrant an order for security being given. This is the latest case that I can find upon the subject, and the tendency of the authorities appears to me to be that poverty is generally a sufficient ground to warrant an order for security of the costs of an appeal being made. In this case, however, I think there is something more. While it does not very distinctly appear from the defendant's examination for discovery that he has been disposing of his property to avoid payment of any judgment that the plaintiffs may recover against him, the circumstances under which he has at a recent date disposed of

[1] C. O. 1898, c. 21.
[2] 44 Ch. D. 296; 62 L. T. 776; 38 W. R. 497.

Judgment. Wetmore, J.

his property, handing it over to his wife, and making her presents, gives it to my mind a very suspicious appearance. I think it is a case in which security should be ordered.

Order accordingly.

ROUSECH v. SCHINDLER.

Vendor and purchaser—Contract for sale of land—Specific performance—Making time of the essence—Delays or defaults of purchaser—Legal tender.

One party to a contract cannot by notice make time of the essence of the contract unless the other party has been guilty of laches or unreasonable or unnecessary delays, and when such notice is given, reasonable time must be allowed the other party to carry out his part of the contract.

To constitute a legal tender the money must be produced and actually shewn, but the party to whom the tender is made may either expressly or impliedly dispense with such production; and

Quære, whether a tender is necessary to support an action for specific performance; whether it is not sufficient to merely allege and prove that the plaintiff is ready and willing to carry out his part of the agreement.

Where specific performance is decreed it is neither just nor equitable to impose such conditions as would compel the party seeking the relief to do something he did not agree to do.

[WETMORE, J., *August 13th, 1903.*]

Statement.

Action by a purchaser of land, against the vendor, for specific performance. The contract, which was in writing, and executed by both parties under seal, provided for the payment of the deferred instalments of the purchase price on the 6th day of October in each year, the whole of the purchase price to become due and to be paid on or before the 6th day of October, 1901. On the 13th September, 1901, the defendant caused the plaintiff to be served with a letter written in German (the language of the parties) reminding him that the contract ended on October 6th and that the defendant expected him to pay in full by that date, and if he did not the defendant would sell the land to another person. The balance due on the contract was not paid on the 6th of October, and on the 10th or 11th October the defendant came to the plaintiff's house on the land in question, at which time the plaintiff informed the defendant that he intended to carry out the agreement on his part by paying the amount due.

The defendant absolutely refused, however, to accept the money under the agreement, and stated that he would not deal with the plaintiff at all except on the terms of his entering into a new contract to pay him $500 for the land in addition to what he had already paid, but the plaintiff insisted upon the agreement in question being acted on and refused to enter into a new contract or pay the additional $500. On the 14th October the plaintiff and the defendant again met. On this occasion the plaintiff had $250 with him, more than enough to pay the principal and interest due under the agreement, and he informed the defendant that he had the money and offered to pay him what was payable under the agreement. No tender, strictly speaking, was made, but the defendant refused to stand by the agreement or accept the money payable under it, and insisted upon the plaintiff either entering into a new contract or giving up the land. On the 24th of the same month the plaintiff went to the defendant's house with some other persons, and on this occasion also he had $250 with him in a pocket book; he then took the pocket book out of his pocket, opened it and exposed the money and so offered it to the defendant, but did not remove the money from the pocket book. At the same time a transfer of the property in question from the defendant to the plaintiff was tendered to the defendant for execution, but he refused either to accept the money or execute the transfer.

Argument.

E. L. Elwood, for the plaintiff.

G. Elliott, for defendant.

Judgment.

WETMORE, J.—It is set up in the first place as an answer to this action that according to the terms of the agreement time was of the essence of the contract, and that the money not having been paid before 6th October, 1901, the defendant was at liberty to treat it as at an end and refuse to convey the land. I have no hesitation in holding that time was not of the essence of this contract. By virtue of *"The Judicature Ordinance"* justice is administered in the Territories on equitable principles, and there is nothing express or implied in this agreement which renders time an essential or indicates that the parties to it considered it essential. The object on the one hand was to

Judgment. Wetmore, J.

obtain the land and on the other to obtain the agreed price, and on equitable principles that can be secured to them. But it was urged that time was made of the essence of the contract by the notice contained in the defendant's letter delivered to the plaintiff on the 13th September. At the time this notice was given the plaintiff had been guilty of no unnecessary delays or defaults, the unpaid principal was not due, and no action could have been brought under the agreement to recover it before the 6th October, 1901. If the unpaid interest was due the defendant had apparently been perfectly willing to allow it to rest and accumulate compound interest under the agreement because there is no evidence that any request was ever made for the payment of such interest. Therefore down to the 6th October there were no unnecessary delays or defaults on the part of the plaintiff, and in my opinion there were none afterwards. I call attention in this connection to the uncontradicted fact disclosed by the testimony that on the 6th October, when the money became payable, the defendant was presumably 60 or 65 miles distant from the plaintiff, and the roads were very bad. I do not lay very much stress on this fact. I merely draw attention to it as a circumstance. But only four or five days after that date when the parties met for the first time the plaintiff clearly expressed his readiness and willingness to pay the balance due and carry out the agreement, and three or four days after that actually had the money ready to pay, and offered to do so, and on the 24th he actually produced the money and on every occasion the defendant refused to accept the money or carry out the contract or transfer the land unless the plaintiff would agree to pay about $300 more than the agreement called for. I am quite at a loss to conceive how it can be said that the plaintiff was guilty of unreasonable or unnecessary delays, and if not, the defendant was not at liberty by notice to make time an essential. I refer to what is laid down by Fry, J.,[1] in *Green* v. *Sevin*[2]:—"It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract, where it has not originally been of the essence, independently of delay on the part of him to whom

[1] At page 599 of 13 Ch. D.
[2] 13 Ch. D. 589; 41 L. T. 724; 49 L. J. Ch. 166; 44 J. P. 282.

Judgment. Wetmore, J.

the notice is given. In my view there is no such right. It is plain upon principle as it appears to me that there can be no such right. That which is not of the essence of the original contract is not made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract *sub modo*, that is, if a reasonable notice be not complied with." I quite agree with what is there laid down. It is true that in that case no time was limited in the contract for completion. But I think that what is laid down by Fry, J., is applicable to all cases where time is not of the essence of the contract. Before a party to a contract can be in a position to give a notice to make time of the essence of the contract, the other party must have been guilty of some laches or unreasonable or unnecessary delays, and then a reasonable time after that must be given him to enable him to carry out his part of the agreement.

It is urged that the plaintiff did not tender the money due under the agreement, that is, that there was no legal tender. I am not sure that tender is an essential ingredient in an action for specific performance, whether it is not sufficient to establish that the party seeking relief was ready and willing to carry out the agreement on his part, but assuming that a tender was essential, I am inclined to the opinion that there was a legal tender on the 24th October, that is, that the money was so actually produced and shewn as to constitute a legal tender, but I consider that not material because the circumstances in evidence bring the matter within what was laid down in *Ex parte Danks*.[3] Knight Bruce, L.J., in that case lays down the law as follows:[4] "The rule of law as I collect it from all the authorities is this, that to constitute a legal tender the money must be there and must be produced and seen, but with this exception, that the party to whom a tender is made may by his conduct relieve the debtor from the necessity of producing it by saying that it need not be produced for that he will not take the money if it be," and in the same case Lord Cranworth lays down: "Now a tender to

[3] 2 De G. M. & G. 936; 22 L. J. Bk. 73; 1 W. R. 57.
[4] At p. 75 of 22 L. J.

Judgment. Wetmore, J.

be strictly legal requires that the money tendered should be actually produced unless the production of it is either expressly or impliedly dispensed with by the creditor." I find as a matter of fact that the production of the money in this case was emphatically dispensed with by the defendant both on the 14th October and on the 24th of that month.

It was also urged on behalf of the defendant that if I decreed specific performance I should only do so on the terms of compelling the plaintiff to pay the increased value of the property. I never heard of such a proposition before, and I certainly do not consider it just or equitable that I should impose any such conditions and thereby compel the plaintiff to do something that he never agreed to do. The result is that the plaintiff is entitled to specific performance.

Judgment for plaintiff.

ELLIOTT v. GIBSON ET AL.

Appeal—Absence of reasons for conclusions of trial Judge—Effect of—Discretion—Lien for keep and care of cattle—Pleading—Damages.

Where the Appeal Book does not contain any reasons for the conclusion of the trial Judge, the Appeal Court should assume that the trial Judge has found every fact open to him to find under the evidence so as to support the conclusion he has reached.

A person keeping and caring for cattle has no lien at common law for such care and keep. A party who wishes to set up a statutory lien must specifically plead such lien. Judgment of SIFTON, C.J. varied.

[COURT EN BANC, *April 15th, 1904.*]

Statement.

The plaintiff, about the 14th August, 1901, delivered to Murray Gibson and Robert Gibson, two of the defendants, 32 heifers rising three years old, under an agreement, to be wintered and cared for by them until the 1st day of May, 1902, and for which they were to be paid $5 per head for every head re-delivered to the plaintiff on the said 1st May. The plaintiff claimed that the defendants so negligently and improperly and insufficiently kept, cared for and fed the animals that 16 of them were lost and died, and he claimed damages by reason thereof. He also claimed damages for the wrongful conversion of two of these heifers with their calves. The defendants counterclaimed for the

feeding and caring for 36 head of cattle at $5 per head. The case was tried before SIFTON, C.J., without a jury, who allowed the plaintiff $100 for four heifers that had died, and $60 for two heifers kept by the defendants, and allowed the defendants $160 for keep of animals, and he dismissed the claim and counterclaim without costs. No reasons were given for the judgment. The plaintiff appealed. Statement.

R. B. Bennett, for plaintiff. Argument.

Jas. Short, K.C., for defendant.

At the conclusion of the argument the Court took time to consider and on a subsequent day WETMORE, J., delivered the judgment of the Court as follows:—

WETMORE, J.—The notice of appeal and the factum on each side aver or assume that the learned Chief Justice made holdings and rulings which, in my opinion, are not warranted by the appeal book, and the appeal book is the record. The appeal book contains no reasons for the conclusions reached by the trial Judge, and this Court must, in my opinion, assume that none were given. This is an unusual circumstance in so far as appeals to this Court are concerned and it becomes necessary to determine what course this Court should adopt in this and similar cases. I am of opinion that in such case the Court should assume that the trial Judge has found every fact open to him to find under the evidence so as to support the conclusion he has reached. If the evidence should be of such a character that no facts could reasonably be found which would support in law the conclusion he has reached, the judgment would have to be set aside. Then again, the facts may be of such a character that the judgment would have to be varied. This Court cannot, however, accept what advocates choose to assert either in their notices of appeal or in their factums as to what the rulings and holdings of the trial Judge have been unless the assertion is supported by the appeal book. To hold otherwise would to my mind be opening a very dangerous door, especially when we consider that the trial Judge is not allowed to sit on the appeal unless it should be necessary for him to do so in order to constitute a quorum. Judgment.

Judgment. Wetmore, J.

[The Court here proceeded to consider the facts established by the evidence as set out in the appeal book, and also the assumed findings of the trial Judge.]

The judgment then proceeded:—

The defendants set up that the plaintiff is not entitled to recover for the conversion of the two heifers detained by the defendants because they had a lien on them for their keep and care. No such lien exists at common law. That is established by *Chapman* v. *Allan*,[1] and *Jackson* v. *Cummins*.[2] But it is urged that the defendants were boarding stable keepers as defined by sub-section 3 of section 2 of "*The Livery Stable Keepers Ordinance*,"[3] and were, therefore, entitled to their lien by virtue of that Ordinance. The defendants did not plead a lien by virtue of the Ordinance. They merely pleaded that these heifers were detained and are still detained for a lien to which the defendants were and are entitled. I doubt if, under such a plea, the defendants could rely on the statutory lien. The plaintiff replied merely denying the right to a lien. Assuming the defendants could set up the statutory right of lien under their plea, the onus was on them to prove their right and that they had complied with the requirements of the Ordinance because unless they had done so, they had no right of lien under it. No mention of any attempt was made to establish that. It was urged that the fact that the defendants had not complied with the requirements of the Ordinance and stating in what particular, should have been pleaded and proved by the plaintiff. Possibly; but I have some doubt about it. If the defendants had pleaded the Ordinance, that might have been correct, but the defendants not having pleaded it but merely pleaded in the way they did, the plaintiff was justified in pleading a denial of the lien and thereby throwing the onus of proving it on the parties setting it up. The judgment of the trial Judge awarding $60 in respect to this conversion must stand.

The judgment in this case should be varied by awarding judgment to the plaintiff on the statement of claim for $235 and general costs, and for the defendants on the counterclaim for $150 and costs, exclusively applicable

[1] (1632), Cro. Car. 271; 2 Ruling Cases 547.
[2] 5 M. & W. 342; 8 L. J. Ex. 265; 3 Jur. 436.
[3] C. O. 1898, cap. 57.

to the counterclaim, to be one taxation of costs, one judgment to be set off against the other and the party in whose favour the balance may be after such set-off, to have execution for such balance. The defendants should pay the appellant's costs of this appeal. Judgment. Wetmore, J.

Appeal allowed with costs.

OSLER v. COLTART ET AL.

Taxation for school purposes—Distress — Homestead lands before issue of patent—Lands of Crown—Not taxable under s. 125 of the British North America Act—Lien on land.

The interest of a homesteader in land before a patent has been issued to him by the Crown is not taxable for school purposes.

Where taxes were assessed on the plaintiff's homestead prior to entry by him and while the same was held by previous homesteaders whose entries were afterwards cancelled, and these taxes were collected by distress of his goods and chattels, before a patent had been issued for the land,

Held, that the money should be returned to the plaintiff, as, until patented, the lands were the property of the Crown, and were exempt from taxation under s. 125 of the British North America Act.

To hold that the taxes became a lien on the land and could be collected from a subsequent occupant who derives his title from the Crown, would be in effect taxing the property of the Crown.

[NEWLANDS, J., *July 24th, 1907.*]

The defendants were the trustees of Prospect School District No 560, and the action was brought to recover $23 taxes and bailiff's fees which they collected from plaintiff by distress of his goods and chattels. These taxes were assessed on the plaintiff's homestead prior to entry by him and while the same was held by previous homesteaders whose entries were afterwards cancelled. No patent had been issued for this land at the time of the trial. Statement.

W. M. Kellock, for the plaintiff. Argument.

F. Ford (Deputy Attorney-General), intervening.

NEWLANDS, J.—It is contended on behalf of the defendants that all land in rural school districts (the district in question being a rural school district) is taxable, including land held by the Crown. This contention is based on the fact that *The School Assessment Ordinance* does not exempt Judgment.

Judgment. Newlands, J.

Crown lands in the case of rural school districts while it exempts Crown lands in every other instance. To shew the fallacy of this argument I have only to point out that section 125 of the British North America Act provides that no land or property belonging to Canada or any province shall be liable to taxation.

After the parties had argued this case, and I had come to the above conclusion, the Attorney-General for the province intervened, and the case was re-argued.

Mr. Ford, the Deputy Attorney-General, argued that there could be no doubt but that the interest of the homesteader could be assessed, though, until patent was issued by the Crown that interest could not be sold; that the taxes on the interest of a homesteader, although it would be in the nature of a personal tax would also have some of the incidents of a tax on land and would become a lien on the land for which the land could be sold after the Crown parted with their title to it; that this tax having been properly levied at the time against the interest of the homesteader in the land it could be collected from the occupant of the land in any of the methods prescribed by the Ordinance, except the sale of the land itself before the issue of the patent, and that the tax in this case was collected by distress on goods on this land for a tax that had been properly levied on the interest of a previous occupant.

I cannot see that this argument, however ingenious it may be, answers the objection that land belonging to Canada is thereby taxed. It is true that the interest of the occupant only was assessed, but if the tax becomes a lien on the land realizable from a subsequent occupant who derives his title from the Crown I cannot see but that the property of the Crown has been taxed.

A subsequent homesteader or purchaser would have to take into consideration the lien for taxes that was against the land, and, if a purchaser, would give that much less for the land, which would mean that the Crown paid the tax.

I think that the land is absolutely free from the tax in the hands of the Crown, and that it cannot be revived on the Crown alienating the land to a private individual.

It, therefore, follows that the land not being liable to taxation while belonging to the Crown, it could not be

charged with taxes levied against the interest of the former homesteaders whose entries were cancelled and whose interest reverted to the Crown before the plaintiff went into possession, and the school district would, therefore, have no right to recover the same from the plaintiff. Judgment will, therefore, be for the plaintiff for the amount claimed with costs. Judgment. Newlands, J.

Judgment for plaintiff with costs.

IMPERIAL ELEVATOR COMPANY v. JESSE ET AL.

Originating summons for foreclosure—Homestead—Rights of prior execution creditors—Defective affidavit.

At the return of an originating summons for foreclosure it appeared that there was a mortgage and two executions registered against the property in priority to the mortgage sought to be foreclosed. The land was the homestead of the mortgagor and execution debtor. *Held*, that the execution creditors had no interest in the property *quoad* the subsequent mortgage.

[WETMORE, J., *June 29th, 1907.*]

Originating summons for foreclosure. The facts are stated in the head-note and the judgment. Statement.

W. A. Nisbet, for plaintiffs. Argument.

T. D. Brown, for defendants, execution creditors.

WETMORE, J.—This is an application by originating summons for foreclosure. The property is a quarter section of land, and it is the homestead of the defendant Jesse. On the 18th February, 1904, he executed a mortgage to the Hamilton Provident & Loan Society for $800. This mortgage was registered on the 26th February, 1904. On the 20th August, 1906, he executed a mortgage to the plaintiffs for $400.60. This mortgage was registered on the 6th September, 1906. After the registration of the mortgage to the Hamilton Provident & Loan Society and before the registration of the mortgage to the plaintiffs the defendants Krause and the Balfour Implement Company caused executions at their respective suits against Jesse to be registered against the lands of Jesse. Judgment.

I am of opinion that the defendants Krause and the Balfour Implement Company were properly made parties to this action, and, while the summons is entitled against all the

Judgment.
Wetmore, J.

defendants, the affidavit of William John Bettingen, upon which the originating summons was issued, is only entitled as against the defendant Jesse. Objection was taken to the proceedings by reason of this error, and no doubt it is an irregularity, but inasmuch as both the defendants Krause and the Balfour Implement Company appeared to the summons by advocate on the 26th February and asked for a sale, and appeared again on the 8th March and asked for a sale, and it was only on the 15th March that objection was raised to the irregularity in the title of the affidavit, I am of opinion that this is a case where I may under Rule 306 of "*The Judicature Ordinance*"[1] receive the affidavit, and I will order it to be received accordingly.

The next question that arises is whether the defendants Krause and the Balfour Implement Company have any rights against this land as against the plaintiffs by virtue of the registration of their executions. I am of opinion that the case comes within what was laid down by the Supreme Court of the North-West Territories *en banc* in *Bocz* v. *Spiller*,[2] and that these defendants have no interest by virtue of their registered executions against the property in question insofar as the plaintiffs' mortgage is concerned. There is no subsequent mortgage to the plaintiffs, and I do not know whether or not the property is worth more than the two mortgages against it or not. The plaintiffs are entitled to foreclosure subject to the mortgage of the Hamilton Provident & Loan Society.

Order accordingly.

[1] The Judicature Ordinance, C. O. 1898, c. 21.
[2] V. Terr. L. R. 225.

PERKINS v. JONES.

Vendor and purchaser — Part performance — Illegal and immoral contract—Recovering back money paid—Costs.

The plaintiff said to the defendant, referring to a certain named lot: "If you can get me that lot I will build." Accordingly the defendant, a builder by trade, did purchase the lot for the purpose of building a house thereon for the plaintiff; and a few days later the plaintiff entered into a written agreement respecting such lot and house, with the defendant, and paid $500 cash down. The house was intended for purposes of prostitution, as the defendant knew, and before the defendant had done anything toward building other than "brushing" the lot, the plaintiff gave notice to the defendant that she had decided not to build and demanded an immediate return of the $500 paid by her.

Held, per curiam, that there had been part performance of the contract and that consequently the plaintiff could not recover the money paid by her thereunder.

Quære, per NEWLANDS AND HARVEY, JJ., whether money paid under an immoral contract can be recovered back under any circumstances.

[COURT EN BANC, *January 20th, 1905.*]

Statement.

Some time prior to May 17th, 1904, the defendant, Thomas A. Jones, a builder by trade, went to the house of the plaintiff, whom he knew to be a prostitute, in an endeavour to procure from her the contract for a house which he had heard she desired to have built for the purposes of prostitution. Two other interviews seem to have followed this first one, and in the course of "the negotiations," she having expressed a desire to build nearby south of where she then lived, and he having replied that he "might be able to buy a lot" she went and picked out a lot known as No. 4, a short distance away, saying, "if you can get me that lot I will build."

On May 17th, the defendant entered into an agreement in writing, for the purchase of said lot 4, with the owner thereof, the consideration being the sum of $450, of which $150 was paid at once, the balance being payable on time.

Two days later, that is, on May 19th, the defendant entered into a written agreement with the plaintiff whereby he agreed "to build and finish a house according to plan" on said lot 4 and give the plaintiff a clear title to the same, the consideration being the sum of $2,700, of which the plaintiff paid $500 at the time of the execution of the agreement,

the balance being payable in diverse sums at different stated intervals.

After the execution of the last mentioned agreement and before June 3rd, the defendant ordered from the factory doors and windows for the house in question; and, at a date also subsequent to the said agreement, but which from the evidence might have been either prior or subsequent to said 3rd day of June, he brushed the lot and "fixed it up at an expense of $25."

Nothing further was done by the defendant until June 3rd, when he received from the plaintiff a letter intimating that she had decided not to build, and that he should not go on with the contract, and calling for the immediate return of the $500 paid on account. To this the defendant replied in writing that having ordered sash and doors which he was not at liberty to countermand, he would go on with the contract and hold her to her part of the same. An action then followed for the recovery by the plaintiff of the $500 advanced by her, which action was tried by SIFTON, C.J., and resulted in a verdict for the plaintiff for $325 and costs. The defendant appealed and the plaintiff cross appealed asking for judgment for the full amount of her claim. The appeal was heard before WETMORE, SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ.

Argument. *MacDonald*, for appellant (defendant).

O. M. Biggar, for respondent (plaintiff).

Judgment. PRENDERGAST, J. (after stating the facts):—Both parties admit, in fact urge in their pleadings, that the contract between the plaintiff and the defendant was an immoral one. Not only was the house in question to be built for purposes of prostitution, but the terms of the agreement even suggest that it was contemplated that most of the time payments, constituting more than one-half of the total consideration, should be paid out of prostitution money as it was earned.

The main ground urged on behalf of the plaintiff is that, although the contract was an illegal one, she had a right to repent as long as nothing was done by the defendant in execution of the contract, and that nothing in fact having been so done up to June 3rd, she stands by her letter of that

date *in loco pœnitentiæ* and is entitled to recover on that ground. Judgment. Prendergast, J

For the defendant, it was urged on the other hand that there was part performance of the contract prior to the receiving of plaintiff's notice; and that, even if there was not, the plaintiff is not allowed to repent in this case, and the action should not be entertained on the ground that the contract is not merely illegal but moreover immoral.

If there was part performance of the contract by the defendant, it must be either in his purchasing the lot, the ordering of the sash and windows or the brushing and fixing up of the land.

With reference to the purchase of the lot by the defendant, it was contended by the plaintiff that this could not have been in execution of the contract, as upon the three previous occasions when the parties met, the so-called *negotiations* did not result in any binding agreement, inasmuch as there was no consideration to support the same and it would, at all events, be void under the *Statute of Frauds*. That may be so if we confine ourselves to these immediate facts. But it seems proper to take here a broader view of the matter, and, if possible, to consider as the one transaction all that pursuant to previous understanding was done by the defendant towards the common object contemplated by the parties. The plaintiff had said to the defendant, "if you can get *me that* lot, I will build," which undoubtedly was not binding in itself. But the defendant did in fact go and procure that lot pursuant to this understanding and with no other possible object under the special circumstances shewn by the evidence than to build a house thereon for the plaintiff; and then, a few days later, the plaintiff enters into a written agreement with the defendant, dealing with him as owner of the lot she had so caused him to acquire. It was at her expressed desire that he put himself in a position to enter into the said agreement, and it seems that from the moment this agreement was passed she thereby ratified what had previously been done in furtherance of the object contemplated, and all the dealings of the parties up to that time should be considered as one. In that view, the purchase of lot 4 by the defendant, followed as it was by the said agreement, amounts to part performance of the contract.

Judgment.

Prendergast, J

As to the sash and windows, the defendant did not acquire any proprietory interest by ordering them. According to his own statement he had at the time of the trial only taken out a part, and that to be used in the erection of other houses, and the manufacturer from whom he ordered them states that they were of ordinary measurement and were only charged as taken out. This could not constitute part performance.

With reference to the brushing and clearing of the lot, it seems that a different conclusion should be reached. Under certain circumstances, as where building lots are held for sale generally, this brushing might be held as indifferent acts having no special reference to contract. But here as the lot was bought expressly in view of the contract the clearing of it was evidently also made with reference to it. A difficulty, however, arises here, which is that the evidence does not shew whether this clearing was done before or after the defendant received plaintiff's notice of June 3rd. It would seem, however, that the onus is on the plaintiff in this respect.

The contract here is admittedly illegal, and it is certainly the general rule that money paid on an illegal contract cannot be recovered back. There are undoubtedly exceptions to this rule, and the plaintiff urges that one of these is to the effect that a party may under such circumstances repent by giving notice before any part of the contract is performed. But it lies with the party seeking to recover to shew that he or she comes within the exception, and in the present case the plaintiff has to prove that the contract was still wholly unperformed when she gave notice.

It was also urged by Mr. Biggar, of counsel for plaintiff, that the agreement in this case is one which does not admit of part performance, and that it remained wholly unperformed until it was fully performed inasmuch as it was an agreement to sell a house and lot. But the terms of the agreement and of the receipt for the advance of $500, as well as the advance itself, to a certain extent, shew that the agreement was to build and sell.

Having reached upon the question of part performance the above conclusions, which must be fatal to the plaintiff, it is not necessary to enter into the defendant's further conten-

tion based upon a distinction between contracts merely illegal and contracts tainted with moral turpitude. Judgment. Prendergast, J

Although the appellant succeeds in the issue, I do not think, as he is conclusively shewn by his own evidence to have been the initiator of this immoral transaction, that he should be allowed costs either of the appeal and cross-appeal or of the trial in the Court below.

In my opinion the appeal should be allowed and the cross-appeal dismissed, the verdict of the learned Chief Justice set aside, and judgment entered for defendant.

WETMORE and SCOTT, JJ., concurred.

HARVEY, J. (after referring to the facts):—The rule adopted by the Courts in regard to cases such as this, arising out of illegal contracts, is stated by the Lord Chief Justice in the early leading case of *Collins* v. *Blantern*,[1] quoted with approval in *Kearley* v. *Thomson*,[2] as follows: "Whoever is a party to an unlawful contract if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back." The same rule is stated in a somewhat more general form by Lord Ellenborough, C.J., in *Edgar* v. *Fowler*,[3] as follows: "But we will not assist an illegal transaction in any respect. We leave the matter as we find it, and then the maxim applies *melior est conditio possidentis*."

It is urged by the plaintiff's counsel that there is an exception to this general rule, and that where money has been paid by one party under an illegal contract, but the contract has not been executed in any respect by another party, the contract may be repudiated and the money recovered back, and that the present case comes within this exception. I have examined all of the cases cited in support of this contention as well as many others referred to in the various authorities and text books, and while there is no doubt that the proposition is laid down in substantially the form urged

[1] (1767) 2 Wils. 341; 1 Sm. L. C. 9 ed., 398.
[2] 59 L. J. Q. B. 288; 24 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.
[3] (1802) 3 East 221; 7 R. R. 433.

Judgment.
Harvey, J.

both in the text books and by many of the Judges in *obiter dicta*, the only cases I have found which are direct authorities are *Aubert* v. *Walsh*,[4] in which the Court of Common Pleas held that the premium paid on a wager could be recovered before the period at which the wager was to be determined, and *Wilson* v. *Strugnell*,[5] in which Stephen, J., sitting alone, ordered the repayment of a sum of money paid to a surety on a bail bond as indemnity. It will be seen that in neither of these cases was the contract immoral in the ordinary sense, and in *Tappenden* v. *Randall*,[6] a distinction is made between such cases and immoral contracts, and the judgment appears to have been based on that ground Lord Alvanley, C.J., says: "In the present transaction there was no moral turpitude whatever, and though it has sometimes been held that where there is moral turpitude in the contract the Court will not allow the party who has advanced the money in such a contract to recover it back, yet no argument of that sort can be alleged in the present case."

In the comparatively recent case of *Kearley* v. *Thomson*,[2] in which it was held that money paid under an illegal contract which had been partially carried into effect could not be recovered back, the proposition in question was considered, and Fry, L.J., at p. 746,[7] says: "There is suggested to us a third exception, which is relied on in the present case, and the authority for which is to be found in the judgment of the Court of Appeal in the case of *Taylor* v. *Bowers*.[8] In that case Mellish, L.J., in delivering judgment, says, at p. 300:[9] 'If money is paid for goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.' It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor* v. *Bowers*,[8] which occurred in 1867, and, notwithstanding the very high authority of the learned Judge who expressed the law in the terms which I have read, I cannot help saying for myself, that I think the extent of the application of that

[4] 1810, 3 Taunt. 277; 12 R. R. 651.
[5] 50 L. J. M. C. 145; 7 Q. B. D. 548; 45 L. T. 218; 14 Cox. C. C. 624.
[6] 2 Bos. & P. 467; 5 R. R. 662.
[7] Of 24 Q. B. D.
[8] 46 L. J. Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499.
[9] Of 1 Q. B. D.

principle and even the principle itself may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice."

Judgment. Harvey, J.

In view of this case it appears to me that the value of the earlier cases and *obiter dicta* as authorities, is very much shaken if not altogether destroyed, but, even, assuming the exception to the general rule claimed for by the proposition to exist, in my opinion the present case does not fall within it. It was urged by the plaintiff's counsel that the agreement was merely an agreement to sell a lot with a house on it when the house was completed, and that there could be no execution on defendant's part, either wholly or partly, until the lot was conveyed. But the terms of the agreement will not support this contention. The agreement begins, "I, T. A. Jones, of the town of Edmonton, agree to build and finish a house according to plan, also to sell, etc.," and the receipt as above set out shews that the money was paid on account of the building. There appears no doubt therefore that the contract included the building of the house and, that being so, anything done towards the building would be a part performance. The evidence shews, and the learned trial Judge has apparently found, that preparatory work was done to the value of $25. In my opinion that is a part performance which would take the case out of the exception, if such exception existed, and bring it within the authority of *Kearley* v. *Thomson*,[2] to which the general rule was held to apply, and the appeal should, therefore, be allowed and the action dismissed, but in view of the particular circumstances of the case, the defendant being the instigator of this illegal and immoral arrangement of which he benefits to the extent of several hundred dollars, I think he should have no costs either in this Court or the Court below.

NEWLANDS, J., concurred.

Appeal allowed without costs.

LATIMER v. FONTAINE.

Restraint of trade — Covenant — Validity — Reasonableness — Division of agreement.

A general covenant not to engage in business in a particular locality for a stated time is void as being in restraint of trade.

The defendants, having sold their business to the plaintiff, covenanted that they would not engage in business in the town of Strathcona for a period of five years. The defendants did engage in business in the said place within the said period.

Held, the agreement was void, and that effect could not be given it by rejecting the general restraint, and limiting the agreement for the purpose of the action to carrying on the business carried on by the plaintiff.

[SCOTT, J., *September 14th, 1905.*]

Argument. *N. D. Mills*, for plaintiff.

N. D. Beck, K.C., for defendants.

Judgment. SCOTT, J.—The plaintiff claims an injunction restraining the defendants from carrying on the business of general merchants in the town of Strathcona for five years from 30th January, 1902, and damages for breach of a covenant to the effect that they would not carry on such business.

On the date referred to the parties entered into the following agreement in writing: "The said parties of the first part (the defendants) agree to sell and the said party of the first part agrees to buy the goods of the parties of the first part in their store in Strathcona at or for the price or sum of $733, the receipt of which sum is hereby acknowledged

"And the said parties of the first part hereby assign the said goods to the said party of the second part."

"For a period of five years from the date of this agreement the said parties of the first part agree that they will not engage in business in the town of Strathcona, and in case of a breach of this clause the said Cleophas Fontaine and Telie Fontaine for themselves, their executors and administrators, undertake to pay the said Albert Edward Latimer the sum of $500 by way of agreed and liquidated damages."

"In witness whereof, etc."

Judgment. Scott, J.

One of the defences relied upon by the defendants is that the covenants upon their part contained in this agreement, which is the covenant relied upon by the plaintiff, is void upon the ground of public policy.

That the covenant is one in restraint of trade is beyond question. It was at one time held that all such covenants were void as being contrary to public policy, but the present view appears to be that if they are not wider than is reasonably required for the protection of the covenantees they will not be held void upon that ground. See *Underwood* v. *Banker*,[1] and judgment of Lord Macnaghten in *Nordenfeldt* v. *Nordenfeldt Gun Co.*[2]

The question therefore to be considered is whether the covenant in question is a reasonable one. While I think there cannot be any doubt as to its reasonableness in so far as the extent of the territory to which the restriction is confined is concerned it is in my view unreasonable in restricting the defendant from carrying on any business within these limits. All that was necessary for the protection of the plaintiff and all that he should in reason have required was that the defendants should not carry on business of the description of that purchased by him from them or that of general merchants, or dealers in merchandise.

In *Bakers* v. *Hedgcock*,[3] defendant contracted to serve plaintiff for three years at a stated salary, and also agreed not to leave his service or enter the service or employ of any other person or enter into any engagement or be concerned or interested in carrying on either on his own account or otherwise any business whatsoever within a distance of one mile of a certain place in London or any other place of business of the plaintiff which he then had or thereafter might have during the continuance of the term of service or within two years thereafter without the consent of the plaintiff. It was held that the stipulation was unreasonable in that it prohibited the defendant from carrying on any business whatever within these limits and was, therefore, void. It was also held that the agreement was not divisible and could not

[1] (1899), 1 Ch. 300; 68 L. J. Ch. 201; 80 L. T. 306; 47 W. R. 347.

[2] (1894), A. C. 565; 63 L. J. Ch. 908; 43 W. R. 550; 71 L. T. 489.

[3] (1888), 39 Ch. D. 520; 57 L. J. Ch. 889; 59 L. T. 361; 36 W. R. 840.

Judgment. Scott, J.

be construed as applying only to the business carried on by the plaintiff and that to hold otherwise would be to create or carve out a new covenant for the sake of validating an instrument which would otherwise be void.

I cannot see any material distinction between that case and the present. It is true that the words in the contract in that case were "any business whatever," while those used in the present contract are "any whatever," but in my view the latter expression is as wide as the former.

I give judgment for the defendants with costs.

Judgment for defendants.

THE McCORMICK HARVESTING MACHINE CO. v. HISLOP.

Sale of machinery—Agreement—Incorrect copy given to purchaser—Authority of agent—Adding to written agreement—Evidence—Non-compliance by purchaser with agreement providing for an immediate return on certain contingencies—Effect of—Laches.

The plaintiff sold to defendant a binder under a written agreement, a copy whereof was delivered to the defendant at the time of sale. Both the original agreement and the copy were made out by the plaintiff's agent who effected the sale. The copy contained a clause conferring on the defendant an important right, which was omitted by inadvertence from the original and the plaintiff was unaware of such clause.

Held, that the plaintiff was bound by the clause.

The agreement provided for an *immediate* return of the binder if the same could not be made to work well, and that failure so to do should be considered an acceptance thereof. The defendant being busy with harvesting operations did not return it until the expiration of eight days after the day upon which he was entitled to do so, but did not make any use of it.

Held, that the defendant by his laches had accepted the binder.

The defendant sought to show that the written agreement did not contain the whole of the agreement, but that the agreement was partly verbal and partly written. It appeared, however, on the evidence that the parties intended to embody in the written document their whole agreement.

Held, therefore, that they were bound by what the written agreement contained.

[WETMORE, J., *February 28th, 1903.*]

Statement.

On the 9th April, 1902, the defendant ordered from the plaintiffs by order partly written and partly printed a 7-foot right-hand binder and 4 horse eveners. This order was given at the solicitation of one Rutledge, an agent of the plaintiffs. Two orders were filled out by Rutledge, one of

which was signed by the defendant on the face and the other was not. The order signed by the defendant was retained by Rutledge and was as follows: Statement.

"Give each purchaser a
"duplicate of this order.
"McCormick Harvesting Machine Co., Chicago, Ill.

"Gentlemen,—The undersigned hereby purchases of you to be shipped on or about August 1st, 1902, one of your 7-foot right-hand binders and 4 horse eveners including the usual extras, to be consigned to the care of Connell & Clement, at Arcola. Upon receipt of the machine the undersigned agrees to pay freight on same, and pay to you $140 in cash, or execute and deliver to you approved notes for the sum of $140, as follows:

"$140 payable on the first day of November, 1902.
"Said notes to draw interest at the rate of —— per cent. per annum from date until maturity, and —— per cent. per annum from maturity until paid.

"It is distinctly understood that the above mentioned machine is purchased subject to the following *warranty*, and no other, and the undersigned hereby acknowledges the receipt of a copy of same:

"McCormick Harvesting Machine Co. warrants this machine to do good work, to be well made, of good materials, and to be durable if used with proper care. If upon one day's trial the machine fails to work well, the purchaser shall immediately give written notice to said company in Chicago, Illinois, or to its authorized agent through whom the machine was purchased, stating wherein it fails; allow reasonable time for a man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the machine cannot then be made to work well, the purchaser shall immediately return it to said agent, and the money or notes given for it shall be refunded, which, when done, shall constitute a settlement in full of the transaction. Failure on the part of the purchaser to comply with any of the conditions herein named shall be considered an acceptance of the machine. The provisions of this warranty cannot be changed or waived in any respect; neither can this

order be cancelled without the consent of the McCormick Harvesting Machine Company.

"Dated the 9th day of April, 1902.

"Post Office, Arcola. Signed: William T. Hislop."

"Sold by O. G. Rutledge."

That order contained the following endorsement in Rutledge's handwriting: "If the purchaser's old McCormick binder is sold for $60, O.K., otherwise the McCormick Company will send a man to put old binder in good repair and continue to do so during the life of the machine.

"O. G. RUTLEDGE."

The other order, which was left with the defendant, was substantially the same on its face. The only differences were that "ten" was filled in as the rate of interest the note was to draw from maturity, and it was not signed by the defendant, and it contained the following indorsement, also in Rutledge's handwriting:

"If purchaser's old McCormick binder is sold for $60, O.K., otherwise the McCormick Company agree to send a man to put old binder in good repair and continue to do so during the life of the machine.

"O. G. RUTLEDGE.

"If old binder is not sold it will not be necessary to take delivery of our machine this year."

This last clause was not signed by any person.

Argument. *C. Logan,* for plaintiff.

T. T. Grimmett, for defendant.

Judgment. WETMORE, J. (after referring to the facts).—It does not lie in the mouth of the plaintiffs to set up that the added clause on the copy does not form part of the agreement. It is true that the plaintiffs did not know that their agent had agreed to this clause, because it was not endorsed on the original order signed by the defendant and which was the only document they received. That, however, was the fault of their agent, the defendant was in no way to blame for it, and cannot be prejudiced by the omission of the plaintiffs' agent. It was urged, however, that Rutledge had no power to make such a clause and thereby bind the company. Rutledge was a general agent of the plaintiffs to sell their

machines. He was not a special agent, and therefore as between the plaintiffs and third persons had the authority to make sales subject to such fair, ordinary and reasonable terms and conditions as might be agreed upon in the absence of any notification to such third person to the contrary. I, therefore, hold the clause in question to be a portion of the order or agreement.

Judgment. Wetmore, J.

The defendant sets up that the plaintiffs agreed in writing, and that it was a condition precedent, that they should take the defendant's old binder as part payment of the price of the new one, or that they should sell such old binder, and $60 should be allowed as the price or value of the old binder, and that they have never taken the old binder or sold it. The defendant also denies that he took delivery of the new binder. There can be no question that under the evidence the defendant did take delivery of the new binder, and I so find. With respect to the other matter of defence above mentioned, evidence was put in, on both sides, without any objection, as to what was intended by the agreement, but such evidence amounts to nothing; the parties are bound by what they have agreed to in writing. I can discover nothing ambiguous in the writings when the surrounding circumstances are made apparent.

It was urged further that the evidence established an oral agreement, apart from the writings, that the plaintiffs were to accept the old binder at $60 as part payment upon the new binder. The general rule is that verbal evidence is not admissible to alter or qualify the express terms of a written agreement. Such evidence may be admitted to explain or throw light upon the agreement so as to put the Court in a position properly to construe it. So evidence of a verbal agreement which is collateral to the agreement which was reduced to writing may be received, provided always that it is supported by sufficient consideration. As for instance, in *Lindley* v. *Lacey*,[1] relied on by the defendant in this action, where the plaintiff agreed to sell some furniture and other things to the defendant. In discussing the proposed agreement of sale and before it was drawn up the defendant stated that he would find money to settle the action brought against the plaintiff by one Chase if

[1] 17 C. B. (N.S.) 578; 34 L. J. C. P. 7; 10 Jur. (N.S.) 1103; 11 L. T. 273; 13 W. R. 80.

Judgment.
Wetmore, J.

the plaintiff would persuade the landlord to forbear pressing for certain rent: the plaintiff did this and the agreement to sell the furniture, &c., was drawn up in writing and contained a clause authorising the defendant to settle Chase's action, but it went no further as to that action. But before signing the agreement the plaintiff said: "Am I to understand Chase's bill is to be settled because that is the groundwork of the whole?" The defendant replied that it would be settled and thereupon the plaintiff signed the agreement. The defendant did not settle Chase's action, and the plaintiff brought the action for breach of the defendant's agreement in failing to do so. The Court held that the agreement to settle the Chase action was a distinct preliminary matter to the agreement to sell the furniture, which was to be done *quamprimum*, and that the action was maintainable. *Morgan* v. *Griffith*,[2] and *Erskine* v. *Adeane*,[3] were also relied upon by the defendant. The facts are of a precisely similar character. In *Lindley* v. *Lacey*,[1] which is the leading case, Erle, C.J., is reported as follows:[4] "The question is, does it appear from the written instrument that it was meant to contain the whole that was intended to be binding between the parties. If so, nothing can be added to it. If this does not appear then an agreement upon a distinct matter may be shewn to have been made orally and may be enforced:" and Keating, J., at same page is reported: "The question is whether the facts shew that it was the intention of the parties to make a distinct preliminary agreement." In this case, however, the evidence of the defendant himself establishes beyond all question that the intention was to put in the written agreement all that was intended to be binding between the parties. I hold that there was no agreement valid in law that the plaintiffs should take the defendant's old McCormick binder as part payment of the price of the new binder. The old binder has never been sold, it still remains on the defendant's place and in his possession.

Counsel for the plaintiffs in the course of his address to me admitted that Connell & Clement were the authorized agents of the plaintiffs through whom the machine was purchased, and I find that the new binder having been taken by

[2] 40 L. J. Ex. 46; L. R. 6 Ex. 70; 23 L. T. 783; 19 W. R. 957.
[3] 42 L. J. Ch. 835; L. R. 8 Ch. 756; 29 L. T. 234; 21 W. R. 802.
[4] At p. 9 of 34 L. J. C. P.

Judgment.
Wetmore, J.

the defendant to his farm, was there set up by one Preston, an employee of Connell & Clement, and the defendant commenced to work it on Wednesday, the 20th August, late in the forenoon, and continued working it on the 21st and 22nd August. The binder did not work satisfactorily, it failed to work well, and on the 22nd August the defendant sent a verbal notice to Connell & Clement of that fact. There is no evidence that Connell & Clement were informed by this notice as to the manner in which the machine failed to work satisfactorily. The next day, Saturday, 23rd August, Clement, one of the firm of Connell & Clement, went out to the binder with one of the plaintiffs' experts. They did some trifling thing to it, which I find to have been of no consequence. They did not remedy the defect or make the binder work well. As a matter of fact they practically did nothing towards making it work well; what they did to it was mere pretence, and the defect has not been remedied to this day, and the binder has never been made to work well.

The defendant continued working the binder until Thursday, the 28th August, and then made up his mind that he would have to give up working it on account of it not doing the work properly. He came into Arcola that same evening and the next day took out a Deering binder, with which he completed his harvesting. On this same Thursday evening the defendant saw the plaintiffs' expert and also an employee of Connell & Clement named "Atchison," and informed them that the McCormick binder would not work and that he was going to take out a Deering to complete his harvest work, and the next morning gave a similar notification to Connell, of the firm of Connell & Clement. These last mentioned notifications were verbal. Neither Connell nor Clement nor any person on their behalf or on behalf of the plaintiffs ever went out to the binder or did anything whatever to it after the repairs were put in, on 23rd August. No person on behalf of the plaintiffs coming out within a day or two after the 29th August, when the defendant had notified Connell that the binder had failed to work, the defendant made up his mind, and I think quite correctly, that no person intended coming out on behalf of the plaintiffs to do anything to the machine. It would be therefore about the 31st August or 1st September that the defendant so made up his mind, and I so find. On the 8th

Judgment. Wetmore, J.

September the defendant brought the binder in to Arcola and left it back of the plaintiff's warehouse there. No person was present on behalf of the plaintiffs when this was done. This binder has been there ever since. I find that this machine was returned to the plaintiffs' premises and possession and has been there ever since, but the plaintiffs have never by any act or conduct of theirs accepted it back.

It is contended on behalf of the plaintiffs that the agents and expert having gone out with the view of making the machine work well and not having succeeded in doing so, the defendant should have immediately then returned it to the agents, and not having done so that he must be held under the terms of the agreement as having accepted it. I am of opinion that I must give effect to this contention of the plaintiffs'. The agreement expressly provides that if after notice given as hereinbefore mentioned and after allowing a reasonable time for a man to be sent to put it in good order the machine cannot be made to work well "the purchaser shall *immediately* return it," and that failure to do so shall be considered an acceptance of the machine. I am of opinion that down to and including the 31st August or 1st September the defendant was guilty of no laches under the agreement in not returning the machine, and I so find, and that, notwithstanding that he had made up his mind on the 28th August that he would have to give up working it. But when on the 31st August or 1st September the defendant according to his own sworn testimony made up his mind that they did not intend coming to do anything more to the machine, then he ought to have *immediately* returned the binder to the agents, Connell & Clement. It was not returning it *immediately*, to return it on the 8th of September, some seven or eight days after he had so made up his mind. And the reason he really gives for not doing so, namely, that he was busy with his harvest and anxious to finish it, affords no excuse for neglecting his agreement. He was bound to do what he agreed to do or take the consequences. He could not put off doing so to suit his convenience, because that is all his excuse amounts to. I thought possibly that *Toms* v. *Wilson*,[5] and *Massey* v. *Sladen*,[6] might assist the

[5] 4 B. & S. 442; 32 L. J. Q. B. 382; 10 Jur. (N.S.) 201; 8 L. T. 799; 11 W. R. 952.

[6] 38 L. J. Ex. 34; L. R. 4 Ex. 13.

defendant, but on careful perusal I find that they will not. The first named case merely decides that when under a covenant money is to be paid immediately on demand, the covenantor was entitled to a reasonable time after the demand to get the money and ascertain who was authorized to receive it before he became liable to the consequences provided in the contract for non-payment. And in *Massey* v. *Sladen*[6] it was held that the notice to pay provided for was such a notice in case of the absence of the party required to make the payment as might be reasonably supposed to reach him and give him an opportunity of complying with it. Neither of those cases held that the doing the act might be postponed to suit the convenience of the party required to do it. I must therefore hold that the defendant did not *immediately* return the binder as he was required to by the terms of the agreement, and I must therefore according to the terms of such agreement hold him as having accepted the machine. Judgment. Wetmore, J.

Judgment for plaintiff.

GRIFFIN v. RULLER.

Practice—Allowance for obtaining security for costs—Defence and counterclaim—Claim and counterclaim arising out of same transaction—Counterclaim substantially a defence to the action.

Held, that where a counterclaim arises out of the same matter as the claim, so that, although a defence has been pleaded, the counterclaim is in reality in the nature of a defence to the action, and judgment is given on that basis, the Court will allow to the defendants the costs of and incidental to obtaining an order for security for costs.

[WETMORE, J., *May 23rd, 1906.*]

Review by the plaintiff of the taxation of the defendants costs of suit after trial. The action was on a "lien note" for $600 given for a stallion sold by the plaintiff to the defendants with a warranty. The defendants pleaded such warranty and a breach thereof as a defence to the action and they also counterclaimed for the same cause. At the trial, which was held before WETMORE, J., without a jury, judgment was given for the plaintiff on his claim for $600 and costs and for the defendants on the counterclaim Statement.

for $550 with costs of counterclaim, including witness fees and the costs of examinations for discovery, the respective judgments to be set off one against the other. On the taxation of the defendant's costs the taxing officer allowed the costs of obtaining an order for security for costs prior to delivery of their defence and counterclaim. The plaintiff reviewed.

Argument.

E. A. C. McLorg, for plaintiff.

J. T. Brown, for defendants.

Judgment.

WETMORE, J.—If I had awarded judgment in the defendants' favour on their defence the plaintiff would only be entitled under Rule 616 of *The Judicature Ordinance*,[1] unless I otherwise ordered, to recover costs under Ord. XLVII. of that Ordinance, and the defendants would have been entitled to tax their costs under the higher tariff; one judgment would have been set off against the other and unquestionably the defendants' judgment would have exceeded the plaintiff's because I would not have made any order to deprive the defendants of the benefit of Rule 616, and I would have allowed them the witness fees and the costs of the examinations for discovery as I did on the counterclaim. The conclusion I have reached is that inasmuch as the event has proved that the amount of the plaintiff's claim against the defendants was not sufficient to indemnify them for their costs of defending the action the defendants were entitled to security for their costs and consequently the clerk was under such circumstances justified in allowing them the items complained of. It seems to me that there is somewhat a parity of reasoning in a case of this sort and certain cases where a defendant resident out of the jurisdiction is not compelled to give security for costs where he sets up a counterclaim. In *Neck* v. *Taylor*,[2] Lord Esher, M.R., lays down the following:[3] "The rule laid down by the cases seems to be as follows: where the counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a

[1] C. O. 1898, c. 21.

[2] 62 L. J. Q. B. 514; (1893) 1 Q. B. 560; 4 R. 344; 38 L. T. 399; 41 W. R. 486.

[3] See (1893) 1 Q. B. at p. 562.

plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly in the absence of anything to the contrary. Where, however, the counterclaim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly." I think the same reasoning is applicable to this case. The counterclaim here was in substance put forth as a defence to the claim, and the fact that the matter was also pleaded as a defence to the claim does not seem to me to affect the question. Possibly if the defendants had not pleaded the matter as a defence they might not have been entitled to recover their costs of the application for security, but, having pleaded it, I think they are.

Taxation affirmed.

BROOKS & COMPANY v. WIDERMAN.

Practice—Summary judgment under Rule 103 of the Judicature Ordinance, C. O. 1898 cap. 21—English Rule distinguished—Costs—Enforcement of lien—Agreement of purchase.

Summary judgment for a debt or liquidated demand may be granted even though such demand is joined with a claim of a different nature.

Upon an action brought to enforce a mechanic's lien and also for a personal judgment against the defendant, an application was made for an order striking out the defendant's appearance and statement of defence, and for leave to sign judgment on the alleged ground that the defendant had no defence on the merits, and that he had admitted the claim. Counsel for defendant contended that summary judgment could not be given where dual claims of a different nature were made as in the present action.

Held, that the difference in wording in the Judicature Ordinance Rule 103[1] from Order 3, Rule 6 of the English Act, was made expressly for the purpose of allowing an application to be made even where a claim to recover a debt or liquidated demand is joined with another claim of a different nature.

[STUART, J., *March 8th, 1907.*]

Wilson, for plaintiff.

Millican, for defendant.

[1] C. O. 1898, c. 21.

Judgment.

STUART, J.—On the 8th of December, 1906, the plaintiffs obtained a summons from MR. JUSTICE HARVEY, in which they asked for an order striking out the defendant's appearance and statement of defence and for leave to sign judgment. This application was adjourned from time to time pending negotiations for settlement, and upon the 28th day of February, 1907, the plaintiff took out a new summons upon the same material and upon an additional affidavit explaining the circumstances of the delay, and stating that negotiations had failed. It was alleged that the defendant had no defence on the merits and that he had admitted the claim. The defendant filed no affidavits; and as the action was brought to enforce a mechanics' lien and also for a personal judgment against the defendant, the defendant's counsel contended that summary judgment could not be given under Rule 103. Our Rule, however, is differently worded from the English Rule in this respect, that the English Rule states that such an application can be made where the writ is specially endorsed, and Order 3, Rule 6, allows special endorsement "where the plaintiff seeks only to recover a debt or liquidated demand in money." In our Rule 103 the word "only" is omitted. The word was evidently omitted for the express purpose of allowing such an application to be made even where a claim to recover a debt or liquidated demand is joined with another claim of a different nature. See *Holmested & Langton* p. 253. The order, therefore, may go for personal judgment against the defendant for the amount claimed and costs to be taxed including the costs of this application as well as the prior one which lapsed.

The plaintiff, however, also asked for a judgment to enforce his lien and based his application upon Rule 229, which states that "any party may at any stage of a cause or matter where admissions of fact have been made, either on the pleadings or otherwise, apply to a Judge for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties, and the Judge may, upon such application, make such order or give such judgment as the Judge may think just." The plaintiffs' affidavit contained a clear allegation that the defendant admitted the amount of the claim, and there is no contradiction. It is possible that

the case of *In Re Beeny*,[2] might justify me in directing judgment to be entered for the enforcement of the lien; but unfortunately the statement of claim shews that the only interest that the defendant has in the lands referred to is under an agreement of purchase. It is not stated from whom the defendant agreed to purchase nor what interest the vendor has in the lands; in fact, no particulars of the agreement are given whatever. The abstract of title filed also shews that the patent is not issued from the Crown. In these circumstances I doubt whether, even if fuller information had been given as to the terms of the agreement, any order could have been made. Certainly none can be made on the present application upon the material before me. The action, in so far as it asks for an enforcement of the lien, will have to go on, therefore, in the usual way.

Judgment. Stuart, J.

Order accordingly.

SNOW v. WOLSELEY MILLING CO. LTD.

Sale of goods—Wheat delivered to elevator—Conditions of delivery—Whether sale effected—Destruction of elevator and contents—Liability of defendants for value of wheat.

The plaintiff delivered wheat to the defendants' elevator to be stored, and gave the defendants the right to mix it with the defendants' current stock, and to use it in the ordinary way of their business. The defendants agreed to re-deliver wheat of a like quality and quantity to the plaintiff or to his order on demand, and when the plaintiff chose to sell the defendants were to have the first chance to buy at the price demanded. Subsequently the defendants' plant was destroyed by fire without any fault on the part of defendants.

Held, following *South Australia Insurance Co.* v. *Randall* (L. R. 3 P. C. 101), that the dealing constituted a sale of the wheat to defendants and was at the defendants' risk.

Cargo v. *Joyner* (4 Terr. L. R. 64), distinguished.

[WETMORE, J., *October 2nd, 1901.*]

Statement.

Action for the price of wheat alleged to have been sold by plaintiff to defendant. The facts are set forth in the headnote and the judgment.

Argument.

Levi Thomson, for plaintiff.

E. L. Elwood, for defendants.

[2] (1894), 1 Ch. 499; 63 L. J. Ch. 312; 42 W. R. 377; 70 L. T. 160.

Judgment.

WETMORE, J.—The defendants were millers and elevator men: the plaintiff put wheat into the defendants' elevator to be stored with their current stock, and it was so stored, being mixed with such current stock, the defendants to have the right to use it as they saw fit in the way of their business, that is, to grind, sell, or use it. The plaintiff had the following rights:—

(a) He had the right to sell wheat of the like quantity and quality to other persons, and if he did he had the right to have wheat of such quality and quantity delivered by the defendants to such other persons upon the plaintiff's order or directions or to the plaintiff for such other persons.

(b) To have wheat of like quality and quantity delivered to himself on demand.

(c) To give the defendants the right to pay for such wheat at such price as he might demand. The defendants were not, however, bound to pay such price. But when the plaintiff determined to sell they were to have the first option of paying for it, and if they elected to pay for it they were to charge no elevator fees. If the defendants did not so elect and the plaintiff sold to other persons the defendants were to charge a small amount for elevator fees.

While nothing was specifically said between the parties about always keeping in stock by the defendants sufficient wheat of the same quality and quantity as to be able to comply with any such demand by the plaintiff, I find as a fact that this must follow as a natural consequence of the arrangement and understanding upon which the wheat was put into the elevator. A great deal appears in the testimony about the plaintiff selling the wheat and his right to sell the wheat. This must be taken to mean wheat of the same quantity and quality, it could not mean the same identical wheat that he put into the elevator. It would have been impossible for him to have done so, and therefore it could never have been contemplated by the parties that he had the right to sell the same identical wheat that he put in.

There is no dispute as to the quantity of wheat put by the plaintiff into the elevator. The mill, elevator and contents were destroyed by fire without the fault of the defendants. It was not disputed that if the wheat was, according to the facts and the law, at the risk of the defendants that the price charged for it was too much.

Judgment.
Wetmore, J.

I hold that the wheat was sold by the plaintiff to the defendants and was at the defendants' risk, and that the plaintiff is entitled to recover. I cannot distinguish this case from *The South Australian Ins. Co.* v. *Randall*,[1] and that decision is absolutely binding upon me. *Benedict* v. *Ker*,[2] follows that decision. Three cases were cited at the trial in support of the view that there was no sale, but merely a bailment, viz., *Isaac* v. *Andrews*;[3] *Clark* v. *McClellan*;[4] and *Cargo* v. *Joyner*.[5] There is, however, a clear distinction in each one of them from the two cases I have before mentioned. In *Isaac* v. *Andrews*,[3] the defendant received the wheat and gave a written receipt expressly excepting it from any risk on his part by fire, and moreover it was not put in with the defendant's current stock, but was kept by itself. In *Clark* v. *McClellan*,[4] the defendant gave a receipt stating that the wheat was received at the owner's risk, and it seems to me that the real question in that case was as Lash, J., says in *Martineau* v. *Kitching*,[6] and cited by Galt, C.J., in his judgment in *Clark* v. *McClellan*,[4] "not in whom the property was but at whose risk the goods were."[7] To hold that the defendant was liable for the price of the wheat in *Clark* v. *McClellan*[4] would have entirely disregarded the provisions respecting the property being at the plaintiff's risk. In *Cargo* v. *Joyner et al.*,[5] decided by my brother Richardson, I was furnished with a copy of his judgment, and there does not appear to have been any arrangement desultory or by custom as to mixing the wheat there in question with the defendant's current stock, and the learned Judge found as a matter of fact that it was binned by itself and so kept until the fire. In my opinion to find or hold otherwise than I have done in this case would be simply to give no effect whatever as an authority to *The South Australian Insurance Co.* v. *Randall*.[1]

Judgment for plaintiff.

[1] 6 Moo. P. C. (N. S.) 341; L. R. 3 P. C. 101; 22 L. T. 843.
[2] 29 C. P. 410.
[3] 28 C. P. 40.
[4] 23 O. R. 465.
[5] 4 Terr. L. R. 64.
[6] 41 L. J. Q. B., 277; L. R. 7 Q. B. 436; 26 L. T. 836; 2 O. W. R. 769.
[7] 23 O. R. at p. 471.

STRINGER v. OLIVER.

Agreement for sale of land—Time of the essence—Failure of purchaser to comply—Cancellation by vendor—Waiver of "time clause"—Repayment of prior instalments—Specific performance—Damages.

Where an agreement for the sale of lands provides that time shall be of the essence of the contract, and that on default in payment, the agreement may be cancelled without any right on the part of the purchaser to compensation for moneys already paid thereon.

Held, that in the absence of something in the surrounding circumstances or in the acts of the parties indicating a contrary intention, the Court would enforce the "time clause" strictly, and would refuse specific performance in an action brought by the purchaser.

Where the parties expressly disclose their intention, the burden of proving that time is not of the essence is upon the party seeking to escape from the effect of such a provision.

A waiver of this clause in respect to one instalment does not preclude the defendant from insisting on its strict operation with respect to a later instalment. (Following *Forfar* v. *Sage*, 5 Terr. L. R. 255).

The offer to perform on receipt of an extra amount simply shows that the defendant was insisting upon his rights.

The moneys already paid on the contract must be returned to the purchaser to prevent a forfeiture.

Where the defendant failed to show that he had sustained any damage by reason of the default of the plaintiff, he is not entitled to any set off.

[STUART, J., *July 19th, 1907.*]

Argument.

Millican, for plaintiff.

Jones, for defendant.

Judgment.

STUART, J.—On January 18th, 1906, the plaintiff Stringer, one A. A. Dick and the defendant entered into an agreement in writing and under seal whereby the plaintiff and Dick agreed to buy from the defendant certain lots in the city of Calgary for the sum of $950 payable as follows: $350 in cash on the execution of the agreement and the balance of $600 in two equal instalments of $300 each in three and six months respectively from the date of the agreement. These instalments were to bear interest at 8 per cent. per annum. The agreement further contained the following clause: "And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of

no effect, and the said party of the first part shall be at liberty to resell and convey the said lands to any purchaser thereof, and all moneys paid thereon shall be absolutely forfeited to the said party of the first part."

Judgment
Stuart, J.

At the time of entering into the agreement the defendant himself held the lands on an agreement of purchase from the firm of Bennett & Ross, real estate dealers in Calgary. He had given that firm two promissory notes for $300 each for instalments of the purchase money due to them. These notes bore interest at 8 per cent. and fell due on April 18th and July 18th respectively, these being the dates on which the plaintiff's two instalments fell due to the defendant. There was evidence tending to shew that the plaintiff knew of these obligations of the defendant and that the dates of payment by the plaintiff were so fixed as to enable the defendant to meet them. When the first note to Bennett & Ross fell due on April the 18th the defendant did not meet it, being disappointed in not receiving on that date the instalment due him from the plaintiff. However, as Bennett & Ross did not press him for a few days, he said nothing to the plaintiff, and finally the plaintiff, on receiving a letter directly from Bennett & Ross intimating to him that the defendant's note had not been met and that they expected him (the plaintiff) to meet it, went to the Bank of Nova Scotia, where the note was held, and gave to that bank a cheque in the bank's favour for the amount of the note and interest. This payment was, therefore, the exact amount required to meet the second instalment due to the defendant. The cheque was given on April the 28th, and the bank applied it on the defendant's note to Bennett & Ross. Nothing more occurred between the parties in respect to this instalment. There was, in fact, no evidence of any conversation at all between them in regard to it. On the 3rd of May Dick assigned all his interest in the agreement to the plaintiff, and some time afterwards the plaintiff went east on a trip to Ontario. He made no arrangements and left no instructions with anyone for the payment of the last instalment, which fell due on July the 18th. He did not return to Calgary until about the 28th or 29th of July, that is, ten or eleven days after the final instalment was due. Upon returning, he found among the letters awaiting him the

Judgment
Stuart, J.

following notification from the defendant, which the defendant had, a few days before, sent to him through the post.

"Calgary, Alta., July 26, 1906.

"Mr. Bert A. Stringer, Calgary.

"Dear Sir,

"I hereby notify you that our agreement whereby I sold you and A. A. Dick, who, I believe, has assigned his right to you, the north fifty feet, &c., &c. (describing the property), has been cancelled on account of default in payment, and your former agreements have been forfeited.

"Yours truly,

"L. P. Oliver."

The payment due on July the 18th had not, in fact, been made by the plaintiff nor by anyone on his behalf. After receiving the above notice the plaintiff sought out the defendant, and meeting him on the street asked him what he intended to do about the matter. The defendant replied by asking the plaintiff what he intended to do, and the plaintiff said that he was ready to pay the balance. This the defendant refused to accept, but he intimated that if an additional $100 were paid, the deal could still go through. The plaintiff refused to pay this and offered an additional $25, which the defendant in turn refused, and the interview ended. Afterwards the plaintiff, in company with his advocate, tendered the defendant a marked cheque for $314.50 and a transfer for signature. The defendant refused to accept the money or to sign the transfer and again intimated that if $100 more had been offered, he would have signed. The plaintiff then brought this action for specific performance of the agreement. The defendant, relying on the clause in the contract above quoted, defends the action, and by counterclaim asks for a declaration that the contract is null and void and that the sums paid have been forfeited.

There is practically no dispute as to the facts except with regard to the plaintiff's offer of $25, which the defendant denies. This, however, is not material. The simple question presented for decision is whether the clause quoted is still binding upon the parties or whether its provisions have not been waived by the defendant.

At law, time was of the essence of the contract, even if nothing more was stipulated than a date for completion.

Judgment.
Stuart, J.

Equity relieved against this, and it became a rule that, unless there was something to shew that the parties really intended time to be of the essence of the contract, then completion within a reasonable time was sufficient. This rule is well understood, but the mistake must not be made of applying it to the case where the parties have by their agreement not merely stipulated for a definite time for payment, but have also expressly declared their intention in so many words that time shall be of the essence of the contract. There could, I should think, be no better means of ascertaining the real intention of the parties than by reading what they have said and solemnly agreed to. It is true that in many cases where the agreement has contained this special clause or something similar the Courts have discovered something in the surrounding circumstances or in the acts of the parties to indicate that the parties did not really mean what they had said. But it will be observed that where nothing more than a time for payment is expressed the presumption in equity is that this was not intended to be essential, and the burden of proving the essentiality of time is thrown upon the party seeking to take advantage of it. On the other hand where the parties have expressly declared their intention in so many words the presumption is, I think, that they meant what they said, and the burden of proving that time is not essential is thrown upon the party seeking to escape from the express provision of the contract. Authorities, therefore, which apply clearly to the first case cannot be relied upon to any great extent where the second case which I have stated has to be dealt with. It is for this reason that I doubt whether the authorities cited by Perdue, J., in *Barlow* v. *Williams*,[1] the case chiefly relied upon by the plaintiff, are quite sufficient to uphold the conclusion drawn from them in that case. In any event, there were special circumstances there, such as possession, &c., which do not exist in this case; and, therefore, I do not think that the case cited can be of much assistance to the plaintiff.

There are no circumstances shewn in the beginning—at the time of the formation of the agreement—which point to any different intention than that expressed therein, and

[1] 4 W. L. R. 233; 16 Man. L. R. 164.

Judgment.
Stuart, J.

there are only two subsequent circumstances which can in any way point to a waiver of the provisions of the clause by the defendant. The first circumstance is the payment of the first of the deferred instalments ten days after it was due, its acceptance by the defendant and his failure then to insist upon the forfeiture. Now, there is no doubt that the defendant did, in fact, waive his rights with respect to that instalment; but it seems to me that there were special reasons for his doing so. Bennett & Ross did not press him but were looking directly to the plaintiff. As long as they were satisfied, the defendant had no special reason for complaint. It is clear that the plaintiff knew that there was another note falling due on July the 18th and that the defendant was expecting again to rely upon his prompt payment in order to meet this. I am, moreover, of opinion that the waiver with respect to the one instalment did not constitute a waiver of the right to insist on the operation of the clause with respect to the later instalment. In *Forfar* v. *Sage*,[2] McGuire, C.J., held that the acceptance of one instalment after it fell due did not constitute a waiver with respect to a subsequent instalment. He said in that case "the default in payment of the third instalment was a new breach which gave a new right to Wilkins to treat the agreement as being abandoned by the purchasers."

In *Hunter* v. *Daniel*,[3] Vice-Chancellor Wigram said, "I agree with the defendants that each breach on the part of the plaintiff in the non-payment of money was a new breach of the agreement and that, time being of the essence of the contract, each breach gave the defendants a right to rescind the contract."

It is also clear that a mere extension of time does not constitute a waiver of the conditions of a contract as to the essentiality of time, but merely applies those conditions to the new time fixed: *Barclay* v. *Messenger*.[4] If, therefore, the plaintiff had even actually asked for time to make the payment of April 18th and the time had been by express agreement extended to the 28th, it is plain that this would not have constituted a waiver of the clause entirely, and I do not see any reason why there should be a different result

[2] 5 Terr. L. R. 255.
[3] 4 Hare 420; 14 L. J. Ch. 194; 9 Jur. 520.
[4] 30 L. T. 350; 43 L. J. Ch. 449; 22 W. R. 522.

where there is what may be called an *ex post facto* extension by acceptance of the payment when it is tendered. It may be said that the acceptance of the payment on April 28th may have led the plaintiff to believe that the defendant did not intend to insist on the express terms of the contract; but in view of the special circumstances in regard to the notes falling due to Bennett & Ross, which I have already mentioned, I do not think that the plaintiff was entitled to make any such inference with respect to the succeeding instalment. The contract is very specific. The plaintiff is a real estate agent and, no doubt, has taken dozens of such contracts from purchasers. He must have known clearly what the clause meant, and I cannot find anything in the facts to justify an assumption on his part that the defendant did not mean to insist upon the rights which the clause gave him. Judgment. Stuart, J.

With respect to the offer to convey on receipt of an extra $100, there is no doubt that this offer simply shews more clearly that the defendant was insisting on his rights and did not propose to give them up unless paid for doing so. The defendant acted with fair promptness when the default was made. Only eight days later he mailed the notice declaring the agreement cancelled, and I think he was entitled to take that position. For these reasons I think the contract became null and void according to its terms when the plaintiff defaulted on July the 18th and that the plaintiff is, therefore, not entitled to have the contract specifically performed.

With regard to the moneys which have been paid to the defendant, namely, the sum of $650, counsel for the defendant practically admitted that the defendant would not be entitled to retain these. I think this is the right position to take, but it is by no means so clear as we were disposed to think it was when the matter was discussed at the trial. In *Forfar* v. *Sage*[2] McGuire, C.J., held the contrary, and he relied upon three cases in Ontario. In tracing these cases back, however, to their sources I find that the well-known principle in regard to the deposit which was laid down in *Howe* v. *Smith*,[5] was extended so as to apply to subsequent instalments, although there is a remark of Boyd,

[5] 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 48 J. P. 773; 32 W. R. 802.

Judgment.
Stuart, J.

C., in one of the cases—*Fraser* v. *Ryan*[6]—which would seem to shew that such an extension of the principles of *Howe* v. *Smith*[5] is not proper. I prefer to rely upon the principle laid down in *Cornwall* v. *Henson*,[7] where Webster, M.R., said: "I feel very grave doubt whether the doctrine of *Howe* v. *Smith*[5] would apply to a case in which the purchase-money was to be paid in instalments," and where Collins, L.J., said: "Indeed if the contract had contained an express stipulation that on the non-payment of any instalment the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty and would have relieved him from it as was done in *Re Dagenham* (*Thames*) *Dock Co.*"[8]

In this latter case, 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 any 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 in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole £3,000 with interest or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase-money which they have paid. It appears to me that this is clearly in the nature of a penalty from which the Court will relieve."

No doubt, if the defendant could have shewn any damages resulting from the default of the plaintiff, he would have been entitled to have these deducted from the amount still in his hands; but as it appeared in evidence that the property is now well worth two or three times as much as it was at the time of the default and as the defendant's real reason for defending the action is beyond question because he wishes to make a better sale of the property than that entered into with the plaintiff, it seems to me that the defendant has clearly suffered no damage whatever, but will be in a better position than he would have been if the plaintiff had carried out his bargain. If the default of the plaintiff had been

[6] 24 A. R. at p. 445.
[7] (1900) 2 Ch. 298; 69 L. J. Ch. 581; 49 W. R. 42; 82 L. T. 735; 16 T. L. R. 422.
[8] L. R. 8 Ch. 1022; 43 L. J. Ch. 261; 21 W. R. 898.

of such a nature as to shew that he intended to repudiate the contract, it might have been a question whether he could then have claimed a return of the money paid; but it was quite evident that he always intended, if he could, to carry out the contract, and would have done so if the defendant had not insisted upon the rescission provided for by the contract itself. Judgment. Stuart, J.

The result is that the plaintiff's action will be dismissed with costs, but no order will be made vacating the caveat until the defendant has paid into Court the sum of $650 to the credit of this action, which amount less the taxed cost of the defendant will be paid out to the plaintiff and the amount of the costs repaid to the defendant, or, if the parties wish, the taxation may take place first and the defendant may pay into Court the sum of $650 less the amount certified for costs. Upon this being done, there will be an order vacating the caveat.

Judgment for defendant.

MASSEY v. EWEN.

Review of taxation of costs—Confirmation of sheriff's sale of land.

The only costs taxable on proceedings to confirm a sheriff's sale of land are such as are incidental to proving the regularity of the sale and of obtaining the confirming order.
Such an application is a "special application."

[WETMORE, J., *November 25th, 1902.*]

Review by plaintiffs of the taxation of costs of an application to confirm a sheriff's sale of land under execution. Statement.

E. A. C. McLorg, for plaintiffs. Argument.

E. L. Elwood, for defendant and purchaser.

WETMORE, J.—This is a review from the taxation by the clerk of the costs of confirmation of a sale by the sheriff under execution. The plaintiffs, who review, set up that the clerk erroneously disallowed a number of items. A number of these items disallowed were items incurred prior to the sale proceedings with a view of having the sale proceeded with. Such for instance as letter in reply to instructions to commence proceedings for sale and asking for description of the land. Letter for abstract of title and fees paid therefor and attending sheriff to have *nulla bona* returned to Judgment.

Judgment.
Wetmore, J.

execution against goods. The only costs taxable under the confirmation are the costs of proceedings necessary to satisfy the Judge that the sale proceedings were regular and according to law and incidental to obtaining the order of confirmation. The expenses of the sale and of the proceedings incidental to the sale are not taxable as part of the costs of confirmation. Some of these would probably be taxable as part of the sheriff's incidental expenses, and are allowable by virtue of the indorsement on the writ and the practice. A number of other items disallowed were items that apparently arose in consequence of the defendant being desirous of settling. These were not incidental to the confirmation proceedings at all.

The defendant and purchaser also applied to review the taxation, claiming that the clerk was in error in allowing a counsel fee of $5. This was a special application. It is true, if the sheriff's proceedings were regular the order for confirmation would go as a matter of course; nevertheless the affidavits have to be carefully drawn, and care has to be taken to prove that every step directed by law to be taken was not only taken, but that it was correctly taken. There are no affidavits that I scrutinize more carefully and critically than the affidavits on these applications to confirm sheriff's sales. The fact that Mr. Elwood consented to the order confirming does not alter the special character of the application; he probably would not have consented if the affidavits and proceedings had not been correct. I will not interfere with the clerk's taxation.

Taxation affirmed.

IN RE GORDON.

Confirmation of tax sale—Omission of the word "public" from the name of school district — Affidavit of execution — Jurat — Irregularity—Description of land.

The transfer described the transferor as treasurer of the "Pebble Lake School District," instead of the "Pebble Lake Public School District," and described the land as "s.w. ¼ of sec. 22-25-4 w. 2nd mer." The jurat to the affidavit of execution on the transfer also incompletely described the place where the affidavit was sworn, and the officer was thus described: "W. Hopkins, J.P."

Held (1) The omission of the word "public" was immaterial, there being sufficient on the face of the transfer to reasonably indicate that the transferor was the treasurer of the "Pebble Lake *Public* School District.

(2) That the description of the land was sufficient to identify the land. *Goblet* v. *Beechey*,[1] approved.

(3) That the place of swearing the affidavit could be ascertained by reference to the body of the affidavit and was sufficient.

(4) The words "J.P." when used in connection with an affidavit sworn in the Territories was a sufficient description of a Justice of the Peace in and for the Northwest Territories.

[WETMORE, J., *February 15th, 1901.*

Statement. Application by Thomas Gordon to confirm the sale to him of certain land sold by the Pebble Lake Public School District for taxes.

Argument. *E. A. C. McLorg,* for applicant.

E. L. Elwood, for registered owners, *contra.*

Judgment. WETMORE, J.:—This is an application to confirm a tax sale under "The School Ordinance."[2]

It is objected that the transfer is bad because the school district was established by proclamation of the Lieutenant-Governor under the corporate name of "The Pebble Lake Public School District No. 316 of the the North-West Territories," and the treasurer, Sam Goodacre, who made the transfer, describes himself therein as treasurer of "Pebble Lake School District No. 316 of the North-West Territories." and the affidavit of execution describes him in the same way. The objection is that the word "Public" is left out. It certainly seems to be the intention of the Ordinance that the name of every district as prescribed by section 11 thereof shall be a corporate name. The trustees are constituted a corporation by section 69. It is neither the district, assuming it to be a corporation, nor the trustees who are authorized to sell land for taxes or transfer the same, it is the treasurer of the district. The whole question therefore is whether sufficient appears on the face of the transfer to reasonably indicate that Mr. Goodacre is the treasurer of the Pebble Lake Public School District No. 316 of the North-West Territories. I think there is. It seems to me that in ordinary language Mr. Goodacre would be spoken of in the manner he is described in the transfer and

[1] (1829) 3 Sim. 24; 9 L. J. (O.S.) Ch. 200.
[2] C. O. 1898, c. 75.

Judgment.
Wetmore, J.

affidavit. Following the form of transfer prescribed by the Ordinance the treasurer has set the seal of the trustees to the transfer. After describing himself in the transfer as stated he asserts that he makes it by virtue of the authority to sell lands vested in him by warrant under the hand of "the chairman of the board of trustees of the said school district and the seal of the said board, &c," and he concludes "in witness whereof I have hereunto set my hand and the seal of the said board of trustees," and the transfer is stamped with a seal having around the circular rim "The Pebble Lake Public School District, N.-W. T.," and in the centre "No 316." I do not think that any person can have the slightest doubt on the subject.

The affidavit of execution purports to be made by "Edward Hopkins, of Yorkton in the North-West Territories, Postmaster," and the jurat is as follows: "Sworn before me at Yorkton this 14th day of December, 1899, W. P. Hopkins, J. P." It was objected that it must not be assumed that Mr. Hopkins before whom the affidavit was sworn was a justice of the peace of the North-West Territories. In *Johnson* v. *Francis and Fitzgerald, claimant*,[3] I held a jurat so signed sufficient; the affidavit purporting to have been sworn in the North-West Territories. It is urged however that according to the jurat of the affidavit now in question it does not purport to have been sworn in the Territories, because there may be two or more places called Yorkton and one of them without the Territories. The place of swearing may be stated in the jurat by reference to a place mentioned in the body of the affidavit: 1 *Archbold Q. B. Practice*.[4] If the jurat had stated "at Yorkton aforesaid" there would have been no possible ground for attacking it. Apparently in *Meek* v. *Ward*[5] an affidavit sworn abroad was ordered to be filed although the place at which it was sworn was omitted in the jurat. Possibly that case may have turned on the fact that the affidavit was sworn abroad, if so it is not applicable because a justice of the peace could not have taken this affidavit without the Territories; but *Meek* v. *Ward*[5] is cited in *Annual Practice, 1897*,

[3] Decided Nov. 28, 1891; no written judgment was delivered.—T. D. B.

[4] 14th edition at p. 463.

[5] 10 Hare, 1; 1 W. R. 275.

Judgment.
Wetmore, J.

for the proposition that trifling irregularities in an affidavit will be overlooked. Seeing that the deponent is described as of Yorkton in the North-West Territories I think that it requires a greater stretch of the imagination to reach the conclusion that the Yorkton mentioned in the jurat was some other place than it does to reach the conclusion that it was the same place. I think that it may be reasonably and fairly inferred that the Yorkton intended was the place mentioned in the body of the affidavit.

The next and only other objection is that the land intended to be transferred is not sufficiently described in the transfer. The description is "All that piece of land being the s.-w. ¼ of sec. 22, 25, 4, w. 2nd Mer." It is urged that this is a mere jargon of letters and figures which means nothing and conveys to the mind nothing of what was intended of which I can take judicial notice, and also that it is incapable of being explained by extrinsic testimony. I cannot see why a transfer of land even if under seal should not be subject to the same rules of construction as an ordinary contract. "The terms of a contract are to be understood in their plain, ordinary and popular sense unless they have generally, in respect to the subject-matter as by the known usage of trade and the like, acquired a peculiar sense distinct from the popular sense of the same words": *Addison on Contracts*,[6] and Bowen, L.J., in *Hart* v. *Standard Marine Ins. Co.*[7] I find the following in the text of Addison at the same page: "If the parties have used technical terms, unintelligible to the ordinary reader, but having a distinct meaning amongst mechanics or merchants, extrinsic evidence may be given of such meaning in aid of the interpretation of the deed." For this he cites *Goblet* v. *Beechey*.[1] I have not these reports and I cannot find that case in any work at present available to me, but I am satisfied that it is good law. In the same way, if persons whose business it is to deal with transfers of lands and the titles thereto or matters relating thereto use technical terms unintelligible to the ordinary reader, but having a distinct meaning to such persons, extrinsic evidence may be given if necessary in aid of the interpretation of the deed. But

[6] 9th edition at p. 43.
[7] 22 Q. B. D. 499; 58 L. J. Q. B. 284; 60 L. T. 649; 37 W. R. 366; 6 Asp. M. L. c. 368.

Judgment.
Wetmore, J.

surely extrinsic evidence would not be necessary to satisfy the mind of a person in the habit of using these words or of having them used to or before him as to what their meaning is. Now in writing in English language very many symbols, if I may so call them, are used to convey a certain well understood meaning to almost every intelligent reader of the English language. Thus a land surveyor wishing to state that he had run a surveyor's line a certain course and distance might express it in writing thus "N. 34°, E. 40 chs." Now any ordinary intelligent man would understand from that that he had run a line forty chains in length on a course 34 degrees east of north. And I have no doubt that if a document expressed in that way came before a Court or Judge to construe, there would be no hesitation in doing so without the aid of extrinsic testimony, because this mode of expression has gone into common use and has become one of the well understood methods of expressing the fact or idea in writing. In the same way, if one found in a contract a bargain for 500 cwt. of sugar, without the aid of extrinsic evidence we would know that that meant five hundred hundred weights of sugar; or that 500 hhds. of molasses meant five hundred hogsheads of molasses, or that 500 lbs. of tea meant five hundred pounds of tea. These are all symbols, phonetically they express nothing, but they have gone into common use and we all know what meaning they intended to convey. Now in the West we all know the system upon which lands are laid out, and it has become a common and ordinary user for persons interested in lands to describe them just as they are described in this transfer, and every person used to dealing with lands or the titles thereto knows right well what is intended to be conveyed to the mind. An advocate wishing to ascertain by correspondence in whom the title to a certain quarter section of land is vested would in nine cases out of ten write to the registrar to let him know who was the registered owner of the N.E. ¼, 5-14-3 W. 2nd, and the registrar would know at once that the advocate wished to know who was the registered owner of the north-east quarter of section five, township fourteen, range three, west of the second principal meridian; and if John Jones was the owner of such quarter section he would write back "John Jones is the owner of the N.E. ¼, 5-14-3, W. 2nd," and

the advocate would know just exactly what was meant. This cannot be better illustrated than it is by what has actually taken place in this application. The applicant's advocate, very correctly knowing that it was necessary to satisfy me as to who is the registered owner of the land transferred to his client, has applied to the registrar for the usual proof of that fact, namely, an abstract of title to the lands, and has produced it. Now that is headed "Registration Abstract and Certificate of the title of the S. W. ¼ of 22-25-4, W. 2nd meridian, in the North-West Territories." That is the only description of the land given in that abstract and I am asked to read it (as I have done I might say scores of other abstracts of title exactly similar), as an abstract of the title to the south-west quarter of section twenty-two, township twenty-five, range four west of the second principal meridian. I cannot call to mind one instance where the land was ever described in the abstract of title in any other manner, and I never knew of an instance where it was not perfectly well understood both by the advocates on both sides and by myself, and this has been going on for years. I think it would be supremely absurd for me to state that I and everybody interested know what these symbols mean in an abstract of title, but that I nor nobody else can know what they mean when we find them in a transfer. I hold the description sufficient, and confirm the sale. Judgment. Wetmore, J.

Sale confirmed.

COLWILL v. WADDELL.

Lien note—Seizure before maturity—Necessity for declaring note due.

When a "lien note" contains a provision empowering the payee to declare it due and take possession of the property covered by the note before maturity, it is unlawful to take possession before maturity without first declaring the note due and serving notice thereof on the party liable.

[WETMORE, J., *Feb. 26th, 1902.*]

Plaintiff had given defendant a note dated 15th June, 1901, payable on the 1st November, and containing the following clause: "Given for one black horse, a little white on hind foot, five years old, and white star on forehead, one Statement.

Statement. set single driving harness and cart. . . . The title, ownership and right to the possession of the property for which this note is given shall remain in Henry Waddell until this note or any renewal thereof is fully paid, and if default in payment is made or should I (Colwill) sell or dispose of my landed property or if for any other reason Henry Waddell should consider this note insecure he has full power to declare the same due and payable even before maturity of the same and take possession of and hold until this note is paid or sell the said property by public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase-price." On the 17th July, 1901, the defendant claiming that he had reason to consider the note insecure seized the horse, harness and cart mentioned therein and sold it. The plaintiff claimed that this seizure and sale were unlawful and brought this action to recover damages therefor.

Argument. *E. L. Elwood,* for plaintiff.

Levi Thomson, for defendant.

Judgment. WETMORE, J.—The plaintiff claimed at the trial that it was a condition precedent to the right of seizure that the defendant should declare the note due and payable and give notice thereof to the plaintiff. It was claimed for the defendant that the seizure was sufficient notice that the defendant declared the note due and payable. I am of opinion that the plaintiff's contention is correct. If the note had matured it would not, I think, have been necessary to declare it due and payable, because that fact would in that case have been apparent according to the tenor of the instrument. But at the time of the seizure it had not matured and I hold that according to its terms before any seizure could be made the holder should declare it to be due and payable. It was evident that the note contemplated that the plaintiff should remain in possession of the property until default was made in payment, and it cannot be held that such default was made if the note had not matured, and the defendant did not make demand for payment. How was the plaintiff to know that the defendant had, even for a sufficient reason, come to the conclusion that the note was insecure when he had

no notice of that fact. I am of opinion that it was but reasonable and the intention of the writing that before seizure the holder of the note should declare the note due and payable and notify the maker so as to give him an opportunity to protect his property by payment or in some other satisfactory manner, and that the defendant had no right to seize until after such opportunity was afforded. It seems to me that the defendant's action in this case was somewhat similar to issuing execution before judgment is obtained. The plaintiff therefore is entitled to judgment. Judgment.

Judgment for plaintiff.

GEDGE v. LINDSAY.

Prairie Fires Ordinance—Objects of—"Run at large"—Meaning of—Appeal from summary conviction—Costs.

The object of passing prairie fire legislation was not to protect an individual person against his own carelessness, but to protect the general public against such carelessness.

A person who allows a fire to run on his own property under such circumstances that there is no reasonable probability of its ever escaping; and it does not as a matter of fact escape from his property, does not allow fire to "run at large" within the meaning of section 2, s.-s. (c) of The Prairie Fires Ordinance.[1]

[WETMORE, J., *August 13th, 1903.*]

Statement.

The plaintiff was convicted by J. D. Moodie, a Justice of the Peace, upon the information of the defendant for allowing a fire under his control to run at large on the 7th May, 1903, contrary to the provisions of *The Prairie Fires Ordinance*.[1] The plaintiff appealed, and the appeal was heard by WETMORE, J. The facts are stated in the judgment.

Argument.

E. A. C. McLorg, for the plaintiff.

E. L. Elwood, for the defendant.

Judgment.

WETMORE, J.—The facts as I find them are as follows: The plaintiff was at the time of the fire hereinafter mentioned the owner of the west half of 10-14-32-West 1st.

[1] C. O. 1898, c. 87.

Judgment. Wetmore, J.

He had purchased the N.-W. ¼ from the defendant subject to the defendant's right to take off the hay, the stable with a shed adjoining belonging to defendant, and certain implements and feed within one year from 24th January last and also subject to a privilege on the part of the defendant of using the pasture of the N. W. ¼ for one year from that date. I find that under the agreement this privilege of using the pasture was not an exclusive privilege. About the 23rd April a prairie fire swept down from the west, burned a considerable portion of the prairie and burned into an old manure pile owned by the plaintiff on the S. W. quarter-section. The plaintiff was in no way responsible for this fire. The effect of this fire and of the farming operations about was to leave the pasture field (in which was situate the hay, stable, etc., belonging to defendant) except between it and the manure pile entirely surrounded by burnt prairie or ploughed land upon which there was no inflammable matter whatever. On the 7th May fire broke out in this manure pile and from there ran into the pasture field and spread over it and burned the respondent's stable, and hay stack situated thereon and also the oat straw stack referred to. I have no doubt and in fact it was conceded that fire had been smouldering in the old manure pile since the fire of 23rd April and that the wind on the 7th May had caused it to break out and spread as stated. This is the fire with respect to which the plaintiff was convicted.

I will in the first place consider the object of *Prairie Fire Ordinances* in general and the purposes for which they are enacted. It is well known that prairie fires are most destructive and if they get headway do widespread and most serious damage, and the object of the Ordinance is to prevent these fires or to have them controlled so that these general and widespread consequences will not follow, and to punish persons who disregard the safeguards and regulations provided by the Ordinance. The object of the Ordinance is not to protect persons against their own carelessness but to protect the general public from such carelessness. I will now examine the provisions of "*The Prairie Fires Ordinance.*"[1] If a person kindles a fire on his own land and lets it run at large on his own land it is clear that he could not be convicted of an offence under clause (a) of section

Judgment.
Wetmore, J

2.[2] It is equally clear that whether a person kindles a fire on his own land or it is under his control there if it does not pass from his own land he cannot be convicted of an offence under clause (b). Of course I must not be understood as holding that the person might not be open in this case to conviction under section 3 of the Ordinance if the fire was kindled for camping or branding purposes or under section 4 if the fire was kindled for the purpose of guarding property, burning stubble or brush or clearing land, and the precautions provided in those sections in such cases were not taken. Leaving these two sections out of the question I am now discussing and dealing with fires of a character or relation not embraced by either of them, I repeat that a conviction could not be sustained in either of the cases I have referred to under clauses (a) or (b) of section 2. That being so and read in the light of such clauses, what is meant by the words "to run at large" in clause (c) of the section? Now I do not wish to be considered in this case as laying down any hard and fast general rule. It is not necessary for the purposes of this case to do so. I can quite conceive that a person may kindle a fire on his own land and therefore be said to have it under his charge or control or he may in any other way have a fire under his charge or control on his own land and be held to have allowed it to run at large under clause (c) when it has not run off his own land; as, for instance, when such fire is so situated that if it get headway there might be great difficulty in preventing its running off his land and sweeping the country. It is possible that under the Ordinance a person may not be allowed to take such risks with impunity. I express no opinion on that question however. I merely hold that when, as in this case, the fire is so situated that there is no reasonable probability of its, under any circumstances, running off the land of the person who has the charge, custody or control of the fire, and it as a matter of fact does not run off from his land by reason of the

[2] Section 2 of the Ordinance provided as follows:
"2. Any person who shall either directly or indirectly, personally, or through any servant, employee, or agent—
(a) Kindle a fire and let it run at large on any land not his own property;
(b) Permit any fire to pass from his own land; or
(c) Allow any fire under his charge, custody or control, or under the charge, custody or control of any servant, employee, or agent to run at large,
shall be guilty of an offence, etc."

Judgment Wetmore, J.

fact that it was so surrounded that it could not do so, it does not "run at large" within the meaning of clause (c). I cannot construe this clause otherwise in view of the fact that under clauses (a) and (b) of the section a person is not liable unless the fire gets upon some property other than his own. In that case the fire under the plaintiff's control was the fire smouldering in the manure pile. That manure pile was on plaintiff's property. If the fire broke out as it did it could spread nowhere except from there to the boundary line between the two quarter sections and from there over to the pasture field, all the appellant's property; it could not possibly get anywhere else, and it did not get anywhere else. Suppose, this fire of the 23rd April having stopped at this manure pile, there had been no ploughed land north of the pasture field and the appellant had noticed the fire smouldering in the manure pile and with a view to preventing it running off his land if it started, and so running at large had ploughed a suitable fire guard at the north of such field across from the ploughing on the west side to the ploughing on the east, it seems to me that in such case he would have taken proper precautions to prevent the fire running at large and would have not been liable to a conviction. So if upon looking the ground over he found the surrounding state of affairs even better so far as a running of a fire was concerned, than I have supposed he cannot be liable to conviction. It is quite immaterial whether he looked about to ascertain the condition of the surroundings. The fact is that they were there and prevented the fire running at large, according to my construction of the clause, and therefore the appellant could not under such construction have allowed it to run at large. The fact that the respondent had some property within that old pasture field which was liable to be destroyed and was destroyed by the fire does not affect the question. The appellant was liable with respect to that property if liable at all as bailee or in a character somewhat similar and will be liable at common law in the absence of such diligence, if any, as he ought to have exercised with respect to it. It is not a case to which the Ordinance applies at all. The conviction must, therefore, be quashed.

Appeal allowed with costs.

LARRY, ADMINISTRATRIX, v. BAKER ET AL.

Dominion Lands Act—Executors and administrators—Lease of land prior to issue of letters of administration and prior to issue of recommend for patent—Validity—Executor de son tort—Letters relating back—Section 89, s.-s. 4 of Land Titles Act, 1894.

An administrator of a deceased's estate cannot be compelled to perform, nor is he liable on, an agreement entered into by him prior to the grant of letters of administration, and s. 89, s.-s. 4 of the Land Titles Act, 1894, is merely declaratory of the common law and causes the title of an administrator to relate back to the date of deceased's death for administration purposes solely, and in the interests of the estate.

A lease of homestead land prior to the issue of recommend for patent is void, under 60-61 Vic. c. 29, s. 5. *Flannagan* v. *Healey*,[1] approved.

[WETMORE, J., *December 16th, 1902.*

Statement.

John Wallace Larry died about 10th December, 1894, leaving his widow, the plaintiff, and some children him surviving. Prior to his death he had made a homestead entry under *The Dominion Lands Act*[2] to the south-east quarter of section 36, township 14, range 3, west of the 2nd principal meridian, and on the date of his death was entitled to the possession of such quarter section to the exclusion of any other person or persons, but at that time the homestead duties had not been all completed, and no recommendation for patent had been granted. On the 11th July, 1898, and before the issue of letters of administration, the plaintiff by indenture of that date leased to one Olaf Johanson and the defendant Peter Anderson, the said land for the term of three years from the first day of November then next (1898). The defendant, Anderson, in the fall of 1898, entered into the possession, and (except as hereinafter stated), by himself or others under him, had been in possession ever since, and had cultivated a portion of it every year. The indenture contained a clause giving the lessees the option of purchasing the land for $200. The plaintiff, at the time that she executed the lease, erroneously thought that she was the owner of the land, although she had no color of right for so thinking. The defendant Anderson, before the expiration of the term demised

[1] 4 Terr. L. R. 391.
[2] R. S. Can. 1886, c. 54.

Statement. by the lease, claimed that he had the right, under the lease, to exercise his option to purchase. And in July and October, 1901, and in January, 1902, applied to the plaintiff to transfer such quarter section to him. The plaintiff refused to sell him the land, claiming that she had not the patent for it, that she had no right to sell it, and that it belonged to the children and not to her. The defendant Anderson had always been ready and willing to pay the purchase money provided in the option clause in the lease for such quarter section, but he never tendered the plaintiff the $200, the price thereof. The other lessee, Johanson, seems to never have gone into possession of or asserted any right to the land. Sometime in the spring of 1902, the defendant Anderson put the defendant Robert William Baker in possession of this quarter section to crop it on shares, but sometime in April, and before Baker put any crop in, both he and Anderson were notified in writing by the plaintiff's solicitor, that Anderson had no right whatever to the land, and, that unless they delivered up possession thereof to the plaintiff on or before the 21st April, an action for ejectment would be brought against them, and for damages for being wrongfully in possession. After this notice was given to Baker he gave up possession of the land to the plaintiff, and his goods were put out of the house on the place and the house locked. But afterwards Baker, at the instance of Anderson, re-entered upon the land, took possession of it and put the crop in. On the 27th March, 1902, a certificate of recommendation for a patent for the said quarter section was issued in favor of the legal representatives of the late John W. Larry and subsequently the patent issued thereon. On the 14th day of May, letters of administration of the estate and effects of the said John Wallace Larry were issued to the plaintiff. On the 23rd May, this action was commenced by the plaintiff, as administratrix, to recover possession of the said quarter section, for damages, and for an injunction restraining the defendants from removing any of the crop.

Argument. *E. L. Elwood*, for the plaintiff.

B. P. Richardson, for the defendants.

Judgment. WETMORE, J. (after stating the facts).—The plaintiff contends that the lease in question and the option clause for purchase in it are void, or at least voidable as against her as ad-

Judgment.
Wetmore, J.

ministratrix, because, at the time she executed that indenture, she was not clothed with any authority to deal with the land.

She also claims that such option clause is void under section 42 of *The Dominion Lands Act*,[2] as enacted by 60 & 61 Vic. (1897), ch. 29, sec. 5.

The defendant Anderson claims that he has the right to exercise the right of option; that the letters of administration have relation back to the date of the death of the intestate Larry so as to render the lease and option binding on the plaintiff as administrator, and that the plaintiff having procured the recommendation for the patent and the patent, the Court will order specific performance of the option clause by the plaintiff, and failing ordering specific performance as to the whole title in the land, it will order specific performance as to the plaintiff's interest in it in distribution as the widow of the deceased Larry. He also claims that section 42 of *The Dominion Lands Act*,[2] as enacted by the Act of 1897, only renders the option agreement void as between the Government and the homesteader and those representing him, and that having obtained the patent she will be obliged, on equitable principles, to carry out that agreement as between the parties thereto.

As to the letters of administration relating back so as to make the option clause in question binding on the administratrix. This question is by no means free from difficulty. In *Doe d. Hornby, Ad., etc.* v. *Glen*,[3] the defendant had granted a lease of the premises in question to the deceased intestate for a term which had not expired. The lessor of the plaintiff, before he was appointed administrator, made an arrangement with the defendant for a consideration to give him possession of the place, and in pursuance of such arrangement, the lease was given up and the widow of the deceased, who was in possession, went out, and the defendant took possession. Afterwards administration was granted to the lessor of the plaintiff, who brought ejectment against the defendant. The Court gave judgment for the lessor of the plaintiff, holding that all the acts done by him before he became administrator went for nothing. There are, however, undoubtedly cases cited in the text books in which it was distinctly held that the letters of administration had relation back to the

[3] 3 N. & M. 837; 1 A. & E. 49; 3 L. J. K. B. 161.

Judgment. Wetmore, J.

death of the intestate. But in all these cases, so far as I have been able to discover, that had been so held at the instance of the administrator to enable him to protect the property of the estate or to obtain the benefit of a contract which was made in the interests of the estate or to get in moneys for the estate. I cannot find an English or Canadian case where that has been laid down to compel an administrator to perform an agreement or to make him liable upon an agreement made by him before he was appointed administrator. I dare say that it is quite likely that United States cases to that effect may be found. It certainly does seem anomalous that a contract made by a person before he is appointed administrator may be unilateral, that is, it may be enforced by one party to it for the benefit of the estate after he takes out administration, but that it cannot be enforced by the other party to it as against the estate; at any rate, unless it is shewn that the contract was made for the benefit of the estate. But such appears to be the effect of the English authorities, and I am bound by them. The question was discussed in *Christie* v. *Clarke*,[4] and I find the following in the judgment of the Court at page 553: "This act of relationship to the time of the death of the intestate is only in those cases where the act done is for the *benefit* of the estate: *Morgan* v. *Thomas*,[5] and no case, we think, conflicts with these decisions." This, in my opinion, correctly states the law, and I adopt it. The judgment in that case as to the grant of letters relating back was considered by the Court of Appeal in *Christie* v. *Clarke*,[4] and was there held to be correct in that respect. The evidence in this case does not establish that the "act done," that is, the option clause in question, was for the benefit of the estate. The plaintiff did not execute the lease in question for the benefit of the estate. And there is no evidence to establish that the option clause in question was as a matter of fact for the benefit of the estate. The onus of establishing that was on the defendants. If they wished to have the benefit of the clause it was upon them to establish Anderson's right to it as against the estate. I may say that I have very great doubts whether, under any circumstances, it would lie in Anderson's mouth to set up that the clause was for the benefit of the estate. In *Morgan* v. *Thomas*,[5] the question of

[4] 16 U. C. C. P. 544.
[5] 8 Ex. 302; 22 L. J. Ex. 152; 17 Jur. 283.

Judgment. Wetmore, J.

the letters relating back was very thoroughly discussed, and the cases in which it had been held that they related back, considered. And it seems to me that it was held that when the letters did relate back it was done merely for the purpose of protecting the property of the estate from being carried away or injured by third persons or lost, wasted, or depreciated by anything done between the death of the intestate and the granting of the letters, and I am, therefore, doubtful whether any other person than the administratrix or possibly some person interested in the estate, such as a creditor or next of kin, would have the right to set up that the letters related back. It is not necessary, however, to express a decided opinion on that point. The result of my conclusion is that Anderson is not entitled to specific performance of the option clause by the plaintiff as administratrix. Neither is he entitled to a transfer by the plaintiff of her interest in the land by way of distribution as the widow of the deceased Larry. There is no evidence that this estate has been wound up; the plaintiff, therefore, at present, holds the land for the purposes of the estate, to pay expenses of administration, debts of the deceased, and other liabilities of the estate, and for all I know, it may be necessary for her to sell this land for that purpose. This question is precluded by the decision in *In re Galloway*.[6]

So far as the land was concerned, no question was raised as to the validity of Mr. Elwood's letters delivered to Anderson and Robert William Baker as a demand of possession thereof. In fact no question as to demand of possession of the land was raised at the trial at all. If demand of possession was necessary, I am of opinion that such letters were a sufficient demand. Possibly, in so far as the plaintiff as administratrix was concerned, no demand of possession was necessary anyway, and the question was not raised *quoad* the land. It follows, therefore, that the plaintiff is entitled to the land in question, and the possession thereof. Having reached this conclusion, it is not necessary for me to decide any of the other questions raised. I will merely state that I continue of the same opinion as expressed by me in *Flannagan* v. *Healey*,[1] as to the effect of 60 & 61 Vic. ch. 29, sec. 5. It has just occurred to me, however, that

[6] 3 Terr. L. R. 88.

Judgment. Wetmore, J.

possibly this case may differ from that case, as the patent for the land in question has actually issued to the plaintiff (of course as administratrix, as I have already found). In *Flannagan* v. *Healey*,[1] neither the patent or the recommendation for it had issued. I express no opinion however. The plaintiff is also entitled to the crop grown on the place last season, and which is held there by virtue of injunction order. It was urged that the defendants Anderson and Robert William Baker were entitled to the crop as emblements because no notice to quit, from the plaintiff as administratrix, was ever served on them until May 17th, 1902, after the crop was put in, and that this was admitted by the pleadings. That is not correct. The 13th paragraph of the statement of defence does allege that notice to quit was served on the defendant Anderson on 17th May, 1902, it does not state in terms that such notice was given by the plaintiff in her capacity as administratrix, but possibly it may be fairly open to that construction. That allegation is denied by the plaintiff's reply, because she in the first paragraph thereto, joins issue on the whole statement of defence of these defendants. As a matter of fact, there is no evidence that any notice to quit was served, either on the 17th May or at any other time since the issue of the letters of administration to the plaintiff. The only documents served which might by any possibility be considered notices to quit were Mr. Elwood's letters before referred to, and they were delivered in April, and before the letters of administration had issued. Possibly, under the authorities, the letters of administration may have relation back to make those letters of Mr. Elwood as the plaintiff's solicitor to enure for the benefit of the estate as a demand of possession. Because if any notice was necessary, a demand of possession under the circumstances of this case would be sufficient; what is technically known as a notice to quit was not necessary. It is not necessary for me to decide this, because, in my opinion, *quoad* the estate, the defendants were wrong-doers, their possession was wrongful, and they could not have any right to emblements as against such estate. The relation of landlord and tenant did not exist between them and the estate at all.

Since preparing this judgment and looking into another matter, I came across sub-section 4 of section 89 of *The Land Titles Act*, 1894. That sub-section was not brought under my

notice at the argument of this case. It provides that "The title of the executor or administrator to the land shall relate back and take effect as from the date of the death of the deceased owner." I am of opinion that this is merely declaratory of the common law and causes the title of an administrator to relate back merely for the purpose of protecting the estate in the manner and to the extent before pointed out in this judgment. Judgment. Wetmore, J.

The damages in respect to the detention of the land and crop will be nominal. No evidence was given as to the amount of such damages. The defendant James Albert Baker appeared to this action and entered a defence; his defence was struck out with costs with leave to amend. He does not appear to have delivered an amended defence. No application was made to me for judgment against him or any steps taken in that direction that I know of.

There will be judgment for the plaintiff against the defendants Robert William Baker and P. Anderson for the recovery of the land in question and of the crop grown on such land last summer and embraced by the injunction order, also for $5 damages and the costs of this action.

Judgment for plaintiff.

IN RE HARDAKER.

Confirmation of sale of land for taxes—Right to redeem—Tender—Right of homesteader to encumber homestead prior to issue of grant—Statute of Limitations—Construction of statutes.

The applicant H. was a purchaser at a sale for taxes of land against which was registered a lien executed by one G., a homesteader, prior to the issue of the grant. H. having refused to inform the lienholder of the amount necessary to redeem, the lien-holder made a tender to H. which turned out to be insufficient. On application by H. to confirm the sale,

Held, that as the insufficiency of the tender was due to the fault of H. in refusing to give information that he ought to have given, the lien-holder would be admitted to redeem upon paying as directed by the Judge the amount actually payable.

Held, also, that the lien being merely a charge on the land and not an "assignment or transfer," within the meaning of s. 42 of the Dominion Lands Act, was a valid encumbrance. *In re Harper*,[1] approved.

[COURT EN BANC, *1st and 2nd June and 9th July, 1903.*]

[1] III. Terr. L. R. 257.

Statement. This was an application to confirm the sale of certain land sold for taxes. The summons for that purpose was heard in Chambers at Moosomin before WETMORE, J., on March 13th, 1903, when the motion was opposed by the Waterloo Manufacturing Company, lien-holders, who claimed to be entitled to redeem. Their claim was contested by the applicant Hardaker on grounds set forth in the judgment now reported. WETMORE, J., ordered Hardaker's costs down to the 13th March to be taxed, and referred the further consideration of the matter to the Court *en banc*. The matter was argued before SIFTON, C.J., WETMORE, SCOTT, and PRENDERGAST, JJ.

Argument. *E. L. Elwood*, for Hardaker.

E. A. C. McLorg, for Waterloo Mfg. Co.

The judgment of the Court was delivered by .

[*9th July, 1903.*]

Judgment. WETMORE, J.—The applicant Hardaker at present disputes the right of the Waterloo Mfg. Co. to redeem the property sold, on three grounds. One of these grounds is that the company has no interest in the lands and, therefore, has no status under section 2 of Ordinance, c. 12 of 1901, to redeem, or in other words, that that Ordinance does not apply to this case.

The sale under which the applicant claims took place on the 22nd of July, 1901, and the transfer is dated the 10th of November, 1902. It is conceded that the school district within which the assessment was made was, at the date of the transfer, a rural district. It is quite clear that the sale took place under the School Ordinance, c. 75 of the Consolidated Ordinances, because no part of that Ordinance stood repealed until 1st September, 1901, and those portions of it under which assessments were made and steps preliminary to the sale of land were taken and sales made, did not stand repealed until 1st January, 1902. (See the School Ordinance (1901), c. 29, secs. 179 and 180), and the School Ordinance (1901), c. 30, did not come into force until 1st January, 1902. (See section 101 of this last mentioned Ordinance.) This last mentioned Ordinance only provides, in specific terms, for the sale of lands for arrears of taxes in village districts. In town districts arrears are recoverable by virtue of the Municipal

Ordinance; in rural districts land only is assessed for school purposes, and arrears of taxes are enforced as against the land by a procedure entirely different from a sale and which it is not necessary for the purposes of this case to describe. Judgment. Wetmore, J.

It is clear, therefore, that at the date of the transfer the whole of the School Ordinance, c. 75, of the Consolidated Ordinances, stood repealed, and that the land in question being in a rural district, there were no provisions in the substituted Ordinances of 1901 authorizing a transfer of such land. The transfer, therefore, being entirely a matter of procedure, must have been executed under the old law of the Consolidated Ordinances by virtue of section 8, paragraph 45 of the Interpretation Ordinance. (Consolidated Ordinances, c. 1.)

No question is raised as to the validity of the transfer, but it is claimed on behalf of Hardaker that this transfer has the same effect as if c. 75 of the Consolidated Ordinances had not been repealed, and that by virtue of sections 186 and 187 of the Ordinance it vests in the purchaser the absolute right of property purged and released from all charges, liens and encumbrances and, therefore, that the company has now no interest in the land.

I am of opinion that this proposition is not tenable. This Court practically held in *Re The St. John School District*,[2] decided last June, that a transfer properly executed, and which the Court must assume to have been properly executed, under the School Ordinance of 1896, vested by virtue of sections 184 and 185 of the Ordinance, an absolute right of property in the land to the purchasers purged and released from all charges, liens and encumbrances, and that such deed could only be questioned or set aside on the grounds specified in section 185 and, therefore, that a mortgagee could not redeem under section 2 of Ordinance No. 12 of 1901. Sections 186 and 187 of c. 75 of the Consolidated Ordinances are practically the same as sections 184 and 185 of the Ordinance of 1896.

I am of opinion that under paragraph 45 of section 8 of the Interpretation Ordinance, the provisions of the old law of the Consolidated Ordinances was only to be considered in force for the purpose of procedure, and to enable the treasurer

[2] Not reported. See 35 S. C. R. 461.

Judgment.
Wetmore, J.

to execute the transfer, but that the effect of such transfer to pass an absolute indefeasible vested interest to the purchaser in view of the provisions of section 2 of Ordinance c. 12 of 1901, is gone.

In the *St. John School District Case*,[2] the transfer had been executed and the vested interest acquired before the enactment of Ordinance No. 12 of 1901. But in this case, not only was the transfer made after sections 186 and 187 of c. 75 of the Consolidated Ordinance stood repealed, but both the sale was made and the transfer executed after the enactment of Ordinance No. 12 of 1901, and I am of opinion that section 2 of Ordinance No. 12 of 1901, operates to extend the time to redeem in cases where the transfer is executed after the passing of that Ordinance.

Another ground on which the company's right to redeem is disputed is that it is not sufficient under section 2 of the last mentioned Ordinance for the person interested to make a tender to the purchaser of the amount of the purchase money paid and the other sums, moneys and costs therein provided in order to redeem the land, but that there must be an actual payment. There is nothing in this ground. If there was, a purchaser could always, if he wished to do so, prevent redemption by simply refusing to accept payment.

But it is also urged that the tender was not sufficient. The transfer and Hardaker's own affidavit disclose that the

Purchase money paid for the land was	$16 95
Hardaker paid for local improvement taxes, and destroying noxious weeds	27 00
For school taxes	12 40
In all	56 35
Twenty per cent. of which amounts to	11 27
Hardaker's costs taxed under my order were	35 25
Hardaker, therefore, on his own shewing was entitled to	$100 87

Mr. McLorg, for the company, tendered $100, or just 87 cents short. Mr. McLorg was acting as advocate for the company in this matter. Mr. Elwood was acting as advocate for

Judgment.
Wetmore, J.

the defendant. Possibly if the question of the amount payable to Hardaker in order to enable the company to redeem depended on Mr. McLorg's affidavit it might not be sufficient, especially as to the amounts paid for local improvement and school taxes. But this is set at rest by Hardaker's own affidavit, and the result is as above stated, assuming that the amounts paid by Hardaker for destroying noxious weeds is a charge against the land within the meaning of the section in question (and I will assume that it is for the purposes of this matter, as it is not disputed).

Mr. McLorg's contention is, however, that he had used every reasonable effort to ascertain the amount payable and that he was unable to do so because Hardaker's advocate refused to inform him what the amount was, although he was aware of it. This fact, that Hardaker's advocate so refused is admitted, and I assume that he adopted this course under the instructions of his client, and gives it the same effect as would a refusal on the part of Hardaker himself.

I am not prepared to express any opinion as to whether or not Hardaker was bound to inform Mr. McLorg of the amount he paid for school taxes or for local improvement taxes. The amount of these taxes, and when they were paid, could have been ascertained by inquiring at the proper quarter, either of the Treasurer of the School District, the Local Improvement Overseer, or at the Department of Public Works. This might involve considerable work in the way of correspondence, and possibly, actual personal inquiry of the officials, but it could have been ascertained, and having been ascertained, it would, I conceive, be a matter of very little difficulty to arrive at the identity of the person making the payments. Mr. McLorg seems to have made no effort whatever in that direction, so far as his affidavit discloses.

So far as the payments made by Hardaker in destroying noxious weeds are concerned, these weeds may have been destroyed by the Overseer of the Local Improvement District, and he may have imposed the cost of so doing as a tax against the land. (See "The Noxious Weeds Ordinance," c. 229, of 1899, sec. 8), and if so they would be matter of record and any person could, on inquiring of the Local Improvement Overseer or of the Department of Public Works, as the case might be, ascertain the amount. On the other hand, Hardaker

Judgment.
Wetmore, J

might have caused these weeds to be destroyed on his own accord or after notice to do so from the Inspector. (See sections 4 and 5 of the last mentioned Ordinance), and paid for the work himself, and if that was the case, there would be no record of it, and the only way that a person who wished to redeem the land could reasonably ascertain the amount so paid would be from Hardaker himself. It is not set forth in any of the affidavits whether the amounts paid for destroying these weeds were imposed against the land by way of a tax or whether Hardaker had them destroyed of his own accord and paid for it. I assume from the contents of his affidavit that Hardaker had these weeds destroyed of his own accord and paid for it.

I am of the opinion, therefore, that, in view of the fact that these payments had been made in this way, Mr. McLorg was, when he made the enquiry of Mr. Elwood, entitled to be informed what the amount due to Hardaker was in order to redeem the land. I cannot conceive how he could possibly get the information elsewhere and without it how he could be in a position to tender the proper amount. No doubt, this was a deliberate attempt on the part of Hardaker to oust the company of their right to redeem this land given to it by section 2 of Ordinance No. 12 of 1901, and when a clear case of that nature is made out without any merits in law or equity behind it, I am of opinion that it may reasonably be inferred that the Judge, to whom application is made to confirm the tax sale, has power to defeat such an attempt. I assume that to that extent at least a Judge exercises his powers of confirmation subject to the same equitable principles that would apply to ordinary actions in the Court of which he is a Judge. In this case the company tendered within eighty-seven cents of all that Hardaker could possibly claim. They were ready and willing, and expressed themselves so, to pay anything more that was payable. It would seem to me monstrous that under such circumstances their rights under a lien for $600 on a quarter section of land should be swept away.

McSweeney v. *Kay*,[3] was an action for specific performance; the head-note is as follows: An agreement was made between the parties "that the defendant should advance

[3] 15 Grant 432.

money on the purchase of land and that the plaintiff should have the right to repurchase the same by a certain day, upon repayment of the amount so advanced, and interest, together with what was paid by the defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract."

Judgment. Wetmore, J.

The plaintiff went to the defendant's house on the day when the money was payable, with $2,370 to pay or tender to him, but the defendant had left home and did not return until after dark. The defendant had previously received notice from the plaintiff of his intention to pay on the day the money was payable, according to the agreement, which fell on a Tuesday. One week later the plaintiff went to the defendant's house and found him at home, he then asked for a statement of the amount due in order to pay him, and produced a large number of bills which he tendered to the defendant, who refused to receive them. Spragge, V.-C., at page 437 of the report, states as follows: "It is said that $2,370 was considerably less than was really due to Kay. It may be so, and probably was, but I have no reason to doubt that there was a *bona fide* desire and endeavour on the part of McSweeney to pay Kay all that was due him, and if the whole amount due Kay was not paid or tendered to him it was because of his own default in not informing the plaintiff what was the amount really due. Without such information it was impossible for the plaintiff to know how much the defendant had expended upon improvements, how much for insurance. . . . I cannot agree that under these circumstances it lay upon the plaintiff *at his peril* to tender a sufficient sum. Information from the defendant of the true amount due was essential to the plaintiff to enable him to tender the true amount."

What is there laid down and quoted seems to be founded on good sense and common justice. The circumstances of this case are very similar, and I am disposed to hold, and do hold, that in a case like the present, when the party entitled to redeem is willing and anxious to do so, and does everything on his part to be done so far as his knowledge and information will allow him to do it, but falls short in the amount tendered of what is really due through the fault of the purchaser in refusing to give him information which he

Judgment. Wetmore, J.

ought to have given, the sale ought not to be confirmed, if the party entitled to redeem pays as directed by the Judge what is actually payable.

The only remaining ground on which the company's right to redeem is disputed before this Court, is that the lien under which it claims is void, having been executed before a recommendation for a patent issued to Goodwin, who executed the lien in question. Goodwin was a homesteader on the land in question, and a certificate of title issued to him on the 6th of March last. The lien under which the company claims was executed by Goodwin on the 16th of August, 1890, and registered in the Land Titles Office on the 2nd of December, 1890. At the time of the execution and registration of the lien, no recommendation for a patent had issued to Goodwin under section 42 of *The Dominion Lands Act* (R. S. c. 54), and it is claimed that the lien is therefore void under that section. In 1894, practically the same question was raised before me in *In Re Harper*,[1] and on the 18th September of that year (and it will be observed before *The Land Titles Act*, 1894, came into operation and while *The Territories Real Property Act*, c. 51 of the Revised Statutes was in force), I gave my judgment presenting a synopsis of the history of the legislation affecting the question and holding that Parliament, in using the words "assignment or transfer" in section 42 of *The Dominion Lands Act*, intended to use them in the sense of an absolute parting with the right and not in the sense of pledging the right by way of security and, therefore, that that section did not apply to mortgages of homestead and pre-emption rights. I see no cause to change my opinion. *In re Harper*,[1] was a reference by the Registrar of Land Titles, and the instrument there in question was stated to be "an encumbrance" but the exact nature of the encumbrance was not stated. I assumed it to be a mortgage drawn according to the old form of mortgages, wherein the mortgagor assigned his interest in the property to the mortgagee subject to be defeated on the mortgagor complying with the condition of payment, or otherwise, as the case might be. I did this because it was the strongest assumption I could make against the party claiming under the mortgage. It is not necessary to make any such assumption in this case (and, possibly, it was not necessary to do so in *In re Harper*.) The abstract of title, which is the

only evidence in this case of the nature of the encumbrance, states it to be a lien. I am familiar enough with the practice of the Registrars of Land Titles to know that when there is a mortgage registered against the land they designate it as such in their abstracts. I, therefore, assume that this is not a mortgage, but that it is some other encumbrance, and one that could be rightfully registered at the time of the registration. As before stated, this lien was executed on the 16th of August, 1890, and registered on the 2nd December, 1890. It was, therefore, registered under *The Territories Real Property Act*, and also while the original section 42 of *The Dominion Lands Act* was in force and before it was repealed and a new section substituted for it (as was done by section 5 of chapter 29 of the Acts of 1897). In the absence of evidence to the contrary, I will assume that this instrument was an encumbrance under *The Territories Real Property Act*. Section 3, paragraph (8) of that Act defined an encumbrance to mean "any charge on land created for any purpose whatever inclusive of mortgage unless expressly distinguished." Now section 77 of the Act provided that "mortgages and encumbrances under this Act shall have effect as security, but shall not operate as a transfer of the land thereby charged." Section 125 of the same Act provided that "any mortgage or other encumbrance created by any party rightfully in possession of land prior to the issue of the grant may be filed in the office of the Registrar who shall, on registering such grant, enter in the register and endorse upon the certificate of the title, before issuing the same to the applicant owner thereof, a memorandum of such mortgage or encumbrance and when so entered and endorsed the said mortgage or encumbrance shall be as valid as if made subsequent to the issue of the grant."

Judgment. Wetmore, J.

In view of what I have quoted from sections 77 and 125 of that Act, and what I have held with respect to the nature of the instrument in question, I have no hesitation in holding that this instrument was not an "assignment or transfer" within the meaning of section 42 of *The Dominion Lands Act*, and I draw attention to the fact, as I think it emphasizes my judgment in this respect, that the provisions of sections 77 and 125 were carried forward in effect into the original sections 73 and 74 of *The Land Titles Act*, 1894. I hold, therefore, that the company, upon the registration of

Judgment. Wetmore, J.

their encumbrance, became possessed of a vested right as against Goodwin in the land in question, and that such vested right remained good and valid as against any person claiming under or through Goodwin, as Hardaker does, and, therefore, that the company had an interest in the land in question to enable it to redeem under section 2 of Ordinance No. 12 of 1901. Section 9 of c. 32 of the Acts of 1898, which amended section 73 of *The Land Titles Act* by adding a third proviso, does not, in my opinion, affect the rights of the company, and I so hold because that enactment is not retroactive. It is a well understood rule that a statute should not be construed retroactively to defeat vested rights unless the intention so to do is clear. This is emphasized by paragraph 60, section 7 of *The Interpretation Act*, added by ch. 7 of the Acts of 1890, which is as follows: "The . . . amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law." It is quite evident that this paragraph is to be read as provided in section 7 "unless the context otherwise requires." But I cannot perceive that the context of section 9 of the Act of 1898 requires that it should be given a retroactive operation. To adopt the language of Fry, J., in *Hickson* v. *Darlow*,[4] the section "does not use retrospective language . . . and throughout uses words of futurity." The declaration contained in this section "that notwithstanding anything contained in this Act (*The Land Titles Act* not *The Territories Real Property Act*, under which the company obtained its rights), such mortgage is in the nature of the assignment or transfer which is prohibited by section 42 of the said Act" (*The Dominion Lands Act*), can be read to apply only to future mortgages, and being capable of being so read, should be so read according to the rules of construction. I also draw attention to the fact that this section deals only with mortgages, it does not expressly mention other encumbrances. I merely refer to this last mentioned fact in passing. I have not given the fact very mature consideration. Neither *Harris* v. *Rankin*,[5] nor *Flannaghan* v. *Healey*,[6] are applicable to this case, because, in both these cases, the instrument was a transfer or an agreement to transfer, and the agreement in

[4] 23 Ch. D. at p. 692.
[5] 4 Man. L. R. 115.
[6] 4 Terr. L. R. 391.

Flannaghan v. *Healey*[a] was made after the enactment of c. 32 of 1898. Judgment. Wetmore, J.

Since this judgment was prepared my attention has been directed to section 2 of 52 Vic. (1889), c. 27 and section 5 of 58 and 59 Vic. (1895), c. 54. It would seem that these enactments are conclusive against Hardaker as to the question I have just discussed, but as they were not brought under the notice of counsel, I prefer resting my judgment on the reasons given herein at length.

When this matter came up for hearing before this Court, Mr. Elwood, for Mr. Hardaker, applied to put in evidence a certified copy of the lien in question, as he stated, with the object of proving that such lien was barred as against the land in question by the *Statute of Limitations* applicable to such case, and Mr. McLorg, for the company, applied to read an affidavit of Franklin T. Webber, for the purpose of proving what was due under the lien. These matters had not been urged before the Judge below, and it was stated by the Court that if the questions specially raised by the Judge's reference were decided in favour of the company, it would consider whether or not the matter would be referred to the Judge below to consider:—

1st. Whether or not there is anything payable to the company, now or in future, under its lien?

2nd. Whether or not the company's right under such lien was barred by the *Statute of Limitations*?

I am of opinion that the matter might fairly be referred back to the Judge below to make those two enquiries, and no other, and to receive further evidence for that purpose.

This matter should be referred back to the Judge below with instructions to refuse to confirm the transfer to Hardaker unless it should be made to appear to him that nothing is payable to the company now or in the future, or that the lien *quoad* the land in question is barred by the *Statute of Limitations*, and if these facts, or either of them, are found against the company to confirm the sale; and if the sale is not so confirmed to make such order with respect to the sum of $100.87 payable to Hardaker for redemption as he may see fit.

Judgment. Wetmore, J.

The cost of the reference to this Court to be paid by Hardaker to the company or its advocate.

The costs of the proceedings before the Judge below to be in his discretion.

Argument.

The matter was referred back accordingly, and argument on the two points above indicated was subsequently heard by WETMORE, J., in Chambers at Moosomin, the same counsel again appearing. The learned Judge having taken time to consider, delivered the following judgment thereon:

[*February 27th, 1905.*]

Judgment.

WETMORE, J.—The only question that is really now remaining for decision is whether the company's lien *quoad* the land is barred by the *Statute of Limitations*. No question was raised as to an amount being due the company under this lien apart from that statute.

The statute in force affecting the question is the Imperial Statute 37 & 38 Vic. c. 57, which is made applicable to the Territories from the time of its enactment by section 2 of c. 31 of the Consolidated Ordinances.

A certified copy of the lien of the company was produced in evidence before me, and it appears, from that, that the company sold to David Bishop and Isaac Goodwin the registered owner of the land in question, a separator and a Pitt's 12 horse-power mount. For this machine the purchasers gave three notes, the first for $200, due 1st January, 1891; the second for $200, with interest at 8 per cent., due 1st January, 1892; the third for $200, with interest at 8 per cent., due 1st January, 1893; and Goodwin created a lien or charge upon the land in question for the amount of these notes. It has been established also by evidence, that the note first mentioned, fell due on 1st January, 1891, has been paid in full by payments made by Goodwin on 11th February, 1891; on 17th January, 1893; 3rd November, 1893, and 8th January, 1894, respectively; leaving only the two last mentioned notes due and payable.

It is quite clear to me that the company's remedy both on the notes and to enforce their lien is not barred by the statute. Section 8 of the statute provides that "No action or suit or other proceeding shall be brought to recover any

sum of money secured by any mortgage, judgment or lien or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid." I have recited all the provisions of the section necessary for the decision of the question raised. Judgment. Wetmore, J.

In the first place, as I have stated, the first note secured by the lien has been paid, and it was paid during the periods I have stated, which prevented the statute operating to bar the right. As to the unpaid notes; one fell due in January, 1892, and the other in January, 1893. The summons in this matter was taken out on 23rd December, 1902, and a tender was made to Mr. Elwood, Hardaker's advocate, on 11th March, 1903. At the time the tender was made therefor, the 12 years mentioned in the statute had not expired; the company, therefore, at that time had the right to redeem the land. I may say that it was conceded all through that the tender made to Mr. Elwood, Hardaker's advocate, should be considered a sufficient tender as if made to Hardaker in person.

I must, therefore, refuse to confirm the sale.

I will now deal with the question of costs. Hardaker's costs down to just before the hearing before me in Chambers on 13th March, 1903, have been taxed and are included in the $100.87 above mentioned. All the difficulty that has occurred since that time has been caused by Hardaker. In the circumstances, Hardaker must pay the costs incurred in the proceedings before me at Chambers subsequent to the date of the tender, which was on 11th March, 1903.

Order accordingly.

AYLWIN v. ROBERTSON.

Landlord and tenant—Notice to quit—Construction of documents.

A lease contained the following clause:—"To have and to hold the said rooms and apartments for and during the term of three years to commence from the 7th day of January, 1903, at and for the monthly rental of seventeen dollars of lawful money of Canada, payable monthly, the first payment to be made on the 7th day of February next ensuing the date hereof, and it is further agreed that at the expiration of the said term of three years the said R. D. Robertson may hold, occupy and enjoy the said rooms or apartments from month to month for so long a time as the said R. D. Robertson and Elaine Aylwin shall agree, at the rent above specified; and that each party be at liberty to quit possession on giving the other three months' notice in writing."

Relying on this clause the landlady, less than four months after the date of the lease, gave notice to quit. The tenant refused to vacate, holding that the provision for the three months' notice did not apply to the term of three years, and that the term could not be put an end to by notice before that period had elapsed.

Held, that upon the proper construction of the above clause, the landlady had the right to so terminate the tenancy.

Held, also, *per* WETMORE, J., that in construing any instrument *inter partes*, regard may be had to punctuation.

[COURT EN BANC, *15th April, 1904.*]

Statement. Appeal by the plaintiff from the order of SCOTT, J., dismissing with costs an application to recover possession of demised premises from an alleged overholding tenant.

Argument. *N. D. Beck*, K.C., for plaintiff (appellant).

G. B. Henwood, for defendant (respondent).

Judgment. WETMORE, J.—This was an application before SCOTT, J., by originating summons on behalf of the landlady Aylwin to recover from Robertson, the tenant, possession of certain rooms and apartments in a house in Wetaskiwin, let by her to Robertson. The lease, which is dated 2nd January, 1903, provided that these rooms and apartments were so let "To have and to hold the said rooms and apartments for and during the term of three years to commence from the 7th day of January 1903 at and for the monthly rental of seventeen dollars of lawful money of Canada payable monthly, the first payment to be made on the 7th day of February next ensuing the date hereof and it is further agreed that at the expiration of the said term of three years the said

R. D. Roberston may hold occupy and enjoy the said rooms or apartments from month to month for so long a time as the said R. D. Robertson and Elaine Aylwin shall agree, at the rent above specified; and that each party be at liberty to quit possession on giving the other three months' notice in writing." This clause is punctuated in the agreement as above set forth. Judgment. Wetmore, J.

Aylwin caused notice to quit to be served on Robertson on the 28th April, 1903. This notice was to quit on the 7th August, 1903. My brother Scott dismissed the application with costs on the ground that the provision for the three months' notice did not apply to the term of three years, and that that term could not be put an end to by notice before the time of its expiration. I am unable to put the construction on the clause in question that my brother Scott has put on it. The more I read the clause the more apparent it is to me that the provision for three months' notice applies to every part of the tenancy created by the lease, and that it is not limited to the tenancy from month to month to commence after the expiration of the term of three years. I read the clause as if it, in the first place, created the term of three years and then it was agreed first, that at the expiration of this term Robertson might continue as tenant from month to month at the same rental; secondly, that either parties might cause possession to be quitted by a three months' notice. This is made more apparent to me by the use of the word "that" in each of the provisions in question. That is in the provision for the continuance of the tenancy from month to month, and in the provision for the three months' notice. Moreover, the provision for the three months' notice provides that each party may "be at liberty to quit *possession*," by giving the notice. That it seems to me refers to the occupancy under the lease, and refers to the whole possession under it.

Then I think that the punctuation tends to the conclusion I have reached. It was urged that in construing a document of this character the Court is not at liberty to pay attention to the punctuation. I cannot find any case or rule of law that establishes that; I am inclined to think that what I can find points the other way. There seems to be some authority for the proposition that in construing an Act of Parliament the punctuation of the published copies of it cannot be relied

Judgment. Wetmore, J.

on. But that apparently is based on the ground that an Act of Parliament was formerly entered upon a roll and must still be looked upon as so entered, in which case it would not be punctuated. (See Hardcastle on Statutes (2nd ed.) 218, and cases there cited). In *Barrow* v. *Wadkin*,[1] Lord Romilly inspected the original Act and found that it was not punctuated. In *Claydon* v. *Green*[2] Willes, J., is reported[3] as follows, after referring to a change in the method of engrossing a Bill in Parliament:—"But I desire to record my conviction that this change in the mode of recording them (*i.e.*, the Acts), cannot affect the rule which treated the title of the Act the marginal notes and the punctuation as not forming part of the Act, but merely as *temporanea expositio*. The Act, when passed, must be looked at just as if it were still entered upon a roll which it may be again if Parliament should be pleased so to order; in which case it would be without these appendages which, though useful as a guide to a hasty enquiry, ought not to be relied on in construing an Act of Parliament." I infer from the fact that Lord Romilly inspected the roll no doubt with the object of obtaining assistance in construing it that if he had been able from the roll to obtain the assistance he required he would have availed himself of it. In view of the peculiar ground stated for not relying on the punctuation of an Act of Parliament, I infer that if it had been the practice to punctuate the Act on the roll that such punctuation might have been relied on, and in the absence of any authority to the contrary I have come to the conclusion that the punctuation may be relied on in construing a deed or agreement or any other instrument *inter partes*, and when one considers what an entirely different meaning may in many instances be given to a sentence by punctuation, I see no reason why parties to any such document might not choose to make their intention clear by punctuation. At the same time I concede that in view of the careless manner in which deeds and agreements are punctuated even by the most careful conveyancers, if punctuated at all, the Courts should be very careful indeed, and in many cases scrutinize the document very carefully and examine it from other stand-

[1] 24 Beav. 327; 27 L. J. Ch. 129; 3 Jur. (N.S.) 679; 5 W. R. 695.
[2] 37 L. J. C. P. 226; L. R. 3 C. P. 511; 18 L. T. 607; 16 W. R. 1126.
[3] At p. 522 of L. R. 3 C. P.

points before they give effect to the punctuation. In the case of the clause in the lease in question the punctuation is peculiar and somewhat marked. The whole clause has only two punctuation marks in it, one a comma at the end of the word "agree," and the other a semicolon after the word "specified," that is between the provision for the month of month tenancy and that for the notice terminating the possession. In my opinion the natural reading of the clause is as contended for by the appellant, and therefore that this appeal should be allowed with costs of the appeal to the appellant, that the order below dismissing the application should be set aside and an order made that the respondent deliver to the appellant possession of the premises, and that the respondent pay the appellant the costs of her application before the Judge and of and incidental to such order.

Judgment. Wetmore, J.

PRENDERGAST, J.—The only question raised by this appeal is involved in the construction of a certain paragraph in an agreement in writing whereby the appellant agreed to let and the respondent agreed to take certain premises therein described, which said paragraph is in the words following:

"(*a*) To have and to hold the said rooms and apartments for and during the term of three years to commence from the 7th day of January 1903 at and for the monthly rental of seventeen dollars of lawful money of Canada payable monthly the first payment to be made on the 7th day of February next ensuing the date hereof (*b*) and it is further agreed that at the expiration of the said term of three years the said R. D. Robertson may hold occupy and enjoy the said rooms or apartments from month to month for so long a time as the said R. D. Robertson and Elaine Aylwin shall agree, at the rent specified; (*c*) and that each party be at liberty to quit possession on giving the other three months' notice in writing."

The letters (*a*), (*b*) and (*c*) are not in the original agreement, but are here inserted in the said paragraph to refer more easily to the different parts thereof.

The appellant's contention is that the paragraph shows an intention to provide in (*a*) for a term of three years which the parties mainly had in contemplation, in (*b*) for the lengthening of that term, and (*c*) for the shortening of it. In this view of course notice given as provided in (*c*) would

Judgment. Prendergast, J.

affect the term of three years provided in (*a*) and not the tenancy from month to month provided in (*b*).

The respondent on the other hand contends that the said paragraph really contains two parts only: the first (being (*a*)) providing for a term of three years, and the second (composed of (*b*) and (*c*) read together) providing after the three-year term for a tenancy from month to month terminable only on giving three months' notice.

Now divisions (*a*) and (*b*) of the said paragraph, besides not being disconnected by any punctuation, are alike in nature and have a like object, each providing for a special tenancy, the first for a tenancy for three years and the second for a tenancy from month to month following the three years; and for this reason they seem, taken together, to constitute the habendum of the agreement.

Division (*c*) on the other hand, which does not provide for any term but only for determination by notice and which is disjoined from the preceding portion of the paragraph by a semicolon, seems to form a distinct part or division by itself and to constitute what is termed the reservation or the condition clause. The words with which it begins "and that each party shall be at liberty" indicate that the parties intended thereby to except something from the operation of that part of the paragraph preceding it.

The question is then: "What part of the habendum is the reservation or condition intended to affect? Is it intended to affect the three-year tenancy or the tenancy from month to month?"

I do not think that, as contended on behalf of the respondent, any significance attaches to the fact that the condition (*c*) follows immediately the provision for the month to month tenancy (*b*), the less so as it is disconnected from it by the only punctuation mark in the whole paragraph. It simply was made to follow the habendum as a whole because that is its proper place in a deed.

Now is there anything repugnant to reading (*a*) and (*c*) together? I surely do not see that there is. Of course (*c*) reserves something which does not flow from such a tenancy as is provided by (*a*), but that is always the object of a reservation or condition clause. It is surely a very common method to draw a lease for a fixed period with a provision for earlier determination, and if such was the intention of

the parties, as I assume for the moment it was, I cannot conceive that they could have expressed it more clearly and concisely either in ordinary language or legal phraseology. Judgment. Prendergast, J.

On the other hand can (*b*) and (*c*) be read together, or in other words is termination upon three months' notice consistent with a tenancy from month to month. Of course if the whole paragraph provided for no other tenancy than a monthly tenancy the provision for termination on three months' notice would have to be read together with it, as it could apply to nothing else and we would then have to gather from them the most plausible meaning possible under the circumstances. But the two in my mind, standing as they do in the agreement in question, are clearly inconsistent. A monthly tenancy is surely terminable on month's notice, and it does not matter here whether this be so by virtue of a rule of law expressly so stating or because such notice is deemed under the circumstances a reasonable one. Nor if the tenancy provided in (*b*) was intended to be terminable by giving three months' notice can I conceive why the words "from month to month" were used at all: it surely was not to make the rent payable monthly, as that is expressly provided for further on.

Read in connection with (*a*), (*c*) simply adds a new feature, that of determination by notice, which is in no way repugnant. Whilst read in connection with (*b*) the operation of (*c*) is, not merely to add to it a new feature but to bring in something contradictory—to substitute one thing for another, which was already there at least by clear implication, namely: a three months' notice for a one month notice.

The first words in (*c*) "and that each party be *at liberty*" also indicate an intention to give to the party desiring to terminate the tenancy an advantage for so doing which he would not have under the habendum and not to throw a further impediment in his way by lengthening the time of the notice to be given.

Both parts of the habendum, (*a*) and (*b*), are clear. So is the reservation or condition, and the only question is: "To what part of the habendum does it apply?" I think it applies to the three-year term.

In my opinion the appeal should be allowed, the judgment of the learned trial Judge dismissing the appellant's application set aside, and the other order applied for granted, with

Judgment. Prendergast, J.

costs incidental to such application and order to the appellant, who should also have costs of this appeal.

SIFTON, C.J., concurred.

Appeal allowed with costs.

LEADLEY v. CRUICKSHANK.

Landlord and tenant—Trespass to lands—Action for damages.

In order to enable a landlord to maintain an action for trespass to lands, the acts complained of must be such as to injure the reversion.

[EN BANC, *16th July and 18th October, 1904.*]

Statement.

Appeal by plaintiff from the judgment of SIFTON, C.J., at trial, dismissing the plaintiff's action with costs. The facts appear in the judgment.

The appeal was heard by WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ.

Argument.

O. M. Biggar, for plaintiff (appellant).

James Muir, K.C., and *J. L. Crawford*, for defendant (respondent).

The judgment of the Court was delivered by

[*18th October, 1904.*]

Judgment.

WETMORE, J.—I am of opinion that the appeal must be dismissed. The defendant is the husband and agent of one Agnes Cruickshank. By agreement dated the 16th August, 1898, The Saskatchewan Land and Homestead Co., the then owners of the *locus in quo*, agreed to sell the same to Agnes Cruickshank. This agreement was in writing and was executed by the company through its agent and by Agnes Cruickshank. Agnes Cruickshank, by her servants and agents, immediately entered into possession of the property and has remained in possession of it continually ever since without any interruption, except as hereinafter stated. The company assigned the lands and its interest in the agreement of sale to the plaintiffs in April 1900, and the plaintiffs are the registered owners of the land.

Judgment, Wetmore, J.

The plaintiff's claim that Agnes Cruickshank, having made default in payment of the instalments of the purchase price payable under the agreement, such agreement is at an end and they have a right to re-enter and take possession of this land, and that they did so take possession. The defendant sets up, among other defences, that the plaintiffs were not in possession of the land at the time of the alleged trespass. The defendant also sets up that the plaintiffs had no right to take possession. In the view that I have taken of the case it is not necessary to decide whether or not the plaintiffs had a right of entry. I will assume, for the purpose of this judgment, that they had.

The evidence establishes that on the 27th April, 1903, Agnes Cruickshank then being in actual possession of the land, one Hogg, who describes himself as the plaintiff's inspector of lands, took one Butler out to the land in question, broke into the house thereon, put some personal property therein and locked the door of the house. He and Butler then left the property. He swore that he took Butler there to work the place. The next morning Butler returned with some stuff, as he describes it, for the purpose of going on the land with it. In the meantime the defendant who, as I have stated, was Agnes Cruickshank's agent, discovered that the house had been entered by some one, threw the property out of it that Hogg and Butler had put in and placed a man in possession, and when Butler came on the morning of the 28th April he put up the bars and prevented him coming on the land. These acts on the part of the defendant are the trespasses complained of. Butler, who was called as a witness for the plaintiffs, swore that when he went to the place on 28th April he told the defendant that he had taken possession of it for one John T. Moore. He also swore that Moore was his landlord, and that he had a verbal agreement with him to work the place on shares, each to get half, and that Moore represented that he was owner of the property. I cannot find that this testimony is anywhere contradicted. It appears that Moore was in some way an agent for the plaintiffs, but just what the character of his agency was I cannot discover by the testimony, except that the plaintiffs authorized him to cancel the agreement between The Saskatchewan Land and Homestead Company and Agnes Cruickshank. I cannot discover that he was authorized by the plaintiffs to put any one in

Judgment. Wetmore, J.

possession of the land. But whether Butler was put in possession under the plaintiff or under Moore makes no difference. He was a tenant, and there was no other actual possession as against Agnes Cruickshank or her agent the defendant, assuming that there was any actual possession as against them by any person, a matter upon which I express no opinion. Assuming that Butler was in possession under the plaintiffs he was so as their tenant.

The trespasses complained of were not of a character to injure the plaintiffs' reversion, and that being so, the plaintiffs cannot successfully maintain an action for such trespasses. That proposition of law is supported by *Cooper* v. *Crabtree*.[1] If Butler was Moore's tenant the plaintiffs had no pretence of a possession to maintain this action. In either view the plaintiffs' action must fail. The learned counsel for the plaintiffs applied at the hearing of the appeal to amend the statement of claim by inserting a prayer for recovery of the land. He subsequently, however, admitted that such amendment could not be made, and it is obvious that it could not, as Agnes Cruickshank is not a party to the action. In my opinion the judgment of the Chief Justice should be affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

[1] 51 L. J. Ch. 544; 20 Ch. D. 589; 47 L. T. 5; 3 O. W. R. 649; 46 J. P. 628.

GUEST v. BOSTON.

Vendor and purchaser — Specific performance—Laches — Waiver of vendor's right to rescind.

The defendant having sold land to the plaintiff under agreement of sale in which the purchase price was payable by instalments, subsequently brought action against the plaintiff to recover the amount of the instalments then overdue, and recovered judgment upon which he placed an execution against the plaintiff's goods in the sheriff's hands. The plaintiff paid the execution in full to the deputy sheriff, and then tendered to the defendant the balance of the purchase money, which, the defendant refusing to accept, the plaintiff began this action for specific performance. The defendant contested the action on the ground that the plaintiff by his laches in making payment had disentitled himself to relief, and also on the ground that, although time was not expressly made of the essence of the contract, yet the nature and character of the property and the transaction were such as to render time of the essence.

Held, that the defendant by his conduct in forcing the plaintiff through the pressure of execution to pay the deferred instalments, had waived his right to rescind the agreement and had also waived the plaintiff's laches.

[WETMORE, J., *November 30th, 1903.*]

[COURT EN BANC, *13th and 15th April, 1904.*]

Statement. Action for specific performance brought by the purchaser of lands under contract against the vendor. The facts are fully set forth in the judgment of WETMORE, J.

Argument. *B. P. Richardson*, for plaintiff.

T. C. Johnstone, for defendant.

Judgment. WETMORE, J.—This is an action brought for the specific performance on the part of the defendant, the vendor, of an agreement for the sale of a parcel of land by him to the plaintiff. About the 30th of January, 1899, the plaintiff and the defendant entered into an agreement in writing under seal whereby the defendant agreed to sell and the plaintiff agreed to purchase the north half of section 4, township 18, range 7, west of the 2nd meridian, for $1,000, payable in seven equal annual instalments with interest, the first instalment payable on the 1st January, 1900. The plaintiff entered into possession of the land under the agreement shortly after it was made, and has been in possession ever since.

On the 9th April, 1900, the purchaser having made default in payment of the first instalment of the purchase

Judgment. Wetmore, J.

money, the vendor (the defendant in this action) alleging that the agreement contained a clause making time of the essence of the contract, and providing that unless the payments were punctually made at the time they became due the agreement should be null and void and the vendor would be at liberty to re-sell the lands, brought an action against the purchaser (the plaintiff in this action) for a declaration that the agreement be declared cancelled and of no effect and for possession of the land and damages by reason of the default in payment of the instalment and the deprivation of the land. This action was defended and came on for trial before me at Grenfell in April, 1901. The principal matter of defence was that the agreement did not contain the clause above set out, making time of the essence of the contract. I gave judgment for the then defendant and dismissed the action, holding that the agreement did not contain the clause in question.

On the 21st June, 1902, the vendor brought an action against the purchaser to recover the instalments due under the agreement on the 1st January, 1900, 1901 and 1902—three instalments, and recovered judgment for the full amount sued for and costs, and *fi. fa.* executions were issued on such judgment against the purchaser's goods and delivered to the sheriff, which the purchaser satisfied by paying the amount to Reginald Gwynne, the sheriff's deputy. And by direction of the advocate on the record for the plaintiff in that suit the sheriff returned the executions "settled between the parties."

The learned counsel for the defendant consented at the trial that my judgment entered in the first suit of *Boston* v. *Guest*, that the clause respecting time being of the essence of the contract was not in the agreement of sale should, for the purposes of this suit as regards the claim for specific performance, stand. Therefore as specific performance is the only relief asked for in this suit we must deal with the case as if the agreement did not contain any such clause.

It was not disputed that the amount of these executions was paid to Gwynne as such deputy sheriff and that it was so paid under the executions. But it is urged, on behalf of the defendant, that that is no evidence that this money was received by the defendant. There is nothing in this contention. The defendant having sued the plaintiff under the agreement to recover the instalments mentioned, having recovered

judgment in such suit for the full amount with costs, and having issued executions to levy the full amount of such judgment, and the plaintiff under pressure of such executions having paid the full amount of such executions to the sheriff's officer, the plaintiff is in the same position as if he had paid the money to the defendant in person. It becomes then a matter between the defendant and the sheriff. I find, therefore, that the instalments due on the agreement down to and inclusive of the 1st January, 1902, were paid on the 28th December, 1902, the date of Gwynne's receipt for the money paid in satisfaction of the executions. Judgment. Wetmore, J.

The next instalment of purchase money payable under the agreement fell due on 1st January, 1903, and the agreement contained a clause by which it was provided that the purchaser might at any of the times provided for payment of any instalment of principal pay two or more instalments if he should see fit, and the vendor agreed to accept the same. On the 1st January last the plaintiff tendered to the defendant $606.35, which was the whole balance of the purchase money and interest down to that date. This the defendant refused to accept.

Apart from the objection that there was no evidence that the instalments of purchase money due prior and down to and inclusive of the 1st January, 1902, were not paid to the defendant (upon which I have already given my ruling), the only objections raised were:

1st. That the plaintiff had not always been ready and willing to carry out his part of the agreement by paying the instalments of purchase money.

2nd. That apart from the fact that the time clause referred to was not in the agreement the nature and character of the property and the transaction were such as to render time of the essence of the contract.

As to the first objection. It is claimed that the plaintiff was guilty of laches, because prior to 1st January last he was not prompt in the performance of the obligations of the contract which were to be performed on his part, namely, the payment of the instalments which fell due prior to that date, that he did not pay them as they fell due, and the defendant had no resort to an action for the purpose of recovering them, and therefore the plaintiff is not entitled to specific performance whatever other remedy he may have. Now conceding the

Judgment.
Wetmore, J.

general rule to be as laid down by the Court in *Wallace* v. *Hesselin*,[1] that "in order to entitle a party to a contract to the aid of a Court in carrying it into specific execution he must show himself to have been prompt in the performance of such of the obligations of the contract as it fell on him to perform and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement;" and assuming that the plaintiff was not prompt in the payment of the instalments falling due prior to the 1st January, last, such laches may be waived. In Fry on Specific Performance,[2] the author states as follows: "Objections grounded on the lapse of time are waived by a course of conduct inconsistent with the intention of insisting on such an objection; and in this respect it is immaterial whether time were originally of the essence or subsequently engrafted on the contract," and for that he cites *King* v. *Wilson*.[3] I regret that I have not been able to peruse this case, but I have not been able to obtain the report. However, what is so stated by Fry appears to me to be a reasonable proposition; and upon the question of waiver see *Hipwell* v. *Knight*.[4] *Hunter* v. *Daniel*,[5] was an action for specific performance, and it was provided in the agreement, then in question, that time was of the essence of the contract, in so far as the payments provided for were concerned. The plaintiff did not make a payment at the time provided for, but made it in part sometime after, and the defendants received it. It was held that the defendants had thereby waived their rights to rescind the contract. So in this case before me, I find as a matter of fact, and hold that the defendant having brought an action to recover the instalments, which he now contends the plaintiff was not prompt in paying, and having recovered judgment and forced the plaintiff to pay them through the pressure of executions, has waived the right to rescind the agreement or to set up that the plaintiff is not entitled to specific performance by virtue of such alleged laches. As to the plaintiff's promptness in payment of the subsequent instalments, it is beyond

[1] 29 S. C. R. at p. 174.
[2] (3rd Ed.) p. 508, s. 1120.
[3] 6 Beav. 124.
[4] 1 Y. & C.; 4 L. J. Ex. Eq. 52.
[5] 4 Hare 420; 14 L. J. Ch. 194; 9 Jur. 520.

question that he came on the very day the next instalment became due and not only tendered the amount of that instalment, but the whole balance of the purchase-money, as he had a right to do. No laches other than what I have mentioned are laid to the plaintiff's charge. Judgment. Wetmore, J.

As to the second objection above stated, as to time being, in view of the character and nature of the property and the circumstances, of the essence of the contract apart from any special provision to that effect, that objection is based upon what is alleged in Fry (3rd ed.), page 493, to have been laid down by Alderson, B., in *Hipwell* v. *Knight*.[4] I have read the report of this case in 4 L. J. And in that report I cannot find that Alderson, B., lays it down just as stated by Fry. Possibly, however, the part quoted by the author may be found in Y. & C., which report I am unable to obtain. I am, however, quite satisfied upon reading the report in the *Law Journal*, that Alderson, B., had reference to property of the nature of stock and property of that character. But anyway, what I have laid down with respect to the waiver is a complete answer to this objection. It is true that the land here in question has greatly risen in value since the date of the sale to the plaintiff, and no doubt that is very sad from the defendant's standpoint. But I fail to appreciate that that fact in itself warrants the defendant in rescinding the agreement or deprives the plaintiff of his right to specific performance.

The defendant appealed, and the appeal was argued before the Court *en banc*, consisting of SIFTON, C.J., SCOTT, and PRENDERGAST, JJ., on 13th April, 1904. Statement.

The same counsel appeared. Argument.

The judgment of the Court was delivered by

[*15th April, 1904.*]

SCOTT, J.:—This Court is of opinion that the learned trial Judge was right in the conclusion he reached and that the appeal should be dismissed with costs. Judgment.

It may be open to question whether the defendant by reason of the long delay on the part of the plaintiff in the

Judgment. Scott, J.

payment of the instalments of purchase-money could not have successfully resisted an action by him for specific performance of the contract, if it had not been for the fact that after that delay had occurred, he instituted an action against the plaintiff to recover the overdue instalments, and, having recovered judgment therein, placed an execution in the sheriff's hands for the amount of the judgment and maintained same therein, until it was satisfied by the plaintiff, a few weeks after the receipt by the sheriff.

This in the opinion of the Court must be construed as a waiver by the defendant, of any delay on the part of the plaintiff, which might otherwise have disentitled the defendant to succeed in this action. It would be manifestly inequitable to hold that a vendor is entitled to demand and enforce payment of the purchase-money, and at the same time to refuse to convey the lands on the ground that there had been delay on the part of the purchaser in its payment.

Appeal dismissed; judgment for plaintiff.

IN RE SINCLAIR.

Medical Profession Ordinance—Object of Legislature in passing—Persons entitled to be registered without undergoing an examination.

A member of the College of Physicians and Surgeons of Manitoba is entitled, without undergoing any examination, to be admitted upon the register of the College of Physicians and Surgeons of the North-West Territories, under C. O. 1898, c. 52.

[COURT EN BANC, *12th and 19th July, 1904.*]

Statement. Reference by WETMORE, J., argued before the Court *en banc*, consisting of SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST and NEWLANDS, JJ.

Argument. *J. T. Brown*, for the applicant, Sinclair.

J. B. Smith, K.C., for the College of Physicians and Surgeons.

The judgment of the Court was delivered by

[*19th July, 1904.*]

Judgment.

WETMORE, J.:—The applicant William Sinclair, being a member of the College of Physicians and Surgeons of Manitoba, applied to the council of the College of Physicians and Surgeons of the North-West Territories, to be admitted upon the register kept by such council. The applicant claimed to be so admitted by virtue of paragraph (b) of section 29 of *The Medical Profession Ordinance*."[1] The council refused to admit him upon the register unless he passed an examination under paragraph (c) of the said section, and the applicant thereupon applied to a Judge of this Court and obtained an originating summons directed to the said council to show cause why he should not be registered. Upon the return of the summons, the Judge referred the question to this Court sitting *en banc*.

The only question raised is, whether the applicant is entitled to be registered under paragraph (b) of the section of the Ordinance referred to, without undergoing any examination touching his fitness and capacity. It was urged on behalf of the council that the College of Physicians and Surgeons of Manitoba does not exercise powers similar to those imposed by the Ordinance upon the College of Physicians and Surgeons of the North-West Territories, because it has not within itself or its council the power to examine any applicant for admission upon its register such as the council of the Territorial college has by virtue of paragraph (c) of section 29 and by section 35 of the Ordinance, and therefore that a member of the Manitoba college seeking admission upon the register of the Territorial college comes under paragraph (c) of section 29 and must undergo an examination. That was the only question raised.

The general purpose of *The Medical Profession Ordinance*,[1] is to endeavour to secure properly qualified medical practitioners and surgeons within the Territories, and with that object in view, to provide for the registration of such persons so that the public might be informed thereof, and to prohibit persons not registered from recovering charges

[1] C. O. 1898 c. 52.

Judgment.
Wetmore, J.

for their services, and to render them liable to penalties for practising for hire or reward or for wilfully or falsely pretending to be physicians, doctors of medicine, surgeons or general practitioners, etc. The College of Physicians and Surgeons was incorporated, among other things, for the purpose of registering persons qualified for registration, and so authorizing them to practice in the Territories. The Ordinance by section 29 provides who shall be so qualified to be admitted upon the register, and in the first place, it provides that:—

> "(a) Any person possessing a diploma from any college in Great Britain and Ireland (having power to grant such diploma), entitling him to practice medicine or surgery, and who shall produce such diploma and furnish satisfactory evidence of identification,"

shall be registered, and it is quite evident that such person is entitled to be registered without undergoing an examination, respecting his fitness and capacity to practice. In the next place the Ordinance provides that:—

> "(b) Any member of any incorporated College of Physicians and Surgeons of any province of the Dominion of Canada, exercising powers similar to those conferred by this Ordinance upon the College of Physicians and Surgeons of the North-West Territories,"

shall be registered, and it is equally evident that a person embraced by this paragraph is entitled to be registered without undergoing such an examination. The Legislature evidently, therefore, was confident that a person possessing a diploma such as that mentioned in paragraph (a) of the section, or that any member of an incorporated College of Physicians and Surgeons of any province of the Dominion exercising powers similar to those conferred upon the Territorial college, has the fitness and capacity to practice.

We are of opinion that the *similar powers* referred to in paragraph (b), are the powers to register and thereby qualify the person registered to be a regular practitioner in the province, or in other words, the person so qualified by a registration by such an institution becomes qualified without anything further, to be admitted on the register of the Territorial college. The Legislature of the Territories was confident that the Legislature of any province in the Dominion

creating a college authorized to register practitioners and so entitle them to practise would be careful to provide that the persons registered should be fit and capable to practise as physicians or surgeons. The Legislature of Manitoba has been careful in this respect, because while it is true that no power of examination is vested in the Manitoba college or its council, there is the power of examination vested in the University of Manitoba. Therefore, there must, except in cases where there is the right to claim registration without an examination, be an examination by a properly instituted body, before the applicant can be registered. We have no reason to come to the conclusion that the University of Manitoba is not a competent body to examine. It seems to us that the Legislative Assembly intended in a measure, at least, to open the door to duly qualified medical practitioners in Great Britain and Ireland, and in the provinces of Canada, to practice their profession in the Territories, in the same or a similar manner in which they have opened the door to duly qualified legal practitioners in Great Britain and Ireland and in the provinces, to practise law in the Territories.

Judgment.
Wetmore, J.

We, therefore, advise the Judge making the reference, that he should make an order directing the council to register the applicant upon his paying the requisite fee. The question of the costs of the application to the Judge to be left to his discretion. The Territorial college must pay the applicant's costs of the reference to this Court.

Order accordingly.

RE HOBSON ESTATE.

Administrator—Passing accounts—Property bought by deceased with administrator's money—Resulting trust—Intention—Evidence.

Whether or not a purchase of property by a husband in the name of his wife is a gift is a question of the husband's intention at the time of the purchase. *Prima facie* it will be considered a gift, but this presumption may be rebutted. The evidence, however, for such purpose must be clear, but *quære*, whether when the party seeking to rebut the presumption gives evidence, he must swear positively to an intention to create a trust.

[WETMORE, J., *28th February*, 1901.]

Statement. This was an application on the part of Nathaniel Hobson, administrator of the estate of Ellen Susanna Hobson, deceased, to have his accounts passed and allowed. Nathaniel Hobson was the husband of the deceased intestate.

Argument. *J. T. Brown*, for the administrator.

E. A. C. McLorg, for Margaret McCasten.

Judgment. WETMORE, J.:—The first question I have to discuss, is whether the deceased left any estate or property whatever in which she was beneficially interested. The only properties in which it is claimed that she was in any way interested are, apart from some personal property, lots 24 and 25 in block 118 in Grenfell. On the 4th September, 1890, the deceased purchased those lots from the trustees of the town site for $75, which was paid by her husband, Nathaniel Hobson, out of his own personal funds, the deceased paying no part whatever of it. This money was paid down at the time of the purchase. At the time of this purchase Hobson had made arrangements for the building of a brick veneered dwelling house, and on the 12th August, 1890, had received a tender with respect to such building; the tender was accepted, but it does not appear when it was accepted. This building, however, was erected in 1890 and 1891. About one-third of it was placed on lot No. 24 and the remainder of it on lot No. 23, adjoining thereto, which was owned by Hobson, as well as lot No. 22 adjoining 23. The deceased died on 21st August, 1892, and this dwelling was erected as described, with her consent, and the cost of it was paid

Judgment.
Wetmore, J.

by Hobson, and no part thereof was paid by the deceased. Hobson occupied the house down to the time of his wife's death, and afterwards until the summer of 1894, when he rented it to one Gwynne, who occupied it as such tenant for about two years, when Hobson again went into possession and has continued in such possession ever since, and there has been no other occupation of such house or lots. The house and lots have always since the purchase been assessed in the name of Hobson, and he has always kept the house insured against fire and paid the insurance premiums. So far as the abstract of title shews, the title to all these lots Nos. 23, 24, and 25, is in the town site trustees. Mr. Brown, Hobson's advocate, stated, however, during the course of the argument that a transfer had been executed by the trustees to the deceased of lots Nos. 24 and 25, which the administrator holds. I presume that a transfer was also executed to Hobson of lot No. 23, or he holds some document, which gives him a good title in law or equity to that lot, as his title thereto or ownership thereof has not been disputed. Hobson received some $350 in cash as rent from Gwynne for the whole premises rented to him, and Gwynne also did some slight repairs to the property. Lots 24 and 25 were sold at auction on 12th May last and realized $300. The intestate died without any lineal descendants, but leaving brothers and sisters, one of whom, Margaret McCasten, claims that they are entitled in distribution (with the husband), to a moiety of the surplus estate of the deceased.

It is claimed now on behalf of the husband, that the deceased had no beneficial interest in the property, but that under the circumstances there was a resulting trust, and that he is the only person beneficially interested in it. The general rule is quite clear that "where a man buys land in the name of another and pays the consideration money, the land will generally be held by the grantee in trust for the person who pays the consideration money:" *Lewin on Trusts* (8 Eng. ed.), 163; *Storey Eq. Jur.* (13 ed.), paragraph 1201. But when the purchase is made in the name of a child or wife or near relative, the payment of the purchase-money is considered *prima facie* to be an advance: *Lewin on Trusts*, 170, and *Storey Eq. Jur.*, paragraphs 1202 and 1204. In either case, however, the presumption is capable of being rebutted by surrounding and accompanying

Judgment.

Wetmore, J.

circumstances, and by parol testimony. It may be established, therefore, in the case of a purchase in the name of a stranger that the payment was a gift, and that there was no resulting trust. It may be shewn in the case of a purchase in the name of a child or wife, that it was not a gift, but that a trust resulted: *Fowkes* v. *Pascoe*,[1] *Marshall* v. *Crutwell*.[2] The question is one of intention; that is, what was the intention of the person paying the money at the time he paid it: *Fowkes* v. *Pascoe*,[1] *Marshall* v. *Crutwell*,[2] and *Lewin on Trusts*, 175. I was in hopes that I would be able to establish by the decided cases, that there was a resulting trust in this case. I am sorry to have to say that the authorities and the facts before me, force me to hold the other way. The manner in which the administrator has presented the facts to me absolutely prohibits my holding that he ever intended, in paying the purchase-money, to vest the property in his wife for his benefit. For the reasons before stated, the payment and purchase must, it having been made for and in the name of his wife, be *prima facie* taken to be a gift. If it was intended to be a resulting trust, and for the husband's benefit, the onus is on him to shew it. That is, he must shew that it was the intention at the time of the purchase to create a trust. And no person can possibly know what the intention was better than himself. I am not prepared to hold that, because Hobson has not stated under oath, in so many words, that the purchase was intended to be for his benefit, that I could not from the facts and circumstances in evidence find such intention (although Lewin, at page 176, states that Lindley, L.J., in *Ex parte Cooper*,[3] held that, "Where the parties to the transaction are alive and give evidence there is no occasion to resort to any presumption"). The difficulty I have in finding that there was a resulting trust is presented by the affidavit of Hobson used in shewing cause against the chamber summons on the application of Margaret McCasten, for an order that he file an account of his administration. Now, as I have before stated, Hobson must have known what his intention was when he made the purchase, and if it was not intended as a gift, the obvious answer to McCasten's application would

[1] L. R. 10 Ch. 343; 44 L. J. Ch. 367; 32 L. T. 545; 23 W. R. 538.
[2] L. R. 20 Eq. 328; 44 L. J. Ch. 504.
[3] (1882) W. N. 96.

Judgment.
Wetmore, J.

have been to set up that she was not interested, because the deceased had no beneficial interest in the property, as she held it in trust for her husband, and to have presented the facts upon which he founded such claim. He does nothing of the sort, he does not even mention in that affidavit the fact that he paid the purchase-money. He does mention the fact that he erected the dwelling-house at his own expense, but that fact alone would be of no avail to vest any interest in the land in Hobson. But he goes further in that affidavit, he presents facts to shew that he had been dealing or attempting to deal with the land, as if the beneficial interest had been in the deceased. He states in effect that he had attempted to sell it, evidently not for his individual benefit, but for the benefit of the estate, and he offers to pay $617 for the lots, if the Court will allow him to do so. This $617 evidently was to be for the benefit of the estate. If the beneficial interest was in him and not in his wife, why should he pay anything for it? Up to that time no idea had evidently entered his mind, that the purchase was not intended as a gift, but was intended to be for his benefit. And the only conceivable reason it appears to me why it did not enter his mind was that there was no such intention. Were it not for that affidavit, I think, I might have been warranted under the authorities in finding that there was a resulting trust: See *Stock* v. *McAvoy*.[a] With that affidavit I cannot do so. I must hold that the presumption that the purchase was a gift has not been rebutted. It is true that Hobson in his affidavit, used on passing his accounts, sets up the fact that he paid the purchase-money, and his counsel claimed that there was a resulting trust. It was, however, in view of what had gone before then too late. It was evidently an afterthought. I hold the administrator chargeable with the property for the benefit of the estate.

Order accordingly.

[a] 42 L. J. Ch. 230; L. R. 15 Eq. 55; 27 L. T. 441; 21 W. R. 520.

REX v. HINMAN.

Criminal law—Charge of perjury—No allegation of intention to mislead—Appeal—No previous application for a reserved case.

The Court has no authority, under s. 744 of the Criminal Code, 1892, to grant leave to appeal unless it is made to appear on the application that the trial Judge has refused to reserve a case upon the questions sought to be raised by way of appeal.

Held, also, following *Regina* v. *Skelton*,[1] that upon a charge of perjury it is unnecessary to allege any intent to mislead.

[EN BANC, *12th and 19th July, 1904.*]

Statement. Application on behalf of the defendant for leave to appeal from a conviction for perjury, made by SIFTON, C.J. The charge upon which such conviction was made, is set forth in the judgment. The motion was argued before WETMORE, SCOTT, PRENDERGAST and NEWLANDS, JJ.

Argument. *J. L. Fawcett*, for defendant (appellant).

E. P. McNeill, for the Crown (respondent).

The judgment of the Court was delivered by

[*19th July, 1904.*]

Judgment. SCOTT, J.:—This is an application for leave to appeal from a conviction made by the Chief Justice whereby the defendant was convicted "For that he, the said Jesse Hinman, did commit perjury, when giving evidence on his own behalf at the court-house in the town of MacLeod, in the Judicial District of Southern Alberta, in the North-West Territories, on or about the 8th day of March, A.D. 1904, while he, the said Jesse Hinman, was being tried for shooting with intent to do grievous bodily harm to Dennis Lynch by swearing in substance and to the effect following: First, that he, the said Jesse Hinman, did not strike Rattlesnake Pete with a gun, and, secondly, that he the said Jesse Hinman never struck any person over the head with a gun."

The grounds of the present application are:—

1. That the charge is insufficient in that it does not allege an intent to mislead.

2. That the charge states no indictable offence.

[1] 3 Terr. L. R. 58.

3. That the case ought not to have been left to the jury, because there was not sufficient evidence to convict, the particulars of the insufficiency relied upon being set out in the notice of motion. Judgment. Scott, J.

It appears from the copy of the proceedings at the trial filed on this application that, upon the defendant being found guilty of the charge, his counsel moved in arrest of judgment, on the ground that the charge contained no indictable offence, and that the motion was refused. It has not been made to appear on this application that the Chief Justice has ever been applied to to reserve a case upon the question of the insufficiency of the evidence, or that he has refused to reserve that question. Such being the case, this Court is of opinion that it is not authorized by section 744 of the Criminal Code, to grant leave to appeal upon that question.

This Court is also of opinion that the charge is not open to the objection taken to it. In *Regina* v. *Skelton*,[1] the question whether, upon a charge of perjury, it was necessary to allege the intent to mislead was discussed, and it was held to be unnecessary. The charge in this case appears to answer the requirements of section 611, and in drawing it the form FF. (e) in the schedule appears to have been followed.

The effect of that section on the forms in FF., was also discussed in the case referred to, and, according to the opinion then expressed, the present charge appears to contain a sufficient statement of the offence.

Application refused.

REX v. THOMPSON (alias PETERSON).

Criminal law—Evidence—Deposition taken at preliminary inquiry.

In order that s. 687 of the Criminal Code, 1892, can apply, to make admissible at the trial a deposition taken at the preliminary inquiry of a witness, since deceased, the fact that the justice signed the deposition must appear from the document itself and cannot be proven by extrinsic evidence.

At a preliminary inquiry adjournments were made from time to time, and the justice, after entering the adjournments as they respectively occurred, signed his name to each. Except for a general heading to each day's proceedings, there was no caption to any deposition, and there were no signatures by the justice other than those mentioned.

Held, that the deposition should be read together as one continuous document, but that what appeared on the document was not sufficient to enable the Court to say that the deposition purported to be signed by the justice, and it was, therefore, inadmissible as evidence at the trial and a conviction based thereon was quashed.

[EX BANC, *12th and 19th July, 1904.*]

Statement. This was a case reserved for the opinion of the Court *en banc*, by WETMORE, J., before whom sitting without a jury, the case was tried and the defendant convicted. The case reserved so far as is material to this report, was as follows:—

"Christian Thompson, alias Charles Peterson, was tried before me without a jury, and convicted, at Yorkton, in the Judicial District of Eastern Assiniboia, on the 10th and 11th May last, upon a charge of having on or about the 31st day of December last, at Fort Pelly, in the said Judicial District, stolen $960, from the person of one Peter Jenson."

Peter Jenson, from whose person the money is alleged to have been stolen, was sworn, and gave his testimony at the preliminary examination, before the Justice of the Peace. After that and before the trial before me, he died, which was duly proved. Henry Christopherson, Esquire, was called as a witness at the trial before me, and testified that he was a Justice of the Peace, in and for the North-West Territories, and the justice who held the preliminary examination in this case. The deposition of Jenson was placed in his hands and he testified that the writing of the deposition down to the signature of Jenson was his (Christopherson's) handwriting, and was the evidence of Jenson given at such pre-

Statement.

liminary, and that the signature to it was that of said Jenson, and was signed in his (Christopherson's) presence, that such deposition was read over to Jenson before he signed it, and that it was in the same condition as when it was so signed by him. Mr. Christopherson also testified that the evidence of Jenson was taken in the presence and hearing of the accused, that the accused was represented at the preliminary by counsel, and that such counsel had the opportunity of cross-examining Jenson.

The depositions of several witnesses were taken at the preliminary, and that Jenson was one of them. There was no caption to either this deposition of Jenson, or to those of the witnesses generally examined at the preliminary in the form prescribed by Form S. in Schedule 1 of the Criminal Code, 1892, or anything of the like or a similar form. There was no memorandum whatever signed by the justice referring to the deposition of Jenson or the deposition of any other witness or witnesses, who were examined at such preliminary.

The depositions generally were commenced and headed as follows:—

"A Magistrate's Court held in Yorkton, on Monday the 29th day of February, 1904, before Henry Christopherson, J.P.

"The King v. Christian Thompson, alias Charles Peterson."

"Theft."

"Court opened at 10 a.m."

"Sergeant Junget, N. W. M. P., sworn, says:—

"Peter Jenson, sworn says," and then followed the evidence given.

During the progress of the examination as appears from the depositions, the inquiry was adjourned from time to time, and a memorandum of such adjournment was made. The proceedings at the preliminary inquiry, including the depositions of the witnesses examined, were taken on separate sheets of paper, numbered consecutively from No. 1 inclusive on, and the Justice after entering the adjournments as they respectively occurred, signed his name thereto in every instance, except the one before the last; on that occasion there was only an adjournment, but the proceedings

Statement. of the last day followed it, and the Justice signed his name to both the proceedings of that and of the preceding day. The proceedings of the last day included a memorandum of the Justice's decision that the accused be committed for trial. Nothing in connection with the inquiry was signed by the Justice, except as hereinbefore stated. The deposition of Jenson was tendered in evidence. I received it subject to objection.

The question submitted for the opinion of the Court of Appeal, is:—

Was the deposition of Peter Jenson properly received in evidence?

Unless the deposition was properly admissible there was no evidence to establish that any theft had been committed.

The question was argued before the Court, consisting of

Argument. *R. B. Bennett,* for the accused.

J. T. Brown, for the Crown.

The judgment of the Court was delivered by

[*19th July, 1904.*]

Judgment. NEWLANDS, J.:—The question to be determined in this case is whether the deposition of Peter Jenson should have been admitted in evidence.

It was proved at the trial that the deposition was taken in the presence of the accused, and that his counsel had a full opportunity of cross-examining the witness, and, therefore, the deposition would be admissible under section 687 of the Criminal Code, if it purported to be signed by the Justice before whom the same purports to be taken. This must appear from the document itself and cannot be proved by extrinsic evidence: *Queen* v. *Miller*,[1] *Queen* v. *Hamilton*.[2]

The depositions taken in this case commence with the words: "A Magistrate's Court, held in Yorkton, on Monday the 29th day of February, 1904, before Henry Christopherson, J.P."

[1] 4 Cox C. C. 166.
[2] 2 Can. C. C. 390.

Judgment. Newlands, J.

Apart from the above statement, there is no commencement or caption to the deposition of Peter Jenson, but at the end of each day's proceedings the Court was adjourned to a fixed date, and each subsequent day's proceedings is commenced on the date to which the Court was adjourned, so that the depositions may be taken to be a continuous document, and should be read together. It is further required by section 687 of the Code, that the deposition before it is admissible must purport to be signed by the Justice before whom the same was taken. This signature is for the purpose of authenticating the deposition of the witness. Section 590, sub-sec. 5, provides that the signature of the Justice may be either at the end of the deposition of each witness or at the end of several or of all the depositions in such a form as to show that the signature is meant to authenticate each separate deposition.

The deposition of Peter Jenson is not signed by the Justice, nor is there any certificate at the end of the depositions in the Form S. in the Code, or to that effect. The only signatures are at the end of each day's proceedings, and do not appear to be placed there for the purpose of authenticating the depositions of the witnesses, but to be for the purpose of shewing that the Court was adjourned to a fixed date, and at the end of the depositions to shew the action the Justice took in the matter. It cannot, therefore, be said that the deposition of Peter Jenson purports to be signed by the Justice before whom it was taken, and no extrinsic evidence can be admitted to prove that fact under section 687; it cannot, therefore, be admitted under that section.

Although a deposition may not be admissible under section 698, it may still be admissible, if it is proved affirmatively that the Justice in taking the same complied with all the provisions of the law. These provisions are set out in section 590 of the Code. In this case it was not proved that these provisions were complied with, no evidence being given that the deposition was signed by the witness and Justice, the accused, witness and Justice being all present at the same time.

I am, therefore, of the opinion that the deposition of Peter Jenson was not admissible under the provisions of section 687 of the Code, and that as it was not proved that all the provisions of section 590 had been complied with

Judgment. Newlands, J.

it should not have been admitted in evidence, and that, therefore, the conviction should be quashed, and the accused discharged.

Conviction quashed.

FLEMING v. McNEILL.

Trespass—Digging and removing coal—Measure of damages—Wrongful and wilful acts—Res judicata.

A wilful trespass means a deliberate trespass by a person who commits it intentionally with a knowledge that he has no right whatever to do the act.

In assessing damages for trespass the milder rule should be applied unless the contrary be shown.

Judgment of SIFTON, C.J., varied.

[EN BANC, *5th, 6th, 7th July and 16th October, 1903.*]

Statement.

An appeal by the plaintiffs from the decision of SIFTON, C.J.

The action was for an injunction and damages in respect of alleged trespasses committed by the defendants in entering the plaintiffs' lands and digging and taking away coal therefrom. The statement of claim alleged that the defendants wrongfully and wilfully entered and trespassed upon the plaintiffs' lands and dug and removed coal therefrom, and converted the same to the defendants' own use.

The action was tried before MCGUIRE, C.J., sitting with a jury, on the 31st July and the 1st of August, 1902. At the close of the case the learned trial Judge ruled that there was no evidence to go to the jury in support of the defendants' defence, and withdrew the whole case from the jury, and directed a reference to the Clerk of the Court, to ascertain the amount of the plaintiffs' damages, and in pursuance thereof a formal order was settled by the opposing counsel, and issued out of the Court, paragraph 1 of which order was in the following words:

"This Court doth declare, order and adjudge that the plaintiffs are entitled to recover damages from the defendants, for and in respect of the wrongful and wilful trespass and conversion complained of in the plaintiffs' statement of claim.

"And this Court doth further order and adjudge, that it be referred to Lawrence J. Clarke, the Clerk of this Court,

at Calgary, to ascertain and report all the damages occasioned to the plaintiffs by said trespass and conversion, up to and including the date of the said clerk's report." Statement.

The Clerk heard evidence on the question of damages and then by consent, the evidence was submitted to SIFTON, C.J. (successor to MCGUIRE, C.J., who had in the interval resigned his office), who gave judgment, awarding the plaintiffs $1,680.20 damages. From this judgment the plaintiffs appealed. The appeal was argued before WETMORE, J., SCOTT and PRENDERGAST, JJ., on the 4th, 6th and 7th July, 1903.

N. D. Beck, K.C., for plaintiffs (appellants). Argument.

J. A. Lougheed, K.C., for defendants (respondents).

The judgment of the Court was delivered by

[*16th October, 1903.*]

WETMORE, J.—The defendants attempted to set up at the argument of this appeal that the learned trial Judge erred in holding that there was no evidence to go to the jury, on the part of the defendants to support their right to the coal taken, and that there was, therefore, a mistrial. We held that this point was not under the circumstances of the case open to him. The first question then that this Court has to consider is what rule should be applied in assessing the damages. I have come to the conclusion that the language of paragraph 1 of the formal order of the Court of 1st August, 1902, does not preclude the defendants from setting up that the milder rule for assessing damages in cases of this nature should be applied. The language of that paragraph is as follows: "This Court doth declare, order and adjudge that the plaintiffs are entitled to recover damages from the defendants for and in respect of the wrongful and *wilful* trespass and conversion complained of in the plaintiffs' statement of claim." It was urged on behalf of the plaintiffs, that the use of the word "wilful" was an adjudication that the trespass complained of was wilful and therefore that the stronger rule for assessing damages should be applied. I cannot agree with that contention. Judgment.

Judgment.
Wetmore, J.

In the first place, there is nothing in the judgment of the trial Judge which pronounces on the character of the trespasses in any way. As a matter of fact that question does not appear to have been argued before him or brought under his notice at all.

The evidence before the trial Judge presented, to say the least, ample scope for discussion as to whether or not the trespasses were of such a character that the sterner rule for measuring damages should be applied. Knowing the care which the trial Judge always brought to bear upon any matter that came under his consideration, I cannot bring my mind to believe that he would come to a conclusion as to the character of the trespasses without giving an opportunity to have the question thoroughly discussed. It does not seem to me altogether clear that the word "wilful" in the order does, under the circumstances, necessarily imply that the trespasses were of such a character that the sterner rule for measuring damages *must* be applied. The defendants deliberately entered the plaintiffs' lands and dug and took away the coal. They did this fully intending to do it. There was no mistake on their part as to this. Therefore, this act may in that sense be said to be wilful. In *In re Young & Harstons Contract*,[1] Bowen, L.J., defines the word "wilful" as generally used in Courts of law as follows: "It implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing and is a free agent." But a person may "wilfully" do the act in question in that sense, but may at the same time do it in the *bona fide* belief that he has the right to do it, and if he has such *bona fide* belief it may happen that the case would be one in which the sterner rule would not be applied. *Martin* v. *Porter*,[2] seems to be the principal case relied on for applying the sterner rule where the trespass is wilful. I think, however, the tendency of later decisions is to interpret that wilfulness to mean a deliberate trespass by a person who commits it intentionally with a

[1] 54 L. J. Ch. 1144; 31 Ch. D. 168; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245.
[2] 5 M. & W. 352; 2 H. & H. 70.

knowledge that he has no right whatever to do the act. For instance, in *Job* v. *Potton*,[3] we find Bacon, V.-C., laying down the following:[4] "If a wrongdoer does an act, which if it were the case of a chattel, and capable of sustaining an indictment, would amount to larceny—then the most rigorous mode of taking the accounts, is that which is adopted against him." In *The Union Bank of Canada* v. *Rideau Lumber Co.*,[5] the allegation in the statement of claim was that the trespasses were "wrongfully and wilfully" committed. The formal judgment drawn up and settled, stated that "this Court doth declare and adjudge that the plaintiffs have the right to recover damages from the defendants in respect of the matters complained of in the plaintiffs' statement of claim," and it was referred to the Master to ascertain the value of the timber, and the Master treated the matter as open and reached the conclusion that the trespasses were not wilful, but rather innocent, or inadvertent, and applied the milder rule of assessment. The report was appealed from, and Lount, J., held that the damages should be assessed on the footing that the trespasses were "wrongful and wilful." His decision was appealed to the Court of Appeal, and the decision of that Court was given by Garrow, J.A., who is reported as follows, at page 725: "In the reasons for his judgment the learned Judge (Lount, J.), apparently held that the nature and quality of the trespasses in question were *res judicata* by the judgment pronounced at the trial, a conclusion which with deference I am inclined to doubt." In this case the Court of Appeal held that the sterner rule should be applied, because the evidence disclosed that the trespasses were "wrongful and wilful," but as it appears from the quotation I have made, if the contrary had appeared by the evidence, it was, to say the least, doubtful whether they would not have upheld the Master's report, notwithstanding the form of the order. In view of all the circumstances of this case and a consideration of the authorities I have referred to, I have come to the conclusion that in settling the order in question the words "wrongful and wilful trespass and conversion" therein were used merely as words of description, echoing the language of the state-

Judgment.
Wetmore, J.

[3] 44 L. J. Ch. 262; L. R. 20 Eq. 84; 32 L. T. 110; 23 W. R. 588.
[4] At p. 97 of L. R. 20 Eq.
[5] 4 O. L. R. 721.

Judgment.
Wetmore, J.

ment of claim, and without the intention of so describing the character of the trespass that the sterner rule for measuring damages must necessarily be applied. It was, therefore, open to the present Chief Justice to consider whether the milder rule for assessing damages should be applied, and if the evidence warranted it to apply it. The learned Chief Justice has found that the milder rule should be applied, because the defendants worked under a mistaken idea "that they were entitled to enter upon the said land."

I am very much impressed with the remarks of Fry, J., in *Trotter* v. *Maclean*,[6] where, after quoting with approval the observations of Lord Hatherley in *Jegon* v. *Vivian*,[7] he remarks as follows:[8] "Those observations are very material in two ways. In the first place, they express the view of the Lord Chancellor, that the milder rule is to be assumed when the propriety of applying the contrary rule is not shewn and they throw the burden on him who asserts that the severer rule ought to be applied." I am prepared to follow what is there suggested, and the evidence does not satisfy me that this is a case to which the severer rule should be applied to all the trespasses complained of. I am of opinion, to use the language of Lord Hatherley in *Jegon* v. *Vivian*,[7] that the defendants had[9] "a reasonable colour of title on which they might proceed," and so were not wilful wrongdoers in the sense that they were aware that they had no right to do what they did do. This is true down to the 1st August.

I am of opinion, however, that fixing the damages on a basis of 20 cents a ton royalty, cannot be supported. Under the circumstances of this case and under the authorities the measure of damages should be the value of the coal at the mouth of the mine, less the cost of digging it and transporting it there as a merchantable article, and by digging it I mean, hewing it, as it is expressed in some of the cases. In getting at this cost of digging and transporting it is not correct to charge the expense of maintaining and managing the defendants' company, and the payment of its officers. The company and its machinery for its government and management was created with a view of carrying on its legiti-

[6] 49 L. J. Ch. 256; 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244.
[7] (1871) 40 L. J. Ch. 389; L. R. 6 Ch. 742, 760; 19 W. R. 365.
[8] At p. 587 of 13 Ch. D.
[9] See p. 397 of 40 L. J. Ch.

mate work, not for the purpose of committing acts of trespass, no matter how innocently done, and the cost of such government and management must be charged against its legitimate work. In so far as the trespass is concerned the defendants stand as an individual, and have a right to deduct from the value at the mouth of the mine, what it actually disbursed and paid out to the men who went in and actually did the work and committed the trespass, and what was disbursed as incidental to such work. Judgment. Wetmore, J.

The value of the coal at the mine's mouth, less the cost of digging and transporting it there, was 74 cents a ton. The coal taken down to 1st August was 6,108 tons, which at 74 cents a ton amounts to $4,519.92.

The trespasses after the 1st August were deliberately and knowingly wilful on the part of the defendants. The judgment of McGuire, C.J., was delivered on that date, and it is impossible to hold that after that date they could have *bona fide* imagined that they had any rights as to the coal taken after that date. They are liable for the value of the coal at the mouth of the mine less the costs of transportation only, namely, $3.05 a ton. The defendants after 1st August took out 2,293 tons, which at $3.05 a ton amounts to $6,993.65. This makes the total damages which the plaintiffs are entitled to recover in respect of the trespasses in taking the coal $11,513.57. The order appealed from will be varied by changing the figures "$1,680.20" wherever they occur therein to "$11,513 57," and the defendants will pay to plaintiffs their costs of this appeal.

Order appealed from varied with costs.

SJOSTROM v. GALE.

Practice—Setting aside judgment—Irregularity—Affidavit of service—Evidence.

Evidence given by affidavit stands on the same ground as evidence given in any other way, so that an affidavit need not of necessity be altogether disregarded merely because of an erroneous statement therein either by accident or design.

[WETMORE, J., *18th November, 1904.*]

Statement. Application by Chamber summons to set aside a judgment. The points raised are set forth in the judgment.

Argument. *J. T. Brown*, for the motion.

E. L. Elwood, for plaintiff, *contra.*

Judgment. WETMORE, J.—This is an application to set aside the judgment on the ground of irregularity, and failing that to let the defendant in to defend on the merits. The irregularity complained of is an alleged defect in the affidavit of service of the writ of summons. The affidavit alleges that the writ was served on the 28th day of June, one thousand eight hundred and ninety-four. The writ was issued on the 31st May, 1904. There is no doubt that the writ was served on the 28th June last, as appears by affidavit of the defendant himself. The error is undoubtedly a clerical one, and was due to the fact that the officer serving the process made use of an old form of affidavit, which was printed "one thousand eight hundred and ninety——," leaving a blank for the rest of the year to be filled in. It is contended by Mr. Brown for the defendant, practically, that this error makes the affidavit a nullity, just as if a blank affidavit had been filed.

I have come to the conclusion that this view cannot prevail. As stated, the error in the affidavit is evidently a clerical error; it is utterly impossible that the defendant could have intended "one thousand eight hundred and ninety-four," because that was ten years before the issue of the writ. Evidence by affidavit stands on the same ground as evidence received any other way. There may be an erroneous statement by accident, or possibly intention, but it does not follow

Judgment.
Wetmore, J.

that the whole evidence is therefore to be disregarded altogether. Now, making allowance for the clear fact that this was a clerical error, we have it established that the party was served in the month of June, and looking at surrounding circumstances, especially the date of the issue of the writ, there could be no other June except June, 1904; and the words "one thousand eight hundred and ninety-four" can be read as surplusage, and I could read the affidavit just as if he stated that he had served the defendant in the month of June; if he had so sworn there is only one June which would be applicable, which would be last June. I cannot therefore treat this affidavit as no affidavit whatever, and if I do treat it as an affidavit there was an affidavit of service on file to comply with Rule 89 of "The Judicature Ordinance." The defendant therefore fails on this ground, but I think there is sufficient to allow him to defend upon the merits; he has at any rate established the right to set up a partial defence to the claim.

The order, therefore, will be that the judgment be set aside, and the defendant allowed to file an appearance and defence within fourteen days. The defendant must pay the costs of entering judgment and execution and of opposing this motion; but, in view of the fact that there has been very great carelessness on the part of the plaintiff, which invited this application, I will lump those costs at thirty-seven dollars.

Order accordingly.

PINKI v. THE WESTERN PACKING CO. OF CANADA.

Practice—Issue of writ in wrong judicial district—Jurisdiction of Supreme Court—Conditional appearance.

Notwithstanding that the rules of Court do not provide for a conditional appearance, a defendant may nevertheless appear under protest and thus save any rights that would otherwise be waived. The ground of protest, however, should be specifically stated.

An unconditional appearance by the defendant to an action instituted in the Supreme Court, but entered in the wrong judicial district, waives the defect.

[WETMORE, J., *2nd June, 1904.*]

Statement. The plaintiff sued the defendants in the Supreme Court of the North-West Territories, Judicial District of Eastern Assiniboia. The cause of action arose and the defendants carried on their business within the Judicial District of Western Assiniboia. The action, therefore, should have been entered in that Judicial District. The defendant appeared to the writ under protest, but the protest was confined to the question of service of the writ of summons. The defendant, by the first paragraph of his defence, objected to the jurisdiction of the Court to entertain the action and this question was, by the consent of the parties, embodied in a stated case and argued before WETMORE, J., sitting in Chambers. The learned Judge, after argument, reserved his decision and subsequently delivered the judgment now reported.

Argument. *E. L. Elwood,* for the plaintiff.

E. A. C. McLorg, for the defendant.

Judgment. WETMORE, J.—My judgment must be for the plaintiff upon the question of law raised by the special case herein. This action is for a debt for goods sold and delivered, money paid, services performed, commission, etc., and is what was known under the old practice as a transitory action. The Superior Courts of Common Law in England had, on the 15th July, 1870, jurisdiction over causes of action of such a character, and, therefore, the Supreme Court of these Territories has jurisdiction over such actions by virtue of section 48 of *The North-West Territories Act.* Section 4 of *The Judicature Ordinance,* which provides that "Suits

Judgment.
Wetmore, J.

shall be entered, and unless otherwise ordered, tried in the judicial district where the cause of action arose or in which the defendant or one of several defendants resides or carries on business at the time the action is brought," merely regulates the procedure. Cases may arise where neither the cause of action may be said to have arisen within the Territories and where the defendant, or none of them, if there are several, reside within the Territories. Take for instance the case of a promissory note made in Chicago and payable there, and default in payment. It could not be successfully contended that the Superior Courts of Common Law in England would not have jurisdiction over the subject matter provided that the party in default came within the jurisdiction, even for a temporary purpose, and could be served with process. Therefore, the Supreme Court of the Territories would have jurisdiction in a similar case provided the party in default came within the Territories for a temporary purpose. It could not be said, however, that in such case the party was a resident of any part of the Territories. Some question might possibly arise as to what judicial district or deputy clerk's district the action should be commenced in, but no question could be raised as to the jurisdiction of the Supreme Court of these Territories in the matter. The Act of Parliament has conferred the jurisdiction by the section I have referred to, and the Legislative Assembly has no power to take it away, and, in my opinion, has not attempted to do so. In the cases provided for in section 4 of the Ordinance, the action must be entered as provided in that section, and the omission to comply with the Ordinance in that respect is merely an omission to comply with the prescribed procedure. Cases that do not come within the section are not embraced by it, and I am not concerned at present as to what the correct practice in such cases should be.

For the purpose of deciding the question of law raised I must assume that paragraph one of the statement of defence is true, that is, that the defendant company carries on business at Medicine Hat in the Judicial District of Western Assiniboia, and that the cause of action, if any, arose there.

Judgment.
Wetmore J.

In my opinion the defendant, by appearing, has waived the error in bringing the action in the Judicial District of Eastern Assiniboia, and submitted to the jurisdiction of the last named District Court. Possibly this may not be the correct way of expressing it. It seems to me that the question is not one of jurisdiction at all. The Supreme Court of the Territories has jurisdiction, and each District Court is merely a branch of the Supreme Court. The question rather is, in which district of the Supreme Court should the case have been entered? The Ordinance lays it down by way of procedure that it should have been entered in the District of Western Assiniboia, and, therefore, it was irregular to enter it in Eastern Assiniboia, and the defendant has waived the irregularity by appearing. Under the old practice a party by appearing to the action took a step in the cause and waived any irregularity there might have been prior to such appearance. The practice in cases where the party wished to object to the irregularity of the writ of service of it was to enter a conditional appearance, and then apply to set the writ of service, as the case might be, aside. In order to avoid the necessity of entering a conditional appearance, at any rate when the application was to set aside the services of the writ, Rule 30 of Order XII. of the English Rules was promulgated, which provided that a defendant should be at liberty without entering a conditional appearance, to move to set aside the service of a writ or notice of the Court or to discharge the order authorizing the service, and what is now Rule 87 of *The Judicature Ordinance* was enacted, which provided that a defendant, before appearing, might be at liberty to apply to set aside the service of the writ or the order authorizing service or the writ itself on the ground of irregularity. Neither of these provisions, however, take away the rule that prevailed prior to their promulgation or enactment, that if an unconditional appearance was entered the irregularity would be waived thereby. I do not lay it down that the defendant in this case could not have caused such an appearance to be entered as to preserve its right to object to the action being entertained by this Court.

It has been urged that there is no provision for entering a conditional appearance, that the English Rules of Court

do not provide for such an appearance, and there are cases in which it is so laid down; and it was also urged that the rules prescribed by the Ordinance do not contain any provision for a conditional appearance. But there are cases which lay it down that the party may appear and at the same time protest either on a separate document or on the face of the appearance, and so save the right. I refer to *Frith* v. *De las Rivas*,[1] *Moyer* v. *Clautie*,[2] and *"The Vivar"*[3]. In most of the cases of a similar character to these the question arose with respect to the jurisdiction over the person of the defendant, and it was contended that by appearing the defendant had waived the question and submitted to the jurisdiction. The Courts held that by appearing under protest there was no waiver. The inference would be that if the appearance had not been under protest the question would have been waived.

The defendants contend that they did enter an appearance in this case in such form as to save their right. I am of opinion that this is not correct. The appearance was as follows: "Enter a conditional appearance for the defendants, who carry on business at Medicine Hat in the Western Judicial District, under protest to service in this action effected of the writ of summons herein."

In all the cases I have before referred to the protest was to the jurisdiction. In this case the protest is merely to the service of the writ of summons. The appearance, therefore, is only conditional or under protest as to the service. There is no protest to the jurisdiction. There will be judgment for the plaintiff on the special case, and the first paragraph of the statement of defence will be struck out, and the defendants will pay the plaintiff's costs of and incidental to the special case and the hearing and judgment thereon.

Order accordingly.

[1] (1893) 1 Q. B. 768; 62 L. J. Q. B. 403; 69 L. T. 383; 41 W. R. 493.
[2] 7 Times Rep. 40.
[3] 2 P. D. 29; 35 L. T. 782; 25 W. R. 453.

FITZSIMON v. WALKER.

Principal and agent—Commission on sale of land—Quantum meruit—Costs.

The defendant listed with the plaintiff, a real estate broker, for sale, a half section of land on the terms that the plaintiff should be paid a commission on the amount of such sale. The amount of the sale price was not stated, but the plaintiff was not to sell for less than $10 per acre without the defendant's consent. P. having through his agent G. applied to the plaintiff for a statement of farms he had for sale, the plaintiff furnished G. with a number of statements, including one respecting the defendant's farm, quoting the price at $10 per acre. P. was aware, from other sources, that the defendant's farm was for sale and had at different times been over the defendant's farm, but nevertheless he, shortly after receiving the statement furnished by the plaintiff to G., went out and inspected the defendant's farm, informing the defendant that the plaintiff had sent him there and showed to the defendant the statement furnished to G. by the plaintiff. P. did not then purchase the farm, but subsequently negotiations were renewed directly with the defendant resulting in a sale to P. for $2,600. At the trial P. testified that he was influenced to go out and inspect the defendant's farm by the information supplied by the plaintiff to G.

Held, that the plaintiff was entitled to recover the reasonable value of his services, what he had done having led to the sale.

[WETMORE, J., *27th February, 1904.*]

Statement. Trial of an action before WETMORE, J., without a jury. The facts are set forth above and in the judgment.

Argument. *J. T. Brown*, for the plaintiff.

E. L. Elwood, for the defendant.

Judgment. WETMORE, J.—I find as a matter of fact that the defendant listed the land mentioned in the statement of claim with the plaintiff, a real estate broker, to effect a sale thereof. At first such land was listed to realize from any sale thereof a stated price to be paid to the defendant, that is, it was not to be sold at a less price, and the plaintiff was to have for his services any amount he might effect a sale for, over and above that price. No sale was effected under that arrangement. After this, however, the defendant put $10 an acre on the property (it was a half section and the price at that figure would be $3,200), and the plaintiff was to have for his services, if it sold at that price, a commission of five per cent. This arrangement was contained in a letter from the defendant put in evidence at the trial. This letter was not dated, but it was written sometime in September, 1902. There is no doubt that the ar-

Judgment.
Wetmore, J.

rangement contained in that letter was a special one. The letter was written in answer to a letter from the plaintiff to the defendant. There was a prospect of the property being sold through a firm of brokers in Winnipeg, and the defendant, by this letter, fixed the price of the farm at $10 an acre, and agreed that if it was sold for that price in the manner then contemplated, the firm of Winnipeg brokers and the plaintiff were each to receive a commission of five per cent.

I am not prepared to find or hold that this was an express agreement to pay the plaintiff five per cent. commission upon any price the land was sold for through the instrumentality of the plaintiff. But I do find and hold that from the time this letter was received by the plaintiff in September, 1902, the plaintiff was entitled to be paid by commission upon the amount the property sold for if effected through his instrumentality, and the arrangement as to being paid by whatever he might realize over and above a stated price was at an end. The plaintiff was not at liberty to sell this property without the consent of the defendant, at a less price than $10 per acre. But I have no doubt whatever if the sale had been made by the plaintiff and with the consent of the defendant for a less sum than $10 per acre the plaintiff would have been entitled to his commission on the selling price.

I find that this land being so listed with the plaintiff under the arrangement existing after the receipt of the letter in September, 1902, that the purchaser of the land, Piercy, through his agent, Garner, applied to the plaintiff for a statement of farms he had for sale in the vicinity of Wapella, and the plaintiff furnished him with a number of statements, and among others with one respecting the defendant's farm, specifying the land, the situation of it, the number of acres cultivated, the number of acres fenced, the number of acres of unbroken land capable of being broken, the quantity of standing timber, the buildings, number of wells and quoting the price $10 per acre. Piercy, as Garner notified the plaintiff he intended doing, after he got these statements, went to Moosomin for the purpose of inspecting a property there which he had heard of, but this property not being satisfactory, Piercy very properly went to the plaintiff and notified him that he was going out to

Judgment. Wetmore, J.

inspect Walker's place. It seems to me it makes no difference whether this notice was given in consequence of a question asked by the plaintiff or whether it was volunteered by Piercy. The plaintiff at once offered to drive him out, but Piercy declined for the reason, as he stated, that he had a horse and rig of his own, that he was going out to his father-in-law's, Garner's, that night, and as the property in question was only a mile distant from Garner's, he would go over himself, whereupon the plaintiff very naturally told him to inform the defendant that he had sent him. I think that this was quite natural in view of the fact that the plaintiff would naturally suppose or would have a right to suppose that Piercy was going there in consequence of the information he had received from him contained in the statement handed to Garner. Piercy, when he went to the defendant, informed him that Fitzsimon had sent him there, and showed him the statement he had received from Fitzsimon. And Piercy swore that "he was influenced to go out to see this particular farm by having the particulars and knowing the price," and he swore that he meant "by having the particulars" the information respecting this property contained in the statement furnished by the plaintiff to Garner.

I find under these facts, to use the language of Brett, L.J., in *Wilkinson* v. *Alston*,[1] that the plaintiff introduced the property to the notice of Piercy and that Piercy purchased it in consequence of that introduction. I also draw attention to the language of Bramwell, L.J., in the same case, at page 734[2]. In *Green* v. *Bartlett*,[3] the head-note is as follows: "The plaintiff, an auctioneer, was employed by the defendant to sell an estate for him upon the terms that the plaintiff should be paid a commission on the amount of such sale. The plaintiff advertised the property and put it up for sale by auction, but without being able, then, to obtain a purchaser for it. The estate was, however, shortly afterwards sold by the defendant himself by private contract to a person who had attended the sale by auction and had first learned of the estate being for sale by seeing the plain-

[1] 48 L. J. Q. B. 733; 41 L. T. 394; 44 J. P. 35, C. A.
[2] Cf. 48 L. J. Q. B.
[3] 14 C. B. (N.S.) 681; 32 L. J. C. P. 261; 8 L. T. 563; 11 W. R. 834.

Judgment. Wetmore, J.

tiff's advertisement of it. During the negotiations with the purchaser, and before completing the sale to him, the defendant withdrew the plaintiff's authority to sell the estate: Held, that the plaintiff was, nevertheless, entitled to the commission agreed to be paid on the sale, the relation of buyer and seller between the defendant and the purchaser of the estate having been brought about by what the plaintiff had done." That head-note sets forth the effect of that decision. I also draw attention to the observations of the Judge in *Prickett* v. *Badger*.[4]

It was urged that the plaintiff was not entitled to commission unless he sold the property at $10 an acre, or the property was sold at that price. In *Mansell* v. *Clements*,[5] the property was listed with the broker, the plaintiff, at £2,200; the property was, however, sold through another person than the plaintiff by the defendant for £1,700; the Court, however, refused to set aside a verdict for the plaintiff for his commission on the £1,700. In that case the property was placed in the plaintiff's books for sale by instruction of the defendant, and all the plaintiff did was to give cards to view the premises. One Upton, being desirous of purchasing property in the neighbourhood, saw a board containing a notice that this property was for sale and referring him to one Phillips (not to plaintiff at all). Upton then went to the plaintiff's office and enquired what houses were to be had in the neighbourhood; a clerk there gave him cards to view five different houses, the defendant's property being one of them. The back of the card contained particulars of price, rent, fixtures, etc. Upton visited the premises and was shown over them by defendant's agent and offered £1,700 for them; the negotiation, however, failed at that time, but was afterwards re-opened and a sale completed for £1,700. Upton swore that when he left the property on the first occasion, that is, before he went to the plaintiff's office, he abandoned all notion of purchasing the property, thinking the price would exceed his limits, but when he learned what was asked for it he determined to go there again. The following question was put to him by the Judge: "Would

[4] 1 C. B. (N.S.) 96; 26 L. J. C. P. 33; 3 Jur. (N.S.) 66; 5 W. R. 117.

[5] L. R. 9 C. P. 139.

Judgment.
Wetmore, J.

you, if you had not gone to the plaintiff's office and got the card, have purchased the house?" To which Upton answered: "I should think not." The question was objected to. The jury gave a verdict for the plaintiff and a rule *nisi* to enter a nonsuit, or a verdict for the defendant was granted. One of the grounds was that the question put by the Judge was inadmissible. The Court discharged the rule, holding the question proper. But they also held that apart from the answer to that question there was evidence to warrant the verdict. I think that this case is a very strong one to support the plaintiff's right to recover in this action. I may add that if the fact that the property did not sell for $10 an acre is, under the circumstances of this case, to defeat the plaintiff's right to commission, it would be very easy for an unscrupulous person having property to sell to get all the benefits of a broker's services in bringing the property under the notice of buyers and introducing them by the simple method of fixing the proposed price at a figure which he knows that no person would give or larger than he is prepared to accept.

The fact that Piercy was aware, from other sources, that this property was for sale, or that he had repeatedly passed over the property in going backward and forward, does not affect this question of the plaintiff's right to commission, unless it is established that he made the advances in consequence of these rumours or his own knowledge of the property and not by reason of the information he had got from the plaintiff. I find that Piercy approached the defendant in consequence of the information he got from the plaintiff, and, that being so, Piercy and the defendant could not by any understanding they arrived at between themselves defeat the plaintiff's right to a commission. It could not be done by coming to an arrangement or understanding between themselves that the sale was being made independent of the plaintiff, because that as a fact would not be true. I am unable to accept the defendant's statement that there was an express agreement that the plaintiff was only to be entitled to expenses out of pocket if the property was sold for less than $3,000. Such an arrangement would be unreasonable and unbusinesslike. In my opinion the weight of evidence is against it and I do not believe it.

Judgment.
Wetmore, J.

The plaintiff is, however, only entitled to recover $90. It was contended on his behalf that there was a specific agreement to pay 5 per cent. commission. The defendant's letter in which he states: "Sell the farm at $10 per acre and take 5 per cent. each," was relied upon as establishing that agreement. That, however, was written under the special circumstances which I have before mentioned, and was not an agreement to pay the plaintiff 5 per cent. upon whatever price he might sell the land for or procure it to be sold or be instrumental in bringing about the sale for. Having procured a sale of the land at a less price than $10 an acre, he is entitled to recover what his services are reasonably worth. Possibly in the absence of the evidence to which I will draw attention a little further on, I might have been at liberty, in view of that letter, to fix the commission at 5 per cent. on the amount for which the property was actually sold, or again in the absence of such evidence, I might have been at liberty to give it at 5 per cent., that being the usual commission received by the plaintiff. But I am prevented from allowing this by the plaintiff's own conduct. At the last interview in Wapella, which the plaintiff refers to, that he had with the defendant, he consented to take $90. It is true that when asked what his charge was he first said $130, being 5 per cent. on the amount realized on the sale, and stated that was his usual commission. That amount being demurred to, as too much, he mentioned $100, and then reduced it to $90, being 5 per cent. on the first $1,000 and 2½ per cent. on the balance. Looking at all that took place on that occasion, the placing the commission at $90 was not done with a view of a settlement or in view of its being paid down, it seems rather to have been arrived at as a fair price for his services under the circumstances. This is emphasized by the plaintiff's letter written as late as 4th September last, in which he threatens the defendant with action to recover for his services, and in that letter he again, without any qualification whatever, puts his charge at $90. This is tantamount to an agreement to charge that amount, and at any rate it is such an acknowledgment on his own part that his services were not worth more that I cannot escape such a conclusion.

Judgment for the plaintiff for $90 and costs.

ROBERTSON v. EASTMAN.

Practice—Two actions for the same cause—Staying proceedings—Locus standi—Appearance—Discontinuance.

A notice of discontinuance that is merely filed but not served is a nullity.

A defendant before appearance has no *locus standi* to make any motion to the Court except the motions specified in Rule 87 of the Judicature Ordinance, C. O. 1898, c. 21.

[WETMORE, J., *15th March, 1904.*]

Statement. Summons on behalf of the defendant to stay proceedings and for other relief, argued before WETMORE, J., in Chambers. The facts are fully set forth in the judgment.

Argument. *E. A. C. McLorg*, for the motion.

J. T. Brown, contra.

Judgment WETMORE, J.—The plaintiff brought this action in the Judicial District of Eastern Assiniboia to recover a debt. The writ of summons was issued 16th November last, and was, with the statement of claim, served on the defendant on the 29th December. On the 8th January last, the plaintiff caused a writ of summons to be issued out of this Court for the Judicial District of Western Assiniboia upon the very same cause of action and seeking the same relief, and this last mentioned writ was served on or about the 12th January. On the 18th January this application was made on behalf of the defendant and a Chamber summons was granted to shew cause why the service of the second writ of summons should not be set aside, or why the service of each writ of summons should not be set aside, or in the alternative, that the plaintiff be called upon to elect with which suit he intends to proceed and that the proceedings in the other suit be forever stayed. At the return of the summons it was admitted that the plaintiff had filed a notice of discontinuance of the first mentioned action with the Clerk of the Court on the 31st December, but no notice of discontinuance had been served on the defendant and that Mr. McLorg had no notice of it when he made this application on the defendant's behalf. The discontinuance therefore

Judgment.
Wetmore, J.

was a nullity. It ought to have been by notice served on the opposite party (Rule 178 of Judicature Ordinance, and 1 *Arch Q. B. Prac.* 14th ed., 338).

Objection was raised on behalf of the plaintiff that the defendant had mistaken his remedy, that he ought to have appeared and set the matter up by plea by way of defence. In *McHenry* v. *Lewis*,[1] Jessel, M.R., lays down the following: "In this country where the actions are by the same man in Courts governed by the same procedure, and when the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do." And the other members of the Court concurred in effect. And all through the judgments in that case it is clear that the Judges were all of opinion that in such a case the proceedings in one of the actions would be stayed in the exercise of the jurisdiction of the Court to stay vexatious proceedings on motion or application for that purpose; and see *Frith* v. *Guppy*.[2] I must say, however, that that part of the summons which seeks to set aside the service of the second writ of summons is not applicable. There was nothing wrong about the service of that summons and so long as the summons stands the service is good. There was no irregularity in respect of that summons, the issuing of it was a vexatious proceeding, not an irregularity. The same is true of the service of the first summons. The service of neither summons, therefore, can be set aside, and that part of the application fails.

Proceedings in the second suit, however, may be stayed or the plaintiff may be called on to elect which suit he will proceed with and proceedings in the other suit stayed. It was set up, however, that the defendant not having appeared had no *locus standi* to make the application to stay proceedings or to call on the plaintiff to elect. If this position is correct, the defendant must fail altogether, because he has failed as to setting aside the service of the writ. The plaintiff, in support of this contention, contends that that part of the application does not come within Rule 87 of *The Judicature Ordinance*, which provides that "A defendant, before appearing, shall be at liberty to apply to a Judge to set

[1] 22 Ch. D. 397; 52 L. J. Ch. 325; 47 L. T. 549; 31 W. R. 305.
[2] 36 L. J. C. P. 45.

Judgment.
Wetmore, J.

aside the service of the writ upon him, to discharge or set aside the order authorizing such service or to set aside the writ on the ground of irregularity or otherwise"; and as that Rule provides that a party can apply in the cases specified without entering an appearance, the inference is that he cannot apply in other cases without appearing. This rule is very much like Rule 30 of Order XVI. of The English Rules; the only practical difference is that the English Rule does not provide for an application to set aside a writ. I have come to the conclusion, with very great reluctance, that this objection to this application is fatal. I say I do so with reluctance because if an appearance can be conveniently dispensed with in the cases mentioned in Rule 87, I see no reason why it should not be dispensed with in an application of this nature. They are all practically applications to stop the case in *limini*, and I see no reason why a party should be relieved of the expense for entering appearance in the one case and be put to the expense in the other. However, I am not to make the law, it is my duty to administer it. In the first place, the inference drawn by the counsel for the plaintiff, as above stated, is very strong. The practice in the Territories as provided by the Ordinance is as it is established in England, except in so far as it may not be altered by Territorial Enactments and Rules of Court. It seems that until the introduction of Rule 30 of Order XII., or a provision similar to it, it was the practice, except possibly in some special instances, to enter an appearance of some sort before making any application. In cases when the application was to set aside service or notice of a writ or order for service, if an ordinary appearance were entered it waived any irregularity and, therefore, what was known as a conditional appearance was entered, or on the common law side of the Court an appearance under protest might also be entered. To avoid the necessity for such conditional appearance the English Rule was passed. That it was the practice, however, that any application before making that Rule could not be made without an appearance, I refer to 1 *Arch. Q. B.*, 14th ed., 251, and *Annual Prac.*, 1897, 308, 1 *Dan. Ch. Prac.*, 6th ed., 346 and 353. I was inclined to think that the practice with respect to entering a conditional appearance or appearance under protest was confined to the

Chancery Courts. I find that door shut to me, because I find that it was the practice to do so on the common law side of the Court: see *Rein* v. *Stein*,[3] *Frith* v. *De Las Rivas*,[4] Under all these circumstances the inference suggested on behalf of the plaintiff is too strong for me to resist. The reason for the practice is that a party must submit himself to the jurisdiction of the Court before he can make application to it. Judgment. Wetmore, J.

Summons dismissed with costs.

LAWTON v. WILCOX.

Practice—Order to examine abroad a party to a suit.

The principles governing the granting of an order to take the evidence of a plaintiff when he resides out of the jurisdiction do not apply when the application is by a defendant to take his own evidence abroad, and *prima facie* a defendant residing abroad, who is sued here, is entitled to an order to take his evidence where he lives.

[WETMORE, J., *28th December, 1904.*]

Motion by defendant for an order to take his evidence abroad, argued before WETMORE, J., in Chambers. Statement.

E. L. Elwood, for defendant. Argument.

J. T. Brown, for plaintiff.

WETMORE, J.—This is an action to recover $160 commission on the sale of land. The defendant lives at Pomona, in the State of California. Judgment.

This application is made on behalf of the defendant for an order for his examination at Pomona, where he resides. It is objected to on the ground that such an order cannot go in favour of a party to an action. I have great doubts whether a plaintiff making such an application would, except under special circumstances, be entitled to an order, because he has chosen his forum. Such would seem to be the tenor of the authorities. In *Ross* v. *Woodford*,[1] Chitty, J., deal-

[3] (1892) 1 Q. B. 753; 61 L. J. Q. B. 401; 66 L. T. 469.
[4] (1893) 1 Q. B. 768; 62 L. J. Q. B. 403; 69 L. T. 383; 41 W. R. 493.
[1] (1894) 1 Ch. 38; 63 L. J. Ch. 191; 70 L. T. 22; 42 W. R. 188.

Judgment. Wetmore, J.

ing with an application of this character, lays down the law as follows: "There are many cases where the law has been reluctant to accede on the application of the plaintiff to a commission abroad to take evidence when it is the plaintiff who has chosen his own tribunal here. But the case is entirely different when the application is by the defendants and when they are lawfully and properly, according to their ordinary course of life, entitled to be away, and it is sought to drag them over here, when they have not avoided the jurisdiction. I think I would be wrong if I applied to them the same principle which would apply under an application by the plaintiff." *New* v. *Burns*[2] was a similar application, and in delivering judgment in that case, Lindley, L.J., approved of what was laid down by Mr. Justice Chitty in *Ross* v. *Burns*, and is reported as follows: "It is one thing to grant a commission to a foreign country where a foreigner brings an action in this country against an Englishman. In such case the plaintiff must shew very strong grounds for his application. But it is a totally different thing when an Englishman sues a foreigner over here. *Prima facie* a foreigner who is sued over here is entitled to a commission to take evidence at the place where he lives." Smith, L.J., the other Judge sitting on the appeal, practically agreed with this view, and the application in that case was allowed.

These two cases seem to me to dispose of this application, and the defendant is entitled to the order asked for.

Order granted.

RE ANGUS CAMPBELL, DECEASED.

Will — Construction—Rectification—Falsa demonstratio—Devise of lands in which testator has no interest.

The Court has no power to rectify a will by correcting what appears to be a misdescription of property thereby devised, unless there be in the will itself the means of identifying the property in question as the subject of the devise.

[WETMORE, J., *31st May, 1904.*]

[2] 64 L. J. Q. B. 104; 71 L. T. 681; 43 W. R. 182; 11 Times 53.

Statement. Originating summons by an executor to rectify the will of the deceased by correcting an alleged error in description of land, and to determine certain questions arising respecting the rights and interests of the heirs. The facts are set forth in the judgment.

Argument. *E. L. Elwood,* for the executor.

E. A. C. McLorg, for the heirs.

Judgment. WETMORE, J.—Angus Campbell, by his will dated 5th February, 1900, devised two parcels of land in the words following: "I bequeath all my interest and title in the north east quarter of section 7, township 17, range 2, west of the second meridian in the North-West Territories, with all buildings, farming implements, cattle and horses thereon, to my son William Young James Campbell."

"I bequeath to my wife, Lydia Campbell, my homestead, the south-west quarter of section 10, township 17, range 2, west of the second meridian in the said North-West Territories for her to hold or dispose of it as she may see fit." And he appointed his wife Lydia and the said William Young James Campbell executrix and executor of such will. Lydia renounced the office of executrix and the will was admitted to probate and letters testamentary issued to William Young James Campbell. The deceased testator, before his death, sold and transferred his said homestead (south-west quarter of section 10, township 17, range 2, west of the second meridian) to other parties and, therefore, did not own it at the time of his death. The deceased never owned or had any interest in the north-east quarter of section 7, township 17, range 2, west of the second meridian, but, at the time of his death, he owned or had an interest in the north-west quarter of the said section 7. The deceased died on or about the 13th December, 1901. The material used on this application does not disclose whether the deceased owned or had such interest in such north-west quarter of section 7 at the time he executed the will. I will assume, for the purposes of this application, that he had. Upon the application of the said executor and devisee I granted an originating summons calling upon all parties concerned to attend on the hearing of an application that that portion of

Judgment. Wetmore, J.

the will of the deceased be rectified in so far as the description of the land devised to the said William Young James Campbell was concerned, and to determine the rights or interests of the said William Young James Campbell both as executor as well as devisee, and of the heirs-at-law of the said Angus Campbell, deceased, in and to the north-west quarter of said section 7.

I doubt very much if I have power on an application by originating summons to rectify the will. This is really an application to obtain a declaration that the applicant is entitled as devisee to all the rights and interests which the deceased had at the time of his death in the north-west quarter of such section, and that the description of the property in the will as to the north-east quarter was a mis-description and mistake and that the testator intended the north-west quarter. I have come to the conclusion that the weight of authority is against my power to make any such declaration.

The authorities on the question seem to be somewhat conflicting. There are, undoubtedly, cases where a false description has been remedied, but running through all these cases I find that there must be shewn by the will itself an intention to devise or bequeath the particular property in question, although such property may be erroneously described in the will. For instance, in the example cited from Swinburne, in 2 *Wms. on Executors,* 9th ed., 1067. The testator had only one horse and he bequeathed *his* horse Cripple; this was a false description, and by striking out the word "Cripple" the will shewed the intention. In *Door* v. *Geary*,[1] the testator bequeathed £700 capital *East India* Stock, in which he was then *interested, possessed or entitled unto.* He was not interested, possessed or entitled unto any East India Stock, but he was possessed of some bank stock; the words "East India" were rejected as *error demonstrationis* and the bank stock was held to pass. In *Wright* v. *Collings*,[2] the testatrix devised as follows: "I give, devise and bequeath to my husband *all my real estate;*" and then went on to describe it, but did it erroneously, describing the land as a lot in the sixth concession; the testatrix owned no land in the sixth concession, but did own a

[1] 1 Ves. 255.
[2] 16 O. R. 182.

Judgment.
Wetmore, J.

lot similarly numbered in the fifth concession. The Court held that the will showed an intention of devising all the real estate of the testatrix, and so looked upon the mis-description as *falsa demonstratio*, and held that the land in the fifth concession passed. So in *Hickey* v. *Hickey*,[3] a testator devised the property as "*my property* known as," erroneously describing it as lots situated in the second concession, whereas the testator owned no property in that concession, but did own lots similarly numbered situated in the first concession, and the Court (Boyd, C.), held, that by reason of the words "my property" being used in respect to the property the lots in the first concession passed. That is, the will on its face expressed an intention of passing the testator's property, not property that was not his. There is, however, no such or similar expression on the face of the will in this case or to be gathered from its language. The devise is just an abstract devise of the testator's interest and title in the north-east quarter of section 7.

This case comes within *Hickey* v. *Stover*,[4] where Boyd, C., in a very well considered judgment, dealt with the question.

I will draw attention to *Doyle* v. *Nagle*,[5]. In that case the testator, after providing for payment of his debts and funeral expenses by his executors, went on to provide that "the residue of my estate which shall not be required for such purpose I give, devise and bequeath as follows," and then devised the south-westerly quarter of lot number 11, concession 4, and his farm, consisting of part of the west half of lot number 12, in the fifth concession, to his son James. The only real estate the testator owned was the south-west quarter of lot number 12 in concession 4, and the farm above mentioned in the fifth concession. He did not own lot number 11 in the fourth concession. That case was held to come within *Hickey* v. *Hickey*,[3] and *Doe d. Lowry* v. *Grant*,[6] because there was an intention expressed on the face of the will to devise "the residue of his estate." In delivering his judgment, Burton, J.A., is reported as fol-

[3] 20 O. R. 371.
[4] 11 O. R. 106.
[5] 24 A. R. 163.
[6] 7 U. C. R. 125.

Judgment.
Wetmore, J.

lows: "There can be very little doubt that what the testator intended to devise was lot 12; but if there was nothing further in the case than the facts I have just stated, there is a clear and well-defined rule of law which stands inexorably in the way of securing evidence that that lot was intended. But I agree that if there is other language in the devise sufficient to identify the property as the subject of the devise, such as describing it as in the possession of his tenant or otherwise, the word 'eleven' might be rejected as *falsa demonstratio*. The question is, is there anything in this will which can be laid hold of for that purpose? I think there is," and then the learned Judge proceeds, to use his own expression, to lay hold of the intended devise of the *whole of the residue* as expressed in the will as identifying lot number 12 as the one intended to be devised. And the judgments of the other Judges proceed along the same line. And Osler, J.A., expressly refers to *Hickey* v. *Stover*,[4] as one of the cases illustrating the distinction between the cases where there was something in the will which could be laid hold of for the purpose of enabling the Court to reject the erroneous descripton as *falsa demonstratio* and the cases where there was nothing in the will which could be laid hold of for that purpose. I can find nothing in the will of the deceased Campbell which can be laid hold of for such a purpose.

Declare that the right and interest which the testator, Angus Campbell, had in the north-west quarter of section 7, township 12, range, 2, west of the second meridian, did not pass under his will to the said William Young James Campbell as devisee thereof, but that the same forms part of the residuary estate of the said Angus Campbell, deceased. The costs of this application to be taxed by the clerk and paid out of the estate of the said Angus Campbell, deceased.

Order accordingly.

BURKE v. THE NORTH-WEST COLONIZATION CO.

Practice—Order to take evidence abroad—Affidavit for.

While it may be necessary in some cases to show that it is impossible to obtain the attendance of the witnesses at trial, it is not, as a rule, necessary to do so to procure an order to take their evidence abroad.

A party is not entitled *ex debito justitiæ* to an order to examine a witness abroad, but he is, *prima facie*, so entitled on showing the residence abroad and that the evidence sought to be obtained is material.

[WETMORE, J., *25th March, 1904.*]

Statement. This was an application on behalf of the plaintiff to examine two witnesses, residing at Adel, in the State of Iowa, who, it was shewn, were necessary and material witnesses for the plaintiff. The action was brought to recover commission on the alleged sale by the plaintiff of lands belonging to the defendants, and the affidavit on which the application was made alleged that these witnesses were purchasers of the lands or of a portion of it from the defendants.

Argument. *J. T. Brown*, for the plaintiff.

E. L. Elwood, for the defendant.

Judgment. WETMORE, J.—One of the objections to the order going is that the affidavit does not disclose that it will not be possible to obtain their attendance at the trial. While it may be necessary to establish that in some cases I am of opinion that it is not necessary as a rule to do so. The granting of an order for the examination of a witness without the jurisdiction and the ordering a commission to issue for that purpose should, in my opinion, be based on the same principles, and granted on similar material, and I am unable to understand why the words "when it shall appear necessary for the purposes of justice" in the Rule 267, should make any difference between the two cases. I consider that this rule was made partially for the purpose of doing away with the necessity for a commission by giving a less expensive procedure.

In *Armour* v. *Walker*,[1] Lindley, L.J., is reported as follows: "I think that all that is required to justify the issu-

[1] 25 Ch. D. 673; 53 L. J. Ch. 413; 50 L. T. 292; 32 W. R. 214.

Judgment. Wetmore, J.

ing the commission is that it should be shown that there are witnesses resident in America whose evidence is material unless a case is made out why they should be examined here." I should suppose, from the way the case is reported, that Fry, L.J., agreed with him. Cotton, L.J., apparently thought that some reason ought to be affirmatively shewn why the witness could not be in attendance at the trial. When I consider the fact that the witness residing abroad is not amenable to the process of the Court; that the expense of getting him to the trial will be very great, especially if he resides at a great distance, as is the case with these witnesses, that the witness is in a position to dictate his own terms, and that the party bringing the witness into the country would not under the tariff applicable to witnesses be likely able to indemnify himself for the cost of getting him here, I am disposed to follow what is so laid down by Lindley, L.J. I do not mean to hold that if the witness is residing out of the jurisdiction the party requiring an order for his examination is entitled to it *ex debito justitiæ*. That would be at variance with *Coch* v. *Allcock*.[2] But I am of opinion that that fact coupled with the fact of the materiality of the testimony would warrant a Judge in the exercise of his discretion in granting the order unless it is made to appear for some reason that it should not be granted. I must say that upon reading *Lawson* v. *The Vacuum Brake Co.*,[3] my opinion was somewhat shaken until I obtained the light thrown on that case in *Coch* v. *Allcock*.[2] I can quite understand that cases may arise where an order would be refused because the nature of the testimony to be given was such that it would be advisable to have the witness in Court at the trial to be cross-examined there, and there are a number of cases where the order has been refused on that ground, but it will appear in all these cases that the nature of the case was such or the character of the proposed testimony was such that the attendance of the witness before the Court for cross-examination was necessary for some special reason. It does not follow that the mere fact that it is desirable to have the witness cross-examined affords a sufficient reason for refusing the order. If that were so the order would have to be refused

[2] 21 Q. B. D. 178; 57 L. J. Q. B. 489; 36 W. R. 747.
[3] 27 Ch. D. 137; 54 L. J. Ch. 16; 51 L. T. 275; 33 W. R. 186.

almost in every case. I can see nothing in the character of this case or of the proposed testimony that renders it necessary that these witnesses should be produced in Court for cross-examination. Judgment. Wetmore, J.

Order for examination.

LEGARE v. GLASS & LARGE.

Practice—Judgment on admissions—Counterclaim.

Admissions made by a defendant on examination for discovery are sufficient to ground an application for judgment under Rule 229 of "The Judicature Ordinance," C. O. 1898, c. 21.

Whether a Judge will exercise the powers given to him by Rule 229 at all, and also the manner of exercising those powers, are both discretionary, and inasmuch as in the present case the admissions showed that the defendant had no defence, and the plaintiff's claim was greatly in excess of the defendant's counterclaim, judgment was ordered to be entered for the full amount of the plaintiff's claim, and execution stayed for one month, the same to be further stayed until the trial of the counterclaim on condition that the defendant within the month pay into Court the difference between the amount of the plaintiff's claim and the defendant's counterclaim.

[WETMORE, J., *30th December, 1904.*]

Application for judgment on admissions made by the defendant on his examination for discovery. Statement.

E. A. C. McLorg, for the plaintiff. Argument.

E. L. Elwood, for the defendant.

WETMORE, J.—This was an action brought upon two promissory notes made by the defendants in favor of the plaintiff. One for $1,400 and the other for $1,443. The defendant Large appeared and entered a defence to the action: First, denying that he executed the notes sued on; and, second, that there was no consideration for same. He also counterclaimed, setting out that the notes were given for a bunch of horses; that some of the horses escaped from the defendants and returned to the plaintiff's ranch, and the plaintiff refused to deliver them to the defendants. Second, that the plaintiff gave a verbal warranty that such horses were sound in health; that they were not sound in health, but were diseased, and that he lost ten of such horses by reason of such disease, and that the horses so Judgment.

Judgment.
Wetmore, J.

received from the plaintiff communicated their disease to other horses of the defendants, by which he lost three valuable horses. The defendant Large was examined for discovery, and as a result of such examination it is clearly established that in so far as the matters pleaded are concerned, under any circumstances, he has no defence to the action. The plaintiff applied for and obtained a chamber summons to strike out the appearance and such statement of defence and counterclaim, and for judgment to be entered for the plaintiff. It is not just clear on the face of this summons whether this application is made under Rule 103 of *The Judicature Ordinance*, or Rule 229. The counsel for the plaintiff, however, at the return of the summons seemed to rest his case upon Rules 229 and 325. Rule 325 does not appear to me to be applicable, and therefore I will not give it any further consideration, and I will consider the application as made under Rule 229. When I say that I will consider the application as made under Rule 229, I should confine this to the principal part of the application, because some questions of law have been raised to the counterclaim apart from any question arising under that rule. I will only dispose of this case, however, upon the questions that may arise under Rule 229, for I do not think it fair to the defendant to bring him here upon an application to completely strike out his defence and his counterclaim under that section by admissions, and also to ask him to support his counterclaim upon the questions of law raised.

The first question which arises in my mind is whether under Rule 229 I am at liberty to consider admissions which are neither made upon the pleadings nor in pursuance of notice to admit facts as provided in Rule 226. Rule 229 provides that "Any party may at any stage of a cause or matter where admissions of fact have been made either on the pleadings *or otherwise* apply to a Judge for such judgment or order as upon such admissions he may be entitled to." I am of opinion that the words "or otherwise" are large enough, at any rate, to ground an application under that section where the admissions are made in documents which are obtained as part of the practice of the Court and are on the files of the Court, as was the case in this instance; the admissions are obtained in a cross-examination of the defendant Large, which was procured according to the practice.

Judgment.
Wetmore, J.

As already stated, it is quite clear by this cross-examination that Large has no defence to the action. But it is not so clear that he has not a good cause of counterclaim against the plaintiff in respect to some of the matters set forth in his counterclaim. It is quite clear that the plaintiff's claim largely exceeds what the defendant Large may recover in any possible event under his counterclaim. What was laid down by the Court in *Sheppards & Co.* v. *Wilkinson*,[1] throws considerable light on this question. That was an application to strike out the appearance and defence under Order XIV., Rule 1, of the English Practice, which corresponds with the Territorial Rule 103. There was no defence to the claim in that case, but the defendant counterclaimed for a breach of an agreement; the counterclaim overtopped the plaintiff's claim. The Divisional Court ruled that the defendant should only have leave to defend on condition of his paying the amount of the claim into Court. The Court of Appeal varied that order by ordering judgment to be entered for the plaintiff on the claim, but stayed execution until the trial of the counterclaim. In delivering judgment, the Master of the Rolls is reported as follows: "If the counterclaim was for a less sum than that claimed, judgment might be signed if there was no real defence for so much of the amount of the claim as was not covered by the counterclaim, but if the counterclaim overtopped the claim and was really plausible, then the rule, which had been often acted upon at Chambers, of allowing the defendant to defend without conditions, was the right one. There are, however, circumstances which might call on the Court, as in the present case, to act differently;" and consequently the order which I have mentioned was made.

Now, while this was a case arising under the rule corresponding to Rule 103, I think it is applicable in principle to cases arising under Rule 229. In *The Mersey Steamship Co.* v. *Shuttleworth*,[2] an action was brought for a liquidated demand. The defence pleaded, admitted the claim, but set up a counterclaim for liquidated damages for a greater amount. This case is similar to the one I am now considering, only, instead of admitting the plaintiff's claim on the pleadings, the defendant Large admitted it in the manner

[1] 6 Times Rep. 13.
[2] 11 Q. B. D. 531; 52 L. J. Q. B. 522; 48 L. T. 625; 32 W. R. 245.

Judgment.
Wetmore, J.

which I have before stated, and, instead of the counterclaim being for a greater amount than the plaintiff's claim, it is for less. The principles laid down by the Court are as applicable just the same. In that case an application was made under Order XL., Rule 11, of The English Rules then in force, which corresponded with the Rule 229 of The Ordinance. Now, the Court of Queen's Bench in that case refused to grant leave to the plaintiffs to sign judgment under the rule above mentioned, and the Court of Appeal confirmed that ruling. The contention of the plaintiffs in that case was that they should have judgment on the claim to the amount due to them, and the money should be brought into Court and the defendant allowed to proceed with his counterclaim; but the Court held that the defendant had an unconditional right to defend. In delivering judgment, however, Cotton, L.J., says: "I by no means say that a counterclaim will in every case prevent an order for payment into Court being made under Order XL., Rule 11. If a counterclaim is frivolous and unsubstantial an order of that kind may be made." The authorities all support the view that it is discretionary with the Judge to exercise his powers under Rule 229, both as to his exercising the powers and to his manner of exercising them.

In view of these authorities to which I have referred and of the facts that the plaintiff's claim so far over-tops what the defendant can possibly recover, I have come to the conclusion that it would be proper in this case to order judgment to be entered for the plaintiff on his claim for the full amount of his claim and interest, amounting on this date to $2,274.13, with costs applicable to the claim. I will stay execution on such judgment for one month, and if the defendant pays into Court to the credit of this cause before the expiration of such month $1,774.13 the issue of execution upon said judgment will be further stayed until the questions arising under the counterclaim are disposed of. If such sum is not paid into Court the plaintiff will be at liberty to issue execution for the full amount of his judgment, and the defendant may proceed with his counterclaim as he may be advised. The question of the costs of this application will be reserved until the counterclaim is disposed of.

Order accordingly.

GILMOUR v. GRIFFIS.

Trusts and trustees—Statute of Frauds—Action for declaration of partnership.

The question being whether a partnership existed in a lease from the Crown of coal mining rights, letters written by the defendant to the plaintiff were relied on as evidence. In none of these letters was there any express declaration of a partnership, but the defendant had, in referring to the subject matter, used such words as "our," "we," "you and I," "us," etc.

Held, that the letters were sufficient to raise a trust by implication, and that the case was within the *ratio decidendi* of *Forster* v. *Hale*.[1]

[WETMORE, J., *5th March, 1904*.]

Statement. Action for a declaration that the plaintiff is beneficially interested to the extent of an undivided one-half share in a certain lease or license from the Crown of coal mining privileges, and for other relief. The facts fully appear in the judgment.

Argument. *J. S. Ewart*, K.C. (J. T. Brown with him), for plaintiff.

H. M. Howell, K.C. (E. L. Elwood with him), for defendant.

Judgment. WETMORE, J.—I find the following facts under the evidence in this case:

In March, 1902, the defendant approached the plaintiff with a view of obtaining a suggestion as to some opportunity for making money in the North-West Territories. In so doing this the defendant was actuated by the belief that the plaintiff had a better knowledge and experience of western matters than he had, and that he (the defendant) had a strong influence with the Department of the Interior, and that putting the plaintiff's knowledge and experience and his influence together they might be able to obtain through the Department an interest or right in some land out of which the plaintiff and defendant might make jointly considerable money, and they discussed the matter from that standpoint. The plaintiff suggested the obtaining a license from the Crown to mine coal on a royalty basis on the land mentioned in the statement of claim, and it was arranged that application for

[1] 3 Ves. 696; 5 Ves. 308; 4 R. R. 128.

Judgment.
[Wetmore, J.

the lease or license to mine coal should be applied for by and in the name of the defendant, and that if the lease was obtained the plaintiff and defendant were to be equally interested in the land and should open up and operate the property in partnership. This arrangement up to this time was entirely verbal. Sometime prior to being approached by the defendant (in August, 1900), the plaintiff had made application in writing to the Minister of the Interior to purchase the surface and mining rights in the land in question, but his application was not entertained on the ground that the land was a school section and could not be so dealt with. The plaintiff then, about the 23rd May, 1901, procured an application to be made to the Department of the Interior by one John F. Howard for the right to mine coal upon the land at a royalty. This application was refused on the ground that there were no regulations which would permit the mining of coal on school sections. This application was made by Howard entirely in the interests of and for the benefit of the plaintiff, and he was selected for the purpose because he was a friend of the plaintiff and a relative of the Minister of the Interior.

Running right through these interviews between the parties engaged in endeavouring to procure a lease of this land there appears to have been an opinion that the fact that a person had a personal influence of some character with the Minister of the Interior would be an important factor in obtaining the rights sought for. I draw attention to this fact, not because there is any evidence that any improper influence was brought to bear on the Minister to procure these rights or that the Department of the Interior or the Minister were influenced in any way by any personal consideration in granting them (because there is no evidence whatever to establish that, nor is it urged that there was any such evidence) : I draw attention to it, however, because it serves to throw light upon and explain some, and especially one, of the acts of the plaintiff subsequent to the arrangement with the defendant, namely, the procuring of Howard to put in another application for a lease after the arrangement made with the defendant.

The plaintiff and defendant having entered into the verbal arrangement, which I have set out, the plaintiff drew up a memorandum in writing setting forth what the defendant's application for a lease of the land should contain and gave

Judgment.
Wetmore, J.

it to the defendant. The defendant took this memorandum and, on the 25th March, 1902, wrote to the Minister of the Interior applying for such lease, and in that letter closely followed the memorandum so prepared by the plaintiff. Along in June, 1902, Orders in Council were promulgated authorizing the Minister of the Interior to issue leases of school lands for coal mining purposes. This fact was brought to the knowledge of the plaintiff about the 2nd July. The plaintiff believing it important to send in an application for mining rights with respect to this land after the promulgation of the Order in Council so as to get ahead of other persons who might be disposed to apply, and that such application should be put in promptly, and with a view of expediting matters, on the 2nd July put in an application to the Dominion Land Agent at Winnipeg in his own name and also procured Howard to wire an application to the Department of the Interior and to send a telegram to the Minister. This application by Howard was like his other one put in in the plaintiff's interest and for his benefit and in consequence of Howard's influence or supposed influence with the Minister. There was no intention of defeating the defendant in any way with respect to his rights in the lease when issued, and on the 4th or 5th July, when the plaintiff and defendant first met after these applications were put in, the plaintiff informed the defendant of what he had done and assured him that it would not in any way interfere with the understanding between them as to each having a half interest in the property in question.

At this stage the situation in the Department of the Interior was as follows: The order in council referred to had been promulgated. The Department recognized the applications for rights under it of the plaintiff, Howard and the defendant in the order which I have just stated, the plaintiff by virtue of his application in August, 1900; Howard by virtue of his application in May, 1901; and the defendant by virtue of his application of 25th March, 1902. That is, if the plaintiff and Howard had not withdrawn their applications as hereinafter stated, the plaintiff would have been given the first opportunity to lease. If he had not carried it out Howard would have been given the next opportunity, and if he had not carried it out then the defendant would have been given the next, and the parties would have been so dealt with in

Judgment. Wetmore, J.

accordance with the practice of the office. Affairs apparently then got in such a position that a lease would be issued to the defendant provided that the plaintiff and Howard withdrew their applications. The plaintiff apparently in some manner became aware of this fact through correspondence which had taken place between the Minister and Howard, which is not in evidence, and in consequence he drew up withdrawals in writing in favour of the defendant, one on the part of himself and one on the part of Howard. He signed his withdrawal and obtained Howard's signature to the other, and he also prepared an assignment from the defendant to himself of an undivided one-half interest to all surface and mining rights in the section of land in question which might be granted to the defendant or his nominee or assignee by lease or otherwise to mine coal upon such land or any part thereof or for any other purpose when a lease or other rights should be granted, and containing an agreement to execute and deliver any further assignment or conveyance which might be required to vest such undivided half interest in the plaintiff.

Armed with these documents, the plaintiff, on 23rd September, 1902, went to Rat Portage, where the defendant resided, and met him there, and informed him that the lease would issue to him at once according to the information that he had got from Howard, that he had brought down the withdrawals of Howard and himself, and that he had brought down a short form of assignment for him to execute and showed this document to him. The defendant read it and said it was all right, but thought it would be better for him not to execute any formal transfer until the lease actually issued; he stated that the plaintiff's rights were fully protected by the correspondence between them, and said that as soon as the lease was issued he would execute a transfer or assignment to the plaintiff of his half interest in the property, and upon his giving this promise the plaintiff delivered to him the withdrawals by himself and Howard. All these facts are established by the testimony of the plaintiff and Mr. Turriff, the Dominion Land Commissioner, and are uncontradicted. Therefore there was a clear verbal understanding and agreement between the parties to this action that the lease or license for coal mining rights with respect to this land was to be obtained by the defendant for the joint benefit

Judgment.
Wetmore, J.

of himself and the plaintiff, and when obtained that they were to operate the property and coal mines in partnership and that each was to have an undivided half interest in the rights acquired and in the partnership, and also that when the lease was issued to the defendant he was to hold it and the rights under it as trustee for the plaintiff as to one undivided half thereof.

The question is whether, notwithstanding this clear understanding and agreement, the plaintiff has acquired rights which can be enforced against the defendant in this Court. For the purpose of reaching a conclusion as to that I must refer to other facts which are established by the evidence. In the first place it was required that the semi-annual rent to be reserved by virtue of the proposed lease should be paid in advance, and upon this being intimated by the defendant to the plaintiff in writing the plaintiff recommended the defendant also by writing to pay it, to let him (the plaintiff) know the amount and he would send him his half. The defendant wrote to the plaintiff acknowledging the receipt of that letter, and stated therein that he would send the ground rent to the Department by the then "to-morrow's mail." Again, on the 9th September, the plaintiff wrote the defendant requesting him to let him know the amount of the ground rent he had sent to Ottawa and stating that he would send him his half. On the 21st September the defendant wrote to the plaintiff telling him that he had sent the ground rent payable semi-annually in advance amounting to $96. On the 20th October the plaintiff wrote the defendant and enclosed to him a draft for $48, being one-half of the rent which the defendant had so sent to Ottawa on the property in question. And on the 25nd October the defendant wrote the plaintiff acknowledging the receipt of this draft and stating that $48 would probably be more than the plaintiff would be required to pay and would be returned to him when the lease was issued. In order to make it clear what the defendant meant by stating that $48 would probably be more than the plaintiff would be required to pay and that it would be returned to him when the lease was issued, I draw attention to the lease, by which it will be observed that the annual rent reserved is $186.33. The semi-annual rent, therefore, was $93.17, and the half of which would be $46.58. And the defendant intended by this letter to promise that the difference between the $48 so remitted and

Judgment.
Wetmore, J.

the actual half of the semi-annual rent payable would be returned to the plaintiff. The defendant therefore accepted the $48 as representing one-half of the semi-annual rent advanced by him on account of the prospective lease. A lease of the property and coal mining rights therein was issued by the Crown to the defendant, dated 14th November, 1902. It does not appear under the evidence clearly when this lease reached the defendant. I should judge, from the correspondence between the parties to the suit, that it was after the 26th November, as the defendant wrote the plaintiff on that date that he had not received it. Down to the time of the defendant receiving this lease he corresponded with the plaintiff as he had all along done, apparently recognizing the plaintiff's rights according to the understanding between them. At any rate I can discover nothing to the contrary until the defendant's letter to the plaintiff of 16th January, 1903. Then for the first time, so far as the evidence discloses, he intimated that he did not consider that the plaintiff had any interest in the lease or the rights granted under it, and also intimated that there were other persons interested therein and that all he considered the plaintiff entitled to was a money consideration for his services. And finally he entirely repudiated the understanding and arrangement he had made with the plaintiff and denied that he had any rights or was in any way interested in the lease or the property or rights and privileges given under it.

There can be no doubt as to the plaintiff's rights from a conscientious standpoint, and that the defendant had acted most dishonourably. That, however, will not necessarily entitle the plaintiff to relief. I find, as a matter of fact, that the defendant led the plaintiff along letting him believe that he would have an interest in the lease and mining privileges when issued; that he deliberately and purposely concealed from the plaintiff the fact (if it was a fact) that other persons were interested in the proposed lease and privileges, and that he did this with intent to deceive the plaintiff, and when the lease was issued and his purpose served he repudiated the plaintiff's rights, and in so doing I find and hold that he acted fraudulently.

I am of opinion that the plaintiff is entitled to a declaratory decree that he is beneficially interested in the lease in question and the leasehold premises to the extent of an undi-

vided half share or interest therein, and that the defendant is a trustee for the plaintiff for such one-half share or interest. Judgment. Wetmore, J.

It is claimed that the plaintiff has no right to such a decree, because the 7th section of the *Statute of Frauds* (29 Car. II. c. 3) has not been complied with. I am of opinion, however, and hold that the creation of the trust is sufficiently manifested and proved by letters of the defendant forming part of the lengthy correspondence between him and the plaintiff and put in evidence. In reading these letters one cannot avoid the conclusion that through the whole of them down to the letter of the 16th January, 1903, before referred to, the idea is manifested on the part of the defendant that the plaintiff is interested in the procuring of the proposed lease, not merely as a person who is working for the defendant in the expectation of being paid for his services, but as one who is jointly with the defendant beneficially interested in the lease and the rights and privileges granted under it, and the idea is also manifested that such beneficial interest of the plaintiff is to be a one-half interest. I do not propose to embody in this judgment the whole of these letters. It will be sufficient to draw attention to some of them. In the first place, as hereinbefore stated, the application for the mining rights of the 25th March, 1902, put in by the defendant was practically written at the dictation of the plaintiff. The defendant's letter to the plaintiff of the 26th May, 1902, in which he writes, "I wrote the second letter to Mr. Sifton as you directed in yours of May 9th. I am expecting every day to hear from him; he will surely write something before long now, and I will surely advise you on receipt of his reply;" and that of 12th June, 1902, in which he writes, "Enclosed please find letter from Secretary of Interior. Will you kindly return it to me, it looks alright," give a strong impression that they were letters written by one party beneficially interested in the subject matter to another interested in like manner. I refer to these two letters as samples; there are many others giving the same impression. I now refer to the defendant's letter to the plaintiff of the 24th September, 1902, in which he writes, "There is a man went to Ottawa that I instructed to look after *our* coal lands," and "I know enough about the deal now to know that now is the time for *us* to act promptly." I refer also to the letters I have hereinbefore mentioned as passing between the parties with respect to the ground rent, and especially the letter of the defendant acknowledging the

Judgment.
Wetmore, J

receipt of $48 as representing half the ground rent which the defendant had paid. This is important as manifesting that the plaintiff's interest in the proposed lease and rights was to be one-half. I again, however, refer to the defendant's letter of 21st September, in which I find the following: "My information has been from the start that *we* can succeed in obtaining a lease, but if the records were cleared voluntarily action could be taken almost at once," and "There are strong men nibbling at this coal land already, and I have known all along that too much red tape and long delay wasn't what *you and I* wanted." The plaintiff wrote the defendant a letter on the 13th October, 1902, in which he proposed that they should both go over the land and decide upon the best point to make an entry, which the defendant replied to on the 16th of that month, in which he writes: "There is a Mr. Smalle here who has had considerable experience in the mining of soft coal in Nova Scotia . . . would it not be a good idea to bring him along as no doubt he could give *us* a good deal of information one way and another." The plaintiff had also in his letter of the 13th October referred to a shortage of cars, which apparently had been brought under his notice by a letter of the defendant not in evidence, and he expressed the opinion in his letter of 13th that that was a matter which would not trouble them at that time. The defendant in his letter of 16th October also writes: "About the shortage of cars, etc., that is a matter as you say can be dealt with later on, and does not interfere in any way with *our* work of getting the various openings prepared and opened up. This I believe as you do, in any event, should be commenced with and completed as soon as possible, but there are some other things to be considered which you are not fully aware of, and while *I propose to protect you* it is best for *us* (not) to make too much of a stir before the lease has actually issued." I have put the "not" in brackets, as no doubt it was a clerical error to have omitted it in the original. Again, he writes on 18th October: "As I wrote you some time ago, I do not think we had better make too much of a stir just now."

These letters amount to a compliance with the provisions of the 7th section of the *Statute of Frauds*, and bring this case within the *ratio decidendi* of *Forster* v. *Hale*,[1] and entitle the plaintiff to the declaratory decree which I have mentioned.

Judgment for plaintiff.

REX v. OLLIE NUGENT.

Criminal law—Liquor License Ordinance—Stated case.

The defendant was convicted by a Justice of the Peace at Moosomin of unlawfully keeping liquor for the purpose of sale, barter or traffic without the license therefor, by law required, and was committed to the gaol at Prince Albert. She appealed against this conviction by way of a case stated under s. 900 of the Criminal Code, 1892. Six objections were taken to the conviction, of which, however, four only were argued before the Judge, viz.: That there was no evidence to support the charge; that inadmissible evidence was received contrary to the objection of the defendant's counsel; that the justice exceeded his jurisdiction in committing the defendant to gaol at Prince Albert, and that the penalty imposed was excessive.

Held, that the evidence disclosing the presence in the defendant's house of glasses containing beer, and also bottles containing other liquor, as well as empty bottles, empty glasses and a corkscrew, a *prima facie* case was raised under the Ordinance, and this not being rebutted by the accused, there was evidence sufficient to support the charge.

That, although inadmissible evidence was received it was immaterial, because there was ample evidence apart from that to support the charge, and it was not shewn that such improper evidence had influenced the Justice's mind in any way;

That there was no statutory provision that a justice, in committing to gaol, should commit to any particular gaol, and that therefore the Justice had jurisdiction to commit the accused to the Prince Albert gaol.

As to the last objection above mentioned, the defendant's counsel stated that the points he wished to take were that the costs imposed were excessive, and that there was a variance between the minute of adjudication and the conviction.

Held, on the evidence, that the costs were not excessive, and that, as the objection to the variance between the minute of adjudication and the conviction had not been raised before the Justice, it could not be raised before the Judge.

[WETMORE, J., *4th November, 1904.*]

J. T. Brown, for the Crown. Argument.

E. A. C. McLorg, for the defendant.

WETMORE, J.—This is a stated case under section 900 of the Criminal Code at the instance of the defendant. The defendant was convicted before J. A. McGibbon, Esquire, Justice of the Peace, for that she on or about the first day of July last at or near Moosomin in the North-West Territories did unlawfully keep liquor for the purpose of sale, barter and traffic without a license therefor by law required. Judgment.

Six objections were taken to the conviction.

The first one was abandoned at the argument.

Judgment. Wetmore, J.

The third ground of objection was too general and I refused to allow it to be dealt with.

The second ground of objection was that there was no evidence whatever to support the charge. The charge was laid under section 81 of "*The Liquor License Ordinance*" (Consolidated Statutes, cap. 89), which provides that "No person shall sell by wholesale or by retail, or shall keep or have in any house or other place whatsoever any liquor for the purpose of selling, bartering or trading therein without having first obtained a license authorizing him so to do." Staff-Sergeant Hooper, who is the informant, was called as a witness: he swore that he was in the house occupied by the defendant on the night of the 1st July about eleven o'clock, and in one of the rooms he found two men sitting, and that in the room in which they were sitting he found under the sofa four glasses on a salver of the kind which are generally seen in a bar-room, two of these glasses containing a small quantity of beer, and two containing a liquid resembling soda water. In the bedroom he found a flask of brandy in a commode, and nine bottles of beer, and in the kitchen he found a bottle containing a liquid marked "Port," and two empty beer bottles were also found in the kitchen, and another bottle containing a small quantity of an unknown liquid. He also found two glasses in the kitchen containing a small quantity of beer. Constable Foxwell was also sworn, and stated that he saw a corkscrew on the table in the kitchen, which the defendant took up and flung into a drawer, and blew the light out. The constable lit the lamp, and while he was lighting it told the accused that he wanted the corkscrew, and she said it was a tin-opener: he then went to the drawer and took the corkscrew out: it had a cork in it. No evidence was called on the part of the defendant, and this testimony was uncontradicted. Section 114 of *The Ordinance* provides that: "Any house, shop, room or other place in which it is proved that there exists a bar, counter, beer-pumps, kegs, jars, decanters, tumblers, glasses or any other appliances or preparations similar to those usually found in hotels or shops where liquors are accustomed to be sold or trafficked in shall be deemed to be the place in which liquors are kept or had for the purpose of being sold, bartered or traded in in contravention of section 81 of this Ordinance unless the contrary is proved by the defendant in any prosecution. And

Judgment.
Wetmore, J.

the occupant of such house, shop, room or other place shall be taken to be the person who has or keeps therein such liquors for sale, traffic or barter therein." It was conceded at the argument by counsel for the defendant that in construing section 114 it was not necessary in order to fill the section that all the articles specifically mentioned in it should be found in the house, shop, room or other place, and, if that is so, it follows as a matter of course that if any of these articles are found in such house, shop, room or other place the requirements of the section are filled and a *prima facie* case is established against the occupant of the house, shop, room or other place, and the burden is then cast upon such occupant to prove that an offence was not committed. I am unable to perceive how the provisions of this section can be got over. The evidence of the sergeant and constable distinctly proves that glasses, a corkscrew, glasses with beer in them, and other bottles were found there. It may possibly be that any person who is perhaps too active and desirous of making a name for himself as an efficient officer might avail himself of this section to annoy a person, but I think the intention of the Legislature is clear. We all know that parties who contravene a law of this sort are very skilful in devices to evade it and to conceal their operations. The Legislature in order to overcome these devices has chosen to make provision for throwing the burden of proof on the parties charged. Possibly from a broad standpoint the provision may be an unwise one but, whether it is or not, it is not for me to make the law. I must administer it, and the section to me is perfectly clear, and I think there was abundant evidence to establish a *prima facie* case against the defendant and so cast upon her the onus of breaking it down. The learned counsel for the defendant laid great stress upon the word "exists" which is in the section. He seemed to endeavour to impress me with the idea that the mere fact that something of the character mentioned in the section happens to be in the house, does not make it "exist" there. I am unable to appreciate the argument. I find by reference to the dictionary that one of the meanings of the word "exist" is "to be," and I therefore am of opinion that if these things are found in the house or room they exist there within the meaning of the section. I think therefore that there is nothing in this objection.

Judgment.
Wetmore, J.

The next ground of objection which was pressed was that inadmissible testimony was received contrary to the objection of the defendant's counsel. When Staff-Sergeant Hooper was on the stand he mentioned the names of several persons who were at the house while he was there, and he stated that some of these persons were charged before a Justice of the Peace as being inmates of a disorderly house and pleaded guilty thereto. This was the evidence objected to. There is no doubt that this evidence was improperly received, it could not be evidence against the defendant. She was no party to the plea and could not be bound by statements of these men made behind her back; but I am of opinion that the reception of this testimony cannot vitiate the conviction, because there is ample evidence outside that to warrant the conviction. If the defendant had been called or had procured testimony which tended to show that she was not guilty of the offence and so attacked the *prima facie* case which was established against her, I might have come to the conclusion that this testimony would be fatal to the conviction. It might in such case have influenced the mind of the justice, but in the absence of any testimony of the sort on behalf of the defendant, and with the evidence which I have referred to before before him, he could not avoid convicting under section 114.

The next objection is that the magistrate had no jurisdiction to order the imprisonment of the defendant in Prince Albert gaol. The conviction adjudged that in default of the payment of the fine which was imposed and costs, that the defendant should be imprisoned in the common gaol at Prince Albert for four months. It was contended for the defendant that the justice was bound to commit to the nearest prison, and that he had no jurisdiction to commit her to the Prince Albert gaol, which is far away. It was stated that it was provided in "*The North-West Territories Act*," or some statutory law, that in cases of commitment to prison on a conviction by the Justice that the parties should be committed to the nearest gaol. I have looked through "*The North-West Territories Act*" and through "*The Criminal Code*," and I can find no such provision. I find by paragraph 2 of section 955 of the Code that "Everybody who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprison-

ment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there then in that common gaol which is nearest to such locality or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed." While there are three Provisional Districts in the North-West Territories and several Judicial Districts, the gaols in the Territories are not the gaols of anyone of these districts, and there are several gaols, but they are all gaols of the Territories, not of a particular district. Section 78 of "*The North-West Territories Act*" provides that imprisonment for any term not less than two years may be made in any gaol in the Territories. So far as what are called "long term prisoners" are concerned therefore they may be sent to any such gaol no matter where it is situated. Section 80 of that Act, as it was originally passed, provided: "That the Governor-in-Council might cause to be erected in any part or parts of the Territories any building or buildings or enclosure or enclosures for the purpose of a penitentiary, gaol or lock-up for the confinement of prisoners charged with the commission of any offence or sentenced to any punishment therein, and confinement or imprisonment therein shall be held lawful and valid whether under sentence of imprisonment in the penitentiary, gaol or other place of confinement." Under that section and prior to the passing of 54 and 55 Vic., ch. 22 (1891), a gaol was erected in the Territories. This section, however, was repealed by section 14 of the last mentioned Act, and it was therein provided that "The Governor-in-Council may from time to time direct that any building or buildings or any part thereof or any enclosure or enclosures in any part or parts of the Territories shall be a gaol or lock-up for the confinement of prisoners charged with the commission of any offence or sentenced to any punishment or confinement therein, and confinement therein shall be held lawful and valid whether such prisoners are detained for trial or under sentence of imprisonment in a penitentiary, gaol or other place of confinement." The Prince Albert gaol was directed by the Governor-in-Council to be a gaol; other places, such as the cells constructed in the courthouse at Moosomin and those constructed in the courthouse at Wolseley, have been likewise declared gaols. But it will be observed that under the sec-

Judgment. Wetmore, J.

tion of the Act of 1891 there is no provision that a person committed to prison shall be sent to any particular gaol; the provision is general, that confinement in any place so directed to be a gaol shall be lawful and valid. As a matter of fact, while I am not aware that there is any order in council upon the subject, the Department of Justice has requested that female prisoners be committed to the Prince Albert gaol, because there are conveniences for keeping them there, and there are no such conveniences in the other gaols. I see nothing in the law to prevent that request being acted upon, nor can I find anything which would prevent a Judge or Justice of the Peace committing a person who is subject to commitment to any place declared to be a gaol by the Governor-in-Council under the section of the law which I have referred to.

The only remaining objection is that the penalty imposed is excessive. The counsel for the defendant stated that the real point which he desired to raise is not clearly expressed by this objection. The points which he argued and which he wished to raise were: first, that the costs awarded were excessive; and second, that there is a variance in so far as the costs are concerned between the minute of conviction made by the Justice and the conviction. By the minute of conviction the defendant was adjudged to pay $5.45 costs, and the conviction awards $4.40. I have nothing before me to establish that either one of these sums is excessive. So far as the defendant's other objection is concerned, namely, the variance between the minute and conviction, I am of opinion that the defendant is not in a position to set up that ground under the objection taken. Section 900 of the *Criminal Code* evidently contemplates that the objections to be argued upon a special case must be taken before the magistrate, because paragraph 2 of that section provides that the person aggrieved who desires to question the conviction or other proceeding is to apply to the justice to state and sign a case setting forth among other things the grounds on which the proceeding is questioned. Rule 35 of the Supreme Court provides that the Justice among other things in stating his case is to set forth the grounds upon which the proceeding is questioned, and paragraph 7 of section 900 of the Code provides that the Court to which a case is transmitted shall hear and determine the question or questions of law arising

thereon. Now, that cannot mean some other questions of law which have never been submitted by the magistrate at all, and not set forth in the stated case. No person reading this ground that "the penalty imposed is excessive" would ever dream that it was intended to set up under it that there was a variance between the minute and the conviction. Judgment. Wetmore, J.

The appeal, therefore, in this case fails, and the conviction must be affirmed with costs.

The clerk will tax the respondent's costs of this appeal, and, when taxed, I will pass the order.

Conviction affirmed.

REX v. OLLIE NUGENT (No. 2).

Criminal law — Quashing conviction — Costs.

It is proper to award costs in quashing convictions on cases stated by justices, even when the prosecutor is a member of the police prosecuting in the discharge of his duty.

[WETMORE, J., *18th November, 1904.*]

This was an appeal by way of stated case on behalf of defendant from a summary conviction by a Justice whereby the defendant was convicted for keeping a house of ill-fame. Statement.

J. T. Brown, for the Crown. Argument.

E. A. C. McLorg, for the defendant.

WETMORE, J.—This is a conviction against the defendant for keeping a house of ill-fame. The counsel for the prosecutor conceded that the conviction was bad. It is not, therefore, necessary for me to enquire further into the matter. He contended, however, that no costs should be awarded under the circumstances of this case, because the prosecutor was Staff-Sergeant Hooper of the North-West Mounted Police, who was prosecuting in the discharge of his duty; that to awarad costs against him, under such circumstances, would tend to make the force lax in prosecuting offenders for offences punishable by summary conviction wherein costs might be awarded. The objection struck me with considerable force, but at the same time I feel that I am bound by Judgment.

Judgment. Wetmore, J.

precedents. In *Venables* v. *Hardman*,[1] and *Nicholls* v. *Hall*,[2] and *Copley* v. *Burton*,[3] convictions were quashed and the prosecutors were ordered to pay the costs. These cases were all decided on cases stated by Justices. In the last two mentioned cases, *Nicholls* v. *Hall*[2] and *Copley* v. *Burton*,[3] the prosecution was laid by members of the police force; in *Nicholls* v. *Hall*[2] by an inspector, and in *Copley* v. *Burton*[3] by a sergeant of the police. On the application for costs, in *Copley* v. *Burton*,[3] Willes, J., lays down the following: "We desire to be distinctly understood that the burden of proof is on the prosecution, and that in future in quashing convictions in these cases we shall do so with costs." I can find no case laying down a different rule.

This conviction, therefore, must be quashed, and with costs to be paid by the prosecutor, Henry Charles Lewis Hooper. The clerk will tax the costs, and upon the taxation being submitted to me I will pass the order.

Conviction quashed with costs.

DAVIES v. THE CANADIAN AMERICAN COAL & COKE COMPANY LIMITED.

Master and servant — Injury to servant from explosion in defendants' mine — Negligence — Contributory negligence—Breach of statutory obligations — Evidence — Findings of jury — Costs.

The plaintiff, a miner in the employ of the defendant, was injured by an explosion in the defendants' mine, and sued to recover damages. The jury found that the plaintiff's injury was caused by the defendants' negligence, and that the plaintiff was not guilty of contributory negligence, and they assessed the damages at $1,500.

On appeal, *held*, that there was evidence to support the jury's finding that the defendants were guilty of negligence, but the jury's finding that the plaintiff was not guilty of contributory negligence was unsupported by the evidence, and must be reversed.

Held, further, that there had been a mis-direction to the jury by the trial Judge in instructing the jury that the question of contributory negligence only arose in case the jury found that the company had carried out their statutory obligations and their common law duties.

Held, further, that there should be a new trial on the ground of improper admission of evidence, such evidence consisting in a policy of insurance whereby the defendants were insured against loss to the sum of $1,500.

Judgment of SIFTON, C.J., set aside, with costs, and new trial ordered.

[COURT EN BANC, *18th June, 1904, and 20th January, 1905.*]

[1] 1 E. & E. 79; 28 L. J. M. C. 33; 4 Jur. (N.S.) 1108.
[2] 42 L. J. M. C. 105; L. R. 8 C. P. 322; 28 L. T. 473; 21 W. R. 579.
[3] 39 L. J. M. C. 141; L. R. 5 C. P. 489; 22 L. T. 888.

Statement. Appeal by the defendant from the judgment at trial of SIFTON, C.J., sitting with a jury. The appeal was heard by WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ.

Argument. *E. P. McNeill* and *T. B. Martin*, for defendants, appellants.

R. B. Bennett and *C. F. Harris*, for plaintiff, respondent.

The judgment of the Court was delivered by

[*20th January, 1905.*]

Judgment. WETMORE, J.—The plaintiff was a miner in the employ of the defendants, who carried on and operated coal mines at Frank in the North-West Territories. On the 28th September, 1902, he was ordered by Morris, the defendant's manager at Frank, to enter the mine for the purpose of executing some work in connection with mining. He entered the mine accordingly with two companions, one Haines and one Clarke. They proceeded to the immediate vicinity of the place where they were ordered to work, each of these men carrying a naked light, and Haines having a safety lamp which was not lighted. They encountered explosive gas, which was ignited, and an explosion occurred whereby Haines and Clarke were killed and the plaintiff suffered personal injury for which he brings this action. The case was tried before the Chief Justice and a jury, who found a verdict for the plaintiff for $1,500 damages, from which the defendants appeal.

Four questions were submitted to the jury by the learned trial Judge, which are as follows: 1st, Was the injury to the plaintiff, David Davies, caused by any negligence of the defendant company? 2nd, Or was it caused by his own negligence and want of proper care and caution? 3rd, If you find that the injury was caused by the negligence of the defendants, wherein did such negligence consist? 4th, At what sum do you assess the damages to the plaintiff?

The jury answered the first question in the affirmative, the second in the negative, and in answer to the third they found that the negligence consisted: (1) in insufficient ventilation, and (2) that the evidence produced showed insufficient coal in chute 84 to stop leakage; and they assessed the damages at $1,500. Both answers to the third question were in the direction that the defendants' negligence consisted of insufficient or improper ventilation.

Judgment.
Wetmore, J.

It was set up on behalf of the appellant that there was no case to go to the jury, and a non-suit was moved for at the end of the plaintiff's case, also at the close of the whole case.

In view of the findings of the jury, I am of opinion that this Court is only concerned in the question of whether there was sufficient evidence to go to the jury upon the question of improper or insufficient ventilation. All the authorities point in the direction that in order to maintain an action where the omission to carry out statutory provisions of this nature is concerned it must be proved that the accident occasioning the injury was brought about by the omission to carry out the particular statutory provision, and was the proximate result thereof. It is not necessary to cite any other authority for this proposition than *The Canadian Coloured Cotton Mills* v. *Kerwin*.[1]

The jury having answered the questions in the manner stated made no finding whether any omission of the statutory provisions other than that of want of proper ventilation occasioned the accident or that it was the proximate result of such omission, and both of these questions were for the jury. I will, therefore, simply deal with the question whether there was sufficient evidence to warrant the jury in coming to the conclusion that there was negligence on the part of the company at common law in respect to ventilation or whether the improper ventilation was in consequence of the omission to carry out the statutory provision as to ventilation. I am of the opinion that there was evidence which would warrant the jury in coming to the conclusion that the improper ventilation was due to the negligence of the company, and also to its omission to carry out its statutory obligations.

[The learned Judge here referred to the evidence.]

But it is urged on behalf of the defendants that the plaintiff was guilty of contributory negligence which was the proximate cause of the accident, that is, if it had not been for his own carelessness and recklessness with a full knowledge of the danger, the accident never would have occurred.

The question of contributory negligence was one for the jury and they have found by their answer to the second ques-

[1] 29 S. C. R. 478.

Judgment.
Wetmore, J.

tion in effect that the plaintiff was not guilty of any contributory negligence. I am of opinion that this finding is so wholly at variance with the weight of evidence and the testimony of the plaintiff himself that their answer to that question is most unsatisfactory, that their answer ought to have been the other way, and that consequently the verdict should have been entered for the defendants upon the question of contributory negligence, and, that, therefore, the verdict must be set aside and a new trial granted. . . .

It was urged on behalf of the plaintiff that the defendants having been guilty of a breach of the statutory obligation that they must take the consequences in any event of the omission, and the fact that the plaintiff was aware of the danger was no answer to the plaintiff's right to recover, and that the maxim *volenti non fit injuria* did not apply. A number of cases were cited for this proposition: *Baddeley* v. *Earl Granville*,[2] *Grant* v. *The Acadia Coal Company*,[3] and *Smith* v. *Baker*.[4] Now none of these cases lay down the rule that the maxim of *volenti non fit injuria* does not apply to any case where the accident is brought about by the omission to perform a statutory duty. It merely lays down the rule that instances may arise of omission where the maxim would not apply. For instance, in the case of *Grant* v. *The Acadia Coal Company*,[3] the defendants had employed competent officials for the superintendence of the mine, and required that the statutory regulations be observed. They were not observed through the company's employees not doing what they were instructed to do and the company sought to escape liability by reason of that. The Court held that that was no defence, that they were bound to perform their statutory obligations, and, I should judge from the judgment of the Judges holding that, that it was urged on the part of the defendant that, being aware of the defects, it was incumbent upon the plaintiff to leave the company's employ, and, if he did not do so, the maxim in question applied. The Court simply held that it did not apply in such a case. Then in *Smith* v. *Baker*,[4] the plaintiff was engaged in an employment, not in itself dangerous, but he was exposed to danger

[2] 56 L. J. Q. B. 501; 19 Q. B. D. 423; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822.
[3] 32 S. C. R. 427.
[4] (1891) A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660.

Judgment. Wetmore, J.

arising from an operation in another department over which he had no control, the danger being created or enhanced by the negligence of the employer. As a matter of fact the other operation in which the danger consisted was that stones were being slung over the heads of the workmen engaged in the work in which the plaintiff was engaged, and he was aware of that danger, and he, with the other workmen, when stones were being slung would occasionally run away to escape the danger. It was contended there, as in *Grant* v. *The Acadia Coal Company*,[3] that the plaintiff was aware of the danger and that he should not continue in the employ, and the maxim applied; but the Court held that it did not apply in that case.

I can find no case such as the present where the plaintiff himself, being aware of the specific danger, deliberately and recklessly—if I may use the expression—walked into it himself, and was the proximate cause of the accident happening, in which it was held that the maxim did not apply. In my judgment, it was such contributory negligence that the jury ought to have found that and given a verdict for the defendants.

I am also of the opinion that the defendants are entitled to a new trial upon the ground of misdirection by the trial Judge. In charging the jury upon the question of contributory negligence, he instructed them: "It is practically for you to decide . . . as to whether the company in this particular case exercised the precautions that they should have exercised in the carrying out of the statute and in the carrying out of those principles of common law for the purposes of properly protecting their workmen, *and provided you find that they did carry out these provisions, and notwithstanding their carrying out of those provisions an accident occurred*, then it is also for you to consider whether the plaintiff in this case had such a knowledge of all the circumstances as laid on him the duty that he should have himself guarded his life or guarded himself from entering into danger on that particular Sunday night. Whether he, with the knowledge that he had, was guilty of such culpable negligence in going there; because, if he was, then he did not exercise the care that an ordinary miner, not a man who was there as a stranger, or a new man, but an ordinary miner gives." I am of opinion that this direction was erroneous,

Judgment.
Wetmore, J.

in the first place because the jury was instructed, it seems to me, practically and in effect that the question of contributory negligence only arose in case the jury found that the company did carry out their statutory obligations and their common law duties. All I wish to say to that is that if the company had carried out their statutory obligations and common law duties there would be no right of action against them at all, and there would be no necessity in such a case to enter into the question of contributory negligence. The question of contributory negligence only arises when negligence or the omission of some statutory duty arises on the part of the defendants, and if contributory negligence exists that affords a matter of defence, notwithstanding the original negligence or want of duty on the part of the defendants.

Then I think the learned Judge also erred in using the expression "culpable negligence," leaving it to the jury whether he was guilty of such culpable negligence in going there. I think that was a word which was calculated to mislead the jury in giving them an impression that the negligence might not amount to contributory negligence if in the mind of the jury it was not culpable. This is a strong expression to use, and the jury, it seems to me, might not understand that the negligence required was either in commission or omission of an act which the plaintiff as a prudent man of ordinary knowledge of the matter would not or ought not to have committed or omitted.

I am also of the opinion that there must be a new trial upon the ground of the improper admission of the policy of insurance. That evidence had, in point of law, no material bearing on the case at all, and was to my mind clearly inadmissible. It was urged, however, that the admission of this testimony ought not to be a ground of granting a new trial because it could not have affected the minds of the jury. I am of the opinion that this testimony was calculated to affect the minds of the jury in rendering a verdict in this case, and I cannot help but come to the conclusion that it was pressed in on the part of the plaintiff with the hope that it would have such effect. I have too great respect for the legal knowledge of both the counsel for the plaintiff to believe that they were not aware that this evidence was not admissible, and I cannot conceive, with such knowledge,

Judgment. Wetmore, J.

that such testimony would have been pressed in unless they felt that it would likely have some effect; and it is rather a coincidence, in my mind, that the verdict of the jury was for $1,500, just the amount limited for which the insurance company would be liable in respect to injuries or death to one person. And the fact that the jury were influenced by this policy in reaching that amount is further impressed upon me by the fact that under the evidence I am disposed to think the damages rendered are excessive. It is just a case, it seems to me, where a jury would be likely to say: "A verdict against the company is not going to be a serious matter to them because they are protected by a policy of insurance effected with a company who are paid for taking the risk."

For all these grounds, I am of opinion that the verdict should be set aside and a new trial ordered, and I am of opinion that the plaintiff should be ordered to pay the costs of this appeal. I do not know that I would be disposed to make this order as to costs if the new trial merely went upon the ground that the jury found on the question of contributory negligence, against the weight of evidence, or on the ground of misdirection of the trial Judge, but I do think that when the counsel press in evidence of the character to which I have referred, thereby driving the party against whom it is pressed in to apply to the Court for a new trial, their client has got to take the consequences of their so doing.

Appeal allowed with costs, and new trial ordered.

ULMER v. ADOLF.

Arbitration — Award — Common law — Prairie fire.

The Arbitration Ordinance, C. O. 1898, c. 35, governs submissions in writing only, and there may be a valid submission by parol at common law altogether outside of that Ordinance.
Comments on the Prairie Fires Ordinance, C. O. 1898, c. 87.

[WETMORE, J., *9th July, 1904.*]

Statement.

This was an action for damages for the burning of the plaintiff's separator resulting from a fire started by the defendant in alleged violation of the *Prairie Fires Ordinance*, C. O. 1898, c. 87.

The statement of claim also alleged a parol submission to arbitration and sought to enforce a parol award made thereon. Statement.

The facts are fully set forth in the judgment.

Levi Thomson, for the plaintiff. Argument.

B. P. Richardson, for the defendant.

WETMORE, J.—The evidence discloses to my entire satisfaction that the defendant was, in view of the direction in which the wind was blowing and the situation of the plaintiff's separator, guilty of gross negligence at common law in setting fire to the weeds and inflammable matter on his land, which caused the fire whereby the plaintiff's separator was burned, and that he is liable to the plaintiff for the damage caused thereby, namely, the destruction of his separator. The difficulty I experience is that the plaintiff has, by his statement of claim, based his original right to hold the defendant liable upon alleged infringements or breaches by him of "*The Prairie Fires Ordinance.*"[1] I have, to say the least, very grave doubts whether the defendant was guilty of an offence under s. 5 of that Ordinance. I have very grave doubts whether a fire can be held to have run at large within the meaning of that section of the Ordinance which did not pass off or go beyond the land of the person kindling the fire or having the charge, custody or control of it. I had occasion to discuss this question to some extent in *Gedge* v. *Lindsay,*[2] on 13th August last. I did not decide the question, however, in that case, as I did not consider it necessary for the purposes of that case to do so. Judgment.

It was, however, established by the evidence to my satisfaction, and I find as a matter of fact, that the defendant was guilty of an offence against ss. 4 and 6 of the Ordinance in question for kindling a fire for the purpose of clearing land and burning brush without having the land completely surrounded by a fire-guard as provided in those sections, and without having the requisite number of persons in attendance during the whole period of the continuance of the fire provided with the proper appliances for extinguishing prairie fires, as also provided for in those sections. The fact that these fire-guards were not there did not contribute to the injury,

[1] C. O. 1898, c. 87.
[2] 7 Terr. L. R. 141.

Judgment. Wetmore, J.

because proper fire-guards might have been placed which would not have protected the separator from the fire, and still have satisfied the requirements of ss. 4 and 6.

But will the mere fact that an offence has been committed against these sections in itself render the offender liable for damages in a civil action for injury done by the fire? I, to say the least, doubt it very much. In *Gedge* v. *Lindsay*,[2] I discussed the object of "*The Prairie Fires Ordinance*," and I held that the object was to prevent prairie fires, which are apt to be most destructive and entail widespread and serious damage, or to have them so controlled that these general and widespread consequences will not follow, by punishing persons who disregard the safe-guards and regulations provided by the Ordinance. Section 2 of the Ordinance expressly gives a right of civil action for damages occasioned by an offence under that section. No such right of action is given when an offence is committed against ss. 4 and 6. The only consequence specially provided as respects such an offence is the penalty. It is true that s. 9 provides that nothing in the Ordinance "shall bar or prevent any person from bringing any action against any person to which he may be otherwise entitled." That does not create a new right of action. It simply preserves any right of action which a party aggrieved may have at common law or apart from the Ordinance. I do not wish to be understood as expressing a decided opinion upon the subject, but I must say that I am inclined to the opinion, in view of the intention of the Ordinance and the character of the legislation, that in so far as offences under s. 4 or 6 are concerned, what was decided in *Atkinson* v. *The Newcastle and Gateshead Water Company*[3] applies. I express no decided opinion upon any of the questions of law which I have hereinbefore discussed, except the point that the plaintiff had a good cause of action at common law, because I do not, in view of the conclusion I have reached, consider it necessary to do so.

I find under the evidence that, the separator having been destroyed in the manner I have mentioned, the plaintiff Peter Ulmer and the defendant met, and they both honestly believed that the plaintiffs had a good cause of action against the defendant for damages by reason of the destruction of this machine, and I have already found that the plaintiffs

[3] 46 L. J. Ex. 775; 2 Ex. D. 441; 36 L. T. 761; 25 W. R. 794.

Judgment.
Wetmore, J.

had, as a matter of fact, a good cause of action by reason of the defendant's gross negligence at common law. The defendant proposed a settlement of the matter, to which Peter Ulmer agreed, and proposed that each of them should choose two men to whom the matter should be referred, and that these four men would settle the matter, by which I understand that these four men so chosen would settle the question of the defendant's liability and the amount he would have to pay. The defendant agreed to this proposition, and Peter Ulmer selected Rowland H. Hall and Mat Lutz as his men or arbitrators, and the defendant selected his father, Karl Adolf, and his brother William as his men or arbitrators. These four men so selected met and heard the parties interested and awarded that the defendant should pay the plaintiff $450 as damages for the destruction of the separator. It was not stated in so many words that this $450 was to be paid as damages, but that was the effect of their finding. The defendant, upon this award being made, requested Peter Ulmer to knock off, as he expressed it, $50 from the amount awarded. Ulmer proposed that the defendant should pay him $400 and give him a two-year old heifer; this proposition was accepted by the defendant and agreed to by both parties.

It is true, there was no written submission to arbitration and no written award. But it is not necessary in order to make a valid submission that it must be embraced by "*The Arbitration Ordinance.*"[4] That Ordinance only embraces submissions in writing, but there may be a valid submission altogether outside of that Ordinance. At common law there may be a submission to arbitration by parol: *Russell on Arbitration* (8th ed.), 44; and when a parol submission was made the award might be by parol: *Russell on Arbitration,* 173. I am not aware that the law has been altered in this respect. This is a case where both the submission and the award may be by parol. The alleged compromise made as above stated after the award was made is not binding, it was made without consideration.

I am of opinion that this case comes within *Miles* v. *New Zealand Alford Estate Co.*[5] I can find nowhere in the evidence anything to establish forbearance to press the claim as forming a consideration for the compromise. The award therefore stands.

Judgment for plaintiff.

[4] C. O. 1898, c. 35.
[5] 55 L. J. Ch. 801; 32 Ch. D. 266; 54 L. T. 582; 34 W. R. 669.

RE WINTERS ESTATE.

Executors and administrators—Husband and wife—Accounts—Costs.

Whether grain crops grown and harvested by a husband on his wife's land is the property of the husband or of the wife is always a question of fact, and the test to be applied is, was it or was it not the intention of the wife to part with the control and disposition of the land to her husband for the purpose of enabling him to maintain himself and family? If such was her intention, the crops are the property of the husband.

In passing an administrator's accounts the parties interested have, as a rule, the right to a strict examination of the same and also to have witnesses examined *viva voce* if desired, and as a rule the costs of all parties attending the passing should be paid out of the estate.

[WETMORE, J., *22nd April, 1904.*]

Statement. Mary Ann Winters, deceased, died intestate leaving a husband and children, and her husband, Abraham Winters, was appointed administrator of her estate, which consisted entirely of a certain farm.

The intestate had resided with her husband and their family on this farm and the husband had, with the full consent of his wife, cultivated the farm using his own stock, implements and equipment, and he had also controlled and managed it in every way as if it were his own property for the maintenance of himself and his wife and their family.

Some time subsequent to the issue of letters of administration, Abraham Winters purported to advertise the farm for sale and to sell the same to one Deighton. This sale, however, was merely a pretense, and Deighton in due course conveyed the land to Abraham Winters, the administrator, who was the real purchaser.

An order having been made requiring Winters to file his accounts in connection with the estate and apply to have them passed and allowed, he, in obedience thereto, did so. Objection was taken to the alleged sale, but at the Judge's suggestion the parties agreed to allow the administrator to retain the land and to be charged with the value thereof. Argument was then heard respecting the ownership of a crop of grain which has been grown and harvested on this land just prior to the death of the deceased and which was included in the inventory of the estate filed on the application

for the grant of letters of administration. The argument was heard before WETMORE, J., in Chambers. Statement.

E. A. C. McLorg, for the next of kin. Argument.

J. T. Brown, for the administrator.

WETMORE, J.—I have come to the conclusion that the administrator is not chargeable with this grain. Judgment.

In *Powell* v. *Hankey et al.*,[1] the wife before marriage assigned all her mortgages and bonds to her separate use; after marriage she constantly permitted her husband to receive the interest of all these securities and bonds without making any complaint. The Lord Chancellor, Lord Macclesfield, in giving judgment in the case is reported as follows: "Forasmuch as she had for ten years together permitted the husband to receive this interest without making the least objection either to the husband or to the debtors who paid the money or to her own trustees, it should be therefore intended that she consented to the husband's receipt of this interest; that the contrary construction might have been a hardship upon the husband who (probably) depended on the wife's permitting him to receive this as a gift; and on such a presumption might have lived in a more plentiful manner, the comfort whereof the wife must have shared in." This is a very old case, but it strikes my mind as not an unreasonable view to take of the situation, and it is to some extent applicable theoretically at any rate to this case, and proves a good starting point for its consideration.

A fair way to test the question of the right of property is to consider whether under the circumstances this grain would have been properly seizable as the property of Abraham Winters under an execution against him. This question has been discussed to a very considerable extent by the Courts of Upper Canada and Ontario. One of the leading cases upon the question is *Lett* v. *The Commercial Bank of Canada*.[2] This was an interpleader issue to try the right of property in goods seized by the sheriff under execution. The plaintiff, the claimant, was the wife of one of the execution debtors. A portion of the property seized was growing crops. The land on which these crops were growing had been devised by

[1] (1722) 2 P. Wms. 84; 2 Eq. Cas. Abr. 151.
[2] 24 U. C. R. 522.

Judgment. Wetmore, J.

the plaintiff's father to trustees for the use of the plaintiff, to whom he made the rents and profits payable for her sole and separate use and benefit. The plaintiff and her husband were living together on this land, and one of the witnesses stated that the husband was the managing farmer. The question was whether these crops were the separate property of the plaintiff and therefore by virtue of the Statute of Upper Canada not liable to seizure upon execution against her husband. In delivering judgment upon this question, Draper, C.J., is reported at p. 555 as follows: "The will, while silent as to her (the plaintiff's) occupation of the land or of any portion of it, makes express provision for the trustees granting leases at the best rent and gives discretion as to certain things which are to be required from the tenants and makes it the duty of the trustees to pay over the rents, issues and profits to the claimant or her appointee. The occupation of the land may not be necessarily inconsistent with the testator's contention; but he certainly has made no express provision for it. In the absence of any evidence to the contrary, it seems to me the reasonable presumption is that Dr. Lett was tenant of the land on which these crops were growing, and the evidence of a neighbour, one of the claimant's witnesses, gives colour to this presumption when he says, 'Dr. Lett is the managing farmer as far as I know.' If he is, in fact, the occupant farming the land, the growing crops were his, and were liable to an execution against him," and at page 556, he is reported as follows: "Whether hers or her husband's depends on which of them was the occupant in fact and in law of the premises on which they grew. And that is a question which has not been submitted to the jury." The case was sent down for a new trial so far as that point was concerned upon the ground that that question had not been submitted to the jury. This judgment was concurred in by the other Judges, who sat on the case.

I can find no case which has overruled what was so laid down by Draper, C.J. There are cases which draw distinctions. For instance, in *Plows* v. *Maughn*,[1] which was tried by a Judge without a jury, the question was as to the right of a quantity of hay. The land on which the hay was grown, was the property of the wife, who lived on a farm with her husband, about a mile from such land. The hay in ques-

[1] 42 U. C. R. 129.

Judgment.

Wetmore, J.

tion was the produce of seed sown by the husband on this land. He owned the seed, but he was not told to do so by the wife. The hay was cut at the expense of the wife and although taken to the husband's farm, it was kept separate from the husband's hay. The husband managed the land up to the time of sowing the seed. The trial Judge gave judgment for the defendants, the execution creditors, holding that the case was governed by *Lett* v. *The Commercial Bank*.[2] The Court of Queen's Bench drew a distinction, and I think it was quite open to it to do so. Because the crop of hay in question was not the first crop after the sowing, it was the second one, and therefore might be considered as *fructus naturalis*, and although the husband, down to the time of the sowing managed the land, the wife by cutting the hay at her expense and keeping it separate from the husband's, shewed an intention of holding the property as her own, and not the husband's, and thus put an end to any consent or inference that the right of property in the hay grown thereon should be in him. It is true that Harrison, C.J., at page 132, apparently put the distinction between that case and *Lett* v. *Commercial Bank*,[2] partially on the ground that in the last mentioned case "for all that appeared, the husband was the tenant of the land under the wife's trustees." I am of opinion that the judgment in *Lett* v. *The Commercial Bank*,[2] went further than that, and put the right of property upon the broad question of who was, in fact, and in law, occupant of the land.

The distinction, I think, is more correctly drawn in *Ingram* v. *Taylor*.[4] That case was tried without a jury, and involved the right of property in crops grown on a certain lot of land. This lot belonged to the father of the husband. The husband and wife with their family lived on it. After they had lived on it for a number of years the father died, having devised the west half of the lot to his son's wife and the other half to her son, a lad of about ten years of age. The trial Judge in commenting on the evidence and speaking of the wife's evidence is reported[5] as follows: "Her evidence in the first place goes as if she was carrying on the whole business without intervention on the part of the husband; but it was qualified by her cross-examination, it being

[4] 46 U. C. R. 52; 7 A. R. 216.
[5] At p. 55 of 46 U. C. R.

Judgment.
Wetmore, J.

shewn that the husband was doing what a lazy man might do about the farm, conveying her orders possibly, but still being the medium of communication with the men; doing chores, feeding the cattle and the pigs, going to market so far as ascertaining the state of the market, buying whatever had to be bought, implements or grain or anything else, and doing in that way the work which would have had to be done by somebody else, if he had not been there. It does not strike me, however, that the part taken by the husband in that way, in carrying on the work of the farm, created the position that existed in the case of *Lett* v. *The Commercial Bank*.[2] The Judge then went on to point out other distinctions between the facts in the case he was considering and those in *Lett* v. *The Commercial Bank*,[2] and then proceeds: "I think, that having regard to that and to what we have heard all through the evidence, we cannot say that the husband was really working that farm as *the head of the family for the purpose of providing for his family*." On application to have the judgment for the plaintiff set aside and judgment entered for the defendant, the Court of Queen's Bench held that the trial Judge rightly distinguished the facts in the case from those in *Lett* v. *The Commercial Bank*.[2] The judgment of the Court was delivered by Haggarty, C.J., who was a member of the Court that decided *Lett* v. *The Commercial Bank*.[2] The case was carried to appeal, and in delivering judgment on such appeal, Burton, J.A., is reported, as follows:[6] "The learned Judge has found upon evidence which, I think, could lead to no other conclusion that the wife never consented to part with the control and disposition of this farm to her husband, and that there is no pretence therefore for the legality of the seizure of the crops grown upon the west half."

I am of opinion that this citation from Burton, J.A., not only properly distinguished that case from *Lett* v. *The Commercial Bank*,[2] but lays down a rule which should be properly followed, and that is that the question must always be one of fact, to be gathered from the evidence and surrounding circumstances. Was it or was it not the intention of the wife to part with the control and disposition of the land to the husband for the purpose of enabling him to maintain himself and family? If such was her intention,

[6] At p. 219 of 7 A. R.

Judgment.
Wetmore, J.

then the crops would be the property of the husband, and liable to seizure under execution against him. And if that was so, such crops would, in the case of her death, especially if harvested before her death, as in this case, be the property of the husband as against the wife's representatives. I find, as a matter of fact, under the evidence that Winters and his wife, the deceased Mary Ann Winters, during their lives and coverture lived with their family, on the land in question, that she suffered and permitted him to have the sole management and control of such land for the purpose of maintaining themselves and their family, that she suffered him to take to his own use the profits derived from such control and management, and that she did so intentionally. And I hold the grain in question to have been the property of Abraham Winters in his own right, and that he is not chargeable with it in favour of the estate. The fact that the administrator included this grain in the inventory as part of the estate does not affect the question. It is quite clear that he did so under a misapprehension of his legal rights, and he in his testimony explained how he came to do it. It was conceded on all sides that the administrator is chargeable with the fair rental of this land from the date of Mary Ann Winters' death until the date of the alleged sale to Deighton. And the weight of evidence establishes that $300 a year is a fair rental therefor.

As to the question of costs of passing these accounts, I was at one time inclined to think that the administrator should only be allowed out of the estate the ordinary costs of passing the accounts; that is, that he should not be allowed the costs of cross-examination of himself and of Wm. A. McCorkell, W. W. McDonald and Arthur F. Deighton, upon their respective affidavits, and of the examination before the clerk of witnesses generally, and that instead he should be ordered to pay those costs himself. I have on reflection arrived at a different conclusion. In the first place, I am of opinion that when administrator's accounts are scrutinized the parties interested have, as a rule, a right to a strict examination with respect thereto, and that witnesses should be examined *viva voce* if the parties so desire. This undoubtedly was a case where an examination of witnesses *viva voce* was prudent, and it served a useful purpose. Possibly if the examinations before the clerk had been confined to the

Judgment. Wetmore, J.

administrator's conduct in selling the land I might have ordered him to pay the costs of them. But these examinations went outside of that; they took in nearly every important matter that arose in the matter of passing the accounts. I find it very difficult to separate from the rest the costs which I could properly order the administrator himself to pay. I have, therefore, concluded to abide by the usual rule in such cases, and order the costs of all parties attending to be paid out of the estate, including the costs of and incidental to the examinations and cross-examinations before the clerk. The administrator, however, not to be allowed any costs or disbursements in connection with the alleged advertising of the real estate for sale or of the alleged sale to Deighton.

Order accordingly.

ATTORNEY-GENERAL v. CANADA SETTLERS LOAN & TRUST COMPANY.

Assessment and taxation — Confirmation of overseer's return — Land belonging to Canada.

By the Local Improvement Ordinance, C. O. 1898, c. 73, it was provided that upon the confirmation by a Judge of the return of unpaid taxes required by the Ordinance to be made annually by the overseer to the Attorney-General, the lands in respect of which the taxes were imposed should be vested in the Crown subject to redemption within a stated period, and in default of redemption the land became, on the order of a Judge, absolutely vested in the Crown. Under this provision application was made to confirm the overseer's return respecting land, the title to which was in the Crown but which was the subject of a homestead entry at the time the taxes were levied.

Held, that the proceeding was not a process of execution to enforce payment by the person liable to pay such taxes, but was a proceeding to enforce a lien against land, and as land held by the Crown was not liable to taxation, the overseer's return could not be confirmed.

[WETMORE, J., *21st September, 1901.*]

Argument.

Macdonald, for the Attorney-General.

E. L. Elwood, for the Canada Settlers L. & S. Co.

Judgment.

WETMORE, J.:—This is an application to confirm the overseer's return as to the south-east quarter, section 32, township 26, range 5, west second meridian. The land was assessed to a "person unknown," for 1898, $2.50, and 1899,

Judgment.
Wetmore, J.

$2.50. It is conceded that if the return cannot be confirmed as to 1898, it cannot be confirmed as to 1899. The facts of the case are as follows: The title to this land, subject as herein stated, was up to the date of the issue of the patent hereinafter mentioned in the Dominion of Canada. About 1891, one Charles Eyre homesteaded it and entered into possession thereof, and having received an advance from the above named company, a charge was created on such homestead for the amount of such advance, under section 44 of *The Dominion Lands Act*.[1] Eyre remained in occupation of the lot until the cancellation of his entry on 12th October, 1899. A patent to this land was issued to the company on 17th February, 1900. The evidence does not establish how the company obtained this patent. It seemed to be assumed, however, that it was obtained under the provisions of section 44 of *The Dominion Lands Act*.

I am of opinion that this land was not properly assessed in the district, for either of the years 1898 or 1899. The land belonged to Canada, and was not liable to taxation by virtue of section 125 of *The British North America Act*, 1867.

It is urged on behalf of the Attorney-General that the object of that section was merely to prevent the Dominion from taxing the property of a province or a province from taxing the property of the Dominion. Assuming this to be correct (a proposition, however, that I am not at present prepared to assent to), it will not help the matter. The right to legislate on the subject of taxation is given to the Legislative Assembly by section 13 of *The North-West Territories Act*, as substituted by section 6 of ch. 22 of the Acts of 1891, and the powers of legislation conferred by that section are all limited by sub-section 2 thereof, so as not to give any greater powers of legislation than those given to Provincial Legislatures under section 92 of *The British North America Act*, 1867. And the powers given to Provincial Legislatures by section 92 of that Act to legislate upon the subject of taxation, is controlled by section 125 of *The Imperial Act*. Consequently the powers of the North-West Assembly to legislate with respect to taxation is controlled in the same way. The North-West Assembly can

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

Judgment.
Wetmore, J.

no more tax Dominion land than the local Legislature of a province can. I do not wish to be understood as holding that the assessment or taxation in question was not good as against the occupant of the land, whoever he may have been. But if it is so good, the taxation is not against the land, but against the person of the occupant in respect of his occupancy, and the mode for recovery of the tax in that case would be by suit, under section 33 of the Ordinance.[2]

The object of sections 35, 36, and 37 of the Ordinance,[2] is in my opinion to enforce a lien, which has attached in respect to the land taxed. It is not a process of execution to enforce payment. That was not the intention of the Legislature so far as I can gather its meaning from the Ordinance. Section 32 provides that the taxes accruing in respect of land shall be a special lien upon it. If the tax, however, is against the occupant by reason of his occupancy, and not against the land itself, no lien is created upon the land. Then sections 35 and 36 provide a summary procedure, by which such lien (where it exists) may be enforced. Upon the overseer's return being confirmed the land becomes vested in the Crown for the public use of the Territories, subject to a right of redemption within a stated period, and if not so redeemed the property becomes, on the order of a Judge, absolutely vested in Her Majesty.

It is admitted that the remedy in question would not be available against the land unless or until the ownership of the land becomes vested in the person assessed or someone claiming through him. But when such ownership did become vested in the person assessed or someone claiming through him the remedy attached. I cannot assent to that proposition. No authority has been cited for it, and I cannot lay my hands on any authority for it. This proposition seems to involve this: that no lien being created against the land by virtue of the taxation at the time it was imposed, one may subsequently by change of ownership spring into existence (years afterwards for that matter). This is altogether at variance with my ideas on the subject. I must refuse to confirm the return *quoad* this lot.

Application refused.

[2] C. O. 1898, c. 73, "The Local Improvement Ordinance."

RE SPRING CREEK SCHOOL DISTRICT.

Assessment and taxation — Sale of land for taxes — Land held by Crown.

A school district sold for arrears of taxes, land, the title to which was in the Crown, but which had been homesteaded by one B., who, however, had vacated the land prior to the year in which the taxes had been imposed. The Ordinance governing the same provided that all property held by Her Majesty should be exempt from taxation, but that when any such property was occupied by any person otherwise than in any official capacity the occupant should be assessed in respect thereof, but the property itself should not be liable.

On application to confirm the sale by the district,

Held, that taxes could not be recovered by sale of the land, and that the application to confirm must be refused.

[WETMORE, J., *11th March, 1904.*]

Statement. Motion to WETMORE, J., in Chambers to confirm an alleged sale of land for arrears of school taxes.

Argument. *E. L. Elwood*, for the motion.

J. T. Brown, for the Canada N.-W. Land Co., opposed the motion.

Judgment. WETMORE, J.—This is an application by the school district above named to confirm the sale to them by their treasurer of the north-west quarter of section 16, township 22, range 32, west of the 1st principal meridian, for arrears of school taxes. The sale was made on 6th January, 1898, and the transfer was dated 19th April, 1899. About the 18th May, 1884, one Bristow homesteaded this quarter section. In or about September, 1887, Bristow, according to his affidavit, vacated the land, and he has never occupied it since. A patent to this land was issued by the Crown to The Canada North-West Land Co., Ltd., dated the 4th March, 1902, and in pursuance of such patent, a certificate of ownership was issued to them on 22nd May, 1902. Neither the company nor any person with their authority was ever in possession of the land prior to the issue of the patent. The school district was formed on 7th February, 1890, and the land in question prior to that date was not situated in any school district. Consequently up to that date it was not liable to assessment for school purposes nor was any person liable to be assessed in respect thereof for school purposes.

Judgment.

Wetmore, J.

There is no evidence to establish for what particular years the assessment was made and the taxes accrued due for which the land in question was sold. But the sale was on 6th January, 1898, so that the assessment and imposition of the taxes in question must have been made either under ch. 59 of *The Revised Ordinances* (1888), or No. 22 of the Ordinances of 1892, and the amendments thereto. Both these Ordinances provide that all property held by Her Majesty shall be exempt from taxation, but that when any such property is occupied by any person, otherwise than in an official capacity, the occupant shall be assessed in respect thereof, *but the property itself shall not be liable.* (See ch. 59, *Revised Ordinances*, sec. 98, clauses 1 and 3, and No. 22 of 1892, sec. 103, clauses 1 and 3). Then section 125 of *The British North America Act*, provides that "No lands or property belonging to Canada or any province shall be liable to taxation." I am, therefore, of opinion that the land in question could not be assessed, because it was held by the Crown, that seems to me abundantly clear. The party in occupation, however, might be assessed in respect to such occupation, and I wish to draw particular attention to the fact that the land *itself* would not be assessed in such case, but the party in occupation would be assessed *in respect thereof*, the assessment would be against the individual and not against the property.

The next question that arises in my mind is—What procedure was provided for the recovery of taxes so imposed upon any such individual? They might be recovered by distress of his goods and chattels as provided by sec. 119 of ch. 59 of *The Revised Statutes*, sec. 124 of No. 22 of 1892; sec. 153 of Ordinance No. 2 of 1896, and sec. 156 of ch. 75 of *The Consolidated Ordinances*, or they might be recovered by suit against the person assessed as provided by sections 122 of *The Revised Ordinances*, 127 of the Ordinances of 1892, 156 of the Ordinances of 1896, and 159 of *The Consolidated Ordinances*. But I am of opinion and hold that the taxes in question in this matter could not be recovered by sale of the land in question, in the manner in which it was sold, namely, by the treasurer of the school board, under section 172 of the Ordinance of 1896. The Ordinances in my opinion only provided for sales under that section or similar

Judgment.
Wetmore, J.

sections in the preceding Ordinances when the tax was imposed on the land, not where it was imposed on the occupant *in respect of* the land.

My attention has been drawn to section 159 of the Ordinance of 1896. That section provides as follows: "The taxes accrued on any land or property or *in respect of the ownership or occupancy of any land or property* shall be a special lien upon such land or property, having preference over any claim, lien, privilege or incumbrance of any party except the Crown." This provision requires consideration in view of its containing the language which I have italicized. But in my opinion it does not affect this case. I hold that the section does not affect this case, because the language that I have marked as italicized was not in the corresponding section of ch. 59 of *The Revised Ordinance* or of the Ordinance of 1892. (See sec. 125 of *The Revised Statutes*, and 130 of the Ordinances of 1892). Those sections confine the lien to "taxes accrued on any land or property," and I have already held in effect that the taxes now in question did not accrue on the land, and the provisions of section 159 of the Ordinance of 1896, cannot be given a restrospective operation to create a lien on lands with respect to assessments theretofore made or taxes theretofore imposed which did not exist before the Ordinance came into force; there being nothing in such Ordinance which requires such operations to be given to it.

My attention has also been drawn to sec. 132 of ch. 59 of *The Revised Ordinances*, and 137 of the Ordinance of 1892, which is as follows:—

"Where the title to any land sold for arrears of taxes is in the Crown, the deed therefor in whatever form given shall be held to convey only such interest as the Crown may have given or parted with or may be willing to recognize or admit that any person possesses under any colour of right whatever; and the school district on whose behalf any land shall be sold for arrears of taxes, as aforesaid, shall in case of any such sale being declared invalid, be liable only for the purchase-money actually paid therefor to the school district and interest thereon." This provision was in effect carried forward into the Ordinance of 1896. (See section 165).

I must say that I am at a loss to understand what these provisions mean, because as before stated, I can find no authority in the Ordinance in question authorizing the

Judgment. Wetmore, J.

interest of a person in possession of Crown land or otherwise interested in it to be assessed or sold. In fact, any such assessment would be at variance with the provisions of clause 3 of sec. 98, of ch. 59, of *The Revised Statutes* and of section 103 of the Ordinance of 1892, which declare that in the case of a person occupying Crown land *the property itself shall not be liable* to assessment. And for the reasons given by me as hereinbefore stated, I fail to discover the right given to sell lands which have not been assessed. And in addition to all this, I again draw attention to the section of *The British North America Act*, which I have quoted. Then we have the provisions of sec. 4, sub-sec. 2, of ch. 12 of the Ordinances of 1901, whereby it is provided that the conclusiveness of the transfer to entitle a person under it to have it confirmed, may be disputed on the ground that *the land was not liable to assessment*. By virtue of the express clause in section 98 of *The Revised Ordinances*, and 103 of the Ordinance of 1892, the *land* was not liable to assessment.

Application refused.

IN RE A SOLICITOR.

Solicitor and client — Costs — Review of taxation — Counsel fees— Tariff of fees.

A counsel fee advising on evidence is taxable as between solicitor and client at any stage of the suit if the client consults his solicitor in that respect, but the counsel fee for settling pleadings is not taxable until after all the pleadings have been delivered.

The fees authorized by the tariff apply as between solicitor and client with respect to the services covered thereby, but in cases where there is no tariff the solicitor can recover the value of his services upon a *quantum meruit*.

[WETMORE, J., *11th April, 1902.*]

Argument.

E. L. Elwood, for the client.

The solicitor in person.

Judgment.

WETMORE, J.:—This is a review on the part of the client of the taxation of costs, as between advocate and client. The advocates were for the defendant in an action in this Court, and were changed after a statement of defence was prepared and ready for filing and delivery, but before it was filed or delivered.

The affidavit of one of the advocates discloses the fact that he, at the client's request, did advise him as to what

evidence would be necessary at the trial. I am of opinion that under such circumstances the counsel fee of $3 was properly allowed, the advocates having obtained my *fiat* for that amount. This fee would not be taxable as between party and party until after the cause was at issue. If a client, however, chooses before that stage of the case is reached to consult his advocate in this particular, he is liable to pay what the tariff authorizes for such a service. Judgment. Wetmore, J.

The counsel fee of $3 for settling pleadings was not properly allowed. The question of this fee was discussed in an informal way by the Judges of this Court sometime ago, and they were all but one of opinion that this fee was not taxable until after the cause at issue, that is, until after all the pleadings in the case were in, and it was understood that this should be adopted in practice.

As to the charge for "several interviews with the defendant, going fully into the case," allowed at $2.30, I have very great doubts if this charge was properly taxed. A promissory note was in question in the action and the defendant claimed that he had paid the note, but according to the advocate's affidavit the defendant was very uncertain as to the circumstances surrounding the payment, namely, as to when, where, and how he paid it, and how much he paid, and that this rendered lengthy interviews necessary. I am of opinion that these interviews were all of a character which would appertain either to instructions to defend or instructions for pleadings or advising on evidence. The instructions or advisings may be the result of one or a dozen interviews, as the case may be, and it seems to me that the tariff contemplates that. Take, for instance, the fees for instructions to sue, items 1 and 2 of tariff, one fee is provided in such case, when the case is undefended, and a higher fee when it is defended. I can only understand that by assuming that when a case is defended further instructions, and therefore, further interviews would be necessary; otherwise the service would be worth just as much in the one case as in the other. It is quite evident also that advising on evidence may necessitate one or many more interviews, according to circumstances, but the tariff only provides one fee for the service, no matter how long the interview or interviews may be. I have great doubts, therefore, whether this charge I am now discussing comes under any items of the tariff form 47 to 58, both inclusive, as those items according to their head-

Judgment.
Wetmore, J.

ing only include "attendances not otherwise provided for," and it seems to me that these attendances in question, if they may be so classed, are otherwise provided for, being included in the instructions or advisings that I have referred to.

Then is the item taxable as a counsel fee? The law may be now considered as well settled that counsel fees are recoverable by action in this country. See *McDougall* v. *Campbell*,[1] *Paradis* v. *Boise*,[2] *Armour* v. *Kilmer*,[3] *Armour* v. *Dinner*.[4] In *Hamilton* v. *McNeill*,[5] which was a review of taxation of costs as between advocate and client, and referred by me to the Court *en banc*, that Court at its December sittings in 1894, held:—

1st. That an advocate can recover counsel fees from his client.

2nd. That a Judge may grant such counsel fees as are authorized by the tariff.

3rd. That he can allow no counsel fee other than those authorized by the tariff.

The result is that in the Territories, counsel can only recover by action such counsel fees as are authorized by the tariff, provided that the work is of a character to which the tariff is applicable. This holding of the Supreme Court of the Territories is in view of section 534 of Ordinance No. 6 of 1893, now Rule 533 of *The Judicature Ordinance*, quite in accord with what incidentally is laid down in *Paradis* v. *Boise*[2] and *Armour* v. *Kilmer*,[3] because the tariff in the Territories does apply, as between advocate and client. When there is no tariff applicable he can recover the value of his services upon a *quantum meruit*, as was held in *Paradis* v. *Boise*,[2] *Armour* v. *Kilmer*,[3] and *Armour* v. *Dinner*.[4] In that case, however, it would not be a matter for taxation at all, as it would be outside of tariffs. See *Armour* v. *Kilmer*,[3] at page 624.[6]

I can find no item in the tariff allowing a counsel fee for services of the character of the charge now under discussion.

Order accordingly.

[1] 41 U. C. R. 332; 14 C. L. J. 213.
[2] 21 S. C. R. 419.
[3] 28 O. R. 618.
[4] 4 Terr. L. R. 30.
[5] 2 Terr. L. R. 151.
[6] 28 O. R. at p. 624.

KATRINSKY v. ESTERHAZY PROTESTANT SEPARATE SCHOOL DISTRICT.

JUNIC v. ESTERHAZY ROMAN CATHOLIC PUBLIC SCHOOL DISTRICT.

Assessment and taxation—Separate School District — "Owner" of land.

A purchaser of land under agreement who has not paid all the moneys or performed the conditions to entitle him to a conveyance, although he has at the particular time done all his agreement calls for, is not the "owner" of the land so as to entitle him to pay the taxes to the School District of which such purchaser is a ratepayer under the School Ordinance, C. O. 1898, c. 75, which provides by s. 126 that "in cases where Separate School Districts have been established, when property owned by a Protestant is occupied by a Roman Catholic, and *vice versa*, the tenant in such cases shall only be assessed for the amount of property he owns, whether real or personal, but the school taxes shall in all cases, whether or not the same has been or is stipulated to the contrary in any deed, contract or lease whatever, be paid to the school of which such owner is a ratepayer."

Where, however, a purchaser has met the demands and fulfilled all the conditions to entitle him to a conveyance, but such conveyance has not been executed, the purchaser being in equity the owner is the "owner" of the land within the meaning of the section of the School Ordinance above cited.

[WETMORE, J., *30th August, 1902.*]

Statement.

Two appeals by the plaintiffs under section 149 of the *School Ordinance* from decisions of the Court of Revision, affirming the assessments in question.

The facts appear in the judgments.

Judgment.

WETMORE, J.—This is an appeal under sec. 149 of *The School Ordinance*,[1] by Katrinsky, the appellant, from a decision of the Court of Revision of the above-mentioned school district, affirming his assessment in such district, in respect to the south-east quarter of section 12, township 19, range 2 west second meridian. The registered title to this land is in Lauchlin A. Hamilton, Frederick T. Griffin, and James A. Aikins, trustees, subject to section 44 of *The Land Titles Act*. The appellant is in occupation of the land, and is a Roman Catholic. It would seem that he originally went into such occupation under a contract of purchase and sale, from

[1] C. O. 1898, c. 75.

Judgment. Wetmore, J.

the Canadian Pacific Railway Company, made on the 17th November, 1896. But the registered title to the lot having become vested in Messrs. Hamilton, Griffin and Aikins (whom I will hereafter describe as "the trustees"), and I assume the purchase-money not having been paid in full by the appellant, the trustees entered into an agreement with him on the 1st January last, for the consideration therein mentioned, to sell to him this lot for $376.95, of which $105 was to be paid down, and the balance in ten equal annual instalments, on the 1st day of January in each year. All instalments, on becoming due, to bear interest at the rate of six per cent, per annum until paid. The appellant has paid $105 on account of such purchase and the balance still remains unpaid. The trustees are Protestants.

The only ground of appeal stated in the notice of appeal is that the appellant is the owner of the land within the meaning of *The School Ordinance*[1] and should not, therefore, pay taxes in the respondent's district. The public school district in Esterhazy is Roman Catholic, and the contention is that the land in question is liable to assessment for the purposes of the public school district, and not for those of the separate school district.

By virtue of section 132 of *The School Ordinance*,[1] "All real . . . property situate within the limits of any school district . . . shall be liable to taxation," subject to certain specified exemptions, among which this land in question is not included. This land is, therefore, liable to assessment for the purposes of one of the districts in Esterhazy.

Section 126 of the Ordinance[1] provides that, "In cases where separate school districts have been established, when property owned by a Protestant is occupied by a Roman Catholic and *vice versa*, the tenant in such cases shall only be assessed for the amount of property he owns, whether real or personal, but the school taxes shall in all cases, whether or not the same has been or is stipulated to the contrary in any deed, contract or lease whatever, be paid in the school district to which such owner is a ratepayer." This section struck me at first as not being very clear. On closer reading, however, I think that the meaning and intention of it is apparent, namely, that in any district in which a separate school is established, and any land

Judgment.
Wetmore, J.

therein is occupied as pointed out in such section, the Roman Catholic School is not to have the benefit of any taxation in respect to property *owned* by the Protestant. The words "such owner" in the last line of the section has two references: first, to the property *owned* as distinguished from occupation without ownership of the Roman Catholic tenant: second, to the property owned without actual occupation by the Protestant land owner and *vice versa*, and that the rights of the respective districts in this respect cannot be contracted away by the parties. The only question for decision, therefore, is, is the appellant the owner of the land in question? I am of opinion that he is not.

At common law a person entering into possession of land under an agreement for purchase is a tenant: (*Clark on Landlord and Tenant*, 183; *Woodfall, Landlord and Tenant* (5th ed.), 170), generally a tenant at will. Possibly in this case the appellant may be a tenant for years, because by the agreement of purchase he is authorized to take possession of the land and occupy the same until default is made in the agreed payments, and he also by such agreement attorned and became tenant at will to the vendors at an annual rent equal to the annual payment of principal and interest. It is not necessary to decide whether the appellant is a tenant at will or a tenant for years, it is sufficient to hold that he is a tenant to the vendors, the trustees. This common law rule must prevail unless there is some statutory enactment to the contrary.

In *Street* v. *Simcoe*,[2] Richards, J., is quoted[3] as using language which has a tendency to lead to the conclusion that in his opinion when a person has purchased lands and paid all the instalments due by virtue of the contract he is the owner, although some of the instalments of the purchase money have not fallen due, and consequently have not been paid. Possibly he may have been influenced by the circumstances of that case, and the manner in which the plaintiff was allowed to deal with the land. Taylor, C.J., in *Can. Pac. Ry. Co.* v. *Cornwallis*,[4] cites these remarks of Richards, J., apparently with approval. If these learned Judges intended to lay down the rule apart from the circumstances referred to that a purchaser of land who has not paid all the moneys or performed

[2] 12 C. P. 284; 2 E. & A. 211.
[3] At p. 291 of 12 C. P.
[4] 7 Man. L. R. 7; 19 S. C. R. 702.

Judgment. Wetmore, J.

the conditions to entitle him to a conveyance, although he has at the particular time done all his agreement called for, is the owner of the land, with all respect for such eminent Judges I am unable to agree with them.

The learned counsel for the appellant urged that *The School Ordinance*[1] and *The Municipal Ordinance*[5] were, as he expressed it, *so dove-tailed into each other* that inasmuch as there was no definition of the word "owner" in the *School Ordinance* the definition given to the word by sec. 2, par. 7, of the *Municipal Ordinance* is applicable to it in "*The School Ordinance.*" I cannot give effect to this contention. In the first place, the definitions given by sec. 2 of "*The Municipal Ordinance*" are expressly limited to the expressions where "they occur" in that Ordinance. Even without such a limitation that must be the effect of the definitions, they could not be applied to other Ordinances. Moreover, to give effect to the word "owner" as defined in "*The Municipal Ordinance*" would be quite inconsistent in some respects with sec. 126 of "*The School Ordinance,*" as, for instance, to hold that a person is the owner of taxable property who has the use of it. Section 126, as I have pointed out, draws a clear distinction between the person who owns property and the person who has the use of it by actual occupation.

Apart from the common law, I cannot conceive how the appellant can be held to be the owner of the land within the meaning of sec. 126 of *The School Ordinance,*[1] when by his agreement he has attorned to the trustees and has agreed to become tenant to them. Moreover, it is just possible that under this agreement the appellant may never have the title to this property, because the agreement provides that the payment of the stipulated price at the time agreed on is a condition precedent and is of the essence of the contract, and on default the vendors may declare the contract null and void. This provision in the agreement does not deprive the school district entitled to the benefit of the tax from such benefit. The appellant has to pay such tax to the district entitled to it. I do not wish to be understood as holding that if the appellant had paid the purchase-money for the land in full and fulfilled every other stipulation on his part in the agreement so as to be entitled to a conveyance he would not in

[1] C. O. 1898, c. 70.

equity be considered the owner for the purpose of taxation. This state of affairs does not exist in this case. Judgment. Wetmore, J.

The owners of the land being Protestants, the taxes in respect of it must be paid to the separate school district.

Appeal dismissed.

JUNIC'S CASE.

[*August 30th, 1902.*]

WETMORE, J.—The facts in this case are somewhat different from those in Katrinsky's appeal. The land in question is the N. W. ¼, sec. 6, tp. 19, rge. 1, w. 2nd. The registered title is in the same trustees as in the other case and subject in the same way. The appellant is a Protestant, and at the time of the assessment occupied the land. The title to this land was at one time vested in Sir George Stephen, now Lord Mount Stephen, who agreed to sell it to one George Kiss, who paid the purchase-money for it in full and was entitled to a conveyance of the property. A transfer thereof to Kiss was executed on behalf of Lord Mount Stephen by one John Turnbull, professing to be his attorney, but such transfer was not registered, as the registrar of land titles held that the power of attorney to Mr. Turnbull did not authorize the transfer. Subsequently to this Lord Mount Stephen transferred the property to the trustees on 19th July, 1900. About the 3rd February, 1900, Kiss died, and no legal representative has been appointed to his estate. The trustees are prepared to execute a transfer of the land to Kiss' legal representative when appointed. Kiss was a Roman Catholic. Judgment.

The ground of appeal stated in the notice of appeal is that the owner of the land in question is a Roman Catholic. The question raised by this appeal is not as easily disposed of as that in the other appeal. The first question to be decided is, was Kiss at the time of his death, for the purpose of assessment and taxation, the owner of this land? I am of opinion that he was, and so hold. The trustees have no beneficial interest whatever in the property. Kiss in his lifetime had the whole beneficial interest therein, and could enforce specific

Judgment.
Wetmore, J.

performance of the contract on the part of the trustees and compel a transfer. I refer to the judgment of Taylor, C.J., in this respect in *Canadian Pacific Railway Co.* v. *Cornwallis*,[4] and the judgment of Strong, J., on the appeal in this case, concurring in the judgment of Taylor, C.J. And I agree that where all payments have been made and all conditions fulfilled by the purchaser to entitle him to a conveyance he is in equity the owner, and is to be treated as if a conveyance had been made to him on the well known equitable principle that equity considers everything as done which ought to have been done. The greatest difficulty that presents itself to my mind is to determine under the law in force in these Territories, in whom is Kiss' interest vested pending the grant of letters of administration? No question could have arisen at common law, because upon Kiss' death the title would have instantly devolved upon his heirs at law, and I would have had no hesitation in assuming, in the absence of evidence to the contrary, that as Kiss was a Roman Catholic his heirs are Roman Catholics also. But by virtue of sec. 3 of "*The Land Titles Act*" land of a deceased owner goes to his personal representatives, and no personal representative has as yet been appointed to Kiss' estate. At common law the title to real estate could never abate. Did "*The Territories Real Property Act*" and subsequently "*The Land Titles Act*" alter that? I do not consider it necessary to decide this question at present. The land in question is liable to be assessed for school purposes by virtue of sec. 132 of "*The School Ordinance.*" At the time of or just immediately before Kiss' death it was liable to be taxed for the benefit of the Roman Catholic public school in Esterhazy, and not for the benefit of the Protestant separate school, and I hold that this *status* will continue at least until administration is taken out to the estate.

Appeal allowed.

IN RE MURPHY, SHERIFF.

Sheriff's costs of seizure under fi. fa. goods — Withdrawal of seizure under instructions from execution creditor prior to sale—Sheriff's right to poundage.

The sheriff at Moosomin, under the instructions of the solicitor for the execution creditor, took with him when he was going to attend Court at Oxbow, a writ of execution against goods to seize thereunder while in the vicinity of Oxbow, where the execution debtor resided.

The execution debtor informed the sheriff at the time of seizure that he had arranged with the execution creditor for an extension of time to pay, and this being communicated to the solicitor, he instructed the sheriff to withdraw. No steps had been taken by the sheriff other than making seizure. The sheriff having charged for mileage all the way from Moosomin, where his office was, and also charged poundage on the whole execution, the solicitor reviewed such charges before the Judge.

Held, that under the tariff the sheriff was entitled to mileage from his office at Moosomin.

Held, further, that apart from Rule 374 of the Judicature Ordinance, the sheriff would not be entitled to poundage, but that under that Rule the sheriff was entitled to poundage.

[WETMORE, J., *29th April, 1902.*]

Statement. Review of the taxation of the sheriff's bill of costs against an execution creditor for his services in making a seizure under a writ of execution against goods.

Argument. *J. T. Brown*, for the execution creditor.

The sheriff in person.

Judgment. WETMORE, J.—Mr. Brown contends that the sheriff is only entitled to mileage from Oxbow to Gainsboro. His contention is that the sheriff did not necessarily travel all the way from Moosomin to Gainsboro for the purpose of executing the writ, that he travelled to Oxbow for the purpose of attending at Court.

The question arises under item 204 of the tariff, and I am quite clear that the sheriff is entitled to the mileage from his office at Moosomin. Item 204 allows the sheriff mileage for every mile "necessarily travelled . . . in serving and executing writs . . . from the place where the same are severally received or the sheriff's office (whichever is nearest) to the place of . . . execution . . . and return." Now the sheriff must have necessarily travelled to execute the writ,

Judgment. Wetmore, J.

he could not execute it without doing so. Under the item he must be entitled to his travel from his office at Moosomin because he received it there and nowhere else and the item gives him his mileage either from his office or from the place where the writ was received. Under the item, therefore, the mileage would count from no other place. He did not receive the writ at Oxbow, therefore the mileage cannot count from Oxbow. The fact that the sheriff went down south for another object besides that of executing the writ does not affect the question.

Mr. Brown also contends that the sheriff is not entitled to any poundage. Apart from Rule 374 of "*The Judicature Ordinance*," I would have no difficulty in holding that the sheriff is not entitled to poundage. The English cases hold that the sheriff is entitled to poundage after seizure and before sale on the money realized *by virtue of the pressure of the seizure*. That seems to run through all the later cases. See *Mortimore* v. *Cragg*,[1] *Bissicks* v. *Bath Colliery Co.*[2] In *In re Thomas ex parte Sheriff of Middlesex*,[3] the Court seemed to have held that the law was well settled for years that the sheriff is not entitled to poundage unless he sold, with the only qualification that he was entitled to poundage if he has seized but did not sell in consequence of a compromise between the parties. In *Mortimore* v. *Cragg*[1] and *Bissicks* v. *The Bath Colliery Co.*[2] the money was paid by the execution creditors directly to the sheriff or his officer after seizure and before sale, and poundage was allowed in both these cases. I must say with all respect that it seems to me that these cases I have cited were overlooked in *In re Thomas*,[3] but that case, I think, goes a long way to support what I have laid down, that the poundage is only recoverable under the English decision when the money realized may be inferred to have been so realized by virtue of the presence of the execution, and that when no money is realized at all by virtue of the execution and it cannot be inferred that any money was so realized the sheriff is entitled to no poundage.

But Rule 374 alters the effect of the English decisions very materially. That Rule provides that "in case the personal

[1] 3 C. P. D. 216; 47 L. J. C. P. 348; 38 L. T. 116; 26 W. R. 363.
[2] 3 Ex. D. 174; 47 L. J. Ex. 408; 38 L. T. 163; 26 W. R. 215.
[3] (1899) 1 Q. B. 460; 68 L. J. Q. B. 245; 80 L. T. 62; 47 W. R. 259.

Judgment.

Wetmore, J.

estate of the defendant is seized . . . on or under an execution but not sold by reason of satisfaction having been otherwise obtained or *from some other cause and no money is actually made by the sheriff* on or by force of such execution, the sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized not exceeding the amount indorsed on the writ or such less sum as Judge of the Court . . . may deem reasonable under the circumstances of the case." This case is exactly in point; the sheriff has seized the personal estate of the defendant under the execution and he did not sell, but not because satisfaction of the execution had been otherwise obtained, but he did not sell "*from some other cause,*" namely, because Mr. Brown, the plaintiff's advocate, told him to withdraw. I cannot escape the very plain provisions of the Rule, and the clerk's taxation as to this poundage was correct. In the absence of any order or direction from a Judge allowing less poundage than the percentage provided for in the tariff, item 205, the clerk had to allow the poundage according to that percentage. Mr. Brown applied to me at the review to fix the poundage at a less sum which, under the Rule, he was at liberty to do. Under all the circumstances I am of opinion that $20 poundage would be reasonable, and will allow it at that sum.

Order accordingly.

McKEE v. McCLOCKLIN, ET AL.

Assignments and preferences — Residence—Execution—Interpleader.

One Dunn, a merchant at Red Deer, in the Judicial District of Northern Alberta, being in insolvent circumstances, executed in favor of one Robinson on the 9th of February, 1904, an absolute assignment of all his stock in trade and fixtures, the consideration being expressed as $1. Robinson was a traveller for one of Dunn's creditors, namely, Knox, Morgan & Co., of Hamilton, Ontario, having his headquarters at Calgary, which was also in the Judicial District of Northern Alberta. On February 26th, Knox, Morgan & Co., through another traveller, one Munro, effected a sale of the goods and fixtures to the defendant McClocklin at Winnipeg, and on March 9th Robinson gave McClocklin a bill of sale and delivered up possession. Although the other creditors of Dunn were not consulted in the matter, they were notified that the assignment had been taken "in the interests of all the creditors."

On March 15th, the plaintiff recovered a judgment against Dunn upon which they subsequently issued execution and caused the goods in question to be seized.

Held, per WETMORE and SCOTT, JJ., that the assignment to Robinson, being one for the benefit of creditors, was absolutely void, as Robinson was not a resident within the Judicial District of Northern Alberta, and that in consequence the defendants acquired no interest under their bill of sale.

Per NEWLANDS, J., that the assignment was taken by Robinson solely on account of KNOX, MORGAN & CO., who acted in the premises without consulting either Robinson or the other creditors, and that it was not, therefore, an assignment for the benefit of creditors within the meaning of C. O. 1898, c. 42, s. 3, but was void as delaying creditors, and that as the defendants took with notice, the sale to them was void.

Per HARVEY, J. (dissenting), that the onus of shewing that Robinson was not a resident of the Judicial District of Northern Alberta was on the plaintiff, and he had failed to establish that fact. Consequently the assignment to Robinson was a valid assignment for the benefit of creditors; that in any event the defendants were innocent purchasers, and the assignment, being at most voidable only by creditors, could not be impeached as against defendants, who had innocently acquired rights before proceedings were taken.

Judgment of SIFTON, C.J., affirmed.

[EN BANC, *10th and 11th January and 18th July, 1905.*]

Statement. Appeal by plaintiff from the judgment of SIFTON, C.J., on the trial of an interpleader issue respecting the ownership of certain goods.

The facts are set forth above.

The appeal was heard by WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

O. M. Biggar (*Payne* with him), for plaintiff (appellant). Argument.
J. L. Crawford, for defendant (respondent).

[*18th July, 1905.*]

WETMORE, J.—The question of residence is one which very frequently presents difficulties and no hard and fast rule can be laid down for the purpose of determining the question. As stated by Lord Coleridge, C.J., in *Beal* v. *Exeter*,[1] "It is impossible to define exhaustively the word 'residence.' In each case the question must be decided by the rules of common sense." Judgment.

The object of the *Ordinance*,[2] was to prevent transfers for the benefit of creditors being made to persons who were not resident in the Territories, because it had been the custom, prior to the passing of that Ordinance, to make such transfer to persons residing out of the Territories, and principally at Winnipeg. I am strongly of the opinion that this transfer was made to Robinson with a view to evade the provisions of this Ordinance. Robinson was merely a figure head, nothing more; he did nothing but simply accept the assignment and make the transfer hereinafter referred to to the defendant. Knox, Morgan & Co., by themselves or their employees, acted as the real trustees in so far as any action was concerned. However, I am not prepared to say that that would have voided the transfer, provided they had procured a proper person to fill the provisions of the Ordinance, that is, providing that they had had the assignment made to a person who really was resident within the Territories. Robinson was not a resident of Calgary. He had no home at the Alberta hotel there, as he admits. He simply went there as a temporary guest from time to time. He might be there for a day, he might be there for three weeks. If he had a room reserved to which he returned after going out on his travels there might be some justification for saying that he was a resident there; but going to a hotel and occupying a room there just as any ordinary travelling guest passing up and down the country would do, is not, to my mind, sufficient to constitute a residence; and that was the character

[1] 57 L. J. Q. B. 128; 20 Q. B. D. 300; 58 L. T. 407; 36 W. R. 507.
[2] No. 11 of 1900.

Judgment. Wetmore, J.

of his pretended residence in Calgary. There is nothing to indicate that Robinson in so far as Calgary was concerned, had the *animus residendi*. I am of opinion that for the purpose of the Ordinance, the language of Tyndall, C.J., in *Whithorn* v. *Thomas*,[3] is applicable. He says,[4] "Residence implies something more. It must mean actual occupancy either by himself or by his family or servants. There must be an *animus residendi*." And for the purpose of the Ordinance I am of opinion that there must be this *animus residendi*.

Having thus reached the conclusion that Robinson was not a resident of the Judicial District in which the assignor resided or carried on business, the assignment to him was void. The Ordinance did not provide that this would be merely void as against creditors because if it had done so the tenor of the authorities are to the effect that it would have been only voidable. But the Ordinance renders it absolutely invalid and ineffectual as a transfer or assignment unless it is made to a person or persons as provided in that Ordinance. Now, the assignment being void as such for all purposes, McClocklin, the defendants, claiming through such void assignee under an assignment from him, cannot get a better title than he has. The right of property remained, therefore, in Dunn, the execution debtor, and is exigible under plaintiff's execution.

I am of opinion that the judgment of the learned Chief Justice should be affirmed, and this appeal dismissed with costs.

The notice of appeal contains an objection that evidence was improperly admitted by the trial Judge; the only question necessary to discuss on that ground was the reception of a certified copy of the bill of sale. That document was tendered by the plaintiff and objected to, and the objection was sustained. Subsequently Robinson was called and some questions put to him as to where the original bill of sale was, and upon his answering them the certified copy was again tendered, and put in. No objection seems to have been taken to its admissibility at that stage, and the defendant not having then raised the objection is not, in my opinion, in a position to object to it now.

[3] 7 M. & G. 1; 8 Scott (N.R.) 783; 14 L. J. C. P. 38; 8 Jur. 1008.
[4] At page 40 of 14 L. J. C. P.

The other evidence objected to was not material and does not affect the conclusion reached. Judgment. Wetmore, J.

SCOTT, J., concurred.

NEWLANDS, J.:—The appellant claims first that Robinson is not a party to this action and that, therefore, the bill of sale from Dunn to him cannot be set aside. Robinson does not claim as a *bona fide* purchaser for value but only as assignee of Dunn for the benefit of his creditors. Dunn is a party to the suit. Robinson was a witness and had a full knowledge of the proceedings. Either Dunn or Robinson would be a necessary party, but not the both of them, and Dunn being a party with the knowledge of Robinson I do not think it necessary that Robinson should be a party also.

The appellant further urges that this is not an action in which an interpleader should have been granted. As this is not an appeal from the interpleader order it is too late to take this objection. Whether a conveyance can be set aside as a fraud on creditors on the trial of an interpleader issue has been settled in the case of *West* v. *Ames Holden et al.*[a] My brother Scott in his judgment in that case says: "Reference to the Ontario Reports will show that ever since the passing of the *Common Law Procedure Act* in 1854 it has been the common practice there to raise and dispose of in interpleader issues where the title to goods is in issue the question whether a conveyance relied upon is void under 13 Elizabeth or under the statute respecting fraudulent preferences; and I am unable to find that the practice has ever been questioned."

The appellant also objects to the admission of a certified copy of the bill of sale from Dunn to Robinson on the ground that no notice was given as required by section 10 of the *Canada Evidence Act*. When this copy was first produced it was objected to on that ground and ruled out but was subsequently tendered in evidence and received without objection.

Under all the circumstances I do not think this is such an assignment for the benefit of creditors as is protected by section 3 of chapter 42 of *Consolidated Ordinances*, N.-W. T. Robinson took the bill of sale from Dunn solely on account

[a] 3 Terr. L. R. 17.

Judgment. Newlands, J.

of Knox, Morgan & Co., one of the creditors. They took charge, sold the property without consulting either Robinson or the other creditors, and gave considerable time for the purchase money to be paid, and took it upon themselves to divide the purchase money how and when it suited them. There is no doubt that the other creditors were delayed by this course of action in getting what was due them, and therefore the bill of sale is void as against creditors.

The learned Chief Justice also held that the defendant took with notice, and I think there is sufficient evidence to uphold that finding. That being the case, the defendants are in no better position under 13 Elizabeth, chapter 5, than Robinson, and if the bill of sale to him is void against creditors the one to defendants is also void. It is only a *bona fide* purchaser without notice who is protected under section 5 of that Act: *Halifax Joint Stock Banking Co.* v. *Gledhill.*[6]

I think, therefore, that the decision of the learned Chief Justice should be sustained and the appeal dismissed with costs.

PRENDERGAST, J., concurred.

HARVEY, J. (*dissenting*):—There is no Ordinance of the North-West Territories requiring that an assignment for the benefit of creditors shall be in any particular form or that the creditors shall have any particular right to say what the trustee shall do as regards the disposition of the property. In this case a sale was effected at what was apparently a fair price, and there seems no ground of objection to the action of the trustee in dealing with the estate by disposing of it as he did. Certainly there appears to me to be nothing to indicate any fraud on his part or on the part of the defendants. Though I see no reason why the assignment should not have been made in the ordinary way, yet I can see no reason why the bill of sale should not have effected a valid assignment for the benefit of creditors so as to come within the protection of section 3 of the Ordinance respecting preferential assignments.[7]

[6] 60 L. J. Ch. 181; (1891) 1 Ch. 31; 63 L. T. 623; 39 W. R. 104.
[7] C. O. 1898, c. 42.

Judgment.
Harvey, J.

But even if the bill of sale to Robinson did not constitute a valid assignment for the benefit of creditors so as to be protected, it would appear from the authority of *The Meriden Brittania Company* v. *Braden*,[8] *Mehary* v. *Lumbers*,[9] and other similar cases, that it would be only voidable, and could be set aside only, if moved against before other persons acquired rights innocently, and there appears to me to be nothing whatever from which it can be inferred that the defendants acted otherwise than honestly in their purchase and the transfer to them would therefore be unimpeachable.

It is urged, however, that Robinson was not a resident of the judicial district in which Red Deer, the place where the assignor Dunn carried on his business, is situate, and that therefore the assignment was invalid under chapter 11 of the Ordinances of 1900. I am of opinion that the burden of showing that Robinson was not a resident of the judicial district of Northern Alberta in which Red Deer is situate is on the party claiming to set aside the assignment in which he is described as a resident of Calgary, which is in the same judicial district, and which, in my opinion, is otherwise valid, and the evidence in my opinion does not establish this, but rather the reverse.

The only evidence on the subject is that of Robinson himself, with the exception of that of the defendant Thomas McClocklin, who says he thinks Robinson lives in Winnipeg, and thinks that he told him his parents lived in Manitoba. The evidence of Robinson himself on the point is as follows:

"Q. You travel for the house in Hamilton? A. Yes.

Q. What does your territory cover? A. The North-West Territories.

Q. How far west do you go? A. To Calgary.

Q. How far north do you go? A. To Edmonton.

Q. Your home is in Winnipeg? A. My home is in Calgary.

Q. When are you there? A. No stipulated time. I am in Winnipeg twice a year.

Q. How often in Calgary? A. Quite often.

Q. Where do you stay there? A. At the Alberta Hotel.

Q. It is the custom of a great many travellers who make their headquarters in Calgary, is it not? A. Yes.

[8] 21 A. R. 352.
[9] 23 A. R. 51, see p. 60 of the Report.

Judgment.

Harvey, J.

Q. Do your father and mother live in Winnipeg? A. Yes.

Q. What is the reason for you saying that you reside in Calgary, is it that you spend Sundays there when you are not on your trip? A. Not necessarily.

Q. You are on the road considerably, are you not, except on Sundays? A. I am on the road about ten months or more in the year.

Q. Where do you spend the other two months? A. I go to Hamilton once a year and to Winnipeg twice.

Q. Where do you spend your vacation? A. That is all the vacation that I have.

Q. What time do you spend in Calgary outside of Sundays? A. I have been there three weeks and a half at a time.

Q. Within the last year? A. Yes, within the last year.

Q. You have no home there, you simply put up at the 'Alberta?' A. Yes."

The term "resident" or "reside" has no fixed meaning, as defined by the Courts under various statutes. It has been held that a man may have more than one residence at the same time, but I know of no authority that a man may be without any legal residence, and unless there is authority for such proposition I can see no reason for finding on the above evidence that Robinson's residence was not at Calgary, for there certainly is no proof of its being anywhere else. Calgary was his headquarters and the place where he no doubt received his mail and apparently spent his time when he was not travelling.

I am, therefore, for the reasons stated, of the opinion that the title of the defendants is good as against the plaintiffs, and that the appeal should be allowed and the judgment of the trial Judge reversed.

Appeal dismissed, HARVEY, J., *dissenting.*

STIMSON v. HAMILTON.

Attachment of debts — Debt or liquidated demand—Rule 384 J. O.

A claim on a covenant to pay contained in a chattel mortgage given to secure an account, the amount of which had been unascertained, is a debt or liquidated demand authorizing the issue of a garnishee summons under Rule 384 of the Judicature Ordinance, C. O. 1898, c. 21.

[SCOTT, J., *7th January, 1905.*]
[EN BANC, *15th and 20th January, 1906.*]

Statement

The plaintiff was the agent of the North-West Cattle Company, and the defendant from time to time received from the company horses which he held for sale on the company's account, it being the defendant's duty to account to the company for the proceeds of all sales when made, less a commission to which he was entitled on each side. On October 14th, 1895, the defendant was indebted to the company for the proceeds of certain sales and a small sum for goods supplied, but accounts had not been stated nor was the amount of the indebtedness ascertained. On that day the defendant, to secure such indebtedness, gave to plaintiff a chattel mortgage, for $860, bearing interest. This action was brought to recover the amount of such mortgage and accrued interest, and the plaintiff issued a garnishee summons directed to one Delia Anderson. The action was tried before SCOTT, J., who found the facts as stated above, and on May 28th, 1903, gave judgment directing a reference to ascertain the amount of the defendant's indebtedness to the company. The inquiry showed that the defendant, at the time he gave the mortgage, was indebted to the plaintiff in $450, and that nothing had been paid on account thereof.

The garnishee having paid into Court a sum of money, one Macdonald, to whom the defendant on October 11th, 1902, had made an assignment, obtained a summons to show cause why the monies in Court should not be paid out of Court to him on the ground that the action was not for a debt or liquidated demand within Rule 384 of the *Judicature Ordinance*. This motion was heard by SCOTT, J., in Chambers.

Argument.

C. de W. Macdonald, the applicant, supported the motion.

J. C. F. Brown, for plaintiff, contra.

Judgment.
Scott, J.

SCOTT, J. (after reciting the facts).—The fact that the action is one upon the covenant in the mortgage instead of one brought by the company to recover the amount of the indebtedness secured by the mortgage does not appear to me to be material so far as this application is concerned. The whole question turns upon whether the company's claim for the proceeds of the sales of horses and for the goods charged for is a debt or liquidated demand within the meaning of Rule 483.

In the *Encyclopædia of the Laws of England*, vol. 4, p. 150, it is stated with reference to the action of debt that, "it was maintainable for the recovery of money due upon simple contract debts . . . in the case of simple contract debts, certain concise forms of counts were generally used which were described as 'common counts' or common indebitatus counts. Those most frequently employed were for money payable (*inter alia*) for goods sold and delivered for money received for interest, etc." See also *Bullen & Leake, Precedents in Pleading*, 3rd ed., p. 33.

In *Sheba Gold Mining Co.* v. *Trubshawe*,[1] it was held that the words "debt or liquidated demand" in Order 3, Rule 6 (the rule authorizing the special indorsement of writs of summons) are construed as applicable only to cases where the demand is a liquidated demand, and that (following *Rodway* v. *Lucas*,[2]) a claim for interest which is not payable under a contract or by statute is an unliquidated demand.

In the *Annual Practice* (1903), at p. 20, the following is stated:—

Any definite sum of money recoverable at common law by express or implied agreement is within Rule 6, thus in general money due on the common counts as had or received, or paid, or lent, or on account stated is within the rule but not, it would seem, money claimed on a mere *quantum meruit*.

In *Re Williams*,[3] it was held that a claim for flour, the product of wheat left by the plaintiff with a miller to be manufactured into flour, was a liquidated demand, although the quantity of flour produced had not been ascertained.

[1] (1892) 1 Q. B. 674; 61 L. J. Q. B. 219; 66 L. T. 228; 40 W. R. 381.
[2] 10 Ex. 667; 24 L. J. Ex. 155; 1 Jur. N. S. 311; 3 W. R. 212
[3] 31 U. C. R. 143.

Judgment.
Scott, J.

The question of the construction to be placed upon the words referred to is exhaustively treated in an article on summary judgment, in vol. 39 of the *Canada Law Journal*, at p. 545, in which all the cases bearing upon the question are referred to.

In case the action to recover the amount of defendant's indebtedness had been brought by the company the proper claim under the former system of pleading would have been on the common indebitatus counts for money payable by the defendant for money had and received by him for the use of the company for interest upon same, and (as to the particular items I have referred to) for goods sold and delivered or for goods bargained and sold. As to the claim for the proceeds of horses sold there would of course be an enquiry either by the Judge or jury at the trial or upon a reference to take accounts as to the number of horses sold, the amounts received by the defendant in respect thereof and the payments made on account either in money or goods (the evidence shows that payments both in money and goods were made on account), and it would then be merely a matter of computation to ascertain the amount of the indebtedness, but notwithstanding that such enquiry might be necessary the claim is nevertheless a liquidated demand.

Supposing that the claim had been for $100, the proceeds received by the defendant upon the sale of one horse. That would undoubtedly be a liquidated demand. Would it cease to be such if the defendant disputed that he had received that sum or any sum or claimed that he had paid the amount or a portion of it? I think not, and yet in case of any such dispute there would have to be an inquiry to ascertain the amount plaintiff was entitled to.

I cannot draw any distinction between such a claim and the claim in this action which is for the proceeds of the sale of a number of horses, less a fixed and ascertained deduction for commission, and in which in consequence of a dispute an enquiry became necessary to ascertain the amounts received by the defendant and the amounts paid by him on account.

Poulett v. *Hill*,[4] *and Lynde* v. *Waithman*,[5] which were cited by counsel for the defendant, do not appear to me to favour his contention.

[4] (1893) 1 Ch. 227; 62 L. J. Ch. 466; 68 L. T. 476; 41 W. R. 503.
[5] (1895) 2 Q. B. 180; 64 L. J. Q. B. 762; 72 L. T. 857.

Judgment. Scott, J.

In the first mentioned case a mortgagee brought an action against the mortgagor for foreclosure and obtained the appointment of a receiver for the rents of the mortgaged premises. He then brought a second action against the mortgagor in which he claimed by special endorsement the interest which had accrued on the mortgage less certain rents which had come to the hands of the receiver. So far as I can gather from the language used in the judgments it was held on an application for summary judgment under Order 14, that the order should not be made, 1st, because the relief claimed could be obtained in the first action, and 2nd, because by reason of the receipt of rents by the receiver the amount was not a liquidated sum within the meaning of Order 3, Rule 6.

In the latter case the mortgagee, in an action against the mortgagor, claimed by special endorsement the principal and interest due on the mortgage. An application for judgment under Rule 14 was refused merely because there was a plausible dispute as to the amount which the plaintiff was entitled to recover. The defendant showed upon the application that a receiver had previously been appointed for the rents, but Lord Esher, M.R., expressed the view that that fact should not prevent the plaintiff endorsing his writ under Order 3, Rule 6. Kay, L.J., expressed the same view, and in referring to the judgment in the former case, states that it does express the contrary view.

I gather from the latter case that though there may be a dispute between the parties as to the balance due it may still be a liquidated demand within Order 3, Rule 6.

For the reasons I have given, I hold that plaintiff's claim is a liquidated demand within the meaning of Rule 384.

The effect of my holding otherwise would be, in my view, to give to that rule a construction much more restrictive than the Legislature contemplated.

The application will be dismissed with costs.

Statement.

The applicant appealed, and the appeal was argued before SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

Argument.

O. M. Biggar, for applicant (appellant).

J. A. Lougheed, K.C., for plaintiff (respondent).

The judgment of the Court was delivered by

[*20th January, 1906.*]

HARVEY, J.—The pleadings are not set out in the appeal book, but it appears from the judgment of the trial Judge that the claim was on a covenant in a mortgage. That being the case, there would appear to be no doubt that the action so constituted was for a debt, and the garnishee summons was, therefore, *prima facie* authorized. The action came on for trial, and the trial Judge found that "the consideration of the mortgage sued on was not an ascertained indebtedness . . . and that the mortgage was given for that amount merely to cover defendant's indebtedness when ascertained," and he directed a reference to the deputy clerk "to ascertain and report the amount of defendant's indebtedness." Judgment.

This judgment of the trial Judge has not been impeached in any way, and in pursuance of the reference, the deputy clerk has made an enquiry and a report in which he has found a certain sum due from the defendant to the plaintiff, but no judgment has been entered thereon. It is contended by defendant's counsel, however, that there is no evidence before the Judge or the clerk from which it can be found that there is any debt due by the defendant to the plaintiff. This contention appears to me to be entirely beside the question. Whether the evidence is sufficient or whether other evidence should be required is not for our consideration; the judgment of the trial Judge, which cannot be impeached by such proceeding as this, finds that the nature of the claim whatever the amount may be, is one of debt, and, such being the case, the moneys were properly the subject of attachment and must remain in Court until the final determination of the action. I am also of opinion that for the reasons given by my brother Scott the application was properly refused.

Appeal dismissed with costs.

REX v. CANADIAN PACIFIC RAILWAY CO.

Railways—Sparks from engine—Prairie Fires Ordinance—Evidence—Constitutional law.

The fact that shortly after the passing of a locomotive a fire is seen near the railway track, where none existed before, is *prima facie* evidence that the fire originated from sparks from the locomotive.

The provisions of the Prairie Fires Ordinance requiring locomotives to be equipped with certain appliances and in casting on a defendant the onus of proof in a criminal charge relating thereto, are binding on a railway company deriving its powers from the Parliament of Canada, but operating lines of railway in the North-West Territories.

[COURT EN BANC, *12th April, 1904, and 20th January, 1905.*]

Statement. Motion by defendants for a writ of *certiorari*. The facts are set out in the judgment of WETMORE, J. The motion was heard by SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST and NEWLANDS, JJ.

Argument. *J. A. M. Aikins*, K.C., for the defendant.

Horace Harvey, Deputy Atty.-General for the Crown, the Justice and the informant.

[*20th January, 1905.*]

Judgment. SIFTON, C.J.:—This is an application on behalf of the company to quash a conviction under the *Prairie Fire Ordinance*,[1] made by Cortland Starnes, J.P., by which the company was held liable for a fire started in the neighbourhood of Kincorth, a station upon the line of railway owned by the defendants.

A number of grounds of objection were taken, of which, however, only two were relied upon at the argument.

1st. That there was no evidence to support the conviction.

2nd. That the *Prairie Fires Ordinance*,[1] in so far as it purports to affect or bind the Canadian Pacific Railway Company, is *ultra vires*.

As to the first objection, I think, the proper rule in case of an appeal, is that if there is any evidence to justify conviction it is for the Justice of the Peace to decide as to the

[1] C. O. 1898, c. 87.

Judgment.
Sifton, C.J.

weight practically in same manner as a jury, and that his finding should not be interfered with except it clearly appears that there was no evidence before him, which can hardly be argued in this case. The evidence is practically all given by employees of the company, and shows that just after the passing of engines of the defendants the fire was seen by three different employees of the defendants; that a wind was blowing from south to west, and that the fire burned from a point inside the right of way to a distance of several miles north of the track; that these employees, whose duty it would be to look after the interests of the company (and one at least of whom was specially charged with the duty of preventing spread of fires, and was in special charge of the section of the track in the neighbourhood of this fire, and who swears he was the first man at the fire), saw nobody in the neighbourhood who could have started it. And the magistrate having deduced therefrom that the fire necessarily was caused by sparks from one of the engines previously mentioned, I do not feel justified in saying that he had no grounds for such deduction.

As to the second ground, I have no hesitation in saying that if the Ordinance should be construed as compelling the railway company to carry on its undertaking in a manner different from that contemplated by the Dominion statute incorporating the company, in laying upon the company burdens not made a part of its duty by that Act, or The General Railway Act, it would be *ultra vires*, but this does not, to me, appear a necessary construction of the Ordinance, which so far as this case is concerned, only appears to govern the procedure and rules of evidence and shifts upon the defendants in certain cases the burden of proof of the existence or non-existence of certain matters, which ordinarily without the Ordinance might have to be proved by the plaintiff, and to this extent, I think, the Legislature was clearly within its rights in enacting said Ordinance.

I, therefore, think that the motion to quash should be disallowed and the conviction affirmed.

WETMORE, J.—The fire in question took place about two miles east of Kincorth Station, and was first observed somewhere between ten and eleven o'clock in the morning of the 15th October, 1903. Not very long before the fire was

Judgment. Wetmore, J.

discovered, two engines belonging to the defendant company passed, going east from Kincorth Station. One left the station at 9.30 in the morning and the other at 10.35. The first notice that the witnesses had of the fire was seeing the smoke. The parties who testified to seeing the fire, and who went to where it was first, saw this smoke from a distance of about one mile and a half to two miles. By the time they got there the fire had extended a considerable distance north. There was a strong wind from the south-west. An old fireguard had been ploughed on the north side of the track, and the newly burned ground extended from within this fireguard northwards. One of the witnesses stated that he judged it started from the track. This old fireguard had been plowed, but it had been allowed to grow up with weeds and grass so that it was of no use whatever as a fireguard, and there was no other fireguard.

The first objection taken to this conviction was that there was no evidence to establish that the fire originated from the defendants' engine. I am of the opinion that there was evidence to warrant the Justice in coming to the conclusion that this fire did so originate. In *Smith* v. *The London & South-Western Railway Company*,[2] the question was raised whether there was evidence that the fire originated from sparks from the engine of the defendant company. In that case the only evidence that it so originated was that shortly after the up-train had passed a fire was found burning from the inside of the railway fencing, and had consumed some of the trimmings, which, from the unusual heat of the summer, were in a highly combustible state. Kelly, C.B., in delivering judgment, states as follows:[3] "There was here ample evidence from which a jury might have found that the fire arose from a spark from the engine falling on the trimmings." The other Judges did not dissent from this proposition, and must have acceded to it, otherwise the judgment could not have been affirmed as it was. This case now under consideration seems to be on all fours with the case I have just cited.

In *The New Brunswick Railway Company* v. *Robinson*,[4] it would appear from the judgment of Strong, J., at page

[2] 40 L. J. C. P. 21; L. R. 6 C. P. 14; 23 L. T. 678; 19 W. R. 230.
[3] At p. 24 of 40 L. J. C. P.
[4] 11 S. C. R. 688.

694, that "the only evidence to show that the fire was caused by sparks from the defendants' locomotive was that on the day on which the fire occurred a train passed along the railway, and a short time afterwards the respondent's barns, situated about two hundred feet from the line of railway, were discovered to be on fire." At page 690, Ritchie, C.J., is reported as follows: "I think the fair result of the evidence is that the fire took place from a spark from the locomotive getting into the hay and igniting it." Strong, J., at page 694, is reported as follows: "I should have thought it not sufficient to prove that the fire might have originated from the sparks thrown out of the locomotive, but that the plaintiff was bound to prove something further connecting the fire with the passage of the engine. In *Freemantle* v. *N. W. Ry. Co.*,[5] such evidence, however, was held sufficient to make a *prima facie* case for the consideration of the jury." Judgment. Wetmore, J.

In *Rainville* v. *Grand Trunk Railway Company*,[6] the question arose whether the fact that an engine had passed the *locus in quo* a short time prior to the fire being discovered, was evidence upon which a jury might find that it was caused by sparks from such engine. Osler, J.A., is thus reported on page 249: "Then was there evidence that the fire had been caused by the defendants, that it came from their engine? There clearly was. No other probable cause was proved, and that a probable cause of that kind existed was proved. An engine was seen by one of the witnesses to pass along the line opposite the plaintiff's premises. Before then no fire had been seen, and the fire on the defendants' premises was seen by this witness two or three minutes or less afterwards."

Now, in the case under consideration, although no person at the time the fire originated, was actually at the place where it began, the smoke was noticed by the witnesses I have referred to, who were the telegraph operator at Kincorth, the pump man of the company, who was on duty that day at Kincorth, and whose section ran three miles and a half east of Kincorth, and who at the time of the fire was at the east end of his section, and saw the fire about a mile and a half west of where he was working. These men all saw the fire

[5] 10 C. B. (N.S.) 89; 31 L. J. C. P. 12; 9 W. R. 611.
[6] 25 A. R. 242.

Judgment.
Wetmore, J.

shortly after the engines went by, and immediately proceeded to the place and discovered what I have stated; and there is no evidence that any fire had been seen there before the engines went by. This is sufficient to warrant a *prima facie* finding that the fire originated from sparks, at any rate, from one of the engines, and I am inclined to think from the last one. It is not material, however, which of the two engines started the fire.

The Prairie Fires Ordinance[1] provides by section 2 that "any person who shall directly or indirectly, personally or through any servant, employee or agent kindle a fire and let it run at large on any land not his own property . . . shall be guilty of an offence and shall on summary conviction thereof be liable to a penalty . . . ." Ordinance ch. 24 of 1903, amends section 2 of the original Ordinance by adding a sub-section 2, which is as follows: "If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing, it shall be deemed to have been kindled by the person in charge, or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section, if in the case of stationary engines, the precautions required by section 12 have been complied with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines, such engine is equipped with a suitable smoke stack netting and ash pan netting, in good repair, and kept closed and in proper place, and in the case of railway engines, where the line of railway passes through prairie country, there is maintained for a distance of, at least, three miles continuously in each direction from the point at which the fire starts on each side of such line of railway, and not less than two hundred nor more than four hundred feet therefrom, a good and sufficient fireguard of ploughed land, not less than sixteen feet in width, kept free from weeds and other inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire, and there has been no negligence in any other respect."

Section 8 of the principal Ordinance provides that "It shall not be necessary that any prosecutor or complainant shall in any information or complaint for an offence under this Ordinance negative any exemption, exception, proviso, or

condition herein contained or prove any such negative at the hearing or trial, but the accused person may prove the affirmative thereof in his defence, if he wishes to avail himself of it." The requirement in the Ordinance of 1903, is an exemption or exception from liability in case the fireguards, so far as this company is concerned, were made and maintained as required, and in case the locomotive engine was equipped with a suitable smoke stack netting and ash pan netting, in good repair, and kept closed and in proper place, and if this legislation is valid, it was incumbent on the informant to prove the negative herein mentioned; it was on the company to prove that proper fireguards were made and that the locomotive engine was equipped and kept as required. The company did not appear. It was established, however, affirmatively that the fireguards were not properly maintained, because they were not sufficient.

It was urged that these provisions were *ultra vires* the Legislative Assembly, that such Assembly had no power to cast duties or obligations on this company, which was constituted, and its powers and duties prescribed by Act of Parliament. In so far as the casting of the duty upon them to maintain fireguards is concerned, I have very great doubts whether that was within the power of the local Legislature. But, assuming that it was not, it does not to my mind settle the question, for I am of opinion that it did lie within the power of the local Legislature to require that the company's engines should be equipped in the manner prescribed and the netting kept closed and in the proper place. That did not cast upon the company any new obligation, it was their duty at common law to have these appliances properly equipped and kept so that the least possible danger from sparks should ensue, and the Ordinance simply provided that they should perform their common law duties, and if they did not they should be liable for the consequences in a penalty. It is true that the Ordinance threw upon the company, in case of procedure for an offence of this nature, the onus of establishing that they had the appliances, and that they were in proper condition. It was within their powers and reasonably so, because the servants of the company, as a rule, would be the best informed persons to establish that fact, and in many instances would be the only persons available to do so. I am of opinion that the power to so legislate

Judgment.
Wetmore J.

would come under the authority given to the Territories to legislate upon all matters of a merely local or private nature and also the power given to legislate in respect to property and civil rights in the Territories. Prairie fires, we all know, are liable to be most disastrous in their consequences, not merely in the matter of an injury done to the individual, but in many cases the whole district is laid waste, and, not only is the grass destroyed, but grain, houses, and hay stored away for winter use, are not infrequently swept away, and in order to preserve properties of this sort from this danger, I am of the opinion that the Assembly could practically say to this railway company, "You must use your engines in the manner you are required to use them at common law, and, if you do not, you are liable to a penalty." That merely makes them liable to a penalty because they do not observe their common law duties, and in doing so they are not casting any additional duties upon the company other than what they were bound to observe before. This is legitimate legislation in the direction of preserving the property of the inhabitants of the Territories, and in addition to that is entirely of a local nature. I am of opinion that this holding comes within the principle laid down by the Judicial Committee of the Privy Council in *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours.*[1]

I am, therefore, of the opinion that a *prima facie* case was established against the defendants, which warranted the Justice in convicting, and that the *certiorari* should be refused.

SCOTT, PRENDERGAST, and NEWLANDS, JJ., concurred.

Application dismissed.

[1] (1899) A. C. 367; 68 L. J. P. C. 54; 80 L. T. 434.

FROST & WOOD CO., LTD. v. EBERT.

Sale of goods—Trade name—Implied warranty—Evidence of defects.

In answer to an action upon promissory notes given for a Frost & Wood binder, the defendant set up defects in the machine, but the only evidence of their existence was his own and that of a neighbour, neither of whom appeared to have much experience with binders.

Held, that, as the article had been sold under its trade name, there was no implied warranty of fitness for the purpose for which it was sold, and (PRENDERGAST, J., *dissentiente*) that the evidence did not shew that the difficulties the defendant had encountered in operating the machine were due to any defect in it.

[COURT EN BANC, *12th-20th January, 1906.*]

Statement.

This was an appeal by defendant from the judgment of SIFTON, C.J., before whom, without a jury, the case was tried. No reasons were given for the conclusion reached by the trial Judge, his judgment being as follows:—

"Verdict in favour of the plaintiffs for $150.50."

The facts were stated by SCOTT, J., as follows:—

This action was upon two promissory notes given by the defendant to the plaintiffs for the price of a binder purchased by him from them. The defences relied upon by the defendant were: that at the time of the sale of the binder and as part of the agreement therefor, it was verbally agreed between the parties that defendant should take the binder to his farm and that plaintiffs should immediately send there an expert who would set it up in good running order, so as to enable the defendant to cut his crop, which then, as plaintiffs knew, was ready to cut, and required to be cut immediately; that plaintiffs did not send such expert immediately, but after a long time and at a date when, owing to the bad state of the weather, the defendant was unable to cut his crop, which, owing to the delay, was ultimately frozen; that the binder, even when set up by the expert, was not set up so as to run in good working order; that it failed to work properly, and worked only with great difficulty; that it was arranged with two plain knives, instead of, as it should have been, with one plain knife and one cycle knife; that it was not possible to put it out of gear so as to pass over obstructions or bad pieces of ground; that it was not good work-

Statement.

manship; that in consequence of improper workmanship and the improper mode in which it was set up, a number of portions of the machine broke in the course of working it, and that by reason of these facts and circumstances the binder was not worth more than the defendant had already paid plaintiffs on account of same, *viz.*, $30.00. The defendant counterclaimed $100 for damages occasioned by reason of the facts and circumstances stated in the defences referred to.

At the trial, plaintiffs rested their case upon proof of the making of the promissory notes sued upon. The evidence for the defence consisted of the testimony of the defendant and a witness, one Lilge.

The appeal was heard before WETMORE, SCOTT, PRENDERGAST, HARVEY, and NEWLANDS, JJ.

Argument.

C. P. Newell, for defendant (appellant).

O. M. Biggar, for plaintiffs (respondents).

[*20th January, 1906.*]

Judgment.

WETMORE, J.—I agree that the appeal should be dismissed, but only upon the grounds set forth by my brother Newlands, in his judgment, and for the reason therein stated, that there was no implied warranty that the binder was reasonably fit for the purpose for which it was sold.

SCOTT, J. (after stating the facts):—It would appear that judgment was given at the trial on the conclusion of the plaintiffs' case, by the trial Judge, on his own motion and before plaintiffs' counsel had intimated whether he intended to adduce any evidence in reply. It may, therefore, be assumed that the trial Judge considered that no defence had been made out, and that therefore, it was unnecessary to call upon the plaintiffs to reply. In view of the fact that he has omitted to give any reasons for his judgment, it is impossible for this Court to determine whether the conclusion at which he arrived resulted from his not having credited the evidence for the defence or from his being of opinion that such evidence, if believed, was insufficient to establish the defence.

Judgment.
Scott, J.

A review of the whole evidence adduced for the defendant leads me to think that the trial Judge might reasonably have concluded that the defence raised by him had not been established, and I, therefore, think that his judgment should be affirmed.

PRENDERGAST, J. (*dissenting*):—I am unable to adopt the conclusions reached in this matter by the other members of the Court.

In my opinion the defence established at the trial that the binder was defective at least, without speaking of the other defects complained of, in that it could not be set out of gear. This was not shewn by experts, I admit; nor do I pretend that the case is a strong one. Yet, such is the evidence of the defendant, and that of Lilge, who seems to have had some experience in such matters, as he had apparently been using a binder (although of another make) for two years previous. That evidence stands by itself, uncontradicted, as the only evidence put in by the plaintiffs was part of the defendant's examination for discovery, bearing only on the signing of the notes. As I take it, the defendant has made out a *prima facie* case that the machine was defective, and the case stands until rebutted.

Such being, in my view, the clear import of the evidence, and the learned Chief Justice having had before him at the trial absolutely nothing but the defendant's case on the point mentioned, I find myself unable to assume, on the bare ground that the verdict was for the plaintiffs, that he found otherwise than that the machine could not be set out of gear.

If the machine could not be set out of gear, this constitutes, in my opinion, a breach of the implied warranty, that it was fit and proper for the purpose for which it was intended.

If, on the other hand, the proper view of the transaction is that it was a sale of a specified article under its patent or trade name, coming under the proviso to sub-section 1, section 16 of *The Sale of Goods Ordinance*,[1] I think the defendant is still entitled.

Of course, in such a case there is no implied condition that the article shall be fit for the purpose for which it is

[1] C. O. 1898, c. 39.

Judgment. Prendergast, J.

intended. But I think that there is of necessity an implied condition that the article is at least a fair sample of the class or line of goods known under the specified trade name.

In this other aspect of the case, the defendant could not validly object that the binder did not cut or tie up the grain properly, for the plaintiffs could answer that the sale having been of a specified article under its trade name as a Frost & Wood binder, this excluded the warranty of fitness, but the defendant, I think, could rightly reply that the trade name upon which he was relying represented a certain and well defined type of machinery, and that the name was in this case misleading, inasmuch as the binder he got, although perhaps stamped Frost & Wood, was not a fair sample of the class of goods known by that name, it being an essential feature of the latter that they can be set out of gear. This view seems to me the only equitable one, and I do not see that there is anything to the contrary in the judgment of Lord Russell of Killowen in *Gillespie Brothers & Co.* v. *Cheney*,[2] which has been referred to and which only bears on the question of implied warranty of fitness.

In my opinion the appeal should be allowed, the verdict in the Court below set aside and a new trial ordered, with costs in both Courts to the defendant.

NEWLANDS, J.—I am not satisfied from the defendant's evidence that the fact that the binder would not work properly and could not be set out of gear, arose from any defect in the binder itself; it may have arisen from the fact that the defendant did not know how to work it.

As to a straight and cycle knife, there is no evidence that a binder of this make should have them or that the plaintiffs agreed to furnish such knives.

I think, therefore, that the trial Judge was justified in holding that the defendant had not proved the defence set up by him.

I am also of the opinion that this case comes within the proviso to sub-section 1 of section 16 of *The Sale of Goods Ordinance*.[1] "That in the case of a contract for the sale of a specified article under its patent or trade name, there is no implied condition as to its fitness for any particular purpose."

[2] 65 L. J. Q. B. 552; (1896) 2 Q. B. 59.

The article in question was a Frost & Wood binder. There was no evidence that that was a patent name, but it is certainly a trade name. Lord Russell of Killowen in *Gillespie* v. *Cheney*,[2] referring to this proviso, says:[3] "That obviously is intended to meet the case, not of the supply of what I may call for this purpose, raw commodities or materials, but for the supply of manufactured articles—steam ploughs or any form of invention which has a known name and is bought and sold under its known name, patented or otherwise." Judgment. Newlands, J.

There being, therefore, no implied warranty of its fitness for any particular purpose, and the defendant not having proved an express warranty to that effect nor the defence set up by him, I think the trial Judge was right in finding a verdict for the plaintiffs.

HARVEY, J., concurred with NEWLANDS, J.

Appeal dismissed, PRENDERGAST, J., *dissenting.*

REX v. VAN METRE.

Evidence — Deposition taken on examination for discovery in aid of execution — Incriminating answers — Rule 380 of the Judicature Ordinance — Order partly invalid — Effect of.

The accused, an execution debtor, was examined under s.-s. 2 of Rule 380 J. O., for discovery in aid of execution. The Order authorizing the examination improperly directed an examination upon matters beyond the scope of the Rule, but the accused nevertheless submitted without objection to be examined in accordance with the Order, and in giving his testimony did not object to answer any question on the ground that his answer might tend to criminate him.
Held, that the deposition taken on the examination was admissible in evidence against the accused on a criminal charge founded thereon.

COURT EN BANC, *10th and 19th April, 1906.*]

Reference by SCOTT, J., before whom, sitting with a jury, the accused was tried and convicted, on February 23rd, 1906, for offences under section 368 of the Criminal Code. Statement.

The only evidence of the offences with which the accused was charged was contained in the deposition taken on his examination for discovery in aid of execution in November,

[3] At p. 64 of (1896) 2 Q. B.

Statement. 1905, in an action in which E. Shorey & Co. were plaintiffs, and the accused was defendant. This examination was held under an order made by SIFTON, C.J., which order was as follows:—

"Upon the application of the plaintiff and upon reading the affidavit of Canby Foster Newell filed herein, it is ordered that the defendant do attend before the deputy clerk of this Court at Edmonton, at such time and place as the said deputy clerk may appoint, and submit to be examined upon oath as to the estate and effects of the defendant so examined, and as to the property and means that the defendant so examined had when the liability sued on in this action was incurred, and as to the property and means he still has, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to what debts are owing to him."

The question submitted was whether the deposition was admissible in evidence on behalf of the Crown.

The question was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

Argument. *P. J. Nolan*, for the accused.

A. Turgeon, for the Crown.

The judgment of the Court was delivered by

[*19th April, 1906.*]

Judgment. WETMORE, J.—The order of the Chief Justice is framed in the terms expressed in sub-section 2 of Rule 380 of *The Judicature Ordinance*,[1] and the question for the consideration of this Court is whether this deposition was properly received in evidence. The accused in giving his testimony did not object to answer any question put to him on the ground that his answer might tend to criminate him or to establish his liability to a civil proceeding at the instance of the Crown or of any person as provided in section 5 of *The Canada Evidence Act*, as substituted by 61 Vic., ch. 53. I have no doubt that if the examination before the clerk was properly and lawfully held the deposition under such circumstances might be put in as evidence. Before the passing

[1] C. O. 1898, c. 21.

of *The Canada Evidence Act,* it was very clearly established by the more recent authorities that where a witness was giving his testimony under properly constituted proceedings in which he was required to give sworn testimony if a question was put to him which tended to criminate him and he did not object to answer on the ground that his answer might so tend to criminate him, his answer would be receivable in evidence against him on a criminal prosecution. For this authority it is only necessary to refer to *Regina* v. *Coote*[2] Judgment. Wetmore, J.

It was also the law at that time that if a witness claimed the privilege, and the Court or officer holding the enquiry insisted upon his answering notwithstanding he claimed such privilege, the answer so given would not be receivable in a criminal prosecution against him. Section 5 of *The Canada Evidence Act,* as enacted by 61 Victoria, only provides that in every instance a witness can be compelled to answer, but if he claims the privilege his answer will not be receivable against him in a criminal prosecution; if he does not claim the privilege it is receivable.

Now the question here is whether the examination in this case before the deputy clerk was being lawfully held or not. In the first place, had the Chief Justice authority to make the order for examination that he did, and had the clerk the authority to hold the examination therein provided for? Subsection 1 of Rule 380 of *The Judicature Ordinance,* is in effect identical with Rule 32 of Order XLII. of the English Rules, and that was the only provision for examination for discovery in aid of execution contained in our Ordinances relating to the administration of justice down to the consolidation of these Ordinances in 1893, when what is now section 2 of Rule 380 of *The Judicature Ordinance* now in force was introduced. That provision is as follows:—

"Where judgment has been obtained as aforesaid the Court or Judge may *ex parte* on the application of the party entitled to enforce the judgment order any clerk or employee or former clerk or employee of the judgment debtor or any person or officer or officers of any corporation to whom the debtor has made a transfer of his property or effects since the date when the liability or debt which was the

[2] 9 Moore P. C. (N.S.) 463; 42 L. J. P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553; 12 Cox C. C. 557.

Judgment.
Wetmore, J.

subject of the action in which judgment was obtained was incurred to attend before the clerk of the Court or other person to be named in the order and to submit to be examined upon oath as to the estate and effects of the debtor and as to the property and means he had when the liability or debt aforesaid was incurred and (as to the property or means he still has of discharging the judgment), and as to the disposal he has made of any property since contracting the debt or incurring the liability (and as to any and what debts are owing to him)."

It will be observed that section 1 of that Rule 380 does not authorize an examination to the same extent as that provided for in section 2. By section 1 the examination of the debtor is confined to an examination as to whether any and what debts are owing to the debtor and whether the debtor has any, and what property or means of satisfying a judgment or order. Section 2 does not relate to an examination of the judgment debtor at all, and it permits the party examined to be examined, not only as to the property or means which the debtor has at the time of the examination of satisfying the judgment and as to any and what debts are then owing to him, but it permits him to be examined also as to the estate and effects of the debtor generally, and as to the property and means he had when the liability was incurred, and as to the disposal he has made of any property since incurring the liability. The order of the Chief Justice directed an examination as to whether any and what debts were owing to the debtor at the time of the examination, and whether the debtor had any, and what property or means of satisfying the judgment. In so far it was within the provisions of section 1 of the Rule. Now is it bad because it went further and directed the debtor to be examined as to matter not embraced by this section 1, but embraced by section 2? I am quite clear that the order ought not to have gone that far, but it does not follow that, because it did go that far, that it is bad. It is good in so far as it authorized the examination upon the subjects mentioned in section 1 of the Rule. Did the fact that it went further, make the order bad? Was the deputy clerk not authorized to hold an enquiry at all? I cannot bring my mind to that conclusion. I am of opinion that the deputy clerk was authorized to hold an enquiry. It might be, and I think probably was, the fact that the going

into the matters which were not embraced by section 1 of the Rule would be objectionable; that is, objection might be raised to any question that went beyond an enquiry into those subjects and such objection might be good. But as a matter of fact the accused was being examined under oath, and therefore, giving evidence before a duly authorized authority. Therefore the confessions or admissions that were made in the course of such examination were not extra judicial and would come within the provisions of section 5 of *The Canada Evidence Act*, as enacted by 61 Victoria. That being so, I am of opinion that, the accused not having raised the objection to answering the question on the ground that his answer would tend to criminate him, his deposition was admissible and that the conviction in this case should be affirmed. Judgment. Wetmore, J.

Conviction affirmed.

BANK OF HAMILTON v. LESLIE.

Appeal — Order not taken out — Leave to appeal — Irregularity— Waiver.

Leave to appeal may be granted before the order appealed from has been taken out, but to enter and prosecute an appeal against an order without taking out such order is an irregularity. Such irregularity, however, if not objected to on an application to settle the appeal book, will be waived.

[COURT EN BANC, *12th April, 1906.*]

Motion by defendant to quash an appeal from an order of NEWLANDS, J., made in an action brought by originating summons for foreclosure, argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and HARVEY, JJ. Statement.

Alex. Ross, for defendant (respondent). Argument.

D. J. Thom, for plaintiffs (appellants).

The judgment of the Court was delivered by

WETMORE, J.—The grounds of the motion are that the order appealed against was never taken out; that is, Judge Newland's order was never entered or taken out, and that he granted leave to appeal before that order was taken out. Judgment.

Judgment.
Wetmore, J.

As to the objection to granting leave to appeal, we are of opinion that there is nothing in it. The leave to appeal had been given and it would operate, at any rate as soon as the order was taken out.

So far as the taking out of the order is concerned, the authorities are somewhat in conflict. The decision in *Metcalf* v. *The British Tea Association*,[1] and the decision by North, J., in *The Script Phonography Company Limited* v. *Gregg*,[2] each conflict with the other. In each case there was an order to dismiss the action for want of prosecution. In the former case it was held that the order did not operate until it was drawn up and served, and in the other case the order was made but it was not served, and the Court (North, J.), held that when the time expired for proceeding the action was dead and could not be renewed. Those cases are inconsistent with each other. In *Tolson* v. *Jervis*[3] an order was made and was not taken out, and the Court there held that it should have been taken out; but they also held that it was merely an irregularity and voidable. The fact that it was an irregularity did not render it void, and therefore it could be waived.

We are of opinion that the irregularity in this case was waived by not raising the objection before the learned Judge when he settled the appeal book. This application will, therefore, be refused. The costs of the appellant on this application will abide the event of the appeal. There will be no costs to the respondent of this application in any event.

Motion dismissed.

[1] 46 L. T. 31.
[2] 59 L. J. Ch. 406.
[3] 8 Beav. 364; 14 L. J. Ch. 373.

BANK OF HAMILTON v. LESLIE (No. 2).

Mortgage — Costs — Conduct of mortgagee — Discretion of Judge.

While the general rule in suits for foreclosure or redemption is to allow the mortgagee all his costs even where he does not succeed in establishing his right to the full amount claimed, still where the conduct of the mortgagee has been oppressive and unconscientious the Court has a discretion to deprive him of costs and to award costs to the mortgagor.

[COURT EN BANC, *12th-19th April, 1906.*]

Statement.

The plaintiff, the assignee of a real estate mortgage given by the defendant to the Canadian Port Huron Company, Limited, as security for the purchase price of a threshing outfit, brought this action by way of originating summons asking for foreclosure or sale of the mortgaged property. The mortgage provided that in default of payment the mortgagee might take possession of the threshing outfit, re-sell it and apply the proceeds to the mortgage and charge against the mortgagor the costs of repairs and of re-sale, and, under this provision, the Port Huron Company had, prior to the assignment, re-sold the outfit for $3,200, from which amount they deducted expenses for repairs, and for re-sale, including an agent's commission of $296 on such re-sale. Newlands, J., before whom the matter was heard in Chambers, held that the expenses of the re-sale were governed by the Ordinance respecting Extra Judicial Seizure (C. O. 1898 c. 34), and he directed a reference to ascertain the proper amount chargeable for expenses and repairs and deprived the plaintiff of the costs of such reference and awarded the costs thereof to the defendant to be set off against the plaintiff's general costs of the action.

The plaintiff appealed on the question of costs.

The appeal was heard by SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST and HARVEY, JJ.

Argument.

D. J. Thom, for plaintiff (appellant).

Alex Ross, for defendant (respondent).

The judgment of the Court was delivered by

[*19th April, 1906.*]

Judgment. WETMORE, J.—Rule 517 of *The Judicature Ordinance*,[1] is as follows: "Subject to the provisions of this Ordinance and the Rules of Court the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts and compensation or allowance to any executor, administrator, guardian, committee, receiver or trustee shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would otherwise be entitled." It was claimed for the appellant that, in view of the last proviso above cited and the authorities bearing on the subject, the learned Judge had no discretion to either deprive the plaintiffs of these costs or to award them to the defendant. I quite concede that the general rule is in foreclosure or redemption suits to allow the mortgagee all the costs that he has been put to in the matter—that he is to get the money secured by his mortgage free of all costs and expenses he has been put to, and that although he may not have succeeded in establishing the full amount of the claim he contended for, but this rule has its exceptions. Apart from the Ordinance,[1] a mortgagee who had been guilty of misconduct might be deprived of his costs altogether or some portions of them. For instance, in *Detillin* v. *Gale*,[2] where a mortgagee had been guilty of misconduct, Lord Eldon, L.C., deprived him of a portion of his costs.

The proviso I have quoted from the Ordinance leaves the question of costs in the discretion of the Judge where a mortgagee has unreasonably carried on or resisted any proceedings. That is the effect of the decision in *Charles* v. *Jones*.[3] The question is: Did the mortgagees, the plaintiffs, unreasonably carry on or resist proceedings in this case? They must stand in the shoes of the parties through whom

[1] C. O. 1898, c. 21.
[2] 7 Ves. 583; 6 R. R. 192.
[3] 33 Ch. D. 80; 56 L. J. Ch. 161; 55 L. T. 331; 35 W. R. 88.

Judgment.

Wetmore, J.

they claim, and I am of opinion that they did unreasonably resist and carry on proceedings so as to render the enquiry necessary, because the enquiry was altogether taken up with the question of these charges or expenses of resale and repairs.

The charges for expenses of resale and repairs, apart from commission, as claimed by the Port Huron Company, amounted to $148.27; the amount charged for commission to agents, $296, amounting to $444.27. The clerk found payable for expenses of resale and repairs, apart from commission, $61.62, and for commission, $64, in all $125.62, or $318.65 less than what the plaintiffs claimed. Now these charges were, in my opinion, utterly unreasonable and extortionate, and I may add unconscientious.

In *Cottrell* v. *Finney*,[4] James, L.J., lays down the following: "The rule of court is, as laid down in *Cottrell* v. *Stratton*,[5] that the mortgagee is entitled to his security as security for principal, interest and costs—that is the costs of a redemption suit or foreclosure suit—unless the mortgagee has either refused or has been offered the full sum due to him, in which case he loses all subsequent interest, and all costs, and is made liable to pay costs; or unless the Court sees that the conduct of the mortgagee has been oppressive, and that he has been availing himself of his power to extort something which he ought not to have, or doing something which this Court regards as unconscientious."

I think this citation meets the facts of this case. That being so, the question of costs was entirely in the discretion of the Judge, and, therefore, although leave has been given to appeal from his decision, this Court, in view of what is laid down in *Charles* v. *Jones*, before referred to, ought not to interfere with that discretion. I may add that in my opinion the learned Judge exercised a sound discretion, and this appeal should be dismissed with costs to be set off against the plaintiff's judgment and costs.

Appeal dismissed with costs.

[4] L. R. 9 Ch. 541; 43 L. J. Ch. 562; 30 L. T. 733.
[5] L. R. 8 Ch. 295; 42 L. J. Ch. 417; 28 L. T. 218; 21 W. R. 334; 37 J. P. 4.

KNIGHT v. HANSON.

Appeal — Trial Judge's findings of fact — Sale of goods—Acceptance —New trial.

The findings of fact of a trial Judge sitting without a jury, who has had the opportunity of hearing the witnesses give their evidence, will not be reversed by a Court of Appeal if there is evidence upon which such findings can be supported.

A new trial will not be granted on the ground of the discovery of new evidence, unless such new evidence be conclusive in its character.

The defendant told the plaintiff that he would buy the plaintiff's horse if one Pearson, who was employed by the defendant, could work it. The plaintiff delivered the horse to Pearson, who worked it, and informed the defendant that it was satisfactory, whereupon the defendant said he would pay for the horse.

Held, that these acts constituted an unqualified acceptance of the horse by the defendant.

[COURT EN BANC, *12th-19th April, 1906.*]

Statement. The plaintiff sued for the price of a horse alleged to have been sold and delivered by the plaintiff to the defendant. The defence consisted of a denial of the alleged sale and delivery. The action was tried before WETMORE, J., without a jury, who found for the plaintiff.

The defendant appealed, and the appeal was heard by SIFTON, C.J., SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ.

Argument. *Ford Jones*, for defendant (appellant).

D. J. Thom, for plaintiff (respondent).

The judgment of the Court was delivered by—

[*19th April, 1906.*]

Judgment. HARVEY, J.—The evidence is of a very conflicting character, so much so indeed that a perusal of it leads to the irresistible conclusion that some of the witnesses have committed perjury. The result of the trial Judge's judgment, though not so stated in so many words, is to discredit the testimony of the defendant's witnesses and accept that of the plaintiff's. The principle upon which a Court of Appeal acts in reviewing such a case, decided by a Judge without a jury, on contradictory evidence, has been considered very frequently, but I need refer to only two or three of the latest cases.

[The learned Judge referred to *Colonial Securities Trust Company, Limited* v. *Massey*,[1] *Savage* v. *Adam*,[2] and *Coghlan* v. *Cumberland*.[3]] Judgment. Harvey, J.

In *The Village of Granby* v. *Menard*,[4] the judgment of the Court was delivered by Girouard, J., and was concurred in by all the other Judges. At page 17 he says: "It is admitted that the evidence is contradictory, four or five witnesses, principally co-workmen of Cote, testifying one way, and as many, chiefly the officers in charge and experts, flatly contradicting them. The trial was held before a Judge without a jury, the parties not having exercised the option both had for a trial by jury. The learned Judge saw and heard all the witnesses. True, he throws no suspicion, in words, upon the character or credibility of either of them in particular; in fact he makes no remark upon their competency, manner or demeanour, although his formal judgment is accompanied by a full and elaborate opinion." Gwynne, J., at page 16, says: "In a case like the present where the trial Judge, who has heard all the witnesses give their evidence before him, and who has thus had an opportunity which no Court of Appeal can have of estimating the credibility of the several witnesses and the value of all their evidence, has rendered the judgment, no Judge sitting in review of or in appeal from that judgment, upon matters of fact ought to reverse that judgment, unless it is shown to be clearly wrong upon the evidence so taken."

The remarks quoted from the last mentioned case appear to me to be very appropriate to the case before us, and if any case may arise where importance is to be attached to the opportunity the trial Judge has of seeing the witnesses and noticing their demeanour, and manner of giving their evidence, and to the value of his decision reached in consequence thereof, it is such a case as the present. It is not necessary to review the evidence, because it cannot be contended that the evidence which the trial Judge believed is incapable of supporting his decision, nor is there any preponderance of probability that would justify this Court

[1] (1896) 1 Q. B. 38; 65 L. J. Q. B. 100; 73 L. T. 497; 44 W. R. 212; 12 Times R. 57.
[2] W. N. (1895) 109; 99 L. T. J. O. 33.
[3] (1898) 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 450.
[4] 31 S. C. R. 14.

Judgment. Harvey, J.

in coming to the conclusion that he was clearly wrong, and consequently the defendant fails to establish what he must establish in order to succeed in his appeal from the finding of the trial Judge that there was a contract of sale between the parties.

It is contended, however, that there was no acceptance of the horse within the *Sales of Goods Ordinance*, chapter 39 of the *Consolidated Ordinances*, 1898, section 6, so as to make the contract effective. The evidence for the plaintiff, to which credit is to be given by the effect of the trial Judge's decision, is that when the defendant negotiated for the purchase of the horse he said that if one Ole Pearson, who was employed by him, could work him he would buy him; that the horse was delivered to Ole Pearson, who worked him, and that after he had worked him for some time the defendant enquired how the horse was, and Ole Pearson said he was all right, whereupon the defendant said he would pay for him. I am clearly of the opinion that these facts constitute an unqualified acceptance. I should indeed, if it were necessary, be disposed to hold that the receipt of the horse by Ole Pearson would, upon the condition of his being able to work him being established, constitute an acceptance by the defendant, but it is not under the evidence necessary to go that far.

The only question then remaining is whether the application for a new trial, on the ground of the discovery of fresh evidence, should be granted. The evidence which it is desired to bring forward, in so far as it would be admissible, goes no further than to corroborate the evidence which the defendant did adduce, and to contradict that of the plaintiff, and it is quite clear from the authorities that on such evidence a new trial will not be granted. The new evidence required to support an application for a new trial must be conclusive in its character. I refer to *Sexsmith* v. *Murphy*,[5] *Anderson* v. *Titmas*,[6] and *Young* v. *Kershaw*.[7]

In my opinion, therefore, for the reasons stated, the appeal should be dismissed, and the application for a new trial refused with costs.

Appeal dismissed with costs.

[5] 1 Terr. L. R. 311.
[6] 36 L. T. 711.
[7] 81 L. T. 531; 16 Times Rep. 52.

REX v. McLENNAN.

Criminal law — Railway conductor — Money paid for carrying passengers — Failure to account — Theft — Jurisdiction of magistrate to suspend sentence.

Two justices of the peace sitting for the trial of indictable offences under section 782 of Part XV. of the Criminal Code, 1892, are a court, and as such have power to suspend sentence under section 971 and impose costs.

A railway conductor whose duty is to account to his employers for cash fares received, commits theft if, having accepted from a passenger for transportation a sum of money less than the regular fare, he fails to account therefor, and (HARVEY, J., *dissentiente*) it is immaterial that the passenger paid the money and the conductor received it as a bribe for committing a breach of duty and allowing the passenger to travel without paying the prescribed fare.

[COURT EN BANC, *12th-18th July, 1905.*]

Statement. The accused was a conductor on a passenger train on the Canadian Pacific Railway, and his duty was, in the case of cash fares, to issue tickets in duplicate to the passengers and to report and account to his employers at the end of each trip. On December 20th, 1904, he carried without tickets two passengers, each of whom paid to the conductor about one-half of the prescribed fare. The conductor not having accounted to the railway company for the amounts so received, he was convicted of theft by two justices of the peace who, however, suspended sentence under section 971 of the Code, but imposed costs, and required the accused to enter into a recognizance.

The accused obtained a writ of *certiorari* and moved to quash the conviction before HARVEY, J., who referred the matter to the Court *en banc*, and it was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ.

Argument. *P. J. Nolan*, for the accused, took the following objections:

(*a*) The justices were acting under C. C. 1892, Part LV., and had no jurisdiction under that part to suspend a sentence or impose costs.

Argument. (*b*) The facts do not constitute the offence of theft, as the money was paid to the accused as a bribe.

R. B. Bennett, for the Crown and the informant.

[*18th July, 1905.*]

Judgment. WETMORE, J.—Section 971 of the Code provides that in a case in which a person is convicted before any Court of any offence punishable with not more than two years' imprisonment . . . the Court may, instead of sentencing at once to any punishment, direct that he may be released on entering into a recognizance with or without sureties and during such period as the Court permits to appear and receive judgment when called upon and in the meantime to keep the peace and be of good behaviour. It was under that provision that the justices suspended the sentence in this case, and required the party to enter into a recognizance. Paragraph three of that same section provides that the Court may, if it thinks fit, direct that the defendant shall pay the costs of the prosecution or some portion of the same within such period and by such instalments as the Court directs. It was under that provision that the justices ordered the costs to be paid.

Section 974, which is an interpretation clause, provides in effect that the term "court," as used in section 971, means and includes "any superior court of criminal jurisdiction, and 'judge' or 'court' within the meaning of part 55 and any magistrate within the meaning of part 56." It is evident that some mistake has been made in framing this section, because I cannot find that the term "magistrate" is used in part 56 at all. It is, however, the term used in part 55. The objection to the conviction, therefore, is that section 971 does not warrant a magistrate under part 55 suspending a sentence or imposing costs, or in other words that a magistrate under part 55 cannot exercise the powers conferred by section 971. Now, I am of opinion that a magistrate, as defined by section 782, sitting for the summary trial of indictable offences, is a Court. On referring to section 794 it is provided that every court held by a magistrate for the purpose of this part shall be an open public court. Consequently I am of opinion that the powers prescribed by section 971 are conferred upon such court. The maximum punishment provided for a conviction of theft by such magistrate is six months.

and therefore they have the right to suspend sentence and require the party to give security to appear and meanwhile to keep the peace, and they have the authority to impose costs. In so far as the objection raised that the conviction did not provide when the costs were to be paid, I am of opinion the fair intention to be gathered from the conviction was that the costs were to be paid forthwith, and that was sufficient. The justices were not bound to direct that these costs should be payable by instalments. Judgment. Wetmore, J.

The substantial question raised, however, is, whether the facts proved constitute the offence of theft. In order to constitute this theft it must be brought within section 308 of the Code, which provides that "everyone commits theft who having received any money . . . on terms requiring him to account for or pay the same . . . to any other person, fraudulently converts the same to his own use or fraudulently omits to account for or pay the same . . ."

Regina v. *Cullum*,[1] was relied upon on behalf of the accused. The charge in that case was laid under the *Imperial Act*, 24 & 25 Vic. c. 96, s. 68, which provides as follows: "Whosoever being a clerk or servant . . . shall fraudulently embezzle any chattel, money or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on account of his master or employer or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer."

The Court held in effect there that as the money received by the prisoner was not delivered to him for or in the name or on account of the master or employer, and that inasmuch as it was not received or taken in possession by the prisoner for or in the name or on account of his master or employer, that it was not brought within the words of the section and therefore the conviction made must be quashed. The words of section 308 of the Code are, in my opinion, materially different. The language of that section is, "Every one commits theft who, having received any money . . . on terms requiring him to account for or pay the same to any other person, fraudulently converts the same to his own use."

[1] 42 L. J. M. C. 64; L. R. 2 C. C. 28; 28 L. T. 571; 21 W. R 687; 12 Cox C. C. 469.

Judgment. Wetmore, J.

The question here is not whether the money was taken or received by the accused into his possession for or in the name or on account of his employer; but the question is, did he receive it on terms requiring him to account for it? Now I am of opinion that he did receive it on terms requiring him to account for it. He was the conductor of the railway company's train. His duties were to collect fares, or, in other words, to receive monies from persons desiring to travel by the company's train for transporting them from one place to another, and in my opinion the defendant received the money from the two persons in question for that purpose. You may call it a bribe if you choose. To my mind it makes no difference. These men paid the money for the purpose of being transported by this train to their destination and would not have paid it had that not been the purpose, and the defendant must have known that fact. He, therefore, received the money within the scope of his employment. It makes no difference, to my mind, that he was forbidden to take less than the amount prescribed by the company's regulations or tariff. He received it as the price paid for the transportation, and whether he received more or less than the tariff described he was under a moral and legal obligation to account to the company for it; therefore, he comes within the meaning of the section that he received it on terms requiring him to account for it. The learned Judge should, in my opinion, be advised that this conviction is valid.

SIFTON, C.J., SCOTT, PRENDERGAST and NEWLANDS, JJ., concurred.

HARVEY, J. (dissenting).—I am unable to agree with the majority of the Court. In my opinion, the facts as stated do not constitute the offence of theft. If the charge can be supported it must be under section 308 of the Criminal Code. The words of that section are: "Everyone commits theft who, having received any money . . . on terms requiring him to account for or pay the same . . . to any other person . . . fraudulently converts the same to his own use or fraudulently omits to account for the same. . . ."

The important words of this section as bearing on the present case are "*on terms* requiring him to account for or pay the same." There is no doubt the duty of the conductor

Judgment.
Harvey, J.

was to collect the correct fare and pay it over, but he had no authority to allow anyone to travel for less than the correct fare, and therefore when he received anything less than the correct fare he did not receive it as fare but as a payment to him for which he commits a breach of his duty and allowed the person paying it to travel without paying the fare. Take the case of a conductor allowing persons to travel without paying anything. In this case the breach of duty to his employers is exactly the same, viz.: that of allowing persons to travel without paying the proper fare, but in the one case he takes pay for committing the breach of duty, while in the other he does not. I entertain no doubt on the facts stated that this money was not paid to or received by the conductor as fare paid for the benefit of the railway company, but rather as a bribe to induce him to allow the passengers to travel without paying the proper fare. The question is not whether this constitutes any offence but simply whether it constitutes the offence of theft as charged, and it appears to me that it does not. The terms of the conductor's employment do not require him to account for money so received, for they do not contemplate or authorize any such receipt. The case of *The Queen* v. *Cullum*,[1] appears to me to cover the principle exactly. The accused was the captain of a barge on which he was to take such cargo as the employer should direct. His whole time was in his employer's service and he was required to account to his employer after each voyage. On a certain voyage he was ordered to return empty and not to take a certain cargo. He did, however, take the cargo, for which he received pay for which he neglected to account. He was charged with theft or embezzlement under the Statute, which was in the following words: "Whosoever being a clerk or servant . . . shall fraudulently embezzle any chattel, money or valuable security which shall be delivered to or received or taken into possession by him for or in the name or in the account of his master or employer or any part thereof shall be deemed to have feloniously stolen the same from his master or employer." It was held that the offence was not constituted by the circumstances of the case because the money was not received "for or in the name or on account of" the master, but for himself and on his own account.

During the course of the argument in the above case Blackburn, J., said: "Suppose a private coachman used his master's carriage without leave and earned half a crown by driving a stranger, would the money be received for the master so as to become the property of the latter?" And Bramwell, B., said: "Suppose the captain of a barge let his master's vessel as a stand to the spectators of a boat race and took payment from them for the use of it?"

Although the section of our Code is more comprehensive than the Statute under which the charge in this case was laid, I can see no difference in the principle, and the case appears to me to be identical in principle with the one under consideration. Therefore, I am of opinion that the conviction should be quashed.

Conviction affirmed, HARVEY, J., *dissenting.*

REX v. POPE.

By-law — Discrimination — Auctioneer — Invalidity.

Under an Ordinance authorizing a council to pass by-laws for "licensing, regulating and governing auctioneers," and for fixing the sum to be paid for every such license, the council of the city of Calgary passed a by-law requiring all auctioneers within the city to obtain a license and fixing the fee therefor at $20 in the case of *bona fide* residents and at $1,000 in other cases.

Held, that the by-law was void for discrimination.

[COURT EN BANC, *13th-18th July, 1906.*]

Statement. Case stated on behalf of the defendant, under C. C. 1892, s. 900, by the police magistrate of the city of Calgary, before whom the defendant, a non-resident auctioneer, had been convicted of a breach of the above by-law. The case was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ.

Argument. *J. B. Smith,* for the city of Calgary.

P. B. Bennett, for the accused.

HARVEY, J., delivered the judgment of the Court.

[*18th July, 1906.*]

Judgment. HARVEY, J.—In my opinion there is authority binding on this Court and deciding this case. The authority I refer to is *Jones* v. *Gilbert*,[1] in which it was held that a by-law of the city of St. John, which imposed a license fee of $20 on residents and $40 on non-residents, was invalid on the ground of its discrimination.

It is not denied by counsel for the city that unless the cases are distinguishable, the validity of the by-law in question here cannot be upheld; but he points out that in the case of the St. John by-law the power given by the Legislature to the municipality was only "to license," while in the case before us the power is "to license, regulate and govern." The difference in the power given does not, in my opinion, in any way aid the by-law, for its provisions do not regulate or govern "auctioneers and other persons selling, or putting up for sale, goods, wares or merchandise or effects by public auction," but simply impose conditions upon persons who desire to become auctioneers.

This subject was considered by the Court of Appeal in Ontario in *Merritt* v. *City of Toronto*,[2] where it was held that under similar statutory authority the municipality could not impose the condition that the applicant for an auctioneer's license should be a person of good character.

Osler, J.A., says:[3] "Anyone who is willing to pay this fee is entitled to the license, and when licensed must submit, if the legislative power has been further delegated, as it is by the section in question, to such reasonable provisions and restrictions for regulating and governing him in exercising his right as the council see fit to impose. The fallacy of the argument for the appellants as to the construction of the section is in assuming the exercise of the trade or calling of an auctioneer to be a mere privilege grantable in the discretion of the council (in which case they might perhaps attach such conditions as they pleased to the acquirement of it) instead of a common law right, to the exercise of which

[1] 5 S. C. R. 356.
[2] 22 A. R. 205.
[3] At page 208.

Judgment. Harvey, J.

they may attach by the authority of the Legislature the condition of taking out a license, and may regulate and govern the holder of such license." And MacLennan, J.A., says:[4] "The words 'govern and regulate' are no doubt very large words, but in themselves they cannot, as it seems to me, when applied to a class of persons, extend to giving power to exclude from the class to be regulated and governed. What the municipality is authorized to do is to regulate and govern a certain class of persons. To exclude a person from that class is one thing; to regulate and govern is another, and different thing."

Nor does it appear to me that the suggestion of counsel that the by-law is one for the granting of an unconditional license of $1,000, with a condition or a reduction where the terms of residence specified by the by-law are complied with, helps the case, for it still remains a case of imposing conditions which constitute a discrimination between residents and non-residents; and if a discrimination whereby one class is made to pay twice as much as another is sufficient to invalidate the by-law, one which makes the ratio fifty to one must surely be.

Conviction quashed with costs.

MOLINE v. BLYTHE ET AL.

Practice — Third party notice.

No leave is required to either issue or serve a third party notice by one defendant against a co-defendant under Rule 67 of the Judicature Ordinance, C. O. 1898, c. 21, whether such notice issues before or after the time limited for delivering defence.

[WETMORE, J., *21st March, 1904.*]

Statement.

Motion by the defendant Blythe for directions pursuant to Rule 64 of the *Judicature Ordinance* in respect of a third party notice issued by him, claiming contribution and indemnity against co-defendants.

Argument.

J. T. Brown, for co-defendants objected that inasmuch as the third party notice had not been issued until after the

[4] At page 213.

time limited for delivering statement of defence, the issue of such notice without leave was irregular. Argument.

E. A. C. McLorg, contra.

WETMORE, J.—A third party notice was issued by Blythe, one of the defendants in this case, under Rule 67 of *The Judicature Ordinance,* claiming contribution and indemnity against Mary P. Nugent, administratrix; George E. Nugent, deceased, and Henry J. Rawson, assignee of the firm of Nugent & Martin, all co-defendants. It was conceded that the notice might be issued without leave under Rule 67, provided that it had issued before the time limited for Blythe to deliver his defence, but it was contended that if such time had passed leave must first be obtained. Judgment.

Rule 67 is the same as Rule 55 of Order XVI. of The English Rules. Leave to issue the notice is not necessary under that rule: *Towse* v. *Loveridge*,[1] and *Baxter* v. *France*,[2] And therefore it is not necessary under Rule 67 of the Ordinance. I can find no distinction drawn in these cases between a notice issued before the time limited for appearance and one issued after. The contention was, however, that inasmuch as Rule 67 provides that the procedure for determining the question between the defendants shall be the same as if the defendants served with the notice were third parties, and that as Rule 60 provides that the notice shall, unless otherwise ordered by the Court, be served within the time limited for delivering the defence of the party issuing the notice, and those provisions apply to a notice issued under Rule 67, leave must be obtained to issue such last mentioned notice if it is issued after the time so limited for delivering the defence. In view of the reason given in the authorities cited (*supra*) for holding that leave to issue a notice under Rule 67 is not necessary, I do not see why I should incorporate these words into that rule. I can see some reason for urging that such a notice so issued cannot be served without leave after the time for pleading has expired. But I am of opinion that the same reason exists for not reading that provision into Rule 67, namely, that the parties are already brought into Court,

[1] 25 Ch. D. 76; 53 L. J. Ch. 499; 49 L. T. 466; 32 W. R. 151.
[2] (1895) 1 Q. B. 455; 64 L. J. Q. B. 335; 72 L. T. 146; 43 W. R. 227.

Judgment.
Wetmore, J.

and Rule 67 is silent as to this provision. I think that all that that rule contemplates as to applying the procedure is that the co-defendant being served with notice the parties shall from that time out proceed to have their rights tried out as if the party served had been a third party. I think this view is strengthened by the fact that the clause in Rule 60 on which the learned counsel for Nugent and Rawson relied goes on to state that the party in that rule interested shall be served with a copy of the statement of claim and writ of summons in the action. Why serve persons with these documents over again? They have already been served with them. I can quite conceive this, however, that if a party defendant claims contribution against a co-defendant he must come promptly and not so delay his application as to complicate the action, or render it inconvenient to make any practical order to try out the question of the liability to indemnify or contribute, and that the co-defendant served with notice might, at the return of the summons for directions under Rule 64, set up the delay. It would seem that under *Baxter* v. *France*,[2] he cannot apply to set aside the notice but must raise his objections at the return of the summons for directions.

Objection overruled.

NEW HAMBURG MFG. CO. LTD. v. KLOTZ.

Contract for sale of goods — Divisibility — Condition precedent — Performance — Waiver.

Upon a sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal arrangement, made contemporaneously with the written agreement of purchase, that these were to be attached to the threshing machine by the plaintiffs. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made.

Held, that the contract was divisible, and that the price of the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower.

Held, however, that the proper attachment of the wind stacker was a condition precedent to the paintiffs' right to obtain payment, and that under the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition.

[NEWLANDS, J., *7th June, 1905.*]
[EN BANC, *10th-19th April, 1906.*]

Statement.

This was an action for the price of a "Maple Bay" wind stacker, chaff blower, and 36 feet of rubber belting. These were sold by the plaintiff to the defendant under a written agreement which contained the following warranty: "All machines manufactured by us are warranted to be well built of good material and capable of doing good work when properly operated. During the first season, should any break occur through defective material or workmanship, we will replace the broken part free of charge. If, when started, the machine should be in any way defective and not work well, the purchaser should give notice promptly to us or the agent from whom he purchased, and reasonable time allowed to remedy the defect, if any (with the purchaser's necessary and friendly assistance), when, if it cannot be made to do good work, it will be replaced by a new machine. Failure to give immediate notice as above or continued possession of the machine whether kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. No agent has any authority to add to, abridge, or change this warranty in any manner." The defence alleged was that it had

Statement. been agreed that the plaintiff should fit the wind stacker and chaff blower to the defendant's threshing machine, fix the same in their respective places, and make the same work to the satisfaction of the defendant, and that the plaintiffs had never fixed the machinery, whereby the defendant had been released from all obligations to pay for it. It appeared at the trial that the defendant had a J. I. Case threshing machine and an attempt had been made on the part of the plaintiffs to attach the chaff blower to the threshing machine, but this had been found impossible, and at the trial they abandoned their claim for its price. The wind stacker had been attached by the plaintiffs to the threshing machine and the defendant had used it through one season, but it had not worked satisfactorily, partly on account of a broken wheel and partly because certain alterations which required to be made in a "Maple Bay" wind stacker in order that it should work properly upon a J. I. Case threshing machine had not been made; and the defendant stated that he had been obliged to continue using it because in putting on the wind stacker the plaintiffs had cut off a part of the threshing machine which prevented him putting on the apparatus he had formerly used for stacking. The plaintiffs' agent had gone to the defendant's place to make these necessary alterations; the threshing was over, but as it was very cold weather and as the defendant had refused to settle until the machine was running in the following year, they had left the alterations incomplete, and the agents stated that they had not fixed it the next year because the defendant had purchased another wind stacker and was using that. The defendant explained that he had waited until just before the commencement of the threshing season and had bought the new wind stacker because the plaintiffs had not fixed the old one. There was no plea of a breach of warranty in reduction of damages or any counterclaim, and no evidence was given at the trial as to any damages sustained by the defendant.

Argument. *J. F. L. Embury*, for the plaintiffs.

D. J. Thom, for the defendant.

Judgment. NEWLANDS, J.—As the contract was in my opinion a divisible one, the fact that the chaff blower would not fit the defendant's thresher does not affect the balance of the claim,

Judgment.
Newlands, J.

and from the evidence given at the trial, I am of the opinion that the agreement pleaded by the defendant is not a verbal alteration of the written contract, but like the agreement in *Morgan* v. *Griffiths*,[1] it is collateral to the written agreement and upon the strength of it the latter was entered into. I am also of opinion that the performance of it was a condition precedent to the defendant's promise to pay.

In Williams' note to *Pordage* v. *Cole*,[2] the following rule is laid down: "When a day is appointed for the payment of money . . . and the day is to happen after the thing which is the consideration of the money . . . is to be performed, no action can be maintained for the money . . . before performance." The alteration of this wind stacker so that it would work properly in connection with the defendant's threshing machine being a condition precedent and being unperformed, the plaintiffs cannot, under the above Rule, recover, unless the defendant has waived the condition.

If a man offers to perform a condition precedent in favour of another, and the latter refuses to accept the performance or hinders or prevents it, this is a waiver, and the latter's liability becomes fixed and absolute.[3] There was no offer to perform the condition in this case. It should have been performed a reasonable time before the threshing season commenced and if the defendant waited until a reasonable time before the season opened for the performance of the condition by the plaintiffs and nothing was done by them, he would, I think, be entitled to consider that they were not going to perform the condition and that the contract between them was at an end. Therefore, I do not think that the purchase by him of another wind stacker was a waiver of the condition that they were to attach it to his threshing machine and make it work satisfactorily.

But it was contended by the plaintiffs that the defendant accepted the wind stacker by using it through the season of 1903; that even though they did not fix it as agreed, he had received and accepted a substantial part of what was to be performed in his favour, and that if there was any condition

[1] (1871) L. R. 6 Ex. 70; 40 L. J. Eq. 46; 23 L. T. 783; 19 W. R. 957.
[2] 1 Wms. Saund. 320.
[3] See Benjamin on Sale (3rd Ed.), p. 842.

Judgment. Newlands, J.

precedent, its character was changed and it became a warranty which would oblige him to perform his part of the agreement; and that as he had not pleaded the breach of warranty in reduction of damages or counterclaimed, they should recover.

There may, however, be cases of a partial performance where the defendant may still be at liberty to say that the plaintiff is not entitled to recover the contract price. Such a case is pointed out by Bramwell, B., in *White* v. *Beeton*.[4] "Suppose," he says, "the guardians of a union contracted with a man to supply bread for the house, say 100 loaves per day for three months, it would be preposterous to suppose that if he did it for every day with one exception, in which he supplied 99 only, that he would not be entitled to the contract price. Suppose that he delivered them on the first day and not afterwards, is he then to be paid the contract price? That is equally unjust. It seems to me the parties who would have the 100 loaves for one day might reasonably complain that a new contract should be forced upon them by reason of the breach of the other party, and they might say 'as to our retaining the things we cannot help it, for the loaves are consumed.'" This is also laid down by Blackburn, J., in *Pust* v. *Dowie*,[5] and by Pollock, C.B., in *Graves* v. *Legg*,[6] and other cases.

But this partial performance must be a substantial part of the consideration. In *Heilbutt* v. *Hickson*,[7] Bovill, C.J., says: "In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in *Poulton* v. *Lattimore*,[8] where the purchaser had sown some and sold other part of certain clover seed which had been warranted as new growing seed, but the whole of which turned out to be totally unproductive and useless."

In this case the acceptance of the defendant was conditional on the plaintiffs fixing the wind stacker as agreed and

[4] (1861) 7 Jur. (N.S.) 735; 4 L. T. 474; 9 W. R. 751; 30 L. J. Ex. 373.
[5] (1863) 32 L. J. Q. B. 179, at p. 181; 13 W. R. 459.
[6] (1854) 23 L. J. Ex. 231.
[7] (1872) L. R. 7 C. P. 438, at p. 451; 41 L. J. C. P. 228; 27 L. T. 336; 20 W. R. 1085.
[8] (1879) 17 C. L. R. 373; 9 B. & C. 259.

he was compelled to use it for the time he did because the plaintiff's agent had so altered his threshing machine that he could not use his own apparatus. He used it not because he wanted to, but because their action compelled him to. During the time he so used it it was of very little value to him on account of numerous stoppages to fix it, and because he required an extra man to do the work the machine should have done. Judgment Newlands, J.

I think from all the evidence the wind stacker was of no practical value to him, and that he did not receive such a substantial part of the consideration as would turn the condition precedent into a warranty which would compel him to pay for the wind stacker and look to the plaintiffs for the damages he suffered.

It is also contended by the plaintiffs that the machine is still at the defendant's place and has never been returned to them. Under the authority of *Heilbutt* v. *Hickson* (*supra*), I think that the defendants had the right to throw it upon the plaintiffs' hands there, and was under no obligation to return it to them.

As to the belting no evidence was given as to its being delivered to the defendant, so I presume the plaintiffs dropped that part of their claim also.

I therefore give judgment for the defendant with costs.

The plaintiffs appealed and the appeal was heard before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST and HARVEY, J.J. Statement.

The same counsel appeared. Argument.

HARVEY, J., delivered the judgment of the Court.

[*19th April, 1906.*]

HARVEY, J.—The provisions of the clause of the contract set out under the head of "Warranty," in my opinion contain more than a mere warranty, but even as far as the warranty itself goes the possession and use by the defendant cannot by reason of the promises made by the plaintiff's representatives, be held to be evidence that the machine answered the warranty. The notice that was given was under the cir- Judgment.

Judgment. Harvey, J.

cumstances reasonable notice, and it was so treated by the plaintiffs, who accepted and acted upon it. The defendant received no benefit from the use of the stacker since the evidence shews that the damage sustained by loss of time, etc., was probably greater than the value derived from its use. The plaintiffs under the agreement were bound either to make the stacker work satisfactorily or to furnish a new one, the defendant having done all that the agreement called on him to do. The plaintiffs have not done this, and they have therefore, in my opinion, no cause of action for the price of the machine.

The appeal should be dismissed with costs.

Action dismissed.

ROSS v. PEARSON.

Judgment — Subsequent contrary decision of Supreme Court of Canada — Extension of time for appealing.

Leave to appeal, after the proper time has expired, on the ground that there has been a subsequent decision of the Court of Appeal altering the law as it was previously understood, will not be granted where the litigating parties have dealt with the subject matter in dispute in such manner as to so alter their positions regarding it and to put it out of the power of the Court to restore the *status quo*. *Quære*, whether leave should ever be granted on that ground alone.

[SCOTT, J., *3rd October, 1905.*]

Statement.

This was an application by plaintiff to extend the time for appealing to the Supreme Court of Canada from a decision of the Court *en banc*, in an interpleader issue to try out the right of property in a steamboat seized under the defendant's execution and claimed by the plaintiff under a chattel mortgage. The trial Judge found the issue in plaintiff's favor and the defendant appealed to the Court *en banc* which, on 18th April, 1905, reversed the trial Judge's decision.

Prior to the expiration of the time for appealing therefrom, viz., on 2nd May following, a judgment was delivered by the Supreme Court of Canada upon an appeal before it in the case of *Benallack* v. *Bank of British North America* (36 S. C. R. 120), which decided the main question involved in

this issue contrary to the decision of the Court *en banc;* but it appeared that plaintiff's advocates did not become aware of the judgment in that case until it appeared in the number of the Supreme Court Reports which reached Edmonton in the ordinary course of distribution about 19th July, 1905, which was after the time for appealing had expired. Statement.

The steamboat in question remained in the deputy sheriff's custody under seizure until about 27th April, 1904, when, pursuant to the terms of the interpleader order, it was delivered to plaintiffs pending adjudication upon the interpleader issue, they having given security to the deputy sheriff for its return. About 1st March, 1905, when the appeal to the Court *en banc* was pending, plaintiffs advertised it for sale by auction under their mortgage, and at that sale they themselves became the purchasers. About 17th March, before the judgment of the Court *en banc* was delivered, they resold it to the Edmonton Coal Company, but, although the sale to the latter company was completed at that time and the steamboat delivered under it, the purchase money had not been paid at the date of this application. A few days after the delivery of the judgment of the Court *en banc,* the deputy sheriff resumed possession of the steamboat under the executions in his hands, and shortly afterwards plaintiffs placed in his hands an execution upon a judgment recovered by them, presumably for the debt secured by their chattel mortgage. Having done this, they, through their advocates, entered into negotiations with defendant's advocates and the advocates for one MacDonald, another execution creditor, for the release of the steamboat from their executions in order to avoid a sale thereof under the executions. The result of these negotiations was that the defendant consented to release the steamboat on payment by plaintiffs of $300, on account of his judgment for $348, and Macdonald consented to release on payment by them of $60 on account of his judgment for $101.85, and on or about 17th June plaintiffs issued their cheques for these amounts and afterwards caused them to be delivered to defendant and MacDonald, whereupon they released the steamboat from their respective executions.

It appeared that the only matter connected with the interpleader issue which remained unsettled at the date of this application, was defendant's costs of the appeal to the Court *en banc,* they not having been paid.

Statement. It further appeared that during the negotiations for the release of the steamboat one of the plaintiffs' advocates stated to the defendant's advocate that if the amount in dispute were larger his firm would advise an appeal to the Supreme Court of Canada.

Argument. *O. M. Biggar*, for plaintiff, supported the motion.

C. F. Newell, contra.

Judgment. SCOTT, J.—This application is based solely on the ground that since the judgment sought to be appealed against was delivered there has been a contrary decision of the higher Court.

It appears to be open to serious question whether that fact alone is a sufficient ground for granting the leave applied for. In *Craig* v. *Phillips*,[1] Baggallay, L.J., says:[2] "I do not mean to say that the Court would not in any case where the 12 months had elapsed enlarge the time to appeal on the ground that there had been a contrary decision of a superior court on a point of law, but there must be circumstances of a very special character." In the same case Thesiger, L.J., says:[3] "I give no opinion whether, if there were a clear decision of a court of appeal overruling previous decisions, this discretion ought not in some case to be exercised."

Apart from this question I am of opinion that leave to appeal should not now be granted. The main question involved in the issue was the construction of an Ordinance which had not before received judicial construction. After the judgment was pronounced plaintiffs' advocates appear to have considered the propriety of appealing against it and to have decided not to do so. They then proceeded to buy out the defendant's interest in the subject matter of the action, the result being that he can no longer claim any interest in it. If an appeal were taken, and it were sustained, the effect would probably be that he never had any interest in it, but I cannot now assume that that would be the result of an appeal or that it must necessarily be decided in favor of plaintiffs.

Not only has the defendant parted with his interest, but plaintiffs have also parted with theirs. It may be that the

[1] 47 L. J. Ch. 239; 37 L. T. 772; 7 Ch. D. 249; 26 W. R. 293 C. A.
[2] 7 Ch. D. at p. 252.
[3] *Ibid*, p. 253.

sale by them to the coal company was at one time subject to the defendant's interest, but it is no longer so since he released it from his execution. Judgment. Scott, J.

The purchasing company are entitled to hold it as against both the parties to the issue, the result being that by the plaintiffs' acts the subject matter is gone beyond recall, and in case defendant succeeded upon an appeal (and that contingency should not be ignored) his interest could be restored to him.

In *Craig* v. *Phillips* (above), Jessel, M.R., says,[4] in answer to the contention of counsel that the Court had not unfrequently given leave to appeal after the proper time had expired when there had been a subsequent decision of the Court of Appeal altering the law as it was previously understood: "Not unless the property is still in Court or in some manner under distribution."

Application refused with costs.

ANDREAS v. CANADIAN PACIFIC RAILWAY CO.

Railway — Negligence — High rate of speed — Findings of jury — Obstruction of view at crossing.

In an action against a railway company for negligence, it appeared that a locomotive of the defendants was running at a dangerous rate of speed for the locality, and struck and killed a person who was driving a team and wagon over the track at a street crossing. There was a tool house near the crossing, which to some extent obstructed the view, and there was also another train shunting near by. The jury found that death was caused by the defendants' negligence in failing to reduce the speed of their train as provided by the Railway Act, and that the deceased had committed no acts of contributory negligence No questions were submitted to the jury as to whether the defendants were guilty of any other acts of negligence.

Held, that as the noise of the shunting train might have reasonably engaged the attention of the deceased, and as his view near the crossing was obstructed by the tool house, the jury was justified in finding that there was no contributory negligence; but that following *G. T. R.* v. *McKay*, 34 S. C. R. 81, the verdict in the plaintiff's favour should be set aside, and (WETMORE, J., *dissentiente*) a new trial ordered.

[EN BANC, *12th April and 18th July, 1905.*]

The following statement of facts is abstracted from the judgment of WETMORE, J.: Statement

[4] *Ibid* at p. 250

Statement. This was an action brought by the plaintiff, the widow and administratrix of Nicholas Andreas, deceased, to recover from the defendants damages. On 22nd June, 1903, the deceased passed west on what is known as South Railway street, in the town of Regina, came to Albert street and then proceeded north on this last mentioned street towards the defendants' railway. There was a railway crossing at Albert street. In attempting to cross the railway at this crossing the horse and wagon in which he was driving were struck by one of the defendants' trains coming from the west and he and the horses were killed and the wagon practically destroyed.

In coming along South Railway street and passing along Albert street up to about opposite to where the tool shed hereafter mentioned was, an approaching train coming from the west could be seen without any obstruction at a distance of at least one mile and a half away, but near the crossing there was a tool shed on the west of Albert street, which obscured the view.

The jury found in answer to questions that the engine was running at 25 miles per hour, and that the rate of speed was dangerous for such a locality; that Andreas could not, by the use of ordinary care, have seen the train and avoided the accident. The only question submitted to the jury respecting the cause of death and the answer thereto was the following:—

Was the death of the deceased caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission which caused the accident? Ans. 1st. Yes. 2nd. Failure to reduce speed of train as provided in *Railway Act*.

Judgment having been given by the trial Judge for the plaintiff, the defendants appealed, and the appeal was heard by SIFTON, C.J., WETMORE, PRENDERGAST, and HARVEY, JJ.

Argument. *J. A. M. Aikins*, K.C., for defendants (appellants).

Ford Jones and *A. L. Gordon*, for plaintiff (respondent).

[*18th July, 1905.*]

Judgment. WETMORE, J.—Inasmuch as the jury have found that the death of the deceased was caused in consequence of the neglect or omission to reduce the speed of the train as pro-

Judgment. Wetmore, J.

vided in *The Railway Act*, and have not found that it was caused in consequence of any other neglect or refusal, it is not necessary, in view of what was held in *The Grand Trunk Railway Co.* v. *McKay*,[1] to consider the other matters of negligence alleged.

I am of opinion that there was evidence to submit to the jury as to whether or not there was contributory negligence on the part of the plaintiff, and from which the jury might find, as they did in effect, that the plaintiff was not guilty of contributory negligence. I can quite understand that it would not occur to a person passing along South Railway street, to look west to see whether a train was coming from that direction, because it was quite a distance from where South Railway street joined Albert street, to where the crossing was, and I can quite understand that it would not occur to a person of ordinary care to look for a train coming from the west, until he got fairly close to the railway track. Now, there was evidence in this case from which the jury could find that while this man was passing along Albert street, a train, which was to the east of the crossing and very near to it indeed, was shunting and moving backward and forward, and that the whistle of that locomotive was blown and its bell rung, and that there was a considerable amount of shouting. There was no evidence that the plaintiff was well acquainted with this crossing, and I can quite conceive that his attention might be so taken up with the train and noise of the people to the east, that he would not be looking towards the west at all, and it would only occur to him to look to the west when he got behind the tool-shed, and when he got there his view would be obscured. This tool-shed was only about nineteen feet south of the railway track, and was to the west of Albert street, and close to that street. I am not prepared to say that a jury would not be justified, under all these circumstances, in coming to the conclusion that there was no contributory negligence on the part of the deceased. I think the case in this respect comes within what was held by the House of Lords in the *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery*.[2]

Danger v. *London Street Railway Co.*,[3] was cited on behalf of the defendants upon this point, but the facts of that

[1] 34 S. C. R. 81.
[2] 3 A. C. 1155; 39 L. T. 365; 27 W. R. 191.
[3] 30 O. R. 493.

Judgment.
Wetmore, J.

case were very different. The plaintiff in that case had not his attention drawn away by any circumstances of the character which I have stated might be sufficient to take away the attention of the deceased in this case, and, while he was in a covered buggy, he could lean and reach his head forward so as to see around without much difficulty, and he did not look or endeavour to look, nor did he listen for any noise to ascertain the position of that car before crossing the track in front of it, although he knew the car which caused the accident was coming on the track. *O'Hearn* v. *The Town of Port Arthur*,[4] was also relied on by the defendants. There was nothing in that case whatever to distract his attention in any way, the outlook was clear, and there was no obstruction to it; and in my opinion, as before stated, the facts of the case are more within *Dublin* v. *Slattery*,[2] than within the two Ontario cases referred to.

It is claimed, however, that in so far as the general public are concerned, there is no obligation on the defendants to reduce their rate of speed, even assuming it was a thickly populated part of the town, and not fenced; and *The Grand Trunk Railway Co.* v. *McKay*,[1] before referred to, was relied upon in support of that proposition. The facts of this case are not the same as those in the case just referred to, because the Court held there that the track was, as a matter of fact, fenced, as provided by section 259 of the Act, as amended, according to their interpretation of that section; and, it being so fenced, there was no limit to the rate of speed by any provisions of the Act, and there could be no such limitation unless by regulation of the Railway Committee—and there was none. But in that case Davies, J., in delivering the judgment of the Court, referring to the 197th and the 259th sections of "*The Railway Act*," as amended by the Act of 1892,[5] laid it down at page 100 that: "Their object was not to provide for the protection of the public travelling along the highway, which was provided for by the 187th section of the Act, but for the safe passage of trains, and to secure that safe passage as far as possible by the exclusion of animals from the track, either by way of the highway or from the adjoining lands." I am of opinion that this Court is bound by what was so laid down: it has

[4] 4 O. L. R. 209.
[5] 55 & 56 Vic. cap. 27.

Judgment.
Wetmore, J.

been suggested that this is a mere *dictum*, that it was not necessary to lay this down for the decision of the case, and that this Court is not bound by it. I am unable to take that view. The question certainly was one that arose in the case. It was not only in the judgment of Davies, J., but it was concurred in by the Chief Justice and Killam, J., and these Judges constituted the majority of the Court—it was the judgment of the Court. That being so, I cannot see how the deceased or the plaintiff in this case can claim protection against an omission which was not enacted for their benefit. The Railway Committee in view of the dangerous crossing at this point, not having been invoked under section 187 of the Act, to make the necessary regulations to minimize or do away with the danger, the company cannot be held to have committed an act of negligence in so far as the deceased or the plaintiff are concerned. This in my opinion comes within the *ratio decidendi* of *The Grand Trunk Railway Co.* v. *McKay*;[1] and as to the plaintiff having the right to recover is within the principle of what was laid down in *Gorris* v. *Scott*.[6]

I am of opinion, therefore, that the learned trial Judge should, upon the answers to the questions handed in by the jury, have directed the judgment to be entered for the defendants, and this appeal should be allowed and the judgment below reversed and judgment entered for the defendants accordingly, with costs; and the plaintiff should pay the costs of this appeal.

HARVEY, J.—I entirely agree with the opinion of my brother Wetmore, except as to his conclusion that the jury having found that the accident was occasioned by the negligence of the defendants' servants in running at too high a rate of speed, it must be assumed that in their opinion that is the only negligence contributing directly to the accident.

It is quite true that there are statements in the judgments of both Mr. Justice Sedgewick and Mr. Justice Davies in *G. T. R.* v. *McKay*,[1] which, taken in their widest significance, would seem to warrant this conclusion, but it appears to me that they must be taken in connection with the findings of the jury, which were being dealt with, and which

[6] 43 L. J. Ex. 92; L. R. 9 Ex. 125; 30 L. T. 431; 22 W. R. 575.

Judgment.
Harvey, J.

differentiate the case very materially from the one under review. In the case before us there was much evidence of a very conflicting character as to the blowing of the whistle and the ringing of the bell, and on that evidence I am distinctly of opinion that a finding by the jury that the defendants had been negligent in not ringing the bell or blowing the whistle as required by the statute, and that the accident was caused thereby, could not be set aside.

The jury, however, were not asked any direction on this, as they were in the *McKay* case, and consequently there is no express finding on that. In the *McKay* case the jury were asked the question, and the finding was that the whistle had been blown and the bell rung, though not strictly required by the statute, but their attention having been drawn to this by the questions asked, and they having answered the questions as they did, and in such a way that the Court might very reasonably say that the neglect to comply with the law strictly could not reasonably be considered to have caused the accident, and having ascribed negligence in another respect as the cause of the accident, the Court might reasonably conclude that the neglect in that minor respect was immaterial. In the case before us, however, it is quite otherwise. There is much evidence of negligence, not only as regards the speed of the train, and the Judge in his charge directed the jury's attention to both these matters, making no distinction between them as to the legal consequences, but their attention was directed to the rate of speed by the questions, while there were no questions asked on the other point.

There was evidence to show that if the train had been running at the rate of speed authorized by the law it could have been stopped after the engineer saw the deceased without causing the accident. This being the case, it appears to me most reasonable to assume that the jury, having come to the conclusion they did, may have left the other question of negligence entirely unconsidered. It is an every day occurrence for a Judge, having found one ground on which to base his judgment, to disregard altogether other grounds which may be raised, and it seems to me unreasonable to say a jury may not do the same. I am, therefore, of opinion that the findings of the jury cannot be said to exclude all other negligence than that specifically found and that the de-

defendants, therefore, should not be entitled to judgment on that ground, but that a jury should have an opportunity of finding specifically on the point. Judgment. Harvey, J.

The appeal should, in my opinion be allowed with costs, the judgment below set aside and a new trial ordered, the costs of the first trial to be costs to the successful party on the new trial.

SIFTON, C.J., and PRENDERGAST, J., concurred with HARVEY J.

Order for new trial.

WOODLEY v. HARKER AND McROBERT, GARNISHEE.

Practice — Garnishee — Application by defendant to have the liability of the garnishee determined — Status — Construction of Rule — "Any other person interested."

Where the defendant in garnishee proceedings applied for an order to have the liability of the garnishee summarily determined, it appeared that the plaintiff had not recovered judgment against the defendant in the original action and had refused to proceed further against the garnishee. The Rule provided that "the plaintiff or any other person interested" might apply for and obtain the order.

Held, per curiam, that the defendant's application was rightly refused.

Per NEWLANDS, J. (SIFTON, C.J., HARVEY and STUART, JJ., concurring), that defendant has no right or status to apply for the order, he not being "any other person interested" within the meaning of the rule.

Per WETMORE, J., that a defendant is "a person interested" within the rule, and may apply for the order, but that it is discretionary with the Judge to make the order when applied for by him, and that under the circumstances of the present case the order should be refused.

[EN BANC, *11th-12th, and 30th April, 1907.*]

Statement.

The garnishee having been served with a garnishee summons issued by the plaintiff, disputed his liability to the defendant, whereupon the defendant applied to Johnstone, J., to fix a time and place for summarily determining such liability under Rule 390 of *The Judicature Ordinance*. This Rule provided that "If the garnishee disputes his liability . . . he shall enter with the clerk a statement shewing the grounds on which he disputes liability . . . after which, on application of the plaintiff or any other person interested . . . the Judge may fix a time and place

Statement. for summarily determining the question of liability . . ." JOHNSTONE, J., refused the application and the defendant appealed.

The appeal was heard before SIFTON, C.J., WETMORE, SCOTT, NEWLANDS, HARVEY and STUART, JJ.

Argument. *G. E. Taylor*, for defendant (appellant).

W. B. Willoughby, for plaintiff (respondent).

Judgment. NEWLANDS, J.—The appeal book gives very little information. It does not shew when the garnishee summons was issued, what is the state of the proceedings between the plaintiff and defendant, nor why this application is not made by the plaintiff, but from the statement of counsel at the argument it appears that at the time the application was made no judgment had been entered in the original suit, and that the plaintiff refused to proceed under said Rule 390.

Under this state of facts has the defendant the right to make such application? Where a garnishee summons is issued by a plaintiff before judgment, it is for the purpose of attaching a debt due to a defendant for the purpose of securing the plaintiff in the event of his obtaining judgment against the defendant in the suit. The proceedings are entirely for his benefit, and the defendant is in no wise interested in the proceedings except in so far as his debt to the plaintiff may be discharged by such proceedings. As far as the defendant himself is concerned his remedies against the garnishee are not affected, excepting only that he would not be allowed to recover from the garnishee the amount that would be required to discharge his own indebtedness to plaintiff. He may, however, proceed against the garnishee and obtain judgment for the amount of his indebtedness, and also, I should think, recover from him the surplus above what was necessary to satisfy the plaintiff's claim. It would be no defence to plead that the debt due him had been attached by garnishee process, unless there was payment by the garnishee, either to the plaintiff in the garnishee proceedings or into Court. This was decided in Ontario in the Court of Queen's Bench in *Sykes et al.* v. *The Brockville and Ottawa Railway Company*,[1] and I adopt the reasons there given by

[1] 22 U. C. R. 459.

Judgment. Newlands, J.

Hagarty, J. On page 464 that learned Judge says: "The law, in my opinion, gives a defence to the garnishee as against his original creditor, only in the event of his paying over on an order so to do, or on execution being levied on his property. Section 297 of the *Common Law Procedure Act* enacts, 'Payment made by or execution levied upon the garnishee, etc., shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although the proceedings should be afterwards set aside or the judgment reversed.' I have not read any English case where the point before us is expressly determined. But I gather from all the authorities as far as they go, from the words of the Act, and from the reason of the thing, that it must be so." And on page 465, "Apart from authority, I cannot see with what justice a debtor can urge in bar of his creditor's right to obtain judgment against him for a settled or unsettled account, that a creditor of his creditor has obtained an order to have the debt paid to him. In many cases the proceeding to judgment can alone properly settle a disputed account. It cannot but be in many cases a most inconvenient way of adjusting the true balance by action against the garnishee. If the latter pay under the order so to do, he is forever protected; if his property be levied upon he is to that extent also protected. In no case can he in my judgment bar the original creditor's action, or suspend the right of the latter to proceed to judgment."

The defendant is not, therefore, "any other person interested," referred to in Rule 390, who may apply to have the liability of the garnishee summarily determined.

Apart from this it seems to me that the context shews that the defendant cannot be included in these general words. The Rule says: "The plaintiff or any other person interested," and Rule 391 says: "If the plaintiff does not proceed to have the question of liability determined," etc., the garnishee may apply to have the summons set aside. Under these general words, if any other person besides the plaintiff is intended it can only be an assignee of the plaintiff.

In *Irwell* v. *Eden*,[2] similar words were restricted in their meaning. Under a rule which provided for the "examination of such debtor or of any other person," Lord Esher, M.R.,

[2] 18 Q. B. D. 588; 56 L. J. Q. B. 446; 56 L. T. 620; 35 W. R. 511.

Judgment. Newlands, J.

said: "We have come to the conclusion that the expression 'any other person,' does not include within the Rule in the case of an individual debtor any other person than himself or in the case of a corporation any one by the officers of the corporation."

In this case I am of the same opinion that the words "any other person interested," includes only the plaintiff or an assignee of the plaintiff's claim.

It was stated by the counsel for the defendant, that plaintiff had refused to apply to have the liability of the garnishee summarily disposed of. He must, therefore, I think be taken to have abandoned the proceedings, and the garnishee would have the right under Rule 391 to have the garnishee summons set aside. In *Wintle* v. *Williams*,[3] where the garnishee disputed his liability, but the judgment creditor refused to issue a writ against him to determine his liability (which process under *The Common Law Procedure Act*, was for the same purpose as is now filled by the summary proceeding provided for in Rule 390), the attaching order was rescinded on the ground that the judgment creditor had abandoned the proceedings. Channell, B., says:[4] "If a garnishee does not pay the money into Court, and does not dispute the debt, or does not appear upon the summons, the Judge may order execution to issue without any previous writ or process: but if the garnishee disputes his liability, the judgment creditor has the option of issuing a writ against him. Here, the judgment creditor declined to do so; and, therefore, I think, the learned Judge was right in rescinding the attachment order. The judgment creditor in effect abandoned his right of obtaining payment from the garnishee."

I think, therefore, that the learned Judge was right in refusing the defendant's application to have the question of the garnishee's indebtedness summarily disposed of, and that the appeal should be dismissed with costs.

SIFTON, C.J., HARVEY, and STUART, JJ., concurred with NEWLANDS, J.

[3] 27 L. J. Ex. 311; 3 H. & N. 288; 6 W. R. 501.
[4] 3 H. & N. at p. 290.

Judgment.
Wetmore, J.

WETMORE, J.—There have been some important alterations in the law affecting the question concerned in this appeal since *The Judicature Ordinance* of 1893. Sections 368 and 369 of the Ordinance of 1893, were the sections that provided for the issue and service of a garnishee summons. These sections had no provision for service of the summons upon the defendant. The provision for service upon a defendant was first introduced by section 2 of Ordinance No. 21 of 1896. Section 1 of Ordinance No. 6, of 1897, repealed sections 368 and 369, as amended by such Ordinance of 1896, and enacted provisions practically the same as Rule 384 of the present Ordinance, which provides for service of the garnishee summons on a defendant. Section 371 of *The Judicature Ordinance* of 1893, was the section that provided for the course to be taken where the garnishee disputed liability, and the only person who under that section could apply to a Judge to fix a time and place for determining the question of the liability, was the plaintiff. That section was repealed by section 1 of Ordinance No. 6, of 1897, and a new section substituted, which is practically the same as Rule 390 of the present Ordinance. It will be observed that under that Rule the order to fix a time and place for determining the liability may be made on the application of the plaintiff *or any other person interested.*

In view of these amendments I am of opinion, that the order may be made on the application of a defendant. In the first place, he is a party interested, and he is required to be served with the garnishee summons. I cannot otherwise conceive what the object of the amendments could be.

But while I am of that opinion, I am also of opinion that it is discretionary with a Judge to make the order on the application of the defendant. There may be circumstances in which he might consider it advisable to make the order: there might be circumstances in which he might consider it unnecessary. It will be observed that the language of the section is that the Judge may make the order. The language, therefore, appears to me to be permissive. Of course, in exercising his discretion a Judge must do so reasonably and on principle. If he does not the Appellant Court has power to correct his action. For instance, if the plaintiff had made the application to have the question of liability

Judgment. Wetmore, J.

determined, the Judge could not refuse to comply unless there were some peculiar or special reasons therefor. But in this case I do not think that the Judge did exercise a discretion which was either unreasonable or against principle. As stated by the counsel on the argument in this case, the plaintiff did not apply, because he did not intend to do so. The defendant could have his right of action against the garnishee by the ordinary process of the Court, and it was not necessary for him to resort to the procedure prescribed by Rule 390 of the Ordinance. The service of the garnishee summons on a garnishee, while it binds the debt, does not transfer it. That was held in *Re Combined Weighing and Advertising Machine Company*,[5] and in *Norton* v. *Yates*.[6] In *Sykes* v. *Brockville Railway Company*,[1] the Court held that the serving of a garnishee summons was no bar to an action brought by the primary creditor. And in view of the English authorities which I have just referred to I agree with that judgment.

I think my brother Johnstone exercised a warranted discretion in the matter and, therefore, this Court ought not to interfere with it. In my opinion this appeal should be dismissed with costs.

SCOTT, J., concurred in the result.

Appeal dismissed with costs.

[5] 43 Ch. D. 99; 59 L. J. Ch. 26; 61 L. T. 582; 38 W. R. 67; 6 Times Rep. 7.
[6] (1906) 1 K. B. 112; 75 L. J. K. B. 252; 54 W. R. 183.

OSMENT v. DUNDAS.

Landlord and tenant — Terminating lease — Overholding tenant— Notice to quit.

A yearly tenancy may be determined on whatever notice the parties agree on, and where a lease provided for its termination "by giving one full month's notice," it was held immaterial on what date the notice was given so long as the notice was for a full month at least.

[RICHARDSON, J., *27th March, 1903.*]

Statement. This action was commenced by originating summons granted 3rd March, 1903, under Rule 452 of *The Judicature Ordinance* (C. O. 1898, ch. 21), to enforce the delivery up by the defendant to plaintiff of lots 16 and 17 in block 39, Indian Head.

It was founded upon plaintiff's affidavit alleging that until the expiration of the month of February, 1903, defendant was rightfully in possession of the said lots under a lease given him by the plaintiff, which on such last mentioned date, was terminated under a provision contained in such lease for ending the same, notwithstanding which, as also a demand of possession on 2nd March, 1903, defendant wrongfully withheld possession from plaintiff.

On the return of the summons both parties appeared by counsel, and the matter was adjourned into Court, and was heard by RICHARDSON, J., without a jury.

Argument. *Ford Jones,* for the plaintiff.

T. C. Johnstone, for the defendant.

Judgment. RICHARDSON, J.—Defendant by a written lease, dated 8th May, 1902, became lessee of plaintiff of the lots in question, known as the Royal Hotel at Indian Head, for the term of one year to be computed from 1st July, 1902, the rent reserved being $1,500, payable $125 monthly, in advance, commencing with July 1st, 1902. The lease contained the usual covenants and provisions in leases and had this special proviso: "Provided, however, that the term hereby granted may be terminated by either party hereto giving to the other one full month's notice in writing of his intention to terminate the tenancy hereby created."

Judgment.
Richardson, J.

On 22nd January, 1903, the plaintiff served on the defendant personally a notice in the following words: "To Andrew Dundas, Esq., Royal Hotel, Indian Head. I hereby give you notice to quit and deliver up to me on the 28th February next, possession of the premises now held by you as my tenant situate in the town of Indian Head and being and known as the Royal Hotel, and the sample room appurtenant thereto."

On these two documents, coupled with the personal demand referred to, the plaintiff claimed to be entitled to have the possession asked for by the summons enforced by process of the Court.

For the defendant:

An effort was made to establish as a fact that the lease of 8th May, 1902, under which the proceedings were started, was given for the specific purpose of enabling the defendant to convince through a Mr. Phillips, the local license inspector, the Department of the North-West Government controlling hotel liquor licenses, that he (defendant) had a lease of the premises for the term of the currency of the license defendant was applying for, namely, one year from July 1st, 1902, and that this being so, on the ground of public policy, such a proviso for terminating the lease at an earlier date than the year term created by it was void, and being void defendant was entitled to take advantage of the situation. I see nothing, however, in the objection thus raised, for not only is the Ordinance[1] silent in declaring such a proviso void, but sec. 52, sub-sec. 2, defines what is to be done with the license. "If during the currency of any such license the holder's tenancy of the premises in respect whereof the license is held is determined by . . . notice to quit . . ."

This distinctly to my mind recognizes such transactions as are covered by the lease of 8th May, 1902, and consequently in my judgment this objection fails.

The next objection raised is that as the term granted by the lease commenced with 1st July, 1902, the month's notice to quit, to be valid, must be given so as to end with the day next preceding the first day of the month next following.

This objection, in my judgment, is untenable. I assume the law to be expressed by Cotton, L.J., in *Re Threlfall*,[2] as fol-

[1] "The Liquor License Ordinance," C. O. 1898, c. 89.
[2] 16 Ch. D. 274, at p. 281; 50 L. J. Ch. 318.

lows: "There is no law or principle to prevent persons agreeing that a yearly tenancy may be determined on whatever notice they like. There is freedom of contract in this respect." Here the proviso authorizes either party at any time during the currency of the lease by giving one month's notice to the other to terminate the term. "In one sense indeed," as Lord Cotton states, "there is here a tenancy at the will of either landlord or tenant enabling either to put an end to a tenancy for a year on one full month's notice to the other," and there being more than a full month between the 22nd January, when the plaintiff gave defendant notice to quit, and 28th February, when possession was called for by the notice, in my judgment, defendant's tenancy terminated with the close of the last-named day. Judgment. Richardson, J.

The next contention of the defendant was that having been induced by creditors of one Skinner, the former tenant of the premises, to buy him out at a large sum, he was, as a part of the consideration of the bargain for sale, to have the benefit of the then unexpired term Skinner had in the premises, *i.e.*, up to October, 1903, and to this plaintiff was a consenting party.

Not only did defendant in his own evidence fail to connect plaintiff with being a party to such arrangement, but both his witnesses called by him to prove the fact, as also the plaintiff, denied its ever having been made.

The judgment I pronounce is that on the 3rd March, 1903, when the proceedings herein commenced, the plaintiff was entitled to possession of the premises in question from the defendant, who was then an overholding tenant thereof; and that the plaintiff do recover possession of the same; and that defendant pay plaintiff his costs in the matter after taxation.

Judgment for plaintiff.

The defendant appealed, but his appeal not being prosecuted with effect, the Court *en banc* on the 2nd June, 1903, dismissed it with costs.

DUNDAS v. OSMENT.

Landlord and tenant—Overholding—Tenant's right to fixtures—Prior judgment between litigants — Right of trial Judge to inspect reasons for prior judgment—4 Geo. II. c. 28, s. 1.

The plaintiff had been the lessee of the defendant. The defendant having given notice to quit and the plaintiff still continuing in possession, the defendant took proceedings by way of originating summons, and obtained an order for the immediate delivery up of the premises. From this order the plaintiff appealed, but did not prosecute his appeal with effect, and it was dismissed and the sheriff ejected the plaintiff. In an action by plaintiff to recover the value of fixtures left by him in the premises when the sheriff ejected him.

Held, that a tenant's right to remove fixtures exists only during the tenancy and for such further time as the tenant holds the premises under a right still to consider himself as a tenant, but no right of removal exists after the termination of the lease where the tenant retains possession wrongfully.

Held, also, that the previous order for delivery having been proven and put in evidence, it was competent for the trial Judge to inspect the written reasons given by the Judge for making such order for the purpose of ascertaining the questions then raised and having regard thereto, and also to the abortive appeal taken by the plaintiff, that the plaintiff's holding over was wilful and contumacious, and that plaintiff was under 4 Geo. II., c. 28, s. 1, liable to the defendant for double the yearly value of the premises."

Stair pads merely tacked on to keep them in place are not fixtures.

A notice to quit is a sufficient demand of possession under 4 Geo. II., c. 28, s. 1.

[NEWLANDS, J., *8th June, 1906.*]
[EN BANC, *9th-10th-30th April, 1907.*]

Statement. The parties in this case were the same as in the case of *Osment* v. *Dundas, supra,* the present plaintiff being the defendant in the former suit. This action was brought to recover the value of one aceytelene gas machine and attachments and fittings, tables and shelving, seventeen stair pads, one bath, and fittings, and hot water apparatus, which the plaintiff alleged the defendant detained from him, when defendant was ejected. The defendant in addition to defending the action, counterclaimed for double the yearly value of the premises, leased by him to plaintiff because of plaintiff over-holding after termination of the lease.

Argument. *T. C. Johnstone,* for plaintiff.

Ford Jones, for defendant.

NEWLANDS, J.—The chattels which plaintiff alleges defendant detains were affixed to the building by a previous

Judgment.
Newlands, J.

tenant, and were sold by him to plaintiff when he obtained a lease of the building. This lease was for one year, but terminable on one month's notice. This notice was given by defendant, and by the judgment of Richardson, J., in *Osment* v. *Dundas*,[1] it was held that the tenancy was terminated on 28th February, 1903. Defendant appealed from this judgment to the Court *en banc*, but, as he never perfected his appeal, it was dismissed by that Court, and the sheriff, under a writ of possession, ejected plaintiff on 7th June, 1903, but gave him until the 13th of that month to remove his furniture. On that day the sheriff's bailiff asked plaintiff if he had got all his stuff from the building, and he replied that he had. The bailiff then locked the building and handed the key to defendant. The goods mentioned in the statement of claim were left in the building by plaintiff. The evidence shows that plaintiff never attempted to remove them, that he was never prevented from moving them by defendant or the sheriff, and, though the bailiff told him not to remove fixtures, none of these articles were specified. From this evidence, I think, plaintiff abandoned any claim he might have to the articles.

I am also of the opinion that all the articles specified were fixtures, as they were all annexed to the freehold in some manner. In the absence of an express agreement—and there was no agreement in this case as to fixtures—fixtures which a tenant is entitled to remove must be removed during the tenancy, and if they are not removed during the tenancy the property in them vests in the owner of the reversion. The right of removal also exists for such time beyond the original term as he holds the premises under a right still to consider himself as a tenant, but the right of removal after the termination of the lease does not exist where he retains possession wrongfully: *Barff* v *Probyn*,[2] *Meux* v. *Jacobs*,[3] *Pugh* v. *Arton*.[4]

In the proceedings which defendant took to eject the plaintiff, which were commenced on 3rd March, 1903, Richardson, J., held, as I have said, that plaintiff's tenancy terminated on 28th February, 1903, and that after that he was

[1] 7 Terr. L. R. 339.
[2] (1895) 64 L. J. Q. B. 557; 73 L. T. 118; 11 Times L. R. 467.
[3] 44 L. J. Ch. 481; L. R. 7 H. L. 481; 32 L. T. 171; 23 W. R. 526.
[4] 38 L. J. Ch. 619; L. R. 8 Eq. 626; 20 L. T. 865; 17 W. R. 984.

Judgment. Newlands, J.

an overholding tenant and a trespasser, and under the above decisions, there can be no doubt but that on such termination of the tenancy on 28th February, the property in the fixtures passed to defendant, and plaintiff could not afterwards remove them without the consent of defendant. The plaintiff, therefore, must fail in his action.

The defendant counterclaims for double the yearly value during the time plaintiff was an overholding tenant. Mr. Johnstone contends that the statute only applies where the tenant holds over, knowing that he has no right, not where he claims to hold under a fair claim or right; and he says in this case plaintiff believed he had a right to the possession of the premises until the end of a year notwithstanding the notice to quit. There is no doubt, as Cockburn, C.J., said in *Swinfen* v. *Bacon*,[5] that "ever since the case of *Wright* v. *Smith*,[6] the interpretation put upon the 4 Geo. II., ch. 28, has been that when a person holds over, not contumaciously as against the person entitled to the possession, but under a *bona fide* belief that he has a right to do so, the statute does not apply." Did the plaintiff in this case hold over under the *bona fide* belief that he had the right to do so? The plaintiff held under a lease, dated 8th May, 1902, for a term to commence on 1st July in that year and to terminate on 30th June, 1903, subject to that term being terminated by either party giving one full month's notice in writing of his intention to terminate the tenancy thereby created. Richardson, J., in his judgment in the action for possession of the premises in *Osment* v. *Dundas*,[1] says: [His Lordship quoted at length from the reasons for judgment of Richardson, J., reported *ante* page 339.]

His Lordship proceeded:—

This judgment, as I have said, was appealed to the Court *en banc*, but the appeal was never perfected, and so the case was not heard by that Court. From these facts it seems to me that plaintiff defended the action for possession and appealed from Mr. Justice Richardson's judgment, not because he believed he had a *bona fide* right, but merely for time, and he is, therefore, liable for double the yearly value of the property for the time he was overholding, namely, from

[6] 6 H. & N. 846; 30 L. J. Ex. 368; 7 Jur. (N.S.) 897; 5 L. T. 83; 9 W. R. 740.
[5] 5 Esp. 203.

8th March to 13th June, 1903, amounting to (less the amount paid without prejudice to this claim) $429. Judgment. Newlands, J.

The defendant also counterclaims for $200 damages for breach of the covenant to repair, but on this issue, I think, there is no evidence to shew that plaintiff did any damage to the building beyond reasonable wear and tear, and I, therefore, find on it for plaintiff.

He also counterclaims for $70.83 taxes paid by him which under the lease should have been paid by plaintiff. In his evidence he says he paid the taxes for 1903, over $100 or about $150. That is all the evidence he gives on this point, and, as the lease was terminated on 28th February of that year, and plaintiff, therefore, would only be liable for two months' taxes, I am unable from the evidence to say how much that would amount to, and, as the burden of proof is on the defendant, I find this issue also for plaintiff.

Judgment will be for defendant for $429 and costs.

From this judgment the plaintiff appealed, and the appeal was heard by SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ. Statement.

N. Mackenzie, for plaintiff (appellant). Argument.

J. A. Allan, for defendant (respondent).

The judgment of the Court was delivered by

[*30th April, 1907.*]

WETMORE, J.—With respect to the stair pads, I am of opinion that they were not fixtures; they were simply rubber pads placed one on each stair, and were tacked down to prevent them from slipping, and to keep them in place. They were no more fixtures to my mind than an ordinary carpet which was tacked down in a room would be, and it is clear that that is not a fixture. I am of opinion, however, for the reason that will appear hereafter that the plaintiff abandoned his right to these pads, and, therefore, is not entitled to recover for them. Judgment.

As to the other articles, plaintiff's counsel conceded on the argument that they were all fixtures.

The plaintiff was in occupation of this hotel under a lease from the defendant, dated the 8th of May, 1902, for the

Judgment. Wetmore, J.

term of one year to be computed from the 1st day of July then next. This lease contained a clause whereby it was provided that the term thereby granted might be terminated by either party giving to the other a month's notice in writing of his intention to terminate the tenancy. On the 22nd January, 1903, the defendant gave the plaintiff notice to quit on the 28th February then next. The plaintiff continuing in possession of the premises, proceedings were then had by originating summons before Richardson, J., then one of the Judges of this Court, who, on the 27th of March, 1903, made an order that the plaintiff do forthwith deliver up to the defendant possession of the lands and premises in question. Prior to making this order the learned Judge gave a written judgment setting forth his reasons and grounds for making the order.

At the argument of this appeal there was considerable discussion as to the right of the trial Judge herein to look at this judgment. It was urged in the first place that the formal order or judgment was not in evidence. As a matter of fact this formal judgment or order did not appear in the appeal-book. The learned trial Judge's judgment seemed to indicate that this order was before him, and on consulting him, it evidently appeared from his statements and his notebook, that a certified copy of this order was put in evidence, and was before him, as was also a certified copy of the judgment of the Court *en banc*, dismissing an appeal in the matter. Upon this Court being possessed of these facts it was held that these documents should be used as being part of the material before the Court on this appeal. Now the formal judgment being proved, it was competent for the trial Judge and for this Court to inspect the written judgment of Richardson, J., to ascertain the grounds upon which he made the order; or, in other words, to ascertain what adjudication he made. This is supported by Vice-Chancellor Hall in *Lord Tredegar* v. *Windus*,[7] *Houston* v. *The Marquis of Sligo*,[8] *Barber* v. *McCuaig*,[9] and in *Re Graydon*.[10]

Judge Richardson held, that the plaintiff was an overholding tenant, that the notice to quit (to which I have re-

[7] L. R. 19 Eq. 607 at p. 612; 44 L. J. Ch. 268; 32 L. T. 596; 23 W. R. 511.
[8] 29 Ch. D. 448; 52 L. T. 96.
[9] 31 O. R. 593.
[10] (1896) 1 Q. B. 417; 65 L. J. Q. B. 328; 44 W. R. 495.

ferred), terminated the tenancy, and therefore, that the then plaintiff, and now defendant, was entitled to possession of the premises in question. Notwithstanding this judgment, however, the plaintiff continued to hold possession of the premises until the 7th of June, 1903, when the sheriff took possession and ejected him, under a writ of possession issued under the Judge's order. Up to that time the plaintiff had not removed these fixtures or his personal effects, and he made no effort to do so until after the sheriff put him out. The sheriff did not on the 7th of June put all the plaintiff's personal property out of the hotel, but at the request of the plaintiff he put a man named Sample in possession as his bailiff, and with the consent of the defendant he gave the plaintiff eight days to take his property out.

Judgment.
Wetmore, J.

I have intimated that the plaintiff took steps to appeal from the judgment of Richardson, J., but he did not prosecute his appeal with effect, and the Court dismissed it. The plaintiff, therefore, to my mind, was clearly an overholding tenant. It was declared practically that his lease determined on the 28th of February, and he had no right to continue in there any longer, and he was a trespasser. Under such circumstances he was not in a position to move his fixtures after the sheriff had ejected him, and the permission which was given him to remove his goods was not a continuation of the tenancy, it was merely an indulgence, a license it might be called, to take his property away during the period fixed. That would only include movable property that he had the right to take away, and could not be construed into a right to take away fixtures. But apart from that, as stated by the learned trial Judge, fixtures which a tenant is entitled to remove must be removed during the tenancy. If they are not removed during the tenancy the property in them vests in the owner of the reversion. The right of removal also exists for such time beyond the original term as he holds the premises under a right still to consider himself as a tenant, but the right of removal after the termination of the lease does not exist where he retains possession wrongfully. And for that the learned Judge cites *Barff* v. *Probyn*,[2] *Meux* v. *Jacobs*,[3] *Pugh* v. *Arton*.[4] The first case is especially in point, and was decided by Charles, J., a very able Judge, and is comparatively a late case. I would also draw attention to what was laid down in *Weeton* v. *Wood-*

Judgment.
Wetmore, J.

cock:—[11] "The rule to be collected from the several cases decided on this subject seems to be this: That the tenant's right to remove fixtures continues during his original term and during such further period of possession by him as he holds the premises under a right *still to consider himself as tenant*." Clearly the plaintiff in view of Judge Richardson's judgment, could not consider that he was holding the premises under a right still to consider himself as tenant. That case is referred to in the note to *Elwes* v. *Maw*, in 2nd *Smith's Leading Cases*, (10th ed.), at page 212, and seems to be recognized as good law.

Although what I have hereinbefore stated, in my mind, disposes of the question of the plaintiff's right to recover, in so far at any rate as the fixtures are concerned, it may be as well to refer to another contention, which would not only fix the right to recover with respect to these fixtures, but would fix the right to recover with respect to the pads. The plaintiff sets up that he was prevented from removing all these articles in question, because Sample told him he was not to remove fixtures, or things attached to the walls or the building. Now these directions given by Sample were given with the approval of the defendant, but the directions were of a general character, there was no particular article specified that he should not remove, nor did the plaintiff insist upon removing any particular article. He did not, for instance, point out any article and state that he had the right to remove it, and insist upon it. He took what articles he desired to take, and when he got through he informed Sample that he had everything out. I do not consider that a refusal to allow him to take away the articles. I think, he being an outgoing tenant, if he claimed these articles, or if he claimed the right to remove them as tenant's fixtures, he ought to have specified them; and, not having done so, his right to take them was gone. We have no further demand with respect to them until the 29th of December, 1903, more than six months afterwards.

It is for these reasons that I have held that having left the stair pads behind him, under the circumstances he abandoned them. I think the learned trial Judge was correct in giving judgment for the defendant on the plaintiff's claim.

[11] (1840) 7 M. & W. 14 at p. 19; 10 L. J. Ex. 183.

Judgment. Wetmore, J.

The defendant counterclaimed for double the yearly value of the lands under 4 Geo. II., ch. 28, sec. 1, and the learned trial Judge found for the defendant. The plaintiff also appeals from this decision.

The only demand in writing under this section was the notice to quit hereinbefore referred to. That notice did not contain a demand in specific terms, it merely was a notice to quit and deliver up possession on the 28th February, 1903. It has been repeatedly held that this is a sufficient demand, the notice being to deliver up possession on a specified day. *Hirst* v. *Horn* [12] went further; the notice required the defendant to quit the farm in question "on the first day of July then next, or on such other day as their holding should expire next after the expiration of half a year after the receipt of that notice." The Court held that the notice was sufficient demand under the Act. Parke, B., says[13]: "It is clear this was a good notice to quit in order to determine a tenancy from year to year. It is a form which has long been adopted in order to prevent the effect of any mistake in the statement of the time when the tenancy expires, and it is equally a sufficient demand of possession."

In order to render a party liable for double the yearly value of the premises under the Act in question, the holding over must be wilful and contumacious. The question of the wilfulness of the holding is a question of fact, and I am of opinion that there was evidence to warrant the learned trial Judge in reaching the conclusion that he did, and I am not disposed to interfere with his finding. It was urged that he rested some of his conclusions upon the written judgment of Richardson, J. The question of the wilfulness and contumacy of the plaintiff was not a question before Richardson, J., but the nature and character of his defence would be an element for consideration by Newlands, J., in deciding whether or not the proceedings before that Judge were *bona fide*, and I am of opinion that the trial Judge was at liberty to have recourse to the judgment of Richardson, J., for the purpose of ascertaining what questions were raised before him. When I consider that the lease under which the plaintiff claimed contained a clause enabling either party to determine at a month's notice, and that he had executed another

[12] 6 M. & W. 393.
[13] *Ibd.* p. 395.

Judgment. Wetmore, J.

lease of the same premises on the 27th of February, 1902, in which there was a clause enabling the lessor to terminate the lease on thirty days' notice, in the event of his making a sale of the demised premises, that he started an appeal from Judge Richardson's judgment to the Court *en banc*, which he either pressed so negligently or abandoned that the Court *en banc* dismissed the appeal, and that notwithstanding all this the plaintiff held possession of the premises until he was evicted by process of law, I am not surprised that the learned trial Judge came to the conclusion that the holding over was wilful and contumacious. But there is in my opinion an error in the amount awarded for double the yearly value of the premises. This has been computed from March 8th to June 13th. I think it should be computed from March 1st, 1903, the day after the notice to quit expired, and the 7th of June, when the sheriff took possession. That would be three months and six days. The double yearly value of the premises, therefore, would be $800, and deduct from that the amount taken out of Court by the defendant without prejudice, $391.67, leaves a balance of $408.33, for which amount there should be judgment for the defendant. In my opinion, therefore, the appeal as to the plaintiff's claim should be dismissed, and the judgment for the defendant on the counterclaim should be varied by reducing it from $429 to $408.33. The plaintiff should pay the defendant's costs of this appeal. The plaintiff did not appeal to the Court on the ground that the amount awarded on the counterclaim was more than warranted; his appeal was confined altogether to the defendant's right to recover anything. The question of the Judge having awarded too much came out incidentally in the course of the argument by the respondent's counsel. Under such circumstances I am of the opinion that the plaintiff should pay the defendant's costs of this appeal.

Appeal dismissed; judgment for defendant.

STEELE v. McCARTHY.

Agreement for sale of land — Purchase price to be paid in instalments — Interest payable in advance — Time to be of the essence —Notice of cancellation — How sent — Consistent clauses.

If it is agreed between the parties that time shall be of the essence of the contract, the Court will hold to a strict construction unless an intention to the contrary is shewn.

On an agreement for sale of land, the purchase price to be paid in instalments, and interest to be paid in advance, it was provided that time should be of the essence of the contract, and that all interest on becoming overdue should be forthwith treated as purchase-money and bear interest. The plaintiff on tendering an overdue instalment, after having been notified that the contract had been cancelled, owing to his failure to pay on time, sought a decree declaring that the contract was in full force and effect, and an injunction restraining the defendant from dealing in any way with the land.

Held, that time was of the essence of the contract, although it stipulated that all interest on becoming overdue should be forthwith treated as purchase money, this stipulation not being inconsistent with the time clause, and that either one of them might be enforced at the option of the defendant.

Where the contract states no address to which a notice of cancellation may be sent, it is sufficient if it is sent to the plaintiff's residence, and he receives it.

[NEWLANDS, J., *19th July, 1907.*]

Statement. Action for a declaration that a notice purporting to cancel an agreement for sale of lands is void and for other relief heard before NEWLANDS, J., without a jury.

Argument. *J. F. Frame*, for the plaintiff.

C. E. D. Wood, for the defendant.

Judgment. NEWLANDS, J.—On the 22nd May, 1905, the defendant agreed in writing to sell to the plaintiff the whole of section 25 in township 16, range 19, west of the second meridian, for the sum of $9,600, and plaintiff agreed to pay defendant for said land the said amount in three equal annual instalments of $3,200 each, the first of such instalments to be made on the 1st day of November, 1907. In the meantime plaintiff was to have possession of the land to pay interest in advance at the rate of 7 per cent. computed from the first day of November, 1905, the first payment of interest to be at that rate. The plaintiff also agreed to break 400 acres of said land during the year 1905, and 220 acres during the year 1906.

Judgment.
Newlands, J.

On or about the 5th day of November, 1905, the plaintiff made the first payment of interest, namely, $672, which was accepted by defendant, and in February, 1906, the plaintiff having failed to break 75 acres of the 400 agreed, it was agreed between the plaintiff and defendant that plaintiff should pay defendant the sum of $300 in lieu thereof. On the part of the plaintiff it is stated that this sum was to be in advance of interest payable on November 1st, 1906, and was to bear interest at 7 per cent., and by defendant that it was to be held by him and applied on principal when a final settlement was made. This payment was made by cheque on which plaintiff made a memorandum of the agreement as he states it, and he also mentions the same fact in his letter to defendant enclosing the cheque. In spite of this corroborative evidence it seems to me that defendant's version of the agreement is more likely to be correct, as otherwise on the 1st of November, 1906, defendant would neither have the $300 as security nor the breaking, unless in the meantime plaintiff broke an extra 75 acres, in which event the money would be freed to be applied on interest. This, however, plaintiff did not do.

On the 1st November, 1906, the payment of interest due on that date was not made by plaintiff, and on the second day of that month defendant wrote him the following letter:

"Regina, Sask.,
"November 2nd, 1906.

"A. B. Steele, Esq.,
"W. Derby, Vt.

"Dear Sir,—I find that the terms of the agreement of sale of section 25, township 16, range 19, that interest which should be paid in advance on $9,600, at 7 per cent. has fallen due of November 1st, 1906.

"This interest has not been paid, and according to the terms of the contract, the agreement is void.

"Please accept this as notification thereof.

"Yours truly,
"E. J. McCarthy."

This letter was addressed to plaintiff at his home, West Derby, Vermont, U.S.A., and sent by registered letter. Plaintiff was away from home when the letter arrived, and did not return until the 28th of that month, when he received the

letter, and on the next day he wired to one Arthur Bell in Regina, who was interested with him in this land, to tender defendant $360, which, with the $300 the defendant held, and the interest on it, he claimed would make the payment of interest due. He also wired to defendant as follows: Judgment. Newlands, J.

"New Port, Vt., Nov. 29th, 1906.

"Ed. McCarthy, "Via Winnipeg, Man., 29.

"Regina, Sask.

"Just arrived home and received your notice. Have wired Arthur Bell, Regina, to pay you three hundred and sixty dollars which with three hundred and interest thereon advanced February 16th last, makes six seventy-two. Wire immediately if O.K.

"Asa P. Steele."

Bell immediately made a tender to defendant as directed but defendant refused to accept same. Bell on the next day made another tender to defendant of the sum of $672, but defendant also refused to accept that sum. On the 26th day of March, 1907, the plaintiff again made a tender to defendant, which was also refused, of the sum of $1,135.35, being for interest due and an allowance for breaking not done during the year 1906 as required by the agreement. Under the agreement plaintiff was to break 220 acres during the year 1906, but he only broke about 100 acres, and the balance of the breaking has never been done. Plaintiff paid the amount last tendered into Court and claims a decree (1) declaring the notice of cancellation of November 2nd, 1906, to be void; (2) declaring the contract in full force and effect, and (3) an injunction restraining defendant from dealing in any way with the land.

Defendant contends that time was of the essence of the contract, and the payment of interest not having been made on the 1st November, 1906, as agreed, he had the right to and did cancel said agreement of sale. The agreement of sale provides that "10. Time shall be in every respect the essence of this agreement," and

"7. Provided that in default of payment of the said moneys and interest, or any part or parts thereof on the days and times aforesaid, or of performance or fulfilment of any of the stipulations, covenants, provisoes and agreements on

Judgment.
Newlands, J.

the part of the purchaser herein contained, the vendor shall be at liberty to determine and put an end to this agreement, and to retain any sum or sums paid thereunder, as and by way of liquidated damages in the following method, that is to say—by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchaser at post office; and at the end of twenty days from the time of mailing the same the said purchaser shall deliver up quiet and peaceable possession of the said lands and premises, or any part thereof, to the vendor or his agent immediately at the expiration of said twenty days."

The plaintiff contends that because there is a clause in the agreement which provides that all interest on becoming overdue shall be forthwith treated as purchase-money and shall bear interest at the rate aforesaid, that it was not the intention of the parties that time should be of the essence of the agreement, but, as was pointed out by Hunter, C.J., in *Peirson* v. *Canada Permanent Mortgage Corporation*,[1] these two stipulations are common ones generally found in agreements of sale and are quite consistent. He says: "The time clause is a stipulation inserted for the benefit of the vendor, which he may enforce if he chooses, but, if he does not choose to enforce it, then the other clause provides that he shall get interest at the rate of 8 per cent. from 1st April, 1904, both before and after the purchase-money becomes due, until the amount is paid."

I am of the opinion that time was of the essence of the agreement in this case and that, as plaintiff did not make the payment at the time agreed, defendant had the right to cancel the agreement.

This was done by sending the letter of November 2nd, 1906. This letter was addressed to defendant at his home in Vermont, U.S.A. Now in the clause providing for this notice of cancellation to be sent there is no address; the space in the printed form where the address should be filled in having been left blank. Plaintiff's counsel argues from this fact that it was not the intention of the parties to use this particular clause, and therefore there is no provision in the agreement for sending a notice of cancellation. The evidence

[1] 11 B. C. R. 139; 1 W. L. R. 99.

Judgment.
Newlands, J.

does not show this, but it does show that the plaintiff's address at any particular time of the year was uncertain. His home was in Vermont, but he resided in Saskatchewan for a part of the year, and travelled in other parts of the West. It seems to me that the reason for leaving the address out was this uncertainty of the plaintiff's whereabouts at any particular time. The clause was not overlooked, however, because the word "his" is written in in one place where a blank was left. I think that, seeing there is no fixed place for sending this notice to, it would have to be sent to the plaintiff's residence at the time and that the clause would be complied with by proof that plaintiff had received the notice, and as he admits receiving it I think defendant has done all that was required of him under the agreement.

It may seem hard on the plaintiff that the contract was immediately rescinded by defendant on his failure to pay the interest on November 1st, 1906. This, however, was the right of the defendant, and if the right is to be exercised it should be done promptly. As Vice-Chancellor Wagram in *Hunter* v. *Daniel*,[2] said:[3] "I agree with the defendant that each breach on the part of the plaintiff in the non-payment of money was a new breach of the agreement, and that time being the essence of the contract, each breach gave the defendant the right to rescind the contract, but that right should have been asserted the moment the breach occurred."

I am of the opinion that there was a breach of the contract by the non-payment of the interest due on November 1st, 1906, that time was of the essence of the contract, and that the defendant by his action of November 2nd, 1906, rescinded the contract, and as the same is now at an end the plaintiff is not entitled to the relief asked for.

As I have accepted the defendant's version that the $300 were deposited with him on account of not completing the breaking of 400 acres in 1905, that amount will have to be returned by him to plaintiff. Defendant will have the costs of action.

Judgment for defendant with costs.

NOTE.—An appeal from the above judgment was dismissed by the Supreme Court of Saskatchewan *en banc*.

[2] 4 Hare 420; 14 L. J. Ch. 194; 9 Jur. 520.
[3] At p. 432 of 4 Hare.

REX v. STANDARD SOAP COMPANY, LIMITED.

Criminal law — Charge against corporation — North-West Territories Act — Repeal — Saskatchewan and Alberta Acts — Criminal Code, s. 873 — Grand jury.

The repeal of the North-West Territories Act (R. S. C. 1886, c. 50) by R. S. C. 1906, does not affect the laws of the provinces of Saskatchewan and Alberta.

A corporation is not subject to a preliminary examination before a magistrate, and can be proceeded against only by one of the methods set out in the Criminal Code (R. S. C. 1906, s. 873); therefore where by direction of the Attorney-General an order was obtained from a Judge to lay a charge against the defendant corporation, and a formal charge in writing was, pursuant thereto, presented to the Court, it was held that the proceedings were properly laid. *In re Chapman and the Corporation of the City of London*, 19 O. R. 33, followed.

[EN BANC, *10th-30th April, 1907.*]

Statement. This was a case reserved by STUART, J., for the opinion of the Court *en banc*, under sec. 1014 of *The Criminal Code* (R.S.C. 1906).

On March 15th, 1907, James Short, Esquire, agent for the Attorney-General, and Crown Prosecutor for the Calgary Judicial District, appeared before STUART, J., in open Court and applied under section 873, sub-section 2, of *The Criminal Code*, 1906, for an order that a charge be preferred by him before the Court against the Standard Soap Company, Limited, a corporation, for a violation of the provisions of sec. 236 of the Code. The defendant corporation was not represented on that application. The material upon which the application was made (the sufficiency of which was not in question), consisted of certain depositions taken upon a preliminary investigation of a charge under the same section of the Code against the secretary of the defendant corporation personally, upon which the magistrate had refused to make a committal for trial and also of an affidavit of the agent of the Attorney-General stating that he had good reason to believe, and did believe, that the defendant corporation was guilty of the offence alleged, and to which affidavit a letter from the Deputy Attorney-General of Alberta was attached as an exhibit. That letter was as follows:

Statement.

"Department of the Attorney-General,
"Edmonton, Alberta, March 11th, 1907.

"James Short, Esq.,
"Agent of Attorney-General,
"Calgary, Alta.,

"You are hereby authorized to prefer a charge against the Standard Soap Company, before the Supreme Court of the North-West Territories, in the Judicial District of Calgary, for that the said company did in the City of Calgary, in the province of Alberta, in or about the month of June, in the year of Our Lord one thousand nine hundred and six (1906), and on divers times thereafter during said year unlawfully conduct a certain scheme for the purpose of determining what lots or tickets were the winners of certain property, to wit, a piano, Gurney Oxford Chancellor range, a baby carriage and other articles proposed to be given or disposed of by a mode of chance contrary to the statute in such cases made and provided."

"(Sgd.) S. B. Woods,
"Deputy Attorney-General."

The learned Judge granted the following order:

"Upon the application of James Short, Agent of the Attorney-General for the province of Alberta, upon hearing what was alleged by said James Short, upon reading the direction of the Deputy of said Attorney-General and the depositions taken at the preliminary enquiry in the case of the King against Frederick T. Weir, which depositions were filed this 15th day of March, 1907.

"This Court doth order the said James Short, agent for the Attorney-General, to prefer a charge before this Court, being the Supreme Court of the North-West Territories, Judicial District of Calgary, now sitting at Calgary aforesaid, against the said the Standard Soap Company, Limited, as follows:

"Canada,
"Province of Alberta,
"Judicial District of Calgary,
"To wit:
} The King v. The Standard Soap Company, Limited.

"The Standard Soap Company, Limited, stands charged before the Honourable Charles A. Stuart, a Judge of the

Statement.

Supreme Court of the North-West Territories, Judicial District of Calgary, at the City of Calgary, in said Judicial District, this fifteenth day of March, in the year of Our Lord, one thousand nine hundred and seven (1907).

"For that the said the Standard Soap Company, Limited, did in the City of Calgary, in the Province of Alberta, in or about the month of June in the year of Our Lord one thousand nine hundred and six (1906), and on divers other times thereafter during said year unlawfully conduct a certain scheme for the purpose of determining the holders of what lots or tickets were the winners of certain property, to wit, a piano, a Gurney Oxford Chancellor range, a baby carriage and other articles proposed to be given or disposed of by a mode of chance contrary to the statute in such cases made and provided.

"(Sgd.) James Short,
"Crown Prosecutor,
"Agent for the Attorney-General.
"Dated at Calgary this 15th day of March, 1907.
"By the Court,
"(Sgd.) Chas. A. Stuart, "J.S.C." "(Sgd.) Lawrence J. Clarke. "Clerk of Court."

A charge was forthwith prepared and signed by the agent of the Attorney-General and filed in Court. The Court was then adjourned to allow the proper notice to be served on the defendant corporation as provided by sec. 918 of the Code. On 30th March, the defendant corporation appeared in Court in pursuance of the notice by its attorney, one F. T. Weir. The charge was then read, and, instead of pleading thereto, the defendant corporation by its counsel, applied for time to demur to the charge. That application was granted, and on 3rd April the defendant corporation by its counsel filed a written demurrer, to which the agent for the Attorney-General filed a rejoinder.

The ground taken by the counsel for the defendant corporation in support of the demurrer was that a bill of indictment could not be preferred before any Court under the section in question except before a Grand Jury as part of such Court, and that, as there is no Grand Jury in the provinces of Saskatchewan and Alberta, there was no authority to make the order in question.

Statement.

After hearing argument for the defendant corporation and for the Crown, the learned Judge was of opinion that the demurrer should be sustained and therefore dismissed the charge.

The question reserved for the opinion of the Court *en banc* was: Should the demurrer have been sustained upon the grounds taken in support thereof?

The question was argued before SIFTON, C.J., SCOTT, NEWLANDS, HARVEY and JOHNSTONE, JJ.

Argument.

J. A. Allan, for Crown.

P. J. Nolan, for defendant.

The judgment of the Court was delivered by

Judgment.

NEWLANDS, J.—*The North-West Territories Act*, ch. 50, R.S.C. 1886, sec. 65, provided that the procedure in criminal cases should, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in England on the 15th day of July, 1870; but that no grand jury should be summoned or sit in the Territories. This Act was amended by 54-55 Vic. ch. 22, sec. 11, which provided that in lieu of indictments and forms of indictments as provided by the *Criminal Procedure Act* the trial of any person charged with a criminal offence in the North-West Territories should be commenced by a formal charge in writing setting forth as in an indictment the offence wherewith he is charged. When *The Criminal Code*, 1892, was enacted it was, by sec. 983, made applicable to the North-West Territories except in so far as it was inconsistent with the provisions of *The North-West Territories Act* and the amendments thereto.

As far as this case is concerned the only changes made in the Code by that Act are that instead of an indictment being presented by a grand jury to the Court where a person is charged with a criminal offence, the proceedings are commenced by a charge in writing setting forth the offence in the same manner as in an indictment.

When the provinces of Saskatchewan and Alberta were formed by *The Saskatchewan* and *Alberta Acts*, *The North-West Territories Act* ceased to apply to them as by *The North-*

Judgment. Newlands, J.

West Territories Amendment Act passed at the same session of the Parliament of Canada, and which came into force on the same day as *The Saskatchewan* and *Alberta Acts*, namely, 1st September, 1905, the words North-West Territories used in that Act were changed to mean only the territory north of those provinces and the province of Manitoba, excepting the Yukon Territory, but it was by the *Saskatchewan* and *Alberta Acts* expressly provided that all laws, so far as they were not inconsistent with anything contained in those Acts or where those Acts contained no provision intended as a substitute therefor, existing immediately before the coming into force of those Acts in the Territories thereby established into provinces should continue in those provinces as if those Acts had not been passed.

As no change was made by those Acts in the procedure in criminal cases, the laws relating thereto continued as before and there has been no change made since, so that criminal prosecutions are commenced in the same manner as when the *North-West Territories Act* was in force.

It was argued by Mr. Nolan that because ch. 50 R.S.C., 1886, had been repealed by the R.S.C., 1906, there was now no law in force excepting *The Criminal Code*, but, as I have shown, that Act ceased to affect these provinces after the passing of *The Saskatchewan* and *Alberta Acts*, so that the repeal of ch. 50, R.S.C., 1886, could have no effect upon the laws of these provinces.

It therefore only remains for me to see that the procedure provided by *The Criminal Code* as altered by *The North-West Territories Act* has been followed in this case. It is unnecessary to consider the procedure in ordinary criminal cases because it has been held that the same proceedings cannot be taken against a corporation as against an individual, they not being subject to a preliminary examination before a magistrate as an individual.

Robertson, J., in *Re Chapman and the Corporation of the City of London*,[1] says: "I am clearly of opinion that the justice has no jurisdiction in this matter; he cannot compel the corporations, or either of them, to appear before him; should he summon them, they need not obey; should they not obey, he cannot issue a warrant to bring them, or either

[1] 19 O. R. 33 at p. 38.

Judgment.
Newlands, J.

of them, before him; although they and each of them are a corporate body, yet their 'body' cannot be taken into custody, and the justice has no power to proceed *ex parte*. The accused must be before the Court when the testimony is given, and the procedure points out what is to be done when the accused does appear, etc. Nor can he, the Justice, commit, or detain in custody, nor can he bind over to appear and answer to an indictment; that being so, he has no jurisdiction to bind over the prosecutor, or person who intends to present the indictment, etc."

This decision was followed by the Division Court in *Regina* v. *City of London*,[2] and I see no reason why it should not be followed by this Court. This disposes of the argument of Mr. Nolan that the company in this case were brought before the Court without a preliminary examination. They therefore must be proceeded against by one of the methods set out in sec. 873 of *The Criminal Code* (R.S.C., 1906).

This section makes it clear that no one but the Attorney-General or someone by his direction or with the consent or order of a Judge may prefer an indictment unless preceded by a preliminary examination before a magistrate.

Now as it is provided by the law in force in the provinces of Saskatchewan and Alberta that there shall be no grand jury, and that a formal charge shall be laid in lieu of an indictment, it follows that this section is complied with by a formal charge in writing being laid either by the Attorney-General, or by someone under his direction, or with the consent or order of a Judge, and the corporation must appear by attorney and plead or demur thereto as provided by sec. 619 (R.S.C. 1906).

In this case the offence was committed in the province of Alberta, and Mr. Short, by direction of the Attorney-General of that province, obtained an order from a Judge to lay the charge, and a formal charge in writing was presented to the Court. Section 873 of the Code, as altered by *The North-West Territories Act* and continued in force, is therefore fully complied with, and the learned Judge should not have sustained the demurrer on the grounds taken in support thereof, and the question submitted for the opinion of the Court should therefore be answered in the negative.

Order accordingly.

[2] 32 O. R. 326.

BLACKSTOCK v. WILLIAMS.

Vendor and purchaser — Specific performance — Construction of document — Statement of price by vendor — Implied contract to sell.

A statement in writing by the owner of real property to a prospective purchaser that "the best I can consider is, etc.," (naming the price and terms) is not an offer to sell the property at the price and terms quoted.

[NEWLANDS, J., *31st December, 1906.*]
[EN BANC, *12th-30th April, 1907.*]

Statement. This was an action for the specific performance of an alleged agreement for the sale of certain real estate by defendant to plaintiffs, tried before NEWLANDS, J. The following letter written by defendant to plaintiffs and its oral acceptance by plaintiffs constituted the agreement alleged:—

"Regina, April 18th, 1906.

"To Messrs. Blackstock & Co.,
"Regina, Sask.,

"Gentlemen,—The best I can consider upon lots 36, 37, 38, 39, 40, 41, and 42, in block 287, and good up to the 19th inst., at 6 o'clock, p.m., is as follows:

"175 feet at $150.....$26,250

"Under agreement at the following terms:—

"$ 2,500.....Cash.
"$ 3,750.....June 1st, 1906.
"$10,000.....January 1st, 1907.
"$10,000.....June 1st, 1907.

"Interest at the rate of 7 per cent. from date of sale.

"Yours very truly,
"R. H. Williams."

Argument. *F. W. G. Haultain, K.C.*, for the plaintiffs.

N. Mackenzie, for defendant.

Judgment. NEWLANDS, J.—Lord Morris, in *Harvey* v. *Facey*,[1] said: "The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the enquiry."

[1] (1893) A. C. 552 at p. 556; 62 L. J. P. C. 127; 1 R. 428; 69 L. T. 504; 42 W. R. 129.

Judgment. Newlands, J.

I have, therefore, to consider whether this letter is the mere quotation of a price or a definite offer to sell. The letter evidently contemplates a sale. It is to be "good up to the 19th instant at 6 o'clock p.m.," and after the lowest price is quoted it states it is to be "under agreement at the following terms." All these expressions point towards a sale being intended, although he does not say "I will sell you this land for $26,250 on the following terms," which on acceptance would make a complete contract.

It is, however, urged on the part of defendant that this interpretation cannot be put on the letter, because the defendant starts out by saying: "The best I can consider," and because he has reserved the right to consider it implies that he has not made up his mind to sell, but was still going to think over the transaction, and that the very point he wished to consider was the vital one as to whether he would sell or not. If this letter, therefore, shows that defendant had not definitely made up his mind to sell, there would be nothing for plaintiffs to accept, and it would still be open to defendant to accept or refuse to sell after plaintiffs intimated that they would give the price on the terms mentioned.

The letter has all the appearances of being an offer to sell, and it is with considerable hesitation that I have come to the conclusion that defendant has, by the use of the words "The best I can consider," reserved to himself the right to reject the offer on plaintiffs expressing their willingness to accept his terms, and that, therefore, there is no agreement that can be enforced between the parties.

Statement.

The plaintiffs appealed and the appeal was argued before the Court *en banc*, consisting of SIFTON, C.J., WETMORE, SCOTT, HARVEY, JOHNSTONE, and STUART, JJ.

Argument.

The same counsel appeared.

[30th April, 1907.]

Judgment.

WETMORE, J.—There is no ambiguity on the face of this document (letter), and if it constituted a bargain it has got to be gathered within the four corners of the instrument itself. No oral testimony can be received to aid in its construction. If there is not a complete contract to be gathered on the face of the instrument it is invalid as a contract of sale.

Judgment.
Wetmore, J.

In the light of the authorities I cannot bring my mind to the conclusion that the document amounts to a contract of sale; it is merely a statement that the best price the defendant could take into consideration for the sale of the property is $150 a foot, and the terms of the payment to be as stated. In the next place there is no allegation in the document that the defendant would sell to the plaintiffs. Possibly, if the interviews referred to as taking place before this document was forwarded might be considered in aid of the construction of the document, one might arrive at a different conclusion, but, as I have stated, that cannot in law be done. The conclusion I have arrived at is in my opinion supported by the judgment of the Judicial Committee of the Privy Council in *Harvey* v. *Facey*.[1] In that case the plaintiff wired the defendant, "Will you sell us Bumper Hall pen. Telegraph lowest cash price." The defendant replied by telegram the same day, "Lowest price for Bumper Hall pen £900," to which the plaintiff replied by telegram, "We agree to buy Bumper Hall pen for the sum of £900 asked by you." The Court held that this did not create a binding contract of sale. They stated that the first telegram asked two questions: (1) as to the willingness of Facey to sell to the appellants; (2) the lowest price. The defendant replied to the second question only and gave the lowest price, and the judgment went on to say, at page 555: "Their Lordships cannot treat the telegram from L. M. Facey as binding him in any respect except to the extent it does by its terms, namely, the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them. It is an offer that required to be accepted by L. M. Facey." And further on the judgment proceeds: "The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the enquiry."

So in this case. Leaving the fact out that the letter to the plaintiffs is merely a consent to consider the question of the sale, in order to make it an agreement to sell to the plaintiffs words have got to be implied. This case is absolutely

binding upon this Court, and I am not able to distinguish the case now under discussion from it. I am, therefore, of the opinion that this appeal should be dismissed with costs. Judgment. Wetmore, J.

JOHNSTONE, J., concurred with WETMORE, J.

HARVEY, J.—I agree that the judgment should be sustained, but I do so with great reluctance, because I feel satisfied from the evidence that the defendant's letter was intended as an offer, and it is admitted by his counsel that if it was an offer it was accepted. It seems quite clear from the authorities that parol evidence is not admissible to explain a document unless it is ambiguous. If it is not indefinite or ambiguous the party must be deemed to have intended what he said. I think possibly that the word "consider" might be susceptible of more than one meaning, but the most favourable meaning for the plaintiffs that I find myself able to place on it is that of "accept," and though all the other terms of the letter appear to me to be more consistent with the view that it is an offer to sell on certain terms, open for acceptance for a certain time, yet they are not really inconsistent with the view that it is simply an invitation for an offer which it is intimated will be accepted if made wthin the specified time, and the first expression of the letter: "The best I can consider (or accept)" is inconsistent with the former view, for, with the only meaning that can be attached to those words, they involve the idea of an offer being made to the writer, otherwise there would be nothing to consider or accept. No such offer having been made there was no contract.

SIFTON, C.J., and SCOTT, J., concurred with HARVEY, J.

STUART, J.—I think the judgment should be sustained. Before a contract can be established it is necessary not only to show an intention on the party charged to agree but also to show an expression of that intention. Even assuming that the defendant intended the letter of April 18th as an offer to sell, which I very much doubt, I am unable to find in the words of the letter any sufficient expression of that intention. The words of the English language have certain recog-

Judgment. Stuart, J.

nized meanings, and we are bound to take the words of the letter as we find them, and to give them their ordinary grammatical meaning as they are generally understood by persons using that language. I can find no words in the letter which can be held to express the thought "I will sell you" the property in question. . . .

It is said the words are ambiguous. But I can see no ambiguity whatever; therefore no explanation, to my mind, is necessary outside of the words themselves. It seems to me that when ambiguity is suggested what is really meant is this—that having first travelled beyond the document and considered the surrounding circumstances, and having conceived a suspicion in that way that the defendant meant to make an offer to sell, we feel a doubt arising in our minds as to whether the defendant actually said what he meant to say. That is a very different thing from an ambiguity arising on the face of the document itself. I cannot entertain any doubt as to the meaning of the words used considered in themselves, and that being so I do not think we are permitted to go beyond the document in order to discover another meaning. . . .

The only conceivable ground on which the plaintiffs could possibly succeed is, to my mind, this: that the Court should find that the defendant intended to make an offer to sell, that therefore his letter must, *to his mind*, have contained an offer to sell, that the plaintiffs so understood it and that therefore there was a concensus or meeting of minds which would in the particular case be sufficient, no matter how defective the language of the letter may be. But this reasoning would clearly infringe the rules of interpretation because it would involve, firstly, travelling beyond the instrument to ascertain intention in a case where such a course is not necessary and therefore not permissible, and, secondly, it would amount to saying that because the defendant meant to say a certain thing therefore he must be held to have said it, a course which is also not permissible. I think therefore the appeal should be dismissed.

Appeal and action dismissed with costs.

MACARTNEY v. MILLER.

Prairie Fires Ordinance — Starting fire on one's own land — Fire escaping — "Letting" or "permitting."

A person who kindles a fire on his own land and does not properly watch it to see that it does not escape, "lets or permits" it to do so, and if it does escape he is guilty of an offence under "The Prairie Fires Ordinance," C. O. 1898, c. 87.

[WETMORE, J., *4th August, 1905.*]

Statement. The statement of claim alleged that the defendant set fire to some straw on land occupied by him and allowed such fire to escape on to the plaintiff's land where it burned and destroyed a quantity of wood for which the plaintiff claimed damages.

The action was tried on the 6th and 7th June, 1905, before WETMORE, J., who found on the evidence that on the 5th November, 1904, the defendant set fire to some straw bucks on his own land; that he watched the fire for some time but went away leaving the fire smouldering in the straw; and that a wind, springing up later in the day, caused the fire to spread from the defendant's land on to the plaintiff's land and so to a bluff thereon in which the wood in question was, and destroyed the wood. Argument was heard on the questions of law involved.

Argument. *E. A. C. McLorg,* for plaintiff.

J. T. Brown, for defendant.

Judgment. WETMORE, J.—Having found that the fire which did the damage was started by the defendant, the next question is whether an offence was committed against paragraphs (a) or (b) of section 2 of *The Prairie Fires Ordinance.*[1] That section provides as follows: "Any person who shall either directly or indirectly, personally or through any servant, employee or agent:

"(a) Kindle a fire and let it run at large on any land not his own property;

[1] C. O. 1898, c. 87.

Judgment. Wetmore, J.

"(b) Permit any fire to pass from his own land; "shall be guilty of an offence."

It was urged on behalf of the defendant that no offence had been committed against this section, because there was no *letting* or *permitting* upon the part of the defendant; that the term "letting" or "permitting" involved the idea of action or abstaining from action. Conceding this to be true, I am of the opinion that there was on the part of the defendant at least an abstaining from action. He started the fire; it is true that he stayed there for an hour or an hour and a half, but that is the longest time he did stay there I find, and when he left, the fire was smouldering in the straw bucks, and a wind sprang up later in the day, which caused it to spread. According to his own testimony also, which I very much doubt, he burned some sort of a guard around the straw bucks before he set fire to them. If he did, the guard must have been insufficient for the purpose. It did not prevent the fire from getting away. If a person kindles a fire on his own land and does not properly watch it to see that it does not get away, and it does get away, he lets or permits it to do so; that is, he abstains from taking the action that he ought to have taken to have prevented it so getting away, and therefore he is guilty of an offence under the section of the Ordinance referred to. This holding is not at all at variance with what was held in *Toleman* v. *Portbury*,[2] or *Wilson* v. *Twamley*.[3]

Having reached this conclusion I must hold that the defendant is liable to damages by virtue of the section of the Ordinance before referred to, which expressly gives a right of action. I assess the damages at $35.

There will, therefore, be judgment for the plaintiff for damages, $35 and costs.

Judgment for plaintiff.

[2] L. R. 5 Q. B. 288; 39 L. J. Q. B. 136; 22 L. T. 33; 18 W. R. 579.

[3] (1904) 2 K. B. 99; 73 L. J. K. B. 703; 52 W. R. 529; 90 L. T. 751; 29 T. L. R. 440.

MOSSEAU v. TONE.

Master and servant — Hiring at "$25 a month for 8 months"— Payment of wages.

A hiring at "$25 a month for 8 months" entitles the employee to payment of his wages at the end of each month. *Taylor* v. *Kinsey* (4 Terr. L. R. 178) followed and approved.

[EN BANC, *12th and 30th April, 1907.*]

Statement. This was an appeal from NEWLANDS, J., at trial. The action was brought by plaintiff to recover wages from defendant for work done as a farm labourer from April 17th to October 24th, 1905.

The bargain, as stated by the plaintiff in his evidence at trial, was as follows: "The defendant asked him what he wanted a month, and he said $25 a month, for either seven or eight months. The defendant said, "Alright, you come along in the course of a week or two and I will give you $25 a month for eight months." And on his cross-examination plaintiff said he was hired for $25 a month for the full term of eight months. He began to work on the 17th April and left the defendant's employ on the 24th of October, therefore, only working a little over six months.

The learned trial Judge, at the conclusion of the plaintiff's case, dismissed the action on the ground that the plaintiff had wrongfully quit defendant's service before his term of hiring had expired and that he was not therefore entitled to any wages.

The plaintiff appealed and the appeal was argued before the Court *en banc* consisting of SIFTON, C.J., WETMORE, SCOTT, HARVEY, and JOHNSTONE, JJ.

Argument. *W. B. Willoughby,* for plaintiff (appellant).

G. E. Taylor, for defendant (respondent).

[*30th April, 1907.*]

The judgment of the Court was delivered by:

Judgment WETMORE, J.—The payment of wages in this case was to be made monthly. The bargain was to give him $25 a

Judgment. Wetmore, J.

month for eight months. I held in *Taylor* v. *Kinsey*,[1] that, under a similar contract, the employee had a right to receive his wages at the end of each month and that an action then accrued to him therefor. I am of opinion that that case was correctly decided, and the cases referred to by the learned trial Judge in his judgment do not seem to me to hold the contrary.

In *Spain* v. *Arnott*,[2] the hiring was for a year, and nothing was said as to when the wages were to be paid. In *Turner* v. *Robinson*,[3] the agreement was that the employee was to have wages at the rate of £80 a year. That clearly established a hiring for a year. In *Lilly* v. *Elwin*,[4] there was a general hiring as an agricultural labourer, and the judgment of Coleridge, J., states, that that in law was a hiring for a year. In none of these cases was there any reservation of wages payable before the end of the term. In *Davis* v. *Marshall*,[5] the hiring was for a year and the employee's wages were made payable monthly. He was wrongfully dismissed and brought an action for wrongful dismissal. The Court held that, notwithstanding the fact that the wages were payable monthly, the damages were not confined to only a month's wages. That does not touch the question involved in this case it seems to me. I do not dispute the fact that in this case the hiring was for eight months; and that is what was held in *Rex* v. *Birdbrook*.[6] The question involved in this case was not touched upon in that case. If in this case the hiring had been merely for eight months without any statement as to when the wages were to be paid they would not be payable until the expiration of the term of hiring, and in that case if the employee had left wrongfully before the end of the term he would not be entitled to recover any wages, but inasmuch as in this case the hiring was for eight months at $25 a month the plaintiff is entitled to recover at the end of each month, and the only remedy the employer would have would be a counterclaim or cross-action for damages for the servant's wrongful leaving.

[1] 4 Terr. L. R. 178.
[2] 2 Stark. 256; 19 R. R. 715.
[3] 2 N. & M. 829; 6 Car. & P. 15; 5 B. & Ad. 789.
[4] 11 Q. B. 742; 17 L. J. Q. B. 132; 12 Jur. 623.
[5] 4 L. T. 216; 9 W. R. 520.
[6] 4 Term Rep. 245.

Judgment.

Wetmore, J.

The judgment was given in this case without hearing evidence for the defence. Under such circumstances I am of opinion that there should be a new trial. I think the judgment of the learned trial Judge should be set aside with costs of this appeal to the plaintiff, and a new trial granted. Costs of the first trial to abide the event.

Order for new trial with costs of appeal.

McLORG v. COOK.

Mortgage — Consideration — Onus — Admission by widow of deceased — Mortgagee — New trial — Corroboration.

The onus of proving absence of consideration in a mortgage deed is upon the person setting it up.

The discovery of new evidence which is merely in corroboration of that adduced at the trial is not a sufficient ground for directing a new trial.

Quære, whether an admission by a next of kin of a deceased person is binding on the administrator or other persons interested in the estate.

[EN BANC, *13th, 15th and 30th April, 1907.*]

Statement.

The plaintiff was the administrator of Philip Lee Cook deceased, and brought this action to recover under the covenants therein contained, the amount of two mortgages under seal, one of land and one of chattels, both executed by defendant in favour of the deceased. The defendant, who was a brother of the deceased, admitted in his defence the execution of both mortgages, but alleged absence of consideration. At the trial which took place before JOHNSTONE, J., without a jury, the defendant was represented by counsel (William Trant, Esquire), and the only evidence adduced was that of the defendant himself who stated that both mortgages were given without any consideration, and solely by way of protection against creditors. This evidence was not corroborated in any way nor was it contradicted. The trial Judge having found for the plaintiff, the defendant appealed asking to have the judgment against him reversed on the law and the evidence, and in the alternative for a new trial on the ground of discovery of new evidence.

Statement. The appeal was argued before SIFTON, C.J., WETMORE, SCOTT, NEWLANDS, HARVEY, and STUART, JJ.

Argument. *J. T. Brown*, for (appellant) defendant.

The plaintiff (respondent) in person.

The judgment of the Court was delivered by

[*30th April, 1907.*]

Judgment. SCOTT, J.—At the end of the chattel mortgage, being one of the mortgages in question, there appears the usual affidavit of *bona fides* by the deceased, viz.: That the defendant was then indebted to him in the sum of $2,000; that the mortgage was executed in good faith and for the express purpose of securing the payment thereof and not for the purpose of protecting the goods and chattels comprised in the mortgage against the creditors of the defendant, or of preventing such creditors from obtaining payment of any claim against him. There is also endorsed upon the mortgage an affidavit of the defendant in which, after making certain statements as to the ownership of the goods and chattels comprised in the mortgage, the absence of encumbrances or liens thereon, and other matters, he alleged that those statements were made with the intent and for the express purpose of raising a loan upon the security of the mortgage.

Apart from any question as to whether the uncorroborated testimony of the defendant should be accepted as against the personal representative of a deceased person, I think the learned trial Judge was justified in holding that the defendant had failed to establish the absence of consideration. In fact I do not see how he could have arrived at any conclusion other than that no reliance should be placed upon the defendant's testimony at the trial. What weight could be attached to the statement of a witness who admits that for the purpose of perpetrating a fraud he not only committed wilful perjury himself but also induced another to do so?

It was contended on the part of the defendant that where there is a denial of consideration the onus was upon the plaintiff to shew such consideration.

Judgment. Scott, J.

The authorities cited in support of this contention do not bear it out. At the most they shew that in mortgage actions where the action is undefended or in taking accounts in the Master's office, the mortgagee is by the practice of the Court required to show by affidavit that the mortgage moneys were actually advanced, but this falls far short of supporting that contention.

In the case cited by counsel for the defendant, *Re Garnett, Gandy* v. *Macaulay*,[1] Brett, M.R., says: "It was said that the release to the aunt had no value in itself; that the person to whom it was given, or those representing her, were bound to shew—inasmuch as she had been a trustee—that everything in regard to that deed had been fully explained in the first instance. I cannot agree to this proposition which is in effect that if a deed is produced in a Court of Equity, although in a Court of Common Law it would not need any consideration to be proved, the person in whose favour a deed is executed is thereupon to have the burthen of proof thrown upon him of showing that the deed was given for a good consideration."

The fresh evidence discovered by the defendant since the trial which is relied upon as a ground for obtaining a new trial is disclosed in the affidavit of one Montgomery, who states that in a conversation with the wife of deceased after his death she stated that a mortgage had been found among his papers executed by the defendant, that she knew that it was given to protect the defendant against a threshing machine company, that she was satisfied that no money had passed from her deceased husband to the defendant under the mortgage; that defendant had acted unfairly towards her husband in the matter of a pre-emption, and that consequently her son John T. Cooke intended if possible to make the defendant pay up the amount of the mortgage.

It is to my mind open to serious doubt whether, if a new trial was granted, this evidence would be admissible. It is true that the plaintiff is a trustee of the estate, but it is not shown that the wife of the deceased has any interest therein. Although it is shown to be of considerable value, it is not shown that it is sufficient to pay the debts of the

[1] 31 Ch. D. 1 at p. 8.

Judgment. Scott, J.

deceased. Even if it were shewn that the wife possessed any such interest it is at least doubtful whether any admission made by her would bind either the other persons interested or the plaintiff.

Apart from the question, however, the discovery of new evidence which is merely in corroboration of that adduced at the trial, does not appear to be a sufficient ground for directing a new trial: See *Trumble* v. *Hortin*,[2] and *Howarth* v. *McGugan*,[3].

For the reasons I have stated I am of opinion that the appeal should be dismissed with costs and a new trial refused.

Appeal dismissed with costs.

CLIPSHAM v. GRAND PRAIRIE SCHOOL DISTRICT.

School Ordinance — Agreement — Dismissal of teacher — Appeal to Commissioner of Education under s. 153 of the School Ordinance —Amending adjudication of Commissioner — Teacher's right to salary — Burden of proof.

On an appeal to the Commissioner of Education under section 153 of the School Ordinance (c. 29 of the Ordinances of 1901) by a teacher against his dismissal by the Board of Trustees, the only matters which can be investigated are the reasons for the dismissal given by the trustees; the Commissioner cannot hold that such reasons are insufficient and confirm the dismissal on other grounds.

The adjudication of the Commissioner when once made and communicated to the parties interested is final, and the Commissioner cannot subsequently amend it so as to practically reverse it.

Where a contract has been entered into by a school district which on its face shews a compliance with the requirements of the School Ordinance, the onus of shewing that the necessary formalities have not been in fact complied with is on the party setting up such non-compliance.

[NEWLANDS, J., *23rd January and 23rd March, 1906.*]
[EN BANC, *19th and 30th April, 1907.*]

Statement.

The plaintiff, a school teacher, was engaged by the defendant under agreement in writing in the prescribed form, to teach for one year, from the 30th May, 1904, at a salary of $600 per annum. On 3rd January, 1905, he was dismissed by the Board of Trustees for alleged immoral conduct.

[2] 22 A. R. 51 at pp. 52 and 56.
[3] 23 O. R. 396 at p. 401.

Against this dismissal he appealed to the Commissioner of Education under section 153 of *The School Ordinance* (c. 29 of *The Ordinances of 1901*), which provides that "any teacher who has been suspended or dismissed by the board may appeal to the Commissioner, who shall have power to take evidence and confirm or reverse the decision of the board, and in case of reversal, he may order the reinstatement of the teacher, provided that in case there is no appeal to the Commissioner, or in the event of an appeal, if the decision of the board is sustained, the teacher shall not be entitled to a salary from and after the date of such suspension or dismissal." Statement.

After investigation the Deputy Commissioner sent the following communications (exhibits A and B respectively at trial) to the parties interested:

"Regina, March 3rd, 1905.

"Sir:—I am directed to inform you that Mr. McColl's report has been received and that it has been decided to reverse the decision of the Board of Trustees of the Grand Prairie School District on the ground that there was not sufficient justification for their action in dismissing you as teacher. It is believed, however, that your conduct on the occasion referred to was not without blame, and for that reason it has been thought advisable not to reinstate you as teacher in this school. As your influence in the community has become more or less weakened, and as you should have little difficulty in securing another school, the trustees are being advised by to-day's mail that they are at liberty to engage another teacher.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

"Thos. R. Clipsham,
Caron, Assa."

"Regina, March 3rd, 1905.

"Sir:—I beg to inform you that Mr. McColl's report on the investigation recently held at your school has been received and that the Commissioner of Education has decided that your trustees are not justified in the action they took in dismissing their teacher. In so far, therefore, as the grounds of dismissal are concerned, the decision of your

Statement.

board has been reversed. While Mr. Clipsham's action may have been thoughtless, there was absolutely no evidence to show that he had any unlawful or immoral intent. Doubtless, however, his influence in your community has become more or less weakened and for this reason it has been decided to permit your trustees to engage another teacher.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

"Jas. LaLonde, Esq.,
Westview, Assa."

In answer to an enquiry from the secretary-treasurer of the defendant, the Deputy Commissioner wrote as follows (exhibit C at trial):

"Regina, March 9th, 1905.

"Sir:—I beg to acknowledge yours of the 6th inst. relative to salary due Mr. Clipsham. With reference to the case in question I beg to say that the Department decided that Mr. Clipsham should receive no salary from the date of his dismissal.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

"Jas. S. LaLonde, Esq.,
"Westview, Assa."

The defendant having refused to pay salary for the full year, the plaintiff brought this action claiming such salary. After action brought the Deputy Commissioner of Education wrote to one of the solicitors for the defendant a letter as follows:

"Regina, March 16th, 1905.

"Sir:—I beg to acknowledge receipt of your letter of the 13th instant in reference to Mr. Clipsham's claim against the Grand Prairie S. D. and to state in reply that the Commissioner did not order the reinstatement of the teacher as provided by section 153 of the *School Ordinance*. In fact the trustees were advised that they were at liberty to engage another teacher. The action of the board in dismissing Mr. Clipsham has not been reversed. They were simply advised that the Commissioner had decided that they were not justified in the action they took. As, however, Mr. Clipsham was

not altogether free from blame, and as it was believed that his influence in the community has been considerably weakened, the Commissioner did not think it advisable to reverse the decision of the board in order that the teacher might have a claim for salary from the date of dismissal. If you will note carefully the provisions of section 157 of the *School Ordinance,* you will note the effect of the decision in the point at issue. Statement.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

At trial the following certificate was put in and received in evidence on behalf of the defendant, although objected to by the plaintiff's counsel:

"Regina, March 24th, 1905.

"This is to certify that the Board of Trustees of the Grand Prairie School District No. 833 of the North-West Territories, dismissed their teacher, Mr. Thomas R. Clipsham, on or about Thursday, January 5th, 1905; that the said teacher appealed from the action of the said board, as provided by section 153 of the *School Ordinance;* that the said appeal was duly investigated, heard and considered, and that the Commissioner of Education did not reverse the decision of the said board.

"D. S. MacKenzie,
"Acting Deputy Commissioner
(Seal.) of Education."

The action was tried on 23rd January, 1906, by Newlands, J., without a jury.

W. B. Willoughby, for plaintiff. Argument.

C. E. Armstrong, for defendant.

[*23rd March, 1906.*]

Newlands, J.—I think there can be no doubt that, reading the letters of 3rd March (exhibits A and B) by themselves, it must be held that the Commissioner reversed the decision of the board, the latter part of the first letter being only in effect a statement that he would not order the reinstatement of the teacher, as he had power to do under section 153 of the Ordinance.[1] Judgment.

[1] "The School Ordinance," 1901, c. 29.

Judgment.
Newlands, J.

By his letter of 9th March he attempted to deal with the question of salary, which I think he had no power to do, as that matter is dealt with by the section referred to, and no power other than that mentioned is conferred on the Commissioner.

It was, however, shown in evidence by a subsequent certificate, from the Commissioner, dated 24th March, 1905, that after the appeal had been duly investigated, heard, and considered, the Commissioner did not reverse the decision of the board, and by the evidence of the Deputy Commissioner, who had the powers and was acting for the Commissioner in his absence, and who decided this question, that the intention was to confirm the decision of the board as to the dismissal of plaintiff, reversing only the reasons the board gave for such dismissal.

The question, therefore, arises: Can I give effect to the decision of the Commissioner as he intended it; in other words, can he amend his written decision after it is communicated to the parties interested so as to make it conform to his intention?

From the earliest times it was held that the record of a judgment could be amended in the event of a mistake or of an ambiguity occurring therein, from the Judge's notes. In *Doe d. Church* v. *Perkins*,[2] after a writ of error had been brought, the defendant in error applied to Lord Loughborough to amend the *postea* by his notes, which he did, and on a motion for a new trial, on this amendment being objected to, the Court said there was no foundation for the objection; for that, according to the practice of amending by the Judge's notes, which was of infinite utility to the suitors, and was as ancient as the time of Charles I., the amendment might be made at any time.

And in *Ernest* v. *Browne*,[3] Tindal, C.J., said: "It is the ordinary practice, when any mistake has arisen at the trial, to apply to the Judge to say, by reference to his notes, on what counts the verdict is to be entered." And Vaughan, J., said: "We are not precluded from advancing justice by correcting a mistake in entering the verdict of the jury. We

[2] 3 Term Rep. 749.
[3] 4 Bing. (N.C.) 162; 5 Scott 491; 1 Arn. 2; 7 L. J. C. P. 145; 2 Jur. 34.

cannot alter the verdict against the intention of the jury; but here I assume, and I think from the clearest evidence, that we are only giving effect to that intention." This practice has continued down to the present day. Judgment. Newlands, J.

In *Abbott* v. *Andrew*,[4] on a trial before Lord Coleridge, C.J., the plaintiff obtained a verdict, but was nonsuited on some of the issues, and the Master refused to tax the defendant's costs on the issue upon which the plaintiff was nonsuited, because, by the terms of the judgment, a taxation of the plaintiff's costs only was directed, and it was uncertain whether or not the Judge had intended to make an order as to costs. North, J., affirmed the Master's order. On appeal in giving judgment reversing this order, Lord Coleridge said: "He ought to have applied to the Judge who tried the case to correct any ambiguity in the judgment, instead of appealing from the Master's order."

And in *Clack* v. *Wood*,[5] the Court held that they had power to amend the record of the trial. Jessel, M.R., said: "It is clear there must have been a mistake in this case either in what was left to the jury, or in the certificate of the associate as to the finding of the jury. We have consulted Mr. Justice North as to the question which he put to the jury, and it is clear from his letter to us in reply that whatever words he used he did not intend to leave to the jury any question as to the non-approval of Maxwell's title by the defendant's solicitor, but to reserve that question to himself."

I think, therefore, that the Commissioner of Education had the right to correct his written decision in accordance with his intention, and that it is my duty to give effect to the decision he intended to make. He is practically made the sole judge on the question of the dismissal of a teacher by a school board, and the same reasons apply for correcting the record of his judgment and giving the judgment he intended to give as to the record of a Superior Court.

This raises the question whether he has the right to hold that the reasons given by the trustees are not valid and to confirm their decision on other grounds. The duties of a teacher are set forth in section 158 of the *School Ordinance*,[1]

[4] 8 Q. B. D. 648; 51 L. J. Q. B. 641; 30 W. R. 779.
[5] 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931.

Judgment. Newlands, J.

and he would be liable to be dismissed if he did not perform those duties. The section which gives him the right to appeal to the Commissioner provides that the Commissioner may take evidence, so that the teacher is practically on trial before him, and I think he would have power to confirm the decision of the board to dismiss the teacher for any failure on his part to perform the duties required of him by the Ordinance. The reasons given by the Commissioner are that the plaintiff's influence in the community has become more or less weakened; that being the case, it would certainly prevent him from maintaining proper order and discipline, which are amongst his duties laid down by the Ordinance.

Under any circumstances, the Commissioner has considered, after investigation, that the decision of the board to dismiss plaintiff should be sustained, and, as he is, I think, under the Ordinance, the sole judge, it is therefore my duty to give effect to that decision.

The decision of the trustees being sustained, the Ordinance provides that the teacher shall not be entitled to salary from the date of dismissal, and I must therefore give judgment for defendants with costs.

Statement.

The plaintiff appealed, and the appeal was argued before the Court *en banc*, consisting of SIFTON, C.J., SCOTT, HARVEY, JOHNSTONE and STUART, JJ.

Argument.

The same counsel appeared.

[*30th April, 1907.*]

The judgment of the Court was delivered by

Judgment.

JOHNSTONE, J.—The appeal of the teacher to the Commissioner was against the right of the respondents through their trustees to dismiss him upon the ground or for the reason set out in the notice of dismissal, namely, for immoral conduct. The finding of the Deputy Commissioner, as expressed in exhibits A and B, was clearly that the evidence adduced before the board and the Deputy Commissioner was insufficient to justify the appellant's dismissal by the board for the alleged cause, and this being the question before the Commissioner and the only one which could be considered by him,

Judgment.
Johnstone, J.

the conclusion arrived at as contained in his letters A and B had no other effect that that of reversing the action of the board appealed from and in no sense could the determination referred to be construed as confirming or sustaining the action of the board so as to bring the case within section 153 of the *School Ordinance*, and thereby enable the trustees to take advantage of the provision relating to non-payment of the salary for the balance of the term of hiring.

In my opinion the Deputy Commissioner in so holding the evidence insufficient to justify the dismissal and in perfecting this his adjudication through his having sent out communications, exhibits A and B, to the parties directly concerned, which formal communications under the signature of the Deputy Commissioner constitute the sole and only record according to his own statement of his disposition of the appeal, could not thereafter deal with the matter in a manner entirely repugnant to and in reversal of his judgment of 3rd March. His adjudication of the 3rd March, 1905, neither confirmed nor sustained the decision of the board; and it does not appear from any subsequent action on the part of the Commissioner or Deputy Commissioner that the decision of the board was ever confirmed or sustained.

It will be seen that the certificate of the acting Deputy Commissioner goes no further than to say: "The Commissioner of Education did not reverse the decision of the board." This is quite true when it is remembered the Commissioner never dealt with the matter, as appears from the evidence given by him at the trial.

But assuming the acting Deputy Commissioner in granting this certificate in using the word "Commissioner" was referring to the "Deputy Commissioner," I am convinced, after perusal of the evidence of the Deputy Commissioner and taking into consideration the circumstances (also in evidence) under which this certificate was granted, it was at most a declaration by the acting Deputy Commissioner of the construction which should be placed upon the adjudication as contained in A. and B. The Deputy Commissioner did not dictate or sign this certificate. In fact he never saw it.

I am in full accord with the opinion expressed by the learned trial Judge as to the effect of exhibits A and B alone, but with his ruling in admitting the certificate in question

Judgment. Johnstone, J.

in evidence and in giving to it the weight he did I cannot agree.

As to the extent to which a judgment may be varied, altered or amended, I refer to *The Preston Banking Co.* v. *Allsup*,[6] and cases therein referred to.

It was open to the respondents at the trial to have given evidence of misconduct of the appellant without regard to the conclusions arrived at by the Deputy Commissioner as to the appeal, and as no such evidence was given or tendered, and in view of what I have stated as to the effect of the Commissioner's adjudication the defence of dismissal for cause relied upon by the respondents in my opinion fails.

As to the remaining defence relied upon, namely, that the appellant never was engaged under the authority or resolution of the school board passed at a regular or special meeting, in support of which some evidence was given by the respondents at the trial, I am of opinion this also fails for the following reasons:

It is provided, with reference to the contract of engagement of the teacher by a school board by section 152 of the *School Ordinance*, as follows:

"The contract shall be deemed valid and binding if signed by the teacher and by the chairman on behalf of the board."

Apart from the ordinary rule as to onus of proof, this provision cast upon the defendant in the Court below the onus of proving the formalities required by section 91 of the Ordinance as to the calling of meetings of the school board whereat the teacher was engaged had not been complied with.

The evidence adduced, in my opinion, was insufficient for this purpose, and the contract, therefore, must be considered a valid and binding contract.

An examination of the minutes recorded in the minute-book of the respondents produced and given in evidence at the trial which shows the proceedings had at two meetings of the board of school trustees, one on the 7th of June, and the other the previous meeting of the board, at both of which meetings the subject of the engagement of a teacher for the district came up. At the first of these, which was a meeting

[6] (1895) 1 Ch. 141; 64 L. J. Ch. 196; 71 L. T. 708; 43 W. R. 231.

regularly held as is shown by the minutes, a resolution was passed authorizing and empowering two of the trustees to engage a teacher for a year. Judgment. Johnstone, J.

On the 7th of June the minutes contain a resolution adopting the contract of the 30th May. I think if this meeting of the 7th of June never had been held the contract would notwithstanding be a valid and binding contract because of what took place at the first mentioned meeting.

The plaintiff states that he received another engagement on the 1st of April, so that he would not be entitled to be paid under this contract for the months of April and May. It does not appear from the evidence clearly how much the plaintiff had received, but by his claim he asks for $183.70 as the balance due him under the whole contract. This is not denied, and may be assumed to be correct. The amount of the salary pertaining to the months of April and May should be deducted from this amount. Under section 155 of the *School Ordinance*, there being thirty-eight teaching days in those two months, this amount would be $108.55, and the balance due the plaintiff would be $75.15.

In my opinion the appeal should be allowed with costs and a verdict directed to be entered for the plaintiff in the Court below for $75.15 with costs of suit.

Appeal allowed; judgment for plaintiff.

McLORG v. JOHNSTON.

Costs — Discontinuance before appearance — Right of defendant to tax costs against plaintiff.

Where an action is discontinued before appearance the defendant is nevertheless entitled to tax against the plaintiff and recover the costs of all work reasonably and properly and not prematurely done by him.

[WETMORE, J., *30th May, 1907.*]

Statement. The plaintiff issued a writ of summons against the defendant which was duly served. The defendant consulted his advocate and gave instructions to defend the action. The advocate did accordingly prepare a statement of defence and forwarded the same, along with an appearance, to his agents to be entered and delivered. Before the appearance was entered the plaintiff discontinued. The defendant applied to the taxing officer to have the costs incurred by him taxed against the plaintiff, and the clerk taxed and allowed the same accordingly, including the costs incidental to the taxation. The plaintiff reviewed.

Argument. *H. Y. MacDonald,* for the plaintiff, objected that as the defendant had not appeared he had no *locus standi* and could not tax any costs against plaintiff.

T. D. Brown, for the defendant.

Judgment. WETMORE, J.—Rule 174 of the *Judicature Ordinance,*[1] relating to discontinuance, is practically identical with Rule 1 of Order XXVI of the English Rules. These Rules provide that, upon a plaintiff giving notice of discontinuance, he shall pay the defendant's costs of the action. In *Moore* v. *Southern Counties Deposit Bank,*[2] the plaintiff had, by leave of the Court, before the defendants appeared, served them with a notice of motion for an injunction. The motion was heard and refused, the costs being made costs in the action. The plaintiff then discontinued, the defendants still not having appeared to the writ. The taxing master considered

[1] C. O. 1898, c. 21.
[2] (1899) W. N. 156.

that he had no power to tax to the defendants the costs of the action, as they had not appeared. The defendants then took out a summons before North, J., who ordered that the plaintiff should pay the defendants the costs of the action, although they had not appeared. The plaintiff appealed. The Court of Appeal, consisting of Fry and Lopes, L.JJ., held that the defendants were entitled to their costs. Fry, L.J., delivered the judgment of the Court and he is reported as follows: "He said that the only point in favor of the plaintiff was the old practice of the Court of Chancery. It was contended that that practice was still in force, and that it applied to the analogous case of discontinuance before appearance of the defendant. But Rule 1 of Order XXVI. governed the practice as to discontinuance, and it said that, when a plaintiff discontinued his action, 'thereupon he shall pay the defendant's costs of the action.' In His Lordship's opinion that was not necessarily confined to discontinuance after appearance of the defendant; it did not make the appearance of the defendant a condition precedent to the payment of his costs. And it was consistent with justice that the plaintiff should pay the defendant's costs. For, though before appearance the defendant had no *locus standi* to take any step in the action, proceedings might be taken against him (as in the present case) by the plaintiff, and yet, if the defendant was successful in such proceedings he would, if the argument for the appellant was well founded, be deprived of the costs of them." I adopt that ruling and the reasons for it. I have only to add that the defendant before discontinuance may have incurred costs relating to the action which he would be compelled to pay to his advocate, and I think it is but just that he should have the remedy, as far as taxable costs are concerned, over against the plaintiff, who has inadvisedly or without cause brought an action against him.

Judgment. Wetmore, J.

It may be urged that a difficulty might arise as to what costs were to be taxed. The case of *Harrison* v. *Leutner*,[2] lays down the principle upon which the taxing officer should be governed in such cases. The plaintiff in that case, having served the defendant with notice of motion for an injunction,

[2] 16 Ch. D. 559; 50 L. J. Ch. 264; 44 L. T. 331; 29 W. R. 393.

Judgment. Wetmore, J.

afterwards gave notice of abandonment, whereupon an order was made directing the plaintiff to pay the defendant's taxed costs of the motion. The question then arose on taxation as to the costs of preparing affidavits which had not been filed at the date of the abandonment. The Judge directed certain questions to be answered by the taxing masters, and they certified as follows: "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived. We apply the same principle in taxing costs on discontinuance of action or dismissal of bill, and we have not made any charge in practice in this respect since the *Judicature Act*." Jessel, M.R., acted upon the taxing masters' certificate.

The clerk was correct in taxing costs to the defendant.

Taxation affirmed.

HILL v. BIBLE.

Trusts and trustees — Conveyance absolute in form — Action for declaration of trust—Evidence.

In an action for a declaration that certain conveyances absolute in form were in fact executed in trust, the evidence at trial was contradictory and was evenly balanced on both sides, both as to the number of witnesses and the circumstances. The trial Judge believed the evidence on the part of the plaintiff, and such evidence if believed clearly and unquestionably established the trust.

Held, on appeal, that although in such an action the evidence of the trust must be of the clearest and most conclusive and unquestionable character, yet inasmuch as the trial Judge believed the evidence for the plaintiff, and as such evidence was sufficient, if believed, to establish the trust, the finding of the trial Judge should not be interfered with. It is not necessary in such an action that the character of the trust should be so clearly established as to enable the Court to direct a trust deed to be prepared, specifying clearly the nature of the trust. *Fowler* v. *Fowler*, 4 De G. & J. 250, distinguished.

[EN BANC, *10th and 18th July, 1906.*]

Statement.

The plaintiff, on 14th May, 1903, executed to defendant a transfer of lands and also a bill of sale of chattels, the consideration expressed being "the sum of $1 and other

considerations." Both conveyances were absolute in form. The defendant took possession, sold the chattels and entered into a binding agreement to sell the lands to a third party. The plaintiff thereupon brought this action practically for a decree that such conveyances were intended to operate by way of a trust and that the lands and chattels covered thereby were held by the defendant in trust for the plaintiff. The defendant denied the trust and alleged that the conveyances were absolute, the consideration being the undertaking by the defendant to pay off the mortgages and other encumbrances against the property. At the trial the evidence was conflicting. The action was tried before Scott, J., without a jury, who, on the 3rd March, 1906, delivered judgment in favor of the plaintiff. The defendant appealed and the appeal was argued before SIFTON, C.J., WETMORE, PRENDERGAST and HARVEY, JJ. Statement.

Beck, K.C., and *Muir*, K.C., for defendant (appellant). Argument.
O. M. Biggar, for plaintiff (respondent).

The judgment of the Court was delivered by

[*18th July, 1906.*]

WETMORE, J.—The *Statute of Frauds* was not pleaded, and it was therefore conceded at the hearing of the appeal that no question could be raised under that statute. There is no doubt that the character of the trust relied upon and testified to by the plaintiff was somewhat vague and unsatisfactory; but there was evidence which, if believed, established that this property was handed over to the defendant and accepted by him in trust for the benefit of the plaintiff, or, as the learned trial Judge puts it, "that it was not the plaintiff's intention to hand over this property absolutely to the defendant." Of course, the defendant denied this, and the evidence on either side was very evenly balanced both as to the number of witnesses and the circumstances. Such being the case, we are of opinion that this Court ought not to interfere with the finding of the trial Judge. Judgment.

It was urged on behalf of the defendant that in order to induce a Court to declare that a deed absolute on its face was intended to operate by way of trust the evidence must be

Judgment.
Wetmore, J.

of the clearest and most conclusive and unquestionable character; and *McMicken* v. *The Ontario Bank*,[1] was cited for that proposition. That case certainly does lay that down; but we are of opinion that the evidence on the part of the plaintiff, if believed, did clearly and unquestionably establish that the transfer and assignment in this case were intended to operate by way of trust; and, if the Judge found that that evidence was true, he was bound to give effect to it. It was also urged that the character of the trust must be so clearly established that the Court could direct a trust deed to be prepared specifying clearly the nature of the trust; and *Fowler* v. *Fowler*,[2] was cited on behalf of that proposition. That was an action for the purpose of reforming an instrument in which it was contended a mistake had been made. We can quite understand that in such a case it must be established what the mistake was and exactly what the parties intended the instrument should have been at the time of its execution. But such a rigid rule would not apply when it is sought to obtain a declaration that a deed absolute on its face was intended to operate by way of trust.

Appeal dismissed with costs.

Newlands, J., not being present at the argument, took no part in the judgment.

[1] 20 S. C. R. 548.
[2] 4 De G. & J. 250.

BIBLE v. HILL & MOSES.

Parties — Striking out action for an injunction to restrain from proceeding with an action — Amendment — Costs.

An action cannot be maintained in the Supreme Court of the North-West Territories for the purpose of enjoining a party from bringing an action therein or from proceeding therewith.

A defendant against whom the only relief claimed is such as the Court has no power to grant, and who is not a necessary party in order that the plaintiff may obtain the relief prayed for against other defendants, will be struck out as a party defendant, and it is no longer the practice of the courts to permit a party to be made a defendant simply for the purpose of making him liable for costs.

[EN BANC, *10th, 11th, 15th January, 1907.*]

Statement.

Appeal by plaintiff from an order of SIFTON, C.J., in Chambers, striking out the name of the defendant Moses as a party. The statement of claim and relief prayed for were as follows:

1. The defendant Hill brought an action in this Honourable Court against the plaintiff, Bible. On the 3rd March, 1906, a judgment was rendered therein whereby it was declared, amongst other things, that the plaintiff Bible held certain lands and chattels in question in the said action as trustee for the defendant Hill, and that the plaintiff Bible was liable as such trustee to account to the defendant Hill for the same.

2. The said judgment was obtained by the fraud and conspiracy of the defendants Hill and Moses.

3. The particulars of the said fraud and conspiracy are as follows:

The lands and chattels in question in the said action had been purchased by the plaintiff Bible from the defendant Hill absolutely and the plaintiff Bible became the registered owner thereof.

The plaintiff Bible agreed to sell the lands in question to the defendant Moses for the sum of $3,840, payable partly by way of deferred payments.

The defendant Moses sold to the plaintiff Bible his interest in certain lots for the sum of $684.15, and this latter sum was by agreement applied on account of the purchase price of the lands in question in the said action.

Statement.

The market value of the lots sold by the defendant Moses to the plaintiff Bible quickly increased, while the market value of the lands sold to the plaintiff Bible did not appreciably increase, and the defendant Moses in the expectation of being able to recover from the plaintiff Bible the said lots fraudulently procured the defendant Hill to bring the said action against the plaintiff Bible, and to obtain an injunction therein, preventing the plaintiff Bible from carrying out his agreement for the sale thereof to the defendant Moses, and the defendant Moses furnished the defendant Hill, who was then entirely without means and had no money, with money for the purpose of enabling him to travel to the city of Toronto, in the province of Ontario, for the purpose of interviewing the plaintiff Bible and for the purpose of bringing and carrying on the said action.

The defendants Hill and Moses, prior to the commencement of and during the progress of said action, conspired together fraudulently to obtain the said judgment thereon by both committing perjury therein as, in fact, they both did in the following respects:

(*a*) The defendant Hill falsely swore in the said action in several forms of words to the effect that the sale by him to the plaintiff Bible of the lands and chattels in question in the said action was not an absolute sale but was upon an express verbal trust.

(*b*) The defendant Moses falsely swore in the said action to the effect that he had not known the defendant Hill until the day previous to that upon which the defendant Moses gave his evidence in the said action, and that he had not previously spoken to the defendant Hill; that about the 4th or 5th July, 1904, the plaintiff Bible went to the place of abode of the defendant Moses, and while there asked the defendant Moses to come out of his house and that accordingly he did so, and that thereupon the plaintiff Bible told him that there was a verbal agreement between the plaintiff Bible and the defendant Hill that the plaintiff Bible should hold the land in question in the said action in trust for the defendant Hill, and that there was no understanding between the defendant Moses and the defendant Hill that if the defendant Hill should be successful in the said action the defendant Hill would get back the land in question in the

said action and the defendant Moses get back the lots sold by him to the plaintiff Bible. Statement.

The said evidence so falsely given by the defendant Moses was false to the knowledge of the defendant Hill, and was given in pursuance of a previous arrangement made between him and the defendant Moses.

4. In further pursuance of the fraudulent scheme of the defendants Hill and Moses, the defendant Moses having, as hereinbefore stated, procured the defendant Hill to prevent the defendant Bible from being able to fulfil his agreement for the sale of the lands in question to the defendant Moses, brought an action in this Honourable Court against the plaintiff Bible praying for specific performance of the said agreement or a cancellation thereof and a reconveyance of the said lots sold as aforesaid by the plaintiff Bible to the defendant Moses and the purchase price whereof had been applied upon the purchase price of the lands in question in the first mentioned action and alleging and falsely and wilfully representing in the last mentioned action upon an application therein for the purpose of obtaining an interim injunction which he in fact obtained restraining the plaintiff Bible from dealing with the said lots to the effect that said lots were taken by way of exchange and constituted in themselves part of the consideration for the said lands agreed to be sold by the plaintiff Hill to the defendant Moses.

The plaintiff therefore claims:

1. A declaration that the judgment in the said action of *Hill* v. *Bible*, rendered on the 3rd March, 1906, was obtained by the fraud of the defendants and is void and an order setting the same aside.

2. An injunction restraining the defendant Hill from proceeding to enforce the said judgment.

3. An injunction restraining the defendant Moses from proceeding with the said action of *Moses* v. *Bible*.

4. Such further and other relief as may be just.

The appeal was argued before WETMORE, J.

N. D. Beck, K.C., for plaintiff (appellant). Argument.

O. M. Biggar, for defendant Moses (respondent).

The judgment of the Court was delivered by

[*15th January, 1907.*]

Judgment. WETMORE, J.—I am of opinion that the appeal should be dismissed. The only relief specifically claimed against the defendant Moses is an injunction restraining him from proceeding with an action brought in this Court against the plaintiff. By paragraph 5, of section 24, of *The Judicature Act*, (1873) (Imperial), "no cause or proceeding at any time pending in the High Court before the Court of Appeal shall be restrained by prohibition or injunction." There is no such express provision in the practice applicable in this country. It may, however, be possible that this provision of *The Judicature Act* is in force in this country by virtue of section 3 of "*The Judicature Ordinance.*" But whether it is so in force by virtue of this section or not, I am of opinion that by the very nature of the constitution of this Court and its jurisdiction, the bringing of an action therein or the proceeding with such action could not be enjoined. There is no necessity for any such practice. It must be remembered that injunctions were formerly issued in England out of the Court of Chancery to restrain actions brought on the common law side of the Court, when questions of equitable rights or interests arose, which could not be disposed of in the common law Courts, because the common law Courts could not deal with equitable rights and interests. I have never heard of an injunction being issued out of the Court of Chancery to restrain another action brought in the Court of Chancery, and no injunction ever issued to restrain an action in the common law Courts could effectively deal with the subject matter of the suit.

It is well known that the Supreme Court of the North-West Territories administers law and equity together. There are no two sides to this Court, in one of which equity is administered and in the other common law. There is, therefore, no occasion for an injunction to issue. The reason for issuing it does not exist; consequently the practice as it formerly was in the Court of Chancery in England, in such cases, does not apply here. The relief, therefore, claimed against the defendant Moses, in the statement of claim is not a proper relief. If Bible desires to restrain the action brought by Moses against him until this action is disposed of,

Judgment.
Wetmore, J

he may apply and on proper material obtain an order staying proceedings in that action. It is not necessary that Moses should be made a party in order to obtain the relief prayed for against the defendant Hill.

It was urged, however, that the defendant Moses was a proper party, because he is liable for damages by reason of the fraud alleged against him. The statement of claim claims no relief by way of damages. It was urged, however, that the plaintiff would be entitled to recover damages, although there was no prayer for such relief, that it was sufficient if the facts disclosed the right to damages. The authorities do not bear that out. It is true that where general damages are claimed they need not be specifically set out; but there must be a general prayer for damages.

It was further urged that Moses was a proper party by reason of the fraud alleged, because in cases of that nature, although no relief could otherwise be asked or obtained against him, the Court would order him to pay the costs of the action. That certainly was laid down by James, L.J., in *Clark* v. *Girdwood*.[1] But in the *Canada Carriage Company et al.* v. *Lea*,[2] this question was discussed by Moss, C.J., who delivered the judgment of the Court. He is reported as follows:[3] "The only plausible ground for making A. C. Lee a party to the action was the charge of conspiracy. He was neither a debtor of the plaintiffs nor a grantor or grantee of any of the property in question. He appears to come within the description given by Lord Eldon in *Whitworth* v. *Davis*,[4] 'a person who has no interest . . . against whom there could be no relief.' And it has long been settled that if a person is so completely without interest in the question at issue that a decree in the cause cannot affect him, he must not be brought into Court merely that costs may be prayed against him. No doubt, he acted as go-between or agent in the transaction. But, according to the modern view, that alone does not justify making him a party, and the practice of adding him, even though he is charged with being concerned in a fraud, is discountenanced. In *Weise* v. *Wardle*,[5] a bankrupt was made a party defendant to a bill

[1] (1894) 1 Q. B. 451; 63 L. J. Q. B. 355.
[2] 11 O. L. R. 171, affirmed, 37 S. C. R. 672.
[3] At pp. 177, 178 of 11 O. L. R.
[4] (1813) 1 V. & B. 545, 550.
[5] (1874) L. R. 19 Eq. 171.

Judgment. Wetmore, J.

by the trustee in bankruptcy to set aside as fraudulent a conveyance by the bankrupt. On demurrer by the latter, Sir George Jessel, M.R., said (page 172): 'Now, in respect of that property, he has no interest, nor is he under any personal liability; why, then, is he made a defendant? It is said that he has been a party to a fraud, and that he may be a defendant for the purpose of obtaining discovery and payment of costs. Now, it is true there is a rule that a mere agent may in certain cases be made a party to the suit, but that rule has been disapproved of by eminent Judges in several cases.' He then referred to the observations of Sir James Wigram and Lord Cottenham in cases before them, and concluded: 'I consider that the practice as it now exists applies only to cases in which the defendant is an agent (under which is in the case of his being an attorney or solicitor) or an arbitrator.' *Barnes* v. *Addy*,[6] was decided earlier in the same year as *Weise* v. *Wardle*,[5] but it was not cited or referred to. In that case Lord Selborne said (page 255): 'I hope the impression will go abroad that of late years the Court has set its face against making solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. I know no principle on which they can be charged and made parties for that purpose, unless other and further relief might also be given against them.' In *Burstall* v. *Beyfus*,[7] he affirmed the same view." "I agree with what is there laid down, and I am of opinion, that under the laws as now understood, Moses cannot be made a proper party, simply for the purpose of making him liable for costs. Since dictating the extract from the *Canada Carriage Co.* v. *Lea*, my brother Stuart has drawn my attention to the fact that the plaintiffs in that case appealed to the Supreme Court of Canada against the judgment dismissing the action as against A. C. Lea, and that Court dismissed the appeal.

There was an application made at the hearing of the appeal to amend the statement of claim by inserting a prayer for damages or a claim for damages as a matter of relief. I am of opinion that this application should not be entertained. I have no doubt, from reading the statement of claim, that

[6] (1874) L. R. 9 Ch. 244.
[7] (1884) 26 Ch. D. 35.

when this action was started it never occurred to the plaintiff or his advocate to claim damages. The action was launched for the purpose of setting aside the judgment of Hill against Bible, and enjoining the action of Moses against Bible. No application was made to the Judge below to amend, and the first and only application of that character was made to this Court on the appeal. If an amendment was ordered, it would be on the terms of the plaintiff paying the costs of the application before the Chief Justice, and of this appeal, which the plaintiff will be ordered to pay in any event. Judgment. Wetmore, J.

No substantial object will be attained, therefore, by ordering the amendment, as the plaintiff can, with very small additional costs, if he desires to do so, discontinue this present action and bring a new one; and I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

CODVILLE v. SMITH.

Practice — Summary judgment—Verifying cause of action—Affidavit.

The affidavit verifying the cause of action on a motion for summary judgment may be made in general terms.

[WETMORE, J., *17th February, 1906.*]

This was a motion for summary judgment, under Rule 103 of *The Judicature Ordinance,* (C. O. 1898, ch. 21). Statement.

The affidavit was made by one Georgeson, and the paragraph verifying the cause of action was as follows:—

"The defendant is indebted to the plaintiffs in the sum of $2,444.45 and interest at $2,429.73, from December 9th, A. D. 1905, until judgment, at 5 per cent. per annum, under the various bills of exchange and the promissory note set forth in the said statement of claim and which said bills of exchange and promissory note are now shewn to me and marked as exhibits "B.," "C.," "D.," "E.," "F.," "G.," "H.," and "I.," hereto."

J. T. Brown for the defendant, objected that the affidavit was insufficient inasmuch as it did not properly verify Argument.

Argument. the cause of action, in view of the statement of defence filed in which the defendant denied acceptance of the bills, the making of the promissory note and presentment for payment.

E. L. Elwood, for the plaintiffs, *contra*.

Judgment. WETMORE, J.—It is set up that, defendant having denied the making of the note and the acceptances and the presentment, these facts should have been specifically proved in Mr. Georgeson's affidavit. I may say that at the argument I was strongly impressed with the idea that this view was correct, and I was referred to a case, *Stobart* v. *Lopston*, decided by me at Saltcoats, last July, in which it was alleged that I held that it was necessary to prove specifically the several matters so as to establish a *prima facie* right to recover before an application could be granted under the Rule in question. Unfortunately no memorandum has been kept of my judgment in that case, and I am not able to state just what I did hold. If I did hold as above stated, I have reached the conclusion that my judgment was erroneous. The authorities appear to be against me.

In *May* v. *Chidley*,[1] the action was brought for the amount of a dishonoured cheque. The allegation in the affidavit for judgment was "that the defendants are justly and truly indebted to the plaintiff in the sum of £28 ls. 6d. for the amount of a dishonoured cheque, dated 21st August, 1893, and for bank charges, and were so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement on the writ of summons in this action." The Court held that this affidavit was sufficient, and laid down the following:[2] "The verification of the cause of action in the affidavit may be made in general terms."

In *Roberts* v. *Planet*,[3] an affidavit which appeared to be in somewhat general terms, the Court held good, but there is a remark of Lopes, L.J., which strikes me with some force; he says:[4] "I agree that the affidavit must sufficiently verify the cause of action—that is to say, it must state such facts as are necessary to establish a good cause of action."

[1] (1894) 1 Q. B. 451; 63 L. J. Q. B. 355.
[2] At p. 453 of (1894) 1 Q. B.
[3] (1895) 1 Q. B. 597; 64 L. J. Q. B. 347; 71 L. T. 878; 72 L. T. 181; 43 W. R. 308.
[4] At p. 605 of (1895) 1 Q. B.

Judgment. Wetmore, J.

However, I find that the Judges of the High Court in England lately in prescribing some new forms have prescribed a form of affidavit to be used on an application of this nature (see Form 23a, 2 *Annual Practice* (1905), page 42.) This appears in appendix "B." This form is very general in its character, and I must assume that the Judges believed that it came up to the requirements of the Rule allowing applications of this nature. That Rule, so far as the question I am discussing is concerned, is practically identical with Rule 103 of *The Judicature Ordinance*. I do not feel warranted, in view of what is laid down in *May* v. *Chidley*,[1] and what I conceive to be the effect of the form which I have referred to, in holding that the affidavit here is insufficient. I, therefore, hold that it complies with the Rule.

Order for judgment.

COCKSHUTT v. MILLS.

Sale of goods — Express warranty — Breach of conditions of warranty — Inconsistent parol warranty — Right to rely on implied warranty.

A parol warranty which is inconsistent with a written warranty is invalid.

Where there is an express warranty coupled with conditions an implied warranty or condition to the same effect cannot be set up so as to get rid of the express warranty.

Where an agreement for the purchase of a chattel provides that the purchaser upon complying with certain requirements may return the chattel, compliance by the purchaser with such requirements is a condition precedent to his right to return the chattel.

[WETMORE, J., *8th June and 3rd November, 1905.*]

Statement.

Action by the payer of two "lien notes," against the maker, tried before WETMORE, J., on the 8th June, 1905. The facts were stated by the trial Judge as follows:—

Sometime in March, 1904, the defendant by order in writing requested the plaintiffs to ship to Arcola "One 17 double disc drill," for which he agreed to pay $140. The order specified that it would be subject to the printed warranty and agreement on the back of the order. That warranty and agreement is as follows:—

Statement.

"It is understood that the implement mentioned in this order is warranted to be well made, of good material, and capable of doing good work when properly adjusted and managed. Should the implement not work well, the purchaser must notify the agent from whom he ordered it, and also the Cockshutt Plow Co., Ltd., of Winnipeg, Manitoba, stating wherein it fails, and allow them reasonable time to get it and remedy the defects (if any), the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, etc., when, if it cannot be made to do good work, he shall immediately return it to the place where received, free of charges of any kind, in as good condition as when received, and a new implement will be furnished in its place, or the notes or money given therefor will be refunded."

The Moose Mountain Lumber & Hardware Co. were the agents of the plaintiffs at Arcola, and one Watt was the agent at Arcola of The Moose Mountain Lumber & Hardware Co., and the order in question was taken by him from the defendant. These drills were kept on hand by the last mentioned company, and they did not have to send to Winnipeg, where the plaintiffs' headquarters for the West were situated, for the drill ordered. Some few days after the order was made the defendant came and got his drill and was requested to sign the notes forming the subject matter of this suit. He declined to do so before he had a trial of the machine, and he was informed that the plaintiffs' agents were not in the habit of sending a machine out that way, and thereupon Watt stated that "if the seeder (meaning the disc drill) did not suit the defendant, he could return it and get his notes," and thereupon the defendant signed the notes. The evidence does not establish that there was any agreement on the part of the plaintiffs or any person on their behalf to set up the seeder on defendant's farm or anywhere else. The drill did not work satisfactorily, and the defendant notified Watt to that effect. An expert was sent out, and he did not make it work any better. It was then suggested, and the suggestion was acceded to by the defendant, that if shoes were changed for the discs the machine might work satisfactorily, and the plaintiff's agents agreed to send for these shoes, representing that they would have them there in a couple of days. These shoes were to have come from Winnipeg; they did not arrive, and about a week after

the arrangement to have the shoes exchanged for the discs was made the defendant sent the drill into Arcola, and it was left back of the warehouse of The Moose Mountain Lumber & Hardware Co., but not on their grounds. Neither the last mentioned company or any person on behalf of the plaintiffs ever accepted re-delivery of this seeder. Statement.

J. T. Brown, for the plaintiffs. Argument.

E. L. Elwood, for the defendant.

[*3rd November, 1905.*]

WETMORE, J.—It is claimed that the statement made by Watt to the defendant at the time the notes were signed amounted to a warranty, and that, the seeder not giving satisfaction, the defendant was entitled to return it, and that having done so it was an answer to the action brought on the notes. I may add here that if the defendant was entitled to return the machine, he did return it. I am not satisfied that the statement made by Watt could under any circumstances be construed to be a warranty. I am inclined to think that it was merely a re-echoing of what Watt considered to be the effect of the warranty endorsed on the order. But, assuming that it could be construed into a warranty on the part of Watt, I am of opinion that it would have no binding effect upon the plaintiffs, because it is inconsistent with the warranty endorsed upon the order. There are cases where it has been held that where there is an agreement in writing and a verbal warranty is given, which may be construed as collateral to the written agreement, the warranty would be binding. I refer to such cases as *Morgan* v. *Griffith*,[1] and *De Lassalle* v. *Guildford*.[2] In these cases, however, the parol warranties were not inconsistent with the written agreement. In this case it is quite inconsistent, and therefore, upon a well known principle it cannot be held to alter the written agreement. The warranty endorsed on the order provided that if the implement did not work well the purchaser was to notify the agent from whom he ordered it, and also the Cockshutt Plow Co., in Winnipeg, stating where it failed and allowing them reasonable time to Judgment.

[1] (1871) 40 L. J. Ex. 46; 23 L. T. 783; 19 W. R. 957.
[2] (1901) 2 K. B. 215; 70 L. J. K. B. 533; 49 W. R. 467; 84 L. T. 549; 17 T. L. R. 384.

Judgment.
Wetmore, J.

get it and remedy the defects (if any), and it was only after that was done and the defects could not be remedied that the defendant would be in a position to return the implement and receive back his notes. The defendant did not notify the Cockshutt Plow Co., at Winnipeg, that the machine did not work satisfactorily, and, therefore, has not complied with the precedent condition which would entitle him to return it. That disposes of the defendant's defence, and there must be judgment for the plaintiffs on the cause of action.

An application was made at the conclusion of the trial to amend the statement of defence by setting up that the drill was not reasonably satisfactory for the purpose for which it was purchased. That amendment cannot be allowed, because that would be setting up an implied warranty* that it was not satisfactory for the purpose for which it was sold. That is involved, however, in the express warranty endorsed on the order, and where there is such an express warranty an implied one cannot be set up to the same effect, or, in other words, the defendant cannot be allowed to set up an implied warranty for the purpose of getting rid of the provisions of the express warranty to the same effect contained in his agreement.

It was claimed that there was a waiver of the condition with respect to notifying the company at Winnipeg, by reason of the agent having sent an expert out to examine the drill, and my judgment in *The John Abell Co.* v. *Long,* was referred to in connection with that. In that case, however, the defendant had notified both the agent from whom he purchased the machine and the company, and the only notice taken of the notification was the conduct of the agent, who then did an act which I held to be a waiver of the clause providing for sending an expert out. There must be some object in giving the company notice as well as the agent. In the Abell case the company having been notified did no act whatever. The agent was the only person who acted in that case. In this case the company have not been given an opportunity to act, because no notice was given to them as provided for by the agreement; I feel I must assume that in view of the language of the agreement in question.

* The words "implied warranty" were no doubt used inadvertently for the words "implied condition." T. D. B.

It follows that the counterclaim arising from the unsatisfactory character of the machine must fail also. The defendant took the machine practically on trial and subject to the other conditions contained in his agreement. It was incumbent on him to carry out the conditions of that agreement on his part, and he not having done so he must fail. Judgment. Wetmore, J.

Judgment for plaintiffs.

SCOTT v. DALPHIN.

Criminal law — Notice of appeal — Authority of solicitor's clerk to sign.

A notice of appeal from a decision of a justice of the peace may be signed by an advocate on behalf of the appellant without any express authority, but authority must be expressly shewn where the notice is signed by the advocate's clerk, and unless such authority be shewn the notice is insufficient.

[WETMORE, J., *30th May, 1907.*]

This was an appeal from an order of a Justice of the Peace, dismissing a charge laid by the plaintiff against the defendant. The notice of appeal was signed thus: "M. C. Scott, of Grenfell, by her advocate, B. P. Richardson, per attorney A. Gowler." Statement.

E. A. C. McLorg, for the defendant (respondent), took the preliminary objection that the notice of appeal was insufficient, for want of signature by a person having the necessary authority. Argument.

B. P. Richardson, for the plaintiff (appellant), cited *R.* v. *Justices of Kent,* 42 L. J. M. C. 112.

WETMORE, J.—The Act is silent upon the question as to whom the notice should be signed by; that being so, I think it is quite clear under the authorities that it may be signed by an advocate, but I am of opinion that it cannot be signed by the clerk to the advocate, unless it is expressly shewn that he had authority to sign. In this case no authority for Gowler to sign was proved. *Regina* v. Judgment.

Judgment. Wetmore, J.

Justice of Kent,[1] was cited on behalf of the appellant, but I am of opinion that that case does not bear out his contention. There the notice of appeal was signed by the clerk with the express authority of the appellant.

The consequence is that this appeal fails by reason of the notice not being sufficient. The appellant must pay the respondent's costs of this appeal.

Appeal quashed.

In re GRAY.

Parent and child — Agreement for adoption — Parent's right to custody of child.

As a general rule any agreement whereby a father relinquishes the custody of his child in favour of another is contrary to public policy and, hence, illegal, but the Court will nevertheless give effect to an agreement of adoption when it is clearly for the moral benefit of the child or in some very serious and important respect clearly right that such should be done.

The Court should, however, exercise its powers in this regard with great caution.

[Wetmore, J., *4th June, 1907.*]

Statement.

This was a motion on behalf of Gray for a writ of *habeas corpus* to deliver to him his child Vina Almira Gray, held in the custody of one Balkwill. It was alleged by Balkwill, in opposing the motion, that in March, 1903, Gray's wife refused to live with her husband any longer and left his household and never returned; that at this time Vina Almira was some three years of age, and Gray being unable to satisfactorily care for her, entered into a verbal agreement with Balkwill and his wife (who were childless), for her adoption by them; that the Balkwills accordingly adopted the child, and thereafter continuously fed, clothed, and in all respects cared for her as their own, that she was known as Vina Almira Balkwill; and that she did not know that the Balkwills were not her real parents. It appeared also that the Balkwills were in better circumstances, financially, than was Gray; and that Vina Almira herself, who was brought before the Judge on the hearing of the motion, was unwilling to leave them and return to Gray. Gray on his part de-

[1] 42 L. J. M. C. 112; L. R. 8 Q. B. 305; 21 W. R. 685.

nied the agreement of adoption, and alleged that he was in all respects in a position to properly look after his child. Statement.

W. A. Nisbet, supported the motion. Argument.

T. D. Brown, for Balkwill, *contra*.

WETMORE, J.—I am of opinion that, assuming the statement of the Balkwills to be true, they have no right to the custody of this child. The alleged agreement of adoption was not in writing. I do not know that that, however, makes any difference. In *Roberts* v. *Hall*,[1] Boyd, C., lays down the following: "The general rule is indisputable, that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy." This case of *Roberts* v. *Hall*, as well as later cases, lays down the law, that there are circumstances under which the Courts will give effect to an agreement of adoption, and in which they will give the custody and control of the child to a person other than the parent; and the circumstances under which they will do so are when it is clearly for the moral benefit of the child, and in some cases, when it is for his material interest. In *Regina* v. *Gyngall*,[2] Lord Esher, M.R., said:[3] "The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right;" and then, after quoting from what was laid down by Knight Bruce, V.-C., in *In re Fynn*,[4] he goes on: "That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shown that either the conduct of the parent or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but—I will not say 'essential'—but clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded." I can find nothing in this case which would warrant me in suspending or superseding the right of the parent. The affidavits disclose that he is a man able to support the child, of good moral Judgment.

[1] 1 O. R. 388, at p. 404.
[2] 62 L. J. Q. B. 559; (1893) 2 Q. B. 232; 4 R. 448; 69 L. T. 481; 57 J. P. 773.
[3] At p. 242 of (1893) 2 Q. B.
[4] 2 De G. & S. 457; 13 Jur. 483,

Judgment. Wetmore, J.

character, a regular attendant at Bible class and church services, and causing his children to regularly attend Sunday school, day school and church—he is the father of other children besides Vina Almira. And in so far as his having females in his house to look after the child is concerned, the affidavits disclose that his daughter Cora, a young girl of 17 years of age, keeps house for him, and is competent to look after the child. In addition to that, it is contemplated that an aunt of these children is about to reside with Gray. I can find that there is nothing under such circumstances which would lead me to the conclusion that it would be any more in the moral interest or the material interest of the child to leave her with the Balkwills than it would be to restore her to the parental control.

There will be an order, therefore, for the writ of *habeas corpus* to go.

Order accordingly.

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*HENNENFEST v. MALCHOSE.

Interpleader — Sale of goods — Bill of sale — Consideration — Bills of Sale Ordinance, s. 11 — Validity.

Held, that a bill of sale, the expressed consideration of which was a present payment, but of which the real consideration was partly a present payment and partly a past indebtedness, was void under the Bills of Sale Ordinance, s. 11.

[WETMORE, J., *3rd February, 1906.*]

Statement.

Trial of an interpleader issue. The property, the ownership of which was in question, was a threshing outfit which the sheriff had seized under an execution, issued by the plaintiff, against one Joseph Malchose. The outfit was claimed by Hubert Malchose, a brother of Joseph Malchose. The issue was tried before WETMORE, J., without a jury, at Oxbow.

Argument.

E. L. Elwood, for the plaintiff.

J. D. Murphy, for the defendant.

* Compare *Walley* v. *Harris*, 3 Terr. L. R. 161, which it is submitted is more in accord with the authorities. T. D. B.

Judgment.

Wetmore, J.

WETMORE, J.—The defendant Peter Malchose and Joseph Malchose purchased the threshing outfit in question from Russell & Co., of Massillon, Ohio. This purchase was effected in July, 1902. According to the testimony of the Malchoses, there had been some previous talk about selling this machine to Hubert, but I find that it was never carried out until 5th May, 1904, when the alleged sale, if any, was made. Peter and Joseph remained in actual possession and control of this machine until such alleged sale to Hubert, and they continued to remain in such possession and control thereafter, until it was seized by the sheriff. It was brought into Canada by Joseph and Peter, and was worked and operated there by them.

In the first place, the question arises: What would be the effect of such a transfer in the State of North Dakota? By consent of the advocates of both parties, those parts of the Code of North Dakota bearing upon the subject have been presented to me, and it has been agreed that I may interpret them. Section 5053 of that Code provides that "every sale made by a vendor of personal property in his possession or under his control, and every assignment of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or incumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors, purchasers, or incumbrancers." And section 5055 provides that "in all cases arising under section 3599 or under the provisions of this chapter, the question of fraudulent intent is one of fact, and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." Inasmuch as there was no immediate delivery followed by an actual and continued change of possession, it is presumed, according to the law of North Dakota, that the sale is fraudulent and void as against the creditors of the vendors, Joseph and Peter. Therefore, we have that *prima facie* fact established—that the sale is fraudulent and void as against creditors, and the burden lies

Judgment.
Wetmore, J.

upon the claimant Malchose of establishing that the sale was made in good faith and without intent to delay, hinder, or defraud creditors; that, according to the law of North Dakota, is a question of fact; it is quite clear that at the time this alleged sale was effected Peter and Joseph Malchose were indebted; they were indebted to Russell & Co., upon notes due or maturing due, which represented over $1,000; and the plaintiff's judgment on which the execution issued against Joseph was practically based on those very notes. They were also being pressed for a claim arising out of an injury to a child, through their threshing machine. I have great doubt, however, whether the persons pressing that claim could be called creditors at the time the alleged sale to Hubert was made.

At the trial of this matter Peter, Joseph, and Hubert Malchose gave testimony, and their evidence was intended to establish that at the time of the sale Peter and Joseph were indebted to Hubert, and that he purchased the threshing outfit and a number of horses, for a consideration partly based on such indebtedness, and I may say here that there apparently was no actual change of possession in respect to the horses in so far as the evidence goes, as well as in respect to the threshing outfit. The manner in which these witnesses gave their testimony gave me an unfavourable impression with respect to their *bona fides* in this matter. Many of the features of the transaction were extraordinary, and the witnesses contradicted each other in very many important points. It is not necessary to point them all out, and all I can say is, that I can put no reliance on the testimony they have given, and, therefore, they have failed, and I so find, to break down the *prima facie* presumption created by the Dakota law, by reason of there being no actual and continued change of possession of the property sold.

After all these witnesses had been called, and the case had been presented solely on the bill of sale of the 5th May, 1904, Peter Malchose was recalled and a new case apparently started, based upon a bill of sale, dated 2nd February, 1905, by Peter and Joseph Malchose, to the claimant of the threshing outfit. This document was registered in the Oxbow registration district. It was admitted that it was based on no other consideration than the sale of 5th May, 1904. I hold this bill of sale to be null and void under section 11 of the

Bills of Sales Ordinance, because the consideration for which the same was made is not truly expressed therein. The expressed consideration is a present payment: the real consideration, if any, which I very much doubt, was a payment of cash of $600 on 5th May, 1904, and a past indebtedness due Hubert Malchose, which had accrued prior to 5th May. Judgment. Wetmore, J.

I, therefore, give judgment for plaintiff in this matter, and order that the claimant be barred; plaintiff to pay the sheriff's costs of the interpleader proceedings, including possession money, if any, from the date of the claim to the date of this judgment; and the claimant to pay plaintiff his costs of the interpleader proceedings, including the costs and possession money so ordered to be paid by him to the sheriff, and of the trial of the claim; no action to be brought against the sheriff.

Judgment for plaintiff.

ADOLPH v HILTON AND STEPHENS.

Attachment of debts — Sale of goods on condition — Lien on goods— Onus of proof.

Plaintiffs served a garnishee summons to attach an alleged debt owing by the garnishee to defendant. The garnishee having disputed any liability to defendant, the matter was tried in a summary way, at which trial the only evidence tendered was that of the garnishee himself, who alleged that he had bought goods from defendant, but that such goods he had found on inquiry were not paid for by the defendant and were subject to liens. There was no evidence to establish any valid lien or claim.

Held, per SCOTT, PRENDERGAST, HARVEY AND JOHNSTONE, JJ., affirming the judgment of the trial Judge, that the onus of proof as to the validity of any liens or claims against the goods was on the garnishee.

Held, per STUART, J. (SIFTON, C.J., concurring), that the evidence was sufficient to raise a *bona fide* doubt as to the right of the defendant to sell the goods, and that as the onus of proving his title and his right to sell would, in an action by the defendant for the price of the goods, lie on the defendant, the plaintiffs in the garnishee proceedings could stand in no better position and must prove the defendant's right to sell the goods to the garnishee.

[EN BANC, *16th and 30th April, 1907.*]

Appeal from the judgment of WETMORE, J., without a jury, on the summary trial of the question of the garnishee's liability to the defendant. Statement

Statement. The appeal was argued before SIFTON, C.J., SCOTT, PRENDERGAST, HARVEY, JOHNSTONE, and STUART, JJ.

Argument. *J. T. Brown*, for garnishee (appellant).

E. L. Elwood, for plaintiff (respondent).

[*30th April, 1907.*]

Judgment. SCOTT, J.—This is an appeal by the garnishee from the judgment of WETMORE, J., under Rule 390 of *The Judicature Ordinance*, determining the question of the garnishee's liability.

The only evidence adduced at the hearing was that of the garnishee, who admitted that he had purchased a team, waggon and harness from the judgment debtor for $500, payable $350 in money, and the delivery to the latter of a mare and colt, valued at $175. He claimed, however, that the purchase by him was subject to the condition that he was not to settle for the team until he was satisfied that they were paid for, but upon cross-examination by his own counsel, when asked to state the exact words used by him at the time the agreement was made, his reply was such as would, in my opinion, reasonably lead to the conclusion arrived at by the learned Judge, that no such condition was attached to the agreement.

The garnishee obtained possession of the team, waggon and harness, immediately after the agreement was made and he retained and used them until after the service of the garnishee summons upon him, more than two months afterwards. Shortly after the making of the agreement the judgment debtor obtained possession of the mare and colt. The garnishee contended that the taking possession by him of the team at that time was merely for the purposes of trial, and that he delivered the mare and colt to the judgment debtor merely by way of loan, but the circumstances attending these changes of possession as related by the garnishee were such as would reasonably justify the learned Judge in holding as he did hold, that these changes of possession were not for those purposes, but that they were deliveries of possession in pursuance of the agreement.

After obtaining possession of the team, waggon, and harness, and before the service of the garnishee summons, the garnishee caused inquiries to be made as to whether they had

Judgment.
Scott, J.

been paid for, and as to the existence of any liens upon them, and having been informed that they had not been paid for he spoke to Hilton about it, telling him that there was $450 due on the team, and that he has been requested to give his note therefor. Hilton came to him shortly afterwards and informed him that one Duxbury was going to settle for "those things" by first January.

There is nothing in the evidence to show that anyone had any valid claim of lien upon the articles for purchase-money or otherwise, or even that any lien was claimed by any person.

Even assuming that the agreement was subject to the condition that the garnishee was to be satisfied that the articles were paid for before he should be called upon to pay for them, I doubt whether, under it, Hilton would be required to produce proof of that fact before he would be entitled to sue the garnishee. It appears to me that the only effect of such a condition would be that the latter would be entitled to a reasonable time in which to make such inquiries and ascertain whether any liens existed against the property.

But as the learned Judge has found, and I think properly found, that no such condition was attached to the agreement, the question arises as to the onus of proof in such a proceeding as this, as to the existence or non-existence of any liens upon the property.

I am of opinion that if there existed any such lien or claim the amount of which the garnishee was entitled to deduct from the purchase-money, the onus was on him to prove the fact. It would be incumbent upon him to do so in an action by the judgment debtor against him for the price, and I see no reason why the burthen of proof should be shifted in such a proceeding as this.

In my opinion the appeal should be dismissed with costs.

PRENDERGAST, HARVEY, and JOHNSTONE, JJ., concurred.

STUART, J.—I am of the opinion, with great respect, that the appeal should be allowed and the judgment reversed. The garnishee, Stephens, was the only witness examined, and the account given by him of the transaction was to the effect that he had agreed conditionally with the defendant to purchase the defendant's team and outfit for $500, the con-

Judgment.
Stuart, J.

dition being that he (Stephens) must be satisfied that they were paid for by Hilton before the agreement should have effect at all. The learned trial Judge disbelieved that part of the garnishee's evidence in regard to the condition, holding that the sale was an absolute one. I should hesitate much before venturing to disturb this finding of the trial Judge, but I am of opinion that the case can be disposed of on other grounds without taking that course.

The Sale of Goods Ordinance, section 13, enacts as follows: "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (1) an implied condition on the part of the seller that in the case of a sale he has the right to sell the goods and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass."

Whether the garnishee's story as to the express condition is true or not, this provision applies to the sale in question, and the sale from Hilton to Stephens was, therefore, subject to the implied condition that the former had the right to sell, there being admittedly no circumstances showing a different intention. To my mind there cannot be the slightest doubt that if Hilton had, at the date of the garnishee summons, sued Stephens for the price of the goods and Stephens had told to his advocate the story which he told at the trial, he would, if properly advised, have put a plea on the record that the goods were not Hilton's and he had no right to sell them. There were no pleadings in this case, and even if a formal issue had been directed it would have taken merely the form of an assertion by the plaintiffs and a denial by the garnishee that at the date of the service of the summons there was a debt due or accruing due from the garnishee to the defendant. Under this issue I think the garnishee would have been entitled to raise any defence which he might have raised against Hilton, and he was entitled to do the same at the summary trial upon which the judgment under appeal was given. Whether the garnishee proved the lack of title in Hilton or not, he certainly raised the question quite definitely in the evidence which he gave. He swore that he had received an offer from some stranger to sell the horses to him, and had even received a note to be signed. Whether that was true or not, it was sufficient, I think, as an informal plea. The plaintiffs can stand in no

Judgment.
Stuart, J.

better position than Hilton would have stood, and I am, therefore, of opinion that the question must be dealt with in exactly the same manner as it would have been dealt with if Hilton had sued Stephens and Stephens had pleaded that Hilton had no right to sell. What would have been the position of the parties in that case? Upon whom would the burden of proof have lain? It may be that the burden of proving his title would not, in the first instance, have rested upon Hilton. I would have doubted even on that point, if there had been no delivery of the goods. But what is the position in this case? It is true Stephens took possession of the property, and, as the learned Judge found, delivered a mare and colt in part payment therefor. But supposing Hilton had sued for the balance of the price and Stephens had said, "true, I agreed to buy your goods; true, I have possession of them. But I still have them, and I can return them as they were. You come into Court and admit you have not paid for them. You admit there is $83 still to pay. (I am taking here the trial Judge's version of the evidence, although I am inclined to think the $83 referred to was stated by Hilton to be due, not on the horses, but on the present plaintiffs' debt). You say, again, that some man in Elkhorn has promised to settle for them by the first of January. More than this I have had a man offer to sell them to me myself, and he has sent me a note to sign for them. All this has caused me to doubt very much whether you ever had a right to sell the goods to me at all. I want to be sure the goods are mine before I pay for them." If Stephens had said this in Court when he sued Hilton, what course would the Court have taken? It will be observed that the trial Judge has not found that the statements made by Stephens, at the trial, and which I have just repeated, were untrue. He has practically accepted them, but he held that they do not go far enough. No doubt they do not go far enough to establish conclusively the proposition that Hilton had no right to sell the horses and wagon. But I am of opinion that if it had been an action at the suit of Hilton against Stephens, and this evidence had come out, the Court would have hesitated a good while before giving judgment for Hilton, without requiring, at least, a simple oath from him that the goods were his and he had a right to sell them. In other words, even if the burden of proving title would

Judgment.
Stuart, J.

not have been upon him in the first instance, I think Stephens would in the case supposed have brought out sufficient and cast enough doubt upon his title to shift the burden of proof upon Hilton. It is true Stephens had taken the goods, but, as the evidence shews, he was still in a position to return them and actually did so. Even if he had kept them when sued by Hilton it seems to me he was entitled to say: "I am ready to carry out my bargain, but I have given you grave reason why I doubt your title. You must now, at least, satisfy me that the goods were yours." It is a well known rule of evidence that where a fact is peculiarly within the knowledge of one party the burden of proving it lies upon him. Hilton's title was peculiarly within his own knowledge, and I think in the exercise of a sound discretion the Court would, in the supposed case, have thrown the burden upon him of proving it. That would be the time to settle the matter, once for all, instead of giving judgment for Hilton and leaving Stephens to bring an action for damages in case it should turn out afterwards that the title was defective, of which there was certainly a very grave suspicion. The plaintiffs, as I have said, must stand in the place of Hilton. What Hilton would be bound to prove they were bound to prove. It was argued that Hilton was away, and they could not call him: but that is true also of Stephens, if the burden of proof is thrown on him.

To give judgment for the plaintiffs against Stephens, seems to me, in this case, to be doing nothing less than giving judgment for Hilton against Stephens by accepting Stephens evidence in so far as it is against him, and rejecting what is in his own favour, and by depriving him of the opportunity either to cross-examine Hilton at trial, or to examine him for discovery, both of which means of proof would have been open to him if Hilton had sued him. In this respect the plaintiffs are being placed in a far more favourable position than Hilton would have been in, and this is an additional reason, to my mind, why the burden of proof should not have been placed upon Stephens, inasmuch as his best means of proof are not available to him.

I think, therefore, this Court is at liberty, without at all interfering with the trial Judge's findings as to the terms of the contract, to say that before Stephens should be made to pay for the goods, it was incumbent on the plaintiffs to

show that he had received a good title. The learned trial Judge apparently assumed that the burden was upon Stephens, but in that, with great deference, I cannot but think he was, in the circumstances, mistaken. There being no evidence whatever to show title in Hilton, I am of opinion that the appeal should be allowed and the order varied so as to declare that at the date of the service of the summons there was no debt due or accruing due from the garnishee to the defendant. Judgment. Stuart, J.

SIFTON, C.J., concurred.

Appeal dismissed, SIFTON, C.J., and STUART, J., *dissenting.*

ELLIOTT v. McLEAN AND McLEAN, CLAIMANTS.

Interpleader by sheriff — Execution creditor abandoning — Costs to which sheriff entitled—Rules 432 and 433 of Judicature Ordinance—Claimant's costs.

Rules 432 and 433 of the Judicature Ordinance (C. O. 1898, c. 21), are not intended to alter the law so as to create any liability for sheriff's costs where none existed by law previously. They are intended to limit the liability, where by law such exists, to those fees and expenses set out in Rule 432.

A sheriff who makes a seizure without specific instructions is not entitled to any costs of seizure if the seizure prove abortive.

[WETMORE, J., *30th January, 1901.*]

An interpleader application by a sheriff. Statement.

The sheriff of the Judicial District of Eastern Assiniboia having made seizure of certain cattle under execution, they were all claimed by Margaret McLean, the execution debtor's wife. Shortly after one Mary McLean put in a general claim to "three of the cattle seized." The grounds on which these parties based their claims were not disclosed in the notice of claim given the sheriff. The sheriff interpleaded. On the return of the summons the execution creditor abandoned the seizure, upon ascertaining the grounds for the claimant's claims. Argument was heard on the question of costs.

J. T. Brown, for the sheriff. Argument.

E. A. C. McLorg, for the execution creditor.

E. L. Elwood, for the claimants.

WETMORE, J.—The difficulty I have had in this matter is to determine what, if any, fees for seizure, etc., the sheriff Judgment.

Judgment.
Wetmore, J.

is entitled to or with respect to which I should make an order. My impression had always been that the sheriff was entitled to no fees for such services when he made an abortive seizure; as, for instance, when he seized the goods of the wrong party, unless he was directed to make the very seizure by the execution creditor or his advocate. I must say, however, that a portion of Rules 432 and 433 of *The Judicature Ordinance*,[1] has caused me to have some doubts on the subject. These rules are taken from English Rules of comparatively recent date. Rule 432 provides that if the execution creditor (of course after being served with notice of the claim), admits the title of the claim and gives notice thereof to the sheriff (within the four days after service of notice of the claim), "he shall only be liable to such sheriff or officer for any fees and expenses prior to the receipt of the notice admitting the claim." It would almost seem that this recognized a right in the sheriff in any case to fees and expenses in respect to the seizure, not that it creates a new right, but rather recognizes an existing right. This, however, is quite at variance with decided cases so far as I have been able to discover. In *Cole* v. *Terry*,[2] and *Newman* v. *Merriman*,[3] it was held that a sheriff's officer was not entitled to recover his fees against the attorney who issued the *fi. fa.* for a levy which was ineffectual by reason of the property not being the property of the execution debtor. In *Newman* v. *Merriman*,[3] the officer went out of possession pursuant to an interpleader order, and it was held that the officer was not entitled to recover because he had done nothing in respect of the levy that was beneficial. In *Cabbabe on Interpleader*,[4] I find the following: "With respect to the expenses of the execution, the sheriff's right to his 'poundage, sheriff's fees and the like' depend on the legality of the seizure." I have reached the conclusion that neither these rules nor the English Rules from which they are taken, intend to alter the law. Rule 432 provides that the execution creditor "shall only be liable." That is, that he shall be liable for no more, and I take it that what is intended is that when there is any liability at all on the execution creditor, he shall not be

[1] "The Judicature Ordinance," C. O. 1898, c. 21.
[2] 5 L. T. 347.
[3] 26 L. T. 397; 20 W. R. 370.
[4] 2nd edition at p. 116.

liable for more than what is so specified. It does not intend to create a liability where none existed according to the law as it stood prior to the promulgating of the rule. In this case, so far as the affidavit discloses, the sheriff did not seize the property in question by direction of the plaintiff or his advocate. The sheriff is entitled to possession money from the time of the notice to the execution creditor, and the execution creditor must pay this, as well as the sheriff's costs of the interpleader. Formerly the sheriff was as a rule only entitled to possession money from the date of the application for interpleader. I think, in view of the rules referred to, he is now, when the execution creditor abandons the seizure, entitled to it from the time of the service of the notice of the claim upon such creditor. I do not think the circumstances of this case are such that I can make the claimants pay the costs. The only question is whether they are entitled to any costs. In *Cole* v. *Skinner and Claimant*,[5] I stated I would lay down no hard and fast rule respecting claimants' costs of interpleader when the execution creditor abandoned at the return of the summons after being made acquainted with the nature of the claim. In that case I allowed no costs to the claimants. This case is in some respects similar. The property was seized in the apparent possession of the defendant, and there was no registration to shew title in the claimants as far as I know. The claimants were his wife and his step-daughter, and moreover, the manner in which the claims were presented was of such a character as to leave them very much in need of inquiry. The wife claimed the whole of the property seized, and then the step-daughter claimed a portion of the property claimed by her mother, and even then did that in a very general way as stated. Then the step-daughter claimed as Mary McLean, when as a matter of fact her name was Mary McLeod. Then, although the seizure was made on the 10th December and there was a man nearly all the time on the adjoining land practically in possession and the property was advertised for sale twice, no claim was put in by any person until 29th December. I think if there ever was a case where the execution creditor was justified in delaying his action until he was made aware of the nature of the claim at the return of the Chamber summons, this was one. I will not allow the claimants any costs.

Judgment.

Wetmore, J.

Order accordingly.

[5] Wetmore, J., Nov. 15, 1896. Not reported.

PEASE v. JOHNSTON, ET AL.

Conditional sale of goods — Seizure — Charge for keep of chattels— Lien — Redemption.

A seizure under a "lien note" is an extra-judicial seizure within C. O. 1898 c. 34.

A vendor of chattels under a lien note, who has retaken possession under the powers contained in the note, is not entitled to add to the security or charge against the chattels the expense of keeping and caring for the chattels after seizure.

[WETMORE, J., *18th March, 1905.*]

Statement. On 8th February, 1904, defendant Winters sold to defendant Johnston a team of horses, taking in part payment a lien note thereon, executed by Johnston and one Terryberry. The note provided that Winters might take possession of the property on the happening of certain contingencies and hold the same until the note was paid, or sell the property by public auction or private sale and apply the proceeds in reducing the amount unpaid on the note. This note was duly registered.

On 10th February, 1904, Johnston executed a chattel mortgage on the horses in favour of plaintiff. Johnston did not take good care of the horses, and they became thin and depreciated in value, so that defendant Winters, on 9th May, 1904, for the protection of his claim, retook possession and fed and otherwise properly cared for the horses, with the result that the horses improved in condition and increased in value.

On 21st and 22nd June, 1904, plaintiffs claiming to be entitled to redeem, tendered to Winters $150 and a memorandum in writing for signature, stating that his claim was satisfied, and upon Winters refusing to accept the tender, plaintiff paid the money into Court and brought this action for possession of the property. The action was tried before WETMORE, J., without a jury.

Argument. *E. A. C. McLorg*, for the plaintiff.

J. T. Brown, for the defendant Winters.

Judgment. WETMORE, J.—Winters sets up that the tender made was not sufficient, and that he was entitled to receive not only the

amount secured by the note on its face, with interest, as therein provided, but was also entitled to be made whole for the expense of seizing and taking possession of these horses and for keeping them. He places the amount payable for the seizure at $3 and for the care of the horses at about $1.05 per day, taking into consideration the value of hay and oats at the time, and the value of the labour and time of a man in looking after them. I think the estimate of $3 for taking possession is exorbitant in any circumstances. I think that a reasonable price to pay for taking care of these horses would be not more than 65 cents a day for the pair. I find that the horses could have been put out and cared for at that price.

I have come to the conclusion under the provisions of sec. 2 of ch. 34 and sec. 7 of ch. 44 of the *Consolidated Ordinances* that Winters is not entitled to demand for the seizure and keeping possession of these horses more than is prescribed by the schedule of the Ordinance, ch. 34, above mentioned. I hold the seizure to have been an extra-judicial seizure, and that it is therefore embraced in sec. 2 of ch. 34 referred to. By virtue of sec. 7 of ch. 44, referred to, Winters was bound if he took possession of this property, to retain it in his possession for at least 20 days, and the buyer or any one claiming through him was entitled to redeem the same upon payment of the amount actually due thereon and the actual necessary expenses of taking possession.

The plaintiffs in this case were persons claiming through the buyer, and were entitled to redeem. That was not questioned. But it is very ingeniously argued that, as Winters had a lien upon this property, he was entitled to add to his security, and charge against the property mentioned the expense of caring for these animals caused by such possession because he improved the value of the property. It was urged that the case was the same in principle as the cases decided with respect to mortgages on real property in which it was held that the mortgagee in possession was entitled to add to his security and charge against the land the costs and expenses of permanent improvements made on the land, not to exceed the increase in value of the property by such improvements, and, that being so, the money

Judgment.
Wetmore, J.

so expended for care and keep became due on the goods and were embraced by the words in sec. 7, "the amount actually due thereon." In the first place, no case was cited to me nor can I find any in which it was held that a person holding a lien upon personal property has the right to make such charges against the property; in fact, the decisions are quite the other way, and it is only necessary to refer to the case cited by Winter's advocate at trial, *Soames* v. *British Empire Shipping Co.*[1] I refer to the judgment of Lord Wensleydale. He is reported as follows: "Two principal points have been raised in this case. The first is whether, if a person who has a lien upon any chattel chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has by law a right to add to his lien upon a chattel a charge for keeping it until the debt is paid. That is in truth a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession." This view was practically concurred in by all the members of the Court. As I understand it, what is intended by the party keeping the property for his own benefit is that he is keeping it for the purpose of enforcing his claim, and that he will not be allowed therefore to make such charge. I hold under this decision that Winters, as a lien-holder, had no right at common law to make such a charge, and he certainly has been given no right to do so by the Ordinance. It may be a hardship that he is compelled to hold the property for 20 days and not be paid for it, but the Legislature has made no provision for it, and I cannot do so. Possibly the fact that no such provision has been made by the Legislature may be a *casus omissus*. I may add that I am of opinion that what the Legislature intended by the words "the amount actually due thereon" in sec. 7 of the Ordinance, ch. 44, means the amount actually due on the security, and it is not intended to include any such charges as are suggested by the learned counsel for Winters.

As before stated, I hold the seizure made by Winters to be an extra-judicial seizure, and therefore within sec. 2 of ch. 34.

[1] 8 H. L. 338 at p. 345; 30 L. J. Q. B. 229; 6 Jur. (N.S.) 761; 8 W. R. 707.

Judgment.
Wetmore, J.

That section provides that "no person whomsoever making any seizure under the authority of any chattel mortgage, bill of sale, or any other extra-judicial process," shall charge more for services than the fees therein specified. The section no doubt is somewhat badly expressed. A lien note is not what I would call an extra-judicial process under the strict meaning of the word "process," but it will be observed that the words used are "any other extra-judicial process;" and a lien note is just as much a judicial process as a chattel mortgage or a bill of sale. Evidently the Legislature has seen fit in this section to designate chattel mortgages and bills of sale as judicial processes, and the words "other extra-judicial processes" are intended to embrace any other security under which personal property may be seized, except processes of the Courts. The right to fees and charges for seizures under chattel mortgages has been considered by me in three cases, namely, *McNaughton* v. *Hamilton*,[2] decided on 23rd June, 1893, *Hamilton* v. *Hutchinson*,[2] decided on 4th July, 1894, and *Lynes* v. *Machel*,[2] decided on 2nd July, 1895; and I held that no more or other fees and charges could be enforced for such seizure than those prescribed by the Ordinance then in force, *Revised Ordinances*, ch. 42, which is exactly the same as ch. 34 of the *Consolidated Ordinances*. My reasons for reaching such conclusions are fully set out in these judgments, especially in *McNaughton* v. *Hamilton*.[2] I am still of the same opinion. The only amount, therefore, that Winters had a right to claim with respect to the seizure of these horses is $1 for the seizure. None of the other services provided for by the schedule to the Ordinance, ch. 34, were performed. I am of opinion that the $1.50 per day for man in possession is intended to cover possession by a man other than the lien-holder or mortgagee. It seems to me that that must be so, in view of what was laid down in *Soames* v. *British Empire Shipping Co.*[1] The amount of the principal and interest due upon this note at the time of the tender hereinbefore mentioned was $141.60; to this add $1 for the seizure, which makes the amount then coming to Winters $142.60. Plaintiffs were entitled to redeem the property and have it delivered to them on payment of that amount, and they tendered more, and therefore Winters ought to have given up the property to them.

Judgment for plaintiff.

[2] Not reported.

HUTCHINSON v. TWYFORD.

Practice — Security for costs — Application to extend time.

Where an order is made directing security for costs to be given and providing that in default the action stand dismissed with costs without further order, default in compliance therewith *ipso facto*, puts an end to the action.

[SCOTT, J., *9th January, 1906.*]

Statement. This was an application on behalf of the plaintiff after the expiration of the time allowed for furnishing security for costs to extend the time for furnishing such security.

Argument. *James Short,* for defendant, objected that default having been made under the terms of the order, and such order providing that in such event the action stand dismissed, the suit was at an end.

W. L. Walsh, K.C., for the plaintiff.

Judgment. SCOTT, J.—Following *Whistler* v. *Hancock*,[1] *King* v. *Davenport*,[2] and *Collinson* v. *Jeffrey*,[3] I must hold that, as the security was not given within the time limited by the order in this case, the action was at an end at the expiration of that time, and that any application to vary the terms of the order should have been made before the time expired. *Carter* v. *Stubbs*,[4] seems to me to imply that Order 57, Rule 6, of the English Rules, is not applicable to such a case, but, even if it were, the difference between that Rule and our Rule 548, which is taken from it, is so wide that, in my view, the latter would not authorize the making of the order applied for.

Application refused with costs.

[1] 3 Q. B. D. 83; 47 L. J. Q. B. 152; 37 L. T. 639.
[2] 4 Q. B. D. 402; 48 L. J. Q. B. 606; 27 W. R. 798.
[3] (1896) 1 Ch. 644; 65 L. J. Ch. 375; 74 L. T. 78; 44 W. R. 311.
[4] 6 Q. B. D. 116; 50 L. J. Q. B. 161; 43 L. T. 746; 29 W. R. 132.

BALCOVSKI v. OLSON.

Practice—Security for costs—Affidavit.

An affidavit to support an application for security for costs is sufficient if based on information and belief, and where the source of the information and belief is the copy of the writ of summons served, it is not necessary to produce such copy as an exhibit to the affidavit.

[WETMORE, J., *7th April, 1906.*]

Statement. Motion for security for costs on behalf of the defendants, argued before WETMORE, J., in Chambers.

Argument. *E. A. C. McLorg,* for plaintiffs, objected that the affidavit upon which the summons was based was insufficient on grounds set forth in the judgment.

E. L. Elwood, for defendants.

Judgment. WETMORE, J.—Both the defendants made affidavits upon which the summons was issued, and the contents are exactly similar; they each swear: "I am informed and verily believe that plaintiffs herein reside at Winnipeg, in the province of Manitoba, and out of the jurisdiction of this honourable Court, as appears by the writ of summons issued in this action." It was contended that this affidavit was insufficient, because it did not state positively that the plaintiffs reside out of the jurisdiction, and also that the writ of summons should be produced for the purpose of shewing that it was therein stated that the plaintiffs reside out of the jurisdiction.

For the first contention *Joynes* v. *Collinson*[1] was relied on. In that case the defendant did not in his affidavit shew the source from which his information was derived upon which his belief was founded. *Sandys* v. *Hohler*[2] was cited, and it was stated that that case expressly decided that in order to obtain security for costs it must be positively stated that the plaintiff was resident out of the jurisdiction, and that belief to that effect was insufficient. I have not been able to lay my hands on this case, as it is not in the

[1] 13 M. & W. 558; 2 D. & L. 449; 14 L. J. Ex. 2; 8 Jur. 1010.
[2] 6 Dowl. P. C. 274.

Judgment. Wetmore, J.

library here. I rather infer from the judgment of Parke, B., in *Joynes* v. *Collinson*,[1] that he was under the impression that there should be a positive affidavit. But in *Dowling* v. *Harman*,[3] Alderson, B., seems to question that. He is there reported as saying: "How can a man swear that positively, when he is himself here?" Security was in that case refused, but not on the ground that the affidavit as to residence was not positive—it was refused on another ground. In *Cardwell* v. *Baynes*,[4] the security was allowed upon the affidavit of the defendant stating his information and belief and giving the grounds of such belief, and such grounds were as follows: "That in a notice bearing date the 2nd May instant, purporting to be signed by the above named plaintiff and addressed to the above-named defendant . . . the above-named plaintiff described himself as of Newry, in the Kingdom of Ireland, corn merchant, without describing himself as residing elsewhere." And the Court held that that was sufficient to call for an answer from the plaintiff. The form of summons required by the *Judicature Ordinance*,[5] provides that the residence of the plaintiff shall be set forth, and Rule 9 provides that it shall be indorsed with the address of the plaintiff. Following what was laid down in *Cardwell* v. *Baynes*,[4] I hold that the affidavit in question contains sufficient to call for an answer from plaintiff. It seems to me it is not necessary to produce the writ of summons or a copy of it. All that is necessary for them to state under Rule 295 is the ground upon which their belief is founded, and the defendants have stated that their grounds for belief are founded upon what appears upon the writ, and that must mean what appears upon the writ as to residence. In *Cardwell* v. *Baynes*,[4] the letter upon which the belief of the deponent was founded was not produced nor was a copy of it.

The plaintiffs, however, have asked for the cross-examination of the defendants, and such cross-examination will be ordered.

Order accordingly.

[1] 6 M. & W. 131 at p. 132; 8 Dowl. P. C. 165; 9 L. J. Ex. 53; 4 Jur. 43.
[4] 2 W. R. 525; 2 C. L. R. 777.
[5] Form A to C. O. 1898 c. 21.

MACDONALD v. LOGAN.

Practice—Counterclaim for malicious prosecution—Action for price of goods—Striking out counterclaim.

A defendant can counterclaim against the plaintiff and a third party only when the relief claimed relates to or is connected with the original cause of action.

Where in an action for the price of goods the defendant counterclaimed against the plaintiff and a third party for damages for alleged malicious prosecution, the counterclaim was struck out.

[SCOTT, J., *27th July, 1905.*]

Statement. This was an application by the plaintiff company to exclude the counterclaim filed by the defendant on grounds set forth in the judgment.

The plaintiff's claim in the action was for the price of goods sold and delivered.

Argument. O. M. Biggar, for the plaintiff.

C. F. Newell, for the defendant.

[*27th July, 1905.*]

Judgment. SCOTT, J.—The counterclaim is against the plaintiff company and one Cooper, who is alleged to be its manager at Edmonton, and is a claim for damages for malicious prosecution, it being alleged that Cooper in the course of his employment as such manager falsely, maliciously, and without reasonable and probable cause, swore certain informations against the defendant, charging her with transferring her property and removing part thereof with intent to defraud her creditors or the plaintiff company, one of her creditors.

The only authority I can find for a counterclaim by a defendant against a plaintiff and a person who is not a party to the action, is sub-sec. 3 of sec. 8 of *The Judicature Ordinance*,[1] and that authority is restricted to cases where the relief claimed against the plaintiff and such other person relates to or is connected with the original subject of the cause or matter.

[1] C. O. 1898, c. 21.

Judgment. Scott, J.

Rule 110, which is relied upon by defendant, in my opinion, applies only to a counterclaim against a plaintiff alone, and is, therefore, inapplicable to the present case.

I think it cannot reasonably be concluded that a claim for malicious prosecution relates to or is in any way connected with a claim for goods sold and delivered, and I, therefore, think that the counterclaim in this case should not be allowed. I am also of opinion that, even if such a counterclaim were authorized by the practice, it is one that could not be conveniently disposed of in the action, and that, therefore, the defendant should not be permitted to avail himself of it.

The order will go to strike out the counterclaim with costs of the application to the plaintiff in any event on final taxation.

Order accordingly.

REX v. SINCLAIR.

Criminal Law — Elections — Returning officer — Conspiracy to defraud — Particulars — Amendment — Stated case—Territorial Election Ordinance—C. C. 1892, ss. 394 and 527.

The accused, a returning officer at an election of a member to serve in the Legislative Assembly of Saskatchewan, was charged with: (1) Conspiring to defraud D., a candidate, from being returned as elected; (2) conspiring to defraud the electors by illegally obtaining the return of one T.; (3) conspiring to defraud the public by procuring by illegal means the return of T.

Held, that such charges did not constitute any indictable offence under the Criminal Code, 1892, or at Common Law.

Particulars delivered under C. C. 1892, s. 616, do not form a part of the charge.

The Court has no jurisdiction on the consideration of a "Stated Case" to decide any question not submitted by the Case.

[EN BANC, *10th July, 10th and 19th October, 1906.*]

Statement.

This was a case stated by PRENDERGAST, J., under sec. 743 of *The Criminal Code*, 1892, as follows:—

The accused was tried before me with a jury at Prince Albert, on June 6th, 1906; on a charge purporting to be laid under sec. 394 of *The Criminal Code*, 1892.

The charge as amended read as follows:

"'1. For that he, the said James Sinclair, being the returning officer at an election held on the 13th day of Decem-

Statement.

ber, 1905, to elect a member to represent the electoral division of Prince Albert in the Legislative Assembly of the province of Saskatchewan, did on or about the first day of December, 1905, and on divers other days between the first day of November, 1905, and the 13th day of December, 1905, at or near the city of Prince Albert in the province of Saskatchewan, and within the Judicial District of Saskatchewan, unlawfully conspire with John F. Nelson, Charles J. Sutherland, Rory McLeod, and divers other persons to defraud Samuel James Donaldson, a candidate at the said election, from being returned thereat as member of the said Legislative Assembly for the said electorial division. C. C. 394.'

"'2. For that he, the said James Sinclair, returning officer, at the time and place aforesaid, did unlawfully conspire with John Nelson, Charles J. Sutherland, Rory McLeod, and divers other persons to defraud the electors of the aforesaid electoral division of Prince Albert, by illegally obtaining the return of Peter D. Tyerman, as a member for the said electoral division. C. C. 394.'

"'3. For that he, the said James Sinclair, being the returning officer aforesaid, did at the times and places aforesaid unlawfully conspire, with the said John F. Nelson, J. Sutherland, and Rory McLeod, and divers other persons unknown, by fraudulent means to defraud the public, by procuring by the means aforesaid, Peter David Tyerman, a candidate at the said election, to be illegally returned thereat.'"

The particulars furnished with the charge, were as follows:—

"'1. Conspiring to grant in the said electoral division of Prince Albert subsequent to the issue by the said James Sinclair therein of the election proclamation, and prior to the nomination day at the said election, three additional polling divisions, namely: No. 24, Pine Point. No. 25, Sandy Lake; and No. 26, Bear Lake, without the authority thereto required.'

"'2. Conspiring to appoint deputy returning officers for the said three polling places and to deliver to them the poll books and ballot boxes therefor, before nomination day at the said election, and before receiving any sufficient demand for the opening of the said three polling places.'

Statement.

"'3. Conspiring to cause to be entered in the poll books for the said three polling divisions an erroneous place and date for administering the oath to the said deputy returning officers.'

"'4. Conspiring to represent that the oaths of office had been administered to the said deputy returning officers without the same having been so administered.'

"'5. Conspiring to withhold notice of the granting of the said three polling divisions from the said Samuel James Donaldson until it would be too late for him to be represented thereat.'

"'6. Conspiring to falsely represent that a number of votes were polled at the said three polling places, in favour of Peter David Tyerman, and to count them in favour of the said Peter David Tyerman.'

"'7. Conspiring to falsely fill in, in the poll books of the said three polling divisions, names of certain persons as having voted at the said three polling divisions without such persons having voted thereat.'

"'8. Conspiring to pretend to hold a poll at said three polling divisions without such polls being held.'

"'9. Conspiring to mark ballots as having been cast at the said three polling divisions without such ballots having been cast.'

"The jury found the prisoner guilty, and I suspended passing sentence pending the present reference to the Court *en banc.*"

"The question for the consideration of the Court is as follows: Does the charge read in the light of the particulars furnished therewith, constitute an indictable offence under sec. 394 of *The Criminal Code,* 1892, or under any other section of the said Code?"

The case was argued before SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ., on 10th July, 1906, by

Argument.

Muir, K.C., for the Crown.

N. Mackenzie, for the accused.

And again on 10th October, 1906, by

E. L. Elwood, for the Crown

N. Mackenzie, for the accused.

[*19th October, 1906.*] Judgment.

WETMORE, J.—A suggestion was made at the hearing of this case that the learned Judge should amend it by raising the question whether a common law offence had been set out in the charge. It seemed, however, that counsel for the Crown, at the trial, distinctly asserted that he did not rely upon a common law offence, but placed his right to a conviction entirely under sec. 394 of the Code. Under such circumstances the learned Judge refused to make the suggested amendment, and, in my opinion, was quite right in doing so, because no question with respect to a common law offence could have been submitted to the jury. Wetmore, J.

The first question to be decided is whether the charge with the particulars disclosed an offence under sec. 394 of the Code. I am of opinion that it does not. This section is found in Part XXVIII of the Code, and that part, except some few sections which deal with marks on public stores and unlawful possession of such stores and receiving arms, clothing, etc., from soldiers or seamen, or the like, deals with matters of fraud. Section 394 is the only one that deals with conspiracy to defraud. The other sections deal with fraud of a character which deprives a person of his property or right of property; something of a commercial or of a tangible character. No provision of a substantive character is made for punishment of a fraud such as is alleged to have been in the minds of the conspirators in this case. I cannot bring my mind to the conclusion that Parliament intended to make a conspiracy to defraud in the way suggested by the charge, in this case an offence, and make no provision for a substantive offence of that character.

I am of the opinion that the conspiracy to defraud contemplated by sec. 394 is not to defraud in the sense set out in the charge in this case, read with the light of the particulars set out in the stated case. The conspiracy contemplated by the section is not one to defraud a candidate of his hopes or expectations of being elected or the electors or the public of their hopes or expectations of having a certain candidate elected. The conspiracy intended is one to deprive or defraud "the public or any person" of certain substantial rights, such as its or his property or means or something of a like character. Mr. Crankshaw has set out a number of

Judgment. Wetmore, J.

cases,[1] in which it has been held that the section applies, and these cases illustrate, I think, very fairly what I intend to convey.

The next question for consideration, is whether the charges, in the light of the particulars, constitute an offence under sec. 527 of the Code. That section is as follows: "Every person is guilty of an indictable offence, and liable to seven years imprisonment, who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence."

The matters with respect to which the accused is alleged to have conspired are (1) to defraud Samuel James Donaldson, a candidate at the said election, from being returned thereat as a member of the Legislative Assembly; (2) to defraud the electors of the electoral division by illegally obtaining the return of Peter D. Tyerman, as a member of the said Assembly; and (3) to defraud the public by procuring the return of the said Peter D. Tyerman as such member.

The question arises, are these matters indictable offences? If they are, it would seem to me that the charge would hold under the section of the Code in question; if they are not, it will not hold. It is very clear that these matters do not amount to a statutory offence. I cannot find any statute which creates such matters an indictable offence. Then, are these matters indictable offences at common law? I have looked into this question also and I cannot find that they are. In *Russell on Crimes*,[2] the following is laid down as a definition of cheats and frauds punishable at common law, namely: "the fraudulent obtaining of the property of another by any deceitful and illegal pretence or token (short of felony), which affects or may affect the public." In *R.* v. *Bent*,[3] the accused was charged in two counts with intending fraudulently and deceitfully to contravene the provisions of an Act of Parliament, and to prevent a fair election of councillors from taking place for a ward, and wrongfully and deceitfully wishing to make it appear that A. and B., who were then and there respectively candidates for the office of councillors of and for the said ward, were duly elected

[1] Crankshaw. Criminal Code (2 ed.), p. 432.
[2] 6th Ed. at p. 463.
[3] 2 Car. & K. 179; 1 Den. C. C. 157.

councillors thereof at the election aforesaid for the said ward, falsely, fraudulently, deceitfully, and contrary to, and in fraud of the provisions of the statute aforesaid, in that behalf did personate one J. H., the name J. H. being then on the burgess roll of the said ward, and the defendant then and there as in the name of the said J. H., did give his vote for the said A. B. This was simply a charge of personation. The question therefore arose: "Did these counts contain the description of an offence at common law?" The Court held they did not. In *R.* v. *Hogg*,[4] also for personating a voter at a municipal election, *R.* v. *Dent* was followed, and it was held not to be an indictable offence. I can see no difference so far as the question involved is concerned between a municipal election and an election to the Legislative Assembly. Possibly the acts referred to in the particulars, namely, granting three additional polling divisions subsequent to the issue of the returning officer's proclamation and prior to nomination day, and withholding the notice of granting of the three polling divisions from the candidate Donaldson, may have been a contravention of *The Territorial Election Ordinance*,[5] and if so, it would be punishable under sec. 128 of that Ordinance, but it would not be an indictable offence so as to bring it within the purview of sec. 527 of the Code. Judgment. Wetmore J.

It was contended that paragraph 7 of the particulars alleged an indictable offence under sec. 503 of the Code. That section is as follows: "Everyone is guilty of an indictable offence and liable to seven years' imprisonment who wilfully (*a*) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated; or (*b*) makes or causes to be made any erasure, addition of names or interlineation of names in or upon any writ of election, or any return to a writ of election, or any indenture, poll book, voters' list, certificate affidavit or report, or any document, ballot or paper made, prepared or drawn out according to any law in regard to Dominion, provincial, municipal or civic elections." It seems to me that the furnishing of this particular will not help the Crown, because the original charge is, as I have already stated, namely, conspiring to defraud Donaldson, the electoral division and the public respectively; that is the gravamen of

[4] 6 Car. & P. 176.
[5] C. O. 1898, c. 3.

Judgment. Wetmore, J

the charge, and that will not support a charge under sec. 503, for making or causing to be made an erasure, addition of names or interlineation of names in or upon a poll book. I am of opinion that such particulars cannot be referred to for the purpose of bolstering up a charge under that section. In order to make my meaning more clear I had better refer to the contention of the learned counsel for the Crown. The particulars were furnished under paragraph 2 of sec. 616 of the Code, and sec. 617 provides as follows: "When any such particular as aforesaid is delivered a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular." It was urged that the particulars so furnished by virtue of this provision became part of the charge. I am not of that opinion They became part of the record for the purpose of this trial; that is, to limit the Crown in so far as the charge is concerned to the acts of conspiracy stated in such particulars. The charge itself was not amended; the *trial* only proceeded as if it had been amended.

Assuming paragraph 7 of the particulars to contain a charge under sec. 503 of the Code (and I am not clear that it does), I am satisfied that such particulars could not be lifted up and incorporated in the original charge so as to form a charge under sec. 503 which was not necessarily embraced by the original formal charge as laid. I would very much like to see, if it were done, how a warrant of commitment for enforcing any sentence of imprisonment under sec. 503 would be worded. I must confess that my ingenuity has not been able to conceive how a warrant for that purpose could be made out under such circumstances.

The question was raised whether the several counts in the charges are valid in form. In so far as the first two counts are concerned, because it is not alleged that the conspiracy was made by deceit, falsehood or other fraudulent means; and as to the third count, because the subject matter of the conspiracy was not one in which the general public as such were concerned or with respect to which they could be defrauded, I do not feel called upon to express a decided opinion on these questions. In *R.* v. *Skelton*,[6] a charge was laid under sec. 147

[6] 3 Terr. L. R. 58.

of the Code for making a false solemn declaration; the charge omitted to allege that the false declaration was made "with intent to mislead," it was held that the omission of that allegation did not vitiate the charge. I think if that decision is binding upon this Court as at present constituted we must hold the charge in this case is good in so far as the question I am now discussing is concerned. I have always had doubts whether that case was correctly decided in the respect mentioned, and if I am not bound by that decision I think I would be inclined to hold the charges in this case bad in form. But I very much doubt whether it is open to the Court to decide that question because the learned trial Judge informs me that no question of that sort was raised at the trial, and certainly no such question was pressed before this Court at the first argument at Calgary. It was raised by the members of the Court after the argument there, and therefore the second argument was directed for the purpose of discussing such question. I therefore cannot conceive that it was the intention of the trial Judge to reserve any such question for the opinion of this Court. It is true that the case as stated and the questions submitted are large enough to embrace the points in question, but this Court has repeatedly held that it has no authority, on the consideration of a stated case, to decide any question not submitted by the case, and inasmuch as the learned Judge never intended to submit the question I very much doubt whether we should decide the points raised as to the form or validity of the charge. It is not, however, necessary to express any decided opinion upon the subject, because I have come to the conclusion, for the reasons previously stated in this judgment, that the conviction should be quashed.

Judgment.
Wetmore, J.

SCOTT and HARVEY, JJ., concurred.

NEWLANDS, J.—Sec. 394, to which the charge expressly refers, is headed "Conspiracy to Defraud," and makes everyone guilty who conspires with any other person "by deceit or falsehood or other fraudulent means." These latter words "other fraudulent means," must be restricted in their meaning by the particular words which precede them to other fraudulent means in the nature of deceit and falsehood. That this interpretation is the correct one is, I think,

Judgment. Newlands, J.

also shewn by the last words of the section—"whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence as hereinbefore defined." This definition is given in sec. 358 of the Code as follows: "A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation. Exaggerated commendation or depreciation of the quality of anything is not a false pretence, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact."

The question then is: At what class of offence does sec. 394 aim? Its words are to prevent persons from conspiring "by deceit or falsehood or other fraudulent means to defraud the public or any person ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise, or anything else publicly sold." These words read in the meaning of the word "defraud" as given in the New English Dictionary that it is to deprive a person by fraud of what is his by right either by fraudulently taking or dishonestly withholding it from him, and in the restricted meaning which must be given to "other fraudulent means" can, it seems to me, be interpreted in no other way than that they were intended to prevent persons from conspiring together by false and deceitful means to defraud the public or any person out of their money or property or to cause them to lose money by, in the same manner, affecting the price of anything publicly sold.

Now, the charge in this case is not that he defrauded any person or the public out of any money or property or caused anyone to lose money, but that by unlawful means he prevented Samuel James Donaldson from being elected a member of the Legislative Assembly, which is an offence that, in my opinion, is not contained in this section of the Code.

The first two counts of the charge are also defective by not stating that he conspired "by deceit or falsehood or other fraudulent means." They simply state that he conspired to defraud, the means by which the conspiracy was to be carried out not being stated as required by the section. The meaning of "defraud" being restricted by sec. 394, it is therefore a

necessary ingredient of the offence that it was done in the manner stated by the Code. Judgment. Newlands, J.

I think these two counts cannot be aided by the particulars as the charge itself should contain all the ingredients of the offence as contained in the section of the Code under which it is laid.

This last objection does not apply to the third count, which is bad only because the offence charged in it is not one of the offences contained in that section, and because the public have no rights in this matter out of which they can be defrauded.

If this charge is not an offence under sec. 394, is it an offence under any other section of the Code? Section 527 is the only other section under which in my opinion this charge could come. That section provides that everyone is guilty of an indictable offence who, in any case not thereinbefore provided for, conspires with any person to commit an indictable offence. Are therefore the unlawful acts which Sinclair conspired to do indictable offences? They were not offences known to the common law but were made offences by *The Election Ordinance*,[5] and by sec. 128 of that Ordinance a penalty of $500 or one year's imprisonment, or both, are imposed upon a returning officer for at least some of the offences mentioned in the particulars. In *Couch* v. *Steel*,[7] Lord Campbell, C.J., says: "The penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for the breach of it, except for the particular mode of punishment by a penalty prescribed by the Act. As far as the public wrong is concerned there is no remedy but that prescribed by the Act of Parliament." In *R.* v. *Robinson*,[8] Lord Mansfield said: "The objection to this indictment is that the offence is not indictable because the Act of Parliament has pointed out a particular punishment and a specific mode of recovering the penalty which it inflicts. The rule is certain that when a statute creates a new offence by prohibiting and making un-

[7] 3 El. & Bl. 402 at p. 410; 2 C. L. R. 940; 23 L. J. K. B. 13, 121; 18 Jur. 515; 2 W. R. 170.
[8] 2 Burr. 799; 2 Ld. Ken. 513

Judgment. Newlands, J.

lawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued and no other."

The offences set out in the particulars were not known to the common law before the passing of *The Election Ordinance*,[5] and they are punishable under sec. 128 of that Ordinance by fine or imprisonment, or both; and by sec. 133 these penalties may be recovered on summary conviction before two justices of the peace. Under the above mentioned rule, the particular method of proceeding pointed out by the Ordinance must be followed and no other. They are not therefore indictable offences, and the accused could not be prosecuted for conspiring to commit them under sec. 527 of the Code.

I can see no reason in this case why the accused was not prosecuted under *The Election Ordinance*,[5] because the offences he is alleged to have conspired to commit are certainly offences under that Ordinance; and the Legislature in providing the penalties there prescribed evidently considered them sufficient for the offence. Even if he did not actually commit them, but only conspired to do so, it would be a breach of his oath that he would act faithfully in that capacity without partiality, favor, or affection; and, as that oath is a part of the Ordinance, he would, I think, be guilty of a contravention of its provisions by so conspiring, and, therefore, punishable under section 128. To prosecute a man for conspiring to commit an offence when the charge should be for committing the actual offence itself is strongly condemned by such eminent Judges as Lord Cranworth,[9] Lord Cockburn,[10] and by Meredith, J.A.,[11] in *Rex* v. *Goodfellow*. Lord Cockburn in *R.* v. *Boulton* said: "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the

[9] *Re Rowlands*, 5 Cox C. C. 497.
[10] *R.* v. *Boulton*, 12 Cox C. C. 87.
[11] *R.* v. *Goodfellow*, 11 O. L. R. 359 at p. 365.

possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses. I do not say this merely on my own authority. I have the authority of the late Lord Cranworth, one of the ablest of our Judges, for the view I have expressed. In a case before him, in which the parties had been indicted, not for the offence they had committed, but for conspiracy to commit it, that eminent Judge said that such a course was no doubt legal, but that it would have been more satisfactory if they had been indicted for that which they had done, and not for conspiring to do it." Judgment. Newlands, J.

For the above reasons I think that the questions asked by the learned trial Judge should be answered in the negative.

SIFTON, C.J., concurred with NEWLANDS, J.

PRENDERGAST, J., concurred in the result.

Conviction quashed.

BOOTH v. BEECHEY.

Landlord and tenant — Misrepresentation—Fraud—Damages—Deceit.

In an action by a tenant against his landlord for damages for misrepresentations, made by the landlord in relation to the demised premises prior to the making of the lease, the evidence showed that there was no fraud on the part of the landlord in making the representations. It also appeared that the tenancy had expired before any claim for damages was put forward.

Held, therefore, that the tenant could not recover.

[NEWLANDS, J., *18th December, 1906.*]

Plaintiff brought action to recover against the defendant for goods sold and money lent, to which action the defendant counterclaimed for damages for alleged fraudulent misrepresentations, made by the plaintiff in connection with certain farm lands leased by the plaintiff to the defendant. The misrepresentations alleged were that there were 130 acres of summer-fallowed land and forty acres of breaking ready for crop, that there was a good well, 100 acres fenced for pasture and granary accommodation for 7,000 bushels of grain, while in fact there were only ninety acres of summer- Statement.

Statement. fallowed land and twenty-six acres of breaking, there was no well, no land fenced for pasture, and a granary with accommodations for 4,000 bushels of grain only.

Argument. *Ford Jones*, for plaintiff.

W. M. Martin, for defendant.

Judgment. NEWLANDS, J.—The evidence shews that plaintiff was never on the demised premises before leasing to defendant; that he had purchased the farm from one Scott the autumn before and took it on his representations: that he made the representations to defendant honestly believing that Scott had told him the truth; that defendant went on the land under the lease and remained in possession during the term; that he made no complaint to defendant until after the completion of his term; and that the first notice plaintiff had of the claim for damages was when defendant filed his counterclaim.

In a similar case, *Legge* v. *Croker*,[1] the Lord Chancellor of Ireland (Lord Manners), said: "It appears, that pending the treaty, and before any agreement was concluded (for I find no article had been previously signed), Colonel Legge asked the defendant if the public had any right of way through the grounds: the defendant replied that they had not: and on this representation, it is alleged, Colonel Legge was induced to take the lease. On a subsequent interview it appears that Colonel Legge reduced the minutes of the agreement to writing: and it was agreed that defendant should prepare the lease: he afterwards gave a draft of the lease to the plaintiff, who had it in his possession about ten days, and it appears that neither the draft, nor the lease that was afterwards prepared from it, contains any stipulation or covenant in respect of the right of way. Then arises the question, whether, under the head of fraud or mistake, the defendant is bound to make good the injury the plaintiff has sustained by reason of the right of way being established; and if he is, whether that is to be done by altogether rescinding the contract and cancelling the lease, or by making compensation by way of damages? . . . The case appears to me to bear some resemblance to the sale of a horse where the vendor says he

[1] Ball & B. 506; 12 R. R. 49.

believes the horse to be sound, but will not warrant him; now to make him liable the purchaser must prove the *scienter*, which is the gist of the action, that at the time he asserted he was sound, he knew him to be unsound. So here, Mr. Croker says, that in his opinion, the fact is so, and assigns the reason for that opinion, and when the leases are prepared, this is not followed up by a covenant to that effect. The case would have been materially different if wilful misrepresentation, or omission, had been made out: it is sufficient for me to say they form no part of the case before the Court."

Judgment. Newlands, J.

In *Manson* v. *Thacker*,[2] it was held that a purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance. In delivering judgment, Malins, V.-C., said: "I apprehend that upon every principle the purchaser, having investigated the title and looked at the property, must be taken to have been satisfied. I do not express any opinion as to whether he might not have been entitled to compensation, or even to rescind his contract, if he had discovered the culvert before he completed his purchase. But the purchaser here has had ample opportunity of examining the property, for there was no concealment, and he ought to have discovered this defect before he completed his purchase."

In *Besley* v. *Besley*,[3] there was a claim for damages on account of a misrepresentation of the length of time a lease had to run, made when the parties were entering into a sublease. In delivering judgment, Malins, V.-C., said: "Under these circumstances, what are the rights of the parties? It has been laid down as a rule that a purchaser must be wise in time, and it is quite immaterial whether the rule is applied to a purchaser for valuable consideration or to a lessee, because a lessee is a purchaser for value, and is equally bound to look into the facts connected with the subject of the lease as a purchaser is to look into the matters connected with his purchase. That is clearly shewn by the case of *Legge* v. *Croker*;[1] and Lord St. Leonards, in his *Vendors and Purchasers*, says that a purchaser cannot recover his purchase money after the conveyance is executed, either at law or in equity."

[2] 47 L. J. Ch. 312; 7 Ch. D. 620; 38 L. T. 209; 26 W. R. 604.
[3] 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

Judgment.
Newlands, J.

In *Brownlie* v. *Campbell*,[4] Lord Selborne, L.C., said: "It appears to me that the cases which have been decided in this country and in Ireland are to the same effect. During the course of the argument I called the attention of the learned counsel for the appellant to what was said in the judgment given in this House by Lord Cottenham in the well-known case of *Wilde* v. *Gibson*,[5] and more particularly to the case of *Legge* v. *Croker*,[1] there referred to, apparently with approbation, which was before Lord Manners in Ireland, and which has in some respects a close resemblance to this case. There a positive statement was made that there had been a decision against a right of way. It was *bona fide* believed that there had been such a decision, but when it was examined it was found not to exclude every sort of right of way, but only a certain kind; and one other kind, not excluded by it, remained, and was eventually established. That representation having been believed to be true at the time it was made, and having been made in good faith, it was held, after conveyance, by the Court, that it was no ground for relief in equity, either by way of compensation, or by setting aside the contract."

In *Brett* v. *Clowser*,[6] there was a claim for compensation arising out of a misrepresentation made by an auctioneer in selling leasehold premises upon the faith of which plaintiff bought the lease at a higher rate than he would otherwise have paid. Denman, J., in delivering judgment, said: "The cases in which misrepresentations have been held to afford a defence to a suit for specific performance, or even to entitle the purchaser to specific performance with compensation, or to entitle him to rescind the contract, do not conflict with the doctrine acted upon in *Legge* v. *Croker*.[1] That case appears to me to be identical with the present in principle; for I can see no distinction between the inaccurate denial of the servitude in the one case, and the inaccurate assertion of the quasi-easement in the other."

In *Joliffe* v. *Baker*,[7] the vendor of real property, during the negotiations for the sale, made a representation to the pur-

[4] 5 A. C. 925 at p. 937.
[5] 1 H. L. Cas. 605; 72 Jur. 527.
[6] 5 C. P. D. 376.
[7] 11 Q. B. D. 255; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

Judgment.
Newlands, J.

chaser, *bona fide,* and believing it to be true, that the pieces of land sold contained 3 acres, whereas they contained a less quantity. After completion of the contract and execution of the conveyance, the purchaser sought to recover compensation from the vendor for the false representation. The Court held that after completion such compensation could not be recovered unless there had been fraud. In discussing the question of fraud, A. L. Smith, J., said: "If a man makes a statement knowing it to be untrue, with the intention that another should act upon it, that obviously is fraud; so also if a man recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which, in my opinion, is necessary to maintain an action for damages for deceit. If a man makes a statement which he believes to be true, but which is in fact untrue, even though made with the intention that another should act upon it, this, in my judgment, will not suffice to maintain an action for damages for deceit. In the present case the necessary moral turpitude is wanting. It seems to me to be misleading to talk of legal fraud in such a case as distinguished from moral fraud, and I adopt what was said by Bramwell, L.J., upon the point in *Weir* v. *Bell.*[s] In my judgment fraud, as above described, and nothing short of it, must be established to sustain an action for damages for deceit."

In this case I have found that there was no fraud on the part of the plaintiff in making the representation he did, and, as the contract has been fully completed, and the term for which the premises were let has expired, the defendant cannot recover any compensation on account of these representations being untrue.

Judgment for plaintiff.

[s] 47 L. J. Ex. 704; 3 Ex. D. 238; 38 L. T. 929; 26 W. R. 746.

JONES v. ENGLAND.

Bills of exchange—Promissory note — Endorsement for collection—Action by original payee—Holder—Presentment for payment—Costs.

In an action by the payee of a note against the maker it appeared that the plaintiff had previously endorsed the note to his solicitor for collection, and that the note had never been presented for payment.

Held, that the action was properly brought in the plaintiff's name.

Held, further, that the note not having been presented for payment, the action could not be maintained, but that the defendant was not entitled to costs inasmuch as he had not shown that he had money at the bank where the note was payable from the time the note fell due until the commencement of the action.

[NEWLANDS, J., *31st December, 1906.*]

Statement. Action by the payee of a promissory note against the maker for payment thereof.

Argument. *C. E. D. Wood*, for the defendant, objected that the action could not be maintained because the plaintiff prior to action had endorsed the note to a third party, and because also the note was not presented for payment before action.

M. McCausland, for plaintiff.

Judgment. NEWLANDS, J.—This is an action on a promissory note made by defendant payable to plaintiff. Before suit plaintiff indorsed the note "Pay to the order of M. McCausland," signed the same, and handed it to Mr. McCausland as his solicitor for collection. No value was given by McCausland. On this state of facts defendant contends that plaintiff was not the holder of the note at the commencement of the action.

It seems to me, however, that, as no property in the note passed to McCausland, and as he took it merely as agent for plaintiff, that plaintiff would still be the holder of the note, and, although McCausland could have sued upon it in his own name, he could have done so merely as agent for plaintiff: *Solomon* v. *Bank of England*,[1] *De La Chaumette* v. *Bank of England*.[2] McCausland could not therefore be

[1] 13 East, 135.
[2] 9 B. & C. 208; 7 L. J. (O.S.) (K.B.) 179.

the holder of the note: *Marston* v. *Allan*,[3] *Bradaugh* v. *De Rin*,[4] and therefore plaintiff has the right to recover. Judgment. Newlands, J.

Defendant also contends that, though the note was payable at the Union Bank of Canada at Regina, it was not before action brought presented there for payment (this is not denied by plaintiff), and therefore plaintiff cannot recover. In support of this contention plaintiff cites *Warner* v. *Symon-Kaye Syndicate*,[5] where the Supreme Court of Nova Scotia held that where a note was payable at a particular place it must be presented for payment before action. Mr. Justice Graham, after citing sec. 86 of the *Bills of Exchange Act*, 1890, said: "First, there is the expression 'must,' which is imperative. Here, too, it is dealing with the necessity of presentment in the case of the maker and the maker only, because sub-secs. 2 and 3 deal with the necessity of presentment in order to make the indorser liable. Then the maxim *expressio unius exclusio alterius* is to be applied to this provision: 'But the maker is not discharged by the omission to present the note for payment on the day it matures.' Some effect must be given to a clause like that. The same may be said of this further clause: 'If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable.' The provision as to costs will have effect too, in this as well as in the other case, namely, that, if the maker succeeds on the ground that there has been no presentment proved, the Court may still deprive him of the costs usually given to a successful suitor."

On behalf of defendant there was cited the opinion of Armour, C.J., in *Merchants Bank of Canada* v. *Henderson*,[6] where he said: "The effect of this provision seems to be that it is still necessary in order to charge the indorser that such a note should be presented for payment at the particular place on the day it falls due; but that to charge the maker, it is unnecessary that it should be so presented, but that it may be so presented at any time before action brought, and that an action may be brought upon it against the maker,

[3] 8 M. & W. 494; 11 L. J. Ex. 122.
[4] 39 L. J. C. P. 254; L. R. 5 C. P. 473; 22 L. T. 623; 18 W. R. 931.
[5] (1894) 27 N. S. 340.
[6] 28 O. R. 360 at p. 365.

Judgment. Newlands, J.

even without any presentation at the particular place, at the risk of the plaintiff being obliged to pay the costs of such action in case the maker shall shew that he had the money at the particular place to answer the note when the note fell due and thereafter; but it may be that the effect of his provision is that, as far as the maker of such a promissory note is concerned, the promissory note is to be deemed and taken to be a promise by him to pay generally; but it is unnecessary to determine the effect of this provision in determining this case."

As the decision of the Supreme Court of Nova Scotia is a considered one, and the opinion of Armour, C.J., only an *obiter dictum*, and as I agree with the reasons given by Graham, E.J., I have come to the conclusion that the first mentioned is the correct interpretation of sec. 86, and I therefore think that the objection is fatal and that there must be a judgment for defendant.

As to the question of costs, which by the section are in the discretion of the Court, I think that before defendant should be entitled to costs he should prove that he had the money in the Union Bank of Canada at Regina, the place where the note was payable, from the time the note was due until the commencement of this action, and, as there is no evidence that such was the case, the judgment will be without costs to either party.

Action dismissed without costs.

REX v. CANADIAN PACIFIC RAILWAY COMPANY.

Railway—Prairie Fire Ordinance—Application to Dominion railways—Constitutional law—Jurisdiction of Court to review evidence on certiorari.

The provisions of the Prairie Fires Ordinance respecting the kindling of fire and the letting of fire run at large, apply to the Canadian Pacific Railway Company in the operation of locomotive steam engines upon its railways.

The provisions of sec. 239, ss. 1 and 2 of the Dominion Railway Act, are not in conflict with nor do they supersede the provisions of the Prairie Fires Ordinance.

Section 25 (E) of the Dominion Railway Act does not in the absence of rules and regulations thereunder supersede the Prairie Fires Ordinance.

On *certiorari* the Court cannot examine the evidence either in support of or in disproof of any findings of fact of the Justices, nor for the purpose of finding any additional facts.

[EN BANC, *16th and 30th April, 1907.*]

Statement.

This was a motion by the defendants to make absolute two rules *nisi* for writs of *certiorari* for the purpose of quashing convictions made against them for breach of *The Prairie Fires Ordinance*. The section under which the convictions were made, as amended by sub-section (2) of the Ordinances passed in the first session of 1903, and of sub-section (3) in the second session of the same year, are as follows:

"2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—

(*a*) Kindle a fire and let it run at large on any land not his own property;

shall be guilty of an offence and shall, on summary conviction thereof, be liable to a penalty of not less than $25 and not more than $200, and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.

(2) If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section if in the case of stationary engines the precautions required by section 12 have been complied

Statement. with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke-stack netting and ash-pan netting in good repair and kept closed and in proper place, and in the case of railway engines where the line of railway passes through prairie country, there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway, and not less than two hundred nor more than four hundred feet therefrom a good and sufficient fireguard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire, and there has been no negligence in any other respect.

(3) For the purpose of ploughing any fireguard as in the next preceding sub-section provided, and of freeing from inflammable matter the line between such fireguard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor provided that no unnecessary damage shall be done."

The motion was argued before SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, HARVEY and STUART, JJ.

Argument. *H. A. Robson*, for the motion.

Frank Ford, Deputy Atty.-Gen., and *J. F. Frame*, for the Crown.

[*30th April, 1907.*]

Judgment. HARVEY, J.—Several grounds were taken in the rule but the only ones which were urged or argued on this motion are as follows:

"5. That penalties imposed by a provincial legislature for the kindling of fire and letting it run at large do not apply to railway companies governed by *The Dominion Railway Act* in the operation of locomotive steam engines upon their railways."

"6. That the provisions contained in sub-section (2) of section 2 of *The Prairie Fires Ordinance*, as amended, whereby the penalties provided by the section are not to be imposed 'if in the case of railway or other locomotive engines

Judgment.
Harvey, J.

such engine is equipped with a suitable smoke-stack netting and ash-pan netting in good repair and kept closed and in proper place, and in the case of railway engines where the line of railway passes through a prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway, and not less than two hundred nor more than four hundred feet therefrom a good and sufficient fireguard of ploughed land not less than sixteen feet in width kept free from weeds and inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire,' are in effect requirements of the Legislature of the North West Territories or the Province of Saskatchewan, that such recited precautions be observed under penalty for the want of such observance; that the accused company is a railway company formed, existing and operating under the laws of the Dominion of Canada, and as to such railway companies the provisions of sub-section (2) requiring such precautions have been superseded by and are in conflict with the provisions of *The Railway Act*, 1903, and particularly section 25 thereof, whereby the Board of Railway Commissioners for Canada may make orders and regulations 'with respect to the use of any engine, of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions, and generally, in connection with the railway respecting the construction, use and maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring upon, along or near the right of way of the railway.'"

"7. That the provisions of said amended section 2 regarding fireguards are *ultra vires* as regards railways governed by Dominion Legislation as is the applicant."

The first objection which is numbered (5) is met by the decision of this Court against the same defendants: *The King* v. *The Canadian Pacific Railway Company*,[1] in which a conviction for the same offence was in question. I may also refer to *Grant* v. *Canadian Pacific Railway Company*,[2] in which a somewhat similar Act of the province of New Brunswick was held as applying to the defendant company.

[1] 7 Terr. L. R. 286; 1 W. L. R. 89.
[2] 36 N. B. R. 528.

Judgment.
Harvey, J.

The next objection, however, is that those decisions are not now applicable because the Dominion Parliament has legislated on the subject, and even if the province or the Territories had the right to pass such legislation to affect Dominion railways at the time it was passed it must be taken as being now overborne by the Dominion legislation.

The Dominion legislation referred to, and which is applicable to this case, is contained in paragraph (*e*) of section 25 of *The Railway Act*, 1903, which provides that the Board of Railway Commissioners which is constituted by that Act may make orders and regulations,

"(*e*) With respect to the use on any engine of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions, and, generally, in connection with the railway respecting the construction, use and maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along or near the right of way of the railway;" and section 239 of the same Act, which is in the following terms:

"239. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter."

"2. Whenever damage is caused to crops, lands, fences plantations or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any Court of competent jurisdiction;

"Provided that if it be shewn that the company has used modern and efficient appliances and has not otherwise been guilty of any negligence, the total amount of compensation recoverable under sub-section two of this section, in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed five thousand dollars, and it shall be apportioned amongst the parties who suffered the loss as the Court or Judge may determine."

"3. The company shall have an insurable interest in all such property upon or along its route, for which it may be so held liable, and may procure insurance thereon in its own behalf."

Judgment.
Harvey, J.

It does not appear to me to be necessary for the purposes of this case to consider whether the first sub-section of sec. 239 supersedes any portion of the Ordinance, for it is not in any way in conflict with it, and in the view I take the question of the proper penalty for breach cannot arise having reference to the evidence. It is quite clear from sec. 25 (*e*) that this sub-section is not intended to cover the whole field, and therefore to supersede entirely the provisions of the Ordinance on the subject. It was not strongly urged, nor do I think it can be strongly urged, that the second sub-section of sec. 239 supersedes the provisions of the Ordinance. The provisions of the Act have reference to the civil liability alone, and are for the protection of the individual injured; while the provisions of the Ordinance, as far as in question here, simply impose a penalty for the protection of the public generally.

As to sec. 25 (*e*), it is admitted that no rules and regulations have been made by the Board, and I am quite unable to see how it can be seriously contended that until that is done it is effective legislation by the Dominion.

The point, moreover, appears to be settled by the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*,[3] in which it was held that, notwithstanding the provisions of *The Canada Temperance Act*, the provincial Act of Ontario permitting local prohibition in municipalities was valid, and effective in municipalities in which the provisions of *The Canada Temperance Act* were not adopted, it being also a permissive Act with same object as the Ontario Act. During the course of the argument Lord Watson said:[4] "Where the *Temperance Act* is not adopted there is no law as yet applicable, and there the field is not covered." It appears clear from this authority that the provincial legislation cannot be rendered inoperative by Dominion legislation which is itself inoperative and incomplete.

With regard to the last ground advanced, it is urged that the evidence shews that the conditions of the Ordinance other than those relative to the fireguards existed and that those conditions are such as the provincial legislature has no right to impose. In support of the convictions, however, it is objected that the evidence cannot be looked at to support any such conclusion. As was pointed out in *The King* v.

[3] (1896) A. C. 348.
[4] At p. 354.

Judgment. Harvey, J.

Canadian Pacific Railway Company,[1] under sec. 8 of *The Prairie Fires Ordinance* the burden is on the defendants of establishing the existence of the conditions necessary to relieve them of the penalties imposed by the Ordinance. It is not suggested that in the present cases there is not evidence to shew the contravention of the Ordinance and thus to justify a conviction in the absence of proof of the conditions establishing an exemption, but it is urged that leaving aside the question of the fireguards there is uncontradicted evidence of the existence of all the conditions, and that being uncontradicted it should be believed, and the conclusion therefore arrived at that the decision of the magistrate is founded on the absence of fireguards, the existence of which it is admitted is not proved.

It is in this regard, and in this regard only, that the two convictions differ. In the one where the fire started near Mortlach, admissions were made by the prosecutor "that the engine was inspected and in proper order," and "that the engine was properly operated." In the other case, where the fire started near Ernfold, there were no admissions, and I will consider it first. The authorities do not appear to be entirely clear as to whether the evidence may be looked at on *certiorari*, but I can find no authority that would justify the conclusion that it could be looked at and weighed as would require to be done to support the defendants' contention. This is not an appeal. There is an appeal from such a conviction to a Judge of this Court, and on such an appeal the evidence could be considered and weighed. In *Reg.* v. *Bolton*,[5] a motion to quash on a return to a *certiorari*, Lord Denman, in delivering judgment, said: "All that we can then do, when their (the magistrates') decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law;" and further on: "When a charge has been well laid before a magistrate on its face bringing itself within his jurisdiction he is bound to commence the enquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the enquiry evidence being offered for and against the charge, the proper, or, it may be, the irresistible conclusion to be drawn may be that the offence has not been

[5] 1 Q. B. 66; 4 P. & D. 679; 5 Jur. 1154.

Judgment.
Harvey, J.

committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrate's decision was wrong if he affirms the charge and not to shew that he acted without jurisdiction. . . . Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the enquiry." This case is constantly referred to in the later cases, and was approved and followed by the Privy Council in *The Colonial Bank of Australia* v. *Willan*.[6] In that case it is stated that *Reg.* v. *Bolton*[5] is an example of the authorities which establish that "an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that any such fact however essential has been erroneously found." Likewise it has been held in our own Court in *The Queen* v. *O'Kell*,[7] that the Court cannot review the magistrate's conclusion, and that "the law is clear that where the charge is one that, if true, is within the magistrate's jurisdiction, the finding of the facts by him is conclusive and is not open to review here." In the last mentioned case the evidence was looked at for the purpose of ascertaining whether there was evidence of the offence charged. There are other Canadian cases in which this appears to have been done, but so far as I have been able to find that is the utmost limit to which use may be made of the evidence, certainly in cases where there is an appeal. What is asked here, however, is that the evidence be looked at and a decision given that there is not simply enough evidence for proof of certain facts. It is the same as if the Court were asked on *certiorari* to make a conviction where a dismissal had taken place. This was done in *The King* v. *Reason*.[8] In the report of this case it is stated that "the Court said that the evidence given was entirely and exclusively for the consideration of the

[6] L. R. 5 P. C. 417; 43 L. J. P. C. 39; 30 L. T. 237; 22 W. R. 516.
[7] 1 Terr. L. R. 79.
[8] 6 T. R. 375.

Judgment. Harvey, J.

justices below, who were placed in the situation of a jury, and as they had acquitted the defendant this Court could not substitute themselves in the place of the justices acting as jurymen and convict him. That they could not judge of the credit due to the witnesses whom they did not hear examined. That they could only look to the form of the conviction and see that the party, if convicted, had been convicted by legal evidence, and that they must consider on this return that the magistrates had determined on the facts and not on the law of the case as distinguished from the facts." The last sentence is important because in that case, as in the one before us, it was a question of the magistrate having erred in the law. It appears to me beyond question that on these authorities it is not open to this Court to usurp the functions of the justices and find any facts proved which they do not appear to have found proved.

As to the *Mortlach Case*, it is urged that the admissions leave nothing but the question of the fireguards. Without examining the admissions carefully to determine their purport and without considering their effect, it appears to me that giving the defendants the fullest benefit possible from them there is still the general question of negligence. The meaning of the exemption in sub-sec. 3 appears to be that if there has been no negligence there is no liability, certain illustrations of what will be negligence being stated. What other negligence there might be is for the justices' consideration. If they err the Court of Appeal is the place to have the error corrected, not this Court on such an application as this.

I am not prepared to say what might be other negligence. It would depend on the circumstances of the case and would be determinable on the evidence by the justices. The evidence shews that the fire started in the defendants' right of way in the grass which had not been burned or otherwise cleared away. Apart from the provisions of sub-sec. 1 of sec. 239 of *The Railway Act*, 1903, above quoted, the case of *Rainville* v. *Grand Trunk Railway Company*,[9] shews that the presence of this grass for one thing might be considered as negligence, even though the provisions of the Ordinance regarding its removal were invalid. It is said that being

[9] 25 A. R. affirmed 29 S. C. R. 201

specially mentioned by the Ordinance it is not *other* negligence. To give such a meaning would not in my opinion give effect to the spirit of the Ordinance and would not be justified, the intention of the exemption being, as I have indicated, the absence of all negligence. It appears to me, therefore, that in the *Mortlach Case*, as in the *Ernfold Case*, it is not competent for this Court to say that the justices founded their decision on the view that the provisions of the Ordinance respecting fireguards were valid and binding, but even if they did in my opinion that would be no ground for quashing the convictions, for it appears to me that they are without doubt within the competence of the Legislature to pass as applicable to Dominion railways.

That the Ordinance in question was passed by the Legislature of the North-West Territories does not appear to me to be material. By virtue of *The Saskatchewan Act* it has become provincial law, and the power of the Territorial Legislature was, so far as the matter under consideration is concerned, practically identical with that of a provincial legislature.

The scheme of division of legislative power under *The British North America Act* has been considered by the Judicial Committee in numerous cases, and, from the decisions, the following general opinion appears to be deducible, namely: That in the absence of Dominion legislation on matters that are not of the essence of the subject-matters exclusively reserved to the Dominion Parliament by sec. 91, but are merely ancillary thereto, the province may legislate if the method of treatment in such legislation is to make it come properly within any of the classes of legislation reserved to the province by sec. 92. In the late Privy Council case decided last year, *Grand Trunk Railway* v. *Attorney-General for Canada*,[10] Lord Dunedin, who delivered the judgment, said: "A comparison of two cases decided in the year 1894, namely, *Attorney-General of Ontario* v. *Attorney-General of Canada*,[11] and *Tennant* v. *Union Bank of Canada*,[12] seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may

[10] 76 L. J. P. C. 23; (1907) A. C. 65; 95 L. T. 631; 23 T. L. R. 40.
[11] (1894) A. C. 189.
[12] (1894) A. C. 31.

Judgment.
Harvey, J.

overlap, in which case neither legislation will be *ultra vires* if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." In the former of the two cases mentioned *The Provincial Assignments Act* was held *intra vires*, and, referring to it in *Huson* v. *The Township of South Norwich*,[13] Taschereau, J., says: "It results from that case, if I do not misunderstand it, that there are under *The British North America Act* subjects that may be dealt with by both legislative powers, and that the provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the provincial legislatures, if it fall within any of the classes of subjects enumerated in sec. 92." The validity of the Ordinance under consideration is not questioned otherwise than in its application to Dominion railways, and therefore it is conceded that it falls within one or more of the classes of subjects enumerated in sec. 92, and the only question then to consider is whether it deals with matters essential or only ancillary to Dominion railway legislation. As I have pointed out before, there is no effective Dominion legislation with which it can be said to be in conflict. The fact that ever since Confederation there has been legislation by the Dominion covering the field of Dominion railways without any provisions upon the subject of the provisions of the Ordinance appears to me a very strong argument in favour of the view that it cannot be deemed to be essential to such railway legislation, and that therefor it is *inter vires* so long as the field is clear.

The defendants rely very strongly on the case of *Madden* v. *Nelson and Fort Sheppard Railway Company*,[14] in which it was decided that an Act of the Province of British Columbia, which declared that railway companies within the authority of the Parliament of Canada which did not fence their right of way should be liable for damage for cattle killed or injured by their trains, was *ultra vires*. It does not appear to me that that case governs the present one at all. It is not denied that if the Dominion had as part of its railway legislation made provisions for protection from prairie fires in

[13] 24 S. C. R. 145, at p. 155.
[14] (1899) A. C. 626.

conflict with the provisions of the Ordinance, or covering the field, the provisions would thereupon cease to be applicable to Dominion railways. In the *Madden Case,* at the time the Act thereby declared *ultra vires* was passed, there was, as part of *The Dominion Railway Act of 1888,* provision for the erection of fences, and other safeguards for the protection of animals, and for the liability for failure to comply with such provisions. What the province attempted to do, and what in the preamble to the Act it showed it intended to do, was to impose a further obligation and liability on the same subject. This it clearly had no right to do, the obligation and liability having been fixed by the Dominion legislation, and the field of legislation having been thereby occupied. As it is stated in the judgment at page 628, "It would have been impossible as it appears to their Lordships to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them, and is, therefore, manifestly *ultra vires.*" The case of *The Canadian Pacific Railway Company* v. *Notre Dame de Bonsecours,*[15] decided a couple of months earlier, seems to me to be much more applicable. It is perfectly clear from that and from many other cases that it is no objection to the vadidity of a provincial law, that it imposes burdens on railway or other corporations, which are subject only to the Dominion. In the judgment of Lord Watson, it is stated:[16] "*The British North America Act,* whilst it gives the legislative control of the appellants' railway *qua* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the Provincial Legislatures. Accordingly the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia,* reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the 'railway legislation,' strictly so-called, applicable to those

[15] (1899) A. C. 367.
[16] At p. 372.

Judgment.
Harvey, J.

lines which were placed under its charge should belong to the Dominion Parliament. It, therefore, appears to their Lordships, that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec."

Now it appears to me that in the case before us all that is required is the removal of the combustible matter on the surface for the same purpose as was in view in that case, namely, to prevent injury to other property, and that it does not in any way attempt to interfere with the structure of the authorized works of the railway. The primary purpose of the ploughing is to permit the space between to be burned without danger to the property beyond. If the provisions are all complied with there will be a space of a certain width, through which the track runs, deemed to be wide enough to catch all sparks emitted from the engines which will be entirely free from any matter of a combustible nature and whereby the danger of such sparks starting a fire will be removed.

I cannot see how it can be said that the ploughing interferes with the works of the railway. It does not in any way affect the track or the right of way or other property of the company, and so is quite different from a fence on or bounding the right of way. It does not in any way interfere with the management of the company's business as a railway. It simply is something which the company may do on other people's property on which it is authorized to go for that purpose, and is entirely independent of its business as a railway company.

I am of opinion, therefore, that until the Dominion Parliament occupies the field, the Ordinance in question applies to Dominion railways.

As in my view none of the defendants' grounds can be sustained, the rules should be discharged.

SIFTON, C.J., PRENDERGAST, NEWLANDS, and STUART, JJ., concurred. Judgment. Wetmore, J.

WETMORE, J.—I agree with the conclusion arrived at by my brother Harvey, in the *Ernfold Case*. Sub-section (2) of sec. 2 of *The Prairie Fires Ordinance*, ch. 87 of *The Consolidated Ordinances*, as amended by ch. 25 of the first session of 1903, cast the burden of proving that the engine and apparatus were in proper repair and properly operated, upon the company. If it failed to satisfy the Justice of that fact it was his duty to impose a penalty. We are unable to assume in this case that the company did establish to the satisfaction of the Justice that the engine and apparatus were in good repair and properly operated. I am of opinion that the authorities fully bear out the proposition that where the question is one entirely of fact this Court cannot by *certiorari* quash the conviction; at any rate, unless there is a total absence of any evidence to warrant a conviction.

This Court held in *Rex* v. *The Canadian Pacific Railway Company*,[1] that the Ordinance was *intra vires* in requiring that the company's engines should be equipped in the manner prescribed and the netting kept closed and in the proper place. That is the law as we understood it at the time that decision was given and in my opinion it is the law yet. I can find no legislation, either in the *Dominion Railway Act* or in any regulation made under its provisions, which lays down a different law, and until some legislation or duly authorized regulation is made by some proper authority that law as interpreted by the case cited, still remains in force. I am, therefore, of opinion that the rule in this case should be discharged.

As to the *Mortlach Case*, however, I regret that I cannot agree with my brother Harvey. In *The King* v. *The Canadian Pacific Railway Company*[1] before cited, I expressed a doubt whether the duty cast upon the company to make fireguards was within the power of the local Legislature, and I have come to the conclusion that these doubts were well-founded. Sub-section (2), before referred to, of the Ordinance in question, has to my mind two provisions, so far as railways are concerned. First, there is the provision where fire is caused by the escape of sparks or igneous matter from an engine, and such engine is not equipped with suitable

Judgment. Wetmore, J.

smoke-stack and appliances in good repair and kept closed and in proper place; second, in cases where the line of railway passes through prairie country a good and sufficient fireguard is not made and kept free from weeds and other inflammable matter, and the space between the fireguard and line of railway kept burned or otherwise freed from the danger of spreading fire, and there is no negligence in any other respect.

In this case it was admitted on behalf of the prosecution that the engine was inspected and in proper order, and that it was properly operated. I take the fair meaning of that to be that the prosecution did not purpose to base this case upon the engine not being properly equipped or upon its being improperly operated in so far as the provisions in the sub-section in question were concerned. They practically abandoned any case in so far as those questions were concerned. I take that to be a reasonable construction to put upon the admissions referred to. This brings us to the question of the fireguard. To my mind it just narrows itself down to this: Had the local Legislature power to compel the company to plough a fireguard practically the whole length of its distance through prairie country, or take the consequences of being liable to a penalty if it did not do so, and a fire occurred from sparks from one of its engines? The burning of weeds between the fireguard and the line of railway and keeping it freed from weeds and other inflammable matter is merely an incidental matter. Everybody who is acquainted with this country knows that in the fall of the year the prairie grass is very inflammable, and that any attempt to burn off the grass, etc., on the railway right of way without first ploughing a fireguard would almost inevitably result in the fire running at large over the whole country. The fireguard provided for by the Ordinance in the nature of things intended to prevent the fire, which was to be lit either to burn off the grass or the weeds between it and the railway, from escaping. The language of the sub-section indicates that the fireguard is to be ploughed first, because it provides that the space "between such fireguard and such line of railway is to be kept burned or otherwise freed from the danger of spreading fire." I am of opinion that such legislation was not within the power of the local Legislature,

Judgment.
Wetmore, J.

because I cannot distinguish this case on principle from *Madden* v. *Nelson and Fort Sheppard Railway Company*.[14] In *The Canadian Pacific Railway Company* v. *Notre Dame de Bonsecours*,[15] Lord Watson lays down the following:[17] "It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If on the other hand the enactment had no reference to the structure of a ditch, but provided that in the event of its becoming choked with silt or rubbish so as to cause overflow and injury to other property in the parish it should be thoroughly cleaned out by the appellant company, then the enactment would in their Lordships' opinion be a piece of municipal legislation competent to the Legislature of Quebec." Now, the legislation in this case does not deal merely with the proper looking after some work already constructed of a character similar or somewhat similar to a ditch, but the Legislature calls upon them actually to construct a fireguard, and I think that this case is within what was laid down by Lord Watson in the last-mentioned case, as not being within the power of the local Legislature. I think in the *Mortlach Case* the rule should be made absolute for a *certiorari*.

Rules discharged.

[17] At p. 373.

NELSON v. BREWSTER.

Practice and procedure—Action to realize Mechanics' Lien—Amendment of statement of claim.

The plaintiff, a lien holder, brought action within the ninety-day period allowed by the Ordinance, asking for a personal judgment for the amount for which the lien was filed. Subsequently and after the expiration of the ninety-day period the plaintiff, without leave, amended his statement of claim by claiming to realize the lien and by adding the necessary averments to support such a claim. The defendant not appearing, an order was made for judgment in accordance with the amended claim. On application by defendant to set aside this order,

Held, (following United States authorities) that the amendment to the statement of claim was properly made.

[SCOTT, J., *4th April, 1906.*]

Statement. This was an application on behalf of the defendant, Brewster, to set aside an order for judgment in the plaintiff's favor under the circumstances set forth in the head-note. The ground of the application was that the amendment to the statement of claim was improper and should not be allowed inasmuch as it introduced a new cause of action after the time limited by law for bringing such an action had expired. The motion was argued before SCOTT, J., in Chambers.

Argument. *W. Gariepy*, supported the motion.

E. T. Bishop, for plaintiff, *contra.*

Judgment. SCOTT, J.—The authorities cited upon the argument, both in support of and against this contention, do not appear to me to bear strongly upon it.

The Ontario cases have no bearing upon it, as they are decisions upon an amendment to the *Ontario Mechanics' Lien Act*, which has not been enacted here. The only Canadian case I can find bearing upon the question is *Davidson* v. *Campbell*,[1] in which it was held that a plaintiff could not in such an action introduce by amendment an entirely new cause of action after the expiration of the period for commencing his suit, and rely upon the original bill and certificate of *lis pendens*, but that formal amendments in support of the case originally sought to be made should be permitted.

[1] 5 Man. L. R. 250.

Judgment.

Scott, J.

There are, however, a number of American cases which are directly in point.

In *Phillips on Mechanics' Liens* (Ed. of 1874), the following is stated at p. 576: "The amendment of a complaint for work and labour and materials furnished, demanding a money judgment, by adding thereto the requisite averments and asking judgment of lien under a mechanics' lien law, has been held not to be an amendment which changes the cause of action, and is therefore allowable under a statute which allows amendments in the same cause of action. The amendment only changes the remedy, and not 'the cause of action,' or, in other words, the labour performed and materials furnished were the same whether the plaintiff proceeded under the original or amended complaint." *Lackner* v. *Turnbull*,[2] is referred to by the author as supporting this view. The same view is expressed in the *Encyclopædia of Pleading and Practice*,[3] and that case and others are cited as supporting it.

I cannot find that those decisions have ever been dissented from or questioned.

I find that in the Ontario and Manitoba cases respecting mechanics' liens the decisions of the Courts in the United States are frequently referred to and usually followed. In the absence of any authority in our own Courts upon the question arising upon this application, I see no reason why I should not adopt the principle laid down in the authorities I have referred to.

Application dismissed with costs.

[2] 7 Wisconsin 105.
[3] Vol. XIII. at p. 1010.

BELL ENGINE AND THRESHER CO. v. BRUCE.

Practice—Appearance—Notice of appearance.

Notice of appearance is not necessary under Judicature Ordinance C. O. 1898, c. 21.

[WETMORE, J., *May 25th, 1907.*]

Statement. Motion for security for costs on behalf of the defendant. The material filed disclosed that the defendant had entered an appearance with the clerk of the Court but had not served any notice thereof.

Argument. *T. D. Brown,* for plaintiffs, objected that notice of appearance not having been given there was no proper appearance and that the motion could not be heard.

E. L. Elwood, for defendant.

Judgment. WETMORE, J.—In *Fraser & Co.* v. *Dowad,* decided by me to-day, I expressed the opinion that it was necessary to enter an appearance before making application for security for costs. The question now is whether an appearance was entered in this case. Rule 80 of the *Judicature Ordinance*[2] provides as follows: "Within the time limited for appearance by the writ of summons, or afterwards, before the plaintiff has taken any further step in the cause, if the defendant, or, if there be more than one defendant in the action, a defendant, desires to contest the plaintiff's claim and defend the action, he shall by himself or his advocate enter an appearance in the office of the clerk whence the writ of summons issued." That is the only provision in the Ordinance respecting the entering of appearance which affects the question under discussion. The English practice respecting the entering of appearance is governed by Order XII. of the English Rules of Court. Rules 8 and 9 of that Order contain all the provisions necessary for discussion in deciding the question now before me. It will be observed that the Ordinance contains no provision for service of notice of appearance. Section 21 of the Judicature Ordinance provides that "subject to the provisions of the Ordinance and the Rules of Court, the practice and procedure existing in the Supreme Court of Judica-

Judgment.
Wetmore, J.

ture in England on the first day of January, 1898, shall, as nearly as possible, be followed in all causes, matters, and proceedings." The question, therefore, is, whether, under that section, Rule 9 of Order XII. is (in so far as it is applicable) applicable to the practice here. I find it sometimes extremely difficult to decide whether a rule of practice which is in force in England is applicable here by virtue of the section of the Ordinance which I have cited. The Ordinance very frequently passes over a section which would appear to be quite applicable, and there seems to be no reason why it was not included in the Ordinance. In these cases it is perhaps not difficult, as a rule, to reach a conclusion. In a case like the present, however, it is more difficult. The framers of the Ordinance in providing for the entering of appearance have somewhat departed from the language of the English Rule 8. It will be observed that by the English Rule "a defendant should enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing," and then it specifies when it is to be dated and what it shall contain. Rule 80 of the Ordinance provides that "if the defendant desires to contest the plaintiff's claim and defend the action, he shall by himself or his advocate enter an appearance in the office of the clerk." These provisions in the Ordinance with respect to appearance appear in the first *Judicature Ordinance* of 1886, secs. 52 and 53, and what is equivalent to Rule 10 of the English Rules is contained in section 53 of the last mentioned Ordinance and Rule 81 of the present *Judicature Ordinance*.[2] That is, the framers of all the *Judicature Ordinances* existing in this country, while they have provided for the entering of appearance with the clerk, have left out the section providing for notice, which is the following section, but retained the provisions of the next following section of the English Rules. And for the reasons stated it is somewhat difficult to arrive at just what they intended. This I am satisfied of, that whatever was intended by the Ordinance of 1886 must be held as the intention under the present *Judicature Ordinance*.

In view of the manner in which Rule 9 of the English Rules is framed, and the state of this country as it was in 1886, I have come to the conclusion that it was the intention not to embody the provisions in the Rules for giving notice of appearance in our practice. Rule 8 provides for a duplicate

Judgment. Wetmore, J.

memorandum being delivered to the officer, and for that memorandum being sealed and returned to the party entering the appearance, and Rule 9 provides that the notice of appearance, no matter how it is served or delivered, is to be accompanied with this sealed duplicate memorandum. It seems to me that it was not intended to incorporate these provisions into the practice in this country, and I do not see my way clear to say that one part of Rule 9 shall apply and the other shall not. I have, therefore, come to the conclusion that it is not necessary to serve a notice of appearance on the opposite party. If the plaintiff attends at the clerk's office to sign judgment for default of appearance, he will find, if the defendant has appeared, the appearance entered, and that will prevent his entering judgment. Consequently the appearance was properly entered in this case.

Objection overruled.

OSMENT v. THE TOWN OF INDIAN HEAD.

Assessment and taxation — Municipal law — School taxes — General municipal taxes—Exemption.

An exemption from "general municipal taxation" does not include school taxes under The Municipal Ordinance.

[EN BANC, *15th, 30th April, 1907.*]

Statement.

Defendants by by-law exempted certain property of plaintiff "from general municipal taxation and from payment of said taxes." Subsequently, and while the by-law was in full force, defendants assessed the property for school purposes. Plaintiff appealed to the Court of Revision, from whose decision the matter came before NEWLANDS, J., by way of a case stated. NEWLANDS, J., on the authority of *C. P. R.* v. *Winnipeg*,[1] held that the exemption covered school taxes, and from that judgment this appeal was taken by the town. The appeal was argued before SIFTON, C.J., SCOTT, PRENDERGAST, HARVEY, STUART and JOHNSTONE, JJ.

Argument.

F. W. G. Haultain, K.C., for (defendant) appellant.

A. L. Gordon, for (plaintiff) respondent.

[1] 30 S. C. R. 588.

The judgment of the Court was delivered by

Judgment.
Harvey, J.

[*30th April, 1907.*]

HARVEY, J.—It was objected by the respondent that an appeal does not lie because paragraph 1 of section 138 of *The Municipal Ordinance* refers to "the person appealing." The word "person" it is contended not covering the council. It seems to have been overlooked, however, that the expression "the person appealing" is used with reference to an appeal to a Judge not to an appeal from him, and paragraph 12 of the same section, which provides that "the decision and judgment of the Judge shall be final and conclusive in every case adjudicated upon and can only be appealed from by a unanimous vote of the council," is quite wide enough to include an appeal by the council, a unanimous vote having been passed, as was done in this case.

I am of opinion that the case before us is distinguishable from *C. P. R.* v. *Winnipeg*,[1] the terms of the exemption being quite different. The terms used in the by-law in that case were "free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind." The expression before us is not of the same comprehensive character, and it is an expression which is used in the *Municipal Ordinance* in different places, and where so used excludes school taxes.

In section 139 we find the words "general, school, special and debentures rates," in section 143 "improvement tax, general fund, local fund and school rates," and in section 144, "general fund, debenture fund, school fund, statute labour fund."

The council when passing the by-law must be deemed to have had knowledge of the provisions of the Ordinance, and when they used the term "general taxation" and "said (meaning general) taxes" it is reasonable to conclude that they used them with the meaning which the *Municipal Ordinance* gives to them, and with that meaning they did not include school taxation and school taxes, and that it was not the intention to exempt the building from the burden of school taxes. The definition of "municipal taxes" given in the *Winnipeg Case*, at p. 564, is as follows: "The widest defi-

Judgment. Harvey, J.

nition I could give to the expression 'municipal taxes' would be that they are taxes imposed by the governing body of a municipality for the purposes of the municipality." Under this definition the school taxes here would not be municipal taxes, for they are not imposed for the purposes of the municipality but for the purposes of the school district, which in territorial extent and composition is quite different and distinct for the municipality.

In the *Winnipeg Case* the Legislature had ratified the by-law so that there was no question of the power of the municipality to exempt in so far as the province could give that power. The present case differs in that respect also, and in my opinion this difference is important.

As stated above, the school district comprises lands outside the municipality. By sub-section 2 of section 89 of *The School Assessment Ordinance* the area outside of the municipality is deemed for the purpose of raising the school taxes to be a part of the municipality, and by sub-section 1 of that section and section 167 of *The Municipal Ordinance* the municipality is required to raise the school taxes not from property liable to assessment for municipal purposes, but from "the property liable to assessment in such district for ordinary school purposes."

If the municipality were allowed to exempt property from taxation for school purposes then the property outside the municipality, but within the school district, would require to pay a greater proportion of the school taxes, and if the municipality could exempt from school taxes with other taxes it appears to me that it could exempt from school taxes alone, and thereby if it saw fit throw the whole burden of the school taxes on the property of the district outside the municipality, the owners of which property of course have no voice in the creation of the exemption.

In the absence of express legislative authority, which it is not suggested exists here, I am clearly of opinion that no such power exists in the municipality. Numerous difficulties present themselves also by reason of the actual or possible existence of public and separate school districts, together within or partly within the municipality, but I do not consider it necessary for me to go into them in view of my conclusion on the other point.

For the reasons mentioned, I am of opinion that the exemption of the by-law does not exempt from the liability to assessment for school purposes, and the appeal should be allowed with costs, and the judgment of my brother Newlands reversed, and the assessment confirmed. Judgment. Harvey, J.

Appeal allowed with costs.

McGILLIVRAY v. CITY OF MOOSE JAW.

Highway—Negligence—Municipal law—Misfeasance or nonfeasance—Liability of Municipality for negligence of contractor—Contributory negligence—Livery-stable keeper's liability for negligence of hirers of rigs—Remoteness of damage—Evidence.

The city of Moosejaw employed a contractor to construct and instal a sewer along one of the principal streets of the city, where the public were in the habit of passing. The plaintiff, a livery stable keeper, had hired a team and rig to four men who drove along the street with the result that one horse was killed and the other horse, together with the rig and harness, were damaged by falling into an open ditch.

Held, per curiam, that the city was bound to see that proper precautions were taken by the contractor to guard against danger, and the accident having been caused by the negligence of the contractors, the city was liable.

Held, also, that it is misfeasance on the part of a municipality to attempt to do work and do the same negligently so that damage is caused thereby.

Held, also, that where the question is not one of the veracity of witnesses, but one of the proper inference to be drawn from truthful evidence, an appellate Court is in as good position as the original tribunal to draw such inferences, and is at liberty to draw inferences so as to reach a conclusion different from that of the trial Judge.

Per STUART, J., that on the evidence the drivers of the horses were guilty of contributory negligence, but that such negligence could not be imputed to the plaintiff.

[EN BANC, *11th, 30th April, 1907.*]

Appeal by plaintiff from the decision of the trial Judge dismissing plaintiff's action with costs, argued before the Court *en banc*, consisting of SIFTON, C.J., WETMORE, SCOTT, HARVEY and STUART, JJ. Statement.

G. E. Taylor, for plaintiff (appellant). Argument.

C. E. Armstrong, for defendant (respondent).

[*30th April, 1907.*]

WETMORE, J.—This is an action for the recovery of damages alleged to have been caused to the plaintiff by the Judgment.

Judgment.
Wetmore, J.

defendants, or contractors under them, in not properly guarding a ditch which they had dug in one of the defendants' streets. Messrs. Dobson, Jackson & Fry had contracted with the defendants to construct and instal a sewer in the city of Moose Jaw. The defendants had authority, under their charter,[1] to construct such a work. At the time of the accident a main sewer had been placed in the centre of High street, one of the principal streets of the city, the earth had been filled in on top of it, and the contractors were engaged in placing service sewers from the main sewer to the houses along the street. They had dug a ditch about 9 feet in depth from the main sewer, extending northerly as far as the boulevard, for the purpose of putting the service into the house of one Miller. The centre of the street was very rough, owing to the fact that the main sewer had been placed there and the earth filled in, and persons passing along the street in vehicles were in the habit of going either to the north or south of the centre. The width of the street from the centre of the boulevard was about 24 feet. On the night in question, the plaintiff, who is a livery stable keeper, had hired out a rig and double team to 4 men named Morrison, Fleming, Oakes and Glenn, and these men, in this rig and driving these horses, were going along High Street on the north side of the centre and in an easterly direction, and the horses went into this ditch. One was killed, and the other horse, together with the waggon and harness, was injured.

It was urged, on behalf of the defendants, that they are not liable in any event, as the negligence, if any, was the negligence of the contractors and not theirs. I have already drawn attention to the city charter, which authorizes the construction of a work of this character by the city, and to the fact that they were causing this work to be done through contractors. In *Kirk* v. *City of Toronto*,[2] work was being done by contractors with the city in a public and busy street, and through failure to take proper precautions to prevent accidents an accident had occurred, and it was contended that the defendants were not liable. The Court held that they were liable. Moss, C.J.O., thus lays down the law, at p. 738: "The place where the work was to be done and the means by and the manner in which it was to be performed made it

[1] (1903), 2nd sess., c. 34, s. 9.
[2] 8 O. L. R. 730.

Judgment.
Wetmore, J.

incumbent on the city, if it had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller. That being so, it is clear that the city could not denude itself of this obligation by intrusting the work to a contractor. *In Penny* v. *Wimbledon Urban District Council*,[3] the rule was stated by Bruce, J., as follows: 'When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.'"

I am of opinion that the law is thus correctly laid down, and is applicable to this case.

It was further urged that, inasmuch as the corporation were, *quoad* the work they were doing or causing to be done, a highway authority, they were not liable for nonfeasance. The claim, however, is not one for nonfeasance. If a municipal authority is required to do work of a certain character, say, for instance, to keep highways in repair, and does not do it, it would be nonfeasance; but if it does attempt to do it, as in this case, and in so doing does the work negligently, so that damage is caused by such negligence, it would be misfeasance. in *Mayor of Shoreditch* v. *Bull*,[4] the Lord Chancellor deals with the subject as follows: "In some cases nonfeasance might be equivalent to misfeasance; and there was here enough to shew that the conduct complained of was an alteration in the normal state of the road. That being so, if there was anything wrong in what was done—if it was negligent—it was not protected by any of the decisions."

We, therefore, arrive at the question whether there was negligence on the part of the defendants, or, which amounts to the same thing, the contractors, in the matter of this ditch. The trial Judge has found that there was no negligence on the part of the defendants, but that the persons driving the plaintiff's horses were negligent, and he therefore gave judgment for the defendants.

[3] (1898) 2 Q. B. 212; 67 L. J. Q. B. 754; 62 J. P. 582; 78 L. T. 748; 14 T. L. R. 477, affirmed in appeal.

[4] (1904) 2 K. B. 756; 20 T. L. R. 254; 90 L. T. 210; 68 J. P. 415.—H. L.

Judgment. Wetmore, J.

The question of negligence is one of fact, and an appellate Court will rarely interfere with the findings of fact of the Judge when the case is tried by a Judge without a jury. There are cases, however, in which the appellate Court will interfere, and one instance when it will do so is pointed out by Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James*,[5] as follows: "Doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an appellate Court."

I will state the facts in this case, and where there is a conflict of testimony I will take them as presented by the witnesses for the defendants. The defendants cannot complain if the facts as so presented are accepted. On the night in question, the contractors and their workmen left the ditch in question with the earth thrown out of it along its course just as it was thrown out. This pile of earth on the west side of the ditch was from 2 to 4 feet high, according to some witnesses about 2 feet, according to others from 3 to 4. On the top of this sewer, pipes about 12½ feet long were placed on end and filled with dirt and banked up well to keep them steady. On the top of these pipes a plank was placed, and this extended north about 12 feet from the centre of the street, and from there to within about 2 or 3 feet from the curb, a pile of 3-inch sewer pipes about 4 feet high were placed. The earth thrown out from the ditch would naturally spread out, and the west side of it would be more or less sloping. A lantern was placed on a plank over the ditch about 3 or 4 feet from the south end of the ditch. This lantern was therefore much nearer the south end of the ditch than the north end. No lantern or other light was placed at or near the north end of the ditch. There was an electric light at the next corner of the street, but there is no evidence how far from the ditch that was, or what effect it would have in throwing light on the *locus in quo*. The night was dark. Matters

[5] (1904) A. C. 214; 73 L. J. P. C. 116.

Judgment.

Wetmore, J.

being in this situation, Morrison and his companions came, as stated, along this street, going at the rate of about 3 or 4 miles an hour, and the horse fell into the ditch. These men were aware that sewer operations were being carried on in this street. They had passed other places where ditches had been dug and observed the lights there. Morrison, who was driving the horses, testified, in effect, that, seeing the light where it was, he was impressed with the idea that the ditch was on the south side of the street, and that he would be safe in keeping to the north of such light. This being a street much used, it was the duty of the contractors with the defendants to give warning as to these dangerous ditches which they were placing upon it, and such warning ought to have been of a character sufficient to notify a person of ordinary care of the danger. In my opinion, it was not sufficient to place a single light in the position that the light in this case was placed, nor was it sufficient to erect a barrier almost right on the edge of the ditch, so that, when the barrier effected its purpose of notifying the parties whose horse touched it or came against it of the danger, such horses were liable at the same instant to be in the ditch.

I am of opinion, therefore, that the defendants were guilty of negligence.

I am not able under the evidence to discover anything to warrant my arriving at the conclusion that the persons driving the horses were guilty of contributory negligence. The horses were going along at a moderate rate of speed. There was no contradictory evidence in this respect, and it seems to me that the fact that they had attempted to jump or had partly jumped the ditch, and had fallen back, does not warrant the conclusion that they were being recklessly driven.

The judgment of the trial Judge should be reversed and judgment entered for the plaintiff in the Court below for $193 and costs, made up as follows:

Value of horse killed	$150 00
Horse injured, 14 days' loss of time	28 00
Damage to harness and rig	10 00
Cost of burying the dead horse	5 00
	$193 00

The amount claimed for the loss of the dead horse before it was replaced is too remote.

Defendants should pay the costs of this appeal.

Judgment.

Stuart, J.

SIFTON, C.J., SCOTT and HARVEY, JJ., concurred.

STUART, J.—I agree that the judgment in this case should be reversed, although I arrive at the result on different grounds. I concur entirely in the judgment of my brother Wetmore in so far as the question of negligence on the part of the municipality is concerned, but I have been unable to bring my mind to the conclusion that the drivers of the team were not themselves also guilty of negligence. They knew perfectly well that cross-drains were being constructed at different points in the street, having already, before reaching the point where the accident occurred, passed and noticed two of them. I can see nothing which would justify them in assuming that the third one was also on the south side of the street. Such drains were just as likely to be on one side of the street as the other. The fact that the one lamp was placed slightly to the south of the end of the drain was not sufficient, in my view, to justify them in making that assumption. Indeed, having once observed the light, I do not think they were justified in making any assumption on the point at all. A reasonably careful driver would, I think, have gone slowly enough to satisfy himself finally as to the exact position of the danger indicated by the light, even if he had to stop his horses altogether in order to do so. The evidence satisfies me that the men in the rig were not acting as carefully as they should have acted in the circumstances, and that their carelessness contributed to the accident which happened.

This conclusion has made it necessary for me to consider a further point, which the other members of the Court have not, in the view they take of the case, found it necessary to consider, viz., whether or not, even if the drivers were negligent, this negligence can be imputed to the plaintiff so as to deprive him of his right to recover. I have come to the conclusion that their negligence cannot be imputed to him, but, as this is only my own personal view, I content myself with stating very shortly my reasons for so holding. A careful examination of the judgment of the House of Lords in *Mills* v. *Armstrong*,[6] and of the principles laid down therein by Lord Herschell and Lord Watson, convinces me that the liability of one person for the negligence of another and the liability

[6] 13 A. C. 1; 57 L. J. P. 65; 58 L. T. 423; 36 W. R. 870; 52 J. P. 212.

Judgment
Stuart, J.

of the first person to be charged with the contributory negligence of that others are, where the same relationship exists, reciprocal and co-extensive. In reviewing and overruling the older case of *Thoragood* v. *Bryan*,[7] in which a passenger in a cab had been held disentitled to recover damages against the owner of another cab whose driver had been negligent and had caused him injury because the driver of the cab in which he, the passenger, was driving, was himself negligent, the House of Lords in *Mills* v. *Armstrong*,[8] clearly applies the test of inquiring whether the passenger would have been liable to an innocent third party for the negligence of the driver, who was not his servant and was not under his control. Having decided that he clearly would not be, they declare that the negligence of the driver could, therefore, not be imputed to the passenger as contributory negligence so as to disentitle the latter to recovery. It seems to me the position here is exactly the same. It will be admitted that the plaintiff could not have been held liable for the negligence of the drivers, if they had by such negligence caused an injury to a third party, inasmuch as the relationship was that of bailor and bailee, and there was no control on the part of the plaintiff over the drivers. If authority is needed for this it will be found in the cases of *Venables* v. *Smith*,[8]; *King* v. *London Improved Cab Co.*[9]; *Keen* v. *Henry*,[10]; *Smith* v. *Bailey*.[11]

This being so, according to the principle stated, I cannot see that the negligence of the drivers can be imputed to the plaintiff. There is no injustice in this, because I cannot see why a livery stable keeper, whose ordinary business it is to let horses and rigs out for hire, should be required to satisfy himself first in each case as to whether the hirer is a person who is likely to be negligent or not. It is not like the case of engaging a servant to be kept in employ for some time. The test generally applied is whether there is control or not. Plaintiff had no control whatever over the drivers, once they had left the stable. The case might have been different if there had been any

[7] 8 C. B. 115; 18 L. J. C. P. 336.
[8] 2 Q. B. D. 279; 46 L. J. Q. B. 470; 36 L. T. 509; 25 W. R. 584.
[9] 23 Q. B. D. 281; 58 L. J. Q. B. 456; 61 L. T. 34; 37 W. R. 737; 53 J. P. 788.—C. A.
[10] (1894) 1 Q. B. 292; 63 L. J. Q. B. 211; 69 L. T. 671; 42 W. R. 214; 58 J. P. 262.—C. A.
[11] (1891) 2 Q. B. 403; 60 L. J. Q. B. 779; 65 L. T. 331; 40 W. R. 28; 56 J. P. 116.—C. A.

Judgment. Stuart, J.

satisfactory evidence that the drivers were intoxicated, and this to the knowledge of the plaintiff when the hiring was done, but there is no sufficient evidence of either fact.

Judgment should therefore be entered for the plaintiff, for the amount stated in the judgment of my brother Wetmore.

Appeal allowed with costs.

REX v. DOLL.

By-law—Municipal law—Early closing of retail stores—Conviction — Certiorari.

Under an Act empowering a city council to pass by-laws for "fixing, altering and regulating" the hours of opening and closing retail stores, the council of the city of Calgary passed a by-law fixing the hours for opening and closing retail stores in that city, but provided therein that before any person should be convicted thereunder it must be proven that he transacted business during the prohibited hours.

Held, that the by-law was *ultra vires*.

[EN BANC, *11th, 30th April, 1907.*]

Statement.

This was an application for a *certiorari* to bring up a conviction made by the police magistrate of the city of Calgary against the applicant Doll, for not keeping his place of business closed in contravention of by-law No. 705 of the city of Calgary and to quash such conviction. The by-law in question was claimed to have been passed under the provisions of ch. 55 of 1906, of the *Acts of Alberta*, which conferred upon the City Council the power to pass by-laws.

"(86) For fixing, altering and regulating from time to time the hours of opening and closing retail stores and places of business within the city, or certain portions thereof, and for exempting from the operation of such by-law certain classes of business, and for imposing a penalty for breaches of such by-law."

The by-law leaving out the recitals and the parts not material to the questions involved herein was as follows:—

"1. Every person carrying on a retail store or place of business within the city of Calgary with the exception of those persons carrying on the business of a newsdealer, tobacconist, druggist or licensed victualler, shall keep such retail store or place of business closed from 6 p.m. until 7 a.m.

on Monday, Tuesday, Wednesday, Thursday, and Friday, in each and every week, and from 11 p.m. on Saturday in each and every week until the hour of 7 a.m. on the following Monday, excepting on the day preceding any legal holiday, when every such person shall keep his store or place of business closed from 11 p.m. to 7 a.m. on the day following such holiday, except again as hereinafter mentioned, and no such person shall during the hours aforesaid, in his said store or place of business, sell or agree to sell or offer to sell to any person whatever, nor accept any order for any wares or merchandise." Statement.

"6. Any person guilty of an infraction of this by-law shall be liable on summary conviction to the penalties prescribed by section one hundred and forty-nine (149) of Ordinance number thirty-three (33) of 1893, of the North-West Territories, but before any person shall be convicted of an infraction of this by-law it must be proven that such person did during the hours hereinbefore mentioned in his store or place of business, sell or agree to sell or offer to sell or accept any order for an article of goods, wares or merchandise not usually sold by a newsdealer, tobacconist, confectioner, fruiterer, druggist or licensed victualler."

The motion was argued before the Court *en banc*, consisting of SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ.

R. B. Bennett, K.C., for applicant. The conviction is bad inasmuch as the by-law makes the selling of goods the essential element of the offence, whereas the city had p wer only to pass a by-law for "fixing, altering, and regulating" the hours for opening and closing retail stores and places of business. Argument.

J. S. Hall, K.C., for the magistrate and the Crown.

WETMORE, J.—I am of opinion that this by-law is not authorized by the Act in question. It practically provides a penalty for selling goods or agreeing to sell them or offering them for sale or accepting orders for them during the prescribed hours, not for keeping a place of business closed as provided by the by-law. Under the provisions of this by-law a person may keep his place of business open during the prescribed hours without any consequence resulting from it. It is only when he sells that he becomes liable to the Judgment.

Judgment. Wetmore, J.

penalty. It seems to me utterly immaterial in what language the by-law may be couched, what I have stated is the practical effect of it. It is not the intention of the Act to have persons fined for selling, but the penalty was to be imposed for keeping a place of business open during the prescribed hours. It seems to me to put a construction upon this Act, such as the city council have attempted to put upon it by this by-law, would defeat the intention of the Legislature. Legislation of this character throughout Canada is, comparatively speaking, of recent date, and the object of it was to enforce what is called the early closing movement as regards retail stores and places of business and to assure that all persons in business of the character specified in the by-law should alike be compelled to keep their places of business closed, so that one man should not keep his place of business open during the prescribed hours, while another kept his place closed. If a person is allowed to keep his place of business open during the prescribed hours, and is only liable when he sells, the difficulty of enforcing the law would be very greatly increased, and the temptation to evade the law or defy it would also be greatly increased. Now, I do not consider it necessary to discuss the question what constitutes "being closed" under the provisions of the Act, whether it means an actual closing by being locked or whether it means a closing in the sense of not actually transacting business in the shop, because, whether it is a closing by being locked or whether it is a closing by not transacting business, the result, so far as this by-law is concerned, is the same—the party is not liable until he sells. Therefore, if the closing is an abstaining from doing business, a person may leave his store wide open for the purpose of doing business and he would not be liable to a penalty until he actually sold. And I can readily conceive that in very many instances the fact of selling might be one very difficult to prove. I cannot believe that the Legislature ever intended anything of this sort.

My opinion, therefore, is that a *certiorari* should issue to bring up the conviction, and that, on such *certiorari* being returned with the conviction, the conviction should be quashed.

SIFTON, C.J., and SCOTT, J., concurred with WETMORE, J.

Judgment.
Stuart, J.

STUART, J.—I am of opinion that the by-law in question in this case is clearly within the powers conferred by the Legislature. The Act gives the Council power to pass by-laws "for fixing, altering, and regulating the hours of opening and closing retail stores and places of business" within the city. In my view the real meaning and intention of the Act is to give the council power to fix, alter, and regulate the hours during which persons may carry on their business in retail stores and places of business in the city. I cannot believe that the Legislature had in view the mere mechanical operation of opening and closing the doors or other means of entrance and exit to retail stores and places of business. The ordinary man for whom the legislation was passed would surely understand from the Act that what the council were being permitted to do was to fix the hours during which merchants might carry on their ordinary business. This being so, it seems to me to be clear that the council have done nothing beyond this, and were quite within the power given them in passing the by-law they did. It is said that the council had no power to prohibit a man from selling goods, but the prohibition contained in the by-law is not in such general terms. The by-law merely refers to a sale or offer to sell in his retail store or place of business. This, I think, the Legislature intended to give the council power to deal with. Certainly the power to order the closing of stores during certain hours must mean, if it means anything effective or within the purpose of the statute at all, that the sale of goods within the store which would constitute a carrying on of ordinary business may be prohibited. In fact I have no hesitation in saying that the words "closing retail stores," in the statute mean and were intended to mean "ceasing to carry on business in retail stores." Reading the by-law as a whole I can find nothing in it, therefore, which in any way exceeds the power given by the statute. The by-law fixes certain hours during which certain retail stores must be closed. It is admitted that so far the by-law is *intra vires*. Adopting then the interpretation of these words which I do, I can see no reason why the council may not state a minimum amount of "carrying on business," if I may use the expression, which will be necessary before there shall be a conviction. The by-law as it stands does not and cannot by any interpretation of it, be said to de-

Judgment. Stuart, J.

clare that a man shall be fined for making a sale. He may be fined for not closing his store and for that only. It is still open to the Court before which he is brought to say whether he has or has not in fact closed his store, and to find that he has closed it in compliance with the Ordinance even though an actual sale or offer to sell may be proven. The by-law does not say that if a sale is proven then there has been a failure to close, and, therefore, an infraction of the by-law. Even though ten sales may be proven, it is still, as the by-law is worded, open to the Court, if it pleases, to find that the store was closed. What the by-law says is that unless at least one sale or offer to sell is proven, then there shall be no finding that the store was not closed. The council were careful to keep within the power given them. They were careful, as is abundantly evident from the way the by-law is drawn, to see that no injustice or oppression should result from the passing of the by-law, and it seems to me to be an extraordinary thing to say that, because they have been thus careful, because they have held themselves far within the meaning of the statute and have provided that unless there has been some overt act of carrying on business, then the man shall not be fined—that for this reason their by-law is bad. It is said that as the by-law stands a man may keep his store wide open and have his clerks there and exhibit his goods and yet not be fined unless he makes a sale. That is true; but that was surely a matter of policy for the council to decide, and not a matter of law for this Court. The effect is not to fine a man for selling goods as I see it, but is rather to insist for the protection of the man that he shall have been proven to have done something in a substantial way that is forbidden by the order to close his store before he shall be fined for not having done so.

The cases cited by counsel for the applicant do not appear to me to touch the point in any way. In everyone of them the Court held that the council had gone beyond the powers given them by the statute under which they were acting. We are here interpreting a different statute and a different by-law, and the cases cited are of no assistance to us in so doing.

Something was said as to the difficulty of enforcing the by-law as it stands. I think it extremely probable that the council avowedly and purposely added the clause so that it

would not be so very easy to secure a conviction and that this was done in order to prevent the oppressive operation of the by-law, but that again was a matter of policy for the council to deal with, and, if the by-law is within the powers given by the statute, should not concern this Court in any way. Judgment. Stuart, J.

With regard to the remaining objections to the conviction, I am of opinion that none of them can be sustained. The direction as to distress is clearly permissible under the provisions of the *Criminal Code*, section 739, which are applicable to the case. The fact that two days are stated upon which the offence was committed is evidently to be accounted for by the fact that the period during which the offence was committed and during which the closing is ordered by the by-law consisted of part of one day and part of another. The conviction might possibly have been more accurately drawn, but I do not think that there is there any defect which is fatal to the conviction.

It was also objected that there was no evidence at all upon which the magistrate could convict. Assuming it to be open to the defendant to take this objection, as to which I say nothing, I am of opinion that there was evidence from which the magistrate could reasonably, if he saw fit, make the inference that the sale was made by the defendant. The defendant stood beside the auctioneer behind the counter, the sale was made in the defendant's store, in which he generally carries on business, and was of an article such as he usually sells. I can see no distinction between an auctioneer employed by the defendant and a clerk or other employee, and it seems to me that a sale by a clerk in a defendant's store, at least, when made in the defendant's presence and with his knowledge, constitutes a sale by the defendant within the meaning of the by-law. The magistrate certainly had some evidence, therefore, from which the inference of a sale by the defendant could reasonably be drawn, and that is the only question which we could in any case consider on this application. I think, therefore, that the writ should be refused and the application dismissed.

HARVEY, J., concurred with STUART, J.

Conviction quashed; HARVEY and STUART, JJ., *dissenting.*

NORTH OF SCOTLAND CANADIAN MORTGAGE CO. v. KIMBER ET AL.

Practice — Service upon defendant of order for issue of writ ex juris —Costs.

It is a convenient practice to serve a copy of the order for service *ex juris* of an originating summons on the party or parties to be so served, and if done, the costs incidental thereto will be allowed on taxation.

[WETMORE, J., *May 6, 1903.*

Statement. Review by defendant on the taxation of the plaintiffs' costs in foreclosure proceedings.

Argument. *J. T. Brown,* supported the review.

E. L. Elwood, contra.

Judgment. WETMORE, J.—I think that the case of an originating summons is different from that of a writ of summons. When a writ of summons is ordered to issue for service *ex juris* the Judge prescribes the time *after service* for appearance. And this must be put in the writ, otherwise it is irregular. I cannot see any necessity in that case for serving the order for leave to issue the writ and for service *ex juris* (and see *Reynolds* v. *Coleman.*[1]) An originating summons directs the defendant to appear at a fixed date; it does not direct him to appear within a specified time after service. By rule 471 of *The Judicature Ordinance,*"[2] there shall, unless otherwise ordered, be at least ten clear days between the service and return of an originating summons. In most cases ten clear days would be obviously insufficient where the service is effected *ex juris,* and therefore it is usual in such cases to prescribe by the order that the service shall be effected a prescribed time more than ten clear days before the return of the summons. When this has been done I think it is but expedient that the defendant should have notice that he has been given a reasonable time for appearance, and that the order has been in that respect complied with, and that a copy of the order should, therefore, be served upon him. In this

[1] 36 Ch. D. 453; 56 L. J. Ch. 903; 57 L. T. 588; 35 W. R. 813.
[2] C. O. 1898, c. 21.

case it happens that no time was prescribed by the order for serving the summons, it was left to the operation of the Ordinance, ten clear days. Nevertheless, I think that it is a convenient practice in cases of originating summons to serve a copy of the order for service *ex juris* on the party interested. I do not wish to be understood as holding that it would be an irregularity not to serve a copy of the order for service *ex juris* on the party; I merely wish to state that in my opinion it is a convenient practice to do so, and, if done, the item should be allowed on the taxation.

Judgment. Wetmore, J.

Taxation affirmed.

BROWN v. THOMPSON AND THOMPSON, CLAIMANT.

Interpleader — Claimant's costs — Circumstances under which claimant though partially successful may be ordered to pay costs.

A claimant who is entirely successful is *prima facie* entitled to his costs of interpleader.

A claimant who is partially successful is *prima facie* entitled to his costs antecedent to the issue and also to his subsequent costs incidental to the portion of his claim to which he so succeeds, and must pay the costs incidental to the portion of his claim not proven, but when the claimant sets up false allegations in his affidavit, thereby rendering a cross-examination on such affidavit necessary, he will, although successful as to half of his claim, be ordered to pay the costs of and incidental to such cross-examination.

[WETMORE, J., *April 9, 1902.*

Sheriff's interpleader. Statement.

E. L. Elwood, for the plaintiff. Argument.

E. A. C. McLorg, for claimant.

WETMORE, J.—In *Allen, Brydges & Co.* v. *Wilson & Wilson,* claimant,[1] I held that when a claimant was successful he was *prima facie* entitled to his costs, but I intimated that there might be circumstances in which I might order no costs. This decision applied to cases when the execution creditor withdrew at the return of the summons and after hearing the claimant's affidavit read. My decision was at variance with some of the Ontario decisions. Nevertheless, I still adhere to it. In this case now under consideration Judgment.

[1] Decided July 15th, 1895. Not reported.

Judgment. Wetmore, J.

the claimant has succeeded as to one-half of the property seized and the plaintiff has succeeded as to the other half. In *Lewis* v. *Holding*,[2] the question was as to the right of property in five horses, an issue was ordered, the claimant established his right to two horses only. The Court held that the claimant (the plaintiff in the issue) was entitled to his interpleader costs prior to the ordering of the issue, because he was forced into Court in order to establish his claim, and as to the costs subsequent to the ordering of such issue that the taxing officer "should look to the costs on both sides and see how much of the whole was incidental to the plaintiff's proof of his right to the two horses and how much to the defendant's making out of his claim to three. He will see the briefs and witnesses and see how much has been incurred by each party. He will then balance the one against the other, and the party in whose favour any balance remains will then be entitled to receive those costs from the other." This course was, in effect, adopted in *Davis* v. *Clinton*.[3] I agree with the general rule laid down in these cases. In fact I think I am bound by them. But at the same time I am of opinion that there may be circumstances which would justify a Judge in the exercise of his discretion in departing from such rule, and that the circumstances of this case are of such a character. The claimant did not in his affidavit truly disclose the nature of his claim, and the plaintiff was quite justified in having him cross-examined upon his affidavit. Without that he in all probability could never have arrived at the true nature of the claimant's claim. Consequently the claimant, by basing his claim on a false ground and false statements of facts, rendered proceedings necessary which, if he had stated the facts truthfully, might have been quite unnecessary. Under such circumstances I will, in the exercise of my discretion, not only allow him his costs of interpleader antecedent to the order for enquiry as to the right to property, but I will order him to pay the costs of his cross-examination on his affidavit before the clerk, including the amount paid for his conduct money and attendance thereat.

Order accordingly.

[2] 2 Man. & G. 875; 3 Scott (N.R.) 191; 9 D. P. C. 652; 10 L. J. C. P. 204.

[3] 6 E. & B. 392; 25 L. J. Q. B. 344; 2 Jur. (N.S.) 490; 4 W. R. 546.

BABBITT v. BOILEAU.

Practice — Caveat — Contract — Finding of fact — Memorandum under Statute of Frauds — Sec. 91 of the Land Titles Act (1906 Alberta).

Where an application under section 91 of the Land Titles Act (1906) was made by A. B., the registered owner of certain land, for an order discharging a caveat registered against it by one C. B., who claimed to be entitled to a transfer of the lot under an agreement for sale from A. B.

Held, that sec. 91 provided a means of reaching a speedy decision upon the merits of a dispute as to the sale of real property where a caveat has been filed which ties up the property.

Held, further, that where the Court, acting under that section, finds as a fact that no agreement for sale has been entered into, it has power to direct the removal of the caveat.

Although a memorandum was signed, which would satisfy the Statute of Frauds, if the memorandum is equivocal as to whether or not an agreement was entered into, the agreement must be proved by extrinsic evidence.

[STUART, J., *April 6, 1907.*

Statement.

This was an application under section 91 of *The Land Titles Act*, 1906, by one Adolphe Boileau, who is the registered owner of the north-west quarter of section two in township twenty-seven, range two, west of the fifth, for an order that a caveat, registered against the said land by one Lauriston A. Babbitt, wherein the said Babbitt claimed to be entitled to a transfer of the said land from the said Boileau under an agreement of sale, should be discharged. The summons was issued upon an affidavit of Boileau wherein he had alleged that he had never agreed to sell the said land, and that the document which the said Babbitt had obtained, and upon which the caveat had been registered, had been obtained by fraud and misrepresentation.

Argument.

S. L. Jones, for Boileau.

W. P. Taylor, for Babbitt.

Judgment.

STUART, J.—Upon the return of the summons, I had expected that probably an affidavit would be filed on behalf of Babbitt, and that there would then be some discussion as to the proper procedure to be taken under the New Act, and that a direction would be asked from me in regard to it. Instead of this, however, the advocates of the parties came into

Judgment.
Stuart, J.

Chambers, bringing with them every possible witness that knew anything about the case. The advocate for the applicant Boileau asked that the merits of the whole matter be disposed of in a summary way. The advocate for Babbitt did not exactly consent to this, but it appeared that he had a few days previously examined Boileau for discovery, as it was said, by consent. At any rate, the examination was not upon the affidavit, and the document filed with the clerk is called an examination for discovery. In view of these circumstances, I decided to hear the oral evidence in a summary way in Chambers and to give a decision on the merits of the dispute instead of merely upon the point whether the caveat had been properly filed or not. In *Hogg on The Australian Torrens System*, page 1042, I find it stated as follows: "On hearing of the motion or summons, the Courts have frequently decided the merits of the question at issue between the parties at once where this could be done conveniently, or they may order the caveat to remain till further order, or may order the caveat to be removed if proceedings are not taken by a specified time to establish the claim of the caveator. It has, however, been held that the Court can only either remove the caveat or order it to remain and cannot adjudicate finally on the rights of the parties." It is apparent from this that the practice varies in the different States of Australia, where practically the same statutory provisions exist as those of section 91 of our Act. It appears to me that it is the intention of the new Act to provide a means of reaching a speedy decision upon the merits of a dispute as to the sale of real property where a caveat has been filed which ties the property up. In this particular case, moreover, all the witnesses were present, all the documents had been produced, and Babbitt had had the advantage of examining Boileau for discovery. There was, therefore, no reason that I could see why the dispute should be longer drawn out and the delay incurred which is incident to a formal action.

It appeared in evidence that Boileau had authorized one Girvin, a milkman, to secure a purchaser for his property at the price of $4,500, promising him 5 per cent. commission. Girvin's son, who is a real estate agent in the city of Calgary, was present at this conversation, although it did not appear that any authority had been given to him either by Boileau or

Judgment.
Stuart, J.

Girvin senior. Girvin junior then went to Babbitt, who is also a real estate agent in the city of Calgary, and is carrying on business with one Morris, and told him what he had heard. Babbitt thereupon, without seeing or speaking to Boileau, advertised the land in question for sale in the list of properties published by him in his usual advertisement in the newspapers and stated the price to be $5,000. In response to this advertisement, one Levi Houghton came to Babbitt's office and entered into negotiations in regard to the purchase of the property. On the 8th February Girvin junior, Morris, and Houghton started to drive out from Calgary to Boileau's place. They had not proceeded far when they met Boileau on the road driving a load of hay. Houghton jumped out of his rig in which he was riding and went and had some conversation with Boileau which was not admitted in evidence. Boileau then came on into Calgary and the other three drove out to the place and inspected it. That evening they returned to the city and Girvin and Babbitt met Boileau in the Queen's hotel. They went from there to Babbitt's office, where a discussion took place between Boileau, Girvin junior, Morris, and Babbitt in regard to the place. Girvin told Boileau that Houghton was well satisfied with the place, and Boileau states, "I was told that my place was sold to Levi Houghton." This was in Babbitt's presence. An appointment was then made for half-past 10 the next morning at Babbitt's office. The next morning a meeting took place at his office as arranged. Babbitt says that Houghton came first, then Girvin and Morris, and afterwards Boileau. Babbitt, it appears, had succeeded in inducing Houghton to buy the place for $4,950, and he got a cheque from Houghton in his own favour for $200 as a deposit. After he got this cheque he (Babbitt) states that he interviewed Boileau apart in an inner office and asked him, "What is your net price to me for your place?" to which Boileau replied "$4,256." After getting this information, Babbitt wrote out a receipt and gave it to Houghton in the following terms:—

Calgary, Alberta, Feb. 9th, 1907.

Received from Mr. Levi Houghton $200 (two hundred dollars) deposit on the north-west quarter of section two, township twenty-seven, range two, west of the fourth, with all improvements and stock, implements and furniture excepting

Judgment. Stuart, J.

clothing, bedding, sewing machine and clock, purchase price to be $4,950 (four thousand nine hundred and fifty dollars), $500 to be paid February 12th, '07, $3,150 (three thousand one hundred and fifty dollars) to be paid March 9th, '07 or sooner if possible, balance of $1,100 mortgage.

(Signed) L. A. Babbitt.

Having given this receipt to Houghton, Babbitt took the cheque for $200 endorsed it and handed it to Boileau and received from him the following receipt:—

Calgary, Alberta, Feb. 9th, 1907.

Received from L. A. Babbitt $200 deposit on the north-west quarter of section two, township twenty-seven, range two, west of the fifth, with all improvements and stock, implements and furniture excepting clothing, bedding, sewing machine and clock, purchase price $4,256 (four thousand two hundred and fifty-six dollars, $500 (five hundred) to be paid February 12th, '07, $2,456 (two thousand four hundred and fifty-six dollars) to be paid March 9th, '07 or sooner if possible, balance $1,100 mortgage.

(Signed) A. Boileau.

Witness: William John Morris.

Babbitt says that he does not think that Boileau knew what he, Babbitt, had signed and given to Houghton, and Houghton did not know what he had taken from Boileau. He says, "It was my business to keep them apart probably, because if Houghton knew what I was getting it from Boileau for, he would want another reduction in the price." Boileau in his evidence states, "Babbitt mentioned the commission the first night. He mentioned $250. I said I did not think it would be that much. He took his pencil and started to write in figures, and I said I thought it would be $244. He said, 'Oh, yes; that is right.'" The next that occurred was when Boileau went to Babbitt's office for the $500 on the 12th of February. He swears that they told him to wait as they were going over to get a cheque from Houghton. Babbitt says that he did go to Houghton for the cheque. He says further, "I gave him to understand that if he did not pay it, and if he did not pay it that night, I was going to pay it in the morning and would lose his deposit of $200 and there was no chance of him having the place after 12 o'clock that night." Houghton gave Babbitt a cheque for $500 and Babbitt returned to his office and, after endorsing it, handed

it to Boileau. Some question had arisen as to a set of harness which Boileau claimed was not going with the place, but which Houghton wanted, and it was worth $44. Boileau wanted to be allowed this $44, and Babbitt states that at the interview, when the $500 cheque was handed over to Boileau, the latter said: "You can well afford to make $44 for me as you are making $5,000." and I said: "No, I am getting $4,950." After receiving the cheque for $500, Boileau signed another receipt in practically the same terms as the receipt above quoted of February 9th. Judgment. Stuart, J.

Babbitt claims that the result of what occurred is that Boileau agreed to sell the place to him. He claims that he was not acting in any way as an agent but that he was simply buying from Boileau and re-selling to Houghton at a profit, which, he said, he had a perfect right to do. Boileau claims that he thought all the time he was selling to Houghton, that he never intended or agreed to sell to Babbitt, that although the receipt of the 9th of February was read over to him before he signed it, it did not indicate to him in any way that he was making the sale to Babbitt but only that he had received the money from Babbitt, which was the fact.

There is no question under the authorities that, if Boileau did in fact agree to sell to Babbitt, the receipt of the 9th of February is a sufficient memorandum of the agreement to satisfy the *Statute of Frauds*. The real question to be decided is: Did Boileau in fact agree to sell the land to Babbitt? Before dealing with this question, there is one matter to which I desire to refer. It may be said that it cannot make any difference to Boileau whether he was selling to Babbitt or to Houghton inasmuch as he was in any way getting his price. I may say at once that I do not see how this could have anything to do with the question even if the sale were for cash. There is a simple question of fact to decide upon the evidence and the circumstances that it could make no difference to Boileau from whom he got his price cannot surely be allowed to have any weight in coming to a conclusion upon that question of fact. He either agreed to sell to Babbitt or he did not; and if the Court is of opinion from the evidence that he did not in fact so agree, it certainly would not be proper for the Court to say: "It is true you did not agree to sell to Babbitt; but it does not make any difference to you whether you did or not if he pays you the

Judgment. Stuart, J.

price, and, therefore, we will make you agree." This would be making an agreement for the parties, which the Court cannot do. Moreover, in this case there was credit given, and the personality of the buyer might in that case be of considerable importance to the seller.

In *Leake on Contracts*, page 8, it is said: "An agreement may be defined as consisting of two persons being of the same intention concerning the matter agreed upon. The intention of a person can be ascertained by another only by means of outward expressions as words and acts, and for the purpose of agreement there must be a communication of intention between them by means of such expression." In this case we are, therefore, to inquire what outward expressions there are, either by words or acts, which indicate the intention on the part of Boileau to sell this property to Babbitt. In my opinion, there is not a single expression or act on the part of Boileau proven in the evidence which is not just as consistent with an intention to sell to Houghton as with an intention to sell to Babbitt. Take first the verbal conversation which Babbitt swears to. He states that he asked Boileau: "What is your net price to me for your place?" and in another part, instead of saying "to me," he uses the words "from me." To this question Boileau replied, $4,256." Now, it will be remembered that Boileau was asking $4,500 and expected to pay a commission. Girvin junior knew this, and I am convinced that Babbitt knew it as well. Boileau, instead of saying to Babbitt "I will sell you my place for $4,256," merely answers the question asked him. I cannot see how this can be construed into anything more than this: "I want $4,500 for my place but there is commission to be paid and if you (Babbitt) will hand me over $4,256, I will sell the place." There had been a conversation the night before about the commission between Boileau and Babbitt, and in this respect I accept Boileau's statement of that conversation as true. I cannot understand how it can be said that Boileau would, in speaking directly to his purchaser, and knowing that he was speaking directly to his purchaser, mention any less sum than $4,500. The very fact that he deducted the commission before stating the price, which I hold he did, shews to my mind conclusively that he did not understand that he was speaking to his purchaser but thought that he was speaking to an agent

who intended to deduce the commission. As I say, I think Babbitt must have known that Boileau thought he was speaking to an agent when he made this deduction. It is absurd, I think, for Babbitt to attempt to make out an agreement of sale to him simply because he himself used the two little words "to me" or "from me," in his question, perhaps without the emphasis which he gave them when quoting them in Court. The words might very well have passed unnoticed entirely by Boileau. The words which he would really notice would be the words "net price" which themselves suggest the idea of a commission. In any case, it is familiar law that the mere asking for a price and getting an answer does not constitute an agreement for a sale. See *Harvey* v. *Facey*,[1]

Judgment.
Stuart, J.

It may be said that Boileau signed the memorandum. That is true. But there is not a word in it which necessarily means that Boileau agrees to sell to Babbitt either personally or in any capacity. In all of the cases where such a memorandum had been held sufficient to satisfy the statute, the agreement itself and the parties to it have been proven by extrinsic evidence; but it is quite another thing, in a case where there has been a failure to make out an agreement of sale to a particular person by extrinsic evidence to attempt to make the memorandum itself the agreement. Of course, the memorandum might have been drawn in such a way as to constitute the agreement in itself, but the trouble in this case is that the receipt of February 9th does not say that Boileau agrees to sell to Babbitt. It merely says that Boileau has received certain money from Babbitt as a deposit on certain land, which was the fact. In the circumstances, the wording of the receipt is entirely equivocal as far as the point in dispute is concerned. It is just as consistent with Boileau's account of the transaction as with Babbitt's; besides, we must remember that Babbitt drew it himself and that he was clearly attempting to occupy the position of a purchaser from Boileau and a vendor to Houghton without coming out into the open and letting either of them know very clearly what he was about. It seems to me the most natural thing in the world that Boileau should think throughout the whole transaction that

[1] (1893) A. C. App. 552.

Judgment. Stuart, J.

he was selling direct to Houghton. Babbitt's partner—Morris, and young Girvin drove Houghton out to the place, and Boileau met them on the road. That same night he was told in Babbitt's office that Houghton was pleased with the place and that he had agreed to buy. When he went to Babbitt's office next day, he found Houghton there. They were both in the real estate office together. It was Houghton's cheque that was given him as a deposit although it passed through Babbitt's hands. Boileau swears that he always thought he was selling to Houghton. In view of all these circumstances, I believe he did so think. Even Babbitt himself, when he was asked if he thought Boileau understood that he was selling to himself, would not swear that he did think so. He simply told the Court what he would have understood if he had been in Boileau's place, which is a different matter. Moreover, Babbitt admits that Houghton might have thought he was acting as an agent, and his statement that when he went to get the $500 he told Houghton that if he (Houghton) would not pay it, he (Babbitt) would pay it himself constitutes to my mind a clear admission that it was well understood between Babbitt and Houghton at any rate that Babbitt was an agent. If Babbitt was a purchaser, then he would have to pay the $500 whether Houghton paid it or not. I do not see how Babbitt can be heard to say that he was acting in his relation with Houghton as an agent and that he occupied a different position in his relations with Boileau.

For a time, however, I did not see how Boileau could substantiate his allegation of fraud against Babbitt. It appeared to me Babbitt was indeed trying to do a very clever thing but that there was nothing wrong either in attempting to do it or in doing it. A man has a perfect right, no doubt, to buy property at one price and sell it at a higher price. He has even a perfect right to sell it at a higher price before he buys it at a lower if he wants to take the risk; but there is more than that in this case. I repeat again that I am convinced that Babbitt knew that Boileau, in stating his price, was allowing for a commission; and yet, according to his own story, he acted solely as a purchaser and accepted the price named as the purchase price. If there had been any suggestion that Boileau was authorizing him to pay the difference between the price named and the $4,500

as a commission to Girvin, this might have constituted a reasonable explanation; but there is nothing of the kind. Babbitt, in fact, quietly takes the advantage of a commission to himself and yet attempts to maintain the position of a purchaser. If this does not amount to fraud, it comes very near to it. It may be said that Boileau was not injured; but if he was not selling through an agent, he ought to get his full price and not be shorn of the commission. It is remarkable how careful Babbitt and Morris and Girvin junior all were to avoid any suggestion that they were claiming a commission. It would have been dangerous for Girvin to claim it owing to his connection with the other two. If Boileau could sell his place without anybody being entitled to a commission, then he ought to have got his $4,500, and it is in this respect that he is injured. It was urged that because Houghton and Boileau subsequently entered into an agreement between themselves for the purchase and sale of the property for $4,500, the whole thing was a scheme to save $450 for Houghton and $224 for Boileau. No doubt this will be the result if the application is granted; but I do not see how this can affect my finding upon the facts of the case. It might affect the credibility of their evidence; but there is practically no dispute between Babbitt and Boileau as to outward, tangible acts and statements, although there is a dispute as to secret intentions. The one exception may be Boileau's account of the conversation in regard to a commission on the night of the 8th of February; but even if that account had not been given by Boileau, I would still have been convinced that Babbitt knew that Boileau was deducting a commission and stating his price and that he knew that Boileau thought he was dealing with an agent. Judgment. Stuart, J.

It was also urged because Boileau said what he did on the 12th of February about Babbitt making $5,000 out of the place that this is evidence that he knew Babbitt was a purchaser from the beginning. Here again I think this remark by Boileau is entirely equivocal. It might just as well be interpreted to mean: "You are taking $5,000 from the purchaser and only giving $4,256 to me," as anything else.

I, therefore, find that Boileau never agreed to sell the land to Babbitt, and the order will, therefore, direct the

Judgment. Stuart, J.

removal of the caveat and contain a declaration that no such agreement as is alleged was even entered into. The order, however, will not issue until the expiration of thirty days from this date and then only upon satisfactory evidence that no appeal has been taken from the judgment now given. Babbitt will pay Boileau's costs in this application.

Application allowed.

THERIAULT v. EVANS.

Practice — Setting aside writ — Nullity or irregularity.

Where a writ purported to be issued out of the Judicial District of Northern Alberta after that Judicial District had ceased to exist, an application to set such writ aside was dismissed on the ground that it was not shewn that the writ was not issued by the proper officer or from the proper office and that consequently the only objection was that the writ was not properly styled, and this, being an irregularity merely, could be amended. *Saskatchewan* v. *Leadley*, 6 Terr. L. R. 82, distinguished.

[SCOTT, J., *Nov. 23, 1906.*

Judgment.

SCOTT, J.—This is an application to set aside the writ of summons and all subsequent proceedings in the action on the ground that the writ is a nullity by reason of the fact that it purports to be issued in this Court in and for the Judicial District of Northern Alberta which district had ceased to exist before the issue of the writ.

The writ was issued on 4th October, 1906. By order in Council of 17th September, 1906, which came into effect on the 1st October, 1906, the Judicial District of Northern Alberta ceased to exist and new judicial districts were constituted, one of which styled the Judicial District of Edmonton, comprised a portion of the territory comprised in the Judicial District of Northern Alberta. The deputy clerk of the former judicial district is now and has been since 1st October last, clerk of the Edmonton Judicial District, and he occupies the same office premises as he formerly occupied.

There is nothing before me to shew that the writ in this action was not issued by the proper officer from the proper office. The only objection is that the officer when issuing it improperly styled it as being issued in the Judicial Dis-

trict of Northern Alberta instead of the Judicial District of Edmonton. In my opinion its issue in that manner was not a nullity but merely an irregularity and as such it may be amended. The case of *Saskatchewan Land Co.* v. *Leadlay*, decided by the Court en banc is distinguishable from the present case in that it was there shewn that the writ was not issued from the proper office or by the proper officer. Judgment. Scott, J.

Plaintiff to be at liberty to amend the writ and statement of claim by substituting the Judicial District of Edmonton for that of Northern Alberta. Such amendment to be made within ten days. Costs of the application to be costs in cause to defendant in any event. No order need be taken out.

Motion refused.

REX v. MAGYAR.

Criminal law — Dying declaration — Form — Words of deceased — Admissibility.

The essential element in a dying declaration is the abandonment of hope of recovery, and the time when the statement is made, though a circumstance for consideration, is not a guide to its admissibility or otherwise.

A statement in writing prepared by another, but read over to and signed by the deceased when he had no hope of recovery, is admissible as a dying declaration.

R. v. *Mitchell* (17 Cox C. C.), disapproved.

[COURT EN BANC, *Oct. 9-19, 1906.*

Crown case reserved by WETMORE, J., before whom the defendant was tried and convicted of the murder of one Campbell. The case was argued before the Court en banc, consisting of SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS and HARVEY, JJ. Statement.

J. A. Allan, for the Crown. Argument.

N. Mackenzie, for the accused.

The judgment of the Court was delivered by

[*19th October, 1906.*]

HARVEY, J.—This is a case reserved by my brother WETMORE, as to the admissibility in evidence of a dying declara- Judgment.

[1] 6 Terr. L. R. 82.

Judgment. Harvey, J.

tion made by one Campbell of the murder of whom the above named Magyar was convicted. The declaration was as follows:

"Sworn statement of me Donald J. Campbell made this 22nd day of March, A.D. 1906.

"I know of no cause which led to the shooting other than the refusal of my hired man Vinceur Magyar refusing to do my just commands as an employee.

"On the morning of the 22nd of March, 1906, about sunrise I was out in my stable doing my chores and loading manure on the manure sled when the said Magyar swung open the door and said, give me money, I said, give me time till I get to the house. He immediately pointed the gun at me and shot me. He then left me where I fell, inside the stable door. No person was present at the time of the committal of the shooting.

"Sworn before me at Frobisher, in the Province of Saskatchewan, this 22nd day of March, 1906. } "Sgd.) D. J. Campbell.

(Sgd.) Samuel J. Hopper,
A Justice of the Peace in and for the Province of Saskatchewan.

"Vinceur Magyar the accused was brought before me at 2.30 p.m., on this 22nd day of March, A.D. 1906, and I identify the said Vinceur Magyar as being the man who fired the shot which wounded me.

(Sgd.) D. J. Campbell."

"Witness:
(Sgd.) Samuel J. Hopper,
(Sgd.) H. C. MacColl."

The reception of this declaration was objected to on the following grounds:

1. That the evidence did not establish that the deceased had abandoned all hope of recovery.

2. It was not in the deceased's own words; it was prepared by another person.

3. It is in the nature of a deposition and should have been taken in the presence of the accused.

The trial Judge, in addition to the general question of guilty or not guilty, submitted to the jury the following question, which was answered in the affirmative, there being,

the Judge states, sufficient evidence to warrant such answer. "Eliminating the statement of the deceased Campbell signed by him and put in evidence and apart from that statement does the rest of the testimony taken on the whole satisfy you beyond a reasonable doubt that the prisoner is guilty of the murder charged?"

Judgment. Harvey, J.

The questions submitted for the opinion of the Court are:

1. Was this statement properly received in evidence?

2. If not in view of the answer of the jury to the question so submitted should a new trial be ordered?

It will be observed that the declaration is in two parts, which were made at different times, but inasmuch as the second part merely declares that the prisoner is the man who fired the shot, which is stated as a fact by the reserved case and was, I learn from the trial Judge, admitted by the prisoner himself who gave evidence in his own behalf, it is not necessary to consider it since it could have had no effect on the jury. The general principle on which dying declarations are accepted as evidence is given by *Russell on Crimes*,[1] quoting from the judgment of Eyre, C.B., in *Woodcock's Case*,[2] as follows, viz.: "That they are declarations made in extremity when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." The time when they are made in relation to the death furnishes no guide as to the admissibility of non-admissibility of such declarations, though it is a circumstance for consideration. Indeed, declarations made ten or eleven days before death have been admitted, and declarations made a few minutes only before death have been rejected. The essential element is the abandonment of hope of recovery, and it is necessary in each case to examine the evidence to ascertain whether there is that absence of all hope which alone renders such a declaration admissible. In the present

[1] Vol. 3, p. 389.
[2] 1 Leach 500.

Judgment. Harvey, J.

case we find that the deceased about seven o'clock in the morning was shot with a shot-gun at a distance of a few feet, the whole charge entering his abdomen near the navel making a hole about the size of a watch from which eighteen inches of intestine, which was severed, protruded. From this wound deceased died within twenty-four hours. Two doctors were in attendance within a short time after the wound was inflicted, and both were satisfied that there was no possible chance for the wounded man's recovery and told him so. To his wife he said: "Annie, I am going to die," several times before the declaration was made, and added: "Whatever shall you do." About the time the first doctor came the deceased said to his brother-in-law: "Angus, do you think there is any chance?" The brother-in-law replied: "It looks bad," and he answered: "Well, you will do for the family what you can?" After this one of the doctors told him that if he had any matters to arrange he had better do so then as he might not be able to do so later, and he then asked the doctor to make his will telling him how he wished to dispose of his property. One of the doctors also states that he repeatedly said: "I am going to die, Jesus is coming for me," but he was not able to say whether these statements were made before the dying declaration was made or not.

The circumstances, apart from the utterances of the wounded man, are such as to lead almost irresistibly to the conclusion that he could have had no possible hope of recovery, but taken with the statements made by him I find myself unable to come to any other conclusion than that the wounded man fully appreciated his condition and understood that death was certain and near, and such being the case the condition of mind existed which would make a declaration admissible. There was only one statement made which did not clearly point to that condition of mind and that was the statement made to Dr. Deyell who, when Campbell asked his opinion, said: "I am very sorry to say I have no hope of your recovery," whereupon Campbell said he didn't think himself he could recover but he knew they would do all they could for him. This statement is somewhat equivocal and might be only a manner of speech or indicate a desire to put the doctors at ease, or might refer to what could be done to relieve his suffering. The doctor was asked

by counsel: "Do you think he thought there was any possible chance of his recovery?" and he answered: "From his statement I would not think so," and "Well, would you say he had lost all hope, do you think he had gone so far as that?" to which he answered: "From his statement to me I would infer that he had lost all hope. The doctor's interpretaion of the man's meaning and his condition of mind, in view of the equivocal character of the statement, is useful and it does not suggest any ray of hope in the man's mind. Taken in conjunction with the other statements and the circumstances, I feel no doubt that the deceased had no hope of recovery when he made the declaration. Judgment. Harvey, J.

As regards the second objection, it appears from the evidence that questions were asked the wounded man, and the substance of the questions and answers in narrative form written out, as we have it here. This was read over to the wounded man, who then signed it and swore to it, the evidence shewing that he understood what he was doing.

In *Regina* v. *Mitchell*,[3] Cave, J., held, that a statement to be admissible must be in the actual words of the deceased, and if questions are put both the questions and answers must be given.

This case, however, does not appear to be in accord with either the earlier or the later authorities which are mentioned in *Archbold's Criminal Pleading and Evidence*,[4] nor, in my opinion, with sound reason. It is clear from the authorities that a dying declaration need not be in writing, and if evidence of such a declaration were being given by a person who heard it he could not be expected to give the exact words with any degree of accuracy, but what he would give necessarily would be in his own words the substance of what was said to the best of his recollection. But in this case, where the statements, after being written down, were read over to the deceased and accepted and signed by him, they did in effect become his own words. In *The King* v. *Louis*,[5] the Supreme Court of British Columbia declined to follow *Regina* v. *Mitchell*,[3] and held that a statement in narrative form obtained by questions through an interpreter and not read over to the deceased after being

[3] 17 Cox C. C. 503.
[4] 23rd Ed. p. 324.
[5] (1903) 7 C. C. C. 347.

Judgment.
Harvey, J.

written down was admissible. That case goes much further than it is necessary to go in the present one, and, in my opinion, the second objection to the reception of this evidence, as well as the first, cannot be sustained.

The third objection was not urged in the argument, and it does not appear to be tenable. The declaration was not offered as a deposition but simply as a statement, and the fact that it was made under the sanction of an oath cannot give it less validity than a simple written or even oral statement which would be admissible. As none of the objections can in my opinion be sustained the first question submitted by the trial Judge should be answered in the affirmative, and such being the case the second does not require an answer, and the conviction should be affirmed.

Conviction affirmed.

DIGEST OF CASES REPORTED IN THIS VOLUME

ABBREVIATIONS, EFFECT OF.

See ASSESSMENT AND TAXATION.

ADMISSIONS.

See PRACTICE.

ADOPTION.

See PARENT AND CHILD.

AFFIDAVIT.

See ASSESSMENT AND TAXATION — JUDGMENT—PRACTICE.

APPEAL.

1. **Appeal** — *Absence of Reasons for Conclusions of Trial Judge—Effect of — Discretion — Lien for Keep and Care of Cattle — Pleading—Damages.*] —Where the Appeal Book does not contain any reasons for the conclusion of the trial Judge, the Appeal Court should assume that the trial Judge has found every fact open to him to find under the evidence so as to support the conclusion he has reached. A person keeping and caring for cattle has no lien at common law for such care and keep. A party who wishes to set up a statutory lien must specifically plead such lien. Judgment of Sifton, C.J., varied. *Elliott* v. *Gibson et al.* (Court en banc, 1904), p. 96.

2. **Appeal** — *Order not Taken Out —Leave to Appeal — Irregularity — Waiver.*] — Leave to appeal may be granted before the order appealed from has been taken out, but to enter and prosecute an appeal against an order without taking out such order is an irregularity. Such irregularity, however, if not objected to on an application to settle the appeal book, will be waived. *Bank of Hamilton* v. *Leslie.* (Court en banc, 1906), p. 301.

3. **Appeal** — *Trial Judge's Findings of Fact — Sale of Goods — Acceptance —New Trial.*]—The findings of fact of a trial Judge sitting without a jury, who has had the opportunity of hearing the witnesses give their evidence, will not be reversed by a Court of Appeal if there is evidence upon which such findings can be supported. A new trial will not be granted on the ground of the discovery of new evidence, unless such new evidence be conclusive in its character. The defendant told the plaintiff that he would buy the plaintiff's horse if one Pearson, who was employed by the defendant, could work it. The plaintiff delivered the horse to Pearson, who worked it, and informed the defendant that it was satisfactory, whereupon the defendant said he would pay for the horse. — *Held*, that these acts constituted an unqualified acceptance of the horse by the defendant. *Knight* v. *Hanson.* (Court en banc, 1906), p. 306.

4. **Judgment** — *Subsequent Contrary Decision of Supreme Court of Canada—Extension of Time for Appealing.*]—Leave to appeal, after the proper time has expired, on the ground that there has been a subsequent decision of the Court of Appeal altering the law as it was previously understood, will not be granted where the litigating parties have dealt with the subject matter in dispute in such manner as to so alter their position regarding it and to put it out of the power of the Court to restore the *status quo.* — *Quære*, whether leave should ever be granted on that ground alone. *Ross* v. *Pearson.* (Scott, J., 1905), p. 324.

5. **Mortgage** — *Consideration — Onus — Admission by Widow of Deceased — Mortgagee — New Trial — Corroboration.*]—The onus of proving absence of consideration in a mortgage deed is upon the person setting it up. The discovery of new evidence which is merely in corroboration of that adduced at the trial is not a sufficient ground for directing a new trial. — *Quære*, whether an admission by a next of kin of a deceased person is binding on the administrator or other persons interested in the estate. *McLorg* v. *Cook.* (En banc, 1907), p. 371.

6. Criminal Law — *Notice of Appeal — Authority of Solicitor's Clerk to Sign.*]—A notice of appeal from a decision of a justice of the peace may be signed by an advocate on behalf of the appellant without any express authority, but authority must be expressly shewn where the notice is signed by the advocate's clerk, and unless such authority be shewn the notice is insufficient. *Scott* v. *Dalphin.* (Wetmore, J., 1907), p. 401.

APPEARANCE.

See PRACTICE.

ARBITRATION AND AWARD.

1. Arbitration — *Award—Common Law — Prairie Fire.*]—The Arbitration Ordinance, C. O. 1898, c. 35, governs submission in writing only, and there may be a valid submission by parol at common law altogether outside of that Ordinance. Comments on the Prairie Fires Ordinance, C. O. 1898, c. 87. *Ulmer* v. *Adolf.* (Wetmore, J., 1904), p. 246.

ASSESSMENT AND TAXATION.

1. Assessment and Taxation — *Constitutional Law — Land Grants to the Canadian Pacific Railway — Exemption from Taxation — Grant in Præsenti — Equitable Principle — 44 Vict. (Can.), c. 1, s. 24, (Alberta Act), 4-5 Edw. VII. c. 3.*]—Lands owned and held by the Canadian Pacific Railway Co. under and by virtue of the sixteenth section of the Contract for the Construction of the Canadian Pacific Railway, are exempt from taxation for twenty years from the date of the issue of the letters patent of grant from the Crown of such lands. The assessors of the plaintiff school district assessed taxes for the year 1907 against the defendant company upon lands which were part of the original grant made to the company under and by virtue of the contract referred to in and confirmed by 44 Vict. (Can.), c. 1. These lands were patented in 1901 and the whole railway referred to in the contract was completed in 1886. — *Held*, following *Springdale School District* v. *Canadian Pacific Railway Co.* (1904), 35 S. C. R. 550, that these taxes could not be collected as the land grant to the C. P. R. Co. under 44 Vict. c. 1, was not a grant in *præsenti* and consequently the period of twenty years' exemption from taxation of such lands provided by the sixteenth section of the contract for the construction of the C. P. R. began from the date of the actual issue of the letters patent from the Crown from time to time, after they had been earned, selected, surveyed, allotted and accepted by the company. Section 24 of the Alberta Act, establishing the Constitution of the Province of Alberta, expressly stipulates that the powers granted to the province must be exercised subject to the provisions of s. 16 of the contract which provides for the exemption, and this effectually prevents the province from saying that it is not bound by the contract.—*Quære*, whether or not, considering the speculative character and difficulties of the company's enterprise as well as the difficulties of making a selection of the lands to be accepted, the Crown, represented by the Government, in its capacity of trustees of these lands, the beneficial interest of which is in the people, was not so dilatory in actually granting the lands under the provisions of the contract as to estop the beneficiaries from insisting upon the application of the equitable principle that "that must be held to have been done which should have been done," and enforcing the collection of taxes after the expiration of twenty years from the date of the completion of the railroad. *Spruce Vale S. D. No. 209* v. *C. P. R.* (Stuart, J., 1907), p. 80.

2. Taxation for School Purposes —*Distress — Homestead Lands before Issue of Patent — Lands of Crown — Not Taxable under s. 125 of the British North America Act—Lien on land.*]—The interest of a homesteader in land before a patent has been issued to him by the Crown is not taxable for school purposes. Where taxes were assessed on the plaintiff' homestead prior to entry by him and while the same was held by previous homesteaders, whose entries were afterwards cancelled, and these taxes were collected by distress of his goods and chattels, before a patent had been issued for the land.—*Held*, that the money should be returned to the plaintiff, as, until patented, the lands were the property of the Crown, and were exempt from taxation under s. 125 of the British North America Act. To hold that the taxes became a lien on the land and could be collected from a subsequent occupant who derives his

title from the Crown, would be in effect taxing the property of the Crown. *Osler* v. *Coltart et al.* (Newlands, J., 1907), p. 99.

3. Confirmation of Tax Sale — *Omission of the Word "Public" from the Name of School District — Affidavit of execution — Jurat — Irregularity—Description of Land.*]—The transferee described the transferor as treasurer of the "Pebble Lake School District," instead of the "Pebble Lake Public School District," and described the land as "s.w. ¼ of sec. 22-25-4 w. 2nd mer." The jurat to the affidavit of execution on the transfer also incompletely described the place where the affidavit was sworn, and the officer was thus described: "W. Hopkins, J.P." —*Held* (1) The omission of the word "public" was immaterial, there being sufficient on the face of the transfer to reasonably indicate that the transferor was the treasurer of the "Pebble Lake *Public* School District. — (2) That the description of the land was sufficient to identify the land. *Goblet* v. *Beechey*, approved.—(3) That the place of swearing the affidavit could be ascertained by reference to the body of the affidavit and was sufficient.—(4) The words "J.P." when used in connection with an affidavit sworn in the Territories was a sufficient description of a Justice of the Peace in and for the Northwest Territories. *In re Gordon.* (Wetmore, J., 1901), p. 134.

4. Confirmation of Sale of Land for Taxes — *Right to Redeem — Tender — Right of Homesteader to Encumber Homestead Prior to Issue of Grant — Statute of Limitations—Construction of Statutes.*] — The applicant H. was a purchaser at a sale for taxes of land against which was registered a lien executed by one G., a homesteader, prior to the issue of the grant. H. having refused to inform the lien-holder of the amount necessary to redeem, the lien-holder made a tender to H. which turned out to be insufficient. On application by H. to confirm the sale. —*Held*, that as the insufficiency of the tender was due to the fault of H. in refusing to give information that he ought to have given, the lien-holder would be admitted to redeem upon paying as directed by the Judge the amount actually payable. — *Held*, also, that the lien being merely a charge on the land and not an "assignment or transfer," within the meaning of s. 42 of the Dominion Lands Act, was a valid encumbrance. *In re Harper*, approved. *In re Hardaker.* (Court en banc, 1903), p. 151.

5. Assessment and Taxation — *Confirmation of Overseer's Return — Land Belonging to Canada.*] — By the Local Improvement Ordinance, C. O. 1898, c. 73, it was provided that upon the confirmation by a Judge of the return of unpaid taxes required by the Ordinance to be made annually by the overseer to the Attorney-General, the lands in respect of which the taxes were imposed should be vested in the Crown subject to redemption within a stated period, and in default of redemption the land became, on the order of a Judge, absolutely vested in the Crown. Under this provision application was made to confirm the overseer's return respecting land, the title to which was in the Crown but which was the subject of a homestead entry at the time the taxes were levied.—*Held*, that the proceeding was not a process of execution to enforce payment by the person liable to pay such taxes, but was a proceeding to enforce a lien against land, and as land held by the Crown was not liable to taxation, the overseer's return could not be confirmed. *Attorney-General* v. *Canada Settlers Loan & Trust Company.* (Wetmore, J., 1901), p. 256.

6. Assessment and Taxation — *Sale of Land for Taxes — Land Held by Crown.*]—A school district sold for arrears of taxes, land, the title to which was in the Crown, but which had been homesteaded by one B., who, however, had vacated the land prior to the year in which the taxes had been imposed. The Ordinance governing the same provided that all property held by Her Majesty should be exempt from taxation, but that when any such property was occupied by any person otherwise than in any official capacity the occupant should be assessed in respect thereof, but the property itself should not be liable.—On application to confirm the sale by the district.—*Held*, that taxes could not be recovered by sale of the land, and that the application to confirm must be refused. *Re Spring Creek School District.* (Wetmore, J., 1904), p. 259.

7. Assessment and Taxation — *Separate School District — "Owner of Land.*] — A purchaser of land under agreement who has not paid all the moneys or performed the conditions to

entitle him to a conveyance, although he has at the particular time done all his agreement calls for, is not the "owner" of the land so as to entitle him to pay the taxes to the School District of which such purchaser is a ratepayer under the School Ordinance, C. O. 1898, c. 75, which provides by s. 126 that "in cases where Separate School Districts have been established, when property owned by a Protestant is occupied by a Roman Catholic, and *vice versa*, the tenant in such cases shall only be assessed for the amount of property he owns, whether real or personal, but the school taxes shall in all cases, whether or not the same has been or is stipulated to the contrary in any deed, contract or lease whatever, be paid to the school of which such owner is a ratepayer." — Where, however, a purchaser has met the demands and fulfilled all the conditions to entitle him to a conveyance, but such conveyance has not been executed, the purchaser being in equity the owner is the "owner" of the land within the meaning of the section of the School Ordinance above cited. *Katrinsky* v. *Esterhazy Protestant Separate School District.* (Wetmore, J., 1902), p. 265. *Junic* v. *Esterhazy Roman Catholic Public School District.* (Wetmore, J., 1902), p. 269.

8. **Assessment and Taxation** — *Municipal Law — School Taxes—General Municipal Taxes — Exemption.*] —An exemption from "general municipal taxation" does not include school taxes under The Municipal Ordinance. *Osment* v. *The Town of Indian Head.* (Court en banc, 1907), p. 462.

ASSIGNMENTS AND PREFERENCES.

1. **Assignments and Preferences** — *Residence — Execution — Interpleader.*]—One Dunn, a merchant at Red Deer, in the Judicial District of Northern Alberta, being in insolvent circumstances, executed in favour of one Robinson, on the 9th of February, 1904, an absolute assignment of all his stock in trade and fixtures, the consideration being expressed as $1. Robinson was a traveller for one of Dunn's creditors, namely, Knox, Morgan & Co., of Hamilton, Ontario, having his headquarters at Calgary, which was also in the Judicial District of Northern Alberta. On February 26th, Knox, Morgan & Co., through another traveller, one Munro, effected a sale of the goods and fixtures to the defendant McClocklin at Winnipeg, and on March 9th Robinson gave McClocklin a bill of sale and delivered up possession. Although the other creditors of Dunn were not consulted in the matter, they were notified that the assignment had been taken "in the interests of all the creditors."—On March 15th, the plaintiff recovered a judgment against Dunn upon which they subsequently issued execution and caused the goods in question to be seized. — *Held, per* Wetmore and Scott, JJ., that the assignment to Robinson, being one for the benefit of creditors, was absolutely void, as Robinson was not a resident within the Judicial District of Northern Alberta, and that in consequence the defendants acquired no interest under their bill of sale.—*Per* Newlands, J., that the assignment was taken by Robinson solely on account of Knox, Morgan & Co., who acted in the premises without consulting either Robinson or the other creditors, and that it was not, therefore, an assignment for the benefit of creditors within the meaning of C. O. 1898, c. 42, s. 3, but was void as delaying creditors, and that as the defendants took with notice, the sale to them was void, — *Per* Harvey, J. (dissenting), that the onus of shewing that Robinson was not a resident of the Judicial District of Northern Alberta was on the plaintiff, and he had failed to establish that fact. Consequently the assignment to Robertson was a valid assignment for the benefit of creditors; that in any event the defendants were innocent purchasers, and the assignment, being at most voidable only by creditors, could not be impeached as against defendants, who had innocently acquired rights before proceedings were taken. — Judgment of Sifton, C.J., affirmed. *McKee* v. *McClocklin, et al.* (En banc, 1905), p. 274.

ATTACHMENT OF DEBTS.

1. **Practice** — *Interpleader Summons by Garnishee — Reasonable Discretion of Judge — Rules 392, 393 and 431 of Judicature Ordinance.*] — Where there are claimants to the amount owing by a garnishee, other than the plaintiff, the garnishee has his rights under Rule 392 of the Judicature Ordinance. — An interpleader summons was taken out by a garnishee in

an action which was being defended and had been set down for trial. The garnishee admitted a liability of $2,000 under a policy of insurance upon which there had been a loss, but, claiming to fear that other actions might be brought by interested parties, obtained an interpleader summons. — *Held*, that the garnishees were not yet shewn to be under liability to the plaintiffs and had no right in law to interplead, their rights not coming within Rule 431 of the Judicature Ordinance, but rather within Rules 392 and 393 of the same Ordinance. — While it is discretionary for the Judge to act under Rule 393 of the Judicature Ordinance, the limits of his discretion must be reasonable, and an arbitrary refusal of a proper application would be a ground for correction upon appeal. *Mears* v. *Arcola Wood Working Co. et al.* (Wetmore, J., 1907), p. 86.

2. Attachment of Debts — *Debt or Liquidated Demand — Rule 384 J. O.*]—A claim on a covenant to pay contained in a chattel mortgage given to secure an account, the amount of which had been unascertained, is a debt or liquidated demand authorizing the issue of a garnishee summons under Rule 384 of the Judicature Ordinance, C. O. 1898, c. 21. *Stimson* v. *Hamilton.* (Scott, J., 1905), (En banc, 1906), p. 281.

3. Practice — *Garnishee — Application by Defendant to have the Liability of the Garnishee Determined — Status — Construction of Rule—"Any other Person Interested."*] — Where the defendant in garnishee proceedings applied for an order to have the liability of the garnishee summarily determined, it appeared that the plaintiff had not recovered judgment against the defendant in the original action and had refused to proceed further against the garnishee. The Rule provided that "the plaintiff or any other person interested" might apply for and obtain the order. — *Held, per curiam*, that the defendant's application was rightly refused. — *Per* Newlands, J. (Sifton, C.J., Harvey and Stuart, JJ., concurring) that defendant has no right or status to apply for the order, he not being "any other person interested" within the meaning of the rule.—*Per* Wetmore, J., that a defendant is "a person interested" within the rule, and may apply for the order, but that it is discretionary with the Judge to make the order when applied for by him, and that under the circumstances of the present case the order should be refused. *Woodley* v. *Harker and McRobert*, Garnishee. (En banc, 1907), p. 333.

4. Attachment of Debts — *Sale of Goods on Condition—Lien on Goods —Onus of Proof.*]—Plaintiffs served a garnishee summons to attach an alleged debt owing by the garnishee to defendant. The garnishee having disputed any liability to defendant, the matter was tried in a summary way, at which trial the only evidence tendered was that of the garnishee himself, who alleged that he had bought goods from defendant, but that such goods he had found on inquiry were not paid for by the defendant and were subject to liens. There was no evidence to establish any valid lien or claim.—*Held*, per Scott, Prendergast, Harvey and Johnstone, JJ., affirming the judgment of the trial Judge, that the onus of proof as to the validity of any liens or claims against the goods was on the garnishee. *Held*, per Stuart, J. (Sifton, C.J., concurring), that the evidence was sufficient to raise a *bona fide* doubt as to the right of the defendant to sell the goods and that as the onus of proving his title and his right to sell would, in an action by the defendant for the price of the goods, lie on the defendant, the plaintiffs in the garnishee proceedings could stand in no better position and must prove the defendant's right to sell the goods to the garnishee. *Adolph* v. *Hilton and Stephens*, Garnishee. (En banc, 1907), p. 407.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Bills of Exchange — *Promissory note — Endorsement for Collection — Action by Original Payee — Holder — Presentment for Payment — Costs.*]— In an action by the payee of a note against the maker it appeared that the plaintiff had previously endorsed the note to his solicitor for collection, and that the note had never been presented for payment. — *Held*, that the action was properly brought in the plaintiff's name. — *Held*, further, that the note not having been presented for payment, the action could not be maintained, but that the defendant was not entitled to costs inasmuch as he had not shewn that he had money at the bank where the note was payable from the time

the note fell due until the commencement of the action. *Jones* v. *England.* (Newlands, J., 1906), p. 440.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. **Interpleader**—*Sale of Goods—Bill of Sale—Consideration—Bills of Sale Ordinance, s. 11—Validity.*]—*Held,* that a bill of sale, the expressed consideration of which was a present payment, but of which the real consideration was partly a present payment and partly a past indebtedness, was void under the Bills of Sale Ordinance, s. 11. *Hennenfest* v. *Malchose.* (Wetmore, J., 1906), p. 404.

2. **Conditional Sale of Goods** — *Seizure — Charge for Keep of Chattels — Lien — Redemption.*] — A seizure under a "lien note" is an extra-judicial seizure within C. O. 1898 c. 34.—A vendor of chattels under a lien note, who has retaken possession under the powers contained in the note, is not entitled to add to the security or charge against the chattels the expense of keeping and caring for the chattels after seizure. *Pease* v. *Johnston.* (Wetmore, J., 1905), p. 416.

BY-LAW.

See MUNICIPAL LAW.

CERTIORARI.

See CRIMINAL LAW—MUNICIPAL LAW.

CHOSE IN ACTION.

See LANDLORD AND TENANT.

COMMISSION.

See PRINCIPAL AND AGENT.

COMPANY.

See CRIMINAL LAW—SALE OF GOODS.

CONDITIONAL SALES.

See SALE OF GOODS.

CONSTITUTIONAL LAW.

See ASSESSMENT AND TAXATION — CRIMINAL LAW — HUSBAND AND WIFE—PRACTICE—RAILWAY.

CONSTRUCTION OF STATUTES.

See ASSESSMENT AND TAXATION.

CONTRACT.

1. **Vendor and Purchaser**—*Part Performance—Illegal and Immoral Contract — Recovering Back Money Paid —Costs.*]—The plaintiff said to the defendant, referring to a certain named lot: "If you can get me that lot I will build." Accordingly the defendant, a builder by trade, did purchase the lot for the purpose of building a house thereon for the plaintiff; and a few days later the plaintiff entered into a written agreement respecting such lot and house, with the defendant, and paid $500 cash down. The house was intended for purposes of prostitution, as the defendant knew, and before the defendant had done anything toward building other than "brushing" the lot, the plaintiff gave notice to the defendant that she had decided not to build and demanded an immediate return of the $500 paid by her.—*Held, per curiam,* that there had been part performance of the contract and that consequently the plaintiff could not recover the money paid by her thereunder. —*Quære, per* Newlands and Harvey, JJ., whether money paid under an immoral contract can be recovered back under any circumstances. *Perkins* v. *Jones.* (Court en banc, 1905), p. 103.

See ASSESSMENT AND TAXATION — COVENANT — LANDLORD AND TENANT — MASTER AND SERVANT — SALE OF GOODS — SCHOOL DISTRICT — VENDOR AND PURCHASER.

CONVICTION.

See CRIMINAL LAW—MUNICIPAL LAW

COSTS.

1. Practice — *Sheriff's Interpleader — Notice to Execution Creditors of Claimant's Claim — Sheriff Interpleading Without Allowing Reasonable Time to Execution Creditor to Investigate and Admit — Object of Sheriff's Interpleader — Costs.*] — It is not sufficient for a sheriff to wait merely the four days allowed by law after giving notice of the claimant's claim, but the sheriff must, before interpleading, allow a reasonable time to the execution creditors to investigate the claim of the claimant and admit or dispute the same. —The object of sheriff's interpleader proceeding discussed. *Fraser et al.* v. *Ekstrom and Massey, Claimant.* (Wetmore, J., 1900), p. 1.

2. Costs — *Foreclosure — Brief and instructions for brief.*] — The advocate for the mortgagee in foreclosure proceedings is entitled to tax against the defendants the fee allowed for the tariff for "Instructions for Brief" and for "Brief," although the defendants do not appear to the suit, nor in any way oppose the proceedings.—A fee for perusing an originating summons, and a fee for instructions for pleadings, are also taxable, on foreclosure proceedings. *Calder* v. *Narovlansky.* (Wetmore, J., 1900), p. 5.

3. Sheriff's Interpleader—*Costs —Service Fees — Review of Taxation.*] —A sheriff is not entitled to any costs for serving an interpleader summons, it being against the policy of the law to allow them. *Commercial Bank* v. *Fehrenbach and Boake,* Claimant. (Wetmore, J., 1900), p. 8.

4. Sheriff's Costs of Certificate of Satisfaction of Fi. Fa. Lands — *Duty of Sheriff — Land Titles Act, 1894, s. 93.*] — Upon the satisfaction of a *fi. fa.* against lands, it is the duty of the sheriff to forward to the Registrar a certificate under s. 93 of the Land Titles Act, 1894, whether requested so to do or not, and the fees therefor are properly taxable against the execution creditor. *In re Brown.* (Wetmore, J., 1904), p. 67.

5. Practice — *Review of Taxation — Necessary Affidavit — Application whether Final or Interlocutory — Action Dismissed.*]—An order dismissing an action for want of prosecution is a final order, but the application to dismiss is itself interlocutory. *Gibson* v. *Stevenson.* (Wetmore, J., 1905), p. 88.

6. Practice — *Security for Costs —Poverty — Defendant Disposing of his Property — Suspicious Circumstances.*]—Poverty is generally a sufficient ground to warrant an order for security for costs of an appeal.—Upon an application calling upon the defendant for security for costs of the appeal it was shewn, by the examination of the defendant for discovery, that he had no property against which payment of costs could be enforced by the plaintiff.—*Held,* that this circumstance was sufficient to warrant an order for security being given under Rule 502 of the Judicature Ordinance. *Dakota Lumber Co.* v. *Rinderknecht.* (Wetmore, J., 1905), p. 91.

7. Practice — *Allowance for Obtaining security for Costs — Defence and Counterclaim—Claim and Counterclaim Arising out of Same Transaction —Counterclaim Substantially a Defence to the Action.*] — *Held,* that where a counterclaim arises out of the same matter as the claim, so that, although a defence has been pleaded, the counterclaim is in reality in the nature of a defence to the action, and judgment is given on that basis, the Court will allow to the defendants the costs of and incidental to obtaining an order for security for costs. *Griffin* v. *Ruller.* (Wetmore, J., 1906), p. 119.

8. Review of Taxation of Costs —*Confirmation of Sheriff's Sale of Land.*]—The only costs taxable on proceedings to confirm a sheriff's sale of land are such as are incidental to proving the regularity of the sale and of obtaining the confirming order. — Such an application is a "special application." *Massey* v. *Ewen.* (Wetmore, J., 1902), p. 133.

9. Sheriff's Costs of Seizure under Fi. Fa. Goods — *Withdrawal of Seizure Under Instructions from Execution Creditor Prior to Sale—Sheriff's Right to Poundage.*] — The sheriff of Moosomin, under the instructions of the solicitor for the execution creditor, took with him when he was going to attend Court at Oxbow, a writ of execution against goods to seize thereunder while in the vicinity of Oxbow, where the execution debtor resided.—The execution debtor informed the sheriff at the time of seizure that he had

arranged with the execution creditor for an extension of time to pay, and this being communicated to the solicitor, he instructed the sheriff to withdraw. No steps had been taken by the sheriff other than making seizure. The sheriff having charged for mileage all the way from Moosomin, where his office was, and also charged poundage on the whole execution, the solicitor reviewed such charges before the Judge. — *Held*, that under the tariff the sheriff was entitled to mileage from his office at Moosomin. —*Held*, further, that apart from Rule 374 of the Judicature Ordinance, the sheriff would not be entitled to poundage, but that under that Rule the sheriff was entitled to poundage. *In re Murphy, Sheriff.* (Wetmore, J., 1902), p. 271.

10. Mortgage — *Costs — Conduct of Mortgagee — Discretion of Judge.*] —While the general rule in suits for foreclosure or redemption is to allow the mortgagee all his costs even where he does not succeed in establishing his right to the full amount claimed, still where the conduct of the mortgagee has been oppressive and unconscientious the Court has a discretion to deprive him of costs and to award costs to the mortgagor. *Bank of Hamilton* v. *Leslie* (No. 2). (Court en banc, 1906), p. 303.

11. Costs — *Discontinuance before Appearance — Right of Defendant to Tax Costs against Plaintiff.*] — Where an action is discontinued before appearance the defendant is nevertheless entitled to tax against the plaintiff and recover the costs of all work reasonably and properly and not prematurely done by him. *McLorg* v. *Johnston.* (Wetmore, J., 1907), p. 384.

12. Interpleader by Sheriff — *Execution Creditor Abandoning—Costs to which Sheriff Entitled—Rules 432 and 433 of Judicature Ordinance — Claimant's Costs.*] — Rules 432 and 433 of the Judicature Ordinance (C. O. 1898, c. 21), are not intended to alter the law so as to create any liability for sheriff's costs where none existed by law previously. They are intended to limit the liability, where by law such exists, to those fees and expenses set out in Rule 432.—A sheriff who makes a seizure without specific instructions is not entitled to any costs of seizure if the seizure prove abortive. *Elliott* v. *McLean and McLean*, Claimants. (Wetmore, J., 1901), p. 413.

13. Interpleader — *Claimant's Costs — Circumstances under which Claimant though Partially Successful may be Ordered to Pay Costs.*] — A claimant who is entirely successful is *prima facie* entitled to his costs of interpleader.—A claimant who is partially successful is *prima facie* entitled to his costs antecedent to the issue and also to his subsequent costs incidental to the portion of his claim to which he so succeeds, and must pay the costs incidental to the portion of his claim not proven, but when the claimant sets up false allegations in his affidavit thereby rendering a cross examination on such affidavit necessary, he will although successful as to half of his claim be ordered to pay the costs of and incidental to such cross examination. *Brown* v. *Thompson*, Thompson Claimant. (Wetmore, J., 1902), p. 479.

See BILLS OF EXCHANGE AND PROMISSORY NOTE — CONTRACT — CRIMINAL LAW — EXECUTORS AND ADMINISTRATORS — JUDGMENT — MORTGAGE—PRACTICE—SOLICITOR.

COVENANT.

1. Restraint of Trade — *Covenant — Validity — Reasonableness — Division of Agreement.*] — A general covenant not to engage in business in a particular locality for a stated time is void as being in restraint of trade.—The defendants, having sold their business to the plaintiff, covenanted that they would not engage in business in the town of Strathcona for a period of five years. The defendants did engage in business in the said place within the said period. — *Held*, the agreement was void, and that effect could not be given it by rejecting the general restraint, and limiting the agreement for the purpose of the action to carrying on the business carried on by the plaintiff. *Latimer* v. *Fontaine.* (Scott, J., 1905), p. 110.

CRIMINAL LAW.

1. Criminal Law — *Charge of Perjury — No allegation of Intention to Mislead — Appeal — No Previous Application for a Reserved Case.*]—The Court has no authority, under s. 744 of the Criminal Code, 1892, to grant leave to appeal unless it is made to appear on the application that the trial Judge

has refused to reserve a case upon the questions sought to be raised by way of appeal. — *Held*, also, following *Regina* v. *Skelton*, that upon a charge of perjury it is unnecessary to allege any intent to mislead. *Rex* v. *Hinman*. (En banc, 1904), p. 186.

2. Criminal Law — *Evidence — Deposition Taken at Preliminary Inquiry.*]—In order that s. 687 of the Criminal Code, 1892, can apply, to make admissible at the trial a deposition taken at the preliminary inquiry of a witness, since deceased, the fact that the justice signed the deposition must appear from the document itself and cannot be proven by extrinsic evidence. — At a preliminary inquiry adjournments were made from time to time, and the justice, after entering the adjournments as they respectively occurred, signed his name to each. Except for a general heading to each day's proceedings, there was no caption to any deposition, and there were no signatures by the justice other than those mentioned. — *Held*, that the deposition should be read together as one continuous document, but that what appeared on the document was not sufficient to enable the Court to say that the deposition purported to be signed by the justice, and it was, therefore, inadmissible as evidence at the trial and a conviction based thereon was quashed. *Rex* v. *Thompson* (alias Peterson). (En banc, 1904), p. 188.

3. Criminal Law — *Liquor License Ordinance — Stated Case.*] — The defendant was convicted by a Justice of the Peace at Moosomin of unlawfully keeping liquor for the purpose of sale, barter or traffic without the license therefor, by law required, and was committed to the gaol at Prince Albert. She appealed against this conviction by way of a case stated under s. 900 of the Criminal Code, 1892. Six objections were taken to the conviction, of which, however, four only were argued before the Judge, viz.: That there was no evidence to support the charge; that inadmissible evidence was received contrary to the objection of the defendant's counsel; that the justice exceeded his jurisdiction in committing the defendant to gaol at Prince Albert, and that the penalty imposed was excessive.— *Held*, that the evidence disclosing the presence in the defendant's house of glasses containing beer, and also bottles containing other liquor, as well as empty bottles, empty glasses and a corkscrew, a *prima facie* case was raised under the Ordinance, and this not being rebutted by the accused, there was evidence sufficient to support the charge.— That, although inadmissible evidence was received it was immaterial, because there was ample evidence apart from that to support the charge, and it was not shewn that such improper evidence had influenced the Justice's mind in any way; that there was no statutory provision that a justice, in committing to gaol, should commit to any particular gaol, and that therefore the Justice had jurisdiction to commit the accused to the Prince Albert gaol. — As to the last objection above mentioned, the defendant's counsel stated that the points he wished to take were that the costs imposed were excessive, and that there was a variance between the minute of adjudication and the conviction. — *Held*, on the evidence, that the costs were not excessive, and that, as the objection to the variance between the minute of adjudication and the conviction had not been raised before the Justice, it could not be raised before the Judge. *Rex* v. *Ollie Nugent*. (Wetmore, J., 1904), p. 233.

4. Criminal Law — *Quashing Conviction — Costs.*] — It is proper to award costs in quashing convictions on cases stated by justices even when the prosecutor is a member of the police prosecuting in the discharge of his duty. *Rex* v. *Ollie Nugent* (No. 2). (Wetmore, J., 1904), p. 239.

5. Evidence — *Deposition Taken on Examination for Discovery in Aid of Execution — Incriminating Answers —Rule 380 of the Judicature Ordinance — Order Partly Invalid — Effect of.*]—The accused, an execution debtor, was examined under s.-s. 2 of Rule 380 J. O., for discovery in aid of execution. The Order authorizing the examination improperly directed an examination upon matters beyond the scope of the Rule, but the accused nevertheless submitted without objection to be examined in accordance with the Order, and in giving his testimony did not object to answer any question on the ground that his answer might tend to criminate him. — *Held*, that the deposition taken on the examination was admissible in evidence against the accused on a criminal charge founded thereon. *Rex* v. *Van Metre*. (Court en banc, 1906), p. 297.

6. Criminal Law — *Railway Conductor — Money Paid for Carrying Passengers — Failure to Account — Theft — Jurisdiction of Magistrate to Suspend Sentence.*] — Two justices of the peace sitting for the trial of indictable offences under s. 782 of Part XV. of the Criminal Code, 1892, are a Court, and as such have power to suspend sentence under section 971 and impose costs.—A railway conductor whose duty is to account to his employers for cash fares received, commits theft if, having accepted from a passenger for transportation a sum of money less than the regular fare, he fails to account therefor, and (Harvey, J., *dissentiente*) it is immaterial that the passenger paid the money and the conductor received it as a bribe for committing a breach of duty and allowing the passenger to travel without paying the prescribed fare. *Rex* v. *McLennan.* (Court en banc, 1905), p. 309.

7. Criminal Law — *Charge against Corporation — North-West Territories Act — Repeal — Saskatchewan and Alberta Acts — Criminal Code, s. 873— Grand Jury.*]—The repeal of the North-West Territories Act (R. S. C. 1886, c. 50) by R. S. C. 1906, does not affect the laws of the provinces of Saskatchewan and Alberta. A corporation is not subject to a preliminary examination before a magistrate, and can be proceeded against only by one of the methods set out in the Criminal Code (R. S. C. 1906, s. 873) : therefore where by direction of the Attorney-General an order was obtained from a Judge to lay a charge against the defendant corporation, and a formal charge in writing was, pursuant thereto, presented to the Court, it was held that the proceedings were properly laid. *In re Chapman and the Corporation of the City of London,* 19 O. R. 33, followed. *Rex* v. *Standard Soap Company, Limited.* (En banc, 1907), p. 356.

8. Criminal Law — *Elections — Returning officer — Conspiracy to Defraud — Particulars — Amendment — Stated Case — Territorial Election Ordinance—C. C. 1892, ss. 394 and 527.*] —The accused, a returning officer at an election of a member to serve in the Legislative Assembly of Saskatchewan, was charged with: (1) Conspiring to defraud D., a candidate, from oeing returned as elected; (2) Conspiring to defraud the electors by illegally obtaining the return of one T.; (3) Conspiring to defraud the public by procuring by illegal means the return of T. —*Held,* that such charges did not constitute any indictable offence under the Criminal Code, 1892, or at Common Law. — Particulars delivered under C. C. 1892, s. 616, do not form a part of the charge. — The Court has no jurisdiction on the consideration of a "Stated Case" to decide any question not submitted by the Case. *Rex* v. *Sinclair.* (En banc, 1906), p. 424.

9. Railway — *Prairie Fire Ordinance — Application to Dominion Railways — Constitutional Law — Jurisdiction of Court to Review Evidence on Certiorari.*]—The provisions of the Prairie Fires Ordinance respecting the kindling of fire and the letting of fire run at large, apply to the Canadian Pacific Railway Company in the operation of locomotive steam engines upon its railways. — The provisions of s. 239, s.-ss. 1 and 2 of the Dominion Railway Act, are not in conflict with nor do they supersede the provisions of the Prairie Fires Ordinance.—Section 25 (E) of the Dominion Railway Act does not in the absence of rules and regulations thereunder supersede the Prairie Fires Ordinance. — On *certiorari* the Court cannot examine the evidence either in support of or in disproof of any findings of fact of the Justices, nor for the purpose of finding any additional facts. *Rex* v. *Canadian Pacific Railway Company.* (En banc, 1907), p. 443.

10. Criminal Law—*Dying Declaration — Form — Words of Deceased — Admissibility.*] — The essential element in a dying declaration is the abandonment of hope of recovery, and the time when the statement is made though a circumstance for consideration, is not a guide to its admissibility or otherwise.—A statement in writing, prepared by another but read over to and signed by the deceased when he had no hope of recovery is admissible as a dying declaration. *R.* v. *Mitchell* (17 Cox C. C., disapproved). *R.* v. *Magyar.* (Court en banc, 1906), p. 491.

See MUNICIPAL LAW.

DAMAGES.

See LANDLORD AND TENANT—MASTER AND SERVANT — TRESPASS—VENDOR AND PURCHASER.

DISCONTINUANCE.

See COSTS—PRACTICE.

DOMINION LANDS ACT.

See HOMESTEAD.

DYING DECLARATION.

See CRIMINAL LAW.

ELECTIONS.

See CRIMINAL LAW.

EVIDENCE.

See APPEAL—ATTACHMENT OF DEBTS—CRIMINAL LAW — EXECUTION — MASTER AND SERVANT—PRACTICE —RAILWAY — SALE OF GOODS — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER.

EXECUTION.

1. Confirmation of Sheriff's Sale of Land under Execution—*Evidence —Publication of Notice—Sufficiency of —Fairness of Sale—Inadequate Price—Redemption of Land.*]—The production of an abstract of title having an execution noted thereon is *prima facie* evidence that such execution is a valid charge against the land.—*Hæsitante* (after consultation with the other Judges of the Court), publishing a notice in a weekly newspaper from the 18th January to the 15th March, both inclusive, is a publication for "two months." An apparent inadequacy of selling price is not of itself evidence of unfairness in the conduct of a sale under execution. In the absence of fraud a Judge has no power to allow any party to redeem after a sale by a sheriff of land under execution. *Hind* v. *Wesbrook.* (Wetmore, J., 1900), p. 10.

2. Practice — *Pluries Execution—Application for Leave to Issue — What Must be Disclosed.*]—On an application for leave to issue execution under Rule 349 of the Judicature Ordinance, the affidavits must clearly disclose the amount that is due on the judgment. It is not sufficient under any circumstances for the plaintiff to merely swear that no payment has been made. *Frost & Wood* v. *Roe.* (Wetmore, J., 1900), p. 79.

3. Originating Summons for Foreclosure — *Homestead — Rights of Prior Execution Creditors—Defective Affidavit.*]—At the return of an originating summons for foreclosure it appeared that there was a mortgage and two executions registered against the property in priority to the mortgage sought to be foreclosed. The land was the homestead of the mortgagor and execution debtor.—*Held,* that the execution creditors had no interest in the property *quoad* the subsequent mortgage. *Imperial Elevator Company* v. *Jesse.* (Wetmore, J., 1907), p. 101.

See ASSIGNMENTS AND PREFERENCES—EXEMPTION.

EXECUTORS AND ADMINISTRATORS.

1. Dominion Lands Act—*Executors and Administrators — Lease of Land Prior to Issue of Letters of Administration and Prior to Issue of Recommend for Patent — Validity—Executor de son tort—Letters Relating Back—Section 89, s.-s. 4 of Land Titles Act, 1894.*] — An administrator of a deceased's estate cannot be compelled to perform, nor is he liable on, an agreement entered into by him prior to the grant of letter of administration, and s. 89, s.-s. 4 of the Land Titles Act, 1894, is merely declaratory of the common law and causes the title of an administrator to relate back to the date of deceased's death for administration purposes solely, and in the interests of the estate. A lease of homestead land prior to the issue of recommend for patent is void, under 60-61 Vic. c. 29, s. 5. *Flannagan* v. *Healey,* approved. *Larry, Administratrix,* v. *Baker et al.* (Wetmore, J., 1902), p. 145.

2. Administrator — *Passing Accounts—Property Bought by Deceased with Administrator's Money—Resulting Trust — Intention — Evidence.*] — Whether or not a purchase of property by a husband in the name of his wife is a gift is a question of the husband's

intention at the time of the purchase. *Prima facie* it will be considered a gift, but this presumption may be rebutted. The evidence, however, for such purpose must be clear, but *quære*, whether when the party seeking to rebut the presumption gives evidence, he must swear positively to an intention to create a trust. *Re Hobson Estate.* (Wetmore, J., 1901), p. 182.

3. Executors and Administrators — *Husband and wife — Accounts —Costs.*]—Whether grain crops grown and harvested by a husband on his wife's land is the property of the husband or of the wife is always a question of fact, and the test to be applied is, was it or was it not the intention of the wife to part with the control and disposition of the land to her husband for the purpose of enabling him to maintain himself and family? If such was her intention, the crops are the property of the husband. In passing an administrator's accounts the parties interested have, as a rule, the right to a strict examination of the same and also to have witnesses examined *viva voce* if desired, and as a rule the costs of all parties attending the passing should be paid out of the estate. *Re Winters Estate.* (Wetmore, J., 1904), p. 250.

See HOMESTEAD—WILLS.

EXEMPTION.

See ASSESSMENT AND TAXATION — EXECUTION.

FIRE.

1. Prairie Fires Ordinance — *Objects of — "Run at Large"—Meaning of—Appeal from Summary Conviction—Costs.*] — The object of passing prairie fire legislation was not to protect an individual person against his own carelessness, but to protect the general public against such carelessness. A person who allows a fire to run on his own property under such circumstances that there is no reasonable probability of its ever escaping; and it does not as a matter of fact escape from his property, does not allow fire to "run at large" within the meaning of section 2, s-s. (c) of The Prairie Fires Ordinance. *Gedge* v. *Lindsay.* (Wetmore, J., 1903), p. 141.

2. Prairie Fires Ordinance — *Starting Fires on One's Own Land — Fire Escaping — "Letting" or "Permitting."*]—A person who kindles a fire on his own land and does not properly watch it to see that it does not escape, "lets or permits" it to do so, and if it does escape he is guilty of an offence under "The Prairie Fires Ordinance," C. O. 1898, c. 87. *McCartney* v. *Miller.* (Wetmore, J., 1905), p. 367.

See ARBITRATION AND AWARD — RAILWAY—SALE OF GOODS.

FIXTURES.

See LANDLORD AND TENANT.

FORECLOSURE.

See EXEMPTION—MORTGAGE.

FRAUD AND MISREPRESENTATION.

See LANDLORD AND TENANT.

GARNISHEE.

See ATTACHMENT OF DEBTS.

HOMESTEAD.

See ASSESSMENT AND TAXATION — EXECUTORS AND ADMINISTRATORS —EXEMPTION.

HUSBAND AND WIFE.

1. Husband and Wife — *Action for Declaration that Marriage is Null and Void — Jurisdiction of Court to Entertain the Suit.*] — The Supreme Court of the Northwest Territories has jurisdiction to entertain a suit for a declaration that a marriage is void *ab initio*. *Lawless* v. *Chamberlain*, approved. *Hardie* v. *Hardie.* (Wetmore, J., 1900), p. 13.

See EXECUTORS AND ADMINISTRATORS.

INJUNCTION.

See LAND TITLES ACT—PRACTICE.

INTERPLEADER.

See ASSIGNMENTS AND PREFERENCES—ATTACHMENT OF DEBTS—BILLS OF SALE AND CHATTEL MORTGAGES—COSTS.

IRREGULARITY.

See APPEAL—JUDGMENT.

JUDGMENT.

1. Practice — *Summary Judgment under Rule 103 of the Judicature Ordinance, C. O. 1898 cap. 21 — English Rule Distinguished — Costs—Enforcement of Lien—Agreement of Purchase.*] —Summary judgment for a debt or liquidated demand may be granted even though such demand is joined with a claim of a different nature. Upon an action brought to enforce a mechanic's lien and also for a personal judgment against the defendant, an application was made for an order striking out the defendant's appearance and statement of defence, and for leave to sign judgment on the alleged ground that the defendant had no defence on the merits, and that he had admitted the claim. Counsel for defendant contended that summary judgment could not be given where dual claims of a different nature were made as in the present action.—*Held*, that the difference in wording in the Judicature Ordinance Rule 103 from Order 3, Rule 6 of the English Act, was made expressly for the purpose of allowing an application to be made even where a claim to recover a debt or liquidated demand is joined with another claim of a different nature. *Brooks & Company* v. *Widerman*. (Stuart, J., 1907), p. 121.

2. Practice — *Setting Aside Judgment — Irregularity — Affidavit of Service — Evidence.*]—Evidence given by affidavit stands on the same ground as evidence given in any other way, so that an affidavit need not of necessity be altogether disregarded merely because of an erroneous statement therein either by accident or design. *Sjostrom* v. *Gale*. (Wetmore, J., 1904), p. 198.

3. Practice — *Summary Judgment —Verifying Cause of Action—Affidavit.*] —The affidavit verifying the cause of action on a motion for summary judgment may be made in general terms. *Codville* v. *Smith*. (Wetmore, J., 1906), p. 395.

JURISDICTION.

See CONSTITUTIONAL LAW.

JUSTICE OF THE PEACE.

See ASSESSMENT AND TAXATION — CRIMINAL LAW.

LACHES.

See CONTRACT—SALE OF GOODS—VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. Lease — *Agreement for Lease—Land Titles Act, 1894—Agreement Void as Lease — Assignment — Breach of Agreement to do Breaking — Action by Assignee of Reversion for Damages — Chose in Action.*] — By agreement in writing but not sealed, the defendant leased from one McLean certain land, and entered into possession thereof. Subsequently, but during the currency of the term, McLean transferred the demised land to the plaintiff, and also assigned to the plaintiff the agreement of lease. In an action by the assignee against the tenant, *held* that the agreement, although void as a lease, was, nevertheless, valid as an agreement, and the defendant having entered into possession under it, a tenancy was thereby created.—*Held*, further, that, notwithstanding that the Statute, 32 Henry VIII. c. 24, which confers on a grantee of a reversion a right of action against a lessee for non-performance of conditions in a lease, does not apply when the demise is, as in this case, not by deed, yet the plaintiff was, nevertheless, entitled as assignee under cap. 41 of the Consolidated Ordinances, 1898, to maintain an action against the defendant for his breach of the agreement prior to the date of the assignment thereof to the plaintiff. *Brown* v. *Appenheimer*. (Wetmore, J., 1903), p. 51.

2. Landlord and Tenant—*Notice to Quit — Construction of Documents.*] —A lease contained the following clause:—"To have and to hold the said rooms and apartments for and during the term of three years to commence from the 7th day of January, 1903, at and for the monthly rental of seventeen dollars of lawful money of Canada, payable monthly, the first payment to be made on the 7th day of February next ensuing the date hereof, and it is further agreed that at the expiration of the said term of three years the said R. D. Robertson may hold, occupy and enjoy the said rooms or apartments from month to month for so long a time as the said R. D. Robertson and Elaine Aylwin shall agree, at the rent above specified; and that each party be at liberty to quit possession on giving the other three months' notice in writing." Relying on this clause the landlady, less than four months after the date of the lease, gave notice to quit. The tenant refused to vacate, holding that the provision for the three months' notice did not apply to the term of three years, and that the term could not be put an end to by notice before that period had elapsed.—*Held*, that upon the proper construction of the above clause, the landlady had the right to so terminate the tenancy.—*Held*, also, *per* Wetmore, J., that in construing any instrument *inter partes*, regard may be had to punctuation. *Aylwin* v. *Robertson*. (Court en banc, 1904), p. 164.

3. Landlord and Tenant — *Trespass to Lands — Action for Damages.*] —In order to enable a landlord to maintain an action for trespass to lands, the acts complained of must be such as to injure the reversion. *Leadley* v. *Cruickshank*. (En banc, 1904), p. 170.

4. Landlord and Tenant — *Terminating Lease — Overholding Tenant —Notice to Quit.*]—A yearly tenancy may be determined on whatever notice the parties agree on, and where a lease provided for its termination "by giving one full month's notice," it was held immaterial on what date the notice was given so long as the notice was for a full month at least. *Osment* v. *Dundas*. (Richardson, J., 1903), p. 339.

5. Landlord and Tenant — *Overholding — Tenant's Right to Fixtures —Prior Judgment between Litigants—Right of Trial Judge to Inspect Reasons for Prior Judgment—4 Geo. II. c. 28, s. 1.*]—The plaintiff had been the lessee of the defendant. The defendant having given notice to quit and the plaintiff still continuing in possession, the defendant took proceedings by way of originating summons, and obtained an order for the immediate delivery up of the premises. From this order the plaintiff appealed, but did not prosecute his appeal with effect, and it was dismissed and the sheriff ejected the plaintiff. In an action by plaintiff to recover the value of fixtures left by him in the premises when the sheriff ejected him.—*Held*, that a tenant's right to remove fixtures exists only during the tenancy and for such further time as the tenant holds the premises under a right still to consider himself as a tenant, but no right of removal exists after the termination of the lease where the tenant retains possession wrongfully. — *Held*, also, that the previous order for delivery having been proven and put in evidence, it was competent for the trial Judge to inspect the written reasons given by the Judge for making such order for the purpose of ascertaining the questions then raised and having regard thereto, and also to the abortive appeal taken by the plaintiff, that the plaintiff's holding over was wilful and contumacious, and that plaintiff was under 4 Geo. II., c. 28, s. 1, liable to the defendant for double the yearly value of the premises." Stair pads merely tacked on to keep them in place are not fixtures. A notice to quit is a sufficient demand of possession under 4 Geo. II., c. 28, s. 1. *Dundas* v. *Osment*. (Newlands, J., 1906; En banc, 1907), p. 342.

6. Landlord and Tenant — *Misrepresentation — Fraud — Damages—Deceit.*] — In an action by a tenant against his landlord for damages for misrepresentations, made by the landlord in relation to the demised premises prior to the making of the lease, the evidence showed that there was no fraud on the part of the landlord in making the representations. It also appeared that the tenancy had expired before any claim for damages was put forward.—*Held*, therefore, that the tenant could not recover. *Booth* v. *Beechey*. (Newlands, J., 1906), p. 435.

LAND TITLES ACT.

1. Injunction — *Motion to Dissolve—Vendee of Land with Notice of Prior Interest — Fraud — Sections 42, 55 and 56 of Land Titles Act,*

1894.]—An injunction will lie against the registered owner of land which he acquired with intent to defraud one having a prior equity in the land. M. agreed to sell to H. and S. a block of land, the agreement providing that upon payment of the purchase money H. should have a two-thirds interest in the land. Upon the death of H., S. paid up the balance due on the purchase price, and induced M. to transfer the land to him. S. sold the land to one Hamilton, who had knowledge that deceased had an interest in the property. In an action by the representatives of the deceased alleging fraud on the part of Hamilton, an injunction was granted restraining Hamilton from dealing with the land. Upon an application by Hamilton to dissolve the injunction, *held*, that the right of the representatives of the deceased was a prior one and should prevail over the interest of the vendee S., under section 126 of the Land Titles Act, 1894.—*Quære*, whether irrespective of the question of fraud, the holder of the certificate of title would, under sections 55 & 56 of the Act, be protected against the deceased's representatives, where the former had notice of the interest of the deceased before he obtained the certificate. *Hooper* v. *Smith and Hamilton.* (Scott, J., 1905), p. 27.

2. Practice — *Caveat* — *Contract* —*Finding of Fact* — *Memorandum under Statute of Frauds* — *Sec. 91 of the Land Titles Act, 1906.*] — Where an application under section 91 of the Land Titles Act, 1906, was made by A. B., the registered owner of certain land, for an order discharging a caveat registered against it by one C. B., who claimed to be entitled to a transfer of the lot under an agreement for sale from A. B.—*Held*, that sec. 91 provided a means of reaching a speedy decision upon the merits of a dispute as to the sale of real property, where a caveat has been filed which ties up the property.—*Held*, further, that where the Court, acting under that section, finds as a fact that no agreement of sale has been entered into, it has power to direct the removal of the caveat. Although a memorandum was signed, which would satisfy the Statute of Frauds, if the memorandum is equivocal as to whether or not an agreement was entered into, the agreement must be proved by extrinsic evidence. *Babitt* v. *Boileau* (Stuart, J., 1907), p. 481.

See COSTS—LANDLORD AND TENANT—HOMESTEAD.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILL.

LIEN.

See APPEAL—ATTACHMENT OF DEBTS —BILLS OF SALE AND CHATTEL MORTGAGES.

LIEN NOTE.

See SALE OF GOODS.

LIMITATION OF ACTIONS.

See ASSESSMENT AND TAXATION.

LIQUOR LICENSE ORDINANCE.

See CRIMINAL LAW.

LIVERY-STABLE KEEPER.

See MUNICIPAL LAW.

MALICIOUS PROSECUTION.

See PRACTICE.

MARRIAGE CONTRACT.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. Master and Servant — *Injury to Servant from Explosion in Defendants' Mine* — *Negligence* — *Contributory Negligence* — *Breach of Statutory Obligations* — *Evidence* — *Findings of Jury* — *Costs.*]—The plaintiff, a miner in the employ of the defendant, was

injured by an explosion in the defendants' mine, and sued to recover damages. The jury found that the plaintiff's injury was caused by the defendants' negligence, and that the plaintiff was not guilty of contributory negligence, and they assessed the damages at $1,500. On appeal, *held*, that there was evidence to support the jury's finding that the defendants were guilty of negligence, but the jury's finding that the plaintiff was not guilty of contributory negligence was unsupported by the evidence, and must be reversed. — *Held*, further, that there had been a misdirection to the jury by the trial Judge in instructing the jury that the question of contributory negligence only arose in case the jury found that the company had carried out their statutory obligations and their common law duties. —*Held*, further, that there should be a new trial on the ground of improper admission of evidence, such evidence consisting in a policy of insurance whereby the defendants were insured against loss to the sum of $1,500. Judgment of Sifton, C.J., set aside, with costs, and a new trial ordered. *Davies* v. *The Canadian American Coal & Coke Company Limited*. (Court en banc, 1905), p. 240.

2. Master and Servant — *Hiring at "$25 a Month for 8 Months" — Payment of Wages.*]—A hiring at "$25 a month for 8 months" entitles the employee to payment of his wages at the end of each month. *Taylor* v. *Kinsey* (4 Terr. L. R. 178) followed and approved. *Mosseau* v. *Tone*. (En banc, 1907), p. 369.

MECHANIC'S LIEN.

See JUDGMENT—PRACTICE.

MEDICAL PROFESSION ORDINANCE.

1. Medical Profession Ordinance —*Object of Legislature in Passing — Persons Entitled to be Registered without Undergoing an Examination.*] — A member of the College of Physicians and Surgeons of Manitoba is entitled, without undergoing any examination, to be admitted upon the register of the College of Physicians and Surgeons of the North-West Territories, under C. O. 1898, c. 52. *In re Sinclair*. (Court en banc, 1904), p. 178.

MORTGAGE.

See APPEAL—COSTS.

MUNICIPAL LAW.

1. By-law — *Discrimination—Auctioneer — Invalidity.*]—Under an Ordinance authorizing a council to pass by-laws for "licensing, regulating and governing auctioneers," and for fixing the sum to be paid for every such license, the council of the city of Calgary passed a by-law requiring all auctioneers within the city to obtain a license and fixing the fee therefor at $20 in the case of *bona fide* residents and at $1,000 in other cases.—*Held*, that the by-law was void for discrimination. *Rex* v. *Pope*. (Court en banc, 1906), p. 314.

2. Highway — *Negligence—Municipal Law—Misfeasance or Nonfeasance —Liability of Municipality for Negligence of Contractor — Contributory Negligence — Livery-stable Keeper's Liability for Negligence of Hirers of Rigs—Remoteness of Damage — Evidence.*]—The city of Moose Jaw employed a contractor to construct and instal a sewer along one of the principal streets of the city, where the public were in the habit of passing. The plaintiff, a livery-stable keeper, had hired a team and rig to four men who drove along the street with the result that one horse was killed and the other horse, together with the rig and harness, were damaged by falling into an open ditch.—*Held*, *per curiam*, that the city was bound to see that proper precautions were taken by the contractor to guard against danger, and the accident having been caused by the negligence of the contractors, the city was liable.—*Held*, also, that it is misfeasance on the part of a municipality to attempt to do work and do the same negligently so that damage is caused thereby. — *Held*, also, that where the question is not one of the veracity of witnesses, but one of the proper inference to be drawn from truthful evidence, an appellate Court is in as good position as the original tribunal to draw such inferences, and is at liberty to draw inferences so as to reach a conclusion different from that of the trial Judge. Per Stuart, J., that on the evidence the drivers of the horses were guilty of contributory negligence, but that such negligence could not be im-

puted to the plaintiff. *McGillivray* v. *City of Moose Jaw.* (En banc, 1907), p. 465.

3. By-law — *Municipal Law — Early Closing of Retail Stores — Conviction — Certiorari.*]—Under an Act empowering a city council to pass by-laws for "fixing, altering and regulating" the hours of opening and closing retail stores, the council of the city of Calgary passed a by-law fixing the hours for opening and closing retail stores in that city, but provided therein that before any person should be convicted thereunder it must be proven that he transacted business during the prohibited hours.—*Held*, that the by-law was *ultra vires*. *Rex* v. *Doll.* (En banc, 1907), p. 472.

See ASSESSMENT AND TAXATION.

NEGLIGENCE.

See MASTER AND SERVANT—RAILWAY.

NORTH-WEST TERRITORIES ACT.

See CRIMINAL LAW.

NULLITY.

See PRACTICE.

PARENT AND CHILD.

1. Parent and Child — *Agreement for Adoption — Parent's Right to Custody of Child.*]—As a general rule any agreement whereby a father relinquishes the custody of his child in favour of another is contrary to public policy and, hence, illegal, but the Court will nevertheless give effect to an agreement of adoption when it is clearly for the moral benefit of the child or in some very serious and important respect clearly right that such should be done. The Court should, however, exercise its powers in this regard with great caution. *In re Gray.* (Wetmore, J., 1907), p. 402.

PARTIES.

See PRACTICE.

PARTNERSHIP.

1. Trusts and Trustees—*Statute of Frauds—Action for Declaration of Partnership.*] — The question being whether a partnership existed in a lease from the Crown of coal mining rights, letters written by the defendant to the plaintiff were relied on as evidence. In none of these letters was there any express declaration of a partnership, but the defendant had, in referring to the subject matter, used such words as "our," "we," "you and I," "us," etc. —*Held*, that the letters were sufficient to raise a trust by implication, and that the case was within the *ratio decidendi* of *Forster* v. *Hale*. *Gilmour* v. *Griffis.* (Wetmore, J., 1904), p. 225.

PERJURY.

See CRIMINAL LAW.

PLEADING.

1. Pleading — *Counterclaim and Set-off — Statute of Limitations.*] — The Statute of Limitations is pleadable to a counterclaim in the same way as to a separate action for the same relief. —A set-off can only arise where the action is for a liquidated amount and there are mutual debts between the litigating parties. *The Waterous Engine Works Co., Ltd.* v. *Ball.* (Wetmore, J., 1903), p. 32.

2. Practice — *Pleading — Amendment — Right of Defendant to Plead de novo — Premature Application to Strike Out—Costs.*] — Where a statement of claim is amended under Rule 179 of the Judicature Ordinance, the opposite party is entitled to plead *de novo* to the whole claim as amended, notwithstanding that he has previously pleaded to the original claim, and a defence delivered to such original claim cannot be under Rule 182, considered as pleaded to the amended claim until the expiration of the eight days allowed for pleading to the amended claim. *Pease* v. *Town of Moosomin and Sarvis.* (Wetmore, J., 1901), p. 36.

3. Pleading — *Demurrer — General denial — Sufficiency — Striking Out.*] —A plea by a defendant that the statement of claim is not sufficient in law

to sustain the action without setting forth the grounds is bad and will be struck out. *Yorkton Printing & Publishing Co., Ltd.* v. *Magee.* (Wetmore, J., 1897), p. 54.

4. Pleading — *"Not Guilty by Statute" — Other Defences—Contributory Negligence — Workmen's Compensation Ordinance, c. 13 of 1900.*] —A plea of "not guilty by statute" under Rule 113 of the Judicature Ordinance (C. O. 1898, c. 21), entitles the party so pleading to raise any defence that he might raise under a plea of "not guilty" at common law.— Evidence of contributory negligence is properly admissible under such a plea. —A general denial of "each and every material allegation" in a statement of claim is a bad plea. *Adkins* v. *North Metropolitan Tramway Co.*, 63 L. J. Q. B. 361, not followed. — The Workmen's Compensation Ordinance, 1900, c. 13, is not an Ordinance affecting procedure merely, and is not retroactive. —A question of law cannot be raised by a general allegation in a pleading, but the grounds thereof must be stated. —*Yorkton Printing Co.* v. *Magee*, 7 Terr L. R. 54, followed. *Smith* v. *Canadian Pacific Railway Company.* (Wetmore, J., 1901), p. 56.

5. Small Debt Procedure—*Pleading — Reply to Counterclaim — Necessity for — History of Small Debt Procedure.*] — It is not necessary to file any reply to a counterclaim under the Small Debt Procedure. *Kirkland* v. *Hole et al.* (Wetmore, J., 1902), p. 64.

See COSTS—LIEN.

PRACTICE.

1. Practice — *Small Debt—Abandonment of Portion of Claim.*] — A person having a demand exceeding $100 may abandon the overplus so as to bring an action under the Small Debt Procedure. — Where the plaintiff's demand, in such a case, consists of several items, it is not necessary to abandon a specific item or items, it is sufficient to abandon in general terms the excess over $100. *McLeod Bros.* v. *Sickavitch.* (Wetmore, J., 1903), p. 30.

2. Parties — *Joinder of Causes of Action — Rules 26 and 29 of "The Judicature Ordinance" C. O. 1898, c. 21.*]—The plaintiffs brought action against the defendant Howland for the purchase price of machinery sold and delivered to him, and joined therewith a claim against the defendant company on notes given by it to plaintiff to secure part payment of such machinery; and also a small claim against the defendant company for the price of goods.—*Held*, that these constituted separate and distinct causes of action and could not be joined. *Waterous Engine Works Company* v. *Howland and the Saskatchewan Mutual Development Company.* (Wetmore, J., 1907), p. 44.

3. Practice — *Issue of Writ in Wrong Judicial District — Jurisdiction of Supreme Court — Conditional Appearance.*] — Notwithstanding that the rules of Court do not provide for a conditional appearance, a defendant may nevertheless appear under protest and thus save any rights that would otherwise be waived. The ground of protest, however, should be specifically stated. — An unconditional appearance by the defendant to an action instituted in the Supreme Court, but entered in the wrong judicial district, waives the defect. *Pinki* v. *The Western Packing Co. of Canada.* (Wetmore, J., 1904), p. 200.

4. Practice — *Two Actions for the Same Cause — Staying Proceedings— Locus Standi — Appearance — Discontinuance.*]—A notice of discontinuance that is merely filed but not served is a nullity. — A defendant before appearance has no *locus standi* to make any motion to the Court except the motions specified in Rule 87 of the Judicature Ordinance, C. O. 1898, c. 21. *Robertson* v. *Eastman.* (Wetmore, J., 1904), p. 210.

5. Practice — *Order to Examine Abroad a Party to a Suit.*]—The principles governing the granting of an order to take the evidence of a plaintiff when he resides out of the jurisdiction do not apply when the application is by a defendant to take his own evidence abroad, and *prima facie* a defendant residing abroad, who is sued here, is entitled to an order to take his evidence where he lives. *Lawton* v. *Wilcox.* (Wetmore, J., 1904), p. 213.

6. Practice — *Order to Take Evidence Abroad — Affidavit for.*]—While it may be necessary in some cases to

shew that it is impossible to obtain the attendance of the witnesses at trial, it is not, as a rule, necessary to do so to procure an order to take their evidence abroad.—A party is not entitled *ex debito justitiæ* to an order to examine a witness abroad, but he is, *prima facie*, so entitled on shewing the residence abroad and that the evidence sought to be obtained is material. *Burke* v. *North-West Colonization Co.* (Wetmore, J., 1904), p. 219.

7. Practice — *Judgment of Admissions — Counterclaim.*] — Admissions made by the defendant an examination for discovery are sufficient to ground an application for judgment under Rule 229 of "The Judicature Ordinance," C. O. 1898, c. 21.—Whether a Judge will exercise the powers given to him by Rule 229 at all, and also the manner of exercising those powers, are both discretionary, and inasmuch as in the present case the admissions shewed that the defendant had no defence, and the plaintiff's claim was greatly in excess of the defendant's counterclaim, judgment was ordered to be entered for the full amount of the plaintiff's claim, and execution stayed for one month, the same to be further stayed until the trial of the counterclaim on condition that the defendant within the month pay into Court the difference between the amount of the plaintiff's claim and the defendant's counterclaim. *Legare* v. *Glass & Large.* (Wetmore, J., 1904), p. 221.

8. Practice — *Third Party Notice* —No leave is required to either issue or serve a third party notice by one defendant against a co-defendant under Rule 67 of the Judicature Ordinance, C. O. 1898, c. 21, whether such notice issues before or after the time limited for delivering defence. *Moline* v. *Bluthe et al.* (Wetmore, J., 1904), p. 316.

9. Parties — *Striking out Action for an Injunction to Restrain from Proceeding with an Action — Amendment — Costs.*] — An action cannot be maintained in the Supreme Court of the North-West Territories for the purpose of enjoining a party from bringing an action therein or from proceeding therewith.—A defendant against whom the only relief claimed is such as the Court has no power to grant, and who is not a necessary party in order that the plaintiff may obtain the relief prayed for against other defendants, will be struck out as a party defendant, and it is no longer the practice of the Courts to permit a party to be made a defendant simply for the purpose of making him liable for costs. *Bible* v. *Hill & Moses.* (En banc, 1907), p. 389.

10. Practice — *Security for Costs — Application to Extend Time.*] — Where an order is made directing security for costs to be given and providing that in default the action stand dismissed with costs without further order, default in compliance therewith *ipso facto*, puts an end to the action. *Hutchinson* v. *Twyford.* (Scott, J., 1906), p. 420.

11. Practice — *Security for Costs —Affidavit.*]—An affidavit to support an application for security for costs is sufficient if based on information and belief, and where the source of the information and belief is the copy of the writ of summons served, it is not necessary to produce such copy as an exhibit to the affidavit. *Balcovski* v. *Olson.* (Wetmore, J., 1906), p. 421.

12. Practice — *Counterclaim for Malicious Prosecution — Action for Price of Goods—Striking out Counterclaim.*] — A defendant can counterclaim against the plaintiff and a third party only when the relief claimed relates to or is connected with the original cause of action. — Where in an action for the price of goods the defendant counterclaimed against the plaintiff and a third party for damages for alleged malicious prosecution, the counterclaim was struck out. *Macdonald* v. *Logan.* (Scott, J., 1905), p. 423.

13. Practice and Procedure — *Action to Realize Mechanics' Lien — Amendment of Statement of Claim.*]— The plaintiff, a lien holder, brought action within the ninety-day period allowed by the Ordinance, asking for a personal judgment for the amount for which the lien was filed. Subsequently and after the expiration of the ninety-day period the plaintiff, without leave, amended his statement of claim by claiming to realize the lien and by adding the necessary averments to support such a claim. The defendant not appearing, an order was made for judgment in accordance with the amended claim. On application by defendant to set aside this order.—*Held.* (following United States authorities) that the

amendment to the statement of claim was properly made. *Nelson* v. *Brewster*. (Scott, J., 1906), p. 458.

14. Practice — *Appearance—Notice of Appearance.*]—Notice of appearance is not necessary under Judicature Ordinance C. O. 1898, c. 21. *Bell Engine and Thresher Co.* v. *Bruce*. (Wetmore, J., 1907), p. 460.

15. Practice — *Service upon Defendant of Order for Issue of Writ ex Juris — Costs.*] — It is a convenient practice to serve a copy of the Order for service *ex juris* of an originating summons on the party or parties to be so served and if done the costs incidental thereto will be allowed on taxation. *North of Scotland* v. *Kimber*. (Wetmore, J., 1903), p. 478.

16. Practice — *Setting Aside Writ —Nullity or Irregularity.*] — Where a writ purported to be issued out of the Judicial District of Northern Alberta after that Judicial District had ceased to exist an application to set such writ aside was dismissed on the ground that it was not shewn that the writ was not issued by the proper officer or from the proper office and that consequently the only objection was that the writ was not properly styled and this, being an irregularity merely, could be amended. — *Saskatchewan* v. *Leadley*, 6 Terr. L. R. 82, distinguished. *Theriault* v. *Evans*. (Scott, J., 1906), p. 490.

See ATTACHMENT OF DEBTS — COSTS — EXECUTION — JUDGMENT — PARTIES.

PRINCIPAL AND AGENT.

1. Principal and Agent—*Promissory Note — Chattel Mortgage — Authority of Agent to Deal with his Principal's Property.*] — An agent of the plaintiff, holding for collection a promissory note payable to order, and a collateral chattel mortgage made by defendant in the plaintiff's favour, delivered the same to one Thompson, in alleged payment of a certain personal indebtedness of the agent to Thompson. The defendant, *bona fide*, settled with Thompson, and Thompson delivered to the defendant the note and mortgage. The note had not been endorsed by the plaintiff, nor the mortgage assigned in any way. — *Held*, that the delivery of the note and mortgage to Thompson was outside the scope of the agent's authority, and that, as the instruments were not transferable by delivery, and the plaintiff had not made any representation that they would so pass, the defendant was liable to pay the amount thereof to the plaintiff. Remarks of the Lord Chancellor in *Goodwin* v. *Roberts*, considered. *Abramovich* v. *Sair*. (Wetmore, J., 1900), p. 15.

2. Land Agent — *Sale Made through his Solicitations — Right to Commission.*]—If the services rendered by a land agent with whom property is "listed" result in bringing the vendor and purchaser together so as to result in a sale, he is entitled to his commission.—The defendant "listed" his farm with the plaintiff, a land agent, to be sold at $10 per acre, and agreed to give him $1,000 if he would make the sale. One M. inspected the farm in company with the plaintiff with a view to purchasing it. As a result thereof negotiations were subsequently entered into between the defendant and M., resulting in a sale to M., not only of the farm, but also of some personal property not previously considered.—In an action for $1,000 commission.—*Held*, that as the plaintiff had been the means of bringing the defendant and purchaser together, the plaintiff was entitled to the commission. — The fact that the sale included some additional property not "listed" with the plaintiff, was no ground for defeating his right to commission on the property listed.—It was not necessary for the recovery of the commission that the plaintiff should have personally introduced the defendant to the purchaser. *Ings* v. *Ross*. (Court en banc, 1907), p. 70.

3. Principal and Agent — *Commission on Sale of Land — Quantum Meruit — Costs.*] — The defendant listed with the plaintiff, a real estate broker, for sale, a half section of land on the terms that the plaintiff should be paid a commission on the amount of such sale. The amount of the sale price was not stated, but the plaintiff was not to sell for less than $10 per acre without the defendant's consent. P. having through his agent G. applied to the plaintiff for a statement of farms he had for sale, the plaintiff furnished G. with a number of statements, including one respecting the defendant's farm, quoting the price at $10 per acre. P. was aware, from other sources, that the defendant's farm was for sale and

had at different times been over the defendant's farm, but nevertheless he, shortly after receiving the statement furnished by the plaintiff to G., went out and inspected the defendant's farm, informing the defendant that the plaintiff had sent him there and shewed to the defendant the statement furnished to G. by the plaintiff. P. did not then purchase the farm, but subsequently negotiations were renewed directly with the defendant resulting in a sale to P. for $2,600. At the trial P. testified that he was influenced to go out and inspect the defendant's farm by the information supplied by the plaintiff to G. — *Held*, that the plaintiff was entitled to recover the reasonable value of his services, what he had done having led to the sale. *Fitzsimon* v. *Walker*. (Wetmore, J., 1904), p. 204.

See VENDOR AND PURCHASER.

QUANTUM MERUIT.

See PRINCIPAL AND AGENT.

RAILWAY.

1. Railways — *Sparks from Engine —Prairie Fires Ordinance — Evidence —Constitutional Law.*]—The fact that shortly after the passing of a locomotive a fire is seen near the railway track, where none existed before, is *prima facie* evidence that the fire originated from sparks from the locomotive. —The provisions of the Prairie Fires Ordinance requiring locomotives to be equipped with certain appliances and in casting on a defendant the onus of proof in a criminal charge relating thereto, are binding on a railway company deriving its powers from the Parliament of Canada, but operating lines of railway in the North-West Territories. *Rex* v. *Canadian Pacific Railway Co.* (Court en banc, 1905), p. 286.

2. Railway — *Negligence — High Rate of Speed — Findings of Jury — Obstruction of View at Crossing.*]—In an action against a railway company for negligence, it appeared that a locomotive of the defendants was running at a dangerous rate of speed for the locality, and struck and killed a person who was driving a team and waggon over the track at a street crossing. There was a tool house near the crossing, which to some extent obstructed the view, and there was also another train shunting near by. The jury found that death was caused by the defendants' negligence in failing to reduce the speed of their train as provided by the Railway Act, and that the deceased had committed no acts of contributory negligence. No questions were submitted to the jury as to whether the defendants were guilty of any other acts of negligence.—*Held*, that as the noise of the shunting train might have reasonably engaged the attention of the deceased, and as his view was obstructed by the tool house, the jury was justified in finding that there was no contributory negligence; but that following *G. T. R.* v. *McKay*, 34 S. C. R. 81, the verdict in the plaintiff's favour should be set aside, and (Wetmore, J., *dissentiente*) a new trial ordered. *Andreas* v. *Canadian Pacific Railway Co.* (En banc, 1905), p. 327.

See CRIMINAL LAW.

REDEMPTION.

See ASSESSMENT AND TAXATION — EXECUTION.

RESTRAINT OF TRADE.

See COVENANT.

SALE OF GOODS.

1. Conditional Sale of Goods — *Repossession and Resale — Rescission —Defence Arising Subsequent to Issue of Writ.*]—When a vendor under a conditional sale, repossesses the goods and makes a resale thereof other than that contemplated by the conditional agreement, he thereby rescinds the agreement: *Sawyer* v. *Pringle*, and *Harris* v. *Dustin*, approved and followed, and such result will follow even if the vendor, before repossessing, has instituted a suit under the agreement to recover the purchase price. — A corporation will be bound by its unsealed contracts entered into *bona fide* in the course of its ordinary business within the scope of the objects for which it was incorporated. *The Fairchild Co., Ltd.* v. *Hammond et al.* (Wetmore, J., 1903), p. 20.

2. Sale of Machinery — *Agreement — Incorrect Copy Given to Purchaser — Authority of Agent—Adding to Written Agreement — Evidence — Non-compliance by Purchaser with Agreement Providing for an Immediate Return on Certain Contingencies—Effect of — Laches.*] — The plaintiff sold to defendant a binder under a written agreement, a copy whereof was delivered to the defendant at the time of sale. Both the original agreement and the copy were made out by the plaintiff's agent who effected the sale. The copy contained a clause conferring on the defendant an important right, which was omitted by inadvertence from the original and the plaintiff was unaware of such clause. — *Held*, that the plaintiff was bound by the clause. — The agreement provided for an *immediate* return of the binder if the same could not be made to work well, and that failure so to do should be considered an acceptance thereof. The defendant being busy with harvesting operations did not return it until the expiration of eight days after the day upon which he was entitled to do so, but did not make any use of it. — *Held*, that the defendant by his laches had accepted the binder. — The defendant sought to shew that the written agreement did not contain the whole of the agreement, but that the agreement was partly verbal and partly written. It appeared, however, on the evidence, that the parties intended to embody in the written document their whole agreement. —*Held*, therefore, that they were bound by what the written agreement contained. *The McCormick Harvesting Machine Co.* v. *Hislop.* (Wetmore, J., 1903), p. 112.

3. Sale of Goods — *Wheat Delivered to Elevator — Conditions of Delivery — Whether Sale Effected — Destruction of Elevator and Contents—Liability of Defendants for Value of Wheat.*]—The plaintiff delivered wheat to the defendants' elevator to be stored, and gave the defendants the right to mix it with the defendants' current stock, and to use it in the ordinary way of their business. The defendants agreed to re-deliver wheat of a like quality and quantity to the plaintiff or to his order on demand, and when the plaintiff chose to sell the defendants were to have the first chance to buy at the price demanded. Subsequently the defendants' plant was destroyed by fire without any fault on the part of defendants.—*Held*, following *South Australian Insurance Co.* v. *Randall* (L. R. 3 P. C. 101), that the dealing constituted a sale of the wheat to defendants and was at the defendants' risk.—*Cargo* v. *Joyner* (4 Terr. L. R. 64), distinguished. *Snow* v. *Wolseley Milling Co., Ltd.* (Wetmore, J., 1901), p. 123.

4. Lien Note — *Seizure before Maturity — Necessity for Declaring Note Due.*]—When a "lien note" contains a provision empowering the payee to declare it due and take possession of the property covered by the note before maturity, it is unlawful to take possession before maturity without first declaring the note due and serving notice thereof on the party liable. *Colwill* v. *Waddell.* (Wetmore, J., 1902), p. 139.

5. Sale of Goods — *Trade Name — Implied Warranty — Evidence of Defects.*]—In answer to an action upon promissory notes given for a Frost & Wood binder, the defendant set up defects in the machine, but the only evidence of their existence was his own and that of a neighbour, neither of whom appeared to have much experience with binders. — *Held*, that, as the article had been sold under its trade name, there was no implied warranty of fitness for the purpose for which it was sold, and (Prendergast, J., *dissentiente*) that the evidence did not shew that the difficulties the defendant had encountered in operating the machine were due to any defects in it. *Frost & Wood Co., Ltd.* v. *Ebert.* (Court en banc, 1906), p. 293.

6. Contract for Sale of Goods— *Divisibility — Condition Precedent — Performance — Waiver.*] — Upon a sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal arrangement, made contemporaneously with the written agreement or purchase, that these were to be attached to the threshing machine by the plaintiffs. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made. —*Held*, that the contract was divisible, and that the price of the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower.—*Held*, however, that the proper attachment of the wind stacker was a condition precedent to

the plaintiffs' right to obtain payment, and that under the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition. *New Hamburg Mfg. Co., Ltd.* v. *Klotz.* (Newlands, J., 1905; En banc, 1906), p. 319.

7. Sale of Goods — *Express Warranty — Breach of Conditions of Warranty — Inconsistent Parol Warranty —Right to Rely on Implied Warranty.*] —A parol warranty which is inconsistent with a written warranty is invalid.—Where there is an express warranty coupled with conditions an implied warranty or condition to the same effect cannot be set up so as to get rid of the express warranty. — Where an agreement for the purchase of a chattel provides that the purchaser upon complying with certain requirements may return the chattel, compliance by the purchaser with such requirements is a condition precedent to his right to return the chattel. *Cockshutt* v. *Mills.* (Wetmore, J., 1905), p. 397.

See APPEAL — BILLS OF SALE AND CHATTEL MORTGAGES.

SCHOOL DISTRICT.

1. School Ordinance — *Agreement —Dismissal of Teacher — Appeal to Commissioner of Education under s. 153 of the School Ordinance—Amending Adjudication of Commissioner — Teacher's Right to Salary — Burden of Proof.*] — On an appeal to the Commissioner of Education under s. 153 of the School Ordinance (c. 29 of the Ordinances of 1901) by a teacher against his dismissal by the Board of Trustees, the only matters which can be investigated are the reasons for the dismissal given by the trustees; the Commissioner cannot hold that such reasons are insufficient and confirm the dismissal on other grounds. — The adjudication of the Commissioner when once made and communicated to the parties interested is final, and the Commissioner cannot subsequently amend it so as to practically reverse it. — Where a contract has been entered into by a school district which on its face shews a compliance with the requirements of the School Ordinance, the onus of shewing that the necessary formalities have not been in fact complied with is on the party setting up such non-compliance. *Clipsham* v. *Grand Prairie School District.* (Newlands, J., 1906; En banc, 1907), p. 374.

SHERIFF.

See COSTS — EXECUTION — INTERPLEADER.

SMALL DEBT PROCEDURE.

See PLEADING—PRACTICE.

SOLICITOR.

1. Solicitor and Client — *Costs —Review of Taxation — Counsel Fees —Tariff of Fees.*]—A counsel fee advising on evidence is taxable as between solicitor and client at any stage of the suit if the client consults his solicitor in that respect, but the counsel fee for settling pleadings is not taxable until after all the pleadings have been delivered. — The fees authorized by the tariff apply as between solicitor and client with respect to the services covered thereby, but in cases where there is no tariff the solicitor can recover the value of his services upon a *quantum meruit. In re A Solicitor.* (Wetmore, J., 1902), p. 262.

SPECIFIC PERFORMANCE.

See CONTRACT — VENDOR AND PURCHASER.

STATED CASE.

See CRIMINAL LAW.

STATUTE OF FRAUDS.

See PARTNERSHIP—VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STORAGE OF GRAIN.

See SALE OF GOODS.

SUMMARY JUDGMENT.

See JUDGMENT.

TAXES.

See ASSESSMENT AND TAXATION.

TENDER.

See VENDOR AND PURCHASER.

THEFT.

See CRIMINAL LAW.

THIRD PARTY.

See PRACTICE.

TIME.

See EXECUTION — VENDOR AND PURCHASER.

TRESPASS.

1. Trespass — *Digging and Removing Coal — Measure of Damages —Wrongful and Wilful Acts — Res Judicata.*] — A wilful trespass means a deliberate trespass by a person who commits it intentionally with a knowledge that he has no right whatever to do the act. — In assessing damages for trespass the milder rule should be applied unless contrary be shewn.—Judgment of Sifton, C.J., varied. *Fleming* v. *McNeill.* (En banc, 1903), p. 192.

See LANDLORD AND TENANT.

TRUSTS AND TRUSTEES.

1. Trusts and Trustees — *Conveyance Absolute in Form — Action for Declaration of Trust — Evidence.*] — In an action for a declaration that certain conveyances absolute in form were in fact executed in trust, the evidence at trial was contradictory and was evenly balanced on both sides, both as to the number of witnesses and the circumstances. The trial Judge believed the evidence on the part of the plaintiff, and such evidence if believed clearly and unquestionably established the trust.—*Held*, on appeal, that although in such an action the evidence of the trust must be of the clearest and most conclusive and unquestionable character, yet inasmuch as the trial Judge believed the evidence for the plaintiff, and as such evidence was sufficient, if believed, to establish the trust, the finding of the trial Judge should not be interfered with. It is not necessary in such an action that the character of the trust should be so clearly established as to enable the Court to direct a trust deed to be prepared, specifying clearly the nature of the trust. *Fowler* v. *Fowler*, 4 De G. & J. 250, distinguished. *Hill* v. *Bible.* (En banc, 1906), p. 386.

See EXECUTORS AND ADMINISTRATORS —PARTNERSHIP.

VENDOR AND PURCHASER.

1. Vendor and Purchaser—*Agreement for Sale of Land — Agent — Statement of Price and Terms—Statute of Frauds — Implied Contract — Evidence — Damages — Specific Performance — Ejectment — Mistake—Mesne Profits — Laches.*] — The plaintiff in reply to a letter from their agent asking for "the very lowest figure and best terms" at which they would sell "the Lane Place," wired as follows: "Lane Place, $480 on usual terms," and immediately followed this by letter to the same effect. Upon receipt of the telegram the agent purported to sell the land to the defendant, who entered into possession. In an action to recover possession of the land. — *Held*, that the agent had not been authorized by the plaintiffs to sell, and that the plaintiffs were entitled to recover.—*Held*, further, that the defendant having persisted in his possession, with full knowledge that the plaintiffs objected to it, the plaintiffs were entitled to *mesne profits*, and that the defendant could not recover anything for the buildings and improvements placed by him on

the land. *The Canada Settlers Loan & Trust Co.* v. *Purvis.* (Wetmore, J., 1903), p. 38.

2. Vendor and Purchaser — *Contract for sale of land — Specific performance — Making Time of the Essence — Delays or Defaults of Purchaser — Legal Tender.*] — One party to a contract cannot by notice make time of the essence of the contract unless the other party has been guilty of laches or unreasonable or unnecessary delays, and when such notice is given, reasonable time must be allowed the other party to carry out his part of the contract.—To constitute a legal tender the money must be produced and actually shewn, but the party to whom the tender is made may either expressly or impliedly dispense with such production; and *quære*, whether a tender is necessary to support an action for specific performance; whether it is not sufficient to merely allege and prove that the plaintiff is ready and willing to carry out his part of the agreement. —Where specific performance is decreed it is neither just nor equitable to impose such conditions as would compel the party seeking relief to do something he did not agree to do. *Rousech* v. *Schindler.* (Wetmore, J., 1903), p. 92.

3. Agreement for Sale of Land —*Time of the Essence — Failure of Purchaser to Comply — Cancellation by Vendor — Waiver of "Time Clause" —Repayment of Prior Instalments — Specific Performance — Damages.*] — Where an agreement for the sale of lands provides that time shall be of the essence of the contract, and that on default in payment, the agreement may be cancelled without any right on the part of the purchaser to compensation for moneys already paid thereon. — *Held*, that in the absence of something in the surrounding circumstances or in the acts of the parties indicating a contrary intention, the Court would enforce the "time clause" strictly, and would refuse specific performance in an action brought by the purchaser. — Where the parties expressly disclose their intention, the burden of proving that time is not of the essence is upon the party seeking to escape from the effect of such a provision.—A waiver of this clause in respect to one instalment does not preclude the defendant from insisting on its strict operation with respect to a later instalment. (Following *Forfar* v. *Sage*, 5 Terr. L. R. 255).—The offer to perform on receipt of an extra amount simply shews that the defendant was insisting upon his rights. — The moneys already paid on the contract must be returned to the purchaser to prevent a forfeiture. — Where the defendant failed to shew that he had sustained any damage by reason of the default of the plaintiff, he is not entitled to any set off. *Stringer* v. *Oliver.* (Stuart, J., 1907), p. 126.

4. Vendor and Purchaser—*Specific Performance — Laches — Waiver of Vendor's Right to Rescind.*]—The defendant having sold land to the plaintiff under agreement of sale in which the purchase price was payable by instalments, subsequently brought action against the plaintiff to recover the amount of the instalments then overdue, and recovered judgment upon which he placed an execution against the plaintiff's goods in the sheriff's hands. The plaintiff paid the execution in full to the deputy sheriff, and then tendered to the defendant the balance of the purchase money, which, the defendant refusing to accept, the plaintiff began this action for specific performance. The defendant contested the action on the ground that the plaintiff by his laches in making payment had disentitled himself to relief, and also on the ground that, although time was not expressly made of the essence of the contract, yet the nature and character of the property and the transaction were such as to render time of the essence. —*Held*, that the defendant by his conduct in forcing the plaintiff through the pressure of execution to pay the deferred instalments, had waived his right to rescind the agreement and had also waived the plaintiff's laches. *Guest* v. *Boston.* (Wetmore, J., 1903, Court en banc, 1904), p. 173.

5. Agreement for Sale of Land —*Purchase Price to be Paid in Instalments—Interest Payable in Advance— Time to be of the Essence—Notice of Cancellation — How Sent — Consistent Clauses.*]—If it is agreed between the parties that time shall be of the essence of the contract, the Court will hold to a strict construction unless an intention to the contrary is shewn. On an agreement for sale of land, the purchase price to be paid in instalments, and interest to be paid in advance, it was provided that time should be of the essence of the contract, and that all interest on becoming overdue should be forthwith treated as purchase-money and bear interest. The plaintiff on

tendering an overdue instalment, after having been notified that the contract had been cancelled, owing to his failure to pay on time, sought a decree declaring that the contract was in full force and effect, and an injunction restraining the defendant from dealing in any way with the land. — *Held*, that time was of the essence of the contract, although it stipulated that all interest on becoming overdue should be forthwith treated as purchase money, this stipulation not being inconsistent with the time clause, and that either one of them might be enforced at the option of the defendant. Where the contract states no address to which a notice of cancellation may be sent, it is sufficient if it is sent to the plaintiff's residence, and he receives it. *Steele* v. *McCarthy*. (Newlands, J., 1907), p. 351.

6. Vendor and Purchaser—*Specific Performance — Construction of Document—Statement of Price by Vendor—Implied Contract to Sell.*] — A statement in writing by the owner of real property to a prospective purchaser that "the best I can consider is, etc.," (naming the price and terms) is not an offer to sell the property at the price and terms quoted. *Blackstock* v. *Williams*. (Newlands, J., 1906, En banc, 1907), p. 362.

WAIVER.

See APPEAL—SALE OF GOODS—VENDOR AND PURCHASER.

WARRANTY.

See SALE OF GOODS.

WAY.

See MUNICIPAL LAW.

WILLS.

1. Executors and Administrators — *Satisfaction of Legacy — Construction of Will — Evidence—Advancement — Ademption.*] — The deceased testatrix by her will bequeathed to the plaintiff the sum of $200. At the time of the execution of the will the testatrix was in the position of a debtor of the plaintiff to the extent of $95.47, and between the date of the will and the date of her death she gave to the plaintiff the sum of $125 in goods and chattels. — *Held*, that the language of the will being plain and unambiguous and indicating an intention to bequeath to the plaintiff the sum of $200, evidence could not be received as to the testator's instructions for the preparation of the will, and that the legacy was not satisfied by the payment of the debt.—*Held*, also, that following the rule laid down in *Pankhurst* v. *Powell*, and *In re Fletcher*, the advances made by the testatrix after the execution of the will up to the amount of the plaintiff's debt, viz., $95.47, must be applied *pro tanto* in reduction of the legacy. *Bell* v. *Sarvis et al. Executors of the Last Will of Janet Bell, Deceased.* (Wetmore, J., 1903), p. 74.

2. Will — *Construction — Rectification — Falsa Demonstratio — Devise of Lands in which Testator has no Interest.*]—The Court has no power to rectify a will by correcting what appears to be a misdescription of property thereby devised, unless there be in the will itself the means of identifying the property in question as the subject of the devise. *Re Angus Campbell, Deceased.* (Wetmore, J., 1904), p. 214.

WORDS, PHRASES, ETC.

"Any other person interested."—*See* p. 333.
"Debt or liquidated demand."—*See* p. 281.
"Final or Interlocutory."—*See* p. 88.
"J. P."—*See* p. 134.
"Letting: Permitting."—*See* p. 367.
"Owner."—*See* p. 265.
"Run at large."—*See* p. 141.

WORKMEN'S COMPENSATION ORDINANCE.

See PLEADING.

WRIT OF SUMMONS.

See PRACTICE.