REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Queen's Bench, Manitoba,

WITH

TABLE OF CASES AND PRINCIPAL MATTERS.

EDITED BY

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VOLUME VI.

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AFFIDAVITS.—FOREIGN.—Irregularities in foreign affidavits treated leniently. British Linen Co. v. McEwan 292

AFFIRMATION.—What is an.—*See* Libel.

AMENDMENT. — *After judgment entered upon demurrer.—Jurisdiction of referee.*—To a declaration for personal service by the plaintiff as the servant of the defendant, the defendant pleaded various pleas. To one of these the plaintiff demurred; upon the others he joined issue. Defendant then obtained an order striking out all the pleas except the one demurred to. Plaintiff succeeded upon the demurrer. Defendant then applied in Chambers to add two pleas. The referee refused the application and the plaintiff signed judgment. The defendant appealed from the referee's order. *Held*, 1. That the referee had jurisdiction to permit the pleas to be added. 2. The discretion to amend should be used to the utmost extent consistent with justice and the rights and interests of the parties. 3. An equitable plea asking for an account permitted to be added, unless the plaintiff would undertake not to set up the judgment in defence to a bill in equity. 4. Circumstances under which a bill for an account will lie discussed. Johnson v. The Land Corporation of Canada . . 527

——— *Mis-joinder of defendants. — Statute of Limitations.* —Plaintiffs issued a writ upon a note signed J. G. & Co., against J. G. & W. G. Afterwards they struck out W. G., and moved to strike out the defence of J. G. He defended on the ground that he had a partner, but declined to give his name. Plaintiffs then amended by adding W. B., and went down to trial. The plaintiff's evidence showed that not W. B. but S. B. was the partner, whereupon plaintiffs moved to amend by striking out W. B. Since the commencement of the action, the statute of limitations would have barred the remedy against S. B. The plaintiff's evidence as to the circumstances under which the note was made was contradictory. Leave to amend was refused, and a non-suit entered. Merchants Bank v. Good 543

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———LIMITED TO PART OF ORDER. *See* Railways.

———WHEN NEW TRIAL ORDERED.—When a county court judge is dissatisfied with a verdict, and orders a new trial, his decision will not be reversed unless it can be shown that he was clearly wrong. Watson Manufacturing Co. v. Stock 146

ARBITRATION.—*Disqualification of arbitrator.—Previous opinion for one party.*—Under section 31 of the Railway Act (44 Vic. Man. c. 27,) a person appointed arbitrator (for the settlement of the value of lands taken) "shall not be disqualified by reason that he is professionally employed by either party, or that he had previously expressed an opinion as to the amount of compensation." An objection to an arbitrator that he had previously given a valuation to one party and would naturally be biassed in favor of the amount he had fixed, *Held*, Untenable in view of the statute. The section is not limited to arbitrators appointed by a judge. Re Nicolson & The Railway Commissioner . 419

———*Employment of arbitrator by party.*—The railway commissioner being desirous of expropriating lands of the plaintiff, arbitrators were appointed, C. (one of them) being appointed by the other two. Contemporaneously with the progress of the arbitration, C. was engaged in auditing certain municipal books at the request of the municipal commissioner. For this work he was paid by the municipal commissioner, who intended to reimburse himself out of the legislative grant to the municipality. The railway commissioner was a Minister of the Crown. The municipal commissioner was a corporation sole, and also a Minister of the Crown. The moneys he disbursed were those of the municipalities and not those of the Crown. The two arbitrators who made the award, (one of them being C.,) swore that they were not influenced by C's. employment. *Held*, That it did not appear that C. might have been biassed or affected in any degree by his employment; and that an interlocutory injunction restraining the taxation of costs under the award should not be granted. Rowand v. Railway Commissioner 401

ASSIGNMENTS FOR BENEFIT OF CREDITORS.—*Statutes.—Construction.—Ultra vires.*—A local statute enacted that certain conveyances should be fraudulent against creditors; provided for voluntary assignments for the benefit of creditors; and declared that the assignee should have the exclusive right to sue for the rescission of such conveyances. *Held*, 1. That the statute was *intra vires* of the legislature. 2. That the conveyances might be attacked by creditors, where no assignment had been made by the debtor. *Per* KILLAM, J.

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.* PAGE

The section of the Act declaring certain conveyances fraudulent against creditors may be treated apart from the other provisions of the statute, as an independent enactment; and not, therefore, *ultra vires* by reason only of its association with other statutory provisions. Stephens v. McArthur 496

ATTACHMENT OF DEBTS.—*Costs.—Affidavit disputing liability.—Form of.*—A garnishee upon the first return of a summons to pay over, filed an affidavit alleging an assignment of the debt by the judgment debtor previous to attachment; and also denying the existence of the debt, but this denial was not in sufficient form. *Held*, That the plaintiff might elect to abandon the proceedings without costs. The North West Farmer v. Carman 118

———*Debtor a trustee.—Chattel Mortgage Act.*—Plaintiff sold a stock of goods to defendant; and took a mortgage upon it, and all goods which might be afterwards added to it, as security for payment. At the same time an agreement was entered into whereby the defendant was to carry on business with the stock, and, after making deductions for expenses, &c., was to remit the receipts to the plaintiff daily. Creditors of the defendant having attached, by garnishee orders, certain debts due to the defendant for goods sold in the business. *Held*, That such creditors were not entitled to such debts as against the plaintiff. Garnishee orders take effect only as against that which the debtor can properly, and without violation of any other rights of any one else, grant. The Chattel Mortgage Act does not apply to such a case. Campbell v. Gemmell 355

ATTACHMENT OF GOODS. — *Foreign parties. — Form of affidavit.*—In order that the goods of a foreign defendant may be attached, it is essential that the plaintiff be a resident of this Province. Where the parties to a note both reside in a foreign country, the presumption is that the note was made there. An affidavit for an attachment must state whether or not the defendant is a corporation. McMaster v. Jones 186

ATTACHMENT OF PERSON.—*Cause of action doubtful.—Misnomer.*—The affidavit upon which a *capias* issued disclosed a good cause of action, but examination upon it rendered success very doubtful. Upon a motion to set aside the writ, *Held*, That the court should not interfere unless it was very clear that the plaintiff must fail. The affidavit gave the defendant's name as "J. Berkwin Johnson." His proper name was "Berkwin Johnson," but he had been sued and had pleaded as "J. B. Johnson," and admitted that he frequently used the "J." as a distinguishing letter. In the order and writ the name was "J. B. Johnson." *Held*, That the order and writ were defective, but might be amended upon payment of costs. Anderson v. Johnson 113

———*Debtor's Act.—Committal for non-payment of costs.—Means to pay.*—Upon an application to commit two persons for non-payment of

ATTACHMENT OF PERSON.—*Continued.* PAGE

a judgment for costs, it appeared that they were two of the members of a firm engaged in carrying out several contracts. One contract was completed and out of it a profit had been made which had not been divided, but had been used in the work under the other contracts. It was uncertain whether profit or loss would accrue from the other contracts. *Held*, That the facts did not establish that the debtors had had means to pay the judgment debt. Saul v. Bateman 189

——*Debtor's Act.—Committal for non-payment of money ordered to be paid.*—R., as agent of S., obtained out of court a sum larger than that to which S. was entitled. An order was made for the repayment of the excess with costs. Upon an application to commit R. for default in payment, *Held*, 1. That the Debtor's Act 32 & 33 Vic (Imp.) c. 62, was in force in Manitoba. 2. That it sufficiently appearing that R. had means to pay, an order should be made for his committal. 3. That the order might be made for non-payment of costs. 4. That the default in payment might be proved as well by R's. admission as by affidavit of the party to whom payment should have been made. Re Bremner 73

——*Debtors Act.—Material for application.—Appeal.—Order other than that asked for.*—Depositions of a debtor taken upon an examination, as to his means to satisfy a judgment, may be used against him on an application to commit under the Debtors Act. So also, may his cross-examination upon an affidavit filed by him in answer to such an application. The decision of a single judge upon such an application will not be readily reversed upon appeal. An order to pay by instalments may be made upon a summons to commit. McMonagle v. Orton 350

——*Debtors Act.—Non-payment of costs.—Examination of debtor under judgment for costs.—Depositions improperly taken.*—A debtor under a judgment for costs only, cannot be examined as to his means. A debtor having been examined under such a judgment, *Held*, That the depositions could not be read on an application against him under the Debtors Act. Waters v. Bellamy 295

ATTORNEY.—*Agreement that attorney not to account for moneys received.—Business done before a magistrate.*—An attorney was employed to conduct the entire defence of a prisoner. He appeared upon the preliminary investigation before a police magistrate. He received money from the prisoner. Upon an application for the delivery of his bill he swore that it had been agreed that he was to use the money in procuring the prisoner's release, but was to keep no account of the money paid out. This the client denied. *Held*, 1. That the attorney should deliver an ordinary bill of costs. 2. That such an agreement must be in writing. Re A., an Attorney 181

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———*Rule to answer charges.—Indictable offence.*—A rule will not be granted to compel an attorney to answer charges if they may be made the subject of an indictment. Re R. A., an Attorney 398

———*Striking barrister and attorney off the rolls.—Non-payment of money.*—An attorney will not be struck off the rolls for non-payment of money merely. Whether the court has jurisdiction to remove attorneys apart from the Provincial Statute. *Quære.* A client left with an attorney a mortgage for collection, and also a discharge to be delivered over upon payment. The attorney received the money and paid to the client a portion of it, telling him from time to time that that sum was all that he had received. Discovery of the truth was not made until after the attorney had left the country the following year. *Held*, That this was misconduct "in the discharge of his duties as an attorney." The attorney had also received payment on behalf of mortgagees, for whom he was not entitled to act; the mortgagor believing that he was so entitled. The attorney paid over a portion of the money only. *Held*, That he should be struck off the attorneys' roll, but not off the barristers', as he had done nothing discreditable in the discharge of that office. Re J. A., an Attorney 19

———*Striking off the rolls.—Delay.—Civil action pending.*—A delay of six months is not a bar to a motion to strike off the rolls where an unsuccessful motion for an order to compel the attorney to answer, had meanwhile been made. The pendency of civil proceedings upon a cause of action arising out of the same matters is not an answer to a motion to strike off. Nor is the fact that the matter complained of involves a criminal charge. (*Re R. A., an Attorney*, 6 Man. R. 398, commented on.) The charges being denied, a reference to enquire and report was ordered. Re R. A., an Attorney 601

———*Undertaking.—Summary jurisdiction.*—An attorney having an execution in the sheriff's hands, and the sheriff requiring security before seizure, the attorney's partner wrote to the sheriff agreeing to indemnify him. The sheriff seized, was sued, and judgment went against him. Upon a summary application to enforce the undertaking. *Held*, 1. That the undertaking was that of the writer personally. 2. That it was given in a professional capacity and might be summarily enforced. 3. But that the sheriff having acted improperly in the seizure and so incurred a greater liability than that against which he was indemnified, he should be left to his action. Re McPhillips, an Attorney 108

BARRISTER. *See* Attorney.

CERTIFICATE OF JUDGMENT.—*Informalities.*—A certificate of judgment invalid because the judgment having been recovered by Thomas Houston and William S. Foster, trading as Houston, Foster & Co., for $1,278.60, whereas the certificate was of a judgment recovered

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by Thomas Hustin and William S. Fisher, trading as Hustin, Fisher & Co., for $1,188.70. Waterous v. Orris 177

CERTIORARI.—*County Judge or Magistrate.—Amendment of notice.*—S. having been convicted before magistrates, took proceedings to appeal to the County Judge and procured the papers to be sent to his clerk. Afterwards and before any proceeding by the judge he had the papers returned to the convicting justices. Upon notice to the justices of an application for a *certiorari* to be directed to them he now moved for the writ. *Held*, 1. That the return of the papers to the justices was irregular and that the *certiorari* should go to the county judge, he being the legal custodian of the papers sent to him for the purpose of the appeal. 2. That the notice for a *certiorari* to be directed to the convicting justices could not be amended. It was then contended that the statute 13 Geo. 11, c. 18, s. 5, entitles the convicting justices only to the six days notice, and that the county court judge was not entitled to any notice of motion for the writ and that the notice to the justices might be treated as a nullity and the order now made for the writ to go directed to the county court judge. But: *Held*, That although the justices only may be entitled to the statutory notice, yet, where the records of the conviction have passed into the custody of another officer not entitled to notice, the justices ought to have notice of the motion for the writ proposed to be directed to such officer, and that a new motion must be made for *certiorari* to the county judge and notice thereof given to the justices. Present application dismissed without costs. It is not necessary that the affidavits by which objections are raised should be sworn and filed before service of the notice on the magistrates. The notice must show who the party moving is. The practice of arguing the validity of the conviction upon the application for the *certiorari* does not apply, except when the parties consent. The pendency of an appeal to the county judge does not interfere with *certiorari*; unless, at all events, the question of jurisdiction is not raised upon the appeal. Regina v. Starkey 588

CHATTEL MORTGAGE.—*Consideration represented by notes under discount to bank.*—A chattel mortgage was expressed to be to secure payment of $870.34, which was the amount owing by the mortgagor to the mortgagee. A large portion of it, however, was represented by notes which the mortgagee had, previous to the date of the mortgage, transferred to a bank as collateral security for his own debt. *Held*, That the mortgage was not upon that account invalid. (*Fish* v. *Higgins*, 2 Man. R. 65, followed.) Stephens v. McArthur 496

COLLATERAL SECURITY. *See* Pledge.

COMMITTAL FOR NON-PAYMENT OF MONEY. *See* Attachment of person.

COMPANY. *See* Corporation.

CONSTITUTIONAL LAW. PAGE

CONSTITUTIONAL LAW.—*Interest upon taxes.*—A Provincial statute provided that all parties paying taxes prior to a certain date should be entitled to a reduction of ten per cent.: and that there should be added to all taxes unpaid upon a certain later date a sum of ten per cent. *Held*, 1. (Following *Schultz* v. *Winnipeg*, 6 Man. R. 35.) That viewing the whole statute the amount to be added was, in reality, interest, and as the provision was *ultra vires*, interest at six per cent. could not be charged. 2. That the provision as to rebate was *intra vires*. Morden v. South Dufferin 515

————*Taxes.—Interest.—Retrospective statutes.*—By the Act of 1886; "In cities a rate of ¾ per cent. at the end of each month shall be added upon overdue taxes, the same to commence on the 1st day of January, from and after the year in which the rate shall have been levied." By the Act of 1888, (May), the provision of 1886 was repealed, and the following substituted: "Upon all taxes remaining due and unpaid on the 31st December, there shall be added a rate of ¾ per cent. per month at the beginning of each month thereafter." Certain taxes having been due for the years 1885, 1886 and 1887. *Held*, 1. That the statutes were not retrospective; that the percentage could be added to the 1885 taxes; that none could be added under the 1886 statute after its repeal in May, 1888; and none under the 1888 statute until after the following 31st of December. 2. That viewing the whole statute, the percentage was, in reality, interest, and so *ultra vires* of the legislature. (Affirming Taylor, C.J., Killam, J., dissenting.) BAIN, J., founded his opinion on the fact that the interest exceeded 6 per cent. per annum. Schultz v. City of Winnipeg . . . 35

CONSTRUCTION OF A RELATIVE CLAUSE. *See* Insurance.

CONTRACT.—*Rescission.—Quantum meruit.*—Plaintiff agreed to serve defendant for five years, the defendant agreed at the end of that period to convey to him 240 acres, 50 of which he would break in the preceding summer. Pending the term the defendant intimated that he would only convey 160 acres all unbroken. *Held*, That plaintiff was entitled to treat this as a repudiation of the contract, and to sue upon *quantum meruit* for work and labor. Festing v. Hunt 381

————*See* Misrepresentation.

————*See* Warranty.

CORPORATION.—*Authority of manager.*—*See* Malicious prosecution.

————*Contract not under seal.*—While the defendant's Municipal Council was in session it verbally contracted with the plaintiff for the construction by him of a bridge on a travelled road. During the work some payments were made upon account, and after its completion a resolution was passed accepting the bridge and directing payment. The council afterwards repaired the bridge, and it was used by the public. There was no by-law authorizing the construction of the road

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or the contract accepting or dealing with the bridge. In an action for the money. *Held*, That the contract not being under seal nor it or the work authorized or adopted by by-law, the plaintiff could not succeed. Bernardine v. The Rural Municipality of North Dufferin 88

——— *Provincial license to hold real estate.*—Certain property having been brought under the Real Property Act, a certificate of title was issued to the C. P. R. Co The Company had not taken out a Provincial license, and desired to transfer a part of the property. *Held*, That the question was settled when the certificate of title issued, and could not now be raised. Re Canadian Pacific Railway. Re Douglas Lots 598

——— *Seal.—Name.*—The use of a seal as the corporate seal with the knowledge and tacit consent of the governing body is a sufficient adoption of it. *Per* DUBUC, J.—A misnomer of variation from the precise name of the corporation in a grant or obligation by, or to, it is not material, if the identity of the corporation is unmistakable either from the face of the instrument or from the averments and proof. McRae v. Corbett 426

——— *Winding up.—Allowance to liquidator.—Reference to Master.*—The court has no power to refer to the master the consideration of the amount to be allowed to the liquidator. The scale of remuneration of liquidators fixed in England will be followed here, not as absolutely binding, but as a guide. Amount of remuneration under certain circumstances discussed. Re The Saskatchewan Coal Mining Co. . . . 593

——— *Winding Up Act.—Remuneration of liquidator.*—An application by a liquidator to fix his remuneration should be supported by an affidavit shewing the number of hours devoted by him and his clerks to the business of the liquidator. No charge can be made for time spent in procuring his own appointment or opposing his discharge. Scale of remuneration, and business for which it is allowed, discussed. Re Assiniboine Valley Stock and Dairy Farming Co. 184

——— *Winding up.—Removal of liquidator.*—An application to remove a liquidator and appoint others was granted upon the grounds, (1) that creditors to the amount of $29,123.23, out of a total of $29,451.39, requested the change, (2) that the proposed liquidators would act without remuneration, and (3) that the business connection of one of the proposed liquidators would be of value to the company. Re Assiniboine Valley Stock and Dairy Farming Co. 105

COSTS.—*Answer instead of demurrer.*—A bill prayed foreclosure and ejectment. The answer attacked the mortgage and claimed title in defendants. At the hearing defendants submitted to foreclosure, but contended that ejectment ought not, upon the frame of the bill, to be decreed, and plaintiff did not press for it. *Held*, That the plaintiff should have the costs of a simple foreclosure merely. If a defendant

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answers when he might have demurred, and the case goes to a hearing no costs will be given to either party. Eden v. Eden 596

————*See* Statutes. Retrospective.

COUNTY COURT.—*Judgment.*— The note or memorandum of a county court judge is not, but the entry of the clerk in the procedure book is, the judgment. Re Joyce & Scarry 281

————*Jurisdiction.*—"Cause of action" in the County Court Act means the whole cause of action. An action may proceed in a court other than the one of the district in which the action arose, (1) by leave of the judge previous to commencing the proceedings, or (2) by transfer from that district after action commenced. Wright v. Arnold. 1

————APPEAL.—*Certificate of judge.—Evidence "in substance."*—Accompanying an appeal book upon a County Court appeal was a certificate from the County Judge, that it contained "the evidence in substance taken at the trial." *Held*, That the certificate was insufficient, and the appeal was struck out of the list. Winnipeg Water Works Co. v. Winnipeg Street Railway Co. 614

————*Security.*—By the County Court Act, 1887, the giving security for, or depositing in court, the amount for which judgment has been recovered, and a sum sufficient to cover the probable costs of the appeal is a condition precedent to the right to appeal. An objection that such conditions have not been complied with, may be taken when the appeal comes on to be heard and may be supported by affidavits. Mahon v. Inkster 253

————*Time.—Mandamus.*—Proceedings in appeal from the County Court had been taken and an unsigned certificate of the County Judge filed with the Prothonotary within the proper time, under the belief that it had been properly signed. Upon discovery of the fact, but after the time for filing the certificate, an application was made to the judge to affix his signature. He refused. *Held*, That the judge was right in so refusing, and an application for mandamus was dismissed. Orr v. Barrett 300

————*See* Prohibition.

CRIMINAL LAW.—*Conviction.—Distress and imprisonment in default of fine.—Certiorari.—Practice.*—A statute permitted punishment by imprisonment or penalty, or both. It also provided that where a fine is imposed and is not paid, a warrant of distress may issue, and after a return, if no sufficient goods, the defendant may be committed to gaol. It also provided that no conviction should be quashed for want of form or should be moved by *certiorari* into any superior court. A conviction under this statute directed the payment of a fine, and in default of payment, a distress, and if no goods, then imprisonment. *Held*, That as there was jurisdiction to award distress and imprisonment, the conviction was not bad, although by it the jurisdiction was prematurely

CRIMINAL LAW.—*Continued.* PAGE

exercised—such award at that time was surplusage only. A fiat for a writ of *certiorari* should not issue, as of course, if the Justice do not appear upon notice of an application for a summons that it should issue. Notwithstanding the statutory provision, a *certiorari* may issue where the Justice has no jurisdiction. Reg. v. Galbraith 14

———*Forgery of one of several signatures,—Interested witness.*—A joint and several bond was executed by the prisoner under an assumed name for a fraudulent purpose. There was no proof whether the other signatures had been forged or not. *Held*. That an indictment that the prisoner had forged the bond was sustained. The bond was executed in order to obtain a marriage license. It having been obtained, a form of marriage before a person without authority to celebrate marriage, was gone through. *Held*, That the issuer of the license was not an incompetent witness as a person interested or supposed to be interested. *Per* DUBUC, J.—Neither was the woman incompetent as a witness. Reg. v. Deegan 81

———*Having in possession goods stolen abroad.*—Upon a charge of having in possession goods stolen in a foreign country, it is not always necessary to prove the state of the law of that country. *Per* TAYLOR, C.J.—When the Crown proved that the prisoner had taken, and had in his possession in Canada, property which he had, in any other country, taken under such circumstances, that had he taken it in like manner in Canada, it would, by the laws of Canada, have been felony, then the offence was proved. 2. And an allegation in the indictment that the prisoner "feloniously had taken and carried away" the goods, does not impose any additional burden of proof upon the Crown. *Per* KILLAM, J.—It may be necessary under certain circumstances, for the Crown to prove the foreign law as an element in the moral quality of the act. Queen v. Jewell 460

———*Veterinary surgeon.—Questions raised upon Certiorari.—Waiver of irregularities by appearance.—Imposition of unwarranted costs.*—A. B. was convicted of practising as a veterinary surgeon without the proper qualification. *Held*, That the conviction was good, although it did not allege any particular act done. An objection of *res judicata* cannot be urged upon *certiorari* if not taken before the magistrate. The absence of a formal adjournment of the proceedings before a magistrate may be waived by subsequent appearance. A conviction stated the offence to have been committed in the County of Norfolk. The information charged the offence as in the Municipality of North Cypress, in the County of Norfolk, in the Province of Manitoba. By statute the Municipality of North Cypress was in the County of Norfolk. In the absence of any affidavit denying that the magistrate had jurisdiction. *Held*, That an objection that no offence within the Province had been shewn was untenable. Costs unwar-

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ranted by statute having been imposed. *Held*, That the conviction was bad. Re Bibby 472

———*See* Extradition. Habeas Corpus. Felon.

CROWN CHOOSING FORUM.—The Crown may, when proceeding in relation to property to which the Sovereign is entitled in right of the Crown, choose its own forum; but otherwise, where the Crown claims no beneficial interest. Attorney-General v. Macdonald 327

DELAY. *See* Misrepresentation.

DISCOVERY.—*Insurance cases.—Production upon examination, of copies of papers.*—In an action upon an insurance policy, the plaintiff may be compelled to produce upon his examination in the cause, copies of the claim papers sent by him to the Insurance Company. *Semble*, In all actions the parties may, upon such an examination, be compelled to produce all documents which they would be bound to produce if called upon for discovery in Equity. Morrison v. City of London Fire Insurance Co. 222

EJECTMENT.—*Plaintiff losing title pending action.*—In ejectment, if at the trial the evidence shows title out of both parties, although in plaintiff when writ issued the plaintiff is entitled to judgment for costs only. McLaren v. McClelland 533

EVIDENCE.—*Given without objection.*—When inadmissible evidence is received at the trial without objection, the opposite party cannot afterwards object to its having been received. McLaren v. McClelland. 533

———*Documentary Evidence Act.—Proof of seal.*—A conveyance executed by a municipality is not a public document within the meaning of the Documentary Evidence Act, 8 & 9 Vic. c. 113, s. 1. The sufficiency of certain oral testimony in proof of corporate seal discussed. Morice v. Baird 241

———*Interested witnesses. See* Criminal law.

———*Proof of seal.*—The sufficiency of certain oral testimony in proof of corporate seal discussed. Morice v. Baird 241

———*See* Misrepresentation.

EXECUTION.—A *fi. fa.* having been tested 17th August, 1885, and renewed more than 30 days before its expiration, *Held*, Not properly renewed. Waterous v. Orris 177

———*Abolition of fi. fa. lands. See* Fraudulent conveyance.

———*Exemptions.—Abandonment of homestead.—Statutes.—Repeal.* 49 Vic. c. 17, s. 117, ss. 8, exempts from execution the land upon which the defendant or his family resides, or which he cultivates wholly or in part, not exceeding 160 acres, provided that "said 160 acres must be outside the limits of any city or town." The proviso was by 49 Vic. c. 35, s. 2, repealed. *Held*, That the repeal rendered lands within town limits exempt from execution for debts incurred pre-

EXECUTION.—*Continued.* PAGE

vious to the repeal. Defendant owned a homestead and occupied a house upon it for several years. He himself was much absent in England, but his family continued to reside there until the 1st of October, 1889; when, without defendant's knowledge they removed to another place—for the temporary purpose merely of wintering their cattle. In the following March they returned to the homestead accompanied by the defendant. *Held*, That in the absence of evidence to show an intention to abandon the homestead, or that the plaintiff was in any way mislead, the exemption still continued. A conveyance of a homestead by way of mortgage does not preclude a claim of exemption from execution. Hockin v. Whellams 521

———*Exemption from seizure.—Land once bound by writ not afterwards exempted.*—Defendant sold land to his father in 1882. Plaintiff recovered judgment against defendant in 1885 for $15,000; and issued *fi. fa.* lands. In 1888 a decree declared the deed from defendant to his father fraudulent as against the plaintiff. Immediately after decree the father re-conveyed the land to the defendant to enable him to claim it as exempt from seizure. Until the re-conveyance, defendant lived with his father upon the land as a member of his family only; and the cultivation was by, or for the benefit of the father. After the re-conveyance the father lived with the defendant, who resided upon and cultivated the land. *Held*, That the land was not exempt from sale under the *fi. fa.* The land having once been bound by the writ did not become exempt by the acts of the defendant. McLatchie v. McLeod 452

———*Sale of goods of third party under.—Satisfaction of judgment.—Amending sheriff's return.*—Under plaintiff's judgment and execution the sheriff seized and sold certain horses of the defendants. S. and M. claiming to be mortgagees of the horses, attended the sale and notified intending purchasers. The horses having been sold, the mortgagees brought trespass and trover against the sheriff, and recovered against him the amount for which he had sold the horses. Plaintiff had indemnified the sheriff against damage by reason of the seizure and sale, and also by reason of payment to him of the purchase money, and the sheriff having paid over the money to the plaintiff, the plaintiff paid the mortgagees the amount of their verdict against the sheriff. Plaintiff then issued an *alias fi. fa.* taking no notice of the return of the sheriff to the previous writ of "money made and paid to the plaintiff's attorney." *Held*, That the new *fi. fa.* should be set aside; satisfaction be entered up on the judgment roll; and a summons to amend the sheriff's return should be dismissed. Hanna v. McKenzie 250

EXECUTOR.—*Judgment against.—Form.—Pleading.*—A certificate of a county court judgment against "A. B., administrator of the estate of X," charges A. B. personally, and not the estate. *Semble*, When an executor or administrator is made a party to an action, as such, he must declare, or be charged clearly in that character. Re Joyce & Scarry . 281

EXEMPTION. PAGE

EXEMPTION. *See* Execution.

EXTRADITION.—*Identity of charge.—Foreign depositions.—Condensed depositions.—Evidence for extradition.—Accessories.—Statute passed after Extradition Act.*—The information upon which the original warrant for the arrest of the prisoner issued, was sworn on the 20th June. It was afterwards amended and re-sworn on the 2nd July. The prisoner, in fact, came before the extradition judge on the 26th day of June. The caption of the evidence given before the judge, stated that it was taken in the presence of the prisoner, "who is charged on the 26th day of June, 1889, and this day before me," &c. The charge in the information and the caption of the evidence was identical. *Held*, That the evidence so taken could be read in support of the information. Foreign depositions may be read although not taken in the presence of the prisoner. Depositions were taken by a stenographer before a grand jury in a foreign country. From these a shorter statement was made by an attorney, who swore that he omitted nothing material. The witnesses were then with this shorter statement sent back to the grand jury. When tendered in evidence here, the depositions appeared to be properly certified as having been signed and sworn to by the witnesses. *Held*, That such depositions were admissible. Foreign depositions more in the form of affidavits than depositions may be admissible in evidence here. The evidence necessary for extradition must be as strong as (in the case of a domestic offence) that necessary for committal for trial. Upon appeal, the finding of the single judge as to the weight of evidence, will not be interferred with. The foreman of a grand jury is an "officer" who can certify to depositions in order that the same may be used here. DUBUC and KILLAM, JJ.—The offence of being accessory to a murder is included in the offence of murder under the Extradition Act. TAYLOR, C.J.—In determining whether the offence charged constitutes a crime within the Extradition Act, the law of the date of the offence governs, and not that of the time of the treaty. Regina v. Burke 121

FELON.—*Property of.—Imp. Act 33 & 34 Vic. c. 23.—Pleading.—Allegations of fraud.—Multifariousness.*—Irrespective of the Imperial Act 33 & 34 Vic. c. 23, all chattel property, including choses in action, possessed by a felon at the time of his conviction, or acquired thereafter during the currency of his sentence, passes to the Crown. *Quære*, Whether the Imperial Act prohibiting a convict from suing; and vesting the right to sue in an administrator, is in force here. Haffield v. Nugent 547

FIRE INSURANCE. *See* Insurance.

FRAUD *See* Mi-representation.

FRAUDULENT CONVEYANCE.—*Abolition of fi. fa. goods.—Multifariousness.—Bill by execution creditor on behalf of all others.*—A judgment creditor, although entitled to priority over others, may file a

FRAUDULENT CONVEYANCE.—*Continued.* PAGE

bill on behalf of himself and the others, to have a deed declared fraudulent against creditors. An Act repealed the only statutory provisions under which real estate became bound by, and could be sold under writs of *fi. fa.* The same Act provided that writs then in the sheriff's hands "shall remain in full force, virtue and effect, and may be renewed from time to time." During the following session another Act empowered sheriffs to sell lands under writs remaining in his hands. Between these Acts a bill was filed by an execution creditor on behalf of himself and all others, to set aside a deed. *Held*, That under the former Act writs remained in the sheriff's hands in full force, but awaiting further legislation to enable the sheriff to proceed; and that even prior to such further legislation, the plaintiff had a sufficient *locus standi*. The Western Canada Loan and Savings Co. v. Snow 606

——— *See* Assignment for benefit of creditors.

HABEAS CORPUS.—*Escape.—New conviction.—Warden's authority without certificate.*—A statute provided that "The warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, and shall there detain him." *Held*, That the absence of a certificate or copy of the sentence did not make the detention of a prisoner properly convicted and sentenced, illegal. *Per* BAIN, J.—*Semble*, Even if no such copy of the sentence had originally been delivered to the warden, (and were any such necessary), his possession of it at any time previous to his return to a *habeas corpus* would be sufficient. A statute provided that "Every one who escapes from imprisonment shall, on being re-taken, undergo in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape." After an escape and before re-capture, the penitentiary was changed from one building to another. *Held*, 1. (KILLAM, J., *dubitante.*) That a conviction for an escape was not necessary to imprisonment for the unserved portion of the sentence. 2. That imprisonmeet in the new building was lawful. Reg. v. Peterson 311

INJUNCTION.—*Ex parte.—Misrepresentation in obtaining.—Balance of convenience.—Costs.—Laches.*—An *ex parte* order for an injunction to last for a few days and until a motion to continue it had been disposed of, was obtained upon a misstatement of a fact material to one of the grounds upon which, in the bill, the plaintiffs' right was founded. Upon an application to continue the injunction, *Held*, That having in view the great importance to the plaintiff of maintaining the *status quo* and the absence of damage to the defendant, the injunction might be continued, notwithstanding the misstatement in respect of a portion of the property in question upon an equitable ground not affected by the fact misstated; but the plaintiff was ordered to pay the costs of the motion. (*Burbank* v. *Webb*, 5 Man. R. 264, considered.) Laches as disentitling to interim injunction discussed. Winnipeg and Hudson's Bay Co. v. Mann 409

INJUNCTION.—*Continued.* PAGE

——— ——— *Plaintiff's title to office.—Wrongful assumption of jurisdiction.—Injunction where mandamus proper.—Evidence.*—Plaintiff having been elected alderman, and taken his seat, and having been unseated by order of the county judge for lack of property qualification, obtained an *ex parte* injunction to restrain the mayor from proceeding to a new election, and from refusing to permit the plaintiff to sit and vote as a member of the council, upon the ground that the county judge had no jurisdiction. Upon a motion to continue the injunction, *Held*, 1. That the plaintiff not being in fact, qualified, no injunction should be granted. 2. The court interferes by injunction only to prevent or restrain injuries to civil property, and in defence of, or to enforce rights which are capable of being enforced at law or in equity. The court has no jurisdiction to restrain persons from acting without authority. 3. Although under section 9 of the Q. B. Act of 1886, the court may issue an injunction in cases where the plaintiff would have been entitled to a mandamus at law, yet it must appear that the circumstances would have justified a mandamus; and the only ground of complaint being, that the defendant "threatens and intends and will unless restrained," &c. *Held*, That the right to mandamus had not been shown. 4. In any case, the absence of the jurisdiction of the county judge would have to be very fully and clearly shewn. Calloway v. Pearson 364

———, INTERLOCUTORY.—*Evidence.*—Although for the purposes of an interlocutory injunction there is not required to be the clear evidence necessary to support the case at the hearing, yet there must be some evidence. Rowand v. The Railway Commissioner 401

INSURANCE, FIRE.—*Carpenter's risk.—Re-payment.—Condition.—Proofs of loss.—Condition precedent.—Construction of relative words.*—Declaration upon a policy of fire insurance, which recited that the plaintiff had paid the sum of $106 and also the additional sum of $2.25 for insuring against loss by fire, and especially any loss arising from carpenters, &c., being employed upon the premises. Another count was upon an interim receipt which recited an application for insurance against loss by fire and especially any loss arising from carpenters, &c., being employed upon the premises, and payment of the $106 and also the additional sum of $2.25, with a provision on the issuing of the policy for cancellation of the receipt. Both the policy and the receipt were alleged to be subject to a condition that the Company would not be answerable for loss by fire in, or of any buildings under construction wherein carpenters were employed, unless the special consent of the Company in writing was first obtained, and endorsed upon the policy. To these counts the defendant pleaded (7th plea) that after making the policy and before loss, and also (18th plea) after the granting of the receipt and before loss, the plaintiff had employed in the buildings, carpenters, &c., without having obtained and having endorsed on the policy, the consent in writing of the defendant. *Held*, 1. That the con-

INSURANCE, FIRE.—*Continued.* PAGE

dition as to the employment of carpenters was not repugnant to the contract, and did not itself constitute a consent of the Company as stipulated for by the condition. 2. That the pleas were bad because they did not allege the employment of the carpenters at the time of the occurrence of the fire. A policy was subject to the following condition: "Persons sustaining any loss or damage by fire are forthwith to give notice thereof in writing at, &c., ... and are, within fourteen days after the loss, to deliver in writing, in duplicate, a particular statement and account of their loss, &c, ... the assured's title or interest therein, and the names and residences of all other parties (if any) interested therein, &c., . . . whether any other insurance, &c., . . . also stating in what manner . . . . the building insured was occupied at the time of the loss . . . . and when and how the fire originated as far as the assured may know or believe; and the assured shall verify such statement, &c., and until such accounts, declaration, testimony, vouchers and evidence as aforesaid, are produced and examined (if required) and such explanations given, no money shall be payable by the Company under this policy, ... and if the claim shall not, for the space of three months after the occurrence of the fire, be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy, and time shall be of the essence of the contract." *Held*, 1. That the delivery of the statement and account within the 14 days, was a condition precedent to the assured's right to recover. 2. That the words in the condition "as far as the assured may know," related to "when and how the fire originated," and not to all the preceding requirements of the condition. Morrison v. The City of London Fire Insurance Co. 225

INTERPLEADER.—*Jurisdiction of referee.—Barring parties.*—Where an interpleader application before the referee falls to be disposed of upon a matter of practice, as where the sheriff by his delay or having taken indemnity from one of the parties, is not entitled to relief; where either the execution creditor or the claimant fails to appear on the return of the summons; where either of them though appearing, declines to take an issue; where the claimant, though appearing, fails to support his claim by any evidence which can be looked at; or where there is some such state of circumstances, the referee may dispose of the whole question. But where the claimant does support his claim, and the question is, whether he has merits or not, then the referee should order an issue or refer the matter to a judge. Galt v. McLean. 424

———*Security for costs.*—Pending an interpleader summons, an order was made for the examination of the claimant upon an affidavit filed by her. Thereupon the claimant applied for and obtained an order staying proceedings until security for costs was given by the claimant, a foreign execution creditor. *Held*, That no order for security could be made until an issue was directed. Buchanan v. Campbell. 303

INTERPLEADER.—*Continued.* PAGE

———*Security for costs.—Extension of time after party barred.*—An interpleader order directed that the plaintiffs should give security for costs to the satisfaction of the prothonotary on or before the 10th April, and that in default they should be barred from all claim to the goods. On the day named the plaintiffs paid $200 into court, but did not obtain upon notice to the claimant, an expression of the prothonotary's satisfaction with such security. *Held*, 1. That the referee had, after the expiration of the day named, jurisdiction to extend the time. 2. The withdrawal from possession by the sheriff after the day named constitutes no bar to an appeal by the plaintiffs from an order reversing the referee's order extending the time. Howe v. Martin 477

———*Sheriff's costs.—Appeal for costs.*—An execution creditor directed a sheriff to interplead between him and a claimant to some seized goods. Upon the return of the interpleader summons the creditor obtained an enlargement to examine the claimant. Upon the further return the creditor abandoned. *Held*, 1. That the creditor ought to pay the sheriff's costs of the proceeding. 2. That the refusal of the referee to allow such costs might be appealed from. Stephens v. Rogers—Ex parte Livingstone 298

———ISSUE.—*Form of.*—"*The goods or any part thereof.*"—It is immaterial whether an interpleader issue refers to "the goods seized," or "the goods seized or any part thereof." Under the former words the claimant may prove for a portion of the goods seized. Stephens v. McArthur 111

———ORDER.—*Rescission, because of sheriff giving up possession.*—An interpleader order, besides providing for an issue, required the execution creditor to give security for costs by a certain day, otherwise he should be barred, and directed the sheriff to sell unless the claimant gave security for the goods. After lapse of the prescribed period the referee made an order enlarging the time. Upon appeal, a judge discharged this order, holding that the creditor had become barred, and that there was no jurisdiction to extend the time. The full court, however, restored the referee's order. After the order of the single judge the sheriff withdrew from possession and the goods were dissipated. The creditor then finding it useless to proceed with the issue, moved to rescind the interpleader order. *Held*, That the order should not be rescinded, but that the creditor's remedy was by action against the sheriff if he had done wrong. Howe v. Martin 615

JUDGMENT, FOREIGN.—*Interlocutory or final.—Action on.—Evidence.—Exemplification and office copy.—Pleading.*—An action will not lie upon a foreign judgment unless it be final. The distinction between a final judgment and an interlocutory order discussed. The plea of "never indebted," is applicable to a declaration upon a foreign judgment and puts the plaintiff to the proof of a judgment sufficient to support his action. Graham v. Harrison 210

INJUNCTION, FOREIGN.—*Continued.* PAGE

———*Defences which might have been raised.—Counter-claim.*—A plea to an action on a foreign judgment, of the statute of limitations, to the original cause of action ought not to be struck out as embarrassing; a plea of the statute of limitations being *lex fori*, and one which could not have been pleaded in a foreign country. Nor should a counter-claim be struck out where, at all events, the defendant was not bound to raise it in the original action. *Quære*, Whether the Manitoba statute relating to foreign judgments does not entitle the defendant in an action on a foreign judgment, to set up any defence which he might have set up, if the plaintiff had sued on the original cause of action instead of on the judgment. The British Linen Co. v. McEwan 292

JURY. *See* Practice.

LANDLORD AND TENANT.—*Notice of demand, &c.*—A count by tenant against lordlord for seizing and selling as for distress without giving the notice required by 46 & 47 Vic c 45, s 6, whereby the tenant lost the difference between the value of the goods and the amount realized by their sale. *Held*, Bad on demurrer. Vaughan v. The Building and Loan Association 289

LIBEL.—*Affidavit or affirmation—Authority of commissioner.—Truth of contents of affirmation—Pleading.—Special damages.—Benefit of an Act.*—50 Vic. (M) c. 23, enacts that no person shall publish a newspaper until "an affidavit or affirmation . . . . shall have been delivered to the prothonotary." . . . . The affidavit or affirmation was to set forth truly certain particulars, and power was given to any justice of the peace or commissioner to take the affidavit or affirmation. *Held*, That an affirmation was sufficient although made by a person not entitled to substitute an affirmation for an affidavit. Such an affirmation was made by the managing director of a company. In the absence of evidence as to his duties. *Held*, That the affirmation was sufficient. The affirmation was entitled, "In the matter of The Manitoba Daily Free Press (a daily newspaper) and of chapter 23 of the statutes of Manitoba, passed in the fiftieth Victoriæ;" commenced, "I, W. F. L., of ———, journalist, do solemnly declare and affirm;" and concluded, "and I make this solemn declaration, conscientiously believing the same to be true, and by virtue of 'The Act respecting Extra Judicial Oaths.'" The commissioner's certificate was as follows: "Solemnly declared and affirmed before me at the City of Winnipeg, in the County of Selkirk, this 19th day of December, A D. 1887, John B. McKilligan, a commissioner, &c." The authority of the commissioner to take the affirmation was derived, not from the Act respecting Extra Judicial Oaths, but from the Act above quoted or 49 Vic. (M) c 2. *Held*, That the affirmation was, nevertheless, valid. There was no proof that the person before whom the affirmation was taken was a commissioner. *Held*, That the onus of proof was on the person asserting the lack of authority. There was no proof of the truth

LIBEL.—*Continued.* PAGE

of the affirmation. *Held*, That such proof was unnecessary. The Act 50 Vic. (M.) c. 22, provided that, "Except in cases where special damages are claimed, the plaintiff in all actions for libel in newspapers shall be required to prove either malice or culpable negligence in the publication of the libel complained of." And the Act 50 Vic. (M.) c. 23, provided that, "No person . . . . who has . . . . not complied with the provisions of this Act, shall be entitled to the benefit of any of the provisions of the" other Act. *Held*, 1. That it was not necessary to plead compliance with chapter 23 in order, upon the trial, to obtain the benefit of chapter 22. 2. That "cases where special damages are claimed," means not merely claimed in the declaration, but also by evidence at the trial. 3. Allegations of loss of business are allegations of general damages only. Where special damages are claimed, the names of the customers whose business has been lost must be set out. Ashdown v. The Manitoba Free Press Co. 578

MALICIOUS PROSECUTION.—*Authority of manager of Company to order arrest—Indirect motive.*—The manager of a company (resident at its head office) directed the prosecution of the plaintiff for larceny of the Company's property. The general solicitor of the Company advised the arrest, prepared the information and conducted the prosecution. The duties of the manager were prescribed by by-law. They did not provide for taking such proceedings. There was no evidence of express authority from the Company, or that the arrest was within the scope of the manager's duties. *Held*, (DUBUC, J. diss.) That the Company was not liable for the arrest. The objection that the Company had not authorized arrest was taken on motion for non-suit at the close of the plaintiff's case, but not as an objection to the judge's charge. *Held*, That the point was open in Term. *Per* DUBUC, J.—Evidence that a prosecution was instituted in order to save the trouble and expense of a law suit in a court of civil jurisdiction, tends to show an "indirect motive" and lack of good faith. Miller v. The Manitoba Lumber & Fuel Co. 487

———*No criminal charge laid.—Prosecution on advice of counsel or magistrate.—Mistake in law or fact—Prosecution with view to compensation.*—A child having strayed and come into the house of the plaintiff, the defendant, her guardian, applied for the child, but was refused. Defendant then went to a magistrate for "an order for the delivery of the child." The magistrate informed defendant that he had no power to give such an order, and after consultation with defendant, issued a summons to plaintiff alleging that the plaintiff "did detain one H. B. with intent to deprive the said A. P. S. of possession of the said H. B. contrary to the form of the statute," &c. Plaintiff was committed for trial, indicted and acquitted. After verdict for plaintiff in an action for malicious prosecution and upon a motion for non-suit or new trial, *Held*, 1. (BAIN, J., *dubitante*.)—That the action

MALICIOUS PROSECUTION.—*Continued.* PAGE

lay, although no criminal charge had been sufficiently alleged in the information. 2. If a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, he is not liable to an action. 3. Advising with a magistrate is a circumstance only for the consideration of the jury in deciding the question of malice. 4. In considering the question of reasonable and probable cause, a defendant may be protected although he was mistaken upon a matter of fact, if his mistaken belief was honest and *bona fide*, but not upon a matter of law. 5. Proceedings not with a view to the punishment of an abducter, but by means thereof to regain possession of the child, exhibit a malicious motive. Rex v. Stewart 257

MARRIED WOMAN.—*Next friend.*—A married woman defendant applied for a commission. Her husband who was also a defendant appeared and supported the motion. *Held*, That a next friend was necessary for the purposes of the application, but the order was made as upon the application of both husband and wife. Ontario Bank v. Smith 600

MASTER'S OFFICE.—*Accountant in.*—*Attendance there of parties or experts.*—The master has power to direct the appointment of an accountant and to tax the payment of his fee. Although the general rule is, that nothing can be taxed for the preparation of accounts directed to be brought into the master's office, yet in a partnership case, when it was not the duty of either party to prepare them, a disbursement for their preparation was allowed. No allowance beyond ordinary witness fees can be made for the attendance in the master's office during the passing of accounts, of a person specially familiar with them. Nor to a party to the cause so attending. Scott v. Griffin . . 116

———*Foreign evidence taken by master.*—By consent the master attended in Montreal for the purpose of taking certain evidence. The evidence "was to be used on the reference (saving all just exceptions) in the same manner as if said evidence had been taken under a commission." The depositions were styled in the cause (short form) and then proceeded: "A. B. sworn," with question and answers following. The answers were not stated to have been made by any one, and there were no signatures either of witnesses or examiner. Upon appeal from the master's report, he certified at the request of the judge, that the evidence had been taken and afterwards transcribed by a short hand reporter, but that it had not been read over to the witnesses. KILLAM, J.—Without considering whether there is any justification for departing from the old practice in the master's office, it would certainly be improper to receive any evidence, as that taken in Montreal, upon less proof of its being correctly taken than would be required if there had been an order appointing the master a special examiner for the purpose. Lewis v. Georgeson 272

MISREPRESENTATION. PAGE

MISREPRESENTATION.—*Rescission.—Waiver.—Evidence.—County Court.—Rules of equity.—New trial.*—In an action upon a note given for the purchase of a machine, the defendant pleaded that he purchased upon the plaintiff's false representation of the age of the machine. He learned the true age on the 28th of September. On the 9th October plaintiff wrote him for payment of another note. The defendant answered on 10th November, remitting $11.40 on the other note. On the 13th November plaintiff wrote for payment of the machine note. On the 20th November plaintiff first complained of the misrepresentation. He returned the machine in the following month. The jury found a verdict for plaintiff. The county judge ordered a new trial and the plaintiff appealed. *Held*, 1. That evidence of parol misrepresentation was admissible although a written warranty was given. 2. It is no answer to a charge of misrepresentation that the deceived party had the means of verification at hand. 3. If the representation was untrue, and made recklessly and without reasonable ground for belief in its truth, the contract might be rescinded. 4. Generally speaking, the circumstances that will support an action for deceit will justify a party in rescinding the contract. 5. In the county courts the rules of equity as to the rescission of contracts prevail, rather than the rules of law. 6. The delay in complaining of the misrepresentation was evidence only of an intention to confirm the contract, and did not necessarily estop the defendant. *Per* KILLAM, J.—As the jury may have proceeded upon the ground that by the delay the defendant had elected to affirm the contract, the verdict should not be disturbed. The Watson Manufacturing Co. v. Stock 146

MISTAKE OF TITLE.—*Improvements under. See* Will.

MORTGAGE.—*Conveyance of equity of redemption in discharge of debt. —Pleading.*—To an action upon covenant in a mortgage defendant pleaded that he had conveyed the equity of redemption to B., who conveyed it to the mortgagee in discharge of the debt. *Held*, A good equitable plea. After the conveyance to B. there was an implied obligation in equity on his part to indemnify the mortgagor against the debt. *Quære*, Whether in such a case the relation of principal debtor and surety, as between the mortgagor and B. was constituted. Forrest v. Gibson 612

———*Mortgagee buying at tax sale.—Action on covenant.—Removal by mortgagee of buildings.*—After a mortgagee had taken possession under his mortgage, purchased the land at tax sale and obtained a conveyance, and removed valuable buildings from the land, he obtained judgment upon the covenant in the mortgage. Upon a motion to stay proceedings on the ground that the judgment had been satisfied, *Held*, 1. A mortgagee may purchase at tax sale and then resist redemption. The effect of the purchase is the same as if he had obtained a final order of foreclosure. It does not satisfy the covenant, but an action on

MORTGAGE.—*Continued.* PAGE

the covenant would let in redemption. 2. The removal by the mortgagee of buildings does not prevent an action upon the covenant. Waste is a matter of account. 3. An application to stay proceedings upon a judgment on the ground of its satisfaction can properly be made in Chambers. Miller v. McCuaig 539

——— *Power of sale.—"Without any notice."—Private sale without advertisement.*—A mortgage "provided that the Company (the mortgagees) on default of payment for two months may, without any notice, enter upon and lease or sell the said lands." By statute 49 Vic. (Man.) c. 42, s. 6, it was enacted that any mortgage containing such words should be deemed to contain the long form of words in the Act respecting Short Forms of Indentures, (C. S. M. c. 61, 2nd sch., 2nd col., No. 13,) which provided a method of sale involving the service of a written notice on the mortgagor. *Held*, That a sale without notice to the mortgagor could not be upheld. A power of sale permitted a sale "by public auction or private contract." *Held*, That a private sale could be made without previous advertisement of it. Re Shore . . 305

NEW TRIAL.—*Absence of witness.*—A party who finds himself at the trial without some important witness, should ask for an adjournment of the trial instead of proceeding with the trial. If he proceeds, a new trial will not afterwards be granted. Morice v. Baird 241

——— *Objections not taken to charge.* *See* Malicious Prosecution.

——— *Reducing verdict.*—Where a verdict cannot be impeached except upon the ground of excessive damages, the court may, with the plaintiff's consent, reduce the damages. Miller v. Manitoba Lumber & Fuel Co. 487

OMNIA RITE ESSE ACTA. *See* Libel.

PARTNERSHIP.—*Admissions.—Books as evidence.*—It was alleged that some of the goods were purchased by S. for his own use. He having admitted, however, the correctness of accounts delivered to the firm, including these goods; and the books of the firm, which he kept, having recognized the indebtedness as of the firm, *Held*, That the onus was on the defendants of proving that goods were so purchased by S. Hudson's Bay Co. v. Stewart 8

——— *Liability.—Goods sold to firm.—Admissions by one partner.—Books as evidence.—Goods for private use.*—S. was a member of the firm of S. & Co. He purchased goods for the use of the firm, but said that they were for J. S. & Co., of which firm he said that his partners were members. *Held*, That the firm was liable. Hudson's Bay Co. v. Stewart 8

——— *Power.—Quare*, Can one member of a partnership after dissolution assign a judgment obtained by the firm. Hockin v. Whellams. 521

——— *Power of partner to borrow.*—A partner has power to borrow money for the purposes of the firm, but if borrowed upon his own cre-

PARTNERSHIP.—*Continued.* PAGE

dit, even if applied for the purposes of the firm, he alone is liable. Hudson's Bay Co. v. Stewart 8

PAYMENT BY CHEQUE.—*Dishonor of cheque.—Pleading.*—Defendants being indebted to plaintiffs, sent them the cheque of B. for a portion of the amount. Subsequently the plaintiffs rendered accounts showing a credit of the amount of the cheque, but stating that it had not been paid, and still later rendered other accounts showing the amount charged back. The defendant in an earlier letter said that he had not seen B. since getting the check, but "will go and see him tomorrow, and when I see him will remit to you at once." His later letters made no objection to the re-charging of the amount. *Held*, 1. That the conduct of the parties shewed that the cheque had not been received as payment. 2. That under a plea of payment, the plaintiff was not bound to prove presentment of the cheque and dishonor. 3. That the correspondence might be considered as an admission that everything had been done to entitle the plaintiff to sue. Campbell v. Heaslip 64

PAYMENTS.—*Application of.—Charge of.* *See* Will.

PLEADING.—*Demurrer.—Plea to several counts, one of which is good.*—When a plea is pleaded to several counts or breaches and is bad as to some of them upon demurrer, it is bad altogether. It cannot be construed distributively under the C. L. P. Act. Robertson v. The City of Winnipeg 483

———*Fraud.*—Variance between misrepresentations as alleged and proved, discussed Winnipeg & H. B. Ry. Co. v. Mann 409

———*Fraud.—Multifariousness.*—Precision in pleading fraud discussed. A bill by a client against solicitors for an account, and to set aside a conveyance of land made by the client at the instance of the solicitors to the wife of one of them, is multifarious. Haffield v. Nugent 547

———*Fraudulent conveyance.*—It is not sufficient in a bill impeaching a conveyance as fraudulent against creditors to allege that it was made for the purpose and intent of defrauding, &c., without alleging the purpose and intent to have been those of the grantor. In such a bill the insolvency of the grantor is not shown by alleging (1) that at the time of the making of the deed the grantor was indebted to the plaintiff and others in large sums of money; (2) and was not at the time of making said deed, or at any time since, able to pay his creditors and others, and (3) was and is in fact insolvent. Charges of fraud must be precise and definite. The Western Canada Loan Co. v. Snow. 317

———*Husband and wife.*—Counts in trespass to the goods of a husband cannot be joined with counts for unlawful distress of the goods of the wife, and such counts may be demurred to. Vaughan v. Building Association 289

PLEADING.—*Continued.* PAGE

———*Joinder to pleas of release and counter-claim.*—Plaintiff joined issue upon pleas of release by deed and counter-claim. *Held*, That a joinder was appropriate to such pleas. Elliott v. Armstrong 255

———*Misjoinder of plaintiff.* *See* Warranty.

———*Never indebted.* *See* Judgment, Foreign.

———*Pleas in abatement and bar to same count.*—After a plea in abatement had been filed and issue joined upon it, pleas in bar were, by leave, added, *Held*, That the plea in abatement was waived; and after trial of the issues it was disregarded. Shore v. Green 322

———STATUTE IN ORDER TO OBTAIN BENEFIT OF IT. *See* Libel.

———*See* Mortgage.

———*See* Payment by cheque.

PLEDGE.—*Deposit.—Collateral security.—Multifariousness.*—As collateral security for the payment of certain acceptances, the defendants deposited with the plaintiffs certain of the defendant's mortgage bonds; with power of sale in case of default. After default and recovery of judgment upon the acceptances, plaintiffs filed their bill on behalf of all holders of similar bonds for a receiver and for sale of the railway. *Held*, BAIN, J.—1. That the legal title in the bonds did not pass to the plaintiffs, but that they were pledgees merely. Their remedy was a sale of the bonds; and not a sale of the railway. 2. That the bill was multifarious in basing the right to a receiver upon plaintiff's judgment, for in that the other holders had no interest. Upon appeal, *Held*, That having regard to the surrounding circumstances, the plaintiffs were not pledgees of the bonds; and that no obligation arose upon them until after sale of them by the plaintiffs under their power. West Cumberland Iron & Steel Co. v. Winnipeg & Hudson's Bay Railway Co. . . 388

PRACTICE.—*Appeal.—Acting on order by serving it.—Preliminary objection.*—A garnishee attaching order having been issued in this case, a subsequent garnishee attaching creditor moved to rescind the first order upon the ground of irregularity and of misrepresentation. BAIN, J, made an order amending the attaching order by reducing the amount attached from $11,000 to $3,600. The applicant took out the order, served a copy of it upon the plaintiffs, and also a copy upon the attorneys who usually acted for the garnishees, but who had not acted for them as attorneys in connection with this case. The applicants then applied to vary the order amending the attaching order, claiming to set it aside altogether. Application dismissed with costs. Royal City Planing Mills v. Woods 62

———*Commission.—Material on application.*—It is not always necessary upon an application for a commission to shew the nature of the evidence proposed to be given. Ontario Bank v. Smith 600

PRACTICE.—*Continued.* PAGE

——*Fraudulent conveyance.—Onus as to proof of solvency.—Amendment.*—C. P. was indebted to plaintiffs in respect of a mortgage upon certain lands in Emerson. After default he conveyed certain other lands to his son, who immediately conveyed them to his (C. P's.) wife. The conveyances were voluntary and intended as a "provision for the wife so that she could have a home." Previous to the date of the conveyances, land had become unsaleable in Emerson, and the plaintiff's security was altogether inadequate. There was no direct evidence that C. P. had no other property sufficient to pay the debt, but there was sufficient to lead the court to suspect it. The deeds were not registered, but were handed to the wife, who was not careful to keep them separate from her husband's papers. The husband continued to collect the rents and to put them into the common purse for household purposes. At the hearing the wife, without withdrawing her answer, offered to consent to a sale and a rateable division among all her husband's creditors of the proceeds. *Held*, That the conveyance was fraudulent as against creditors. *Per* TAYLOR, C.J.—The onus of shewing the existence of other property available for creditors is upon those supporting a voluntary conveyance. The bill was originally filed upon a certificate of judgment against C. P. alone. He having then disclosed the conveyances to his wife, she was made a party, the existence of a *fi. fa.* against C. P. alleged, and the conveyances attacked as fraudulent against creditors. At the hearing it appeared that the *fi. fa.* was placed in the sheriff's hands after the bill was filed. An amendment was allowed in order to make the bill one on behalf of all the creditors of C. P. The Dundee Mortgage Co. v. Peterson 66

——*Jury fee after new trial.*—49 Vic. c. 4, s. 2, provides that "No civil cause shall be entered to be tried by a jury, or shall be tried by a jury, until the party requiring the jury shall have deposited with the sheriff the sum of $25, to be applied towards the payment of jurors and shall have filed with the Prothonotary the sheriff's receipt for the $25." The defendant complied with this enactment. The action was tried with a jury and a verdict rendered for the defendant. A new trial was ordered in term. The defendant did not pay in any further sum. The plaintiff then moved to strike out the jury notice. BAIN, J., made the order. The defendant applied to reverse the order. *Per Curiam.*—Application allowed with costs. A second payment was not necessary. Elliott v. Wilson 63

——*Notice of re-hearing.*—A decree having been made in favor of the plaintiffs, the defendants properly entered the cause for re-hearing before the court *in banc*, and gave the following notice: "Take notice that I have this day entered this cause for re-hearing before the Full Court in order that the decree herein dated, &c., may be wholly discharged, &c." *Per Curiam.* The notice is good. Dundee Mortgage Co. v. Peterson 65

PRACTICE.—*Continued.* PAGE

———*Notice of appeal from verdict of single judge.*—A verdict having been rendered for the plaintift, the defendant properly filed a *præcipe* requiring the cause to be set down for rehearing before the court *in banc*, and gave the following notice to the other side: "Take notice that the defendants will apply by way of appeal to the Full Court from the decision of Mr. Justice Dubuc in this cause," setting out the grounds of appeal. *Per Curiam.*—The notice is insufficient. Application dismissed with costs. Simpson v. McDonald 302

———*Staying new suit until payment of costs of former suit* —Where a suit is instituted seeking relief substantially the same as that sought in a previous suit, the proceedings will be stayed until the costs of the former suit have been paid. The fact that the first suit was not determined upon its merits is not necessarily an answer to the application. The fact that the judge who heard the application exercised a discretion and dismissed the application is no bar to an appeal. *Per* KILLAM, J.—It was not a case for the exercise of discretion. The fact that in the first suit a married woman was suing alone, and in the second, that she sued by a next friend, is no ground for refusing the application. (Hind v. Whitmore, 2 K. & J. 458, considered.) *Per* TAYLOR, C.J. (1) The test of the identity of the suits is, whether the bill in the second suit could have been produced by a fair amendment of the first. But the proceedings will sometimes be stayed although the relief sought in the second suit could not have been obtained in the first. (2) That there is new matter in the second suit; that the relief sought is not exactly the same; or that the parties are not identical in both suits, is no ground for refusing to stay proceedings. McMicken v. The Ontario Bank 155

———*Re-instatement of appeal on list.*—Through misapprehension as to the hour at which the court sat, counsel appeared after his appeal had been struck out, *Held*, Considering the nature of the order appealed from, that the appeal would be reinstated were there reason to believe that upon full argument the order would prove to be erroneous. McMonagle v. Orton 350

———*See* Attachment of debts.

———*See* Attachment of goods.

———*See* Attachment of person.

———*See* Attorney.

———*See* Discovery.

———*See* Interpleader issue.

———*See* Security for costs.

PREFERENTIAL ASSIGNMENT.—A creditor in good faith and without knowledge that the debtor was insolvent, took from him a chattel mortgage. The transaction was straightforward and honest, but the "effect" of it was to give the mortgagee a preference over other

PREFERENTIAL ASSIGNMENT.—*Continued.* PAGE

creditors. *Held*, That the mortgage was void as against creditors. Stephens v. McArthur 496

PROHIBITION. — *County Court.* — "*Cause of action.*" — If the want of jurisdiction of an inferior court is apparent on the face of the proceedings, the defendant may move at any time for prohibition; but if it does not so appear, he should first raise the objection in the inferior court. Wright v. Arnold 1

———*Judge in Chambers.*—A judge sitting in Chambers has no power to order the issue of a writ of prohibition to a county court judge. Watson v. Lillico 59

PROMISSORY NOTE.—*Delivery in blank with authority to fill up.*—To a declaration upon a note, by indorsee against maker, defendant pleaded that G. & Co. being indebted to McL. & Co., delivered to them a blank note with authority to fill it up with the amount of the indebtedness and payable within two months, and when so filled up, but not otherwise, to deliver it as the note of G. & Co.; and that after payment of the indebtedness, and after more than 15 months, and after revocation of all authority by lapse of time, by the express acts of the parties and by the dissolution of the firm of G. & Co., the said McL. & Co. filled up and delivered the note to the plaintiffs. *Held*, Upon demurrer, that the plea was bad. Merchants Bank v. Good 339

———*Presentment.—Constitutional law.—3 & 4 Anne, c. 9.*—If a note be at the place of payment at the time it becomes due, it is sufficiently presented. 3 & 4 Anne, c. 9 s. 1, enabling endorsees of notes to sue the maker or endorser was introduced into Manitoba by 38 Vic. (Man.) c. 12. The Act 34 Vic. (D.) c. 5, enabling banks to discount promissory notes, &c., implied that notes were negotiable. Merchants Bank v. Mulvey 467

RAILWAYS.—"*By reason of the Railway.*"—*Smuggled goods.*—The statutory limitation of actions for "damages or injury sustained by reason of the railway," does not apply in an action, either contract or tort, for damages for non-delivery of goods delivered to the railway for carriage. To a declaration against a carrier for non-delivery defendants pleaded that the goods had, prior to the delivery to the carrier, been forfeited to the Crown for non-payment of customs due, *Held*, Not a valid defence. A carrier pleaded a lien for tolls, to which plaintiff replied that he was ready and willing and within a reasonable time offered to pay the tolls, and requested delivery, but defendants neglected and refused to deliver, and thereby discharged plaintiff from tendering the tolls. *Held*, Bad on demurrer. White v. Canadian Pacific Railway Co. 169

———*Lands injuriously affected.—Danger to children.—Evidence on appeal.*—The promoter of a railway had power to expropriate land making compensation "for the value of the land taken, and for all damages to land injuriously affected by the construction of the railway,"

RAILWAYS.—*Continued.* PAGE

with a proviso for setting-off the increased value of the lands not taken, by reason of the passage of the railway through or over the same "against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of, or using the said lands or grounds as aforesaid." A portion of certain lands having been taken by the railway, *Held*, 1. That the compensation should be the difference between the value of the land as it existed before, and of the remaining portion after the construction of the railway. 2. That inconveniences arising not only from the construction, but from the operation of the railway, such as noise, ringing of bells, smoke and ashes, might be included in the estimate. 3. Danger to children and others should not be included. Upon appeal to the court *in banc*. *Held*, That compensation was correctly allowed for depreciation in the value of the land not taken, occasioned by the anticipation of the subsequent operation and user of the railway on the land taken. *Per* KILLAM, J.—The appeal having been limited to a part of the order, the respondent could not attack the other part of the order in arguing the appeal. *Per* BAIN, J.—That evidence of an arbitrator as to whether in estimating the compensation, he had taken into consideration matters which were not within his jurisdiction, was admissible. Re Scott & The Railway Commissioner 193

——*Liability to fence.—Adjoining owners.*—The liability of a railway company to fence arises by statute only. There is no common law liability to fence, either as respects the highway, nor as respects adjoining proprietors. A statute provided that, "When a Municipal Corporation for any township has been organized, and the whole or any portion of such township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township," &c.; and further, that "Until such fences and cattle-guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals not wrongfully on the railway and having got there in consequence of the omission to make, complete and maintain such fences and cattle-guards as aforsaid." *Held*, That having regard to the current of previous legislation, the liability of the railway to fence existed only in favor of the owners or occupants of lands adjoining the railway. The Westbourne Cattle Company v. The Manitoba & N. W. Railway Company 553

REAL PROPERTY ACT.—*Affidavits in support of petition after caveat.*—It is not necessary to file affidavits in support of a petition based upon a caveat in the Land Titles Office. Cause may be shown by argument upon the allegations in the petition, or by affidavits; after which the judge may, if necessary, permit the petitioner to adduce evidence, or may direct an issue. Re McArthur & Glass 301

REAL PROPERTY ACT.—*Continued.* PAGE

———*Affidavit to be filed with caveat.*—An affidavit filed in support of a caveat did not state that, in the deponent's belief, the applicant had a good and valid claim upon the land, as required by statute. *Held*, That the filing of a caveat that complies with the statute is a condition precedent to the jurisdiction of the court to entertain a petition upon it. The petition was, therefore, dismissed with costs. McArthur v. Glass 224

———*Appeal.—Affidavits.*—An appeal will lie from a verdict rendered upon the trial of an issue under the provisions of the Real Property Act, 1889 2. Upon such an appeal, affidavits cannot be read, when they are not mentioned in the notice of appeal, or of the intention to read which, notice has not been given until two days before the argument of the motion, unless satisfactory reasons are assigned why an earlier notice was not given, Morice v. Baird 241

———*Commission* —The court has no power to issue a foreign commission to take evidence upon an issue directed under the Real Property Act. Grant v. Hunter 610

———*Evidence on reference.*—Upon a reference by the registrar-general under the Real Property Act, no material other than the case submitted together with any documents transmitted, can be considered. Re Joyce & Scarry 281

———*Instrument substantially in form given by Act.—Non-registration.—Action on covenant in unregistered instrument.*—The defendant, owner of land subject to the Real Property Act, executed a lease of it to plaintiff, using the form given in the Act respecting Short Forms of Indentures. It purported, however, to be made in respect of the Act respecting Short Forms of Leases. The lease contained the statutory covenant for quiet enjoyment The lease was not registered or filed. Afterwards the lessor conveyed the land to X. by a conveyance which made no mention of the lease. In an action upon the covenant for quiet enjoyment, after ouster by X. *Held*, 1. That the covenant in the lease could be sued upon. 2. That the instrument was within the Act respecting Short Forms of Indentures. 3. Costs of an action of ejectment by plaintiff against X. were allowed as part of the damages, but not costs of some Police Court proceedings stated in evidence to have arisen out of an endeavor by the plaintiff's husband to obtain possession, but the nature of which did not clearly appear. *Per* KILLAM J.—1. The instrument was substantially in conformity with the form given in the R. P. Act, and could have been registered. 2. Not having been registered it could not take effect as a lease. 3. Even without registration the covenant might be sued upon. 4. The neglect of the lessee to register his lease was not, but the transfer by the lessor without mention of the lease, was the proximate cause of the damage to plaintiff. *Per* BAIN, J.—*Quære*, Whether the lease was one which could have been registered under the R. P. Act. Shore v. Green 322

REAL PROPERTY ACT.—*Continued.* PAGE

——— *Issue.—Security for costs* —A. applied for a certificate of title. B. filed a caveat. Both parties claimed under conveyances from the patentee. *Held*, That in an issue to try the right, A should be plaintiff, and being out of the jurisdiction, should give security for costs. (*McCarthy* v. *Badgley*, 6 Man. R. 270, considered.) Grant v. Hunter 559

——— *Issue.—Security for costs.*—B. applied for a certificate of title. McC. filed a caveat and an order was made for the trial of an issue in which he was made plaintiff. B. applied for security for costs. *Held*, That B. was in reality the plaintiff and could not obtain security for costs. McCarthy v. Badgley 270

——— *Priority between registered fi. fa. and unregistered transfer.*—After a *fi. fa.* against the registered owner of lands had been registered, a prior transferee of the whole estate registered his transfer. *Held*, That a transfer gives to the transferee the right to have the land registered in his name, but until it is registered it has no effect upon the land; and that the execution creditor was therefore entitled to priority. Re Herbert & Gibson 191

——— *Trial of issue.—Costs* —An order directing the trial of an issue under the Real Property Act should reserve all further questions, including the question of costs, until after the trial of the issue. Lavalle v. Drummond 120

SALE OF GOODS.—*Authority to buy, of person in charge of business,*—Defendant was in partnership with Mrs. P., in a business of which Mr. P. had the management under a power of attorney from both partners; and carried on under the name of P. & Co. Defendant himself took no part in the management, further than being sometimes consulted about purchases. Mrs. P. died and P. was left in charge to take stock and wind up the business and to obtain a purchaser for it. The firm name remained over the store and there was no outward change. While so in charge P. ordered goods from the plaintiffs, their agent entering up the order in the name of P. & Co. After the goods had been delivered, defendant took possession of the whole stock, including the goods supplied by plaintiff, and eventually sold it. Before the sale, the plaintiff demanded the goods from the defendant, but was refused. In an action for goods sold and delivered, *Held*, 1. That P. had no authority to bind the defendant by the purchase. 2. If plaintiff thought he was selling to the defendant, and defendant did not purchase, the property would not have passed and defendant would have been liable in some form of action. But these facts were not clearly proved. Vineberg v. Anderson 335

SECURITY FOR COSTS.—*Payment into Court.*—The referee having made an order that security for costs should be given "in accordance with the usual practice of this Court," *Held*, That he could not permit the plaintiff, in lieu of giving a bond, to pay into court a sum less than $400. McMicken v. The Ontario Bank 175

SECURITY FOR COSTS.—*Continued.* PAGE

———*No defence to action.—Proof of.*— Upon an application for security for costs the plaintiff cannot (other than in proof of defendant's admission) file affidavits in proof of his cause of action and oblige the defendant to show that he has some defence. An action was brought upon a foreign judgment. Upon an application for security the plaintiff filed a certified copy or exemplification of the judgment. The existence of the judgment was admitted by the defendant and he did not allege payment of it. *Held*, That as there might be some doubt upon the the construction of the judgment as to whether it was of such a nature as to raise an implied promise to pay it, the defendent was not to be deprived of his right to security. The British Linen Co. v. McEwan 29

SOLICITOR. *See* Attorney.

STAMPS.—*Papers annexed to affidavit*.—Papers annexed to an affidavit are not filings distinct from the affidavit, and do not require to be stamped. Case v. Stevens 552

———*Treble stamping*.—Leave to treble stamp should not be given except upon a substantive motion for that purpose, supported by such evidence as will satisfy the court or judge that the stamps had been inadvertently omitted. Buchanan v. Campbell 303

STATUTES.—*Construction.*—A statute provided that a notice of appeal from an award should be given to all interested parties. *Held*, That the notice was sufficient if signed by the attorney of the party appealing. Such a notice need not be served upon the arbitrators. Service of such a notice upon the cashier of a foreign corporation is sufficient service. Re Scott & The Railway Commissioner 193

———*Construction.—"From day to day."*—In a statute regulating the procedure upon a contested election, it was provided that the judge "shall adjourn from day to day, until he has pronounced his final judgment;" but there was no provision declaring the proceedings void if this provision was not observed. *Held*, That the provision was directory only, and its non-observation did not vitiate the judge's decision. McMicken v. Fonseca 370

———*Construction.—"Majority in value of the creditors."*—Upon a motion for an injunction, held by Bain, J., that in estimating the "majority in value of the creditors" under 50 Vic. (M.) c. 8, s. 1, s-s. 5, the question of security held by any creditor should not be taken into account. Fraser v. Darroch 61

———*Construction.—Parties.*—After the S. & R. M. Railway had incurred some liabilities, its name was by statute, changed to the N.W. C. Ry. Co. The Act provided that, "the existing liabilities of the Company for work done for the said Company shall be a first charge upon the undertaking." A further Act provided that, "the Company shall remain liable for all debts due for the construction of the railway,

STATUTES.—*Continued.* PAGE

and if such debts are due to contractors, shall cause all just claims for labor, &c., to be paid by such contractors." Afterwards a charter was issued to the G. N. W. C. Ry. Co., in which that railway covenanted with Her Majesty to pay all debts due by the above-named railways, "and will cause all just claims for labor, &c., due by contractors to be paid by such contractors." Upon an information against the last named Railway Company, and certain contractors of the first named railway, to enforce the covenant, *Held*, 1. That the railway was liable only to the extent to which the previous railway was liable to its own contractors, and not for sums due by such contractors to workmen beyond the amount of that liability. 2. If otherwise, the workmen ought to be parties to the bill. Attorney-General v. Macdonald 37

———*Construction of.—Tax deed.—"Sale"*—A statute provided that no "sale" of land for taxes should be impeached because of the addition of interest to the taxes. A bill was filed to prevent the execution of a tax deed in pursuance of a sale on the ground that such an addition had been made. *Held*, That the statute was not confined in its operation to a sale completed by conveyance, but made valid the sale itself. Schultz v. The City of Winnipeg 179

———*Statute of frauds.—Parol trust.*—C. owned land subject to mortgages. For the purpose of securing O. against some accommodation endorsements, she mortgaged the land to him, but in form the mortgage was to secure payment of $3,500. The first mortgagee took foreclosure proceedings. A verbal agreement was then made, (as the plaintiff alleged) that O. should prove upon his mortgage, should redeem the prior mortgagees, borrow upon a new mortgage sufficient to recompense him, and hold the equity of redemption in trust for C. The plaintiff purchased a judgment against C., upon which *fi. fa.* lands and a certificate of judgment had been issued; and filed a bill upon them claiming that O. was a trustee for C., and asking for a sale. The evidence shewed that the plaintiff was simply the nominee of C. *Held*, That the agreement being verbal, the Statute of Frauds was a valid defence. Waterous v. Orris 177

———REPEAL. *See* Executions. Exemptions

———*Retrospective.—Costs.*—In an action on contract the plaintiff had a verdict for $101. When the action was commenced, the County Court had jurisdiction up to $250, but when the amount claimable exceeded $100, the case could be brought in the Queen's Bench. In such case if the verdict exceeded $200, full costs were given, but if less than $200 and more than $100, costs upon a lower scale were taxed. Pending the action an Act provided that "In case an action of the proper competence of the county courts be brought in the Queen's Bench," County Court costs only should be allowed, and that subject to a set-off of Queen's Bench costs, unless the presiding judge certified otherwise. *Held*, That the statute although passed after the case was

STATUTES.—*Continued.* PAGE

commenced, governed the question of costs. Todd v. The Union Bank of Canada 457

———*Retrospective.*—After an award and before the expiration of the time for appeal, a statute came into operation amending the previous provisions respecting appeals. *Held*, That the new statute applied to the case. Re Scott & The Railway Commissioner 193

———*Retrospective.* *See* Constitutional law.

STOPPAGE IN TRANSITU.—*Termination of transit by sheriff.*—*Insolvency of consignee.*—*Proof.*—Goods while in transit were seized by a sheriff under an execution against the assignee, and removed from the custody of the carrier. *Held*, That the consignor could not, after such removal, stop in transitu. *Semble*, 1. By insolvency, in such cases, is meant a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence. 2. A vendor who in good faith and in ignorance of the embarrassed circumstances of a customer, sold goods to him, may, on discovery of the customer's insolvency, exercise the right of stoppage in transitu. Couture v. McKay 273

TAX SALES.—*Liability of lands to sale.*—*Furnishing lists to clerks.*—*Method of sale.*—*Sale for nominal price.*—*Illegal addition to amount.*—*Name of corporation.*—*Adoption of seal.*—*Onus of proving invalidity.*—*Bill attacking void transaction.*—Lands were by virtue of the local statutes liable in 1885 to be sold for taxes. Furnishing to the municipal clerks lists of lands in arrear under section 272 of the Act of 1883, and section 289 of the Act of 1884, is not a condition precedent to the sale of land for taxes. *Per* DUBUC, J.—Any such objection would be cured by the Act of 1886, s. 673, as amended by the Act of 1887, s. 52. Under the Act of 1884, the treasurer, in selling lots not divided into legal sub-divisions, should determine whether, having regard to the interests of both owner and municipality, he will offer the whole parcel of land or some definite part. Having so determined, he should sell for the highest price obtainable. He is not, however, "bound to enquire into or form any opinion on the value of the land." And not having done so, forms no reason for avoiding the sale. Land worth $700 was sold for taxes for the sum of $17. The evidence showed, however, that there was great difficulty in selling lands at all. *Held*, That these facts did not shew that the sale was not conducted in a fair, open and proper manner. The amount for which lands were sold for taxes was illegally increased by the addition of interest. *Held*, Not to invalidate the sale. *Per* KILLAM, J.—1. In a suit attacking a tax sale deed the *onus* of proving its invalidity is upon the plaintiff. 2. A bill to set aside a tax sale deed alleged that the official who conducted the sale had no authority to do so; and that the deed was not executed by the officers or under the seal of the proper municipal corporation. *Quære*, Whether it thus appearing that the deed was wholly void, a

TAX SALES.—*Continued.* PAGE

bill would lie to have it so declared. The Municipality of Kildonan was not dissolved by the Municipal Act 1886. McRae v. Corbett . . 426

——— *Statutes confirming.—Irregularities.*—Land was sold in 1882 for the taxes of 1880 and 1881. No by-law levying a rate was passed in either year after the revision of the assessment roll. The statute then in force authorized a sale when two years arrears were due. Upon the deed in pursuance of such sale being attacked. *Held*, 1. (Overruling TAYLOR, C.J.)—That the sale and deed were invalid. 2. That the Act 47 Vic. c. 11, s. 340, providing that, "all lands heretofore sold for school, municipal and other taxes, for which deeds have been given to purchasers, shall become absolutely vested in such purchasers . . . unless the validity thereof has been questioned . . . . before the 1st day of January, 1883," and the Act 49 Vic. c. 52, s. 673, as amended by 50 Vic. c. 10, s. 52, only applied where there were two years arrears legally due. *Per* BAIN, J.—The Act 51 Vic. c. 101, s. 58, which provides that "all assessments heretofore made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby," only extends to remedying and supplying irregularities and defects in assessments and rates that were actually made and struck in substantial conformity with the directions of the statutes. *Per* KILLAM, J.—That Act having been passed after the execution of the deed could not operate to pass to the purchaser a title which previously he had not obtained. Ryan v. Whelan 565

TAXES. *See* Constitutional law.

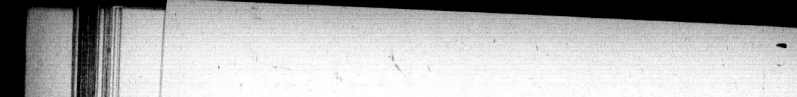
WARRANTY.—*Action on, previous to payment of purchase price.—Measure of damages.—Misjoinder of plaintiff.*—Action upon a warranty given on sale of second hand machinery "good for twelve months with proper care." The action was brought in the name of two persons, to one only of whom the warranty had been given. *Held*, 1. That no objection to the frame of the suit having been taken at the trial, the court in term had power to give judgment for the proper plaintiff. 2. That damages could be recovered for a breach of the warranty, notwithstanding that the purchase money had not been paid, promissory notes having been given for the amount. (*Church* v. *Abell*, 1 Sup. Ct. R. 442, distinguished.) 3. The measure of damages was the sum which at the time of the sale, it would have been necessary to expend in order to remove any defect which constituted a breach of the warranty. Cook v. Thomas 286

WILL.—*Construction of.—Estate.—Application of rents upon mortgage. —Improvements under mistake of title.*—A testator appointed executors "directing my said executors to pay all my just debts and funeral expenses and the legacies hereinafter given out of my estate." In a subsequent part of the will it was provided that "after paying off my said debts and funeral expenses, I give and bequeath to my daughter M. the

WILL.—*Continued.*

PAGE

sum of $5,000 to be paid to her at the age of 21 years by my executors, and "I give to my wife all my real estate whatsoever and wheresoever, and all my chattels and household furniture with the exception of the above named legacy." "And also my executors to educate and provide all necessaries for said child (M.) from my estate until she is 21 years of age over and above the $5000 above mentioned." The plaintiffs had a mortgage upon part of the real estate of the testator. After his death they loaned the widow a further sum for the purpose of erecting buildings upon it. After default they took possession under the first mortgage and appropriated the rents to its payment. Upon a bill to foreclose the second mortgage, *Held*, 1. That the legacy and provision for maintenance and education were a charge upon the real estate. 2. That the plaintiffs were not entitled to priority over these charges either upon the ground of mistake of title, or because the court would have sanctioned the loan on behalf of the infant if applied to at the time. 3. The plaintiff could not be permitted to change the application of the rents to the reduction of the second mortgage. The Confederation Life Association v. Moore 162



MANITOBA LAW REPORTS.

VOLUME VI.

WRIGHT v. ARNOLD.

(IN APPEAL.)

County Court.—Prohibition.—"Cause of action."

If the want of jurisdiction of an inferior court is apparent on the face of the proceedings, the defendant may move at any time for prohibition; but if it does not so appear he should first raise the objection in the inferior court.

"Cause of action" in the County Court Act, means the whole cause of action.

An action may proceed in a court other than the one of the district in which the action arose (1) by leave of the judge previous to commencing the proceedings, or (2) by transfer from that district after action commenced.

Rule *nisi* for prohibition against the maintenance of an action in the County Court of Selkirk. On the rule *nisi* being applied for before Mr. Justice Dubuc, his Lordship referred the matter to the full court. The rule having been granted, upon its return,

W. R. Mulock, for plaintiff, objected to the matter coming on in this way. Defendant should have appealed. C. C. Act, 1887, c. 9, s. 41, sub-sec. 2. As to jurisdiction of C. C., defendant relied on *Noxon* v. *Holmes*, 24 U. C. C. P. 541; *Vaughan* v. *Weldon*, L. R. 10 C. P. 47; *Bradley* v. *McLeish*, 1 Man. R. 103. See section 47 of C. C. Act, which is not found in English C. C. Act. As to word "practice," see *Attorney-General* v. *Sillem*, 10 Jur. N. S. 457. The Statute 9 & 10 Vic. c. 95, s. 88, differs largely from s. 47 of our C. C. Act. See also R. S. O. 1877, c. 47, s. 244; *Re Clarke*, 2 U. C. L. J. 266.

J. S. Hough, for defendant. As to right to prohibition instead of appeal, *High on Extraordinary Legal Remedies*, 615; *Robertson* v. *Cornwell*, 7 Pr. R. 301; 48 Vic. c. 22, s. 23; *Garland* v. *Omnium Securities Co.*, 10 Pr. R. 135; *King* v. *Farrell*, 8 Pr. R. 119; *Hagel* v. *Dalrymple*, 8 Pr. R. 183; As to section 47 of C. C. Act, *Ahrens* v. *McGilligat*, 23 U. C. C. P. 171.

(*7th June, 1889.*)

TAYLOR, C.J.—This is a rule *nisi* for a writ of Prohibition directed to the acting judge of the County Court of Selkirk, to prohibit the said court from further proceeding in this suit.

The suit was begun on the 7th of January, 1889, and the particulars of claim served with the summons set out a promissory note dated at Winnipeg, the 16th August, 1884, signed by the plaintiff and defendant for payment by them on or before 1st January, 1885, of $50 with interest at seven per cent., to the Massey Manufacturing Co. or order, at Winnipeg. Written beneath that appears, "The Plaintiff claims $65 (amount of above promissory note with interest) paid by him for defendant at his request, and interest on $50 to judgment at seven per cent." From an affidavit filed, it appears that plaintiff and defendant both live in the Western Judicial District, and that the suit is brought on an agreement, made at Beaconsfield in the Western Judicial District, that the defendant should pay the note in question. Judgment was signed by default, but that was set aside and when the case came on for trial, an objection was taken that the Court had no jurisdiction. By agreement, this question was argued before any expense was incurred in bringing witnesses or entering upon the merits. The learned judge after reserving judgment, held that he had jurisdiction. From this decision, no appeal was taken, but the defendant applied for prohibition.

The objection is taken that, this is really an appeal from the County Judge. His judgment on the point could have been appealed against, and not having been so, it is final and conclusive between the parties, 50 Vic. c. 9, s. 42, sub-sec. 2. Several cases in Ontario and in England are cited to sustain the plaintiff's contention that the defendant having submitted the question of jurisdiction to the County Judge, taking the chance of a decision in his favor, he has made his election and cannot, now, be heard.

There is no doubt that some remarks by Draper, C.J., in *Re Clarke*, 2 U. C. L. J. N. S. 266, support such a view, but there are other cases to the contrary. *Knight* v. *Medora*, 11 Ont. R. 144, relied on by the plaintiff, was a suit in a division court for damages on account of injury sustained by negligence to repair a bridge. The Ontario Division Court Act, 43 Vic. c. 8, s. 14, provides that a defendant disputing the jurisdiction of the court is within a limited time after service upon him to file a notice

that he disputes the jurisdiction of the court, and in default of such notice, "the same shall be considered established and determined." The court having held in *Clarke* v. *McDonald*, 4 Ont. R. 310, that the section did not oust the court of its jurisdiction to prohibit where no such notice had been given, an amendment to it was made by 48 Vic. c. 14, s. 1, adding the words, "Every such notice shall be in writing, and prohibition to a Division court shall not lie in any such suit from any court whatever, where such notice disputing the jurisdiction has not been duly given as aforesaid." No such notice was given, but after several postponements of the trial objection to the jurisdiction was urged by defendant's counsel. The suit was, however, tried and on the 18th of September, judgment given for the plaintiff. The defendant's counsel then expressed his desire to apply for a prohibition or a writ of *certiorari* removing the case to a superior court and the judge reserved his judgment to enable him to do so. It was under such circumstances that the Court of Queen's Bench Division refused a writ of prohibition. *Symons* v. *Rees*, 1 Ex. Div. 416, was an action of ejectment in a County Court which had jurisdiction only where the premises were under the annual value of £20. The defendant applied for prohibition on the ground that they exceeded that value, but the judge dismissed the summons, holding that the annual value was less. From this finding, there was no appeal. At the trial the defendant took objection to the jurisdiction of the court, and sought to go into evidence showing that the value exceeded £20, this the judge refused to receive, holding that he was bound by the decision of the superior court judge. It was on a motion for a new trial on the ground of improper rejection of evidence that Cleasby, B., said "The defendant might have waited until the hearing in the county court and might then have raised the question as to value, instead of so doing, he took the chance of obtaining a decision in his favor by a judge of the High Court of Justice; having made his election he is bound by the result so far as concerns the present suit." The election there was that he moved for prohibition before raising the question in the county court, and after a decision against him on that, he could not again raise it in the inferior court.

It seems to me that the proper view is that urged by the defendant, if the want of jurisdiction is apparent on the face of the proceedings, the defendant may move at any time, but if it

does not so appear, he should first raise the objection in the inferior court. The statutory provisions in Ontario shew that it is considered proper that the question should be raised there first.

In *Buggin* v. *Bennett*, Burr. 2035, where it was sought to prohibit the Court of Admiralty after sentence, on a ground not appearing on the face of the proceedings, no objection having been taken to the jurisdiction, Mr. Justice Aston said, "The matter now suggested as a ground for prohibition was not made use of as an objection below, to oust the admiralty of jurisdiction. It should have been tendered to them as a plea to oust them of their jurisdiction. They had no notice that there was any objection to their jurisdiction. Therefore, even, before sentence, it would not be decent to grant a prohibition, when no such plea had been tendered to them." The same view as to setting up the want of jurisdiction in the inferior court was held by Mr. Justice Gwynne in *Robertson* v. *Cornwell*, 7 Pr. R. 300.

In my opinion the court can entertain the application.

The proper disposition of it depends on the construction to be put upon section 48 of "The County Courts Act, 1887," and the words "Cause of Action" therein. These words in the Common Law Procedure Act have been held to mean, not the whole cause of action, but the act on the part of the defendant which gave the plaintiff his cause of action. This view has been adopted by all the courts in England and in Ontario since *Vaughan* v. *Weldon*, L. R. 10 C. P. 47, and by this Court in *Bradley* v. *McLeish*, 1 Man. R. 103. In England the same words in the County Courts Act have been held to mean the whole cause of action. The same meaning has been uniformly given to them in the Division Court Act of Ontario and has continued to be given since *Vaughan* v. *Weldon*; *King* v. *Farrell*, 8 Pr. R. 119; *Hagel* v. *Dalrymple*, 8 Pr. R. 183; *Garland* v. *Omnium Securities Co.*, 10 Pr. R. 135. For giving them another meaning in the County Court Act of this Province, reliance is placed upon section 47 of the Act, but that section can only apply to suits properly brought, suits within the jurisdiction of the court and instituted in the court of the proper division.

It seems to me impossible to give section 48 the construction contended for by the plaintiff. If the proviso in the latter part of the section permits a suit to be brought in any division, as the plaintiff contends, then the first part of the section is meaning-

less. The first part provides that a suit may be entered and tried in one or other of two divisions, either in the judicial division in which the cause of action, the whole cause of action, arose, or in the judicial division in which the defendant or one of several defendants resides or carries on business. Then comes the proviso which, in my judgment, must be read as providing for two things, first, that where, before a suit is brought, it is made to appear to the judge that it is more convenient and inexpensive for both parties to bring it in a judicial division other than the division in which, under the first part of the section it is required to be entered and tried, the judge may order it to be brought in the court of some other judicial division, that is, in some division other than that in which the cause of action arose, or in which the defendant or one of several defendants resides or carries on business, and second, if a suit is already brought, that is properly brought in the judicial division in which the cause of action arose, or in which the defendant or one of several defendants resides or carries on business, and it is made to appear to the judge that it would be more convenient and inexpensive for both parties, he may order it to be tried in the court of some other judicial division. It is, to my mind, plain that such is the proper and the only proper reading of the Act.

The suit now in question has been brought in a judicial division other than that in which the cause of action arose, and in which the defendant does not reside nor carry on business. There is no pretence that before the suit was brought, the judge of the proper judicial division made an order that it should be brought in the County Court of Selkirk. That Court has no jurisdiction to entertain the suit, and the writ of prohibition should be granted.

KILLAM, J.—I agree with the learned Chief Justice in thinking the applicant entitled to the writ of prohibition.

Under the English County Courts Acts and the Ontario Division Courts Acts, upon which, clearly, our County Courts Act is modelled, the expression "cause of action" had a well defined meaning, when it was first adopted in our County Courts Act. A different meaning had been given to the same expression in the Common Law Procedure Acts of England and Ontario. This less limited meaning might well be justified by the consider-

ation that the Acts applied to Superior Courts, and by reference to the context and to the previous jurisdictions of those courts.

This distinction being well known at the time of the first enactment in Manitoba of a County Courts Act containing that phrase, in which it was used in much the same way as in the Acts taken as models by which to frame it, it is impossible to suppose that it was intended that the expression should have any other than the more limited meaning.

The plaintiff's counsel argues that under the provision in the 47th section of the County Courts Act, 1887, 50 Vic. c. 9, that, "In any case not expressly provided for in this Act, or by any general rules or orders, the law and the general principles of procedure or practice in the Court of Queen's Bench, may be adopted and applied," the meaning ascribed to the expression "cause of action," in the Common Law Procedure Act, applies. But the 48th section does provide for the jurisdiction of the respective county courts as among themselves, and this is, then, not a case "not expressly provided for by the Act." What is asked is that the principles on which the jurisdiction of the Court of Queen's Bench is based, be applied in the county courts, which is not what the 47th section authorizes. If this be not the right view, but the matter in the Queen's Bench be one of practice or procedure rather than of jurisdiction, then it is clearly impossible to apply a principle of procedure or practice in the Queen's Bench as one of jurisdiction in the county courts. It cannot apply because the enactment in the Common Law Procedure Act relates to the procedure upon the service of writs beyond the jurisdiction of the court and to cases in which it may be done and the proceedings thereon, whereas the 48th section in the County Courts Act, 1887, has nothing to do with service of the writs or the places of service or the procedure in case of service beyond the jurisdiction.

If a party resident out of Manitoba be found here, he can be served with an ordinary writ of summons from the Queen's Bench. If a resident of Manitoba be served out of the Province he would be served with the *ex juris* writ and could be then proceeded against thereon only upon such a cause of action as could a non-resident served out of the Province.

Whereas, in the county courts the writs can be served anywhere within the Province (not considering the question of service else-

where.) If a party be found in another judicial division than that in which he resides, this will not give the court of that division jurisdiction over him, and a party resident in one judicial divison may be personally served without it with a summons from its county court in respect of any cause of action, wherever arising, for which an action can be brought in a county court, and the subsequent proceedings against him will be just the same as if he had been personally served within the judicial division. This shows that it is not the principle of procedure or practice of the Queen's Bench that is sought to be applied, but the sense in which, for other purposes and under a practice not applicable to the county courts a certain expression is used.

Then it is clear that the proviso in the 48th section, that "it shall be competent for any judge . . . . to make a special order authorizing the suit to be brought, or if already brought, to be tried in the court of some other judicial division," cannot extend the meaning of the expression "cause of action" in the first part of the section. It is only a provision for the bringing or the trying of the action in some judicial division other than that in which the cause of action arose, or in which the defendant or one of several defendants resides or carries on business. Under it the suit may be brought in such other judicial division, if a judge, after hearing the parties, so orders. I say, after hearing the parties, because I can hardly suppose that ordinarily such an order would be made *ex parte*. At least, it is proper to suppose that in few cases, if ever, would the judge find such circumstances as to warrant an *ex parte* order to that effect. "If already brought," then naturally means, "If already brought in the proper judicial division in which it can be brought without order, as otherwise a party may have been compelled, before a judge has considered the propriety of such special order, to enter a defence and prepare for his defence in a county court, other than that to which he has contributed to give jurisdiction; and he will have been compelled to do this without being heard by the judge or the judge having determined that there was such a case that he should allow this without hearing the defendant. It is all very well to say that he may apply to have the case transferred back to the proper court for trial. Perhaps he may, but it is not such a light matter for a man in a remote part of the Province to make such an application in Winnipeg or Portage la Prairie

or Brandon. One end at which the County Courts Act aims, is the saving of expense in matters of small amount. A defendant is brought into court against his will, and he should not be put to the trouble or expense of opposing such an application or of making one or of taking any step beyond his proper judicial division until the judge has seen that there is a proper ground for requiring him to do so.

The action, then, was improperly brought in the court in which it was. I agree with the views of the Chief Justice upon the other points raised and desire to add nothing with respect to them.

BAIN, J., concurred.

Writ of prohibition granted.

HUDSON'S BAY CO. v. STEWART.

(IN APPEAL.)

Goods sold to firm.—Admissions by one partner.—Books as evidence.—Goods for private use.

S. was a member of the firm of S. & Co. He purchased goods for the use of the firm, but said that they were for J. S. & Co., of which firm he said that his partners were members.

Held, That the firm was liable.

It was alleged that some of the goods were purchased by Stewart for his own use. He having admitted, however, the correctness of accounts delivered to the firm, including these goods; and the books of the firm, which he kept, having recognized the indebtedness as of the firm,

Held, That the onus was on the defendants of proving that goods were so purchased by S.

A partner has power to borrow money for the purposes of the firm, but if borrowed upon his own credit, even if applied for the purposes of the firm, he alone is liable.

This was an action brought for recovery of goods sold and delivered to the defendants. The defendants had entered into a written partnership providing for the carrying on of certain lumbering business in Manitoba under the name of Stewart & Co. The defendants, other than Stewart, reside in the City of Ottawa. Stewart had had dealings with the plaintiffs previous to the formation of the partnership. After its formation he advised the company of its existence and opened an account with them in the name of J. Stewart & Co. At this time he was indebted to plaintiffs upon his own account. Books were opened by Stewart in Manitoba for the firm and various entries appeared in them showing the firm to be indebted to the plaintiffs in a very large amount. The books, however, shewed Stewart's private indebtedness also as a debt of the firm. The evidence for the plaintiffs consisted in the entries in the books of the defendants and in certain admissions by Stewart, who, it was sworn, had admitted all the accounts, including his own, to be due by the firm. It appeared that goods which were delivered at Stewart's own house were also charged to the firm and were part of those sued for. It further appeared that a boarding house had been kept near the defendant's mill under Stewart's authority, at which Stewart and men employed by the firm were boarded, and that some of the goods sued for were used at the boarding-house by these men.

C. P. Wilson for defendants other than Stewart. Stewart could not make admissions binding on other members of the firm. The whole question in dispute is whether goods were obtained for Stewart alone. Many of the goods evidently were for Stewart's own personal use. *Taylor on Evidence*, §, 599; *Lindley on Partnership*, 608; *Parker* v. *Morell*, 2 Ph. 452; *Lodge* v. *Pritchard*, 3 D. M. & G. 906; *Fairchild* v. *Fairchild*, 64 N.Y. 471; *Topliff* v. *Jackson*, 78 Mass. 569; *Re Brown*, 19 Beav. 97; *Hallmark's case*, 47 L. J. Ch. 868; *Lindley*, 262; firm not liable for goods supplied on private contract.

H. M. Howell, Q.C., and *W. E. Perdue*, for plaintiffs. Admissions of partners after dissolution evidence against other partners. *Wood* v. *Braddick*, 1 Taunt, 104; *Pritchard* v. *Draper*, 1 R. & M. 200. As to admissibility of evidence objected to. *Clarke* v. *Saffery*, Ry. & M. 126; *Taylor on Evidence*, 8th edition, 1197; *Bedford* v. *Deakin*, 2 B. & Ald. 217; *Bottomley*

v. *Nuttall*, 5 C. B. N. S. 144. Slight mistake in name not important. *Williamson* v. *Johnson*, 1 B. & C. 146.

(*7th June, 1889.*)

TAYLOR, C. J.—The defendants contend that the admissions of Stewart are not binding upon them because made after the dissolution of the firm, but that is scarcely correct. A statutory declaration made by Stewart as to the accounts, was indeed made after the alleged dissolution, but the acknowledgments to Kennaird and Macdonald seem to have been while the firm still existed. As to acknowledgments and admissions, even after a dissolution, *Wood* v. *Braddick*, 1 Taunt. 104, is an authority for holding that admissions by a partner, made after a dissolution, respecting transactions which took place during the partnership are competent evidence against other partners. This was followed in *Pritchard* v. *Draper*, 1 R. & M. 200.

That the taking of the separate notes of Stewart was an election to look to him alone and a discharge of the firm from liability, is completely disposed of by such cases as *Bottomley* v. *Nuttall*, 5 C. B. N.S., 144, and *Carruthers* v. *Ardagh*, 20 Gr. 579. In the latter case the law was fully discussed by the late Chancellor Spragge, and Vice-Chancellor, now Mr. Justice Strong.

As to the goods sued for being largely for the personal use of Stewart, it appears that the firm was boarding a number of the men in its employment and many of the articles may well have been for use in the boarding establishment. The learned Judge who tried the cause was, I think, right when he held that the onus of proving that any particular goods were supplied to Stewart for his private use rested upon the defendants.

In my opinion the verdict in favor of the plaintiff should stand and the motion to set it aside be dismissed with costs.

DUBUC, J.—The plaintiff, it is true, did not bring witnesses to prove the delivery of every item charged in this long account, covering about 25 pages of foolscap paper. But Kennaird, who was in charge of the plaintiff's business at Fort Ellice, swears that he knows of his own knowledge that almost the whole of the goods were delivered to J. Stewart & Co., and that a very considerable portion of the said goods were delivered by himself, very often to John Stewart personally, sometimes to one or

other of his men. Besides that, the plaintiffs were furnishing Stewart with monthly statements of account, which Kennaird says he, in most cases, delivered personally to Stewart, and on several occasions he had conversations with Stewart in reference to said accounts and he was satisfied with them. Stewart himself admits the correctness of the accounts. In the ledger of the defendants, kept by Stewart, an account headed "Hudson's Bay Co." is found, containing entries of the indebtedness of the firm to the plaintiffs at different dates. On the 27th Feb., 1886, the amount then due to the plaintiffs was settled by two notes for $2,000 and $1,300 respectively, signed by John Stewart, personally. All these put together afford in my opinion ample and sufficient proof that the goods were delivered and that the charges made for them are correct.

The defendants, other than Stewart, contend that the admissions of Stewart, and the entries iu the books of the firm kept by Stewart are not binding on them.

It was held, in *Wood* v. *Braddick*, 1 Taunt, 104, that the admission by one of two partners after the dissolution of partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge other partners. The same principle was followed in *Pritchard* v. *Draper*, 1 R. & M. 200. Under these authorities, the statements of Stewart as to the correctness of the accounts must be admissible.

As to the entries in the books of the defendants, if they stood alone and were the only evidence in favor of the plaintiffs, the three Ottawa partners would not under *Stewart's Case*, L.R. 1 Ch. 587, be necessarily bound by their contents. But being found to agree with the accounts rendered by the plaintiffs and the admissions of John Stewart, with the fact that the said Ottawa partners might have had access to them, particularly when Forbes, one of them, had an opportunity of examining them while he was at Fort Ellice in March, 1885, and at Moosomin in August, 1886, I think they were properly admitted in evidence.

As to the point that portions of the goods charged were purchased by Stewart for his personal use, it is clear that in so doing Stewart was acting unfairly towards his co-partners. But he bought those goods on the credit of the firm and asked that they should be charged to the firm. Kennaird swears to it, and

Stewart himself makes the same statement. As a partner, and particularly as the manager of that concern, Stewart had the undoubted right to pledge the credit of the firm. Some of the items charged are for provisions, clothing, and money advanced. But the evidence shows that Stewart was boarding the men employed by the firm in their lumbering operations, that the moneys were to pay these men, and sometimes paid directly to them on the order of Stewart, and that these moneys and clothings as well as the board were charged by Stewart on their wages. When these things were asked to be charged to the firm, whether a portion of them was to be used by Stewart for his personal purpose, the plaintiffs had no means of discriminating.

Another contention of the defence is that the plaintiffs having in February, 1886, taken the personal notes of Stewart for the amount due to them at that date, the other defendants should be discharged from liability for that amount. But that contention seems to be unsustainable. In *Bedford* v. *Deakin*, 2 B. & Ald., 217, it was held that notes taken by a creditor from an individual member of a firm, do not amount to a satisfaction of the debt unless so agreed. These notes being unproductive, he might still resort to his remedy against the other partners.

In *Bottomley* v. *Nuttall*, 5 C. B. N. S. 144, one member of a firm had bought goods for the firm for which he had given his own acceptance. The acceptor became bankrupt before maturity of the bills. It was held that the vendor of the goods had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance. The mere fact of the vendor dealing with the resident partner, making the invoices to him individually, and drawing upon him alone, though aware that he was a member of a firm and that the goods were to be shipped to the firm, makes no difference.

In this case the evidence does not show that the notes were taken or given in satisfaction of the debt. Kennaird says these notes were taken as a means of fixing the accounts more than anything else. They were not discounted at any bank, and no entry was made in reference to them in the plaintiff's books. Stewart says he got notice when the notes became due, but no demand for payment was made afterwards, no letter written to him, and he never heard from the plaintiffs with reference to the notes after they were due. These circumstances show be-

yond doubt that the notes were not taken in satisfaction of the debt.

I think the verdict entered for the plaintiff should be affirmed with costs.

KILLAM, J.—I adhere to the views which I expressed upon entering the verdict in this cause. It appears to me clear that Stewart had authority, both actual and ostensible, to purchase on the credit of the firm such goods as those for which the plaintiff company sues. It is admitted that he could purchase supplies upon which to maintain the employees of the firm when engaged in cutting and hauling logs in the woods. It may not be the practice in a majority of instances of millowners to so maintain their employees at their mill. It is, however, not uncommon, and might well be necessary at a locality such as Fort Ellice. In my opinion Stewart, as the managing partner, must be considered to have had authority to determine upon the policy of the firm in this regard. Even in the beginning, when bringing in the machinery, and when sending out parties or going with parties to the limits, such suplies may well have been required. The nature of the business was such that power to bind the firm by contracts to purchase them must be implied in Stewart.

I have found, as a fact, that his purchases were made on behalf of the firm. This being so, there can be no doubt that his entries in the partnership books of the amounts of the liabilities to the plaintiff and his acknowledgements to the plaintiff's officers were competent evidence of such amounts against all the members of the firm. This evidence was not absolutely binding, but it was *prima facie* sufficient. It was rebutted, in the case of certain cash advances, by the evidence showing that they were made on the personal credit of Stewart, and not upon that of the firm. It did not, and does not, appear to me that it was sufficiently rebutted as to other goods, merely by general evidence that some of them after being supplied were consumed by Stewart at his private house, though with the knowledge of the plaintiff's officers.

Appeal dismissed with costs.

REG. v. GALBRAITH.

Conviction.—Distress and imprisonment in default of fine.—Certiorari.—Practice.

A statute permitted punishment by imprisonment or penalty, or both. It also provided that where a fine is imposed and is not paid, a warrant of distress may issue, and after a return, if no sufficient goods, the defendant may be committed to gaol. It also provided that no conviction should be quashed for want of form or should be moved by *certiorari* into any superior court. A conviction under this statute directed the payment of a fine and in default of payment a distress, and if no goods then imprisonment.

Held,—That as there was jurisdiction to award distress and imprisonment, the conviction was not bad, although by it the jurisdiction was prematurely exercised—such award at that time was surplusage only.

A fiat for a writ of *certiorari* should not issue, as of course, if the Justice do not appear upon notice of an application for a summons that it should issue.

Notwithstanding the statutory provision a *certiorari* may issue where the Justice has no jurisdiction.

J. A. M. Aikins, Q. C., for the Indian Department.

J. H. Munson and *Smith Curtis* for defendant.

T. D. Cumberland for the magistrate.

(*9th April, 1889.*)

BAIN, J.—The defendant is convicted of an offence against the provisions of sec. 94 of the Indian Act. The punishment fixed by that section is imprisonment or a penalty, or both, in the discretion of the judge or the magistrate convicting. The defendant having been tried before two justices of the peace, was found guilty, and by their minute made in pursuance of sec. 52 of the Summary Convictions Act it was adjudged that he was to pay $100, with costs on or before the 18th of October, and in default of payment a distress warrant was to be issued and if there was no sufficient distress found, that he was to be imprisoned for the term of two months. The conviction was afterwards drawn up awarding the punishment as stated in the minute, and the conviction is in the form J 1 referred to in sec. 53.

By sec. 108 of the Indian Act, no conviction under the Act shall be quashed for want of form, or be removed by *certiorari* into any superior court. *Colonial Bank* v. *Willan*, L. R. 5 P. C. 442, and numerous other cases establish that this prohibition does not absolutely deprive the court of its power to issue the writ of *certiorari*, but that, notwithstanding the express prohibition, when an excess or want of jurisdiction is shewn or appears in the proceedings of the inferior court, the writ will be issued and the conviction or other proceedings quashed.

As there was evidence before the justices besides that of the two Indian women, I need not stop to inquire whether the omission to caution these women as required by sec. 122 of the Indian Act, even if the omission were proven, would affect the jurisdiction to make the conviction, for, the offence charged being one over which they had jurisdiction, if there was any evidence at all on which the conviction might be made, it is not open to me to review its weight or sufficiency.

The only question I have to consider is, whether the punishment imposed for the offence being a fine of $100 and costs, to be paid on or before the 18th of October, the conviction is bad, because, after stating the imposition of the fine and costs, it goes on to adjudge distress in the advent of the fine and costs not being paid by the day fixed, and imprisonment in default of sufficient distress.

The practice in this respect under secs. 52, and 62 to 67 inclusive of the Summary Convictions Act, and under the several forms given in the schedules to the Act as applicable to these sections, is not by any means clear.

I may say here, however, that this case is clearly distinguishable from *Reg.* v. *McKenzie*, 6 Ont. R., 165, on which the defendant relied, and other similar cases, as *Reg.* v. *Sparham*, 8 Ont., R. 570 and *Reg.* v. *Logan*, 16 Ont. R., 335. In *Reg.* v. *McKenzie* a fine was imposed and imprisonment in default of payment of the fine, but this was a punishment that was not authorized either by the act under which the conviction was made, or by the provisions of the Summary Conviction Act, and it was held the magistrate had exceeded his jurisdiction in awarding it.

Section 53 of the Summary Convictions Act provides that the conviction shall be drawn up by the justice in such one of the forms of conviction given in the schedule as is applicable to the

case, or to the like effect, and, as I have said, this conviction is exactly in the form of J 1, which is headed "Conviction for a penalty to be levied by distress, and in default of sufficient distress, by imprisonment." Section 62 of this Act provides that whenever a conviction adjudges a pecuniary penalty, and whenever by the Act or law in that behalf no mode of raising or levying the penalty or of enforcing payment of the same is stated or provided, the justice, or any one of them making such conviction, or any justice for the same division may issue his warrant of distress in the form given in the schedule, for the purpose of levying the same. Then section 67 goes on to provide that when the Act on which the conviction is founded provides no remedy, in case it is returned to a warrant of distress, that no sufficient goods of the defendant can be found, the justice to whom such return is made, or any other justice for the district, may, by his warrant, commit the defendant to gaol for a period not exceeding three months. Under these provisions the justices had jurisdiction to order a distress in default of payment of the fine, and imprisonment in default of sufficient distress; though I think they should not have awarded them in the original conviction, and their awardiug them then, as regards enforcing them, was inoperative.

I gather from *Reg.* v. *Brady*, 12 Ont. R. 358, that Wilson, C. J., then thought that when a penalty is imposed, and the Act imposing it does not provide a means of enforcing it, the effect of the sections I have referred to of the Summary Conviction Act, and the forms in the schedules of the Act, make it right that the adjudication and the conviction should be in the forms they are in in the case before me; it is to be observed, too, that the form of the warrant of distress upon a conviction for a penalty (N 1) seems to assume that the conviction has ordered the distress and imprisonment in default of payment of the penalty, as has been done here. But in *Reg.* v. *McKenzie*, above cited, Rose, J., evidently thought that when a penalty only was adjudged, the conviction should say nothing as to enforcing it in default of payment, and in *Reg.* v. *Dunning*, 14 Ont., R. 52, Wilson, C. J., himself has adopted this view. This case seems to be very much in point. The defendant was convicted under a section of the Weights and Measures Act, which imposed a penalty of $100. Auother section of the Act provided that

penalties imposed under the Act should be recoverable, if not forthwith paid, by distress, and the provisions of the Summary Convictions Act were made applicable. The conviction was that the defendant was adjudged to pay $100 and $15.95 costs and if the same were not paid forthwith they were to be levied by distress, and in default of sufficient distress he was to be imprisoned for three months. The objection to the conviction was that the the justices had exceeded their jurisdiction in awarding imprisonment. Wilson, C. J., in delivering the judgment of the Court, said "I think the imprisonment, as an alternative punishment, should not have been awarded in the conviction, for by section 62" (of the Act of 1889, now sec. 66 of the Act in the Revised Statutes) "that is only to be imposed upon the return of no goods, and the justice is to recite that return and grant a special warrant for the imprisonment of the defendant. * * The justices had jurisdiction to proceed against the defendant by distress and imprisonment, but not, I think, in the form in which they have done so * * * I am also of opinion the defendant is not entitled to the writ, because the punishment imposed by the conviction is within the jurisdiction of the justices to award; but they have irregularly directed that it shall follow the insufficiency of the distress, whereas the constable should have made his return of no goods, and the justice should then upon that statement of facts, have made a warrant of commitment for imprisonment, but that shews only an insufficiency in the form of the conviction, which the defendant is not entitled to question at this stage of the case," that is, after *certiorari* had been taken away by the affirmance of the appeal to the Sessions. It is to be observed also, that the Weights and Measures Act does not contain the provision of section 108 of the Indian Act, that no conviction should be quashed for want of form. Armour, J., dissented from the judgment of the Court, as he thought that under section 62 of the Act of 1869, the justices had no power to award imprisonment in default of sufficient distress, unless imprisonment was provided for by the Act under which the conviction was made. The section was open to that construction, though the court held otherwise, but any doubt on this point has been removed by the section which has since been added to the Act, and is now section 67 of the Act in the Revised Statutes, and had this section then been in the Act, I think I

may infer the learned Judge would not have differed from the Court.

In *Reg.* v. *Porter* in the Superior Court of Nova Scotia, noted in 9 C. L. T. 57, the defendant was convicted of an offence against the Canada Temperance Act and adjudged to pay a fine. The conviction was in the form of the one in this case and was held to be bad. But in *ex parte Goodine*, in the Supreme Court of New Brunswick, noted in 7 C. L. T. 22, it was held that in convictions under this section of the Indian Act, the conviction must be in the form J 1 of the Summary Conviction Act, which is the form used in the present case.

In view of the doubt there is as to the practice, I need not decide whether, where a penalty is adjudged and the Act under which it is adjudged contains no provision for enforcing its payment, the conviction should only adjudge the penalty, or, as has been done here, go on and adjudge distress, and imprisonment in default of sufficient distress, but if it should only adjudge the penalty, then I hold, following *Reg.* v. *Dunning*, that as the justices had jurisdiction to award distress in default of payment of the penalty, and imprisonment in default of sufficient distress, their adjudging it prematurely does not make the conviction bad, as it is only surplusage and insufficiency in form. The defendant can in no way be prejudiced by these provisions being in the conviction, because before a distress could be levied a distress warrant would have to be issued as provided in section 62, and the justice to whom application was made for the warrant would have to consider whether, if the distress would be ruinous to the debtor's family, he should issue it or commit the defendant to gaol under section 64. Then, if the distress warrant were issued, and a return of insufficient distress made, a warrant would have to be specially issued before the defendant could be imprisoned.

The defendant gave the six days notice to the justices that on the 12th of March he would move in chambers for a summons to shew cause why a writ of *certiorari* should not issue. On the matter coming up in chambers on the day mentioned, no one appeared on behalf of the justices, and the counsel for the defendant stated that the usual practice in this court was that the *fiat* for the writ should be made without going into the grounds on which it was moved, and that on the return of the writ, when

all the papers were before the Court, the sufficiency of the grounds alleged would be considered as if the *fiat* had not been made. I thereupon gave the *fiat* without considering the matter, but I can find no authority for such a practice as the learned counsel stated either in this or in any other Court. As the writ was improperly and improvidently issued, the order I now make is that it be superseded and that the conviction be returned to the justices to be executed. The defendant to pay all costs.

RE J. B., AN ATTORNEY.

(BEFORE THE FULL COURT.)

Striking barrister and attorney off the Rolls.—Non-payment of money.

An attorney will not be struck off the rolls for non-payment of money merely.

Whether the court has jurisdiction to remove attorneys apart from the Provincial Statute. *Quære.*

A client left with an attorney a mortgage for collection, and also a discharge to be delivered over upon payment. The attorney received the money and paid to the client a portion of it, telling him from time to time that that sum was all that he had received. Discovery of the truth was not made until after the attorney had left the country the following year.

Held, That this was misconduct "in the discharge of his duties as an attorney."

The attorney had also received payment on behalf of mortgagees, for whom he was not entitled to act; the mortgagor believing that he was so entitled. The attorney paid over a portion of the money only.

Held, That he should be struck off the attorney's roll, but not off the barrister's as he had done nothing discreditable in the discharge of that office.

H. M. Howell, Q.C., for The Law Society of Manitoba referred to *Re Campbell*, 32 U. C. Q. B. 444; Con. Stat. Man.

c. 9, s. 344; *Guildford* v. *Sims*, 13 C. B. 370; *Re Titus*, 5 Ont. R. 87; *Re Martin*, 6 Beav. 340.

R. A. Bonnar, for attorney.

(*7th June, 1889.*)

TAYLOR, C.J.—This is a rule obtained by the Law Society, calling upon the attorney to show cause why a rule should not issue to strike his name off the rolls of barristers and attorneys of this court, and to disable him from practising either as an attorney or solicitor or barrister.

The rule was issued in Easter Term of last year, and has been enlarged each Term since, at the instance of the attorney. The affidavits filed in support of it, set out two charges of having misappropriated moneys which came to his hands as an attorney. It is alleged that, in the spring of 1883, one Garrioch left with him for collection, a mortgage upon which there was due about $4700, and soon after he procured Garrioch to sign a certificate of discharge, leaving it in his hands, to be delivered over upon payment of the money. The mortgagor sent the money to another attorney, who paid it over to the attorney now complained of, receiving from him the certificate of discharge. When the attorney procured the certificate to be executed, he must either have received the money or have known that it was ready to be paid over for the certificate appears to have been registered in the Registry Office the day after it was executed. The attorney, however, represented to Garrioch that he had received only $500 on account, which he paid over, saying at the same time, that he hoped he would shortly have more money for him. From time to time the attorney stated that he had received only this sum, and Garrioch relying on his statements, made no further enquiry until the spring of 1884, when the attorney left the Province. He then learned the true facts. It is further alleged, that in the spring of 1883, the attorney who had been acting for a firm in Ontario, receiving money upon mortgages held by them in this Province, received a sum of $250 from one Craig in payment of an instalment upon a mortgage he owed the firm. The attorney had then ceased to represent the firm, but Craig paid the money, believing that he still acted for them, and the attorney received it as if he did so. Afterwards he admitted to Craig that he had not paid over the money. At a later date he did pay $100, part of the money, but he has neither paid the

remainder to the mortgagees, nor returned it to Craig, who has been compelled to pay the money a second time. None of these facts are contradicted by the attorney. The only affidavits filed on his behalf are for the purpose of showing payments made to several of his creditors since he left, and setting out attempted negotiations for settlement with Garrioch and Craig.

Payment even after proceedings have been taken should not be regarded as sufficient in itself to stay the hand of the court. As was said by Grove, J., in *Re a Solicitor*, 62 L. T. 446, "An immediate payment when first asked, may be something upon which to appeal to the consideration of the court; but, merely raising money at the last moment, when being struck off the rolls is imminent, does not alter the question."

In England it seems settled that the court will not strike an attorney off the roll for mere nonpayment of money. There must be something more to justify the taking of that extreme step.

It was so held in *Guildford* v. *Sims*, 13 C. B. 370, the judgment in which is very short, "Per *Curiam*:—Attachment is clearly the proper course. There is no pretence for this motion." Under what circumstances the money had come to the hands of the attorney, or, how he had dealt with it, does not appear from the report, but during the argument, on a case being cited in which an attorney was said to have been struck off under similar circumstances, Jervis, C.J., remarked, "There must be very special circumstances to justify such a course; mere nonpayment of money will not do." See also, *Re Sparks*, 17 C. B. N. S. 726, a case in its facts not unlike the present. After the review of a large number of English authorities, these cases were followed in Ontario in *Re Campbell*, 32 U. C. Q. B. 444. Quite recently the question has been considered there in *Hands* v. *Law Society*, 16 Ont. R. 625. That was an action brought to have a resolution of the Benchers, that the plaintiff "is unworthy to practice as a solicitor, and that he be disbarred as a barrister," declared void and to restrain the defendants from taking further proceedings under it. Boyd, C., dismissed the action, but his judgment has been reversed by the Queen's Bench Divisional Court, Falconbridge, J., dissenting and the Court of Appeal has, I believe since affirmed the judgment of that court. The case cannot be cited as an authority either way, for the judgments in the

Queen's Bench Divisional Court and the Court of Appeal have not yet been reported. These courts may have held that the misconduct complained of was not such as to justify striking off the roll, or they may have only given effect to some of the numerous objections to the regularity of the proceedings taken by the Discipline Committee of the Law Society, and which were overruled by Chancellor Boyd.

It was sought to support the authority of the court to make the present rule absolute on the ground that the attorney has been guilty of a criminal offence under section 61 of the Larceny Act. But it has been held that the court will not proceed summarily against an attorney in respect of matters for which he might be indicted, *Re Miller*, 1 U. C. Q. B. 256. I do not think, however, that in the present case a charge against him under that section could be sustained. In neither of the cases set out in the affidavits was the money left with him "for safe custody." See *Queen* v. *Newman*, 8 Q. B. D. 706. Besides, to convict under that section it would be necessary to show an improper and fraudulent appropriation of the money, and even in England fraudulent misappropriation by an attorney was sufficient to justify an order being made, *Re Wright*, 12 C. B. N. S. 705; *Re Blake*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 543.

The jurisdiction of the Court in this country is wider than in England. Con. Stat, c. 9, sec. 344, enacts that, "It shall be lawful for the Court of Queen's Bench upon rule *nisi*, to hear and determine any complaint that may be made against any member of the Law Society in the discharge of his duties as barrister or an attorney at law, and such member of the Law Society so offending may, according to the gravity of the offence, and in the discretion of the said Court of Queen's Bench, be either suspended from practising law in any court of this Province, or struck off the roll and disabled from practising either as an attorney or solicitor or barrister in any of the said courts." The section is not very clearly worded. What is the "so offending?" I suppose it must mean, found by the court to have acted improperly, to have offended, in the manner complained of. Certainly the conduct of the attorney here complained of, is such as to justify a complaint being made, and the facts being neither contradicted nor explained the complaint must be held to be substantiated. His conduct has been highly reprehensible. In

one case he received a large sum of money for his client in satisfaction of a mortgage, at the same time representing that he had received only a small part of the money. He continued to make representations and statements to the same effect for a year and until he left the Province. The result of his conduct is that the client has parted with his mortgage security and has received only about one tenth of the amount due to him. In the other case knowing that he had ceased to have any authority to receive money upon a mortgage, he allowed the mortgagor, who supposed that his authority continued, to pay him money, which he neither paid over to the rightful owner nor returned to the person from whom he received it, the consequence being that he has had to pay the mortgage twice over.

But the question is raised whether he received these moneys in his character as an attorney. The statute in terms applies only to a person offending, "in the discharge of his duties as barrister or an attorney at law." It is said he was in these cases acting or professing to act as a scrivener. In Ontario it has been said there is no such class of persons as scriveners. As Chief Justice Wilson said in *Re Attorney*, 7 Pr. R. 183, "Attorneys and solicitors with us transact all such business in the usual and ordinary course of their profession, and they are entrusted with it because of their profession." Here, the attorney was, there can be no doubt, entrusted with the mortgage and the receiving of the money on it in Garrioch's case because he was an attorney, whatever may have been the case with respect to the money paid by Craig. *Re Aitkin*, 4 B. & Ald. 47, and *Re Bodenham*, 8 A. & E. 959, are English authorities shewing that where the person is employed to do business because of his being an attorney, he will be dealt with summarily by the court. Even where an attorney is guilty of misconduct in matters in which he was not acting strictly as an attorney, the court may interfere. In *Lush's Pr.*, 320, it is said, "For any gross misconduct, whether in the course of his professional practice or otherwise, the court will expunge the name of the attorney from the roll." And in *Re Blake*, 3 E. & E. 34, Cockburn, C.J., said, "I am of opinion that Blake is amenable to the summary jurisdiction of this court, although the misconduct of which he has been guilty, did not arise in a matter strictly between attorney and client, but out of a simple loan transaction. I proceed on the general ground that, where

an attorney is shown to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers." So, in *Re O'Reilly*, 1 U. C. Q. B. 392, where the attorney had not been acting in the matter complained of in that character, and the court on that ground refused an attachment, Jones, J., said, "It is not clear that they may not in a case of great impropriety like the present, tending to shew that the attorney is not trustworthy, interfere on application to strike him off the rolls." See also the language of Spragge, C., in *Re Currie*, 25 Gr. at p. 345.

Another, question is, whether the court can or ought in the case of a complaint against an attorney for professional misconduct deal with him in his character of a barrister, where he is also a barrister. Whether the case of *Hands* v. *Law Society*, already cited is, or is not an authority respecting the power of the court to deal with an attorney under the circumstances there appearing, Chancellor Boyd had there, no doubt, that he had power to punish the barrister for misconduct as a solicitor. He said, the conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honor in the law; and where practitioners, as in this Province, usually continue the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free."

In my opinion, a case has been made out which justifies the court in exercising the powers it possesses.

As, however, the question of dealing with a barrister for misconduct in a different office held by him, and the propriety of punishing him in respect to the one office for an offence committed in the other, requires and deserves a good deal of consideration, I think the Court should, in the present case, confine itself to making the rule absolute to strike the attorney off the roll of attorneys.

KILLAM, J.—I agree fully with the learned Chief Justice in thinking that the rule must be absolute to strike the name of the

party complained against from the roll of attorneys, and declare him disabled from practising as an attorney or solicitor in any court of this Province. I do not propose to add anything to the reasons given by him in support of that opinion.

The application is made under the 344th section of the Act Con. Stat. Man. c. 9, Div. 8, which enacts that, "It shall be lawful for the Court of Queen's Bench, upon a rule *nisi* to hear and determine any complaint that may be made against any member of the law society in the discharge of his duties as barrister or an attorney at law, and such member of the law society may, according to the gravity of the offence, and in the discretion of the said court of Queen's Bench, be either suspended from practising law in any court of this Province, or struck off the roll and disabled from practising either as an attorney or solicitor or barrister in any of the said courts." We have, under this section, to hear and determine complaints against parties in the discharge of their duties as barristers or as attorneys. Every attorney is not necessarily a barrister or every barrister an attorney. It appears to me that each is to be dealt with in reference to his office or position for breach of duties in that position. In neither position is he to be dealt with for general misconduct not connected with his duties as a member of the law society. If, then, a party occupies two offices, which are distinct from each other and is punishable by deprivation of the office, and in neither case for misconduct wholly unconnected with either, it appears that the only punishment intended is deprivation of or suspension from the one in reference to which the misconduct occurs. The section imposes a penalty or forfeiture and, if ambiguous, it should be construed in the sense more favorable to the offender.

While concurring in the argument of the Chief Justice showing that the misconduct complained of can be considered to have been committed in the discharge of the parties duties as an attorney, I cannot conceive it possible to say that it was in any way connected with the degree or office of barrister. That seems so clear that I deem it unnecessary to pursue the point.

It is quite true that such misconduct is discreditable to the party guilty of it, and that it seems anomalous to deprive a man of the office of an attorney on account of it, while leaving him in what is considered as the higher and more honorable one; but

there are many kinds of misconduct not referred to in the section, and which it gives this court, as such, no authority to deal with, and many of these would be as discreditable and shew the party guilty of them to be as unworthy of confidence as the misconduct now complained of. I think then that so far as our authority may be derived from the section referred to, it does not extend to a distance which will warrant us in striking the name of the party from the barrister's roll.

The Ontario statute under which was made the application in which Boyd C., made the remarks referred to by the Chief Justice is framed in different language from this section in our Act.

So far as the application to strike from the barrister's roll is concerned, we have not had the advantage of any argument based on other considerations than this section of the statute. I have, therefore, not considered this portion of the application in any other light, and if counsel for the Law Society desires to press the point on other grounds, I think that it would be better to enlarge the application until the next Term of the court.

BAIN, J.—I think in both cases the misconduct alleged against the attorney was in the discharge of his duties as an attorney. In the Garrioch case, at all events, it is not open to doubt that it was as an attorney he was employed to collect the mortgage money, and that as such he received it.

This court has jurisdiction to entertain the application to strike him off the attorneys' roll, both by virtue of the summary jurisdiction exercised by the courts in England over attorneys, and also by virtue of the powers specifically given to it by sec. 344 of cap. 9 of the Consolidated Statutes. This section gives the court ample power to strike an attorney or barrister off the rolls, or to suspend him from practising, on a complaint being made and substantiated that he has misconducted himself in the discharge of his duties as such. *Re A. B., An Attorney*, 3 Man. R. 316.

Each complaint that is made to the court under the provisions of this section will have to be disposed of on its own merits, but as a general rule, I think the court should still follow the principles that have governed the courts in England in the exercise of their summary jurisdiction in such cases.

While the courts in England will not strike an attorney off the roll for the mere nonpayment of money, it is clear they will do so when, as in this case, it is shewn that the attorney has fraudulently and dishonestly misappropriated moneys that he had received, *Re Wright*, 12 C. B. N. S. 705; *Re Sparks*, 17 C. B. N. S. 727; *Re Hill*, L. R. 3 Q. B. 543. The principle upon which the court acts in such cases is thus stated by Blackburn, J., in *Re Blake*, 3 E. & E. 34, "The court has a jurisdiction in such cases as the present to ascertain whether a person accredited as one of its officers is unfit to be so accredited. It is not necessary in order to induce the court to interfere in a summary manner that the conduct charged should either amount to an indictable offence, or arise out of a transaction in which the relation of attorney and client subsists between the attorney and the person against whom he has been guilty of misconduct."

The misconduct of which the attorney is shewn to have been guilty is so grave that there can be no doubt but that he should be struck off the attorneys' roll, as one whom the court can no longer accredit as one of its officers.

Under the section of the Act above referred to, power is given to the court to strike the name of an offender off the roll of barristers as well as off the attorneys' roll, and the rule is asked to strike the name off both rolls. But the power is to be exercised only in cases where complaint has been made against a member of the society for something he has done in the discharge of his duties as a barrister or attorney, and it appears to me it would be unduly straining the meaning of the provision which is essentially a penal one, to hold that it gives us power to strike a member off both rolls, when he has been shewn to have misconducted himself in the discharge of his duties in one branch of the profession only. In the case of an attorney, the court has a much wider jurisdiction derived from the English courts than is conferred by this section, and it may be it has also a summary jurisdiction over barristers, or at all events, the right to refuse to hear a barrister who is shewn to be unworthy of his position. But it is our jurisdiction under the section that has been appealed to in this case, and as the misconduct proved against B—— cannot be said to have been in the discharge of his duties as a barrister, I am, without having heard the question fully discussed,

inclined to think that the section does not give us jurisdiction to order that he be struck off the roll of barristers.

If it should appear upon a due consideration of the question, that the court has no power to discipline a barrister beyond that which is conferred by the section, it will be very desirable for the Law Society to obtain legislation that will enable either the court or the benchers to discipline barristers who are shewn to be guilty of misconduct that renders them unworthy of the position, whether such misconduct has been in the discharge of their professional duties or otherwise. With us the two professions are usually combined in one and the same person, and in cases like the present where dishonesty or other personal misconduct is proved, and the court strikes the offender off the attorneys' roll, because it can no longer accredit him as one worthy of confidence, it is absurd that the same individual should still be accredited to practice in the higher and more honorable position of a barrister. Such an anomaly could never have been intended, and I regret that the wording of the section compels me to put the construction I have upon it. In Ontario, a barrister may be disbarred, or a solicitor struck off the rolls, not only for professional misconduct, but for conduct unbecoming a barrister or solicitor, (Revised Statutes, c. 145, s. 44,) and we should have a similar provision in our statutes.

Rule absolute granted to strike the attorney off the roll of attorneys.

THE BRITISH LINEN CO. v. McEWAN.

(In Appeal.)

Security for costs.—No defence to action.—Proof of.

Upon an application for security for costs the plaintiff cannot (other than in proof of defendant's admission) file affidavits in proof of his cause of action and oblige the defendant to show that he has some defence.

An action was brought upon a foreign judgment. Upon an application for security the plaintiff filed a certified copy or exemplification of the judgment. The existence of the judgment was admitted by the defendant and he did not allege payment of it.

Held, That as there might be some doubt upon the construction of the judgment as to whether it was of such a nature as to raise an implied promise to pay it, the defendant was not to be deprived of his right to security.

Application to reverse decision of Bain, J., dismissing a summons for security for costs.

C. W. Bradshaw for defendant. *Prima facie* on defendant showing plaintiff is out of the jurisdiction the order for security should go. *N. W. Timber Co.* v. *McMillan*, 3 Man. R. 277. Order may be refused if plaintiff shows there is no defence; *Western Electric Light Co.* v. *McKenzie*, 2 Man., R. 51; *Doer* v. *Rand*, 10 Pr. R. 165; *Bank of Nova Scotia* v. *La Roche*, 9 Pr. R. 503; *Anglo-American Co.* v. *Rowlin*, 20 C. L. J., N. S. 371. There is no reason why an action on a foreign judgment should differ from any other cause of action; *Pigott on Foreign Judgments*, 185; *Henbury* v. *Turner*, 2 Ont R. 284; *Martel* v. *Dubord*, 3 Man. R. 599; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155; *Beaty* v. *Cromwell*, 9 Pr. R. 547; *Starr Kidney Pad Co.* v. *McCarthy*, 8 C. L. T. 195. There is nothing to show that the judgment was final; *Patrick* v. *Shedden*, 2 E. & B. 14.

J. Stewart Tupper and *F. H. Phippen* for plaintiff. Intention of the Manitoba Legislature was to interfere to limited extent only with existing law. The Act does not apply to defences that were set up in the foreign tribunal; *Fowler* v. *Vail*,

27 U. C. C. P. 417; *Rousillon* v. *Roussillon*, 14 Ch. D. 351; *De Cosse Brissac* v. *Rathbone*, 30 L. J., Ex. 238. As to effect of foreign judgment; *Taylor on Evidence*, §1,742; *Manning* v. *Thompson*, 17 U. C. C. P., 606; *Anglo-American Casings Co.* v. *Rowlin*, 10 Pr. R. 391; *Gault* v. *McNabb*, 1 Man. R. 35; *Meyers* v. *Prittie*, 1 Man. R. 27; *North* v. *Fisher*, 6 Ont. R. 206, reverses *Fowler* v. *Vail*. Not necessary that defence should be on merits; *Harris* v. *Quine*, L. R. 4. Q. B. 653. Statute of limitations is that of the *lex fori*; *Ellis* v. *McHenry*, L. R. 6 C. P. 238; *Piggott*, 104.

(7th June, 1889.)

KILLAM, J. delivered the judgment of the Court (*a*).—This is an application to reverse an order of my brother Bain dismissing a summons taken on the part of the defendant, calling upon the plaintiff to show cause why it should not give security for the defendant's costs of the action. The summons was founded upon affidavits showing merely that the defendant has appeared to the action and that the plaintiff company is a corporation carrying on business in Great Britain and having no office, branch or place of business in Manitoba, and carrying on no business here. In reply there was filed an affidavit of the partner of the plaintiff's attorney, stating that he has personal knowledge of the facts to which he deposes and that the action was brought upon a specially endorsed writ to recover £1,080 4s. 4d. stg., or $5,236 Canadian currency, being the amount of a judgment recovered by the plaintiffs against the defendant by the Court of Sessions for Scotland. The affidavit also verifies the writ in this action with what the deponent calls a certified copy of the decree of the Court of Sessions and a copy of the pleadings, and states that the deponent believes that the defendant has no defence to the action but that his appearance has been entered for the purpose of delay.

In reply to this affidavit the defendant filed an affidavit of the partner of his attorney, stating that he (the deponent) "received instructions from the defendant as to his defence to this action and advised him thereon," that he is instructed by the defendant and believes that the defendant has not resided or had any domicile in that part of Great Britain called Scotland

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

during the past twelve years, and that the defendant has been permanently resident in Manitoba for the past eight years, and that his domicile has been only in Manitoba during such past eight years, that he is further instructed by the defendant and believes "that the original cause of action sued on herein did not accrue within six years before the commencement of the action on which the judgment or decree sued on herein was recovered, or within six years prior to the commencement of this action"; that the defence of the statute of limitations was not set up in the original action by the defendant and that he (the deponent) is instructed that such defence could not have been so set up in the courts in Scotland in which said judgment or decreet was recovered, by reason of there being no such statute in force there; that "from a consideration of all the facts of this suit I believe that the defendant can show just grounds for defending the same, and that said defendant is entitled to plead to said action on the merits and has a good defence thereto;" that he (the deponent) is also instructed and believes that before the action came on for trial in the Scotch courts the defendant's solicitor notified the the plaintiff that the defendant abandoned all defences (if any) raised in the action in Scotland, except the question of jurisdiction, and that no other defence or question raised by the defendant, except the question of jurisdiction was ever enquired into in said action by the court in Scotland, it being defendant's intention to reserve his defence to meet any action brought in Manitoba by the plaintiffs; and that he (the deponent) is further instructed by the defendant that he (the defendant) was not in Scotland when said action in Scotland was commenced, and has not since been in Scotland, and at the date of commencement of said action he owned no property in Scotland. This affidavit also contains some statements made for the purpose of excusing the want of an affidavit from the defendant himself.

The special indorsement upon the writ of snmmons sets out a claim upon a "judgment recovered in the Court of Sessions for Scotland under decree of said court," giving the date and amount.

The paper writing called a certified copy of the decree of the Court of Sessions sets out that defences were lodged for the defendant, that the parties were allowed a proof of the averments on the plea of no jurisdiction and proof was adduced, that the

Lord Ordinary "repelled" this plea and allowed the parties proof of their averments, that such "proof being called and no appearance for the defender," the Lords of Council and Session "decerned and ordained and hereby decern and ordain the defender to make payment to the pursuers" of the sums mentioned, and that "the said Lords grant warrant to messengers-at-arms in Her Majesty's name and authority to charge the defender personally or at his dwelling-house, if within Scotland, and furth thereof by delivering a copy of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, to make payment of the aforesaid sums," &c., "within fourteen days next after he is charged to that effect, under the pain of poinding, and also grant warrant to arrest the defender, his readiest goods, gear, debts and sums of money in payment and satisfaction of the said sums of money," &c., "and if the defender fail to obey the said charge, then to poind his readiest goods, gear, and other effects," &c.

The paper said to be a copy of the pleadings in the cause in Scotland sets out defences to the original action upon the merits and on the ground of want of jurisdiction.

It is contended for the plaintiff that it appears clear that there can be no defence to this action and that upon the principles laid down in *Western Electric Light Co.* v. *McKenzie*, 2 Man. R. 51; *De St. Martin* v. *Davis*, W. N., 1884, p 86; *Anglo-American Casings Co.* v. *Rawlin*, 10 Pr. R., 391, no order for security for costs should be made. None of those cases, however, goes as far as it is necessary to go to support the plaintiff's contention. In each of them the defendant had, independently of the Act which gave the original cause of action, and shortly before the action was brought, expressly admitted the debt in writing, and upon the motion when this was shown no explanation was offered or defence suggested. It has never, so far as I know, been determined that, in answer to the *prima facie* case made for security by showing the plaintiff to be resident out of the jurisdiction of the Court, a plaintiff can file material, apart from such subsequent admission of the defendant, in proof of his cause of action, and thus oblige a defendant to show that he has some defence. Such a practice seems to me objectionable as tending to increase the expense of interlocutory applications of this nature and to encourage unnecessary preliminary contests.

It may be that there is here sufficient *prima facie* evidence of the recovery of the judgment sued upon to support the plaintiff's case upon the trial. I have formed no opinion upon that point, but I think it well to suggest to the plaintiff's attorney to consider carefully, if the document produced is the sole evidence on which they rely for the purpose, whether it is an exemplification of a judgment. For the purposes of this interlocutory application it appears to me that the affidavit of the defendant's attorney impliedly admits the recovery of a judgment in the Court and for the amount alleged by the plaintiff. But, apart from such admission, I do not think that, even granting that there is such an exemplification, the defendant should be put to showing a defence in order to support his application. The action is brought upon the implied promise arising from the recovery of the alleged judgment. The judgment is not matter of record here, but merely raises a simple contract on which the judgment creditor must sue, as he would upon a promissory note. In my opinion a foreign plaintiff should not in an action upon a promissory note, by filing an affidavit in proof of the defendant's signature and of belief that there is no defence, throw upon him the onus of disputing it, or showing some other defence to support an application for security for costs. But a foreign judgment is not recovered by the action of the defendant. The final step to make it a judgment is taken by the Court or its officers. The defendant may even have allowed it to go by default, or have expressly consented to it, but neither his default nor his consent constitutes the judgment, which must be the result of some subsequent step taken by other persons. Then there is not even as much admission by the defendant of that which constitutes the real cause of action in such a case as this as in that of a promissory note payable generally on which, after the signature of the defendant, nothing may be necessary to occur save lapse of a certain period of time to constitute the cause of action. When the action is brought here, the defendant may not be aware whether all the necessary steps have been taken to constitute a valid judgment, and he may not be in a position, upon the application for security for costs, to show even a belief that such steps have not been taken.

It, therefore, appears to me that, if no affidavit had been filed for the defendant in reply to that of the plaintiff's attorney, the order for security for costs should have been made.

It is claimed for the defendant that the affidavit in reply was filed under protest on the ground of some ruling of the learned judge in chambers or of some opinion expressed by him. Even if that be so, the plaintiff is clearly entitled to avail itself of any admission or statement of fact contained therein. Parties should understand that in such matters they must accept the responsibility of the action they take and be bound by their own statements of fact.

The question then remains, whether the affidavit contains sufficient to show that the defendant has no real defence to this action. In my opinion, it does not. Although it appears to admit sufficiently for the purposes of the application, that a judgment has been recovered in Scotland, this does not necessarily involve an admission that the judgment is of such a nature that this action will lie. Upon an examination of the alleged decree, it seems to me not altogether clear that the action would lie without proof of the defendant having been charged in the manner there set out. Unless this is perfectly clear, it should not be assumed. If there is any question whatever about it, upon the construction of the document, it should not be decided upon such an application as this. Whether, in fact, the defendant was so charged, he may not know. It is alleged that he has not been in Scotland since the commencement of the action there. I do not see how he could be called upon to admit or deny that he was so charged in order to support his motion.

Whether, then, it is made sufficiently to appear by this affidavit that the defendant can have no defence on any ground on which the *onus* would be thrown upon him, I deem it unnecessary to consider.

In my opinion, the application should be granted, the order dismissing the summons discharged and the plaintiff ordered to give security for costs in the usual way, costs of the application to the court to be costs in the cause to the defendant in any event, and costs in chambers to abide the event of the cause.

Order made for security for costs.

SCHULTZ v. CITY OF WINNIPEG.

(IN APPEAL.)

Taxes.—Interest.—Constitutional law.—Retrospective statutes.

By the Act of 1886; "In cities a rate of ¼ per cent. at the end of each month shall be added upon overdue taxes, the same to commence on the 1st day of January, from and after the year in which the rate shall have been levied."

By the Act of 1888, (May) the provision of 1886 was repealed, and the following substituted: "Upon all taxes remaining due and unpaid on the 31st December, there shall be added a rate of ¼ per cent. per month at the beginning of each month thereafter."

Certain taxes having been due for the years 1885, 1886 and 1887.

Held, 1. That the statutes were not retrospective; that no percentage could be added to the 1885 taxes; that none could be added under the 1886 statute after its repeal in May, 1888; and none under the 1888 statute until after the following 31st of December.

2. That viewing the whole statute the percentage was in reality interest and so *ultra vires* of the legislature. (Affirming Taylor, C.J., Killam, J., dissenting.)

BAIN, J., founded his opinion on the fact that the interest exceeded 6 per cent. per annum.

Rehearing of suit in equity to restrain the sale of plaintiff's lands for taxes.

H. M. Howell, Q.C., and *Isaac Campbell*, for defendants. As to the right to add additional amounts for delay in non-payment, see Municipal Acts of 1886 sec. 626; 1887, sec. 43; and 1888, sec. 53. Taxation by the Municipality is taxation by the Legislature. *Wishart* v. *Brandon*, 4 Man. R. 453; *Maximilian* v. *Mayor, &c., of New York*, 62 N. Y. 165; *Buttrick* v. *Lowell*, 83 Mass. 172. The word "Interest" in B. N. A. Act, sec. 92, sub-sec. 2, and sec. 91, sub-sec. 19 refers to contract. The intention was to deal with matters relating to trade and commerce. The Act is very tersely put and must be expanded by interpretation. *Bank of Toronto* v. *Lambe*, 12 App. Ca. 575. There being no legislation by Dominion Parliament, the Provincial Legislature can legislate. The laws of each Province were to

remain until other legislation by Dominion Parliament, *L'Union* v. *Belisle*, L. R. 6 P. C. 36. This Act provides only damages for wrongful retention of money. Legal interest not the correct term, R. S. C. c. 127, s. 2. Reference was made to Con. Stat. U. C., c. 43, ss. 1 to 4; the Ontario Statute of 1884, c. 10, s. 4; and 1888, c. 29, s. 5; Revised Statutes of Ontario, c. 193, s. 157. All taxation should be equal, *Dillon*, pp. 728, 729, 730. An addition to overdue taxes equalizes. Interest allowed as damages may vary with the value of money. *Powell* v. *Peck*, 15 Ont. App. R. 138. As to word interest, see *Bouvier's Law Dictionary*; *Byles on Bills*, 308; B. N. A. Act, s. 92, sub-sec. 15; *Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.*, 2 Cartwr. 361.

F. H. Phippen, for plaintiff. There was no legislation which authorized taxes on any year before 1886. If any addition, on account of wrong principle, the sale bad, *Yokham* v. *Hall*, 15 Gr. 335; *Claxton* v. *Shibley*, 10 Ont. 195; *Hall* v. *Farquharson*, 15 Ont. App. 457; *C. P. R.* v. *Calgary*, 5 Man. R. 37. The Municipal Acts authorizing interest are not retractive, *Cooley on Taxation*, 221; *Conway* v. *Cable*, 37 Ill. 82; *Maxwell on Statutes*, 143, 348, 349. As to constitutional question, *Parsons* v. *Queen's Insurance Co.*, 1 Cartwr. 272; *Trust & Loan Co.* v. *Ruttan*, 1 Sup. C. R. 564. This is not a tax, it is a penalty for nonpayment of money. There could be no right to interest unless specifically conferred, and Dominion Parliament alone could confer it. As to term "interest," see *Imperial Dictionary*; 20 *Myer's Federal Decisions*, p. 198; *Bainbridge* v. *Wilcocks*, 1 Bald. 536; *Brown's Law Dictionary*; *Hawkins* v. *Bennet*, 7 C. B. N. S. 507, 552. As to municipal institutions, see *Cushing* v. *Dupuy*, 1 Cartwr. 258, 272; *Fitzgerald* v. *Champneys*, 2 J. & H. 31; *Church* v. *Fenton*, 1 Cartwr. 831; *Queen* v. *Robertson*, 2 Cartwr. 65; *Slavin* v. *Orillia*, 36 U. C. Q. B. 159.

(*3rd January, 1884.*)

TAYLOR, C.J., delivered the following judgment at the hearing:—

The bill in this case is filed, praying an injunction to restrain the sale of lands for arrears of taxes. An interim injunction was granted, with leave to move to continue it. Since then an answer has been filed, and the motion to continue was, by consent, turned into a motion for a decree.

There is no dispute as to the facts. The plaintiff is the owner of the lands, and they have been advertized to be sold for arrears of taxes. The lands were assessed in the years 1885, 1886 and 1887. The amount for which they are now advertised to be sold, is, $4,149.20 made up of $3,673.50, the taxes for those three years, with, added thereto, a rate of threequarters of one per cent. upon the taxes of 1885 and 1886, at the end of each month, during the year 1887, and also, a rate of three quarters of one per cent. upon the taxes of the three years, at the beginning of each month, during the first nine months of 1888 The defendants claim to be entitled to make the additional charge of three quarters of one per cent. for each month, by virtue of section 626 of The Municipal Act, 1886, the 49 Vic. c. 52, as amended by 50 Vic. c. 10, s. 43, and 51 Vic. c. 27, s. 43.

The plaintiff's contention is, that the Local Legislature has no power to impose such interest, that being a subject, by The British North America Act, reserved to be dealt with exclusively by the Parliament of Canada. Also, that, there is no authority under The Municipal Act, as amended, to charge interest upon these taxes for the period after the 18th of May, 1888.

Interest is one of the matters reserved by section 91 of The British North America Act, to be dealt with exclusively by the Dominion Parliament, and an Act of the Parliament of Canada has been passed, R. S. C., c. 127, applicable to this Province, which fixes the legal rate of interest at six per cent. But the defendants urge, that the addition made under the provisions of the Municipal Act, of three quarters of one per cent for each month, upon overdue taxes is not interest, but an increase by way of damages, and argue that it is quite competent for a Local Legislature to impose damages for nonpayment of money, estimating these damages at any rate or percentage on the debt.

Are damages for the nonpayment of money and interest on the money, the same thing?

The Imperial Dictionary defines interest to be, the premium paid for the use of money; the profit per cent derived from money lent, or property used by another person; or from debts remaining unpaid. In *Bouvier's Law Dictionary*, it is said to be the compensation which is paid by the borrower to the lender, or by the debtor to the creditor for its use. The debtor, in case of default in payment, must pay interest from the day the pay-

ment should have been made. This is because he detains from the creditor against his will, a sum of money which he was entitled to have, and interest is the legal compensation or damage allowed for such detention. *Van Rensselaer* v. *Jewett*, 5 Denio, 135.

That, in the absence of contract, the measure of damages for the detention of money, is the legal rate of interest, seems settled by a long current of authority.

In *Robinson* v. *Bland*, 2 Burr. 1077, the plaintiff sued upon a bill of exchange, for money lost at play and for money lent, and recovered a verdict on the common counts, for so much of his claim as was for money lent. On a motion in Term Mr. Justice Wilmot, speaking of the interest to be given on the assessment of damages, said, "This is an action that sounds in damages, and the true measure undoubtedly is the damage which the plaintiff sustains by the nonperformance of the contract, and that damage is the whole interest upon the sum lent." In *Craven* v. *Tickell*, 1 Ves. 60, Lord Eldon said, it is the constant practice, either by the contract or in damages, to give interest upon every debt detained. In *Hillhouse* v. *Davis*, 1 M. & S. 169, interest for the sum detained was held proper to be given by way of damages. Best, C.J., in *Arnott* v. *Redfern*, 3 Bing. 353, said, "There are two principles on which interest is given in our courts; first, where the intent of the parties that interest should be paid, is to be collected from the terms or nature of the contract: secondly, where the debt has been wrongfully detained from the creditor. The Supreme court of Pennsylvania in 1803, when disposing of *Crawford* v. *Willing*, 4 Dall. 286, said, "We have traced with pleasure, the progress of improvement upon the subject of interest to the honest and rational rule that, whenever one man retains the money of another, against his declared will, the legal compensation for the use of money, shall be charged and allowed."

In *Sumner* v. *Beebe*, 37 Vt. 562, cited in *Sedgwick on Damages*, 176, note, the court laid it down as well settled, as a general rule, that after a debt for a fixed sum becomes due, so that it is the duty of the party to pay it, interest will be allowed as damages for the detention of the debt. And in *Foote* v. *Blanchard*, 88 Mass. 221, Bigelow, C.J., said, "Where a definite time is fixed for the payment of a sum of money, the law raises a pro-

mise to pay damages by way of interest, at the legal rate, for the detention of the money." See also *Dodge* v. *Perkins*, 26 Mass. 369.

There have been similar decisions in the State of New York, among which *Anon*, 1 Johns. 315; *Wilson* v. *Conine*, 2 Johns. 280; *Beals* v. *Guernsey*, 8 Johns. 446; *Law* v. *Jackson*, 2 Wend. 210; *Dox* v. *Dey*, 3 Wend. 356; *Dana* v. *Fiedler*, 12 N. Y. 40, may be referred to. In *Rensselaer Glass Factory* v. *Reid*, 5 Cow. 587, when classes of cases were being spoken of, in which juries might allow interest, one class was said to comprehend those cases "where interest is not a necessary incident to the debt, but may be allowed under circumstances, by way of mulct or punishment for some fraud, delinquency or injustice of the debtor, or for some injury done by him to the creditor; and in such cases the legal rate of interest is assumed as the measure of damages.

In the Supreme Court of the United States, the same doctrine has been repeatedly stated. In *Curtis* v. *Innerarity*, 6 How. 156, it was said that in assessing the damages for the breach of a contract, the jury may allow interest by way of damages. In *Lincoln* v. *Chaflin*, 74 U. S. 132, it was said, that interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. So, in *Young* v. *Godbe*, 82 U. S. 562, it was said, that if a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. See also, *Chicago* v. *Tebbetts*, 104 U. S. 120. In *Loudon* v. *Taxing District*, 104 U. S. 775, it was laid down that, where there is delay in the payment of money, the law assumes that interest is the measure of damages. And in *Goddard* v. *Foster*, 84 U. S. 123, the court held, that where interest is allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*, and in that case, seven per cent. being the rate, interest at that rate was given. So, in *Meyer's Fed. Dec.*, under the heading "Interest," section 3, the case *City of Memphis* v. *Brown*, 1 Flip. 210, is cited, in which it was held that the measure of damages for a debtor's failure to pay money is, the amount due with the interest given by the *lex loci*.

If, then, the measure of damages which the law allows in the case of the detention of money is, interest at the legal rate, the

legal rate fixed by the Parliament of Canada, which has the exclusive power of fixing the rate, must be the measure of damages in this Province. I do not see how the Local Legislature can change that and fix another and higher rate. Calling the sum or rate to be charged, damages, increase or addition, can make no difference. While the usury laws were in force, attempts were constantly being made in this way to evade them, but all such attempts were conspicuous failures.

As was said by Lord Chancellor Hardwicke in the famous case of *Chesterfield* v. *Jansen*, 1 Atk. 301, and 1 Wils. 286, "Courts regard the substance and not the mere words of contracts." Or, as it was expressed by Lord Mansfield in *Richards* v. *Brown*, Cowp. 770, "The question is, what was the substance of the transaction and the true intent and meaning of the parties, for they alone are to govern, and not the words used." The same learned judge in *Lowe* v. *Waller*, 2 Doug. 735, said, "The only question in all cases like the present is, what is the real substance of the transaction, not, what is the color and form." The opinions so expressed were approved of and acted upon by C.J. Marshall, in *Scott* v. *Lloyd*, 9 Pet. 418; C.J. Taney, in *Andrews* v. *Pond*, 13 Pet. 65, and by C.J. Robinson in *Wright* v. *Marratts*, 8 U. C. Q. B. 511.

The question now presented for decision has only once before been raised, and that in the Province of Quebec. The 14 & 15 Vic. c. 128, an Act of the old Province of Canada, amending and consolidating the ordinance to incorporate the City of Montreal, by section 75 provided that, an annual increase of ten per cent. should accrue upon all unpaid assessments on real property, and that the property should, after nonpayment for five years of the arrears and increase, be liable to be sold. After confederation and in 1874, the 37 Vic. c. 51, Q. passed by the Local Legislature, repealed the former statute and gave the corporation power to remit by way of discount for prompt payment, or to charge interest, *eo nomine*, at ten per cent. Then, in 1878, the 41 Vic. c. 47, Q. was passed imposing an increase, addition or penalty, instead of the interest under the previous Act. In *Ross* v. *Torrance*, 2 Cart. 352, the plaintiff succeeded in his contention that such legislation was not within the power of the Local Legislature. Mr. Justice Johnson, in giving his judgment in favor of the plaintiff, said, "Before the Act of 1878, the question

would have been, whether the Provincial Legislature could, in 1874, change or authorize any creditor to change the legal rate of interest; and now the question is, whether the Provincial Legislature could, in 1878, authorize the exaction of an increase addition or penalty of ten per cent. for delay in payment of taxes. . . . . As to the real nature of the exaction, whether it be called interest or increase, I must say at once, that my judgment and conscience utterly refuse to yield to any attempt at distinction between these two things. The law itself rejects any such distinction. It is old law, and finds plain and emphatic expression in the words of a specific article of the code (Art. 1077,) "The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed on by the parties, or, in the absence of such agreement, at the rate fixed by law." If any other rate is to be fixed by law, since confederation, it must be by the Parliament of Canada. . . . . Therefore, by whatever name they (that is, the Provincial Legislature) call the exaction in question it is, by law, still interest and nothing else. They cannot change its nature by changing its name. . . . . If they can give the corporation of Montreal by this mere changing the name of the thing, a legal right to ten per cent:, in the absence of agreement between the parties, they can give it to the Bank of Montreal or to any other creditor they choose to designate, and the plain provision of the constitution would become a dead letter."

In that judgment the learned judge refers to an article of the Quebec code, but the law as stated in it, is not law peculiar to the Province of Quebec. It seems to me, a concise and accurate statement of the law as laid down in the cases to which I have already referred, and which is in force in this Province. The language used by several judges in these cases, might be substituted for the article in the code without changing its effect or meaning in the slightest.

The argument urged in the present case as to to the power of the Local Legislature to fix an amount to be charged, not as interest, but by way of damages or penalties, was urged before Mr. Justice Johnson also. He thus dealt with it. "It was urged by counsel for the corporation, that paragraph 15 of the 92nd section of The British North America Act, gave power to the Local Legislature to impose penalties. . . . . Here are th

express words of the power given:—The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province in relation to any matter coming within any of the classes of subjects enumerated in this section." Surely this never meant that people were to be punished by fine, penalty or imprisonment imposed by a treasurer or other officer of a corporation without defence trial or hearing. Therefore, it seems to me, that the penalty theory will not do; that the interest authorized by the 37 Vic. c. 51, was *ultra vires*; that the new section substituting increase or penalty instead of interest *eo nomine* is no better."

The point raised before me, having thus been directly decided in favor of the plaintiff's contention, I should follow the decision already given. In doing so, I may say that I fully concur in the conclusion arrived at by Mr. Justice Johnson.

Holding that the imposition of the increase or penalty in question is not within the power of the Local Legislature, it is unnecessary to consider the other point raised, and to enter on an examination of the chameleon like legislation on the subject of municipal matters, with which the City of Winnipeg has been afflicted during the past few years.

There must be a decree in favor of the plaintiff, granting a perpetual injunction against the sale of the lands in question, which has been advertised. The decree will be with costs.

An appeal was taken to the Full Court and the following judgments were there delivered.

(*7th June, 1889.*)

DUBUC, J.—The first point raised against the legality of the intended sale, is, that the above mentioned provisions do not cover the whole rate added herein by the defendants.

The part of said section 626 specially applying to this case is as follows: "In cities, a rate of ¾ per cent. at the end of each month shall be added upon overdue taxes, the same to commence on the first day of January, from and after the year in which the rate shall have been levied and accrued due, &c." The futurity shown in the phraseology of that sentence is such, that in construing it, it is difficult to see how one can make it apply to taxes of past years.

In principle, all legislation is taken to be prospective; and no enactment is construed as having a retrospective operation, unless the intention to have it so construed is expressed in clear and unambiguous terms. *Phillips* v. *Eyre*, L. R. 6 Q. B. 23; *Dask* v. *Van Kleeck*, 7 Johns. 502; *Calder* v. *Bull*, 3 Dall. 391; *Midland Ry. Co.* v. *Pye*, 10 C. B. N. S. 191. In the latter case, Erle, J., said, "Wherever it is possible to put upon an Act of Parliament a construction not retrospective, the court will always adopt that construction." Similar expressions were used by the judges in the other cited cases.

That doctrine of a strict construction is even more particularly adhered to when the enactment imposes a burden or charge upon the subject.

In *Denn* v. *Diamond*, 4 B. & C. 245, Bayley, J., said: "It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language." The very same words were used by Parke, J., in *Casher* v. *Holmes*, 2 B. & Ad. 597.

In *Goslin* v. *Veley*, 12 Ad. & E. N. S. 407, the doctrine was laid down by Wilde, C.J., in the following language: "The rule of law that no pecuniary burden can be imposed upon the subjects of this country by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it."

In *Shaw* v. *Ruddin*, 9 Ir. C. L. R. 214, the Court held, that Acts of Parliament in order to infringe upon the legal rights of the subject, and especially to impose a tax, must be expressed in language clear beyond all reasonable doubt. The same expression was used in *The Queen* v. *Mallow Union*, 12 Ir. C. L. R. 35; *Cooley on Taxation*, at p. 221, shows that the same principle is followed in the United States.

Adopting that rule of construction, the provision respecting the said additional rate found in said section 626 of the Municipal Act of 1886, must be held to apply to the then current and following years; and not to the taxes of previous years. If the Legislature had intended to give it a retrospective effect, it should have so stated in clear terms, leaving no reasonable doubts.

So, by adding the rate of three quarters of one per cent. per month on the taxes of 1885, the City Corporation exceeded the power conferred on them by the said statutes of 1886.

The same construction should be applied to section 53 of ch. 27 of the statutes of 1888. It reads thus: "Upon all taxes remaining due and unpaid on 31st December, there shall be added a rate of ¾ per cent. per month at the beginning of each month thereafter, &c." In the absence of any words expressing a retrospective intention, I think the 31st December mentioned, should be held to mean the 31st December of the then current year, 1888. And, as said section 53 repeals section 626 of the Municipal Act of 1886, the authority to add the said rate at the end of every month, did entirely cease when the said Act, ch. 27, of the statutes of 1888 came in force on the 18th May of that year. It follows, that the rate added for the subsequent period in which it was added in that year, was unlawfully added.

Another point raised in this matter was, that the provisions under which the City Corporation claimed authorization to add the said rate, were *ultra vires* of the Provincial Legislature; on the ground that the added rate is in the nature of, and is in fact, interest charged by the City Corporation upon overdue taxes, and that interest is, by sub-section 19, of section 91 of the B. N. A. Act, one of the subjects over which the Dominion Parliament has exclusive jurisdiction to legislate.

It is contended that the rate authorized to be added by the Provincial Legislature, is an increase by way of damage for the nonpayment of taxes in due time, and that it should not be considered as interest. This is, no doubt, a nice distinction. Interest is defined as the premium paid for the use of money, or the legal compensation or damage allowed to the owner of money for the detention thereof against his will. The damage suffered by a man who is deprived of a sum of money which he is entitled to have, is called interest. The rate may be agreed to or not. In the absence of agreement, the legal rate is allowed as compensation for such damage.

Now, whether the amount claimed in addition to the principal money is called a rate, an increase by way of damage, a penalty for non-payment, or otherwise, it is nothing else than compensation for the detention of money which should have been paid. And this comes within the legal definition of interest. As the

Dominion Parliament has, by the B. N. A. Act, exclusive jurisdiction to legislate on the subject of interest, and has fixed the legal rate of interest to be six per cent., the Provincial Legislature has no authority to impose or to empower any corporation to impose a higer rate of interest upon any person unwilling to pay it.

This question was raised and discussed in *Ross* v. *Torrance*, 2 Cart. 352. In that case, Mr. Justice Johnson, in a very elaborate and able judgment said, that by whatever name the exaction may be called, it was by law, interest, and nothing else. The law rejects any distinction by which the exaction may be called increase or damage. The same view was taken by the learned Chief Justice of this court at the hearing, and I fully agree with him.

It has been argued, that in 49 Vic. c. 35, s. 22, the Provincial Legislature has enacted, that verdicts rendered in courts in this Province shall bear interest from the date at which they are rendered; and it was asked whether this was also an infringing of the exclusive power of the Dominion Parliament to legislate on the subject of interest. I do not think so. It is unquestioned that a man who unjustly or wrongfully detains money to which another man is entitled, causes damage to the latter. Under sub-section 13 of section 92 of the B. N. A. Act, respecting "property and civil rights," the Provincial Legislature can declare that the said damage shall be enforced in courts of justice. But, when that damage is, as in that case, in the nature of interest, the Provincial Legislature can enact that the legal rate of interest fixed by Dominion legislation may be allowed as damage on the money so detained. It cannot go further, it cannot impose a higher rate.

The Provincial Legislature may likewise empower municipalities to issue debentures bearing interest not exceeding seven per cent. or any other rate. In that case, it only authorizes the corporate body, as an artificial person, to contract for a rate of interest higher than the legal rate. The corporate body is not forced, nor bound to pay such rate against its will. It is only allowed to contract for such a rate, if it so desires. By said enactment, the Legislature is not imposing a higher rate against a person unwilling to pay it, as in this case. On this ground, I think the City Corporation had no authority to add any portion

of the rate, and had no right to make the rate intended to be made.

In my opinion, the appeal should be dismissed with costs.

KILLAM, J.—I agree with my learned brothers in thinking that the Provincial statute did not authorize the levying of the additional charges in respect of the overdue taxes for the year 1885. By the 626th section of the Act of 1886, the imposition of the additional rate was to commence on the first day of January, from and after the year in which the rate shall have been levied and accrued due. To apply this to taxes for past years, would be to justify the computation of the additional rate from former months of January, and thus, add large sums to the overdue taxes at once, upon the Act coming into force. It is impossible to interpret the clause so as to make it refer to taxes of previous years without producing this extraordinary result. This consideration together with the framing of the previous portion of the section with reference to towns and rural municipalities, shows distinctly that the clause was intended to relate only to taxes becoming overdue after the coming into force of the Act.

A similar interpretation must be placed on the section substituted by the 53rd section of the Act of 1888, 51 Vic. c. 27, so far as taxes levied in 1885 are concerned. But, taking that section into consideration with the former legislation, it appears to me that the additions were still to be made to the taxes of 1886 and 1887.

By the Interpretation Act, Con. Stat. Man., c. 1, s. 7, sub-sec. 32, "Where any Act is repealed, wholly or in part, and other provisions substituted . . . . all proceedings taken under the old law shall be taken up and continued under the new law, when not inconsistent therewith; and all penalties and forfeitures may be recovered, and all proceedings had in relation to matters which have happened before the repeal, in the same manner as if the law were still in force, pursuing the new provisions as far as they can be adapted to the old law." And by sub-section 33, "The repeal of an Act at any time shall not affect any act done, or any right or rights of action existing, accruing, accrued or established, ... before the time when such repeal shall take place."

I think, then, that it is evident that the additional charges imposed in respect of the taxes of 1886 and 1887, before the coming into force of the Act of 1888, remained payable. The right to them had then already accrued and the repeal of the clause and substitution of the new one would not take away that right. The only result of the substitution was, that in respect of the taxes of former years, the additions were thereafter to be made according to the Act of 1888, at the beginning of each month; and not, as provided by the Act of 1886, at the end of each month.

Upon the constitutional question, however, I have the misfortune to differ in opinion from the learned Chief Justice and my other brother judges.

Under the 92nd section of the British North America Act, among the subjects of legislation by the Provincial Legislatures, are, (2) "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes." (8) "Municipal institutions in the Province."

It appears quite clear that the power of taxation conferred by sub-section 2, could be exercised by statutory imposition of rates computed by reference to the amounts of rates previously or otherwise imposed, and added at definite intervals. In legislating respecting "Municipal Institutions within the Province," the Provincial Legislature admittedly and necessarily has authority to provide for the levying of direct taxation in order to the raising of revenues for municipal purposes. There can, then, it seems to me, be no doubt, that apart from the provisions of the 91st section of the British North America Act, the legislation in question would be *intra vires* of the Legislature of Manitoba.

We have, then, according to the canons of construction of the British North America Act laid down in *The Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96; 1 Cartwr. Cas. 265; and in *Dobie* v. *Temporalities Board*, 7 App. Cas. 137; 1 Cartwr. Cas. 351, to consider whether the subject of the enactments in question, the addition of these extra rates to taxes which have become overdue, computed with reference to the amounts of such overdue taxes and the periods of time during which they are overdue, comes within any of the classes of subjects assigned by the 91st section exclusively to the Parliament of Canada.

But, in considering this, we must remember that the 91st section itself is to be interpreted with reference to the 92nd section and to the general scope and spirit of the Act, and not absolutely upon its own wording alone. In the judgment of the Judicial Committee of the Privy Council in *The Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, it is said, "With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the Legislatures of the Provinces. In these cases, it is the duty of the courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them, the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to all of them. . . . . The first question to be decided is, whether the Act impeached in the present appeals, falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the Provincial Legislature is or is not thereby overborne. . . . . It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not, by necessary implication or reasonable intendment, be modified and limited."

The reasoning of the learned Chief Justice and the authorities referred to by him have clearly shown that *prima facie* such an

additional charge would, in a case of an ordinary debt or liability due or payable by one person to another, properly come within the general designation of "Interest." The use or non-use of the word "Interest" can, I agree, make no difference. The real question is whether the additional rate imposed upon the ratepayers of a municipality in respect of overdue taxes is within the term "Interest," as used in the 91st section of the British North America Act.

Now, it was admittedly competent for the Provincial Legislatures, under the authority to make laws upon the subject of "Municipal Institutions within the Province," to create municipalities such as these Acts provide for, to authorize these municipal bodies or the parties composing them to perform many, if not all, of the functions thereby assigned to them, and through this medium to distribute over the different portions of the provinces the expense of providing many works and conveniences, chiefly of local importance.

This involved legislation of an extensive and varied character. It must involve the power of authorizing these bodies or localities, as corporations or otherwise, to make contracts and to incur liabilities and responsibilities of various kinds. It must involve the power of dealing with the contingency of the noncollection of the municipal revenues as required for expenditure. It must have been contemplated that the Provincial Legislatures might authorize such bodies or localities to enter into engagements or place themselves in positions which would involve them in greater expense and loss if the municipal rates or taxes should not be promptly paid.

The mode of distributing the burdens over the ratepayers or the property in each locality or municipality must, to a large extent at least, be for the Provincial Legislature to prescribe. Whatever may be the limitations, if any, upon their powers in this respect, it is very clear that they must be justified in aiming at a fair and equable distribution of these burdens. They may not absolutely attain this end, but it is for them to devise the means thereto; the validity of their legislation cannot be judged by reference to their success or failure in this respect. It must, then, be for these Legislatures to determine whether it is necessary to make any provision for any increased burdens arising from delay in getting in the rates or taxes. It is only equitable

that these burdens should fall, as far as possible, upon those failing to pay promptly. It appears to me that the Provincial Legislatures must necessarily have the power to so distribute them as far as possible, and to determine whether this should be done by additional rates upon the defaulters or otherwise.

Then, it must also be competent, in connection with such legislation, for these legislatures to provide for the assessment and and levying of rates with reference to certain definite periods, and to seek to secure the meeting of the expenditure in each such period by rates to be levied therein, and the levying in the aggregate of only sufficient for that purpose in each such period. I do not say that the legislation must aim at or secure this, but only that it is a reasonable and legitimate end at which to aim. This appears to me to involve the power to legislate so that a pecuniary or substantial inducement will be held out for prompt payment. This is done partially by authorizing discounts in cases of early payments. It is difficult to do this wholly by such a method, even if it be not open to the objection now made. Why should there not be the power to do this by authorizing the levying of additional rates? Without this power the hands of the Legislatures seem materially shortened.

The Legislature of Manitoba has seen fit to sub-divide the Province into municipalities together covering the area of the Province, to constitute each a separate corporate body, and to makes the rates or taxes within the limits of each payable to the body and a charge upon the property liable to taxation. This need not have been done in this way. It is merely the method that is considered most expedient for the purpose of distributing the local expenditures over the property in each locality. This legislation, then, is not to be viewed as that which creates an ordinary debt from one person to another, and then a further liability by way of penalty or damages for nonpayment, but in the light of the nature of the subject matter of legislation and the object aimed at.

I am of opinion that these provisions for extra rates to be added in case of nonpayment are to be taken only as a part of the means by which these burdens are to be distributed over the property in each municipality, so as to make each portion bear the share which the Provincial Legislature conceives it should

bear, and which that Legislature alone is competent to apportion to it.

This reasoning appears to me, necessarily to exclude all power of the Dominion Parliament to affect the action of the Provincial Legislatures, either by fixing a maximum rate of interest, or otherwise.

The word "Interest" occurs in the 91st section of the British North America Act, in the midst of a number of other subjects of legislation of a commercial character, the prime object evidently being to secure a uniform commercial law for the Dominion. Undoubtedly, it justifies legislation upon the subject of interest in relation to many matters hardly appearing to be of a commercial character; but, evidently, the immediate object is not to reach the relative distribution of municipal taxes over the property subject to it.

I deem it unimportant to distinguish nicely whether it should be said that the additional rates should not strictly be termed interest, as not being properly charged for nonpayment by one independent person to another of a debt or liability; or whether it would be more proper to say that the word "Interest," in the 91st section is so far qualified by the power to legislate upon the subject of Municipal Institutions given by the 92nd section, that the authority which would otherwise reside in the Dominion Parliament under the 91st section, does not. In one view or the other, in my opinion, the Provincial Legislatures alone can provide for the levying of such extra rates and the amounts thereof.

The bill in this case appears to be framed upon the assumption that the addition of an unauthorized amount in the attempt to levy taxes due by sale of the lands, will necessarily invalidate the sale, and also entitle the property owner to an injunction to restrain the sale. Both parties appear to have accepted these views and, both upon the original hearing and upon the rehearing, the only questions discussed have been those relating to the right of the civic authorities to levy these additional rates or some portion of them. I desire that it be understood that both of the propositions are fully open to further consideration in any future case. In the case of *The Canadian Pacific Railway Co.* v. *The Town of Calgary*, 5 Man. R. 37, we were very careful to limit our affirmance of the propriety of interfering by injunction to restrain the levying of taxes upon lands to the particular case

then before us. As, with us, the lands taxed are sold for the best price obtainable and the surplus, if any, paid to the land owner, and in view of other special legislation in this Province, it may be found that the principles of the Ontario cases do not apply here.

However, as the parties have seemed desirous rather to have the right to these additional rates decided, than the principles upon which tax sales will be restrained or considered void, we have determined not to undertake the consideration of the latter. We could not well have done so without giving the parties an opportunity for further argument.

If effect be given to all the objections made, the only result is that there is an excessive amount sought to be levied. We differ only respecting the amount of the excess, and if an excess be sufficient to warrant the decree, it is possible for us all to concur in affirming the decree as framed, particularly as no objection to its frame has been made. It appears to have been unfortunately framed. The judgment pronounced by the learned Chief Justice was, that there should be "a decree in favor of the plaintiff, granting a perpetual injunction against the sale of the lands in question, which has been advertised." As subsequently settled, however, the decree was one granting a perpetual injunction restraining the defendant "from proceeding with the said sale for taxes set forth in the plaintiff's bill of complaint herein, of the plaintiff's lands in the said bill described, but without prejudice to the defendant's right upon proper advertisement to sell the said lands for such taxes and charges as may be legally due."

I would suggest that this be now modified so as to show exactly what the court determines to be the taxes and charges legally due. This would definitely settle the matter, instead of leaving it open to be decided by any further proceedings, and the defendant, if desirous of doing so, could carry the constitutional question in a satisfactory way directly to the Supreme Court.

This could be done by making the saving clause read, "Without prejudice to the defendant's right, upon proper advertisement, to levy upon the said lands by sale thereof the rates and taxes duly assessed and imposed thereon for the years 1885, 1886, 1887, and any rates and taxes lawfully assessed and imposed thereon for any subsequent years, and the lawful charges and expenses of such levy and sale, but without the additional rates stated in the

pleadings in this cause to have been added upon the taxes for the years 1885 and 1886 at the end of each month during the year 1887, and upon the taxes for the years 1885, 1886 and 1887, at the beginning of each month during the first nine months of the year 1888, and without adding any other additional rates or taxes for the former or any further default in the payment of any of such rates or taxes, save the lawful charges and expenses of levy and sale."

This suggestion is, of course, made to conform to the opinions of the majority of the court. If my opinion were to be followed the exception from the saving clause would be only in respect of the additions made in respect of the taxes of 1885.

Having had the advantage of a perusal of the judgment about to be delivered by my brother Bain, I desire to express my concurrence in his remarks upon the character of the legislation of the last session of the Legislature, assuming at a stroke to take away rights of property which the Chief Justice had already in this very suit declared to exist.

BAIN, J.—(After referring to the statutes.) These sections, imposing as they do a tax upon a tax, come clearly within the rule that statutes imposing taxes must be construed strictly, and that the provisions of such statutes will not be extended by implication beyond the clear import of the language used. As Parke, B., says in *Wroughton* v. *Turtle*, 11 M. & W. 561, "It is a well settled rule of law, that any change in the subject must be imposed in clear and unambiguous words," and in *United States* v. *Wrigglesworth*, 2 Story 367, the same principle is thus expressed by Story, J., "It is, as I conceive, a general rule in the interpretation of all statutes levying taxes and duties upon subjects and citizens, not to extend their provisions by implication beyond the clear import of the language used." It is also a general rule of construction, that statutes are to be construed as operating only on facts or cases which come into existence after they have been passed, and especially is this rule applicable to provisions like the ones in question, imposing new obligations and penalties In such cases, the enactment is not to be held retrospective or retroactive, unless the intention that it is to so operate, is clearly manifest.

In section 626, the Legislature simply said the rate was to be added on overdue taxes, and that, I think, must be taken to mean

on taxes that shall be overdue after the Act comes into effect. By overdue taxes, they may have meant taxes that were then overdue as well as those that should afterwards become overdue, but the provision in the first part of the section, allowing a discount or reduction for prompt payment, clearly applied only to taxes due and payable after the Act became law, and probably the whole section was intended to apply only to such taxes. At all events, there is nothing in the section to shew an intention that it was to apply to taxes previously overdue, and the proper construction is, I think, to hold that it was not so intended. There was, therefore, no authority under this section to add the rate to the taxes due for the year 1885.

Then, on the 18th of May, 1888, this section was repealed, and no rate could thenceforth be added under it, but, I suppose, the additions that had been properly and actually made under its authority, would stand as part of the taxes against the land.

The authority of the defendants to add the rate to the total amount of the three years' taxes for the first nine months of 1888 at the beginning of each month must be derived from the provision substituted on the 18th of May, 1888, for section 626, that upon all taxes remaining due and unpaid on 31st December, there shall be added a rate of ¾ per cent. per month at the beginning of each month thereafter. The defendants have assumed this 31st December to mean the 31st December, 1887, but if the words are to be taken to refer to a date anterior to the passing of the Act, I see nothing to shew why 1887 rather than any other year should be fixed upon. There is nothing in the section itself to indicate that a date anterior to the Act was meant, and I find nothing in the repealed sections that can clearly indicate that intention, and therefore, I think, the words cannot be taken to refer to any 31st December anterior to the one first arriving after the passing of the Act.

The last ground taken by the plaintiff is, that this added rate or per centage is in reality interest, and that, as interest is a subject reserved for Dominion legislation, these provisions in the Provincial Act are altogether *ultra vires*; and it was on this ground that the learned Chief Justice decided in favor of the plaintiff.

The rate is added by way of damages or a penalty for the non-payment of the taxes at the time they become payable, and on the

authority of the numerous cases referred to in the judgment of the learned Chief Justice, it would seem that such damages or penalty must be deemed to be, and is in fact, interest. And the Legislature itself seems to have considered the rate to be interest, for in section 647 it is provided that, "When interest is due and payable on taxes in arrears, such interest may be added to the taxes and shall be considered to form part of the taxes so in arrears." In section 642, "percentages" are spoken of, but as I can find nothing else in the Act except this rate to which section 647 can apply, the word "interest" in it would seem to mean this rate. Then, at the last session of the Legislature, and since this case was argued before the court, the amendment to the Municipal Act was passed, 52 Vic. c. 45, s. 22, which provides that except in cases in which prior to the 5th of March, 1889, the day on which the bill was assented to suits in equity had been instituted, "No sale of any lands for arrears of taxes heretofore or hereafter made under the provisions of any statute of this Province shall be impeached or set aside or held to be invalid on the ground that a rate of percentage, whether by way of increase or interest or otherwise however, was added to the original amount of taxes and forms part of the claim for arrears for which the lands were sold. The Court of Queen's Bench for Manitoba shall not have jurisdiction to impeach any such sale for alleged arrears of taxes on the grounds set forth in this section." This section, passed as it was while the question was still *sub judice*, seems to admit practically and frankly, not only that the added rate was interest, but also that the Legislature had exceeded its powers in imposing it, for if the addition had been legal and valid, there could be no object whatever in thus legislating in reference to it. And here I feel compelled to express my deep regret that the Legislature should have allowed itself to be induced to grant such legislation. If, as has manifestly been assumed, the imposition of the rate was illegal, then the attempt has been made by this section to take away from those who have been arbitrarily and illegally dispossessed of their property, their right of applying to the courts for redress. If the rights and security of property are to be preserved, this is a right that cannot lightly be interfered with, and the existence of this section in the statutes, passed apparently as it has been in the interests of a few, and in deroga-

tion of the rights of citizens generally, is, in my opinion a reproach to a Province that claims to enjoy free institutions.

But, notwithstanding this admission on the part of the Provincial Legislature of its want of jurisdiction to impose the rate, the question whether or not it had such jurisdiction is one of those difficult questions arising on the construction of the British North America Act, that can only be finally settled by the decision of a final Court of Appeal. But the decree appealed from was made without prejudice to the defendant's rights to sell the lands for such taxes and charges as might be legally due, and they are entitled to the opinion of the court on this question. On the construction we have placed on the sections themselves, only a portion of the added rate would have to be struck off, but if the sections are *ultra vires*, then the whole addition will have to come off.

I assume, as I think I must, that this rate is really interest, just as if the sections imposing it read, "Upon taxes remaining due and unpaid, there shall be added interest at the rate of ¾ per cent. per month."

By section 91, sub-section 19, of the B. N. A. Act, "Interest," is a subject reserved for the exclusive legislative authority of the Parliament of Canada. But by section 92, the Provincial Legislatures are given exclusive authority to make laws in relation to, among other subjects, municipal institutions in the Province and property and civil rights; and the defendants argue that under either or both of these heads, the Legislature must be deemed to have been given the right to make the enactment in question. It was also argued, that the case might be covered by sub-section 15 of section 92, which allows the Legislature to provide for the imposition of punishment by fine, penalty or imprisonment, for enforcing Provincial laws, as the rate might be looked on as a penalty imposed for the nonpayment of the taxes at the proper time. But this sub-section applies only to punishment awarded by a competent court after judicial investigation, and has no bearing on the case.

In chapter 127 of the Revised Statutes, Parliament has legislated in regard to the rates of interest to be charged and allowed in the several Provinces, and in section 2, it has provided that, "Whenever interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of

interest shall be six per cent." The meaning of the words "by law," in the section was not referred to on the argument, but I think they must have been intended to mean by law of the Parliament of Canada, as declared in the subsequent sections of that or of any other Act, and it cannot be inferred from them that Parliament recognized the right of Provincial Legislatures to fix rates of interest, or, at all events, higher rates than that fixed by the section.

In giving to the Provincial Legislatures exclusive powers to make laws in relation to municipal institutions, power was, of course, given to make all such laws as would be reasonably necessary to establish, carry on and work such institutions, even if such laws encroached upon some of the subjects that were reserved for the exclusive jurisdiction of the Parliament of Canada As was said by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, "Notwithstanding the endeavonr to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature, should be absorbed in those given to the Dominion Parliament. . . . With regard to certain classes of cases, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the Legislatures of the Provinces. In these cases, it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects, exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of the one interpreted and, where necessary, modified by that of the other." On this principle of construction, it will often be found that the Provincial Legislatures must be deemed to have jurisdiction to a limited extent in matters that come within the subjects mentioned in section 91, but in exercising this jurisdiction the legislature must not invade the field of the Dominion jurisdiction further than is necessary to enable it to deal effectually with the subject assigned to its jurisdiction by section 92.

It is, perhaps, desirable that municipal corporations should have the power of charging ratepayers who do not pay their taxes when they fall due, interest on the amount overdue, for otherwise delinquents would have an unfair advantage over those who pay their taxes promptly. If taxes imposed to meet current expenditure are not paid when due, then the corporation may have to borrow an amount equal to the arrears, and it is only fair that delinquents should pay as much interest on their arrears as the corporation has to pay on what it has borrowed. But still, municipal corporations can be, and in fact have been in this and the other Provinces for many years, carried on without any power to charge such interest, and it does not appear to me that it is of the essence of, or even necessarily incident to, municipal institutions that there should be power to charge any given rate. And there are other means within the jurisdiction of the legislature by which prompt payment of taxes can be enforced.

If the Legislature can fix a rate of over six per cent. to be paid on overdue taxes, by virtue of its power to legislate in regard to municipal institutions, then it seems to me it could also fix any rate it sees fit on the money overdue from one man to another, under its jurisdiction in regard to property and civil rights, and the Dominion Legislation on the subject of interest would be completely over-ridden. But such a conflict of authority could never have been intended. Parliament, by virtue of the general jurisdiction it has over the subject, has fixed six per cent. as the rate to be charged in cases not specially provided for, and if the legislature must be deemed to have been impliedly given the right to charge interest as incidental to its right to legislate in regard to certain general subjects, the apparent conflict can only be harmonized by holding that the Legislature cannot allow or fix a rate higher than six per cent. The only reported case in which the subject has been considered is that of *Ross* v. *Torrance*, 2 Cartwr. 352, and this is the view that was taken by the learned Judge who decided that case.

In this Province the question is not complicated by the fact that municipal institutions or laws existed before the passing of the British North America Act, and it has to be decided on the construction of the provisions of that Act.

The opinion I have come to is that, if the Legislature has the

power to impose interest on overdue taxes at all—a point that it is not necessary to decide—it has not power to impose the rate it has in this case, or any rate exceeding six per cent. per annum.

I think the decree appealed from should be affirmed with costs.

Decree affirmed with costs.

WATSON v. LILLICO.

(IN CHAMBERS.)

Prohibition.—Judge in Chambers.

A judge sitting in Chambers has no power to order the issue of a writ of prohibition to a county court Judge.

C. P. Wilson, for plaintiff.

W. H. Culver, for defendant.

(*February 23rd, 1889.*)

BAIN, J.—This is an application for a writ of prohibition to restrain the Judge of the County Court of the County of Brandon from further proceeding with and enforcing an order or decision of the judge for a new trial herein, on the ground that he gave his decision for a new trial without first having appointed a day to hear the attorney who had acted for the plaintiff in the County Court action, as required by section 241 of the County Court Act of 1887.

Mr. Culver appears for the defendant and the County Judge and contends that this omission of the Judge was only in a matter of procedure and so amounts only to an irregularity which does not affect the jurisdiction of the Judge to make the order, and he contends, also, that a judge of this Court in Chambers has no jurisdiction to entertain an application for a writ of prohibition.

By 13 & 14 Vic. c. 61, s. 22, it was provided that it should be lawful for any of the judges of the superior courts of common law at Westminister, either in Term or vacation, to entertain applications for writs of prohibition directed to judges of the county courts, and under this provision the application can, in England, be made in chambers. But it does seem that it is only by virtue of this section that the application can be so made, and that if the provisions of the section are not in force here, as Mr. Wilson for the plaintiff contends they are, it is only the Full Court that has power by virtue of its common law jurisdiction to issue writs of prohibition to the County Courts, for our County Court Act contains no provisions as to prohibition at all.

In *Kemp* v. *Owen*, 10 U. C. L. J. (1864) p. 267, Draper, C.J., after examining the English cases, held that a judge in Chambers had no power to entertain an application for a prohibition to a Division Court judge, and in the following year, probably in consequence of his decision, the provisions of the above section of the Imperial Act were embodied in section 2 of cap. 18 of the statutes of Canada of 1865.

I cannot agree with Mr. Wilson's contention that the power given by the Imperial Act to a judge in Chambers to entertain these applications, was extended to the Judges of this Court by the enactment of the Provincial Legislature, that the practice and procedure of the Court of Queen's Bench shall be regulated by the modes of practice and procedure as they stood in England on the 15th of July, 1870. Our County Courts in no way depend on the Imperial Act of which the above is one of the special provisions, but have been established by an Act of the Provincial Legislature in which the whole subject of the practice and procedure of the County Courts is dealt with, and I do not think that any of the provisions of the Imperial Acts relating to County Courts in England, can be in force here. If, therefore, it is only by virtue of this provision of the English Act that a judge in Chambers has this jurisdiction and it is not in force here and we have no similar provision in our Provincial Acts, it follows that applications for writs of prohibition can only be made to the court in Term, or, perhaps, to a judge sitting in the Tuesday Court.

As it has always been the practice here for judges in Chambers to entertain these applications, I have arrived at the above con-

clusion not without hesitation, and the question is one that should be determined by the Full Court. If I am right in my conclusion, then the inconvenience the change of practice will cause should be remedied by the adding to our County Court or Queen's Bench Act a provision similar to the one in the English Act.

It is not necessary for me to decide the other point raised on the argument. But as far as I have considered it, I am inclined to think the omission of the judge to fix a day to hear the attorney does not so clearly deprive him of jurisdiction to make the order as to entitle the plaintiff to a writ of prohibition, and it is only when the want of jurisdiction is made clearly to appear that the writ will be issued.

The summons will be discharged with costs.

FRASER v. DARROCH.

Construction of statute.—"Majority in value of the creditors."

[BAIN, J., 12th March, 1889.]

Upon a motion for an injunction, it was held by Bain, J., that in estimating the "majority in value of the creditors" under 50 Vic. (M.) c. 8 s. 1 s-s. 5, the question of security held by any creditor should not be taken into account. "I think creditors must be taken to be such for the full amount of what the debtor owes them."

J. S. Ewart, Q.C., and *J. D. Cameron*, for plaintiff.

H. M. Howell, Q.C., and *T. D. Cumberland*, for defendant.

ROYAL CITY PLANING MILLS v. WOODS.

THE CANADIAN PACIFIC RAILWAY CO. (Garnishees.)

Appeal.—Preliminary objection.

[FULL COURT. 1st December, 1888.]

A garnishee attaching order having been issued in this case, a subsequent garnishee attaching creditor moved to rescind the first order upon the ground of irregularity and of misrepresentation.

BAIN, J., made an order amending the attaching order by reducing the amount attached from $11,000 to $3,600.

The applicant took out the order, served a copy of it upon the plaintiffs, and also a copy upon the attorneys who usually acted for the garnishees, but who had not acted for them as attorneys in connection with this case.

The applicants then applied to vary the order amending the attaching order, claiming to have it set aside altogether.

H. M. Howell, Q.C., and *T. D. Cumberland*, for plaintiffs, contended that the order appealed from having been acted upon, by being served an appeal would not lie. They cited the following cases, *Giraud* v. *Austin*, 1 Dowl. N. S. 703; *Pearce* v. *Chaplin*, 9 Q. B. 802; *Hayward* v. *Duff*, 12 C. B. N. S. 364.

J. S. Ewart, Q.C., and *J. W. E. Darby*, for applicants, contended that a preliminary objection to the application should have been taken by a substantive motion and cited *Shaw* v. *Canadian Pacific Railway Company*, 5 Man. R. 337.

TAYLOR, J., and DUBUC, J., held that the case of *Shaw* v. *Canadian Pacific Railway Company*, was not in point; and that the applicants having acted upon the order could not appeal from it.

KILLAM, J., thought that it had not been sufficiently shown that the order had been served upon the garnishees, and expressed himself as doubting whether, by its having been served upon the plaintiff's attorneys, the applicants were estopped.

Application dismissed with costs.

ELLIOTT v. WILSON.

Jury fee after new trial.

[BAIN, J.—3rd November, 1888.]

[FULL COURT.—30th November, 1888.]

49 Vic. c. 4, s. 2, provides that "No civil cause shall be entered to be tried by a jury, or shall be tried by a jury, until the party requiring the jury shall have deposited with the sheriff the sum of $25 to be applied towards the payment of jurors and shall have filed with the Prothonotary the Sheriff's receipt for the $25."

The defendant complied with this enactment. The action was tried with a jury and a verdict rendered for the defendant. A new trial was ordered in term. The defendant did not pay in any further sum. The plaintiff then moved to strike out the jury notice.

BAIN, J., made the order. The defendant applied to reverse the order.

Per Curiam.—Application allowed with costs. A second payment was not necessary.

G. Davis, for plaintiff.

J. H. Munson, for defendant.

CAMPBELL v. HEASLIP.

Payment by cheque.—Dishonor.—Pleading.

[DUBUC, J., 14th November, 1888.]

Defendants being indebted to plaintiffs, sent them the cheque of B. for a portion of the amount. Subsequently the plaintiffs rendered accounts showing a credit of the amount of the cheque, but stating that it had not been paid, and still later rendered other accounts showing the amount charged back. The defendant in an earlier letter said that he had not seen B. since getting the check, but "will go and see him to-morrow, and when I see him will remit to you at once." His later letters made no objection to the re-charging of the amount.

Held, 1. That the conduct of the parties shewed that the cheque had not been received as payment.

2. That under a plea of payment, the plaintiff was not bound to prove presentment of the cheque and dishonor.

3. That the correspondence might be considered as an admission that everything had been done to entitle the plaintiff to sue.

C. P. Wilson, for plaintiff.

J. H. Munson, for defendant.

DUNDEE MORTGAGE CO. v. PETERSON.

(In Equity.)

(Before the Full Court.)

Practice.—Notice of Re-hearing.

(*8th May, 1889.*)

A decree having been made in favor of the plaintiffs, the defendants properly entered the cause for rehearing before the Court *in banc*, and gave the following notice: "Take notice that I have this day entered this cause for rehearing before the Full Court in order that the decree herein dated, &c., may be wholly discharged, &c." Upon the cause coming on for argument, *J. S. Ewart, Q.C.*, and *C. W. Bradshaw*, for the plaintiffs objected that the notice was insufficient, inasmuch as it did not say that the application had been entered "with the prothonotary;" and quoted rule 55 of Easter Term 1885, as follows:—"Application by way of appeal from or for the reversal or variation of the order or decision of a single judge shall be entered with the prothonotary, and notice of such entry given within two weeks after, &c."

H. M. Howell, Q.C., and *A. Dawson*, for the defendants.

Per Curiam. The notice is good.

THE DUNDEE MORTGAGE CO. v. PETERSON.

(IN APPEAL.)

Fraudulent conveyance.—Onus as to proof of solvency.—Amendment.

C. P. was indebted to plaintiffs in respect of a mortgage upon certain lands in Emerson. After default he conveyed certain other lands to his son, who immediately conveyed them to his (C. P's.) wife. The conveyances were voluntary and intended as a "provision for the wife so that she could have a home."

Previous to the date of the conveyances, land had become unsaleable in Emerson and the plaintiff's security was altogether inadequate. There was no direct evidence that C. P. had no other property sufficient to pay the debt but there was sufficient to lead the court to suspect it. The deeds were not registered but were handed to the wife, who was not careful to keep them separate from her husband's papers. The husband continued to collect the rents and to put them into the common purse for household purposes. At the hearing the wife, without withdrawing her answer, offered to consent to a sale and a rateable division among all her husband's creditors of the proceeds.

Held, That the conveyance was fraudulent as against creditors.

Per TAYLOR, C.J.—The onus of shewing the existence of other property available for creditors is upon those supporting a voluntary conveyance.

The bill was originally filed upon a certificate of judgment against C. P. alone. He having then disclosed the conveyances to his wife, she was made a party, the existence of a *fi. fa.* against C. P. alleged, and the conveyances attacked as fraudulent against creditors. At the hearing it appeared that the *fi. fa.* was placed in the sheriff's hands after the bill was filed. An amendment was allowed in order to make the bill one on behalf of all the creditors of C. P.

Rehearing at the instance of defendants.

H. M. Howell, Q.C., and *A. Dawson*, for defendants. They referred on the question as to the onus of proof of solvency to *Freeman* v. *Pope*, L. R. 5 Chan. 538; *Osborne* v. *Carey*, 5 Man. R. 237; *Thomson* v. *Victoria Mutual Fire Insurance Co.*, 29 Gr. 56; *Mason* v. *Bogg*, 2 M & C. 443; *Kellock's Case*, L. R. 3 Chan. 768. Prayer wrong in asking that proceeds of sale be applied in payment of plaintiff's claim; should have been for distribution *pro rata*, *Jenkyn* v. *Vaughan*, 3 Drew. 419; *May on*

Fraudulent Conveyances, 527. Onus of supporting conveyance not on grantee, *Henry* v. *Armstrong*, 18 Ch. D. 668. No evidence against wife that plaintiffs are creditors. *Brown* v. *Davidson*, 9 Gr. 439. No enquiry directed here as to indebtedness, *Brown* v. *Davidson*, 9 Gr. 439. Plaintiffs can only claim position they had when bill filed, *Leacock* v. *Chambers*, 3 Man. R. 645.

J. S. Ewart, Q.C., and *C. W. Bradshaw*, for plaintiffs referred to *Masuret* v. *Mitchell*, 26 Gr. 435; *Clark* v. *Hamilton Provident*, 9 Ont. R. 177.

(*7th June, 1889.*)

TAYLOR, C.J.—The plaintiffs being mortgagees of two lots in the Town of Emerson, filed their bill against the mortgagor Cephas Peterson to enforce payment of their mortgage. In that suit, a decree was made on the 24th November, 1885, directing, among other things, immediate payment of the amount which might be found due by the master. The master made his report on 12th December, 1885, finding the amount due to be $1,986.87. The mortgagor being the owner of another lot in Emerson, the plaintiffs registered a certificate of the decree they had obtained and filed their bill in this suit, alleging the registration of the certificate and praying that the land mentioned in the bill might be sold to satisfy the amount due them. Peterson, thereupon, filed an answer alleging that he was not the owner of the land. When examined for discovery, it appeared that, he had at one time owned the land, and on the 12th of June, 1884, had conveyed it to his son G. L. Peterson, who, on the same day, conveyed it to his mother, the wife of Cephas Peterson. Both these conveyances were made without any consideration. The plaintiffs then amended their bill, making Mrs Peterson a defendant, alleging that they had a writ of *fi. fa.* against lands in the hands of the sheriff, and praying that the two voluntary conveyances might be set aside as fraudulent and void against them. At the hearing it appeared that the plaintiffs had no writ against lands in the sheriff's hands when they filed their bill, and it was again amended by making the suit one on behalf of the plaintiffs and all other creditors of Cephas Peterson. Thereupon a decree was made by my brother Bain, declaring the two conveyances fraudulent and void against the plaintiffs and all other creditors of the defendant Cephas Peterson. This decree has been reheard at the

instance of the defendants. They insist that the bill should be dismissed, but the defendant Mrs. Peterson is willing that a decree should be made in the terms of a consent contained in her answer to the bill as last amended, for a sale of the land, and that the plaintiffs, as to the unpaid balance after realizing their security, be allowed to share *pro rata* with all other of the creditors of the defendant Cephas Peterson.

In my opinion the decree which has been made should be affirmed.

It seems clear upon the authorities that mortgagees, having an insufficient security, may maintain a suit to set aside as fraudulent and void, a conveyance of other property made by the mortgagor. The evidence here establishes beyond all doubt that the mortgaged property is not of sufficient value to satisfy the mortgage debt, and that it was not so at the time when the conveyances complained of were made.

It is true there is no evidence of any other indebtedness on the part of the grantor, but it is also apparent, as far as the evidence goes, that he had no other property than that covered by the mortgage and that comprised in the voluntary conveyances. No evidence of the existence of any other property is given. It was argued that the Court had gone too far, when holding in *Osborne* v. *Carey*, 5 Man. R. 237, that the onus of showing the existence of other property available for creditors, is upon those supporting a voluntary conveyance and *Brown* v. *Davidson*, 9 Gr. 439, was spoken of as the only case in which an opinion to that effect had been expressed. But, that the onus is on the defendant was decided as long ago as the time of Lord Hardwicke in *Taylor* v. *Jones*, 2 Atk. 600, and I do not think it has been seriously questioned since then. In *Brimstone* v. *Smith*, 1 Man. R. 302, the late Mr. Justice Smith said that, when it was shown by the sheriff "that the position of Joseph Smith is *nulla bona*, it is fair to call upon him to show he had other sufficient means to satisfy the claims of his creditors when the conveyances were executed." In *Masuret* v. *Mitchell*, 26 Gr. 435, where a subsequent creditor was seeking to set aside a conveyance, setting up as proof of indebtedness at the time of the voluntary conveyance being executed, an indebtedness by mortgage upon insufficient security, Spragge, C., held that the existence of the mortgage debt being proved the onus was on the defendant to show

that the debt was secured by a mortgage upon land sufficient to satisfy the debt. *Henry* v. *Armstrong*, 18 Ch. D. 668, was cited as authority that the onus is not on the party supporting the voluntary conveyance. But there, the grantor was seeking to set aside his own deed, and what Kay, J., held was, that the cases did not go so far as to say that whenever a voluntary settlement is impeached on any ground whatever, the onus is at once thrown on those who would maintain it. He followed that up by saying "As I understand it, the law is that anybody of full age and sound mind who has executed a voluntary deed by which he has divested himself of his own property, is bound by his own Act, and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside." *Cooke* v. *Lamotte*, 15 Beav. 234, referred to by Kay, J., during the argument as having held that the onus is on those setting up the deed, and as to which he asked, "Has that ever been followed?" was a case in which an executor filed a bill to have a bond made by his testator set aside and in which the Master of the Rolls held, perhaps erroneously, that the onus of supporting it was on the grantee.

Counsel further argued that *Freeman* v. *Pope*, L. R. 5 Chan. 538, in which it was held that a voluntary settlement may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that it would necessarily have that effect, has been overruled by *Re Mercer*, 17 Q. B. D. 290. The learned reporter does not say it was overruled, only "considered."

No doubt Lord Esher did say, "I will venture to say as strongly as I can that to my mind that proposition is monstrous;" but neither of the other members of the court said anything of that kind. Lindley, L.J., said, "Although I am not prepared to say that a voluntary settlement can never be set aside under the statute of Elizabeth, as it has been construed, unless there has been in fact an intention to defraud, I am not aware of any decision which goes the length of upsetting the present deed under the circumstances with which we have to deal." Lopes, L.J., said, he would express no opinion upon the matter. Under such circumstances I do not see how *Freeman* v. *Pope*, can be said to have

been overruled. It was a decision of the Court of Appeal, by two judges, either of them quite as eminent as Lord Esher.

Re Mercer, was a case widely different from the present. When the settler made the voluntary settlement no doubt he had been served with a writ, but as Lord Esher says the result of the action no one could foretell, it might have been a verdict for 1s. or £500. "It was entirely a matter of speculation what the amount of the verdict would be. Therefore, he was not insolvent, it was not the necessary consequence of what he did to defeat or delay the plaintiff in the action, for, if the verdict had been for a small amount, she would not necessarily have been delayed for a week." Of the verdict which was recovered, £500, his lordship said, "It was a startling verdict, which I should not have anticipated, and I do not see why he was bound to anticipate it." And Lindley, L.J., said, "When the settlement was executed, the probability of the plaintiff obtaining substantial damages was slight." Then, no secret was made of the settlement, and the settlor's whole conduct such as to furnish, Cave, J., said in the Divisional Court, proof of his *bona fides*, and that it was not for the purpose of defeating and delaying creditors.

Here there was a debt, an ascertained amount due, secured upon wholly insufficient property, upon property in a town where the parties resident in that town must have known property was fast falling, and had fallen in value. Then the transaction was kept secret, the deeds never being registered. Secrecy has always been held a badge of fraud.

The direct result of the impeached conveyances was to delay and hinder the creditors.

Taking the whole of the evidence as to the transaction in question, I am of opinion that the decree should be affirmed and the appeal dismissed with costs.

DUBUC, J., concurred.

KILLAM, J.—It does not appear to me that *Taylor* v. *Jones*, 2 Atk. 600; *Osborne* v. *Carey*, 5 Man. R. 237, or *Brown* v. *Davidson*, 9 Gr. 439, determine that, in order to have a transfer of property declared or considered fraudulent and void as against a creditor, it is sufficient for the party attacking it to show that the transfer was voluntary and that, when it was made, the transferor owed some debt or was under some liability. In the two

former cases there were circumstances which were considered sufficient to throw upon the transferee the onus of showing the solvency of the debtor at the time of the transfer, or his possession of other property subject to be made available to creditors. In *Brown* v. *Davidson*, there was evidence given of some attempt to make the money by execution without success, and of there being no assets available to execution in the county or bailwick where, if at all, they might be expected to be found.

I agree with the contention of the defendant's counsel that there is not here, any absolutely definite evidence that the husband was not possessed of other property sufficient to meet his liabilities at the time he made this conveyance to the son that it might be transferred to the wife. I agree, also, that some of the expressions used in *Freeman* v. *Pope*, L. R. 5 Ch. 538, may be considered to be open to qualification. In their absolute sense they are hardly consistent with the judgment in *re Mercer*, 17 Q. B. D. 290; but *Freeman* v. *Pope*, cannot be said to have been overruled in what it determined.

Treating the question in this case, however, as one of fact, it is that of ascertaining from the circumstances the intention of the parties. The conveyances were admittedly voluntary. They bear date the 12th June, 1884. Taking the evidence of the terms of the mortgage and the dates, it is clear that one instalment of interest was then overdue and that an instalment of principal and another of interest was about to fall due on the 1st July, 1884. None of these have been paid. Mrs. Peterson's answer practically admits that the mortgaged lands are insufficient in value to meet the mortgage. Mr. Peterson admits great depreciation in value. It appears that before the year 1884, trade had been diverted from Emerson and that the people had been driven to make great exertions to regain it. Circumstances occurred early in 1884 which were calculated to cause apprehension that the exertions would be unsuccessful, and they evidently caused such apprehension. It is clear that the reaction from the previous era of high prices and the depreciation in values had set in before these conveyances were made. This was the period when, as the defendants say, the husband, on the son's suggestion, determined by this transaction to "make provision for" the wife, so that she "would have a home." There was not, as I have said, strict evidence that the husband had not other pro-

perty, but there is sufficient to lead one to suspect it. Mrs. Peterson said that her husband stated that she "should have this property as he had the other one, meaning the property covered by the plaintiff's mortgage." The deeds were not registered, but handed to the wife who put them away, but apparently without much care as to keeping them separate from her husband's papers. He continued to receive the rents as before, and they evidently went into a common purse for the ordinary expenses of the household, from which the husband drew money as he desired. Matters, then, were kept in such a position that the parties could act on these assumed conveyances or not, as they might find convenient.

Upon this bill being filed, the husband set up the conveyance to the wife. The bill was then amended so as to attack the conveyances as made with intent to defeat, hinder, or delay creditors. The parties denied the fraudulent intent and went to a hearing, but upon all the resources of technicality being exhausted the wife filed a formal consent that the lands be sold and the proceeds divided upon certain suggested terms among the husband's creditors, and from the judgment of my brother Bain it appears that the only question then argued was that as to the principle upon which in such case the plaintiff company should rank in the division of the proceeds. It is true that the original defence was not withdrawn and that the defendants could not be considered as assenting to a sale on any terms but those offered; but the offer was not one privately made without prejudice, and it should be taken into consideration as any other conduct of a defendant against whom such a claim was being made.

I am, therefore, of opinion that, as matter of fact only, the inference of the fraudulent intent is the proper one. It is seldom possible in such cases to show such an intent by positive and express evidence. The retention of possession by a debtor is one of the usual badges of fraud, as is also the observance of secrecy in reference to the transfer.

There is, then, quite sufficient, as in *Taylor* v. *Jones* and *Osborne* v. *Carey*, to throw upon the parties supporting the transfer the onus of proving the solvency of the debtor at the time of the transfer, or other circumstances tending to rebut the presumption of a fraudulent intent thus raised.

I want to add that I have taken care to remember in considering the depositions of the defendants that they are not to be used as against their co-defendants. While I think the case sufficient against both defendants, I have been particularly careful as regards Mrs. Peterson, as the plaintiff company is seeking to take property *prima facie* hers and it is against her especially that they should make out a case.

We are not called upon to consider the propriety of the form of the decree, as in their præcipe and notice of rehearing, the defendants ask only that the bill be dismissed.

Decree affirmed with costs.

RE BREMNER.

(IN APPEAL.)

Committal for non-payment of money ordered to be paid.—Imperial Debtors Act.

R., as agent of S., obtained out of court a sum larger than that to which S. was entitled. An order was made for the repayment of the excess with costs. Upon an application to commit R. for default in payment,

Held, 1. That the Debtors Act 32 & 33 Vic. (Imp.) c. 62, was in force in Manitoba.

2. That it sufficiently appearing that R. had means to pay, an order should be made for his committal.

3. That the order might be made for non-payment of costs.

4. That the default in payment might be proved as well by R's. admission as by affidavit of the party to whom payment should have been made.

(Affirming Dubuc, J.)

Rehearing of application to commit W. J. Robinson. The facts are set out fully in the judgments.

N. F. Hagel, Q.C., for Robinson, referred to *Dickson* v. *Cook*, 1 Ch. Ch. 210; *Holroyde* v. *Garnett*, 20 Ch. D. 532. The Debtors Act 32 & 33 Vic. c. 62, s-s. 3, 4, 5 under which motion made, is not in force here. The repeal of 36 Vic. c. 19, s. 9, sub-sec. 3 of the statutes of this Province does not revive the English Act. *Monkman* v. *Sinnott*, 3 Man. R. 170, assumed that the Act was in force, but this was not there really considered. The material filed is insufficient; no proof of nonpayment. See also *Gilbert* v. *Endean*, 9 Ch. D. 260. In *re Firmin*, 57 L. T. N. S. 45; *Preston* v. *Etherington*, 36 W. R. 49; *Maughan* v. *Wilkes*, 1 Ch. Ch. 91; *Attorney-General* v. *Adams*, 12 Jur. 637. Not shown execution issued and returned, *Nelson* v. *Nelson*, 6 Pr. R. 194.

C. P. Wilson, for the Attorney-General, referred to *Re Attorney*, 3 Man. R. 316; *Day's Common Law Procedure Act*, 530, 531, 532; *Jackson* v. *Mawby*, 1 Ch. D. 87; *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53.

(*7th June, 1889.*)

TAYLOR, C.J.—Jemima Bremner an infant, now Mrs. Shirtliff, was entitled to a sum of money standing in court to the credit of this matter. In October, 1888, she having then attained twenty-one, an application was made for payment out of the money to her. On the application a certificate from the accountant was produced showing the amount in court to be principal $188 and interest $241, 44, or in all $429,44, and for payment of that amount, an order was made. Thereupon a cheque was issued which came to the hands of one W. J. Robinson, who was acting for Mrs. Shirtliff under a power of attorney, and who instructed the solicitor who obtained the order to make the application for it. The cheque was endorsed by Robinson as attorney for Mrs. Shirtliff, and the money obtained under it. Robinson paid over the money to Mrs. Shirtliff, the amount which remained after paying the solicitor's charges connected with the application and obtaining the cheque, less the sum of $74.44, which he retained. There was, in fact, an error in giving a certificate showing $429.44 as the amount in court, the true amount being only $283.28. As soon as this was discovered an application was made to Robinson and Mrs. Shirtliff to refund the amount overpaid, which they failed to do. Thereupon a petition was presented praying that he and Mrs. Shirtliff might be ordered to

repay the money. From the affidavits filed, even from the affidavit of Robinson himself it appeared that he knew, if not when he received the cheque, yet beyond all question, before he endorsed the cheque as attorney of Mrs. Shirtliff, and the money was paid upon it, that the cheque was for a sum in excess of the true amount. An order was therefore made that he and Mrs. Shirtliff should, within a time limited by the order, repay the sum of $146.16, and pay the costs of the application. These were taxed at $60.61. The order and certificate of taxation having been duly served and the order not being obeyed, a motion was made to commit Robinson under The Debtors Act, Imp. Act, 32 & 33 Vic. c. 62, and an order for committal was made. From this order Robinson now appeals.

Numerous objections to the order are taken. It is argued that The Debtors Act is not in force in this Province. It was treated by the full court as in force in *Re an Attorney*, 3 Man. R. 316, and by myself in *Monkman* v. *Sinnot*, 3 Man. R. 170. I have no doubt that it is so. For showing that it is not in force, reliance is placed upon 36 Vic. c. 19, s. 9, which provided that no writ of *capias ad satisfaciendum* or other execution against the person shall be allowed. It cannot be said that that Act repealed the Debtors Act, for the law of England had not then been introduced. It was only by the 38 Vic. c. 12, s. 1, that it was so. But it is argued that the Act could not thereby be introduced, because the law of England was so," except as the said laws . . . . may have been already changed or altered . . . by any Act or Acts of the Legislature of Manitoba," and the 36 Vic. c. 19, s. 5, had already changed or altered the law. A few months after, by 38 Vic. c. 5, s. 70, (2nd sess.) the whole of the Act 36 Vic. c. 19, was repealed. It is contended by the respondent that as at that time there was no enactment providing that the repeal of an Act shall not revive a former Act which had been thereby repealed, the Debtors Act thereupon revived. It seems to me that this cannot be argued because if the effect of the 36 Vic. c. 19, was so to change or alter the law that the 38 Vic. c. 12, s. 1, did not introduce The Debtors Act, the repeal of the 36 Vic. c. 19, could not revive an Act which had never come into force in this Province. Besides, when the 36 Vic. c. 12, introduced the law of England, it introduced the Imp. Act

13 & 14 Vic. c. 21, s. 5, which provided that the repeal of an Act repealing another should not revive the first Act.

None of this, however, seems to me important, as I cannot see that the 36 Vic. c. 19, s. 5, did so change or alter the law as to prevent The Debtors Act coming into force here under 38 Vic. c. 12, s. 1. All that the Act says is, no writ of *capias ad satisfaciendum* or execution against the person, shall be allowed. Now, the Debtors Act does not deal with writs of *capias* at all. The words occur only once in the Act where it is provided in section 5, that persons committed may be so to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal shall be issued, obeyed and executed in like manner as such writ. An order for committal under the Act is clearly not an execution against the person, for the same section 5 expressly provides for that.

It may be doubtful if Robinson can be brought within section 4, rule 3 of the Act; whether to bring him under that he must not be a trustee, or be acting in a fiduciary capacity for the person seeking the order. But he seems clearly to be brought within section 5. It has, I think, been shown sufficiently that since the date of the order for payment, he has had the means to pay the sum in respect of which he has made default. He negotiated with the solicitor for the applicant for a small reduction of the amount payable, which was agreed to. On his failing to pay the reduced sum according to promise, the solicitor called upon him and swears that he then said he had the money ready, but did not intend to pay until Mrs. Shirtliff came in to him. Though he has filed several affidavits on the motion there is no denial of this statement. On a subsequent application to him, he said he intended if any proceedings were taken to enforce payment, to test the jurisdiction of the court and refused to pay. In *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53, it having been sworn that the debtors had means, V.C. James said, they have had an opportunity of filing an affidavit in answer and they have not done so. Whether they have the means or not must be known to them."

The evidence of default is I think, sufficient. The solicitor only swears, it is true, that he is advised and believes that the money has not been paid, but he sets out in addition, the interviews with Robinson, his refusal to pay and his expressed determin-

ation to test the jurisdiction of the court if any steps should be taken to enforce his payment. His filing an affidavit in which he makes no attempt to show payment is also a circumstance to be taken into account.

That a committal under this Act may be for nonpayment of costs, there seems no doubt. In *Reg.* v. *Pratt*, L. R. 5 Q. B. 176, Lush, J., remarked that, "The words in the enacting part 'default in payment of a sum of money' are advisedly used instead of 'debt,' in order to include cases which might not properly have been called cases of debt. . . . . The enacting part, therefore, uses the words 'sum of money,' and this clearly applies to and includes costs." Or, as V.C. James when dealing with a case under section 5, said in *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53, "where a court of competent jurisdiction has ordered a man to pay a sum of money, whether in the shape of costs or anything else, that is a debt due from him in pursuance of an order or judgment of this Court. . . . . It seems to me to be a play upon words to say that a debt arising *ex contractu* and a debt arising in respect of costs differ in any way from one another. There is an order of the court directing a sum of money to be paid, and that is a debt under the order."

In my opinion the appeal should be dismissed with costs.

KILLAM, J.—I feel no doubt that, in so far as it affects the application before us, the Debtors Act, 32 & 33 Vic. c. 62, is in force here. It appears to me that it was so before the Act 36 Vic. c. 19, M. It was not repealed by section 9, sub-section 3 of that Act providing that, "No writ of *capias ad satisfaciendum* or other execution against the person, shall issue or be allowed." The Debtors Act did not confer the power to issue an attachment for disobedience of an order of the Court of Chancery for payment of money. The jurisdiction had long previously been exercised. It simply imposed limitations upon that power. The Act 36 Vic. c. 19, M. simply imposed further limitations or abolished it. If it is to be considered as abolishing it, the repeal of the latter Act revived the power either with or without the limitations. In my opinion, it simply revived it with the limitations imposed by the Debtors Act, or rather, the repeal simply abolished the additional restriction imposed by the Act 36 Vic. upon the authority of the court to issue attachments. I do not think that the Act 36 Vic. ever affected the authority of the

court to attach its own attorneys for nonpayment of moneys received by them in that character when ordered by the court to pay them. Such an attachment would not come within the term "Execution against the person." This may be taken as the ground of the decision in *Re Attorney*, 3 Man. R. 316. There is more reason for considering the attachment now sought, to come within that term, but even so, the Debtors Act merely restricted to some extent the authority to grant writs of attachment. The Act 36 Vic. merely restricted that power to a greater extent; but it did not repeal the Debtors Act which had not conferred such an authority. A repeal of the Manitoba Act imposing the restriction left the authority in existence with no other restrictions than those imposed by the Debtors Act.

The Act, as I have said, did not confer the jurisdiction to grant such writs. This being already established, that Act provided that, "With the exceptions hereinafter mentioned, no persons shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money."

Then followed the exceptions, among which are (sub-sec. 3) cases of "default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity, any sum in his possession or under his control." And by section 5, "Subject to the provision hereinafter mentioned and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court." But (sub.sec. 2) "Such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects so to pay the same." Then follows the provision that "Proof of the means of the party making default may be given in such manner as the court thinks just and for the purposes of such proof the debtor or any witnesses may be summoned and examined on oath," &c.

In *Daniel's Chancery Forms*, 930, note n, it is said, "Where the Act directed to be done is the payment, transfer or delivery of money, stock or other thing to a person out of court, the

default should be proved by his own affidavit." The money is made payable to the Attorney-General and his affidavit of the default is not produced. But, while this should ordinarily be supplied, the Act does not prescribe it. I see no reason why the default should not be proved by the admissions of the party ordered to make payment. He clearly did make default. He negotiated for a settlement and was offered a reduction in the amount of the costs; he accepted it and agreed to pay the reduced sum. After a delay it was again demanded of him and he then refused to pay, saying that he intended to test the jurisdiction of the court. There was, then, a default, and the party refused to pay. It is not a case of mere neglect to which very likely the party to whom the payment was made could alone be supposed to speak positively. If the payment has been made, notwithstanding the refusal, it would be very easy for the debtor to show it.

The order directs William J. Robinson to pay $146.16 and the costs of the application. It directs Jemima Shirtliff to pay a like sum and the costs of the application. So far as the sums, other than costs are concerned, there is nothing in the order to show that they are the same, so that payment by one would satisfy the liability of the other.

Prima facie Robinson is in default. It may be that upon such an application as this it would be proper to look behind the order to ascertain that both sums represented the same claim. But there being a *prima facie* case of default by Robinson in paying a sum which upon the face of the order was to be paid by him alone, I think that it is for him to show that the other party has paid and that his liability should be taken as satisfied. It is different from the case of an order which upon its face directs two parties to pay the same sum.

I decline to consider whether this order for payment ought to have been made. It was not appealed from apparently, and it stands in full force. If the party has had the means to pay, he should have paid or have appealed from the order. We have had no argument addressed to us upon the question of the jurisdiction to make the order, but merely respecting the liability of Robinson upon the merits with a suggestion that the money should have been payable to the accountant or that he should have been the applicant. That the court has jurisdiction in some

form to order or adjudge the repayment can hardly be doubted. *Holroyde* v. *Garnett*, 20 Ch. D. 532, to which we have been referred was the case of an order against a trustee under sub-sec. 3. Bacon, V.C., thought that he should look into the original circumstances to see if the original default had been fraudulent, but it was not suggested that the order for payment should be reviewed. If, admitting the liability we are to look back into the circumstances under which it was incurred, these amply justify the order for an attachment.

I quite agree that a default in payment of costs is within the Act, *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53, and *Reg.* v. *Pratt*, L. R. 5 Q. B. 176, are sufficient authorities for this. I do, however, feel very doubtful of the sufficiency of the evidence of means. The Act clearly places upon the applicant the onus of showing that the debtor had or has the means. This is adopted in the directions for the affidavits in support of the application in *Daniel's Forms*, 930. In *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53, the applicant must have given some evidence to show means. Sir Wm. James, V.C., states that "It has been sworn that these gentlemen are in receipt of good salaries," and he only afterward adds "They have had an opportunity of filing an affidavit in answer and they have not done so. Whether they have the means or not must be known to them." From the report in 18 W. R. 802, it appears that one of the debtors was in receipt of a salary of £100 and the other of £200. Taking this with the dates, there might have been sufficient to warrant the inference, when nothing was shown to the contrary, that the parties making default had since the date of the order had the means.

Now it is "the means to pay the sum in respect of which he has made default" that he should have had, to warrant the order. There is no evidence of the general circumstances of this debtor. There is only evidence of a promise to pay a portion of the amount in respect of which he has made default, and I cannot feel wholly free from doubt whether the subsequent statement that he had the money ready was not referable to that reduced sum. If I had been asked to make the order originally I should not have done so upon that material. But as the Act requires proof of means "to the satisfaction of the court," and as my brother Dubuc was satisfied in the first instance and my other learned brothers are so now, I can hardly feel that my doubt upon this

point would warrant my positive dissent from the order affirming the order for an attachment.

BAIN, J., concurred.

Appeal dismissed with costs.

REG. v. DEEGAN.

(BEFORE THE FULL COURT.)

Criminal law.—Forgery of one of several signatures.—Interested witness.

A joint and several bond was executed by the prisoner under an assumed name for a fraudulent purpose. There was no proof whether the other signatures had been forged or not.

Held, That an indictment that the prisoner had forged the bond was sustained.

The bond was executed in order to obtain a marriage license. It having been obtained, a form of marriage before a person without authority to celebrate marriage, was gone through.

Held, That the issuer of the license was not an incompetent witness as a person interested or supposed to be interested.

Per DUBUC, J.—Neither was the woman incompetent as a witness.

The prisoner in this case was tried and found guilty of forgery. His Lordship Mr. Justice Killam reserved the following case for the opinion of the Full Court:—

IN THE QUEEN'S BENCH.

THE QUEEN v. THOMAS DEEGAN.

I hereby certify that at the sittings of the court of assize and *nisi prius*, *oyer* and *terminer* and general gaol delivery in and for the Eastern Judicial District of the Province of Manitoba, held on the 12th day of March, A.D. 1889, Thomas D. Deegan was brought before me for trial, upon an indictment charging that "Thomas D. Deegan on the fourth day of August, in the year of our Lord one thousand eight hundred and eighty-eight, at the City of Winnipeg, in the County of Selkirk, in the Province of Manitoba, a certain

bond and writing obligatory feloniously did forge with intent thereby then to defraud against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and dignity."

The said Deegan had been arraigned at a previous sitting of the said Court and had pleaded not guilty to the said indictment.

The bond produced at the trial as that which the prisoner was charged with having forged, was in the words following:

"Know all men by these presents that we, James William McLea of the City of Winnipeg, Charles Strong of the City of Winnipeg and Robert Thomas Rowan, of the City of Winnipeg, are held and firmly bound jointly and severally unto our sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, in the sum of eight hundred dollars of current money of this Province, to be paid to Her said Majesty, Her heirs and successors for the which payment well and truly to be made, we do bind ourselves and each of us by himself, our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated at Winnipeg the fourth day of August, in the fifty-second year of Her Majesty's Reign and in the year of our Lord one thousand eight hundred and eighty-eight.

The condition of the obligation is such, that whereas the above bounden James William McLea hath obtained a license of marriage for himself and Eliza Harriet Betsworth, now, if it shall not appear hereafter that they, or either of them, the said James William McLea and Eliza Harriet Betsworth, have any lawful let or impediment pre-contract, affinity, or consanguinity, to hinder their being joined in holy matrimony, and afterwards then living together as man and wife, then this obligation to be void and of none effect otherwise to be and remain in full force and virtue.

Signed, sealed and delivered at Winnipeg, in presence of W. G. Fonseca, Marriage License Issuer.

James Wm. McLea.
Chas. Strong.
R. T. Rowan.

I further certify that the said instrument purported to be signed and sealed by the parties thereto and also to be signed by W. G. Fonseca as witness to the execution thereof and as "Marriage License Issuer." (The evidence was then summarized.)

Objection was taken at the trial by counsel for the prisoner that there was not sufficient proof of the forgery of the bond or instrument, sufficient to sustain the charge in the indictment in question, because it was not proved that the signature and seals of all the executing parties were forged, and also that the witnesses William G. Fonseca and Eliza Harriet Betsworth were, or one of them was interested or supposed to be interested in respect of the bond or writing obligatory referred to in the indictment and that the evidence of neither was sufficiently corroborated within the two hundred and eighteenth section of the Criminal Procedure Act.

I overruled the objections for the time being, deciding to reserve them for determination by the Court of Queen's Bench, and I left the case to the jury

who found the prisoner guilty of the crime charged in the indictment.

I now desire the opinion of the Court of Queen's Bench upon the following two questions so reserved by me, namely:—

1. Was it sufficient to maintain the charge made in the indictment that it be proved that the prisoner forged the name and seal of one of the parties to the bond or writing obligatory in question without proving any forgery in respect of the signatures and seals of the other parties thereto?

2. Were the witnesses William G. Fonseca and Eliza Harriet Betsworth persons, or was either of such witnesses a person interested or supposed to be interested in respect of the bond or writing obligatory mentioned in the indictment; and if so, was their evidence or the evidence of the one so interested or supposed to be interested sufficiently corroborated by other legal evidence in support of such prosecution to satisfy the two hundred and eighteenth section of the Criminal Procedure Act?

(Signed) A. C. KILLAM, J.

Dated at Winnipeg this 18th day of April, A.D. 1889.

N. F. Hagel, Q.C., for the prisoner cited *Rex* v. *Birkett*, Russ. & R. 251; *Reg.* v. *Harper*, 7 Q. B. D. 78.

J. D. Cameron, for the Crown cited *Rex.* v. *Teague*, Russ. & R. 33; *Rex.* v. *Bingley*, Russ. & R. 446; *Rex.* v. *Dunn*, 1 Leach. 68; *Reg.* v. *Boyes*, 1 B. & S. 320; *Reg.* v. *Giles*, 6 U. C. C. P. 84; *Re Monteith*, 10 Ont. R. 547; *U. S. Express Co.* v. *Donohue*, 14 Ont. R. 348; *Reg.* v. *Bannerman*, 43 U. C. Q. B. 549; *Reg.* v. *Hagerman*, 15 Ont. R. 598. The word interest means beneficial interest, one to whom an interest may accrue from his testimony, *Reg.* v. *Selby*, 16 Ont. R. 255.

(*7th June, 1889.*)

DUBUC, J.—The prisoner in this case was tried at the last assizes and found guilty of forgery; but the judge reserved two questions of law to be submitted to the consideration of this Court. The first of these questions is as follows:

"Was it sufficient to maintain the charge made in the indictment, that it be proved that the prisoner forged the name and seal of one of the parties to the bond, or writing obligatory in question, without proving any forgery in respect of the signatures and seals of the other parties thereof?"

The forged document was a bond in the form required by law to obtain a marriage license. The prisioner was one of the three parties who signed said bond as sureties. The prisoner, whose real name is Thomas D. Deegan, gave his name as Robert Thomas

Rowan, and signed "R. T. Rowan." This was proven at the trial. But no evidence was given showing whether the other two sureties signed their real names, or some other names.

The name signed by the prisoner was either the name of some existing person, or it was a fictitious name. It is equally forgery in both cases, if the forged name be assumed for the purpose of fraud. *Archbold Crim. Plead.*, 612, and cases cited.

It was urged before the court that the prisoner who is charged in the indictment with forging a certain bond, was only proven to have forged his name to said bond and could not be convicted of forging the whole instrument.

Formerly, it was necessary, in an indictment for forgery to set out *verbatim* the forged instrument. But now, under the Dominion Statute 32 & 33 Vic. c. 19, s. 49, incorporated in R. S. C. c. 174, s. 131, it is sufficient to describe the instrument by any name or designation by which the same is usually known, or by the purport thereof.

It is not considered necessary that the document which is forged should be perfectly valid for the purpose for which it is intended. *Rex* v. *Grate*, 1 Ld. Raymond, 737; *Rex* v. *Lyon*, Russ. & R. 255. It would be different though, if the indictment charges the prisoner with forging any particular instrument. In that case, if the instrument is incomplete and not valid, it would not be forgery. This was held in *Reg.* v. *Harper*, 7 Q. B. D. 78, Harper was charged with forging the indorsement on a bill of exchange; there was no drawer's name signed to said bill. The court held that the document bearing no name of drawer was not a bill of exchange, and that Harper could not be convicted of forging an indorsement on a bill of exchange.

The case is different when an instrument complete and valid on its face is forged by several parties. It was held in *Rex* v. *Bingley*, Russ. & R. 446, that if several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.

In the present case, the bond alleged to have been forged is complete and valid on its face. It was signed by three parties. There is no evidence showing whether the two other names were forged, or were genuine names. But this makes no difference as

to this prisoner. The two other names may have been the real names of the parties who signed the said bond, or may have been fictitious names. Sec. 76 of chap. 8, C. S. M., requires that a bond to obtain a marriage license should be signed by the party applying for said license and by two sureties. Being one of the two sureties, his name was required to make the bond complete and valid. And if he signed a name different from his own, he may be properly said to have forged the said bond, as it would not be a valid bond without his name. When a man writes a false name to a bill of exchange or promissory note, he is charged and may be convicted of forging the instrument so signed by him. I do not see that there is any difference if the instrument bears several signatures, as the one false name is sufficient to make the instrument a forged instrument.

So, I think the first question reserved by the learned Judge who tried the cause, may be answered in the affirmative, and the conviction could not be held bad on that ground.

The second question reserved by the learned Judge is as follows: "Were the witnesses William G. Fonseca and Elizabeth Harriett Betsworth, persons, or was either of such witnesses a person interested or supposed to be interested in respect of the bond or writing obligatory mentioned in the indictment, and if so, was their evidence or the evidence of the one so interested or supposed to be interested sufficiently corroborated by other legal evidence in support of such prosecution to satisfy the two hundred and eighteenth section of the Criminal Procedure Act?"

The contention of the defence is that Fonseca who issued the Marriage Licence, was interested to the extent of the fee received by him for issuing the said licence, viz.: one dollar, as if the bond is held forged, the license itself will be void, and he may be compelled to return the one dollar received by him, as his fee.

Was Fonseca really interested? If so, what was his interest? The sense and meaning of section 218 of the Criminal Procedure Act is, that an interested witness may be biassed in his testimony on account of his interest in the conviction of the accused. It has not, and cannot have any other meaning. Here, if Fonseca can have any interest, it is in upholding the validity of the bond, in which case he could not be asked to refund the fee, while if the bond is held forged and the marriage license declared invalid,

he may be requested to return the fee. The argument, therefore, falls to the ground, and Fonseca cannot in any way or sense whatever, be considered an interested witness within the meaning of said section 218 of the Criminal Procedure Act.

As to Elizabeth Harriett Betsworth, if she had been married by a person lawfully authorized to perform marriage, she might or might not be interested, or supposed to be interested in a more or less remote or doubtful way, or think she is so interested in having the bond held forged and the licence declared void; but she knew perfectly well at the trial, that she had been the victim of a bad and contemptible trick, and that the illusory ceremony of marriage she had gone through could have no legal or binding effect whatever. So, she could not be considered more interested to have the prisoner convicted than any complainant whose testimony brings to justice an offender, charged with an offence committed to his detriment.

In my opinion, neither of the two witnesses in question can be considered interested or supposed to be interested within the meaning of section 218 of the Criminal Procedure Act, and the conviction should be held valid.

BAIN, J.—As to the first question reserved by the learned judge, I am of opinion that the evidence was sufficient to maintain the charge in the indictment.

The bond executed by the prisoner under the false name was a joint and several one. It was forged as far as he had to do with it, and his forgery rendered the whole instrument false and fraudulent for the purpose for which it was given. If, as is established by *Rex.* v, *Teague*, Russ. & R. 33, and other cases, evidence of having altered a genuine instrument in a material part, will support the charge of having forged the instrument, I cannot doubt that evidence of having forged one of the signatures of a joint and several bond, will support the charge of having forged the bond.

As to the second question, I am of opinion that W. G. Fonseca, the subscribing witness to the bond who proved its execution by the prisoner, was not "a person interested or supposed to be interested" in respect of the bond, within the meaning of section 218 of the Criminal Procedure Act. This section was

presumably passed with the object of preventing a prisoner charged with forgery from being convicted on the unsupported testimony of a witness who has or may be supposed to have some object to gain in having the instrument in question held to be forged. I do not think Fonseca can be said to have, or can be supposed to have any interest in the instrument, or in the result of the trial, one way or another, and certainly he can have no interest to make it appear that the bond was forged. He issued the marriage licence on the strength of it, and I should suppose would prefer to have the bond held genuine, and on the argument of the prisoner's counsel, he had a direct interest in supposing it genuine.

In my opinion, the provision of the section would be strained and extended far beyond its intention were we to hold that this witness was, or can be supposed to have been interested in respect of the bond. See *Reg.* v. *Giles*, 6 U. C. C P. 89; *Reg.* v. *Hagerman*, 15 Ont. 598; and *Reg.* v. *Selby*, 16 Ont. 255. As the execution of the bond by the prisoner was proved by Fonseca, it is unnecessary to consider whether the other witness, Betsworth, was interested or not.

TAYLOR, C.J., concurred.

Conviction affirmed.

BERNARDINE v. THE RURAL MUNICIPALITY OF NORTH DUFFERIN.

(IN APPEAL.)

Municipal Corporation.—Contract not under seal.

While the defendant's Municipal Council was in session it verbally contracted with the plaintiff for the construction by him of a bridge on a travelled road. During the work some payments were made upon account, and after its completion a resolution was passed accepting the bridge and directing payment. The council afterwards repaired the bridge and it was used by the public. There was no by-law authorizing the construction of the road or the contract accepting or dealing with the bridge.

In an action for the money.

Held, That the contract not being under seal nor it or the work authorized or adopted by by-law, the plaintiff could not succeed.

Motion to set aside nonsuit and enter verdict for plaintiff, or for a new trial.

J. Fisher and *C. P. Wilson*, for plaintiff. The bridge was a necessity, *Young* v. *Corporation of Leamington*, 8 Q.B. D. 586; 8 App. Ca. 523; *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620; *Clark* v. *Cuckfield Union*, 21 L. J. Q. B. 349; *Haigh* v. *North Bierly Union*, 28 L. J. Q. B. 62; *Hunt* v. *Wimbledon*, 4 C. P. D. 48; *Gordon* v. *Toronto &c. Land Co.*, 2 Man. R. 318; The defendants accepted the benefit of the work, *Green* v. *Corporation of Oxford* 15 Ont. R. 506; *Pim* v. *Ontario*, 9 U. C. C. P. 304; *Lawrence* v. *Lucknow*, 13 Ont. R. 421; *Canada Central Ry. Co.* v. *Murray*, 8 Sup. C. R. 328; *Scott* v. *Clifton School Board*, 14 Q. B. D. 500; *Robins* v. *Brockton*, 7 Ont. R. 481. Defendants are liable by acquiescence and ratification. *Reuter* v. *Telegraph Co.*, 6 E & B, 341; *Totterdell* v. *Fareham Blue Brick & Tile Co.*, L. R. 1 C. P. 674; *Re Snell* 5 Ch. D. 815; *Fetterley* v. *Russell*, 14 U. C. Q. B. 433; *Mc Brian* v. *Ottawa* 40 U. C. Q. B. 80. It was the duty of the defendants to build the bridge, *Brown* v. *Lindsay*, 35 U. C. Q. B. 509. *Brown* v. *Belleville*, 30 U. C. C. B. 373; *Nevill* v. *Ross*, 22 U. C. C. P. 487.

H. M. Howell Q. C., for defendants. The document executed by Grant was not an equitable assignment, *Kehoe on Choses in action*, 43, *Brown* v. *Johnston*, 12 Ont. App. R. 190. Defendants not liable even if contract executed, *Borough of Bathurst* v. *Macpherson*, 4 App. Ca. 256; *Wallis* v. *Assiniboia*, 4 Man. R. 89; *Hunt* v. *Wimbledon*, 4 C. P. D. 48. The bridge was ordered in 1882, not built until 1885, it cannot be considered necessary. Ratification is in reality a contract, and must be by by-law, *Scott* v. *Clifton School Board* 14 Q. B. D. 500.

Wilson in reply cited *Wycott* v. *Campbell*, 31 U. C. Q. B. 584; *Brice* v. *Bannister*, 3 Q. B. D. 569; *Pennington* v. *Taniere*, 12 Q.B. 998; *Port of London Ship Owners Loan and Assurance Co's Case*, 5 D. M. & G. 465; *Church* v. *Imperial Gas Co.*, 6 A & E. 846.

(*7th June 1889.*)

KILLAM, J.—The plaintiff sues upon the common counts as assignee of one John F. Grant to recover from the municipality of North Dufferin, the sum of $600 claimed to be the balance due for the erection of a bridge for the municipality, under an alleged contract not under the corporate seal. The defendants pleas are 1. Never indebted. 2. Denying assignment and several others which need not be referred to, as I cannot find evidence sufficient to prove them, and they are not relied on. It appears that on the 15th Sept., 1882, Grant agreed with the council of the municipality of Dufferin North to build a bridge across the River Boyne, on the line of a travelled highway and within that Municipality, but that contract, though in writing and signed by Grant, was not executed by any person on behalf of the Municipality or under its seal, and there is no evidence of any by-law authorizing the work. By the Municipal Act of 1883, Dufferin North was divided into two municipalities of which one is the present defendant, within whose limits the bridge was to have been erected. By the original agreement the bridge was to have been completed in 1883, and Grant was to be paid $200 at the commencement of the work, $200 upon its completion and $400 at the expiration of one year from its completion. It was to be subject to the approval of an inspector to be appointed by the council of the municipality.

The present defendant municipality was organized 1st Jany., 1884, and no work having been done under the agreement, the

council proceeded to inquire into the matter. The terms of the agreement were ascertained and the matter was discussed in council, Grant being sometimes present. Mr. Roblin, who was then reeve of the municipality says that the council found the terms satisfactory and concluded to have the contract carried out, that they ratified the contract and set Grant to work at it. His evidence on any definite action of the council, apart from any resolutions passed is, however very vague and unsatisfactory. It does not appear that any formal resolution was passed upon the subject, until the 29th March, 1884, when there was a resolution authorizing the payment to Grant of $200. It does not appear whether this amount was paid, though the plaintiff gives credit for it. Nothing more was done by the council until the 18th April, 1885, when a resolution was passed directing the clerk to notify Grant that unless he took immediate steps to complete the bridge, his contract would be annulled and the council would proceed to complete the same. The clerk accordingly notified Grant by letter of this resolution. On the 4th July, 1885, a resolution was passed by the council "that the bridge over the Boyne River, between sections 28 and 33, township 6, range 4 west, as built by John F. Grant be accepted and that $200 as per contract be paid into the county court on solicitor's advice less $37, amount already paid on order." The payment of the money into court was determined upon, on account of the existence of conflicting claims under the plaintiff's assignment, and a supposed garnishee attaching order which is not proved.

The bridge is stated to have been a necessary work, to be upon a travelled highway and to have been since kept in repair by the municipality. No by-law authorizing or adopting the work is proved. Beyond what I have stated there is no evidence of any contract to pay for the work, or for the acceptance of it by the municipality, or of its value.

The action was tried before my brother Bain, without a jury. He refused, at first to enter a nonsuit, but after the counsel for the defendant had stated that he would offer no evidence, and full argument being had, a nonsuit was entered on the ground of there being no contract under the defendant's corporate seal.

The plaintiff now moves to set aside the nonsuit and to have a verdict for the full amount of the price of the bridge, less the $200 credited as paid in advance.

We are thus again confronted with the much vexed question of the liability of a corporation upon a contract not under seal, which I do not think that we have yet definitely determined in this Province for a corporation such as the present defendant. The plaintiff relies strongly upon *Harris* v. *The City of Winnipeg*, not reported, as deciding the question with reference generally to executed contracts where the corporation has received and enjoyed the benefit of the work done under it. It is true that reference is there made to *Pim* v. *The Municipal Council of Ontario*, 9 U. C. C. P. 304, as supporting the judgment; but in *Harris* v. *The City of Winnipeg* there were circumstances showing the urgent necessity of appointing some person to take charge of the work and make contracts for carrying it on to some extent without awaiting the action of the council or the making of a contract under seal, which are not found in the present case. In *Pim* v. *The Municipal Council of Ontario*, too, the court appears to have placed some reliance upon the circumstance that the erection and maintenance of the court-house there in question was the especial purpose for which the corporation was formed, and both in that and in *Harris* v. *The City of Winnipeg* the building was to be the property of the corporation, erected upon its land and in the latter case particularly it was used and enjoyed for the purposes of the corporation. We have now to deal with the case of a work erected, not for the benefit of the corporation or those composing it as such, but for the use and benefit of the general public, and the use and enjoyment subsequently had and taken of it is that of the public and of the residents and rate-payers of the municipality only as portions of the general public. The corporation itself, as such, cannot be said to take possession of or use the work, which is a highway for the use of Her Majesty's subjects and those within the Queen's peace generally.

It is evident, then, that we have to deal with a very different case from that which was before us in *Harris* v. *The City of Winnipeg*. The learned judge, in deciding as he did, relied very strongly upon some remarks which, in the house of Lords, in the case of *Young* v. *The Corporation of the Royal Leamington Spa.*, 8 App. Ca. 517, were attributed to Brett, L.J. as having been used by him in the Court of Appeal. That case itself turned wholly upon a clause in the Public Health Act positively requiring contracts for more than a certain sum to be under the corporate

seal of the local authority. The remarks on the general question of the necessity for a corporate seal do not appear in the regular report of the judgments in the Court of Appeal, 8 Q.B.D. 579. They were certainly *obiter dicta* but whether dropped for that reason, or because the learned judge desired to have them left for further consideration, does not appear. The plaintiff here relies upon the argument that the circumstances which I have stated show an acceptance of the work by the corporation which raises an implied contract to pay for it, just as such an acceptance by an individual person, without previous request, is considered by the law to raise such a contract. The case just referred to indicates, what a very cursory perusal of the reports of previous cases would be sufficient to show, how conflicting and unsettled were the previous authorities.

I have gone very carefully over the reports of the English and Canadian cases in any way affecting the question, but I do not think that any useful purpose could be served by my now stating their different circumstances in detail. I propose to limit myself almost wholly to stating the conclusions which I draw from them, and, particularly, such as affect the present case, not desiring to decide the general question any farther than may be necessary for present purposes.

Two questions, which are discussed in the various cases, must not be confused. One has reference to the form of action or the nature of the liability, and the other to the existence of any liability. These are wholly distinct questions, though the discussion of one often involves the discussion of the other. Thus, it has been clearly settled as an abstract proposition that a corporation may enter into a simple contract and be sued in debt or assumpsit. I need only to refer to *Beverley* v. *The Lincoln Gas Light Co.*, 6 A. & E. 829 upon this point. It is when the particular nature and circumstances of the alleged contract relied on in any case, come to be disclosed that it must be considered whether that is one which can be made without the corporate seal.

Now, it is an acknowledged general rule, that a corporation cannot enter into an express contract except under its corporate seal. This rule, also, is subject to exceptions as clearly established as the rule itself. I need not now repeat these; I will simply say that, in my opinion, the case of *The Mayor &c. of Ludlow*

v. *Charlton* 6 M. & W. 815 distinctly determines that a contract with a municipal corporation for the construction of such a work as that now in question is not within those exceptions. Upon that point so far as it concerns an express contract, I cannot find that that case has ever been overruled or even doubted. I take it to be founded upon unanswerable reasoning.

It appears to me, however, that we cannot consider that case as going farther than I have stated. I gather from the report that the plaintiff had to rely wholly upon the request or promise claimed to be shown by the passage of the resolution upon which he acted and the circumstances under which it was passed, and not upon subsequent acts of acceptance.

On the other hand, *Bartlett* v. *The Corporation of Amherstburg* 14 U. C. Q. B. 152, *Fetterley* v. *The Municipality of Russell and Cambridge*, Id. 433 and *Gibson* v. *The Corporation of Ottawa*, 42 U. C. Q. B. 172, do apply the doctrine of an implied contract where the corporations were municipal ones and the works sued for improvements upon the public highways and there were slight circumstances to show subsequent adoption and acceptance of the works.

From the judgments in *The Mayor &c. of Ludlow* v. *Charlton* and from the consideration of the cases generally, it is clear that the exceptions to the rule requiring a contract under the corporate seal are founded upon an implied agency of the head, the officers, or the managing body of the corporation in certain cases; and an implied contract can only, just as an express contract in the excepted cases, arise from the acts or words of the duly authorized agents of the corporation.

It appears to me that Bramwell B. stated correctly the result of the decisions, when he said, in *Hunt* v. *The Wimbledon Local Board*, 4 C. P. D., 48. "The doctrine exists to some extent or to some amount, that where a man has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work, may recover." It is to be observed, however, that the statement is very guarded and he immediately proceeds to suggest certain limitations which I do not repeat or discuss as I deem it unnecessary to do so. Brett L. J. appears almost wholly to dissent from this view, though I do not take it that he does so absolutely with reference to all corporations. He proceeds to point out the difference

between a corporation such as a Railway company, whose directors order works which the whole body of shareholders accept and use for their profit, and a body such as the defendant in that case which was acting for the inhabitants, who could neither accept nor reject the works constructed. And Cotton L. J. said "I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have beneficial enjoyment of anything supplied on the order of this body are not the corporation, but those for whom the corporation act as trustees."

It is evidently with reference to these remarks that Burton J. said in *Silsby* v. *Dunnville*, 8 Ont. App. R., 524, that "some of the cases referred to in *Pim* v. *The Municipality of Ontario* have lost much of their weight as authorities since the delivery of that judgment by the Lords Justices of Appeal."

I feel, then, that we can give less weight than in many instances we might to the long line of cases in Ontario and the opinions of the able judges who, yet not wholly without dissent on the part of others, have decided them.

While, in *Hunt* v. *The Wimbledon Local Board*, Brett L. J., as is usual with him, spoke very positively, Bramwell B. and Cotton L. J., in the remarks which I have cited and in the limitations which the former suggested, plainly showed that they thought there was yet much for discussion in the subject. The decision did not turn upon these points, and I do not take them as determined by their expressions, which, however, appear to me to support the distinction which I draw between this case and *Harris* v. *The City of Winnipeg*.

Now, if this doctrine of an implied contract with a corporation is to be admitted at all, and as is said by Bramwell, B., it must be so to some extent, it must require either actual enjoyment of the benefit of the consideration by the corporation as such, in its corporate capacity, or other acts of acceptance and adoption by such officers or agents as have power to render the corporation liable. If the views suggested in *Hunt* v. *The Wimbledon Local Board* be accepted the former alternative is absolutely essential. I do not think it necessary to determine this for in my opinion neither condition is satisfied.

Now, if we had nothing here, after the execution of the work, but that it was used by those travelling over the highway, it is

clear that this would not be a use or enjoyment of it by the corporation. Any inhabitants or rate-payers of the municipality taking advantage of the bridge would be doing so only as others of Her Majesty's subjects to whom the highways are free, and not by virtue of their relations to the municipality which, in its corporate capacity could neither possess nor enjoy the benefit of the work.

I know of no English case in which a contract for such a work has been implied on the part of a purely municipal corporation. *De Grave* v. *The Mayor and Corporation of Monmouth*, 4 C. & P. 111, was a case in which certain weights and measures were accepted at a meeting of the corporation, so as to bind it, but this may have been regarded as a small matter for which a contract under seal was unnecessary, and the articles would evidently become the property of the corporation and be used by it as such. *Hall* v. *The Mayor &c. of Swansea*, 5 Q. B. 526 was a case in which the corporation was held liable for money of the plaintiff received by officers of the corporation and applied to its use. It is evident, then, that with the weight of the Ontario cases admitted by one of the judges of the Court of Appeal of that Province to be greatly lessened, the burden is very strongly upon the party who asserts the liability of this municipality for such a work as the bridge in question in consequence of the action of its council. If such a liability exists it must be by virtue of the express language of, or by necessary implication from, the statute creating this corporation.

The plaintiff's counsel has referred us to the 44th section of the Municipal Act of 1884 which provides that "The powers of every such municipality shall be exercised by the council thereof." What are the powers of the municipality and in what mode can the council exercise them?

The 43rd section provides that the municipality "shall have all the rights and be subject to all the liabilities of a corporation" and especially to acquire &c. property, to sue and be sued, to "become parties to any contracts or agreements in the management of the affairs of the said municipality" &c. The language of the section is all very general and if interpreted generally would involve the right to make any kinds of contracts for any purposes whatever. Such can never be considered to be intended. We must look elsewhere to find the objects and purposes for which

these corporations are created, the "affairs" to be managed. We find no mention of roads and bridges or similar local improvements, to be constructed or made by the municipality itself, until we come to the 111th section, under which, "the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter enumerated, that is to say; (1) The raising of a municipal revenue . . . . (2) The expenditure of the municipal revenue. (3) Roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality," &c., and giving a large number of other subjects.

Except under these provisions the Act itself gives the municipalities no power whatever to undertake the construction or maintenance of roads and bridges. The only other authority for their doing so is found in the Act 44 Vic. (2nd sess.) c. 5, if, indeed, that be applicable.

Now, either the 111th section gives the only power which the municipalities have in this respect, or it is intended to provide for the mode of exercising that power by the council. There is a wide distinction under the Municipal Act between resolutions and by-laws. The latter are by section 180, required to be under the corporate seal of the municipality.

In my opinion, the construction of the bridge in question by the municipality cannot be considered to have been authorized without a by-law providing for it. It may not be necessary that each contract for such a purpose should be specifically authorized by a by-law. It may be that a party obtaining a contract under the corporate seal of the municipality would not be obliged to inquire whether there was a by-law authorizing the work. These are questions not necessary to be now determined. But it appears to me that the council cannot render the municipality liable by the adoption and acceptance of such a work not contracted for uuder seal of the municipality, and which is not enjoyed and used by the corporation, as such, unless it does so by by-law or under the authority of a by-law authorizlng such construction.

The principal cases in England supporting the plaintiff's claim are those of Boards of Guardians of the Poor or of trading corporations. The difference between the latter and corporations such as those under our Municipal Act have been too often pointed out to require comment now. The purposes for which they are

created, and the nature of the business which they are to transact, often justify the implication of powers in their managing bodies not to be imputed in other cases.

In *Clarke* v. *The Guardians of the Cuckfield Union*, 21 L. J. Q. B. 349, Wightman J. pointed out that these boards were at first unincorporated bodies acting by resolution at a meeting of not less than three, and that they were only made corporations for the more easy execution of the laws affecting them. They do not appear to have been limited afterward to a particular mode of exercising their powers except by implication from their being constituted corporations.

This being, then, the state of the authorities in England, and our municipalities being purely statutory bodies whose powers and the mode of acting of whose councils must depend upon statute, I think that it is impossible to imply authority in the councils to act so as to render the corporations liable to pay for works of this kind, not authorized by by-law, or contracted for under the corporate seal.

It may be suggested that we should infer from the action of the council the existence of a by-law authorizing the work, but I am of opinion that it would be unsafe to do so. The plaintiff made his whole case by calling the former reeve of the municipality and procuring the production of the corporation books. Our statutes provide ample methods of obtaining discovery of acts or instruments supporting the plaintiff's case, and it is only fair to presume that if there were such a by-law, it would be produced. Mr. Roblin states, too, that municipal councils are not very particular about the formality of their proceedings, and it is not unreasonable to suppose that this one of which he was for some years the head, was one whose mode of acting justified his statement.

I think that the nonsuit should stand and the application be dismissed with costs.

TAYLOR C.J.—I have had an opportunity of reading the judgof my brother Killam, and in addition of considering full notes made by him on a critical examination of about seventy cases bearing on the question of the liability of corporations. I agree with the conclusions at which he has arrived, and with the reasoning by which he has supported those conclusions.

DUBUC, J.—It is a well known doctrine that corporations should contract under their corporate seal; but there are exceptions. The principle is laid down in *Church* v. *The Imperial Gas Light Co.* 6 A. & E. at p. 861 per Lord Denman C. J. when he says: "The general rule of law is that a corporation contracts under its common seal; as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions."

The general rule appears to have been strictly adhered to when an executory contract happened to be questioned. But when the contract has been executed, and the corporation has had the benefit thereof, the Court have admitted some exceptions, as for instance, when the thing or work contracted for was considered necessary or urgently required, or when the amount involved is not a large one. It seems that in Ontario, they have been more inclined to give effect to the exceptions; while in England the general rule appears to have been rather more closely followed. However we find a good many English cases in which corporations have been held liable under executed contracts of which they have had the benefit, although the said contracts were not under seal.

In *Sanders* v. *St. Neot's Union*, 8 Q. B. 810, it was held that if work be done for a corporation for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal. Lord Denman who rendered the judgment of the Court, based his decision on the ground that the work was necessary for the purpose of the corporation. It was also on the ground of necessity, that the same Lord Denman based his judgment in *Hall* v. *Mayor of Swansea*, 5 Q. B. 526. That necessity was in *Lowe* v. *The London & N. W. Ry. Co.*, 17 Jur. 376, interpreted by Lord Campbell to mean "no other than a moral necessity that defendants should pay their debt" and by Erle, J., "that it was absolutely necessary that the defendants should be compelled to do that which common honesty required."

The language of Lord Denman in *Sanders* v. *St. Neot's Union* was also approvedly quoted by Wightman J., in *Clark* v. *The Guardians of the Cuckfield Union*, 21 L. J. Q. B. 349. In the course of his judgment, the same judge says: "The corporation

cannot keep the goods or the benefit of the work and refuse to pay, on the ground that, though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting."

In *Haigh* v. *The North Bierly Union*, 28 L. J. Q. B. 62, the guardians of a poor law union employed an accountant to audit their accounts. Resolutions were passed to that effect, but there was no contract under seal. It was held that the plaintiff, having done the work agreed upon, was entitled to recover, although the contract was not under seal.

In *Nicholson* v. *The Bradfield Union*, L. R. 1 Q. B. 620, the plaintiff supplied coal to the defendants, the guardians of a poor-law union, under articles of agreement executed by the plaintiff but not under the seal of the defendants. It was held in an action for goods sold and delivered that as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purpose for which the defendants were incorporated, the defendants were liable to pay for the coal, although the contract was not under seal.

In *Totterdell* v. *The Fareham Blue Brick & Tile Co.* L. R. 1 C. P. 678, the plaintiff entered into an agrement to act as foreman of the company's works, which agreement was signed by the plaintiff and by two shareholders as chairman and managing director respectively, the defendants were held liable. In his judgment Montague Smith J. said. "This agreement was within the scope of the companys' powers, and two directors may have been able to enter into it, either as forming a quorum of directors, acting as a committee to whom they had delegated their authority. This being so, why should not the company be bound? It appears to me that the *onus* is on the company to show that the two directors had not authority to make the contract."

A contrary conclusion was arrived at in *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48, but the work contracted for, viz: the plans made by the plaintiff were found too expensive and were not used; So the defendants did not enjoy the benefit of the contract.

In a comparatively recent case, *Young* v. *The Corporation of Leamington* 8 Q. B. D. 586, the general rule that a corporation cannot contract except under seal, was applied and enforced, although the contract had been executed and the corporation had had the benefit and enjoyment thereof. But it was under a special statute, the Public Health Act, 1875, c. 55, s. 174 which enacts that "every contract made by an urban authority whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal of such authority." The Court held that the said provision was obligatory and not merely directory. The contract there was not only in opposition to the general rule of law in regard to corporations; but was in direct contravention of a special statutory provision applicable to the case. But a contract with a corporation and not under seal was upheld in the more recent case of *Scott* v. *The Clifton School Board*, 14 Q. B. D. 500, under the Elementary School Act, 1870. The plaintiff, an architect, had been appointed in manner prescribed by the Act for the appointment of an officer of the board, which did not require to be under seal. He was on that ground, entitled to recover. But Matthew J. in his judgment said: "If it was necessary for my decision, I should hesitate to regard the cases relied upon by the defendants, when contracts by corporate bodies were held to be under the common seal, to be a safe guide in the present (or indeed in any other case), where the contract was for a purpose incidental to the performance of the duties of the corporate body, and its necessity was shewn by proof that the corporation, with full knowledge of its terms and all the facts had acted upon and taken the benefit of its performance." Further on, he says: "It was contended by the defendants that an architect was not an officer of the board as was contemplated by the regulation, in as much as it could not be supposed that his services were intended to be more than temporary. I cannot adopt this construction."

As hereinbefore stated, the Ontario Courts have shown a still more pronounced disposition to adopt the principle that a corporation should be held liable under its executed contract, though not under seal, when it has enjoyed the benefit of the same.

In *Fetterly* v. *The Municipality of Russell and Cambridge*, 14 U. C. Q. B. 433, there had been, as in the present case, a

division of the municipality originally known as Clarence, Russell and Cambridge. The plaintiff had done work upon a road under a contract with the former municipality. The contract was made with the road surveyor and a councillor of the former municipality appointed for that purpose, in pursuance of a resolution of the council of the said late municipality. An order for the sum agreed upon was given to the plaintiff on the treasurer of the former municipality. The new municipality had accepted the order of the treasurer of the former union. The plaintiff brought his action against the new municipality, and it was held that no difficulty was caused by the fact that the municipality sued was not that contracted with; and that a contract under seal was unnecessary.

In *Pim* v. *The Municipal Council of Ontario*, 9 U. C. C. P. 304, the council had contracted under seal with one Wallace for the erection of a court house and gaol. Wallace failing to complete the building in time, the architect acting under the authority of the building committe tork it out of his hands and employed the plaintiff to finish the building. The plaintiff brought his action, which was defended, and it was held, in appeal reversing the judgment of the court below, that an action may be sustained against a corporation for work and labor done for and accepted by them, without being supported by a contract under the seal of a corporation.

That decision was followed and the same doctrine upheld in *Nevill* v. *The Corporation of Ross*, 22 U.C.C.P. 487; *Brown* v. *The Corporation of Belleville*, 30 U. C. Q. B. 373; *Mc. Brian* v. *The Water Commissioners for the City of Ottawa*, 40 U.C.Q.B. 80; *Gibson* v. *The Corp. of Ottawa*, 42 U. C. Q. B. 172; *Robins* v. *Brockton*, 7 Ont. R. 481; *Lawrence* v. *The Corp. of Lucknow*, 13 Ont. R. 421; *The Canada Central Ry. Co.* v. *Murray*, 8 Sup. C. 313.

The latest case on the subject is that of *Green* v. *The Corp. of Orford*, 15 Ont. R. 506. The work was done by the plaintiff under a verbal order given to him by the engineer of the municipality, without any formal resolution of the council authorizing it, nor any contract under seal; yet the corporation was held liable.

In the present case, there was a contract in writing; it was produced at the trial and is mentioned in the evidence; but it

appears to have been lost and cannot be found among the papers. The learned judge who tried the cause refers it in his judgment and says: "This agreement was in writing and was signed by Grant; but it was not executed by any one on behalf of the municipality nor was its corporate seal affixed thereto. No by-law had been passed authorizing it." This is a feature similar to that found in *Nicholson* v. *The Bradfield Union*. The contract was made with the former Municipality of Dufferin North. When the new municipality came into existence, as the bridge was to be within its limits, they adopted the said contract and after the completion of the said bridge, they passed a resolution accepting it. They had paid the first instalment at the beginning of the work, and the second instalment, at its completion. They also provided the money for the balance, under the terms of the contract, and paid it into the county court. This brings the case within the scope of *Fetterley* v. *The Municipality of Russell and Cambridge*.

The only witness examined was R. P. Roblin who had been reeve of the former municipality when the contract was entered into, who was also reeve of the new municipality when the bridge was constructed and accepted, and when the money was provided to pay for it. He declares that the bridge was on a regular highway; that it was a necessity; that they notified Grant to proceed with its construction; that they set him to work. From all these we must conclude as in *Reuter* v. *The Electric Telegraph Co.* 6. E. & B. 341, that the former contract was ratified, if not authorized by the new corporation, and that it is binding.

The bridge may not have been a work of very pressing necessity as it was allowed to remain uncompleted for a rather lengthy period after the agreement to build it was first made; but as the present defendant municipality adopted and ratified the contract made for its construction by the former municipality, as they instructed Grant to build it, and set him to work in the early part of 1884; as in April 1885, the council notified Grant that unless he took immediate step to complete it, they would annul the contract and proceed to complete the same, they by such persistance and determination to have the bridge constructed, must have felt that the said bridge on a regular highway and travelled road, was urgently required and much needed, this is

the conclusion to be derived from the action of the council. But besides that, we have the positive statement of the reeve that the bridge was a necessity and no evidence was adduced to rebut the correctness of said statement, or even to show anything to the contrary. It cannot be denied that the work was, as held in *Sanders* v. *St. Neot's Union*, "for purposes connected with the corporation," or, as stated by Montague Smith J., in *Tatterdell* v. *The Fareham B. B. & T. Co.*, within the scope of the corporation's powers.

With these facts before us, and under the above authorities, I do not see how the plaintiff can be prevented from recovering on the ground that the contract was not under seal.

The decision in our own Court of *Armstrong* v. *The Portage W. & N. W. Ry. Co.* 1 Man. R. 344, cannot affect this case, because the plaintiff's claim there was on an executory contract.

It was further contended on the part of the defendants that the only power of a municipality to deal with bridges is, under the provision of sec. 113, sub-sec. 3, of the Municipal Act of 1883, by by-law, and that no by-law having been passed, the municipality had no authority to make a contract for its construction. The provision in question reads thus:

"Sec. 113: In every city, town or local municipality, the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter enumerated, that is to say:—(3) Roads and bridges wholly within the municipality; providing," &c.

This section, if strictly construed, shows the different subjects on which the council may pass by-laws. It does not enact that the said council *shall not*, or *may not* deal with such matters without by-law or may deal with such matters *only* by by-law. Such might be the literal interpretation of the said section. I am aware, however, that the wisest and safest course for municipal corporations, and, I may say, their ordinary mode of action to be derived from the meaning of said provision, as well as from the general law respecting corporate bodies should be by by-law. But, if I look at section 46, of the said Municipal Act which enacts that "The powers of every such municipality shall be exercised by the council thereof," and if I take into consideration several of the Ontario cases above cited, decided under a muni-

cipal Act with provisions practically similar to those of our own Act, where corporations were held liable for work done which had not been authorized by by-law, and, in some instances under a mere verbal order, I think I may safely conclude that under the said authorities as also under the English cases quoted, the absence of a by-law in the present case should not be a bar to the plaintiff's right to recover in this action.

Reverting to the main question at issue, and to the general rule that corporations should contract under the corporate seal, it is certainly a very sound doctrine. The object, no doubt, is to prevent fraudulent transactions by which unscrupulous persons might obtain hastily from unscrupulous officials of corporations, through influence, favor or other discreditable means and without the legal formality required in ordinary cases, contracts which might prove useless or disadvantageous to the corporate body. But the exception as to executed contracts made in good faith is an equally sound principle. When a man has straightforwardly made an honest contract with a corporation; when he has supplied the goods or performed the work called for by said contract; when the object of the contract has been necessary or useful and urgently required by the corporation and the corporation has had the full benefit and enjoyment of the same, one does not see why, and on what reasonable grounds the person in question should be prevented from recovering, just because the mere formality of affixing a seal to the contract has been inadvertently omitted.

I am of opinion that the nonsuit should be set aside, and a verdict entered in favor of the plaintiff for the amount of his claim. The appeal should be allowed with costs.

Application dismissed with costs.
Nonsuit to stand.

RE ASSINIBOINE VALLEY STOCK AND DAIRY FARMING CO.

Winding up.—Removal of liquidator.

An application to remove a liquidator and appoint others was granted upon the grounds, (1) that creditors to the amount of $29,123.23 out of a total of $29,451.39 requested the change, (2) that the proposed liquidators would act without remuneration, and (3) that the business connection of one of the proposed liquidators would be of value to the company.

T. D. Cumberland, for creditors.

J. S. Hough and *G. A. Elliott,* for liquidator.

[*19th February, 1889.*]

TAYLOR J.—On the 18th of September, 1888, an order was made under The Winding Up Act, (R. S. C. c. 129) for winding up the business of the Company. The person proposed as liquidator by the petitioner was not appointed, but Mr. Wm. A. Henderson the nominee of a number of the creditors. Since then, the creditors claims have been sent in and adjudicated upon, those allowed amounting in the aggregate to $29, 451.39. An application is now made upon behalf of a large majority in value of the creditors, for his removal and for the appointment of Duncan McArthur and Geo. Wm. Girdlestone as joint liquidators without remuneration. No charge of unfitness is made against Mr. Henderson, but the application is based upon the two grounds, the saving of expence, and that through Mr. McArthur's business connections the proposed liquidators possess facilities for disposing of the assets more favorably than Mr. Henderson. The only chance, it is said, of securing a reasonable dividend for the creditors is, the being able to dispose of the assets *en bloc* to a new company.

The statutory provision as to removing a liquidator is section 27, "A liquidator may resign or may be removed by the court on due cause shown." It seems at one time to have been considered that the court would not remove a liquidator once appointed, except for personal unfitness. *Re Civil Service and*

General Stores, W. N. (1884) 158. But it is not so now. Malins, V.C., in *Re Marseilles Rail. & Land Co.*, L. R. 4 Eq. 692, thought the court may take all the circumstances into consideration, and if it finds that it is, upon the whole, desirable that a liquidator should be removed, it may remove him. To this view he adhered in *Re British Nation Life Association*, L. R. 14 Eq. 492. In *Re Association of Land Financiers*, 10 Ch. D. 269, the same learned judge said, he had only one duty to perform, and that was to see that the assets were realized in the most speedy and least expensive method. In *Re Sir John Moore Gold Mining Co.*, 12 Ch. D. 325, the Master of the Rolls said he was not prepared altogether to adopt the view of V.C. Malins, saying it was difficult to define the extent to which the words in the Act distinguish a case from one in which the ordinary words "if the court shall think fit," are used. "I should say that, as a general rule, they point to some unfitness of the person, it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term." More recently the meaning of the words "on due cause shown," has been considered by the Court of Appeal in England in *Re Adam Eyton*, 36 Ch. D. 299. In that case it was held that the power of removal is not confined to unfitness. The "due cause," it was said, is to be measured by reference to the real, substantial, honest interests of the liquidation. Cotton, L.J., said, "In my opinion it is not necessary in order to justify the Court under this section in removing the liquidator, that there should be anything against the individual."

In the present case the claims proved amount to $29,451.39. The request for the removal of the present liquidator, and the appointment of McArthur and Girdlestone, is made by creditors representing $29,123.23, and opposed by creditors whose claims amount to $328.16. They and the liquidator oppose the appointment of McArthur and Girdlestone, alleging grounds of unfitness on the part of McArthur, and that the request for their appointment was signed by a number of the creditors through misrepresentation.

The charge that signatures were obtained by misrepresentation has not been sustained. Some signatures to the original document may have been attached to it on account

of somewhat exaggerated statements of the excessive cost likely to be incurred by continuing the present liquidator, but after those signing have been written to by the present liquidator as to their reasons for doing so, almost every one of them has signed another paper to the same effect. Indeed I believe the only ones who have not signed it were absent from town.

As to the charges of unfitness against McArthur, there are certainly some transactions on his part in dealing with assets of the company which are not satisfactory, to say the least. The transaction with the Ryan mortgage has caused me difficulty. It seems to me one which should be closely enquired into, and on any such enquiry, his interests and that of the company must necessarily conflict, but the 5th and 6th paragraphs of his affidavit sworn on the 1st of February, 1889, are possibly enough to bind him to submit to redemption in respect of the land in the Ryan mortgage and also to procure the handing over, upon reasonable terms, of the cattle and other chattels of the company of which he is now the owner, or over which he or the Commercial Bank have control. This removes to a large extent my difficulty.

Then too the creditors signing the request for the new appointment, seem aware of all these matters. Of the business capacity of the proposed liquidators, there can, I presume, be no doubt. V.C. Malins said in *Re Association of Land Financiers*. "If I am satisfied that Mr. Sims and Mr. Standing can well perform these duties, and will perform them gratuitously, so as to save the usual expense of an official liquidator, and are supported by those whose interests they are to represent, why should they not be appointed? If this had been a bankruptcy, the creditors and not the court would have selected the trustee or assignee, and when the creditors have by a very large majority desired the appointment of these two gentlemen, I think I ought to accede to the motion. The creditors have a right to the management of their own affairs, not of course personally, as they are too numerous, but by their representatives, and they choose these two gentlemen."

On the whole I think the order should be made removing Mr. Henderson, not on account of any unfitness, but because it seems in the interest of the creditors that the winding up should be

carried on inexpensively and with the advantage of the business connections which Mr. McArthur has.

The remuneration to which the original liquidator is entitled will be the first charge after the costs of the liquidation. The costs of all parties will come out of the estate.

RE McPHILLIPS, AN ATTORNEY.

Attorney's undertaking.—Summary jurisdiction.

An attorney having an execution in the sheriff's hands, and the sheriff requiring security before seizure, the attorney's partner wrote to the sheriff agreeing to indemnify him. The sheriff seized, was sued, and judgment went against him. Upon a summary application to enforce the undertaking,

Held, 1. That the undertaking was that of the writer personally.

2. That it was given in a professional capacity and might be summarily enforced.

3. But that the sheriff having acted improperly in the seizure, and so incurred a greater liability than that against which he was indemnified, he should be left to his action.

Rule *nisi* calling upon L. G. McPhillips an attorney, to show cause why he should not perform an undertaking to indemnify the sheriff for seizure, &c.

A. E. McPhillips, showed cause. The undertaking was not given in the character of attorney, *Thompson* v. *Gordon*, 4 D. & L. 49; *Exparte Watts*, 1 Dowl. 512; *Walker* v. *Arlett*, 1 Dowl. 61; *Lewis* v. *Nicolson*, 18 Q. B. 503; *Re Hilliard*, 2 D. & L. 919; *Re Kearns*, 11 Jur. 521; *Lewis* v. *Nicholson*, 16 Jur. 1041. As to waiver, *Miller* v. *James*, 8 Moore 208; *Ex parte Clifton*, 5 Dowl. 218.

J. S. Hough, in support of rule. The undertaking was a personal one. There was no qualification, *Hall* v. *Ashurst*, 1 C. & M. 714; *Burrill* v. *Jones*, 3 B. & A. 47. As to enforcing under-

taking summarily, *Archbold's Practice*, 103; *Lush*, 217. As to time of applying, *Re Swan*, 15 L. J. Q. B. 402. As to waiver, *Corbett* v. *O'Reilly*, 8 U. C. Q. B. 130. As to power to bind partner by undertaking, *Re Toms & Moore*, 3 Ch. Ch. 41; *Archbold*, 101.

(*15th October, 1888.*)

KILLAM, J.—This is an application to compel Mr. L. G. McPhillips, an attorney of this Court, to perform an undertaking to indemnify the sheriff of the Central Judicial District against all loss, damages or expenses to be incurred in seizing certain goods as those of one Findlay under an execution at the suit of Thibaudeau Brothers & Co. The goods were in the possession of one Stewart who claimed to have bought them from Findlay, and on being requested by Mr. McPhillips by whose firm the execution was issued, to seize the goods, the sheriff requested a bond of indemnity. The bond was prepared, but before it was executed Mr. McPhillips wrote the sheriff requesting him to proceed without waiting for it to be completed, and this letter contains the undertaking relied on.

The sheriff seized and on a claim being made by Stewart, an interpleader application was made. When the summons came up the creditors abandoned all claim, and an order was made directing the sheriff to withdraw from possession. For some reason the order was not at once obeyed, but some unnecessary delay appears to have occurred on the part of the sheriff or his bailiff. Subsequently Stewart brought an action against the sheriff, his bailiff and the creditors, and twice recovered large damages of them, a new trial having been granted them after the first verdict. The creditors paid the amount finally recovered and Stewart's costs, but neither they nor their attorneys ever paid the sheriff's costs of defence for which his attorney has recovered a judgment against the sheriff.

It is claimed that the undertaking contained in the letter was given by Mr. McPhillips only as agent for his clients and that it is binding on them alone; also, that it cannot be enforced summarily as not being given by him in a professional capacity, his brother being the attorney on the record; also, that it was waived by a subsequent threat of the sheriff's attorney to sue the clients for the costs incurred; also, that the action against the sheriff

and the others was induced only by acts of the bailiff who seized in excess of his duty and by the sheriff's delay in withdrawing.

For similar reasons to those expressed in *Burrell* v. *Jones*, 3 B. & A. 47, I take the undertaking to be the personal undertaking of the attorney. Upon grounds similar to those expressed in *re Aitkin*, 4 B. & A. 47 and *De Woolfe* v. ——, 2 Ch. 68, I would consider this undertaking to be given in a professional capacity and enforceable as such, although this is not a case of attorney and client. Surely such a communication with the sheriff must be so understood when made by an attorney seeking to enforce an execution. Such an officer as a sheriff seems peculiarly entitled to such protection from the court. That a partner was the attorney named on the record can make no difference. Mr. McPhillips was not an outside party seeking to intervene as a surety or as mere agent of the creditor. The evidence shows that he was the active attorney in the cause. As to the waiver there is no evidence that the sheriff's attorney had authority to waive the personal liability of Mr. McPhillips or the right to have it enforced summarily.

The last objection, however, presents more difficulty, It certainly appears from the evidence taken at the trial that some claim for damage through somewhat high-handed acts of the bailiff was made, and also a claim for the whole time of detention of the goods. I think now, as I did at the trial, that if the creditors were parties to the seizure, the retention of possession after the order to withdraw was a continuation of the joint trespass for which, as well as for the seizure and previous detention, all the parties were liable to Stewart. But, as between the sheriff and the creditors, the former alone should bear the loss arising from any delay longer than was necessary to forward instructions to the bailiff. It is reasonable to suppose that the damages awarded covered the whole period. It is impossible to sever them now.

In *Miller* v. *James*, 8 Moore 208, an application such as the present is said to be one to the discretion of the court. In view of the circumstances mentioned, I think that it would be improper thus to enforce this undertaking, but that the sheriff must be left to his action on the agreement to indemnify against the attorney or the client as he may be advised. It is not wholly unimportant, besides, that the sheriff does not appear to have paid any costs. The court could not order payment to his attor-

ney direct, and though in some such case the undertaking might be enforced and complied with, no costs might ever be paid to the attorney. The rule will be discharged without costs. No costs of the examination of Mr. McPhillips will be allowed.

STEPHENS v. McARTHUR.

(IN CHAMBERS.)

Interpleader issue.—Form of.—"The goods or any part thereof."

It is immaterial whether an interpleader issue refers to "the goods seized," or "the goods seized or any part thereof." Under the former words the claimant may prove for a portion of the goods seized.

An order was made on the application of a sheriff, directing an issue to try whether the goods seized were the property of a claimant as against an execution creditor, and an issue was delivered thereunder. A motion was now made by the claimant to amend the order and issue by inserting the words, "or any part thereof."

F. C. Wade, for the claimant.

G. A. Elliott, for the execution creditor.

T. D. Cumberland, for the sheriff.

(*19th March, 1889.*)

TAYLOR, C.J.—The form of interpleader issue given in *Chitty's Forms*, p. 825, no doubt, is whether certain goods "were, or some part thereof was," the property, &c. A similar form is found in *Cababe on Interpleader*, p. 174, and that is in several cases, spoken of as the ordinary form. That was the form in *Lott* v. *Melville*, 9 Dow. 882; *Staley* v. *Bedwell*, 10 A. & E. 145. In *Lewis* v. *Holding*, 2 M. & G. 875, the issue was as to five horses, "or one, or some of them." In other cases, as *Gadsden* v. *Barrow*, 9 Ex. 514; *Edwards* v. *English*, 7 E. &

B. 564; *Shingler* v. *Holt*, 7 H. & N. 65; *Chase* v. *Goble*, 2 M. & G. 930, it seems to have been the same as the issue in this case. The form of order given both in *Chitty* and *Cababe* merely directs an issue to try whether the goods were the property, &c. The form of order and issue here, is the one which I understand has been in common use in this Province. It seems immaterial whether the words now sought to be introduced are used or not.

In *Plummer* v. *Price*, 39 L. T. N. S. 38, 657, the form of the issue was, "Whether the goods or any part thereof, were the goods of the claimant," &c. On a summons to shew cause why the words "or any part thereof" should not be struck out, or why the claimant should not specify what goods he claimed. Cleasby, B., ordered the issue to stand as settled, but the Common Pleas Division ordered (26 W. R. 45) the claimant to specify the goods claimed by him. He went to trial without complying with this order, and had a verdict for the greater part of the goods. The Court ordered him to pay the costs of the issue, but on appeal that was reversed, and the claimant held entitled to a verdict and his costs. "I am clearly of opinion" said Bramwell, L.J., "that the form of the issue is of no consequence. It is directed for the purpose of informing the conscience of the court. The issue is not decided against the claimant if he claims all the goods, and it turns out that he is only entitled to some, but it is to be taken distributively, and it means, Are the goods or part of them, and if so, what part, the property of the claimant?" See also *Feehan* v. *Bank of Toronto*, 10 U. C. C. P. 32.

The order and issue should stand as they have been settled.

ANDERSON v. JOHNSON.

(IN CHAMBERS.)

Capias.—Cause of action doubtful.—Misnomer.

The affidavit upon which a *capias* issued disclosed a good cause of action, but examination upon it rendered success very doubtful. Upon a motion to set aside the writ,

Held, That the court should not interfere unless it was very clear that the plaintiff must fail.

The affidavit gave the defendant's name as "J. Berkwin Johnson." His proper name was "Berkwin Johnson," but he had been sued and had pleaded as "J. B. Johnson," and admitted that he frequently used the "J." as a distinguishing letter. In the order and writ the name was "J. B. Johnson."

Held, That the order and writ were defective, but might be amended upon payment of costs.

Summons to set aside a *capias*, or to discharge defendant from custody. The action was brought for breach of promise of marriage.

T. D. Cumberland, for plaintiff, showed cause. A judge will not discharge a defendant from custody unless upon the strongest evidence that there is no cause of action, *Willett* v. *Brown*, 8 Pr. R. 468; *De Lisle* v. *De Grand*, 3 Pr. R. 105; *Robertson* v. *Coulton*, 9 Pr. R. 16; *Damer* v. *Busby*, 5 Pr. R. 356. Amount can be reduced, but order not set aside, *Green* v. *Hammond*, 3 Man. R. 97; *Laing* v. *Slingersaw*, 12 Pr. R. 366; *Wilson* v. *Storey*, 2 Pr. R. 304; *Fisher* v. *Magnay*, 1 D. & L. 40.

N. F. Hagel, Q.C., and *G. H. West*, for plaintiff, in support of summons. As to name not properly given, no case has been cited where the name of a man arrested under a *capias* has been amended. *Archbold*, 760; *Lake* v. *Silk*, 3 Bing. 296; *Callum* v. *Leeson*, 2 Dowl. 381; *Pegg.* v. *Campbell*, 1 Pr. R. 328.

(*15th April, 1889.*)

DUBUC, J.—The defendant has been arrested under a writ of *capias*, and applies to be discharged on the following grounds:

1st. because the plaintiff has no cause of action; 2nd. because his name has not been set forth fully and correctly in the order to hold to bail and writ of *capias*.

The action was for breach of promise of marriage, and the order for the writ was obtained after action commenced, issue joined, notice of trial given and countermanded.

The affidavit on which the order was obtained disclosed a good cause of action; the plaintiff swearing that the defendant and herself had been engaged to be married and he was now unwilling to marry her; that he was about to quit Manitoba, &c.

She was examined on her affidavit, and in her examination, while relating the different conversations she had with the defendant about marriage, she did not disclose an actual promise by the defendant to marry her. But she was there to answer the questions put to her by the defendant's counsel, and not necessarily to make out her own case. Her statement in her affidavit about the promise of the defendant to marry her is corroborated by the affidavit of Margaret Anderson, her mother in law, who mentions some admissions made to her by the defendant. If the case had been fully tried with no better cause of action shown than there is now before me, I do not think a verdict could be entered for the plaintiff, but as stated by Park, B., in *Pegler* v. *Hislop*, 1 Ex. 437, the court should not interfere, unless it is a very clear case that the plaintiff has no cause of action. The same doctrine was adopted in *Delisle* v. *Degrand*, 3 Pr. R. 105.

In *Willett* v. *Brown*, 8 Pr. R. 468, where the defendant was arrested on a *ca. re.*, and it was doubtful whether the debt was actually due or not, the court refused to discharge the defendant although the judge who granted the order for the writ would not have done so if all the facts had been before him.

Here, the evidence does not disclose a clear cause of action; but it does not clearly show and satisfy me that a cause of action does not exist and may not be proven. Under such circumstances, I do not think that the defendant should be discharged from custody on that ground.

As to the misnomer, the correct name of the defendant is Berkwin Johnson. He had been sued as J. B. Johnson and had appeared and pleaded as J. B. Johnson. In the affidavit on

which the order for the writ was obtained the plaintiff gives the full name of the defendant as J. Berkwin Johnson. But in the order and in the writ he is described as J. B. Johnson. In his own affidavit, the defendant says that the letter J. has been used by him for the purpose of distinction.

The name of the defeudant as stated in the affidavit cannot be held to be materially defective. The correct name "Berkwin Johnson" is set forth, with the addition "J," which the defendant says he used for the purpose of distinction.

In the order and writ, the name is defectively set forth; but I do not think that the defect is such as to render them void. In *Archbold's Q. B. Prac.*, p. 777, it is stated that a defect in the writ which does not render it void, may be amended if the plaintiff's conduct has not been oppressive, and the defendant has not suffered by the defect.

In *Bilton* v. *Clapperton*, 9 M. & W. 473, where an affidavit of debt described the plaintiff as "Walter Bilton the younger," but in the *capias* he was described as "Walter Bilton" only, his father bearing the same name and residing in the same town as himself, the writ was held defective, but the court allowed the plaintiff to amend it on payment of costs.

I think I will follow the principle adopted in this last case. No order will be made for the discharge of the defendant; but the plaintiff will be allowed to amend on payment of costs.

And, as there is some doubt as to whether a real cause of action is existing, I think the bail should be reduced to $200.

SCOTT v. GRIFFIN.

Taxation.—Accountant in master's office.—Attendance there of parties or experts.

The master has power to direct the appointment of an accountant and to tax the payment of his fee.

Although the general rule is, that nothing can be taxed for the preparation of accounts directed to be brought into the master's office, yet in a partnership case, when it was not the duty of either party to prepare them, a disbursement for their preparation was allowed.

No allowance beyond ordinary witness fees can be made for the attendance in the master's office during the passing of accounts, of a person specially familiar with them. Nor to a party to the cause so attending.

H. E. Crawford, for plaintiff.

W. H. Culver, for defendant.

(*2nd November, 1888.*)

TAYLOR, C.J.—The defendant Griffin appeals against the taxation of costs in this case, seeking to have three items allowed by the master, struck out of the plaintiff's bill, and to have one item, which was disallowed, added to his own. The three items allowed by the master are items of disbursements which he allowed because he found in the master's book entries made by the late master requiring them to be paid by the plaintiff.

The first item is a payment to an accountant appointed by the master as an expert to investigate the partnership books and accounts. In this Province the master has power under G. O. 148, to employ an accountant. It is a power which should be cautiously and sparingly used, resorted to only in cases of difficulty. When the master decided to appoint an accountant the defendant was represented by his solicitor, and not only did he not object to such an appointment, but suggested the name of the person to be appointed. The person then named was unable to undertake the work and another was named by the master in his place, the defendant being on that occasion also represented by his solicitor, and making no objection. In Ontario, the master has not as here the power to employ an accountant, but in

Re Robertson, 24 Gr. 555, the master having appointed one, Proudfoot, V.C., held that a party having assented to the appointment, he could not afterwards object to the allowance of the remuneration.

Another item objected to is a sum paid by the plaintiff under the master's direction for the preparation of the partnership accounts for filing in the master's office. Ordinarily a party making a claim must, at his own expense, prepare the necessary accounts for establishing his claim, the only taxable item being perhaps the copy required to be filed. This is a different case. The suit is one for taking partnership accounts in which all the parties were interested. There was no reason why one should be required to prepare and bring in the accounts, more than another. The master directed the plaintiff to bring them in and that he should be allowed the reasonable expenses of the former book-keeper of the firm, in preparing them. It was, I think, very reasonable and proper for the master to make such a direction.

These two items were further objected to as of excessive amount. They seem somewhat high, but I have no means of determining what would be proper amounts. The master exercised his discretion in fixing the amounts, and the plaintiff paid both in good faith under the master's directions. I cannot under these circumstances interfere, and the appeal as to these items should be disallowed.

The next item is a sum allowed also by direction of the master, to the former book-keeper of the firm for attending in the master's office during the examination of witnesses, and the taking of the accounts, apparently looking up entries in books, and hunting up and producing vouchers. I can find no authority for such an allowance being made, and this item should be reduced to the amount properly payable to the book-keeper as a witness when examined, said to have been three days, for one of which he was paid by the defendant Griffin.

The item which the defendant seeks to add to his bill is the amount of his expenses coming to Winnipeg and while attending upon the reference. At the time of the argument, I said I did not see how this could be allowed, and I have found nothing to change my opinion then expressed. He was here, he says in his affidavit of disbursements, as a necessary witness on his own

behalf, and to instruct his solicitor. He was not examined as a witness, and it is not shown that his evidence was rendered unnecessary on account of the plaintiff having abandoned part of his claim, or having failed to give evidence on some particular point which he was prepared to meet, and expected to have to meet. No allowance is ever made to a party for his expenses attending a trial merely to instruct his solicitor.

The plaintiff succeeds as to three items and the defendant as to one. They should have costs according to that proportion.

Perhaps the simplest way will be to allow the appeal in respect of the one item, reducing it to the proper witness fees for two days, and to dismiss the appeal as to the other items, with $10 costs to be paid to the plaintiff by the defendant. In this way the expense of a reference back to the master will be avoided.

NOTE.—This judgment was affirmed upon appeal to the Full Court.

THE NORTH WEST FARMER v. CARMAN.

(IN CHAMBERS.)

Garnishee.—Costs.—Affidavit disputing liability.—Form of.

A garnishee upon the first return of a summons to pay over, filed an affidavit alleging an assignment of the debt by the judgment debtor previous to attachment; and also denying the existence of the debt but this denial was not in sufficient form.

Held, That the plaintiff might elect to abandon the proceedings without costs.

In answer to a summons calling upon garnishees to pay over, an affidavit was filed setting up an assignment by the judgment debtor. Affidavits were also filed from several of the garnishees denying their indebtedness. The plaintiff not desiring to contest the assignment, claimed to be entitled to abandon further

proceedings without paying costs, on the ground that the affidavits of the garnishees were not sufficient in form. These were all alike and were as follows, "I am one of the above named garnishees. I am not indebted or liable to the above named judgment debtor J. A. C. in any sum of money whatever. Any transactions between the said J. A. C. and myself were fully settled before the 6th day of March instant."

J. H. D. Munson, for the plaintiff.

J. S. Hough, for garnishees.

(*28th March, 1889.*)

TAYLOR, C.J.—This is the first return of the summons, and the plaintiff does not desire to contest the validity of the assignment which is worn to. Where an assignment is thus set up and the plaintiff is at once prepared to abandon further proceedings, I think he should be allowed to do so without costs. In the case of an interpleader summons, if the judgment creditor upon the production of the claimant's affidavit is satisfied with it, and does not desire to take an issue, he is barred without paying costs. The present is a somewhat analogous case.

Should the plaintiff be made to pay costs because the garnishees, in addition to filing affidavits from the judgment debtor and the bookkeeper of the assignee setting up an assignment, also filed their own affidavits denying indebtedness, in the form they have done here? I think not. Such an affidavit should, I think follow the words of the statute and the attaching order, and deny that there is any debt, obligation or liability owing or accruing to the judgment debtor. Many persons would swear to such an affidavit as there is here, and would do so without any evil intent, who would refuse to do so if their attention was directed to the fact that they must negative not merely a present indebtedness and liability for a sum of money, but also any obligation or liability accruing due in the future. The affidavits as worded, do not seem to me satisfactory, and the plaintiff should be at liberty to abandon further proceedings on this summons without costs.

LAVALLE v. DRUMMOND.

Real Property Act.—Trial of issue.—Costs.

An order directing the trial of an issue under the Real Property Act should reserve all further questions, including the question of costs, until after the trial of the issue.

An issue under The Real Property Act, having been ordered to be tried by a judge without a jury, a question was raised on settling the order as to how the costs should be dealt with. The order as drawn up by the caveatees, the plaintiffs in the issue, reserved all questions of costs "to be disposed of by the judge at the trial of the said issue."

G. A. Elliott, for the caveatees.

C. W. Bradshaw, for the caveator.

(*21st March, 1889.*)

TAYLOR, C.J.—The order after directing the issue, specifying the question to be tried, and providing for the mode of trial, should reserve all further questions and the question of costs until after the trial of the issue, as is the practice in the case of an ordinary interpleader issue.

If the issue is entered to be tried at the Court of Assize, the judge presiding there can only at the trial enter a verdict in favor of the plaintiff or defendant in the issue, as the case may be. He cannot deal with the matter beyond that. Then after the verdict has been entered, the record with the verdict endorsed comes back to the Court of Queen's Bench when, unless the verdict is moved against by the unsuccessful party, an order is made disposing of the questions between the parties, including the question of costs, based upon the verdict found on the issue.

If tried on a Tuesday it is the same thing. It can be so entered for trial under section 24 of The Queen's Bench Act, 1885, *Douglas* v. *Burnham*, 5 Man. R. 261, but a judge sitting and trying actions entered under that section, has in respect of them just the same powers and authorities as a judge of Assize and *Nisi Prius*.

REGINA v. BURKE.

Extradition.—Identity of charge.—Foreign Depositions.—Condensed Depositions.—Evidence for Extradition—Accessories.—Statute passed after Extradition Act.

The information upon which the original warrant for the arrest of the prisoner issued, was sworn on the 20th June. It was afterwards amended and re-sworn on the 2nd July. The prisoner in fact came before the extradition judge on the 26th day of June. The caption of the evidence given before the judge, stated that it was taken in the presence of the prisoner, "who is charged on the 26th day of June, 1889, and this day before me," &c, The charge in the information and the caption of the evidence were identical.

Held, That the evidence so taken could be read in support of the information.

Foreign depositions may be read although not taken in the presence of the prisoner.

Depositions were taken by a stenographer before a grand jury in a foreign country. From these a shorter statement was made by an attorney, who swore that he omitted nothing material. The witnesses were then with this shorter statement sent back to the grand jury. When tendered in evidence here, the depositions appeared to be properly certified as having been signed and sworn to by the witnesses.

Held, That such depositions were admissible.

Foreign depositions more in the form of affidavits than depositions may be admissible in evidence here.

The evidence necessary for extradition must be as strong as (in the case of a domestic offence) that necessary for committal for trial.

Upon appeal, the finding of the single judge as to the weight of evidence will not be interferred with.

The foreman of a grand jury is an "officer" who can certify to depositions in order that the same may be used here.

DUBUC AND KILLAM, JJ.—The offence of being accessory to a murder is included in the offence of murder under the Extradition Act.

TAYLOR, C J.—In determining whether the offence charged constitutes a crime within the Extradition Act, the law of the date of the offence governs and not that of the time of the treaty.

This was an application for a writ of *habeas corpus*. The applicant had been arrested and charged with having committed

a murder in Chicago, and an order had been made for his extradition.

H. M. Howell, Q.C., and *T. D. Cumberland*, for the prosecution showed cause. They cited with reference to the requisite evidence, *Re Hall*, 8 Ont. App. R. 39; *Re Phipps*, 1 Ont. R. 606, 607; 8 Ont. App. R. 87; *Re Reno*, 4 Pr. R. 299; *Re Morton*, 19 U. C. C. P. 18; *Re Lee*, 5 Ont. R. 596. As to the jurisdiction of the magistrate, *Re Weir*, 14 Ont. R. 391; *Re Huguet*, 29 L. T. N. S. 41; *Re Maurer*, 10 Q. B. D. 513. As to the extradition of accessories; the first Canadian Act came in force by proclamation on 8th August, 1868, it was held of no force because the English Act was in force. The Imperial Acts of 1870 and 1873, were in force in Canada until December, 1882. Nothing said in the Ashburton Treaty about accessories, but Extradition Acts can extend the treaty to a crime not strictly within the terms of the treaty. *Re Phipps*, 1 Ont. R. 609. Accessories are liable to be surrendered, 33 & 34 Vic. c. 52. R. S. Can. c. 145, ss. 1, 3. *Reg.* v. *Browne*, 6 Ont. App. R. 400. As to the objection that the depositions taken before the foreman of the grand jury should not be admitted, see *Re Phipps*, 1 Ont. R. 590; *Re Counhaye*, L. R. 8 Q. B. 415. If there is any error, in the caption of the depositions taken, affidavits explaining same can be allowed, *Reg.* v. *McNaney*, 5 Pr. R. 438; *Re Thompson*, 6 H. & N. 193. If there be sufficient evidence without the inadmissible evidence, then prisoner will not be discharged. *Re Huguet*, 29 L. T. N. S. 41.

W. E. Perdue and *Isaac Campbell*, in support of the rule. An accessory before the fact is not extraditable. As to interpretation of treaty they cited, *Re Windsor*, 6 B. & S. 521. Statute does not make the offence of being accessory, murder, *Wharton's Criminal Law*, 267; *Russell on Crimes*, vol. 1, p. 641; Criminal Procedure Act, s. 109; *Reg.* v. *Browne*, 6 Ont. App. R. 400. Difference between accessory and principal in second degree, *Reg.* v. *Jeffries*, 3 Cox. 85; *Reg.* v. *Cruse*, 8 C. & P. 541. The depositions read here were only extracts from the original depositions. *Taylor on Evidence*, 437, 438, 484; *Alcock* v. *Royal Insurance Co.*, 13 Q. B. 292. All evidence under commission must be read, *Temperley* v. *Scott*, 5 C. & P. 341. Evidence must be taken as by law of this Province, R. S. Can. c. 139, s. 10; *Taylor on Evidence*, 512. The test as to

sufficiency of evidence is, Is there evidence on which a judge would leave the case to a jury? See rule laid down in *Re Weir*, 14 Ont. R. 391.

H. M. Howell, Q.C., as to accessories, *Reg.* v. *Browne*, 31 U. C. C. P. 505; *Re Hall*, 3 Ont. R. 338; *Reg.* v. *Browne*, 6 Ont. App. R. 400; *Wharton's Conflict of Laws*, § 836.

(*30th July, 1889.*)

TAYLOR, C.J.—On the 10th of July instant, Mr. Justice Bain, acting judicially in an extradition matter under the provisions of the Extradition Act, R. S. C., c. 142, after a lengthened investigation, determined that Martin Burke, *alias* Martin Delaney, *alias* Frank Williams, *alias* W. J. Cooper, should be surrendered in pursuance of the said Act, on the ground of his being accused of the crime of murder, within the jurisdiction of the State of Illinois, one of the United States of America, and of the United States of America, and issued a warrant accordingly for his detention. On the 24th of July a rule was issued upon the application of Burke, calling upon the keeper of the common gaol of the Eastern Judicial District and John C. McRae, the persons to whom the warrant was addressed, to appear and show cause why a writ of *habeas corpus ad subjiciendum* should not issue to bring up his body before the court, and why he should not be discharged from custody. The information, depositions, warrant and all other proceedings have been returned by Mr. Justice Bain under a writ of *certiorari* addressed to him. The rule was argued before the full court on the 25th and 26th days of July, and has now to be disposed of.

The grounds urged in support of the rule are, substantially, that the depositions taken in the United States are not admissible in evidence owing to the manner in which they were taken, that the evidence taken before Mr. Justice Bain cannot be read, because shown on the face of it to have been taken upon some other information than the one which has been returned, that the depositions and evidence, even if admissible, do not show the applicant to have been guilty of any extradition crime, and that, if they show anything, they only show the applicant to have been an accessory, and accessories are not liable to extradition.

Dealing first with the question of the admissibility of the evidence, it seems to me that the evidence before my brother Bain is

not open to the objection which is taken. It is quite true that in the caption to this evidence, it is stated that it was taken in the presence and hearing of Martin Burke *alias* W. J. Cooper, *alias* Martin Delaney, *alias* Frank Williams, who is charged on the 26th day of June, 1889, and this day before me for that the said Martin Burke, etc., did commit the crime of murder, etc., setting out the crime charged specifically.

The information upon which the original warrant for the arrest of the applicant issued, was sworn on the 20th of June, and then, having been amended, was re-sworn on the 2nd of July. The applicant was, as appears from the affidavit of Mr. Howell, in fact charged before the judge upon the 26th of June, that is, on that day he was before the judge upon a charge identical with that now set out in the caption, and two witnesses were examined. The information having afterwards been amended and re-sworn, the evidence of these witnesses was read over to them, and re-sworn by them, at a later date.

The caption shows the name of each witness, that he was sworn, the date on which his evidence was taken and before whom, that it was in the presence of the accused, and that the accused was "this day," that is, on the day on which the evidence was taken, charged with the offence which is set out. It does not seem necessary that the caption should set out the date of the information, and no matter whether there was another charge on the 26th of June or not, or what the nature of that charge, if any, was, he was, "this day," that is, on the day the evidence was taken, "charged for that the said Martin Burke, *alias* Martin Delaney, *alias* Frank Williams, *alias* W. J. Cooper, did commit the crime of murder in the State of Illinois, one of the United States of America, to wit that the said Martin Burke, *alias* Martin Delaney, *alias* Frank Williams, *alias* W. J. Cooper, on or about the 4th day of May in the year 1889, at the City of Chicago, in Cook County, in the State of Illinois, one of the United States of America, did feloniously, wilfully and of malice aforethought, kill and murder Patrick H. Cronin," and the evidence taken has relation to that charge.

The evidence of Donald McKinnon the constable, does not seem to me open to the objection made to it. Whatever may be said of the practice sometimes improperly resorted to by police officers, of questioning prisoners, and however strongly such a

course may be reprobated, the questions put here by McRae the chief of police, do not seem so objectionable. The questions put by him to the applicant, seem to have been only as to his name and residence, and intended merely to get the information necessary for making the usual entries on the charge sheet or register, the record kept in the police office of all persons brought there under arrest.

The depositions taken before the grand jury at the Criminal Court of Cook County in Illinois, the depositions sent here for use upon the extradition proceedings, as having been so taken, are objected to, because, it is said, they are not the depositions of the witnesses, but only an abstract of them. They are certified in proper form as the depositions. From the evidence of Mr. Baker, the Assistant United States Attorney, it appears that, witnesses were examined at great length before the grand jury, a stenographer being present, who took down the questions and answers, then Mr. Baker using the evidence so taken down, prepared the present depositions in shortened form, omitting, he says, nothing that was material, and the witnesses were then, with the depositions so prepared, sent back before the grand jury. They appear now, properly certified by the foreman of that grand jury, as having been signed by the witnesses and sworn to on the 19th of June. The foreman of the grand jury had power to administer the oath to, and the grand jury had power to examine, any witnesses sent in to them by the attorneys for the State, in relation to any enquiry they were then making into any case for the purpose of finding or ignoring an indictment. Such an enquiry was then pending before the grand jury, and an indictment was found on the 19th of June, the day on which the depositions now produced were sworn to. What occurred on that occasion in the grand jury room, we do not know, but on the well known maxim, *omnia presumuntur rite esse acta*, we must presume that the witnesses were first sworn, and then the indictment found, not that the indictment was first found and then the witnesses sworn, when the enquiry was over and nothing pending before the jury in relation to which the evidence could be taken.

Before dealing further with these depositions, those taken before the magistrate, Mr. Sweeny, may be referred to as some of the objections are common to both sets. These are objected

to as having been taken without authority, and not in relation to any charge then pending before him. This, however, is not the case. On the 19th of June, an information was laid before him, he issued his warrant for the arrest of the applicant, and then, the depositions were sworn to by the various witnesses. These depositions are identical with those sworn to before the grand jury, and the further objection is, that they are not depositions such as are required by the Extradition Act, the very words of the witnesses taken down in answer to questions put to them, but are properly mere affidavits. This objection applies equally to the depositions said to have been taken before the grand jury. Now, even assuming that this is not evidence taken, as a magistrate here proceeding under The Criminal Procedure Act, R. S. C., c. 174, s. 69, would have taken it, I do not think it should be excluded by reason of section 10 of R. S. C., c. 139, which says, "In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the Province in which such proceedings are taken shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings." One of the "other Acts of the Parliament of Canada," the Extradition Act has said in section 10, "Depositions or statements taken in a foreign state on oath, or on affirmation, where affirmation is allowed by the law of the state, ... may be received in evidence in proceedings under this Act." It may, I think, fairly be assumed that depositions, no matter how taken, if taken according to the practice, or in a way which would render them admissible in the foreign state, should be received here. The Imperial Act 33 & 34 Vic. c. 52, says in sec. 14, "Depositions or statements on oath taken in a foreign state . . . . may, if duly authenticated, be received in evidence in proceedings under this Act." Mr. Justice Blackburn in *Re Counhaye*, L. R. 8 Q. B. at p. 415, said, that section "makes any depositions on oath receivable in evidence," and again at p. 416, "We are, I believe, also all agreed that section 14 makes depositions properly authenticated, evidence in proceedings under the Act, whether they are taken in the particular charge or not, and whether taken in the presence of the person charged or not. In most European states, I believe it is not the practice to take the depositions in the presence of the accused; at all events, the law is indifferent in the

matter. I would add that it is for the magistrate to give what weight he thinks proper to depositions so taken." In *Re Phipps*, 1 Ont. R. 586, where depositions, taken in the State of Pennsylvania, were objected to on the ground that the evidence in extradition matters must be such as is admissible by the law of Canada, and none of those put in evidence complied with our law; Hagarty, C.J., said, he was not pressed by the objections urged as to the manner in which any depositions produced had been taken, or as to the manner in which the case went to the grand jury, or how the witnesses were sworn, so long as it was proved clearly that they were duly sworn under proper authority.

The objection was strongly urged that these depositions should not be read because they are only an abstract of the actual depositions. It is true they are an abstract or condensation of what the witnesses said before the grand jury when first examined, but they were afterwards adopted and sworn to by the witnesses, when sent back before the grand jury. That they do not contain all that was said, that statements favorable to the applicant may have been left out, although there is no charge that such statements were wilfully suppressed, was no doubt, fair matter of comment before my brother Bain, but I think it was for him, as said by Blackburn, J., to give what weight he thought proper to depositions so taken. The case of *Temperley* v. *Scott*, 5 C. & P. 341, is not an authority for excluding these depositions. It merely decides that, when witnesses have been examined for a plaintiff under a commission, and he reads as evidence their answers to the interrogatories in chief, their answers to the cross-interrogatories must go in at the same time, and the defendant is not left to put in these answers as the evidence of witnesses called for the defence. Although what has been done here may, as I have said, be the subject of remark, I do not see that the United States authorities were bound to send here all the evidence taken there. Ten witnesses might have been examined before the grand jury, and they might have sent here the evidence of six of them only. Their doing so, would only have been a subject to be remarked upon.

Then, as to the objection that these depositions are not properly such, because they are not the answers of witnesses to questions put to them, it is true, "deposition" is, in *Wharton's Law Lexicon*, defined to be "The act of giving public testimony;

technically, the evidence put down in writing by way of answer to questions," but they are at all events, statements on oath, and so are admissible under the Extradition Act. The case of *Alcock* v. *Royal Exchange Assurance Co.*, 13 Q. B. 292, relied on for the applicant, is no authority against their reception. In that case, a witness examined abroad under commission, in answer to a general interrogatory as to whether he knew anything which might tend to the benefit and advantage of the plaintiff, besides what he had been interrogated unto, said, "I have nothing further to say. I hand you a legalized copy of a deposition, (D.) which I made at the English consulate, and which I now confirm." This document evidently handed in as an exhibit, purported to be "Extracted from the original existing in the British Consulate Office at Alexandria in Egypt." Its contents were, a declaration and certificate as to the opinion of the witness upon the circumstances in which a vessel, upon which the insurance being sued for had been effected, was placed, and as to his own conduct and proceedings. At the trial this being objected to, the judge refused to allow it as evidence. Upon a motion for a new trial on the ground of improper rejection of evidence, counsel for the defendant urged a number of objections, one of them being that if the deposition was used only to refresh the witness's memory, and he was to be understood as repeating what he there said, "the original should have been put in; whereas it does not appear that what was handed in was even an accurate copy, nor is it even shown that the witness ever saw the original." Lord Denman who delivered the judgment of the court, disposed of this question by saying, "We need not advert to any other points of objection that were stated to this mode of swearing by reference, because, the preliminary one, to a copy, though stated to be legalized, but neither officially authenticated, nor examined, nor in any manner described or even identified, appears to us all conclusive against its admission." That was something very different from what we have here, the original depositions certified to have been read over to and subscribed, and sworn to by the witnesses.

The settlement of the question whether an accessory is within the Extradition Act and can be extradited or not, turns upon the question whether an "extradition crime," means only something which was a crime at the time the treaty was entered into, or

includes something which has been made so since. That the treaty cannot be extended, and that only what was a crime at its date can be dealt with under it, is urged, and in support of this, *Re Windsor*, 6 B. & S. 522, is relied on. But in that case the offence charged was not forgery in England; it would Cockburn, C.J., said, "No more be forgery in America than here; and it is only by an Act of the local legislature of New York that it is made one."

The two points in *Re Windsor* were, that the offence charged was not forgery by the law of both parties to the treaty, and it was not even forgery by the law of the United States, but only by a local law of the State of New York. Plainly, as pointed out by Armour, J., in *Re Phipps*, 1 Ont. R. at p. 612, the learned judges had not their attention called to the fact that under the constitution of the United States there could be no federal law against the crime in that case charged. That the court was dealing with the question of the crime not being one common to the law of both countries, is evident from the language used. Thus, Cockburn, C.J., said, "The true construction of this statute is, that its terms, specifying the offences for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of both countries. And where a part only of one of the two nations thinks proper to make certain acts, an offence which do not fall within that offence as known to the general law of both, it will not be sufficient to bring a case within the statute." And Blackburn, J., said, "The crimes thus specified are those defined in a treaty previously entered into by the two high contracting parties. . . . . Forgery is one of the crimes specified and that must be understood to mean any crimes recognized throughout the United States and in England as being in the nature of forgery. 'Piracy' is another, which means offences committed on the high seas, and it is so understood by both. But I do not think if either country were to say that some crime committed on land should be piracy, this would come within the treaty."

The law as to accessories seems the same in the State of Illinois and in this country, Mr. Baker says in his evidence, that by the law of Illinois, "If a murder is committed, and a man is an accessory before the fact, he is guilty of the crime of murder. According to our statute, an accessory before the fact is treated

as a principal. The indictment against Burke is a good indictment against him as an accessory. The Supreme Court of Illinois has ruled that the accessory shall be indicted as a principal." To support this he refers to two cases decided in that Court. I have read both these, and they fully sustain his evidence. The Act of the State of Illinois says, "Accessories shall be deemed and considered as principals and punished accordingly." In *Baxter* v. *Illinois*, 3 Gill. 368, it is said, "They must be indicted as principals or not at all, for they are declared by the Act to be principals. If they are not to be indicted as principals, the very object of the law is defeated; if they are to be indicted as accessories they must be tried and convicted as accessories, and then they could not be tried until after the conviction of the principals."

Our statute, R. S. C., c. 145, s. 1, says, "Every one who becomes an accessory before the fact to any felony, whether the same is a felony at common law, or by virtue of any Act, may be indicted, tried, convicted and punished in all respects as if he were a principal felon." This corresponds with the Imperial Act 24 & 25 Vic. c. 94, s. 1. Under the statute, it seems to me, that an indictment against an accessory before the fact charging that he did feloniously, wilfully and of his malice aforethought kill and murder the deceased would be a perfectly good indictment, *Reg.* v. *Hughes*, 6 Jur. N. S. 177; *Reg.* v. *Manning*, 2 C. & K. 903.

When the law in the State of Illinois became law there, does not appear, but the Canadian Act seems to have been passed since the treaty was made. The question then, must be considered, whether the subsequent legislation can extend the terms of the treaty, so as to include what was not an offence at the time of the treaty being made.

In my opinion the court, in deciding whether the crime charged comes within the terms of the treaty or not, must be guided by the law existing at the date when the alleged crime was committed, although there may have been a change in the law since the making of the treaty. Section 24 of the Extradition Act says, "The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act."

Whatever then, is in Canada at the date of the commission of the alleged offence, murder, forgery, or any other of the crimes named in the treaty, is within the Act, and an extradition crime. Of course it must also be a crime in the country making the requisition, otherwise the demand for the surrender of the accused cannot be made. In the Imperial Act 33 & 34 Vic. c. 52, the following words, almost the same as those I have above quoted from section 24 of our Act, stand as the preamble to the first schedule, which contains the list of crimes, "The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act."

The question now under consideration has several times been before the courts in Ontario, and judges there came to the same conclusion as I have done, although some held otherwise. In *Reg.* v. *Browne*, 31 U. C. C. P. 484, a case decided under the Imperial Act of 1870, Wilson, C.J., after remarking that the evidence did not show the accused to be a principal, proceeded, "Can he be given up on this indictment? I have no doubt he can be if he be an accessory before the fact." In so holding the learned judge seems to have relied upon the provisions of the then Canadian Act, 31 Vic. c. 72, the first section of which was the same as R. S. C., c. 145, s. 1. There, the charge made was, as here, that the accused "did wilfully, feloniously and of malice aforethought, kill and murder," &c. That case was carried to the Court of Appeal and the judgment of that court delivered by Paterson, J.A., will be found in 6 Ont. App. R. 386. That learned judge agreed with C.J. Wilson in the court below that an accessory before the fact to the crime of murder can be extradited, although an accessory after the fact was not so liable. It is true that when coming to this conclusion he referred to the provisions of the Imperial Act of 1873, the 36 & 37 Vic. c. 60, which in terms refers to the surrender of accessories before or after the fact, but he evidently did not rely upon it, for he held that the section in question, the 9th should be considered inapplicable to Canada because it requires accessories after as well as before the fact to be surrendered, and such an one could not by our law be apprehended and committed for trial for murder. "It is," he said, "enough that an accessory after the

fact to the crime of murder cannot, by our law, be tried and executed for murder." In *Re Phipps*, 1 Ont. R. at p. 609, Armour, J., dealing with this point said, "In framing the treaty the parties to it were not providing for the past and present, but for the future; and I do not think the treaty should be construed as referring only to what was understood to be forgery at the date of the treaty, but that under the generic term forgery, everything was included which was in the nature of forgery, and which, thereafter, might be held to be forgery at common law by the decisions of the courts, or might be declared to be forgery by the statute law."

The late Sir Matthew Cameron however, took a different view, and held the contract to be, "that each nation will surrender to the other all fugitives from justice charged with certain specified offences then known to the laws of both, not, that they will surrender persons charged with offences, either not then existing, or not then known by the specified names, but which either party might afterwards create or designate."

Two years later, the point again came up in *Re Hall*, 3 Ont. R. 331, where the charge was for an act made forgery by statute since the passing of the treaty. Proudfoot, J., held, that the accused could be held for extradition, relying upon the words used in the first schedule of the Imperial Act 33 & 34 Vic. c. 52, which appear in our present Act as part of section 24. He said, "But it was contended that the crime charged must have been forgery under our law at the date of the treaty, 1842, and as this Act, which for the first time makes altering an account with intent to defraud, a forgery, was not passed till 1869, the prisoner cannot be held under it. The Imperial Statute of 1870, regulating our practice as to extradition, however, disposes of this objection, as it provides that the list of crimes for which persons are liable to be extradited, is to be construed according to the law existing in England or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of that Act. And in that list of crimes is forgery, counterfeiting and altering and uttering what is forged, counterfeited or altered." An appeal from this judgment was dismissed by the Court of Appeal, the court being equally divided upon the question whether the offence charged was forgery, or only embezzlement, a crime not

within the treaty. The case of *Re Phipps*, already cited, also came before the Court of Appeal, 8 Ont. App. R. 31, and there Burton, J.A., held that, the list of crimes could not be extended to crimes, which though designated in the same form of words as in the treaty, have become such by legislation subsequent to its date. *Re Counhaye*, L. R. 8 Q. B. 410, can scarcely be referred to as an authority for the view I have taken, because that was a decision under a treaty between England and Belgium, in which, accessories before the fact were mentioned as extraditable, and as the court held that there could be no accessory in the case of the offence then under consideration, anything said was a mere *obiter dictum*. It is, however, worthy of remark, that it was not upon the provision in the treaty that Blackburn, J., relied when speaking as he did, and this is the more noticeable as he was one of the judges by whom *Re Windsor* was decided. In his argument for the Crown, the Attorney-General, now Lord Chief Justice Coleridge, said accessories were expressly mentioned in the treaty, but that it must be conceded could not be taken to extend the Act, the 33 & 34 Vic. c. 52. In the schedule to the Act, accessories before the fact were nowhere mentioned, because at common law they were in effect the same as principals, and it could not be contended that accessories were not included. Moreover, aiders, and abettors, by statute, could be tried as well as punished, as principals. And Blackburn, J., said, "I agree with the Attorney-General that as to many of the crimes included in the list, accessories before the fact would be included; then he gives a reason for so holding, not that the treaty deals with them, but "they are now liable to be indicted as principals, and were always liable to be punished as principals." Such an eminent writer as *Wharton* in his work on the *Conflict of Laws*, expresses the opinion that the treaty may be extended by subsequent legislation. After observing in section 836 that extradition treaties generally contain a provision that the surrender shall only be made upon such evidence of criminality as, according to the laws of the place where the fugitive is found, would justify his apprehension and commitment for trial if the offence had been there committed, he adds, "But under this provision it has been held that it is sufficient if the offence charged be a crime in the asylum State at the time of its commission, though it was not so at the time of the execution of the treaty."

The question remains to be considered whether the evidence shows the applicant to have been guilty of any extradition crime or not. Remarks have been frequently made by learned judges as to the way in which extradition proceedings should be dealt with, and that when dealing with a foreign State in such a matter, a liberal construction should be put upon the Act. Whatever opinion I may, as an individual, entertain upon the subject of extradition, as to the desirability of such proceedings being simple, and the exchange of criminals between two countries situated as the United States and Canada are, facilitated, sitting as a judge to dispose of an extradition matter, I have no right, if I do my duty, to be either liberal or illiberal in the disposition I may make of it. I must be governed by the statute. If such evidence is produced as would, according to the law of Canada, justify the committal of the accused for trial, if the crime had been committed in Canada, he must be held for extradition. If such evidence is not produced, then he must be discharged.

But sitting as I now do, in appeal, it is not for me to weigh conflicting evidence, nor would I be justified in reversing the finding of my brother Bain on the mere weight of evidence, *Huguet's Case*, 29 L. T. N. S. 41; *Re Maurer*, 10 Q. B. D. 513; *Re Weir*, 14 Ont. R. 389. If there is any evidence, the sufficiency of it is a question upon which his finding should not be disturbed. As it is, however, contended that there is here no evidence against the applicant, it must be examined. I do not think that the evidence upon which an accused person can be held, must be such as to satisfy the judge that he would, without any reasonable doubt, be convicted. In *Re Stanbro*, 1 Man. R. 263, I adopted the view expressed by *Mr. Clarke* in his *Work on Extradition*, at p. 185, "The magistrate investigating a case of demanded extradition is not quite in the same position as if he were deciding on a charge of crime committed within his own jurisdiction. In the latter case he has full discretion. He may and often does discharge a prisoner because, although there is *prima facie* evidence of guilt, the circumstances are so obscure, the intent so doubtful, the testimony so conflicting, that he thinks a jury would not be likely to convict. But in a case of extradition, he cannot consider these matters. If he find sufficient evidence of guilt to justify a committal, the question of a probability of a conviction, is not one for his consideration." For

instance, although a jury may convict upon the uncorroborated evidence of an accomplice, yet it is, I believe, the usual practice for the judge to advise a jury not to convict upon such evidence, yet, a prisoner has been held for extradition upon the sole evidence of two accomplices, *Re Caldwell*, 5 Pr. R. 217.

The evidence against the applicant is not strong, in this way, that some of the links necessary to connect him with the murder in question, are at present wanting, links which must certainly be supplied before the State can hope to secure a conviction, but taken as a whole, the evidence lays him under very strong suspicion. (The learned judge discussed the evidence.)

There is evidence against the applicant, and as my brother Bain deemed it sufficient to justify his issuing a warrant to detain him, on the ground of his being accused of murder, I would not feel warranted in reversing his finding and discharging the applicant. Whether he so detained him on the ground of being a principal in the strict sense, or only an accessory, seems to me of no moment, as in either character he is liable to be extradited.

The rule *nisi* should in my judgment be discharged.

DUBUC, J.—The principal questions raised in this case are 1st. Whether the depositions taken in Chicago were sufficiently authenticated to be received in evidence here; 2nd, Whether the evidence adduced by the prosecution before the extradition judge was sufficient to warrant the committing of the prisoner for extradition; 3rd. Whether in a case of murder, an accessory before the fact, is liable to be extradited, under the treaty and statutes in that behalf.

On the first point, I think the authentication is sufficient to satisfy the requirements of the Extradition Act. Sec. 10 says that if the depositions or statements, or the copies thereof, purport to be certified to be the originals or true copies, by a judge, magistrate or officer of the foreign state, they shall be deemed duly authenticated.

A series of said depositions purport to have been taken before the foreman of the grand jury, and they are certified by him; another series purports to have been taken before a justice of the peace, and they are certified by him.

Another series is certified by the Secretary of the United States: Then, G. H. Baker, barrister of the State of Illinois, where

the crime was committed, was examined before the extradition judge, and swears that he conducted the matter before the magistrate in Chicago, on behalf of the State; he saw each one of the witnesses write his or her name to the said depositions, and saw the said magistrate sign all the documents of the series certified by him.

One of the objections to these depositions is that they were not taken in presence of the prisoner; but in *Re Counhaye*, L. R. 8 Q. B. 410, it was considered that, under the Extradition Act of 1870, depositions duly authenticated were admissible in proceedings under the Act, though not taken in the presence of the accused, on the particular charge.

In *re Weir*, 14 Ont. R. 389, the warrant and depositions were certified under the hand and seal of a justice of the peace of Oscoda Township, in the County of Josio, in the State of Michigan. At the hearing of the case before the County Judge, the prosecuting attorney for the said County of Josio appeared and identified the depositions, and stated that they were depositions and copies of depositions relating to the charge and that the justices who took the depositions were justices of the peace, and had jurisdiction in the premises. It was held that the documents were sufficiently authenticated, and that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant was issued.

Under the said authorities, I must hold that the depositions and other documents are properly authenticated and were receivable in evidence.

The second ground taken on behalf of the prisoner is as to the weight of evidence; the contention being that the evidence is not sufficient to prove the guilt of the prisoner, and that he should be discharged.

In the first place, we are not in this matter sitting as a Court of appeal, and we have no power to review the decision of the committing judge as to the weight of evidence.

In *ex parte Huguet*, 29 L. T. N. S. 41, upon a committal by a police magistrate, under the Extradition Act in England, it was held that the Court was not a court of appeal, that it should

not question the judgment of the magistrate if the case was within his jurisdiction and there was any evidence to support his decision.

In *The Queen* v. *Maurer*, 10 Q. B. D. 513, upon an application for a *habeas corpus* in the case of a fugitive criminal committed under the Extradition Act. the Court declared they had no power to review the decision of the magistrate, on the ground that it was against the weight of evidence laid before him, there being sufficient evidence before him to give him jurisdiction in the matter.

The same doctrine was upheld in an application for a *habeas corpus* in *Regina* v. *Munro*, 24 U. C. Q. B. 44.

In the second place, I think the evidence before the judge was quite sufficient to warrant him in committing the prisoner for extradition. (The learned judge discussed the evidence.)

The other point raised is that the prisoner is only alleged to be an accessory before the fact, and that an accessory is not extraditable under the extradition treaty in force with the United States, and the laws and statutes relating to extradition.

In the schedule annexed to the Extradition Act, containing the list of crimes for which a person may be extradited, we find "murder, or attempt or conspiracy to murder," and no mention of an accessory before the fact. But by the Act respecting accessories, R. S. C. c. 145, s. 1, an accessory before the fact to any felony is assimilated to the principal criminal, in this that he may be indicted, tried, convicted and punished in all respects as if he were a principal felon.

We do not find it mentioned in the list of extraditable crimes, because the offence of which he is accused is not a different offence. His only difference with the principal felon is in his mode of acting and in the part he has taken in the felony. When a murder has been committed, he who is an accessory before the fact, is, by law, just as guilty as he who actually does the killing. In certain cases he may even be more guilty, because the killer may only be an instrument used for murderous purposes, who may not be able to realize the criminality of the act he is committing. I think, therefore, that the offence of the party who, in a case of murder, is an accessory before the fact is included in the crime of murder found at the head of the list of extraditable crimes. The offence of attempt to murder, which

is considered a lesser offence than murder, and not subject to capital punishment, and the offence of conspiracy to murder, which is only a misdemeanor, are made extraditable offences. Can we suppose that the Legislature intended to include those and exclude the crime of the party who is guilty in the same degree and is liable to the same capital punishment, as the principal felon? I may say that I have not the least doubt on the subject. The same view was held by the Court in England in *Re Counhaye*, L. R. 8 Q. B. 410; and by the Ontario Court in *Regina* v. *Browne*, 6 Ont. App. 386.

In applications for extradition as in this case, when the fugitive from justice is demanded by a civilized country as the United States, where we know he will have a fair trial, before Courts and under a procedure which generally give more weight to technicalities, and afford consequently more technical means of escaping conviction, I think the policy of the law and of the court should be in favor of surrendering the criminal refugees whose extradition is demanded by the foreign country where the crime has been committed. These were the views expressed by Chief Justice Hagarty in *Regina* v. *Morton*, 19 U. C. C. P. 18, and in *Re Phipps*, 1 Ont R. 607; and by Spragge, C. J. in *Re Hall*, 8 Ont. App. R. 39.

I think the rule should be discharged.

KILLAM J.—I propose to add very little to what my learned brothers have said upon the questions respecting the admission of evidence raised by the rule *nisi*. I adopt fully all that has been said by the learned chief justice upon this part of the case. It appears clear that the foreman of the grand jury having authority to administer the oath to the witnesses and to receive their depositions was an officer who could certify to the depositions, at least as long as he continued in that office. It is not shown that it was contrary to his duty or his oath of office for him thus to disclose the nature of the evidence given before the grand jury. The very instances given in Mr. Baker's evidence of prosecutions for perjury committed before the grand jury show that in some cases the evidence must of necessity be divulged. It is useless to discuss what would be proper here, as we have to deal with what was done in Chicago. The presumption is that the officer has acted properly, and there is no evidence that he has done otherwise.

Similarly, we must presume that the magistrate had jurisdiction to take the depositions of the witnesses brought before him. If it were shown that in the absence of the prisoner, or upon information laid after indictment by the grand jury, or for any other reason, he had not such jurisdiction the matter would stand in a different position.

The same presumption also appears to me to apply to the mode of taking the depositions. With us the magistrate or clerk would go through much the same process as Mr. Baker, without the intermediate one of the taking down of questions and answers *verbatim* by a stenographer, though he would probably be more careful to preserve the witnesses' own expressions. With reference to the omission of a part of the testimony it appears requisite only to say that it is not necessary under the statute that it be shown that all the evidence given before the particular tribunal is furnished to the extradition judge. The witnesses read over, signed and adopted the evidence thus written out with any changes of expression. These writings then appear to answer the description "depositions or statements taken in a foreign state on oath" given by the 10th section of the Extradition Act. Applying, as the statute does, to many foreign countries in which depositions may be taken in many ways that would be irregular with us, it seems impossible upon Mr. Baker's description of the mode of taking these to reject as irregular or not satisfying the statute these documents which come to us with the impress of official sanction. These views are still further supported by the remarks in *Re Counhayes*, L. R. 8 Q. B. 410, and *Regina* v. *Browne*, 31 U. C. C. P. 484; 6 Ont. App. R. 386. It is I think only for the magistrate, to determine what weight to give to such depositions where such facts appear as Mr. Baker testifies to.

The objection to the evidence of Donald E. McKinnon is wholly unimportant, as its omission would not materially weaken the case against the prisoner. Other evidence in the same line, showing the prisoner to have been passing through Winnipeg under an assumed name and to be otherwise acting suspiciously, was given. If there was sufficient evidence with that of McKinnon to warrant the prisoner's committal for extradition, there was quite sufficient without it.

The reference, in the formal part of the depositions taken here, to the prisoner being charged before the learned judge on the twenty-sixth of June when it does not appear that any information was laid or proceedings had upon that day, may be rejected as a superfluous recital of an unimportant fact, not in any way inconsistent with the return of the learned judge to the writ of *certiorari*. In other respects the formal parts comply with those prescribed by the statute for depositions taken before justices of the peace, and such an addition cannot serve to make the proceedings void and the committal of the prisoner invalid or to prevent the extradition judge from acting on the depositions in which this superfluous recital appears.

After a careful perusal of the evidence I am of opinion that, if it related to a murder supposed and alleged to have been committed in Canada, it would amply justify the committal of the prisoner for trial upon the charge. In such a case it could hardly ever have been important that the information or the warrant of commitment should distinguish nicely between a principal offender and an accessory. With us it is wholly unimportant now in view of the enactment making an accessory before the fact indictable, &c. in all respects as if he were a principal felon. The evidence of Mr. Baker and the authorities to which he refers show clearly that, by the law of the State of Illinois, an accessory before the fact is not only so indictable, triable and punishable, but that he is made a principal and may be tried and convicted upon an indictment for the principal felony *simpliciter*. The objection to the form of the charge appears, therefore, to fail entirely. There is a distinct charge which, both here and where the crime is alleged to have been committed, would be supported by evidence that the accused was merely an accessory to the crime before the fact.

The question, however, remains whether the evidence shows an offence for which, under the Extradition Act, the accused could be committed for extradition.

Now, the evidence appears to me to be equally consistent with the accused being either a principal or an accessory before the fact. While there is such a chain of circumstantial evidence as, together with the subsequent conduct of the accused, appears to connect him with the murder which was almost certainly committed, yet I cannot see that all this points to his being a prin-

cipal any more than to his being an accessory. As was said by the late Chief Justice Spragge in *Re Hall*, 8 Ont. App. R. 135, "It is, I apprehend, incumbent upon us to see that the act charged constitutes an extraditable offence." If the evidence is merely such as is equally consistent with his having committed an offence which is extraditable, as with his having committed one which is not so, it appears to me that he cannot be held for extradition.

I agree with the strongest remarks which have been cited to us in favor of the policy of the freest interchange with our neighbors to the south of those against whom there is strong evidence of guilt of criminal offences. But the question of policy is one for Parliament and the Executive, not for the courts. We have only to administer the law as laid down by Parliament. Aliens are as free as British subjects to enter, reside in or depart from Canada. No man, be he a judge under the Extradition Act or any other Act, be he minister of the Crown or any one else, has any right to deprive any Briton or alien of his liberty, or to hand him over to accusers, official or otherwise, in another country, except according to law. As was said by Patterson, J., in the same case of *Re Hall*, at p. 54, "We are to be on our guard against letting the natural desire to aid in what may seem to be justice, lead us to construe the law less strictly than we should do if trying a similar charge in one of our own courts."

It is then, in the view which I take of the matter, absolutely necessary to determine whether, under our Extradition Act, an accessory before the fact to the crime of murder can be extradited to the United States.

It appears to me that by the third section of the Extradition Act its application is limited in respect of the United States, to charges of offences which are included within the Ashburton Treaty. It is quite true that Parliament may provide for extradition in cases not provided for by treaty, and that the question is one wholly of the statute, from which alone the judges or commissioners derive their authority to commit for extradition. But this Act does not assume to provide that parties may be extradited to any country upon charges of any of the offences mentioned in the schedule. It gives a list of all crimes for which there can be extradition under any treaty or arrangement. If any treaty is wider it cannot be carried into effect without further legislation.

But, as to any particular country, the Act is evidently intended to authorize extradition only for crimes provided for in the treaty or arrangement with that country. It could hardly be contended that under this Act there could be extradition to the United States for charges of embezzlement, obtaining money, &c., under false pretences and many other of the offences named in the schedule. No more, then, can the Act extend to authorize extradition to the United States under the 24th section for acts not constituting offences within the list provided for by the Ashburton Treaty at the time of its making, but made to do so by subsequent enactment, or, under the 25th sub-section of the schedule, for "any offence which is in the case of the principal offender included in any foregoing portion of the schedule and for which the fugitive criminal, though not the principal criminal, is liable to be tried or punished as if he were the principal," unless such could have been done under a statute simply adopting and providing for the execution of the Ashburton Treaty, which, as regards the United States, must practically be taken as forming a portion of the Act.

In view of the great dearth of authorities, and of the recital in the Imperial Act of 1873, that doubts had arisen whether accessories came within the Act of 1870, I should be bold, indeed, if I should say that I came to a conclusion without considerable hesitation. Although we have not been able to take a very long time for the consideration of such an important question, yet I cannot fancy that any longer delay would have effectually removed my doubts or have placed me in a position to express a more positive opinion than I have now formed.

In *Regina* v. *Browne*, 31 U. C. C. P. 484; 6 Ont. Ap. R. 386, the Court of Appeal based its decision that an accessory before the fact to the crime of murder was subject to be extradited to the United States upon the terms of the Act of 1873. In the Common Pleas, Wilson, C.J., expressed the opinion that an accessory before the fact could be so extradited, relying upon the enactment making such an accessory liable to be indicted, &c., as a principal in Canada. I find two difficulties in following this reason. In the first place, the change made is one of procedure only. Our statute is not like that of Illinois, which directly enacts that he "shall be deemed and considered as a principal." See *Dempsey* v. *The People*, 47 Ill. 326; *Baxter* v. *Illinois*, 3

Gil. 368. In the second place, and more important, it does not appear that there has been such a general change in the law in the United States since the making of the Ashburton Treaty that the offences there designated could now be deemed to extend to such accessories if they did not when the treaty was made. In *Re Windsor*, 6 B. & S. 521, shows that at any rate such a change must be general. The evidence is confined to the law of the State of Illinois. *Mr. Wharton* in his work on the *Criminal Law*, shows that in many states the distinctions of the common law are retained.

In *Mr. Foster's* admirable discourses *on Treason, Homicide, &c.*, he says (p. 343,) "The accessory is indeed a felon, but guilty of a felony of a different kind from that of a principal." (For a similar remark see p. 360.)

By the Imperial Act, 24 & 25 Vic. c. 100, s-s. 6, 9, 10, the offences of murder, manslaughter and of being accessory to murder or manslaughter are distinguished as separate offences, and the same language is used in *Mr. Justice Stephen's Work on Criminal Procedure*, p. 2, art. 6.

Bearing in mind then, that such langnage was used by so careful and learned a writer long ago, and that the distinction was regarded as existing long after the making of the Ashburton Treaty and long after the Act 11 & 12 Vic. c. 46, which contained a similar section to that in our Accessories Act, R. S. C., c. 145, s. 1, so much relied on, let us consider the terms of that treaty.

As recited in the Statute 6 & 7 Vic. c. 76, it provided that Her Majesty and the United States should, upon mutual requisitions by them, or their ministers, officers or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder, or assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, &c.; with the proviso that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found as would justify his apprehension and commitment for trial if the crime or offence had been there committed.

The treaty of 1872 with Belgium, although referring to more crimes, described them simply by general names as did the Ashburton Treaty. Blackburn, J., in *Re Counhaye*, L. R. 8 Q. B.

417, referring to that treaty with Belgium, said, "I agree with the Attorney-General that as to many of the crimes included in the list, accessories before the fact would be included; they are now liable to be indicted as principals, and were always liable to be punished as principals. But the description of most of the crimes in the schedule is general," &c. And Quain, J., said, "In the enumeration of the other crimes the schedule does not say by whom, and the definition may well be taken to include aiders and abettors."

If we look at the crimes there referred to we see several that are, and always have been misdemeanors only. This is to a slight extent, the same with the Ashburton Treaty. At the time it was made many forms of assault with intent to commit murder were by the law of England, misdemeanors only. By the common law all such assaults were so. I would judge from *Mr. Wharton's Work on Criminal Law*, that all such assaults have not uniformly been made felonies in the various States of the American Union.

By the common law, forgery also was a misdemeanor only. It is true that at the time of the making of the Ashburton Treaty the forgery of many, and probably of almost all instruments which could be forged, had been made a felony in England by statute, and this was done to a great extent in the United States; but *Mr. Wharton* appears to have thought that there might still be some States be indictments for the common law misdemeanor of forgery in respect of some instruments. Now, the distinction between principals and accessories before the fact did not exist in cases of misdemeanor, and it is difficult to suppose that unless such a treaty one who was only in the position of accessory should be extradited where the offence was only in the nature of a misdemeanor, but not so where it was a felony. It is also difficult to believe that the contracting parties would intentionally provide for the extradition of parties charged with assaults with intent to commit murder where no murder had been committed, and intentionally omit to provide for the extradition of aiders and abettors of actual murders. It is only in comparatively modern times that such assaults have been treated as very serious crimes, while such aiders and abettors have been treated as felons in early times.

I have thus stated what appear to me to be the strongest arguments for and against a construction extending the treaty

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accessories. In considering which should have the greater weight, we must remember the nature of the instrument which we are interpreting. While we are not to lose sight of distinctions which are incident to the subject matter, we must bear in mind that such an instrument must be construed with as little reference as possible to technicalities. It mentions certain kinds of offences in wide, general terms. It is not concerned with nice distinctions between felonies and misdemeanors. It does not attempt to deal with the character in which parties are to be guilty of them, but only with acts which, by the general sense of mankind, are regarded as punishable offences.

It, therefore, appears to me that we can properly reject an interpretation founded on the nice distinctions which have grown up in the development of our law, based largely as *Mr. Justice Stephens* shows in his *History of the Criminal Law of England*, vol. 2, p. 232, on the effect of the statutes relating to the benefit of clergy.

In my opinion, then, an accessory before the fact should be deemed to be within the Ashburton Treaty, in respect of the crimes there mentioned.

I agree that the rule should be discharged.

Rule discharged.

THE WATSON MANUFACTURING CO. v. STOCK.

(IN APPEAL.)

Parol misrepresentation.—Rescission.—Waiver.—Evidence.—County Court.—Rules of equity.—New trial.

In an action upon a note given for the purchase of a machine, the defendant pleaded that he purchased upon the plaintiff's false representation of the age of the machine.

He learned the true age on the 28th of September. On the 9th October plaintiff wrote him for payment of another note. The defendant answered on 10th November remitting $11.40 on the other note. On the 13th November plaintiff wrote for payment of the machine note. On the 20th of November plaintiff first complained of the misrepresentation He returned the machine in the following month. The jury found a verdict for plaintiff. The county judge ordered a new trial and the plaintiff appealed.

Held, 1. That evidence of parol misrepresentation was admissible although a written warranty was given.

2. When a county court judge is dissatisfied with a verdict, and orders a new trial, his decision will not be reversed unless it can be shown that he was clearly wrong.

3. It is no answer to a charge of misrepresentation that the deceived party had the means of verification at hand.

4. If the representation was untrue, and made recklessly and without reasonable ground for belief in its truth, the contract might be rescinded.

5. Generally speaking the circumstances that will support an action for deceit will justify a party in rescinding the contract.

6. In the county courts the rules of equity as to the rescission of contracts prevail, rather than the rules of law.

7. The delay in complaining of the misrepresentation was evidence only of an intention to confirm the contract, and did not necessarily estop the defendant.

Per KILLAM, J.—As the jury may have proceeded upon the ground that by the delay the defendant had elected to affirm the contract, the verdict should not be disturbed.

Appeal from an order of Prudhomme Co. C.J., ordering a new trial.

F. H. Phippen, for plaintiffs, cited *Graham & Waterman on New Trials*, 1271; *Adam* v. *Newbigging*, 13 App. Ca. 308; *Grinnell on Deceit*, 76; *Abbott's Trial Evidence*, 618; *Pickering* v. *Dowson*, 4 Taunt. 779; *Kain* v. *Old*, 2 B. & C. 277; *Taylor on Evidence*, 968; *Benjamin on Sales*, 438; *Campbell* v. *Fleming*, 1 Ad. & E. 40; *Oliphant on Horses*, 152; *Peek* v. *Derry* 37 Ch. D. 541.

J. T. Huggard, for defendant cited, *Pence* v. *Langdon*, 99 U. S. R. 578; *Redgrave* v. *Hurd*, 20 Ch. D. 1; *O'Donaghue* v. *Fraser*, 4 Man. R. 469; *O'Donoghue* v. *Swain*, 4 Man. R. 476; *Pollock on Contracts*, 537; *Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 E. & I. App. 99; *Campbell* v. *Fleming*, 1 Ad. & E. 40.

(*7th June, 1889.*)

BAIN, J.—This action was brought in the County Court of the County of Selkirk, to recover the amount of two promissory notes made by the defendant to the plaintiffs. One of the notes was given for the balance of the price of a second-hand binder which the defendant had bought from the plaintiffs, and the other for the price of some binding twine. The defendant's dispute note sets up the defence that the first note sued for was obtained from him by fraud and that there was no consideration for it, and payment. The case was tried before His Honor Judge Prudhomme and a jury, who found a verdict for the plaintiffs for the full amount of their claim and interest. The defendant appealed to the county court judge for a new trial or a reversal or variation of the verdict, and the judge thereupon ordered a new trial on the ground that the verdict was against the weight of evidence and the judge's charge.

It appears that the fraud which the defendant alleges, and which he claims entitles him to rescind the contract he made with the plaintiffs for the purchase of the machine, consisted in the plaintiff's manager representing to him before he bought the machine that it had not been made more than three years before, while in fact it had been made six years before the date of its purchase by the defendant. The defendant says that a machine five years old, of this make, would have an entirely different knotter from one which was not more than three years old, and he wanted to buy a machine with the new knotter. The plaintiffs manager denies that he ever made any such representation, but the evid-

ence of the defendant that he did, before the defendant decided to buy the machine, is corroborated by another witness. The statement is alleged to have been made while the defendant, the plaintiff's manager and this other witness were looking at the machine outside the plaintiff's warehouse; and after the defendant agreed to take it, he and the plaintiff's manager went into the office, and the manager made out a bill of the machine to the defendant, at the foot of which was written, "Machine to be complete and we to stand any breakage while in transit on its wheels from Winnipeg to farm," and he claims this was the only warranty or representation that was given. The defendant paid $15 on account and gave the note for $60 for the balance of the price. The machine was taken out to the defendant's place, and it was found not to work properly, but it was not until the 20th of November following—the purchase was made on the 10th of August—that the defendant notified the plaintiffs that he would not keep it. Afterwards he caused it to be left on the street in front of the plaintiff's warehouse, where it had been when he bought it.

From the manner in which the case was left to the jury by the judge, it is evident that in returning a verdict for the plaintiffs, they found that, as a matter of fact, the plaintiff's manager did not make the representation the defendant alleges he did. But the judge who heard the evidence, is in the best position to judge whether or not the verdict was against the weight of evidence.

He thinks that it was, and has ordered a new trial, and in so doing, it must be assumed that he has held as a matter of law that the defendant, if he can establish the case he sets up, would be entitled to rescind the contract. I think this Court should adopt the rule that prevails in the courts in Ontario, that when the county court judge is dissatisfied with the verdict of a jury and has, in the exercise of his discretion, set it aside, and ordered a new trial, that discretion will not be interferred with on appeal, unless it appears that the judge was clearly wrong in granting a new trial. *Manning* v. *Ashall*, 23 U. C. Q. B. 302; *Harris* v. *Robinson*, 25 U.C.Q.B. 247; *Hunter* v. *Vanstone*, 6 Ont. App. 337. Unless, then, it should appear that the defendant would not be entitled to succeed, admitting the facts to be as he alleges, I think the order appealed from should stand.

I think the representation alleged, made at the time it was by the plaintiff's manager, must be deemed to have been a material one, and it cannot be regarded, as the plaintiff's counsel urged it should, merely as an expression of opinion. The defendant could doubtless, if he had seen fit, have verified the truth of the statement, but it is no answer to his charge to say that he did not do so. The case of *Redgrave* v. *Hurd* 20 Ch. D. 1, in the Court of Appeal, establishes the propositions that "when the seller has made a false representation, which from its nature might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to enter into the contract, and it does not rest with him to shew that he in fact relied upon the representation," and also that, "when the buyer relies upon the seller's representation, he is not deprived of his right to relief because he had the means of discovering that the representation was false." (See *Benjamin on Sales*, p. 414). If Watson made the statement the defendant alleges he did, it was a statement of a material fact, which might have induced, and it must be assumed, did induce, the defendant to purchase the machine, and I think the defendant if he can establish that the statement was made and that it was untrue, whether to Watson's knowledge or not, would be entitled to rescind the contract. In the case of *Redgrave* v. *Hurd* above cited, Jessel M. R. at p. 12, says, "As regards the recission of a contract, there was no doubt a difference between the rules of courts of equity and rules of courts of common law, a difference which has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of the court of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false." In *Hart* v. *Swaine* 7 Ch. Div. 42, Fry, J., said, "The defendant took upon him to assert that which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this believing it to be true, the result appears to me to be that which is expressed in the judgment of Maule, J., in *Evans* v. *Edmonds*, 13 C. B. 777, when he says, 'I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done with a view to secure

some benefit to himself, or to deceive some third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of the falsehood, the representation may still have been fraudulently made.'"

It is laid down by many authorities that before a plaintiff can recover damages at law in an action of deceit for false representation, or rescind a contract, into which he has been induced to enter by such false representation, it is incumbent on him to establish "a concurrence of fraudulent intent and false representation." *Benjamin on Sales*, p. 413. But it may be doubted if the rule at law in such cases was even so much narrower than in equity, as Jessel M. R. as above quoted, would seem to indicate, and in the later cases a very extended meaning has been given to the words "fraudulent representation"—Generally speaking the circumstances that will support an action for deceit, will justify a party in rescinding the contract at law, (*Pollock on Torts*, p. 246) and the principles laid down in the one class of cases apply to the other. In *Smith* v. *Chadwick*, 20 Ch. D. 27, in the Court of Appeal Cotton L.J. (p. 68) said, "This action though brought in the Chancery Division is a mere common law action of deceit. In order to entitle the plaintiff in such an action to relief, it must be shewn, first, that the representations which in fact were not true had been made by the defendants; that these representations were made, either with a knowledge that they were not true, or recklessly, in which case although they knew not of the untruth, they would be liable as if they had known that the statements were untrue." *Peek* v. *Derry*, 37 Ch. D. 541, was another common law action for deceit, and in his judgment in the Court of Appeal at p. 585, Lopes, L. J. said, "An action of deceit will not lie for an innocent misrepresentation for such misrepresentation is not fraudulent. On the other hand, a slight degree of what I will call moral obliquity will suffice to render a misrepresentation fraudulent in contemplation of law." And he then proceeds to state what he believes to be the law, as the result of the cases, "If," he says, "a person makes to another a material and definite statement of a fact which is false, intending that person to rely on it, and he does rely upon it

and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made —first, if it is false to the knowledge of the person making it; secondly, if it is untrue in fact and not believed to be true by the person making it; thirdly, if it is untrue in fact and is made recklessly, for instance without any knowledge on the subject and without taking the trouble to ascertain if it is true or false; fourthly, if it is untrue in fact, but believed to be true, but without any reasonable ground for such belief." The other judgments in this case in the Court of Appeal bear out this statement of the law on the subject, and it may be taken to be settled as thus stated, and, as I understand the case, without reference to the operation of the Judicature Act. It would seem, therefore, that even at law the defendant would be entitled to succeed if he can establish the case he sets up, but in cases in the County Court, I think the provisions of section 41, sub-section 2 of the County Court Act, require us to hold that the rules that prevail in equity as to the recission of contracts, rather than those that prevail in law, must be applied.

I do not think the defendant is precluded from shewing by parol evidence, if he can, that such a representation was made, by the fact that the written memorandum which was given him by the plaintiffs, and which was doubtless intended to be a warranty, does not refer to the age of the machine. Such a representation is not a warranty, strictly speaking, but a condition, and while of course, the defendant could not show that any warranty except that in the memorandum was given verbally, he can shew that it was a condition of the contract that the machine was of the kind it was represented to be, and that he was induced to buy it by the fraud of the plaintiffs. This is something outside of and collateral to the contract. The case of *Kain* v. *Old*, 2 B. & C. 627, was relied on by the plaintiffs to shew that parol evidence of Watson's statement could not be received, but that was an action on *assumpsit* as on a written warranty, and the judgment shews that while, if the contract be reduced into writing, nothing which is not found in the writing can be considered as part of the contract, still it can be shewn the contract was induced by the fraudulent representation of the seller. Parol evidence cannot be admitted to shew that the contract itself was different from that authenticated by the written instrument; but

it is admissible to shew that the assent of the party to the contract was obtained under false pretences, and that the contract is bottomed in fraud, and has, therefore, no legal existence.

The plaintiffs also contend that even if the defendant could establish the fraudulent misrepresentation, he is estopped from rescinding the contract by his delay in not rescinding it promptly, after he discovered that the machine was older than he says it had been represented to be. The defendant seems to have definitely learned that the machine was an old one about the 28th of September, and he did not notify the plaintiffs that he would not keep it until the 20th of November following. In *Clough* v. *London & N. W. Railway Co.*, L. R. 7 Ex. 26, it was said, "Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great it probably would in practice be treated as conclusive evidence to shew that he has so determined." I cannot say the lapse of time it appears there has been here is conclusive evidence of the defendant having determined to keep the machine. It is only evidence tending to shew acquiescence, and it is a question of fact to be determined whether after he knew that he had the right to rescind, he shewed by his words or his actions he had determined to keep the machine, notwithstanding the fraud. The case of *Campbell* v. *Fleming*, 1 A. & E. 40, was relied on by the plaintiffs on this point, but that case only shewed that if after discovering the fraud, the party continues to deal with the property as his own, he cannot repudiate the contract.

It is open to question on the evidence, I think, if the jury should not have found for the plaintiffs on the ground of acquiescence; but as this question was not left to them by the judge, nor even suggested by counsel, I cannot infer that it was on this ground they based their verdict.

It appears to me on the whole, that the defendant, if he can establish the defence he sets up, may be entitled to succeed; and as the learned judge was dissatisfied with the verdict of the jury on the facts, I do not think his order setting aside the verdict and ordering a new trial should be disturbed. The appeal should be dismissed with costs.

DUBUC, J., concurred.

KILLAM, J.—I agree with the view expressed by my brother Bain, that there was a question to go to the jury upon the alleged

fraudulent misrepresentation. If the evidence for the defence be accepted, the plaintiff's manager undertook to make an assertion of the age of the machine, without reasonable ground for belief in its truth. It was untrue. He made it recklessly, without taking any trouble to ascertain its truth or falsity. It was on a definite and specific matter of fact not matter of opinion or asserted as such. Without affirming all the propositions stated in *Peek* v. *Derry*, 37 Ch. D. 541, but upon the strictest view, this would have been sufficient to entitle the defendant to rescind at law. If it were necessary, I would agree also that the defendant could invoke the principles on which a court of equity rescinds a contract for fraud. The cases on which the plaintiff's counsel relied are clearly distinguishable. *Kain* v. *Old*, 2 B. & C. 627, was an action of *assumpsit* for breach of warranty. No question of fraud arose. *Pickering* v. *Dowson*, 4 Taunt. 779, was a case in which the vendor made no representation of fact. He merely handed over a writing containing an alleged description of the vessel sold as one received by him from his vendor. He sold the vessel by written agreement subject to all faults. He used no fraud or device to prevent the purchaser from examining the vessel. The judges expressly find that there was no fraud proved.

I agree, also, that we are not in a position to say that the learned judge of the county court was wrong in deciding that upon the question of there having been the representation claimed by the defendant, the verdict was against the weight of evidence. He saw the witnesses and heard the evidence given, and we must assume that he considered the verdict upon this point to be unreasonable and unjust.

This, however, does not appear to me to settle the matter. I cannot agree with the contention of the plaintiff's counsel, that the delay in rescinding necessarily estopped the defendant from doing so. The cases cited by him were cases in which there were positive acts of user of the articles purchased after discovery of the fraud. But I do think that the circumstances shown in this case were such as should have gone to the jury upon the question of affirmance or non-affirmance.

The defendant learned positively the age of the machine on the 28th September. The plaintiff wrote him on the 9th October notifying him that the note for the twine would fall due November 1st. On the 10th November he sent $11.40 "to apply on

note for twine," leaving a balance of $15.00 due. The plaintiff wrote him on the 13th November asking for this balance, and in his reply of the 20th November, the defendant for the first time made the claim of fraud and sought to rescind. He returned the machine in the latter part of December.

I think that these are circumstances from which the jury might have inferred an election to adopt the contract after knowledge of the fraud. I do not dissent from the principles laid down in *Clough* v. *The London & N. W. R. Co.*, L. R. 7 Ex. 26, but it is there admitted that lapse of time may furnish evidence of an intention to affirm the contract.

Now, if the jury specifically found that there was the alleged misrepresentation, but that the defendant after knowledge of its falsity had affirmed the contract, it does not appear to me that the verdict could have been set aside. The verdict may then be supported as having possibly been given on that view. It should not be set aside unless clearly against the weight of evidence on all grounds on which it can be supported.

On this point, we are in as good a position to judge of the propriety of the verdict as the learned judge of the county court. In *The Metropolitan Railway Co.* v. *Wright*, 11 App. Cas. 152, the House of Lords affirmed the judgment of the Court of Appeal reversing the decision of the Divisional Court granting a new trial on the ground that the verdict was against the weight of evidence; and in *The Commissioner of Railway* v. *Brown*, 13 App. Cas. 133, the Privy Council reversed the judgment of an Australian Court granting a new trial on the same ground. There is then no difficulty, that the matter is one of discretion with which we cannot interfere.

For these reasons I think that the appeal should be allowed without costs, and that the verdict should stand.

Appeal dismissed with costs.

McMICKEN v. THE ONTARIO BANK.

(IN APPEAL.)

Staying new suit until payment of costs of former suit.

Where a suit is instituted seeking relief substantially the same as that sought in a previous suit, the proceedings will be stayed until the costs of the former suit have been paid.

The fact that the first suit was not determined upon its merits is not necessarily an answer to the application.

The fact that the judge who heard the application exercised a discretion and dismissed the application is no bar to an appeal.

Per KILLAM, J.—It was not a case for the exercise of discretion.

The fact that in the first suit a married woman was suing alone, and in the second that she sued by a next friend is no ground for refusing the application. (Hind v. Whitmore, 2 K. & J. 458, considered.)

Per TAYLOR, C.J.—(1) The test of the identity of the suits is, whether the bill in the second suit could have been produced by a fair amendment of the first. But the proceedings will sometimes be stayed although the relief sought in the second suit could not have been obtained in the first.

(2) That there is new matter in the second suit; that the relief sought is not exactly the same; or that the parties are not identical in both suits, is no ground for refusing to stay proceedings.

J. S. Ewart, Q.C., and *C. W. Bradshaw*, for the defendants.

The general rule is quite clear and its application is not discretionary, *Altree* v. *Hordern*, 5 Beav. 626; *Ernest* v. *Partridge*, 8 L. T. N. S. 762; *Martin* v. *Earl of Beauchamp*, 25 Ch. D. 12. A change in parties is immaterial, *Long* v. *Storie*, 13 Jur. 1091; *Cobbett* v. *Warner*, L. R. 2 Q. B. 108; *Grand Junction Ry.* v. *Peterboro*, 10 Pr. R. 107. As to identity of cause of action *Budge* v. *Budge*, 12 Beav. 385; *Taylor* v. *Taylor*, Ib. 221; *Foley* v. *Smith*, Ib. 154. As to the application of the general rule to the case of a married woman plaintiff, *Hind* v. *Whitmore*, 2 K. & J. 458; *Redman* v. *Brownscombe*, 6 P. R. 84; *Re Payne*, 23 Ch. D. 288. The next friend should have been appointed in the previous case and he would then have been liable for part costs, *Witts* v. *Campbell*, 12 Ves. 493; *Payne* v. *Little*, 14 Beav. 647.

W. H. Culver and *T. S. Kennedy*, for the plaintiff. The general rule referred to is based upon the Judicature Act, Order 26, Rule 4; apart from that the matter is discretionary, *Cobbett* v. *Warner*, L. R. 2 Q. B. 110; *Morton* v. *Palmer*, 9 Q. B. D. 91; *Stewart* v. *Sullivan*, 11 P. R. 540; *Wright* v. *Wright*, 12 Pr. R. 42; *Re Wickham*, 35 Ch. D. 282. If discretionary, no appeal, *Wigney* v. *Wigney*, 7 Pro. D. 181. Second bill is not vexatious, the first not having been disposed of upon merits, *Lucas* v. *Crookshank*, 13 Pr. R. 31; *Doolan* v. *Martin*, 6 Pr. R. 319; *Caswell* v. *Murray*, 9 Pr. R. 192. The same cause of action means the same remedy, *Stewart* v. *Jackson*, 3 Man. R. 568. As to the position of the married woman law in England, *Re Youngs*, 31 Ch. D. 239; *Re Neal*, Ib. 437; *Re Wickham*, 35 Ch. D. 272; *Re Isaac*, 30 Ch. D. 418.

J. S. Ewart, Q.C., in reply. As to the extent to which amendments will be allowed, *McGillivray* v. *McConkey*, 6 Pr. R. 56.

(*22nd July, 1889.*)

TAYLOR, C.J.—In July, 1885, the plaintiff filed a bill against The Ontario Bank, praying relief on account of a transaction which took place between them several years before. After some proceedings, the plaintiff, in October, 1887, moved for leave to amend, and the defendants made a cross motion to stay proceedings until the plaintiff, a married woman, should appoint a next friend. This motion was granted, and leave to amend was also granted, conditional, upon the next friend being appointed. In August, 1888, the plaintiff applied to be allowed to sue in *forma pauperis*, which was refused, and in October, 1888, no next freind having been appointed, the bill was dismissed with costs. The costs of the Bank have been taxed, but remain unpaid. On the 8th of December, 1888, the plaintiff filed a new bill by her next friend, making not only the Bank, but Brown the Bank Manager at the time the transaction complained of occurred, and two other persons defendants. The Bank then moved before the referee, that proceedings be stayed until payment of the costs of the first suit, which motion was refused on the authority of *Hind* v. *Whitmore*, 2 K. & J. 458. An appeal from the order of the referee was dismissed by my brother Dubuc, on the grounds that the first suit had not been decided upon the merits, and the

second suit is not vexatious. The defendants, the Bank, have now appealed to the full court.

That the judge exercised a discretion in dismissing the appeal is no bar to an appeal to the full court. *Cobbett* v. *Warner*, L. R. 2 Q.B. 109; *Martin* v. *Palmer*, 9 Q. B. D. 89; *Re Wickham*, 35 Ch. D. 272; *Stewart* v. *Sullivan*, 11 Pr. R. 540; *Stewart* v. *Jackson*, 3 Man. R. 568; are all cases in which appeals from a judge were entertained.

It is no bar to a motion to stay proceedings that the first suit was not decided upon the merits. In *Pickett* v. *Loggon*, 5 Ves. 702, the bill in the first suit was dismissed by default, yet proceedings in the second suit were stayed, although counsel urged that no case was to be found for such an order, except *Holbrook* v. *Cracroft*, and in that case the dismissal had been on the merits So in *Spires* v. *Sewell*, 5 Sim. 193, a bill having been dismissed for want of prosecution, a second suit was stayed until the costs of the former suit were paid. *Altree* v. *Hordern*, 5 Beav. 623, and *Long* v. *Storie*, 13 Jur. 1091, were both cases in which the first suit came to an end by abatement without the merits being ever considered.

No doubt the ground upon which proceedings are stayed until the costs of a former suit are paid, is, that the further proceedings are vexatious. This is the ground upon which the courts interfere, both at law and in equity, though at one time at least, courts of law were more unwilling to interfere than courts of equity. The latter took the view that proceedings in a second suit, until the costs of a former one were paid, were *prima facie* vexatious. Indeed, V.C. Knight Bruce, said in *Long* v. *Storie*, 13 Jur. 1091, that it was grossly unjust to allow a party to go on with a second suit before he had paid the costs of the first. The only question seems to have been whether the second suit was for substantially the same object. In *Ernest* v. *Partridge*, 8 L. T. N. S. 762, V.C. Wood said the rule was well established, that no person should be allowed to vex another with a second suit until he should have paid the costs of a former suit for the same object. In such cases as *Budge* v. *Budge*, 12 Beav. 385; *Caswell* v. *Murray*, 9 Ont. Pr. 192; *Lucas* v. *Cruickshank*, 13 Ont. Pr. 31; and *Stewart* v. *Jackson*, 3 Man. R. 568, the court refused to stay proceedings, but it did so because the second suit was not for the same matter, nor substantially the same as the first.

That there is new matter in the second suit, that the relief sought is not exactly the same, or that the parties are not identical in both suits, is no ground for refusing to stay proceedings. In *Long* v. *Storie*, 13 Jur. 1091, there were additional defendants and only part of the relief sought in the first suit was prayed, but the Vice Chancellor said, "it is nothing to say that there is in the new bill some matter which is wholly different, for there is, to a great extent, the same relief prayed." In *Altree* v. *Horndern*, 5 Beav. 623, a bill was filed by two plaintiffs, and after answer a motion to amend was refused. Both plaintiffs died and the executors of the last surviving plaintiff, instead of reviving the suit, filed a new bill. The M. R. speaking of the new bill said, "I can only treat it as such a bill as might have resulted from an amendment of the original bill, for the transaction, in respect of which the relief is sought by the second bill is precisely the same, and although there are other specific portions of relief which are sought by it, yet generally speaking, the relief is of the same sort, as that asked by the first bill," and again, "I think there is in this court, sufficient jurisdiction to say, that these plaintiffs shall not be at liberty to prosecute this suit; founded as it is upon the former suit, and seeking, though not precisely the same relief, yet relief founded on the same transaction, without first relieving the defendants from the costs which have been incurred in the former suit."

The main question seems to be, as it was put in *Budge* v. *Budge*, 12 Beav. 385, could the bill in the second suit have been produced by a fair amendment of the first? Here the plaintiff had in the first suit leave to amend so soon as the order for the appointment of a next friend was complied with. Under the amendments she then had leave to make, and it does not appear that the order to amend was strictly limited to the amendments, a draft of which was produced, she could have had substantially the relief sought by the second bill, except perhaps as to the relief sought against Brown personally. It seems to me, doubtful, if she can have that relief even in the second suit, but the making additional parties and praying further or somewhat different relief, does not seem to affect the question. The second suit here is like that in *Altree* v. *Horndern*, one seeking, though not precisely the same relief, yet "relief founded on the same transaction." The transaction in respect of which the plaintiff

claims to be entitled to relief, is exactly the same in both suits, though in the second it is presented in a different light.

Even where the relief sought in the second proceeding could not have been obtained in the first, proceedings have sometimes been stayed. Thus in *Foley* v. *Smith*, 12 Beav. 154, the plaintiff having obtained an order on petition, under which he was advised he conld not obtain all the relief he sought, abandoned the order and filed a bill. The M. R. considered the plaintiff had been rightly advised, yet he stayed proceedings until the costs were paid.

I can find nothing which could lead me to hold that the rule, said by V.C. Wood in *Ernest* v. *Partridge*, to be well established, is not still in force, where the second suit is one seeking relief substantially the same, founded upon the same transaction as the first.

The present appeal must, therefore, in my opinion, be allowed with costs of this rehearing, and an order made staying proceedings in this suit until the costs of the former suit are paid. There should be no costs of the appeal from the referee to the judge in chambers.

KILLAM, J. It is clear that there is a general rule that a defendant shall not be vexed with a second suit to the same effect as a former one in which the plaintiff has failed without payment of the costs of the first suit. The referee dismissed the application on the ground that this rule did not apply in the case of a married woman plaintiff, following *Hind* v. *Whitmore*, 2 K. & J. 458. In this he probably acted wisely. That case, however, cannot be considered as an authority binding upon us on a rehearing. The learned Vice Chancellor did not asume to decide that there was an established practice, but merely refused, apparently without much consideration, to make a precedent where none existed. It is clear from the remarks of the Lords Justices of the Court of Appeal in *Re Payne*, 23 Ch. D. 288, that the practice was not considered to be definitely settled. Now, it may be true that the decision in the latter case turned to some extent upon the rule of the Judicature Acts respecting suits by married women; but as no good reason has been suggested, apart from that rule, for making a distinction between married women and other suitors, I feel that none should be made. It appears to me that in this

particular the *onus* of establishing the propriety of such a distinction is on the party who asserts it.

But the learned judge who heard the appeal from the referee passed over that point and rested his decision upon what may be considered as the merits of the application itself. He put it on the two grounds, that the first suit was not decided upon its merits, and that the second suit was not vexatious.

Now it is clear that the fact that the first suit was not determined upon its merits is not necessarily an answer to the application. In *Ernest* v. *Partridge*, 8 L. T. N. S. 762, the first suit was against some only of the defendants in the second suit and it was dismissed on a demurrer for multifariousness, and in *Altree* v. *Hordern*, 5 Beav. 623, the plaintiffs in the first suit having died, the personal representatives of the survivor began a second instead of reviving the first. Undoubtedly, however, the circumstances of the dismissal of the first suit or which could reasonably lead the plaintiff to its abandonment and the substitution of the second, are matters to be considered in determining whether the plaintiff's couduct is to be considered as vexatious. If it were the case, as Mr. Kennedy contends, that the first suit came to an end through a mistake common to the legal profession respecting the proper mode of conducting a suit by a married woman, it might well be held that no order should be made staying this suit until the costs of the former should be paid. But we find that full opportunity was given the plaintiff to remove the obstacle to proceeding with that suit, and that she was just as much at liberty to continue it by appointing a next friend, as she has been to institute the present. She had begun the suit in the form and with such allegations and request for relief in her bill as she had chosen. She had obtained an answer on some admissions in which, according to Mr. Kennedy's argument, she now relies. She had obtained an order to amend the bill so as to place her claim to relief on the ground she chose. It may be true that the defendant could have taken the objection before answering the bill and before the amendments were allowed, but the reasonableness of the plaintiff's conduct ought to be judged by the position in which the parties were when the course was adopted of allowing the first suit to be dismissed and substituting a second. It certainly does seem strange that the costs of the first suit should have run up to so large a sum, but we must now presume that all circum-

stances to be taken into account were so taken both in awarding any costs and in fixing the amount to be allowed. I shall add very little to what the chief justice has said respecting the substantial identity of the two suits. Even taking the first according to the original bill, the objects of the two are identical. Both were brought for the purpose of getting over the effect of the absolute form of the conveyance to the Bank, to establish that the Bank held the lands only as security for certain liabilities and to have the accounts taken upon that basis. It is true that in the present suit the plaintiff offers payment of any balance that may be due, but the present bill alleges, as did the former, that the Bank has realized from sales of the lands more than sufficient to satisfy its claims. This bill does ask that the conveyance be declared void, as obtained by fraudulent misrepresentation, but the suggested amendments of the former alleged the representations and their falsity, though not so much in detail; and, even if the order to amend would not have authorized the present prayer, it would be unreasonable that such a change should suffice to prevent the operation of the rule. It is unnecessary at present to consider the probability of the plaintiff succeeding in supporting the claim against the defendant Brown personally, or the propriety of joining that claim with those against the Bank. The main ground of the present suit is to obtain similar relief against the Bank to that sought in the former suit. The claim against Brown is merely put forward incidentally. If this suit were brought only to get the relief from Brown, that could have been done without putting forward again the original claim against the Bank. To put the Bank to a defence of the original claim in connection with the new one against Brown, is quite as vexatious as to do so without this addition.

In my opinion, therefore, there was no ground which could justify the learned judge in departing from the general rule, and the matter cannot be said to be one for the exercise of discretion.

The order dismissing the appeal from the referee should be reversed, the appeal allowed and the proceedings in this suit stayed until the costs of the former one shall have been paid. As, however, the referee only followed *Hind* v. *Whitmore*, which a single judge might well have felt bound by, I think that no costs should be allowed of the original appeal from the referee, but the motion being afterward contested mainly on its merits,

the Bank should have costs of the rehearing, but those of the original application to the referee will be costs in the cause.

BAIN, J.—I agree that the appeal should be allowed, and an order made staying proceedings in this suit until the costs of the former suit shall have been paid. The rule is clearly established that if a suit is dismissed with costs, the same plaintiff cannot proceed in another suit against the same defendant for the same objects, until the costs of the first suit have been paid. The rule is a reasonable and wholesome one, and should be applied, I think, in all cases that come within it. Since the decision of the Court of Appeal in *Re Payne*, 23 Ch. D. 288, there can be no doubt but that it is competent for the court to apply the rule in the case when a married woman sues by her next friend as well as in ordinary cases. The present suit is founded on identically the same transactions as was the former one, and the objects of the two suits are identical. Adopting the expression used by Lindley, L.J., in *Martin* v. *Earl Beauchamp*, 25 Ch. D. p. 15, this suit "is really and substantially a second action for the same matter." and it must, I think, be held to be vexatious, and within the rule.

Appeal allowed with costs.

THE CONFEDERATION LIFE ASSOC'N v. MOORE.

(IN EQUITY.)

Will, construction of.—Estate.—Application of rents upon mortgage.—Improvements under mistake of title.

A testator appointed executors "directing my said executors to pay all my just debts and funeral expenses and the legacies hereinafter given out of my estate." In a subsequent part of the will it was provided that "after paying off my said debts and funeral expenses I give and bequeath to my daughter M. the sum of $5000 to be paid to her at the age of 21 years by my executors

and I give to my wife all my real estate whatsoever and wheresoever and all my chattels and household furniture with the exception of the above named legacy." "And also my executors to educate and provide all necessaries for said child (M.) from my estate until she is 21 years of age over and above the $5000 above mentioned."

The plaintiff had a mortgage upon part of the real estate of the testator. After his death they loaned the widow a further sum for the purpose of erecting buildings upon it. After default they took possession under the first mortgage and appropriated the rents to its payment. Upon a bill to foreclose the second mortgage,

Held 1. That the legacy and provision for maintenance and education were a charge upon the real estate.

2. That the plaintiffs were not entitled to priority over these charges either upon the ground of mistake in title, or because the court would have sanctioned the loan on behalf of the infant if applied to at the time.

3. The plaintiff could not be permitted to change the application of the rents to the reduction of the second mortgage.

H. M. Howell, Q. C. and *A. Dawson* for plaintiffs cited the following cases; *Brooke* v. *Rooke*, 3 Ch. D. 630; *Russell* v. *Plaice*, 18 Beav. 22; *Leith's Williams on Real Property*, 16; *Smith's Real & Personal Property*, 18; *Wheldon* v. *Burrows*, 12 Ch. D. 46; *Moore* v. *Mellish*, 3 Ont. R. 174; *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *Gummerson* v. *Banting*, 18 Gr. 516; *Cooper* v. *Phibbs*, L. R. 2 H. L. 170; *Munsie* v. *Lindsay*, 11 Ont. R. 520; *McGregor* v. *McGregor*, 5 Man. R. 617.

W. H. Culver, for defendant Mrs. Moore, cited *Theobald on Wills* 157; *Walker* v. *Taylor*, 8 Jur. N. S. 681; *Smith* v. *Bonnisteel*, 13 Gr. 29; *Wilson* v. *Graham*, 12 Ont. R. 472; *Cook on Mortgages*, 283, 953; *Huggins* v. *Law*, 14 Ont. App. R. 385; *Wishart* v. *McManus* 1 Man. R. 224; *Field* v. *McArthur*, 27 U. C. C. P. 15; *Taylor & Ewart*, Jud. Act, 196.

J. D. Cameron, for infant defendant cited; *London and Canada Loan Co.* v. *Wallace*, 8 Ont. R. 537; *Wills Act*, (Man.) 1882; *Shaw* v. *Borrer* 1 Keen 559; *Robinson* v. *Lowater*, 17 Beav. 592; *Wrigley* v. *Sykes*, 21 Beav. 337; *Hodkinson* v. *Quinn*, 1 J. & H. 309; *Sabin* v. *Heape*, 27 Beav., 553; *West of England &c. Bank* v. *Murch*, 23 Ch. D. 138; *Re Clay*, 16 Ch. D. 3; *Re Tanqueray Willaume*, 20 Ch. D. 465; *Davis* v. *Jones*, 24 Ch. D. 190; *Yost* v. *Adams*, 8 Ont. R. 411; 13 Ont. App. R. 129; *Hawkins on Will*, 284; *Theobald on Wills*, 362; *Lewin on Trusts*, 461; *Berry* v. *Berry* 7 Ch. D. 657.

(*31st May, 1889.*)

TAYLOR C. J. The bill in this case is filed to foreclose a mortgage made by the defendant Emma Moore, then Emma Beall to the plaintiffs.

The land was owned by one William Beall, subject to a mortgage created by him in favor of the plaintiffs. He died in May 1882, having made his will by which he appointed his widow, now Mrs. Moore and William Pearson executrix and executor. He thereby directed payment of his debts and personal expenses, gave his daughter, the infant defendant May Winnifred Hodgson Beall, a legacy of $5000, payable to her when twenty-one, directed her maintenance until she should attain that age, and gave all his real and personal estate to his widow. The will was duly proved by the executor and executrix, but the latter took the active management of the estate, even during the life of Pearson. He died in September, 1883.

In September 1882, Mrs. Moore made the mortgage now in question, securing payment of $2000 in four equal annual instalments, with interest at nine per cent. There is no dispute as to the money having been advanced or as to default in the repayment. The only question calling for decision is, whether under the terms of the will, the legacy to the infant, and the provision for her maintenance, are charges upon the land in priority to the mortgage now sued upon? It is not necessary to consider the question which has been discussed in so many cases whether there being a direction for the payment of debts, the plaintiffs were or were not liable to see to the application of the money. At the opening of the case counsel for the plaintiffs made the admission that one Yeomans was the agent of the plaintiff company and knew that the money was being borrowed for the purpose of building the centre double house on the premises.

By the will the testator, in the first sentence, appoints his widow and Pearson executrix and executor "directing my said executors to pay all my just debts and funeral expenses and the legacies hereinafter given out of my estate." He does not simply direct them to be paid by his executors, a direction which has in many cases been held to indicate that payment is to be made out of the personal estate, as that is the estate which comes to the hands of the executors. The direction is to pay them "out of my estate." He does not say out of what estate. But looking at

the will thus far, that is equivalent to saying out of my whole estate, real and personal.

Mr. Buller, afterwards the eminent judge, when arguing *Hogan* v. *Jackson*, Cowp. 306, said, "the word estate is a technical legal expression and properly applicable to real estates." The meaning of the word was considered by the Judical Committee of the Privy Council in *Mayor of Hamilton* v. *Hodsdon*, 11 Jur. 193; and there it was said, "the principle is now perfectly recognized . . . . that the word 'estate' is *genus generalissimum*; and will by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the realty as well as personalty; and is not to be confined and restrained to personalty only, unless there is a clear intent expressed in other parts of the will . . . . or from the way in which the word is used in the particular part of the will where the contested use of it arises, or in some other way it is shewn to be restricted to mere personal estate, contrary to the strict, usual, and now established force effect and value of the word." That some contrary intention ought to appear, to induce the court to put on the word a less extensive signification than it naturally bears had been held by Lord Hardwicke in *Tilley* v. *Simpson*, 2 Term, 659 n.: and by Sir William Grant in *Barnes* v. *Patch*, 8 Ves. 603. The mere use of the word in connection with others that denote personal property will not be sufficient to restrict its meaning. In *McCabe* v. *McCabe*, 22 U. C. Q. B. 378, the words, "all my estate, goods and chattels," were held to pass the realty.

Is there any contrary intention shown in this will? The word is again used in connection with the provision for maintenance. "And also my executors to educate and provide all necessaries for said child from my estate until she is twenty-one years of age over and above the $5000 above mentioned." No doubt there, the word estate, looking at that clause alone, must be taken to mean the whole estate, real and personal. But the whole will must be looked at, and it is argued that the terms of the gift to the widow show that the personalty only is chargeable with the legacy and maintenance. That gift comes immediately after the appointment of the executors, the direction to pay debts, funeral expenses and legacies out of the estate and the gift of the legacy to the child. The whole sentence reads thus, "After paying off

said debts and funeral expenses, I give and bequeath to my daughter Mary Winnifred Hodgson Beall the sum of $5000 to be paid to her at the age of twenty-one years by my executors, and I give to my wife all my real estate whatsoever and wheresoever and all my chattels and household furniture with the exception of paying the above named legacy." The plaintiffs desire to read that as two separate gifts, first one of the real estate, and then as something distinct, the chattels and household furniture with the exception of paying thereout the legacy. That seems to me a very forced construction to put upon the sentence. The gift is one of the realty and the personalty, and the exception of paying the legacy must relate back to the whole subject matter of the gift. That, on careful consideration, seems to me the more sensible and the ordinary way of reading the passage. It is true that there the legacy is to be paid by the executors, nothing more being said. But the testator had already, when directing generally the payment of debts and legacies by the executors indicated the source from which they were to make the payment "out of my estate." Then the gift to the widow is a residuary devise of realty and personalty in one mass, she being also an executrix and so the case falls within *Re Brooke*, *Brooke* v. *Rooke*, 3 Ch. D. 630, and cases of that class, in which the real estate has been held charged with legacies.

The plaintiffs, however, contend that even if the legacy and maintenance are prior charges, they should be given priority over them to the extent of their advances, or to the extent that the property has thereby been improved, because their money has been used to render the property productive by putting buildings upon it, and so a fund out of which the infant can be and has been maintained, provided. Or, as it was put by Mr. Dawson, had an application been made in 1882 to the court, for leave to borrow this money for improving the property, the loan would have been sanctioned, and the plaintiffs should now be put in the same position as if authority to borrow the money had then been given. I do not think the matter can now be dealt with in that light, but even if it could, I cannot conceive that the court would in 1882 have given authority to borrow the money. There was no need then for any such expenditure of money in improving the property. Look at the position then. The infant was when the testator died, thirteen months old, not

two years old when the money was borrowed, so her education and maintenance could not be a serious matter for some years to come. The testator died owing about $1000, and left personal property worth about $700. He held a parcel of ground under a lease which had four years to run. On this was erected a building which was then leased at $1000 a year, and from which the widow received the first year that amount. On the land covered by the mortgage there was erected a house in which the widow lived, and from which when she went to Ontario in October, 1882, she received $40 a month. Then she had $4000 from an insurance policy on the testator's life in her favor, out of which she paid the debts, leaving her $3000. Then she got $1000, the amount of another policy of insurance in favor of the infant. These two sums could easily have been invested to produce $240 a year. The gross income would be $1720 a year. Deducting from that $216, the ground rent for the leasehold, $225 taxes, $160 the interest on the first mortgage, say $100 for insurance, and say $100 for repairs, there would be left a clear income of over $900 for the support of herself and this infant two years of age. As it was, she put an addition to the house on the property costing $100, and built a double house at a cost of $2100. This was made up, the infant's insurance money $1000, from her father $600, and the remainder $500 from her own insurance. She had then, when she went to Ontario, rent from the leasehold property $1000, from the house originally on the land $480, from the double house she put up $840, from the balance of insurance money $2,400 if invested, she could have had $144, or a total of $2,464, and making the same deductions as before of $801, it would have left her a clear income of over $1,600 a year. It is true the rents began to fall, that the leasehold became vacant and the lease was forfeited, and the building lost through her inability to pay the ground rent, but in testing the propriety of borrowing the money and whether it was necessary for making the estate productive, the then existing state of things is what should be looked at. Certainly the getting this money, and the making improvements on the estate, did not mend matters, for it was after that was done that the decline began.

But it is further argued that the plaintiffs should have a lien for improvements, the money having been advanced under a mistake of title. No doubt the courts have gone very far in

allowing liens for improvements made under a mistake of title, but was there any such thing here? The widow, the mortgagor, owns the land, and the plaintiffs advanced her money to improve her estate, which she spent in doing so. It is true her estate was encumbered with a charge of which they had notice, but which they chose to disregard. How is there any mistake of title there. Suppose a man owning an equity of redemption proposed to borrow money for building purposes, and the lender applied to, assuming that the existing mortgage was barred by the Statute of Limitations, or for some other reason was void and could not be enforced, lent the money, and suppose the mortgagee afterwards proving an acknowledgment, which would take the case out of the statute, proceeded to enforce his claim, I do not see how the court could ever give the second mortgage priority over the first on the ground of mistake of title. Yet the second mortgagee would have as good reason to make that claim as the plaintiffs have here. They advanced the money to the widow, the owner of the land, and they have the security of her estate and interest in the land, the security upon which they advanced it.

I can see no reason for giving the plaintiffs a decree permitting them to remove the centre double house from off the land. It was, when put there, intended to be affixed to the freehold, and that is what must govern, not the question of whether it is capable of being removed or not.

I do not think it is necessary to consider the question so fully argued as to whether the mortgage should have been executed by the two executors or not. It, as it stands, is a good mortgage of Mrs. Moore's estate in the lands, and that is all the plaintiffs can claim under it.

Sufficient evidence has been given of her owning separate estate to warrant an order for payment on her covenant.

There must be a decree declaring, that the legacy to the infant and the provision for her education and maintenance are a charge upon the land in question, in priority to the mortgage from the defendant Mrs. Moore to the plaintiffs dated 1st Sept., 1882, directing an account of the amount due on that mortgage, limiting a time for payment by her, and in default for foreclosure of her estate in the land. It may provide also for immediate payment by her of the amount due. The plaintiffs ask that although they

have applied the rents received since they took possession upon their first mortgage, they should be permitted to change this, and to apply them on the mortgage now in question. I do not see how they can be permitted to do this. Apart from any question as to their having already appropriated the money to the first mortgage, and communicated that to the mortgagor, which would prevent them from now making a change, *Simson* v. *Ingham*, 2 B. & C. 72, it appears from the letter of 18th February, 1888, that they took possession under their first mortgage. Now it is well settled that where a mortgagee having two debts, takes possession, he must apply the rents and profits which he may receive, upon the debt in respect of which he takes possession, *Montgomery* v. *Donohoe*, 5 Ir. Ch. 495; *Skirrelt* v. *Athy*, 1 B. & B. 430.

The plaintiffs are entitled to their decree with costs as against Mrs. Moore, except such costs as were occasioned by the first hearing when the cause stood over to amend. Her costs occasioned by that hearing, Mrs. Moore is entitled to tax against the plaintiffs and set off against their claim. Against the infant the bill must be dismissed with costs.

WHITE v. THE CANADIAN PACIFIC RAILWAY CO.

Carriers.—"By reason of the Railway."—Smuggled goods.

The statutory limitation of actions for "damages or injury sustained by reason of the railway," does not apply in an action, either contract or tort, for damages for non-delivery of goods delivered to the railway for carriage.

To a declaration against a carrier for non-delivery defendants pleaded that the goods had, prior to the delivery to the carrier, been forfeited to the Crown for non-payment of customs dues,

Held, Not a valid defence.

A carrier pleaded a lien for tolls, to which plaintiff replied that he was ready and willing and within a reasonable time offered to pay the tolls, and requested delivery, but defendants neglected and refused to deliver and thereby discharged plaintiff from tendering the tolls,

Held, Bad on demurrer.

The declaration contained several counts for non-delivery by the defendants of certain goods given to them to be carried.

The 17th plea justified the detention because of non-payment of tolls.

The 18th and 19th pleas alleged that the grievance complained of was damage or injury sustained by reason of the railway, and that the action was not commenced within one year.

The 23rd, 24th, 25th and 26th alleged in varying forms that prior to delivery of the goods for carriage, they had become forfeited to the crown for non-payment of customs dues.

To the 17th plea the plaintiff replied that she was ready and willing and within a reasonable time offered to pay the tolls to the defendants and then requested the defendants to deliver the goods to her, but the defendants then and for a long and unreasonable time neglected and refused to deliver the said goods to the plaintiff and thereby discharged the plaintiff from tendering the tolls.

Demurrer to all the above pleas except the 17th and to the replication to that plea.

R. Cassidy and *B. E. Chaffey*, for plaintiff, upon the main point, cited the following cases:—*May* v. *Ont. and Quebec Ry. Co.*, 10 Ont. R. 70; *McCallum* v. *G. T. R.*, 31 U. C. Q. B. 527; *Palmer* v. *Grand Junction Ry.*, 4 M. & W. 766; *Carpne* v. *London & Brighton Ry. Co.*, 5 Q. B. 757; *Garton* v. *G. W. R.*, E. B. & E. 846; *Kelly* v. *Ottawa Street Ry. Co.*, 3 Ont. App. R. 616; *Auger* v. *Ontario, Simcoe, &c., Ry. Co.*, 9 U. C. C. P. 164; *Browne* v. *Brockville Ry. Co.*, 20 U. C. Q. B. 202; *Jefferies* v. *G. W. R.*, 5 E. & B. 801, Defendants cannot set up *jus tertii*, *Parsons on Contracts*, vol. 2, p. 217, n, x.; *Thorne* v. *Tilbury*, 3 H. & N. 534; *Atkinson* v. *Marshall*, 12 L. J. N. S. Ex. 117; *Gosling* v. *Birnie*, 7 Bing. 339; *Holl* v. *Griffin*, 10 Bing. 246; *Kieran* v. *Sandars*, 6 A. & E. 515.

J. A. M. Aikins, Q.C., and *W. H. Culver*, for defendants, upon the main point cited, *Bullen & Leake*, 799; *Chitty on Pleading*, vol. 2, p. 26, n.; *Blagrave* v. *Bristol Water Works Co.*, 1 H. & N. 369; *Roberts* v. *G. W. R.*, 13 U. C. Q. B. 615; *Conger* v. *G. T. R.*, 13 Ont. R. 160; Customs Act, Rev. Stat. Con. c. 32, s. 35, 36, 47, 118, 161, 167, 192, 196, 197, 200, 204,

205, 212, 233, read s. 118 with 192. As to *jus tertii*, *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 648, 650, n.; *Cheesman* v. *Exall*, 6 Ex. 345, n.; *Smith* v. *Mawhood*, 14 M. & W. 461; *Waugh* v. *Morris*, L. R. 8 Q. B. 208; *Hooper* v. *Coombs*, 5 Man. R. 65; *Wilkins* v. *Despard*, 5 T. R. 112. *Addison on Contracts*, 1162. As to replication, *Lake* v. *Biggar*, 11 U. C. C. P. 175; *Llado* v. *Morgan*, 23 U. C. C. P. 517; *Kendal* v. *Fitzgerald*, 21 U. C. Q. B. 585. Replication a departure, *Coulthard* v. *Royal Ins. Co.*, 39 U. C. Q. B. 409.

(*9th April, 1889.*)

KILLAM, J.—The eighteenth and nineteenth pleas are pleaded with a view to take advantage of the 287th section of the General Railway Act of Canada, 51 Vic. c. 29, which provides that "All actions or suits for indemnity for any damages or injury sustained by reason of the railway, shall be commenced within one year next after the time when such supposed damage is sustained, or if there is a continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence in any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act or of the special Act."

A similar clause appeared in the early railway Acts of the Province of Canada, and has been found in the various General Railway Acts of the Dominion. Both before and since Confederation there have been a number of decisions upon this clause in the Courts of Upper Canada or Ontario.

But, first, I wish to say with reference to two cases upon the limitation clause in some of the English Railway Acts, upon which the plaintiff's counsel to some extent relies, *Palmer* v. *The Grand Junction Railway Co.*, 4 M. & W. 749, and *Carpue* v. *The London & Brighton Ry. Co.*, 5 Q. B. 747, that they do not appear to determine absolutely that if this plea followed the wording of the English Acts it would in a similar action in England, necessarily be bad upon demurrer. The latter case appears to turn upon the nature of the accident causing the injury and the language of Parke, B., in the former, is to some extent ambiguous. This being so and the wording being different, I think that we can say of them only that they point out, without

wholly turning upon, the distinction which has been made in the Ontario cases.

In *Roberts* v. *The Great Western Ry. Co.*, 13 U. C. Q. B. 615; where the plaintiff sued the defendant company as a carrier of passengers for the negligent running of the train on which the plaintiff was travelling whereby the car in which he was, was thrown from the track and he was injured, a plea that the action was not brought within six months from the date of the plaintiff's sustaining the injury, under a clause of the defendant's special Act differing from that now in question, only in fixing the period of limitation at six months, was held bad on demurrer. Robinson C.J., then said, "We are all of opinion that the 10th section of 16 Vic. c. 99, does not apply to an action of this nature, but only to actions for damages occasioned by the company in the exercise of the powers given or assumed by them to be given for enabling them to construct and maintain their railway. This is an action charging them with negligence in the conduct of a description of business that any individual might be engaged in without requiring the aid of legislative Acts enabling them to take or use the property of others against their will."

In *Auger* v. *The Ontario, Simcoe and Huron Ry. Co.*, 9 U. C. C. P. 169, Richards, J., said, "There is no doubt the courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers even in those cases where they are permitted by their Act of Incorporation to use locomotives, &c., for the conveyance of passengers and goods, and to charge for such conveyance, but the liability arises in those cases from the breach of contract arising from their implied undertaking to carry safely and to take proper care of the goods, &c. The same principle does not apply in these cases; the right of the plaintiff does not rest in any way on contract, but is strictly an action of tort against the defendants for an alleged wrong done by them in exercising the powers conferred upon them by the Act." The action in that case was for the killing of the plaintiff's cattle which had strayed upon the line of the railway.

In *Kelly* v. *The Ottawa Street Ry. Co.*, 3 Ont. App. R. 616, Burton, J. referring to the remarks of Robinson, C.J. in *Roberts* v. *G. W. R. Co.*, which I have already quoted, said, "This appears to me to be a correct exposition of the law."

In my opinion the distinction pointed out by Richards, J., in *Auger* v. *The Ontario, Simcoe & Huron Ry. Co.*, is the correct one. This action, so far as the first three counts are concerned is not brought "for indemnity for damages or injury sustained by reason of the railway." It is brought for indemnity for the breaches of the contracts set out in those counts. It may be that it was something that happened by reason of the railway which caused those breaches of contract, but the damage or injury thus sustained was sustained by the company, which is bound under such contracts absolutely except in case of loss happening through certain events.

This view has been very clearly put by Mr. Justice Wetmore of the High Court of Justice of the North West Territories, in the case of *Walters* v. *C. P. R. Co.*, 1 N. W. T. R. 17. He says, "The defendant's obligation or contract as a common carrier unless limited by some special agreement with the plaintiffs or by some notice, condition or declaration which they might lawfully make or give, was to carry and safely deliver the goods at all risks, save only the act of God or the Queen's enemies. In that case they were the insurers of the goods, and if they failed to deliver they would have committed a breach of their contract and would be liable therefor, and that whether such failure was brought about by their own negligence or wrongful act in managing their railway or otherwise, or by the negligence or wrongful act of another person, or by accident. A suit instituted to recover for such a breach would not, in my opinion, be a suit instituted for indemnity for any damage or injury sustained by reason of the railway,' because the neglect or wrongful act of the defendant in the construction, maintenance, use or management of the railway would not be the gist of the action. The gist of the action would be the breach of contract as before stated."

This may seem in some respects a narrow view to take of the question, and to be reducing it to a question of the form of action, but it is not really so. The same reasoning would be equally applicable if the form of the declaration were in tort. Indeed, in the case last referred to the distinction in form was not involved as in the North West Territories there is not a common law declaration used, but a statement of claim setting forth the facts as under the English Judicature Act.

In view of the discussion thus several times raised in the courts

upon this subject, the use of language upon which this distinction can so clearly be made, and the repetition of the same clause without change in successive statutes, it seems to me proper to follow the opinions of Robinson, C.J., Richards, J., Burton, J. and Wetmore, J. upon this point. If the legislature had intended that this distinction should not be taken, one would expect under the circumstances that this intention should be shown by clear words. The enactment is one which is in restraint of the ordinary right of action and must be strictly construed, and I do not feel warranted in considering its operation to be extended beyond what the words necessarily call for.

I do not find it necessary, then, to enter upon a consideration of the other Ontario cases, or the argument based on the latter part of the section to which Wilson, C.J., referred in *May* v. *The Ontario & Quebec Ry. Co.*, 10 Ont. R. 70. This argument would strengthen very much the opinion I have formed, but as it would seem to tend to even a narrower construction of the clause than is necessary for the present case, and as my opinion would for present purposes be the same if the latter portion of the clause were not there, I do not base my decision upon it.

For the purposes of the other pleas demurred to, I have looked carefully through the Customs Act and, particularly through the sections to which I have been referred by the defendant's counsel. I am unable to find anything in the Act which can make the contracts of carriage and of bailment on which the first twelve counts are based illegal. The pleas do not show that these contracts were in any way made for the purpose of assisting in the violation of the Act. At the most they could only be taken as showing that, before the delivery to the defendant as carrier or bailee, the goods had been forfeited and had become the property of the Crown. The pleas can then be looked upon merely as setting up the *jus tertii*, without showing that the goods have been claimed or taken by the Crown or that the defendant withholds them by authority of the Crown. In this respect I can find no difference in the position of the defendant in the circumstance that the property is said to be in the Crown rather than in any other third party.

Then, as to the counts in detinue and trespass, even if the pleas be sufficient to show a general property in the Crown, they are not sufficient to negative a special property or a right which

as between the plaintiff and the defendant the latter would be estopped from denying, sufficient to support the action. Counsel for the plaintiff has pointed out objections to the framing of the individual pleas to show that they are not sufficient to support the claim of forfeiture under the respective clauses under which they are pleaded. Others, also, might be suggested. But I do not find it necessary to discuss these, as it appears to me that for the reasons which I have mentioned none of these pleas form an answer to any of the counts of the declaration.

During the argument I intimated sufficiently my view of the replication demurred to, which alleges neither a tender of the tolls due nor sufficient facts to amount to a waiver of a tender or render it unnecessary.

All of the demurrers must be allowed.

Demurrers allowed.

McMICKEN v. THE ONTARIO BANK.

Security for costs.—Payment into Court.

The referee having made an order that security for costs should be given "in accordance with the usual practice of this Court,"

Held, That he could not permit the plaintiff, in lieu of giving a bond, to pay into court a sum less than $400.

A motion was made before the referee on behalf of the defendants, for an order staying proceedings until a new next friend should be appointed, or security for costs given. In support of this motion the defendants intended to examine the next friend. Thereupon a notice was served by the plaintiff's solicitors, that, "So far as security for costs is required from the next friend, the plaintiff does not intend to oppose your motion for Wednesday next and consequently the next friend will not attend for examination."

Upon the return of the motion the referee made an order that all proceedings be stayed until the next friend was changed and a new next friend a person of substance appointed in his place, "or security for costs be given by said plaintiff or her next friend in accordance with the practice of this court, with leave

to the plaintiff to pay $200 into court to the credit of this cause in lieu of giving such security." Against this order the defendants appealed so far as it gives leave to pay into court $200.

C. W. Bradshaw, for the appellants.

W. H. Culver, for the plaintiff.

Australian Steamship Co. v. *Fleming*, 4 K. & J. 407; *Cliffe* v. *Wilkinson*, 4 Sim. 122; *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62; *Atkins* v. *Cook*, 3 Jur. N. S. 283; *Partington* v. *Reynolds*, 6 W. R. 307; *Drinan* v. *Mannix*, 3 Dr. & W. 161; Gen. Ord. 312 were referred to.

(*8th February, 1889.*)

TAYLOR, C.J.—The practice in England requires security for costs to be given by bond for £100, but since, at all events, *Cliffe* v. *Wilkinson*, 4 Sim. 122, a plaintiff may obtain an order allowing him to pay into court £120 instead of giving a bond. In Ontario the practice for many years has required a bond for $400, or the payment into court of the same sum. Here the same practice has obtained on the equity side of the court, although I believe on the common law side payment into court of $200 has been considered sufficient in an ordinary suit.

It is sought to uphold the referee's order here because Gen. Ord. 312 says, the penal sum to be inserted in the bond is to be fixed upon the application for security by the judge, referee or master who makes the order. Under this it is claimed the referee had a discretion in fixing the amount. But did not he exercise his discretion when he required the security to be given, "in accordance with the practice of this court." That required a bond for $400 and I know of no practice which allows the alternative of payment into court of a smaller sum. In England when instead of giving a bond, money is paid into court, an increased amount has to be paid to cover the costs of the motion for payment in the event of costs being awarded against the plaintiff. The referee has, in my opinion, no discretion after requiring the security to be by bond of $400, which is what this order requires in the first instance, to give an alternative with a lesser amount.

I allow the appeal, but as the referee was misled by the common law practice, I make the costs costs in the cause.

WATEROUS v. ORRIS.

(IN EQUITY.)

Statute of Frauds.—Parol trust.—Renewal of fi. fa.—Certificate of judgment.—Informalities.

C. owned land subject to mortgages. For the purpose of securing O. against some accommodation endorsements she mortgaged the land to him, but in form the mortgage was to secure payment of $3,500. The first mortgagee took foreclosure proceedings. A verbal agreement was then made, (as the plaintiff alleged) that O. should prove upon his mortgage, should redeem the prior mortgagees, borrow upon a new mortgage sufficient to recompense him, and hold the equity of redemption in trust for C.

The plaintiff purchased a judgment against C. upon which *fi. fa.* lands, and a certificate of judgment had been issued; and filed a bill upon them claiming that O. was a trustee for C., and asking for a sale. The evidence shewed that the plaintiff was simply the nominee of C.

Held, 1. That the agreement being verbal, the Statute of Frauds was a valid defence.

2. The *fi. fa.* had ceased to be in force, it having been tested 17th August, 1885, and renewed more than 30 days before its expiration.

3. That the certificate of judgment was invalid. The judgment was recovered by Thomas Houston and William S. Foster, trading as Houston, Foster & Co., for $1,278.60, whereas the certificate was of a judgment recovered by Thomas Hustin and William S. Fisher, trading as Hustin, Fisher & Co., for $1,188.70.

H. M. Howell, Q.C., and *A. E. McPhillips*, for plaintiff, cited the following cases:—*Haigh* v. *Kaye*, L. R. 7 Ch. 469; *Taylor* v. *Bowers*, 1 Q. B. D. 291; *Symes* v. *Hughes*, L. R. 9 Eq. 475; *Davies* v. *Otty*, 33 Beav. 540; *Mundel* v. *Tinkis*, 6 Ont. R. 625; *Lincoln* v. *Wright*, 4 D. & J. 16; *Childers* v. *Childers*, 1 D. & J. 482; *Campbell* v. *Dearborn*, 109 Mass. 130; *Browne on Statute of Frauds*, 95, 98; *Harper* v. *Culbert*, 5 Ont. R. 160.

J. S. Ewart, Q.C., and *A Haggart*, for defendant Orris, cited the following cases:—*Blake* v. *Jones*, 3 Anstr. 651; *Story's Equity Pleading*, § 152, 153; *Holmsted's Rules & Orders*, 45; R. S. Ont. 1887, c. 124, s. 4, c. 64; *Browning* v. *Ryan*, 4 Man. R. 486; *Fisher on Mortgages*, 13; *Leman* v. *Whitley*, 4 Russ. 423; *Langlois* v. *Baby*, 10 Gr. 358; *Reg.* v. *Calloway*, 3 Man.

R. 297; *Beaty* v. *Fowler*, 10 U. C. Q. B. 382; *Davidson* v. *Campbell*, 5 Man. R. 250; *Macdonald* v. *Fonseca*, 3 Man. 413; *Vanwhort* v. *Smith*, 4 Man. R. 421.

H. M. Howell, Q. C., in reply cited:—*Howell* v. *McFarland*, 2 Ont. App. R. 31; Con Stat. U. C., c. 45, s. 10; *Macdonald* v. *McLean*, 16 Gr. 665.

(*7th June, 1889.*)

TAYLOR, C.J.—On the 15th of August, 1885, Thomas Houston and William S. Foster, merchants in Toronto, Ontario, trading as Houston, Foster & Co., recovered a judgment in the Court of Queen's Bench for Manitoba, against the defendant Mary Rosalie Cameron, trading in Winnipeg as J. R. Cameron & Co., for $1,278.60 damages and costs, and a writ of *fieri facias*, against lands dated 17th August, 1885, was on the same day placed in the sheriff's hands, which writ was renewed on the 5th of July, 1887. On the 29th March, 1886, the partnership between Houston & Foster was dissolved, the latter assigning his interest in the assets to Houston, who then carried on business as Thomas Houston & Co. until 28th March, 1887, when he executed an assignment for the benefit of creditors to one Clarkson. On 30th April, 1887, the judgment was assigned to the plaintiff, the assignment being expressed to be made between Thomas Houston and William S. Foster, trading together as Houston Foster & Co. of the first part, and Frederick L. Waterous of the second part. It is under seal and executed thus, "Thomas Houston & Co. successors to Houston, Foster & Co. by E. R. C. Clarkson, trustee" On the 20th of June, 1887, a certificate of the judgment was registered in the Registry Office for the City of Winnipeg. On the 10th of August, 1885, Mary Rosalie Cameron then the owner or apparent owner of the land now in question, executed a conveyance of it to one George Heenan, which was registered on 12th August. This deed was wholly voluntary and without consideration, and from the evidence of Ashbaugh, who was her solicitor, it was executed to protect the property from creditors, and it is doubtful if the grantee ever heard of its existence. Leaving this deed out of consideration, Mary Rosalie Cameron was owner of the land subject to two mortgages to a Loan Co., and one to Duncan MacArthur made in May, 1883. In September, 1883, she made a mortgage to the defendant Orris for $3,500. He was then and is still resident in Ontario, but his son living in Winnipeg,

took the mortgage. In the December following, the two mortgages to the Loan Co. were assigned to MacArthur who then filed a bill for foreclosing the equity of redemption in the land. According to the allegations in the bill, the mortgage to Orris was really made to secure him as surety for certain payments to be made by Mrs. Cameron, which were all duly made, that it was agreed that his mortgage should be proved as a subsisting security, that he should redeem MacArthur, and after obtaining a final order of foreclosure, should borrow the money paid to MacArthur on the security of the land, and subject thereto, hold it for Mrs. Cameron. The claim on Orris' mortgage was proved, the necessary affidavit being being made by his son, MacArthur was redeemed, and after the final order was made, money was borrowed from another Loan Co., that mortgage being at the present time still unpaid. Orris gives a very different account of matters from what is set up by the plaintiff and sworn to by witnesses called on his behalf.

It seems to me that the plaintiff cannot succeed in this suit. From the evidence it is plain that the plaintiff is simply the nominee of Mary Rosalie Cameron the debtor, the bill is her bill, not his. It is not a bill by a creditor to set aside a fraudulent conveyance, it is a bill to enforce a trust. It sets up an agreement that Orris after mortgaging the land to reimburse himself the money advanced to redeem MacArthur, "should then hold the said lands as trustee for the defendant Mary Rosalie Cameron." It submits, "that he ought to be declared to hold the same as trustee for the said defendant Mary Rosalie Cameron," and the prayer is, that, "the defendant William Orris may be declared to hold the lands hereinbefore described as trustee for the defendant Mary Rosalie Cameron." The Statute of Frauds which is pleaded seems to me a complete answer to the claim she now asserts through the plaintiff. There is no writing of any kind signed by Orris to evidence the trust. Even if the plaintiff should not be held merely the nominee of Mary Rosalie Cameron seeking to enforce this claim for her and for her benefit, proceeding as he seeks to do under a certificate of judgment, that puts him simply in the same position as if he had a charge in writing by her, the judgment debtor, under her hand and seal, and he can have no rights in this matter to the relief he seeks greater than she would herself have.

Then the objection to the registration of the certificate seems

to me fatal to the plaintiff's success. The judgment was one for $1,278.60 recovered by Thomas Houston and William S. Foster, trading as Houston, Foster & Co. The certificate registered is of a judgment recovered by Thomas Hustin and William S. Fisher, trading as Hustin, Fisher & Co. for $1,188,70. Under such cases as *Sale* v. *Crompton*, 2 Str. 1209; *McDonald* v. *Rodger*, 9 Gr. 75; *Vanwhort* v. *Smith*, 4 Man. R. 421, the registration cannot be held effectual. The *fi. fa.* against lands was not properly renewed. It was dated and tested on 17th August, 1885, so under section 103 of The Administration of Justice Act it would expire on the 16th of August, 1887, but that section says such a writ "may within thirty days before its expiration . . . be renewed," &c. In *Beaty* v. *Fowler*, 10 U. C. Q. B. 382, the construction of somewhat similar words in the Ontario Chattel Mortgage Act was considered. That Act 12 Vic. c. 74, provided that a chattel mortgage should cease to be valid after the expiration of one year from the filing, "unless within thirty days next preceding the expiration of the said term of one year," a true copy should be again filed. The court held that where the year expired on the 24th of February, filing a copy forty seven days before, on the 9th of January, was not a compliance with the statute. In *Shipman* v. *Grant*, 12 U. C. C. P. 395, the question was as to a proviso in a lease for notice of renewal "within three months previous to the 9th day of March next." It was contended on the one side, that the notice must be given not less than three months before the day, and on the other, that it might be given on any day which fell within three months of the 9th of March. The court held that a notice given between the 9th of December and the 9th of March following was sufficient. Draper, C.J., after remarking that he could not distinguish this from *Beaty* v. *Fowler*, said, "the word 'within' is defined to mean 'not beyond,' and I can find no sound or legal reason for withholding that meaning."

The bill must be dismissed with costs, including the costs which were at the former hearing reserved by my brother Bain.

Bill dismissed with costs.

RE A., AN ATTORNEY.

(IN CHAMBERS.)

Attorney and client.—Agreement that attorney not to account for moneys received.—Business done before a magistrate.

An attorney was employed to conduct the entire defence of a prisoner. He appeared upon the preliminary investigation before a police magistrate. He received money from the prisoner. Upon an application for the delivery of his bill he swore that it had been agreed that he was to use the money in procuring the prisoner's release, but was to keep no account of the money paid out. This the client denied.

Held, 1. That the attorney should deliver an ordinary bill of costs.

2. That such an agreement must be in writing.

F. C. Wade, for applicant.

C. P. Wilson, for attorney.

(*14th August, 1889.*)

TAYLOR, C.J.—Whatever it may be proper to hold, when delivery of an attorney's bill is sought, the entire work having been done on a preliminary enquiry before a single justice of the peace (and from *Cowdell* v. *Neate*, 1 C. B. N. S. 332, it seems doubtful if that is a court within the meaning of "any other court," in 6 & 7 Vic. c. 73, s. 37.) *Re Lewis*, 1 Q. B. D. 726, seems an authority for making an order in a case like the present. There, the attorney was retained for the entire defence, the work was done on a preliminary enquiry before a magistrate at one of the Metropolitan Police Courts, and the client was committed for trial. Here, the attorney was also engaged for the entire defence, the work was done on a preliminary enquiry, before the magistrate in the Provincial Police Court, who committed the client for trial. Con. Stat. Man., c. 7, s. 17, gives the Provincial Police Magistrate all the powers possessed by one, two or more justices of the peace.

By The Criminal Procedure Act R. S. C., c. 174, s. 7, he is by virtue of having that Provincial authority, empowered to do alone whatever is authorized by that Act to be done by any two

or more justices of the peace. So, in dealing with criminal matters, he would seem to occupy a position similar to that of the Metropolitan Police Magistrate before whom the proceedings in *Re Lewis*, were had, Imp. Act, 2 & 3 Vic. c. 71, s. 14, and to have been acting in the same capacity as he did.

The attorney swears that when he received certain moneys from his client, "I was instructed to use those moneys, or as much of them as requisite in endeavoring to procure his release from the charge preferred against him, but I was to keep no account of the moneys so paid out." He then proceeds to say that he did actually pay out so much of the money and is willing to pay over the balance, less his proper fees and charges. The client files an affidavit in reply, that he never stated that he would not require an account of the money expended, nor anything upon which such a meaning could be placed, and the attorney never asked him to agree to such a proposition.

It was argued that such an agreement as is set up by the attorney, must be in writing, to be given effect to, but for this no authority was cited. Also that where there is a conflict between an attorney and his client, the statement of the latter must be accepted as the attorney could have protected himself by using writing. For this the well known rule in the case of a disputed retainer is relied on. But it does not seem that this rule applies except as to retainer, *Re Kerr, Akers & Bull*, 29 Gr. 188. In that case, Proudfoot, J., said, "Though in a simple case of a distinct assertion and a distinct denial of a fact at the time of retainer, and forming a part of the contract of service, it may be a very proper rule to say, that in such a case the solicitor has himself to blame, as he might have protected himself by having his retainer in writing, yet I am not aware of any authority for extending that rule to facts arising after the retainer and during the progress of the litigation."

That if delivery of a bill could be ordered at all, it should be, not a technical bill, but rather a general statement giving no details of the money said to have been expended, was strongly urged upon the authority of *Re Vann*, 15 C. B. 341, and when the summons was argued, I inclined to this view. But on looking at that case it will be seen there were peculiar circumstances. The agreement as to keeping no account, was sworn to by the attorney, and apparently not denied by the client. Then, though

an account had been demanded and refused, within two months, no steps had been taken to compel the delivery of a bill for six years after. C.J. Jervis, though remarking that, an attorney ought not to take advantage of the position in which his client is placed, to extort from him such a bargain as was set up, thought the attorney should furnish such a general account of the money he had expended as the master might think that, under the peculiar circumstances, he ought to give, and the whole matter was referred to the master.

To allow the expenditure of large sums of money without any liability to account for it seems so dangerous, there should be the clearest and undoubted evidence of the client having agreed to such a proceeding. Where any doubt can exist as to the client's assent, I do not see how an account can be dispensed with. And if there is no precedent for holding that such an agreement will not be enforced unless in writing, I think I should make one, and hold that, before an attorney can relieve himself from liability to account for the expenditure of moneys placed in his hands by his client, he must produce a written agreement signed by the client, relieving him from such liability. Here, the whole matter is of recent date, not much over a month old, and all the facts must be fresh in the recollection of the attorney. If he has properly expended the money in the interests and for the benefit of the client, he can have no difficulty in giving the details of his expenditure.

The summons should be made absolute, the bill to be delivered within one week.

Summons made absolute.

RE ASSINIBOINE VALLEY S. & D. FARMING CO.

(IN CHAMBERS.)

Winding Up Act.—Remuneration of liquidator.

An application by a liquidator to fix his remuneration should be supported by an affidavit shewing the number of hours devoted by him and his clerks to the business of the liquidator.

No charge can be made for time spent in procuring his own appointment or opposing his discharge.

Scale of remuneration, and business for which it is allowed, discussed.

G. A. Elliott, for original liquidator.

T. D. Cumberland, for present liquidators.

(*6th August, 1889.*)

TAYLOR, C.J.—The liquidator appointed when the Winding Up order was made, has been removed, not on account of any misconduct, but because a large number of the creditors desired the appointment of two other persons as liquidators, who agreed to act without remuneration. The original liquidator, having passed his accounts, now applies to have his remuneration fixed.

The Winding Up Act by section 28 provides that, "The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs." No scale of remuneration has been agreed upon by the judges. Section 28 is almost identical with section 93 of the English Companies Act, 1862.

Under that Act, the Master of the Rolls and Vice-Chancellors, with the approval of the Lord Chancellor, in 1868, made a regulation as to the mode of remunerating liquidators, which will be found in L. R. 3 Ch. lxiv, giving a percentage of so much per day of eight hours, larger or smaller, according to the amount of the assets divisible among the unsecured creditors. Every application for remuneration is required to be supported by an affidavit showing the number of hours devoted by the liquidator and his clerks respectively to the business of the liquidation. The liquidator here has filed such an affidavit in which he says the whole of the time appearing in the statement annexed was

employed upon matters proper to engage his attention, and which could not properly be entrusted to clerks. He says further, that it is the practice and custom with chartered accountants in this Province, to charge for their services according to the number of days employed, such day to consist of seven hours. The statement annexed to the affidavit, and verified, sets out in detail the days on which he was employed, how employed and the number of hours on each day. The time amounts in all to 379 hours or 54 days of seven hours each and one hour. According to the English reckoning of the day as eight hours, it would be 47 days and 3 hours.

As the greater part, indeed it might be said, the whole of the assets consist of lands which have not been disposed of, it is not yet known what the amount of assets divisible among the unsecured creditors will be. The affidavit says the assets consist almost entirely of 4,500 acres of land which at a low valuation should realize $6 an acre. That would make their value $27,000 but it does not appear whether they are subject to any encumbrances by way of mortgage, or liens for unpaid purchase money. Calculated upon the English scale and assuming that the whole amount will be divisible among unsecured creditors, the remuneration would be £4, or say $20 for each day of eight hours. But, in England, the scale of remuneration is much higher, at all events in connection with litigation, than in this Province. If the remuneration given judges and officers of the court, can be taken as any guide, it would be about $1 here for each £1 there.

Then, when the statement of time is examined, no small part of the time for which a charge is made was spent on business for which no charge can be made against the estate. At the very start 18 hours seem to have been spent in efforts to procure the appointment as liquidator, attending various creditors, attending solicitors to have affidavits drawn in favor of the appointment, attending creditors to have these sworn to, getting security executed, and so on. Then 26 hours on six separate days are entered thus, "Going over books, papers, &c., of the company for information as to the affairs of the company, and seeing several parties as to their becoming bondsmen." How much time was spent for the last purpose does not appear. So, at the end, 16 hours are charged for consultations, and attendances with solicit-

ors in connection with opposing the appointment of the new liquidators.

Of the remaining time, I think 98 hours seem to have been spent in consultations with the solicitors, attending the examination conducted by them of various claimants, and in chambers when creditors claims were being argued. No doubt these consultations may have been necessary, and the attendance of the liquidator on the examinations may have been useful, and the time so spent should be considered in fixing his remuneration, but it must also be remembered that charges against the estate for all these matters will appear in the solicitor's bill of costs.

No doubt services were rendered by the liquidator, and many of the claims made were either disallowed or compromised at reduced amounts. For what was done he should be paid, though I do not think it can be on the English scale. The assets not being realized so that it cannot be known certainly under what class in that scale this matter would fall, renders it still further difficult to apply that scale. On the whole, I think $300 would be a fair sum to allow the liquidator for his services.

McMASTER v. JONES.

(IN CHAMBERS.)

Attachment.—Foreign parties.—Form of affidavit.

In order that the goods of a foreign defendant may be attached it is essential that the plaintiff be a resident of this Province.

Where the parties to a note both reside in a foreign country, the presumption is that the note was made there.

An affidavit for an attachment must state whether or not the defendant is a corporation.

A. Haggart, for plaintiff.

T. D. Cumberland, for defendant.

(*5th September, 1889.*)

TAYLOR, C.J.—By section 18 of The Administration of Justice Act, 1885, any personal property in Manitoba, of a debtor or a person against whom there is a cause of action, may be attached for the payment of a debt, or satisfaction of a cause of action arising from legal liability, in three specified cases. The case must be brought within one of those three. The present case is clearly not within the first, for the debtor is not an inhabitant of this Province. And it is not within the terms of the second, for the creditor is not a person residing within this Province. Does it come within the third? It is claimed that it does, for it is sworn that, the debtor, a non-resident of this Province, is about to remove his property from the Province, with intent to delay, defeat and defraud the plaintiff and those who have causes of action against him.

That third sub-section applies alike to a debtor "being a resident or non-resident of this Province," but apparently where the debtor is a non-resident, the creditor must be a resident before the writ can issue. Section 20, I think shows this. That section deals with the affidavit on which an application for the writ can be made, and has three sub-sections. The second of these has no application to the present case. The affidavit must, in all cases, state what is set out in sub-section one, and in addition, "In the case of a debtor or other person liable as aforesaid, not being a resident of this Province," what is set out in sub-section three. Whether the case falls within sub-section two of section 18, or within sub-section three of that section, the debtor being a non-resident, the affidavit must show that the cause of action comes within the class of cases mentioned in sub-section two of section 18. That is, it must show that the debtor "is indebted to a creditor or legally liable to a person as aforesaid, residing within this Province, either in respect of a contract express or implied, or in respect of any cause of action made in this Province or arising therein, or in the case of a contract or other obligation, if made elsewhere, to be performed or partly performed or completed in this Province, or liable to be compensated for in damages, or in respect of a cause of action which arose and for which he is liable to satisfy another person in this Province."

Now, here the creditor is a resident of the State of New York, and the debtor is a resident of the State of Kansas. The cause of action is the non-payment of certain promissory notes made by the debtor and of which the creditor is the holder. It is not shown that they were made in this Province, or that they were payable here. In the absence of any such evidence, it seems to me that in the case of two foreigners the presumption is that they were made and payable in the foreign country where they reside.

It was sought on the strength of a statement in the affidavit that the debtor admitted that he owed the amount overdue on the notes to the creditor, to rely upon an account stated. The objection taken to that, that the account must be stated before action brought has no application here, for the admission set up, must have been before action brought. It was made before the affidavit was sworn and the action was begun by the issuing of the writ of attachment after that. But in this case the cause of action relied on in the affidavit is not a stated account, but is expressly said to be "four overdue and unpaid promissory notes for the amount mentioned made by the said Charles J. Jones, and of which said notes the said James S. McMaster is the lawful holder."

I do not think section 32 of 49 Vic. c. 35, has any application to such a case as the present. That section deals only with cases in which service of a writ of summons or notice of a writ of summons out of Manitoba may be allowed.

Then section 21 requires the affidavit in all cases to show whether or not the debtor is a corporation, which in this case is not stated. The omission may seem of no moment, where, as here, an individual is named as the debtor, but the statute requires it to be stated, and the absence of any statement specifically required by the statute to be made, seems fatal, *Keeler* v. *Hazelwood*, 1 Man. R. 28; *Shorey* v. *Baker*, 1 Man. R. 282.

The reasons given by the Supreme Court of New York in *Re Fitzgerald*, 2 Caines, 318, for holding that a non-resident creditor could not take proceedings under the Act in that State against a non-resident debtor, have great force.

The writ of attachment should be set aside with costs, but no action is to be brought against the plaintiff or sheriff.

SAUL v. BATEMAN.

(IN CHAMBERS.)

Committal for non-payment of costs.—Means to pay.

Upon an application to commit two persons for non-payment of a judgment for costs, it appeared that they were two of the members of a firm engaged in carrying out several contracts. One contract was completed and out of it a profit had been made which had not been divided, but had been used in the work under the other contracts. It was uncertain whether profit or loss would accrue from the other contracts.

Held, That the facts did not establish that the debtors had had means to pay the judgment debt.

T. H. Gilmour, for plaintiff.

C. P. Wilson, for defendant.

(*8th October, 1889.*)

TAYLOR, C.J.—This is a summons to commit under The Debtors Act, 1869, two of the plaintiffs Michael Kelly and Thomas Kelly, for non-payment of $241.78, the amount of a judgment for costs obtained against the plaintiffs by the defendant.

Counsel raised the objection that there can be no imprisonment for non-payment of costs, but all that The Administration of Justice Act, 1885, sec. 76, sub-sec. 2, says is, that no person shall be liable to arrest for non-payment of costs, except by the special order of the court or judge. The Full Court has held in *Re Bremner*, that a person may be proceeded against for non-payment of costs under The Debtors Act. It so held following *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53; and *Reg.* v. *Pratt*, L. R. 5 Q. B. 176.

The present case comes within section 5 of the Act and to justify the making of an order for committal, there must be satisfactory evidence that the persons making default either have, or have had, since the date of the judgment, the means to pay the sum in respect of which they have made default, and have refused or neglected, or refuse or neglect to pay the same.

Payment has been demanded from each of the persons now moved against. The defendant swears that when he demanded payment from Thomas Kelly he was threatened with violence if he asked again, and that on a demand being made upon Michael Kelly, he answered that if he had a million of dollars he would not pay a cent. Thomas Kelly seems to admit that he did threaten the defendant, and to justify it because he considered he had committed perjury in some previous transactions between them. Michael Kelly explains his refusal to pay by saying he thought the defendant was fooling with him, and declares that until the day of his examination he did not know of the judgment in question.

To make out that the plaintiffs have since the date of the judgment means to pay it, reliance is placed upon evidence given by themselves when examined under an order to attend for that purpose contained in the summons.

These plaintiffs are partners in the firm of Kelly Brothers & Co. They have each one half of three fourth's interest in the partnership, their partner having the other fourth. The firm has or had lately four contracts, three of them being still in progress and incomplete. They both swear that they cannot at present tell whether there will be any profit out of them, and that up to the present time they have not drawn more than gives them and their families a bare living. The fourth contract has been completed, and it would appear that from that a sum of $2,700 was derived, of which they would be entitled to three fourths. This money it is sworn was used for the purpose of carrying on another of the contracts. This, it is argued, was an improper use of the money, that the plaintiffs having that amount, had no right to use it for business purposes, but should have applied it in payment of the defendant's claim. Upon reflection I do not think that can be said. Had the plaintiffs drawn out from the firm that money, had there been a division of the profits arising from that particular contract among the partners, there might have been room for such a contention. But there is no evidence of that. Here is a firm carrying on business as builders, and having several contracts, the funds derived from one are used for partnership purposes in other contracts, and it is only when all the contracts are completed, or the seasons work finished, that it can be said the shares of the partners are ascertained and a divi-

sion made. Of course there might be a division of the profits made on each particular contract at the completion of that contract, but there is no evidence that it was so here.

In *Harper* v. *Scrimgeour*, 5 C. P. D. 366, cited for the defendant, the court disbelieved the affidavit of the defendant as to his want of means, and believed the affidavit of the plaintiff that he had abundant means to satisfy the order, and they may have been quite justified in doing so. I have no reason for disbelieving the plaintiffs here. They have met with serious losses as appears from their examination. They have a large number of unsatisfied judgments against them, and so far as the evidence before me goes, they are struggling along to clear their feet and make a living for themselves and their families.

I cannot say that the evidence satisfies me, that they have or have had, since the date of the judgment, the means to pay, and I must discharge the summons with costs, to be set off against the amount of the judgment.

Summons discharged.

RE HERBERT & GIBSON.

Real Property Act.—Priority between registered fi. fa. and unregistered transfer.

After a *fi. fa.* against the registered owner of lands had been registered, a prior transferee of the whole estate registered his transfer.

Held, That a transfer gives to the transferee the right to have the land registered in his name, but until it is registered it has no effect upon the land; and that the execution creditor was therefore entitled to priority.

W. H. Culver, for Massey Manufacturing Co.

C. P. Wilson, for Herbert.

(*18th April, 1889.*)

BAIN, J.—This is a case submitted for the opinion of the court by the registrar-general.

On the 29th of March, 1888, one William Gibson was the registered owner of this land, and on that day the Massey Mfg. Co. registered a writ of execution they had issued against him, against this land.

On the 1st of May, 1888, a transfer of the land from Gibson to one Herbert, dated the 23rd of February, 1888, was filed and registered, and thereupon a certificate of title was issued to Herbert, but subject to the above mentioned writ of execution against Gibson.

Herbert filed the affidavits of himself and his solicitor with the registrar-general, shewing that this transfer had been executed by Gibson on the day of its date, and that the full consideration had been paid to Gibson a day or two afterwards, and applied to have this execution as an encumbrance affecting the land removed from the register and certificate of title. The registrar-general refused to do this, but under the provisions of section 110, submits for opinion the question whether, under the circumstances above set forth, the registration of this execution against Gibson binds the land as against Herbert.

The question was argued before me by counsel for the execution creditors and for Herbert.

Apart from the Real Property Act, the land would not be bound by the execution, but looking at the provisions and the policy of that Act, I am of opinion that Gibson being the registered owner of the land at the time the copy of the execution was filed and registered, the previously executed transfer from Gibson to Herbert will not avail to prevent the execution binding the land.

If the copy of the writ of execution delivered to the registrar-general for registration under section 102 is an "instrument," in the meaning of the word under the Act, as I think it is, then section 33 provides that its registration prior to that of the transfer shall give it priority.

But apart from this, the whole object and policy of the Act, as shewn by section 62 and various other sections, is for all purposes and against all the world, to vest the beneficial ownership of the land in the person named in the certificate of title, that is, the registered owner, and there can be no other estate or interest in anyone else. This ownership which is the creation of the statute,

is changed, not, as in the case of land which has not been brought under the Act, by the execution of the deed or conveyance, but only by the registration of a transfer which has been executed in accordance with the Act. A properly executed transfer gives the transferee the right to have the land registered in his name, but as regards the land itself, until it is registered it has no effect whatever, and the land still remains the property of the transferor, the registered owner, both at law and in equity.

Section 61 of the Act of 1885, as amended by the Act of 1887, section 20, provides that the land mentioned in a certificate of title shall be deemed to be subject to executions against the registered owner of the land. I think, therefore, the registrar-general was right in issuing the certificate of title to Herbert, subject to the execution against Gibson, and I shall certify my opinion to him accordingly.

RE SCOTT & THE RAILWAY COMMISSIONER.

(IN APPEAL.)

Lands injuriously affected.—Danger to children.—Statutes.—Retroactive.—Expropriation.—Appeal from award.—Parties.

After an award and before the expiration of the time for appeal, a statute came into operation amending the previous provisions respecting appeals.

Held, That the new statute applied to the case.

A statute provided that a notice of appeal from an award should be given to all interested parties.

Held, That the notice was sufficient if signed by the attorney of the party appealing.

Such a notice need not be served upon the arbitrators.

Service of such a notice upon the cashier of a foreign corporation is sufficient service.

The promoter of a railway had power to expropriate land making compensation "for the value of the land taken, and for all damages to land injuriously affected by the construction of the railway," with a proviso for setting-off the increased value of the lands not taken, by reason of the passage of the railway through or over the same "against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of, or using the said lands or grounds as aforesaid." A portion of certain lands having been taken by the railway,

Held, 1. That the compensation should be the difference between the value of the land as it existed before, and of the remaining portion after the construction of the railway.

2. That inconveniences arising not only from the construction, but from the operation of the railway, such as noise, ringing of bells, smoke and ashes, might be included in the estimate.

3 Danger to children and others should not be included.

Upon appeal to the court in *banc*. (*a*.)

Held, That compensation was correctly allowed for depreciation in the value of the land not taken, occasioned by the anticipation of the subsequent operation and user of the railway on the land taken.

Per KILLAM, J.—The appeal having been limited to a part of the order, the respondent could not attack the other part of the order in arguing the appeal.

Per BAIN, J.—That evidence of an arbitrator as to whether in estimating the compensation he had taken into consideration matters which were not within his jurisdiction, was admissible.

This was an application by way of appeal from an award giving compensation to Emily A. Scott for certain portions of land taken from her for railway purposes.

The application was made on behalf of the railway commissioner under "The Railway Act of Manitoba," 50 Vic. c. 5: "The Expropriation Act, 1888," and an Act passed at the last session of the Legislature, intituled "An Act to amend certain Acts and to provide for certain matters."

(*6th April, 1889.*)

DUBUC, J.—Preliminary objections were taken and argued and stand now for my decision.

The award was made on the 26th February last, and notice of it given on the first of March. Any party to said arbitration dissatisfied with the award, had one month to appeal. The notice of appeal is dated the 23rd March, and was served on the 25th March.

(*a*) Present: Taylor, C.J., Killam and Bain, JJ.

The Act of last session amending the provisions respecting appeals contained in section 34 of "The Railway Act of Manitoba," came into force on the 5th of March last.

It is contended that the amending provisions of the Act of last session cannot apply to this appeal, because the award was made before the passing of the said Act. There is nothing in the Act stating that it should be retroactive.

It is understood that a statute which takes away or impairs vested rights acquired under existing laws, has no retroactive effect unless it is so expressed, or clearly intended. *Maxwell on Statutes*, 257, and cases cited. In *The Queen* v. *Ipswich Union*, 2 Q. B. D. 270, Cockburn, C.J., said: "It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act."

It is different, though, when the new enactment affects only the procedure and practice of the courts. It seems that alterations in the procedure are always retroactive, unless there be some good reason against it.

In *Costa Rica* v. *Erlanger*, 3 Ch. D. 69, Mellish, L.J., held that no person has a vested right in any course of procedure. The same was held by James, L.J., in *Warner* v. *Murdock*, 4 Ch. D. 752.

In *Wright* v. *Hale*, 6 H. & N. 232, Wilde, B., said: "When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act." This was followed and approvedly quoted by Lord Wensleydale in *The Attorney-General* v. *Sillem*, 10 H. L. 763.

In *Gardner* v. *Lucas*, 3 App. Ca. 603, Lord Blackburn says: "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that when alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal."

In *Boodle* v. *Davis*, 8 Ex. 351, the new enactments are held to apply to existing judgments.

Under the above authorities I have not the least doubt that the provisions of the Act of last session, respecting appeal from awards, contained in section 16 of the said Act are applicable to this appeal, as mere matters of procedure.

It was argued that the notice of appeal should have been signed by the railway commissioner and not by his attorney, and that it should have been served on the arbitrators. These objections do not seem to me to be serious, I think that the notice by the attorney of the railway commissioner was sufficient, and I do not consider that the arbitrators are to be considered interested parties entitled to have notice of the appeal.

It has been urged on the part of the Confederation Life Association, mortgagees of the lands in question, that service of the notice of appeal served on Charles E. Kerr, cashier of the company, which is a foreign corporation, was not a good service on the company. But under *Newby* v. *Von Oppen*, L. R. 7 Q. B. 293; *Wilson* v. *The Aetna Life Assurance Co.*, 8 Pr. R. 131, and *The Royal Mail Steam Packet Co.* v. *Braham*, 2 App. Ca. 381, and under our Q. B. Act of 1885, sec. 41, the service on that official of the said corporation must be held to be a good service.

The application was then argued upon the merits before the same judge who held as indicated in the head note. His judgment as to compensation for apprehended danger to children from the user of the road not having been questioned upon appeal is here transcribed.

DUBUC, J.—But, it was stated by Brock, that the danger to children and others was also considered by the arbitrators in making their award, and I have strong doubts as to whether this is an inconvenience for which compensation could be allowed. It may be greater and more serious than the other inconveniences already mentioned. But the injury involved in this does not actually exist and is not a necessary consequence of the operation of the railway; it is only the fear of an injury contemplated, which may never occur. I think this is such a contingency which cannot be properly assessed prospectively, and that it should not have been taken into consideration.

I do not know, and I have not any means of ascertaining whether the arbitrators have given any weight to such item of inconvenience, and have increased the compensation on account of it, or whether they have only considered it in a general and vague manner, without adding anything to the amount awarded in respect of said item. However, as it has been considered, and as the compensation might have been made larger on that account I think the award should be referred back to the arbitrators for their re-consideration, and reduced by whatever amount, if any, the sum awarded has been increased by such item.

Award referred back to arbitrators.

From this decision the railway commissioner appealed to the court in *banc*.

On the appeal, *J. D. Cameron* and *T. G. Mathers*, appeared for the railway commissioner.

If damages not from construction, but subsequent user, then no compensation. Damages could be given only for cases directly within the provisions of the Railway Act. *Hammersmith & City Ry. Co.* v. *Brand*, L. R. 4 H. L. 171; Railway Act, 44 Vic. c. 27, s-s. 7, 8, 10; 51 Vic. c. 5, c. 6; *Caledonian Ry. Co.* v. *Ogilvey*, 2 Macq. H. L. Cas. 229; *Hodges on Railways*, 220; *Penny* v. *South Eastern Ry. Co.*, 7 E. & B. 660; *Chamberlain* v. *West End & Crystal Palace Ry. Co.*, 2 B. & S. 617; *Senior* v. *Metropolitan Ry. Co.*, 32 L. J. Ex. 225; 2 H. & C. 258; *In Re Stockport, Timperley & Altringham Ry. Co.*, 33 L. J. Q. B. 251; *Ricket* v. *Metropolitan Ry. Co.*, L. R. 2 H. L. 175; *Beckett* v. *Midland Ry. Co.*, L. R. 3 C. P. 82; *Widder* v. *Buffalo & Lake Huron Ry. Co.*, 29 U. C. Q. B. 154; *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 Ex. 221; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243; *Hopkins* v. *Great Northern Ry. Co.*, 2 Q. B. D. 224; *Caledonian Ry. Co.* v. *Walker's Trustees*, 7 App. Ca. 276; *Reg.* v. *Essex*, 17 Q. B. D. 449; *Ford* v. *Metropolitan & Metropolitan Dis. Ry. Co.*, 17 Q. B. D. 12; *Reg.* v. *Poulter*, 57 L. J. Q. B. 138. Under the Manitoba Railway Act, the title vests in the railway commissioner as soon as possession taken. *G. W. R. Co.* v. *Warner*, 19 Gr. 506; *Masson* v. *Robertson*, 44 U. C. Q. B. 323; *Widder* v. *Buffalo & Lake Huron Ry. Co.*, 29 U. C. Q. B. 154; *Devlin* v. *Hamilton & Lake Erie Ry. Co.*, 40 U. C. Q. B. 162; *James* v. *Ontario &*

Quebec Ry. Co., 15 Ont. App. R. 1. As to remoteness of damage, *Sedgwick on Damages*, vol. 1, p. 206. The statutes in this Province are different from the English Acts, English Railway Act, 1845, clauses 6 & 7. Lands Clauses Consolidation Act, clauses 63 & 68, 44 Vic. c. 27, s. 7 (Man.) 51 Vic. c. 5; 51 Vic. c. 6. If land bought, and then railway built and run without an Act, no action would lie, only an indictment. *Day* v. *G. T. R. Co.*, 5 U. C. C. P. 420.

J. H. D. Munson, for owner Scott. No such provision in England as section 23 of the Railway Act. 51 Vic. c. 6, s. 13. Authorities on which respondent relies:—*Lloyd on Compensation*, 127, 129; *Hodges on Railways*, 230; *Redfield on Railways*, vol. 1. 278, 302, 310; *Croft* v. *London & N. W. Ry. Co.*, 32 L. J. Q. B. 113; *Taylor* v. *Ontario & Quebec Ry. Co.*, 6 Ont. R. 388; *James* v. *Ontario & Quebec Ry. Co.*, 12 Ont. R. 624; 15 Ont. App. R. 1. Damages for user given in U. S., *Bangor Ry. Co.* v. *McComb*, 60 Me. 290; *Cleveland, &c., Ry. Co.* v. *Ball*, 5 Ohio St. R. 568. See also, *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 676. Meaning of construction, *Bickford* v. *Chatham*, 14 Ont. App. R. 40.

H. Nason, for Confederation Life Association.

J. D. Cameron, in reply. As to examination of arbitrators, *G. W. R. Co.* v. *Warner*, 19 Gr. 506.

(*20th December, 1889.*)

TAYLOR, C.J.—On the argument a large number of cases were cited, and numerous sections of the Acts relating to railways, and the expropriation of lands, remarked upon, and compared with statutes for similar purposes in England. It does not seem to me that there is any material difference between the terms made use of in the Acts of this Province and in the English statutes.

The question turns upon the term lands "injuriously affected," and the meaning to be attached to it. At one time, a narrow and technical construction was put upon these words, which were interpreted to mean, affected in such a manner as but for the statutes would constitute an injury at law and would support an action for damages. To such a construction being put upon these words, many eminent judges objected, as Lord Westbury in *Ricket* v. *Metropolitan Rail. Co.*, L. R. 2 H. L. 175; Lord O'Hagan in *Metropolitan Board of Works* v. *McCarthy*, L. R. 7

H. L. 243; Lord Cairns in the same case, and in *Hammersmith* v. *Brand*, L. R. 4 H. L. 171; and in the last case Mr. Justice Willes, his judgment being concurred in by Baron Pigott and Justices Lush and Keating. In *Great Western Railway Co.* v. *Warner*, 19 Gr. 506, Mr. Justice Strong of the Supreme Court, then a Vice-Chancellor of Ontario, declared his decided preference for the opinions expressed by these learned judges.

To review all the cases cited upon the argument, or any considerable number of them, would be a tedious task, to make the attempt to reconcile them with one another, would be to attempt an impossibility. Happily, it seems to me, that a recent decision of the House of Lords has rendered anything of this kind unnecessary.

The case of *Reg.* v. *Essex*, 17 Q. B. D. 449, a decision of the Court of Appeal was strongly relied on by the appellant, as supporting his contention. Since the argument before us, the decision of the House of Lords, given in April last, and reversing the judgment of the Court of Appeal has been reported, as *Cowper Essex* v. *Local Board for Acton*, 14 App. Ca. 153. The Lord Chancellor Halsbury, Lord Watson, Lord Bramwell, Lord Fitzgerald and Lord MacNaghten, before whom the case was argued, were unanimous in reversing the judgment of the Court of Appeal. They were not all agreed as to whether the case of *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, settled and disposed of the question before them, but they all agreed that the law was correctly laid down in the *Stockport Case*, 33 L. J. Q. B. 251.

In that case, land was taken for a railway company under their compulsory powers, and the owner having a cotton mill upon land adjoining the portion of his land taken by the company, contended that he was entitled to compensation on account of the increased risk of fire to his mill from the passage of the railway trains, and the execution of the company's work. On the inquisition to assess damages, besides questions as to the value of the land taken, and the damages from severance, the sheriff left a third question to the jury, whether the claimant's mill had been rendered less suitable for the purposes of being used and occupied as a cotton mill, and by reason thereof rendered of less value in consequence of increased liability to risk of fire from the passage of trains, and otherwise by the execution of the works. The jury

gave £300 in respect of this head of compensation. A rule for a *certiorari* to bring up the inquisition was refused. As the law laid down in this case is now, by the highest court in England, declared to be correct, I cannot do better than quote from the judgment of Mr. Justice Crompton. He said, "But it was asserted that no action would have lain against any proprietor for damage from fire arising from the proximity of works or engines carried on and managed without negligence, and, therefore, that the well established rule, that compensation is only given, when what would have been unlawful and actionable but for an Act of Parliament, is permitted by the Act of Parliament and compensation therefor allowed in lieu, and by reason of such right of action being taken away. I adhere entirely to this rule as laid down by my brother Willes in *Broadbent* v. *The Imperial Gas Co.*, 7 H. L. 600, and in many other cases. But the question here is whether such rule is at all applicable to cases where part of the land is taken and compensation is given, not only for the value of the part taken but for the rest of the land being injuriously affected, either by severance or otherwise; and I am of opinion that the distinction pointed out by Mr. Manisty is correct, and that the rule in question does not apply to such cases. Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of sinking of a well, and causing the abstraction of water by percolation, the company have a right to say, we have done what we had a right to do as proprietors, and do not require the protection of any Act of Parliament, we, therefore, have not injured you by virtue of the provisions of the Act, no cause of action has been taken away from you by the Act. Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say it is by the Act of Parliament, and by the Act of Parliament only that you have done the acts which have caused the damage; without the Act of Parliament everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question."

In *Cowper Essex* v. *Local Board for Acton*, 14 App. Ca. 153, part of the plaintiff's land was taken for sewage works, and it was

held that compensation might be awarded for damage to be sustained by reason of the injuriously affecting his other lands, not only by the construction of the sewage works, but by their use. Lord Halsbury, after speaking of the proposition, that land taken under the powers of the Lands clauses Act, and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation, proceeded to say, "But a second proposition is, it appears to me, not less conclusively established, and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighboring proprietors from whom nothing has been taken for the purpose of the intended works." And Lord Watson, after remarking upon several cases, said, "It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers." Lord MacNaghten dealing with the argument that in assessing damages, the use to be made of the land could not be taken into consideration, said, "I do not think that there is anything in the Act which leads to a conclusion so absurd and so contrary to common sense."

As I have already said, some of the learned lords had doubts as to whether the *Buccleuch Case* had settled the question with which they were called upon to deal. I cannot say that I share these doubts, for it seems to me to have decided that the subsequent use to be made of land compulsorily taken, and the extent to which the land not taken might thereby be pre-judicially affected, were matters proper to be considered in fixing the amount of compensation. There, an embankment and road along the river having been made, not only the loss of the river frontage, and the loss of privacy were taken into account, but the increase of dust and noise by the creation of the embankment and road, were held matters proper to be considered.

When most, or at all events a very large number of the cases in which compensation for damage arising from subsequent user of land taken are examined, it will be found that, in them the compensation was sought in respect of injury to lands other than those of which part had been taken, or in which the use complained of as injurious, was not of that part of the railway constructed upon land which had been taken. *Caledonian Railway Co.* v. *Ogelvy*, 2 Macq. 229; *City of Glasgow Union Railway Co.* v. *Hunter*, L. R. 2 H. L. Sc. 78; and *Hammersmith Railway Co.* v. *Brand*, L. R. 4 H. L. 171, so strongly relied on for the appellant, were all cases of that kind. In the *Buccleuch Case*, Lord Chelmsford, speaking of these cases, said, that if lands of the parties had been taken for the railway, he did not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise occasioned by passing trains.

During the present year the Supreme Court at Ottawa had this question before them, on an appeal from the Exchequer Court. The judgments have not yet been reported, but in a short note of the case, *Reg.* v. *Vezina*, given in 9 Can. L. T. 326; 25 Can. L. J. 407, it is said, that the Court held, one judge dissenting, that compensation for damages should include damages resulting from the operation, as well as the construction of a railway. In October last, a Divisional Court in England had before it a case stated by an arbitrator, as to the basis upon which compensation should be estimated. The case is reported, *In re London, Tilbury and Southend Railway Co.*, W. N. 9 Nov. 1889, p. 183, and there it was held, that, "the owner of an easement which has been interfered with by the construction of works under statutory powers, stands, as regards his rights to compensation, in the same position as an owner of land whose land has been compulsorily taken, and is entitled to be compensated, not merely to the extent of the damages which would have (but for the statutory powers) been recoverable in an action, but for all the damage, whether legal or not, which he has suffered in consequence of the exercise of those powers."

These authorities establish that the narrow construction at one time sought to be put upon the words "injuriously affected," is no longer to be adhered to. It was a construction which, as said

by Strong, V.C., in *Great Western Ry. Co.* v. *Warner*, led to unjust results. An owner of land asked to sell a part of his land, will, certainly, take into consideration the use intended to be made of the part he is asked to sell, and if he thinks that use likely to affect pre-judicially the portion left, will either refuse to sell at all, or ask a higher price, having regard to the apprehended injury. When land is taken from him under compulsory powers, why should he be placed in a worse position?

I quite agree with the opinions expressed by Lord Bramwell and Lord MacNaghten in the *Cowper-Essex Case*. According to the former, a man ought to be paid a sum which he may reasonably ask, and he may reasonably ask the value of what is taken, and a compensation for the damage that will be done on it to what is left.

Lord MacNaghten, dealing with the argument that the jury were not at liberty to take into consideration the purpose or probable effect of the works which the local board were authorized to construct, said, where land is required for public purposes, the injury, if any, to the owner's adjoining property depends mainly on the character of the undertaking. Then, after speaking of the various steps to be taken for acquiring the land and ascertaining the compensation to be paid, his Lordship proceeded to say, "These elaborate provisions, designed apparently for the protection of private as well as public interests, would be something of a mockery, if a person from whom land is taken is to be told when he asks for compensation, that at that stage of the proceedings it is all one whether his land be required for a public garden or for a sewage farm. It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will: ignorance or prejudice, or fancy: the loss to the owner who may want to sell is not the less real. In such a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly. The promoters of an undertaking can only take lands for the purpose authorized by their Act. When the lands are taken, the promoters can only use them for that purpose. It is the purpose of the undertaking, and that alone, which justifies its existence, and directs and controls the exercise of its powers. And yet it is said that on a question of disputed compensation, the arbitrators

or the jury, as the case may be, are to shut their eyes to the purpose of the undertaking and to make believe that the intended works are some innocent and meaningless folly. I do not think that there is anything in the Act which leads to a conclusion so absurd and so contrary to common sense. When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to other lands held therewith, I think the tribunal which assesses compensation is bound to take into consideration the purpose of the undertaking, the consequences likely to result from the execution of the works on the lands required, and any alteration in the character of the property which those works are calculated to bring about."

If the arbitrators in the present case did, as it is said they did, include in the amount they awarded, compensation not only for the actual construction of the railway, but for depreciation in the value of the land occasioned by the subsequent operation and user of the railway on the land taken, they properly did so, and their award cannot be disturbed on that account.

My brother Dubuc referred the award back for review, with a direction to the arbitrators to reduce the amount awarded by the amount (if any) which they estimated as occasioned by reason of the danger to children and others. As the matter has come before the court, I do not see that we can do anything except affirm his order. I do not see that we can at present deal with the question of interest upon the amount awarded, or make any order respecting that.

The order of Mr. Justice Dubuc should be affirmed, and the appeal dismissed with costs.

KILLAM, J.—It appears to me that the question which we have to decide has been effectually settled by the late decision of the House of Lords in the case of *Cowper Essex* v. *The Local Board for Acton*, 14 App. Ca. 153, on appeal from the judgment of the Court of Appeal in *The Queen* v. *Essex*, 17 Q. B. D. 447.

I have perused very carefully the reports of the cases so strongly relied on by counsel for the railway commissioner, and, notwithstanding the able arguments by which the contrary view has been supported before us, I should have felt warranted, quite independently of that late decision, in coming to the same conclusion. I feel now, however, that it could serve no useful purpose to dis-

cuss the earlier cases, as otherwise I might have felt called upon to do. All that I could say has been already far better said by the learned lords who advised the House of Lords in *Cowper Essex* v. *The Local Board for Acton*, and by the learned judges of the Queen's Bench Division in *The Queen* v. *Essex*, 14 Q. B. D. 753. I content myself with referring to their judgments both for the purpose of distinguishing the earlier cases and for the support of the principle thus finally adopted in England.

That principle is well stated by Lord MacNaghten, as follows, (p. 178):—"When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to other lands held therewith, I think the tribunal which assesses compensation, is bound to take into consideration the purpose of the undertaking, the consequences likely to result from the execution of the works on the land required, and any alteration in the character of the property which those works are calculated to bring about."

So far as we can judge from the short note upon the case of *Regina* v. *Vezina*, in the Canadian Law Times, vol. 9, at p. 326, a similar view was taken by the Supreme Court of Canada, under the Dominion Expropriation Act, R. S. C., c. 39.

So far as our statutes, under which the award now in question was made, are concerned, it appears to me that, if the question were otherwise doubtful, it is made abundantly clear by the 23rd section of "The Railway Act of Manitoba," 44 Vic. c. 27, and the 13th section of The Expropriation Act, 1888, 51 Vic. c. 6, that the purpose of the undertaking and the consequences likely to result from the execution of the works upon the land taken from the claimant, must be taken into consideration in awarding compensation.

We have been asked by counsel for the claimant to reverse the order of the learned judge who heard the appeal and to restore the award. I do not feel at liberty to enter into the consideration of the propriety of that order. The railway commissioner applied to the court to reverse the order except in so far as it directed such a re-consideration for the purposes mentioned in the order. The terms of the motion are somewhat awkwardly expressed, but certainly they did not ask what counsel for the claimant asks. They showed an intention to support the order to that extent. The claimant has made no substantive motion

to vary or reverse the order. This application is not like the rehearing of a suit in equity, but by the 3rd sub-section of the 16th section of the Act 52 Vic. c. 35, it is to be treated as an ordinary application to reverse or vary a judge's order. The further powers given by the sub-section are given for the purposes of the motion made, and do not open up the whole original appeal.

Then, as to the question of the interest which the claimant asks us to award, it is enough to say that there must now be a new award. We have no authority to empower the arbitrators to allow interest which they could not otherwise allow, nor can we add by anticipation a sum for interest upon the amount that may eventually be awarded.

Whether we could make any order respecting interest under other circumstances, is a question which we are not now called upon to consider.

In my opinion there should be a simple order dismissing the application with costs.

BAIN, J.—The legislature having authorized the commissioner to take possession of the land and to build and operate the railway, the owner is entitled only to the compensation that the legislature has seen fit to allow, but she is entitled to that compensation, even if it should appear to be greater than the damages she could have recovered at law, had the taking of her land been illegal and not, as it was, duly authorized.

The Red River Railway Act provides that the compensation shall be decided, settled and made according to the provisions of the Expropriation Act of 1888, and section 23 of that Act provides that the provisions of the Railway Act of Manitoba relating to the appointment, power and duties of arbitrators shall apply to arbitrators appointed under that Act, and by section 72 of the Red River Valley Railway Act, the Expropriation Act and the General Railway Act are incorporated into and made part of the Act.

When the legislature has compelled an owner, as it has in the present case, to part with or sell a portion of his lands, it would not be unreasonable to expect to find that, in providing for the compensation to be awarded for the land taken, regard might be had to the effect the severance of the land and the purposes for

which it is to be used would have on the value of the remaining portion of the owner's land. These are considerations that would influence one who was selling voluntarily, and if, by selling a portion, the value of the rest of his land was to be reduced, he would naturally expect to get so much the more for the piece he was selling. It was, of course, competent for the legislature to say that considerations such as these should not be given any effect to in estimating the price to be paid for a piece of land taken compulsorily, but in my opinion, they have not said so, but on the contrary, a reasonable construction of the provisions to be found in the above statutes seems to direct and require that depreciation in the value of remaining portion of the property, from causes such as above indicated, should be estimated and allowed for. And I think this would be the case, even if the respondent had nothing to rely on but section 7 of the General Railway Act. The provisions of this section seem to me to be essentially similar to those of the 63rd and 68th sections of the English Lands Clauses Act 1845, and the 6th section of the Railway Clauses Act 1845. This section 7 is the same as section 5 of cap. 66 of the Consolidated Statutes of Canada, and in *Great Western Ry. Co.* v. *Warner*, 19 Gr. 506, it was held that that section should receive the same construction as the 68th section of the English Act. The words "injuriously affected," in section 7 are the same words which are used throughout the English Acts. I do not see that anything is to be gained by the examination of the very numerous and conflicting decisions which we find in the English courts on the meaning that should be given to these words and to the provisions of the English Acts in which they are found, for I think the decision of the House of Lords in the *Buccleuch Case*, L. R. 5 H. L. 418, is decisive of the present case in favor of the respondent. In the head note of the case we find the following proposition as one deducible from the case, and in my opinion, it is properly deducible: "Though compensation may not be granted to a person annoyed by the smoke and vibration occasioned by trains passing along a railway, constructed under the authority of an Act of Parliament, when no part of his land has been taken, compensation may be given for deterioration in the value of his property occasioned in a similar manner when a part of his land has been taken for the construction of the work authorized by an Act." This case, I think,

upholds the judgment in the *Stockport Case*, 33 L. J. Q. B. 251, and I do not find anything in the case of the *Caledonia Ry. Co.* v. *Walker's Trustees*, 7 App. Ca. 259, a case that was relied on by the appellant's counsel, that takes away from the effect of the decision in the *Buccleuch Case*.

In *Great Western Ry. Co.* v. *Warner*, above mentioned, an award was moved against on the ground that the arbitrator in allowing an amount for depreciation of a farm generally on account of a portion of it having been taken for the railway, had exceeded his jurisdiction, which, it was contended, was limited, under the terms of the section in the Railway Act in the Consolidated Statutes, to giving compensation for the land actually taken, but the court held on the authority of the *Buccleuch Case*, that these damages for depreciation were a proper subject for compensation. See also *Reg.* v. *Essex*, 17 Q. B. D. 447, and *Cummins* v. *Credit Valley Ry. Co.*, 21 Gr. 162.

But, the respondent is not left to rely wholly on section 7. Section 23 of the Railway Act, and section 13 of the Expropriation Act, are provisions that are not found in the English Acts, and one might suppose they have been introduced into our Acts in order to remove the doubts that have been raised as to the proper construction of the words "injuriously affected." These sections direct in effect that the arbitrators in deciding on the value of any land or property taken, shall consider the advantage as well as the disadvantage of the work as respects the land of any person through which it passes, and in the words of section 23, they are "to set off the increased value that will attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of, or using, the said lands or grounds as aforesaid," or, as in section 13, they are to "take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by the construction of the public work." To what extent these sections may have extended the right to compensation beyond that given by section 7, it is not necessary now to inquire, but in my opinion, they have made it clear that it is the duty of arbitrators in estimating the price to be paid for a piece of land compulsorily taken for an authorized work, to consider and allow for the depreciation, if any, in the remaining portion of the property

caused by the severance of the piece taken, and the use to which it is to be put.

The direction of the learned judge that the award should be reduced by the amount (if any) that was "estimated in the amount awarded as occasioned by reason of the danger to children and others," is not appealed against, and it is not necessary to consider whether that is an element of loss or damage that should have been allowed for or not.

The objection was taken by the respondent's counsel that the evidence of the arbitrator Brock had been improperly admitted before the judge in chambers. Sec. 16 sub-sec. 2 of 52 Vic. c. 55, gives the judge in chambers power to admit evidence "as to all matters and things which have heretofore been at law or in equity, proper grounds for setting aside awards." The *Buccleuch Case*, above cited, establishes that, even in an action at law to enforce an award, an arbitrator or umpire is a competent witness, and that he may be examined as to whether he had taken into consideration, in estimating the amount to be awarded, matters which were not within his jurisdiction. In an appeal in chambers, the examination can certainly go to this length and probably a good deal further.

I think the order appealed from should be affirmed, and the appeal dismissed with costs.

Since writing the foregoing, the report of the case *Cowper Essex* v. *Local Board for Acton*, in the House of Lords, 14 App. Ca. 153, in which the House reversed the judgment of the Court of Appeal in the case of *Reg.* v. *Essex*, 17 Q. B. D. 447, has been received. I did not consider the latter case to be an authority in favor of the appellant, as the ground of the decision seemed to be that the land claimed to be injuriously affected was not, under the meaning of the Act, part of the land actually taken. But, in reversing this decision, the House of Lords has expressly held that the effect of the *Buccleuch Case*, was to affirm the *Stockport Case*, and they extended the principle established by that case to the facts of the case before them. Had I seen the report of this case before I prepared my judgment, I would not have considered it necessary to consider the matter as fully as I have done.

Appeal dismissed with costs.

GRAHAM v. HARRISON.

Foreign interlocutory judgment.—Action on.—Evidence.—Exemplification and office copy.—Pleading.

An action will not lie upon a foreign judgment unless it be final. The distinction between a final judgment and an interlocutory order discussed.

The plea of "never indebted," is applicable to a declaration upon a foreign judgment and puts the plaintiff to the proof of a judgment sufficient to support his action.

Judgment of TAYLOR, C.J., affirmed.

Application to set aside nonsuit, and to enter a verdict for plaintiff for $3,163.05, or for a new trial.

J. D. Cameron, for plaintiff. There are two questions raised: (1) Admissibility of documents; (2) Nature of the order sued on. As to rules of evidence see Queen's Bench Act, 1885, s.-7, and 14 & 15 Vic. c. 99, s-s. 7, 11. *Taylor on Evidence*, p. 1313 § 1538; *Roscoe's Nisi Prius Evidence*, 92; *Leith's Blackstone*, 52, 54; *Reg.* v. *College of Physicians and Surgeons of Ontario*, 44 U. C. Q. B. 564; *Smiles* v. *Belford*, 1 Cartwr. 765; 1 Ont. App. R. 436; *Low* v. *Routledge*, L. R. 3 H. L. 100. As to the consitution of Divorce Court, see 20 & 21 Vic. c. 85, s. 13; 8 & 9 Vic. c. 113, s. 1; 14 & 15 Vic. c. 99, s. 14; *Tilton* v. *McKay*, 24 U. C. C. P. 94. As to principle on which foreign judgments enforced, *In re Henderson*, 37 Ch. D. 244; *Patrick* v. *Shedden*, 2 E. & B. 14; *Cowan* v. *Braidwood*, 1 M. & Gr. 893; *Barned's Banking Co.* v. *Reynolds*, 40 U. C. Q. B. 459; *Russell* v. *Smith*, 9 M. & W. 810; *Williams* v. *Jones*, 14 L. J. Ex. 147; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 159; *Hesketh* v. *Ward*, 17 U. C. C. P. 194; *Rousillon* v. *Rousillon*, 14 Ch. D. 351. As to whether action lies, *Plummer* v. *Woodburne*, 4 B & C. 625; *Frayes* v. *Worms*, 10 C. B. N S. 149; *Fry* v. *Malcolm*, 4 Taunt. 705; *Dent* v. *Basham*, 9 Ex. 469; *Gauthier* v. *Routh*, 6 O. S. 602; *Paul* v. *Roy*, 21 L. J. Ch. 361; *Austin* v. *Mills*, 9 Ex. 288; *Sheehy* v. *Professional Life Assurance Co.*, 2 C. B. N. S. 211; *Hutchinson* v. *Gillespie*, 11 Ex. 815. English courts of common law have refused to enforce

decrees of courts of Equity, *Henley* v. *Soper*, 8 B. & C. 16; *Carpenter* v. *Thornton*, 3 B. & Ald. 52. Latest definition of final judgment is in *In re Henderson*, 37 Ch. D. 255. The order on its face is absolute, *Robertson* v. *Struth*, 5 Q. B. 941; *Henderson* v. *Henderson*, 6 Q. B. 288; *Alivon* v. *Furnival*, 1 C. M. & R. 277. As to identity of parties, *Sewell* v. *Evans*, 4 Q. B. 626; *Manning* v. *Thompson*, 17 U. C. C. P. 606; *Taylor on Evidence*, 1575.

W. H. Culver and *George Patterson*, for defendant. As to what is a final judgment, *Ex parte Chinery*, 12 Q. B. D. 343; *Ex parte Schmitz*, 12 Q. B. D. 509; *Ex parte Moore*, 14 Q. B. D. 630; *Re Riddel*, 20 Q. B. D. 516. As to judgments on which actions can be brought, *In re Henderson*, 37 Ch. D. 250; *Wharton's Law Lexicon*, 395; *Pigott on Foreign Judgments*, 51; *Taylor on Evidence*, § 1741; *Roscoe Nisi Prius Evidence*, 196; *The Delta* 1 P. D. 404; *Harris* v. *Quine*, L. R. 4 Q. B. 653. With regard to documents produced, *Tilton* v. *McKay*, 24 U. C. C. B. 94; *Junkin* v. *Davis*, 6 U. C. C. P. 408; *Hesketh* v. *Ward*, 17 U. C. C. P. 667. As to evidence of identity, *Henebery* v. *Turner*, 2 Ont. R. 284; *Huntingdon* v. *Attrill*, 17 Ont. R. 246; *Warener* v. *Kingsmill*, 7 U. C. Q. B. 409; *Hughitt* v. *Saxton*, 42 U. C. Q. B. 49. As to necessity of final judgment;—*Carpenter* v. *Thornton*, 3 B. & Ald. 52; *Philpott* v. *Lehain*, 35 L. T. 855.

(*20th December, 1889.*)

KILLAM, J.—This is an application to set aside a non-suit entered by the learned chief justice and to enter a verdict for the plaintiff, or for a new trial.

The declaration contains two counts. The first of these alleges "that the now defendant, on the 20th day of August, A.D. 1884, filed his petition in the Probate, Divorce and Admiralty Division of the High Court of Justice in England, against Harriet Moore Harrison his wife, respondent, and Edward Sutton Page, co-respondent, alleging that, on the date therein mentioned, the now defendant was married to the said respondent, and that thereafter the said defendant and the said respondent co-habited together, and that the children therein named are the issue of the said marriage, and that the said respondent had frequently committed adultery with the said Edward Sutton Page, and the now defendant by his said petition prayed that the said

marriage should be dissolved, and thereafter the said respondent Harriet Moore Harrison by her solicitor the above named plaintiff, answered the said petition, and all proceedings were taken necessary to a trial of the issues between the said parties, and thereafter a trial was had of the said issues pursuant to the practice of the said court, and thereafter, on the eleventh day of August, 1885, an order was made by the said division of the said court whereby the now defendant was ordered to pay within seven days to the plaintiff, the sum of £649.10s.10d. of lawful money of Great Britain and Ireland, being the amount of the said respondent's taxed costs of trial in said suit, yet the defendant has not paid the said sum or any part thereof."

The second count alleged that, on the eleventh day of August, A.D. 1885, in a suit depending between the now defendant as petitioner and Harriet Moore Harrison as respondent and Edward Sutton Page as co-respondent, in the Probate, Divorce and Admiralty Division of the High Court of Justice in England, the defendant was ordered by the said court to pay to the above named plaintiff as solicitor for the said respondent the sum of £649.10s.10d. of lawful money of Great Britain and Ireland, being the amount of said respondent's taxed costs of trial in said suit and the said order and judgment is still in full force and unsatisfied.

The only plea of importance is never indebted. At the trial the plaintiff produced in proof of his case two documents of which one purported to contain a copy of a petition by the present defendant to the Probate, Divorce and Admiralty Division of the High Court of Justice in England for a divorce from his wife on the ground of adultery alleged to have been committed with one Edward Sutton Page, and a copy of an order, entitled in the court and in the cause, Harrison against Harrison and Page, that the petitioner, within seven days, pay to Mr. John Graham, the respondent's solicitor, a certain sum Then followed a certificate and a seal. The other document was entitled in the same court and division, and purported to certify that, "Upon search being made in the Principal Probate Registry of the Probate Divorce and Admiralty Division of the High Court of Justice amongst the proceedings for divorce in a certain cause numbered 9029, entitled Harrison against Harrison and Page, between William Lomas Harrison (petitioner) and Harriet More

Harrison (respondent) and Edward Sutton Page (co-respondent) it appears that on," &c., "the petition of the said William Lomas Harrison," of &c., "was filed in the said registry, and that on," &c., (giving the dates of the filing of the answers of the respondent and correspondent and of the petitioner's reply, stating that on the 12th December, 1884, a verdict of a special jury upon the issues of fact raised was recorded, that on the 11th August, 1885, the order for costs made by Sir Charles Parker Butt Knight, one of the judges of the division, was filed, and on the 11th November, 1885, the order dismissing the petition with costs was recorded, all which petition, answers, reply, verdict and orders remain of record in the said registry.) The document then proceeds to set out the petition and other proceedings mentioned, from which it appears that the respondent and co-respondent both denied the charges against them and the respondent charged the petitioner with cruelty and adultery and asked for divorce, which charges were denied in the petitioner's reply, that evidence was taken and a trial had before Sir Charles P. Butt, and a special jury upon the issues of fact thus raised, after which the jury, on the 12th December, 1884, found in favor of the petitioner upon the charges made against him and were discharged from giving a verdict on the charges in the petition; that on the 11th August, 1885, the same judge ordered that the petitioner should within seven days pay to Mr. John Graham, the respondent's solicitor, the sum of £699. 18s. 10d., after deducting therefrom the sum of £50 paid into court, being the amount of the respondent's taxed costs of trial; and that on the 11th November, 1885, an order was made by the same judge dismissing the petition with costs of the application, "the petitioner not having complied with the orders for alimony and payment of respondent's costs of late trial respectively." The document purported to be signed by a party styled "registrar," and to have a seal affixed.

The only other evidence produced at the trial was that of a witness to prove the value in Canadian money of the sum named in the order for payment. The orders set out in the two documents were identical. The plaintiff is Mr. Graham therein mentioned.

Objections were made to the admissibility in evidence of the documents referred to, as not being sufficiently authenticated,

subject to which they were admitted, and the learned Chief Justice entered a nonsuit on the ground that the order sued on was interlocutory only and not in the nature of a final judgment on which an action can be maintained.

It has been contended before us that the plea of never indebted is not a proper plea in this case, or, if so, that it does not put in issue the finality of the judgment or order, and that it sufficiently appears that the order is one on which this action will lie.

In my opinion, the plea of never indebted is a proper form of the general issue to this count. It was held in *Barned's Banking Co.* v. *Reynolds*, 36 U. C. Q. B. 267, to be a good plea of the general issue to a count in debt upon a foreign judgment. While that decision is not binding upon us, it is fully supported by the authorities cited. Indeed, the fact that the eminent counsel who appeared for the plaintiff admitted its validity is in itself strong authority for the plea. In *Bullen & Leake's Precedents of Pleading*, 3rd ed. p. 623, n. (a) and in *Chitty on Pleading*, 7th ed., vol. 2, p. 470, it is given as the proper plea.

By Reg. Gen. No. 6, T. T. 1853, "this plea operates as a denial of those matters of fact from which the defendant's liability arises."

The debt arising upon a foreign judgment is an implied one. There is no express contract. It is one raised by the law upon the recovery of a judgment. But it is not every judgment or order for the payment of money which raises such a debt. It must be one of the character known as a final judgment. This has been clearly exemplified lately in *In re Henderson*, 35 Ch. D. 704, 37 Ch. D. 244, where the subject was much discussed. It appears that the judgment of the Court of Appeal proceeding upon this distinction has just been affirmed by the House of Lords. See *Nouvion* v. *Freeman*, W. N. 1889, 200. While authorities are numerous, no other need be cited.

It appears, then, that as the plaintiff is obliged to show the facts from which a debt is implied, he should show a judgment which, on its face at least, is of the requisite character to raise the implication. If this does not appear upon the record of the alleged judgment itself, then the utmost which the plaintiff can ask is to be allowed to prove that, by the law of the country in which it is recovered, it bears that character. Whether such evidence would be admissible I shall not now consider.

Now, I take it as clear that the order sued on is, upon the face of the proceedings, what is usually known as an interlocutory order. It is not made as part of an order or judgment finally disposing of the cause. When it was made the cause was still depending, and, apparently, could still have been prosecuted. Indeed, not only was the cause not finally dismissed until the expiration of some months following the order sued upon, but the ground of dismissal is expressed to be, in part, the failure to comply with the order for payment of the costs. This indicates also that the court had in its hands one method of enforcing such an order, while the reference in the order sued on to sequestrators appears to suggest another method. At any rate, the natural presumption would be that the court pronouncing such an order would have some peculiar method of enforcing it, and would not leave a party to apply to another court, by action or otherwise, for assistance.

Of course there are interlocutory orders of various kinds. Some do, finally and absolutely, direct the immediate payment of money from one party to another, and are intended to be irrevocable and unconditional. Others may direct payments to be made for temporary purposes in the cause, not intending to adjudge the amounts to the parties to whom they are made payable; others may direct other acts than the payment of money.

I take it as clear also that, if we put aside all that we may know of the practice of the court in which the order in question was made, and consider it as one of a completely foreign nation, of whose system of jurisprudence we have no knowledge at all, there would be no means of judging the exact character of the order. It would be apparently an interlocutory order of some kind, but whether intended as a final adjudication to the respondent's solicitor of the sum named for himself and in his own right, or as a method of adjudging payment to the respondent, whose solicitor was named only as her agent to receive it, or as a deposit for the purposes of security or otherwise, in the progress of the cause, we should be wholly unable to judge. But the contention of the plaintiff's counsel is that we must take judicial notice of the nature and effect of the order. His argument is that we must notice the laws of England and the practice of the courts, as they existed on the 15th July, 1870, and that, as the British Parliament still retains paramount authority to make laws for us, not-

withstanding the constitution granted to Canada, judicial notice must be taken in our courts of all Imperial statutes, whether confined in their operation to the United Kingdom itself, or portions of it, or otherwise. Several questions are thus raised, which I deem it unnecessary to determine at present. In the first place, it is not at all clear that this court has any of the authority of the Ecclesiastical Courts of England, except, under the 6th section of the Queen's Bench Act, 1885, in reference to probate matters. If not, it did not acquire the practice in matrimonial causes. Then, it is also by no means clear that in England the courts of common law would, before the Judicature Acts, notice judicially the practice of the Ecclesiastical Courts. In *Brown* v. *Ackroyd*, 5 E. & B. 819, the practice under which just such orders as that now sued on were made in matrimonial causes, was proved at the trial as matter of fact.

This practice did not originally depend upon statutory authority. It is not expressly established by statute for the Probate Divorce and Admiralty Division of the High Court of Justice. By the Judicature Act of 1873, the various courts were united, different kinds of causes being assigned to different divisions, which were to retain for those various matters, in as far as consistent with the statute, the former systems of practice and procedure, until they should be altered by rules to be made under the Act. If we could take judicial notice of the statute we could not of the rules. We are not in a position to judge whether or not these orders are now made in pursuance of the old practice or not. This shows, I take it, that we cannot assume to take judicial notice of the practice of the English courts at any time since the 15th July, 1870, but where it is important to be informed of it we must be so by evidence as in case of any foreign country.

But, what is the practice under which such orders are made, assuming it to continue as before the 15th July, 1870? As I understand it, the wife's solicitor formerly had his bills of costs taxed from time to time, and upon their being so taxed, obtained orders or monitions for payment of the amounts to him by the husband. It was considered that the wife had implied authority to pledge his credit in order to obtain the services of a solicitor, and that, where the wife had no separate means, the court should see that she was furnished during the progress of the suit with the means of presenting her own case. This practice was changed

to one requiring security from the husband, by a deposit of money, and ordering him at or after the trial to pay any balance of the taxed costs of the wife to her solicitor. See *Keats* v. *Keats*, 28 L. J. P. & M. 77; *Evans* v. *Evans*, Id. 136; *Brown* v. *Ackroyd*, 5 E. & B. 819; *Rice* v. *Shepherd*, 12 C. B. N. S. 332; *Robertson* v. *Robertson*, 6 P. D. 119; *Macqueen on Husband and Wife*, p. 195; *Bishop on Marriage and Divorce*, vol. 2, § 387.

The orders, then, were partially intended as an adjudication of the amounts to the solicitor finally in his own right and a method of enforcing the husband's liability to him to that extent. The case of *Rice* v. *Shepherd*, and *Brown* v. *Ackroyd* before mentioned and *Ottaway* v. *Hamilton*, 3 C. P. D. 395, show that he was not limited to that method of recovery, but might sue the husband at law for his costs. I am not aware that it has ever been decided whether the order merged the liability as a judgment at law, and constituted a bar to a suit upon the original bill of costs. In the cases cited no orders had been made.

But, it is also evident that the orders were made in this summary way from time to time, out of regard for the wife rather than for the solicitor, and in consideration of the nature of the cause. They partook then of the nature of interlocutory orders or rules made between the parties to a cause. It does not appear to me that there could be any greater right to bring an action upon them abroad than in case of an interlocutory order or rule adjudging absolutely a sum of money from one party to the cause to another such party for costs or otherwise.

Now, I take the decision in *Sheehy* v. *The Professional Life Assuranee Co.*, 2 C. B. N. S. 211, as binding upon this court, and as determining that an action does not lie upon such a rule or order of a foreign court. Other cases might be distinguished. That one cannot be. It is suggested that it turned upon the fact that the proper remedy was by attachment, but the point, as I take it, was that such orders should be left to be enforced by the court which makes them by the method proper in that court. It did not turn upon any distinction between an order of a judge and an order or rule of court, as is rendered more clear by reference to the cases of actions in England, upon rules or orders of English courts, on which the decision is largely based.

I attach little importance to the cases under the Bankruptcy Act. These proceed upon the wording of the statute, which

mentions a "final judgment," and upon the technical meaning of that expression. Here, the real question is whether from an order in the nature of such a judgment as finally and absolutely directing payment of a definite sum of money, though not technically to be known as a judgment, the law can raise the duty from which the debt is implied.

Nor would I feel bound by cases of suits in England on interlocutory rules or orders of English courts, for they might be distinguished as, in *Henley* v. *Soper*, 8 B. & C. 16, were actions on decrees of colonial courts of equity from those on decrees of the Court of Chancery of England.

As to *Hutchinson* v. *Gillespie*, 11 Ex. 798, the judgment is based entirely upon the circumstance that a statute directed that parties should pay such costs as the Judicial Committee of the Privy Council should direct. The action was regarded as one for debt upon a statute. All the judges evidently sought to distinguish it on that ground from ordinary actions upon interlocutory orders, rather than to overrule the other decisions.

In *In re Henderson* has no greater application, unless it should be made to appear that an order such as the present created no merger of the cause of action so as to prevent a suit in England upon the original bills of costs, or created no estoppel against denial of the liability. The expressions of the judges of the Court of Appeal must be considered with reference to the subject of the suit. While not intending to express any opinion of my own, I think the question well worthy of further consideration by an appellate court. In the meantime, however, I feel bound by the *Sheehy Case*.

As, then, I think that the nonsuit was proper, upon the very ground on which it was entered, I shall not consider the objections to the reception of the evidence.

In my opinion, the application should be dismissed with costs.

BAIN, J.—(After referring to the documents.) To certain judgments of foreign courts, the law of England has given the effect that the judgment itself can be made a cause of action, and generally speaking, a conclusive one, against the person against whom it has been recovered or pronounced. But it is not questioned that, to quote the words of Lopes, L.J., *in re Henderson*, 37 Ch. D. at p. 257, "A foreign judgment to be a good cause of

action in this country, must be given by a court of competent jurisdiction, and be final and conclusive in the country where it was pronounced."

The question to be decided in the present case is, whether the order sued on is a final judgment, that, in itself, will give a cause of action against the defendant in this court. The learned Chief Justice held that it is not such a final judgment, and I have found little difficulty in coming to the same conclusion.

There is an inherent distinction between a judge's order and a final judgment, and it is clear that this order, made on hearing the solicitors for the parties and in no way adjudicating on the cause on its merits, is in reality a judge's order and not a judgment. The order is to pay the costs, not to one of the parties to the cause, but to a third party, the solicitor for one of the parties, and it may be that in England there is a statute providing that moneys thus ordered to be paid, shall be paid. But we have no evidence of such a statute, and need not consider what its effect might be on the question, if there were one; we have only to consider the order as it appears in itself and with reference to the proceedings in the cause in which it was made.

The term "final judgment," as has been said, has a strict and proper meaning; and considering the effect given to foreign judgment in actions in our courts to recover moneys awarded by them, provided they are final, I think the judgments that are thus allowed in themselves to be causes of action, should only be such as come within the strict and proper meaning of the term. In several recent cases in England, the courts have had to consider and define the meaning of a "final judgment," and all the definitions that have been given, seem to me clearly to exclude such an order as is here sued on.

In *Ex parte Chinnery*, 12 Q. B. D. 342; *Ex parte Moore*, 14 Q. B. D. 627, and in *In re Riddell*, 20 Q. B. D. 512, all cases in the Court of Appeal, questions arose as to the meaning of the words "final judgment," in the section of the Bankruptcy Act, 1883, which provided that if a creditor had obtained final judgment against a debtor, he might take proceedings under the Act against him; and, as far as I can see, the words in this section mean just what they do in the statement of the law I have quoted above, given by Lopes, L.J. In the first of these cases, the court held that a garnishee order absolute was not a final judg-

ment, and after pointing out the inherent and well known distinction between "orders" and judgments, Cotton, L.J., defined the strict and proper meaning of a final judgment to be "a judgment obtained in an action by which a previous existing liability of the defendant to the plaintiff is ascertained or established." In *Ex parte Moore*, the order relied on was an order for the payment of the plaintiff's costs of suit, which was made as part of the judgment of the Chancery Division, granting a perpetual injunction against the defendant. The court held that this order being part of a judgment which finally enforced a pre-existing liability of the defendant, was a final judgment within the Act, and it is clear the judges were all of the opinion that, as the Master of the Rolls put it, if it "had been only an order, however final, for the payment of a sum of money, it could not be said to be a final judgment within the Act." *In re Riddell*, the appellant had obtained an order in the Chancery Division dismissing a suit for want of prosecution and for the payment of his costs. But the court held that as this order was only equivalent to a verdict of non-suit and did not finally determine the questions in dispute in the suit, it could not be considered to be a final judgment. The Master of the Rolls after referring to the definitions that had been given in the cases above mentioned, gave the following definition, (p. 516,) which he thought would be found to cover most cases: "A final judgment," he says, "means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant, is finally determined in favor either of the plaintiff or the defendant." This definition was meant specially to exclude the term "on the merits," that Lord Selborne, L.C., had, doubtless inadvertently, used in a definition he had given in *Ex parte Moore*.

These definitions are, it is true, given of the term as it occurs in an Act in which it is necessary to construe it with strictness. But, as I have said, I think the term for the purposes of the case before us must be taken in its strict and proper sense, and in the latest English case to which we have been referred on the question of what foreign judgments will, in themselves, support an action in England, (*In re Henderson*, 37 Ch. D. p. 245,) it is clear that the Court of Appeal was of the opinion that unless a foreign judgment was final in the sense of the definitions above

given, it could not be the foundation for an action. Cotton. L.J. in the course of his judgment says: "A foreign judgment does not, in the view of an English court, merge the original cause of action, but if the party likes to proceed here on the original cause of action, he may do so notwithstanding the foreign judgment. If he elects to proceed on the foreign judgment, then he must shew that the matter has been adjudicated upon by a competent court, and that the adjudication is final and conclusive," and he held that the judgment sued on was not a final one because it did not finally adjudicate upon and decide the rights of the parties. Lindley, L.J., expressed himself to the same effect, and Lopes, L.J., said, "A foreign judgment to be a good cause of action in this country must be given by a court of competent jurisdiction and be final and conclusive in the country where it was pronounced. It must be an adjudication of the rights and liabilities of the parties." This case has since been affirmed on appeal by the House of Lords. W. N. 1889, 200.

Now, the order in question, as the only evidence tendered by the plaintiff shews, so far from being a final adjudication or decision in the rights and liabilities of the parties in the cause in which it was made, was only made incidentally in the course of the proceedings in the cause, and apparently had not in itself any necessary bearing on the decision of those rights and liabilities, which, at the time the order was made were still undecided by the court.

Whether or not an action would lie on this order in England at the suit of the plaintiff to recover the money ordered to be paid is a question that, on the evidence tendered here, does not concern us, and I am unable to see what bearing the case of *Hutchinson* v. *Gillespie*, 11 Ex. 798, on which the plaintiff's counsel seemed to rely, has in this case.

I think the nonsuit was properly entered on the ground I have discussed, and that the appeal should be dismissed with costs.

DUBUC, J., concurred.

Application dismissed with costs.

MORRISON v. CITY OF LONDON FIRE INS. CO.

(IN CHAMBERS.)

Discovery.—Insurance cases.—Production upon examination, of copies of papers.

In an action upon an insurance policy the plaintiff may be compelled to produce upon his examination in the cause, copies of the claim papers sent by him to the Insurance Company.

Semble, In all actions the parties may upon such an examination be compelled to produce all documents which they would be bound to produce if called upon for discovery in Equity.

George Patterson, for plaintiff.

T. D. Cumberland, for defendant.

(*19th October, 1889.*)

TAYLOR, C.J.—On the argument of this summons, I expressed the opinion that a party examined for discovery under section 134 of The Administration of Justice Act, 1885, is, if called upon to produce documents, bound to produce all documents which he would be bound to produce if called upon for discovery in equity. Sub-section 2 of that section does not limit the production to such documents as the party would be bound to produce under a subpœna *duces tecum* at a trial. The object of that section is to provide that upon a notice served as provided in the first sub-section, the party shall produce as upon a subpœna. I am still of the opinion I expressed on the argument, but I do not think it is necessary to decide the general question on the present application.

This is an action upon a policy of insurance, and the courts have always been more liberal in granting production and discovery in actions of that nature than the others. Even before the passing of the Common Law Procedure Act extending the powers of Common Law Courts as to production and discovery, this was the case, at all events, since the early part of this century. This, as was said by Cockburn, C.J., in *Rayner* v. *Ritson*, 6 B. & S. 888, exceptional practice, seems to have arisen out of the particular nature of the contract of insurance.

In *Tidds Pr.*, 591, it is said that in actions on policies of insurance, a judge at chambers will make an order for the insured to produce to the underwriter, upon affidavit, all papers in possession of the former relative to the matters in issue.

In *Goldschmidt* v. *Marryat*, 1 Camp. 562, Mansfield, C.J., had great difficulty in believing the statement that Heath J. had refused an order for the plaintiff to produce all the papers in his possession concerning the cause. He said, "I have made fifty such orders since I became Chief Justice of this Court." The same learned judge said in *Clifford* v. *Taylor*, 1 Taunt. 167, "Let the defendant take out a summons in the most general terms requiring the production of all papers." In *Daniel* v. *Bond*, 9 C. B. N. S. 716, where counsel showing cause against a rule for production argued most strenuously, as it was argued here, that the documents sought were not and could not be evidence, though Erle, C.J., admitted that the documents were not strictly evidence in themselves, yet as they had a proximate tendency to advance the plaintiff's case, the rule was made absolute.

Here it seems to me that an inspection of the copies of the claim papers in the hands of the plaintiff, or the drafts of these papers showing how the amounts claimed were made up and arrived at, may be very important for the defendants. They cannot by being produced upon the examination be made evidence against the plaintiff at the trial, if not otherwise competent evidence, for section 135 makes the depositions taken on an examination for discovery, evidence at the trial, only saving all just exceptions.

The summons for the plaintiff attending for further examination and producing the documents sought should be made absolute.

Summons made absolute.

McARTHUR v. GLASS.

Real Property Act.—Affidavit to be filed with caveat.

An affidavit filed in support of a caveat did not state that, in the deponent's belief, the applicant had a good and valid claim upon the land, as required by the statute.

Held, That the filing of a caveat that complies with the statute is a condition precedent to the jurisdiction of the court to entertain a petition upon it. The petition was, therefore, dismissed with costs.

R. W. Dodge, for caveator.

A. Monkman, for caveatee.

(*1st May, 1889.*)

BAIN, J.—In this matter, the petition having been filed within the time limited, I do not think the amendment allowed by Mr. Justice Killam having been made after the time limited for filing the petition had expired, should prevent me from treating the petition as having been duly filed. But section 107, sub-sec. 11 of the Act of 1887, directs that the affidavit filed in support of a caveat shall, among other things, state the deponent's belief that the person on whose behalf the caveat is filed has a good and valid claim upon the lands in question, and it appears that the caveat filed here omits this statement, and does not contain any statement to the like effect. I think this direction of the statute must be deemed to be imperative, and if it is, then the petitioner not having complied with the conditions on which the right to petition the court has alone been given to him, the petition cannot be entertained. The filing a caveat that complies with the directions of the statute is a condition precedent to the court having any jurisdiction in the matter.

I dismiss the petition with costs.

MORRISON v. THE CITY OF LONDON FIRE INS. CO.

Fire insurance.—Carpenter's risk.—Repayment.—Condition.—Proofs of loss.—Condition precedent.—Construction of relative words.

Declaration upon a policy of fire insurance, which recited that the plaintiff had paid the sum of $106 and also the additional sum of $2.25 for insuring against loss by fire, and especially any loss arising from carpenters, &c., being employed upon the premises. Another count was upon an interim receipt which recited an application for insurance against loss by fire and especially any loss arising from carpenters, &c., being employed upon the premises, and payment of the $106 and also the additional sum of $2.25 with a provision on the issuing of the policy for cancellation of the receipt. Both the policy and the receipt were alleged to be subject to a condition that the Company would not be answerable for loss by fire in, or of any buildings under construction wherein carpenters were employed unless the special consent of the Company in writing was first obtained and endorsed upon the policy.

To these counts the defendant pleaded (7th plea) that after making the policy and before loss, and also (18th plea) after the granting of the receipt and before loss, the plaintiff had employed in the buildings, carpenters, &c., without having obtained and having endorsed on the policy, the consent in writing of the defendant.

Held, 1. That the condition as to the employment of carpenters was not repugnant to the contract, and did not itself constitute a consent of the Company as stipulated for by the condition.

2. That the pleas were bad because they did not allege the employment of the carpenters at the time of the occurrence of the fire.

A policy was subject to the following condition:—"Persons sustaining any loss or damage by fire are forthwith to give notice thereof in writing at, &c., ... and are within fourteen days after the loss, to deliver in writing, in duplicate, a particular statement and account of their loss, &c., ... the assured's title or interest therein, and the names and residences of all other parties (if any) interested therein, &c., ... whether any other insurance, &c., ... also stating in what manner . . . . the building insured was occupied at the time of the loss . . . . and when and how the fire originated as far as the assured may know or believe; and the assured shall verify such statement, &c., and until such accounts, declaration, testimony, vouchers and evidence as aforesaid, are produced and examined (if required) and such explanations given, no money shall be payable by the Company under this policy, ... and if the claim shall not, for the space of three months after the occurence of the fire, be in all respects

verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy, and time shall be of the essence of the contract."

Held, 1. That the delivery of the statement and account within the 14 days, was a condition precedent to the assured's right to recover.

2. That the words in the condition "as far as the assured may know," related to "when and how the fire originated," and not to all the preceding requirements of the condition.

These were two applications by way of appeal from a judgment of the learned Chief Justice, upon demurrers to several pleas in an action at law.

The declaration contained four counts. The first and third counts were upon policies of insurance of the plaintiff's goods against fire. The first count alleged that the defendant company agreed by the policy "to pay to the plaintiff all the damage and loss which the plaintiff should suffer by fire on the property above mentioned," with a proviso that the policy was subject to certain conditions set out in the count. One condition was alleged to have been that, "This company will not be answerable for any loss . . . . by fire in or to any buildings under construction or repair, or wherein carpenters, joiners or other workmen are employed, unless the special consent, in writing, of the company be first obtained and endorsed on the policy." Another condition was alleged to have been, "Persons sustaining any loss or damage by fire, are forthwith to give notice thereof in writing at," &c., ... "and are, within fourteen days after the loss, to deliver in writing, in duplicate, a particular statement and account of their loss or damage, specifying fully the particulars of the property destroyed or damaged, and what was the whole cash value thereof, and of the property insured immediately before the fire, the assured's title or interest therein, and the names and residences of all other parties (if any) interested therein and of all incumbrances, whether mortgages, judgments or executions, affecting the property insured or any part thereof, the amount of loss or damage sustained, whether any other insurance or insurances had been effected upon or in respect of the same property, and, if so, full particulars of each and every such other insurance, and, if requested, a copy thereof, also stating in what manner (as to trade manufactory, merchandise or otherwise) the building insured or containing the property insured, and the several parts

thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, as far as the assured may know or believe; and the assured shall verify such statement and account by the production of their books of account and other vouchers, and by affidavit," . . . . "and where practicable, the assured shall further verify such statement and account by the testimony of their domestics, servants or other persons in their employ." . . . . "The assured must also procure a certificate under the hands of two magistrates," &c., ... "and if required, the assured shall submit to an oral examination," &c. . . . . "If the insurance be on a building," &c., "the assured shall produce his title deeds to the property," &c. . . . . "The assured shall also supply such other vouchers, and produce such further evidence, and give such other explanation as," &c. . . . . "and until such accounts, declaration, testimony, vouchers and evidence as aforesaid, are produced, and examination (if required) and such explanations given, no money shall be payable by the company under this policy," . . . "and if the claim shall not, for the space of three months after the occurence of the fire, be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy, and time shall be of the essence of the contract." Another condition was alleged to have been that, "Payment of losses shall be made within sixty days after the loss shall have been ascertained and proved in accordance with these conditions." The count then alleged a loss by fire, and generally performance of all conditions precedent, &c., and breach by non-payment.

The third count alleged, that by a policy of insurance, the defendants, "after reciting that the plaintiff had paid the sum of one hundred and six dollars, and also the additional sum of $2.25 to the defendants for insuring against loss or damage by fire, and especially against any loss or damage occasioned by, or by reason of any special risk arising from carpenters, builders or workmen being employed upon the premises on which the property hereinafter mentioned was situate;" then proceeded to charge the contract of insurance as in the first count, subject to conditions which were alleged to be "the same as those set out in the first count hereof," and concluded as the first count.

The second and fourth counts were upon interim receipts for insurance premiums. The second alleged that the plaintiff applied to the defendants for insurance upon goods, and to amounts mentioned in the count against loss or damage by fire for a period named, and paid to the defendants agent $106.88, the amount of the premium for that period, that the defendant's lawfully authorized agent then delivered to the plaintiff a receipt or note in writing in the words or figures set out in the count, which purported to be a receipt for the premium paid for an insurance against loss or damage by fire effected with the defendant company for twelve months, "subject to the conditions of the policy which will be issued within thirty days unless the application is declined within that period." The count then alleged that the conditions of policy mentioned in the receipt were "the same as those set out in the first count hereof," that while the receipt and the insurance thereby effected were in full force, the insured property was burnt, damaged and destroyed by fire, whereby the plaintiff sustained damage, non-delivery of a policy of insurance, performance of conditions precedent, &c., and non-payment.

The fourth count was very like the second, but it alleged application by the plaintiff to the defendant "for an insurance against any loss or damage by fire, and especially, against any loss or damage by fire occasioned by, or by reason of any special risk arising from carpenters, builders or workmen being engaged or employed upon the premises on which the property hereinafter mentioned was situate," and payment to the defendant's agent of the $106.88, and "also the additional sum of $2.25, the amount of premium for said insurance for said period for an insurance of such nature," the issue of a similar receipt for the $106.88, having at the foot the expression, "One No. C. R. $2.25 from 1st November, 1887," and then proceeded exactly as the second count.

The pleas demurred to were the 7th, 10th, 11th, 18th, 21st and 22nd, of which the first three were pleaded to the 1st and 3rd counts, and the others to the 2nd and 4th counts of the declaration.

The 7th plea alleged that, after the making of the policies and before loss, and the 18th that, after the granting of the receipt and before loss, the plaintiff had employed in the building

wherein the insured property was situate, carpenters and joiners, without having obtained and having endorsed on the policy the consent in writing of the defendant.

The 10th and 21st pleas alleged that the plaintiff did not, within fourteen days after the said loss, deliver in writing in duplicate, a particular account of his loss and damage, specifying fully the particulars of the property destroyed or damaged, and what was the whole cash value thereof, and of the property insured, immediately before the fire.

And the 11th and 22nd pleas denied similarly delivery of an account stating manner of occupation of the building.

The learned Chief Justice overruled the demurrers to the 7th and 18th pleas, but allowed the demurrers to the other four. Both parties applied to reverse this judgment so far as it was against them respectively.

W. M. Howell, Q.C., and *T. D. Cumberland*, for defendants. As to the 10th, 11th, 21st and 22nd pleas, they all relate to the 14th condition, referred to in the head note. Plea admits fulfilment of first condition as to time, but says proof of loss not delivered within 14 days. Apparently, *Weir* v. *Northern Counties Ins. Co.*, 4 L. R. Ir. 691, is against defendant, but that expressly gives a penalty. Meaning is, that the claim is to be put in within 14 days, but if other things required, these must be done before action. *Columbia Ins. Co. of Alexandria* v. *Lawrence*, 10 Pet. 512; *Cammell* v. *Beaver Ins. Co.*, 39 U. C. Q. B. 3; *Lefarge* v. *Liverpool, London & Globe Ins. Co.*, 17 L. C. Jur. 237; *Clarke on Insurance*, 217; *Porter on Insurance*, 190, 194; *Whyte* v. *Western Assurance Co.*, 22 L. C. Jur. 215; *Mann* v. *Western Assurance Co.*, 17 U. C. Q. B. 191; *Robins* v. *Victoria Mutual Ins. Co.*, 31 U. C. C. P. 562; 6 Ont. App. R. 427; *Cameron* v. *Canada Fire Ins. Co.*, 6 Ont. R. 398. This a condition precedent, *Roper* v. *Lendon*, 1 E. & E. 825; *Mason* v. *Harvey*, 8 Ex. 819.

J. A. M. Aikins, Q.C., and *George Patterson*, for plaintiffs. As to principle of construction of conditions in insurance policy, *Wood on Fire Insurance*, 140, 147; *May on Insurance*, 305; *Berryman on Insurance*, 295; *Weir* v. *Northern Counties Ins. Co.*, 4 L. R. Ir. 689. There is no statement that if proof not furnished in 14 days, policy to be void. *Kimball* v. *Howard*

Fire Ins. Co., 74 Mass. 36; *Lancaster Fire Ins. Co.* v. *Lenheim*, 89 Penn. St. 497. The 7th plea is no answer to the 3rd count. As to the 4th count, consent could not be endorsed on policy, as same not issued. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139. Plea does not show carpenters, &c., employed at time of fire, but only before fire. *Wood*, 444; *May*, 305. As to 7th plea, *James* v. *Lycoming Ins. Co.*, 19 Myers Fed. Dec. 567; *Sansum on Insurance*, 1210. As to consent, *Ames* v. *N. Y. Ins. Co.*, 14 N. Y. 253; *Bullen & Leake*, 468. Proofs within 14 days, not a condition precedent, *Richardson* v. *Canada Farmers Ins. Co.*, 16 U. C. C. P. 432; *Coventry Mutual Live Stock Ins. Co.* v. *Evans*, 102 Penn. St. 281; *Hutchinson* v. *Niagara District Ins. Co.*, 39 U. C. Q. B. 483. Pleas bad as to some counts, bad altogether, *Gabriel* v. *Dresser*, 15 C. B. 622; *Bullen & Leake*, 440; *Stephens on Pleading*, 355; *Ash* v. *Pouppeville*, L. R. 3 Q. B. 86; *Lyne* v. *Siesfield*, 1 H. & N. 278; *Saunders on Pleading*, vol. 2, 649. Each policy must depend on its wording, *Glen* v. *Lewis*, 8 Ex. 607; *Wood*, 457; *Berryman*, 97; *Sansum*, 122; *Parsons* v. *Queen Ins. Co.*, 43 U. C. Q. B. 271.

T. D. Cumberland, in reply. As to pleas being bad if not an answer to all the counts to which pleaded; this not the rule, and not supported by cases cited, *McCuniffe* v. *Allan*, 5 U. C. Q. B. 571; *Blagrave* v. *Bristol Water Works Co.*, 1 H. & N. 369; *Burrowes* v. *DeBlaquiere*, 34 U. C. Q. B. 498; *Goldsmid* v. *Hampton*, 5 C. B. N. S. 94. There is nothing repugnant between 14th condition and the policy, *McEwan* v. *Guthridge*, 13 Moo. P. C. 304; *Mason* v. *Hartford Fire Ins. Co.*, 29 U. C. Q. B. 585. Defendant wished to prevent carpenters being in the building at all; fact of being there an element of risk, *Garrett* v. *Provincial Ins. Co.*, 20 U. C. Q. B. 201; *Glen* v. *Lewis*, 8 Ex. 607; *Wood*, 130.

(*20th December, 1889.*)

KILLAM, J.—With reference to the 7th plea, it was urged on behalf of the plaintiff, that it formed no answer to the 3rd count, as the condition referring to carpenters should be read and construed with the recital, which showed that part of the condition to be practically annulled, or, on the ground that the recital amounted to the consent required by the condition, which the defendant was estopped from denying. Similarly the 18th plea was claimed to be no answer to the 4th count, as the memorandum at the foot

of the receipt showed that the company had expressly insured against the risk of the employment of carpenters upon the premises, so that the clause embodying the conditions of the policy must be qualified so as to annul the one requiring consent to such employment to be endorsed on the policy, and also as such endorsement was impossible until the policy should issue.

I agree with the view taken by the learned Chief Justice in overruling these objections. The third count specially alleges the policy to have been subject to the conditions set out in the first count, and it is then impossible for the plaintiff to have the policy construed as not embodying the condition respecting the employment of carpenters on account of his allegation of the recital. And besides, I cannot interpret the recital as amounting to an agreement to insure against the risk of the employment of carpenters so as to qualify the conditions of the policy, even if the policy were set out *in hæc verba*, showing both the recital and the condition. Nor can I read the recital as a consent to such employment, so as to satisfy the condition. It in no way states such consent, and it is quite consistent with the fact of the payment alleged to have been recited, that the risk was to be run only upon the giving of a further formal consent.

It is impossible to determine the meaning of the expressions in the memorandum at the foot of the receipt set out in the fourth count without evidence. As they stand, they are meaningless; and to enable us to construe the contract by their aid their meaning should be alleged in the count. It might be that, if the meaning of the memorandum is, as I understand the plaintiff claims, a consent to the employment of carpenters upon the premises for one month from the 1st November, a court of equity would decree the issue of a policy endorsed with such consent, and that the plaintiff could recover as if a policy had issued so endorsed; but the memorandum not amounting, without evidence of the meaning of some of the expressions, to such a consent, it is unnecessary to determine what would be the effect of the supposed consent.

The conditions of the proposed policy referred to in the receipt being alleged to be those set out in the first count, the plaintiff is bound by them. If his argument were good that the real meaning of the contract was that the consent was not to be endorsed on a policy pending its issue, but that the defendant would, in

the meantime, be bound by a consent otherwise signified, he should have so stated the contract. He has himself alleged the contract to be absolutely subject to the condition requiring not only a consent, but also its endorsement upon the policy. Besides, it is not impossible that the parties should have contracted that, where carpenters were employed, the defendant should not be liable unless the policy should have issued and the consent have been endorsed. This shows that we cannot reject as meaningless the part of the condition requiring endorsement of the consent.

There was, however, another objection to the 7th and 18th pleas which does not seem to have been sufficiently urged upon the attention of the Chief Justice.

It arises upon the construction of the condition as set out in the first count, and if the construction contended for by the plaintiff be correct the pleas constitute no answer to any of the counts. Counsel for the plaintiff argues that the defendant is not relieved unless the carpenters were employed upon the premises at the time of the occurrence of the fire while to support the plea it is necessary to find that the effect of the condition was to relieve the defendant if the carpenters should be so employed, without the requisite consent, at any time during the term of the insurance, even though the employment should have ceased long before the occurrence of the fire, and have had no connection with the fire. I agree that if such were clearly the condition effect must be given to it, and that we cannot consider whether or not it was unreasonable that the company should thus protect itself, the policy having issued before the enactment of the late Act affecting these conditions.

The construction contended for on the part of the defendant is in effect, that the policy becomes void upon the happening of the prohibited employment without consent. If this were intended, I would expect it to be so stated in the condition. In some conditions it is distinctly stated that the effect of non-compliance shall be to make the policy void; in others it is that the assured shall not be entitled to any benefit under the policy; in others, that he shall forfeit every right to restitution or payment by virtue of the policy. In the condition on which the 7th and 18th pleas are based, it is that the "company will not be answerable for any loss by fire in or to any buildings under construction, or wherein

carpenters, joiners or other workmen are employed, unless the special consent," &c. The words themselves would be satisfied by making them relate to the time of the fire. To my mind, that is the most natural meaning, even if we were without the previous part, "in or to any building under construction." Obviously it would be so in the case of the building being under construction. If the loss occurred after the completion of the construction, it would not be properly described as a "loss in a building under construction." Another meaning that might be suggested would be by reading the condition as referring only to the date of the contract of insurance, as if it were, "wherein carpenters, &c., are now employed." Another might be that, the condition spoke of what was habitually done, referring to a building in which the employment of carpenters was usual and continuous, as if it read "are habitually (or customarily) employed." But both of these suggested meanings would be unhesitatingly rejected because it is evident that neither would give full protection from the risk intended to be guarded against. On the other hand, if the condition be construed to mean that if carpenters are employed upon the premises at any time during the continuance of the insurance without consent no money shall be payable for any loss, whenever or from whatever cause it occurs, much more than the necessary protection would be given. I would then accept as more nearly giving the exact protection which it was reasonable to require, the construction which makes the condition refer to the time of the fire. The cases to which counsel for the defendant referred differed so widely in the terms of the conditions from the present that they afford no assistance. In each one the construction adopted was in accordance with the obvious and primary meaning of the condition, and in no way inconsistent with that which I place upon the one now in question.

I think, therefore, that the demurrers to the 7th and 18th pleas should have been allowed.

Two questions have been raised under the remaining pleas. First, whether the period of fourteen days allowed for delivery of the statement and account of loss, &c., was of the essence of the condition, so as to defeat the claim under the policy if the delivery should be longer delayed; and, secondly, whether the words "as far as the assured may know or believe," relate back

to all the particulars to be shown in his "statement and account," or only to the time and manner of origin of the fire.

In *Roper* v. *Lendon*, 1 E. & E. 825, it was held that a condition requiring delivery of proofs of loss within a certain time must be strictly complied with, and that a delay beyond the period named was fatal. In *Weir* v. *The Northern Counties Insurance Co.*, 4 L. R. Ir. 689, however, it was held that where, after such a provision, the condition proceeded, "and in default thereof no claim in respect of such loss or damage shall be payable until such notice, account," &c., "are given and produced," &c., the only penalty for delay in delivery was that provided by the condition itself, the postponement of the time for payment. From the reference in *Clarke on Insurance*, p. 217, and *Porter on Insurance*, p. 190, it appears that a Lower Canadian Court took a similar view in *Lafarge* v. *The Liverpool, London & Globe Insurance Co.*, 3 Rev. Crit. 59, 17 L. C. Jur. 237.

So, also, in *Cammell* v. *The Beaver Insurance Co.*, 39 U. C. Q. B. 3, where the condition was interpreted to require the furnishing of the proofs within a reasonable time, with a provision that until furnished the insurance moneys should not be payable, there was a similar holding, the judgment of the court being delivered by Harrison, C.J. He cited in support of his opinion an expression used by Robinson, C.J., upon a similar condition in *Mann* v. *The Western Assurance Co.*, 19 U. C. Q. B. 314, apparently somewhat favoring the same view, and another expression of Story, J., in *The Columbia Insurance Co. of Alexandria* v. *Lawrence*, 10 Pet. 512, which would hardly appear to me to support the opinion. Indeed, though it is not clear, I would rather have judged from the report that Mr. Justice Story was of the opposite opinion.

We have now, however, been furnished with the report of a case which came before the Privy Council upon appeal from the Court of Queen's Bench for the Province of Quebec, which does not appear to have been brought to the attention of the learned Chief Justice upon the original hearing of the demurrers. This was the case of *Whyte* v. *The Western Assurance Co.*, 22 L. C. Jur. 215. There the condition provided that the assured "shall within 30 days after such loss or damage, deliver to the secretary or manager or to the agent of the company as aforesaid, a full and detailed account of such loss or damage, signed with their

own hands, and verified by their oath or affirmation; they shall also declare on oath or affirmation whether any or what other assurance has been made on the same property," &c.; "and in case of buildings, machinery or other fixed property, they shall further accompany the said statement by the affidavit of two builders," &c.; "and also shall produce such other evidence as to any loss or damage by fire, as this company or its agents may reasonably require. They shall also produce a certificate within the said 30 days, under the hand and seal of a magistrate or notary public," &c.; "and until such proofs, declarations and certificates are produced, the loss shall not be payable." A statement of claim and a certificate of a notary public were sent in within 30 days after the loss, but nothing more until after the expiration of that period. It was held by the Judicial Committee of the Privy Council, that it was essential that all the proofs be sent in within thirty days, and they affirmed on that ground the judgment entered in favor of the defendant company in the court below.

They appear to have been led to this view to some extent by the consideration of the circumstance, that if the period of 30 days was not material, then no time was fixed for sending in the proofs, and the assured might wait for some years before doing so. They adverted to *Mason* v. *Harvey*, 8 Ex. 819, and *Roper* v. *Lendon*, 1 E. & E. 825, as decisions of the English courts that the time mentioned is an essential part of conditions of the kind; and to a clause in the Civil Code of Lower Canada, by which, if by some impossibility the assured was prevented in sending in the proofs within the proper time, further time might be given him, evidently as showing that if there were no such impossibility the law of Lower Canada was similar to that of England.

In the present instance, the requirements are that a statement and account, in duplicate, are to be delivered within fourteen days; that these are (without specifying time) to be verified by production of books of account and other vouchers, by affidavit or statutory declaration of the assured. and where practicable, by the testimony of domestics, servants or other employees; there must also (again without specifying the time) be a certificate of a magistrate furnished, and if required, an oral examination of the assured; and the assured must supply such other vouchers, produce such further evidence and give such further explanations

as may be required to prove "such account of loss," and his "right to recover the amount claimed." Then follows the provision that, "until such accounts, declaration, testimony, vouchers and evidence are produced, and examination had (if required) and explanations given, no money shall be payable."

Now, if the condition stopped here, it would be clear that the decision in *Whyte* v. *The Western Assurance Co.*, would be conclusive upon us.

There is, however, a further clause which makes the proper construction of the condition a matter of no inconsiderable difficulty. It is, "If the claim shall not, for the space of three months after the occurrence of the fire, be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy." Now, the first thing that strikes one with reference to this clause is that it removes largely the difficulty felt by the Judicial Committee of the Privy Council in the *Whyte case*. And even though it mean only that the statement and account are to be verified within the three months, this involves their delivery within that period that they may be verified.

It is true that the "statement and account" are nowhere previously spoken of as a "claim." They are to contain, certainly, the items of the claim and other particulars. But, the "claim" is to be "verified in manner aforesaid." By the previous part of the condition, the statement and account are to be verified in various ways. Nothing else is previously spoken of as to be verified. It is evident, then, that the limit of three months is for the verification of the statement and account, and not for their delivery.

Having regard, then, to the fact that, under the authority of *Whyte* v. *The Western Assurance Co.*, without the subsequent limitation of three months, it would be a condition precedent that the statement and account should be delivered within fourteen days, can that time be said to be extended by the addition of a clause limiting three months for the verification, for which no limit of time had previously been prescribed? Indeed that addition would seem to be made upon the assumption that the time for their delivery had already been positively fixed, and the argument in favor of the delivery within fourteen days being absolutely a condition precedent is strengthened rather than weakened by

the addition. By construing that first limitation of time as material, effect is given to both limitations, whereas, otherwise, the first would be wholly inoperative.

I am therefore, compelled, not, I must confess, without some hesitation, to adopt the view that it was necessary that the statement and account should be delivered within the fourteen days, and that the first objection to these pleas fails.

Upon the other objection, I agree with the view taken by the Chief Justice. By grammatical construction the words "as far as the assured may know or believe," might relate to all the former requirements respecting the "statement and account," or they might relate only to the particular immediately preceding them, that relating to the time and mode of origin of the fire. If, however, we examine all the particulars, we see that the last is wholly different in character from the others. It is seldom that the actual beginning of a fire causing loss to insured property is seen. It is usually matter of surmise, as to how and when it originated. The other particulars are matters usually capable of being positively ascertained. They are matters upon which the assured may reasonably be expected to keep himself informed for the purposes of his insurance contract. It would be impossible to construe the words in question as relating back to some only of the requirements preceding the last and not to all. Insurers require these particulars of the property destroyed, that they may know positively what the insured is entitled to claim for. Usually they are not in a position to inform themselves positively otherwise, and they can hardly be expected to pay for property which the assured is not in a position to state positively to have been lost. They should not be expected to be satisfied with the statement that "as far as I know or believe I lost" such and such articles, any more than would the court upon the trial of an action for the insurance moneys. It is not reasonable to suppose that such was the intention of a condition of this kind.

I am, therefore, of opinion that rules should go allowing both applications without costs, directing that if judgments have been entered upon any of the demurrers they be set aside, and that judgment be entered for the plaintiff upon the demurrers to the seventh and eighteenth pleas and for the defendant upon the demurrers to the other pleas.

BAIN, J.—I agree with the learned Chief Justice in holding that the 8th condition, a breach of which is sought to be set up in these pleas, is not repugnant to the policy itself, and that the 3rd and 4th counts cannot be said to allege an insurance against the special risk arising from carpenters and joiners being employed on the premises. On the interim receipt set forth in the 4th count, there is nothing that, without evidence to explain the contractions and abreviations, would shew any reference to this special risk, and what the 3rd count alleges is, that the policy, after reciting that the plaintiff had paid the defendants the premium and the additional sum of $2.25 for insuring against loss or damage by fire, and especially against the special risk from carpenters, &c., being employed upon the premises, had declared that for the period stated the company should be liable to pay to the plaintiff all the damage and loss which he should suffer by fire on the property insured to the amount insured, provided always that the policy should be subject to the several conditions and stipulations indorsed upon it. One of these conditions, as set out by the plaintiff himself, is the 8th, which reads, "This Company will not be answerable . . . . for any loss by fire in, or to any building under construction or repair, or wherein carpenters, joiners or other workmen are employed, unless the special consent in writing of the Company be first obtained and indorsed on the policy." The plaintiff alleges that he had paid the $2.25 for insuring against the special risk, but he also alleges in effect that the Company had only agreed to insure against this risk if he complied with the terms of the condition which he sets out.

But on these pleas another question arises, that, apparently, was not raised before, or considered by the learned Chief Justice. The pleas set up that, after the making of the policy and before the loss, the plaintiff had employed on the premises, carpenters and joiners, without, &c, and on the argument it was contended that, there is, here, no breach of the condition alleged at all. I think this contention is right, for on the wording of the condition, its plain and ordinary meaning appears to me to be that the Company will not be answerable for any loss by fire in buildings while carpenters are employed therein, and not as the pleas allege, that they will not be answerable, if before the fire, carpenters, &c., have been employed therein. On this ground, therefore, I think these

pleas are bad, and that the plaintiff's appeal against the judgment appealed from should be allowed.

The demurrer to the 10th, 11th, 21st and 22nd pleas raises the question of the construction of the 14th condition endorsed on the policy. The requirements of this condition, the breach of which is set up in these pleas are as follows: (The learned judge then read them.)

These conditions to deliver the account and statement within 14 days are reasonable, and had they stood alone, would, certainly, be conditions precedent, *Mason* v. *Harvey*, 8 Ex. 818; *Cammel* v. *Beaver Fire Insurance Co.*, 39 U.C.Q.B. 17, but, it is argued, they must be construed with reference to the remaining provisions of the condition in which they are found, and the subsequent terms of the condition shew that it was not the intention that the delivery of the account and statement within the fourteen days should be a condition precedent. The provision of the condition, that, "until such account, declaration, testimony, &c., are produced, no money shall be payable under the policy," indicating, as it appears to do, what is to be the effect of the non-delivery of the account, statement, &c., certainly lends weight to this contention, and in the case of *Weir* v. *Northern Insurance Co.*, 4 L. R. Ir. 689, the court held that a similar provision in a condition had the effect the plaintiff here contends for; and on the authority of this case and of *Lafarge* v. *Liverpool, London & Globe*, 17 L. C. Jur. 237, the learned Chief Justice held that the time for the delivery of the account and statement had been extended beyond the fourteen days, and allowed the demurrer to these four pleas. But since the argument of the appeal in Term, the defendant's counsel has handed us the report of the judgment of the Privy Council in the case of *Whyte* v. *Western Assurance Co.*, reported in 22 L. C. Jur. 215, and it appears to me that this decision is an authority that we must follow, that in a condition such as this, the delivery of the accounts, statement, &c., within the time limited is a condition precedent to the assured's right to recover, notwithstanding the subsequent provision that, until such accounts, &c., are produced, no money shall be payable under the policy. The condition in this case required the assured to give immediate notice of any loss, and within 30 days after the loss, to deliver a full and detailed account of the loss and declaration and certificates to prove the loss, and then it went on to provide,

"that until such proofs, declaration and certificates are produced, the lost shall not be payable," and what was said in the judgment on this point was this: "It was said that although it was a condition precedent that the proofs should be sent in, yet the period of 30 days was not material; but if that were so, then there would be no time appointed at all within which the proofs were to be sent in, and the assured might wait one, two, or three or four years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the provision." And then after referring to the decision in the case of *Mason* v. *Harvey*, cited above, that the time limited is an essential part of a condition of this kind, the judgment proceeds: "Therefore, their Lordships think that it was essential that the proof should be sent in within 30 days, unless that was waived."

If, in the condition now before us, the provision at the end of the condition beginning, "and if the claim shall not, for the space of three months after the occurrence of the fire, be in all respects verified in manner aforesaid," &c., could be held to refer to the delivery of this account and statement, it might be argued that the case could be distinguished from the one in the Privy Council, as the presence in the condition of such a provision would seem to exclude the case from the reason for the decision. But, this provision does not refer, I think, to the delivery of the account and statement, but only to the verification of the claim in the manner pointed out in the clause, beginning: "And the assured shall verify such statement and account by the production of their books of account," &c. The verification of the claim in the manner required is something that would necessarily require considerable time, and it could not reasonably be expected the assured could complete it within the 14 days, and it is evident too, I think, that the delivery of the statement and account is plainly distinguished by the wording of the condition from the verification of the account. It would, I think, be straining the construction to refer the last clause of the condition to anything but the verification of the claim, as distinguished from the delivery of the particular account of the loss or damage.

As to the other objection, that the condition requires the delivery of the particular account of his loss and damage, and the account stating in what manner, &c., "only as far as the assured may know and believe," and that, therefore, these pleas are too

wide, I have no doubt but that these qualifying words refer only to the clause immediately preceeding them, "and when and how the fire originated." All the other information required, a claimant could give precisely and definitely, and it would not be unreasonable for the Company to require it thus to be given, but as to the origin of the fire it would be absurd to require the assured to state absolutely how it occurred.

I think the demurrer to these four pleas should have been overruled, and that the defendant's appeal should be allowed without costs.

DUBUC, J., concurred.

MORICE v. BAIRD.

(IN APPEAL.)

Real Property Act.—Appeal.—Affidavits.—Documentary Evidence Act.—Deed of Municipality.—Absence of witness.—New trial.

An appeal will lie from a verdict rendered upon the trial of an issue under the provisions of the Real Property Act, 1889.

2. Upon such an appeal, affidavits cannot be read, when they are not mentioned in the notice of appeal, or of the intention to read which notice has not been given until two days before the argument of the motion, unless satisfactory reasons are assigned why an earlier notice was not given.

3. A conveyance executed by a municipality is not a public document within the meaning of the Documentary Evidence Act, 8 & 9 Vic. c. 113, s. 1.

4. The sufficiency of certain oral testimony in proof of corporate seal discussed.

5. A party who finds himself at the trial without some important witness, should ask for an adjournment of the trial instead of proceeding with the trial. If he proceeds, a new trial will not afterwards be granted.

This was an issue tried under the provisions of The Real Property Act, 1889.

The plaintiff claimed title under a patent from the Crown to W. N. Kennedy, deed from Kennedy to Samuel Spencer and deed from Spencer to himself, all of which were produced and proved. The defendant claimed his title under a tax sale deed from the reeve and treasurer, and under the seal of The Municipality of Assiniboia. To prove this deed, his solicitor was called, who said, "I know of my own knowledge that the seal attached to this deed is the seal of the Municipality of Assiniboia, and that the signatures to it are those respectively of the reeve and treasurer. This deed was produced from the registrar-general's office, and I have to return it. I got it for the purpose of bringing it here, and it is the deed given by the Municipality of Assiniboia to the defendant, of the land in question, and it is the deed under which the defendant claims title." On cross-examination the witness admitted that he had never seen the seal put to any document by any officer of the municipality, he could not say what device was on the seal, or that it was the seal used by the municipality, he knew it to be the seal, only from receiving documents from the municipality with the same seal on it. "My only knowledge is in that way, and what the treasurer told me, that they had issued the deed. I did not produce the deed to him. I asked him about the deed and he said that they had given the deed. I referred to the deed given, but I had nothing in my hand to show him, but I saw the seal in his office when I was up there. I did not examine it." As to the signatures to the deed, he said, "Mr. Tait was the reeve at the time, I don't know the present reeve William Tait, Mr. Ness is the treasurer. The only means I have of knowing Tait's signature is from communications: I never saw him write: I am pretty certain I have seen Mr. Ness write his signature. . . . . I never met Tait personally and would not know him if I saw him, the only way I know him is by receiving communications from him signed by both him and the treasurer." On that evidence the learned judge held, that the deed was not proved, and he entered a verdict for the plaintiff.

The defendant moved in Term, to set aside the verdict and enter a verdict for the defendant, or for a new trial.

C. P. Wilson, for the plaintiff.

T. S. Kennedy and *A. Howden*, for the defendant.

On the motion coming on, Mr. Wilson took the objection, that no appeal lies from the finding of a judge on the trial of an issue under the Act. Section 127 of The Real Property Act, 1889, provides, that in the conduct of actions and proceedings provided for under the Act, there shall be the same rights of appeal as are in force or exist for the time being, in respect of actions and other procedings of a similar nature in the court in which such action or proceeding may be tried or taken. The only similar proceeding in the court is the trial of an interpleader issue, and to permit of a verdict in such an issue being moved against express statutory provision had to be made, Administration of Justice Act, 1885, s. 73. There is no suit in court here, *Hamlyn* v. *Betteley*, 6 Q. B. D. 63.

Per Curiam.—The trial of an issue is a proceeding provided for under the Act. The rules of procedure mentioned in section 127, are not merely rules made by the court or judges, but include all provisions relating to procedure whether by statute, rules of court, or derived from common law, and as by practice, verdicts in other similar cases may be set aside, so may this.

During the argument, Mr. Kennedy proposed to read an affidavit on behalf of the defendant.

Mr. Wilson objected to it. Notice of moving against the verdict was served on the 3rd of August, and makes no mention of moving upon affidavit. A copy of the affidavit was not served until the 2nd of December. Under the former practice, when motions for new trial were made by rule *nisi*, no affidavit could be used in support of a motion for a new trial, unless made within the four days of Term allowed for moving for the rule, without special permission of the court.

Per Curiam.—Where a party gives a notice of his intention to move against a verdict, which contains no mention of affidavits being used in support of the motion, he cannot be allowed to read an affidavit, notice of reading which has been given only two days before the argument of the motion, without assigning a satisfactory reason why the affidavit was not referred to in the original notice, or, at all events, why notice of his intention to read it was not given at an earlier period. No excuse or explanation is offered here, and the affidavit cannot be read.

The appeal was then argued upon the merits.

T. S. Kennedy and *A. Howden*, for defendant. The judge proceeded on the ground that the tax sale deed was not proved; it was a public document, which did not require proof, *Roscoe Nisi Prius Evidence*, 94; 8 & 9 Vic. c 113, s. 1; *Reg* v. *Parsons*, L. R. 1 C. C. 24. The Municipal Act of 1886 does not require the seal of the municipality to such a deed. Section 691 requires it, but not section 672. Section 673 amended by statute of 1887, 50 Vic. c. 10, s. 52. Deed purporting to be signed by reeve and treasurer, and to be sealed with seal of municipality; the slightest proof, if any, required. *Taylor on Evidence*, 8th ed., p. 163, § 143, also p. 169, § 149. *Ontario Salt Co.* v. *Merchants Salt Co.*, 18 Gr. 551; *Woodhill* v. *Sullivan*, 14 U. C. C. P. 265; *Fell* v. *South*, 24 U. C. Q. B. 196. The deed is produced from proper custody, and there is clear proof of execution. *Fitch* v. *McCrimmon*, 30 U. C. C. P. 183; *Austin* v. *Armstrong*, 28 U. C. C. P. 47.

C. P. Wilson, for plaintiff. As to discretion of the court, *Pritchard* v. *Hanover*, 1 Man. R. 366. Even if the deed were proved, this not sufficient, the sale not proved. *McKay* v. *Crysler*, 3 Sup. C. R. 482; *Proudfoot* v. *Austin*, 21 Gr. 566; *Stevenson* v. *Traynor*, 12 Ont. R. 804; Imperial Act, 8 & 9 Vic. c. 113, not applicable.

(*20th December, 1889.*)

TAYLOR, C.J.—The defendant contends, that the deed under which he claims, being an official act, carried out by officers of a corporation having no interest, and merely exercising statutory powers, is an official and public document, within The Documentary Evidence Act, 8 & 9 Vic. c. 113, s. 1. The learned judge at the trial held, that while section 673 of The Municipal Act, 1886, amended by 50 Vic. c. 10, s. 52, makes such a deed as the one in question, conclusive evidence of the validity of the sale and of all prior proceedings, still, as The Documentary Evidence Act seems to apply only to the proof of certain particulars or facts set forth in the documents, or to which they relate, the party relying on a deed, not for the proof of particulars and facts set forth in it, but as being in itself a conveyance, was not relieved from the necessity of proving execution and delivery in the ordinary way. To hold the party relieved from doing so,

would, he thought, be carrying the provisions of the Act far beyond its intention.

I cannot see that the deed here is a public document. Such documents are said in *Taylor on Evidence*, 1265, to consist of the acts of public functionaries in the executive, legislative and judicial departments of Government, including, under this general head, the transactions which official persons are required to enter in books and registers in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. The court has held in *McLellan* v. *Assiniboia*, 5 Man. R. 265, that it is not a deed of the municipal corporation.

Several Ontario cases, relating to deeds of the Canada Company, were cited and relied on for the defendant.

In *Woodhill* v. *Sullivan*, 14 U. C. C. P. 265, the proof of a deed was objected to, but there was evidence that the seal attached to the commissions of the attorneys or commissioners of the Company in Canada, was the seal of the Company, that the seal affixed by them to the deed in Canada, was the seal approved of by the Company for that purpose, under the provisions of Imp. Act, 9 Geo. 4, c. 51, s. 2, and also that the two persons signing the deed were, at its date, the commissioners of the Company in Canada. In *Fell* v. *South*, 24 U. C. Q. B. 196, the objection as to proof of the deed, was at once met by the 27 & 28 Vic. c. 100, passed after *Woodhill* v. *Sullivan* was decided, which provided that any deed purporting to be under the seal of the Company should be received in evidence as *prima facie* proof of its having been duly executed, without any proof of the seal, or of the signature or appointment or official character of the person appearing to have signed it. In *Doe King's College* v. *Kennedy*, 5 U. C. Q. B. 577, the signatures of the officials to the lease in question were admitted, but not the seal or their authority to give the lease. Evidence was then given by a witness who had received leases from the plaintiffs at their office, and had seen their seal affixed to documents, and who identified the seal to the lease in question as the seal. This was held sufficient evidence to go to the jury. In *McRae* v. *Corbett*, before me, in which a question was raised as to the seal and signatures to just such a deed as the present, the secretary-treasurer of the Municipality

proved his own signature and that of the reeve, and that the seal was the seal always used by the Municipality.

So far as I can find, apart from the provisions of special statutes, and cases coming within The Documentary Evidence Act, the only seals judicially noticed in England are the great and privy seals of the three Kingdoms, the seals of the different courts and the seal of the City of London, in all other cases there must be evidence.

Here there is some evidence as to the signature of Ness, the treasurer, there is no evidence whatever of the signature of the reeve, and no evidence that the seal is the corporate seal of the Municipality. The witness swore it is, but when cross-examined, he had to admit that although he saw the seal at the treasurer's office, he never examined it, he never saw it affixed to any document, and he could not tell what device or lettering there was on it. If he did not know the device or lettering on the seal of the corporation, his saying that the seal on the deed in question is the seal of the corporation, was merely hazarding a guess.

The learned judge was right in holding the deed not proved. No sufficient excuse for not being prepared with proper evidence at the trial is offered, and the motion to set aside the verdict should be refused with costs.

KILLAM, J.—I agree that the application should be refused.

Strictly, the question respecting the admission of the tax sale deed is not properly raised. Upon that point the application should have been for a new trial on the ground of the wrongful rejection of evidence. This, however, is a variance in form which, if the point were well taken, might have been amended.

The principal contention of the defendant is, that the tax sale deed is an "official or public document, or document or proceeding of a corporation," receivable in evidence of some "particular."

By the 672nd section of "The Manitoba Municipal Act, 1886," 49 Vic. c. 52, "Such deed shall have the effect of vesting the land in the purchaser, his heirs or assigns," &c. Previously to the execution of that deed, the purchaser at the tax sale does not acquire the title to the land. The deed is necessary in order to divest the former owner of his title and to vest it in the purchaser. Then, although it is executed by officials, it is, when executed,

the private title deed of the purchaser. It is true, that by the 673rd section of the Act, as amended by the 52nd section of the Act 50 Vic. c. 10, M., that document so executed is made "evidence of the validity of the sale and of all proceedings prior to same," but the fact that it is so and that it is executed by officials of the Municipality, cannot make it the less a private title deed. Its execution may be an official act, but, when executed, the document is a private, not an official document. The case of *McLellan* v. *The Municipality of Assiniboia*, 5 Man. R. 265, shows that the deed is not a "document or proceeding" of the municipal corporation.

The instrument being, then, one of whose execution extrinsic evidence was required, I think that the learned judge was quite right in considering it to have been insufficiently proved. Although the witness at first, swore positively and, no doubt, honestly to the seal and the signatures, his cross-examination showed that he had no real knowledge of the seal or the signature of the reeve.

After giving this evidence of the execution of the deed the case for the defendant was closed, but application was at once made to have it re-opened and the trial adjourned in order to procure the evidence of Mr. Ness, the treasurer of the Municipality, to prove the execution of the deed, if the learned judge should be of opinion that it was not already proved. In support of the application counsel stated that he was given to understand by the plaintiff that Ness would be present in court on the trial, and therefore, did not subpœna him; also, that Ness had been in the city and in the court room for several days prior to the day of the trial, and was so on the day immediately preceding that of the trial. No affidavit was filed in support of the application and no other reason for the non-production of further evidence was assigned.

The application was refused, and after argument as to the necessity of extrinsic proof of the execution of the instrument and the sufficiency of that offered, the plaintiff (caveator) had a verdict.

We have, then, to deal with a case in which a party went to trial relying either upon the opinion that a document necessary to his title required no extrinsic proof, or upon the sufficiency of

the evidence of the witness produced to prove it. If he had been intending to rely upon the witness Ness, he should have had him present, or have applied for a postponement before entering upon the trial.

The learned judge was not bound to accept the statement of counsel in excuse for the non-production of the witness. Judges often do so, but, if they do not, another court cannot review their decisions upon the basis that the statements are proved. Even, however, if stated upon affidavit, the facts alleged at the trial would form no sufficient excuse for the failure to subpœna the proposed witness. They amounted in no way to a promise or undertaking on the part of the plaintiff to have the witness present at the trial. If they had done so, the proper course would have been to ask an adjournment instead of proceeding to trial. See *Turquand* v. *Dawson*, 1 C. M. & R. 709; *Edwards* v. *Dignam*, 2 Dowl. 642; *Kitchen* v. *Murray*, 16 U. C. C. P. 74.

In *Shedden* v. *Patrick*, L. R. 1 H. L. Sc. 545, Lord Chelmsford said, "It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial. If this were permitted, it is obvious that parties might endeavor to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case re-tried upon additional evidence which was all the time within their power." In the same case somewhat similar remarks were made by Lord Colonsay.

In *Cooke* v. *Berry*, 1 Wils. 98, the court in refusing an application for a new trial said, "New trials are never granted upon the motion of a party where it appears he might have produced and given material evidence at the trial if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this."

Both of these reasons are as forcible to-day as they were in 1745. I do not see how we can well act on a supposition that

the case of the party applying is so likely to be true that there is no danger of perjury. We must deal with these cases in the abstract.

While I should feel as ready as any person to relieve a party from the result of a mere slip, it appears to me that this case has reached a stage when we cannot do so, even if it were proved that there was a mere slip, at which no attempt is made. I feel in no way impressed by the circumstance that the defendant claims as a purchaser at a sale for unpaid taxes. A title honestly acquired in that way is as much entitled to protection as any other.

With reference to the two cases cited in support of the indulgence asked. In *Fitch* v. *McCrimmon*, 30 U. C. C. P. 183, the new trial was moved for on the ground of misdirection, that the defendant, who had a verdict, had not given sufficient evidence on a point on which the *onus* was upon him, and that the verdict was against law and evidence. The judges did not really agree on the grounds on which they granted a new trial, but their respective judgments went on some of the grounds taken in the rule *nisi*. The plaintiff was not in fault. In *Austin* v. *Armstrong*, 28 U. C. C. P. 47, the verdict was held to be wrong, and the only question was whether a different verdict should be entered at once, the action having been tried without a jury, or a new trial granted.

In my opinion, the motion should be refused with costs.

DUBUC, J., concurred.

Application refused, with costs.

HANNA v. McKENZIE.

(IN CHAMBERS.)

Execution.—Sale of goods of third party under.—Satisfaction of judgment.—Amending sheriff's return.

Under plaintiff's judgment and execution the sheriff seized and sold certain horses of the defendants. S. and M. claiming to be mortgagees of the horses, attended the sale and notified intending purchasers. The horses having been sold, the mortgagees brought trespass and trover against the sheriff and recovered against him the amount for which he had sold the horses.

Plaintiff had indemnified the sheriff against damage by reason of the seizure and sale, and also by reason of payment to him of the purchase money, and the sheriff having paid over the money to the plaintiff, the plaintiff paid the mortgagees the amount of their verdict against the sheriff.

Plaintiff then issued an *alias fi. fa.* taking no notice of the return of the sheriff to the previous writ of "money made and paid to the plaintiff's attorney."

Held, That the new *fi. fa.* should be set aside; satisfaction be entered up on the judgment roll; and a summons to amend the sheriff's return should be dismissed.

The defendants had a summons calling upon the plaintiff to show cause why *alias fi. fas.* issued by him should not be set aside, and why satisfaction should not be entered upon the roll. The plaintiff had a cross summons calling upon the defendants and the sheriff of the western district to show why the return of money made should not be amended.

The facts were, that in 1883 the sheriff seized a quantity of grain and six horses as the property of the defendants. The horses were claimed by Mowat & Knowlton under a chattel mortgage, and instead of applying under the Interpleader Act, the sheriff took a bond of indemnity from the plaintiff and proceeded to sell the horses. Having sold them he, on receiving another bond of indemnity, paid over the money to the plaintiff, the amount being sufficient to satisfy his claim in full. Mowat & Knowlton then sued the sheriff and recovered a verdict. The amount of this verdict the plaintiff Hanna paid, and thereupon issued *alias* writs of *fi. fa.*

J. S. Ewart, Q.C., for defendants, referred to *Addison on Contracts*, 971; *Chapman* v. *Speller*, 14 Q. B. 621; *Freeman* v. *Caldwell*, 10 Watts, 9; *Smith* v. *Painter*, 5 S. & R. 223; *Friedly* v. *Scheetz*, 9 S. & R. 156; *Vattier* v. *Lytle's Executors*, 6 Ohio, 478. As to statutes in England, *2 Chitty's Statutes*, 836; 32 Hen. 8, c. 5, provides only for case of lands; does not deal with goods. Presumption that purchaser buys equity of redemption merely, *Weaver* v. *Toogood*, 1 Barb. S. C. 239; *Freeman on Executions*, s. 54. As to what payment to a sheriff means, *Federal Bank* v. *Canadian Bank of Commerce*, 2 Man. R. 257.

W. H. Culver, for plaintiff. There was an announcement by sheriff that he was selling the absolute property, *Piper* v. *Elwood*, 4 Denio. 1165; *Adams* v. *Smith*, 5 Cowen, 280; *Richardson* v. *McDougall*, 19 Wend. 80. The plaintiff here by giving bond, and by the sheriff's representations is in the same position as if he had bought himself. *Caveat emptor* has no application here; there was express warranty by sheriff, *Herman on Executions*, 465. For law as to warranty where sheriff is selling, see *Morley* v. *Attenborough*, 3 Ex. 499; *Shirley's L. C.*, 164; *Raphael* v. *Burt*, Cab. & Ellis, 325. If mortgagees had recovered against the purchaser, they could then have, on what occurred at the sale, recovered back their money from the sheriff and plaintiff, *Lee* v. *Neilson*, 3 L. J. O. S. 72; *Lewine* v. *Savage*, 3 L. J. O. S. 89; *Ross* v. *Jones*, 2 L. J. O. S. 68. No objection to *alias fi. fa.* on ground of irregularity. Can satisfaction be entered up? *Tidd's Pr.*, 1041; *Arch. Pr.*, 721. As to practice on entering satisfaction, *Ward* v. *Broomhead*, 7 Ex. 726; *Bingham's Law of Judgments*, 269. As to amendment of returns, *Herman on Executions*, 397; *Freeman on Executions*, s. 361, s. 445. Defendants have never satisfied execution. Plaintiff is in the same position as if he had bought, and a stranger had recovered the horses from him.

J. W. H. Wilson, for sheriff asked protection and costs.

(*31st May, 1889.*)

TAYLOR, C.J.—I do not see how I can possibly make the plaintiff's summons absolute. A sheriff's return may be amended to make it in accordance with the true facts, but what I am asked to do, is to amend the return so as to make it a false return. I cannot amend it so as to make the sheriff return the writ *nulla bona*, when under it he sold goods sufficient to satisfy the full

amount of the plaintiff's judgment with his own fees, and actually paid the money over to the plaintiff.

On the other hand, it seems to me, that what has occurred here has operated as a satisfaction of the judgment. The defendant's goods have been seized and sold, the purchase money which they produced was paid over to the plaintiff, and the purchasers are still in possession of the goods.

The defendants had, at the time of the seizure, an interest in the horses, an equity of redemption, which was properly seizable and saleable. The purchasers bought such title as the defendant had, and got no warranty of title on the sale by the sheriff. What the sheriff seems to have said at the sale in reply to a question by an intending purchaser or some person present, cannot, I think, be regarded as a warranty of title. It was only an incorrect statement of the law. Whatever might be the case where the plaintiff becomes a purchaser, giving credit on his execution for the goods bought, and then the goods turning out not to have belonged to the defendant, he has had to account for them, this is not such a case. Here, the goods of the defendants, goods in which they had an interest were seized, sold, and the proceeds paid to the plaintiff. Thereby his judgment was satisfied. That it is satisfied without his receiving any practical benefit from it, is his own fault. It has all arisen from his not allowing the sheriff to interplead, and giving a bond of indemnity in consequence of which he has had to make good the amount of the verdict recovered by the mortgagees.

It was pressed that if I considered the question doubtful, I should not order satisfaction to be entered, but leave the matter to be brought up in some other way, and for this *Lewine* v. *Savage*, 3 L. J. O. S. 89, was referred to. There, the doubtful question was one of fact, the defendant setting up a settlement which he had had with the plaintiff, while the plaintiff insisted there was still a sum due. Here, there is no dispute as to the facts, and I do not think there can be much doubt upon the law.

A further question was raised, that the summons is not properly framed to obtain the relief desired. This question I cannot dispose of, as neither party has handed me with the papers a copy of the summons.

The evidence taken at the trial in *Mowat* v. *Clement*, which was put in by the plaintiff, but objected to by the defendants, cannot, I think, be read.

The plaintiff's summons must be discharged with costs, and the defendant's summons made absolute with costs.

MAHON v. INKSTER.

(IN APPEAL.)

County Court appeal.—Security.

By the County Court Act, 1887, the giving security for, or depositing in court, the amount for which judgment has been recovered, and a sum sufficient to cover the probable costs of the appeal is a condition precedent to the right to appeal.

An objection that such conditions have not been complied with, may be taken when the appeal comes on to be heard and may be supported by affidavits.

Appeal of defendant from a decision of the Judge of the County Court of Selkirk.

J. D. Camerou, for plaintiff, took the objection that no proper notice of appeal had been given, and that the security given was not sufficient. County Court Act, 1889, sections 243 to 266 inclusive. It was incumbent on the appellant to show that he had complied with the proviso; it had not been complied with. *Macdonald* v. *Abbott*, 3 Sup. C. R. 278. This was the proper place to object to the material, *Reid* v. *Ramsay*, Sup. Ct. Dig. 239.

H. M. Howell, Q.C., and *Colin H. Campbell*, for defendant. From the certificate of the Judge of the County Court, this Court should assume that everything was done that was required in the County Court. *Gerrie* v. *Chester*, 5 Man. R. 258. The time for appeal is unlimited, *Fraser* v. *Abbott*, Sup. Ct. Dig. 403.

(*6th December, 1889.*)

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

The objection that the defendant who appeals has not given security for, or paid into court, the amount for which judgment has been given against him, and a sum sufficient to cover the probable costs of the respondent on the appeal, seems fatal.

This objection is one which can be taken when the appeal comes on to be heard, and it can be supported by affidavit. *Daniels* v. *Charsley*, 11 C. B. 739; *Stone* v. *Dean*, E. B. & E. 504; *Norris* v. *Carrington*, 16 C. B. N. S. 10; *Griffin* v. *Coleman*, 4 H. & N. 265; *Ward* v. *Raw*, L. R. 15 Eq. 83, are all cases in which such an objection was entertained when the appeal was called on to be heard.

By The County Courts Act 1887, sections 243 & 245, the giving security for, or depositing in court, the amount for which judgment has been recovered and a sum sufficient to cover the probable costs of the appeal is a condition precedent to the right of appeal. It is only when the security has been given that the appeal shall be taken and deemed to be allowed. It is only when the deposit has been made under section 243, or when the security has been given under section 245, that the proceedings are to be certified by the judge, and the return made to the Court of Queen's Bench. Here there is nothing among the papers certified to show what the security was, but endorsed upon them is a memorandum said to be in the handwriting of the judge, requiring the appellant to pay into court $75 The amount recovered in the action was $166. There is no pretence that any other sum was paid into court. The judge had no power to dispense with the plain requirement of the statute as to the amount to be deposited, or for which security should be given; *Stone* v. *Dean*, E. B. & E. 504, and until the statutory requirements were complied with he had no jurisdiction to certify the proceedings. The appeal is not properly before the court, and must be struck out of the paper with costs.

Appeal struck out with costs.

(*a*) Present: Taylor, C.J., Killam, Bain, JJ.

ELLIOTT v. ARMSTRONG.

(IN CHAMBERS.)

Pleading.—Joinder to pleas of release and counter-claim.

Plaintiff joined issue upon pleas of release by deed and counter-claim.

Held, That a joinder was appropriate to such pleas.

This was a summons to strike out plaintiff's joinder of issue on defendant's pleas (1) of a release by deed, and (2) of a counter-claim for damages for breach of warranty.

C. P. Wilson, for defendant. The proper replication to a plea of release by deed is *non est factum*, and not a simple joinder of issue. *Day's Common Law Procedure Act*, 120, 241, 242; *Bullen & Leake*, 671; *Chitty on Pleading*, vol. 2, p. 456. The counter-claim is for a breach of warranty and for unliquidated damages. To a counter-claim there must be a plea, *Sharp* v. *McBirnie*, 3 Man. R. 161. As to judgment on a counter-claim, *Stooke* v. *Taylor*, 5 Q. B. D. 569; *Beddall* v. *Maitland*, 17 Ch. D. 182; *McGowan* v. *Middleton*, 11 Q. B. D. 474. As to practice on set-off before 1852, see *Milwain* v. *Mather*, 5 Ex. 59; *Chapple* v. *Durston*, 1 Cr. & J. 1, 10.

T. H. Gilmour, for plaintiff. In Ontario a mere joinder is a good answer to a counterclaim, *Hare* v. *Cawthrope*, 11 Pr. R. 354; *Macara* v. *Snow*, 12 Pr. R. 616. As to replication to plea of release by deed, *Tetley* v. *Wanless*, L. R. 2 Ex. 275; *Johnson* v. *Barratt*, L. R. 1 Ex. 66; *Bullen & Leake*, 454, 644; *Stephen on Pleading*, 60, 181.

C. P. Wilson, in reply, cited *Waterman on Set-off*, 174.

BAIN, J.—Section 79 of the C. L. P. Act provides that the form of joinder of issue given in the section shall be deemed to be a denial of the substance of the pleading it is pleaded to, and an issue thereon. The object of this provision was to enable a party to traverse in a compendious form all the allegations which, before the Act, he could have traversed separately. A plaintiff is not bound to reply in this form. He may still traverse the

allegations that he wishes to deny in the opposite pleading in the forms given in the schedule to the C. L. P. Act or in like appropriate forms, but the use of this general form seems to be permissible in all cases where the issue to be raised involves matters fit to be tried by a jury, and when the plaintiff wishes to deny all the material allegations in the opposite pleadings. The authorities cited by Mr. Wilson do suggest. I must admit, a doubt if this replication is the proper one to a plea of release by deed, but they do not establish that it is not, and I can see no sufficient reason why the provisions of the section should not be as applicable here as in other cases. The defendant, in any case, cannot have been misled or prejudiced by the plaintiff's replication, and if I thought it were not correct, I would, probably, allow him to amend as of the date when his replication was filed.

As to the other point taken, in *Sharp* v. *McBirnie*, 3 Man. R. 161, it was said that the general principles of practice and pleading must be applied to the enlarged defence of set-off and counter claim allowed by the Q. B. Act. The usual practice is to take issue on a plea of set-off, and if a plaintiff has no other answer to make to a counter-claim than to deny the statements of fact on which it is based, it would seem to follow that he can do so in the form given in the Procedure Act, as he has done here. Probably any defence which a plaintiff could make to a set-off by joining issue on the plea, can likewise be made to the counter-claim.

Summons discharged with costs, to be costs to the plaintiff in the cause.

Summons discharged with costs.

1889, July 10th.—On appeal to the Full Court, the appeal was dismissed with costs.

REX v. STEWART.

Malicious prosecution.—No criminal charge laid.—Prosecution on advice of counsel or magistrate.—Mistake in law or fact.—Prosecution with view to compensation.

A child having strayed and come into the house of the plaintiff, the defendant, her guardian, applied for the child but was refused. Defendant then went to a magistrate for "an order for the delivery of the child." The magistrate informed defendant that he had no power to give such an order, and after consultation with defendant, issued a summons to plaintiff alleging that the plaintiff "did detain one H. B. with intent to deprive the said A. P. S. of possession of the said H. B. contrary to the form of the statute," &c. Plaintiff was committed for trial, indicted and acquitted.

After verdict for plaintiff in an action for malicious prosecution and upon a motion for non-suit or new trial,

Held, 1. (BAIN, J., *dubitante.*)—That the action lay, although no criminal charge had been sufficiently alleged in the information.

2. If a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, he is not liable to an action.

3. Advising with a magistrate is a circumstance, only, for the consideration of the jury in deciding the question of malice.

4. In considering the question of reasonable and probable cause, a defendant may be protected although he was mistaken upon a matter of fact, if his mistaken belief was honest and *bona fide*, but not upon a matter of law.

5. Proceedings not with a view to the punishment of an abducter, but by means thereof to regain possession of the child, exhibit a malicious motive.

This was an action on the case for malicious prosecution. The first count in the declaration averred, that the defendant falsely and maliciously, and without reasonable or probable cause appeared before a justice of the peace and charged that the plaintiff did detain one Hilda Blake with intent to deprive the defendant, her lawful guardian, of the possession of said Hilda Blake, contrary to the form of the statute in such case made and provided, and upon such charge procured the justice to grant his summons for apprehending the plaintiff, and bring-

ing her before the said justice to be dealt with according to law, and by virtue of said summons caused the plaintiff to be brought before the justice, who having heard the charge, adjudged the plaintiff to be guilty thereof, and committed her to gaol to be safely kept until thence delivered in due course of law, and the plaintiff then being a prisoner in the common gaol, committed for trial on the charge aforesaid, was brought before a judge of the Court of Queen's Bench, and having consented to be tried before a judge without a jury, and being ready for her trial, was arraigned upon the charge aforesaid, and pleaded not guilty, and no evidence being offered by the Crown, the judge found her not guilty of the offence with which she was charged, and dismissed the same, and discharged her out of custody, whereby the prosecution was determined. The second count was the same, except that it averred, that before the judge, the plaintiff was arraigned upon the charge, "that she, the said Mary Rex on, &c., at, &c., feloniously and unlawfully did by force detain one Hilda Blake, a child then under the age of fourteen years, to wit, of the age of nine years, with intent then to deprive one Alfred P. Stewart, the guardian of such child, of the possession of the said child, against the form of the statute," &c. The defendant pleaded to each count not guilty, and that the prosecution was not determined as alleged.

The case was tried at Brandon, before Mr. Justice Killam, and the jury found a verdict for the plaintiff for $46.

The defendant moved in term to set aside the verdict and enter a non-suit pursuant to leave reserved, or for a new trial upon a number of grounds. Of these, the only ones argued were:—That there was no offence charged against the plaintiff in the information or evidence produced at the trial, and the declaration being framed as it was, no cause of action was shown against the defendant. For misdirection of the learned judge in this, that he left the question of reasonable and probable cause too broadly to the jury, as more fully set out in objections taken at the trial. For non-direction in this, that the learned judge should have told the jury, that if the defendant laid the facts fully and fairly before the magistrate, and then, the magistrate acted and prepared the information which defendant then signed, defendant would be relieved from responsibility.

The evidence showed that some charitable persons in England had sent an orphan girl about nine years of age to the defendant, and she was, on the 5th of March last, living in his house and under his care. On that day about noon, she, without the knowledge of the defendant or any of his family, left the house. As soon as she was missed a search was begun, but before those sent out by the defendant came up to her, she had been picked up by a son of the plaintiff and another young man, who refused to give her to the defendant's son, and took her to the plaintiff's house, near which she was found. The defendant soon after came there asking for the child, and showing the letters from England in virtue of which he claimed that she was under his care, when the plaintiff refused to allow him to take her. As to what passed on that occasion, and as to the exact terms in which the refusal to give up the child was expressed, the evidence was contradictory. The same evening the defendant went to a magistrate desiring to get, as the magistrate said, an order for the delivery of the child. This, the magistrate thought, he had no power to give, but the defendant having stated the facts of the case, he told him to return again in the morning, and promised in the meantime to look up the matter the best way he could. Next day the defendant returned, and the magistrate having examined the Criminal Statutes, read to him, and they discussed together sec. 45 of c. 162 of the R. S. C. The defendant then swore to an information which charged that the plaintiff "did detain one Hilda Blake with intent to deprive her lawful guardian the said A. P. Stewart, of possession of the said Hilda Blake, contrary to the form of the statute," &c., and the magistrate issued a summons calling on the plaintiff to appear the next day before him to answer the complaint. On that day, the 7th of March, she appeared before two magistrates, who found the charge laid in the information proved, and committed her for trial at the next court of competent jurisdiction, accepting bail for her appearance there. At the next assizes, on the 20th of March, the plaintiff was ready to take her trial, but no one appeared to prosecute. No criminal business having been expected, and there being no civil cases for trial by a jury, the sheriff, acting under 48 Vic. c. 17, s. 178, had summoned neither grand nor petit jurors. Thereupon, the plaintiff was brought before the presiding judge under The Speedy Trials Act, and

elected to be tried by a judge without a jury. An indictment was accordingly prepared, charging the defendant as is set out in the second count of the declaration. To this the plaintiff pleaded not guilty, and no evidence being offered to support the charge, the judge entered a verdict of not guilty, and she was discharged.

W. H. Culver and *T. M. Daly*, for plaintiff. The verdict is for $46 only; and the motion being for a new trial, on ground of weight of evidence and misdirection, and the grounds of the misdirection not being set out, the application will not be entertained. *Scott* v. *Crearer*, 11 Ont. R. 541; *Crandell* v. *Nott*, 30 U. C. C. P. 36; *Archbold's Practice*, 1538.

N. F. Hagel, Q. C., for defendant. The objections are set out in the notes of the trial; the sixth ground is for misdirection, and the non-direction is specifically set out.

The court allowed the appeal to proceed upon the grounds of misdirection and want of direction.

N. F. Hagel, Q. C., for defendant. The information disclosed no criminal charge. He cited *Hunt* v. *McArthur*, 24 U. C. Q. B. 254; *Macdonald* v. *Henwood*, 32 U. C. C. P. 433; *Stephens* v. *Stephens*, 24 U. C. C. P. 424; *Munroe* v. *Abbott*, 39 U. C. Q. B. 78. The judge should have told the jury, that if the defendant had fully and honestly stated the case to the magistrate, and the magistrate acted on his own idea of the case, the defendant was not liable.

W. H. Culver and *T. M. Daly*, for plaintiff. The magistrate does not take the place of counsel, *Olmsted* v. *Partridge*, 82 Mass. 381; *Murphy* v. *Larson*, 77 Ill. 172; *Brobst* v. *Ruff*, 100 Penn. St. 91; *Abrath* v. *N. E. Ry. Co.*, 11 Q. B. D. 455.

Defendant knew charge was a felony when he made an offer of compromise. *Reg.* v. *Barrett*, 15 Cox. C. C. 658; *Stephens on Malicious Prosecutions*, 50. As to malice, *Stevens* v. *Midland Counties Ry. Co.*, 10 Ex. 352. As to what is a prosecution, *Jones* v. *Gwynn*, 10 Mod. 148; *Chambers* v. *Robinson*, 2 St. 691; *Wicks* v. *Fentham*, 4 T. R. 247; *Pippett* v. *Hearn*, 1 D. & R. 269; *Clarke* v. *Postan*, 6 C. & P. 423; *Lawrenson* v. *Hill*, 10 Irish C. L. 177.

(*20th December, 1889.*)

TAYLOR, C.J.—The first ground upon which the verdict is

moved against is, that the information set out in the declaration disclosing no criminal charge, an action for malicious prosecution will not lie.

For the preparation or preferring of the charge set out in the second count, the defendant cannot be held responsible, as there is no evidence that he took part in that, or was even aware of its being done. On the proceedings before the magistrate, there is no doubt he was the actor, and in every sense the prosecutor.

That no criminal offence is charged by the words used in the information, seems plain. It is not alleged that the detaining Hilda Blake was unlawful, or by force or fraud, nor is it alleged that she is under fourteen years of age.

In support of this first ground of objection, several Ontario cases are cited and relied on. In *Smith* v. *Evans*, 13 U. C. C. P. 60, there were two counts, the first, that defendant charged plaintiff with having feloniously stolen, &c., a note or receipt for money, the second, trespass for causing plaintiff to be arrested. In the information proved, the charge was, that the plaintiff "did abstract from the table in the house of John Evans, a paper being a valuable security for money." At the trial, Richards, J., ruled that the first count was not proved, as there was no proof that defendant accused plaintiff of any crime. *Hunt* v. *McArthur* 24 U. C. Q. B. 254, was an action on the case, in which the defendant was sued for malicious prosecution, he having procured an information to be laid against the plaintiff for obtaining money under false pretences, upon which a warrant issued, and he was arrested. The charge was laid and the warrant issued in the City of London by a justice of the peace for the County of Middlesex only, and the court held, that as the magistrate could under the circumstances, neither entertain the complaint nor issue a warrant upon it, it was as if the defendant had himself directed the plaintiff's arrest on an unfounded charge, in which case trespass was the proper remedy, and the action being misconceived, a nonsuit was entered. In *Stephens* v. *Stephens*, 24 U. C. C. P. 424, there were two counts, the one in case, the second trespass. The first count averred, that the defendant had, in an information, charged the plaintiff with causing the death of S. by administering a poisonous drug, and had, upon such charge, procured a warrant for plaintiff's arrest. This was held bad as disclosing no cause of action, for no felony wat

charged, but the evidence showing defendant to have interfered personally in the arrest, that was sufficient to support a verdict on the second count. In *Munroe* v. *Abbott*, 39 U. C. Q. B. 78, the only count was in case. It alleged that defendant charged plaintiff with having unlawfully and maliciously set on fire defendant's premises, upon which she was arrested, and at the trial she had a verdict for a large amount. The information proved, merely stated that defendant had reason to believe the premises were set on fire by plaintiff, then a servant in his employ. The court held, that though the charge was not stated with so much precision as it might and ought to have been, yet, after verdict, it might be reasonably held as imputing a crime, but the objection of a variance was held, in the absence of amendment of the declaration, fatal. And Harrison, C.J., said, "It is a question whether, if the count be so amended as to suit the information, it will be a good count." The court thinking the damages excessive, and being strongly of opinion that the case was one for a compromise, proposed that the declaration should be amended by inserting a count in trespass, and the damages reduced to $300, to which the parties agreed. In *McDonald* v. *Henwood*, 32 U. C. C. P. 433, the statement of claim alleged, that defendant charged plaintiff with a felony, but the information and warrant of commitment when produced, showed only a civil trespass, and the plaintiff was non-suited. It appearing, however, that when the parties were before the magistrate, and the objection was taken that no criminal offence was charged, one of the defendants said, that to have the case investigated, he would charge the plaintiff with stealing the oats, the court ordered a new trial with leave to amend the statement of claim. Wilson, C.J., thought the defendants were, under the circumstances, disclosed in the evidence, liable as trespassers, but Osler, J., said, "Whether an action on the case in the nature of an action for malicious prosecution will lie for making a false and malicious statement to a magistrate, shewing nothing which confers jurisdiction on him, but on which he nevertheless acts by issuing a warrant, is a question which requires further consideration."

These cases turn on the form of pleading, and decide that a plaintiff cannot recover on a count in case where no criminal offence is charged, though, if there is a count in trespass, and he has been arrested, he could have a verdict on that. In the pre-

sent case there is nothing in the evidence which would support a count for trespass.

The English authorities seem inconsistent with the decisions in Ontario. The law in England is stated generally in *Stephens Mal. Pros.*, 11, "Where the bill was found by the grand jury, but the indictment was bad, so that theoretically the plaintiff could not have been convicted upon it, the action lies notwithstanding, if the prosecution was malicious and without probable cause." The first decision to this effect seems to have been in 1620, *Taylor's Case*, Palm. 44, but in some subsequent cases it was held otherwise. *Chamberlain* v. *Prescott*, is reported in a note in Sir. T. Raym. 135, and it is there said, "there was a verdict for the plaintiff, and a motion in arrest of judgment on the ground that the action would not lie where the charge was only a trespass in its nature, but, notwithstanding, the plaintiff had judgment, but this decision was afterwards reversed." In *Low* v. *Beardmore*, Sir. T. Raym. 135, the King's Bench felt bound by the judgment in the Exchequer Chamber, though Twisden, J., said, "It seemed a hard case if the action should not lie." In *Savil* v. *Roberts*, 1 Salk. 14, it seems to have been assumed that in order to sustain an action, the charge should be of a criminal offence. The leading case, however, and the one which has ever since been followed, appears to be *Jones* v. *Gwynn*, 10 Mod. 148, 214, in which the King's Bench, after apparently two arguments, expressly decided, that an action will lie although the indictment is bad, for it equally serves the purpose of malice as if it had been good. This case was followed in *Chambers* v. *Robinson*, 1 Str. 691; *Wickes* v. *Fentham*, 4 T. R. 247; and *Pippett* v. *Hearne*, 5 B. & Ald. 634; 1 D. & R. 270. So, the action will lie, though the prosecution was in a court incompetent to take cognizance of it. Thus, in *Attwood* v. *Monger*, Sty. 378, an action for false presentment before the conservators of the Thames, after verdict for the plaintiff there was a motion in arrest of judgment, because it did not appear that the conservators had authority to take the presentment, and if they had not, the proceeding was *coram non judice*, and the plaintiff could not be prejudiced, but Rolle, C.J., said, it was all one, for the plaintiff was prejudiced by the vexation. It is not the danger to which the plaintiff may have been exposed by the charge, or that chiefly, which gives him his cause of action. As Parker, C.J., put it in *Jones* v. *Gwynn*, the vex-

ation and the expense are the same upon a groundless and insufficient indictment as upon a good one, or as Abbott, C.J., said in *Pippett* v. *Hearne*, "Whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it." A number of American authorities to the same effect are cited in the recent edition of *Stephens on Mal. Pros.*, but the only one I have had an opportunity of examining is *Morris* v. *Scott*, 21 Wend. 281.

What the form of the action was in *Chambers* v. *Robinson*, and *Wickes* v. *Fentham*, does not appear from the reports of these cases, but *Jones* v. *Gwynn*, and *Pippett* v. *Hearne*, were both actions on the case. Reference may also be made to *Goslin* v. *Wilcock*, 2 Wils. 302, and *Elsee* v. *Smith*, 2 Chitty, 304. That the action may be in case, was held in *Morris* v. *Scott*, 21 Wend. 281, and according to Stephens in *Hays* v. *Younglore*, 7 B. Mon. 545, and *Turpin* v. *Renny*, 3 Blackf. 211, also.

As to the grounds of misdirection and non-direction, it was argued that there being no solicitor in the neighborhood whom the defendant could consult, and he having fully and fairly laid all the facts before the magistrate, having consulted with him and been advised by him, that he thought the case came within section 45 of the statute, that should be a protection to him as fully as if he had, after full disclosure to a solicitor, acted upon and under his advice.

The law, certainly, seems to be now settled, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, he is not liable to an action, *Ravenga* v. *Mackintosh*, 2 B. & C. 693; *Fellowes* v. *Hutchison*, 12 U. C. Q. B. 633; *Nourse* v. *Calcutt*, 6 U. C. C. P. 14; *Crawford* v. *McLaren*, 9 U. C. C. P. 215; *Stewart* v. *Sonneborn*, 98 U. S. 187.

At one time the professional standing and ability of the counsel consulted, seems to have been an element in considering how far the protection should extend, or as Heath, J., expressed it in *Hewlett* v. *Cruchley*, 5 Taunt. 277, it would be dangerous to lay down that a defendant may shelter his malice "by applying to a weak or an ignorant man."

I can find no case in England or in Ontario, as to the amount of protection which, having taken the advice of a magistrate,

will afford a defendant, but in the United States, it has been held no defence. In *Brobst* v. *Ruff*, 100 Penn. St. 91, it was said, "Defendant cannot be permitted to prove that he acted under the advice of a justice of the peace in instituting the prosecution. They are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession. They are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them." In *Murphy* v. *Larson*, 77 Ill. 172, it was held, that where the person consulted was not a regularly licensed attorney, that was no protection, and in *Olmsted* v. *Partridge*, 82 Mass. 383, evidence that the defendant acted on the advice of a person, not a counsellor or attorney, was said to be incompetent to disprove malice. Without going so far as to say that having taken such advice, is no defence, it seems to me it would be dangerous to go further than to say, it is a circumstance for the consideration of the jury in deciding the question of malice. Here, all that passed between the magistrate and the defendant was fully brought under the notice of the jury by the learned judge.

Then, on this question of reasonable and probable cause, while a defendant may be protected even though he was mistaken as to matter of fact, if his mistaken belief was honest and *bona fide*, it seems different where there is mistake as to the law. That appears to have been decided in *Sinclair* v. *Broughton*, 47 L. T. N. S. 170, by the Judicial Committee of the Privy Council.

Looking at the whole case, the evidence the jury had before them of the facts upon which the defendant acted in making the charge, the evidence from which it may be inferred, that in making it his object was not to have the plaintiff punished for an offence, but by means of the charge to regain possession of the child, a motive said in *Stevens* v. *Midland Counties Ry.*, 10 Ex. 352, to be a malicious motive on the part of the person so acting, the defendant may congratulate himself that there was not a larger verdict against him.

In my judgment, the defendant's motion for a non-suit or new trial should be refused with costs.

DUBUC, J., concurred.

BAIN, J.—I agree that the verdict in this case should not be disturbed on the grounds taken for mis-direction and non-direction, but whether the action, depending as it does on a statement or information that charged no offence or crime cognizable by criminal law, can be maintained at all, is a question that seems to me open to very considerable doubt. There is no evidence that in any way connects the defendant with the charge laid against the plaintiff in the indictment, and it is not contended that what is alleged in the information charges any offence for which she could be prosecuted criminally. The summons issued by the magistrate was, therefore, wholly void, and the plaintiff was under no obligation to attend upon it, or pay any attention to it, any more than she would have been had the summons been issued by one who was not a magistrate. The subsequent proceedings of the magistrate were as void as was the issue of the summons; and under these circumstances, can it be said there was a criminal prosecution at all?

According to the decisions in the Ontario courts, an action in this form could not be maintained on the facts of this case. What we have here, to quote the words of Hagarty, C.J., in delivering the judgment of the court in *Stephens* v. *Stephens*, 24 U. C. C. P. 424, "is not an improper setting in motion of the criminal law, but a mere void proceeding, an information disclosing no offence, and nothing to found the magistrate's jurisdiction." And the cases of *Smith* v. *Evans*, 13 U. C. C. P. 60; *Campbell* v. *McDonald*, 27 U. C. Q. B. 343; *Munro* v. *Abbott*, 39 U. C. Q. B. 78; and *Macdonald* v. *Henwood*, 32 U. C. C. P. 433, all seem to me to support this view.

Nor do I think it to be at all clear that the English cases of *Jones* v. *Gwynn*, 10 Mod. 214; *Chambers* v. *Robinson*, 2 Str. 691, and the other cases cited and relied on by Mr. Culver, necessarily conflict with this view.

In *Stephens on Malicious Prosecution*, at p. 26, it is laid down as a general rule, deducible from the authorities, "that whenever there is a prosecution for a criminal offence, an action for malicious prosecution will lie if the prosecution be malicious and without reasonable cause, whatever the alleged criminal offence may have been." This statement does not necessarily imply that there may not, perhaps, be other cases in which the action will lie, but in *Indermaurs Principles of the Common Law*, at p. 340,

it is said, "Malicious prosecution may be defined as a tortious act consisting in the unjust and malicious prosecution of one for a crime, or the unjust and malicious making one a bankrupt, without any reasonable and probable cause." And of much more weight than any general statement in a text book, are the remarks of Lords Mansfield and Loughborough in the case of *Sutton* v. *Johnstone*, in error 1 T. R., at p. 544. "There is no similitude or analogy," they say in giving their reasons why the judgment of the court below should be reversed, "between an action of trespass or false imprisonment and this kind of action. An action of trespass is for the defendants having done something which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the face of it, is manifestly legal. The essential ground of this action is that a legal prosecution was carried on without a probable cause."

It will be found, I think, that all the cases relied on by the plaintiff differ from the present case in what seems to me to be two important particulars, that is, that in all of them, indictments had been actually preferred, and further, that in all of them except perhaps in *Jones* v. *Gwynn*, the indictments, though defective, charged offences for which the parties were liable to be indicted and punished. *Jones* v. *Gwynn* is the decision on which all the subsequent cases are founded, and while I must admit that there are expressions in the judgment which seem to hold that the action will lie in cases where the indictment has charged no offence at all, still I am not free from doubt if the judgment was intended to go that length, and certainly the subsequent cases do not go that length. In *Jones* v. *Gwynn*, the plaintiff had been indicted for carrying on the trade of a badger or corn dealer without a license, against the form of the statute, &c., and that there was in some sense, an offence charged, would seem to be implied in the remark in the judgment of the Chief Justice, that "all the danger in this case, if the indictment had been good, would only have been incurring a fine." And that the Chief Justice had in his mind defective indictments, whether or not the judgment was intended to apply to indictments that charged no offence, is evident from the following remarks: "It ought to be considered" he says, "a small slip vitiates an indictment, and if that shall protect a man from an action, a way is opened for the malicious to ruin the innocent; for how easily may a slip be

made on purpose." But at any rate, in this case, as in all the others, indictments had been preferred and the criminal law had been actually put in motion, but in the present case, I doubt if it can be said that the criminal law was in any way put in motion by what the defendant or the magistrate did, though, doubtless, both of them intended to put it in motion and thought they were doing so.

In *Elsee* v. *Smith*, 1 D. & R. 97, when the defendant had laid an information on which a magistrate had issued a search warrant and a warrant for the arrest of the plaintiff, it was objected that the defendant was not liable in an action for malicious prosecution, In the course of his judgment, Abbott, C.J., said (p. 100) "Now, if the warrant be not void and illegal in its form, and be founded on the matter laid before the justice, and as he, as a justice of the peace, had authority to grant such a warrant, then the present action is proper in its form for falsely and maliciously causing the magistrate to grant a warrant to do the act complained of."

As far as the merits of the present case are concerned, I would be pleased if I could have come to the conclusion that the plaintiff could have maintained the action. If she cannot maintain it, she would seem to be practically without redress for the indignity and expense she has been put to by the action of the defendant and the magistrate, for there is nothing in the facts of the case, as there probably would be in most cases, that would enable her to proceed against either the defendant or the magistrate on a count for trespass. However, as far as I have been able to consider the matter, the authorities seem to me to be against her having the right under the circumstances, to maintain the action for malicious prosecution.

Application refused with costs.

SCHULTZ v. THE CITY OF WINNIPEG.

(IN EQUITY.)

Statutes, Construction of.—Tax deed.—Interest upon taxes.

A statute provided that no "sale" of land for taxes should be impeached because of the addition of interest to the taxes. A bill was filed to prevent the execution of a tax deed in pursuance of a sale on the ground that such an addition had been made.

Held, That the statute was not confined in its operation to a sale completed by conveyance, but made valid the sale itself.

This was an application for an interlocutory injunction to restrain the execution by the defendants of a deed in pursuance of a sale of the plaintiff's land for taxes. The principal ground taken was that interest had been added to the taxes.

J. S. Ewart, Q.C., and *F. H. Phippen*, for the plaintiff. The case is clear under *Schultz* v. *Winnipeg*, 1 Man. R. 35 if the statute 52 Vic. c. 45, s. 22, does not validate the proceedings. That section is as follows, "No sale of any land for arrears of taxes heretofore or hereafter made under the provisions of any statute of this Province, shall be impeached or set aside or held to be invalid on the ground that a rate of percentage, whether by way of increase or interest or otherwise, was added to the original amount of taxes and forms part of the claim for arrears for which the lands were sold. The Court of Queen's Bench of Manitoba shall not have jurisdiction to impeach any sale for alleged arrears of taxes on the grounds set forth in this section. This section shall not apply to cases in which prior to the 5th day of March, A.D. 1889, suits in equity were instituted affecting any such sale on the said grounds or any of them."

The word "sale" means sale completed by a conveyance, and the statute does not apply before conveyance. *C. P. R.* v. *Burnett*, 5 Man. R. 395. It is so used in various parts of the Municipal Act. We do not impeach the "sale" which at most is the knocking down by the auctioneer. but we attack the advertisement, which under the Act (49 Vic. c. 52, s. 646) is a

notification to the owners, and the only notification that they receive. All the proceedings at the sale may be perfectly regular but if proper notice has not been given, a deed should not issue. This notice is bad because it claims interest and the statute does not cure it. *Foote* v *Blanchard*, 4 Man. R. 460.

H. M. Howell, Q.C., and *Isaac Campbell*, for the defendants. If the sale cannot be impeached or set aside or held to be invalid on the ground that interest has been added, it is immaterial whether the advertisement claimed the interest or not.

(*20th June, 1889.*)

KILLAM, J.—Application for interlocutory injunction dismissed with costs.

McCARTHY v. BADGLEY.

(IN CHAMBERS.)

Real Property Act.—Issue.—Security for costs.

B. applied for a certificate of title. McC. filed a caveat and an order was made for the trial of an issue in which he was made plaintiff. B. applied for security for costs.

Held, That B. was in reality the plaintiff and could not obtain security for costs.

J. Graham, for applicant Badgley.

G. W. Baker, for McCarthy.

(*29th August, 1889.*)

TAYLOR, C.J.—Badgley has made an application under The Real Property Act to have a parcel of land in the Town of Emerson brought under the Act, and for a certificate that he is the owner. His title rests upon a tax deed got as assignee of a purchaser at a tax sale. McCarthy has filed a caveat and claims the land under conveyance from the patentee of the Crown.

His contention is, that the taxes, for nonpayment of which the land was sold, had in fact been paid. An order has been made for trial of an issue between them, McCarthy being made plaintiff, and Badgley defendant.

Badgley now applies for security for costs on the ground that McCarthy resides in Ontario. The making of an order is opposed.

The case of interpleader proceedings seems to furnish an analogy for determining whether an order should be made or not. In the issue, McCarthy is the plaintiff and Badgley the defendant but he is the party originating the proceedings out of which the issue has arisen. McCarthy is plaintiff in the issue because of the provisions of Rule 6 Sch. R. 52 Vic. c. 16, that the caveator shall be plaintiff. In interpleader proceedings it is not the position on the record of the parties that determines the question of security being ordered. This is clearly pointed out in *McPhillips* v. *Wolf*, 4 Man. R. 300, and the cases there referred to by my brother Killam fully warrant the conclusion he came to. I do not think that here McCarthy can be said to occupy the position of a plaintiff suing. Badgley is really the plaintiff in this proceeding under The Real Property Act and in the issue which has arisen out of it McCarthy is the plaintiff only because it seems to have been considered by the Legislature convenient that in such an issue the caveator should be plaintiff.

On the analogy of interpleader proceedings and following the authority of such cases as *Belmonte* v. *Aynard*, 4 C. P. D. 221, 352, and *McPhillips* v. *Wolf*, 4 Man. R. 300, I dismiss the summons, but as the point is a new one, I do so without costs.

Summons dismissed without costs.

LEWIS v. GEORGESON.

[KILLAM, J.]

Foreign evidence taken by Master.

By consent the master attended in Montreal for the purpose of taking certain evidence. The evidence "was to be used on the reference (saving all just exceptions) in the same manner as if said evidence had been taken under a commission."

The depositions were styled in the cause (short form) and then proceeded: "A. B. sworn," with questions and answers following. The answers were not stated to have been made by any one, and there were no signatures either of witnesses or examiner. Upon appeal from the master's report, he certified at the request of the judge, that the evidence had been taken and afterwards transcribed by a short hand reporter, but that it had not been read over to the witnesses.

KILLAM, J.—Without considering whether there is any justification for departing from the old practice in the master's office, it would certainly be improper to receive any evidence, as that taken in Montreal, upon less proof of its being correctly taken than would be required if there had been an order appointing the master a special examiner for the purpose.

COUTURE v. McKAY.

THE HUDSON'S BAY COMPANY, Claimants.

Stoppage in transitu.—Termination of transit by sheriff.—Insolvency of consignee.—Proof.

Goods while in transit were seized by a sheriff under an execution against the assignee, and removed from the custody of the carrier.

Held, That the consignor could not, after such removal, stop in transitu.

Semble, 1. By insolvency, in such cases, is meant a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence.

2. A vendor who in good faith and in ignorance of the embarrassed circumstances of a customer, sold goods to him, may, on discovery of the customer's insolvency, exercise the right of stoppage in transitu.

This was an interpleader issue as to the ownership of certain goods, tried summarily in Chambers.

On the 5th or 6th of July, 1889, the Hudson's Bay Co. sold a quantity of goods to McKay, which, addressed to him at Beren's River, care of Capt. Johnson, Selkirk, were delivered to the Canadian Ry. Co. as carriers. On the 8th of July they were seized at the railway warehouse in Winnipeg, under an execution placed in the sheriff's hands on 28th July, 1888. Three or four days after the seizure the goods were removed, under the sheriff's authority, from the railway sheds to Wilson's auction rooms where they remained in store. On the 19th of July the Hudson's Bay Co., having learned of the seizure, gave notice to the Railway Co. of stoppage *in transitu*, and on being informed of the removal of the goods by the sheriff, served notice upon him also. The same day a demand for delivery of the goods was made upon Wilson, who referred the claimants to the sheriff. The sheriff then took interpleader proceedings.

A number of witnesses were examined upon various points and it was admitted by the execution creditor that the goods seized were the same goods as those sold by the Hudson's Bay Co. to McKay.

H. Turnbull, for Couture. This issue is different from an ordinary interpleader issue, a lien does not carry the property in goods, *Bailey on Onus Probandi*, 166. Vendee must be shown to be insolvent. Insolvency must be after sale and before seizure, *Lickbarrow* v. *Mason*, 2 T. R. 63; 6 East. 21; *Smith's L. C.*, vol. 1, 752. Must discover insolvency after sale. No enquiry here until after seizure. There may have been security. Goods were not in carriers' hands when notice given, they had been removed and transit had terminated. *Blackburn on Sales*, 274; *Oppenheim* v. *Russell*, 3 B. & P. 42. H. B. Co. were looking to salary to recoup them, not to resale of goods. An execution is not evidence of insolvency in this country. H. B. Co. should have shown that transit had not terminated. The possession by the C. P. R. was the possession of McKay. The H. B. Co. had no lien until notice given. Plaintiff was led to suppose that the goods were paid for.

W. E. Perdue, for H. B. Co. There is no authority for saying insolvency must be after the sale, *Houston on Stoppage in Transitu*, 29, 39; *Mills* v. *Ball*, 2 B. & P. 457; *Edwards* v. *Brown*, 2 M. & W. 375; *James* v. *Griffin*, 2 M. & W. 633. Defendant had only a salary. The execution had been laying a long time unpaid. Plaintiff should show the H. B. Co. knew of it. The sheriff's possession that of the C. P. R. The goods should not have been given up. As to the effect of the seizure, it will not defeat the right of stoppage, *Smith* v. *Goss*, 1 Camp. 282; *Houston*, 137, 138; *Stokes* v. *Lariviere*, 3 East, 397. The H. B. Co. notified the sheriff that the goods were stopped, also Wilson the warehouseman. *Houston*, 54; *Whitehead* v. *Anderson*, 9 M. & W. 518; *Exparte Watson*; *In re Love*, 5 Ch. D. 35. Did *transitus* ever come to an end? *Houston*, 65. Goods are in transit until they reach the ultimate place of destination.

(22nd November, 1889.)

TAYLOR, C.J.—The objection was urged that the claimants have given no evidence as to the terms upon which the goods were sold. General evidence has been given that they were sold on credit, and have not been paid for. More definite evidence could not well be given, as the bargain was made and terms settled with Mr. Adams the manager, who is at present in England. It does not, however, seem to me important, to have more definite

information as to the terms, for even if the goods were sold upon a credit which had not expired, the claimants would not, on that account, be unable to exercise the right of stoppage in *transitu*, *Inglis* v. *Usherwood*, 1 East. 515; *Bohlingk* v. *Inglis*, 3 East. 381; *Edwards* v. *Brewer*, 2 M. & W. 375.

It was also objected that the insolvency of McKay was not proved. The evidence upon that head was, the existence of the execution under which the goods were seized, that, in reply to enquiries made, the claimants heard of his being indebted to other persons, his own admissions of inability to pay, and the evidence of a witness, a private banker, called for the execution creditor, who has authority to draw McKay's salary and all moneys coming to him from the government, and who said he had made advances to him which have been repaid. "We always take care to be well secured. Would not advance him money without security."

The right of stoppage *in transitu* is one which can be exercised only on account of the insolvency of the vendee, but what is meant by insolvency in that connection. From some American authorities it would seem as if it must be technical insolvency, or what amounts to that, but the English cases do not seem to warrant the restriction of the right to the case of a vendee who would be an insolvent or bankrupt, one who has stopped payment. In *Tudor's L. C. on Mercantile Law*, p. 653, it is said, "By insolvency is meant a general inability to pay debts, of which the failure to pay one just and admitted debt, would probably be sufficient evidence." For this a number of authorities are cited, the most recent being *Bird* v. *Brown*, 4 Ex. 786, and there the right was exercised sometime before any fiat in bankruptcy issued against the vendee. It was the same in *James* v. *Griffin*, 2 M. & W. 623.

The law seems the same in some parts of the United States, at all events, as Parker, C.J., said in *Naylor* v. *Dennie*, 25 Mass. 204. "We do not find that the right of stopping depends upon a declared insolvency, or open bankruptcy, before the arrival of the goods. It is enough that the affairs of the consignee are so involved, that he is unable to pay for the goods, if he was to pay on delivery."

The further objection is taken, that if the vendee was insolvent so as to admit of the claimants exercising their right, he was so

at the time the goods were sold to him, but the right can be exercised only in the case of insolvency happening between the sale, and the stopping of the goods. For this also, American authority is cited. In *Bailey on Onus Probandi*, p. 166, it is laid down, that a vendor exercising the right of stoppage *in transitu* must show (1) That at the time of the sale the vendee was solvent. (2) That before actual and complete delivery he became insolvent. So, in *Parsons on Contracts*, (7th ed.) p. 597, it is said, that the insolvency must take place between the time of the sale and that of the exercise of the right of stoppage. In support of this, a case of *Rogers* v. *Thomas*, 20 Conn. 53, is cited. These reports are not in the library, but the judgment is set out in full in a foot note in *Parsons*, where it is said the question was first raised in that case. The judgment undoubtedly bears out the statement in the text. But the law laid down in that case does not seem to have been generally adopted in the United States. The note giving the judgment, even concludes with, "See contra *Reynolds* v. *Railroad*, 43 N. H. 580." These reports also are not in the library. In *Benjamin on Sale*, (3rd Am. ed.) sec. 837, *Rogers* v. *Thomas* is referred to, and is said to be at variance with *Benedict* v. *Schaettle*, 12 Ohio St. 515, and numerous other cases which are cited. In that case the court held, that the vendor may stop goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency, although he could not if he knew when the goods were sold. The court said, "We have not been able to find, and our attention has not been called by counsel to any decision which sustains the restriction on the right of stoppage *in transitu* laid down in *Rogers* v. *Thomas*, but it has been adopted as a rule of law in several elementary works. It appears to be approved in *Parsons on Contracts*, but that approbation is omitted in the work of the same author on mercantile law, and withdrawn and a grave doubt substituted in his more recent work on Maritime Law."

But, whatever the law may be in the United States, I cannot find that such is, or ever was the law in England. It is true there is no direct authority on the subject, but the old case of *Wiseman* v. *Vandeputt*, 2 Vern. 203, the earliest reported case establishing the vendor's right of stoppage, concludes thus, "And it was so ruled in the like case between *Wigfall* and *Morteux*, and lately

between *Hitchcox* and *Sedgwick*, in case of a purchase without notice of bankruptcy." In *Jones* v. *Jones*, 8 M. & W. 431, a plea setting up the defence of stoppage *in transitu* is given. It alleges that the vendor believing the vendee to be then solvent, then bargained with and agreed to sell, &c., and the vendee then holding himself out as solvent and then representing himself to be a person of credit and fit to be trusted, bargained with and agreed to buy, &c., and then after alleging the shipping of the goods, proceeds, "and before the payment of the said price . . . . the said N. & W, then first learnt, as the fact was that the said L. T. at the time of the said bargain and giving trust and credit, &c., as aforesaid, was insolvent," &c. Now, that is the case mentioned in both *Chitty on Pleading* and *Bullen & Leake*, as giving the form of plea to set up the defence of stoppage *in transitu*. It certainly does seem reasonable that where a vendor has in good faith, and in ignorance of the embarrassed circumstances of a customer, sold goods to him, that he should on discovery of that fact, be in no worse position than if the customer's difficulties had arisen after the sale.

The other objection, that the seizure and removal of the goods by the sheriff put an end to the claimant's right of stopping them presents, perhaps, more difficulty.

The numerous cases to which I was referred, as showing that seizure under legal process does not deprive the vendor of his right, *Smith* v. *Goss*, 1 Camp. 282; *Newhall* v. *Vargas*, 15 Maine, 314; *Naylor* v. *Dennie*, 25 Mass. 204; *Seymour* v. *Newton*, 105 Mass. 272; *Durgy Cement Co.* v. *O'Brien*, 123 Mass. 12; *Calahan* v. *Babcock*, 21 Ohio St. 281; *Buckley* v. *Furness*, 15 Wend. 137, to which may be added *McLean* v. *Breithaupt*, 12 Ont. App. R. 383, seem all cases in which the goods were seized under attachments commencing actions, or before judgment, and not under executions after judgment.

Two matters require consideration here, the goods have not come to the hands of the vendee, but have been taken out of the hands of the carriers by the sheriff, and they were so before the *transitus* was completed. I deal with the latter point first.

There are numerous expressions made use of by judges to the effect that, goods are to be considered as in the course of transit until they reach their ultimate destination. The only case I

have found deciding positively that it is only possession taken by the vendee on the completion of the *transitus* that will put an end to the right of stopping is *Holst* v. *Pownall*, 1 Esp. 240, decided at *Nisi Prius* by *Lord Kenyon*. There, a ship having arrived at Liverpool, the assignees in bankruptcy of the consignee claimed the cargo and put two men on board to guard it. The ship was ordered back to quarantine, and before her release, notice of stoppage *in transitu* was served. That was held sufficient. To the argument of counsel, that the consignee might have met the vessel at sea on her voyage and taken possession, Lord Kenyon replied, "On the case put by the defendants, it might go the length of saying that the consignee might meet the vessel coming out of the port from which she had been consigned . . . . which was a position not to be supported, as there would be then no possibility of any stoppage *in transitu* at all." In a note to the report of this case it is said that the ruling was afterwards upheld by the Court of King's Bench. But in 1801, the same learned judge in *Wright* v. *Lawes*, 4 Esp. 82, held that where goods were bought by a person resident in Norwich, and on their way from London to Norwich, were delivered into his possession at Yarmouth, they were no longer *in transitu*. In *Mills* v. *Ball*, 2 B. & P. 457, Lord Alvanley is reported as saying, "Though it has been said that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage." In *James* v. *Griffin*, 2 M. & W. 623, Parke, B., said the actual delivery which puts an end to the *transitus* may be, by the vendee taking possession by himself or agent at some point short of the original intended place of destination. So, in *London & Northwestern Rail.* v. *Bartlett*, 7 H. & N. 400, Pollock, C.B., considered it clear, that a consignee may receive the goods at any stage of the journey, and Bramwell, B., said it would raise a smile anywhere but in a court of justice, if it were said that a carrier could not deliver to the consignee at any place except that specified by the consignor. The delivery of the goods may be not only to the vendee himself, but to his agent, and in the most recent case *Bethell* v. *Clark*, 19 Q. B. D. 553, affirmed on appeal, 20 Q. B. D. 615, the test as to whether the *transitus* is ended or not seems to be the circumstances under

which the goods came to the hands of the agent, whether to be carried further, or to be held for the vendee.

While there are as already mentioned a number of cases deciding that, a taking of the goods under attachment before judgment does not put an end to the right of stoppage, there is no case to be found as to the effect of a seizure in execution on a judgment. In *McLean* v. *Breithaupt*, 12 Ont. App. R. 383, in which it was held that seizure under an attachment did not prevent the exercise of the right, Hagarty, C.J., concludes his judgment by saying, "It may be well to note the marked difference between the effect of an attachment against an absconding debtor and an execution in judgment." *Oppenheim* v. *Russell*, 3 B. & P. 42, was a case in which a carrier claimed, as against a vendor who had exercised his right of stoppage, to hold the goods not only for freight due on them, but also as having a general lien for freight due on other goods from the vendee. In his reply Sergeant Lens argued that if the goods had been seized by the sheriff under *fi. fa.* in satisfaction of a debt due from the vendees, the vendors could not, by virtue of their right to stop *in transitu*, have retained the goods from the sheriff unless notice had been given to the sheriff at the time he seized them, of the vendors claims. Lord Alvanley, dealing with this argument said, "My brother Lens put a case which I do not think so clear as he seemed to consider it, namely, that if the sheriff had found these goods upon the road and seized them under a *fi. fa.*, in satisfaction of a debt due from the consignee to a third person, the consignor's claims to resume the property after such seizure could not have availed him. Whether the sheriff can make them absolutely the goods of the consignee by stopping them before they come to his hands, appears to me, very doubtful." Chambre, J., was also uncertain on the point, though he does not seem to have had so much doubt as the Chief Justice. He said, "The most colorable argument in my mind, that has been used upon this occasion, is that which was not mentioned until the reply, comparing the case to the case of a creditor of the consignor taking goods in execution upon their passage. It is assumed that the creditor has that right, but if he has it, I still do not think that the cases are similar. Perhaps the consignee himself may intercept the goods in the passage, and indeed I have little doubt but that if he do intercept them in their passage before the consignor

has exercised his right of stopping *in transitu*, and do take an actual delivery from the carrier, before the goods get to the end of their journey, that such a delivery to him will be complete, and I will not say but that his creditors, in the case of an execution against him for his goods, may not do the same thing. No authorities, however, are cited to prove that they may. But, supposing that they may, still I do not think it applies to this case, for the creditor under an execution takes the thing absolutely to sell and dispose of, as the consignee himself would have done, but the carrier does not so take it, for he has no absolute property in the goods, but only a lien." In *Blackburn on Sale*, p. 397, it is said, It is probable that a seizure by the sheriff under an execution against the purchaser would be held to terminate the *transitus*, for the reasons suggested by Chambre, J., in *Oppenheim* v. *Russell*. The opinion of such an eminent lawyer as Lord Blackburn, is certainly entitled to great weight.

While the goods are in the possession of the carrier in the course of transit, the unpaid vendor may exercise the right of stoppage *in transitu*. If the carriage is at end, and the goods have come to the possession of the vendee, the right can no longer be exercised. It is equally defeated, whether the vendee obtain possession of the goods at the termination of the *transitus*, as originally intended, or at some intermediate point. It is equally defeated, whether the possession of the goods be obtained by the vendee himself, or by his agent, who obtains them for the purpose of holding them, and it makes no difference whether the agent obtains them at the end of the journey or at an earlier period. Where an assignee in bankruptcy of the vendee gets possession of the goods before the vendor exercises his right of stoppage, the vendor's right is gone. The assignee in bankruptcy derives his authority to take the goods from his appointment by the court, and he holds the goods for the benefit of the creditors generally. Now, why should not the taking by the sheriff, who derives his authority to take the goods of the vendee, wherever he can get them, from the court, and who takes and holds them for the creditor, under whose writ he acts, be just as effectual to put an end to the right of stoppage, which had not, up to the time of the seizure, been exercised by the vendee. At the time of the seizure the goods were the property of the vendee. It is true, the vendor had the right to re-take them and divest the

vendee of his property in them if he could, at any time before the *transitus* ended. But here the *transitus* had ended, the goods were given up by the carrier, and had been removed before the vendor attempted to exercise his right.

The question seems to be, has the *transitus* terminated, and have the goods come to the actual possession of the vendee, or of some person having authority to receive and hold them as the property of the vendee? It does seem to me then, that, on the seizure by the sheriff and actual removal of the goods from the hands of the carrier, with the intention of putting an end to the *transitus*, the vendor's right of stoppage was at end.

The order now made must be one barring the claimants, The Hudson's Bay Co., and ordering them to pay the costs of the issue, and occasioned by their claim.

RE JOYCE & SCARRY.

Executor.—Judgment against.—Form.—Pleading.—Reference under R. P. Act.

A certificate of a county court judgment against "A. B., administrator of the estate of X.," charges A. B. personally and not the estate.

The note or memorandum of a county court judge is not, but the entry of the clerk in the procedure book is, the judgment.

Upon a reference by the registrar-general under the Real Property Act, no material other than the case submitted together with any documents transmitted, can be considered.

Semble, When an executor or administrator is made a party to an action, as such, he must declare, or be charged clearly in that character.

Michael James Scarry who died intestate on 5th December, 1887, was at the time of his death the owner of the N.W. ¼ of S. 34, T. 14, R. 4 east. Letters of administration of the estate were granted on 31st January, 1888, to Joseph Walter Joyce,

who made an application in the Land Titles Office to bring the land under the Real Property Act. On 27th February, 1889, a certificate of a judgment in the Court of Queen's Bench in a suit in which John Scarry, senior, defendant, recovered judgment against Joseph Walter Joyce, administrator of the estate of the late Michael James Scarry deceased, plaintiff, for $50.40 costs, which judgment was entered on 27th February, 1889, was registered in the Land Titles Office. On 21st March, 1889, a certificate of title was issued to Joseph Walter Joyce as administrator of the estate of Michael James Scarry deceased. The judgment mentioned was endorsed upon the certificate as an incumbrance. On 22nd March, 1889, Joyce sold the land to Edwin Milledge and Robert Milledge, and a new certificate of title was issued to them dated 22nd March, 1889, subject to the judgment. An application was then made to the registrar-general to have the judgment removed as a cloud upon the title; when a case was referred by the registrar-general for the opinion of a judge on the following questions: 1. Does the judgment bind the above land? 2. Should an entry be made in the register releasing the land from the judgment?

Ghent Davis, for Milledges and estate of Michael James Scarry.

J. S. Hough, for John Scarry, senior.

Davis asked leave to file an affidavit showing that when the Milledges took a certificate of title, subject to the incumbrance of this judgment, the estate undertook to have it removed, and that the purchasers retained sufficient of the purchase money to cover it.

Hough objected to an affidavit being read, Real Property Act 1889, 52 Vic. c. 16, ss. 119, 120.

TAYLOR, C.J.—I allow the affidavit to be read in the meantime, subject to the question of whether, on a reference from the registrar-general, evidence explaining his reference or the position of the parties can be read before a judge.

The argument then proceeded.

Davis cited the following cases, *Barnard* v. *Higdon*, 3 B. & Ald. 213; 3 & 4 Wm. 4, c. 42, s. 31; *Jones* v. *Williams*, 6 M. & S. 178; *Tidd's Pr.*, 978; *Williams on Executors*, 1904-5; *Chitty's Forms*, 716, 710; *Bullen & Leake*, 152.

Hough referred to *Archibald's Pr.*, 1232; Real Property Act, 1889, 52 Vic. c. 16, s. 27.

(*1st May, 1889.*)

TAYLOR, C.J.—This is a reference under the Real Property Act, sent by the registrar-general for the opinion of a judge, as to whether a judgment, a certificate of which has been registered in the Land Titles Office, binds the land in question.

The land was owned by Michael James Scarry who died intestate. Letters of administration to his estate issued to Joseph Walter Joyce and a certificate of title was granted to him "as administrator of the estate of Michael James Scarry deceased." Before the issue of that certificate, the judgment in question was registered and a certificate of title was given, subject to the judgment endorsed thereon as an encumbrance. Joyce has sold to two persons of the name of Milledge, to whom a new certificate has been issued, also subject to the encumbrance. An application to the registrar-general to have the endorsation of the judgment removed as a cloud upon the title, has occasioned the present reference.

The certificate of judgment, a copy of which was sent with the reference, is of a judgment signed and entered in the Court of Queen's Bench in favor of John Scarry senior, defendant, against Joseph Walter Joyce, administrator of the estate of the late Michael James Scarry deceased, for $50.40 damages and costs. I do not think that I can properly look at anything behind the certificate registered, but the matter has been argued for all parties as being a judgment entered in the Queen's Bench upon a transcript from the County Court of Selkirk, of a judgment for costs obtained by Scarry the defendant, against Joyce the plaintiff.

If the judgment is one for costs in an action brought by Joyce even as administrator of Michael James Scarry, it cannot bind the lands of the intestate. Before the 3 & 4 Wm. 4, c. 42, an executor or administrator who brought an action as such, in which he was nonsuited or had a verdict against him, was not liable for the costs. The defendant in such a case could not recover costs against him. *Jones* v. *Williams*, 6 M. & S. 178; *Barnard* v. *Higdon*, 3 B. & Ald. 213. By section 31 of the Act just mentioned it was enacted that, in every action brought by

an executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff; and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner. That plainly means that the defendant shall recover his costs in the like manner that he would in an action brought by the executor or administrator in his own right and for his own benefit, that is, out of the estate and effects of the plaintiff himself. That such is the case seems well settled. As was said by V.C. Mowat in *Great Western Rail. Co.* v. *Jones*, 13 Gr. 359, relying on English authority, "the settled rule is that, in litigation with third persons, executors are liable personally to pay costs, whatever the state of the assets may be."

The County Courts Act 1887, sec. 223, sub-sec. 11, provides that, "In actions by executors or administrators, if the plaintiff fail, the costs shall, unless the court shall otherwise order, be awarded in favor of the defendant, and shall be levied *de bonis propriis.*" It was argued for the judgment creditor, that it did not appear what order was made by the judge, that the notice or memorandum made by the judge is the judgment and that he had not had an opportunity of showing this. But, it has been held by the Full Court that the note or memorandum made by the judge is not the judgment, but the entry or record made by the clerk in the procedure book. Even if the judgment is not for costs merely, but, as stated in the certificate of judgment, for damages and costs, still I do not see how a judgment in the form of this one can bind the lands of the intestate. The judgment is not one against Joyce as administrator.

I am not prepared without further discussion and consideration to adopt the argument of Mr. Davis, that in no case does a judgment even against an executor or administrator as such, registered under The Administration of Justice Act, 1885, section 111 bind the lands of his testator or intestate. The wording of section 113 is wide and comprehensive, but there can, I think, be no doubt, that to have such effect, the judgment must be one in the

words of the section, recovered against the "executor or administrator as such." When an action is brought by an executor or administrator as such, he must distinctly declare in that character. It would not be sufficient for him to allege that the cause of action accrued to him, "executor," or "being executor," he must allege that it accrued to him "as executor," 1 *Chitty on Pl.* 227. So where he is sued it must be as executor. The forms given in *Chitty's Forms* show that the same particularity must be observed in entering the judgment.

The forms given under the heading, "Form No. 43," annexed to the County Courts Act, 1887, indicate very plainly the form of minute of judgment to be adopted where it is intended that the successful party shall have his remedy against the estate of the testator or intestate. There is nothing of that kind here, and the judgment as it stands, is one against Joyce in his individual, and not in his representative character.

Upon the argument Mr. Davis proposed to read an affidavit, and I allowed him to do so subject to the further consideration of the question whether on a reference like the present, anything can be looked at beyond the case stated and referred by the registrar-general. On reflection, the conclusion I have come to is, that the case stated, with any documents transmitted by the registrar-general, should alone be dealt with.

The judgment must be removed from the register as a charge upon the land in question, and the judgment creditor must pay the costs. However the judgment first came to be entered as a charge upon this particular parcel of land, he appeared to support its being there as a proper and subsisting charge, and on the principle on which I found the defendant liable for costs in *Blair* v. *Smith*, 1 Man. R. 5, I must award costs against him. I fix the amount of these at $10 if they are paid without any order being required to be issued. If not then, I allow them at $15.

I shall send the following certificate to the registrar-general:—The reference in this matter has been argued before me by counsel for Edwin Milledge, Robert Milledge and John Scarry senior and for the estate of Michael James Scarry deceased, and I am of opinion that the answer to the first question is, that the judgment in favor of John Scarry senior, against Joseph Walter Joyce administrator of the estate of the late Michael James Scarry deceased, registered in the Land Titles Office on the 27th Febru-

ary, 1889, did not bind the land in question in this matter, and the answer to the second question is, that an entry should be made in the register releasing the said land from the judgment.

COOK v. THOMAS.

(IN APPEAL.)

Action on warranty previous to payment of purchase price.—Measure of damages.—Misjoinder of plaintiff.

Action upon a warranty given on sale of second hand machinery "good for twelve months with proper care." The action was brought in the name of two persons, to one only of whom the warranty had been given.

Held, 1. That no objection to the frame of the suit having been taken at the trial, the court in term had power to give judgment for the proper plaintiff.

2. That damages could be recovered for a breach of the warranty, notwithstanding that the purchase money had not been paid, promissory notes having been given for the amount. (*Church* v. *Abell*, 1 Sup. Ct. R. 442, distinguished.)

3. The measure of damages was the sum which, at the time of the sale, it would have been necessary to expend in order to remove any defect which constituted a breach of the warranty.

This action was brought for alleged breach of a written warranty given by defendants, on the sale of a second hand engine and boiler, "good for twelve months with proper care." At the trial before Mr. Justice Killam, the jury gave the plaintiffs a verdict on the first four counts in the declaration for $517, and against this the defendants moved to have the verdict set aside and a verdict entered for them, or for a new trial, or to have the amount of the verdict reduced. The grounds on which they moved were, misjoinder of Frederick Frooks as a plaintiff; misdirection, in the jury being told they might find damages for the difference between what the machine ought to have been worth,

if according to warranty, and what it really was worth, as such damages could only be recovered in an action brought by defendants for the price; verdict excessive in amount; and against the weight of evidence.

Hon. J. Martin, Attorney-General, for defendants. As to misjoinder of parties, *Robson* v. *Doyle*, 3 E. & B. 396; *Brashier* v. *Jackson*, 8 Dowl. 784; *Wickens* v. *Steele*, 2 C. B. N. S. 488. As to misdirection, as to the measure of damages, *Church* v. *Abell*, 1 Sup. C. R. 442. As to amendment, *Day's Common Law Procedure Act*, 74; *Robson* v. *Doyle*, 3 E. & B. 396. On the question of damages, *McMullen* v. *Williams*, 5 Ont. App. R. 518.

N. F. Hagel, Q.C., and *T. M. Daly*, for plaintiff. There was no leave reserved at the trial. There was no objection at the trial on the part of defendants as to misjoinder. As to misdirection, the case is not within *Church* v. *Abell*,. The case was fully submitted to the jury, and therefore no new trial. *Benjamin on Sales*, 892; *Wentworth* v. *Daws*, 117 Mass. 14; *Gordon* v. *Waterous*, 36 U. C. Q. B. 321. As to excessive damages, *Lathbury* v. *Brown*, 10 Moore, 106.

(*20th December, 1889.*)

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

So far as the motion is to enter a verdict for the defendants, it may at once be disposed of by saying, that no leave to enter such a verdict was reserved at the trial.

Frooks seems improperly joined as a plaintiff. No doubt he and Cook were to be partners in the whole threshing outfit, separator, engine and boiler, but Cook alone bought the latter, he himself says so in his evidence, and the warranty shows that he alone was the buyer. But no objection on this ground was taken by the defendants at the trial, and section 19 of the Common Law Procedure Act, 1860, provides for such a case. The cases of *Robson* v. *Doyle*, 3 E. & B. 396, and *Wickens* v. *Steele*, 2 C. B. N. S. 488, were cases of misjoinder of defendants, both decided while the Common Law Procedure Act, 1852, governed the practice, and under that there could be an amendment only at the trial. In *Bremner* v. *Hull*, L. R. 1 C. P. 748, the court

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

held it had power, under that section 19, to give judgment for such of the plaintiffs as might be proved to be entitled.

To support the objection on the ground of misdirection, the case of *Church* v. *Abell*, 1 Sup. Ct. R. 442; 26 U. C. C. P. 338, was relied on. In my opinion, the learned judge at the trial, correctly distinguished that case.

Before the present action was brought, the purchase money had been secured, and a large part of it paid, so the case falls within the exceptions referred to by Moss, J., in his dissenting judgment in the Ontario Court of Appeal. In the Supreme Court his judgment was approved of, indeed Mr. Justice Strong held, that a purchaser's rights in respect of a warranty were in no way subject to any condition of prior payment.

The damages, the jury have undoubtedly assessed on a wrong principle. The claim for these is made under two general heads: First, leakage, the expenses incurred in repairing defects which caused that, with loss of time and wages paid men while the machine was idle repairing defects: Second, and later on, the breaking of the heater, which led to the abandonment of the engine and boiler, and the bringing of this action.

The leakage does seem to have arisen from defects in the boiler, the liability to remove which, the defendants appear to have admitted, they sending, from time to time, men to make repairs. The utmost amount of damage from that cause shown by the evidence, is $52.35.

The evidence as to the breaking of the heater is, by no means, satisfactory. It is doubtful whether it was occasioned by an inherent defect, or by carelessness on the part of the man in charge. I do not know that I would, on the evidence, have found that it occurred through inherent defect, but the question was a proper one for the jury, it was left to them, and they have so found. The cost of replacing the heater with a new one would have been about $60, with, perhaps, some small addition for freight from the foundry in Wisconsin.

There is no evidence to support a verdict for the amount which the jury have given. The proper damages for them to have given in respect of this defect would have been the sum which, at the time of the sale, it would have been necessary to expend in order to remove the defect. That, the evidence shows, would have been about $60. There is no evidence of any other defects.

The court has no power to reduce the verdict, and can strictly only order a new trial. But, in order to prevent further litigation, the plaintiff should be given an opportunity of electing whether he will consent to a reduction of the damages. In my opinion, if the plaintiff will consent to reduce the verdict to $125, with full costs, defendants motion should be dismissed without costs. If he declines to consent, the motion should be allowed with costs, and a new trial granted without costs.

The plaintiff should have three weeks within which to make his election.

VAUGHAN v. THE BUILDING & LOAN ASSOCIATION.

Landlord and Tenant.—Notice of demand, &c.—Husband and wife.—Joinder of causes of action.

A count by tenant against landlord for seizing and selling as for distress without giving the notice required by 46 & 47 Vic. c. 45, s. 6, whereby the tenant lost the difference between the value of the goods and the amount realized by their sale,

Held, Bad on demurrer.

Counts in trespass to the goods of a husband cannot be joined with counts for unlawful distress of the goods of the wife, and such counts may be demurred to.

The plaintiffs James Vaughan and Mary his wife, sued to recover damages for excessive distress.

The 8th count of plaintiff's declaration averred "that the plaintiff Mary was tenant of a messuage . . . . and the defendants distrained divers goods of the plaintiff," and sold same "without giving a copy of demand, and of all costs and charges of the distress signed by them, or either of them, to the plaintiff Mary contrary to the statute." The ninth count was in similar terms, substituting the name of the husband for that of the wife. The 10th, 11th and 12th counts were for distraining and conver-

sion of goods of the husband. The defendants demurred. As to the 8th and 9th counts, the defendants contended that it was not necessary to the validity of the distress to give a copy of demand, also that the 10th 11th and 12th counts disclosed no joint cause of action in the plaintiffs.

W. E. Perdue, for defendants, The Building and Loan Association. The 8th & 9th counts disclose no cause of action. 46 & 47 Vic. c. 45, s. 6, Man., is an Act respecting lodgers and boarders, and the section applies only to them. The Ontario Statute, R. S. O., c. 65, s. 9, the same, and in Ontario there is a penalty provided. The notice cannot be a condition precedent, it could not be served until the distress was completed. No time is limited. *Maxwell on Statutes*, 450, 468; *Thompson* v. *Harvey*, 4 H. & N. 254. The damages assigned cannot result from the breach.

The 10th, 11th and 12th counts join distinct causes of action. This is not an injury done to the wife, and she was never a necessary party. "Injuries" does not mean injuries to property, the husband alone would sue at common law for injuries to property of the wife; section 40 of the C. L. P. Act does not apply. *Bullen & Leake*, 338, 339; *Rischmuller* v. *Uberhaust*, 11 U. C. Q. B. 425; *Dengate* v. *Gardiner*, 4 M. & W. 5; *Jackson* v. *Kassel*, 26 U. C. Q. B. 341. The five counts show two distinct actions in two plaintiffs. Husband and wife joining to sue for damages to wife, and joining counts in his own right, *May* v. *House*, 2 Chitty, 697; *Brigden* v. *Parkes*, 2 B. & P. 424; *Rose* v. *Bowler*, 1 H. Bl. 108; *Jennings* v. *Newman*, 4 T. R. 347; *Corner* v. *Shew*, 3 M. & W. 350; *Ashby* v. *Ashby*, 7 B. & C. 444.

A. Dawson, for plaintiff. As to the 8th and 9th counts, it does not matter where this section came from. It is the same as the provisions in R. S. Ont. 1877, c. 65, s. 9, and c. 136, s. 16, which apply generally to all distresses. *Reg.* v. *Currie*, 31 U. C. Q. B. 582. It does not matter whether plaintiffs can prove the special damage alleged. Where a statute imposes a duty, it also, by implication, gives the right of suing for damages for the breach of same. *Maxwell on Statutes*, 493, 499, 500; *Broom's C. L.*, 4th ed. 672.

As to joining claims of the husband in his own right under section 40 C. L. P. Act 1852, the wife was a necessary party,

she was the tenant. *Harrison's C. L. P. Act*, 86, 87; *Morris* v. *Moore*, 19 C. B. N. S. 359; *Hemstead* v. *Phœnix Gas Co.*, 3 H. & C. 745; *Morley* v. *Midland Ry. Co.*, 3 F. & F. 951. As to misjoinder of parties see *Day's C. L. P. Act*, 70, 71, 364. Objection only by plea in abatement, *Addison* v. *Overend*, 6 T. R. 766. As to misjoinder of causes of action. The whole declaration would be bad, *Archibold's Q. B. Practice*, p. 227, 228; *Taylor* v. *Brown*, 17 C. B. 387. Objection can only be taken on demurrer to whole declaration. As to meaning of word injuries, see *Wharton's Law Lexicon*, 412.

(*22nd November, 1889.*)

BAIN, J.—Section 6 of 46 & 47 Vic. c. 45, intituled "An Act respecting lodgers and boarders," provides that, "Every person who makes and levies any distress, shall give a copy of demand and of all costs and charges of the distress, signed by him to the person on whose goods and chattels the distress is levied."

The 8th and 9th counts of the plaintiff's declaration allege that the plaintiff Mary Vaughan was tenant to the defendants, and that they made a distress of the plaintiff's goods and sold them without giving the notice required by the above section to either of the plaintiffs, whereby the plaintiffs lost the difference between what the said goods were sold for and what they should properly have been sold for.

I think this section must be held to be general in its application, and cannot be confined only to cases where the effects of boarders or lodgers have been distrained by the landlord of the premises.

The section imposes a duty on the person or persons distraining for the benefit of the person on whose goods the distress is levied, and the latter has the right to recover from the person on whom the duty is cast, the damages he has suffered as the direct result of the breach of the duty. But I am unable to see how the damages alleged in these counts can be in any way the result of, or even connected with, the failure to give the notice required by the section, and I think both these counts are bad.

The 10th, 11th and 12th counts as well as the 9th one above referred to, are demurred to on the ground that, in them the husband, James Vaughan, sets up claims for damages in his own right. In the other counts damages are claimed for unlawful distress, &c., of the goods of the wife on premises of which she

was the tenant. The rule is that the several counts in a declaration must be between the same parties and in the same rights, except in the case provided for by section 40 of the C. L. P. Act 1852, that "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right."

But at common law, before the passing of the Married Women's Property Act, it would have been improper to have made the wife a party to an action such as this, brought in respect of injuries to her person and property, committed during coverture. The husband could alone have sued for such injuries, and the present case does not, therefore, come within the exception allowed by the above section of the C. L. P. Act.

I allow the demurrer to the several counts demurred to, with costs.

Demurrer allowed.

THE BRITISH LINEN CO. v. McEWAN.

(IN CHAMBERS.)

A foreign judgment.—Defences which might have been raised.—Counter-claim.—Foreign affidavits.

A plea to an action on a foreign judgment, of the statute of limitations, to the original cause of action, ought not to be struck out as embarrassing; a plea of the statute of limitations being *lex fori* and one which could not have been pleaded in a foreign country. Nor should a counter-claim be struck out where, at all events, the defendant was not bound to raise it in the original action.

Irregularities in foreign affidavits treated leniently.

Quære, Whether the Manitoba statute relating to foreign judgments does not entitle the defendant in an action on a foreign judgment, to set up any defence which he might have set up, if the plaintiff had sued on the original cause of action instead of on the judgment.

This was an appeal from an order made by the referee striking out the 6th, 7th & 8th pleas of the defendant.

The action was brought upon a judgment recovered by the plaintiffs against the defendant in the Court of Session in Scotland. In the 6th plea the defendant alleged that the causes of action in respect of which the alleged judgment was recovered did not accrue within six years before the commencement of the said suit in the declaration mentioned, or within six years before this action. The 7th plea was by way of counter-claim for damages, because the plaintiffs did not sell to the best advantage certain bonds which the defendant employed them to sell as his agents, and the 8th was a counter-claim because the plaintiffs converted to their own use, or deprived the defendant of the use and possession of certain bonds.

C. W. Bradshaw, for defendant. As to the 7th & 8th pleas setting up counter-claims, there was nothing before the referee to show that defendant could file a counter-claim in Scotland, or was bound to do so. It might have arisen since the foreign judgment. As to the counter-claim being embarrassing, *Woods* v. *Tees*, 5 Man. R. 256. As to the 6th plea setting up the Statute of Limitations. The statutes in Manitoba permit a defendant in an action on a foreign judgment, to set up any defences which he might have set up if the plaintiff had sued on the original cause of action instead of on the judgment. The cases decided under the Ontario Statute are not applicable, as that statute only permitted such defences to be set up as were, or might have been set up in an action in which the judgment sued on was recovered. But, apart from our statute altogether, a defendant could always set up any defences which he could not have set up in the foreign court, *Ellis* v. *McHenry*, L. R. 6 C. P. 628. The plea of the statute of limitations is *lex fori*, *Harris* v. *Quine*, L. R. 4 Q. B. 653; *British Linen Co.* v. *Drummond*, 10 B. & C. 903; *Don* v. *Lipmann*, 5 C. & F. 1; *Huber* v. *Steiner*, 2 Bing. N. C. 202. Defendant could not plead our statute of limitations in the foreign courts. As to striking out plea, *Fowler* v. *Vail*, 27 U. C. C. P. 417; 4 Ont. App. R. 267.

F. H. Phippen, for plaintiffs.

(*31st May, 1889.*)

TAYLOR, C.J.—I am still of the opinion I expressed upon the argument that the proper construction of section 45, sub-section

2 of The Queen's Bench Act, 1885, * is, that the defendant may plead to the action on its merits, that is set up any defence on the merits to the action as brought, the action on the judgment; or set up any defence which might have been pleaded to the original cause of action for which the judgment has been recovered, that is, any defence which might have been set up in the original action. It seems to me that, had it been intended that any defence may be set up in the action on the judgment which might have been set up to the original cause of action had it been sued upon in this court, the words "which might have been pleaded," should have been left out. To bear the construction sought to be put upon it, it seems to me, the section should have read, "A defendant in any action upon a judgment . . . . may plead to the action on its merits, or set up any defence to the original cause of action for which such judgment has been recovered."

I believe, however, some of my learned brothers are inclined to take a different view of the section from what I do, and that being the case, I feel unwilling, sitting in Chambers, to so dispose of the case as to shut the defendant out from setting up a defence which they might hold him entitled to raise. Besides, *Ellis* v. *McHenry*, L. R. 6 C. P. 228, seems an authority that, apart from our statute a defendant may set up any defence which it was not open to him to raise in the original action. If so, then, as the defendant could not have raised in the original action our statute of limitations, it should be open to him to raise it now. Then, under such cases as *Huber* v. *Steiner*, 2 Bing. N. C. 202, and *Don* v. *Lipmann*, 5 Cl. & F. 1, the statute of limitations seems to be *lex fori*, in which case it should be open to the defendant to set it up.

As to the two pleas setting up a counter-claim, the defendant was not, so far as I know, bound to raise that in the original action. He seems there to have set up the facts upon which he now bases his counter-claim, but he expressly reserved his claim

* The clause referred to is as follows:—"A defendant in any action upon a judgment obtained in any court out of the Province, or upon a foreign judgment, may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered; provided always, that the opposite party shall be at liberty to apply to the court or a judge to strike out any such plea upon the ground of embarrassment or delay."

for the loss sustained by the plaintiffs alleged unwarranted dealing with the bonds. It cannot, I think, be said that these pleas embarrass the plaintiffs, the *onus* of proving them rests entirely upon the defendant.

The objection to the exhibits referred to in the affidavit of Green should not be given effect to. The courts seem much more liberal in allowing affidavits sworn abroad to be used, notwithstanding irregularities, than they are in the case of affidavits sworn within the jurisdiction. See *In re Magee*, 15 Q. B. D. 332; *Litchfield* v. *Jones*, 25 Ch. D. 64. It seems to me, however, that there are most serious objections to the documents produced as evidence of a final judgment in the Scotch court.

The appeal should be allowed with costs, to be costs in the cause to the defendant in any event, the order of the referee reversed and the summons to strike out these pleas dismissed, costs to be costs in the cause.

WATERS v. BELLAMY.

(IN CHAMBERS.)

Debtors Act.—Non-payment of costs.—Examination of debtor under judgment for costs.—Depositions improperly taken.

A debtor under a judgment for costs only, cannot be examined as to his means.

A debtor having been examined under such a judgment,

Held, That the depositions could not be read on an application against him under the Debtors Act.

George Patterson, for defendant.

(*29th November, 1889.*)

TAYLOR, C.J.—The defendant has a judgment against the plaintiff for costs, and a summons is asked under The Debtors

Act, 1869, calling on the plaintiff to show cause why she should not be ordered to pay the amount of the judgment, and why she should not for default in payment, be committed to prison for six weeks, unless the amount is sooner paid.

The material upon which the summons is asked is, first, an affidavit that she is a spinster. This is to show that the case does not come within the provisions of section 76, sub-section 3 of The Administration of Justice Act, 1885. Then, there is an affidavit proving the recovery of the judgment, that it remains unsatisfied, that the plaintiff was examined under an order made by the County Court Judge of the central district, verifying the depositions then taken, and the signature of the plaintiff. The affidavit concludes, "I verily believe that the plaintiff is well able to pay the amount of the said judgment, and that she has the means to pay the same, but refuses to pay it."

Before the jurisdiction given by the statute can be exercised, it must be proved to the satisfaction of the court, that the plaintiff either has, or has had, since the date of the judgment, the means to pay the sum in respect of which she has made default, and has refused or neglected, or refuses or neglects to pay the same. Plainly, the affidavit by itself would not, if a summons were granted, warrant an order being made. No information is given as to the means which the plaintiff has, nor is there any reason assigned why the deponent believes that she is well able to pay the amount. No facts are stated which can satisfy the court that the deponent's belief is well founded.

Can the depositions of the plaintiff taken under the order of the County Judge, be used to supply what is wanting? I think not. The depositions were taken under an order made under section 52 of The Administration of Justice Act, 1885, and the plaintiff was not liable to be examined under that section. It has been held, following the Ontario authorities upon the similar Act there, that a judgment debtor liable on a judgment only for costs, cannot be examined under that section. Our Act is the same as section 41 of c. 24 Con. Stat. U. C., except that, instead of as there, saying, "In case any party has obtained a judgment," our Act says, "Any judgment creditor who has obtained a judgment." That, however, makes no difference, for, while under the interpretation clause of our Act, "Judgment creditor" means any person, plaintiff or defendant, who has recovered a judgment,

by the 27 & 28 Vic. c. 25, the words in section 41 of the Con. Stat. were to mean as well a party defendant as a party plaintiff. That a debtor against whom a judgment is recovered for costs only, cannot be examined as a judgment debtor, was decided in *Re Hawkins*, 3 Ont. Pr. 239; *Herr* v. *Douglas*, 4 Ont. Pr. 124; *Ghent* v. *McColl*, 8 Ont. Pr. 428; *Meyers* v. *Kendrick*, 9 Ont. Pr. 363.

The words in our Act, as in the Ontario Act, are "debt or liability." The debtor may be examined as to the circumstances of his contracting the debt or liability, as to the means he had when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred, and as to the disposal he has made of any property since incurring such debt or liability. Now, the words "debt or liability," were held in *Hawkins* v. *Paterson*, 23 U. C. Q. B. 197, to apply to the debt or liability to recover or enforce which, the action was brought, and upon which the judgment has been recovered, and they consequently include only a debt or liability existing when the action was brought. That decision has, I believe, never since been questioned. The judge should never have made the order for the examination of the plaintiff in this case, as he had no jurisdiction or authority to make it. Had she failed to attend for examination, and been committed for contempt in so failing, an action would have lain against the defendant's attorney for trespass and false imprisonment, *Hawkins* v. *Paterson*.

As there is no evidence before me which would, if a summons were granted, justify an order being made on its return, I must refuse the summons.

Summons refused.

STEPHENS v. ROGERS—EX PARTE LIVINGSTONE.

(IN CHAMBERS.)

Interpleader.—Sheriff's costs.—Appeal for costs.

An execution creditor directed a sheriff to interplead between him and a claimant to some seized goods. Upon the return of the interpleader summons the creditor obtained an enlargement to examine the claimant. Upon the further return the creditor abandoned.

Held, 1. That the creditor ought to pay the sheriff's costs of the proceeding.

2. That the refusal of the referee to allow such costs might be appealed from.

A. Haggart, for plaintiff.

J. S. Hough, for claimant.

T. D. Cumberland, for sheriff.

(*26th November, 1889.*)

BAIN, J.—This is an interpleader matter in which, on the 14th of November, the referee made an order barring the plaintiff, but directing that no costs should be allowed to the sheriff, or to any of the other parties thereto.

The sheriff appeals from this direction in the order, and asks that the plaintiff be ordered to pay his costs of and incidental to the interpleader application and the costs of the appeal.

From the affidavits it appears that after the plaintiff's solicitor was aware of the nature of the claimant's claim, he instructed the sheriff to interplead, that on the return of the summons, he obtained an enlargement for a week, that he might examine the claimant on his affidavit, and that on the next return of the summons, he abandoned the seizure and submitted to the order to debar him being made.

In England, the costs of interpleader proceedings are in the discretion of the judge, as they are here, under the Administration of Justice Act, *Burnham* v. *Walton*, 2 Man. R. 180; and *Massey Mfg. Co.* v. *Gaudry*, 4 Man. R. 229. In England the practice formerly was not to allow the sheriff his costs for making

and attending on the interpleader application, the relief and indemnity that the application gave him being considered sufficiently beneficial, *Archbold*, p. 1411, but of later years the practice has changed, and the rules now followed are, generally speaking, the sensible and equitable ones laid down by Field, J., in *Searle* v. *Matthews*, W. N. 1883, p. 176. These rules were approved of and adopted by the Court of Queen's Bench in *Goodman* v. *Blake*, 19 Q. B. D. 77, in a note to which the judgment of Field, J., is given at length. What he says is this: "Where an order is made on the application of a sheriff, he is entitled to his costs from the period at which he has been called into interpleading action, that is to say, he is entitled as against an unsuccessful claimant, to costs and possession money from the time of the notice of claim, or from the time of sale, whichever would be first; and when a sheriff is ordered to withdraw, he is entitled to costs as against the execution creditor, from the time at which the latter authorized the carrying on of the interpleader proceedings, that is generally from the return of the interpleader summons." The rules laid down in this judgment should, I think, be applied in interpleader proceedings here, subject, of course, to the restriction stated in the judgment, that they are given as general rules only, and that, "if in any particular case, the sheriff or party interpleading, has unnecessarily caused any portion of the costs, he will not be entitled to recover, and may be called upon to pay costs."

Now, in the present case, the execution creditor not only adopted the sheriff's action in interpleading by attending on the return of the summons and obtaining an enlargement of it, but it was by his express instructions the sheriff interpleaded, and the result of the proceedings was that the execution creditor had to acknowledge the claimant's claim and submit to be barred. In *Ex parte Streeter*, 19 Ch. D., at p. 224, Jessel, M.R., speaking of the sheriff's costs in interpleading proceedings, remarks: "Costs are now in the discretion of the court; whichever side is in the wrong is to pay the sheriff's costs."

While the court is always unwilling to entertain an appeal from a discretionary order, and especially in a matter of costs, it will do so when the discretion has been exercised on a wrong principle. The case of *Goodman* v. *Blake*, above cited, is an example

of an appeal being entertained and allowed upon a question of costs very similar to the one raised here.

I think the referee's order should be varied so as to allow the sheriff his costs as against the plaintiff, and I allow also, his costs of this appeal. I do not vary the order as regards the claimant's costs.

ORR v. BARRETT.

County Court.—Appeal.—Time.—Mandamus.

[TAYLOR, C.J.]

Proceedings in appeal from the County Court had been taken and an unsigned certificate of the County Judge filed with the Prothonotary within the proper time, under the belief that it had been properly signed. Upon discovery of the fact but after the time for filing the certificate an application was made to the judge to affix his signature. He refused.

Held, That the judge was right in so refusing and an application for mandamus was dismissed.

G. G. Mills, for applicant.

RE McARTHUR & GLASS.

Real Property Act.—Affidavits in support of petition after caveat.

It is not necessary to file affidavits in support of a petition based upon a caveat in the Land Titles Office. Cause may be shewn by argument upon the allegations in the petition, or by affidavits; after which the judge may, if necessary, permit the petitioner to adduce evidence, or may direct an issue.

R. W. Dodge, for caveator.

A. Monkman, for caveatee.

KILLAM, J.—I cannot find that it has ever been decided whether affidavits or other evidence should be filed with the petition of the caveator or before the caveatee is asked to show cause. Rule 5 of schedule H of the Act of 1886 seems to contemplate that at some stage, affidavits may be filed in support of the petition, but it speaks of this as a contingency only. Rule 4, however, provides that "If the caveatee shall not appear on the day appointed for the hearing, the court may, upon due proof of the service of such petition, make such order in the absence of the caveatee, either for the establishment of the right of the caveator or as the nature and circumstances of the case may require, as to the court may seem meet." Thus, it is evident that, unless cause be shown, it is unnecessary to support the petition by evidence. The affidavit required by sub-section 11 of section 37 (schedule D.) to be filed with the caveat is sufficient to show the good faith of the caveator, and is evidently demanded to guard against the abuse of the practice, so that for that purpose there is little reason to require the petition to be supported by evidence before allowing the caveator to have an issue tried or some other investigation ordered.

The practice which I shall adopt hereafter will be to hear the petition without affidavits or other evidence in support if none be filed; to allow cause to be shown, by argument that the case made by the petition is insufficient to show a right, or by affidavit either directly meeting allegations of fact in the petition or showing fresh facts, and, upon thus learning the questions in dispute, to allow the petition to be supported by affidavits or other evid-

ence, or, without such, to direct the trial of an issue, direct inquiries or otherwise deal with the matter. This will, of course, not prevent a petitioner from filing affidavits or other evidence in advance, if, knowing the cause proposed to be shown he shall deem this advisable as saving expense or otherwise simplifying the matter.

SIMPSON v. McDONALD.

Practice.—Notice of appeal from verdict of single judge.

[FULL COURT.—7th May, 1889.]

A verdict having been rendered for the plaintiff, the defendant properly filed a *præcipe* requiring the cause to be set down for rehearing before the court in *banc*, and gave the following notice to the other side: "Take notice that the defendants will apply by way of appeal to the full court from the decision of Mr. Justice Dubuc in this cause," setting out the grounds of appeal.

Upon the case coming on for argument, *W. A. Robertson* objected that the notice was insufficient, inasmuch as it was not a "notice of the entry of the application," and quoted rule 50 of Easter Term 1885 as follows:—"The party intending so to apply shall also, within said period of two weeks, serve upon the other parties to the cause, matter or proceeding, notice of the entry of the application and the grounds thereof, to the extent and in the manner that under the hitherto existing practice would be required in rules *nisi*."

H. A. McLean, for defendant.

Per Curiam.—The notice is insufficient. Application dismissed with costs.

BUCHANAN v. CAMPBELL.

(IN APPEAL.)

Security for costs.—Interpleader proceedings.—Law stamps omitted.—Treble stamps.

Pending an interpleader summons, an order was made for the examination of the claimant upon an affidavit filed by her, but not stamped. Thereupon the claimant applied for and obtained an order staying proceedings until security for costs was given by the claimant, a foreign execution creditor. Upon appeal from the County Court, and during the argument, application was made to treble stamp the affidavit.

Held, 1. That no order for security could be made until an issue was directed.

2. Leave to treble stamp should not be given except upon a substantive motion for that purpose, supported by such evidence as will satisfy the court or judge that the stamps had been inadvertently omitted.

Certain chattels were seized under execution, and these were claimed by the wife of the debtor, whereupon the sheriff obtained an interpleader summons from the County Court Judge of the Central District. This summons was enlarged for the purpose of examining the claimant on her affidavit, and pending the enlargement, the claimant, on her own affidavit, stating that the execution creditor resided out of the jurisdiction, obtained a summons for security for costs. On the return of the summons, the learned judge made an order, "that further proceedings be stayed in the interpleader application herein, until the above named plaintiff, Joseph Buchanan, shall have given security for the costs of such interpleader application."

Against this order the execution creditor appealed.

W. J. Cooper, for the appellant. Until an order is made directing an issue, the claimant is no party to any cause or action. By the stay of proceedings the sheriff must remain in possession of the property, and cannot proceed with the application which is for his relief. The order is not for security for the costs of the issue, but of the interpleader application. He referred to *McNider* v. *Baker*, 10 C. L. J. O. S. 193; *Canadian Bank of Commerce* v. *Middleton*, 12 Pr. R. 121; *Tomlinson* v. *Land Corp.*, 14 Q. B. D. 539; *Rhodes* v. *Dawson*, 16 Q. B. D. 548;

Can. Pac. Ry. Co. v. *Forsyth*, 3 Man. R. 45; *McMaster* v. *Jasper*, 3 Man. R. 605; *McPhillips* v. *Wolf*, 4 Man. R. 301. The affidavit of the claimant has no stamp on it, and so could not be read, Con. Stat., c. 8, s. 10.

The Attorney-General, for the respondent. Under Con. Stat. c. 8, s. 16, the court may allow the affidavit to be stamped now, by affixing treble stamps and application is made to so stamp it. There is no rule of court that a defendant must appear to an action before moving for security. Claimant by attending and filing an affidavit on the return of the sheriff's interpleader summons, had in fact appeared. The Ad. Jus. Act, 1885, section 58, gives the judge power to make such orders as may appear just under the circumstances of the case. As the execution creditor was about to examine the claimant, she would incur costs for which she was entitled to security.

(*5th February, 1890.*)

TAYLOR, C.J.—The appellant is entitled to succeed upon both the grounds taken. The order for security was prematurely made. In a proper case, security for costs may be ordered, by the order directing an interpleader issue, or by a subsequent order, but until it is decided that there is to be an issue, security cannot be ordered.

The affidavit upon which the summons was granted and the order afterwards made, having no law stamp on it, could not, under Con. Stat., c. 8, s. 10, be read, and so the learned judge had no material before him on which to act. Section 16, which permits treble stamping in certain cases, plainly contemplates a substantive motion being made for leave to affix treble stamps, supported by such evidence as will satisfy the court or judge, that the stamp has been inadvertently omitted.

The appeal is allowed with costs, the order appealed against reversed, and the summons before the County Judge dismissed with costs.

DUBUC and KILLAM, JJ., concurred.

RE SHORE.

(BEFORE THE FULL COURT.)

Mortgage.—Power of sale.—"Without any notice."—Private sale without advertisement.

A mortgage "provided that the Company (the mortgagees) on default of payment for two months may, without any notice, enter upon and lease or sell the said lands."

By statute 49 Vic. (Man.) c. 42, s. 6, it was enacted that any mortgage containing such words should be deemed to contain the long form of words in the Act respecting Short Forms of Indenture, (C. S. M. c. 61, 2nd sch., 2nd col., No. 13,) which provided a method of sale involving the service of a written notice on the mortgagor.

Held, That a sale without notice to the mortgagor could not be upheld.

A power of sale permitted a sale "by public auction or private contract."

Held, That a private sale could be made without previous advertisement of it.

The petitioner made application for a certificate of title for the lands described in the petition, claiming title under a deed from the Canada Permanent Loan & Savings Co. to one R. H. Shore, and by subsequent conveyances. The deed from the Company to Shore purported to be made and executed pursuant to and in the exercise of a power of sale contained in a mortgage of the lands, made by one Cowan to the Company, dated the 30th of September, 1882. The evidence furnished the District Registrar in support of the application did not shew that after default had been made in payment of the moneys secured by the mortgage, and before selling the lands, the mortgagees had given notice to the mortgagor of their intention to sell, or that they had publicly advertised the lands for sale, and the District Registrar held that there was not, therefore, evidence of the power of sale having been properly exercised, and refused the certificate.

The questions arising on the petition that the court was asked to decide were, as counsel agreed, the following: (1) Under the power of sale in this mortgage, could the mortgagees sell without first having given notice of their intention to sell, and (2) Could they sell by private sale without having publicly advertised the lands for sale?

The power of sale in the mortgage read as follows: "Provided that the Company in default of payment for two months may, without any notice, enter upon and lease or sell the said lands;" and the mortgage purported to have been made in pursuance of the Act respecting Short Forms of Indentures.

W. H. Culver, Q. C., and *G. A. Elliott*, for petitioner. The mortgagee is not a trustee, *Warner* v. *Jacob*, 20 Ch. D. 220; *Martinson* v. *Clowes*, 21 Ch. D. 866; *Carlson* v. *Williams*, W. N. 1889, p. 33; *Taylor on Titles*, 91; *Farrer* v. *Farrer*, 40 Ch. D. 395; *Dart on Vendors & Purchasers*, 67; *Sugden on Vendors & Purchasers*, 67; *Jones on Mortgages*, § 1821, 1863. These show mortgagee may sell by private sale without notice, see also *Armour on Titles*, 279; *Kelly* v. *Imperial Loan Co.*, 11 Ont. App. R. 526. 49 Vic. c. 42, s. 5, probably passed in consequence of a doubt suggested in *Gilchrist & Island*, 11 Ont. 537. There the vendor was the assignee of the mortgagee, here the sale was by the original mortgagee, *Grant* v. *Can. Life Ass. Co.*, 29 Gr. 256; *In re Coath & Wright*, 8 Can. L. T. 10; *Re Green & Artkin*, 14 Ont. R. 697; *Re British Canadian Loan Co. & Rae*, 16 Ont. R. 15; *Clarke* v. *Harvey*. 16 Ont. R. 159.

C. P. Wilson, for District-Registrar. The Act of 1886, 49 Vic. c. 42, really assumes to give a statutory meaning to the power of sale clause. It means that the mortgage shall be deemed by virtue of the use of those words, to have contained the form in schedule 2 of the Short Form Act. Under that form there must be a notice in writing. As no time was specified, then the notice must be a reasonable one, *Massey* v. *Sladen*, L. R. 4 Ex. 13. Power of sale without notice is oppressive and should be construed strictly, *Miller* v. *Cook*, L. R. 10 Eq. 641. If notice not necessary, the mortgagees occupied position of trustee. And should have taken steps to realize best price. They failed to advertize which makes sale void, *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Forlong*, 12 Gr. 303.

(*8th March, 1890.*)

BAIN, J.—By s. 6 of 49 Vic. c. 42, it is provided that, "Whenever any mortgage executed prior to the passing of this Act, or subsequent thereto, and purporting to be made in pursuance of the Act respecting Short Forms of Indentures, contains the following words, 'Provided that the mortgagee on default of payment for two months (or any other definite period) may, without any

notice, enter upon and lease or sell said lands for cash or credit,' or words to the like effect, or without the last four such words, such mortgage shall be deemed to contain, and to have always contained, the form of words in column 2, No. 13 of the 2nd schedule of c. 62, Con. Stats. of Manitoba, intituled 'An Act respecting Short Forms of Indentures.'"

Section 1 of this Act of the Consolidated Statutes provides that when a deed of mortgage made according to the form in the schedule of the Act and expressed to be made "in pursuance of the Act," contains any of the forms or words contained in column 1 in the schedule, such deed shall be taken to have the same effect as if it contained the form of words contained under schedule 2. But the power of sale clause in this mortgage cannot, I think, be held to be the form given in schedule one of the Act, for in providing as it does, that the mortgagee may sell without any notice, it differs from the form in an important particular, and this difference is not, I think, either an exception or a qualification, or an extension or limitation of the form allowed and provided for in section 8. *Re Gilchrist & Ireland*, 11 Ont. R. 537. This Act then, would not operate on this clause, to give it the effect of the corresponding clause in schedule 2, and so by section 2 of the Act, the clause would simply "be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made." But, as we have seen, the Legislature by the subsequent Act, 49 Vic. c. 42, has said that a mortgage purporting to be made in pursuance of the Act in the Con. Stat. and containing the clause we find here, shall be deemed to contain the form of words of the power of sale clause in the 2nd column of the Act. This form expressly provides that the power of sale is to be exercised only after the mortgagee has given written notice to the mortgagor, his heirs or assigns, of his intention in that behalf.

If, as Mr. Wilson argues, the effect of the provision in the 49 Vic. is to give to the words used in the proviso in the mortgage, the meaning of those used in the schedule, then, of course, the mortgagee must give notice of his intention to sell. On the other hand, Mr. Culver contends that by this Act the Legislature has added another power of sale to the mortgage; that the two powers must be construed together, as far as they can be reconciled, and that when, as in regard to this question of notice, their

directions are irreconcilable, the mortgagee can follow either of them. But, I do not think the express direction of the Legislature that notice is to be given, can be disregarded.

A power to sell without notice is, as has frequently been said, a power of an oppressive character, *Coote on Mortgages*, p. 249; *Miller* v. *Cook*, L. R. 10 Eq. 647; *Re Gilchrist & Ireland*, *supra*; and one may well suppose that the Legislature finding that mortgagees had been taking from mortgagors powers to sell without notice, resolved that they would not permit these powers to be exercised until notice had been given, and so passed the enactment in question. At all events, we find the Legislature, knowing, apparently, that mortgages were being, or had been executed with provisoes for sale without notice, expressly declaring that, notwithstanding that a mortgage contained such a proviso, it should "be deemed to contain and to always have contained" a proviso requiring written notice of the intention to exercise the power of sale to be first given. This provision cannot be reconciled with the proviso in the mortgage, but the Legislature had the proviso before them, and in passing the enactment they did, it must be held, I think, that they intended as regards giving notice, to supersede the proviso in the mortgage by the one in the Act respecting Short Forms. In the form in the schedule, a blank is left for the length of time for which notice is to be given, but as neither the Legislature nor the parties have fixed the time, the law will imply that it be given what, under all the circumstances, would be a reasonable time before taking possession or selling. *Massey* v. *Sladen*, L. R. 4 Ex. 13.

I think, therefore, that as the application does not shew that notice of the intention to exercise the power of sale was given to the mortgagor, his heirs and assigns, or any facts that would dispense with the proof of notice having been given, the District-Registrar was right in refusing to give the certificate of title. I do not understand that Mr. Culver relied in any way on the English Act 23 & 24 Vic. c. 145.

The other question that we are asked to answer, is whether, when there is nothing in the power of sale requiring the mortgagee to advertise the property for sale before selling, he can sell without advertising?

In *Richmond* v. *Evans*, 8 Gr. 508, Spragge, V.C., taking the view that a mortgagee with a power of sale is, in a sense, a trus-

tee for the mortgagor, and is bound to sell the property to the best advantage, held, that the absence of advertising or other public notification of the sale would invalidate a sale. But, in the later case of *Warner* v. *Jacob*, 20 Ch. D. 220, Kay, J., after an examination of the authorities bearing on the point, came to the conclusion that their result was, that a mortgagee is not, strictly speaking, a trustee of the power of sale, "It is," he says, "a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the court will not interfere, even though the sale be very disadvantageous, unless indeed, the price is so low as in itself to be evidence of fraud," and this statement of the law was approved of by North, J., in *Martinson* v. *Clowes*, 21 Ch. D. 856. Adopting this view, I do not think it can be held, that when the power of sale does not require that the sale shall be advertised, the fact in itself, that it has not been advertised, will invalidate the sale. If the mortgagee is only authorized to sell by public auction, he cannot sell privately, but when, as in the present case, either mode of sale is permitted, a private sale even without advertisement, is good, if it be made *bona fide* and for a fair price, *Fisher on Mortgages*, vol. 1, p. 495; *Davey* v. *Durrant*, 1 De. G. & J. 535.

But, as on the other point raised, the claimant did not furnish evidence of the power of sale having been properly exercised, I think the District-Registrar was right in refusing the application.

The petition should, therefore, be dismissed with costs.

TAYLOR, C.J.—I agree with the judgment of my brother Bain in this matter.

The mortgage under which the land in question was sold, purports to be made in pursuance of the Act respecting Short Forms of Indentures, and contains a power of sale expressed in certain words. The Legislature has, by the 48 Vic. c. 42, s. 6, declared what, in the case of every mortgage so made, shall be the meaning or equivalent of the words used in this mortgage. It has said, that every mortgage containing these words shall be deemed to contain, and to have always contained the form of words in column 2, number 13 of the 2nd schedule of chapter 61 Consolidated Statutes of Manitoba. I cannot see that since that Act, a mortgagee having a mortgage so worded, has two powers.

Evidently, the Legislature considering that the exercise of a power of sale without notice is, as has been said by judges in some cases, oppressive, determined to make notice necessary in all cases. They have accordingly, by the 49 Vic. c. 42, said, that a mortgage containing a power to sell, worded as this is, and providing for sale without notice, shall be deemed to contain the words of the long form given in column 2, number 13 of chapter 61 Consolidated Statutes. Under that form, written notice before selling has to be given. "In case of default in payment, it shall and may be lawful to and for the said mortgagee, &c., after giving written notice to the said mortgagor, &c., to enter into possession, &c., and also to sell and absolutely dispose of the said lands, &c." The length of time for giving notice is not fixed, the Act saying "not less than previous," so, the notice must be such as would, under the particular circumstances, be a reasonable notice. The giving of a written notice is, however, indispensable.

Where the power is silent as to the mode of exercising it, and does not require the sale to be advertised, a mortgagee may sell by private contract without public advertising. The cases of *Davey* v. *Durrant*, 1 D. & J. 535; *Warner* v. *Jacob*, 20 Ch. D. 220; and *Martinson* v. *Clowes*, 21 Ch. D. 857, are authorities for this view, and should be followed rather than *Richmond* v. *Evans*, 8 Gr. 508. In the present case, the power being that given in the Con. Stat., the mortgagees were empowered to dispose of the land "by public auction or private contract."

There having been no evidence produced in the Land Titles Office that the power of sale was properly exercised, the District-Registrar acted properly in refusing the application made. The present petition should, therefore, be dismissed with costs.

KILLAM, J.—I agree that the effect of the Act of 1886 was to make the power of sale clause one requiring notice of its exercise to the mortgagor and those claiming under him, and that the power was not validly exercised without it.

The form authorizes a private sale, and I can find no reason for saying that advertisement would be a condition precedent to such sale. Whether, in case it was not advertised, the District-Registrar might ask some evidence of value and of the steps taken to realize a fair price, I express no opinion.

Petition dismissed with costs.

REG. v. PETERSON.

(BEFORE THE FULL COURT.)

Habeas Corpus.—Escape.—New conviction.—Warden's authority without certificate.

A statute provided that "The warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, and shall there detain him."

Held, That the absence of a certificate or copy of the sentence did not make the detention of a prisoner, properly convicted and sentenced, illegal.

Per BAIN, J.—*Semble*, Even if no such copy of the sentence had originally been delivered to the warden, (and were any such necessary,) his possession of it at any time previous to his return to a *habeas corpus* would be sufficient.

A statute provided that "Every one who escapes from imprisonment shall, on being retaken, undergo in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape." After an escape and before recapture, the penitentiary was changed from one building to another.

Held, 1. (KILLAM, J., *dubitante*.) That a conviction for an escape was not necessary to imprisonment for the unserved portion of the sentence.

2. That imprisonment in the new building was lawful.

This was a motion to make absolute a rule *nisi* calling upon the warden of the Manitoba Penitentiary to shew cause why a writ of *habeas corpus* should not issue, commanding him to have in court the body of one Albert Peterson, who was said to be detained in his custody as a prisoner, together with the day and cause of his being taken and detained.

The warden shewed cause to the rule, and filed the certificate of the Prothonotary of the Court, as the person having the custody of the records of the General Quarterly Court, shewing that at the General Quarterly Court holden at Winnipeg on the 17th of July, 1871, Albert Peterson was tried and convicted on an indictment for feloniously receiving stolen property, and was sentenced to "be confined in the Penitentiary of the Province, there to remain for three years, at hard labor." The Albert Peterson mentioned in this certificate was admitted to be the individual moving for the writ; and by the English Act 14 & 15 Vic. c. 29, s. 13, it was

contended, such a certificate is evidence of his trial and conviction as stated. There was also filed a copy of the above sentence as it was entered in the minutes of the court, certified by Mr. Walker as Prothonotary and Clerk of the Crown and Peace, and the affidavit of Mr. Bedson, the warden. The affidavit stated that on the 17th of July, 1871, Peterson was delivered to him as warden at the then Manitoba Penitentiary at Lower Fort Garry, by a sergeant of the Provincial Police, with instructions to hold him for a period of three years, under a conviction and sentence of the Quarterly Court; that on the 16th of October following, Peterson escaped from the penitentiary, and was supposed to have gone to the United States; that in May, 1889, the warden heard he had returned to the Province, and had him retaken and brought to the Manitoba Penitentiary, where he was then confined, and was serving out the balance of his sentence.

J. A. M. Aikins, Q.C., for the Department of Justice. He referred to *Taylor on Evidence*, § 1612, 1573; *Richardson* v. *Willis*, L. R. 8 Ex. 69; *Queen* v. *Parsons*, L. R. 1 C. C. 24. The temporary penitentiary building at Lower Fort Garry was a penitentiary by statute, 34 Vic. c. 14, s. 7. This Court is a continuation of the General Quarterly Court, 34 Vic. c. 2, ss. 39 41, (Man.) By 35 Vic. c. 3, the name was changed to "Court of Queen's Bench." By 34 Vic. c. 14, s. 2, D., the General Court was continued. By 34 Vic. c. 13, s. 1, the Acts of Canada were extended to Manitoba. This introduced the statute relating to penitentiaries, 31 Vic. c. 75. See ss. 16-18. These sections repeated in R. S. C. c. 182, ss. 42, 44. See R. S. C. c. 181, s. 28, sub-sec. 4, 6, 7, the same in 32 & 33 Vic. c. 29, s. 91; R. S. C. c. 155, s. 11; 32 & 33 Vic. c. 29, s. 87. Prisoner was undergoing a proper sentence when he escaped. When retaken he was taken to the Manitoba Penitentiary, where, by statute, parties convicted were to be confined. He has to serve out balance of term of imprisonment. *Church on Habeas Corpus*, 169; *People* v. *Baker*, 89 N. Y. 460.

N. F. Hagel, Q.C., for the prisoner. The Act 34 Vic. c. 14, s. 7, makes gaols, then used, penitentiaries. Then came the Act of 1875, 38 Vic. c. 44, s. 15, it does not repeal prior Act. On 20th January, 1877, there was published in the Canada Gazette a proclamation reciting 38 Vic. c. 44, s. 15. Warden did not properly receive the prisoner, without a copy of the sentence.

In case of a transfer, a copy of the warrant has to be certified to the warden of the penitentiary to which prisoner is transferred. A prisoner leaving when the warden had not this certified copy of warrant, is no escape. The penitentiary at Stony Mountain is not the penitentiary of the Province, but a penitentiary for the Province, the North West Territory and the district of Keewatin. Prisoner could not be retaken and confined without a trial. R. S. C. c. 181, s. 1.

(*15th February, 1890.*)

BAIN, J.—It appears that Peterson was retaken after having been at large for about 18 years, and about fifteen years after the term of his sentence had expired.

Section 11 of c. 155 of the Revised Statutes, provides that "Everyone who escapes from imprisonment shall, on being retaken, undergo in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

On the state of facts, Mr. Hagel for Peterson contends, that as it does not appear that, when the prisoner was delivered to the warden, any warrant of commitment or copy of the sentence or any written authority to hold him was delivered to the warden, his imprisonment was illegal, and the term for which he was sentenced having expired long before he was retaken, his retaking and detention are illegal; and further, that, as it appears from the affidavits, he is now confined, not at Lower Fort Garry where he escaped from, but at Stony Mountain, his detention there is not authorized by the above section from the Act respecting Escapes.

The Penitentaries Act of 1868, which was in force in 1871, contained provisions similar to those now found in sections 42, 44 and 45 of the Act in the Revised Statutes. Section 44 provides that "the warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, and shall there detain him," and it may be that, as Mr. Hagel contends, the sheriff or other officer who conveys the prisoner to the prison, should deliver to the warden with the prisoner, the copy of the sentence referred to in section 42, though taking that section by itself, this copy would seem to be intended only as the warrant or authority to the sheriff or other

officer to take and convey the prisoner to the prison to which he is sentenced. If the intention of the statute is that this copy is to be left with the warden, then the production of the copy by the warden would doubtless be proof that the prisoner was in legal custody, but it does not follow, I think, that the omission to leave the copy with the warden would make the detention of the prisoner unlawful, or that the only proof of the lawfulness of the detention is by the production of this copy. What makes a prisoner's detention lawful is the conviction and judgment of a competent court, and as Maule, J., held in *Reg.* v. *Bourdon*, 2 C. & K. 366, the proper proof that a prisoner is in lawful custody under a sentence of imprisonment is, by proof of the record of his conviction. In the case of *The People* v. *Baker*, 89 N. Y. 460, the Court of Appeal, after stating that the statutes of the State seemed to require that after a criminal has been sentenced to a penitentiary, a warrant of committal should be signed by a judge, held that the omission to sign this warrant would not make a prisoner's detention illegal. "It is the judgment of the court," they said, "which authorizes the detention, and that can always be shewn, in justification of the detention." And even in a case of capital punishment, no warrant is issued to anyone to carry out the sentence, for as it was held in *Rex* v. *Antrobus*, 6 C. & P. 688, which was a trial at bar, it is the judgment of the court that gives to the person having the custody of the person sentenced, the power to carry out the execution.

But even if the detention of the prisoner would have been illegal unless the copy of the sentence had been left with the warden, it would seem that the production of such a copy at any time before the return of the writ of *habeas corpus* is returned would have been sufficient to make the detention lawful. In *Gude's Crown Pr.*, 279, it is said, "But, a good warrant of detainer may be lodged before the *habeas corpus* is returned." And in *Reg.* v. *Richards*, 5 A. & E. N. S. 925, counsel having said, "Here the jailer has, at the time of the return, a good warrant from the County justices; how many bad ones he may have had before, is immaterial to the present purpose; the informal ones were waste paper," Lord Denman, C.J., interrupted him and said, "I think you are right, it is impossible not to see the jailer has returned good warrants, upon which the party may be lawfully detained," and the court held accordingly. It

appears, therefore, that had the term of imprisonment still been current, the production by a warden of the copy of the sentence before the return of the writ, would have sufficed to make the detention lawful, supposing it to have been unlawful without such copy having been left. Whether its production now is an answer to the objection that, as it was not left with the warden when the prisoner was delivered to him in 1871, the detention then was unlawful, is a question I need not decide, as I think the detention was lawful by virtue of the judgment of the court.

The prisoner then having escaped from lawful custody, the above provision of the Act respecting escapes authorizes his being retaken and imprisoned to undergo the remainder of his term, unexpired at the time of his escape, in the prison he escaped from. Under this provision it is necessary to consider if he is now, legally speaking, in the prison he escaped from.

The Act 34 Vic. c. 14, s. 7, provided that, in the absence of any penitentiary building, any common gaol or other place of confinement in the Province should be held to be a penitentiary for the confinement of persons lawfully convicted and sentenced to imprisonment, and it was under this provision that the prisoner was sent to Lower Fort Garry. The Penitentiaries Act, 38 Vic. c. 44, contained a provision similar to that now found in section 6 of the present Penitentiary Act, and under it the Governor-in-Council by proclamation declared the tract of land now used at Stony Mountain to be a penitentiary within the meaning of the Act, and declared it to be a penitentiary for the Province of Manitoba, and the prisoners were afterwards removed from Lower Fort Garry to the penitentiary then established. Then the above Act 34 Vic. c. 14, was repealed in the Revision of the Statutes; and the present Penitentiary Act, sections 4 & 5, declares this established to be a penitentiary of Canada, and provides that it shall be maintained as a prison for the confinement of persons lawfully convicted of crime before the courts of the Province. The prison from which he escaped was a penitentiary for Manitoba, and the one at Stony Mountain, where he is now detained, has since, by statute, been declared to be the penitentiary for the Province, and I think it must be held, that by the effect of these statutes, Peterson is now in the prison he escaped from.

The wording of the section in the Act respecting escapes, seems to me to exclude the intention, that before a retaken prisoner shall undergo the remainder of his term of imprisonment, he must first be indicted and convicted for an escape.

I think the warden has shewn sufficient legal cause for the taking and detention of this prisoner, and that the rule *nisi* must be discharged.

DUBUC, J., concurred.

KILLAM, J.—I am of opinion that the prisoner was lawfully and properly held in the custody of the warden of the penitentiary under the judgment and sentence of the General Quarterly Court, at the time of his escape. It was that judgment of record in the court which was the authority for his imprisonment. The warden was not compelled to receive him into his custody without being furnished with evidence of that judgment. In strictness he should not have done so. Bnt in so acting he took the risk of there being such judgment on record, and of being able to prove it when his authority to hold the party should be questioned. This view is supported by the remarks of Hagarty, C.J., in *Ovens* v. *Taylor*, 19 U. C. C. P. 49, and the authorities cited by him, and is made very clear by the authorities to which my brother Bain has referred.

At present, however, I am not satisfied that, upon the expiration of the period of three years from the date of that judgment and sentence, he could be imprisoned and made to serve for a further period, except upon being duly adjudged by a competent court guilty of an escape or breach of prison. Section 87 of the Act 32 & 33 Vic. c. 29, D., now found in R. S. C. c. 155, as sec. 11, appears to be something new as a statutory enactment, and not to be found in the English statute book. In the short time since the argument, I have not been able to satisfy myself of the effect at common law of the escape of a convicted prisoner upon the running of the term of his sentence. Unless it can be made out that in such case at common law it would cease to run until his recapture and then recommence, I could not construe the Canadian enactment as introducing such a principle, but merely as subjecting the escaped convict to imprisonment for the interrupted portion of his term, upon his being adjudged guilty of an escape and in addition to the punishment then awarded for the escape. I agree that the Manitoba Penitentiary

existing under R. S. C. c. 185, ss. 4 & 5, is and was when the applicant was retaken, the penitentiary for Manitoba, and so came within the words of the sentence, though it was also the penitentiary for the North West Territories and the district of Keewatin. By the Revised Statutes, 34 Vic. c. 14, D., under which provincial gaols were constituted penitentiaries, was repealed. See Schedule A, p. 2281. The Manitoba Penitentiary is then the only penitentiary for Manitoba, and as such it is the prison from which the prisoner escaped, although the location has been changed.

I, therefore, satisfy myself with expressing my doubt upon the proper construction of R. S. C. c. 155, s. 11. I cannot regret that my brothers concur in refusing the writ, as it appears to me that the only effect of giving the opposite construction to the section last mentioned, would be that, upon the prisoner being brought before the court, he would be remanded to await his trial for the escape, which could not result in shortening his term of imprisonment.

Rule discharged.

THE WESTERN CANADA LOAN CO. v. SNOW.

(IN EQUITY.)

Pleading.—Fraudulent Conveyance.

It is not sufficient in a bill impeaching a conveyance as fraudulent against creditors to allege that it was made for the purpose and intent of defrauding, &c, without alleging the purpose and intent to have been those of the grantor.

In such a bill the insolvency of the grantor is not shown by alleging (1) that at the time of the making of the deed the grantor was indebted to the plaintiff and others in large sums of money; (2) and was not at the time of making said deed, or at any time since, able to pay his creditors and others, and (3) was and is in fact insolvent.

Charges of fraud must be precise and definite.

This was a demurrer to a bill of complaint for want of equity.

The bill alleged the recovery by the plaintiff company of a judgment at law against Robert Gerrie and R. D. Bathgate on the 19th August, 1885, the issuing of *fi. fa.* goods and lands thereon, and placing of same in the hands of the sheriff on the 26th August, 1885, that they had been kept renewed and were in full force and unsatisfied, and that nothing was available to satisfy them except the lands described in the bill; that on or about the 22nd July, 1884, Robert Gerrie, being the owner of the lands mentioned, by deed between himself, Margaret Gerrie his wife, and William Bathgate, after reciting that the wife was possessed in her own right of other lands and it had been agreed between them that they would respectively settle their said lands for the benefit of themselves and their children as thereafter appeared, pretended to grant his lands mentioned to Wm. Bathgate and his heirs to such uses as Gerrie and his wife should by deed or will appoint, with other uses until appointment; that by a deed bearing date the 18th November, 1885, Gerrie and wife appointed and William Bathgate granted the lands in question and other lands to Robert Gerrie upon certain trusts in the deed to which the plaintiff craved leave to refer, the trusts not being stated in the bill; that by a deed dated the 26th July, 1889, Robert Gerrie and William Bathgate granted and conveyed, and also each directed, limited and appointed the lands in question to the defendant, who was a daughter of Robert and Margaret Gerrie; that the two last mentioned deeds were both voluntary conveyances and without consideration, and the defendant took the last mentioned deed with knowledge of the covin and fraudulent intention of Robert Gerrie by each of the deeds to defraud, delay and hinder his creditors "and others," that Margaret Gerrie joined in the first two deeds with the same knowledge; that Robert Gerrie at the time of making the first deed was indebted to the plaintiff and others, and was not at the time of the making of that deed or at any time since, able to pay his creditors "and others" with the aid of the lands comprised in that deed, and was insolvent; that all the deeds mentioned were voluntary and without valuable consideration and were not *bona fide*, but were made for the purpose and intent of defrauding, delaying and hindering the plaintiff and other creditors of Robert Gerrie "and others," and that the conveyances had so defrauded, delayed and hindered

the plaintiff and other creditors of Robert Gerrie from recovering their just debts.

The bill prayed that all the deeds might be declared fraudulent and void as against the plaintiff and other creditors of Robert Gerrie "and others."

H. M. Howell, Q.C., for defendant Snow.

Time of accrual of cause of action not shown. It must be shown when bill filed, that there was a debt existing at the time of conveyance, which still continued. *May on Fraudulent Conveyances*, 520. There is no sufficient allegation of title, the trusts should have been set out. A request for leave to refer to a deed at the hearing does not embody the terms for the purposes of a demurrer, *Loughead* v. *Stubbs*, 27 Gr. 388.

At common law, a sheriff could seize and sell goods. Then came *capias*, and then *levari facias* against the produce of land, then statute Westminster 2nd, under which writ of *elegit* issued. Q. B. Act of 1885, sec. 7, introduced the laws of England up to July, 1870; writs brought in by sec. 8, Ad. Jus. Act, 1885, sections 101 to 110, create *fi. fa.* lands and give power to sheriff to sell and convey, and without these sections the *fi. fa.* lands are idle. This amended in 1889, 52 Vic. c. 36, s. 5. Section 102 of A. J. Act, 48 Vic. c. 17 repealed. Section 108 of A. J. Act, which especially makes *fi. fa.* lands bind lands is repealed; also sec. 110. *Fi. fas.* before existing are saved by 52 Vic. c. 36, s. 13. If lands are now not subject to *fi. fa.*, conveyance should not be set aside.

When statute of 13 Eliz. c. 5, was passed, certain property was not exigible, and no bill could be filed to set aside transfers of such. At the most, the writs should remain to bind the lands which, at the passing of the Act of 1889, they did bind. *Morphy* v. *Wilson*, 27 Gr. 1; *Cornish* v. *Clark*, L. R. 14 Eq. 184. This bill was not filed on behalf of all creditors. As to demurrer to part of prayer, *Abbott* v. *Canada Central Ry. Co.*, 24 Gr. 580.

J. H. Munson, for plaintiff. The bill sufficiently states the fraudulent intent and the grantor's insolvency and is in the usual form. Where it is shown the grantor was insolvent, it is not necessary to show the fraudulent intent. The question is, how matters stood when settlement was made. *May on Fraudulent Conveyance*, 23, 59. The bill of complaint states the land was

liable to be taken in execution; and if by recent amendments to the Administration of Justice Act the right to sell under *fi. fa.* lands has been taken away, the land would still be available for creditors. The objection that the bill should have been filed on behalf of all creditors, only one for demurrer for want of parties. *Longeway* v. *Mitchell*, 17 Gr. 190; *Morphy* v. *Wilson*, 27 Gr. 1; *Campbell* v. *Campbell*, 29 Gr. 252; *Scane* v. *Duckett*, 3 Ont. R. 370. The plaintiff's writs are still in force, and the land can be sold, if necessary, under the English practice. *Taylor* v. *Coenen*, 1 Ch. D. 636; *Graham* v. *Furber*, 14 C. B. 410; *Cadogan* v. *Kennett*, Cowp. 432; *Twyne's Case*, 3 Rep. 80; 1 *Smith L. C.* 1; *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Spirett* v. *Willows*, 3 D. J. & S. 293; *May*, p. 64 and 516.

H. M. Howell, Q.C., in reply. The knowledge of fraud must be knowledge both of grantor and grantee, *McRoberts* v. *Steinoff*, 11 Ont. R. 369; *Burns* v. *McKay*, 10 Ont. R. 167; *Rae* v. *McDonald*, 13 Ont. R. 352.

(*14th January, 1890.*)

KILLAM, J.—Several objections were, upon the argument, made to the bill, to some of which it is unnecessary to refer. I think that it must be taken upon the allegations of the bill that the conveyances attacked were made without valuable consideration. It is true that an agreement between Gerrie and his wife that they should settle their respective lands in a certain way, is alleged to have been recited in the original deed, but I do not think that it conclusively follows upon what is said that each so agreed in consideration of the agreement of the other. The conveyance may show otherwise. It is positively alleged that the deeds were voluntary and without valuable consideration.

But, it is not voluntary conveyances which are declared invalid by the statute 13 Elizabeth, c. 5, but conveyances made with "the purpose and intent to delay, hinder or defraud creditors." Naturally the words of the statute seem to refer to the intent of the grantor. "Whether or not a deed is to be considered as fraudulent with respect to creditors, must depend on the motives of the party making the deed." Per Le Blanc, J., in *Nunn* v. *Willsmore*, 8 T. R. 530. "By the 13th Elizabeth, the only consideration as to the validity or invalidity of these alienations depends on the intent and conduct of the party making them

and not on the motive with which they are received; for they are made void although the party accepting be entirely innocent in the transaction." Per Lord Eldon, L.C., in *Partridge* v. *Gopp*, 1 Ed. 167. But, as pointed out by Spragge, C.J., in *Brown* v. *Sweet*; 7 Ont. App. R. 735, where there is a valuable consideration the innocent grantee is protected by the 6th section of the Act. Those protected, however, are only those "not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid," and then, only where the conveyance is "upon good consideration."

If then, it were alleged that the conveyance was made with the fraudulent intent on the part of Gerrie, it would be sufficient as against the grantee if made either without consideration or with the knowledge on the part of the grantee of such intent.

The first difficulty is that this bill does not specifically allege such an intent on the part of Robert Gerrie. The 11th paragraph states that all of the conveyances were made for the purpose and intent of defrauding, &c., but not who had such fraudulent purpose and intent. I do not think that in a bill of this kind we should be left to infer that the grantor had the intent. That should be specifically charged.

But the bill is evidently based also upon the principle of a legal presumption from the making of a voluntary conveyance of his property by an insolvent debtor. Here again, however, a difficulty arises upon the loose frame of the bill. It is alleged (1) that at the time of the making of the first conveyance, Robert Gerrie was indebted to the present plaintiff and others in large sums of money, (2) and was not at the time of making said conveyance or at any time since, able to pay his creditors and others without the aid of the lands comprised in that conveyance, (3) and was and is in fact, insolvent.

Now, the mere allegation of indebtedness is not of itself sufficient to raise the presumption necessarily as a matter of law, for the debtor may have ample means left to satisfy those debts. This deficiency is not cured by the second allegation, for there may have been ample to pay the creditors, though not the creditors "and others." Nor is it cured by the third, for it is not stated when he "was" insolvent. The "was" does not necessarily relate back to the time of the making of the conveyance,

for the immediately preceding sentence refers to "the time of making said conveyance or at any time since," and the "was" would be satisfied if at any time since the making of the conveyance Gerrie was insolvent. Parties making these charges of fraud must be precise and definite, not leaving their pleadings open to a construction consistent with *bona fides*.

The demurrer must be allowed with costs.

Demurrer allowed with costs.

SHORE v. GREEN.

(IN APPEAL.)

Pleading.—Pleas in abatement and bar to same count.—R. P. Act.—Instrument substantially in form given by Act.—Non-registration.—Action on covenant in unregistered instrument.

After a plea in abatement had been filed and issue joined upon it, pleas in bar were, by leave, added,

Held, That the plea in abatement was waived; and after trial of the issues it was disregarded.

The defendant, owner of land subject to the Real Property Act, executed a lease of it to plaintiff, using the form given in the Act respecting Short Forms of Indentures. It purported however, to be made in respect of the Act respecting Short Forms of Leases. The lease contained the statutory covenant for quiet enjoyment. The lease was not registered or filed. Afterwards the lessor conveyed the land to X. by a conveyance which made no mention of the lease.

In an action upon the covenant for quiet enjoyment, after ouster by X.

Held, 1. That the covenant in the lease could be sued upon.

2. That the instrument was within the Act respecting Short Forms of Indentures.

3. Costs of an action of ejectment by plaintiff against X. were allowed as part of the damages, but not costs of some Police Court pro-

ceedings stated in evidence to have arisen out of an endeavor by the plaintiff's husband to obtain possession, but the nature of which did not clearly appear.

Per KILLAM, J.

1. The instrument was substantially in conformity with the form given in the R. P. Act, and could have been registered.
2. Not having been registered it could not take effect as a lease.
3. Even without registration the covenant might be sued upon.
4. The neglect of the lessee to register his lease was not, but the transfer by the lessor without mention of the lease, was the proximate cause of the damage to plaintiff.

Per BAIN, J.

Quære, Whether the lease was one which could have been registered under the R. P. Act.

The plaintiff a married woman, sued by an attorney to recover damages for the breach of a covenant for quiet enjoyment contained in a lease made to her by the defendant.

The defendant pleaded in abatement to the plaintiff's writ and declaration, a plea alleging the plaintiff's coverture and the plaintiff replied alleging that she had married her present husband before the 14th of May, 1875, without any marriage contract or settlement, and that she had acquired the premises demised by the deed in the declaration mentioned as and for her separate estate, and that the damages and wrongs complained of, were sustained by her in reference to her separate estate. The defendant joined issue on this replication, but in his rejoinder he went on to allege a number of matters that were really pleas in bar, such as *non est factum*, re-entry for non-payment of rent, &c. The plaintiff demurred to these rejoinders, as they in no way answered the replication, and then an order was made in Chambers, on the application of the defendant, that he should be at liberty to add to the plea he had filed, pleas to the effect of the matters he had rejoined, and accordingly there appeared *non est factum* and various other pleas in bar to the action. The action was tried before the Chief Justice without a jury, who entered a verdict for the plaintiff for $748.43, but reserving leave to the defendant to move in Term.

The land had become subject to the Real Property Act, but the lease was made according to the form given in the Act respecting Short Forms of Indentures, except that it purported to

be made in pursuance of "The Act respecting Short Forms of Leases." It was not registered under either system of registration. After the execution of the lease the lessor transferred the land to one Early by a document in which no reference was made to the lease. This transfer was registered under the provisions of the Real Property Act. Early having obtained possession, the husband of the plaintiff endeavored by force to oust him. Proceedings were then taken in the Police Court between plaintiff's husband and Early; and plaintiff brought ejectment in which she was unsuccessful.

The defendant now moved to set aside the verdict and to enter a nonsuit, or that a verdict be entered for the defendant, or that the amount of the verdict be reduced, or for a new trial.

W. R. Mulock, Q.C., and *G. H. West*, for defendant.

As to damages, *Mayne on Damages*, 4th ed. p. 39; *Marrin* v. *Graver*, 8 Ont. R. 39. As to the costs of the ejectment suit, these were incurred by the voluntary act of plaintiff for which the defendant was not responsible. *Forsyth* v. *McIntosh*, 9 U. C. C. P. 492; *Hodgins* v. *Hodgins*, 13 U. C. C. P. 146; *Hunter* v. *Johnson*, 14 U. C. C. P. 123. As to lease not being in statutory form, *Davis* v. *Pitchers*, 24 U. C. C. P. 516; *Lee* v. *Lorsch*, 37 U. C. Q. B. 262; *Emmett* v. *Quin*, 7 Ont. App. R. 306.

H. M. Howell, Q.C., and *G. A. Elliott*, for plaintiff. All the Ontario cases with regard to the property of married women are disposed of in *Wishart* v. *McManus*, 1 Man. R. 213. Here there is no implied covenant of the husband, as the covenant is the wife's express covenant. A husband can buy property in wife's name and it will be hers. *Dominion Loan Co.* v. *Kilroy*, 14 Ont. R. 468; Real Property Act, 1885, c. 28, s. 140. According to the strict words of the covenant, it is against the world and for the whole term. The Short Forms Act is sufficiently referred to. Con. Stat. Man. c. 61; *Lee* v. *Lorsch*, 37 U. C. Q. B. 262; *Davis* v. *Pitchers*, 24 U. C. C. P. 516. The covenant covers defendant's assigns. *Lloyd* v. *Tomkins*, 1 T. R. 671. Even if there were no lease, the defendant would be liable on his covenant. He placed the plaintiff in possession and covenanted not to disturb him. There was no duty on the plaintiff to register the lease. Plaintiff's right was vested before the conveyance to Early. The Act of 1889, s. 77, saved the lease, if doubtful

before. Early says he had no notice of the lease. The agreement between Green and Early does not mention the lease.

As to damages, when one has covenanted against his own acts, or those of another, the question of costs often arises. As to liability. *Blyth* v. *Smith*, 5 M. & G. 405; *Rolph* v. *Crouch*, L. R. 3 Ex. 44; *Child* v. *Stenning*, 11 Ch. D. 82; *Mayne on Damages*, 180. Defendant encouraged plaintiff to incur costs. Mesne profits recovered from tenant may be recovered over against landlord. *Williams* v. *Burrell*, 1 C. B. 433. There is no plea on the record under which defendant can say the lease is is not what plaintiff claims. *Day's C. L. P. Act*, 495. If defendant's contention is correct, that a lease would be void unless in the form set out in the Act, a verbal lease for more than one year would be void. Real Property Act, 1885, s. 71. Act of 1889, s. 87. Defendant is estopped by the deed and his conduct from objecting to the lease. *Tresidder* v. *Tresidder*, 10 L. J. Q. B. 160; *Smith* v. *Baker*, L. R. 8 C. P. 357; *Roe* v. *Mutual Loan Fund, Limited*, 19 Q. B. D. 350; *Faure Electric Co.* v. *Phillipart*, 58 L. T. N. S. 525. Defendant responsible for the costs of the action in the Police Court. *Childs* v. *Stenning*, 11 Ch. D. 86; *Lee* v. *Riley*, 18 C. B. 722; *Smith* v. *London & S. W. R.*, L. R. 5 C. P. 98; *Grieve* v. *Molson's Bank*, 8 Ont. R. 169.

G. H. West, in reply. Under Con. Stat. Man. c. 65, ss. 1 & 2, there are two classes of married women. Section 2 can apply only to such property as she had before the Act. The Ontario Act of 1872 made one class of married women; 35 Vic. c. 16; *Webster* v. *Leys*, 5 Ont. R. 599. Wife can sue alone only in respect of property mentioned in sections 1 & 2. There may be another action by the husband. *Godfrey* v. *Harrison*, 8 Pr. R. 272; *Redmond* v. *Brownscombe*, 6 Pr. R. 84; *Cooney* v. *Girvin*, 1 Ch. Ch. 94; *McPherson* v. *McCabe*, 1 Ch. Ch. 250; *Re Gracey & The Toronto Real Estate Co.*, 16 Ont. R. 226; *Wyllie* v. *Frampton*, 17 Ont. R. 515; *Furness* v. *Mitchell*, 3 Ont. App. R 510; *Meakin* v. *Samson*, 28 U. C. C. P. 355; *Murray* v. *McCallum*, 8 Ont. App. R. 277; *Campbell* v. *Cole*, 7 Ont. R. 127. Early, the purchaser, had notice of the lease, and Green had a right to sell the reversion, and if plaintiff did not register the lease he must suffer the consequence.

(*8th March, 1890.*)

KILLAM, J.—The plea in abatement alleges that the plaintiff was a married woman whose husband was still living, and it objected to his nonjoinder as a co-plaintiff. In my opinion, the plea in abatement was waived by the pleas in bar. In *Tidd's Practice Add.*, p. 673, it is said, "A plea in abatement may be waived in order to plead in bar."

It is clear that the nonjoinder of the husband is ground only for a plea in abatement. It could not be pleaded in bar. *Dalton* v. *The Midland Counties Ry. Co.*, 13 C. B. 474; *Guyard* v. *Sutton*, 3 C. B. 153; *Bendix* v. *Wakeman*, 12 M. & W. 97; *Holt* v. *Mabberley*, Lee t. Hardw. 134.

A married woman was not entitled at common law to sue by attorney, but this objection also seems to have been only one in abatement of the writ. In *Oulds* v. *Sansom*, 3 Taunt. 261, on demurrer to a writ of right coming up for hearing, counsel for the tenant objected that the demandants appeared to be *femes covert* and sued without their husbands by attorney. Lawrence, J., said, "It is matter in abatement of the writ. The judgment must be *quod breve cassetur*."

In *Coan* v. *Bowles*, 1 Show. 171, Holt, C.J., said, "Suppose a *feme covert* bring an action as a *feme sole* against a man, and the defendant pleads in bar, he shall never assign this for error; if she make an attorney, this will not be assigned for error." A similar holding appears in *Morgan* v. *Cubitt*, 3 Ex. 612, the plaintiff's coverture being pleaded in bar, on demurrer to the plea one point raised for the defendant was that she should have sued in person and not by attorney, but the plea was held bad, as the coverture should have been pleaded in abatement. In my opinion, as the defendant has pleaded in bar, neither objection is now tenable, irrespective of the legislation of recent years respecting the rights of married women.

The land in question was subject to "The Real Property Act of 1885" and amending Acts, when the alleged lease was made. The lease purported to be made "In pursuance of the Act respecting Short Forms of Leases," and was in the ordinary short form used before the Real Property Acts, the demise was for five years, and the covenant was in the words "The said lessor covenants with the said lessee for quiet enjoyment."

Objection is made that this instrument created no demise, and that the covenant cannot be read as having the meaning of the covenant set out in the declaration, which is that given to the words in the instrument by the Short Forms Act, C. S. M., c. 61, schedule 3. For the plaintiff it is argued that the covenant is binding even if there was no demise, and that the instrument did create a demise for the term mentioned.

In my opinion, the instrument was effectual to create the term. True, by section 71 of The Real Property Act of 1885, it was provided that, "When any land subject to the provisions of this Act is intended to be leased or demised for a life or lives or for any term of years exceeding one year, the owner shall execute a lease in the form contained in schedule M. to this Act," and this instrument is in several respects not in exact accordance with that form. But, by section 36, "The Registrar-General shall not register any instrument purporting to transfer or otherwise deal with or affect any land which is subject to the provisions of this Act . . . . unless such instrument be in accordance with the provisions hereof, but any instrument substantially in conformity with the schedules to this Act, or an instrument of the like nature, shall be sufficient." And by section 37, "All such documents may be registered under the Act as are capable of being registered in the registry offices of the Province of Manitoba at the present time, and which are not inconsistent with the provisions of this Act."

It appears to me that the instrument in question was substantially in conformity with the form in schedule M. It did not describe the lessor as registered owner, &c., as in the form, but that appears to be mere matter of description not affecting the validity of the instrument. The operative word of the form in the schedule is "lease." The word is used as well as "demise" in this instrument. The instrument is a little more expanded, but substantially the same as the form in all important respects. The form shows that special covenants may be inserted.

This instrument, however, was not registered under the Act, and there is more difficulty in determining whether, without registration, it took effect. With some hesitation I have formed the opinion that it did not. The Act created an entirely new system of dealing with land. The intention was to recognize only the registered title. By the 33rd section, upon registration

an instrument was to "be deemed and taken to be embodied in the register as part and parcel thereof," and on being so embodied and stamped with the seal of the registrar-general, it was to "thereupon create, transfer, surrender or discharge, as the case may be, the estate or interest therein mentioned in the lands mentioned in the instrument." My hesitation arises principally under the 64th section, which provides that, after registration of the title under the Act, "no instrument shall be effectual to pass any interest therein. . . . . "as against any *bona fide* transferee," unless executed in accordance with the Act and registered thereunder." This seems to suggest that it may be effectual to pass an interest as against the grantor or lessor. But, I think that this may be considered as explained by the 70th section, under which before registration the instrument created a right or claim to registration of the estate or interest which purported to pass. The last mentioned section seems also to be intended to state the exact measure of the interest created by an unregistered instrument. My opinion is strengthened by the 77th section of "The Real Property Act of 1889." That section appears framed upon the same view of the effect of the other provisions of the Act, which, as bearing on this question, seem otherwise similar to those of the Act of 1885.

But, notwithstanding that the instrument could not take effect until registration, for the purpose of determining the meaning of the different portions, and particularly of the covenants, reference may still be made to the Short Forms Act, to which the instrument appears sufficiently to refer within the 1st section. It should then be read as if the corresponding long form of the covenant were set out in the deed. The covenants must take effect upon the execution and delivery of the deed. The lessor, then, covenanted that upon the lessee paying the rent reserved and performing her covenants she should peaceably "possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them."

It appears to me that by the instrument, before registration, the plaintiff obtained the right to be registered as possessed of a term of five years in the land upon the terms of the deed, and a right

under the covenant to an action against the lessor if she should be evicted, not only by any title paramount formerly existing under the lessor, but also by the title paramount retained by the lessor.

This position could not arise under the common law, for the lease would be effectual as against the lessor and any one acquiring title from him subsequent to the demise. The lessor would have a right to convey away his reversion, but more he could have no power at law to convey. As the covenant would not cover mere trespasses, the lessor could not be responsible for any attempt at interference by the grantee of the reversion with the possession of the tenant. *Dudley* v. *Folliott*, 3 T. R. 584; *Hodgson* v. *The East India Co.*, 8 T. R. 278; *Grenelife* v. *W.* Dyer, 42 b.; *Beddoe's Executors* v. *Wadsworth*, 21 Wend. 120.

Then, the consequence was that there could be an action only in case of an eviction under an elder title. Here, the term mentioned was to run from a fixed date, not from the date of registration. The covenant seems to cover the whole of that term. It is true it is for the "term granted," but this appears to relate to the term purported to be granted, to be merely descriptive of it. The covenant is that the lessee shall possess and enjoy the premises for the period without any interruption or disturbance from the lessor or his assigns or any one lawfully claiming under him. It appears to me that a breach of this covenant is made out.

I cannot say that I reach this conclusion without doubt. It is unsatisfactory also, that counsel for both parties have allowed their attention to be diverted from this part of the case by the consideration of the law relating to married women to such an extent that we have not been assisted by any careful argument upon it. If it be suggested that it was through the negligence of the plaintiff in not recording the instrument that the loss occurred, that is true to this extent, that the negligence enabled the defendant to place it in the power of his assigns to evict the plaintiff, but it was not the proximate cause. By the 72nd section of the Act of 1889, in force when the transfer was made, on making a transfer, the transferor is to put upon the instrument of transfer a memorandum of all leases to which the estate being transferred is subject. This, of course, is directed primarily to verbal leases, but I think that it properly includes an instrument of demise which has not been completed by registration. The

estate is subject to the right of the lessee to be registered as possessed of that term under the 81st section.

I adhere to the view which I expressed in *Shore* v. *Early*, that under this Act the transfer took effect absolutely irrespective of any notice to the transferee of the plaintiff's lease. If, however, a memorandum of its existence had been placed on the transfer, the Registrar-General would never have given to the transferee the absolute certificate of title which enabled him to evict the plaintiff. If, then, the lessee was guilty of negligence, the defendant by taking advantage of that negligence, placed it in the power of his transferee to evict her, and as his transferee comes distinctly within the words of the covenant and the defendant distinctly undertook that his assigns should not disturb the plaintiff, the negligence through which the defendant was in a position to enable him to do so can constitute no defence.

There are some American authorities cited by *Mr. Rawle* in his *Treatise on the Law of Covenants for Title*, 4th ed. p. 137 *et seq*, which have a bearing on the question which I am now discussing, but as none deal with such a state of law as exists under our Real Property Acts, I do not refer to them at length. Without adopting all the language used in *Curtis* v. *Deering*, 12 Me. 499, and admitting much of the justice of the criticisms upon it in *Wade* v. *Comstock*, 11 Ohio, St. 71, there is much in the judgment tending to support the opinion I have expressed.

The defendant moves also to reduce the damages. The amount included in respect of costs of Police Court proceedings, appears to me not proper to have been allowed. The proceedings were between Mr. Shore and some other person. What were the charges or the acts on which they were based, does not appear. There is not even evidence to show that the present plaintiff incurred any costs, or was liable for those to which her husband was put. The verdict should be reduced by the sum allowed for these. I agree that the other costs were properly allowed under the circumstances upon the principle of the case to which the learned Chief Justice referred, the defendant having, apparently, urged on the plaintiff to assert her claim and incur the expense.

I cannot agree that the proposed reduction should be practically off set by an increase of damages for the value of the lease, as upon the evidence the plaintiff got fully all she could be entitled to. On the other hand, I do not think that we could

reduce the damages under that heading, as it was fully within the province of the Chief Justice, as a jury, to determine the value for that purpose, and there is nothing to indicate that he proceeded upon any erroneous view of law or fact.

The verdict should be reduced by $75, and the other portions of the application dismissed, the defendant to pay costs of the application.

BAIN, J.—The first objections taken by the defendant, and to which most of his argument was directed, are that the property in the lease not being the plaintiff's separate property, her husband should have been a party to the action with her, and that she could not issue the writ and sue by an attorney. As between the plaintiff and defendant, the question whether the interest or property that passed by the lease was the plaintiff's separate property or not, is material only as it affects the plaintiff's right to sue alone.

But even supposing the defendant's contention is right that the husband should have been joined, and that the plaintiff cannot sue by an attorney, it seems to me the defendant is now precluded from taking the objections. Both objections are only matters in abatement, and they should have been disposed of on the plea in abatement; and the defendant having, after the plaintiff had filed her replication to the plea in abatement, added pleas in bar to the action, he must, I think, be held to have waived and abandoned his plea in abatement, and cannot now take the objections he does. With regard to the non-joinder of the husband, the following statement of the law taken from *Dicey on Parties*, p. 186, seems to be borne out by the authorities. "If a wife sues alone, when she either must or may be joined, the only result is to expose her to a plea in abatement. . . . . The defendant can take advantage of the non-joinder by a plea in abatement, but if he does not plead in abatement, and the fact that the husband ought to have been joined appear at the trial, the defendant can take no advantage of the error." See also, *Chitty on Pleading*, vol. 1, 38; *Morgan* v. *Painter*, 6 T. R. 265; *Milner* v. *Milnes*, 3 T. R. 627; *Dalton* v. *Midland Ry. Co.*, 13 C. B. 474; and *Bendix* v. *Wakeman*, 12 M. & W. 97. And as to the plaintiff suing by an attorney, the law is clear, "that if a *feme covert* bring an action in her own name *per attornatum*, and the defendant plead in bar to the action, he shall never afterwards assign the coverture for error." *Bacon's Ab.*, 22; *Coan* v. *Bowles*,

Carth. 122; *Oulds* v. *Sanson*, 3 Taunt. 261. Now, all pleas must be pleaded in their proper order.—1st, to the jurisdiction; and, in abatement, and 3rd, in bar; and this, it is said, is the natural order of pleading, because each subsequent plea admits there is no foundation for the former, and precludes the defendant from afterwards availing himself of the matter. And the defendant cannot vary the order, for by a plea of any of these kinds, he waives or renounces all pleas of a kind prior in the series. Com. Dig. Abatement; *Bacon's Ab.*, *Pleas and Pleading*; *Chitty on Pleading*, 1, 450; *Stephen on Pleading*, 380.

The defendant also moves on the grounds that the land described in the lease having been brought under the Real Property Act, and the lease not being in the form given in that Act, it is not sufficient to enable the plaintiff to recover, and that the verdict is against law and the weight of evidence and that the damages awarded are excessive. It is also objected that the lease purports to have been made in pursuance of the Act respecting Short Forms, not of "Indentures," but of "Leases." But this, I think, is a sufficient reference to the Act to give the plaintiff the benefit of the covenant in the schedule of the Act, if she requires it.

The certificate of title under the Real Property Act of 1885 was issued on the 15th of March, 1888. The lease, which is in the short form given in the Act in the Consolidated Statutes, is dated the 1st of August, 1888, and demised the premises for a term of five years from the first of September following. The lease could not have been registered under the Lands Registration Act, and it was not registered under the Real Property Act, and its form is so different from the form of a lease given in the latter Act, that it is questionable if the Registrar could properly have registered it, had it been presented for registration. On the 27th of April, 1889, the defendant transferred the land to one Early without making the transfer subject to the lease, and soon afterwards Early took possession of the premises and has since held possession against the plaintiff, and the plaintiff failed to recover possession in an action for ejectment that she brought against Early. But the question of the validity of the lease, as creating an interest in the land, or as between the plaintiff and Early, does not seem to me to arise here. It was a valid instrument as between the plaintiff and defendant, and by it the defendant undertook

to give, and in fact did give the plaintiff possession of the premises, and covenanted with her that she should have quiet enjoyment of them without any interruption or disturbance from him or from anyone lawfully claiming by, from or under him. Early having entered by lawful title from the defendant, there has been, I think, a breach of the covenant, and the plaintiff is entitled to recover such damages as she has established.

It is suggested that it is by the plaintiff's default in not registering the lease that Early has been able to dispossess her, and that the defendant should not be made responsible for the consequences of the plaintiff's own neglect. No authority that supports such a contention has been cited, and at present I am not at all prepared to hold that the covenant of the lessor is to be read as subject to any such implied proviso or qualification. The defendant knew that he had made the lease, and if, as he was quite justified in doing, he wished to transfer the land or his reversion, he should have made the transfer subject to the lease in the manner provided for in sec. 65.

The damages assessed by the learned Chief Justice are made up as follows: for loss of the lease, $300; costs of the ejectment suit against Early, $178; the plaintiff's own costs in that suit, $215; and costs of certain proceedings in the Police Court, $75. The evidence as to the value of the unexpired term of the lease is conflicting, but I see no reason why the court should interfere with the finding of the Chief Justice on that item, and I agree with the Chief Justice that the defendant having encouraged the plaintiff to bring ejectment, the costs of that suit should be allowed as part of the damages. The case of *Child* v. *Stenning*, 11 Ch. D. 82, cited by the Chief Justice, is an authority for allowing this damage, and that case is supported by *Williams* v. *Burrell*, 1 C. B. 402, and *Lock* v. *Furze*, 34 L. J. C. P. 201. But, in allowing the item for costs in the Police Court, I think it must have been overlooked how vague and indefinite the evidence is as to the nature of these proceedings and as to the plaintiff having paid any of the costs. What the evidence shews is only that after Early had taken possession of the premises, the plaintiff's husband attempted to retake possession from him, and Early resisting, the matter ended in Police Court proceedings, in which, apparently, Early was successful and Shore had to pay the costs, which, he says, came to about $75. The plaintiff does

not seem to have been a party to these proceedings, and she is not shewn to have paid anything on account of them; and what I gather from the evidence is that they resulted from a breach of the peace or an assault committed by Shore himself. At all events, I do not think that on the evidence, this $75 should be allowed as part of the damages.

The defendant also moves against the verdict on the ground that the learned judge refused to allow him to amend his pleas pursuant to a notice he served on the plaintiff before the trial, by adding pleas setting up non-payment of the rent reserved, and non-payment of taxes by the plaintiff, and forfeiture, surrender and cancellation of the lease. But it seems clear enough from the evidence that the defendant could not have proved such pleas, if they had been allowed, and it is unnecessary to consider the objection that he was not allowed to add them.

I think the verdict that was entered for the plaintiff should be reduced by $75.00, but as the defendant has substantially failed in his application, he should pay the costs of the appeal. The appeal was really taken, and almost wholly argued, on the grounds on which he has failed.

DUBUC, J., concurred.

Verdict for plaintiff reduced by $75. Other portions of the application dismissed.

VINEBERG v. ANDERSON.

Sale of goods.—Authority to buy, of person in charge of business.

Defendant was in partnership with Mrs. P., in a business of which Mr. P. had the management under a power of attorney from both partners; and carried on under the name of P. & Co. Defendant himself took no part in the management, further than being sometimes consulted about purchases.

Mrs. P. died and P. was left in charge, to take stock and wind up the business and to obtain a purchaser for it. The firm name remained over the store and there was no outward change.

While so in charge P. ordered goods from the plaintiffs, their agent entering up the order in the name of P. & Co. After the goods had been delivered, defendant took possession of the whole stock, including the goods supplied by plaintiff, and eventually sold it. Before the sale, the plaintiff demanded the goods from the defendant, but was refused.

In an action for goods sold and delivered,

Held, 1. That P. had no authority to bind the defendant by the purchase.

2. If plaintiff thought he was selling to the defendant, and defendant did not purchase, the property would not have passed and defendant would have been liable in some form of action. But these facts were not clearly proved.

The plaintiff sued the defendant, describing him as surviving partner of the firm of Pelkey & Co., on the common counts, the causes of action being laid as arising between the plaintiff and defendant alone.

The defendant and a Mrs. Pelkey entered into partnership under written articles for the purpose of a carrying on a general retail mercantile business at Glenboro, Manitoba, under the firm name of Pelkey & Co. By the articles of partnership, the business was to be carried on by Mrs. Pelkey's husband "under a power of attorney in writing authorizing him to transact the said business." This power of attorney was not produced and there was no evidence of its having been executed. The defendant resided in Winnipeg, from which Glenboro is distant about 200 miles, and he did not appear to have interfered with the management of the business, except that he was frequently consulted about the ordering of goods.

The business was started under Mr. Pelkey's management, but about a month after the date of the articles of partnership, Mrs. Pelkey died. The defendant then left Mr. Pelkey in charge, with instructions to take stock and wind up the business, advising him either to sell it to outsiders or to get someone to buy it for himself (Pelkey.) Shortly after Mrs. Pelkey's death, the plaintiff's agent took an order from Pelkey for goods which were shipped from Montreal about two months after the order was given, and were delivered at Glenboro and placed in the store, while Pelkey remained in charge on the same terms as were prescribed after his wife's death.

The order was given by Pelkey in the store over which the old sign Pelkey & Co. remained, and was taken in the name of the firm, and the goods were consigned to Pelkey & Co.

G. Davis and *T. H. Gilmour*, for plaintiff.

J. S. Ewart, Q.C., and *A. Haggart*, for defendant.

(*14th January, 1890.*)

KILLAM, J.—The plaintiff's agent knew, as I infer from his evidence, of the death of Mrs. Pelkey when he took the order. There is no sufficient evidence of any former dealing of the plaintiff or his agent with Pelkey & Co. After the delivery of the goods, the defendant sent agents to Glenboro to take the property of the late firm from Pelkey, and after some difficulty he succeeded in getting possession of the stock by a writ of replevin, and subsequently sold it. Among the stock which the defendant so took and sold, was that obtained by Pelkey, as above mentioned, from the plaintiff. While the goods were in the hands of the agent who acted for the defendant in getting them from Pelkey, the plaintiffs asked to be allowed to take them back. This the defendant refused. Until this request was made of him, the defendant did not know of any purchase from the plaintiff, and he did not learn until after he had sold and delivered them that the plaintiff's goods were ordered after Mrs. Pelkey's death, though the nature of the goods and the other circumstances were such as should have led him to suspect that they were delivered after her death. The plaintiff's agent gave evidence of a conversation with the defendant, on which it is argued that a promise to pay or be responsible for the goods is made out. Both on account of the vagueness of the evidence

and on account of the defendant's want of knowledge of the date of the order, I cannot infer such a promise, and I shall not consider what would be its effect.

In my opinion, the terms of Pelkey's employment after his wife's death were not such as to enable him to bind the defendant for an order for goods in the name of the old firm. There was nothing to warrant the plaintiff's agent in assuming that Pelkey had such authority. The mere finding of Pelkey in charge of a store selling goods or taking stock, would not justify the inference that he had authority to purchase stock. If the plaintiff's agent took the order, and the plaintiff delivered the goods, understanding that Pelkey was not ordering for himself, but for the defendant, or for the surviving partners of the late firm, whoever they might be, and intending to sell to the defendant or such surviving partner, it appears clear that no property passed, and that in some form of action the defendant must account to the plaintiff for his goods.

But the evidence of the agent does not seem to make out with sufficient clearness that he so took the order, or that the credit was given to the defendant or to a supposed surviving partner of the old firm. He states that he had dealings with the defendant's firm, Pelkey & Co., that he sold Pelkey & Co. the goods sued for, that he took the order produced, which is expressed to be that of Pelkey & Co. This, however, does not appear to me to be sufficient. These statements may be mere inferences now made. It is unnecessary to distinguish clearly whether this evidence and the circumstances should be submitted to a jury, if the case were before a jury, for the purpose of having them decide whether they would infer an intention to deal with the defendant or the surviving partner of the old firm. Even if they should be so left, I cannot feel sufficiently satisfied, exercising the functions of a jury, to make that inference. I think, too, that the suggestion of the agent to the defendant, as to the latter assuming responsibility for the debts in a certain event, tends rather to strengthen the hypothesis that the agent understood that the original sale had been to some other than the defendant. It is not a decisive circumstance, but it adds to the uncertainty in which the case is left.

The *onus* is on the plaintiff to establish the liability of the defendant, either directly upon the original contract of sale, or

by virtue of his subsequent conversion of goods that still remained the plaintiff's. He fails in the former. To succeed in the latter he must show that in reality, the assumed contract under which the goods were delivered did not exist, and that the goods taken by the defendant from Pelkey were, when so taken, still the property of the plaintiff.

If this were established, then it would be necessary to consider whether, upon the common counts the plaintiff could recover more than the amount actually realized by the defendant's sale of the goods. Not being satisfied that the plaintiff's agent did not intend to sell to Pelkey himself, or to whom he or the plaintiff understood the sale was being made, I enter a non-suit.

MERCHANTS BANK v. GOOD.

(In Appeal.)

Promissory note.—Delivery in blank with authority to fill up.

To a declaration upon a note, by indorsee against maker, defendant pleaded that G. & Co. being indebted to McL & Co. delivered to them a blank note with authority to fill it up with the amount of the indebtedness and payable within two months, and when so filled up, but not otherwise, to deliver it as the note of G. & Co.; and that after payment of the indebtedness, and after more than 15 months, and after revocation of all authority by lapse of time, by the express acts of the parties and by the dissolution of the firm of G. & Co., the said McL. & Co. filled up and delivered the note to the plaintiffs.

Held, Upon demurrer, that the plea was bad.

The declaration was upon a promissory note for $475, made by the defendants to A. D. McLean & Co., and indorsed by them to the plaintiffs. The note was dated the 15th of May, 1883, and was made payable two months after its date.

The third plea of the defendant John Good was, "that at the time next hereafter referred to, the firm of John Good & Co. was indebted to the said A. D. McLean & Co. in an amount less than two hundred dollars, and that in or about the month of January, 1882, the said defendant signed the name of the said firm of John Good & Co. to a printed papr in the following form; $ after date promise to pay to the order of at the Dollars for value received; and handed the printed paper so signed to the said A. D. McLean & Co., with authority to fill in the name or names of such person or persons as payee or payees as the said A. D. McLean & Co. should desire, and also to fill in immediately before the word "dollars," such words as would represent the indebtedness of the said John Good & Co. to the said A. D. McLean & Co. at the time when the said printed paper should be filled up by the said A. D. McLean & Co., and also to fill up the said date and time for payment so as to make the said instrument on its face payable not later than two months from the time of such handing of said paper to the said A. D. McLean & Co., and also

with authority in case the said printed paper should be filled up in the manner above set forth, but not otherwise, to deliver the said printed paper so filled up and signed as a promissory note of the said John Good & Co., and the defendant avers that the said A. D. McLean & Co. after the expiration of the said period of two months, to wit on the 15th day of May, 1883, filled up and delivered the said printed paper so as to constitute the same and it now is the alleged promissory note sued upon in this action. And the said defendant further avers, that prior to the time at which the said printed paper was so filled up as aforesaid, the said John Good & Co. had fully paid and satisfied the said indebtedness of the said John Good & Co. to the said A. D. McLean & Co., and that there was not at such time any indebtedness of the said John Good & Co. to the said A. D. McLean & Co. in existence, and that the authority which the said A. D. McLean & Co. had to fill up the said printed paper as aforesaid, had expired by lapse of time, and had been revoked by payment of the said indebtedness, by the express acts of the parties and by the dissolution of the said firm of John Good & Co. And the said defendant further avers that the said A. D. McLean & Co. had no authority from him or from the said firm of John Good & Co. to fill up the said printed paper in the manner in which the same was so filled up, or any authority whatever save as aforesaid."

To this plea the plaintiffs demurred on the ground that, as it did not allege that when the note was indorsed to the plaintiffs, the plaintiffs had notice of the matter alleged in it, it was no answer in law to the plaintiff's claim.

Mr. Justice Bain allowed the demurrer and from his decision the defendants appealed to the Full Court.

J. S. Ewart, Q.C., for defendant, cited the following authorities:—*Marston* v. *Allen*, 8 M. & W. 504; *Ingham* v. *Primrose*, 7 C. B. N. S. 84; *Awde* v. *Dixon*, 6 Ex. 869; *Ontario Bank* v. *Gibson*, 4 Man. R. 440; *Foster* v. *MacKinnon*, L. R. 4 C. P. 704; *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *Brown* v. *Howland*, 9 Ont. R. 65. As to negligence. *Bank of Ireland* v. *Evans's Charity*, 5 H. L. 389; *Swan* v. *North British Australasian Co.*, 2 H. & C. 181; *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. 32.

J. S. Tupper, Q.C., and *F. H. Phippen*, for plaintiffs. An unbroken line of decisions shew that a *bona fide* holder for value

without notice, of a promissory note or bill of exchange regular on its face, is not in any way affected by the fact that the note was issued in blank and that some previous holder had exceeded his authority in filling it up. *Russel* v. *Langstaffe*, 2 Doug. 514; *Temple* v. *Pullen*, 22 L. J. Ex. 151; *Montague* v. *Perkins*, 22 L. J. C. P. 187; *Marston* v. *Allen*, 8 M. & W. 564; *Watson* v. *Russell*, 31 L. J. Q. B. 307; *Rice* v. *Gordon*, 11 Beav. 267; *Hogarth* v. *Latham*, 47 L. J. Q. B. 339; *Cross* v. *Currie*, 5 Ont. App. R. 31. The time when the blanks are filled up is immaterial; *Montague* v. *Perkins*, *ante*. Of course if the note is not regular on its face, the law merchant does not apply and the holder is affected by all the equities; *Hatch* v. *Searles*, 2 Sm. & G. 147.

The authorities relied upon by the defendant are cases where the maker or acceptor did not voluntarily part with the note or bill or had been guilty of negligence. In *Baxendale* v. *Bennett*, 3 Q. B. D. 525, the bill of exchange was taken from the acceptor, and in *Foster* v. *McKinnon*, the defendant did not know that the instrument he signed was a promissory note. This case is distinguishable from *Ontario Bank* v. *Gibson*, 3 Man. R. 406; 4 Man. R. 440, as here the note was clearly issued. If, however, the case in hand is considered undistinguishable, it is submitted that *Ontario Bank* v. *Gibson* was decided under a misapprehension as to the true ground of the decision in *Awde* v. *Dixon*, 6 Ex. 869. The note there was incomplete on its face by reason of certain blanks when the plaintiff became the holder, and the defendant escaped liability on that ground not because Robinson had not joined as a maker.

J. S. Ewart, Q.C., in reply. The intention in signing and handing over a note is the turning point. *Lowe* v. *Waller*, 2 Doug. 736; *In re Summerfeldt* v. *Worts*, 12 Ont. R. 48.

(8th March, 1890.)

TAYLOR, C.J.—I am of opinion that the judgment of my brother Bain, allowing the plaintiff's demurrer to the defendants third plea should be affirmed.

The present case is entirely different from *Ontario Bank* v. *Gibson*, 3 Man. R. 406; 4 Man. R. 440. The defendant there was sued as endorser of an accommodation note which he endorsed on express condition that it was to be endorsed by another person

also, before it was issued, which it was not, and the ground of the decision was, that the note had never been issued by the defendant. Here the defendants are the makers of a promissory note which they signed with their firm name in blank and handed to a creditor of the firm, with authority for him to fill in the date, the length of time, the name of the payee, the amount and place of payment. It is true, the plea alleges that instructions were at the same time given that the date and time for payment should be filled up so as to make the note payable not later than two months from its being handed over to the creditor, that the amount should be such sum as would represent the defendant's indebtedness to the creditor at the time of filling it up, while the creditor kept the note for over a year and then made use of it, filling in an amount greatly in excess of what the indebtedness had been, that indebtedness having also, in the interval been entirely paid off. The law as laid down by Lord Esher in the passage from his judgment in *Baxendale* v. *Bennett*, 3 Q. B. D. 531, quoted by my brother Bain, seems to me, directly applicable to this case. "Where a man has signed a blank acceptance, and has issued it, and authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up."

It is plain, on the wording of the plea, that the defendants handed the note to the creditor, intending him to use it. That in so doing he did not comply with secret instructions which they gave, is not, in my opinion, a good defence against a *bona fide* holder for value without notice.

DUBUC, J.—A number of authorities are found on the question of negotiable instruments signed in blank, and handed incomplete to persons empowered to fill them up and who abuse the power so given to them.

As a general principle, a man who put his name to a negotiable instrument and allows it to go out of his hands for the purpose of being used, is liable on it to the holder for value.

In *Young* v. *Grote*, 4 Bing. 253, a customer of a banker left with his wife certain blank cheques signed by himself. The wife filled one with £50. 2s., the fifty commencing with a small letter and placed in the middle of a line. She gave the cheque to her husband's clerk to receive the amount. The clerk inserted the

words "Three hundred and" before the word "fifty," and also, the figure "3" before the figures "50." The banker having paid the £350-2s., it was held that the loss must fall on the customer, as it was by his negligence that the fraud had been committed.

In *Ingham* v. *Primrose*, 7 C. B. N. S. 84, a bill was drawn by one Murgatroyd and accepted by the defendant, for the purpose of being discounted. Murgatroyd could not succeed in discounting the bill, and returned it to the defendant, who tore it in two pieces and threw it in the street. Murgatroyd picked up the pieces, pasted them, and indorsed the bill to another party, who indorsed it to the plaintiff. The defendant was held liable upon the bill at the suit of a *bona fide* holder for value. The reason, as stated by Williams, J., was that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country.

In *Russell* v. *Langstaffe*, 2 Doug. 514, it was held that an indorsement written on a blank note or cheque will, afterwards, bind the indorser for any sum and time of payment which the person to whom he intrusts the instrument chooses to insert. Lord Mansfield said in that case: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'trust Galley to any amount and I will be his security.' It does not lie in his mouth to say, the indorsement is not regular."

In *Temple* v. *Pullen*, 22 L. J. Ex. 151, the defendant being in execution for a debt, signed a promissory note in blank in July, 1846, and delivered it to the attorney for the execution creditor, and was thereupon released. In 1851 he became bankrupt, and obtained his certificate on the 12th May. On the 20th October, 1852, the note was filled up and made payable at one month after date, and indorsed to the plaintiff. To an action brought against him, the defendant pleaded that he had not made the note, and invoked also his certificate of bankruptcy. The jury found that the note had been filled up in a reasonable time. It was held that the defendant was liable and that the certificate of bankruptcy afforded no defence.

The same was held in *Montague* v. *Perkins*, 22 L. J. C. P. 187. The defendant in 1840, gave his acceptance in blank for value to a party who, in 1852, and, as the jury found, not within a reasonable time, filled in his own name for £500, at five months,

The defendant being sued on the bill by an innocent indorsee for value pleaded, (1) that he did not accept, (2) the statute of limitation. The court held that the plaintiff was entitled to recover in both issues, notwithstanding the finding of the jury.

The same decision was laid down in *Marston* v. *Allen*, 8 M. & W. 504; *Watson* v. *Russell*, 31 L. J. Q. B. 307; and in *Cross* v. *Currie*, 5 Ont. App. R. 31.

The principle adopted in the above decisions seems to be that, when a fraud is committed and a loss is the result of it, the party who, by his negligence or his misplaced confidence, has been the cause of the said loss, should be held responsible for the consequence thereof. It was on that ground that the defendant was held not liable in *Baxendale* v. *Bennett*, 3 Q. B. D. 525. He had given his blank acceptance to a party with authority to fill it up. It was returned to him not filled up, and he put it in his drawer which was unlocked. The instrument was afterwards stolen or lost. Another person had filled in his own name and indorsed it to the plaintiff for value. On the action brought by the plaintiff, the defendant was held not liable.

There is, however, a deviation from the general rule when the holder of a negotiable instrument receives the same in an incomplete or imperfect form, or with notice of some restriction or condition imposed on and not fulfilled by the party transferring it.

In *Awde* v. *Dixon*, 6 Ex. 869, the defendant agreed to join his brother in an accommodation note, provided one Robinson would join also, and signed a blank note. Robinson refused to join. The note was in this form:—" Dec. 1848. On demand, we do hereby jointly and severally promise to pay M. or order, £100, as witness our hand. William Dixon." The name of the plaintiff was inserted as payee. The defendant's brother delivered the imperfect instrument to the plaintiff for value, representing that he had authority to deal with it. The plaintiff was held not entitled to recover. The note, when presented to the plaintiff, had on its face something irregular, sufficient to raise his suspicion, and he should have inquired into it.

In *Hatch* v. *Searles*, *Stanway's Case*, 2 Sm. & G. 147, a blank acceptance had been given to one Curtis, who had filled it up in

the presence of the holder who discounted the bill. It was held that giving a blank acceptance is only *prima facie* evidence of an authority to the person to whom it is given to fill up the bill for the amount, and where the holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better position than the drawer or indorser who had given no value for the bill.

In *Hogarth* v. *Latham*, 47 L. J. Q. B. 339, Foster, of the firm of Latham & Co., gave an acceptance purporting to be made by the firm, with a blank for the name of the drawer, and had handed it in that state to Cotton, a partner of the plaintiff. Cotton gave it to the plaintiff for value. The plaintiff filled up the bill, putting the name of his firm, Hogarth & Cotton as drawers, and indorsed it to himself, knowing when he did so, that Foster had no authority to accept the bill for the firm of Latham & Co. It was held that Latham & Co. were not liable on the bill at the suit of Hogarth.

The defendant was likewise held not liable in *Brown* v. *Howland*, 9 Ont. R. 48, where the plaintiff was proven to have known that the bill was imperfect when he received it.

But the exception or departure from the general rule adopted in the last cited authorities cannot be available to the defendant in the present case, because he did not allege that the plaintiff had notice of the matters stated in the plea when he received it.

The case of *Ontario Bank* v. *Gibson*, 4 Man. R. 440, relied on by the defendant, is distinguishable from the present one. In *Ontario Bank* v. *Gibson*, E. F. Rutherford to whom the note was handed, with the indorsement of the defendant, was not to use or issue it until Boyle would also indorse it. The note was handed over with a condition attached to it depending upon the will of a third person, *i. e.*, upon a future event, which might or might not happen. The indorsement of Boyle was not obtained; so E. F. Rutherford had never any authority to issue the note. Until the note was indorsed by Boyle, E. F. Rutherford having no authority to use it, was considered only as the custodian thereof. While in the present case, A. D. McLean received the note with full authority to use and issue it within a certain period. They abused that authority afterwards, but they could not, as E. F. Rutherford was, be considered as the mere custodians of the note. In the one case the note was not fully issued, and Rutherford assumed an authority which he never

had; in the other, the note was at first fully issued, and A. D. McLean & Co. abused the authority which had been given to them. Whether or not, under some authorities and a different state of facts, the distinction would be noticed as affecting the liability or non-liability of the defendant, I think, in the present instance, under the doctrine laid down in the above cited cases, it is sufficiently important to justify a conclusion different from the one arrived at in *Ontario Bank* v. *Gibson*.

The fact that the note was not filled up until about 16 months after it was handed to A. D. McLean & Co., cannot afford any valid defence to the defendant under the authorities, as in *Temple* v. *Pullen*, the note was filled up six years, and in *Montague* v. *Perkins*, twelve years after it had been delivered. And in the latter case, although the jury had found that the notes had not been filled up in a reasonable time, the plaintiff was held entitled to recover.

In my opinion, the judgment of my brother Bain allowing the demurrer should be affirmed with costs.

KILLAM, J.—I am of the opinion that the judgment upon this demurrer should be affirmed.

The well known expression of Lord Mansfield in *Russell* v. *Langstaffe*, 2 Doug. 514, that "the indorsement on a blank note is a letter of credit for an indefinite sum," has never been disputed.

Here the defendant Good signed a document clearly intended to be made into a promissory note by the filling in of certain blanks for the date, amount and time of payment. He did so for the express purpose of enabling the payee to complete it as the defendants' negotiable promissory note. Shortly stated, the plea sets up as a defence a revocation of the authority thus to complete the note. I must confess that I can make no distinction between this case and one in which a complete promissory note has been delivered to the payee by the maker without consideration for negotiation, and the authority to transfer it has been revoked before its negotiation, or one in which the note has been given for a debt paid before its transfer and the authority to negotiate it impliedly or expressly revoked. In neither of these cases would any person now dream that there could be a defence as against an indorsee for value without notice.

This view is clearly supported by the decisions in *Ingham* v. *Primrose*, 7 C. B. N. S. 82, and *Montague* v. *Perkins*, 22 L. J. C. P. 187; 17 Jur. 557. The latter case appears to be directly in point. The bill was given by the acceptor to the payee in blank in 1840 and not filled up or negotiated until 1852. The jury expressly found that it was not filled up within a reasonable time. It was contended that the authority to fill it up had ceased and upon that view Chief Justice Jervis directed a verdict for the defendant; but on motion to the court, after full argument, he concurred with the other members of the court in holding that the defendant was liable to the plaintiff, who was a *bona fide* indorsee for value, on the plain ground that the signature to the bill held out the holder to the public as entitled to it, and as having authority to negotiate it.

We have been much pressed with the authority of *The Ontario Bank* v. *Gibson*, 3 Man. R. 406; 4 Id. 440, and on the other hand, we have been asked to overrule it as decided upon a misapprehension of the *ratio decidendi* in *Awde* v. *Dixon*, 6 Ex. 869. It is evident, however, by reference to the original judgment in 3 Man. R. at p. 411, that the distinction now suggested as to *Awde* v. *Dixon* was not overlooked, and I could not feel at liberty on that ground to reconsider a similar case. There is, however, a broad distinction between the present case and that presented to the court in *Ontario Bank* v. *Gibson*, which I pointed out upon the argument of this application. There, the question arose between the indorsee and the immediate indorser, the note being delivered to the indorsee by the maker in whose hands it had been left by the payee, after writing his name on the back, to be delivered upon another indorser being obtained. The indorsee knew, then, that the right to deliver must depend upon the authority of the agent who was not held out by the form of the instrument as its holder for value. Here, however, the form of the instrument signed represented that there was an indebtedness of the maker to the payee, and upon the well known principles of law applicable to negotiable securities, the indorsee would not be bound by the equities between the maker and the payee. It is true that this distinction is not expressly pointed out in *Ontario Bank* v. *Gibson*, and that the language of the judgments is sufficiently general to cover such a case as the present. But there being such an obvious distinction, I cannot accept that

decision as binding us to give in this instance, a judgment directly contrary to that which appears to us to be correct.

I should not feel bound to apply the decision in *Ontario Bank* v. *Gibson*, to justify a similar defence in a case upon a promissory note between indorsee and maker. Such a case arose in *Rice* v. *Gordon*, 11 Beav, 265, and it is evident from the course taken that Lord Romilly considered that the circumstances afforded no defence if the indorsee had given value without notice of them. It also appears that the indorsee recovered against the maker at law.

It is said that it was established in *Cross* v. *Currie*, 5 Ont. App. R. 31, that the distinction which I make is not valid. It certainly was there decided that where the payee entrusted a promissory note with his indorsement to the maker for negotiation for the accommodation of the maker, the latter could transfer it so as to bind the indorser, in payment of a pre-existing debt of the maker. The case, evidently, went upon the principle that there was the authority to transfer, limited only by instructions as to the purpose of transfer. It was held that the indorsee was not bound by such limitations even when he took from one who could be only an agent. If the decision were to be applied to a case of a conditional authority with condition unfulfilled, as was *Ontario Bank* v. *Gibson*, it would be at variance with the latter, and could not be adopted here. It does not appear, then, that this strengthens the argument for the defence.

There is, to my mind, such an obvious distinction between the case of a party whom the circumstances point out only as an agent and with whom others can deal only on that basis, and one in which a party is armed with the written authority of another to represent himself as the holder of the personal obligation of that other who must naturally contemplate that third parties may be led to deal with him on that basis, and not as a mere agent, that it requires only to be stated to be appreciated. Whether possession of a bill or note duly indorsed is to be taken by third parties as general evidence of authority to transfer, is one thing; and whether possession of such an instrument as this note, by the party apparently entitled to it according to its tenor, is evidence of its regularity on which third parties can rely if the signature is genuine and they have no notice that its validity depends upon any agency to complete or deliver, is quite a different thing.

The distinction is very broad, also, between such a case as *Baxendale* v. *Bennett*, 3 Q. B. D. 525, where possession of the instrument was obtained without the intention of the acceptor, and the present, in which the defendant expressly handed over the note with the signature for the purpose of its being used as his promissory note by the payee. It is true, as argued, that it may have been returned; but, if so, this should have been alleged. It is, then, not a question of negligence, as it would be if the note had been obtained without the maker so intending, It was intentionally placed in possession of the payee by the defendant for use. It was by his express act and not through his negligence that it was obtained.

There is, however, a point not very clearly brought out upon the argument, which at one time appeared to me to be open to some doubt. The declaration is against two parties as the joint makers of a promissory note, dated the 15th May, 1883, under the firm name of John Good & Co. The plea alleges that the note was delivered in the form mentioned to A. D. McLean & Co., in January, 1882, that it was filled up and completed by McLean & Co., on the 15th May, 1883, and that before its being so completed the authority of McLean & Co. to fill it up had been revoked by (among other things) "the dissolution of the firm of John Good & Co." It did occur to me that if this was to be taken as sufficient allegation of the dissolution of the firm before the date of the note, it might sufficiently shew a want of authority in the defendant Good at the date of the note to bind his co-defendant by making a note in the name mentioned, and that the defendants would not be liable upon it to any greater extent than if it had been originally signed and delivered on the day of its date. It is to be observed that there is neither in the declaration nor in the plea a distinct allegation of a partnership between the defendants under the firm name of John Good & Co. I do not think that there are allegations from which it could be assumed that the relations of the defendants were limited to those of the members of an ordinary partnership. I doubt, also, if it ought to be taken as sufficiently alleged that the partnership, if considered to be sufficiently shewn, was in fact dissolved. Upon these points the plea appears to me to have been open to objection as embarrassing.

In the view which I have just suggested, however, the plea can only be supported as amounting to one of *non fecerunt*. For that purpose it should have alleged such facts as to shew distinctly that John Good had no authority on the 15th May, 1883, to bind his co-defendant by making a promissory note in the name mentioned in the declaration. The plea does not do so, for even if they had been in partnership under that name and it had been dissolved, a variety of circumstances might be suggested under which Good might have continued to possess or might have afterwards received that authority. The declaration alleges the making of a joint note under a certain name. The plea merely alleges that a certain relation which might have conferred the authority had ceased, but it does not shew that the authority never otherwise existed.

Judgment allowing demurrer affirmed.

McMONAGLE v. ORTON.

(IN APPEAL.)

Debtors Act.—Material for application.—Appeal.—Order other than that asked for.—Re-instatement of appeal on list.

Depositions of a debtor taken upon an examination, as to his means to satisfy a judgment, may be used against him on an application to commit under the Debtors Act. So also, may his cross-examination upon an affidavit filed by him in answer to such an application.

The decision of a single judge upon such an application will not be readily reversed upon appeal.

An order to pay by instalments may be made upon a summons to commit.

Through misapprehension as to the hour at which the court sat, counsel appeared after his appeal had been struck out,

Held, Considering the nature of the order appealed from, that the appeal would be reinstated were there reason to believe that upon full argument the order would prove to be erroneous.

The defendant entered an application to reverse the order of Mr. Justice Dubuc, directing him to pay by instalments of $12 per month, the amount of the judgment recovered in this action against the defendant, but no one appearing to support the motion when the cause was reached in due course upon the list, the application was dismissed. An affidavit was then filed showing that counsel was instructed to appear for the defendant upon the motion, and that he attended at twelve o'clock, the former hour of the opening of the sitting of each day, and would have attended earlier but that he was ignorant of the change of the hour for opening, and the defendant sought to re-enter the application.

L. McMeans, for defendant. The summons was to commit, the order made was for payment by monthly instalments. The Debtors Act requires proof of means according to prescribed rules. *Day's C. L. P. Act*, 404. If defendant examined, the examination must be *viva voce* before the judge. Reg. Gen. M. T., 1869, r. 3; *Day*, 530. If debtor's evidence used, it must be in the manner provided by the Act, *Waters* v. *Bellamy*, ante, p. 295. No person represented the defendant on the examination. The summons asked the debtor to pay the costs of the examination as a judgment debtor. The summons did not give defendant sufficient notice. The court must be satisfied of defendant's ability to pay, *Chard* v. *Jervis*, 9 Q. B. D. 179, 181; *Ex parte Koster*, *In re Park*, 14 Q. B. D. 597. The Act abolishes imprisonment in case of honest debtors, *Marris* v. *Ingram*, 13 Ch. D. 338. If defendant has not the means he should appeal from the order, *Re Bremner*, 6 Man. R. 73.

R. W. Dodge, for plaintiff. The affidavit filed in support of the application shows no ground for reinstating the appeal. As to merits of the appeal. As to the costs. Costs according to rules and authorities are ordered to be paid in the same manner as the debt, as to which default has been made. *Vide Forms*, 5 & 6, *Seton on Decrees*, 4th ed. 1566; Rule 13, 7th January, 1870; *Morgan & Wurtzburg*, 524; s. 5 Debtor's Act. "Subject to prescribed Rules," and see section 10. *Esdaile* v. *Visser*, 28 W. R. 280. The court can order payment by instalments under section 5 Debtors Act, without notice of any application therefor, *Ex parte Fryer*, 34 W. R. 766; *Ex parte Otway*, 36 W. R. 698. The examination had, upon the affidavit, was regular and pro-

perly read upon plaintiff's application under Administration of Justice Act. In any case court will not interfere upon finding of judge in first instance, that defaulting party has the means to pay. *Esdaile* v. *Visser*, 28 W. R. 280. Defendant counsel asked for no enlargement on first argument to put in material on ground of defendant being unrepresented on his examination.

(*12th February, 1890.*)

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

There is no reason to believe that the excuse is not made *bona fide*, or that the motion would not have been supported by the counsel if he had not been under an error such as is mentioned. I am of opinion that, considering the nature of the order, it would be proper to allow the matter to be re-opened and the motion renewed if there were reason to believe that, upon full argument, the defendant could show that the order was erroneous.

The order was made in an application commenced by summons calling upon the defendant to show cause why he should not be committed to gaol for non-payment of the judgment, and why he should not pay the costs of the application, with other matters not now material, or why such other order should not be made as might seem proper. The summons was based solely upon an affidavit of the plaintiff's attorney, stating the recovery of the judgment, demand for payment, possession by the defendant after judgment of the means of payment and default in payment, and upon the defendant's depositions on his examination as a judgment debtor. The defendant in reply, filed an affidavit stating that at and since the time of the recovery of the judgment he was and had ever since been unable to pay the judgment, and that he had not since the recovery of the judgment made, and was not at the time of making the affidavit, making more than sufficient barely to support himself and family. Upon this affidavit he was cross-examined under an order for the purpose, and his depositions on such cross-examination were read on behalf of the plaintiff upon the application.

The objections to the order are substantially three:—1. That none of these depositions of the defendant could be read; 2.

(*a*) Present: Taylor, C.J., Killam, Bain, JJ.

That the defendant had no notice of an application to pay by instalments: 3. That if these were overruled, the order should not, upon the facts shown, have been made.

The first of these objections is based upon the order made under the Debtors Act, 1869, providing for the oral examination of the debtor before the judge. The same order, however, provides for making the application upon affidavit, and it appears to me that the debtor's own statements upon an examination into his affairs authorized by our statute, must be as admissible as an affidavit made on behalf of the plaintiff, which might well set forth material statements, written or oral, of the defendant himself. As to the depositions of the defendant on cross-examination on his affidavit, the same statute which authorizes the examination authorizes the reading of the depositions. If, under the English statute and orders, only oral evidence could be used upon the application, then I would agree that these depositions could not be so; but as the application may be made on affidavit according to the ordinary method, there can be no ground for excluding the defendant's own statements in the fact that under the English practice no other method existed for compelling them than an examination before the judge. As our statutes provide for their being made and used, they should be as available in an application of the kind in question as in any other or as voluntary statements of the debtor proved by affidavit.

It has been suggested that in consequence of the illness of his solicitor, the defendant had not, upon his last examination, the advantage of professional assistance, and that, if his solicitor had been present, the examination might have been so conducted that many statements and admissions might have been qualified or explained. It does appear, however, that counsel attended on behalf of the defendant upon the argument of the summons on which the order complained of was made, and it would have been very easy to supplement the defendant's material by affidavit making the proper qualifications and explanations, but this was not done nor was the original application to the court against the order sought to be made on any but the material before the learned judge who made the order, and in fact we have nothing additional before us now except the affidavit accounting for the non-attendance of counsel to support the motion. There is a

mere suggestion of counsel that there might have been such qualification or explanation.

As was said by Jessel, M.R., in *Chard* v. *Jervis*, 9 Q. B. D. 181, "the question is a pure question of fact whether 'it is proved to the satisfaction of the court that the person making default has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default.'"

In *Esdaile* v. *Visser*, 13 Ch. D. 421, upon appeal from an order of committal, James, L.J. said, "When all the materials for coming to a conclusion have been before the judge, and he has applied his mind to them, it would require an overwhelming case to induce the Court of Appeal to differ from the judge if he says he is satisfied of the debtor's ability to pay. The mischief would be enormous of encouraging appeals in such cases. . . . . Without laying down an inflexible rule, yet, as a general rule, I am of opinion that the Court of Appeal ought not to interfere with the conclusion of the judge of first instance when he says that the ability of the debtor to pay has been made out to his satisfaction."

The report shows that the original order in that case was made upon affidavit evidence alone.

In *Chard* v. *Jervis*, already referred to, Jessel, M.R., also said, with reference to *Esdaile* v. *Visser*, "Every remark of James, L.J., is entitled to respect, but when his lordship says that it would require an overwhelming case to induce the Court of Appeal to differ from the judge if he says he is satisfied of the debtor's ability to pay, I think the adjective rather too strong. I agree that it requires a strong case; indeed, we never ought to overrule the decision of the court below on a question of fact, unless it is clearly made out that the decision is wrong, and probably James, L.J., meant no more than that."

Upon these principles, I think that we would not have been entitled to interfere in the present instance, even if the learned judge had made the order absolute for committal. Althongh he did not go to that extent, but gave the defendant the indulgence of further opportunity to pay by instalments, there is no greater reason for interfering. It is true that the summons did not ask the latter; but if the learned judge was satisfied of the past ability to pay and of the insufficiency of the excuse for non-payment

he might substitute the less burdensome order. It might be different if there had not been evidence on which it was open to find that there had been the past ability to pay and a default insufficiently excused. The matter standing in this way it could be of no service to the defendant to re-enter the application to reverse the order. He has upon the present motion had the advantage of an opportunity to urge objections to the order. The application should be dismissed with costs.

Application dismisssd with costs.

CAMPBELL v. GEMMELL.

(In Appeal.)

Garnishee.—Debtor a trustee.—Chattel Mortgage Act.

Plaintiff sold a stock of goods to defendant; and took a mortgage upon it, and all goods which might be afterwards added to it, as security for payment. At the same time an agreement was entered into whereby the defendant was to carry on business with the stock, and, after making deductions for expenses, &c., was to remit the receipts to the plaintiff daily.

Creditors of the defendant having attached, by garnishee orders, certain debts due to the defendant for goods sold in the business,

Held, That such creditors were not entitled to such debts as against the plaintiff.

Garnishee orders take effect only as against that which the debtor can properly, and without violation of any other rights of any one else, grant.

The Chattel Mortgage Act does not apply to such a case.

In this suit an order or decree was made on the 15th of August, 1889, restraining the defendant from collecting any moneys owing in respect of a general business he had been carrying on in Virden, and appointing the plaintiff a receiver for the purpose of collecting these moneys.

The petitioners Weir and Musson, recovered judgments against the defendant on the 10th of August, for $1,680.26, and having issued executions therefor, caused attaching orders to issue attaching all moneys due to the defendant by a number of persons who were indebted to the defendant. The plaintiff claimed that he was entitled to receive the moneys owing, and thereupon, Weir and Musson filed a petition in the cause, praying that the court ought to direct that the plaintiff, as such receiver, should be barred from any claim to the moneys owing by the persons named, to the defendant for goods purchased by them in his store at Virden, and should declare that these moneys were duly attached by the attaching orders.

The plaintiff claimed to be entitled to the moneys by virtue of a chattel mortgage from Gemmel, the defendant, to him, dated the 16th of May, 1888, and an agreement made between the defendant and himself of the same date. The chattel mortgage recited that the plaintiff had that day sold to the defendant all the goods and merchandise which formed the stock-in-trade of Downes Brothers in Virden, and their shop fixtures, at the price of 65 cents on the dollar of the prices set out in the schedule thereof, amounting to the sum of $4,691.16, and to secure payment of this sum and interest the defendant mortgaged to the plaintiff all these goods, being in the premises lately occupied by Downes Brothers, and also, all goods, merchandise and furnishings and fixtures to be acquired by the mortgagor, or added to the said stock-in-trade at any time before the mortgage was fully paid, "it being understood that the mortgagor intends to carry on a retail business in the same premises, and that all goods, &c., that shall be acquired or added t stock as aforesaid, while any sum shall remain unpaid under this mortgage shall immediately become vested in and be the property of the mortgagee, subject to redemption hereunder." The mortgage was to be void on payment of the said sum with interest in six months after its date.

By the agreement made the same day between Campbell and Gemmell, after reciting the purchase of this stock by defendant, and his having executed the chattel mortgage, and that it was the intention that he should carry on the business in the premises lately occupied by Downes Brothers, of which the plaintiff as mortgagee had taken possession, it was agreed that the defendant was to occupy these premises as tenant to the plaintiff, at a rental

named, that the plaintiff was, from time to time, to supply goods to replenish the stock, and that all moneys received and collected by defendant in connection with the business were to be remitted daily to the plaintiff, after deducting expenses, &c.

It was admitted by the parties that the moneys sought to be attached were for goods sold by defendant, with plaintiff's consent, in the usual course of his business at this store in Virden, that the goods were part of his general stock, which was made up partly of goods sold by the plaintiff, as mentioned in the mortgage and agreement, and partly of goods bought afterwards by defendant from other parties, and added to his original stock. The question was, whether, under these circumstances, the attaching orders bound the moneys due by the persons named in them to the defendant, as against the plaintiff, under the above chattel mortgage and agreement.

The petition was dismissed by Mr. Justice Dubuc, and the petitioners appealed against his order.

G. A. F. Andrews and *A. J. Andrews*, for petitioners. The mortgage covered after acquired stock. In addition to statements of facts agreed to, it was admitted that executions were issued on the petitioner's judgments. Attaching orders were issued and served before decree in the suit.

The agreement and collateral together form a chattel mortgage for future advances. This is void under the Chattel Mortgage Act, as the mortgage which was filed did not shew true agreement. The special agreement was a part of the mortgage, and should have been filed with it. It was admitted that moneys owing to defendant by the garnishees, were partly for goods not supplied by plaintiff. *Barron on Bills of Sale*, 162; *Dedrick* v. *Ashdown*, 4 Man. R. 139; 15 Sup. C. R. 227. The mortgage involved a consent to the sale of the other goods. *Browne* v. *Fryer*, 46 L. T. N. S. 636. The mortgage is simply a lien or charge. By allowing a sale, the mortgagee loses his lien. The agreement was, that when Gemmell received moneys in hand, he was to pay over. By the attaching orders, these monies were stopped, and can never come to Gemmell's hands. The policy of the courts was against such agreements. *Ryall* v. *Rowles*, 2 White & Tudor, 777; Ridgway's Cases, 194; *Malcolm* v. *Scott*, 3 Ha. 45; *Field* v. *Megaw*, L. R. 4 C. P. 660; *In re Irwin, Ex parte Brett*, 7 Ch. D. 440; *Gorringe* v. *Irwell India Rubber*

Works, 34 Ch. D. 128 and 134; *Rogers* v. *Hosack's Executors*, 18 Wend. 318, 334; *Christmas* v. *Russell*, 14 Wall. 84. The control of the funds was not out of Gemmell. He was to make certain deductions; there could be no specific funds assigned until these deductions were made.

J. S. Ewart, Q.C., and *C. P. Wilson*, for plaintiff and receiver. This is not merely a question of equitable assignment; the question is, whether Gemmell was in any way, a trustee for plaintiff. *Roberts* v. *Death*, 8 Q. B. D. 319; *Re General Horticultural Co., Ex parte Whitehouse*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; *Hirsch* v. *Coates*, 18 C. B. 763; *Down* v. *Lee*, 4 Man. R. 189. By the mortgage, the mortgagor could sell, and the agreement was drawn up to show the terms on which this could be done. As to principle of equitable assignments. *Re Turcan*, 40 Ch. D. 5; *Official Receiver* v. *Tailby*, 13 App. Ca. 523; *In re Clarke, Coombe* v. *Carter*, 35 Ch. D. 109.

(*8th March, 1890.*)

TAYLOR, C.J.—Under the chattel mortgage dated 16th May, 1888, and the agreement of the same date, the defendant was, in fact, a trustee to collect and pay over to the plaintiff, the moneys, the proceeds of goods covered by the chattel mortgage and sold by the defendant, with the plaintiff's consent, in the ordinary course of his business. The moneys which the petitioners, the attaching creditors, claim to hold under their attaching orders, are moneys payable to the defendant by customers, for goods subject to the provisions of the chattel mortgage and agreement, sold by the defendant in the ordinary course of his business. That was admitted by counsel.

Now, the defendant could not, consistently with the terms of the mortgage and agreement, have used the goods, or the proceeds of them when sold, to pay the claim of the petitioners. He was bound, after deducting a specified sum for his own support, and the necessary expenses of the business, to pay over the entire proceeds of the sales to the plaintiff. As was said by Chitty, J., in *re General Horticultural Co.*, 32 Ch. D. 512, an attaching creditor can, under his order, only obtain what the judgment debtor could honestly give him.

The petitioners here could not, under executions issued in their suits, have seized anything beyond the defendant's interest in the

goods, and he could not, consistently with the terms of the mortgage and agreement, have honestly given them the proceeds of the goods, how, then, can they hold these under their attaching orders?

I have no doubt my brother Dubuc came to a correct conclusion, and that his order should be affirmed.

KILLAM, J.—The question for our decision in this case is one of the respective rights of the plaintiff and the defendant, as between themselves, under the agreement and mortgage of the 16th May, 1888. The petitioners claim as attaching creditors, and as such they can take only such rights as their debtor had. In the words of Cotton, L.J., in *Badeley* v. *The Consolidated Bank*, 38 Ch. D. 263, the garnishee orders "could only take effect as against that which the debtor" . . . "could properly and without violation of any other rights of any one else grant." Then could Gemmel properly and without violation of Campbell's rights, grant or assign away these debts? To determine this we must consider whether the latter had as against the former, a claim to the debts enforceable at law or in equity.

I shall not attempt a careful comparison of the various decisions upon equitable charges and assignments. They are many, and often turn upon very narrow distinctions, not important to the present question. This is not a case in which a debtor to whom other debts, in which his creditor has no previous interest, are due, has promised upon their collection to pay the amounts collected over to his creditor, or to pay his creditor out of them. The position of the parties under the bill of sale was that Campbell was the owner of all the stock.

True, the after acquired stock did not pass at law, but it did in equity. As was said by Lord MacNaughten in *Tailby* v. *The Official Receiver*, 13 App. Ca. 543, "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention, an assignment for value in terms present and immediate has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified."

Under the agreement, however, Gemmell could sell the goods in the ordinary course of business, and he was to remit the proceeds daily to Campbell. It is not stated that he could sell on credit, but he did so, and to that no objection has been suggested. It appears to me impossible to say that the proceeds, whether upon payment to Gemmell, or while owing for the goods, were ever intended to belong to any person but Campbell.

Browne v. *Fryer*, 46 L. T. N. S. 636, 45 L. T. N. S. 521, was a very different case. There, it is true, the goods were mortgaged by bill of sale to Bailey, but the shopkeeper was under no obligation to pay over the proceeds of sales. He was only to pay a rate of interest proportioned to the profits, for which purpose, and for that alone, he had to keep an account of debts due to him for the goods and of his receipts and collections. He was selling on his own account and for his own profit. Here, Gemmell was selling Campbell's goods, the proceeds of which he was to pay over to Campbell at once upon receipt. It may be that the contracts with the purchasers were his own, and that Campbell could not have sued the purchasers at law for the amounts, but it is clear that the proceeds, whether in cash or debts, were intended to be Campbell's just as much as if Gemmell were in every respect a mere agent to sell the goods for Campbell.

It has been argued that the bill of sale was void as against the petitioners, as being made partially to secure future advances and without compliance with the statute. It may be that, if the goods had been seized under execution, the bill of sale would not have supported a claim by Campbell on the ground mentioned, or, in respect of the after acquired stock, for want of sufficient description. But it was quite competent for Gemmell to assign to Campbell the proceeds of the goods, whether then acquired or to be afterwards acquired by the former, and such an assignment would have been in no way subject to the Chattel Mortgage Act. Then, for the purpose of determining the title to the proceeds, the position of the immediate parties under the bill of sale must be considered, and that position would be the same whether the Chattel Mortgage Act was complied with or not.

But it is said that Gemmell was interested in the proceeds of the goods, as he had a right to retain thereout, the expenses and his allowance of $50 per month. We know, however, that the plaintiff's claim is that Gemmell did not pay over what he ought

to have paid, but withheld more than the amount of these expenses and the allowance. If, however, the petitioners wish to contest this claim, they should, in my opinion, have an opportunity of doing so by a reference to the master. I would prefer not to express an opinion as to the course to be followed if it should appear that there was some balance due Gemmell at the time of the making of the attaching orders in respect of such allowance and expenses, as it has not been fully argued in that view. I will only say that this would not, in my opinion, entitle the petitioners to more than the amount which Campbell would, on this basis, have a right to retain. If Campbell were a mere agent or an ordinary trustee having a right to retain expenses and commission, this would not make the full proceeds attachable as against the principal or the *cestui que trust*. To the extent of the balance which Gemmell could properly retain, the orders should bind, and I think that it would be easy to protect the rights of the petitioners if there be such balance. The petitioners would have to take this reference at their own risk as to costs with a reservation of the question of their rights until after report, but if they do not wish the reference the order dismissing the petition should be affirmed with costs.

BAIN, J.—I do not think the circumstances of the case bear out Mr. Andrew's contention that the mortgage and the agreement together amount to a mortgage to secure future advances, and so come within the provisions of section 4 of The Chattel Mortgage Act.

The mortgage and the agreement being valid, I think the case should be disposed of on the grounds on which Mr. Ewart relied, namely, that as the defendant could not have used the goods, or the moneys arising from the sale of these goods, to pay the petitioners' claim, and as he was really a trustee to collect and pay over these moneys to the plaintiff, the petitioners cannot take by their attaching orders what the defendant could not, himself, honestly have given them.

The legal and beneficial interest in the goods described in the chattel mortgage was in the plaintiff, and I did not understand Mr. Andrews to question that the effect of the mortgage and the agreement would be to give the plaintiff the beneficial interest also in the goods that were to be afterwards acquired by the defendant. That they would have this effect is, I think, clear.

In *Holroyd* v. *Marshall*, 33 L. J. Chy. 193, the principle was laid down by the House of Lords., "that if a vendor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately. This, of course, assumes that the supposed contract is one of that class of cases of which a court of equity would decree the specific performance." In this mortgage and agreement the character of the goods to be afterwards acquired, and the place where they are to be found is indicated sufficiently to "ear mark" them; and that such a description as this is sufficiently specific to bring the contract within the above rule, is shewn by numerous cases. *Reeve* v. *Whitmore*, 9 Jur. N. S. 243; *Perrin* v. *Wood*, 21 Gr. 492; *Brown* v. *Bateman*, L. R. 2 C. P. 272; and *Lazarus* v. *Andrade*, 5 C. P. D. 318.

All these goods, then, having been the plaintiff's, subject to the defendant's right to redeem, the defendant could not have used them to pay the petitioners' claim, nor could the petitioners under their executions, have seized anything but the defendant's interest in them. The plaintiff allowed the defendant to sell the goods in the ordinary course of business, but the agreement between them clearly expresses the intention that the proceeds of the sales were to take the place of the goods sold, and were to go to the plaintiff, and that, indeed, the defendant was simply to collect the moneys for him; and it would be inequitable that the petitioners, by attaching these moneys in the hands of the purchasers of the goods, should be able to defeat the intention of the parties. In *Hirsch* v. *Coates*, 18 C. B. 757, it was held that a garnishee order has no operation upon debts of which a judgment debtor has already divested himself by a *bona fide* assignment. *In re General Horticultural Co.*, 32 Ch. D. 512, Chitty, J., said, "The C. L. P. Act, 1854, is, so far as the attachment of debts is concerned, in *pari materia* with 1 & 2 Vic. c. 110, and as to a charging order under these latter Acts, it has now been settled that it charges only what the judgment debtor himself can honestly deal with; that rule is now settled;" and he held that an equitable charge given before a garnishee order takes

priority of the order, even in the absence of notice, and that the judgment creditor by his garnishee order, can only obtain what the judgment debtor could honestly give him. The same principle was followed by Stirling, J., in the case of *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536.

By the agreement Gemmell was to be at liberty to draw from the receipts of the business $50 per month for his own support; and it is provided that this sum and all necessary expenses of the business, including insurance, shall first be deducted by Gemmell from the sums collected and received by him in connection with the business, which he was to remit daily to Campbell. There is nothing before us to shew, or suggest, that anything was coming to Gemmell on account of his $50 a month or for expenses, and I do not think we need consider whether, supposing something were due him, these moneys would be attachable to that extent. Presumably, he deducted from the moneys that came into his hands all that he was entitled to.

I think the learned judge was right in dismissing the petition, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

CALLOWAY v. PEARSON.

(IN EQUITY.

Injunction.—Plaintiff's title to office.—Wrongful assumption of jurisdiction.—Injunction where mandamus proper.—Evidence.

Plaintiff having been elected alderman, and taken his seat, and having been unseated by order of the County Judge, for lack of property qualification, obtained an *ex parte* injunction to restrain the Mayor from proceeding to a new election, and from refusing to permit the plaintiff to sit and vote as a member of the Council, upon the ground that the County Judge had no jurisdiction. Upon a motion to continue the injunction.

Held, 1. That the plaintiff not being in fact, qualified, no injunction should be granted.

2. The court interferes by injunction only to prevent or restrain injuries to civil property and in defence of, or to enforce, rights which are capable of being enforced at law or in equity. The court has no jurisdiction to restrain persons from acting without authority.

3. Although under section 9 of the Q. B. Act of 1886, the court may issue an injunction in cases where the plaintiff would have been entitled to a mandamus at law, yet it must appear that the circumstances would have justified a mandamus; and the only ground of complaint being, that the defendant "threatens and intends and will unless restrained," &c. *Held*, That the right to mandamus had not been shown.

1. In any case, the absence of the jurisdiction of the County Judge would have to be very fully and clearly shewn.

This was a motion to continue an interim injunction to restrain the defendant who was the Mayor of the City of Winnipeg, from acting in pursuance of an order or declaration of the County Court Judge declaring the election of the plaintiff as an alderman of the City to be null and void, and from taking any steps in pursuance of such order to hold a new election, and from interfering with plaintiff's right to sit and vote at meetings of the Council.

The judge declared the plaintiff's election to be void, because he had not the qualification required by the Municipal Act to

make him eligible for election; and beyond stating generally that he was duly elected, the plaintiff did not allege or attempt to shew that he was qualified, and the affidavits filed in reply shewed that he was not. The plaintiff's contention, however, was that before the trial of the eleetion petition, certain of those who had signed the petition withdrew their names, and that after their withdrawal, there were not at least ten petitioners as required by the statute, and that, therefore, the judge in proceeding with the matter acted without jurisdiction and his declaration or order avoiding the election was invalid and a nullity. The statute under which the contestation took place, was 49 Vic. c. 52, ss. 207, *et seq.*

J. S. Ewart, Q.C., for the plaintiff. The court always had jurisdiction to restrain the holding of an illegal meeting of a corporation. *Cannon* v. *Trask*, L. R. 20 Eq. 669; *Isle of Wight Ry. Co.* v. *Tahourdin*, 25 Ch. D. 320; *Waddell* v. *Ontario Canning Co.*, 18 Ont. 41; to restrain wrongful exclusion of a member, *Hopkinson* v. *Exeter*, L. R. 5 Eq. 63; *Fisher* v. *Keane*, 11 Ch. D. 353; *Labouchere* v. *Wharncliffe*, 13 Ch. D. 346; or of a master or clergyman, *Hayman* v. *Rugby*, L. R. 18 Eq. 28; *Cooper* v. *Gordon*, L. R. 8 Eq. 249; *Dean* v. *Bennett*, L. R. 9 Eq. 625; 6 Ch. 489; *Weir* v. *Mathieson*, 11 Gr. 401; to restrain directors acting as such. *Imperial Hydropathic Co.* v. *Hampson*, 23 Ch. D. 1; to restrain taking a municipal vote, *Helm* v. *Port Hope*, 22 Gr. 273; *Davies* v. *Toronto*, 15 Ont. 33; to restrain directors from excluding others, *Pullbrook* v. *Richmond*, 9 Ch. D. 610; to restrain expulsion from municipal council, *Mearns* v. *Petrolia*, 28 Gr. 98. Court has power to grant injunction where mandamus formerly the only remedy, Q. B. Act of 1886, s. 9; *Aslatt* v. *Southampton*, 16 Ch. D. 143; *North London Ry.* v. *Great Northern Ry.*, 11 Q. B. D. 30; *Marsh* v. *Huron College*, 27 Gr. 623; *Re Napanee*, 29 Gr. 395; or where prohibition formerly granted, *Hedley* v. *Bates*, 13 Ch. D. 498, as explained by *Stannard* v. *St. Giles*, 20 Ch. D. 190.

W. H. Culver, Q.C., and *George Patterson*, for defendants.

Plaintiff being full of the office, mandamus is the only remedy, *Reg.* v. *Mayor of Oxford*, 6 Ad. & E. 349; *Reg.* v. *Mayor of Leeds*, 11 Ad. & E. 512; *Rex* v. *Blooer*, 2 Burr. 1045; *Queen* v. *Bangor*, 18 Q. B. D. 349; 13 App. Ca. 241. A declaratory decree will not be made unless relief can be asked for, *Brooking*

v. *Maudslay*, 38 Ch. D. 641. There is no question of property or even *status* involved. If the proceedings are illegal, then plaintiff needs no injunction. *London* v. *Cross*, 31 Ch. D. 371; *North London* v. *G. N. Ry.*, 11 Q. B. D. 30. *Quo warranto* is the plaintiff's remedy in case any one usurp his office, *High on Ex. Leg. Rem.*, §§ 619, 641, 677; *High on Injunctions*, §§ 1235, 1242, 3. This court will not review the procedure of another court, *Bateman* v. *Baynton*, L. R. 1 Ch. 368; *High on Inj.* § 1256; *Dillon on Mun. Corps.*, 272. One petitioner cannot withdraw without the assent of the others. The city clerk, (who is the returning officer) ought to be a party, for he may call a meeting of electors, and he is the one to carry it through, Mun. Act 1886, ss. 221, 120, 126, 132, 169. The city ought to be a party, *McLellan* v. *Assiniboia*, 5 Man. R. 127, 265, is distinguishable. Even if remedy open by bill, it must be upon prayer for mandamus. Plaintiff not qualified, and so not entitled, *Dillon*, § 196. As to injunction being a substitute for prohibition, *Short on Inf.*, 483; *Hedley* v. *Bates*, 13 Ch. D. 498; *Stannard* v. *St. Giles*, 20 Ch. D. 196. Plaintiff has no *locus standi*, not shewing himself to be elected. *High on Inj.*, § 935, 938; *High on Ex. Leg. Rem.*, 758. One of several co-plaintiffs cannot withdraw without the consent of others. *Lush's Practice*, 227; *Emery* v. *Mucklow*, 10 Bing. 23; *Whitehead* v. *Hughes*, 2 C. & M. 318.

J. S. Ewart, Q.C., in reply. There has been a sufficient demand and refusal, *Reg.* v. *East India Co.*, 4 B. & Ad. 530; *Reg.* v. *Conservators*, 8 Ad. & E. 901; *Reg.* v. *Allen*, L. R. 8 Q. B. 76; *Reg.* v. *Hertford College*, 3 Q. B. D. 693; *Re Davidson*, 24 U.C.Q.B. 66; *Atty. Gen.* v. *Boston*, 123 Mass. 460. No technical demand and refusal necessary, *Malmesbury* v. *Budd*, 2 Ch. D. 113.

(22nd February, 1890.)

BAIN, J.—Supposing the matter is one in which the court has power to interfere by injunction, I should think the fact that the plaintiff has failed to shew that he is legally eligible and qualified to hold the office he claims, would be a sufficient reason why the Court, in its discretion, should refuse to interfere. But even if the plaintiff had shewn that he is duly qualified, it seems clear that under the circumstances, the Court has not jurisdiction to interfere. The plaintiff alleges that he was duly elected and took his seat as alderman, and has acted and still continues to

act as such alderman, but that the defendant threatens to call a meeting of the ratepayers to proceed to the election of another alderman in the plaintiff's place, and that he will refuse to recognise the plaintiff's right to sit and act as an alderman, and will refuse to allow him to sit and vote at meetings of the council.

It appears, then, the plaintiff is in the full occupation and enjoyment of his seat as alderman, and that he performs the duties belonging to the position; and no act or attempt to remove or oust him from his seat, or interference with him in the discharge of his duties is alleged, beyond the general threat alleged to have been made by the defendant. The court only interferes by injunction to prevent or restrain injuries to civil property, and in defence of or to enforce rights which are capable of being enforced at law or in equity, and further, if, as the plaintiff contends, the judge's order declaring the election to be void is a nullity, then the threats alleged to have been made by the defendant are idle and empty, and anything he might do towards putting his threats in execution would also be null and invalid. In threatening to act upon the order, supposing it to be null, the defendant is assuming a power and an authorty he does not possess, and even under the Judicature Act, the Chancery Division of the High Court in England, has no jurisdiction to restrain persons from acting without authority. In *London & Blackwall Ry. Co.* v. *Cross*, 31 Ch. D. 354, Fry, L. J. said, "In my judgment the practice and procedure of the court do not favor the conclusion that there is any such general jurisdiction to interfere by injunction upon a false assumption of authority, and I think that such an assumption of authority would be entirely wrong. . . . . In my judgment, the time to try the question of authority is when proceedings are taken on the footing of acts done by the claimant, or the claim is made by the claimant."

The case of *Aslatt* v. *Southampton*, 16 Ch. D., 143, was cited and relied on by the plaintiff's counsel in support of his contention that the court has jurisdiction to grant the injunction asked for. But in that case a meeting of the ratepayers had actually been summoned to declare the plaintiff's office void and to elect his successor, and the case itself is a sufficient authority to shew that prior to the Judicature Act, the Court of Chancery had not jurisdiction to grant an injunction under such

circumstances, but that the plaintiff would have been left to the appropriate remedy that the Common Law Courts provided in such cases by mandamus or *quo warranto*. And whether, even under the Judicature Act, which empowers the Chancery Division to interfere by injunction in cases in which the Court of Chancery could have not interfered, the court was right in granting the injunction in this case, has been questioned in the Court of Appeal. *North London Ry. Co.* v. *Great Northern Ry. Co.* 11 Q. B. D. 30.

Mr. Ewart refers to section 9 of the Q. B. Act of 1886, which provides that this Court in any suit on the equity side, "shall have jurisdiction in all matters which would be cognisable in a court of law, and may grant therein to any person all such relief and remedies as he may be entitled to," and urges that, under this provision, if the plaintiff would be entitled to a mandamus or other relief at law, he is entitled to an analogous remedy according to the practice of the equity side of the court. This may be so, but before the argument can avail to be of service to the plaintiff, it must be shewn that he would be entitled to a remedy by mandamus or otherwise, in a court of law. But the facts shewn on this motion are not such, I think, as would entitle the plaintiff to a mandamus or any other relief at law. The case of *Mearns* v. *Petrolia*, 28 Gr. 98, was referred to in this connection, but there, the council had actually passed a resolution declaring the seats of the plaintiffs, as councillors, vacant, and ordering a new election, and the learned Vice-Chancellor was satisfied, on the evidence before him of the defendants themselves, that the plaintiffs had been illegally prevented from exercising the duties of their office. He thought, therefore, that as the plaintiffs would certainly have been entitled to a mandamus to compel the council to admit them to their seats, a provision in the Ontario Ad. of Justice Act similar to the one in our Q. B. Act, justified him in doing by a mandatory injunction what the court would have been bound to do by a writ of mandamus, had one been applied for. The learned Vice-Chancellor granted the injunction on the interlocutory application; and it is evident that before this case could be followed, the plaintiff's right to a mandamus would have to be made clear beyond question.

Assuming then, that, as the plaintiff contends, the order of the judge declaring the election void is null and invalid, I do not think the plaintiff is entitled to the injunction. Whether, under the circumstances alleged, the judge had jurisdiction to make the order, is a question I do not need to decide. But, the County Court Judge having been constituted by the Legislature a special tribunal to try and decide these election petitions, the want of jurisdiction in that tribunal would have to be very fully and clearly shewn before this court would interfere to prevent its judgment or decision from being given effect to as the Legislature has directed.

The provisions of the Municipal Act referring to the presentation and trial of petitions in contested municipal elections, are very general in their terms, and the practice to be followed in the proceedings is not laid down with any particularity or definiteness. The present case, as well as several others that have recently been before us, have come into this court principally on account of the practice in the court below not having been provided for in important particulars, and it seems to me desirable that this omission in the present Municipal Act should be remedied.

The motion to continue the injunction is refused. Question of costs reserved.

Motion to continue injunction refused.

McMICKEN v. FONSECA.

(In Equity.)

Statutes.—Construction.—"From day to day."

In a statute regulating the procedure upon a contested election, it was provided that the judge "shall adjourn from day to day, until he has pronounced his final judgment;" but there was no provision declaring the proceedings void if this provision was not observed.

Held, That the provision was directory only, and its non-observation did not vitiate the judge's decision.

This was a bill similar to that filed in *Callaway* v. *Pearson*, ante, p. 364, the ground of objection to the county judge's order, however, being as stated in the head note.

W. R. Mulock, Q.C., for plaintiff. Question turns upon the language of section 219 of the Municipal Act, 49 Vic. c. 52. "If the trial of such contestation is not concluded at the close of the sittings of the court during which it began, the judge may continue the same, and shall adjourn from day to day until he has pronounced his final judgment upon the merits of the same." By the Interpretation Act the word *shall*, is imperative. He referred to *Re Addington Election*, 39 U.C.Q.B. 131.

W. H. Culver, Q.C., and *George Patterson*, for the defendants. The plaintiff has estopped himself by his conduct, from objecting. "From day to day" is only directory. *Robinson* v. *Robinson*, 35 L. T. N. S. 337. The word "shall" is not always imperative, *Re Lincoln Election*, 2 Ont. App. R. 341; *Maxwell on Statutes*, 452, 453, 459, 460; *Wilberforce on Statutes*, 193, 205, 206, 207, 209; *Richardson* v. *Shaw*, 6 Pr. R. 296; *Re Goderich*, 6 Pr. R. 213; *Reg.* v. *Prudhomme*, 4 Man. R. 261; *Liverpool* v. *Turner*, 2 De. G. F. & J. 507; *Reg.* v. *Heffernan*, 13 Ont. R. 627; *Reg.* v. *Robertson*, Ib. 80.

The judge had jurisdiction in the case and it is procedure only that is complained of, for which prohibition will not lie. *Barnsley Canal Co.* v. *Twidell*, 7 Beav. 19.

The bill does not allege that the plaintiff is in office. *Reg.* v. *McIntosh*, 46 U. C. Q. B. 98. Nor that plaintiff qualified to act as alderman. *Dillon on Municipal*

Institutions, § 196. Injunction not the proper remedy. *Aslatt* v. *Southampton*, 16 Ch. D. 147; *North London Ry.* v. *Great Northern Ry.*, 11 Q. B. D. 30; *Dillon*, § 907; *Bateman* v. *Boynton*, L. R. 1 Chy. 368; *Stannard* v. *St. Giles*, 20 Ch. D. 196-7; *Mearns* v. *Petrolia*, 28 Gr. 98; *Kerr on Inj.*, 1. Mandamus the proper method to restore an alderman to office, *Short*, 284. Fonseca an improper party. If defendants right in proceeding no injunction, and if wrong they will be wrongdoers and so liable, *London & B. Ry.* v. *Cross*, 31 Ch. D. 354. The mayor is not a proper party, for he has no power to do anything, sections 120, 127 of the Municipal Act. The city should be a party, *Aslatt* v. *Southampton*, 16 Ch. D. 147.

W. R. Mulock, Q.C., in reply. Injunction will lie although defendants wrong, *Hedley* v. *Bates*, 13 Ch. D. 498, where an injunction granted to restrain a landowner to take proceedings before justices of the peace on an irregular notice; *Weir* v. *Mathieson*, 11 Gr. 383; *Helm* v. *Port Hope*, 22 Gr. 273; *Dunnett* v. *Fonneri*, 25 Gr. 199. As to acquiescence, *Short on Informations*, 459, 461; *Re Bischoffsheim*, 20 Q. B. D. 262; *Reg.* v. *Shropshire*, 20 Q. B. D. 248. The city not a proper party, *McLellan* v. *Assiniboia*, 4 Man. R. 265. A declaratory decree may be asked, G. O. 176.

(*7th February, 1890.*)

TAYLOR, C.J.—The ground on which relief is claimed is, that the provision in the statute 49 Vic. c. 52, s. 219, as to the judge proceeding from day to day, was disregarded.

That may be imperative in one sense, but as the statute does not render a proceeding by the judge where he has not so adjourned, a void proceeding, it must be taken as directory. The authorities seem clearly to so hold. That being so, the order is not one made without jurisdiction.

I have great doubt, too, whether the court has any jurisdiction to grant an injunction in such a case as the present. After granting the interim injunction, I began to have grave doubts as to the propriety of having done so. *Aslatt* v. *Southampton*, 16 Ch. D. 143, is the only case, and that has been doubted; it was under the Judicature Act. The order being one made by a judge having jurisdiction to make it, I cannot grant the injunction to stay proceedings under it. The motion to continue the injunction must be refused.

Motion refused.

ATTORNEY-GENERAL v. MACDONALD.

(IN APPEAL.)

Statutes.—Construction.—Parties.—Crown choosing forum.

After the S. & R. M. Railway had incurred some liabilities, its name was by statute, changed to the N. W. C. Ry. Co. The Act provided that, "the existing liabilities of the Company for work done for the said Company, shall be a first charge upon the undertaking."

A further Act provided that, "the Company shall remain liable for all debts due for the construction of the railway, and if such debts are due to contractors, shall cause all just claims for labor, &c., to be paid by such contractors."

Afterwards a charter was issued to the G. N. W. C. Ry. Co., in which that railway covenanted with Her Majesty to pay all debts due by the above-named railways, "and will cause all just claims for labor, &c., due by contractors, to be paid by such contractors."

Upon an information against the last named Railway Company, and certain contractors of the first named railway, to enforce the covenant,

Held, 1. That the railway was liable only to the extent to which the previous railway was liable to its own contractors, and not for sums due by such contractors to workmen beyond the amount of that liability.

2. If otherwise, the workmen ought to be parties to the bill.

Per TAYLOR, C.J.—The Crown may, when proceeding in relation to property to which the Sovereign is entitled in right of the Crown, choose its own forum; but otherwise, where the Crown claims no beneficial interest.

This was an information by the Attorney-General for Canada, at the relation of E. J. Chapman, against Alexander Macdonald, W. A. Preston and The Great North West Central Railway Co. It alleged the incorporation of the Company under various statutes of the Dominion; that the Company made a contract with Macdonald & Preston for grading a portion of the line; that the contractors sublet to Chapman, the grading of a portion; that Chapman hired a large number of men, purchased an extensive outfit, and during 1883 performed all the work for which he contracted, to the satisfaction of the contractors and the Company's engineers, and that he furnished to the contractors, a large amount of materials, supplies and board of men and horses. It then alleged that the contractors had furnished to Chapman an

account of the amount said to be payable for the work done by him, and admitted that he received from them supplies to a certain amount, and that they paid so much on time checks given by him to his workmen. It next alleged that Chapman was still indebted to workmen for wages earned by them for work on the grading, for payment of which they were pressing, but he was a poor man wholly unable to pay the amounts justly and truly due and owing to them. Then, it was claimed that in the account given by the contractors to Chapman, he had not been allowed full rates for part of the work done, and for other part, no allowance had been made at all, and a sum was named as the true amount due, while it was said the contractors claimed a balance as due in their favor. Unsuccessful efforts to procure a settlement were then alleged, with the statement that the contractors had no property or means out of which the claim could be realized. It was also alleged, that owing to the failure of the contractors to pay Chapman, he had been sued by one of his workmen, and his plant and outfit sold under legal process, at a great sacrifice. Many of the workmen were said to be in poverty and distress, but Chapman was unable to pay them on account of the contractors' failure to pay him.

The letters patent, issued on 22nd July, 1886, to the Company, as the Great North West Central Railway Co., pursuant to 49 Vic. c. 11, were then referred to, and the 27th clause of the charter was set out as follows:—"Provided always, that the company hereby incorporated shall be, and remain liable for, and shall pay and discharge all debts which were due on or before the 2nd of June last past, by the North West Central Railway Co., and the Souris and Rocky Mountain Railway Co., or either of them, for railway construction, and which have not since been paid and discharged, and the said Company hereby incorporated in accepting this charter, do, for themselves and their successors, covenant, promise and agree to and with Her Majesty the Queen, her heirs and successors, that they will fully pay and discharge all such debts, and will cause all just claims for labor, board of laborers employed in or about such construction, and building materials in respect of such construction, due by contractors, to be paid by such contractors." Applications to the Company to pay the debt due Chapman, and neglect and refusal to do so were then alleged; also, that the accounts between Chapman and the

contractors were long and complicated and could not be settled and adjusted without the assistance of the court. The prayer was, that accounts might be taken of the amount due from the contractors to Chapman, of what was due from him to his workmen, for payment by the Company and contractors, for costs, and further and other relief. The Company demurred for want of equity, and for want of parties, neither the workmen nor laborers or any of them being made parties. After argument the demurrers were overruled by Mr. Justice Dubuc, and from the order then made the Company appealed to the Full Court.

J. H. D. Munson, for defendants The Great North West Central Railway Co. The information is defective for want of parties, the laborers not being parties. It asks for an account of moneys due to the laborers; there is no allegation that they are too numerous to be made parties, or that they are without the jurisdiction. Chapman's interests and that of the laborers conflict. *Michie* v. *Charles*, 1 Gr. 125; *Harrison* v. *Stewardson*, 2 Ha. 530; *Holland* v. *Baker*, 3 Ha. 68; *Adair* v. *New River Co.*, 11 Ves. 430; *Williams* v. *Salmond*, 2 K. & J. 463. The covenant is with the Crown; the information does not make any case for the Crown, nor does it ask any payment to the Crown. There is no provision in the statutes or charter for payment to sub-contractors, only to contractors with the Company. The court will not decree specific performance of an agreement to pay money. *Fry on Specific Performance*, p. 434. The information does not state that as between the Company and Macdonald and Preston there is any debt. This is essential. Chapman was a sub-contractor. *Smith* v. *Gordon*, 30 U. C. C. P. 553.

H. E. Crawford and *G. A. Elliott*, for the Attorney-General. To understand the covenant it is necessary to look at the following statutes, 43 Vic. c. 58; 44 Vic. c. 47; 45 Vic. c. 79; 47 Vic. c. 72; 49 Vic. c. 11; 49 Vic. c. 74. The charter was issued in 1886 and confirmed by 51 Vic. c. 85. Contractors includes sub-contractors. One object is to have the accounts taken, and it is alleged the accounts are lengthy and complicated; this is a reason for coming to equity. *Lord Ranelagh* v. *Hayes*, 1 Vern. 189; *Re Crozier*, 24 Gr. 537. Most of the cases cited for defendant were before 15 & 16 Vic. c. 86, ss. 49, 51; *Clements* v. *Bowes*, 1 Dr. 694; *Williams* v. *Salmond*, 2 K. & J. 468; General Orders, 35, 36; Rule 4. The fourth paragraph of the bill

shows the parties are very numerous, and the nature of the undertaking set out in the bill indicates that they must be numerous.

J. H. D. Munson, in reply. *Mitford on Pleading*, p. 119, shows that an information should be as certain and accurate as a bill of complaint. The case of *De Hart* v. *Stevenson*, 1 Q. B. D. 313, shows the present English practice. *Smith* v. *Doyle*, 4 Ont. App. R. 471; *Barker* v. *Walters*, 8 Beav. 92; *Commi Sewers of City of London* v. *Gellatly*, 24 W. R. 1059. The cases referred to in *Horseman* v. *Burke*, 4 Man. R. 245, are cases of indemnity bonds; they proceed upon the principle *quia timet*.

The Act of 1886 was not to come into force until after proclamation, and it is not shown any proclamation was made. The statute 15 & 16 Vic c. 86, and the general orders cited relate only to cases where matters of property are concerned.

(*8th March, 1890.*)

TAYLOR, C.J.—If this is a suit for specific performance, and it looks very like that, it cannot be maintained. That a court of equity will not decree specific performance of a covenant, or mere agreement to pay money, seems to have been decided as long ago as the time of Lord Chancellor King, see note to *Hall* v. *Hardy*, 3 P. W. 190, and it is recognized law to the present day, *Fry Spec. Per.*, 434.

It was sought to maintain the information on the ground that the Crown has a right to choose its *forum*, and can sue in any court. There is no doubt it may do so, when proceeding in questions relating to the property to which the Sovereign is entitled in right of the Crown, but no such question arises here, for by this information the Crown claims nothing. There is no allegation that the Crown has any beneficial interest in the matter whatever.

The relator bases his claim to payment by the Company, upon certain provisions in Acts of Parliament, and on the charter, incorporating or connected with the Company. It was first incorporated by 43 Vic. c. 58, D., as the Souris and Rocky Mountain Railway Co., and that Act was amended by 44 Vic. c. 47, D., and 45 Vic. c. 79, D. Then, by 47 Vic. c. 72, D., the name was changed to the North West Central Railway Co., and section 7 of that Act provided that, "The existing liabilities of the company for work done for the said Company shall be a first

charge on the undertaking." By 49 Vic. c. 74, D., the previous Acts were continued in force, and the time for construction of the road was extended. Section 3 of that Act provided, that, "The Company shall remain liable for all debts due for the construction of the railway, and if such debts are due to contractors, shall cause all just claims for labor, board and building material, in respect of such construction, to be paid by such contractors, and in default thereof, shall be directly liable to the persons having such claims." About six weeks after the passing of that Act a charter was issued to the Company, as The Great North West Central Railway Co., under the provisions of 49 Vic. c. 11, D., "An Act authorizing the grant of certain subsidies in land for the construction of railways therein mentioned," and this charter was by 51 Vic. c. 85, D., declared to have the same force and effect as if it were an Act of Parliament. Clause 27 of that charter, contains the covenant set out in the 18th paragraph of the information, which provides that the Company shall remain liable for, and shall pay and discharge all debts due on or before 2nd June, 1886, by the Company under its former names, and not since paid, and by which the Company covenanted with Her Majesty to pay and discharge all such debts, and cause all just claims for labor, board of laborers and building materials due by contractors, to be paid by such contractors.

Now, under that covenant, the Company are to remain liable for all debts due before a certain date, that is, for the debts mentioned in the 49 Vic. c. 74, s. 3, debts due for construction of the railway. The effect of that section 3 seems to be, that if the debts are due to contractors, the Company are to see to the application of the money by the contractors, and if they do not see that the contractors satisfy all the just claims specified, the Company is to be directly liable to the claimants. The contractors spoken of there must mean contractors with the Company, and cannot include sub-contractors The Company were not in any way liable to the sub-contractors. The contractors would be liable to them, but the Company would be liable only to the persons with whom they contracted directly, that is the contractors. The foundation of the whole of the statutory liability is found in sec. 7 of 47 Vic. c. 72, D., which says, "The existing liabilities of the Company for work done for the said Company shall be a first charge on the undertaking." For these debts or

liabilities, the Company remain liable, under 49 Vic. c. 74, s. 7, and the covenant in clause 27 of the charter. But, by section 7, it is, "if such debts are due to contractors," that the Company are to see to the application of the money, that they are to cause all just claims to be paid, and that on default they are to be directly liable to the claimants. If nothing is due to the contractors, the Company is under no obligation to see that the contractors pay all just claims, nor do they, in default of such payment, incur any direct liability. Now, this information, nowhere from beginning to end, alleges that any sum of money, whatever, is due from the Company to the contractors. The only allegations are, that there is money due from the contractors to Chapman, and from him to his workmen. Unless there is money due from the Company to the contractors, I cannot see how Chapman can have any claim under these statutory provisions, or under the covenant, either at law or in equity.

If the suit can, by any possible amendment, be maintained at all, I have no doubt the workmen are necessary parties. Chapman and they have not a common interest. They have, to the extent of seeking to hold the Company liable, but not beyond that. There is a prayer for an account being taken of what is due from Chapman to them, and as to that, their interests are adverse.

It was argued that the information contains sufficient to show that they are too numerous to be made parties, but it does nothing of the kind. It alleges in one place, that Chapman hired a large number of men, and in another, that many of his workmen and laborers are in poverty and distress, that is all. The ordinary rule of pleading is, that all persons interested must be parties, and where they are not, the record must disclose a sufficient reason for departure from the settled rules, *Michie* v. *Charles*, 1 Gr. 125. Or, as V.C. Wigram stated it in *Holland* v. *Baker*, 3 Ha. 76, the plaintiff must state distinctly and particularly what the case is upon which he relies as a ground for deviating from the general rule of the court. In that case, the statement that a deed, besides being executed by three of the defendants, had been so, "also by divers other persons, too numerous (being forty in number, or thereabouts) to be made parties individually to this suit; and in case they were individually made parties to this suit, the same could not be effectually prosecuted," was said by

the learned judge to be, "far too meagre to satisfy the court." In the case of *Wilson* v. *Stanhope*, 2 Coll. 629, will be found allegations which saved a bill from a demurrer for want of parties, although even there, V.C. Knight Bruce said, there might possibly be cases in which that allegation as to the number of shareholders would be too vague and loose. At all events, the court only dispenses with the presence of parties interested where there is some representation of their interest by parties to the record. Here there is absolutely no representation of the workmen's interest at all. Gen. Orders 35 & 36, rule 4, referred to in the argument, have no application. They apply to suits for carrying out the trusts under settlements or wills, and in each of them provision is made for there being before the court, some of the parties interested.

In my opinion, the order moved against, should be reversed with costs, and both demurrers allowed with costs.

KILLAM, J.—I agree in the conclusions of the learned Chief Justice.

Upon the argument before us, counsel for the informant was, apparently, unable to point out any definite principle as the basis of the information. He relied merely on a vague general contention that relief could be obtained in no other way. But this idea arises from the evidently existing circumstance that the information is filed in the interest of the sub-contractor and workmen and from the framer and the counsel directing their attention wholly to obtaining payment for them of their alleged claims. The suit is distinctly one for specific performance of the special provision in the instrument of incorporation of the defendant Company, on which the relator and the informant rely. That the alleged obligation arises in that way does not appear to place it in any different position, which warrants this suit, from one arising under a distinct and separate covenant or agreement to pay money to a third party. If such covenant or agreement were, by way of indemnity, against a liability of the covenantee or promisee, a bill might be supported upon the authorities to which I had occasion to refer in *Horsman* v. *Burke*, 4 Man. R. 245, as a bill *quia timet*. But, otherwise, I can find no authority for enforcing specific performance of the covenant for the mere payment of money. I know of no authority warranting the opinion that the Crown has any better title than any other cov-

enantee, to prefer such a suit. Even if an information or bill in equity could be filed in respect of a claim for damages for breach of covenant, whether by prerogative of the Crown or under 49 Vic. c. 14, s. 9, M., this is not such, for the prayer is for accounts of moneys due the relator and his workmen and payment to them, not for payment to the Crown, or to those parties as beneficially interested in the covenant, of damages for the non-performance.

But the important question is one of the construction of the provision referred to. It appears to me that it can only be properly understood by a consideration of the enactments relating to the old Company, and that authorizing the formation of the present one. By the Act 47 Vic. c. 72, D., changing the name of the old Company, "The existing liabilities of the old Company for work done for the said Company shall be a first charge on the undertaking." Then came the Act 49 Vic. c. 74, D., continuing in force the previous Acts and extending the time for the construction of the railway. This was subject to a condition which was, apparently, not performed, so that the charter lapsed. The provisions of that Act consequently never became operative, but form an important part of the legislative history of the undertaking, in the light of which the liability of the present Company must be judged. By the third section, "The Company shall remain liable for all debts due for the construction of the railway, and, if such debts are due to contractors, shall cause all just claims for labor, board and building material in respect of such construction, to be paid by such contractors, and, in default thereof, shall be directly liable to the persons having such claims."

It would be unreasonable to suppose that it was intended by this enactment to increase the amount of the liabilities of the Company. It was to "remain" liable for debts, that is, evidently, for its own debts, and to the extent of those debts it was to see to the application of the moneys by contractors to whom they were owing.

At the same session of parliament, evidently to provide for the event of failure of the old Company to fulfill the condition referred to, authority was by the Act 46 Vic. c. 11, s. 5, D., given to the Governor General-in-Council to grant a charter incorporating a company to carry out the same undertaking. That section contained the proviso "that in the event of a company being so incorporated it shall be provided in the charter that such com-

pany shall be subject to all the present legal obligations of the North West Central Railway Company, in relation to the said railway." It was under that enactment that the present defendant Company was incorporated and the provision in the form of a covenant, set out in the bill, inserted in the letters patent of the corporation. Here again, the statute contemplated only an obligation of the new Company for the liabilities of the old one, and so ran the first part of the covenant. Then, having reference to the former legislation, and the section requiring the provision in the charter, I cannot interpret the latter portion of the covenant as intended to increase the aggregate of liability. Evidently the new Company was to perform the obligation imposed upon the old one by 49 Vic. c. 74, s. 3, and to see that the moneys owing to contractors with the old Company, was paid to those having claims for labor, &c., upon those contractors, but neither to pay more than the old Company had been liable for, nor, in applying the money, to look beyond those to whom the contractors with the old Company were liable.

Then, even if such a suit could be maintained by the Crown, the information is defective in not showing that there were debts owing by the old Company to such contractors.

I agree also, that, if the defendant Company was liable to see to the payment of the claims of others than those to whom the old Company was liable, those others should be parties to the cause.

Appeal allowed, and both demurrers allowed with costs.

FESTING v. HUNT.

(IN APPEAL.)

Repudiation of contract.—Rescision.—Quantum meruit.

Plaintiff agreed to serve defendant for five years, and defendant agreed at the end of that period to convey to him 240 acres, 50 of which he would break in the preceding summer. Pending the term the defendant intimated that he would only convey 160 acres all unbroken.

Held.—That plaintiff was entitled to treat this as a repudiation of the contract, and to sue upon *quantum meruit* for work and labor.

The plaintiff brought his action on a contract of hiring and on the common counts for work and labor. At the the trial before Mr. Justice Killam and a jury both the plaintiff and defendant were examined as witnesses. They both stated that there was a contract of hiring for five years; but they differed as to the terms of the contract. The plaintiff swore that as consideration for his working five years for the defendant as a farm laborer, the latter had agreed to give him, at the end of that period, 240 acres of land, and in the fourth summer to break fifty acres on the land. The defendant stated that he meant only to give him 160 acres of land, and that he was not to do any breaking.

The plaintiff went into the defendant's service about 19th October, 1886, and worked until the 20th or 22nd June, 1889. The difficulty arose between them some time in the spring of 1889. They then discussed for the first time, since the agreement was entered into, the terms of it, each one holding to his contention. The plaintiff seeing that the defendant refused to perform his part of the contract, as he the plaintiff understood it, treated the contract as rescinded, quitted the defendant's work and brought this action. The defendant contended that he never refused to perform his part of the agreement and was ready and willing to perform it, as he understood it, and that the plaintiff could not sue him until he completed his term of service.

The points to be determined were, what were the real terms of the agreement, and supposing the contention of the plaintiff to be the correct one, whether he could treat the contract as rescinded and be entitled to recover for the value of his services. The evidence did not much preponderate one way or the other; the plaintiff, however, was somewhat corroborated in one particular by David Salter, who said the defendant admitted to him that he was to do some breaking, not during the the summer of 1889 as claimed by the plaintiff, but only the following summer. The jury found the terms to be as contended by the plaintiff. They found that the quantity of land to be given by the defendant for the plaintiff's five years work was 240 acres; that the defendant had agreed to do 50 acres of breaking, that the defendant had refused to do any breaking; that the plaintiff's services for the time he worked for the defendant were worth $15 a month. But the learned judge, holding that this did not entitle the plaintiff to leave the defendant's service, and that his duty was to complete his time and then sue for the value of his services, entered a verdict for the defendant, reserving leave to the plaintiff to move to have a verdict entered in his favor.

The plaintiff moved in pursuance of the leave.

V. A. Robertson, for plaintiff. The ground on which a servant unlawfully discharged may recover is, that the master has refused to perform his part of the agreement. *Smith on Master and Servant*, 196. The servant is not bound to wait the expiration of his term. *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Robson* v. *Drummond*, 2 B. & Ad. 303; *Franklin* v. *Miller*, 4 A. & E. 599; *Freeth* v. *Burr*, L. R. 9 C. P. 213; *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. 648, 9 App. Ca. 434; *Midland Ry. Co.* v. *Ontario Rolling Mills Co.*, 2 Ont. R. 1. The plaintiff was entitled to treat the contract as abandoned by defendant, and could sue immediately for *quantum meruit*. *Planche* v. *Colborne*, 8 Bing. 14. Where part of the consideration is executed at the time the covenants are made, the residue of the covenants are independent covenants. *Coatsworth* v. *City of Toronto*, 10 U. C. C. P., 73. Was the performance by the plaintiff of his contract to work, the consideration for the agreement to convey the farm, or was the promise to work, the consideration? One count in the declaration sets out the agreement to work as the

consideration. *Collen* v. *Nickerson*, 10 U. C. C. P. 549. Defendant was to board and clothe plaintiff, suppose he had refused to do so, would plaintiff have been bound to go on serving.

Hon. J. Martin, Attorney-General, for defendant. The promises made by the parties were mutual promises. *Cutter* v. *Powell*, 2 Smith L. C. 17. Where a special contract is entered into there must be the consent of both parties to its rescision. The refusal of one party to carry out the agreement is an offer to rescind; the other party may act upon that, or he can go on to perform the agreement and sue. There was no refusal to carry out the contract, but a dispute as to the terms of it. *Franklin* v. *Miller*, 4 A. & E. 606; *Jonassohn* v. *Young*, 4 B. & S. 296, *Morgan* v. *Bain*, L. R. 10 C. P. 24; *Ehrensperger* v. *Anderson*, 3 Ex. 158; *Freeth* v. *Burr*, L. R. 9. C. P. 213; *Benjamin on Sales*, 550. A mere assertion that a party will not perform a contract is not sufficient. *Ripley* v. *McClure*, 4 Ex. 345. If independent promises then plaintiff must show he has performed his contract.

(*8th March, 1890.*)

DUBUC, J.—The question of fact having been fully determined by the judge we having only to deal with the question of law.

On the defendant refusing to perform his part of the agreement, or, as the time had not yet come for him to do so, on his declaring that he would not perform it, was the plaintiff justified in treating the said agreement as rescinded, and quitting the defendant's service, so as to be entitled to sue at once for the value of his services?

It is a well settled doctrine that in contracts between employer and workman, if the employer incapacitates himself from performing his part of the agreement the other party is not bound to fulfil his whole part of the agreement before he can recover. *Planche* v. *Colborne*, 3 Bing. N. C. 355. The same principle is adopted when one of the contracting parties refuses to perform his part of the agreement. *Withers* v. *Reynolds*, 2 B. & Ad. 882. In this last case the plaintiff had undertaken to supply the defendant with straw at a specified price per load, to be delivered at the rate of three loads in a fortnight, nothing was said as to the time of payment, and it was held to be an implied term or condition of the contract that each load should, if

required, be paid for on delivery. The defendant after paying for some loads, wanted to retain the price of one load, keeping one payment in arrear. It was held that on the defendant refusing to pay as impliedly agreed, the plaintiff was not bound to supply any more straw after such refusal. Patterson, J., said in that case, "If the plaintiff had merely failed to pay for any particular load, that of itself, might not have been an excuse to the defendant for delivering no more straw, but the plaintiff here expressly refuses to pay for the loads as delivered, the defendant therefore, is not liable for the ceasing to perform his part of the contract."

The above is quoted approvingly by Coleridge, C. J., in *Freeth* v. *Burr*, L. R. 9 C. P. 214. And in that same case Keating, J., said; "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract, but there must be an absolute refusal to perform his part of the contract."

The same doctrine was held in *Mersey Steel & Iron Co.* v. *Naylor*, 9 Q B. D. 648, by Bowen, L. J., who said: "A fallacy may possibly lurk in the use of the word 'rescision.' It is perfectly true that a contract, as it is made by the joint will of two parties, can only be rescinded by the joint will of the two parties, but we are dealing here not with the right of one party to rescind the contract, but with his right to treat a repudiation of the contract by the other party as a complete renunciation of it."

We find in *Cutter* v. *Powell*, Smith's L.C., Vol 2, p. 21, the principle laid down in the following words: "It is further submitted that it is an invariably true proposition, that wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, in doing so, immediately sue on a *quantum meruit*, for any portion thereof which he had done under it previously to the rescision."

In the present case the defendant had absolutely refused to perform his part of the contract as understood by the plaintiff, and as found by the jury to be the true contract.

The plaintiff had not agreed to work five years for the defendant for 160 acres of land, nor for whatever wages he might be found entitled to get at the end of such period. He had agreed to do five years work for 240 acres of land with 50 acres broken. When the defendant declared that he would not give him what was contracted for, but something else not acceptable to him, the plaintiff was entitled to say: "I never agreed nor consented to work five years for what you now offer me. I contracted to serve you five years for one particular thing as compensation for my work, *i. e.* 240 acres of improved lands; and now you want to give me quite a different thing, viz., 160 acres of unimproved land. Your repudiation of the true contract in refusing to perform your part authorizes me to treat it as rescinded." And under those circumstances I think he was justified in refusing to complete the period of five years work for the defendant, and should be entitled to recover on a *quantum meruit* for his services.

In my opinion the verdict should be set aside, and a verdict entered for the plaintiff for the amount of wages found by the jury, namely thirty-two months at $15 a month. The appeal should be allowed with costs.

BAIN, J.—The question involved here is the almost always practically difficult one of deciding whether the facts of the case bring it within the exception to the rule that, when there is a special agreement between the parties which still remains open and unperformed, neither party can sue on a *quantum meruit* for anything he has done under the special agreement; and in coming to the conclusion that the case does come within the exception to the rule, it is not without hesitation that I differ from the learned judge who entered the verdict for the defendant.

It will not be questioned, that, as it is stated in the notes to *Cutter* v. *Powell*, 2 Smith's L. C. 21, "it is an invariably true proposition, that whenever one of the parties to a contract, not under seal, has in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may on so doing immediately sue on a *quantum meruit* for anything he has done under it previously to the rescision." And in *Smith's Master & Servant* at p. 196, the same rule is thus laid down as applicable to contracts of hiring and

service as well as to all other contracts: "When one party to a contract has absolutely refused to perform something essential on his side of the contract, the other party is at liberty to rescind it and sue for what he has already done under it upon a *quantum meruit*." The cases on which these propositions are founded are all collected and carefully considered in the very valuable notes to *Cutter* v. *Powell*, 2 Smith's L. C., p. 21.

But it is quite true as the learned Attorney-General urged, that before the plaintiff can treat the contract as rescinded and sue for a *quantum meruit*, it must be shown that the defendant had also, expressly or by implication, rescinded it, and the difficulty in the case lies in deciding whether the defendant's refusal to give the land, or do the breaking, justified the plaintiff in concluding that the defendant intended to repudiate and rescind the agreement they had made.

In *Ehrensperger* v. *Anderson*, 3 Ex. 148, Park, B. said: "The contract on the one side must not only not be performed, or neglected to be performed, but there must be something equivalent to saying, 'I rescind this contract,' a total refusal to perform it, or something equivalent to that which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'"

In *Morgan* v. *Bain*, L. R. 10 C. P. 15, Lord Coleridge said: "Rescission must be by both parties. Either both must have intended to rescind, or one must have so acted as to justify the other in thinking that he intended to rescind." In *Freeth* v. *Burr*, L. R. 9 C. P. 208, and in *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648 and 9 App. Cas. 434, the true question in these cases was said to be "Whether the acts and conduct of the party evinced an intention no longer to be bound by the contract."

Now it cannot be denied that the defendant's promise to give the plaintiff the 240 acres and to do the breaking was a very material part of the contract that was made between them, and if, as the jury have found, the plaintiff's work was worth to the defendant $15 a month over and above his board, lodging and clothing, it is not to be supposed the plaintiff would have made the contract had he not been promised the land and the breaking. It is, of course, very clear that it is not every slight variation in or departure from the terms of a contract that will justify

the other party in treating it as rescinded, but the defendant's refusal in this case seems to me to have gone to the "root of the matter," to use the expression found in several of the cases, and to have departed from and varied the contract in such an essential and material part, that what would have been left, had the plaintiff assented, would not have been the original contract at all, but another and a different one. In refusing to give the land and to do the breaking, and in resisting the plaintiff's claim for compensation for the work he had done, the defendant says in effect, "I have no intention of giving you what I promised as the compensation for your five year's work, but still, all the same, you must go on and work for the five years as you promised." See per Lord Blackburn, *Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Ca. 434. But I cannot think that anyone can legally take such a position, and I think that the defendant having, as the jury have found, told the plaintiff that he did not intend to give him the compensation for his work that he had promised, the plaintiff was justified in treating the contract as rescinded, and that he is entitled to recover from the defendant what his services were fairly worth for the time he worked. He worked for the defendant for a period of just about 32 months, and the jury have found that his services per month were worth $15. This is more perhaps, than upon the evidence, I would have been inclined to allow, but it was for the jury to fix the amount, and the question having been left to them by the learned judge and clearly explained, I suppose if the verdict is to be entered for the plaintiff, it must be for the amount the jury have found.

The verdict entered for the defendant should, I think, be set aside and a verdict entered for the plaintiff for $480. The appeal should be allowed with costs.

TAYLOR, C.J., concurred.

Verdict for defendant set aside and verdict entered for plaintiff.

WEST CUMBERLAND IRON & STEEL CO. v. WINNIPEG & HUDSON'S BAY RAILWAY CO.

(IN APPEAL.)

Pledge.—Deposit.—Collateral security.—Multifariousness.

As collateral security for the payment of certain acceptances, the defendants deposited with the plaintiffs certain of the defendant's mortgage bonds; with power of sale in case of default. After default and recovery of judgment upon the acceptances, plaintiffs filed their bill on behalf of all holders of similar bonds for a receiver and for sale of the railway.

Held, BAIN, J.—1. That the legal title in the bonds did not pass to the plaintiffs, but that they were pledgees merely. Their remedy was a sale of the bonds; and not a sale of the railway.

2. That the bill was multifarious in basing the right to a receiver upon plaintiff's judgment, for in that the other holders had no interest.

Upon appeal,

Held, That having regard to the surrounding circumstances, the plaintiffs were not pledgees of the bonds; and that no obligation arose upon them until after sale of them by the plaintiffs under their power.

Defendants purchased certain rails from the plaintiffs, giving in payment certain acceptances. It was agreed that, "As collateral security for the payment of the said acceptances at maturity the (defendants) shall issue and on production of the respective bills of lading shall deposit with the (plaintiffs) or their bankers . . . . bonds of the (defendants) to an amount double that of the said acceptances." Power of sale in case of default was given.

Default having been made and the plaintiffs having recovered judgment upon the acceptances, this bill was filed on behalf of the holders of all similar bonds for a sale of the railway and for a receiver.

Defendants demurred for want of equity and multifariousness.

H. M. Howell, Q.C., and *J. Stewart Tupper, Q.C.*, for the demurrer.

J. S. Ewart, Q.C., and *C. W. Bradshaw*, for the bill.

(*3rd February, 1890.*)

BAIN, J.—The defendants demur to the plaintiffs' bill for want of equity and multifariousness. They urge that, under the agreement set out and on the facts alleged, the plaintiffs are only pledgees and not holders of the bonds, and as such are not entitled to a decree for the sale of the railway or the other relief they ask; that a judgment creditor is not entitled to ask that a receiver and manager should be appointed, and that, at all events, the bill makes no case for the appointment of one; that if the plaintiffs are not bondholders, and if, then, they rely on their being judgment creditors for the appointment of a receiver, the bill is multifarious, because they sue as bondholders, as well for themselves as for all other holders of these bonds. It is also contended that the issue and deposit of these bonds with the plaintiffs was *ultra vires* of the defendants' powers, under their Act of incorporation.

The principal point to decide on the questions raised by this demurrer is whether the plaintiffs are holders of these bonds, or merely pledgees of them, as the defendants contend they are. The bonds were delivered as collateral security for the defendants' acceptances, and there was, therefore, no absolute sale of them. The plaintiffs have more than a mere lien on them, and so, they must be either mortgagees or pledgees. As was said by Willes, J., in delivering the judgment of the Court of Exchequer Chamber in *Halliday* v. *Holgate*, L. R. 3 Ex. 299, "There are three kinds of security; the first, a simple lien, the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge." The authorities shew that the difference between a pledge or pawn of personal chattels and a mortgage of them is, that a mortgage passes the whole legal interest and property from the mortgagor to the mortgagee, and possession by the mortgagee is not essential to create his title, and, generally speaking, is inconsistent with such a title, while a pledge transfers only a special property in the thing pledged, the general property continuing in the pledgor. The pledgee's right is not complete until he has obtained possession, and his right or special property is to hold the pledge as security for the debt or engagement of the pledgor, and on default on the day appointed for payment or performance, to sell the pledge. Securities for money and negotiable instruments may be given in pledge, and the addition, as there is in the

agreement here, of an express power to sell on default, will not change what would have been a pledge into a mortgage. *Franklin* v. *Neate*, 13 M. & W. 481; *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

A reference to the agreement set out in the bill clearly shews, I think, that the contract made in it concerning these bonds was one of pledge only and not of mortgage. The contract is, that, "as collateral security for the payment of the said acceptances at maturity, the Winnipeg Co. . . . . shall deposit with the West Cumberland Co. or their bankers, bonds to the amount double that of the acceptances," and that "if the said acceptances or any of them shall not be duly met at maturity, the West Cumberland Co. or their bankers, shall be at liberty to sell such mortgage bonds so deposited as aforesaid, to an amount sufficient to cover the amount of the dishonored acceptances, ... and on payment of any acceptances at maturity or previously, the West Cumberland Co., or their bankers, shall hand over to the Winnipeg Co., a proportionate amount in value of the bonds so deposited as aforesaid." In this agreement I find no intention to transfer the legal title and property in the bonds from the defendants to the plaintiffs, or that the defendants should divest themselves of the ownership of the bonds. The words used, "shall deposit with," are apt words to express the intention to pledge, and perhaps, are more commonly used for that purpose than any others; and I do not well see how the intention to pledge the bonds could have been more clearly expressed than it has been by the terms of the agreement.

The plaintiffs then being pledgees of the bonds, and the general property in them being still in the defendants, the right, or special property of the plaintiffs, is to sell so many of the bonds as will be sufficient to cover the amount of the dishonored acceptances. This right is expressly given in the agreement, and it is a right they would have had by law without agreement.

A pledgee may apply to a Court of Equity for an order for the sale of the goods pledged, but, as was pointed out in *Carter* v. *Wake*, 4 Ch. D. 605, and in *Ex parte Hubbard*, 17 Q. B. D. 690, the position of a pledgee and pledgor in this court, differ entirely from those of a mortgagee and mortgagor. There being no transfer of the legal title in the pledge from the pledgor to the pledgee, there is no necessity for the court to interfere to

protect or deal with the equitable title which, in the case of a mortgage, it still recognises in the mortgagor; and so, when the court does interfere, it is only in respect of the legal rights of the parties. As we have seen, the legal right of a pledgee is to sell the goods pledged on default of payment, and the court will assist him by directing a sale. In *ex parte Hubbard, supra*, p. 702, Bowen, L.J., said, "No doubt a pledgee may, in some cases, enforce his charge in a court of equity, but in that case the relief which a court of equity will give, would not be in respect of a right in equity, but it would be equitable relief in respect of a legal right." And in *Carter* v. *Wake, supra*, Jessel, M.R., held that a pledgee has not the right of foreclosure that a mortgagee has, but only the right to have the pledge sold.

But what is asked in this bill is, not a decree for the sale of the bonds, but for the sale of the railway and plant on which these bonds are alleged to be a first charge and mortgage. If I am right in holding the plaintiffs to be only pledgees, this is relief they cannot be entitled to.

Mr. Ewart argued that in every case of a pledge, the extent of the special property that passed to the pledgee depends on the special circumstances of the case, and must always be sufficient to give the pledgee all the remedies that are necessary for his protection. But I find no authority for such a contention, and the case of *The General Credit & Discount Co.* v. *Glegg*, 22 Ch. D. 549, relied on, does not support it, for there the legal title and interest in the shares and stocks had been transferred to the defendants, and the case was one of mortgagor and mortgagee.

Then again, if the plaintiffs are only pledgees, it is clear they have no equity to ask, as they do, for the appointment of a receiver and manager of the railway. And if it be urged that they are entitled to this relief as judgment and execution creditors, then the bill would seem to be clearly demurrable for multifariousness, for two distinct subjects are embraced in the suit, with one of which, as we have seen, the defendants have nothing to do. This is not a case of misjoinder of parties, but of uniting in one suit, separate and distinct causes of action. If it is only as judgment creditors the plaintiffs are entitled to a receiver, this is a relief in which they and the other bondholders have not a common interest. *Glass* v. *Munsen*, 12 Gr. 77.

I think, therefore, the defendants' demurrer should be allowed both for want of equity and multifariousness.

I have not found it necessary to consider the question of the jurisdiction of the court to appoint a receiver and manager of a company like the defendants', nor, if there is such jurisdiction, whether a case is made in the bill for its exercise; nor have I considered the question of the defendants' power, under their Act of Incorporation, to deal with these bonds as they have done.

I allow the demurrer with costs.

Demurrer allowed with costs.

From this judgment the plaintiffs appealed.

J. S. Ewart, Q.C., and *C. W. Bradshaw*, for plaintiff. As to multifariousness, it is held that we have no equity at all, and yet that we have joined two cases together. Plaintiffs are mortgagees of the bonds or at least pledgees with such special property as enables them to enforce the bonds. *Jones on Mortgages*, 4; *Holliday* v. *Holgate*, L. R. 3 Ex. 299; *Glynn* v. *East India Dock Co.*, 6 Q. B. D. 490; *Sewell* v. *Burdick*, 10 App. Ca. 74; *Cavanagh on Money Securities*, 327; *Casey* v. *Cavaroc*, 96 U. S. 477. An express power of sale does not interfere with other remedies. *Nelson* v. *Eaton*, 26 N. Y. 410. The power may be wider than that which would have been implied. *Wheeler* v. *Newbould*, 16 N. Y. 392; *France* v. *Clark*, 22 Ch. Div. 833. A holder of collateral securities can enforce payment of them. *Jerome* v. *McCarter*, 94 U. S. 740; *Hancock* v. *Franklin*, 114 Mass. 155; *Colebrooke on Collateral Securities*, 117, 118, 121, 124, 144, 154; *Attenborough* v. *Clark*, 27 L. J. N. S., Ex. 138; *Synod* v. *De Blaquiere*, 27 Gr. 536, 548; *Wulff* v. *Jay*, L. R. 7 Q. B. 756. Meaning of collateral, *Re Athill*, 16 Ch. D. 211. Power to "raise money" will empower to pay debts, *Re Inns of Court*, L. R. 6 Eq. 82; *Re Regent's Canal Co.*, 3 Ch. D. 43. Power to sell includes power to mortgage, *Bickford* v. *Grand Junction Ry.*, 1 Sup. Ct. R. 736; 1 C. L. T. (ed.) 21, 75.

Power to issue bonds for this purpose not taken away by special power to raise money. *Bickford* v. *Grand Junction*, 1 Sup. Ct. 732; *Re Patent File Co.*, L. R. 6 Ch. 87, 88; *Re Marine*, L. R. 4 Ex. 601; *Re Florence*, 10 Ch. D. 530. Plaintiffs enti-

tled to a sale of the railway, Rev. Stat. Can., c. 109, ss. 101-3; *Bickford* v. *Grand Junction*, 1 Sup. Ct. R. 738; *Redfield* v. *Wickham*, 13 App. Ca. 467; *Walker* v. *Ware*, L. R. 1 Eq. 195; *Wing* v. *Tottenham*, L. R. 3 Ch. 740; *Winchester* v. *Midhants*, L. R. 5 Eq. 17; *Munns* v. *Isle of Wight*, L. R. 8 Eq. 653; L. R. 5 Ch. 414. Plaintiff entitled to a receiver, *Fripp* v. *Chard Ry.*, 11 Hare, 241; *Ames* v. *Trustees*, 20 Beav. 332, 350; *Potts* v. *Warwick*, Kay, 142; *Hopkins* v. *Worcester*, L. R. 6 Eq. 437; *Gardner* v. *London*, L. R. 2 Ch. 201.

H. M. Howell, Q.C., and *J. S. Tupper, Q.C.*, for defendants. As to multifariousness, plaintiffs seek to succeed under a judgment of their own, and they cannot in that respect represent the other bondholders. *Harrison* v. *Hogg*, 2 Ves. 325; *Campbell* v. *McKay*, 2 My. & Cr. 31; *Ward* v. *Northumberland*, 2 Ans. 469. Pledgee of chattels, cannot use them after default, *Stearns* v. *Marsh*, 4 Denio, 227. There is no distinction between "physical chattels" and *choses in action* with reference to the pledgee's rights. *France* v. *Clark*, 22 Ch. D. 833. The rights of a pledgee of short date negotiable securities differs from those of a pledgee of long date ones. Also between a pledgee of a note and a pledgee of a mortgage, in which the legal estate would not pass to the pledgee. Plaintiffs are pledgees only. *Re Hall*, 14 Q. B. D. 386; *Donald* v. *Suckling*, L. R. 1 Q. B. 585. The presumption is in favor of a pledge, *Jones on Chattel Mortgages*, 7; *Barron on Chattel Mortgages*, 29; *3 Myers Fed. Dec.*, p. 49, § 64. As to the word "deposit," *Re Hubbard*, 17 Q. B. D. 690; *Franklin* v. *Neate*, 13 M. & W. 480. Defendants had power to pledge and not to mortgage the bonds, by their charter. Plaintiffs could not foreclose defendant's right of redemption, *Carter* v. *Wake*, 4 Ch. D. 605; *General Credit* v. *Glegg*, 22 Ch. D. 552.

Wheeler v. *Newbould* has been questioned, see *Story on Bailments*, § 322 (n.) A railway company cannot make a pro-note. *Bateman* v. *Mid-Wales*, L. R. 1 C. P. 499. As a railway may be sold under execution, the court will not appoint a receiver. *Peto* v. *Welland Ry.*, 9 Gr. 455; *Galt* v. *Erie*, 14 Gr. 499; *King* v. *Alford*, 9 Ont. R. 643. No allegation that Company has anything that a receiver can take, and so no receiver. *Smith* v. *Port Dover Ry.*, 12 Ont. App. R. 288. For the duties of a

receiver, *Simpson* v. *Ottawa & P. Ry.*, 1 Ch. Ch. R. 126; *Ames* v. *Birkenhead*, 20 Beav. 332.

J. S. Ewart, Q.C., in reply. All the American cases are in our favor, and there is no English case to show that the holder of collaterals cannot sue upon them.

(8th March, 1890.)

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

The whole question involved upon this demurrer appears to arise upon the interpretation of the agreement between the two companies and to be whether, under that agreement, the bonds referred to were to be issued to the plaintiff company so that it would be the holder of them and the obligee or promisee in respect of them, or were, while in their hands, to be merely inchoate instruments which would only come into full force as the bonds of the defendant company upon their sale by the plaintiff company. Although so much was said in argument of the law relating to pledges of personal property and although the decision of my learned brother Bain appears to be based upon an application of that law, I must say, with all respect, that I am unable to consider it at all applicable. It is not a question of the property in the pieces of paper on which the instruments are written, which would be originally in the Railway Company and of which it might make a legal pledge. In the hands of the Railway Company there was no other property in respect of them. It could be only when issued to another party as obligee or promisee in respect thereof, that the instruments could take effect as the obligations of the Railway Company or that there could be said to be any property in the obligations to be pledged by a pledge of the papers containing them.

There is, then, no possibility of treating the transaction as one of pledge of the obligations, for, unless the plaintiff company became the obligees or promisees so as to possess the legal title to the *choses in action* which the instrument purported to represent, there was no obligation or *chose in action* to be pledged.

I apprehend, however, that it was quite competent for the Railway Company, by its officers, to sign and seal such instruments and deposit them as security with a party making advances to it, upon the terms that such party should not be the holder of

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

them, that they should create no obligation to him, but that his only right should be to sell them, as the Railway Company might, and repay himself from the proceeds, he making them, thus, the obligations of the Company to the purchasers. This, it appears to me, was the very transaction to which the parties sought to bind themselves by the agreement set out in the bill.

By the 3rd clause of that agreement, it is provided that, "As collateral security for the payment of the said acceptances at maturity, the Winnipeg Company shall issue and, on production of the respective bills of lading, shall deposit with the West Cumberland Company, or their bankers, Lloyds, Barnetts & Bosanquets Banking Company, Limited, Colmore Row, Birmingham, bonds of the Winnipeg Company, to an amount double that of the said acceptances."

At first sight the word "issue" seems to imply the complete execution and delivery of the instruments to the plaintiff Company, so as to make them the holders of the obligations thereby represented, but I think that the word may be considered to be used in a somewhat less proper sense to signify the preparation, signing and sealing of the documents, and the placing of them absolutely out of the possession and control of the Railway Company. The word is similarly used by Brett, L.J., in *Baxendale* v. *Bennet*, 3 Q. B. D. 525, in speaking of a blank acceptance handed to a party to be filled up and negotiated. In fact, the "issue" there was less complete as it was without consideration, and could be recalled at any time before use of the bill.

The word used in this agreement to specify the transmission to the plaintiff Company is "deposit." The instruments were to be "deposited" with that Company or its bankers. This is not an apt word to denote a completion of the execution by delivery. It appears rather to indicate the physical transfer of the pieces of paper unaccompanied by the mental intention involved in the word "deliver" when technically used. I agree with the view of my brother Bain that the word would be properly applied to a transaction of pledge, rather than to one of mortgage, which is what the plaintiff's bill really assumes this to have been. In fact, it represents a bailment rather than a transfer of property or creation of an obligation, though often of another kind than the naked bailment known as *depositum*.

Looking at the other portions of the agreement and the circumstances, it appears more clear that this is the proper view of the intention of the parties. As is usual with such undertakings, it is evident that the intention was to obtain the necessary funds by disposing of or "floating" bonds or obligations payable at long dates, with interest payable in the interval half yearly. The rails referred to in this agreement were purchased on one year's credit, probably because it was expected that that period would be necessary for the completion of these financial arrangements. No interest was payable upon this debt until the expiration of the year, but the bonds deposited bore interest payable half yearly. The bonds were for double the amount of the debt and bore interest at the rate of six per cent. per annum, while the debt bore interest at the same rate. Upon default in payment of the bonds or interest, the bond holders had under the Act 40 Vic. c. 59, s. 14, D., the right to register them in their own names, whereupon they became entitled to "the same rights, privileges and qualifications for directors, and for voting at general meetings as would be attached to them as shareholders if they had fully paid up shares of the Company to a corresponding amount." Thus, if the contention of the plaintiff be correct, it had the right on default of payment of the first instalment of interest to the position of a holder of shares to double the amount of its debt, when, perhaps, the bonds would realize upon a sale much more than the debt. It may be that a court of equity would restrain it from so acting until its own debt should mature, but, even so, there would, after twelve months, be that position of affairs. It may be said that the Railway Company could dispose of the bonds, if worth so much, but it is difficult to tell how embarrassing it might be under some circumstances to have these powers exercised to this extent even temporarily.

Then, the terms show that the parties contemplated an early return of the instruments to the Railway Company, either together or in proportion to payments. This seems more consistent with an arrangement by which they were not to be completely delivered as the obligations of the Company than with that for which the plaintiff now contends.

A reason for the form which the transaction appears to have been given, may be suggested by the circumstance that the statute 46 Vic. c. 59, s. 13, as amended by 47 Vic. c. 70, s. 3, D., in

its terms authorized a sale or pledge of the bonds only "for the purpose of raising money for the prosecution of the undertaking." It may be that, as claimed, a purchase for a price in money of the iron or steel rails absolutely necessary for the construction of the work, would come within the Act, and that the bonds could be handed over directly in payment without the necessity of making two transactions of one, by a sale of the bonds for money to the vendors of the rails and the application of the money in payment for the rails, but the wording of the statute may have led the parties into an arrangement by which the vendors of the rails were made the attorneys irrevocable of the Railway Company for sale of its bonds on default in payment for the rails, with the protection given by the covenants against the issue of such securities to more than a certain amount.

It is true that these bonds are, by the statute, made assignable and transferable by delivery so as to vest in the holder for the time being, a right of action upon them and to make him a mortgagee *pro tanto* of the Company's assets. It may not follow that there must attach to them all the incidents ascribed by the law merchant to negotiable bills of exchange. However this may be, we have now to consider only the construction of the written contract between the parties, and whether it provided for a completion of these instruments as the obligations of the Railway Company in the hands of the plaintiff Company.

Under that agreement I cannot find the plaintiff to be in the position of the plaintiff in *The General Credit & Discount Co.* v. *Clegg*, 22 Ch. D. 549, or the petitioner in *In re Olathe Silver Mining Co.*, 27 Ch. D. 278. In the former case the debentures had been transferred into the names of trustees for the plaintiff, and in the latter the report distinctly states that the petitioner had become the holder of the debentures. Here, the very question is whether the plaintiff became such holder under the agreement. While the bill alleged that it did, it does so by such reference to the agreement as to amount merely to an allegation of the effect of the agreement. It is clear that no delivery other the "deposit" according to the agreement is asserted.

I am, therefore, of opinion that the order allowing the demurrer should be affirmed with costs.

Order allowing demurrer affirmed with costs.

RE R. A., AN ATTORNEY.

Attorney.—Rule to answer charges.—Indictable offence.

A rule will not be granted to compel an attorney to answer charges if they may be made the subject of an indictment.

The Law Society obtained a rule *nisi* calling upon the attorney to show cause why a rule should not issue requiring him to answer the matters contained in certain affidavits and papers filed. In answer to that rule, no affidavit was filed, but the objection was taken, that the court would not require an attorney to answer the matter of an affidavit where the charge made was of an indictable offence.

J. S. Ewart, Q.C., for the attorney. The charge is one of compounding a felony. A rule will not go calling upon an attorney to answer criminal charges. He is not bound to criminate himself. *Stephens* v. *Hill*, 10 M. & W. 28. The court may issue a rule to strike off. *Archbold's Pr.*, 147; *Re Attorney*, 30 L. T., 243.

H. M. Howell, Q.C., for The Law Society of Manitoba, referred to *Re Hill*, L. R. 3 Q. B. 545; *Cordery on Solicitors*, 141. There is no indictable offence charged here. As to what must be proved on an indictment for compounding a felony see *Archbold's Criminal Pleading*, 896. The act charged here was one contrary to public policy, and one which rendered the attorney unfit to belong to the Society. The court will act, though the offence is an indictable one. *Re Blake*, 3 E. & E. 34; *Re Boultbee*, 6 Man. R. 19. The court may act on mere suspicion. *Re Sparkes*, 17 C. B. N. S. 727; *Rex* v. *Southerton*, 6 East, 142.

(*1st March, 1890.*)

TAYLOR, C.J.—On an examination of the affidavits and papers it does seem to me that the charge made in them is one of having taken money to stifle a prosecution for felony, in other words, of compounding a felony. There can, I think, be no doubt, that the charge might be the foundation of a criminal indictment.

But it is said that, even if so, the court will grant such a rule as is asked here. The authority relied on for this is *Anon*, 17 Sol. Jour. Q. B. 269. These reports are not in the library, but the case is referred to in *Cordery on Solicitors.*, p. 141. It is there said, "It was at one time held, that though the court would strike a solicitor off the roll, it would not compel him to answer matters in an affidavit on allegations amounting to an indictable offence, on the ground that no one should be compelled to criminate himself or incur a contempt, but recently the court refused to recognize the distinction, and ordered the solicitor to answer the matters, leaving him to plead privilege by way of evading the contempt." For this the Anon case is cited as the authority. The case stands alone, and it is singular that it should not have found its way into the regular reports if intended to overrule a long series of decisions to the contrary.

In *Short* v. *Pratt*, 1 Bing. 102, there was a rule calling on two attorneys to shew cause why they should not deliver up certain papers, explain certain accounts and answer the matters contained in the affidavit, but the court thought, that as a charge had been brought forward, clearly amounting to an indictable offence, they could not interfere or call on the attorneys to make an affidavit in which they might be compelled to criminate themselves. *In re Knight & Hall*, 1 Bing. 142, a rule had issued calling on an attorney to show cause why he should not pay over certain moneys, but on cause being shewn, and it appearing that the affidavit on which the rule had been granted contained a charge of conspiracy against the attorney, the court said, if that part of the affidavit had been read last term, they would not have granted the rule, and it was discharged with costs. *In re* ——, 5 B. & Ad. 1088, on a motion for a rule to strike an attorney off the roll, Denman, C.J., said, "The facts stated amount to an indictable offence. Is not it more satisfactory that the case should go to trial? I have known applications of this kind after conviction upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where by answering, they might furnish a case against themselves on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged." The solicitor general admitting that he could find no precedent for such an

application, the rule was refused. *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl. N. S. 669, is a case in which the court drew the distinction between a rule calling upon an attorney to answer the matters of an affidavit, and a rule to strike off the roll. Lord Abinger, C.B., after saying that he never understood that an attorney might not be struck off the roll for misconduct, merely because the offence imputed to him was of such a nature that he might be indicted, proceeded, "If, indeed, he were called on to answer the matter of an affidavit, he would, by not complying, be guilty of a contempt for which he might be punished by attachment, and if the offence imputed to him were of an indictable nature, it would be most unjust to compel him to do so; for which reason a rule to answer the matters of an affidavit is never granted in such a case, but only a rule to strike him off the roll, which gives him a full opportunity of clearing himself from the imputation, if he can, while on the other hand, it does not compel him to criminate himself." This case was followed in *Re Attorney*, 12 W. R. 311.

The Court of Queen's Bench in Ontario seems to have held in *Re Paterson* v. *Miller*, 1 U C.Q.B. 256, that the court will not deal summarily with an attorney, where the matter complained of is one for which he might be indicted, and as pointed out by Lord Abinger in *Stephens* v. *Hill*, the language of Lord Denman unless looked at with attention, might be thought to go as far, but that learned judge said, he had known such applications after conviction. Besides *Stephens* v. *Hill*, such cases as *Re Blake*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 543, shew that even where the charge is of an indictable offence, a motion to strike off the roll will be entertained, though perhaps, where the offence has not reference to professional conduct, only after conviction. *Ex parte Brounsall*, 2 Cowp. 829, and see *Re King*, 8 Q. B. 129.

Here, I am asked to make absolute the rule calling on the attorney to answer matters, which, it seems to me, may be made the subject of an indictment, and the weight of authority is decidedly against granting such a rule, I therefore discharge the rule *nisi*, but I do so without costs.

Rule discharged without costs.

ROWAND v. THE RAILWAY COMMISSIONER.

(IN EQUITY.)

Interlocutory injunction.—Evidence.—Affidavit.—Employment of arbitrator by party.

Although for the purposes of an interlocutory injunction there is not required to be the clear evidence necessary to support the case at the hearing, yet there must be some evidence.

The railway commissioner being desirous of expropriating lands of the plaintiff, arbitrators were appointed, C. (one of them) being appointed by the other two. Contemporaneously with the progress of the arbitration, C. was engaged in auditing certain municipal books at the request of the municipal commissioner. For this work he was paid by the municipal commissioner, who intended to reimburse himself out of the legislative grant to the municipality. The railway commissioner was a Minister of the Crown. The municipal commissioner was a corporation sole, and also a Minister of the Crown. The moneys he disbursed were those of the municipalities and not those of the Crown. The two arbitrators who made the award, (one of them being C.,) swore that they were not influenced by C's. employment.

Held, That it did not appear that C. might have been biassed or affected in any degree by his employment; and that an interlocutory injunction restraining the taxation of costs under the award should not be granted.

An affidavit alleging "That the facts stated in the bill of complaint herein, are true in substance and in fact and to the best of my knowledge and belief," is wholly insufficient to form the ground of an interlocutory injunction.

This was an application to continue an injunction restraining the railway commissioner of Manitoba from proceeding upon an award respecting the compensation to be paid by him for certain lands of the plaintiff taken for, or injuriously affected by certain railway works.

The objections to the award were based upon charges of misconduct of two of the arbitrators, and corrupt inducement offered them by the railway commissioner, and of their incapacity to act as arbitrators in consequence of their being in receipt of moneys from the Provincial Government and being otherwise under the control and influence of the Government.

The railway commissioner offered the plaintiff $200 as compensation, naming the defendant Ross as an arbitrator if the offer should be refused. The plaintiff refused the offer, naming the late Hon. John Norquay as an arbitrator. The two thus appointed nominated the defendant Conklin as third arbitrator. Mr. Norquay having died, the plaintiff appointed Gilbert M. [illegible] place. Evidence was then taken by these three arbitrators, Ross, Conklin and McMicken, but they failed to agree upon the amount to be awarded. Ross and Conklin however, agreed upon $200 as proper compensation and made and signed an award to that effect, which McMicken refused to sign.

The railway commissioner took up the award, paying the fees charged by Ross and Conklin, but not those of McMicken..

The fees paid were charged to have been exorbitant and greatly in excess of those which should have been paid.

The charges against the arbitrators made in the bill, might be thus summarized:

1. Consultations between Ross and Conklin apart from McMicken, and the fixing by them of the amount of their award in the absence of the third arbitrator.

2. The fixing by Ross and Conklin of the amount of their fees without consultation with McMicken, and their use towards him of threats that he would be deprived of his fees if he did not sign, in order to induce him to concur in their award.

3. Promises of the railway commissioner to Ross and Conklin to pay their exorbitant fees for an award in his favor and contrary to their judgment.

4. Consultations between Ross and Conklin and a servant of the railway commissioner respecting the amount to be awarded and the arrangement of details.

5. That Ross and Conklin, during the taking of the evidence, and prior to and at the time of the making of the award, "had been continually, and were then, receiving large sums of money from the said railway commissioner and Government of the Province of Manitoba, on various pretexts, for services rendered, unknown to the plaintiff, and were under the influence of said Government, and the railway commissioner in particular, and were influenced by such transactions in making their award, and were not, in consequence, and could not be impartial judges of

the matter referred to them," and that Ross and Conklin falsely and fraudulently concealed these circumstances from the plaintiff.

6. That the award was due to the undue influence of the Government and the railway commissioner over these two arbitrators, and by fraudulent promises made to them by the railway commissioner.

W. H. Culver, Q.C., and *T. S. Kennedy, Q.C.*, for plaintiff, referred to 51 Vic. c. 5, ss. 4, 5, 25; 51 Vic. c. 6, ss. 12, 23; 44 Vic. c. 27, ss. 20, 32. There was no provision in the statute as to the disqualification of the third arbitrator. *Russell on Awards*, 213; *Conmee* v. *C. P. R.*, 16 Ont. R. 639, 646. As to the consultation between two arbitrators apart from the third, *Beck* v. *Jackson*, 1 C. B. N. S. 695; *Wright* v. *Graham*, 3 Ex. 131; *Little* v. *Newton*, 2 M. & G. 358. As to interference by Court of Chancery, *Beddow* v. *Beddow*, 9 Ch. D. 91; *Malmesbury Ry. Co.* v. *Budd*, 2 Ch. D. 113. As to the position of the arbitrators. *Reg.* v. *Brown*, 16 Ont. R. 41; *Reg.* v. *Klemp*, 10 Ont. R. 154. Conklin was valuator for the Government and the railway commissioner's agent suggested his name without disclosing that fact. *Hickman* v. *Lawson*, 8 Gr. 386.

J. D. Cameron and *T. G. Mathers*, for the Railway Commissioner and Attorney-General.

The original material on which the motion was based was insufficient as not swearing to facts, but only generally that the allegations in the bill were true in substance and in fact to the best of the knowledge and belief of deponent. *Kerr on Injunctions*, 618; *Spalding* v. *Keely*, 7 Sim. 377; *Scotson* v. *Gaury*, 1 Ha. 99; *High on Injunctions*, § 1569. The allegations in the bill not sufficient to support an injunction. The railway commissioner acting as a minister of the Crown in his official capacity is not amenable to the process of this court. The land is vested in the Crown. The bill substantially asks relief against the Crown. *Story on Pleading*, § 62. Plaintiff's remedy, if any, is by petition of right. *Mitford on Pleading*, 31; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 617. The bill did not contain any allegation of any relation between the Government of Manitoba and the railway commissioner. *Attorney-General* v. *Boulton*, 20 Gr. 404. The plaintiff is not entitled to an interlocutory injunction, because no irreparable damage shown. *Hepburn* v. *Caldwell*, 5 Ont. App. R. 363; *Kerr on Injunctions*, 11, 12.

Prospect of injury not sufficient. *Haines* v. *Taylor*, 10 Beav. 75; *Pattisson* v. *Gilford*, L. R. 18 Eq. 259; *Mogul Steamship Co.* v. *McGregor*, 15 Q. B. D. 476. Plaintiff could plead at law the matters set up in the bill. *Morrison* v. *McLean*, 7 Gr. 167; *Anderson* v. *Lamb*, 21 W. R. 764; *Ochsenbein* v. *Papelier*, L. R. 8 Ch. 695. Where what is involved is merely a question of money payment, an interlocutory injunction is only granted on terms of payment into court. *Shaw* v. *Earl of Jersey*, 4 C. P. D. 359; *Garrett* v. *Salisbury and Dorset Junction Ry. Co.*, L. R. 2 Eq. 358. Plaintiff's position not changed by taxation of costs, as costs of arbitration only made a debt by Railway Acts.

(*12th April, 1890.*)

KILLAM, J.—The motion in the first place was based upon the affidavit of the plaintiff's solicitor and the depositions of the defendant Conklin summoned as a witness for the plaintiff. The affidavit showed that the plaintiff's solicitor had obtained the lands mentioned in the bill for the plaintiff, and had had sole control of them from the time of the plaintiff's acquiring them to the date of the affidavit, and that he had acted as solicitor for the plaintiff in the matter of the arbitration, and then was added "That the facts stated in the bill of complaint herein are true in substance and in fact and to the best of my knowledge, information and belief."

I consider such an affidavit wholly insufficient to form the ground of an interlocutory injunction. I do not refer to the objection that the affidavit should be made by the plaintiff himself. If made by him, it would be equally deficient. The objection to it is, that in reality it proves nothing. It may rest, so far as the principal charges in the bill are concerned, wholly upon the suspicions or imagination of the deponent. It does not distinguish how many of the allegations of the bill are true to the knowledge of the deponent, how many are based upon information only, or, how many rest in mere belief without direct information. It may be that of the most important the deponent has only a belief, without such evidence of them as the court would rely upon.

There are now before me, however, not only the depositions of the defendant Conklin, but further affidavits and depositions,

and it is upon the state of facts shown by all of these that my judgment must be based.

Referring to all of this material, it is clear that there is no real evidence of the first, third, fourth or sixth of the charges mentioned. As to the second, it would not seem to be important as directly determining the invalidity of the award. It appears that the amount of the arbitrators' fees was fixed by all of the arbitrators, although Mr. McMicken seems to have disapproved of the charge made and to have merely yielded to the others upon the point. If the alleged threats were made to him, they would be grossly improper, but some explanation may be forthcoming upon this point, for which there has been no opportunity. For present purposes they are not directly material, as he was not induced by them to concur in the award. They do not show that Ross and Conklin fixed the amount for the purpose of obtaining those fees, although they might help to strengthen evidence tending to show that one or both had so acted.

Under none of these charges could I feel warranted in interfering. Although for the purposes of an interlocutory injunction there is not required to be the clear evidence necessary to support the case at the hearing, there must be some evidence. Very often statements of fact upon information only may be accepted, but these statements should be such as, if proved, would afford evidence of the material allegations. Here, upon most of these charges, I find nothing but circumstances which may have raised reasonable suspicion in the mind of the plaintiff or his solicitor, or Mr. McMicken, nothing more.

To some extent these remarks apply to the fifth charge, but there are proved some facts bearing upon that charge which require consideration.

It appears that shortly before the opening of proceedings upon this arbitration, Mr. Conklin was engaged by the municipal commissioner to audit the books of a municipality, that he was engaged upon this work to some extent contemporaneously with the arbitration proceedings, and made his report and received his remuneration before the award was completed. He was paid by the municipal commissioner who declared to the municipal officers his intention of reimbursing himself from a fund granted by the Provincial Legislature to the municipality. It also appears

that in the public accounts of the Province for the year 1889, the year in which the arbitration proceedings were had and the award made, there is the entry, "E. G. Conklin, valuation fees and services re arbitration lot 21, St. Boniface, $480," representing a payment to Mr. Conklin of the sum of $480, being $80 in excess of the fees charged for acting as arbitrator in the matter in question.

It appears also, that before these arbitration proceedings, Mr. Conklin had been offered and had declined an office under the Provincial Government; that about a month after the making of the award, he was offered another position under the Provincial Government, which he refused, and, some two months after the award, he was appointed clerk of the Legislative Assembly.

These last mentioned offers and the appointment cannot possibly affect the award. Mr. Conklin states that he was not in the employ of the Government and did not receive any payment from the Government while the arbitration proceedings were going on. There is nothing to show when the services were performed for which the $80 were paid. They may have been wholly subsequent or wholly prior to the arbitration proceedings, and I cannot assume that they were rendered or were paid for at a time or under circumstances which could have affected the arbitrator.

There remains only the employment and payment of Mr. Conklin by the municipal commissioner. It was upon these that the plaintiff's counsel principally relied in the argument of this motion. Let us consider the position fully. The railway commissioner has no personal interest in the matter. He is merely the servant of the Crown. He obtains, I presume, the best evidence he can to enable him to judge what amount he ought fairly to offer as compensation to those whose lands are required for railway purposes. Acting upon his judgment formed from such evidence, he offers the amount which appears proper. It is not to be expected that he would intentionally act unfairly, having no interest in doing so. His offer being refused, the amount has to be determined by arbitration. Suppose that the arbitrators disagree with his estimate and fix upon a somewhat larger amount to be allowed, it only shows that they differ in judgment with him. This does not necessarily cast any reflection upon his judgment. Neither he nor the executive council of which he is a member,

nor any other member of that body can be expected to have any strong interest in unduly diminishing the amount to be allowed to the claimant.

The municipal commissioner is a corporation sole, having certain duties relating to the municipalities. The moneys disbursed by the occupant of the office are those of the municipalities, not those granted by the Provincial Legislature to the Crown. In the instance referred to in the evidence, there would appear to have been some dispute between the municipal commissioner and the officers of the municipality respecting the amount paid to Mr. Conklin, and the commissioner proposed to use his influence as a member of the Provincial Executive to reimburse himself out of a fund going to the municipality.

I am not in a position to judge whether this was proper. But if not, its effect upon the arbitration proceedings would not be greater than if it were quite regular and proper. Then, in fact, Mr. Conklin was not employed as auditor by the Crown or the Province, but by the occupant of a particular office who was liable to him either individually or as a corporation, and who would be expected to obtain the funds to pay him from a municipal corporation. But it was the Province, or the Crown as representing the Province that has to bear the expense arising from this railway construction.

The arbitration proceedings were between the plaintiff and the railway commissioner representing the Province. Mr. Conklin was neither directly nor indirectly in the employ of the railway commissioner or of the Province. It seems impossible to suppose that he could be influenced in his award or his action upon the arbitration proceedings by his isolated transaction with the municipal commissioner, as he could not expect that commissioner to have any desire to secure the award of an unduly small amount to the plaintiff.

It does not appear that the arbitrators who joined in the award were influenced by the circumstances mentioned. On the contrary, both swear that they were not. Upon the evidence before me, I see no reason even to suspect that the amount awarded might not have been such as could have been awarded by fair and impartial arbitrators. This may well be the case, although another arbitrator might have come to a different conclusion, and

although Mr. McMicken's strong opinion in favor of a somewhat larger amount is, no doubt, perfectly honest and impartial.

There are no authorities from which any aid, except in respect of general principles, can be derived.

In *Conmee* v. *C. P. R.*, 16 Ont. R. 639, the cases have been very fully reviewed, and I can find none which would show that the court should interfere upon such a state of facts as here appears. The Conmee case itself goes farther than any of the others, but there the arbitrator, while the arbitration proceedings were going on, was offered a permanent and evidently lucrative position in the employ of the railway company. That offer was kept open until after the award was made, and was subsequently accepted by him. I quite agree that it would have been most improper that an award made by him should be binding upon the other party.

In the present instance I cannot consider that there is shown to have been any such relation between the arbitrator and the railway commissioner, the Crown or the Province as to lead me to believe that the arbitrator may have been biassed or affected by it in any degree.

I therefore dismiss the application, the Railway Commissioner and the Attorney-General to have costs of the motion as costs in the cause in any event.

Application dismissed.

WINNIPEG AND HUDSON'S BAY CO. v. MANN.

(IN EQUITY.)

Injunction.—Ex parte.—Misrepresentation in obtaining.—Balance of convenience.—Costs.—Laches.—Variance in charges of fraud.

An *ex parte* order for an injunction to last for a few days and until a motion to continue it had been disposed of, was obtained upon a misstatement of a fact material to one of the grounds upon which, in the bill, the plaintiffs right was founded. Upon an application to continue the injunction,

Held, That having in view the great importance to the plaintiffs of maintaining the *status quo* and the absence of damage to the defendant, the injunction might be continued, notwithstanding the misstatement in respect of a portion of the property in question upon an equitable ground not affected by the fact misstated; but the plaintiff was ordered to pay the costs of the motion. (*Burbank* v. *Webb*, 5 Man. R. 264, considered.)

Laches as disentitling to interim injunction discussed.

Variance between misrepresentations as alleged and proved discussed.

The defendants Mann & Holt entered into a contract for the building of the plaintiff's railway. The agreement was executed by the president of the railway, who affixed the seal of the Company to it, and it was alleged that he had no authority to make such an agreement, and, particularly, no power to stipulate, as he did, that a large quantity of the Company's bonds should be deposited as security for payment, to be delivered over to the contractors, and by them sold after giving thirty days notice to the Company. The bill alleged that the work having only been partially performed, the contractors obtained delivery of the bonds by representing that it was completed. It was further alleged that the bonds were then with the defendants, the Imperial Bank, the bankers of the contractors, who held them as depositaries merely. An *ex parte* injunction had been obtained restraining all the defendants from dealing with the bonds or removing them out of the jurisdiction. The present motion was to continue that injunction until the hearing.

The facts sufficiently appear in the judgment.

H. M. Howell, Q.C., and *J. S. Tupper, Q.C.*, for plaintiff. The facts clearly warrant an injunction till the hearing. The argument as to *ultra vires* in *West Cumberland* v. *Winnipeg & H. B. Ry.*, ante, p. 388 need not be repeated, but reference may be made to *Bateman* v. *Mid Wales Ry. Co.*, L. R. 1 C. P. 499.

J. S. Ewart, Q.C., and *J. H. D. Munson*, for defendant. The *ex parte* injunction was obtained by misrepresentation and concealment of facts, and will not be continued. *Burbank* v. *Webb*, 5 Man. R. 264; *Hynes* v. *Fisher*, 4 Ont. R. 60; *Harbottle* v. *Pooley*, 20 L. T. N. S. 436. It is no excuse that plaintiffs not aware of certain facts or thought them immaterial. *Dalglish* v. *Jarvie*, 2 McN. & G. 231; *Stewart* v. *Turpin*, 1 Man. R. 323; *Ley* v. *McDonald*, 2 Gr. 398; *McMaster* v. *Calloway*, 6 Gr. 577; *Clifton* v. *Robinson*, 16 Beav. 355. Even if plaintiffs successful they must pay the costs of the motion. *Hemphill* v. *McKenna*, 3 Dr. & War. 194; *Holden* v. *Waterlow*, 15 W. R. 139. Plaintiffs after suing on a contract, cannot repudiate it. *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 34; *Campbell* v. *Fleming*, 1 Ad. & E. 40. The delay disentitles plaintiffs to an interim injunction.

J. Stewart Tupper, Q.C., in reply. The rule as to concealment and suppression ought not to comply so strictly as practically to exclude hurried proceedings for a necessary injunction.

(*24th March, 1890.*)

KILLAM, J.—There are two main branches of this case, in respect of each of which the plaintiff Company seeks to have continued the *ex parte* injunction granted to restrain the defendants from parting with or disposing of the bonds in question. The first relates to the liability of the Company in respect of the contract assumed to be made on its behalf and under its corporate seal by its president, and upon the bonds issued in pursuance of that contract. The other relates to the circumstances under which the defendants acquired possession of the bonds, their performance of the contract and the charges of misrepresentation on which it is alleged the authority to the Bank of Montreal to hand over the bonds, was obtained.

The bill alleges that a certain resolution was passed by the Company's board of directors, and that this resolution constituted the sole authority to its president, to make and execute the contract on

its behalf. The affidavit of the president upon which the injunction was granted and is sought to be continued, alleges what the bill does not, that "the plaintiff's Company have never to my knowledge, ratified or confirmed the said agreement in any way other than by the passing of the said resolution." The affidavit of the defendant Mann filed in opposition to the motion, alleges that "the plaintiff Company have before or at the commencement of this suit, further adopted and accepted the said contract by bringing an action in this court at law against the defendants Ross, Holt and myself for damages for alleged breach of said contract and are now proceeding with said action." This statement is neither denied nor explained by the affidavits filed by the plaintiff in reply, but, on the contrary, the plaintiff's president expressly admits without qualification or explanation, in cross-examination upon his affidavit, that the plaintiff Company did bring such an action and that it is still pending. It is thus clear that there has been at least one positive act of ratification which must be imputed to the Company.

I am loath to believe that either the party who made the affidavit, the solicitor who drew it or the counsel who used it upon the original motion intended to make a deliberate misstatement upon this point. It may be that the circumstance of the action or its effect was overlooked. None the less, however, was there in the bill a suppression of the ratification and in the affidavit a misstatement of a very material fact. Other misstatements or suppressions of material facts bearing upon this portion of the case are claimed, but it is unimportant to discuss them, one being sufficient and none of these others appearing of such importance as the first, or to show an intention to mislead the court.

The contention is, that the court should refuse to continue an *ex parte* injunction thus obtained.

Undoubtedly if, according to the old practice in England and in Upper Canada, the injunction had been granted *ex parte* to continue until the hearing, and this were a motion to dissolve it, this misstatement of itself would cause it to be dissolved at once irrespective of the merits. In this respect the practice was very strict. *Harbottle* v. *Poolcy*, 20 L. T. N. S. 436; *Dalglish* v. *Jarvie*, 2 McN. & G. 231; *Clifton* v. *Robinson*, 16 Beav. 355; *Hilton* v. *Lord Granville*, 4 Beav. 130; *Hemphill* v. *McKenna*, 3 Dr. & War. 183; *Sturgeon* v. *Hooker*, 2 De. G. & S. 484; *Phillips*

v. *Prichard*, 1 Jur. N. S. 750; *Holden* v. *Waterlow*, 15 W. R. 138; *The Attorney-General* v. *The Mayor, &c., of Liverpool*, 1 M. & C. 210; *Castelli* v. *Cook*, 7 Ha. 89; *Ley* v. *McDonald*, 2 Gr. 398; *McMaster* v. *Calloway*, 6 Gr. 577; *Stewart* v. *Turpin*, 1 Man. R. 323.

Under these authorities it mattered not that the applicant had overlooked the facts, or had considered them not to be material, or was otherwise innocent of any intent to mislead.

But, in *Hynes* v. *Fisher*, 4 Ont. R. 60, it was urged that this principle should not be applied where the motion was only one to continue an interim injunction granted pending a motion for continuance, for the *ex parte* order for an injunction had then served its purpose and was at an end, and the rights of the parties could be discussed upon their merits as upon a substantive motion, after notice, for an injunction. Apparently, Chief Justice Wilson thought that effect should not be given to this distinction, but that the motion should be refused if the suppression were such as to justify a dissolution under the old practice. However, he dismissed the motion upon the merits.

I must confess that when I made the remarks to which reference has been made in *Burbank* v. *Webb*, 5 Man. R. 264, I had not in mind the distinction made by counsel in *Hynes* v. *Fisher*, but based them upon the language of the older cases. The same was the case, I fancy, with Mr. Justice Smith in *Stewart* v. *Turpin*, 1 Man. R. 323. In neither of those cases was the motion dismissed upon such a ground.

In *Sheard* v. *Webb*, 2 W. R. 343, the motion was, upon notice, for an injunction. Sir J. Stuart, V.C., held that the plaintiff was not entitled to it, one ground being that this bill alleged a certain agreement, and it appeared that two other memoranda had been made on the same day with the agreement set up, which must be treated as forming part of it, and which materially affected its construction. He considered that the omission of these from the bill, of itself, disentitled the plaintiff to the injunction. The distinction between *ex parte* orders for injunctions and those obtained on notice, is pointed out by Sir John Romilly, M.R., in *McLaren* v. *Stainton*, 16 Beav. 290. In *Greenhalgh* v. *The Manchester & Birmingham Ry. Co.*, 3 M. & C. 799, Lord Cottenham remarked that the plaintiff acted wisely in joining with his appeal, from an order of the Vice-Chancellor

dissolving the injunction a substantive motion for an injunction. He held the injunction properly dissolved for suppression of material facts, but considered the other portion of the motion upon the merits.

In *Fuller* v. *Taylor*, 9 Jur. N. S. 743, Sir W. Page Wood, V.C., said, "It is time something should be done to restore the practice of the court with reference to *interim* orders and the mode in which they are obtained, to a more strict and regular state of procedure. It is quite true that *interim* orders are not quite like *ex parte* injunctions, which put the other side to the neeessity of coming here to dissolve them, and in many respects they are a very convenient course of proceeding. But, though less strict than motions *ex parte* for injunctions, it is necessary that the court should be informed of every material fact whenever an *interim* order is asked for. The rule ought not to be carried to the extreme nicety to which it formerly was in the case of *ex parte* injunctions when the very smallest scrap of paper that was omitted was held almost to disentitle the party to hold the injunction. But when, as in this case, a portion of the correspondence is not disclosed to the court, and the effect of it is misrepresented in such a manner as to mislead the court, I think I ought in some way to mark my sense of the course which has been taken. . . . . I think that I sufficiently mark my sense of the impropriety of proceeding by *ex parte* application, after the previous correspondence withheld from the court by taking care that the plaintiffs shall have no costs of this motion." He granted the motion to continue without costs to the plaintiffs in any event; but it is important to observe that it appears from the report that the correspondence withheld was regarded as material principally upon the question whether the *interim* order should be made *ex parte* or upon notice.

The order in this instance is similar to that styled an *interim* order under the English practice. It is, clearly, not regarded with the same strictness as the old *ex parte* order for an injunction until the hearing, which the defendant had to apply to dissolve. The case, as I have said, has two main branches. So far as the second branch is concerned, this one misstatement as to ratification of the contract is unimportant. If the bill and evidence establish that the work was not completed according to the contract, that until completion the defendants were not entitled to

obtain the bonds, and that they obtained them upon material misrepresentations of fact inducing the plaintiff's president to believe that it was so completed, a distinct ground for the interference of the court, based on principles peculiarly equitable, is raised. Having reference to these considerations, to the nature of the bonds and the injury to the Company of having them transferred to innocent holders, and to the probability that the motion, if dismissed, would be at once renewed upon the second branch, I feel at liberty, though not without some hesitation, to enter upon the consideration of the second branch. But, while I do this, I desire to say that I consider it so important that parties should deal truthfully and fairly with the court upon *ex parte* motions for these *interim* orders, that I would not wish to be understood as deciding that the motion to continue would be entertained in a case in which the conditions of the present one are not found.

Although it is contended that there were misstatements or suppressions of material facts bearing upon the second branch of the case, I think that there are none which would justify the extreme course of refusing to entertain the motion. Those facts which are suggested as suppressed, really place the matter in no stronger position than the admitted ones. The same circumstances and charges of misrepresentation apply to qualify them, and unless we are to go back to the strictness of which Vice-Chancellor Wood appears not to approve, I cannot take them as fatal to the application. To mention only one or two, the statutes reciting the construction of the 40 miles of railway are referred to in the bill and would be taken as obtained upon the representations of the Company, without evidence of the resolution relating to them. These and the instrument of March, 1887, are explained by Mr. Sutherland's statement, that it was not until July that he learned of the incorrectness of the alleged representations. The terms of the orders in council were shown. The agreement with or representation to the Provincial Government in November, 1886, related to the provincial bonds not now directly in question. It is not claimed and cannot be claimed that the work was then complete so as to entitle the defendants to the Company's bonds. The authority of Money to bind the Company is denied and cannot be determined upon these affidavits. I can find no misstatement clearly established as upon the first branch, and unless

a party is to bring forward every scrap of paper which may become evidence eventually, I cannot think that there is here such suppression as could subject the plaintiff to the serious consequences of a refusal to entertain the motion.

Upon the hearing of the motion I was inclined to think the delay a serious obstacle in the way of the plaintiff. In many cases a degree of laches much less than is necessary to ensure the dismissal of the bill at the hearing of the cause will prevent a plaintiff from procuring an interlocutory injunction. See remarks of Lord Langdale, M.R., in *Gordon* v. *Cheltenham Ry. Co.*, 5 Beav. 233, of Sir W. Page Wood, V.C., in *Patching* v. *Dubbins*, Kay 11, and of Sir George Turner, L.J., in *Pulling* v. *The London, Chatham & Dover Ry. Co.*, 33 L. J. Ch. 505. Here the delay is chiefly important as throwing doubt upon the validity of the plaintiff's claim, and as evidence of waiver of the claim of misrepresentation and non-completion of the contract and of acquiescence in the transfer of the bonds to the defendants. In these respects, it is, to some extent, met by the evidence showing that the same contentions were previously made by the defendants, and that actions in which they were asserted are still pending. It is also asserted, though denied, that these actions have been stayed by agreement of the parties. There is nothing to show that the defendants have been induced by this delay to incur expense or to change their position.

Now, in considering the second branch of the case, I have endeavored wholly to shut out from my mind anything that I might remember of the evidence given in the former suit between these parties and any impressions I may have formed from that evidence, and to confine my attention solely to the case made upon this bill and the evidence addressed upon this application. I desire also to avoid the expression of any opinion which may affect or prejudice either party upon the hearing; regarding it as being necessary to determine only these things, (1) whether the bill makes a case for the interference of the court, (2) whether the case made by the bill is supported to the extent that justifies an interlocutory injunction, (3) whether, having in view the strength of the case, so far as it is thus supported, and all the circumstances, it is a proper exercise of judicial discretion to continue the injunction.

Upon the first point there are some questions which have not been fully discussed before me. It appears to have been almost assumed upon all hands that the bill is sufficient upon this part of the case. Shortly put, the bill alleges that the work was not completed according to the contract, that it was not inspected by or on behalf of the plaintiff Company, but that it was accepted as complete, accounts settled on that basis and authority for the transfer of the bonds executed by the plaintiff's president on its behalf, upon the mistaken belief of its having been properly completed, that mistake being induced by representations of the defendants. The bill does not very distinctly allege that the representations were fraudulently made. It does not show that the defendants knew their representations to be false, or knew that the plaintiff's president relied wholly upon them. So far as concerns the $2100 per mile, the portion of what is termed the contract price, which was to be secured by the bonds, these representations were clearly material. Upon the allegations of the bill, they were untrue. Certainly, the defendants had only to fulfil their contract. They could not be responsible if the land grant was not obtained for want of something which they did not contract to provide. But the representations as alleged, were clearly material upon the execution of the defendants' contract according to their own interpretation of it.

At present, also, it appears to me that they could not be entitled to payment for the tracklaying unless the track was placed upon a properly constructed road-bed. Having reference to the subject matter, although this was a separate item, to be paid for at a fixed date, it would seem that the contract impliedly involved the fulfilment of this condition in respect of the price of the tracklaying. I desire to deal with this question merely for the purpose of this application, as no argument upon the point has been addressed to me. The item for extra bridging appears to stand in the same position. So that, as to all these the representations were material. Perhaps, so far as the written authority and the settlement of the accounts were concerned, the representations were material in the sense that these might not have been obtained if the representations had not been made. But upon the face of the contract the liability for the moneys to be advanced by the defendants and the right to the bonds in respect thereof appear to have accrued irrespective of the per-

formance of the contract work. At any rate, it appears to have been adjudged that the liability to repay did thus accrue. As no tenable objection has been raised, I assume for the present that the bill is sufficient to show that the plaintiff is entitled to go behind the settlement and claim that the amounts of the contract price and for tracklaying are not payable.

When we come to the evidence, it clearly does not very closely or very satisfactorily support the allegations of the bill as to the representations. The bill states that the representations were, (1) that the work had been entirely completed, (2) that the defendants had fully complied with the contract in every way, (3) that the work had been actually examined by the engineer of the Dominion Government, (4) that the engineer was, in fact, satisfied with the work, (5) that the work was so completed as to pass the inspection required by the Dominion Government, (6) that the defendants had completed the work in every respect equal to the standard of the Canadian Pacific Railway, as exacted by that Company from the contractors who constructed the same through a similar country.

According to the affidavit supporting the motion, the representations were made by the defendant Holt and were, (1) "that the said forty miles of road, being the work embraced in the said contract, was fully completed," and (2) "that it had passed the inspection required by the Dominion Government in accordance with the said contract." There is also proved a letter from the defendants Mann & Holt to the plaintiff's president giving him formal notice that they had "completed the contract for the first 40 miles," "according to the terms of our contract."

Now, as the representations are stated to have been made to the plaintiff's president who makes the affidavit and instructed the filing of the bill, and as one can hardly expect his evidence to be supplemented in this respect, it is, certainly, unsatisfactory that there is such a wide divergence between the bill and the affidavit in reference to the terms of the representations. It does appear, however, that the first representation stated in the bill is materially deposed to in the affidavit. The third, fourth and fifth in the bill are, probably, included in the second in the affidavit. The divergence in quantity between the work done and the standard is so great, upon the plaintiffs showing, that it alone would appear to raise some presumption that the statement was

false to the knowledge of the defendant making the representation if that were necessary, for he must be assumed to know the nature of the standard to which the work was to conform. It appears, then, that I may infer that there is some prospect that the plaintiff may be able to establish a case at the hearing of the cause.

The importance to the plaintiff of preventing a sacrifice of its bonds and their transfer to innocent holders is very great. On the other hand, there is nothing whatever to show that the defendants can suffer by a little further delay. It appears, both from the affidavit and from the circumstances, that the bonds can be of little value. It is suggested that there may be an opportunity to dispose of them now, which may be lost by delay. This, however, rests upon mere suggestion wholly unsupported by any evidence. If there were any evidence of importance to support it, I should hesitate upon this material to interfere. As it is, I think that I may properly do so to a limited extent.

In respect of the advances the defendants have judgment. No payments appear to have been made upon the judgment. These bonds are the only security for that indebtedness for which the contract provided. I hear of no other. Quite irrespective of the question whether in strictness the defendants were entitled to them before complete performance of the contract, I think that upon this evidence the court is not warranted in interfering with the defendants' disposal of them. If the plaintiff should establish a right to open up the question of completion of the work and overpayment, it can safely be left to rely upon such damages as it may be found entitled to recover.

To mark my sense of the misstatement respecting the Company's ratification of the agreement, and of the utterly unreasonable and unjust efforts of those connected with this Company to evade its being held bound to the contract, apart altogether from the question of its being technically and legally bound by it, I shall not only refuse it any costs of this motion in any event, but shall continue the injunction as to the portion of the bonds only upon the terms that the defendants are to be entitled in any event of the cause to their costs of this application, although they succeed only in part. Under all the circumstances they succeed wholly on the first branch and partially on the second. The plaintiff must also be on terms to go to a hearing at the next sittings.

RE NICOLSON & THE RAILWAY COMMISSIONER.

Arbitration.—Disqualification of arbitrator.—Previous opinion for one party.

Under section 31 of The Railway Act (44 Vic. Man. c. 27,) a person appointed arbitrator (for the settlement of the value of lands taken) "shall not be disqualified by reason that he is professionally employed by either party, or that he has previously expressed an opinion as to the amount of compensation."

An objection to an arbitrator that he had previously given a valuation to one party and would naturally be biased in favor of the amount he had fixed,

Held, Untenable in view of the statute.

The section is not limited to arbitrators appointed by a judge.

The railway commissioner under the powers given him by 51 Vic. c. 5, took certain land of Nicholson & McNaughton for railway purposes. By section 25, the value of land so taken and the compensation and damage therefor, were to be settled and decided under the provisions of the Expropriation Act, 1888, by arbitration. By section 72, the provisions of The Railway Act, 44 Vic. c. 27, are incorporated with, and are to be deemed part of that Act. By section 12 of The Expropriation Act, 1888, the appointment of arbitrators and all proceedings in connection with the arbitration are to be made and had according to the provisions of The Railway Act.

In the matter of the present arbitration, the owners appointed James Scott of the City of Winnipeg, broker, as their arbitrator, and the railway commissioner applied to have him declared disqualified and removed. No third arbitrator or umpire had been appointed.

It appeared from the evidence, and was not disputed, that the owners were offered on behalf of the railway commissioner, $6000 as compensation for the land taken and for damages, and that Scott before his appointment as arbitrator, had given the owners an estimate in detail, placing the value of the land taken and the damages, irrespective of any damages to business, at $8000. A copy of this estimate was subsequently, on the request of the railway commissioner, given to him by Scott.

The objection to Scott and the ground of disqualification urged against him was, his having given the estimate of value to the owners. Or, as it was stated in the affidavit of the right of way solicitor, "I believe the said James Scott to be strongly biassed in favor of said James S. Nicolson and C. H. McNaughton, and that he will if his appointment be not annulled, endeavor to procure the making of an award in favor of said James S. Nicolson and C. H. McNaughton equal to or exceeding the amount so estimated by him in exhibit C., and that the fact of his having made said estimate and valuation, renders him unfit to make an unbiassed and disinterested award between the parties."

W. E. Perdue, for the Railway Commissioner, referred to the statutes, 44 Vic. c. 27, ss. 27, 29; 51 Vic. c. 5, ss. 25, 72; 51 Vic. c. 6, s. 12. As to disqualification of arbitrators. *Russell on Awards*, 107; *Kemp* v. *Rose*, 1 Giff. 258; *Kimberley* v. *Dick*, L. R. 13 Eq. 1; *Kerr on Frauds*, 325; *Lawson* v. *Hutchinson*, 19 Gr. 84; *Pardee* v. *Lloyd*, 26 Gr. 374; *Conrad* v. *Massasoit Ins. Co.*, 86 Mass. 20.

J. H. Munson, for the owners Nicolson and McNaughton. The expression of an opinion by an arbitrator is not a disqualification. Section 31 of the Manitoba Railway Act of 1881. The reason for such legislation is apparent in a new country where the class of persons qualified to act as arbitrators is limited. The arbitrator expressed the opinion to both sides. The above section refers to all arbitrators. The cases cited on behalf of the railway commissioner only show the law before the statute.

(*19th February, 1890.*)

TAYLOR, C.J.—On the argument, no reasons for supposing there would be a bias or partiality on the part of Scott were suggested, other than his having made the valuation, and that having been employed to make it, he must be regarded as the agent of the owners.

An affidavit of Scott has been filed for the owners, in which he denies being in any way biassed in favor of the owners, and says he is prepared to do his duty as an arbitrator fairly and without favor to either party, and to decide according to the evidence, and to proceed without partiality, but according to law. Upon this affidavit he was cross-examined. To the reading of the depositions on that examination, exception was taken

by Mr. Munson, an objection to the examination proceeding having also been taken before the examiner on the ground that, the present application to a judge in chambers, as *persona designata*, is not a proceeding in the Court of Queen's Bench, and so section 134 of the Administration of Justice Act, 1885, is not applicable. As the order for cross-examination was made by my brother Dubuc, not *ex parte*, but when the application came before him, and after hearing argument for both parties, I do not think I should consider the objection, but should allow the depositions to be read. When cross-examined, Scott stated what instructions he received as to making the valuation, his visiting the property and examining it, and maps placed in his hands.

He says he considered the valuation correct when he made it. He declined, on the advice of counsel, to say whether he now considers it correct. He says he has not changed his mind, for he has never thought of the matter since, but he would not, on the arbitration, consider himself bound by the opinion he has given.

A number of cases were cited by Mr. Perdue as to the necessity for arbitrators being impartial men, and in which awards were set aside on the grounds of partiality, bias, or improper conduct on the part of arbitrators. There is no doubt that, as it is put in *Russell on Awards*, 107, the arbitrator ought to be a person who stands indifferent between the parties, or, as V.C. Stuart said in *Kemp* v. *Rose*, 1 Giff. 258, a perfectly even and unbiassed mind is essential to the validity of every judicial proceeding. But these cases are all English ones, or Ontario cases dealing with ordinary arbitrations between individuals, and the question is, can the principle laid down in them be applied strictly to a matter like the present, in view of section 31 of the Railway Act. No such section is to be found in the Imperial Act, 8 Vic. c. 18, the Lands Clauses Consolidation Act. A similar section seems to have appeared for the first time in the first Railway Act of the old Province of Canada, 14 & 15 Vic. c. 51, s. 11, ss. 17, and it was continued in Consolidated Statutes of Canada, c. 66, s. 11, ss. 17. The same clause with the addition of the word "sole" before "arbitrator," appears in 31 Vic. c. 68, D.; 42 Vic. c. 9, D.; R. S. C., c. 109, and is also found as section 159 in the present Railway Act, 51 Vic c. 29, D. Section 31 of The Railway Act of Manitoba is identical with the

corresponding clause in the Consolidated Statutes of Canada, and is as follows: "The surveyor or other person offered or appointed as valuator or arbitrator shall not be disqualified by reason that he is professionally employed by either party, or that he has previously expressed an opinion as to the amount of compensation, or, that he is related or of kin to any member of the company, provided he is not himself personally interested in the amount of the compensation; and no cause of disqualification shall be urged against any arbitrator appointed by the judge after his appointment, but the objection must be made before the appointment, and its validity or invalidity summarily determined by the judge."

No doubt the Legislature knowing that in a new country the number of persons qualified to act as arbitrators is limited, passed such a section. As professional employment by one of the parties is no disqualification, the engineer or any other servant of the company can be named by it as arbitrator, and no objection to his appointment or to an award made by him can be taken, as in *Elliott* v. *The South Devon Ry. Co.*, 2 DeG. & S. 20. There, the umpire was surveyor of the Great Western Railway, holding shares in it, and that Company was intimately connected with and interested in the South Devon Co., which was, really, only an extension of the other. But V.C. Knight Bruce thought he would be going too far to set aside the award, although he did say, "I am not clear that he ought to have been appointed an umpire in point of delicacy." There are only a limited number of surveyors and land valuators, and naturally, when it is known that lands are likely to be taken, they are consulted by one or both of the parties as to values and damages. Their having been so professionally employed, the statute says, is not to be a ground of disqualification.

It was urged that the section goes no further than that a mere passing, casual opinion, given expression to shall not disqualify, but I have no doubt it means more than that, especially when coupled with the provision that professional employment by one of the parties shall not disqualify.

It was further urged that this section applies only to the case of an arbitrator appointed by a judge under a previous section. Plainly it is not so. This section says, "The surveyor or other person . . . . . shall not be disqualified." Now, where

the appointment not of an umpire where the two arbitrators originally named cannot agree, but of an arbitrator in consequence of the owner neither accepting the compensation offered nor naming an arbitrator, is made by a judge, he seems by section 19, limited to appointing a sworn surveyor as sole arbitrator. It is only where an arbitrator, whether appointed by the parties or a judge, dies or is disqualified, or refuses or fails to act, and another has to be appointed by a judge, that there seems under section 29, to be no limitation on the power of appointment.

The concluding part of section 31 supports the view I take. The first part says, certain things shall not be ground for disqualification, leaving others untouched, such as personal interest in the compensation. Then the concluding part says, that in the case of an arbitrator appointed by a judge, no ground of disqualification whatever can be entertained once the appointment has been made. No matter what the objection may be, it must be taken before the making of the appointment.

No ground of objection is made to Mr. Scott except, that he has given a valuation, and will naturally be biassed in favor of the amount he has already considered a fair one. While I quite agree with the principle so ably urged by Mr. Perdue, that an arbitrator should be a person perfectly indifferent between the parties, as the enunciation of a general principle, I cannot in this case, declare Mr. Scott disqualified to act as an arbitrator upon a ground which the statute has expressly said shall not be a ground of disqualification. I must, therefore, dismiss the application with costs.

Application dismissed with costs.

GALT v. McLEAN.

(IN CHAMBERS.)

Interpleader.—Jurisdiction of referee.—Barring parties.

Where an interpleader application before the referee falls to be disposed of upon a matter of practice, as where the sheriff by his delay or having taken indemnity from one of the parties is not entitled to relief; where either the execution creditor or the claimant fails to appear on the return of the summons; where either of them though appearing, declines to take an issue; where the claimant though appearing fails to support his claim by any evidence which can be looked at; or where there is some such state of circumstances, the referee may dispose of the whole question. But where the claimant does support his claim, and the question is whether he has merits or not, then the referee should order an issue or refer the matter to a judge.

J. S. Hough, for execution creditor.

C. H. Campbell, for claimant.

J. H. Munson, for sheriff.

(*17th March, 1890.*)

TAYLOR, C.J.—On the 30th of January last, the sheriff of the Central District by his bailiff, seized certain goods and chattels as the property of the defendant. Next day the defendant's son served notice claiming the goods seized, as his property, upon which the sheriff applied for the usual interpleader order.

The claimant sets up as his title that the goods were seized by the sheriff before, and on the 7th of January sold to one Mitchell from whom he bought them.

Several affidavits were put in by the claimant, and on these he was cross-examined. The referee upon that material, and after hearing the attorneys for the execution creditor and the claimant, made an order barring the latter, and against this he now appeals.

Section 55 of The Administration of Justice Act, 1885, deals with the procedure on the return of an interpleader summons, as to directing an issue and otherwise, and concludes, "or the judge may in summary manner by his order, dispose of the whole question." Section 56 provides that the court or judge may, upon consent, or if he thinks proper, without consent of the plaintiff and third party, determine and dispose of the merits of their claims in a summary manner, and make such order as to

costs and other matters as shall appear just and reasonable. Section 72 provides for what may be done by a judge in chambers in the way of summarily disposing of interpleader matters.

By General Order 92 defining the powers of the referee, he has no jurisdiction under sections 56 and 72. Can he, then, under the concluding words of section 55 practically do what he has no power to do under the other sections. If he can, it was never intended that he should do so.

It seems to me the proper construction to put upon the jurisdiction of the referee under this section would be to hold, that where the interpleader application falls to be disposed of upon a matter of practice, as where the sheriff by his delay or having taken indemnity from one of the parties, is not entitled to relief; where either the execution creditor or the claimant fails to appear on the return of the summons, where either of them though appearing declines to take an issue, where the claimant though appearing fails to support his claim by any evidence which can be looked at, or some such state of circumstances, then the case is one which may be dealt with under the concluding words of section 55. Where, however, the claimant does support his claim, and the question is whether he has merits or not, then the referee should order an issue, or the case should go over to be disposed of by a judge who can order an issue or deal with it summarily under sections 56 or 72.

Here the claimant has supported his claim, that is, he has sworn that he is the owner of the goods as purchaser from Mitchell and he has produced some evidence that at a sale by the sheriff on 7th January the goods were sold to Mitchell.

The case can be disposed of summarily only upon a consideration of whether, under circumstances which appear connected with the matter, the sale to Mitchell and then by him to the claimant were *bona fide* transactions or not. But that involves a consideration of the merits.

The appeal must be allowed. The value of the goods is small and the least expensive way to dispose of the questions involved will be to make an order for the trial of an issue in the County Court.

As the question is new, and the wording of the statute may have misled the referee, there should be no costs of the appeal.

Appeal allowed.

McRAE v. CORBETT.

(IN APPEAL.)

Tax sales.—Liability of lands to sale.—Furnishing lists to clerks.—Method of sale.—Sale for nominal price.—Illegal addition to amount.—Name of Corporation.—Adoption of seal.—Onus of proving invalidity.—Bill attacking void transaction.

Lands were by virtue of the local statutes liable in 1885 to be sold for taxes.

Furnishing to the municipal clerks lists of lands in arrear under section 272 of the Act of 1883, and section 289 of the Act of 1884 is not a condition precedent to the sale of land for taxes.

Per DUBUC, J.—Any such objection would be cured by the Act of 1886, s. 673, as amended by the Act of 1887, s. 52.

Under the Act of 1884 the treasurer in selling lots, not divided into legal sub-divisions, should determine whether, having regard to the interests of both owner and municipality, he will offer the whole parcel of land or some definite part. Having so determined, he should sell for the highest price obtainable. He is not, however, "bound to enquire into or form any opinion on the value of the land." And not having done so forms no reason for avoiding the sale.

Land worth $700 was sold for taxes for the sum of $17. The evidence showed, however, that there was great difficulty in selling lands at all.

Held, That these facts did not shew that the sale was not conducted in a fair, open and proper manner.

The amount for which lands were sold for taxes was illegally increased by the addition of interest.

Held, Not to invalidate the sale.

The use of a seal as the corporate seal with the knowledge and tacit consent of the governing body is a sufficient adoption of it.

Per DUBUC, J.—A misnomer or variation from the precise name of the corporation in a grant or obligation by, or to, it, is not material, if the identity of the corporation is unmistakable either from the face of the instrument or from the averments and proof.

Per KILLAM, J.

1. In a suit attacking a tax sale deed the *onus* of proving its invalidity is upon the plaintiff.
2. The Municipality of Kildonan was not dissolved by the Municipal Act of 1886.

3. A bill to set aside a tax sale deed alleged that the official who conducted the sale had no authority to do so; and that the deed was not executed by the officers or under the seal of the proper municipal corporation.

Quære, Whether it thus appearing that the deed was wholly void, a bill would lie to have it so declared.

This was a suit in equity brought by the plaintiff for the purpose of having a sale of certain lands for taxes declared to be null and void, and the deed of conveyance to the defendant Corbett made in pursuance of that sale and registered, declared void and a cloud upon the plaintiff's title and delivered up to be cancelled.

At the hearing before Taylor, C.J., his lordship made a decree dismissing the bill with costs; from this decree the plaintiff appealed to the Full Court.

C. P. Wilson and *R. W. Dodge*, for plaintiff.

There is no provision in the Act of 1884 as amended, which makes lands liable to be sold for taxes. The Legislature recognized this and remedied it by the Act of 1886.

Assuming there is such provision, the sale was illegal upon the following grounds:—

1. The lands of the plaintiff and of the C. P. R. were assessed and sold *en bloc*.

2. The whole lot was sold for an amount greater than the taxes. The land in question being a river lot and sub-divided, a sale could only be made of sufficient amount to realize the taxes. *Templeton* v. *Lovell*, 10 Gr. 214; *Knaggs* v. *Ledyard*, 10 Gr. 320. The term "highest bidder" is consistent with a sale by Dutch auction. *Todd* v. *Werry*, 15 U. C. Q. B. 619; *Cooley on Taxation*, 344.

3. If the statute gives a discretion to the officer as to what quantity he shall put up for sale, the discretion was exercised when he advertized to sell "so much of the land as shall be necessary to pay the taxes," the very words used in the Ontario statutes which authorized the sale by Dutch auction.

4. The amount for which the land was sold included interest on taxes at the rate of 10 per centum per annum, which was held illegal in *Schultz* v. *Winnipeg*, 6 Man. R. 35.

5. Assuming that the land was liable to be sold, the sale was not conducted in a fair, open and proper manner. It was conducted in a way different from that in which it was advertized. The treasurer has made no enquiries as to the value of the land. The result was evident from the fact that land proved to be worth $700 was sold for $17. *Deverill* v. *Coe*, 11 Ont. R. 235; *Donovan* v. *Hogan*, 15 Ont. App. R. 432; *Hall* v. *Farquharson*, 15 Ont. App. R. 457

6. The defendant cannot rely upon his deed until he has proved a sale. *Proudfoot* v *Austin*, 21 Gr. 566; *McKay* v. *Crysler*, 3 Sup. C. R. 436. No proof given of a warrant to the treasurer to sell the lands in question.

7. At any rate the deed only protects purchaser against informalities and mistakes and not against deliberate impositions which are illegal.

I. Campbell, Q.C., and *J. S. Hough*, for defendant.

There is a tax deed of the lot to the defendant. The effect of the statute is, that the sale and the deed should be final. No Ontario case has turned upon the smallness of price or want of enquiry; the strongest is *Hall* v. *Farquharson*, 15 Ont. App. R. 487. Read with that *Donovan* v. *Hogan*, 15 Ont. App. R. 432. All refer to *Deverill* v. *Coe*, 11 Ont. R. 222. Chief Justice Wilson indicated that an issue might be directed to find if sale fairly conducted, but while inadequacy of price has been commented upon, it has not been the basis of decision. The omission of the list was unimportant as there was no sale in 1884. As to the C. P. R. crossing the land or the plaintiff not owning all of it, the only evidence is the patent and surrender to the Queen, that is no evidence that the railway occupied the land. The lot was properly assessed as non-resident. Plaintiff's own witnesses show it was unoccupied. The assessor is not in any way bound to inquire into the title of non-resident lands. See *Fleming* v. *McNabb*, 8 Ont. App. R. 656. As to the form of the deed, in reference to one word omitted from the name of the corporation it is only necessary that the corporation should be sufficiently identified. *Kent's Commentaries*, vol. 2, p. 293; *Angell & Ames on Corporations*, p. 83; *Dillon on Corporations*, p. 206. As to *onus* of proof. *Taylor on Evidence*, p. 341, § 365. As to inadequacy of price. *Story's Equity*, p. 240 § 245-8; *Cotter* v. *Sutherland*, 18 U. C. C. P. 410.

(*8th March, 1890.*)

DUBUC, J.—The principal objections urged by the plaintiff against the deed of the defendant, and which require to be noticed are that the name of the municipal corporation of Kildonan set out in the said deed is not the correct corporate name of the said municipality; that the seal affixed to it is not the seal of the said municipality, and that the sale was not conducted in a fair, open and proper manner, as required by the statute.

As to the first point, the corporation is mentioned in the deed as "The Municipality of Kildonan," and it is claimed that the proper name is "The Rural Municipality of Kildonan." Until the Municipal Act of 1886 was in force, the proper name of the said corporation was "The Municipality of Kildonan." Even the said Act of 1886, section 18, sub-section 6, which defines the limits of the said municipality, says that it shall be known as the Municipality of Kildonan. But, section 51 of the same Act enacts, that the name of every body corporate, continued or created under this Act shall be "the city, town or rural municipality (as the case may be) of———." And it appears that the council and officers of the said municipality never noticed that section, and continued to designate and call their corporation the Municipality of Kildonan. Is that variance sufficient to invalidate the deed? In *Angell & Ames on Corporations*, at p. 83, it is stated that, "the name of a corporation frequently consists of several words, and an omission or alteration of some of them is not material." The same principle is found in *Dillon on Corporations*, p. 206, where he says that "a misnomer or variation from the precise name of the corporation in a grant or obligation by or to it, is not material, if the identity of the corporation is unmistakable either from the face of the instrument, or from the averments and proofs." Here, the omission of the word "rural," is certainly immaterial. Another ground against that contention of the plaintiff is, that as held in *McLellan* v. *The Municipality of Assiniboia*, 5 Man. R. 265, the deed is executed, not by the municipal corporation, but by the reeve and treasurer of the municipality who are the persons appointed by statute to execute the same.

In this case the word "rural" may properly be considered as a part of the description of these two officials designated by statute to execute the conveyances.

As to the seal, it was argued that the one affixed to the deed is not the particular seal of the Rural Municipality of Kildonan, the seal which had been used by the former Municipality of Kildonan. Munro, the treasurer, swears that it was the seal which had been in constant use by the said municipality as well after as before the statute of 1886 came in force. So, the municipal corporation of Kildonan existing in 1887, when the deed was executed, whether it should be considered as a new municipality, or as the continuation of the former Municipality of Kildonan with the word "rural" added to its name, had adopted and continued to use the former seal as the proper seal of the corporation. As stated in *Harrison's Municipal Manual*, at p. 12 of the 5th ed., "A corporation as well as an individual may adopt any seal. It need not declare that the seal is their common seal." I cannot, therefore, find the deed invalid on that ground.

The other point raised by the plaintiff, and on which he more specially relied to have the deed set aside, is that the sale was not conducted in a fair, open and proper manner.

The sale took place under the provisions of the Municipal Act of 1884, 47 Vic. c. 11, s. 310, as amended by c. 51, s. 10, s-s. (a), of the same year. The first part of the clause says that the district treasurer shall offer the said land for sale in legal subdivisions or in different lots or parcels. And it continued, "If there be no registered plan of the lands of which the parcel offered for sale forms a part, he shall exercise his discretion in selling the portion which shall appear to him best in the interest of the owner and of the municipality."

In this case, the officer charged with the selling of the lands, offered the whole lot for sale. It is contended that he should have designated on what part of the lot the number of acres to be accepted for the taxes should be taken, and that in not doing so, he failed to exercise the discretion required by the statute.

In the advertisement it was stated that the officer would sell by public auction so much of the lands as might be sufficient to discharge the taxes. In offering the whole lot for sale, did he act, in this particular instance, contrary to the spirit of the advertisement? Did he really fail to exercise his discretion? Let us look at the facts. The sale was conducted by J. H. Hoare, assistant treasurer of the Eastern Judicial Board. In speaking of the said sale in his evidence, he states that "the

question was, in those days, to realize anything on it; it was hard to get up to the taxes; adjournments were tried with regard to other sales and it was only found waste of energy, a great deal of this property was not bid upon." He says, also, that the lands were always sold strictly to the highest bidder, and that the sales were conducted in a business-like way. There is no evidence showing that there was no proper exercise of discretion in offering the whole lot for sale. After his experience in the numerous sales and attempts to sell he had made before, he was, likely, convinced that it would be useless to offer anything less than the whole lot for the taxes due. And, under the particular circumstances, the offering of the whole lot may have been done after the proper exercise of his discretion. His evidence justifies that inference, and nothing is shown to the contrary. The learned Chief Justice has so found, and I perfectly concur in his finding.

Some other points were raised with respect to certain notice not clearly shown to have been given; but the tax notices were proven to have been sent to the plaintiff in 1884 by the secretary-treasurer of the municipality who had them mailed and registered. As the sale was for the taxes of 1883 and 1884, this was the important and material notice. If some other notice was not positively shown to have been sent, though not proven not to have been sent, I think the defect is cured by section 673 of the Municipal Act of 1886 as amended by the Municipal Act of 1887, 50 Vic. c. 10, s. 52. By the said provision, the deed of sale is made conclusive evidence of the validity of the sale and of all proceedings prior to same, and notwithstanding any defect or informality in, or in the proceedings prior to such sale, or in such deed or the form thereof, no such tax sale deed shall be annulled or set aside, except upon the grounds that the sale has not been conducted in a fair, open and proper manner, or that there were no taxes due and in arrear upon such land at the time of said sale, for which the same could be sold by such municipality.

The inadequacy of the price cannot, in itself, be a ground for setting aside the sale. If it were so, the municipalities might, in many instances, be unable to collect the taxes imposed on lands duly assessed.

Had we to consider the question of merits, the inadequacy of the price might, perhaps, though improperly in this case, be invoked in favor of the plaintiff, when the lands which were sold for $17 in 1885, are now stated to be worth about $700. If the plaintiff had been absent from the Province and the notice had not reached him, or, if the property had been intrusted to some agent who had neglected his trust in not paying the taxes or omitting to notify his principal that the lands were to be sold for non-payment of taxes, the plaintiff might, perhaps, be said to have suffered a hardship. But such are not the facts of this case. The plaintiff was part of the time in Winnipeg, and part in Sunnyside, a locality adjoining or very near Kildonan. He knew that by neglecting to pay his taxes in 1883 and 1884, his lands were liable to be sold in 1885; he must have received the notice mailed and registered to him; he could not ignore that numerous sales for unpaid taxes were held in every municipality.

After the lands were sold in 1885 he knew that until November, 1887, he could have redeemed them by reimbursing the purchase price, $17, with interest and costs. Knowing all that, he does nothing. He cannot, therefore, complain of anything but his own negligence; and under such circumstances he cannot be considered to have any merits.

The municipalities having been brought into existence, cannot exist without collecting taxes to meet the expenses and liabilities imposed upon them by the statute. The man who, without any excuse apparent or suggested, chooses to defy or ignore the law which commands him to pay his taxes, who merely stands by when the municipality takes the means of getting the taxes by selling his lands, and allows the period within which to redeem to elapse without showing himself, and who, after the purchaser has advanced his money, waited the two years, obtained his deed, and may properly consider himself the owner of said land, then only commences to move by searching and scrutinizing the proceedings in order to detect some slight omission, mistake or informality on which he can rely to have the sale or deed set aside, that man should not be entitled to any more sympathy than the purchaser who, although he may have acquired a valuable property at a small figure, has done so in conforming himself to the letter and spirit of the law.

I think the decree should be affirmed with costs.

KILLAM, J.—(After referring to the pleadings.) Upon this answer issue was joined and the cause came on for the examination of witnesses and hearing before the learned Chief Justice, who dismissed the plaintiff's bill. It came up for rehearing in Michaelmas Term last, when a number of questions of considerable importance as well as difficulty, arising under our Municipal Acts, were very fully and ably argued before us.

If we were to follow the decisions in *Hurd* v. *Billinton*, 6 Gr. 145; *Buchanan* v. *Campbell*, 14 Gr. 163, and some other Ontario cases, we might consider it improper to allow the plaintiff to raise in this way two of the questions thus discussed. If there was no statutory authority in the secretary-treasurer of the Eastern Judicial District Board to offer lands for sale for the taxes of 1883 or 1884, or if the deed of conveyance to the defendant Corbett was not executed by the officers or under the corporate seal of the proper municipal corporation, the deed is wholly void.

I am not sure, however, that we ought at the present time in this Province, to adopt and apply the principle of those decisions. It is of the greatest importance to property owners, that their registered titles should have no such apparent clouds upon them in the books of the registry offices.

A deed of lands properly executed in pursuance of a valid sale for unpaid taxes, may be registered under "The Lands Registration Act of Manitoba," C. S. M., c. 60, s. 15. Upon production to him of an instrument with proper proof of execution, the registrar is to endorse upon it a certificate of its registration such as appears upon the deed produced in the present case, which was, apparently, in duplicate. See ss. 31 and 32. That certificate, at least where there were two or more original parts, is, by section 31, made *prima facie* evidence of the due execution of the instrument. A solicitor investigating the title would, then, find such proof in the registry office, and it would often be difficult to show clearly that the instrument was not duly executed. Even if The Manitoba Municipal Act, 1884, 47 Vic. c. 11, as amended by the Acts 48 Vic. cc. 24, 25, contained no provisions under which lands could be sold for the taxes of 1883 or 1884, there was in sections 335, 336 and 337, clear provision for sale for arrears of taxes imposed before 1883, and there are in sections 298-334, provisions evidently based on the assumption that sales could be made for other arrears. It is not, then, as if the instru-

ment registered was of such a form as clearly to be of no effect, or, as if there were no provisions which could, under certain facts or as matter of legal construction, give the necessary authority to execute a valid deed of conveyance. The Registration Act does not appear to contain any provision for expunging from the records any instrument not in fact executed or having no legal effect.

The 344th and 351st sections of the Act of 1884 imply the right to bring a suit to set aside or question a sale for taxes. In the present case no obligation to our consideration of any of the questions raised has been made on any such ground as that which I have suggested. On the contrary, all of the questions have been argued as open to be raised in this way, and we are entitled to presume that the defendant as well as the plaintiff wishes them disposed of in this suit, so far at least as they are raised by the pleadings. The right to maintain the suit upon these points is to some extent supported by a recent case in the Supreme Court, *Rodburn* v. *Swinney*, 16 Sup. C. R. 297.

I have referred to the point, however, for the double purpose of showing that it must be regarded as open in future cases, and of indicating some grounds for arguing against the principle of the Ontario cases referred to. I do not intend to express any opinion upon it. I shall proceed to consider upon their merits all the questions argued so far as they appear to be raised by the pleadings.

It is obvious, however, that such a suit cannot be treated as an action of ejectment, in which the plaintiff would prove a *prima facie* title to the land, thus putting the defendant to proof of the tax sale deed and of the facts giving to the officers authority to make it. The plaintiff must certainly allege a title and prove it *prima facie*, but only for the purpose of showing that he has a *locus standi* to attack the instrument complained of. It is still for him to show that the instrument is invalid and does not affect the land. He must prove either that it was not executed or that the facts were such that the officers assuming to execute it had no authority to do so.

(His Lordship then discussed the pleadings and the evidence bearing upon the objection to the assessment *en bloc* of the whole parish lot, holding that it was not sufficiently proved that it was improper to have so assessed it.)

Had the secretary-treasurer of the Eastern Judicial District Board authority to make sale of the land for these arrears? It is denied that he could, under any circumstances, do so, and it is also asserted that even if the authority existed in any case, the conditions necessary to enable him to make a valid sale of the lands in question were not fulfilled.

The difficulty respecting the authority to sell lands for any such arrears arises as follows:—By the 298th section of the Act of 1884, as amended by the Act 47 Vic. c. 51, s. 5, "Wherever the whole or a portion of the tax on any lands has been due for more than a year after the thirty-first day of December of the year when the rate was struck, the treasurer of the district shall submit to the chairman of such district, lists in duplicate of all the lands in his books belonging to the several municipalities within the district, on which he is authorized to collect any taxes and liable under the provisions of this Act to be sold for taxes, with the amount of arrears against each lot set opposite the same, including all taxes in arrear to the end of the calendar year last preceding the submission of such statement, and the chairman shall authenticate each such list by affixing thereto the seal of the board and his signature, and one of such lists shall be deposited with the clerk of the municipality in which the lands therein described are situated, and the other shall be returned to the district treasurer with a warrant thereto annexed, under the hand of the chairman and the seal of the district, commanding him to levy upon the lands therein described for the arrears of taxes due thereon with the costs." And by the 301st section, "The district treasurer shall prepare a copy of the list of lands to be sold, as authorized by this Act, ... and shall cause such list to be published," &c. And by the 310th section, "The district treasurer shall offer the lands for sale by public auction, and in doing so shall make and declare the amount stated in the list or advertisement as the taxes due, together with the other charges, and shall then sell the same to the highest bidder," &c.

The treasurer, then, was empowered to sell only the lands to which his warrant relates and which he has advertised for sale, and the list to which the warrant refers was to be of the lands "liable under the provisions of this Act to be sold for taxes," and the list to be advertised was to be "of lands to be sold, as authorized by this Act." Then, so far as these provisions were

concerned, it was not settled what were the lands "liable to be sold for taxes," or "to be sold as authorized by this Act," or, in other words, what lands the treasurer could sell. In short, he was to sell only those liable to be sold for taxes, without it being specified what those were.

By the 289th section the treasurer of every district was, on or before the 1st July in each year to furnish to the clerk of each municipality a list of all lands in his municipality in respect of which any taxes had been in arrear for the year next preceding the 1st June in that year, and that list was to be headed in the words following:—"List of lands liable to be sold for arrears of taxes in the year one thousand eight hundred and ————." The assessor was then to ascertain if any lands in this list were occupied and mark them "occupied" or "not occupied," as the case might be; and the clerk was to furnish to the district treasurer a list of the several parcels of land appearing "on the resident roll as having become occupied." By the 293rd section the district treasurer was, on or before the 1st September in the then current year, to return to the clerk of each local municipality an account of all arrears of taxes due "in respect of such occupied lands." By the 294th section, the clerk of each municipality was to add these to the taxes assessed against "such occupied lands" for the year. By the 295th section, if there were not sufficient distress "upon any of the occupied lands in the preceding section named," to satisfy both the arrears and the taxes for the current year, the treasurer (presumably of the municipality) was to show this in his roll. Then by the 296th section, "In case it is found by the statement directed to be made to the district treasurer that the arrears of taxes upon the occupied lands of nonresidents, or any part thereof, remain in arrear, such land shall be liable to be sold for such arrears." And by the 300th section, "The said treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities in the month of June preceding the sale, nor any of the lands which have been returned to him as being occupied under the provisions of this Act, except the lands, the arrears for which had been placed on the tax roll of the preceding year, and still remain in arrears in consequence of insufficient distress being found on the lands."

By the 335th, 336th and 337th sections, special provision is expressly made for the sale of lands for arrears owing and unpaid from a time previous to the 1st January, 1883; but, with the exception of the 296th section, no part of the Act appears to expressly make any lands liable to be sold for taxes of succeeding years, and that section applied only to the occupied lands of nonresidents.

As it would not appear that the arrears upon these were intended to be placed on the collector's rolls for collection by distress or otherwise, they would almost seem excluded from liability to sale by the last part of the 300th section. Then, to make the confusion greater, in 1885, by 48 Vic. c. 24, ss. 9, 11, the 292nd, 295th, 296th and 300th sections of the Act of 1884 were repealed, so that no express provision making lands liable to be sold for taxes remained, except those relating to taxes imposed before 1883.

Now, undoubtedly, statutes of this character should be strictly construed. To the many authorities cited by Mr. Justice Gwynne of the Supreme Court in *Crysler* v. *McKay*, 3 Sup. C. R. 436, may be added the expressions of Lord Cairns in *Cox* v. *Rabbits*, 3 App. Ca. 478, "My Lords, a taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax it is not to be imposed;" and in *Partington* v. *The Attorney-General*, L. R. 4 H. L. 122, "if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

But by these Acts, authority was certainly given for the imposition of the taxes. The municipal councils and officers were distinctly empowered to assess the lands, levy rates and collect the same. The Act of 1881 authorized their collection by distress of the goods of the party who ought to pay them, and in the event of there being no property to distrain, by sale of the lands on which taxes were two years in arrear. The Act of 1883, section 246, authorized distress of goods of resident ratepayers and of nonresidents who had required their names to be placed on

the roll. Returns of arrears were to be made to the county treasurers, who were, by section 270, empowered to distrain for taxes on lands of nonresidents. By the 279th section, the occupied lands of nonresidents were made liable to be sold for arrears of taxes. While by the 281st section, the same provision was made as by the original 298th section of the Act of 1884 with reference to the district treasurer, for the preparation of a list of the lands in the county treasurer's books, "the nonresident or other taxes on which he is authorized to collect and liable under the provisions of this Act to be sold for taxes," and the issue of a warrant for the sale of the lands in the list, and while the county treasurer was directed by the 272nd section, as the district treasurer by the 289th section of the Act of 1884, to furnish yearly to the clerks of the municipalities, lists of lands a certain time in arrear with the heading, "List of lands liable to be sold for arrears of taxes in the year one thousand eight hundred and ————," the Act of 1883 contained no more explicit provisions than the original Act of 1884, making any but occupied lands of nonresidents liable for sale for arrears of taxes.

By the 254th section of the Act of 1883 and the 270th section of that of 1884, "The taxes accrued on any land shall be a special lien on such land," &c., but unless the provisions for sale applied no mode of realizing the liens was given.

Now, the reference in the 281st section of the Act of 1883 and the 298th section of that of 1884, to "nonresident or other taxes," showed that the Legislature did not contemplate that the list of lands to be prepared as containing those to be sold under that and subsequent sections should comprise only occupied lands of nonresidents. If the legislation had remained as in the Act of 1883 and the original Act of 1884, I think that there would be no difficulty, having reference to the expression just mentioned in the 281st and 298th sections respectively, and to the directions to the county and district treasurers to prepare lists of all lands on which taxes were for certain periods in arrear with the headings mentioned, in construing the 284th section of the Act of 1883 and the 300th section of that of 1884, providing that, "The said treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities," &c., as declaring that lands properly included

in these lists were liable to be sold. The intention is so obvious that it may be taken as expressed.

Then, although by the amending Act of 1884, 47 Vic. c. 51, s. 5, a new section was substituted for the original 298th before the original Act came into force, from which the expression "the nonresident or other taxes," &c., was omitted, I cannot take that as conclusively showing an intention to take away the liability of other lands than the occupied ones of nonresidents to be sold for taxes. The 289th and the 300th sections still remained, and, though the argument for the construction which I have given those sections and the corresponding ones in the Act of 1883 may be considered, in some respects, weakened without that expression, and there is room for the argument that the repeal of that expression indicates an intention to the contrary, I think that the same construction must be given to the Act as thus amended.

Then, what effect had the repeal of the 296th and 300th sections by 48 Vic. c. 24, ss. 9, 11? If the Act of 1884 had been originally enacted as it would stand after the amendments of 1885, I think that there would be good ground for arguing that it made liable to be sold for taxes, all lands on which taxes were a certain time in arrear, and in respect of which all other necessary conditions should have been fulfilled.

The treasurer of the district was still to transmit annually to the clerks of the municipalities, the lists of all lands on which taxes were a certain time in arrear, with the same important heading, and there were provisions contemplating such sale evidently not relating to lands on which the only arrears were of taxes imposed before 1883. But when we consider that upon the construction which I would give to the Act of 1883 and the Acts of 1884, all lands might become liable to be sold for arrears of taxes up to the time of the passing of the Acts of 1885, and that some amendments were made by the latter Acts in respect of the matters leading up to the sales, it appears to me that the intention that all lands were subject in certain events to become liable to be sold, was sufficiently indicated to bring them upon fulfilment of the necessary conditions within the 298th and following sections.

It is to be noticed also, as aiding this construction, that otherwise either there would be no means of enforcing the lien given

by the statute, or that expensive suits would be required for the purpose, while there is no possible reason which can be suggested for making a distinction in this respect between occupied lands of nonresidents and others, or any indication whatever of such a radical change in the intention of the Legislature at any period. It is also important to notice that the provisions of our statutes of 1883 and 1884, relating to the sales of lands for taxes, are almost verbatim copies of the corresponding portions of the Ontario Assessment Act, 32 Vic. c. 26, which would be open to the same criticism, but under which, as the reports of decided cases show, many parcels of land were sold which were not of the character of those made liable to sale by the express words of the statute. It does appear, however, that the earlier enactments relating to Upper Canada were better drawn and did give express authority for the sale of all lands on which taxes were for a certain period in arrear. See Con. Stat. U. C., c. 55, s. 110 *et seq*, 16 Vic. c. 182, s. 55 *et seq*.

I am of opinion that it is sufficiently shown by the statutes that lands of the description of the lot now in question were liable in 1885 to be sold for taxes in this Province.

Then, the only remaining objections to the authority of the secretary-treasurer of the district to offer these lands for sale, are those which relate to the furnishing to the clerk of the municipality of the lists of lands in arrear under the 272nd section of the Act of 1883 and the 289th and 298th sections of the Act of 1884. I do not deem it of importance to examine the evidence closely for the purpose of determining if it is sufficiently made out that some one of these lists was not furnished, for I cannot regard the furnishing of any of them as a condition precedent to the right to sell the lands.

By the 300th section of the Act of 1884, it was expressly provided that, "The said treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities in the month of June preceding the sale." This provision impliedly excludes the idea that the including of the lands in the list for any other year under the 289th section should be a condition precedent to the sale. The 300th section was repealed in 1885 by 48 Vic. c. 24, s. 11, at the same time as the repeal of that portion of the 290th section which required the assessor to notify the occupiers or owners that

the lands in these lists were liable to be sold for arrears of taxes. This appears to me to show that, although for the purposes of the municipalities, the lists were to continue to be furnished yearly, the furnishing of the list or the including of any particular parcel in it was no longer to be a condition precedent to the right to sell any parcel.

When, too, we find such an enactment as that in the 300th section so closely following the provision of the 298th section, requiring that the list of lands to be sold should be furnished to the clerk of a municipality, it appears to me impossible to suppose that the furnishing of this list was to be a necessary preliminary to the sale. The obvious purpose of requiring a duplicate of the list to be sent to the clerk of the municipality was to ensure better the preservation of a record of the lands to be sold, as well as to place information of what was being done by the officers of the district in the hands of the officers of the municipality. It does not appear that the interests of the owner were particularly concerned in the furnishing of such a list.

I am, therefore, of opinion that it is not shown that in 1885 the land in question was not land on which the whole or a portion of the tax had been due "for more than a year after the thirty-first day of December of the year when the rate was struck," or on which the district treasurer was authorized to collect any taxes, or which was liable under the provisions of the Municipal Act of 1884, as then amended, to be sold for taxes; and that, so far as is made to appear, the district treasurer was justified in advertising and offering the land for sale.

The next question which I will consider is that relating to the mode of sale. Before 1883 our statutes were similar in this respect to those of Ontario under which the officer making the sale knocked down the smallest quantity which a bidder would take for the amount payable on the parcel offered, the competition being downward from the largest portion thus bid for to the least; and that system of sale accordingly prevailed here. But by the Act of 1883 a distinct change was made. By the 295th, 296th and 297th sections, the treasurer was to "offer the lands for sale by public auction," was to declare the amount due with charges as "the upset price on each respective lot or parcel as offered for sale," and "then sell the same to the highest bidder

or to such person as shall be willing to take it at the upset price, there being no higher bidder;" if the land would not sell for the full amount of arrears of taxes and charges, the treasurer was to sell for any sum he could realize, but if it sold for a greater sum, the purchaser was to pay the amount of taxes and charges at once and the balance within one month after the expiration of the time for redemption, and in event of his failure thus to pay the excess, he was to forfeit all claim to the land and the amount previously paid. Other sections made provision for the disposition of this surplus, the ascertaining of the former owner and its payment to him.

There could be no doubt of the treasurer's duty, under these provisions, to offer the whole parcel for sale and to sell it out for the highest price offered. For some reason, however, a change was made in the Act of 1884, by the 310th section of which, "the district treasurer shall offer the lands for sale by public auction, and in doing so shall make and declare the amount stated in the list or advertisement as the taxes due, together with the other charges, and shall then sell the same to the highest bidder, or to such person as shall be willing to take it, there being no higher bidder, but subject to redemption as hereinafter provided for," thus nearly following the 295th section of the Act of 1883—but then adding (what is not found in the Act of 1883) "or so much of the said land as is sufficient to discharge the taxes and all lawful charges incurred in and about the sale and the collection of the taxes, selling in preference such part as he may consider best for the owner to sell first; and in offering or selling such lands it shall not be necessary to describe particularly the portion of the lot which is to be sold, but it shall be sufficient to say that he will sell so much of the lot as may be necessary to secure the payment of the taxes and lawful charges due thereon."

This addition was taken from the Ontario Statutes, R. S. O., c. 180, s. 137, 32 Vic. c. 36, s. 138. In the 312th and subsequent sections, however, were similar provisions to those found in the 297th and subsequent sections of the Act of 1883, for payment of the excess over the amount of taxes and charges, forfeiture of the land and money paid in event of default, and the disposition of the surplus. Their retention appears to me to indicate that the treasurer might still sell out the parcel *en bloc* for

more than the taxes and charges, as under the Act of 1883; though, probably, if the 310th section of the Act of 1884 had remained unchanged, he could have chosen the Ontario method.

But that section did not remain unchanged. It was altered before it came into force by the Act 47 Vic. c. 51, s. 10, which struck out all the added portion to which I have referred, and substituted the following:—"The district treasurer may offer the said land for sale in legal sub-divisions or in different lots or parcels, so that no such lot or parcel shall be less than a single lot according to any registered plan, nor less than a legal sub-division according to the Dominion Government Survey. If there be no registered plan of the lands of which the parcel offered for sale forms a part, he shall exercise his discretion in selling the portion which shall appear to him best in the interests of the owner and of the municipality; and if by selling according to the above conditions a portion of the particular lands assessed for any sum for which the same are advertised for sale, he realizes the full amount of the taxes due thereon and the other charges, he shall not then sell any further portion thereof."

The "legal sub-divisions" referred to in this substituted clause are evidently the legal sub-divisions authorized by the 16th section of the then Dominion Lands Act, 46 Vic. c. 17, R. S. C., c. 54, s. 20, and the description of the land in question shows that it did not form any portion of the lands surveyed into townships and sections, but that it must have been surveyed under 35 Vic. c. 23, s. 16, D., so that there could have been no legal sub-division. The registered plan referred to is evidently one made and filed or registered under the 52nd, 53rd or 55th section of the Registry Act, C. S. M., c. 60, and not a plan of original survey of the Dominion Government. The argument then, is that, as to such lands, the treasurer could sell only so much as would realize the exact amount of taxes and charges due, which would involve his proceeding by the Ontario method. This argument is based upon the assumption that the Legislature would not authorize the sale of any more land than was actually necessary for that purpose. But, having in view the fact that, by the Act of 1883, the whole parcel assessed was to be sold, that by the original Act of 1884 the treasurer was still authorized to sell the whole, and that under the section as amended he was

allowed in most cases to sell whole lots or parcels according to the surveys or plans, even though somewhat more than the amount due should be obtained, I do not think that any such assumption can be made.

The provision at the end of the clause is intended merely to prevent the treasurer from unnecessarily increasing the surplus by making sales of further portions of the assessed parcel after the aggregate of the prices of portions first sold comes up to the amount to be raised.

In my opinion, the treasurer should consider both the interests of the owner and those of the municipality, and having reference to these he should determine whether it would be proper to offer the whole parcel at once, or a definite portion of it, but when he has so determined and put it up for sale, he should sell it out for the highest price obtainable. In the present instance, the whole lot was offered. This was apparently done without inquiry respecting the particular features of the lot or its situation. It is not distinctly stated that the treasurer made no such inquiry, or what was the extent of his personal knowledge. The evidence of Mr. Hoare shows that he was the assistant secretary-treasurer and conducted the sale, that he (Hoare) did not know the value of the lot or anything approaching it, and was possessed of no information which he could give to intending purchasers respecting its value or position or the quality of the land, and that the board had taken no proceedings to ascertain any of these things. It is to be observed upon this evidence, that the board has nothing to do with the matter, and that so far as the exercise of a discretion as to selling a part or the whole or the mode of division into smaller portions, this is the business of the secretary-treasurer himself, which he would, apparently, not be entitled to delegate to any other person. It has not been contended that he could not employ a party to act as auctioneer and conduct the sale as such, which, so far as can be judged from the evidence, was all that Mr. Hoare did. It might be that the secretary-treasurer had some personal knowledge of the property, which, taking into consideration the various circumstances to which Mr. Hoare refers, led him to conclude that the whole lot should be put up for sale, and to so instruct Mr. Hoare.

But, apart from this, the 299th section of the Act of 1884, which was in force when the sale was effected, appears to me conclusive upon this point. It provides that, "It shall not be the duty of the district treasurer to make enquiry before effecting the sale of lands for taxes, to ascertain whether or not there is any distress upon the land; nor shall he be bound to inquire into or form any opinion of the value of the land."

This certainly seems inconsistent with the duty of the treasurer to exercise the discretion mentioned, but there is the express statutory provision applicable to the lot in question as well as to any other, and certainly it is impossible to say that a sale is void because the treasurer did not do what the statute says he is not to be bound to do, or did not make inquiries which could be important only to enable him to form an opinion which the statute says he is not to be obliged to form.

A similar enactment was first made with reference to Upper Canada by the statute 27 Vic. c. 19, s. 4, and in *Yokham* v. *Hall*, 15 Gr. 335, Vankoughnet, C., said, "I think that the fourth section was meant merely to relieve the sheriff or treasurer from certain inquiries as to the value and position of the land, which the court had held it was his duty to make before sacrificing thousands of dollars worth of property to obtain payment of a trifling sum for taxes." Expressions of opinion respecting the existence of such a duty before that enactment are found in *Henry* v. *Burness*, 8 Gr 345, and *Massingberd* v *Montague*, 9 Gr. 92, one being that of the learned chancellor himself, who evidently thought afterwards that the statute rendered it unnecessary.

Upon the evidence I cannot find that the inadequacy of the price should furnish any ground for declaring the sale void. We cannot but regret that valuable property should thus be sacrified; but, so far is the evidence from showing that the sale was a worse one than was to be expected, it appears that about the time when it occurred, the officers experienced great difficulty in realizing the arrears of taxes and expenses by such sales. If they were required to wait until a fair approach to the ordinary market value of such lands could be obtained they would never effect any sales. The mere fact that a purchaser can not be certain of obtaining a good title, but is exposed to the risk of such litigation

as this suit presents, is sufficient of itself to prevent the realizing of any reasonable prices. The adequacy of the price must be judged relatively to the circumstances under which it is obtained.

In *Brown* v. *Hammond*, 2 Ca. in Ch. 249, the plaintiff's bill set forth that he was seized of 300 acres of land in the fens which he demised to one Allison at £50 rent for two years, and after at £60, the lessee covenanting to pay all taxes, that a tax of £30 was imposed and a penalty of £3 incurred, that the lessee having sufficient rent in his hands to pay the £33, combined with the defendant, one of the conservators, to defeat him of his inheritance, and forbore to pay the £33, that the officers appointed to sell by the laws of the fens, sold 100 acres of the 300 to the defendant a commissioner, whereas the 100 acres were worth £400 to be sold. The defendant denied the combination and pleaded to the rest the statutes of drainage, and that the sale was made according to and by virtue of those statutes. "The Lord Chancellor," says the report, "allowed the plea, for he could not relieve contrary to an Act of Parliament, and if he should, it would destroy the whole deconomy of the preservation of the fens and compared it to the case of a mortgage of houses in London of great value that should be settled by the judges according to those Acts made concerning London to be rebuilt. This court shall not examine any sale on pretence of equity." In a note is added, "The sale is made four months after default of payment, twice in the year, and their use is to expose first ten or fewer or more acres for the sum in arrear, and no increase till a chapman offer, &c., and never sell for more than what is in arrear of the tax and penalty, and, it seems, can sell for no more."

In *Cotter* v. *Sutherland*, 18 U. C. C. P. 357, Mr. Justice Wilson referring to *Brown* v. *Hammond* and a case in March, 123, pl. 202, said, "These cases show that it is the necessary accompaniment of every tax sale to be subjected to many exceptions and to have them taken at every stage and in every form, and that it is no new thing to have land sacrificed on such occasions, and that the court should not, on pretence of equity, relieve against the sacrifice because of the Act of Parliament."

And in *Henry* v. *Burness*, 8 Gr. 345, in which it appeared that land worth £500 had been sold for taxes at £2.12, Spragge,

V.C., said, "He," (the plaintiff's counsel) "also insisted upon the extreme inadequacy of price as a ground for setting aside the sale. Upon this latter point, I hardly think that the grounds upon which the court acts upon inadequacy of price apply to such a sale as this. The fraud evidenced by inadequacy of price is that upon which the court proceeds; but on a sale which the law makes the duty of a public officer to collect revenue for public purposes, if the sale be duly and properly conducted, fraud on his part as an inference from inadequacy of price would seem excluded."

But, notwithstanding the length at which I have felt obliged to examine into these objections, I cannot consider it proper to leave the case without some reference to the remarks in later Ontario cases which have been so strongly pressed upon us by counsel for the plaintiff. Of these, perhaps the strongest are those used by Chief Justice Wilson in *Deverill* v. *Coe*, 11 Ont. R. 222. At page 235 he is reported, "The sale, there is no doubt, was openly and fairly conducted in the ordinary sense of those terms, unless selling the land situated as it is for $4.04, which was about the one hundredth part of its value, can at this day be said to be unfairly conducting the sale." And at page 239, "If I had not finally, and, as I have said with hesitation, come to the conclusion that the sale cannot be supported, I should have been in favor of giving the defendant an opportunity if he desired it, of trying the question whether the sale of the land can be allowed to stand or can in law be said to have been faily conducted, when three or four acres of land worth $300 or $400 were sold for only $4.04. I do not pretend to say, nor do I think that there was any unfairness on the part of the treasurer in the ordinary sense of that term; but it may be argued that the mere fact of selling land of so much value for so low a price was an unfair proceeding, however honestly the officer was acting. It was unfair to the owner of the land in that sense. No agent, trustee, auctioneer or sheriff could act in such a manner, and the purchaser must have known he was getting an unfair bargain. The treasurer, under section 137, is to exercise some consideration for the owner, for if he sell a part of the land, he is to sell in preference such part as he may consider best for the owner to sell first, and why should he not consider also the owner's interest

as to whether he should or should not sell his whole land for a most inadequate price. The defendant may not desire to try that question, as he has judgment upon the grounds stated, but if he desire it, we will reserve the right to deal with that part of the case in the event of our judgment being reversed or varied."

Similar remarks were made by Patterson, J. A., in *Donovan* v. *Hogan*, 15 Ont. App. R. 432, and Hagarty. C.J., in *Hall* v. *Farquharson*, 12 Ont. R. 598. I will not repeat them in full. I have given those of Chief Justice Wilson for the purpose of their comparison with what he had said so long before.

I do not regard his judgments in *Cotter* v. *Sutherland* and *Deverill* v. *Coe*, as in any respect inconsistent upon the point which I am considering. Apparently he did not so regard them, as in that case we would have expected some reference in the latter to the former judgment, and some explanation of the change of opinion. Many years had elapsed between the first and the second of the decisions. Great changes had taken place in Ontario in the meantime. A degree of disproportion between the ordinary market value of lands and the price realized at a sale for taxes which would have seemed natural at the time of the sale questioned in *Cotter* v. *Sutherland*, might well be evidence of fraud or unfair conduct of the proceedings when that to which *Deverill* v. *Coe* related took place. It was, evidently, to this view of the matter that he had reference when he said in the latter case "unless selling the land . . . . for $4.04 . . . . can at this day be said to be unfairly conducting the sale."

But, to understand fully his latter remarks, as well as those of the other learned judges mentioned, we must refer to the statute which affected the sales. By R. S. O., c. 180, s. 155, 32 Vic. c. 36, s. 130, "If any tax in respect of any lands sold by the treasurer, in pursuance of and under the authority of The Assessment Act of 1869 or of this Act, has been due for the third year or more years preceding the sale thereof, and the same is not redeemed in one year after the said sale, such sale and the official deed to the purchaser of any such lands (provided the sale be openly and fairly conducted) shall be final and binding," &c. Then, to make this section applicable to give effect to deeds

which, without it, would be invalid for some defect, it was considered a condition precedent that the sale should be "openly and fairly conducted;" but the language of Mr. Justice Patterson in *Donovan* v. *Hogan*, clearly points out the distinction between a set of circumstances which would show this condition not to be fulfilled, and one which, of itself, would invalidate the sale.

It is not clear that in *Deverill* v. *Coe*, Chief Justice Wilson went further. He may have meant that if it were found that the condition was not fulfilled, other objections would be open. At any rate, he did not hold that the sale was bad for the inadequacy of price, merely suggesting that it raised a question to be tried. He in no way indicated that the sale would be void as fraudulent or unfairly conducted if the price was such as was usually realized at sales for taxes honestly and fairly conducted in other respects. If he had done so, I should have felt constrained most respectfully to dissent.

After a careful examination of the reports of cases involving such sales in the courts of Upper Canada and Ontario, I have found none in which a sale has been avoided on the mere ground of the inadequacy of the price. On the contrary, many sales have been upheld in which exceedingly small prices were obtained. In a very recent case, *Claxton* v. *Shibley*, 10 Ont. R. 295, the sale was adjudged good, although only $6.06 were paid for land worth $600 or $800. While Proudfoot, J., originally held it bad, (9 Ont. R. 451,) it was on quite a different ground.

Without considering the question discussed as to whether the deed must be governed by the original Act of 1886, 49 Vic. c 52, s. 673, or by the amending Act of 1887, 50 Vic. c. 10, s. 52, or the extent to which defects are cured under either, I will say only that neither the original nor the amended section appears to make sales invalid which would not be so without the enactments. The section as amended provides, that "no such tax sale deed shall be annulled or set aside except upon the following grounds and no other," one being "that the sale had not been conducted in a fair, open and proper manner." But the section is restrictive, not enlarging. It is intended to cure defects and not to extend the principles upon which a court of equity would interfere to declare void involuntary sales effected under a public

statute to realize charges properly imposed. There is no evidence that the officer having to effect the sale did not sell to the highest bidder or for the best price that could be obtained at such a sale. There is nothing whatever to suggest that he could have taken any course which would have resulted in obtaining a greater price for the whole land, or the amount of the arrears and expenses for a smaller quantity of land. Having reference to the nature of the sale, the uncertainty of titles, made greater by the frequent and confusing changes in our statutes, and the evidence of the difficulty in making good sales, I cannot feel warranted in finding that there was any such fraud, actual or constructive, as would, upon ordinary principles of equity, avoid the sale.

An objection was taken to the form of the advertisement which appears to me unimportant.

Upon the question of the additions to the taxes which have been termed "interest," I will assume that the decision in *Schultz* v. *Winnipeg*, 6 Man. R. 35, applies and that they were unauthorized. As, however, the sale was not to be conducted according to the Ontario method, but the whole lot could be sold for the best price obtainable, I cannot consider that the principle of the Ontario cases upon the effect of selling for an excessive sum has any application here. The result here is only to increase the surplus.

Whatever, then, the effect of the original 673rd section of the Act of 1886 or the amendment of 1887, I can find no reason for considering the sale to have been invalid or the purchaser not to have been entitled to his deed. I agree with the view of my brother Dubuc upon the form of the deed.

Upon the question of the seal I shall say very little. I have formed the opinion that the old corporation of the Municipality of Kildonan was not wholly dissolved by the Municipal Act of 1886, but that the former corporate seal could properly be used. Neither the addition of new members nor the increase of the territory over which the authority of the corporation could be exercised, nor the change of name necessarily put an end to the old corporation and created a new one, though these would be circumstances to be taken into account in construing the statute.

To hold that the old corporation ceased to exist, would be as inconsistent with the words of the 49th section, as to hold that it continued with a change of boundaries and members. Both upon considerations of convenience and of the general law of corporations, which I shall not delay to consider carefully, I am unable to conclude that the Act affected such a change as to create an entirely new corporation having none of the property or rights of the old corporation known as "The Municipality of Kildonan."

To discuss this question properly would require reference to much law, ancient and modern, and I abstain from this, as even if I agreed with the plaintiff's counsel upon the effect of the statute, I should find the evidence insufficient to establish the objection made. I think that it was necessary that the deed should be executed under the seal adopted by the corporation as its common seal. It is not the case of the grant or agreement of the corporation which might for that purpose use any seal. Upon this, as upon other points, the *onus* is on the plaintiff. The contention is based wholly on the evidence of Mr. Munroe, the secretary-treasurer of the municipality. He shows simply that he did not understand that there had been any change of corporation or of name under the Act of 1886, but affixed the seal which had been used by the corporation before the Act assuming that there had been no change. Being asked "That seal was never adopted by this corporation you have now found out you are?" he replied "No, it has been the seal of Kildonan throughout all the various statutory changes." Now, the Act of 1886 came into force on the 15th November, 1886. This deed was executed in November, 1887. Within the interval many corporate Acts would have been required to be performed, for which the council would know that a seal was necessary. It appears to me that the use of the old seal as the corporate seal with the knowledge and tacit consent of the governing body would be a sufficient adoption of it by that body. For this, under such circumstances, very little would suffice. I do not think that the attention of the witness was sufficiently called to this view of the word "adopted." I would think it unsafe to rely upon his answer as a denial of any but an express and formal act of adoption. The seal may have been used in council as the

corporate seal of the body, and yet it might not occur to the witness that this was included in the question. His answer shows that the same seal had continued to be used, which could hardly have been done without the knowledge of the council.

On all grounds, then, I agree that the decree should be affirmed with costs.

BAIN, J., concurred.

Degree affirmed with costs.

McLATCHIE v. McLEOD.

(BEFORE THE FULL COURT.)

Exemption from seizure.—Land once bound by writ not afterwards exempted.

Defendant sold land to his father in 1882. Plaintiff recovered judgment against defendant in 1885 for $15,000; and issued *fi. fa.* lands. In 1888 a decree declared the deed from defendant to his father fraudulent as against the plaintiff. Immediately after decree the father re-conveyed the land to the defendant to enable him to claim it as exempt from seizure. Until the re-conveyance defendant lived with his father upon the land as a member of his family only; and the cultivation was by, or for the benefit of the father. After the re-conveyance the father lived with the defendant who resided upon and cultivated the land.

Held, That the land was not exempt from sale under the *fi. fa.* The land having once been bound by the writ did not become exempt by the acts of the defendant.

This was an action of ejectment and came up for decision upon a special case.

The plaintiff claimed under a conveyance from a sheriff made in pursuance of a sale under a *fi. fa.* lands against defendant. The proceedings were admitted to be regular, but the defendant claimed that the land was exempt from sale, under the circumstances stated in the case, the material parts of which were as follows :—

4. In May, A.D. 1882, the defendant being the owner in fee simple in possession of the said lands, sold the same to his father John McLeod for two thousand four hundred dollars, and in pursuance of said sale conveyed the said lands to the said John McLeod, his heirs and assigns by deed bearing date the sixteenth day of July, A.D. 1884. Prior to the said sale the defendant and his father the said John McLeod lived together in the house upon said lands.

5. Immediately after said sale in May, A.D. 1882, the defendant left Manitoba on a year's visit to Scotland, and the said John McLeod remained living upon said land.

6. The plaintiff and the defendant having had certain dealings prior to May, A.D. 1882, as a result of which the judgment referred to in the said sheriff's deed was recovered, and the said writs of *fieri facias* issued thereon, and the plaintiff being unable to collect the said judgment, commenced an action in this court on its equity side against the said John McLeod, and on the 4th day of February, A.D. 1888, a decree was pronounced in said action declaring that the said conveyance of the lands in question from the now defendant to the said John McLeod, dated the 16th day of July, A.D. 1884, was fraudulent and void as against the now plaintiff, and did order and decree the same accordingly. The said decree was forthwith duly issued and entered and was not appealed against and is now in full force and virtue.

7. On the 6th day of February, A.D. 1888, the said John McLeod re-conveyed the said lands to the now defendant, but no consideration therefor passed between the said parties, the object of such conveyance being to re-vest in Roderick McLeod the interest of the said John McLeod in such lands, and to enable the now defendant to claim the said land as an exemption in case the said sheriff should proceed to sell the said lands under the said execution in his hands against the lands and tenements of the defendant.

8. From the date of such re-conveyance the defendant has been and is now in possession of the said lands.

9. During the year 1882 the land was cultivated. During the years 1883 and 1884 portions of the land were cultivated by John McLeod who was assisted by the defendant. During the years 1885 and 1886 the land was leased to one McKenzie and the rent received by John McLeod. During the year 1887 a portion of the land was cultivated in the interest of said John McLeod, the work being done by the defendant. There was no arrangement

as to wages to be paid by John McLeod to the defendant, except that defendant was at liberty to live with his father in the house upon the land so long as he liked, and when he did not like he could go.

10. There was a house upon the land in question in which the said John McLeod resided from May, A.D. 1882, until the re-conveyance by him to his son on the 6th day of February, A.D. 1888. After the defendants return from Scotland he lived with his father in the said house up till the time of such re-conveyance, since which time the father has lived with the defendant in the same house.

11. The said house upon the land in question was partially built in 1880, and a further portion was added thereto in 1882, since which time the defendant has as before mentioned, lived therein, and during the same period, save the year he was absent in Scotland and the three years that said land was rented, the defendant was during each year occupied in connection with the cultivation of the said land.

12. The plaintiff has never been in occupation of the said land.

The question for the opinion of the court is whether the said land was, at the time of the sale thereof, exempt from sale under the said execution against the lands and tenements of the defendant.

If the court shall be of opinion in the negative, then judgment shall be entered for the plaintiff.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the defendant.

J. S. Ewart, Q.C., for plaintiff. By 48 Vic. c. 17, s. 108, *fi. fas.* bind from delivery to sheriff. "Seizure" in s. 117 not properly applicable to real estate. No seizure necessary: sec. 110. Sheriff's deed conveys debtor's interest as at time of lodgment of writ. For interpretation of word "seizure" he referred to *Miller* v. *Tiffany*, 5 U. C. Q. B. 79; *Tiffany* v. *Miller*, 6 U. C. Q. B. 426; 10 U. C. Q. B. 65; *Freeman*, § 280, 282.

W. J. Cooper, for defendant cited, *Kneettle* v. *Newcombe*, 22 N. Y. 249; *Crawford* v. *Lockwood*, 9 How. 947; *Freeman on Exns.*, § 239; *Hermann on Exns.*, p. 135, 6; *Rorer on Jud. Sales*, 274. As to abandonment of exemptions. *Wiggins* v. *Chance*, 54 Ill. 175; *Green* v. *Marks*, 25 Ill. 204; *Bliss* v. *Clark*, 39 Ill. 590; *Fishback* v. *Lane*, 36 Ill. 437. A fraudulent conveyance does not affect right to exemption. *Marshall* v. *Sears*, Am. & Eng. Dig. *Onus* on plaintiff, *Stephenson* v. *Maroney*, 29 Ill. 532; *White* v. *Clark*, 36 Ill. 289.

(*17th May, 1890.*)

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

It may be that before May, 1882, when the defendant conveyed the land in question to his father John McLeod, and again from 6th February, 1888, when John McLeod reconveyed to the defendant, up to the present time, the benefit of the exemption clause in The Administration of Justice Act, 1885, section 117, sub-section 8, might be claimed by the defendant as against an execution put in the sheriff's hands before May, 1882, or after February, 1888. But from the time when the defendant conveyed to John McLeod, and until the reconveyance, he could not on the facts stated, have set up a claim to the benefit of that sub-section as occupying or cultivating the land as a homestead. John McLeod occupied the house on the land and the defendant when on the land at all, was merely living with him as a member of his family. As it is expressed in the case, "The defendant was at liberty to live with his father in the house upon the land so long as he liked, and when he did not like he could go." The cultivation of the land, when not lying untilled or under lease from John McLeod to McKenzie, by the defendant, was by him merely as the agent or servant of John McLeod. The case says, "During the years 1883 and 1884 portions of the land were cultivated by John McLeod, who was assisted by the defendant," and again "during the year 1887 a portion of the land was cultivated in the interest of said John McLeod, the work being done by the defendant." That the defendant was living on the land in his father's house did not, in my opinion, make it his residence within the meaning of sub-section 8, nor was his cultivation of the land as the servant of his father, the cultivation of it by the defendant within the meaning of that sub-section.

The plaintiff's execution was put in the sheriff's hands in April, 1885, and at that time, as has been established by the decree in the equity suit, which set aside the deed from the defendant to John McLeod as fraudulent and void against the plaintiff, the defendant had an interest in the land, was in fact, except as against John McLeod, the owner of it. Then, when the execution was put in the sheriff's hands, the land and all the defend-

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

ant's estate, right, title and interest therein, both legal and equitable, was under The Administration of Justice Act 1885, section 108, bound by the execution, and he could not at that time, have claimed the benefit of the exemption clause. That execution was kept duly renewed until on the 30th of June, 1888, the sheriff sold the land to the plaintiff, which sale was followed up by a conveyance from the sheriff on 3rd July, 1889.

I have no doubt that the execution having once bound the land, the sheriff could go on to sell under it, even although the defendant should, in the interval between the putting of the writ in the sheriff's hands and the sale, have made the land his residence or be cultivating it so that in the case of a writ placed in the sheriff's hands after that state of things existed he could claim the benefit of the exemption clause. Once bound under such circumstances that the exemption could not be claimed, the land, in my opinion, continued bound and the sheriff could go on and sell.

There should be a judgment entered for the plaintiff with costs.

Judgment for plaintiff.

TODD v. THE UNION BANK OF CANADA.

(IN APPEAL.)

Costs.—Retrospective Statute.

In an action on contract the plaintiff had a verdict for $101. When the action was commenced, the County Court had jurisdiction up to $250, but when the amount claimable exceeded $100, the case could be brought in the Queen's Bench. In such case if the verdict exceeded $200, full costs were given, but if less than $200, and more than $100, costs upon a lower scale were taxed.

Pending the action an Act provided that "In case an action of the proper competence of the county courts be brought in the Queen's Bench," County Court costs only should be allowed, and that subject to a set-off of Queen's Bench costs, unless the presiding judge certified otherwise.

Held, That the statute although passed after the case was commenced, governed the question of costs.

This was an action for refusal to honor the plaintiffs' cheque. The plaintiffs had a verdict for $101. Upon taxation it was held that the plaintiffs were entitled to their full costs of suit. Upon appeal, TAYLOR, C.J., reversed this decision, holding that the plaintiffs were entitled to County Court costs only, against which the defendants were entitled to set-off their Queen's Bench costs. The plaintiffs appealed.

N. F. Hagel, Q.C., and *A. Howden*, for plaintiff. We admit that there is no vested right to costs. The real point is that there was concurrent jurisdiction. The Imp. Act 9 & 10 Vic. c. 95, s. 128; 13 & 14 Vic. c. 61, s. 13; and 15 & 16 Vic. c. 54, s. 4, are analogous and applicable. Rule 10 of 1875 is still in force. 47 Vic. (Man.) c. 22, s. 3, repealed Con. Stat. c. 34, s. 33, but its operation postponed to 1st July 1884, which shews its prospective operation. 47 Vic. c. 21, s. 13, is not applicable to this case. It and 48 Vic. c. 17, s. 133, are clearly prospective. *Kimbray* v. *Draper*, L. R. 3 Q. B. 160; *Wright* v. *Hale*, 6 H. & N. 230.

J. S. Ewart, Q.C., for defendants. Statutes relating to costs are practice statutes and are retrospective. *Wright* v. *Hale*, 6

H. & N. 260; *Freeman* v. *Moyses*, 1 Ad. & E. 338; *Grant* v. *Kemp*, 2 Cr. & M. 636; *Pickup* v. *Wharton*, Ib. 401; *Republic* v. *Erlanger*, 3 Ch. D. 62; *Bell* v. *Smith*, 5 C. & P. 10; *Morgan* v. *Thorne*, 7 M. & W. 400; *Butcher* v. *Henderson*, L. R. 3 Q. B. 335; *Watton* v. *Watton*, 1 P. & D. 227; *Cox* v. *Thomason*, 2 Cr. & J. 497, 188, (74.)

(*7th June, 1890.*)

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

I think the order appealed from was right, and that the appeal must be dismissed.

When the plaintiff began her action, the proviso in s-s. 2 of s. 33 of c. 34 of the Consolidated Statutes was in force, and had it remained in force, she would have been entitled, having recovered a verdict of $101, to tax Queen's Bench costs on the inferior scale, as provided in rule 10. But the proviso was repealed by 47 Vic. c. 22, s. 3, from and after the 1st of July, 1884, and nothing was said as to saving the repeal from affecting existing suits. Then by c. 21. s. 13 of the statutes of the same session of the legislature, the provisions that we now find in sec. 133 of the Administration of Justice Act of 1885 were passed, providing for the costs to be taxed "in case an action of the proper competence of the County Court be brought in the Court of Queen's Bench." The judge who tried the case refused to give a certificate under sub-sections 1 or 2 of this section, and the defendants now claim that the case comes under sub-section 3, and that the plaintiff is entitled to tax only County Court costs and that they are entitled to set-off their Queen's bench costs against the plaintiff's costs and the verdict.

The question of what costs a successful party in an action shall tax must be held to be a matter of practice or procedure, (*Wright* v. *Hale*, 30 L. J. Ex. 40,) and it is an established principle that the presumption against giving a statute a retrospective operation does not apply to enactments which affect only the practice and procedure of the courts. As Lord Blackburn says in *Gardiner* v. *Lucas*, 3 App. Cas. 603, "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be," and it is evident that the fact that the application of the rule will work a hardship

(*a*) Present: Dubuc, Killam, Bain, JJ.

by depriving a successful party of costs that he had a right to count on getting when he began the action, is not such a "good reason" as will prevent its application. The reason of the rule has been explained by Wilde, B., in *Wright* v. *Hale, supra* at p. 43, and his language was adopted by Lord Wensleydale in *Atty.-Gen.* v. *Sillem*, 10 H. L. at p. 763, as clearly and satisfactorily explaining the principle. The right of the suitor, the learned judge says, "is to bring the action and to have it conducted in the way and according to the practice of the court in which he brings it; and if any Act of parliament, or rule founded on the authority of any Act of parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode." He also says, "when you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions whether before or after the Act, then, I think, the principle is that the Act does apply without reference to the former law or practice." Here the proviso which gave the right to tax Queen's Bench costs was repealed, and a new rule or mode of procedure as to the recovery of costs "in case an action of the proper competence of the County Court be brought in the Court of Queen's Bench," was provided. The new provision, in its grammatical and ordinary meaning, may apply as well to such actions then pending as to future actions; and there being nothing to shew a contrary intention, it must be held, I think, to apply to pending actions. *Freeman* v. *Moyes*, 1 Ad. & E. 338; *Burns* v. *Carvalho*, 1 Ad. & E. 883.

In *Atty.-Gen.* v. *Sillem*, 10 H. L. at p. 738, Lord Cranworth says, "The authorities shew that when new arrangements come into force for regulating procedure, they operate on pending as well as on future suits. When this principle has been acted on, as it often has been acted on, with reference to costs, I cannot quite reconcile my mind to what has been done." And in *Kimbray* v. *Draper*, L. R. 3 Q. B. 160, Blackburn, J., says, speaking of the decision in *Wright* v. *Hale*, and the principle there acted on, "whether the Court of Exchequer applied that test properly in holding it was a matter of procedure when a statute enabled a judge to deprive a plaintiff of costs in a case, when, but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case,

I should have been inclined to think this was taking away a right."

However, notwithstanding these remarks, the rule seems firmly established that the principle in question applies to cases of costs, and I think it must be applied here, though its application works a hardship to the plaintiff.

The fact that the repeal of the proviso in the section in the Con. Stat. was not to take effect until sometime after the repealing Act was passed, seems rather to support the view that the Legislature intended the repeal to apply to suits pending when the repeal took effect; and it may be argued that the postponement of the repeal was, in fact, notice to all concerned, that all actions not closed up in the meantime would be affected by it, and by the new provision relating to the taxation of costs in such actions. *Ings* v. *London & S. W. Ry.*, L. R. 4 C. P. 18. I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

QUEEN v. JEWELL.

(BEFORE THE FULL COURT.)

Criminal law.—Having in possession goods stolen abroad.

Upon a charge of having in possession goods stolen in a foreign country, it is not always necessary to prove the state of the law of that country.

Per TAYLOR, C.J.—When the Crown proved that the prisoner had taken, and had in his possession in Canada, property which he had, in any other country, taken under such circumstances, that had he taken it in like manner in Canada, it would, by the laws of Canada, have been felony, then the offence was proved.

2. And an allegation in the indictment that the prisoner "feloniously had taken and carried away" the goods, does not impose any additional burden of proof upon the Crown.

Per KILLAM, J.—It may be necessary under certain circumstances, for the Crown to prove the foreign law as an element in the moral quality of the act.

The following case was reserved for the opinion of the Full Court.

"The prisoner was tried and convicted before me at the last Assizes for the Eastern Judicial District on an indictment which charged that, 'Albert Jewell on the eighth day of November in the year of our Lord one thousand eight hundred and eighty-nine, in the County of Manchester in the Eastern Judicial District in the Province of Manitoba, unlawfully and feloniously did have in his possession in Canada, knowing the same to have been stolen, certain property of the goods and chattels of John Franklin Campbell, to wit: one grey mare, one halter and one bridle of the value of two hundred and fifty-five dollars of lawful money of Canada, which said property of the goods and chattels of the said John Franklin Campbell, he, the said Albert Jewell theretofore to wit, on the said eighth day of November, in the year of our Lord one thousand eight hundred and eighty-nine, at Midland Township in Pembina County, which at the said last mentioned date was in the territory of Dakota, then one of the territories of the United States of America, but which is now in the State of North Dakota, one of the said United States of America, feloniously had stolen, taken and carried away and in the said manner and form the said property of the said John Franklin Campbell, feloniously had stolen, taken and carried away in such a manner that such stealing, taking and carrying away of the same in like manner, in Canada, would, by the laws of Canada, be a felony against the form of the statute in such case made and provided and against the peace of our said lady the Queen, her crown and dignity'."

"The evidence shewed that the property mentioned in the indictment was taken by the prisoner in the territory of Dakota in such manner that, if it had been taken in like manner in Canada, the taking would have been stealing or larceny by the laws of Canada; that he brought the property so taken into Canada and had it in his possession in Canada, knowing it to have been so taken."

"No evidence was adduced by the Crown to shew that the taking of the property under the circumstances in which it was taken in Dakota, was stealing or larceny by the laws in force there, and the counsel for the prisoner objected that in the absence of such evidence there was no case to go to the jury."

"I left the case to the jury, but desire the opinion of the court on the question thus raised, namely, whether on the above indictment it was necessary for the Crown to shew affirmatively by competent evidence that the taking of the property in Dakota under the circumstances in which it was taken, was there stealing or larceny?"

"I sentenced the prisoner to two years imprisonment in the Provincial penitentiary, but respited execution of the sentence until the opinion of the court should be given."

"Dated this twenty-ninth day of March, A.D. 1890." "JNO. F. BAIN, J."

The statute upon which the indictment was laid was The Rev. Stat. of Can. c. 164, s. 88, as follows:

"Every one who brings into Canada, or has in his possession therein, any property stolen, embezzled, converted or obtained by fraud or false pretences in any other country, in such manner that the stealing, embezzling, converting or obtaining it in like manner in Canada, would, by the laws of Canada, be a felony or misdemeanor, knowing it to have been so stolen, embezzled or converted or unlawfully obtained, is guilty of an offence of the same nature and punishable in like manner as if the stealing, embezzling, converting or unlawfully obtaining such property had taken place in Canada."

N. F. Hagel, Q.C., for the prisoner referred to Rev. Stat. Can. c. 164, s. 88, and contended that the statute should be construed so as to make proof of offence in foreign country necessary. That which constitutes such an offence is a question of foreign law, and hence should be proven as a fact, and in the absence of such proof by a skilled witness the Crown had failed to sustain the indictment. He further contended that even if such were not the true construction it must be taken to be so on this indictment, which charges the offence in that way. He distinguished the case of *Queen* v. *Hennessy*, 35 U. C. Q. B. 603, and contended that that case did not turn on the point in question here, but on the count of the indictment charging a theft in Canada, there being a continuous act of felonious taking, by possession of the misappropriated money in Canada. He submitted that the expressions in that case, as to presuming the act to be an offence in the foreign country were not necessary to the decision of the case, and ought not to be considered an authority to support this conviction.

Ghent Davis for the Crown, referred to section 112 of the Larceny Act, before consolidation. It is the bringing into Canada, or having in possession in Canada, goods obtained in a foreign country in such a manner as would amount to larceny by the laws of Canada, that constitutes the offence. We have nothing to do with the laws of the foreign country. We may reasonably assume that stealing is a crime in all civilized countries, but if there is a country where it is no offence, we are not bound to be guided by the ideas of crime prevalent in that country, and allow a criminal to harbour here with his spoils. *Reg.* v. *Hennessy*, 35 U. C. Q. B. 603, is the only case in which this point has been discussed, and in that case although apparently

not argued, it was raised by the court and discussed in the judgment. That decision is binding on this court.

This statute is clearly distinguishable from the New Brunswick statute under which *Reg.* v. *Hill*, 5 All. 630, was decided, because, under our statute, it is the bringing into Canada, not the original taking that constitutes the offence.

The allegation in the indictment that the taking in Dakota was felonious, is surplusage, and it was unnecessary to give evidence in support of it.

(*16th May, 1890.*)

TAYLOR, C.J.—The jury have found that the property brought into Canada by the prisoner, was taken by him in the State of North Dakota, under such circumstances that had it been so taken in Canada, the taking would have been larceny, and in my opinion, that is all the statute requires to be proved.

Reg. v. *Hill*, 5 All. 630, the case cited in the first edition of *Clarke's Crim. Law*, p. 317, and referred to in *Taschereau's Crim. Acts*, (2nd ed.) p. 458, in which the court in New Brunswick held that the taking in the foreign country must be proved to have been larceny by the law of that country, was decided under a statute differently worded from section 88 of The Larceny Act, R. S. C. c. 164. The Act Rev. Stat. N. B., c. 158, s. 8, under which the prisoner was indicted provided that, "When any person shall steal any property out of this Province and shall bring the same within the Province, any such offence . . . . may be dealt with in the county in which . . . . such property shall be brought." There, evidence might well be necessary that the accused did steal or commit larceny where he took the property.

But by section 88 of The Larceny Act, under which the prisoner in the case now before us was indicted, the bringing into Canada or having in possession therein, property stolen, embezzled, converted or obtained by fraud or false pretences in any other country, in such manner that the stealing, embezzling, converting or obtaining it in like manner in Canada would, by the laws of Canada, be a felony or misdemeanor, knowing it to have been so stolen, embezzled or converted or unlawfully obtained, is made an offence of the same nature and punishable in like manner as if the stealing, embezzling, converting or unlawfully obtaining such property had taken place in Canada. It is the

bringing into Canada or having in possession there, knowing it to be stolen, &c., property so obtained, that is dealt with by that section. When the Crown proved that the prisoner had taken and had in his possession in Canada, property which he had, in another country, taken under such circumstances that had he taken it in like manner in Canada, it would by the laws of Canada, be a felony, then the offence for which he was indicted was proved.

The section may be open to some of the objections stated by *Mr. Justice Taschereau* in his work on *The Criminal Acts*, at p. 660, when treating of section 21 of The Criminal Procedure Act, R. S. C. c. 174, but they are objections for the Parliament to deal with and not the Court. But may it not be that the intention of the Legislature in wording the section as it is, was rather to protect a person charged under it, than to expose him to the danger of being convicted here of felony, for taking property under circumstances which would not have rendered him liable to such a charge in the place where he took it. It is quite conceivable that there may be another country in which, by the laws of that country, the taking of property under certain circumstances might be stealing, embezzling, converting or obtaining it by fraud or false pretences, and yet, had it been taken in like manner in Canada, the taker would have been guilty of no felony or misdemeanor. As the Legislature was dealing with Canadian law and making the bringing certain property into Canada an offence against that law, it might well provide that before a person can be convicted of such an offence, it must be proved that he took, converted or obtained the property under such circumstances, that he would by the laws of Canada have been guilty of felony or misdemeanor, and not that he took, converted or obtained it under circumstances which, though unlawful in the other country, would, in Canada, be quite consistent with innocence.

The case of *Reg.* v. *Hennesey*, 35 U. C. Q. B. 603, is not in every way a satisfactory authority, for there the main contention seems to have been, whether the circumstances of the taking made the offence larceny or embezzlement, because if the latter, the prisoner could not be convicted under the indictment which was for larceny, but it seems on the whole to support the view I have taken. As Richards, C.J., said, "Our Parliament has not

declared that larceny in the State of Illinois is a crime here, but that the bringing of the property stolen in another country into this country, when that property was stolen in such a manner as would have made it a felony here, is an offence of the same nature as if such stealing had taken place here." He puts by way of illustration the case of pocket picking in Chicago, and the thief reaching Toronto and selling the watch there, that it would be correct to say that he had brought stolen property into Canada, without shewing affirmatively there was any law in Illinois saying that such an act was larceny.

I do not think the objection that the indictment alleging, "which said property . . . . he the said Albert Jewell on, &c., at, &c., in the State of North Dakota, &c., feloniously had stolen, taken and carried away," the Crown was bound to prove a felonious taking according to the laws of North Dakota, can prevail.

The statute seems to me plain in its language and meaning, and the jury have found the prisoner guilty of the offence with which it deals, so the conviction should be affirmed.

KILLAM, J.—I am of the same opinion. It appears to me that our statute makes the offence created by it dependent in no respect upon the existence of a law in the foreign country forbidding or prescribing punishment for the modes mentioned in the statute of acquiring property brought into or had in possession in Canada.

Probably Parliament assumed that in every civilized country there are such laws. At any rate it could well regard such modes as so inconsistent with man's natural sense of right that no injustice could be done by punishing a party for bringing to or enjoying in Canada the fruits of such acts, knowing how the property was acquired.

I quite agree that where the charge is that the property was stolen abroad, there must be the *animus furandi*, and that if one of the other modes of acquiring be charged, the moral quality of the act becomes important, and that in many cases these may depend upon the laws of the foreign country as upon other circumstances. But once assuming, as I think we are entitled to assume, the recognition of rights of property abroad, the possession of the article or other evidence may show the ownership,

and the mode of taking may frequently indicate the intention of the taker sufficiently.

In the case put by Mr. Hagel, that of a straying animal taken possession of by the accused in a country in which the law makes it the property of the finder, such a law would, it appears to me, be matter to be shown in justification by the prisoner; just as a man snatching a watch from the pocket of another under circumstances which would, in ordinary cases, be *prima facie* evidence of larceny, might show as a defence that he acted under a binding execution, or under an authority from the real owner, or even under a fair color of right.

Our statute describes in general non-technical terms, certain modes of acquiring property, universally recognized as morally criminal. It then limits these, as it appears to me, by attaching the condition that the circumstances must be such as to constitute a felony if they took place in Canada. It may be that all acts made to constitute the crime of larceny under our statutes might not come within the term "stolen" under the section in question, but I am of opinion that in very many cases there might well be ample evidence to be submitted to a jury upon the charge that the property was "stolen" abroad, without any proof of the state of the law where the circumstances occurred.

Although this does not seem to have been positively determined in *Regina* v. *Hennessy*, 35 U. C. Q. B. 603, the opinion of Chief Justice Richards upon the point seems abundantly clear, and I would simply adopt, without repeating, his reasons for the view we now take.

As to the New Brunswick case to which reference has been made, it is impossible to consider it intelligently without a full report of the reasons assigned by the learned judges. Not having seen a report of these reasons, I prefer not to attempt a comparison of the statute under which it was decided with the one now in question.

I understand that counsel for the prisoner does not desire us to decide any but the general question whether, in every case, it is necessary that there be adduced on the part of the Crown, affirmative evidence of the foreign law applicable; otherwise it might be necessary to consider whether the case stated should be so amended as to show the circumstances proved, with a view to

determining whether, in the present instance, such evidence of the foreign law should have been given.

DUBUC, J., concurred.

Conviction affirmed.

MERCHANTS BANK v. MULVEY.

Promissory note.—Presentment.—Constitutional law.—3 & 4 Anne, c. 9.

If a note be at the place of payment at the time it becomes due, it is sufficiently presented.

3 & 4 Anne c. 9, s. 1, enabling indorsees of notes to sue the maker or indorser was introduced into Manitoba by 38 Vic. (Man.) c. 12.

The Act 34 Vic. (D.) c. 5, enabling banks to discount promissory notes, &c., implied that notes were negotiable.

This action was brought on two promissory notes made by the defendant in favor of Alexander McKay and indorsed by McKay to the plaintiffs.

After the plaintiff's case was closed, the defendant moved for a nonsuit on the two following grounds: (1) That there was no presentment proven; (2) That the notes being made and payable in 1883, were not transferable by indorsement.

R. J. Wilson, for defendant. The law of England as it stood in 1670, was the law in force up to passing of 51 Vic. (D.) c. 33; *Sinclair* v. *Mulligan*, 5 Man. R. 17. At that time and up to passing of 3 & 4 Anne, c. 9, notes were not negotiable or transferable by endorsement, but were merely evidence of a debt. *Clerke* v. *Martin*, 2 Ld. Raym. 757; *Potter* v. *Pearson*, 2 Ld. Raym. 759; *Burton* v. *Souter*, 2 Ld. Raym. 774; *Williams* v. *Cutting*, 2 Ld. Raym. 825; *Bullen* v. *Cripps*, 6 Mod. 30; *Trier* v. *Bridgman*, 2 East, 259; *Byles on Bills*, (7th Am. ed.) 5. These notes do not come under 3 & 4 Anne, c. 9, that Act never

having been introduced into Manitoba We are not affected by 51 Vic. (D.) c. 33, as that statute does not affect pending actions.

J. Stewart Tupper, Q. C., and *F. H. Phippen*, for plaintiffs. As to nonpresentment. *Biggs* v. *Wood*, 2 Man. R. 272; *Todd* v. *Union Bank*, 4 Man. R. 29. The note was in the possession of the bank when it became due. This was sufficient evidence of presentment. Plaintiff's bank incorporated in 1861 by 24 Vic. c. 89; that Act was continued by the Banking Act in 1871, 34 Vic. c. 5. As to the negotiability of promissory notes, *Nicholson* v. *Sedgwick*, 1 Ld. Raym. 180; *Trust & Loan Co.* v. *Ruttan*, 1 Sup. C. R. 584. The practice of holding promissory notes negotiable has been recognized by the Local Legislature of Manitoba in making provision for protesting notes. The Dominion Parliament has also done the same thing. To hold otherwise is to admit every action on notes brought by indorsee has been wrongly decided.

Even if the law of England prior to the statute of 3 & 4 Anne, c. 9, were still in force here, this court would not be bound by old decisions holding notes non-negotiable.

(*21st February, 1890.*)

DUBUC, J.—In *Biggs* v. *Wood*, 2 Man. R. 272, and *Union Bank* v. *McKilligan*, 4 Man. R. 29, and cases cited, it was held that if the note be at the place of payment at the time it becomes due, it is sufficient presentment as against the maker.

In this case Mr. Wickson, present manager of the plaintiffs, who was assistant manager in 1883, and had special charge of the general branch of the Merchants Bank where the notes were payable, swears that the notes sued on were at the said Emerson branch when they fell due. He does not say that he was actually there on the day the said notes matured; but he states that being at Emerson most of the time in 1883, before and after the days when the notes became respectively due, and inspecting the books of that branch of the bank, he is aware and knows positively that the notes were in possession of the bank at the branch there, when they became due, and that the bank has held them ever since. His evidence is, in my mind, conclusive on that point, and under the above cited cases, it is sufficient proof of presentment against the defendant.

As to the second point, it is contended on the part of the defendant, that the laws respecting promissory notes, in force in this Province prior to 51 Vic. c. 33 of the Dominion Statutes, were the laws of England as they existed at the time of the Hudson's Bay Company's charter in 1670. At that time and until 3 & 4 Anne, c. 9, promissory notes were not transferable by indorsement in England.

In *Nicholson* v. *Sedgwick*, 1 Ld. Raym. 181, decided a few years before 3 & 4 Anne, c. 9, was passed, a distinction was made between a note payable to a particular person or bearer, and a note payable to a particular person or order. It was held that the bearer of a note payable to a particular person or bearer could not maintain an action thereon in his own name against the maker; while the indorsee of a note payable to a particular party or order could bring the action in his own name. But Lord Holt and the majority of the judges were of opinion that no action could be maintained, even by the payee, on a promissory note as an instrument, it was only evidence of a debt. Shortly after *Nicholson* v. *Sedgwick*, it was held in *Clerke* v. *Martin*, 2 Ld. Raym. 757, that a promissory note payable to a particular person or order is not a negotiable instrument within the customs of merchants. The same doctrine was adopted in *Potter* v. *Pearson*, 2 Ld. Raym. 759; *Burton* v. *Souter*, 2 Ld. Raym. 774; *Buller* v. *Cripps*, 6 Mod. 29; *Trier* v. *Bridgman*, 2 East, 359.

The statute 3 & 4 Anne, c. 9, seems to have been passed for the very purpose of removing doubts on that point and making promissory notes negotiable instruments.

This court has already held in *Sinclair* v. *Mulligan*, 5 Man. R. 17, that the ordinances of the Council of Assiniboia of the 11th April, 1862, and of the 7th January, 1864, brought into operation in this country the procedure of the English courts only, and not the body of the laws of England. The case of *Wicker* v. *Hume*, 7 H. L. 124, cited by the learned Chief Justice, is a strong authority in favor of that construction of the said ordinances of the Council of Assiniboia.

Are we, therefore, to say that, from the creation of this Province in 1870 until 1888, when the Dominion Statute 51 Vic. c. 33, was passed, all promissory notes transferred by indorsement conferred no right of action to the indorsee, and that during the same period, all actions by indorsees of promissory notes brought

in and decided by this honorable court were erroneously brought and wrongly decided.

The case of *Sinclair* v. *Mulligan* had no reference to promissory notes. The action was brought on some land transactions, and the question was, whether those transactions were governed by the provisions of the Statute of Frauds, or by the laws in force in England before the passing of the said statute.

In this case we have to see whether the law applicable to promissory notes in this Province stands in the same position as that respecting real estate transactions.

The laws of England were introduced in this country by the provincial statute, 38 Vic. c. 12. However, as promissory notes are included in the subjects which, by the B. N. A. Act, are reserved to the Dominion Parliament, the Manitoba Legislature had no jurisdiction on the matter. But procedure in civil matters is one of the subjects assigned to provincial legislatures. Therefore, any English statutes, or any enactments or portions of a statute referring to and dealing with procedure in force in England on the 15th July, 1870, were introduced in this Province by 38 Vic. c. 12. In 3 & 4 Anne, c. 9, s. 1, I find a provision stating that any person to whom a promissory note, made payable to any person, is indorsed or assigned, shall and may maintain his action, either against the person who signed such note, or against any of the persons that indorsed the same, in same manner as in cases of inland bills of exchange. That provision respecting the maintaining of an action is certainly one of procedure, and in my opinion, must have been brought into operation here by the Act above referred to. The whole Act 3 & 4 Ann, c. 9, was not imported as part of our laws; but a statute is only a series of enactments or provisions respecting one or several subjects; and although, in some instances, our Legislature had not the power to bring into operation here the whole of an English Act, I see no reason why such provisions of the same Act as were within the jurisdiction of the Provincial Legislature could not have been introduced in this Province. It being so, that provision of 3 & 4 Anne, c. 9, respecting the maintenance of an action by an indorsee of a promissory note against the maker, must, as a matter of procedure, be considered to be in force in this Province, and the plaintiffs should not be debarred on that ground from maintaining this action.

Now, the Act relating to banks and banking, 34 Vic. c. 5, passed by the Parliament of the Dominion in 1871, was certainly made to apply to the whole Dominion, and has been in force in this Province ever since. Section 40 gives power to banks to deal "in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in such trade generally as appertains to the business of banking." And the Merchants Bank of Canada, plaintiffs herein, which had the same provision in its Act of incorporation, 24 Vic. c. 89, s. 21, of the Statutes of Canada, is included in the lists of banks whose charters were continued by the said Banking Act of 1871. The discounting of promissory notes does, in my opinion, imply their negotiability. It is true that a note may, and is sometimes, discounted by the maker himself. But, I think that the word "discounting" there should be construed in its wider and more general business meaning. In the ordinary course of business it is not the maker, but the payee who goes to the bank to obtain money by discounting the promissory note given to him by his debtor. That the words "discounting of promissory notes," implied that the notes were considered negotiable is demonstrated by the broad fact that they were always so understood and dealt with by all the banks, the business men, the legal profession and the courts of this Province since it was made a part of the Canadian Confederation.

On the above grounds, I think the plaintiffs should be entitled to recover.

Verdict for plaintiffs.

On appeal to the Full Court the appeal was dismissed with costs.

RE BIBBY.

Criminal law.—Veterinary Surgeon.—Questions raised upon Certiorari.—Waiver of irregularities by appearance.—Imposition of unwarranted costs.

A. B. was convicted of practising as a veterinary surgeon without the proper qualification.

Held, That the conviction was good, although it did not allege any particular act done.

An objection of *res judicata* cannot be urged upon *certiorari* if not taken before the magistrate.

The absence of a formal adjournment of the proceedings before a magistrate may be waived by subsequent appearance.

A conviction stated the offence to have been committed in the County of Norfolk. The information charged the offence as in the Municipality of North Cypress in the County of Norfolk in the Province of Manitoba. By statute the Municipality of North Cypress was in the County of Norfolk. In the absence of any affidavit denying that the magistrate had jurisdiction,

Held, That an objection that no offence within the Province had been shewn was untenable.

Costs unwarranted by statute having been imposed,

Held, That the conviction was bad.

This was an application for a rule calling on M. Collins, the magistrate and W. S. Henderson, the prosecutor, to show cause why a writ of *certiorari* should not issue to bring up two convictions for the purpose of having them quashed.

The convictions were made on the 1st of June, 1889, by the one, Bibby, not being a person entitled to practise as a veterinary surgeon under 46 & 47 Vic. c. 19, was convicted of practising as such, and by the other, he was convicted of prescribing and administering medicine to animals for hire, gain or the hope of payment or reward.

Colin H. Campbell, for the applicant. The convictions were made under 46 & 47 Vic. c. 19, s. 23. As to the first conviction the charge is, that defendant did practice as a veterinary surgeon or farrier contrary to the statute, that is no charge at all; the information should have set forth in what way he practised. The

matter was enlarged from 25th May to 1st June, there is no record of any enlargement. There is no evidence that the Act alleged to have been done wrongfully was done within the Province. The Summary Convictions Act is not made applicable. The minute of the conviction does not show that defendant was found guilty nor who was found guilty, and is defective. It is not shown how the sum of $12.80 for costs is made up, some of the witnesses were not called at all, and there is no authority to charge witness fees in these cases, and consequently, there is excessive jurisdiction. *Reg.* v. *Grannis*, 5 Man. R. 153. See also 1 *Burns J. P.*, 1151; *Reg.* v. *Walsh*, 2 Ont. R. 206; *Reg.* v. *Wallace*, 4 Ont. R. 127; *Reg.* v. *Elliott*, 12 Ont. R. 530; *Reg.* v. *Brady*, 12 Ont. R. 362; *Reg.* v. *Higgins*, 18 Ont. R. 148. As to sufficiency of evidence. *Reg.* v. *Howarth*, 33 U. C. Q. B. 537. As to the second conviction the charge is double, in the disjunctive and is, therefore, bad. There was a double fine for the same thing.

C. P. Wilson, for the prosecutor. Defendant must negative jurisdiction in the justices. *Rex* v. *Long*, 1 M. & Ry. 139. As to two convictions on the same day. *Paley on Convictions*, 270; *Saunders* v. *Baldy*, L. R. 1 Q. B. 87. Here there were different offences for each of which Bibby was liable. *Allen* v. *Worthy*, L. R. 5 Q. B. 163. At any rate the defendant should have objected to second conviction on ground of *res judicata*, and should have offered evidence of first conviction.

(*25th April, 1890.*)

TAYLOR, C.J.—To these convictions the provisions of the Summary Convictions Act do not seem to apply, counsel for the prosecutor contended that they do apply, and in support of his contention claimed, that while section 151 of 46 & 47 Vic. c. 19, repeals sections 14 to 18, both inclusive, of 44 Vic. c. 18, it leaves the remainder of that Act in force so as to form with the appropriate sections of 46 & 47 Vic. c. 19, the Act relating to veterinary surgeons, and section 20 of that 44 Vic. c. 18, makes The Summary Convictions Act applicable. But on reference to section 151 it will be found that it is not sections 14 to 18 which are repealed, but it is sections 14 to 20, both inclusive, which are so.

It was urged that in the first case no charge of any offence under the Act is set out, that the allegation should have been that

the defendant practised in some one of the particular ways mentioned in the Act. Section 23 is the one which deals with this subject, and it seems to me to mention several and distinct offences. One is, where a person not registered under the Act holds himself out to the public as being so. He does this, when he appends to his name the term veterinary surgeon or any abbreviation of it, when he wilfully or falsely pretends to be one, or when he wilfully or falsely takes or uses any name, title, addition, abbreviation or description, implying or calculated to lead people to infer that he is one. Then another offence is, in the case of a person not registered, who prescribes or administers medicine for animals for hire, gain, or the hope of payment or reward. A third offence is, in the case of any person not registered, who in any way practises as a veterinary surgeon or farrier.

The evidence to support the charge is, that the defendant on one occasion, examined a colt and left medicine for it, and that on another occasion, he filed the teeth of a horse, which, it is sworn, is part of a veterinary surgeon's act.

To the second conviction it is objected that it is a second conviction for the same offence. If, however, my reading of the Act is correct as to the distinct offences, it is not so. This is a conviction for prescribing and administering medicine. The one conviction is for something done in February, the other for something in April. At all events, the objection was not taken before the magistrate, and *Reg.* v. *Herrington*, 12 W. R. 420, is an authority that where a defendant relies on the question being *res judicata*, the objection to the second proceeding should be taken before the magistrate, and if he does not then take it, the court will not grant a *certiorari* to quash the conviction. See also *Reg.* v. *Salop*, 2 E. & E. 386.

There are a number of other objections taken, some of them common to both convictions, but although the proceedings seem to have been conducted by the magistrate in a loose, slovenly manner, these must, I think, be decided against the defendant.

From the material before me it appears that the summonses were returnable on the 25th of May, on which day the defendant was not present, but a Mr. Dickie appeared for him. In the first case he admitted the practising but disputed the sufficiency of the evidence produced of non-qualification. In the second case there was a plea of not guilty. The cases were then

adjourned until the 1st of June. Of this adjournment there is no note on the depositions in the first case, but on that day the defendant appeared with Mr. Barrett as his attorney.

The cross-examination of a witness by him appears on the depositions. He withdrew the admission which had been made on the previous day and insisted upon the charge being proved. What was that, if not pleading not guilty? Where a defendant appears, it has been held that he waives the want of an information or summons. *Reg.* v. *Shaw*, 11 Jur. N. S. 415, and surely the want of a formal adjournment may be waived by the subsequent appearance. See also *Reg.* v. *Hall*, 8 Ont. R. 407.

The objection that no offence within the Province is shown, is untenable. In each case the information is sworn by a person described as of the County of Norfolk in the Province of Manitoba, the matters complained of are said to have been, at the Municipality of North Cypress in the County of Norfolk aforesaid. In each conviction the offence is said to have been at a place in the County of Norfolk aforesaid. In *Reg.* v. *Shaw*, 23 U. C. Q. B. 616, the conviction which was, that John Shaw did on, &c., "at his place in the township of Townsend," assault, &c., was held sufficient because by statute, that township was in the county in which the magistrate had jurisdiction. Here the Municipality of North Cypress is a Municipality in the County of Norfolk in this Province by statute. Besides, there is no affidavit filed denying that the magistrate had jurisdiction, *Rex* v. *Long*, 1 M. & Ry. 139. The conviction seems clearly to satisfy such cases as *Rex* v. *Hazel*, 13 East, 142; *Rex* v. *Highmore*, 2 Ld. Raym. 1220.

There is another objection, that in each case costs have been imposed on the defendant beyond what are warranted by the Act, so that there has been an excess of jurisdiction. Against this it is urged, that by section 148 as amended by 49 Vic. c. 39, s. 33, no proceeding shall be vacated, quashed or set aside for want of form, or for any defect which does not substantially affect the justice of the case, and that as the magistrate might have imposed a much higher penalty than he did, no substantial injustice has been done. Now, although the magistrate did not impose the maximum fine in his power, it must be assumed that he imposed in each case as high a fine as he considered the justice of the case required. If then, such a fine as the merits of the case warranted

has been imposed, and in addition the defendant has been mulcted in costs, in the one case $12.80 and in the other $9.25, of which it is claimed that $9.75 and $7.50 are unwarranted, does it not look as if substantial injustice has been done. The charging excessive costs is not a matter of form, but of substance. *Reg.* v. *Elliott*, 12 Ont. R. 531. In that case where the excess was only one dollar for the use of a hall in which to hear the case, Rose, J., said, "If this could be upheld, we might next have the magistrates assessing the rent of their offices upon unfortunate delinquents brought before them." It was further objected that though there may be evidence against the magistrate of excessive items, it is not evidence against the prosecutor. I cannot see that. There is in each case an affidavit filed setting out the items which make up the costs, and that on information obtained from the magistrate himself. These affidavits are uncontradicted, and are evidence against all parties. The costs objected to in the first case are $7 paid witnesses and fees $2.75 to a constable summoning witnesses. Those in the second case are $7.50 paid a witness. The fees which can be charged are regulated by Con. Stat., c. 51, s. 2, and are those in schedule B. to that Act. Now, by that schedule, it is only in cases of assault, trespass or misdemeanor, that any allowance is made to witnesses attending to give evidence before a justice of the peace, for so attending or for travelling expenses. The present are not cases of assault, trespass or misdemeanor, so the allowances in the one case of $7, and in the other of $7.50, are wholly unwarranted. That being so, it seems to me that notwithstanding section 148, these convictions are bad and ought to be quashed.

Convictions quashed.

HOWE v. MARTIN.

DUPAS.—CLAIMANT.

(IN APPEAL.)

Interpleader.—Security for costs.—Extension of time after party barred.

An interpleader order directed that the plaintiffs should give security for costs to the satisfaction of the prothonotary on or before the 10th April, and that in default they should be barred from all claim to the goods.

On the day named the plaintiffs paid $200 into court, but did not obtain upon notice to the claimant, an expression of the prothonotary's satisfaction with such security.

Held, 1. That the referee had, after the expiration of the day named, jurisdiction to extend the time.

2. The withdrawal from possession by the sheriff after the day named constitutes no bar to an appeal by the plaintiffs from an order reversing the referee's order extending the time.

Under execution issued in this cause the sheriff seized certain goods of the defendant which were then claimed by one Dupas. Thereupon the sheriff made the usual interpleader application upon which an order was made by the referee in Chambers, on the 3rd April 1890, directing that upon payment into court by the claimant, within thirty days from that date or forthwith after trial of the issue thereby directed, if a verdict should then be given for the execution creditor, of a certain sum, or upon the giving within that time of security for payment of that amount according to the directions of any rule of court or judge's order, and upon payment to the sheriff of the possession money, the sheriff should withdraw from the seizure, and that unless such payment should be made or security given within the time mentioned the sheriff should sell the goods and pay the money into court to abide further order; that the parties proceed to the trial of the usual issue; that the execution creditors should, on or before the 10th April, furnish security for the costs of the claimant in the interpleader matter to the satisfaction of the prothonotary, and in default of the security being given within such time

the execution creditors should be barred of all claim to the goods; that the execution creditors pay the sheriff's costs of and incidental to the application; that no action should be brought against the sheriff for seizure or sale of the goods. The order reserved all questions of costs and all further questions until after the trial of the issue, to be then disposed of by the referee. On the tenth day of April the execution creditor paid $200 into court as security for the claimant's costs, having first obtained from the prothonotary, without previous appointment or notice to the claimant, an expression of satisfaction with such security. Upon the claimant's attorney being notified of the payment into court, he suggested that he might object to this course, on account of the want of previous notice of settling the security, whereupon, on the 12th April, the execution creditor applied to the referee to amend his order by extending the time for giving or for allowing the security or by allowing the payment as a sufficient security; and after hearing the parties, the referee on the 15th April, made an order extending the time for giving the security until the 18th April.

On the 15th April the issue came on for trial when upon the claimant objecting that the plaintiff was barred, and that the order of the referee extending the time was *ultra vires*,

BAIN, J., adjourned the trial to enable an appeal to be taken from the referee's order.

The appeal having been argued,

BAIN, J., reversed the order of the referee on the ground that the plaintiff was absolutely barred under the first order, and the referee was without jurisdiction to remove that bar.

The plaintiff appealed.

C. P. Wilson, for claimant, took a preliminary objection to the hearing of the appeal, (1) that since the making of the order of the referee, the plaintiffs had applied for leave to extend the time for appealing from the original interpleader order which had been refused; (2) that since the order made by Bain, J., the sheriff had abandoned possession to the claimant and that there was, therefore, nothing about which an issue could be tried. On the merits he contended that the failure to furnish security operated as a bar to the plaintiffs, and the referee had no jurisdiction

to extend the time. *Lyon* v. *Morris*, 19 Q. B. D. 139; *King* v. *Davenport*, 4 Q. B. D. 402; *Whistler* v. *Hancock*, 3 Q. B. D. 83.

A. Monkman, for plaintiffs. As to sheriff abandoning possession, he was a party to the appeal and it was necessary to reverse the order of Bain, J., before plaintiff could proceed against sheriff for improperly abandoning possession. On the merits; in the cases cited, the case was out of court, while here it was still in court, several matters having been reserved by the interpleader order to be disposed of in Chambers after trial of issue.

(*7th June, 1890.*)

DUBUC, J.—In paying into court on the 10th April, the $200 required to be paid for the security of the claimant's costs, the plaintiff had complied in substance with the provisions of the order of the 3rd April; but he had omitted the formality of giving to the claimant's attorney notice of applying to have the security allowed; and this omission might be fatal if not remedied. But he applied the next day to supplement the omitted informality, and obtained from the referee the required order. And the security, after proper notice to the claimant's attorney, was afterwards allowed by the prothonotary.

The question therefore is, whether the referee had the power to amend his order of the 3rd April, and to extend the time for perfecting the security. I think that the referee who was authorized to make the order fixing the time within which the security should be furnished, had equally the power to extend the time on proper cause being shown, and to amend his first order accordingly. Under the circumstances of this case, when the plaintiff had substantially complied with the order of the 3rd April in putting in within the time prescribed, the best and most satisfactory security required, I think the referee was perfectly justified in extending the time to allow the plaintiff to supplement the technical informality taken advantage of by the claimant. If the formality omitted had in any way prejudiced the interest of the claimant, the order to remedy it might either have been refused or made on terms, but there was no such thing here. The claimant knew that the security had been put in within the prescribed time, that it was sufficient, and that the prothonotary would allow it. The objection was a purely technical one; and

the referee in extending the time and allowing the technical omission to be remedied for the purpose of having the real issue between the parties duly tried, did, in my opinion, act within his power and in the proper exercise of his discretion.

I think the appeal should be allowed with costs.

KILLAM, J.—In answer to the application, the claimant shows that the execution creditors, after the appeal was allowed, applied to have the time appealing from the original interpleader order extended and to appeal from the portion barring the execution creditors or fixing the time for giving the security, which was refused; and also, that the sheriff has abandoned possession of the goods to the claimant, and it is urged that for these reasons the court should not entertain the application.

I cannot regard either of these grounds as an answer to the application. The latter only seems of sufficient importance to warrant discussion. It is claimed that the sheriff having abandoned, cannot again seize under the same writ, and that any further proceeding upon the interpleader application would be wholly nugatory. It does not, however, appear to me that it is important to consider whether, under the circumstances, the sheriff could retake the goods. The sheriff came to the court for protection on account of the adverse claims to the goods. The court then became, under the statutes authorizing interpleader, possessed of the power over the goods in the custody of its officer necessary to the protection of the sheriff and the parties. The sheriff received certain directions of the court. Those directions were to give up possession on certain security being given, otherwise, to sell the goods; and it can hardly be argued that the reservation of further questions did not include the reservation of authority over the goods. There was no direction to the sheriff to abandon the goods except in the one contingency of the security being given by the claimant. This being so, no stay of proceedings was necessary. The goods were in the custody of the sheriff, not merely under the writ, but also subject to the interpleader application, and it was for him to obey the direction given, which involved his retaining the goods until the expiration of the time for the giving of the security by the claimant, and then until he should effect a sale.

However, he did not do so. He abandoned them while, for some purposes, the interpleader application was pending; after

an order had been made by the referee amending the original order so as to remove the bar of the claim of the execution creditor, and before the expiration of the time for moving against the order allowing the appeal from the referee. He did so, then, at the risk of there being such a motion and of its result. He cannot, then, ask that the court should, out of consideration for him, refrain from inquiring into the propriety of the order of the referee. He does not ask it, but it is the claimant who, having accepted back the goods, seeks to use the circumstance to prevent the court from examining into the rights of the parties. It may yet have to be considered whether any relief could be given summarily for the action of the sheriff, or what disposition should be made of an interpleader application when the sheriff chooses to abandon the goods before it is finally disposed of. At present it is sufficient to say that the questions remaining to be settled ought not, if the referee's second order was justified, to be settled upon the basis that the seizure under the writ was improper and the creditor's claim to uphold the seizure unfounded. The argument is based wholly upon the view that the security was not given pursuant to the first order, and that the creditor became *ipso facto* barred, in which case the referee must have disposed of the costs and possession money accordingly. And if the action of the sheriff and the claimant is to prevent the court from inquiring whether the second order of the referee should be restored, then, the result is, that they have been able of their own motion to ensure that these questions shall be disposed of upon that basis.

I agree that the referee had jurisdiction to make the original interpleader order. The interpleader application was properly before him. He found that, in accordance with the usual practice, an issue should be tried that he might be informed of the rights of the parties. He found also that the execution creditor ought to give security for the claimant's costs of the proceedings. It has been found that a mere direction that proceedings be stayed until such security shall be given is an unsatisfactory method of enforcing the giving of security. The order, therefore, directed that in the event of failure to give the security the creditor should be barred. But the giving or not giving of the security within a particular time was not a proper test and was not intended to be a test of the validity of the creditor's claim. The limit of time and the

penalty were merely the means adopted to enforce the giving of the security. The application remained as a pending application before the referee.

He had still to deal with the most important part, to direct what disposition should be made of the goods or their proceeds. But the real rights of the parties were not ascertained. The object of the referee in directing the trial of the issue was defeated. That which was directed merely as a means of protecting the claimant in the event of his claim being established, was sought to be used to prevent inquiry into his claim.

The contention, then, is that the referee was bound to treat his former order as wholly irrevocable and to act upon the assumption that the creditor had no claim to support the seizure. The argument, if correct, would apply whatever the circumstances which prevented the giving of the security within the time originally named. Suppose that the failure had arisen through the wrongful or fraudulent act of the claimant, or some improper conduct of the officer having to approve the security or some wholly unavoidable accident. Then, if the contention of the claimant be correct, there was no power to relieve the creditor. For, given the right to relieve in any such case, the jurisdiction is established and it only becomes a question under what circumstances it shall be exercised. But when we consider the position, that the issue was directed merely to enable the referee to make the proper order respecting the disposition of the goods, that both this and the directions as to security were merely subordinate to the main object, and the latter given merely under the general power contained in the 58th section of The Administration of Justice Act, 1885, to "make such other rules and orders as may appear just according to the circumstances of the case," it appears to me that, so long as the application remained as a pending application before the referee, the power to vary his first order and make such further order as would ensure the attainment of the main objects of the statute must be implied under this general provision.

The cases referred to by the learned judge in allowing the appeal do not appear to me to be applicable, as the ground of the decisions was that the actions had been wholly dismissed out of the court before the making of the orders complained of, while

here the application remained, as I have said, a pending application before the referee.

The matter, then, was wholly one within the discretion of the referee. I do not think that we should inquire closely into the circumstances under which he or a judge varies his own order, especially where the variation is made for the purpose of ascertaining the real rights of the parties and of preventing a failure to comply strictly with that order from becoming a bar to inquiry into those rights. What occurred on the making of the original order and his own reasons for framing it exactly as he did, may often be elements in inducing him to make the change.

In my opinion the order allowing the appeal should be reversed, the appeal from the order of the referee dismissed and the order restored, the claimant to pay the costs both of this application and of the original appeal from the referee.

TAYLOR, C.J., concurred.

ROBERTSON v. THE CITY OF WINNIPEG.

Demurrer.—Plea to several counts, one of which is good.

When a plea is pleaded to several counts or breaches and is bad as to some of them upon demurrer it is bad altogether. It cannot be construed distributively under the C. L. P. Act.

The plaintiff's declaration contained five counts. The first four were special ones charging the defendants with negligence and breach of duty in connection with the construction and maintenance of a sewer in one of their streets, in consequence of which, the plaintiff alleged, his property was damaged; the fifth count was the common one for money payable, &c.

The defendants pleaded one plea to the whole declaration, setting up certain matters which, they claimed, relieved them from liability in respect of the matters complained of; and to this plea

the plaintiff demurred on the ground that it did not answer and avoid the causes of action set forth in the declaration.

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

There are four special counts and the common counts. The plea is bad because it is pleaded to the common counts. If a plea be pleaded to two counts and one is good, and the plea be demurred to, the judgment is for the plaintiff. *Stephen on Pleading*, 141-3; *Brown* v. *C. P. R.*, 3 Man. R. 496. A plea to the whole declaration which only answers a part, is demurrable. *Bullen & Leake*, 446; *Eddison* v. *Pigram*, 16 M. & W. 136; *Ash* v. *Pouppeville*, L. R. 3 Q. B. 86. The pleas do not answer the declaration. The defendants having built the sewer, it was their duty to keep it in repair apart from any statutory duty, *Welsh* v. *St. Catherine*, 13 Ont. R. 375; *Coghlan* v. *Ottawa*, 1 Ont. App. R. 54; *Bathurst* v. *Macpherson*, 4 App. Cas. 256. The Act of 1884 incorporating the City of Winnipeg, 47 Vic. c. 78, s. 228, provides that roads, &c., shall be kept in repair by the city.

H. M. Howell, Q.C., and *Isaac Campbell, Q.C.*, for defendants. If the declaration is bad and the plea bad, and the plaintiff demur to the plea, the judgment must be for defendant. There is one plea to five counts: that is, it is a separate plea to each single count. *Palmer* v. *Solmes*, 45 U. C. Q. B. 16, shows the present rule is to take the view of a pleading that upholds it. This varies the rule that a plea should be taken most strongly against the pleader. The plea should be held on demurrer to be distributive as it is at the trial. *Blagrave* v. *Bristol*, 1 H. & N. 169; *Burrows* v. *De Blaquierre*, 34 U. C. Q. B. 498; *McCuniffe* v. *Allan*, 5 U. C. Q. B. 571. As to duty of defendants to keep sewer in repair. *Brown* v. *Mallett*, 5 C. B. 598; *Wallis* v. *Assiniboia*, 4 Man. R. 89. Act incorporating City of Winnipeg, 1884, 47 Vic. c. 78, s. 149, 8-8. 119, 120. The plea amounts to a general issue and is not demurrable. *Chitty on Pleading*, vol. 2, p. 26; *Lush's Practice*, 472.

(*26th April, 1890.*)

BAIN, J.—On the argument, the defendants contended that the special counts of the declaration were bad, as not disclosing any ground of action, and that, while the plea does not answer the common counts and the plaintiff is entitled to judgment on the

demurrer to the plea as to that count, the plaintiffs are entitled to judgment on their demurrer to the special counts.

On a demurrer the court will consider the whole record and give judgment for the party who thereon appears to be entitled to it; and it is an established rule that upon the argument of a demurrer the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance. *Chitty on Pleading*, vol. 2, 701. So if the declaration here were wholly bad, the defendants would be entitled to judgment, notwithstanding that the plea were also bad. The plaintiff concedes that his first count is bad, and it may be the other three special counts are bad also, but can the judgment be entered distributively, as the defendants claim? The plaintiff says that his common counts, at all events, are good, and that as the plea can be no answer to these counts, while it professes to answer them, it must be held to be bad altogether, and that he with at any rate one good count in the declaration, is entitled to the judgment. If the plea is to be held wholly bad, as the plaintiff thus contends it is, I suppose the plaintiff must have the judgment. See *Brown* v. *C. P. R.*, 3 Man. R. 496.

Before the C. L. P. Act 1852, this plea would certainly have been held to be bad. In *St. Germains* v. *Willan*, 2 B. & C. 102, Bayley, J., says, "It is a well known rule of pleading that if a plea does not answer all it professes to answer, it is altogether bad," and Holroyd, J., says, "a vast variety of cases show that a plea not answering the whole it professes to answer, is bad *in toto*, whether it be pleaded to various facts in one count, or to various counts, or as a ground of defence for various persons." Then section 75 of the C. L. P. Act 1852, provided that all pleadings capable of being construed distributively should be taken distributively, but the weight of English authority seems to hold that this section applies only to the findings of a jury on issues of fact, and has not had the effect of making pleas good that before the Act were bad. There is no question but that a plea which is no answer to part of the cause of action set out in a count in a declaration cannot be made good by construing it distributively under this section, 1 Wms. Saund. 22 n. (e.), but it is open to doubt whether the section applies to a plea like this, pleaded to several counts, and to one of which, at all events, it can be no answer. In *Gabriel* v. *Dresser*, 15 C. B. 622, the court held

that it did not apply, but in *Blagrave* v. *Bristol*, 1 H. & N. 369, the Court of Exchequer took the opposite view. Then, again in *Goldsmid* v. *Hampton*, 5 C. B. N. S. 104, the court after having been referred to this decision, adhered to the view they had expressed in *Gabriel* v. *Dresser*. See also *Chappell* v. *Davidson*, 18 C. B. 194. In Ontario, on the other hand, the view of the Court of Exchequer was adopted in *Burrows* v. *De Blaquiere*, 34 U. C. Q. B. 498, the court holding a plea to be "good as applicable to counts to which it may be properly pleaded, and bad as to those to which it cannot be so pleaded." But see *Kelly* v. *Lisk*, 18 U. C. Q. B. 418.

But it is the English rule that we must follow; and when I find it stated in *Bullen & Leake*, p. 823, that, notwithstanding *Blagrave* v. *Bristol*, the rule is that, "when a plea is pleaded to several counts or breaches and is bad as to some of them, upon demurrer it is bad altogether, and it cannot be construed distributively under the Common Law Procedure Act," and the same rule given in effect in *Stephen on Pleading*, p. 355, and more cases supporting this view than the opposite one, I do not feel at liberty to make a choice between them, but must follow the generally recognized English rule. See also *Bullen & Leake*, 440.

I must hold therefore, I think, that the plea demurred to is wholly bad, and that as one of the counts to which it was pleaded is, at all events, good, the plaintiff is entitled to judgment on the demurrer.

Judgment for plaintiff on the demurrer.

MILLER v. THE MANITOBA LUMBER & FUEL CO.

(IN APPEAL.)

Malicious prosecution.—Authority of manager of Company to order arrest.

The manager of a company (resident at its head office) directed the prosecution of the plaintiff for larceny of the Company's property. The general solicitor of the Company advised the arrest, prepared the information and conducted the prosecution. The duties of the manager were prescribed by by-law. They did not provide for taking such proceedings. There was no evidence of express authority from the Company, or that the arrest was within the scope of the manager's duties.

Held, (DUBUC, J., diss.) That the Company was not liable for the arrest.

The objection that the Company had not authorized arrest was taken on motion for non-suit at the close of the plaintiff's case, but not as an objection to the judge's charge.

Held, That the point was open in Term.

Per DUBUC, J.—Evidence that a prosecution was instituted in order to save the trouble and expense of a law-suit in a court of civil jurisdiction, tends to show an "indirect motive" and lack of good faith.

2. Where a verdict cannot be impeached except upon the ground of excessive damages, the court may, with the plaintiff's consent, reduce the damages.

The facts appear in the judgments.

J. Stewart Tupper, Q.C., and *F. H. Phippen*, for defendants. Plaintiff must show want of reasonable and probable cause. Presumption is in favor of party instituting criminal proceedings that he acted *bona fide*. *Taylor on Evidence*, 140; *Abrath* v. *N. E. Ry. Co.*, 52 L. J. Q. B. 352; 11 App. Cas. 247; *Roscoe Criminal Evidence*, 674; *Burbidge Criminal Law*, 290; *Fellowes* v. *Hutchison*, 12 U. C. Q. B. 633. The objection is, that Dexter was not counsel, but the court will take notice that he is, though there is no evidence on the point. *Rex* v. *Stewart*, 6 Man. R. 257; *Hewlett* v. *Cruchly*, 5 Taunt. 277; *Brobst* v. *Ruff*, 100 Penn. St. 91; *Murphy* v. *Larson*, 77 Ill. 172; *Olmstead* v. *Partridge*, 82 Mass. 383; *Nourse* v. *Calcutt*, 6 U. C. C. P. 14. As to whether an action for malicious prosecution will lie against

a corporation. *Edwards* v. *Midland Ry. Co.*, 6 Q. B. D. 287. There was no evidence of authority from the Company to Davis. *Bank of N. S. Wales* v. *Owston*, 4 App. Cas. 289; *Goff* v. *G. N. Ry. Co.*, 30 L. J. Q. B. 148. The court can reduce damages or set aside verdict for excessive damages. *Massie* v. *Toronto Printing Co.*, 11 Ont. R. 362; *Belt* v. *Lawes*, 12 Q. B. D. 356; *Wilson* v. *Winnipeg*, 4 Man. R. 193; *Praed* v. *Graham*, 24 Q. B. D. 53; *Winfield* v. *Kean*, 1 Ont. R. 203.

N. F. Hagel, Q.C., and *A. Howden*, for plaintiff. The objection of no authority to Davis to make the arrest was not taken at the close of the plaintiff's case. It was not renewed after the evidence of the authority put in. It cannot be taken now in Term. Advice must be from a counsel, not from a solicitor. Davis had consulted Dexter and determined on the course to be pursued. There can be no interference with the verdict unless so excessive as to shock the court. *Praed* v. *Graham*, 24 Q. B. D. 53; *McMonagle* v. *Orton*, 5 Man. R. 193. The court has no power to interfere unless the jury were clearly wrong. Davis was the only manager; he alone had authority, the management was left entirely in his hands.

(*7th June, 1890.*)

TAYLOR, C.J.—This is an action for false imprisonment and malicious prosecution, brought on account of the plaintiff's arrest on a charge of stealing cord wood, the property of the defendants, and at the trial he had a verdict for $1800. The defendants now move to set aside the verdict, and for a nonsuit pursuant to leave reserved, or for a new trial, or to have the amount of the verdict reduced, or to have a verdict entered in favor of the defendants. As the case was tried by a jury the court cannot enter a verdict for the defendants. A nonsuit was moved for and refused at the trial, but it does not appear from the reporter's notes or the judges' notes that leave to move was reserved, and the learned judge who tried the case, on being referred to, says he was not asked to reserve, nor did he reserve any leave.

The defendants move upon a number of grounds, the third of which may be considered first. It is, there was no proof of authority to the manager of the defendant's Company to do the act complained of, and it was not within the scope of his general duties.

The information on which the warrant for the plaintiff's arrest issued was sworn to by Sorsoleil, a bookkeeper of the defendants, and he says he laid it under instructions from Davis the manager. Davis denies that he had anything to do with it, but there is evidence from which the jury might well find that it was under directions from him that proceedings were begun for arresting the plaintiff. That he was the actor would not, however, render the defendants liable unless he had authority from them for this particular case, or his so acting was within the scope of his general duties as manager. In the *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270, where it was sought to make the bank liable for the arrest of the defendant under instructions from the acting manager, the Judicial Committee of the Privy Council said, "The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency. The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shewn, to be within the scope of his authority. . . . . But the arrest and still less, the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to enquire carefully into his position and duties. . . . . In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position, to belong to him, at least in the absence of the directors." Here the ordinary routine of business which Davis would transact and the transaction of which would be presumed within the scope of his authority, would be buying and selling lumber, wood, coal, grain and produce generally and generally a mercantile and trading business. He certainly had not, under the by-laws of the Company relating to the duties of the manager authority for doing what he did. Under them he was to keep records of the proceedings at meetings of the directors and shareholders, he had power to make or endorse promissory notes, draw, endorse or accept bills of exchange, drafts, cheques and all other securities for money in the name of

the Company, and in its name to enter into contracts in all matters which, by the charter of the Company, it is empowered to enter into. That is all. Was there, then, any evidence from which the jury might find that he had a general authority, that when he directed proceedings to be taken for the arrest of the plaintiff, he was acting under a general authority to prosecute on behalf of the Company, it being remembered that he was acting in Winnipeg, at the head office of the Company, and where all the directors were? I can find no such evidence. Indeed it would have been somewhat surprising had there been any evidence of such a continued and general course of acting on the part of Davis as would enable a jury to say what authority he might be presumed to have, for the Company had not been formed to carry on business over five weeks when the arrest took place. The Company was incorporated on the 29th of February, Davis was appointed manager on the 5th of March and the information against the plaintiff was laid on the 5th of April.

As I cannot see that there is any evidence under which the defendants can be held liable for the action of Davis, it is wholly unnecessary to consider the numerous other questions raised. The plaintiff cannot succeed in this action on the evidence which has been given, and there must be a rule absolute for a new trial without costs.

KILLAM, J.—The liability of the Company rests wholly upon the claim that it is responsible for the direction of Mr. Davis to the party who laid the information upon which the plaintiff was arrested.

In the evidence offered for the plaintiff Davis is described as and stated to have been the "manager" of the Company. What were his duties or what was the authority conferred upon him the plaintiff did not attempt to show.

In *McSorley* v. *St. John*, 6 Sup. C. R. 532, the learned Chief Justice of Canada said, "A corporation cannot be made liable for false imprisonment unless the party complaining gives evidence justifying the jury in finding that the persons actually imprisoning him had authority from the corporation," and Mr. Justice Strong cited with approval, remarks of *Mr. Justice Dillon* in his work on *The Law of Municipal Corporations*, to the effect that in an action of tort brought against a corporation it is necessary to show that the wrong was done by an officer in the discharge of

some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation.

In *Owston* v. *The Bank of New South Wales*, 4 App. Cas. 270, it was held necessary in actions of false imprisonment to show the nature of the position and duties of the officer making or directing the arrest.

This seems equally applicable to an action on the case for a malicious prosecution and to have been so treated in the last mentioned case. From the judgment of the Judicial Committee of the Privy Council, I think it clear that it is not sufficient to describe a man as "manager" or by the name of his office, but that the plaintiff must prove either express authority to institute the proceedings complained of or the nature of the office and the powers and duties of the officer who instituted them for the purpose of enabling the court or jury to draw the necessary inferences to show that he had implied authority.

The nature of the evidence to be thus given is suggested to some extent in *Lyden* v. *McGee*, 16 Ont. R. 105.

The plaintiff here supplied no such evidence and there was nothing up to the close of the plaintiff's case from which the inference of implied authority could be drawn. So, with regard to the solicitor, there is nothing to show what his authority was. The mere appointment as general solicitor of the Company could not warrant his instituting or conducting on behalf of the Company prosecutions upon charges of criminal conduct without further authority or instructions. The learned judge appears to have thought that there was evidence of the Company's adoption of his act by payment of his charges for services in connection with the proceedings. This rests wholly upon the evidence of the witness Sorsoleil. He did say, positively at first, that the Company had paid the costs of the prosecution. Being asked how he knew this, he stated that Mr. Davis the manager had so told him. But on being pressed further by his own counsel, he put it that Davis had told him that he (Davis) had paid the costs or was going to pay them, and that he did not remember which it was. The learned judge appears also to have given some weight in his charge to the jury, to the want of repudiation by the Company of the solicitor's charges. But, upon examination of the solicitor's evidence, it does not appear that the charge

had been communicated to the Company; he shows merely that he had made charges for the services against the Company.

This being the state of the evidence, objection was taken at the close of the plaintiff's case and a nonsuit asked by the defendant's counsel on the ground that it was not shown that the Company was responsible for the proceedings taken. The objection was overruled and the learned judge left it to the jury to find whether the Company was responsible.

For the defence evidence was offered of certain by-laws appointing Davis as manager and defining his duties or giving him certain powers. From none of those so expressly given would it seem possible to imply the authority. The evidence for the defence certainly did not in any way strengthen the case for the plaintiff upon this point. The defendant's counsel, however, raised no objection to the charge of the learned judge on account of this question having been left to the jury, or of the way in which it was left, and it is contended that the point is not now open to be taken.

If there had been evidence on which the plaintiff might have recovered and these by-laws or other evidence of the defence if sufficiently proved had met it absolutely, then the defendant could not complain because the jury were not directed that if they found these by-laws proved or believed such other evidence, they must find against the defendant's liability. But there being nothing added which could support the plaintiff's claim and the learned judge having once had the point drawn to his attention and having overruled the objection, I think that it was unnecessary to repeat it.

I am, therefore, of opinion that the verdict should be set aside and a new trial granted without costs.

DUBUC, J.—The plaintiff sued the defendant for malicious prosecution and recovered a verdict of $1800.

The defendants moved in Term on several grounds to have the verdict set aside or reduced.

The principal question to be determined is whether the defendants had reasonable and probable cause for having the plaintiff arrested.

The plaintiff and three companions were hired by the defendants in the winter of 1888 to cut and haul wood in the vicinity of

Monmouth. In the beginning of April these men claiming to have a lien on the wood for their wages, went and took possession of the said wood under the pretended lien. The defendants through their manager Davis, had the plaintiff arrested for stealing the wood. He was brought to Winnipeg, kept a few hours in custody, and then released on bail. The next morning he appeared before the police magistrate who, after the preliminary examination, discharged him. The plaintiff swears that Davis, on hiring him, had agreed to give him a lien on the wood for his wages. Davis denies that.

The question is not whether the plaintiff had, or had not, a real and good legal claim on the wood; but whether the defendants honestly believed that the plaintiff took the wood with the felonious intent of stealing it, or whether they had reason to suspect that he took it under some color of right.

On the conflicting evidence given at the trial, the claim of the plaintiff on the wood appears very doubtful. But at the same time, it is clear that he acted under the belief that he had a lien for his wages. Whether that belief was well founded or not, is not the question. It is evident that he did not take the wood with the felonious intent of stealing it. All the circumstances brought out in evidence tend to show that the taking was not done *animo furandi*. Notwithstanding that, if the defendants after proper inquiry had had no knowledge of his pretended lien, and had honestly believed that the taking amounted to larceny, they might be held not liable. But they knew before arresting him that he was taking the wood under his pretended lien. And it makes all the difference. The first telegram sent to the office of the defendants from Monmouth by their foreman McCowan is dated the 3rd April, 1888, and reads as follows: "Wilson and Cox here with lien on wood for wages of teams and teamsters to the amount of $475." Davis, the manager, answers the same day as follows: "Will have Wilson and Cox arrested for stealing if they remove wood; writing fully." In the letter of the same day written by Mr. Dexter, solicitor of the defendants, he says: "Let me know what these men do under the supposed lien and if they take possession of any wood, as we want to arrest them." On the 5th April McCowan telegraphed to the solicitor of the defendants: "Cox and two of Losey's teamsters, Miller and McDonald, loading wood under lien."

The information was sworn to and the warrant was issued on the same day, and the plaintiff was arrested on the next day, 6th April.

When Davis received the first telegram on the 3rd April, he consulted Mr. Dexter, solicitor of the defendants, and told him that the plaintiff had no such lien as he claimed.

It is held that laying all the facts of the case fully and fairly before counsel and acting *bona fide* upon the opinion given (however erroneous it may be) will be evidence to prove probable cause. *Fellowes* v. *Hutchison*, 12 U. C. Q. B. 633, per Draper, C.J. The learned judge bases his decision on *Ravenga* v. *McIntosh*, 2 B. & C. 693, where it is held to be a good defence for a malicious arrest, that the defendant when he caused the plaintiff to be arrested, acted *bona fide* upon the opinion of a legal adviser of competent skill and ability, and he believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted *bona fide* upon the opinion of his legal adviser, believing he had a good cause of action.

In *Hewlett* v. *Cruchley*, 5 Taunt. 277, it was held that in an action for malicious prosecution, it is no answer that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect or the opinion ill-founded.

In the present case Sorsoleil and McCowan, two men who were in the defendants' employ at the time, swear that the reason given by Davis for arresting the plaintiff was to save the trouble and expenses of a lawsuit in a court of civil jurisdiction. This, I think, may be taken to be "an indirect motive in making the arrest," as mentioned in *Ravenga* v. *McIntosh*.

And on the whole, taking into consideration the circumstance of the telegrams sent by McCowan to the defendants apprising them of the lien claimed by the plaintiff, I am inclined to hold, under *Hewett* v. *Cruchley*, that Davis did not lay the facts properly before counsel, or that the advice to prosecute was ill-founded.

These questions, however, were properly left to the jury. They have found as facts, that Davis acting as manager of the defendant Company, gave the plaintiff to understand that he might have

a lien on the wood in question for his pay; that Davis did not honestly believe that the plaintiff was guilty of having stolen the wood; that in prosecuting, Davis was actuated by malice, that is, by some other motive than an honest desire to bring to justice one whom he believed had committed a crime. So the finding of the jury negatives the inference that the defendants acted *bona fide* upon the opinion of counsel after laying fully and fairly before him all the facts of the case.

The defendants' counsel in this case raised the point that Davis was not authorized by the defendant Company to prosecute the plaintiff; but the fact that Davis was the manager of the defendant Company and that the prosecution and arrest of the plaintiff was made on the advice of their solicitor who prepared the information and conducted the prosecution, is sufficient in my opinion to justify the jury in finding that the criminal proceedings were authorized by the defendants.

As to the excess of damages awarded by the jury, it is not a sufficient ground for setting aside the verdict. The court has the power to reduce them to what may be considered fair and reasonable.

In *Belt* v. *Lawes*, 12 Q. B. D. 356, it was held that in a case where the plaintiff is entitled to substantial damages, and a verdict for the plaintiff cannot be impeached, except on the ground that the damages are excessive, the court has power to refuse a new trial on the plaintiff alone, and without the defendant, consenting to the damages being reduced to such an amount as the court would consider not excessive, had they been given by the jury.

The same principle was followed in *Massie* v. *The Toronto Printing Co.*, 11 Ont. R. 362.

I think that, considering all the circumstances of the case, the damages are excessive, and if the plaintiff consents to have the verdict entered for $300, the appeal should be dismissed without costs. Otherwise, the appeal should be allowed with costs.

Rule absolute for a new trial without costs.

STEPHENS v. McARTHUR.

(IN APPEAL.)

Statutes. — Construction. — Ultra vires. — Fraudulent Conveyances.—Locus standi of creditor.— Chattel mortgage.— Debt secured by transferred notes.

A local statute enacted that certain conveyances should be fraudulent against creditors; provided for voluntary assignments for the benefit of creditors; and declared that the assignee should have the exclusive right to sue for the rescission of such conveyances.

Held, 1. That the statute was *intra vires* of the legislature.

2. That the conveyances might be attacked by creditors, where no assignment had been made by the debtor.

A creditor in good faith and without knowledge that the debtor was insolvent, took from him a chattel mortgage. The transaction was straightforward and honest, but the "effect" of it was to give the mortgagee a preference over other creditors.

Held, That the mortgage was void as against creditors.

A chattel mortgage was expressed to be to secure payment of $870.34, which was the amount owing by the mortgagor to the mortgagee. A large portion of it, however, was represented by notes which the mortgagee had, previous to the date of the mortgage, transferred to a bank as collateral security for his own debt.

Held, That the mortgage was not upon that account invalid.

(*Fish v. Higgins*, 2 Man. R. 65, followed.)

Per KILLAM, J.—The section of the Act declaring certain conveyances fraudulent against creditors may be treated apart from the other provisions of the statute, as an independent enactment; and not, therefore, *ultra vires* by reason only of its association with other statutory provisions.

This was an application to set aside a verdict entered by Mr. Justice Bain in an interpleader issue tried without a jury, in which a chattel mortgage given by the firm of Madill & Robinson to the plaintiff was attacked as a fraudulent preference.

The mortgage was expressed to be to secure payment of the sum of $870.34. This sum represented the amount in which the mortgagors were indebted to the plaintiffs; but for a large portion of it notes had been given by the mortgagors to the plaintiffs

and by them discounted in a bank as collateral security for plaintiff's indebtedness to the bank.

The facts found by the learned judge and adopted by the Full Court were as follows:—At the time the mortgage was given Madill & Robinson were insolvent, but the plaintiff was not aware of that fact. The mortgage was straightforward and honest and given in response to a *bona fide* demand of the plaintiff for security; and not with any such intent, either on the part of Stephens or Madill & Robinson as would render it fraudulent and void under the statute of 13 Eliz. or the first part of section 2 of the Act below referred to. The mortgage had, however, "the effect" of giving the plaintiff a preference over other creditors.

The validity of the mortgage was attacked by creditors of Madill & Robinson as fraudulent under 49 Vic. (Man.) c. 45, s. 2, which was as follows:—"Every gift, conveyance, assignment or transfer . . . . made by any person at a time when he is in insolvent circumstances, or, is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any of them, or which has such effect, shall, as against them, be utterly void." Provision was then made for voluntary assignments for the benefit of creditors. By section 7 it was enacted that "the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of 'The Administration of Justice Act, 1885,' or of this Act."

No assignment under the provisions of the Act had been made by Madill & Robinson.

H. M. Howell, Q.C., and *F. C. Wade* for plaintiffs.

The description is good. Defendants contend that by *McCall* v. *Wolff*, 13 Sup. C. R. 133, it is decided that if a chattel mortgage covers all the goods on the premises that fact should be stated in the mortgage. Ritchie, C.J., in that case said, "It may have been the intention to convey all the goods in the store, but the mortgage does not say so, nor is there any evidence to show the goods named in the schedule were the only goods of

That description in the store or what were the exact goods in the store." In this case there is "evidence to show" that the goods described in the mortgage were all the goods in the store, and therefore the description is good. This is according to the explanation of *McCall* v. *Wolff* in *Whiting* v. *Hovey*, 13 Ont. App. R. 27, since affirmed in *Hovey* v. *Whiting*, 14 Sup. C. R. p. 520.

The consideration is sufficiently stated, although the plaintiff had taken the notes of the mortgagors for a large portion of the account and these notes were still current and held by the Commercial Bank with the plaintiff's endorsement as collateral security for advances made to the plaintiff, the debt represented by them was a debt due to the plaintiffs and not to the Bank, and was, therefore, properly described in the chattel mortgage as a debt due to the plaintiff. *Fish* v. *Higgins*, 2 Man. R. 65; *Hepburn* v. *Park*, 6 Ont. R. 473; *Grant's Law of Banking*, 4th ed. 145; *Hyman* v. *Cuthbertson*, 10 Ont. R. p. 445.

Mr. Wade proceeded to show that the portion of the judgment in *Bathgate* v. *Merchants Bank*, 5 Man. R. 210, referring to the statement of consideration in chattel mortgages, was *obiter dictum* and could not be supported, but was stopped by the court. Killam, J., after consultation with the other judges, stating that the decision in *Fish* v. *Higgins*, 2 Man. R. 65, had not been overruled by *Bathgate* v. *Merchants Bank*, 5 Man. R. 210, and properly stated the law on the point in question.

The chattel mortgage was not a preference. There was no intent to prefer, nothing can have the effect of a preference unless there is intent to prefer as "preference" is and always has been a bankruptcy term incorporating intent in its very meaning. The use of the word preference implies an act of free will, *Ex parte Topham*, L. R. 8 Ch. 614, quoted in *Slater* v. *Oliver*, 7 Ont. R. 163, and there cannot be the effect of a preference without intent to prefer. The case cannot be distinguished from *The Bank of Australasia* v. *Harris*, 15 Moo. P. C. 97, where the Judicial Committee held that "notwithstanding that the other sections referred to fraudulent alienations and that section omitted all reference to fraud or intent; the words "having the effect of preferring," indicated a fraudulent preference and were not intended to refer to any case not fraudulent." Burton, J.A., (diss.) *Kennedy* v. *Freeman*, 15 Ont. App. R. 219, *et seq*, see also

Nunes v. *Carter*, 1 P. C. App. p. 347. These cases were not cited to the court in *River Stave Co.* v. *Sill*, 12 Ont. R. 567. See also remarks of Burton, J.A., in *Molson's Bank* v. *Hallen*, 25 C. L. J. 278. The law not having been changed by the addition of the words "have such effect" a mere demand for payment takes the security out of the statute, Osler, J.A., in *Kennedy* v. *Freeman*, 15 Ont. App. R. 219, quoting *Slater* v. *Oliver*, 7 Ont. R. 158; *Long* v. *Hancock*, 12 Sup. C. R. 532; and *Re Boyd*, 15 L. R. Ir. 321. In this case there was not only an absence of intent, but positive pressure. Rather than give the effect to the statute contended for by defendants, "or" should be read "and," *Fowler* v. *Padjut*, 7 T. R. 509, where the words "to the intent or whereby his creditors may be defeated or delayed," are interpreted by substituting "and" for "or" and requiring intent, see also, *Townsend* v. *Read*, 10 C. B. N. S. 308; *Waterhouse* v. *Keen*, 4 B. & C. 200, and *Cresswell* v. *Booksby*, 2 Bulstr. 51. Pending judgment the following cases were also communicated to the court *Johnson* v. *Hope*, 17 Ont. App. R. 10, and *Lamb* v. *Young*, 26 C. L. J. 219, which were stated to revive the doctrine of intent in preferences in the Ontario Court of Appeal; also decision of Gwynne, J., in *Warnock* v. *Kloepfer*, Sup. C. not yet reported.

Even if transactions are void simply because they have "the effect of" giving a creditor priority, this security is saved by sec. 1, sub-sec. 4 of the amending Act, 50 Vic. c. 8, which excepts securities given for a pre-existing debt where "by reason or on account of" receiving the security the creditor makes an advance to the debtor to enable him to carry on his business or pay his creditors in full. In this case Stephens made an advance for the purposes mentioned and swears that he made it "by reason or on account of" having received the chattel mortgage, though not as a consideration for having received it. The statute does not require that the advance should be made "in consideration of" having the security, but "by reason or on account of having received," which is a much wider conception, also the plaintiff extended the time of the mortgagors to pay, which is equivalent to making a fresh advance to them. Per Cameron, C.J., in *Rae* v. *McDonald*, 13 Ont. R. 365; *Barron*, 187; *Cadogan* v. *Kennell*, 2 Cowp. 432; *Bump*, 12.

In any case under section 7 of the Act, only an assignee has a right to sue to rescind the security. "It is true that the right

which a creditor formerly had to bring an action to impeach such a transaction is taken away and vested exclusively in the assignee." Burton J.A., *Clarkson* v. *Stirling*, 15 Ont. App. R. 240; *Edgar* v. *Central Bank*, Ib. 212; Ib. 210. Unless there is an assignee no one can sue. In order to attack transactions except in common law, legislation is required. A preference is permissible by the common law and the only legislation empowering the rescission of a security vests the right in the assignee "exclusively." The Ontario decisions are not applicable because the similar Act of that Province provides for the distribution of the proceeds of an execution *pro rata*. To set aside an assignment to favor an execution creditor, therefore, would only be perpetuating the mischief of the old state of things and will not be done, *Stuart* v. *Trimaine*, 3 Ont. R. 190, followed by Ferguson, J., in *Harvey* v. *McNaughten*, affirmed in appeal, 10 Ont. App. R. 616.

If all the above averments should fail, the Act itself is *ultra vires* as dealing with bankruptcy and insolvency, two subjects of legislation reserved exclusively to the Dominion Parliament, and if the Act is *ultra vires* it cannot be considered piece meal, and therefore, section 2, forbidding preferences, is *ultra vires*; Hagarty, C.J., in *Clarkson* v. *Ontario Bank*, 15 Ont. App. R. 179, 182; Osler, J.A., Ib. 189, 192; and dicta and arguments of the judges in the group of four cases considered at the same time and upon which the Ontario Court of Appeal divided evenly with regard to the constitutionality of the Act of Ontario from which that in Manitoba has been copied.

H. E. Crawford and *G. A. Elliott*, for defendants. The chattel mortgage is void because the consideration is not truly stated. *Fish* v. *Higgins*, 2 Man. R. 65; *Bathgate* v. *Merchants Bank*, 5 Man. R. 210. One of the results of taking the chattel mortgage was to prevent other creditors from getting paid their claims. *Grant on Banking*, 291; *Mayer* v. *Mindlevitch*, 29 L. T. 400; *Sharp* v. *McHenry*, 38 Ch. D. 454; *Simpson* v. *Charing Cross Bank*, 34 W. R. 568. A preference is prohibited by the statute. *Warnock* v. *Kleopfer*, 14 Ont. R. 288. Intent is not now necessary. *Dominion Bank* v. *Cowan*, 14 Ont. R. 465; *River Stave Co.* v. *Sill*, 12 Ont. R. 557; *Clarkson* v. *Ontario Bank*, 15 Ont. App. R. 166; *Molsons Bank* v. *Halter*, 9 C. L. T. 268. As to the intention of the Legislature in adding the words in the statute. *McRoberts* v. *Steinhoff*, 11 Ont. R. 369;

Burns v. *McKay*, 10 Ont. R. 167; *Ivey* v. *Knox*, 8 Ont. R. 635; *Whitney* v. *Tobey*, 6 Ont. R. 54. All that is necessary on defendants' part is to show that section 2 of the Act is *intra vires*. *Clarkson* v. *Ontario Bank*, 15 Ont. App. R. 182. A contract of a corporation may be partly *intra vires* and partly *ultra vires*. *Addison on Contracts*, 1169; *Manitoba Investment Association* v. *Watkins*, 4 Man. R. 357; *Reg.* v. *Lundie*, 5 L. T. N. S. 830; *Rex* v. *Faversham*, 8 T. R. 356. Defendants' rights arose before there was any assignee. Statute should be interpreted to avoid absurdity. *Flower* v. *Low Leyton*, 5 Ch. D. 352. As to the description of goods in the chattel mortgage, certain goods were sold and replaced by others supplied by the plaintiff; as to these the chattel mortgage cannot apply and the plaintiff must fail. *McCall* v. *Wolf*, 13 Sup. C. R. 130; *Whitt* v. *Bonnell*, 57 L. J. Q. B. 141; *Hovey* v. *Whiting*, 14 Sup. C. R. 515.

(*7th June, 1890.*)

TAYLOR, C.J.—The question of the constitutionality of the 49 Vic. c. 45, having been raised, the giving of judgment was delayed until the Supreme Court should decide the case of *Kleopfer* v. *Warnock*, a case in which it was understood that the constitutionality of a somewhat similar Act in Ontario, 48 Vic. c. 26, O., would be considered and disposed of. That case has now been disposed of, but, so far as can be learned, although the constitutional question was raised by the appellant's factum, it was not argued by counsel, or touched upon in the judgments delivered.

The constitutional question has been raised in Ontario, and discussed in several cases, with the result of considerable difference of opinion among the judges. The Court of Appeal there is equally divided on the question. After a careful perusal of the judgments delivered in these cases, I am inclined to adopt the opinion that the clause now before the court is *intra vires*, dealing with a matter of property and civil rights, and am as at present advised, prepared to so hold. In any event where there is so much difference upon a question of such importance, it is perhaps best for a provincial court, as was said by Burton, J. A., in *Edgar* v. *Central Bank*, 15 Ont. App. R. 202, "to lean to that construction which will sustain the enactment as being *intra vires*, rather than to one which would avoid it." As an Act almost, if not quite identical with section 2 of the Act now ques-

tioned, has been in existence, and its provisions enforced in this Province for fifteen years, without, so far as I know, any serious doubt as to its validity being raised, a provincial court may well uphold it until the court of final resort shall declare it invalid. Especially should this be the case, when, as appears from the judgments of eminent Ontario judges so much can be urged in support of it.

I agree with the conclusion arrived at by the learned judge at the trial, that section 7 applies only to a case where an assignment has been made under the Act. The Ontario Act 48 Vic. c. 26, contains a similar section, but in *Dominion Bank* v. *Cowan*, 14 Ont. R. 465; *Goulding* v. *Deeming*, 15 Ont. R. 201; and *Johnson* v. *Cline*, 16 Ont. R. 129, the right of an execution creditor to attack a fraudulent conveyance does not seem to have been questioned. The point was raised in *Robertson* v. *Holland*, 16 Ont. R. 532, but the court refused to give effect to the objection. In these cases as in the present there does not appear to have been an assignment made under the Act. It is true in *Edgar* v. *Central Bank*, 15 Ont. App. R. 193, Paterson, J. A., did speak of the remedy which creditors had before the Act, being now transferred to the assignee. In *Kennedy* v. *Freeman*, 15 Ont. App. R. 216, Burton, J. A., also spoke of the assignee as the only person entitled to bring an action, and that the creditor might be deprived of the right he had previously enjoyed, and in *Clarkson* v. *Sterling*, 15 Ont. App. R. 234, the same learned judge said, "The right which a creditor formerly had to bring an action to impeach such a transaction is taken away and vested exclusively in the assignee," but, in all these cases, there was an assignee under the Act who was suing, and the court did not require to decide what might be the effect of the Act where there was none. In *Edgar* v. *Central Bank*, at p. 213, Paterson, J. A., spoke of the section as supplying machinery to give practical effect to the mandate against preferences, "not for all cases, but for use in the case of a voluntary assignment made by the debtor for the general benefit of all his creditors." In the more recent case of *Molsons Bank* v. *Halter*, 16 Ont. App. R. 329, the objection was disposed of in favor of the creditor's right. Osler, J. A., there said, "We all agree that when the debtor has not made an assignment, there is nothing to prevent a creditor maintaining an action to set aside a preferential conveyance or

transfer declared by section 2 of the Act to be void against creditors. If there is an assignee, the action must, by force of section 7, be brought by him, but if not, the right of the creditor remains unaffected." To hold otherwise, and that the right to impeach fraudulent transactions can in no case now, be exercised by a creditor, would involve the result, that no matter how many transactions of a debtor there may be, void under section 2, so long as the debtor makes no assignment under the Act, creditors defeated, delayed or prejudiced by these, must be wholly without a remedy. Besides what section 7 says is, "the assignee shall have an exclusive right of suing for the rescission of agreements, deeds, instruments, &c.," but this is not a suit for the rescission of any deed or instrument, all that the defendants seek is to have the chattel mortgage declared fraudulent and void as against them. Even if they succeed, the instrument stands in full force and effect as between the parties to it.

It was argued that it is still necessary to prove an intent to prefer, participated in by both the debtor and the preferred creditor, and that the words "which has such effect," refer only to this preferring and not to the defeating, delaying or prejudicing. It is said, if the true reading extends these words to the delaying, &c., why are not the same words found in the Act as to fraudulent judgments. That may, I think, easily be accounted for. The sections as to fraudulent gifts and fraudulent judgments were originally sections 58 & 59 of the 38 Vic. c. 5, then they became sections 95 & 96 of Con. Stat. c. 37, and later on sections 122 & 123 of 48 Vic. c. 17. In none of these are the words, "or which has such effect," found. But when the 49 Vic. c. 45, was passed, section 123 was repealed and re-enacted as section 2 of the new Act, with the addition of these words, while section 122 was left untouched. Had the legislature been repealing that section also and re-enacting it, perhaps these or similar words might have been introduced into it also. Certainly I do not see how, under the circumstances, an argument can be founded on the absence of these words in section 122.

This question, whether since the same words were introduced into the Act in Ontario, there has been a change in the law, or whether the intent to delay or prefer must still be proved as before, has been a good deal agitated in Ontario. In a recent case of *Johnson* v. *Hope*, 17 Ont. App. R. 10, the Court of

Appeal decided that a transaction entered into by a person in insolvent circumstances is not impeachable unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith. In the subsequent case of *Lamb* v. *Young*, 19 Ont. R. 104, the Queen's Bench Division followed *Johnson* v. *Hope*. Mr. Justice Gwynne in *Kloepfer* v. *Warnock*, in the Supreme Court also held that the introduction of these words has made no change in the law, and that the intent to defeat or delay must still be proved. That, however, was a dissenting judgment, and there does not seem any means of ascertaining how far his views upon this point were in accord with those of the other members of the court.

If the decision in *Johnson* v. *Hope*, was, as it is reported, a unanimous judgment of the Court of Appeal, then Mr. Justice Osler must have seen reason to change the opinion he expressed in *Molson's Bank* v. *Halter*, 16 Ont. App. R. 323. In that case Hagarty, C.J., was of opinion that these words had not the effect of changing the law, although he said, "I fear the words have much embarrassed the general question." Burton, J.A., adhered to the view he had previously expressed in *Kennedy* v. *Freeman*, 15 Ont. App. R. 216, that if the Act was to have the wider construction contended for, it must be left to a higher tribunal so to decide. Osler, J.A., took an opposite view, he said, "The Act now provides that every conveyance made by an insolvent person with intent to defeat, delay, &c., his creditors, or which has such effect shall be void, what is the force of these latter words? They cannot be rejected or treated as surplusage, and as a matter of construction, they apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, &c., as those made with intent to prefer only. . . . . I think the intention of the Legislature was to avoid any conveyance, transfer, &c., by an insolvent (with the exceptions specially mentioned in section 3,) which has the effect of defeating or preferring creditors, whatever may have been the intent with which he made it. The object which the Legislature seems to have had in view was to avoid the sales, &c., of an insolvent, just because he is an insolvent, so that a person in that situation should be, as it were, forced to make an assignment for the benefit of his creditors generally, by means of which his whole estate should be distributed under the elaborate

provisions of the Act." Then, after tracing the course of legislation on this subject he added, "Upon the whole it appears to me that the plain language of the Act calls for the construction I have indicated; for conveyances by an insolvent which have the effect of defeating his creditors, seem to be in express terms avoided equally with those which are made with that intent."

The construction to be put on these words cannot be said to be settled by authority. They must have some meaning, the Legislature must have introduced them into the Act for some purpose. I cannot, on a full consideration of them, come to any other conclusion than that a conveyance which has the effect of delaying, defeating, creditors or of preferring one creditor to another is void equally with one executed with the intent to do so.

The transaction does not seem to have been one protected by sub-section 4 of section 3, as amended by 50 Vic. c. 8. There is no doubt the plaintiff made some advances to Madill & Robinson, and he does say that if they had not given the security, he would not have made the advances, but the two transactions were entirely distinct, and it can in no way be said that the one was the consideration for the other. The chattel mortgage was given for the amount of certain promissory notes then current and held by a bank, endorsed by the plaintiff, the advances were made subsequently to pay a claim of the landlord and some other claims, but for these a separate security was taken by an assignment of the book debts due the firm.

The learned judge came to a correct conclusion as to the effect of the chattel mortgage, and that it was, therefore, void as against the defendants.

The motion to set aside the verdict should, in my judgment, be dismissed with costs.

KILLAM, J.—For the execution creditors it is claimed; (1) That the bill of sale is void under "The Chattel Mortgage Act," Con. Stat. Man. c. 49, ss. 1, 4, being in the form of a mortgage to secure a debt due to the mortgagee and accompanied only by the affidavit required for such a case, whereas it should have been in part at least, in the form of a mortgage to indemnify an

indorser and with the appropriate affidavit. 2. That the instrument is void under the Act, 13 Eliz. c. 5. 3. That it is void under "The Act respecting assignments for the benefit of creditors," 49 Vic. c. 45, s. 2, M., as creating a fraudulent preference.

The learned judge overruled the first two of these objections, but gave effect to the third, finding that at the time of the giving of the security Madill & Robinson were insolvent and unable to pay their debts in full, that it was not proved that the present plaintiff was aware of this, that "the mortgage was given in response to a *bona fide* demand by Stephens for security for his debt," and that the transfer had the effect of giving the plaintiff a preference over the defendants and the other creditors of these debtors.

It is sufficient to say of these findings of fact that there was evidence to warrant them, that it does not appear that they are founded on any error in principle, and that there is no such weight of evidence to the contrary as to make any of them unreasonable or unjust. It is, then, not open to us to review them. This extends to uphold the overruling of the second objection.

As to the first objection, it is concluded by the decision of the Full Court in *Fish* v. *Higgins*, 2 Man. R. 65, which does not appear to me to have been in any way affected by that in *Bathgate* v. *The Merchants Bank*, 5 Man. R. 210.

I understand that the learned judge intended to find that there was such pressure as to rebut any presumption of an intent to prefer. The evidence fully warrants such a finding. This effect of pressure has been so frequently accepted in this court as not to require to be now discussed. It is supported by the judgment of Mr. Justice Gwynne in *Long* v. *Hancock*, 12 Sup. C. R. 539.

Three questions then, arise for consideration, namely:

(1) Was the enactment in the statute 49 Vic. c. 45, s. 2, *intra vires* of the Legislature of Manitoba in so far as it affects the transaction in question?

(2) Is its operation limited by the 7th section of the same statute to the case of an assignment made under the Act and a suit by the assignee to "rescind" the gift, &c.?

(3) Is the 2nd section to be so interpreted as to avoid the transfer in question?

We have delayed the giving of judgment upon this application in the hope that the first of these questions might be settled for us by the Supreme Court of Canada in the case of *Warnock* v. *Kleopfer*, which has recently been decided in that court. We now find, however, that the question has not been decided, or even discussed, either in that case or in the more recent one of *The Molson's Bank* v. *Halter*, now standing for judgment. The parties appear in both cases to have accepted the decision of the Court of Appeal of the Province of Ontario in *Clarkson* v. *The Ontario Bank*, 15 Ont. App. R. 166, and *Edgar* v. *The Central Bank*, Id. 193, although resulting from an equal division of the court.

I find it convenient to consider first the second of these questions, which must, it appears to me, be answered in the negative.

(His Lordship then read sections 2 & 7 of 49 Vic. c. 45.)

The learned judge considered that the latter section did not apply when no assignment had been made under the Act, and in this view I agree with him. But it is not necessary to go to that extent to make the second section applicable in the present instance. The second section like the Act 13 Eliz. c. 5, s. 1, and the 122nd and 123rd sections of "The Administration of Justice Act, 1885," 48 Vic. c. 17, M., makes certain gifts, &c., absolutely void as against creditors. Being void by force of the statutes, they can support no title as against the sheriff acting under an execution at the suit of a creditor. Neither the sheriff nor an execution creditor is obliged to bring any suit or take any step to have them rescinded. It is true that in *McMillan* v. *Bartlett*, 2 Man. R. 374, we held that under the Act 47 Vic. c. 53, s. 2, M., the objection that such a transfer was void under a previous enactment relating to fraudulent preferences, could not be taken upon the trial of such an issue as the present. We had there, however, to deal with different language. The section provided that "no judgment, gift, conveyance, assignment or transfer shall be liable to be set aside or declared void under . . . . except by bill in equity," &c. We considered that, although the court does not, upon an interpleader application,

or the trial of an interpleader issue, pronounce any decree, order or judgment formally declaring any such judgment, gift, &c., void, it must in order to avoid giving effect thereto, practically declare it to be void and act on that assumption. But the 7th section of the Act 49 Vic. c. 45, evidently refers only to active suits or proceedings to avoid the gift or transfer. In view of the distinction taken as to interpleader proceedings in the 124th section of "The Administration of Justice Act, 1885," amending 47 Vic. c. 53, s. 2, the change of language is particularly important. If the section were interpreted as contended for on behalf of the plaintiff, it would prevent any creditor from having the benefit not only of the 2nd section of the Act 49 Vic. c. 45, M., and the 122nd section of "The Administration of Justice Act, 1885," but also of 13 Eliz. c. 5, unless the debtor should choose to make an assignment for the benefit of his creditors, and the debtor would thus be enabled at his own pleasure to frustrate the provisions of each of those enactments.

This view of the application of the 7th section of the Act, 49 Vic. c. 45, M., would appear to remove to a great extent the difficulties which so much impressed some of the learned judges in *Clarkson* v. *The Ontario Bank*, with reference to the validity of the similar statute of the Ontario Legislature. The learned Chief Justice of Ontario and Mr. Justice Osler looked at the statute as a whole and considered that, having reference to its whole scope, it was an enactment in relation to matters coming within the subject of "bankruptcy and insolvency," assigned by The British North America Act, 1867, section 91, sub-section 21, to the exclusive legislative jurisdiction of the Dominion Parliament. There, however, the suit was brought by the assignee, whose right depended not only upon the second section, but also upon the seventh, without which he could be in no better position than the debtor. This, then, to some extent involved the question of the authority of the Provincial Legislatures to enact laws affecting assignments for the benefit of creditors and the rights and powers of the assignees. But the second section appears to me, at least in so far as it relates to such a transaction as that now in question, proper to be treated as an independant substantive enactment, which is no more to be considered *ultra vires* of the Provincial Legislature on account of its appearing in an Act relating gene-

rally to assignments for the benefit of creditors, and proceedings and rights thereunder, than if it were still confined to The Administration of Justice Act or formed a distinct chapter by itself.

This second section differs but slightly from the 123rd section of "The Administration of Justice Act, 1885," for which it is substituted. The principal differences are in the extension to include real estate, which was not affected by the former enactment, in the reference to a "payment," and in the addition of the words "or which has such effect." It is connected with the subject of assignments for the benefit of creditors in two respects only, and those by virtue of two exceptions contained in the third section, both of which would rather appear to be expressed *ex majori cautelâ* than because the excepted transactions would otherwise be avoided by the second section. Treating the excepted transactions as not affected by the second section, there would be no danger of giving to that section an operation different from that intended by the Legislature, by holding it to be operative by itself, even if the remaining portion of the statute should be deemed to be invalid. Mr. Justice Patterson appears to have thus separated the corresponding portions of the Ontario statute in his discussion of them in *Edgar* v. *The Central Bank.* It has so frequently been laid down that in discussing the constitutional validity of statutes of the Dominion or Provincial Legislatures the courts should confine themselves to such questions as necessarily arise in the cases before them, that I think it best to consider thus independently the question raised respecting this second section.

An enactment substantially the same, with the exceptions which I have mentioned, was assumed to be made by the Legislature of Manitoba as long ago as 1875. See 38 Vic. c. 5, s. 59. It was repeated in Con. Stat. Man. c. 37, s. 96, and 48 Vic. c. 17, s. 123, and was only repealed by the first section of the Act now particularly in question. The second section is clearly intended as a substitution for and an extension of the old section, while the corresponding section respecting confessions of judgment, *cognovit actionem* and warrants of attorney is left untouched.

The validity of these provisions has occasionally to some extent been questioned, but they have from time to time been acted

upon in our courts as valid. It appears to me that the argument of Mr. Justice Patterson in *Edgar* v. *The Central Bank*, completely establishes their constitutionality.

Prima facie, the enactment relates pre-eminently to the subject "Property and civil rights in the Province," assigned by the 13th sub-section of the 92nd section of The British North America Act to the legislative jurisdiction of the Provincial Legislatures. The burden, then, is thrown upon those asserting it to show that in consequence of the exclusive authority given to the Dominion Parliament to legislate respecting all matters coming within the subject of "Bankruptcy and insolvency," the power to thus enact is taken from the Provincial Legislatures.

The latter provide for and establish the courts of civil jurisdiction, the practice and procedure therein and the enforcement of the rights of creditors. They provide, also, what shall be the state of the law of the respective Provinces respecting the tenure and transfer of property, real and personal. It must be for them, then, to determine what transfers shall be valid as against the claims of creditors and the process of the Provincial courts. Naturally one factor in dealing with the enforcement of the claims of a creditor upon his debtor is the sufficiency or insufficiency of the property of the latter to meet his liabilities. This is distinctly important in considering the propriety of allowing a debtor to transfer away his property. In *Shears* v. *Rogers*, 3 B. & Ad. 369, Lord Tenterden remarked that "there is, undoubtedly, high authority for saying that a party must be in insolvent circumstances to render a conveyance by him fraudulent within the statute of Elizabeth." And as Mr. Justice Patterson points out, it is only for the case of insolvent debtors that legislation against preferences is required.

In this connection I cannot do better than refer to the language used in the judgment of the Judicial Committee of the Privy Council in *The Citizens Insurance Co.* v. *Parsons*, 45 L. T. N. S. 721, 1 Cartwr. 265, "Notwithstanding this endeavor to give preeminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the

powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament. . . . . With regard to certain classes of subjects generally described in section 91, legislative power may reside as to some matters falling within the general description of those subjects in the Legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been intended that a conflict should exist and in order to prevent such a result, the language of the two sections must be read together and that of one interpreted, and where necessary, modified by the other."

And in *Valin* v. *Langlois*, 3 Sup. C. R. 15, the learned Chief Justice of Canada said, "But while the legislative rights of the local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised so far as may be, consistently with the right of the local Legislatures, and therefore, the Dominion Parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and efficiently in relation to matters confided to the Parliament of Canada."

As has been so frequently shown, it is impossible that there should be any legislation upon the subject of "Bankruptcy and insolvency," which should not affect property or civil rights. The Dominion Parliament must, then, impliedly have, as was held in *Cushing* v. *Dupuy*, 5 App. Cas. 409, the right to so affect them by legislation coming properly under the head of the former subject. Although this would, probably, involve authority to make some such enactment as that now in question in connection with some general scheme of dealing with insolvent estates, the Provincial Legislatures might still, in dealing with the enforcement of the rights of creditors, take into consideration the status of debtors in regard to their ability to pay their debts in full and make enactments expressly or impliedly dependent for their force upon that status so long as they should enact nothing inconsistent with such laws as are provided by the Dominion

Parliament within its express or implied powers. Such, indeed, seems to be the result of the decision in *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31.

I am, therefore, of opinion that this second section in so far as it affects the present action, must be treated as valid and of full force.

I fully agree with the construction placed upon the latter portion of the clause by my learned brother Bain.

We have been furnished with a copy of the judgment of Mr. Justice Gwynne in the case of *Kleopfer* v. *Warnock*, in which he takes a different view, and are informed that the opinions of the other learned judges of the Supreme Court were not given or reported in writing. It appears, however, that the original judgment of the Chancery Division of the High Court of Justice of Ontario was one declaring void a certain assignment of the book debts of a debtor as against his creditors. It was pronounced by Mr. Justice O'Connor who did not expressly state his grounds, but only that he found the assignment void under the second section of the statute. See report in 14 Ont. R. 288.

That judgment could be supported only on the ground of the assignment having been made with the necessary intent or of its having the necessary effect. It was affirmed by the Divisional Court and the Court of Appeal in Ontario and finally by the Supreme Court. In the latter court Mr. Justice Gwynne alone dissented from the judgment of the majority, who must, then, either have differed from him and held that the effect of the assignment alone, without reference to the intent, was sufficient to avoid it, or have thought that the intent was sufficiently shown. In the latter case any decision respecting the concluding portion of the clause would be unnecessary. I think, therefore, that we are driven to decide for ourselves the question of construction now raised with the advantage of such assistance as we can derive from the judgment of Mr. Justice Gwynne and any reported judgments of the courts of Ontario.

From a short note of a decision of the Common Pleas Division of the High Court of Justice of Ontario in the case of *Lamb* v. *Young*, given in 26 C. L. J. at p. 219, it appears to have been held by the full Divisional Court that the party seeking to im-

peach a transfer under the second section of the Ontario Act should show that the transferee knew of the debtor being in insolvent circumstances when he took the transfer.

This appears to have been decided as following a decision of the Court of Appeal in *Johnson* v. *Hope*, of which a short note is given in 26 C. L. J. at p. 87. So far, however, as can be gathered from the latter note, the case was a very different one, the transferee not being the creditor, but one who supplied a consideration which, by direction of the debtor, was paid over to a creditor. In such a case it would not be the effect of the transfer to create the preference, but the effect of the subsequent dealing with the consideration.

In *Kennedy* v. *Freeman*, 15 Ont. App. R. 216, Mr. Justice Burton held that under the Ontario statute the intent of the parties was still material, but Mr. Justice Osler was of opinion that the effect alone, irrespective of the intent, was sufficient to avoid the transfer.

In *The River Stave Co.* v. *Sill*, 12 Ont. R. 557, the full Queen's Bench Division of the High Court of Justice of Ontario, held that in applying the Act the court has only "to ascertain whether the person who has made any gift, conveyance, &c., was at the time insolvent or unable to pay his debts in full, or knew that he was on the eve of insolvency, and if so, what is the effect of such gift, &c., and if its effect is to defeat, delay or prejudice his creditors or to give any one or more of them a preference over his other creditors or over any one or more of them, to declare such gift, &c., as against them to be utterly void," and that the court ought not to be "affected by any such considerations as that the gift, conveyance, &c., was made in good faith, or through pressure, or in ignorance of his circumstances, if he was actually in insolvent circumstances or unable to pay his debts in full, or as that the person to whom he made such gift, &c., took it in good faith or took it without knowing his circumstances," but "ought to look only at the effect it has had upon his other creditors, and deal with it accordingly."

After a careful consideration of the reasons given by Mr. Justice Gwynne and Mr. Justice Burton, I must say with all respect, that I am not convinced by them that the statute should

receive any other interpretation than that which its express words naturally import. They appear to me very fully met by the reasoning of Mr. Justice Osler in *Kennedy* v. *Freeman*, which I need not now repeat.

So far as relates to transactions having the effect of giving a preference, I agree entirely with the language of Mr. Justice, now Chief Justice Armour, in *The River Stave Co.* v. *Sill.* It is unnecessary now to decide whether the words "which have such effect," relate to any transaction except one creating merely a preference. It appears to me that the Legislature intended to escape from the refinements of the courts upon the question of intent and to establish a more definite criterion of the validity of the transaction. I quite agree to this extent with the view of Mr. Justice Gwynne that it is the "effect" at the time of the transfer which is to be considered, and not an effect produced in part by subsequent events. But I cannot agree that it is proper to consider how far either party to the transaction appreciated or intended the effect or had knowledge of the facts from which the effect might be estimated.

Under the Statute of Elizabeth, exception in favor of innocent transferees for value was expressly made. By the third section of the Act 49 Vic. c. 45, also, express provision was made for the protection of innocent purchasers in certain cases. It is, then, impossible to suppose that they were to be protected in other cases.

As to the debtor's knowledge, that also is expressly dealt with in one contingency. The second section establishes as the condition of its operation that the debtor (1) "is in insolvent circumstances," or (2) "is unable to pay his debts in full," or (3) "knows that he is on the eve of insolvency."

The Legislature did not overlook the question of knowledge of the circumstances or that of notice to the transferee. It chose to make its enactment depend upon the debtor's knowledge of one circumstance, but not on that of others, and upon the transferee being "innocent" where the transaction was of a particular kind. How can we say that it is to be dependent on knowledge of other circumstances or upon the transferee's knowledge where the transaction is of a different kind?

The only exceptions from the absolute enactment of the second section which we can recognize are, it seems to me, those contained in the third section as amended by the Act 50 Vic. c. 8.

It has been sought to bring the case within the fourth sub-section added by the latter statute; but, upon that point also, it appears to me that the learned judge was correct.

In my opinion the verdict should stand and the application be dismissed with costs.

DUBUC, J., concurred.

Appeal dismissed with costs.

MORDEN v. SOUTH DUFFERIN.

Constitutional law.—Interest upon taxes.

A Provincial statute provided that all parties paying taxes prior to a certain date should be entitled to a reduction of ten per cent.: and that there should be added to all taxes unpaid upon a certain later date a sum of ten per cent.

Held, 1. (Following *Schultz* v. *Winnipeg*, 6 Man. R. 35.) That viewing the whole statute the amount to be added was in reality interest, and as the provision was *ultra vires* interest at six per cent. could not be charged.

2. That the provision as to rebate was *intra vires*.

This was a special case raised for the purpose of testing the constitutionality of the Provincial statute 49 Vic. c. 52, s. 626, as amended by 50 Vic. c. 10, s. 43. The case was as follows:—

This is an action brought by the plaintiff against the defendants for the recovery of moneys paid under protest by the plaintiff to the defendants for taxes in excess (as the plaintiff claims) of what was lawfully chargeable and by the consent of the parties and by the order of the Honorable Justice Bain, dated 21st November, 1889, the following case has been stated for the opinion of the Court without any pleadings.

1. The plaintiff is now and for the last five years has been the owner of certain land within the Municipality of South Dufferin, to wit, the northeast quarter of section number nineteen in the second township in the fifth range, west of the principal meridian on which the defendants had duly levied and imposed taxes for the years 1886, 1887 and 1888, amounting to $46.08 and for the year 1889 amounting to $12.90.

2. On the 31st October, 1889, the said taxes being still unpaid, the plaintiff tendered to the defendants the said sum of $46.08 in payment of the arrears of taxes, but the defendants refused to accept the same without the payment of a further sum of $6.82 being the sum of ten per cent. on the original taxes added thereto in the several years on the 1st day of March, pursuant to section 626 of the "Manitoba Municipal Act, 1886," as amended. The plaintiff then tendered the sum of 50.17, being the said arrears of $46.08 plus $4.09, being an addition of six per cent. in the various years as aforesaid, instead of ten per cent. but the defendants refused to accept the same. The defendants threatened to sell the land in default of payment of the full amount claimed and the plaintiff thereupon paid the same under protest, $52.90.

3. On the same date the plaintiff tendered to the defendants $11.61 in payment of the said taxes of 1889 being the said sum of $12.90 less $1.29 as a reduction or rebate of ten per cent. on the same for payment before 31st December, 1889, pursuant to said section 626 as amended, but the defendant refused to accept the same or to allow the said reduction. The plaintiff then tendered the sum of $12.13 being the said sum of $12.90 less $0.77, as a reduction of six per cent. as aforesaid, but the defendants refused to accept the same, whereupon the plaintiff paid the full amount under protest, $12.90.

The questions for the opinion of the court are :—

1st. Whether the provisions of "The Manitoba Municipal Act, 1886," and amendments thereto, are valid and effectual to authorize the addition of the sum of ten per cent. (or if not then of six per cent.) of the original amount on all taxes remaining unpaid on the first day of March in each year. If the court shall be of opinion in the negative, then judgment shall be entered up for the plaintiff on this issue for the said sum of $6.82 (or for $2.73 as the case may be) and costs of suit; otherwise it shall be for the defendants.

2nd. Whether the provisions of the said Act as amended are valid and effectual to entitle parties paying taxes to a reduction of ten per cent. (or if not then six per cent) of the same on payment before the 31st day of December in the year in which they are levied. If the Court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff on this issue for the said sum of $1.29 or $0.77 (as the case may be) and costs of suit, otherwise it shall be for the defendants and with costs of suit if the defendants succeeds on both issues.

J. Stanley Hough, for plaintiff. The plaintiff relies wholly on *Schultz* v. *Winnipeg*, 6 Man. R. 35. There is nothing in the statute which authorizes the addition of six per cent. If so, the

court will not justify any further imposition on tax payers. *Cooley on Taxation*, 209, 210, 314, 315; *Dillon on Municipal Corporations*, 3rd ed: 314, 315, 320, 762.

Hon. J. Martin, Attorney-General, and *C. P. Wilson*, for defendant. There is a distinction between percentage and interest. Interest involves a question of time; percentage is merely so much per hundred. *Olney's Science of Arithmetic*, 243. Adding ten per cent. on a certain day in March, what rate is that? Interest grows day by day. In discount also time is an element. At the date of Confederation there was, both in Ontario and Quebec, an extra charge for default in payment of taxes, contained in the Acts relating to municipal institutions. 29 & 30 Vic. c. 53, ss. 126, 145, 148; *Ross* v. *Torrance*, 2 Cartwr. 353. Such extra charges have been made from the inception of municipal institutions. Case of liquor licenses and prohibition. *Corporation of Three Rivers* v. *Sulte*, 2 Cartwr. 280; *Harris* v. *Corporation of Hamilton*, 1 Cartwr. 756; 44 U. C. Q. B. 641; *Slavin* v. *Orillia*, 36 U. C. Q. B. 159; *Hodge* v. *The Queen*, 9 App. Cas. 117. As to interest. 51 Vic. (D.) c. 33.

(7th June, 1890.)

TAYLOR, C.J.—In *Schultz* v. *Winnipeg*, 6 Man. 35, a decree was made restraining a tax sale on the ground that the defendants were proceeding to sell land, not for the taxes assessed upon it, but for these taxes, with, added thereto, the increase or penalty for default in payment, imposed by sec. 626 of 49 Vic. c. 52, as amended by 50 Vic. c. 10, s. 43. I then held that it is not within the power of the Local Legislature to impose, as it has done by that section, a rate of interest, where there is no contract, in excess of what has been fixed by the Dominion Parliament as the legal rate. The decree then made was, on a rehearing before the full court, affirmed, although my brother Killam dissented from the other members of the court upon the constitutional question, and concurred in affirming it for other reasons only.

I have seen no reason since the argument in this case, to change the opinion I then came to and expressed. I still hold that it was not within the power of the Local Legislature to impose the increase or penalty provided for by section 626.

This section 626 being in this respect *ultra vires*, there is no increase or penalty fixed by law for default in payment of taxes, and a municipality is not entitled to add or charge six per cent. or any other amount. Neither can the court fix that rate, or any other rate, as the proper one to be charged.

The giving a rebate for prompt payment does not seem open to objection. The provision for that, although contained in the same section as that which provides for the increase, is an entirely distinct one and may, I think, stand, although the other part falls.

The plaintiff is entitled to judgment on the first issue for $6.82 and on the second issue for $1.29 with his costs of suit.

KILLAM, J.—It appears to me that the decision of the majority of the court in *Schultz* v. *Winnipeg*, 6 Man. R. 35, is applicable and that under it the additions of ten per cent. were improperly demanded. This appears to me equally to involve the illegality of any attempt to impose interest at six per cent. per annum. It is clear that upon the principles of the common law interest would not be chargeable upon such a rate without express authority for its addition. The addition of the ten per cent. has been held invalid on the principle that any increase of the rate on account of its being allowed to become overdue is "interest" within the 91st section of The British North America Act. Whether that be correct or not, the addition authorized is not interest accruing *de die in diem* at the rate of ten per cent. per annum. It is an extra charge imposed at the expiration of a certain time, either once only, as claimed by the learned attorney-general, or annually, but not until the date at which it may be made arrives. So that if taxes were paid the day before that date, no such extra amount would be chargeable. But "interest," as used in the "Act respecting Interest," R. S. C. c. 127, would naturally be interest in the usual sense of the term accruing *de die in diem* and proportioned directly to the time during which the principal remains overdue.

That statute does not prohibit the imposition of any rate higher than six per cent. per annum. It is enabling, not disabling. The Provincial statute is in no respect inconsistent with it. The second section of the Dominion statute fixes six per cent. as the rate only when interest is payable by agreement or

by law and no rate is fixed by agreement or by law. It does not make interest payable where not otherwise payable by agreement or by law. The decision in *Schultz* v. *Winnipeg* proceeded upon the view that the Provincial Legislature could not authorize the addition because, in doing so, it was legislating in relation to a matter coming within the class of subjects denominated "Interest" in The British North America Act, section 91, sub-section 19, not because its legislation was inconsistent with a law of Canada, prohibiting payment of interest or a rate of interest greater than six per cent. per annum. There would, then, be no interest payable either by agreement or by law, and the Dominion Act could have no application.

Then, as to the discount claimed under the 626th section of The Municipal Act of 1886 as amended by the Act 50 Vic. c. 10, s. 43, I am of opinion that the plaintiff was entitled thereto. In *Schultz* v. *Winnipeg*, I suggested certain reasons why the municipalities would naturally require to secure payments of the municipal rates regularly and without great delay, and why the extra expense involved in the default of rate-payers should be thrown upon those occasioning it. But, at any rate, there is no reason why the validity of the legislation of the Provincial Legislatures respecting municipal assessments should be judged by reference to the question of the rates being or not being imposed with absolute equality upon all ratepayers. These rates are payable by force of the Provincial statute, and the municipalities can have no right to any greater amounts than the statute authorizes them to collect. Although the provision for a discount may seem to be an indirect method of accomplishing the same end as that authorizing the additional rate in respect of overdue taxes and thus to be trenching upon the subject of "interest," yet there is this distinction, that for an addition the authority of the Legislature is necessary, but that in respect of the discount there is a qualification of the provisions authorizing the imposition of a general rate such that there is an absence of authority to charge more than the reduced amount before a certain date. I think, therefore, that I am not bound by the decision in *Schultz* v. *Winnipeg*, to hold that the municipality was entitled to the full amount levied, and that the reasons which I ventured to urge in that case apply with still greater force upon this point.

In my opinion there should be judgment for the plaintiff for the two sums of $6.82 and $1.29 with costs.

BAIN, J.—As to the first question we are asked to decide on this special case, it must be held, I think, following the decision of the court in *Schultz* v. *Winnipeg*, 6 Man. R. 35, that the sum of 10 per cent. which section 626 of the Municipal Act directs shall be added to the amount of all taxes remaining unpaid on the first of March, is interest, and that the Provincial Legislature had not jurisdiction to direct the addition of such a rate. Then if this provision of the section is invalid, there is nothing in the Act that authorizes the addition of a rate of six or any other per cent. The question whether a provision directing the addition of a rate of six per cent. would have been valid or not, does not arise. I think that on the issue raised by the first question, judgment should be entered for the plaintiff for $6.82 and costs.

No reason was suggested on the argument, and none occurs to me, why the provision in this section that parties paying taxes before the day mentioned in the section, shall be entitled to a reduction of ten per cent. on the amount of their taxes, should not be valid. On this issue I think judgment should be entered for the plaintiff for $1.29 and costs.

Judgment for plaintiff.

HOCKIN v. WHELLAMS.

(In Equity.)

Exemption from execution.—Abandonment of homestead.—Statutes.—Repeal.

49 Vic. c. 17, s. 117, ss. 8, exempts from execution the land upon which the defendant or his family resides, or which he cultivates wholly or in part, not exceeding 160 acres, provided that "said 160 acres must be outside the limits of any city or town." The proviso was by 49 Vic. c. 35, s. 2, repealed.

Held, That the repeal rendered lands within town limits exempt from execution for debts incurred previous to the repeal.

Defendant owned a homestead and occupied a house upon it for several years. He himself was much absent in England, but his family continued to reside there until the 1st of October, 1889; when, without defendant's knowledge they removed to another place—for the temporary purpose merely of wintering their cattle. In the following March they returned to the homestead accompanied by the defendant.

Held, That in the absence of evidence to show an intention to abandon the homestead, or that the plaintiff was in any way mislead, the exemption still continued.

A conveyance of a homestead by way of mortgage does not preclude a claim of exemption from execution.

Quere, Can one member of a partnership after dissolution assign a judgment obtained by the firm.

This bill was filed to enforce a certificate of judgment registered against the defendant's lands.

The judgment was recovered by S. C. Biggs and E. M. Wood against the defendant on the 6th February, 1883, for $887.82. A certificate of the judgment was taken out on the 14th October, 1889, and registered on the 19th of the same month.

On the 19th November, 1889, the judgment was for the consideration of $100, assigned to the plaintiff herein, who, on the next day, 20th November, filed his bill to enforce it.

The lands sought to be declared subject to a lien for the amount of the judgment as prayed for in the bill, formed part of a quarter section of 160 acres which had been owned and occu-

pied by the defendant and his family since 1878 or 1879, and held by him as his homestead; but the lands being within the limits of what became the town of Rapid City, were divided into town lots, the larger portion of which was sold. The balance owned by the defendant was composed of about 40 acres. The parcel of lands which the plaintiff sought to have declared subject to a lien for his judgment comprised five of the town lots, namely: lots 10, 11, 12, 13 and 14 of block 44, the house and other buildings of the defendant being on lot 11.

During the last few years, and particularly since 1886, the defendant had been most of the time in England as immigration agent, but his wife and children continued to reside on the lands which were cultivated by his sons; for, although the land was laid out into town lots and a plan registered, as that particular piece was outside of the inhabited part of the town, the whole was fenced in as one plot.

On the 1st October, 1889, the family finding no hay around for their cattle and horses, went to Newdale, about 20 miles distant, where they put up at the house of one Kay, who allowed them the use for the winter of his vacant house, without any charge for rent. When the defendant returned from England in November or December, he was much annoyed to see his family off the property. They, however, returned to their house, with the defendant himself, about the end of March following.

It was after the family had left the property in October, 1889, that steps were taken by E. M. Wood, and afterwards by the plaintiff to enforce the judgment as hereinbefore mentioned.

The defendant contended that under the exemption provisions of the statute, his lands could not be sold to satisfy the judgment held by the plaintiff. But the plaintiff claimed to be entitled to succeed in the suit on the grounds: (1) that the lands in question did not come within the scope of the statutory provisions respecting exemptions; (2) that the property had been abandoned by the plaintiff when the certificate of judgment was registered, and when the bill to enforce it was filed; (3) that the defendant had parted with his lands by executing mortgages on the same to Alloway & Champion, and was, therefore, debarred from claiming the benefit of the exemption provisions of the statute.

G. R. Howard for plaintiff. The judgment has been proved, and exemplification put in under 1 & 2 Vic. c. 94, s. 13, and it has not been paid. The certified copy of certificate of judgment by registrar is proved under Con. Stat. Man. c. 60, s. 59; and 48 Vic. c. 17, s. 111. The statutes relating to exemptions are 48 Vic. c. 17, s. 117; 49 Vic. c. 35, s. 1; and 52 Vic. c. 36, s. 8. The defendant's property was vacant for a time and plaintiff contends it was abandoned. *Warne* v. *Housely*, 5 Man. R. 547. Plaintiff contends no part of the premises in question was occupied by the defendant or his family, at the time the certificate of judgment was registered. *Burt* v. *Clark*, 5 Man. R. 150. The land and house were not exempt under the statute. No statute prior to 1885 exempted city or town property from seizure. The evidence shows conclusively that neither defendant nor his family resided on the property when certificate of judgment registered, or the bill was filed. The alienation of the property by defendant, by mortgaging the same to Alloway & Champion, debars him from setting up exemptions under the statute. *Brimstone* v. *Smith*, 1 Man. R. 302; *Allen* v. *Cook*, 26 Barb. N. Y. 374; *Huey's Appeal*, 29 Penn. St. 219; *Arnold* v. *McLaren*, 1 Man. R. 313; *Harris* v. *Rankin*, 4 Man. R. 115, 512; *McLean* v. *Gillis*, 2 Man. R. 113; *Thompson on Homesteads and Exemptions*, § 264, 265, 267.

J. D. Cameron for defendant. The mortgagees, Alloway & Champion, should have been made parties. As to proceedings under certificate of judgment, the statute 48 Vic. c. 17, s. 111, contemplates proceedings to be taken forthwith, the judgment subsequently assigned to plaintiff was recovered in 1883 and nothing was done until 6 years after. As to exemptions from seizure. Under ruling in *Fonseca* v. *Macdonald*, 3 Man. R. 417, plaintiff has not sufficiently negatived the exemptions in the statute. The certificate of the registrar on the copy of the certificate of judgment put in as evidence thereof, is insufficient. Con. Stat. Man. c. 60, s. 59. It says, "certified a true copy," whereas it should show that it was a copy of an instrument duly registered in a registry office in this Province; plaintiff, therefore, failed to connect this certificate of judgment with the land in question. As to exemptions, the statute should be liberally construed in favor of the judgment debtor. *Freeman on Executions*, § 208. As to abandonment by defendant or his family, the

onus is on plaintiff to show unequivocally that defendant not only abandoned, but that he has taken a home elsewhere; a mere temporary absence cannot avail to plaintiff Abandonment is a question of intention. *Thompson on Exemptions*, § 264, 265, 266. 268, 279, 285; *Potts* v. *Davenport*, 79 Ill. 455; *Howard* v. *Logan*, 81 Ill. 383; *Cipperly* v. *Rhodes*, 53 Ill. 351. Proof of abandonment must be clear and decisive. The assignment of the judgment to the plaintiff by Biggs & Wood as alleged in the bill not proved. Wood having executed same in the name of the partnership several years after the dissolution of the firm and not having shown his right to do so.

(*22nd May, 1890.*)

DUBUC, J.—On the first ground the plaintiff contends that the defendant can only claim exemption under s-s. 8 of s. 117 of 48 Vic. c. 17, as amended by 49 Vic. c. 35, s. 1, or under s-s. 11 of said s. 117 as amended by 49 Vic. c. 35, s. 3. Sub-sec. 8 exempts the land upon which the defendant or his family resides or which he cultivates either wholly or in part, not exceeding 160 acres; s-s. 11 exempts the actual residence or home of any person other than a farmer, provided the same does not exceed the value of $1500. But s. 1 of 49 Vic. c. 35, declares that, except the homestead exemption provided by s-s. 8, none of the other exemptions will apply to debts or obligations due or undertaken before the Act 48 Vic. c. 17, came into force. That Act was passed in 1885, and the judgment here was signed in 1883. So the defendant can only claim exemption under said s-s. 8, as a farmer for his homestead, and the latter part of said sub-section declares that "said 160 acres must be outside the limits of any city or town." This last provision was repealed the following year by s. 2 of 49 Vic. c. 35. Mr. Howard, counsel for plaintiff, argued that the repealing section did not apply in this case, because the debt was contracted before the statute of 1885 came into force. But I do not see any ground for such contention.

As I view it, the amendment, s. 2 of c. 35 of the statute of 1886, applies absolutely to s-s. 8 of c. 117 of 1885, and allows a man to claim exemption for his homestead cultivated as a farm, even within the limits of a city or town. As is well known, during the real estate excitement of a few years ago, certain towns or cities were incorporated with very wide limits including farm

lands which remained and will likely remain as farm lands for perhaps a generation or two, it was, probably, on that account that the Legislature, after due consideration, [illegible] sion preventing a man claiming exemption for his homestead because it happened to be within the limits of a town or city which had shown larger expectations than the subsequent circumstances would realize.

As the evidence shows that the defendant or his family actually resided on the lands in question, and cultivated from year to year about 25 acres of the same, which were fenced in as one plot, although it had previously been divided into town lots, I think he should be held entitled to claim exemption under s-s. 8 of s. 117 of the statute of 1885 as amended by s. 2 c. 35 of 1886.

The second point is, as to the alleged abandonment by the defendant of the property in question. When is a person considered to have abandoned his homestead so as to lose [illegible] of exemption?

Thompson on Homesteads and Exemptions, s. 265, and following sections say that, "abandonment is a question of fact. There must be actual removal with no intention to return . . . If the removal is temporary and the *animus revertendi* is established and third persons have not been led to believe it was not a homestead by the owner thus out of possession, and to act upon this belief in purchasing or specifically altering their condition, upon the belief that it was not exempt as a homestead, the law would treat the homestead right as still subsisting.

"It was laid down very emphatically that, to abandon a homestead, a party must forsake and leave it with the intent never to return to it again as a homstead. . . . . Abandonment must be actual and not merely intentional. After having intended to abandon, he may change his mind."

In *Potts* v *Davenport*, 79 Ill. 455, it is held that temporary absence by the party and his family without acquiring another home is not an abandonment of the right.

The same is found in *Cipperly* v. *Rhodes*, 53 Ill. 346, which decides that where a party left the State to better his condition, and being taken sick rented a room in an adjoining State and kept house there with his wife, and so remained about nine months, but always with the intention of returning to his home

in Illinois; this was held not to amount to an abandonment of his homestead.

The evidence here shows conclusively that there was no intention whatever to abandon the said property. The defendant himself is not shown to have ever expressed or intimated any intention to abandon the said homestead. His family left the premises on the first of October to go and spend the winter where they would find hay for the cattle and horses. They did not acquire nor even rent any other property to settle upon; but went temporarily to the house of a friend. The windows of their house had been boarded up for protection and some articles of furniture were left in it. The plaintiff knew these facts and instead of having been deceived by the representations or the action of the defendant or of his family, the promptness with which the proceedings were taken after the family had left the house, shows that he wanted to avail himself of their temporary absence to obtain some legal rights in order to have his judgment satisfied. There was nothing fraudulent or illegal in that; but he cannot claim to have been deceived or induced to make the transaction he has made and take the proceedings he has taken by the representations or the action of the defendant. I must hold, therefore, that the defendant has not forfeited or waived his right of exemption by abandonment.

As to the third point, that the defendant has lost his homestead right by alienating his property in favor of Alloway & Champion, the evidence shows that it was not a complete and absolute conveyance, but only a security given by way of mortgage. The defendant retains still the equity of redemption and may redeem at any time to save his homestead. He has not, therefore, parted with his property, nor evinced any intention to do so. That does not deprive him of his homestead exemption right.

Having held as above, I am not called upon to decide the point raised by Mr. Cameron, the defendant's counsel, that the assignment of the judgment held by Biggs & Wood was not duly executed and is not valid.

The said assignment is signed as follows: "Biggs & Wood," "S. C. Biggs by his partner and attorney E. M. Wood," and "E. M. Wood." The signature "Biggs & Wood," was also

written by E. M. Wood. The firm of Biggs & Wood was dissolved in 1882, and the assignment was executed in November, 1889. E. M. Wood says that he does not know whether S. C. Biggs, his late partner, ever knew that he made such assignment; that Biggs never authorized him before to make said assignment, nor ratified it after. He is not aware whether Biggs knows anything of the proceedings herein. He says that the judgment was a part of his assets in the firm of Biggs & Wood. He makes that bare statement without explaining that there ever was a settlement of accounts between himself and Biggs, in which that judgment was attributed to him as part of his assets, or that it was ever admitted by Biggs or understood between Biggs and himself that the said judgment was to be considered as part of his assets. Under such circumstances I have some doubts as to whether Wood had due authority, seven years after the dissolution of the partnership, to sign the firm name, or the name of S. C. Biggs, as his partner and attorney, to the assignment of judgment.

I think the bill should be dismissed with costs.

Bill dismissed with costs.

JOHNSON v. THE LAND CORPORATION OF CANADA.

Amendment after judgment entered upon demurrer.—Jurisdiction of referee.

To a declaration for personal service by the plaintiff as the servant of the defendant, the defendant pleaded various pleas. To one of these the plaintiff demurred; upon the others he joined issue. Defendant then obtained an order striking out all the pleas except the one demurred to. Plaintiff succeeded upon the demurrer. Defendant then applied in Chambers to add two pleas. The referee refused the application and the plaintiff signed judgment. The defendant appealed from the referee's order.

Held, 1. That the referee had jurisdiction to permit the pleas to be added,

2. The discretion to amend should be used to the utmost extent consistent with justice and the rights and interests of the parties.

3. An equitable plea asking for an account permitted to be added, unless the plaintiff would undertake not to set up the judgment in defence to a bill in equity.

4. Circumstances under which a bill for an account will lie discussed.

This was an appeal from the referee under the circumstances mentioned in the head note.

W. R. Mulock, Q.C., for defendants. Defence is good. *Makepeace* v. *Rodgers*, 11 Jur. N. S. 215. If amendment not allowed, defendants will be barred as they would be precluded from fyling bill on grounds set forth in plea. When the demurrer was allowed, the question of amendment was left to be determined in Chambers. There is no verdict. By C. L. P. Act, (*Archbold*, 297,) there is full power to amend. *Peterkin* v. *McFarlane*, 9 Ont. App. R. 429; *Toussaint* v. *Thompson*, 5 Man. R. 53; *Breakenridge* v. *King*, 4 O. S. 297; *Watson* v. *Hamilton*, 6 O. S. 312; *Hamilton* v. *Davis*, 1 U. C. Q. B. 526. "Judge" means judge in Chambers. *Sweaton* v. *Collier*, 1 Ex. 457.

T. D. Cumberland for plaintiff. There is no jurisdiction in Chambers to add pleas at this stage. To do so is in effect to order a new trial. Any such application as this must be a court motion. There is no case reported where an order such as is here asked for has been made in Chambers.

Where issues of fact tried and afterwards demurrer disposed of no amendment will then be allowed, and practically that is the position here, the defendants having withdrawn all pleas on which issues of fact joined, and rested their defence on result of demurrer.

After argument of demurrer and judgment pronounced, amendment will only be allowed, if at all, on shewing very special circumstances.

In any event the pleas in question should not be allowed to be added. The first of them attempts to raise a question never before raised in the suit, and besides it would clearly be bad on demurrer; while the other is embarrassing in form, and shews no facts entitling the defendant to ask the exercise of the courts equitable jurisdiction.

The following cases were referred to. *Bramah* v. *Roberts*, 1 Sc. 364; *Smith* v. *London, &c., Ry. Co.*, 7 C. B. N. S. 782; *Skuse* v. *Davis*, 10 A. & E. 635; *Jackson* v. *Galloway*, 1 C. B. 297; *McLellan* v. *Rogers*, 12 U. C. Q. B. 651; *Kelly* v *Moulds*, 3 Pr. R. 207; *Wilkin* v. *Reed*, 15 C. B. 192.

(*9th May, 1890.*)

KILLAM, J.—I am unable to agree with the view, upon which, as I am informed, the learned referee acted in dismissing the summons, that it would be beyond the jurisdiction of a judge in chambers to allow pleas to be now added. The application is not to amend the plea upon the demurrer to which the court has ordered judgment to be entered, but to add two entirely new pleas.

The analogy to a case in which there is a verdict upon issues of fact does not appear to me exact, as the difficulty in that case would be in the awarding of a new *venire* while the former verdict remained.

The power of amendment under the 222nd section of the C. L. P. Act, 1852, is given equally to a judge in chambers and to the court; and it is frequently exercised by directing the addition of new pleas or other pleadings, as well as by the amendment of existing ones.

As to the final judgment, it was signed before the expiration of the time for appealing from the order of the referee, and even if it were otherwise important, I should not consider it a bar, or even a ground of objection to the proposed amendment.

Under the circumstances I consider the application just as if made at once to the court upon the announcement of the opinion of the court respecting the demurrer. I regard the expressions and decisions to which Mr. Cumberland has referred rather as giving reasons for refusing amendments after judgment or intimation of the opinion of the court upon the demurrer, than as decisions binding the court or a judge in every instance to refuse an amendment after such judgment or expression. The courts were formerly much less liberal than they are now in granting amendments.

I am one of those who believe that the power should be used to the utmost extent consistent with justice and the rights and interests of the parties. I concur entirely in the opinion of Lord

Justice Bowen in *Cropper* v. *Smith*, 26 Ch. D. 710, that the object of the court should be "to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights."

The course followed by the defence in this case has been a most peculiar one, and one which renders it very difficult to afford any relief to the defendant. I do not, however, think that it necessarily precludes the court from still investigating the rights of the parties if it should appear that there is grave reason to believe that the plaintiff is not entitled to recover the sum claimed or some considerable portion thereof, and that the defendant is forever precluded from relief against the judgment.

So far as the first plea is concerned, I regard it as so clearly bad that it is not to be considered. It admits that the plaintiff was employed by and served the defendant, and that his engagement afterward terminated. It does not show that the agreement was such that the keeping and handing over to the defendant of the books of account was a condition precedent to the right to remuneration for the period during which the plaintiff served. Upon the evidence before me, I would presume that the plaintiff was employed at a salary proportioned to the period of service. If he served out a period necessary to the accrual of a portion of the salary, it would be payable. A breach of duty or disobedience of orders might justify his discharge and prevent the accrual of the salary for the then current period upon discharge. But if the plaintiff continued undischarged until such accrual, the salary would be payable. And still less could the refusal to deliver over the books of account after completion of the term and accrual of the salary justify its nonpayment. I see no reason, then, to believe that there was any defence of the nature of that set up in the first of these proposed pleas; and it is unnecessary to consider whether it would now be allowed to be raised if the plea were apparently good and in accordance with the facts.

The other proposed defence stands upon somewhat different grounds.

The proposed plea itself does not appear to me now to be one which would be sustained upon demurrer. It does not seem to show sufficiently that the plaintiff occupied such a fiduciary posi-

tion that a bill in equity for an account would lie against him at the suit of this defendant. A mere servant does not occupy that position. See *Ermatinger* v. *Gugy*, 5 Moore P. C. 1; *Fluker* v. *Taylor*, 3 Drew. 183. It is not every case of agency that gives the principal the right to bring such a suit. *Phillips* v. *Phillips*, 9 Ha. 471; *Moxon* v. *Bright*, L. R. 4 Ch. 292; *King* v. *Rossett*, 2 Y. & J. 33; *Heming's* v. *Pugh*, 4 Giff. 456; *Barry* v. *Stevens*, 31 Beav. 258.

The general allegations of intricacy and complication of accounts in the proposed plea appear wholly insufficient apart from the fiduciary relation. See *Padwick* v. *Hurst*, 18 Beav. 575; *Frietas* v. *Dos Santos*, 1 Y. & J. 574; *Glennie* v. *Imri*, 3 Y. & C. Ex. 436; *Darthez* v. *Clemens*, 6 Beav. 165.

Looking at the evidence before me, it appears probable that the defendant would be able to establish such a fiduciary agency as to entitle it to maintain a suit in equity for an account, but the circumstances showing such a relation should appear more clearly in pleading. The principal evidence in favor of such a presumption is that afforded by the conduct of the plaintiff in retaining the books of account and subsequently accounting in part. It is claimed by the defendant, apparently with some show of right, that the plaintiff has not accounted fully for the goods and moneys of the defendant which have passed through his hands. The defendant appears to have sought throughout *bona fide* to compel the plaintiff to so account, and the plea demurred to and the second of those now asked to be added have been framed in the assertion of a claim to have that account taken in the present action.

The question whether this claim could be successfully asserted by a proper plea upon equitable grounds is a fair one for consideration.

Apart from "The Court of Queen's Bench Act, 1886," 49 Vic. c. 14, the defendant could have had the full measure of relief sought only by filing a bill in equity for an account and an injunction to restrain this action. Having reference to the decisions of the Ontario Courts upon the statute from which our Act is so largely copied, there is some reason to fear that, if this relief could be obtained in this action, all or some portion of it might be lost by failure to claim it. But if it would not be lost,

and the only effect of such failure would be to subject the defendant to the expense and trouble of a second suit to enforce the claim asserted, this would not constitute a sufficient reason in view of the course taken on the part of the defendant for letting in a new plea.

I do not think that I ought, upon such an application as the present, to bind the parties by a positive decision of these questions. If the plaintiff has not fully accounted, it seems unreasonable that he should be paid in full before he does so. If the defendant had at the commencement of this action a right to insist by plea or bill in equity upon the plaintiff so accounting before the plaintiff's claim should be finally enforced, I think that the court should still protect the defendant in that right, notwithstanding what has occurred. It is true that this will have the effect of delaying the plaintiff somewhat, but for this the plaintiff is, in a measure, responsible, by delaying his declaration until the Assizes were so near that the defendant was somewhat embarrassed by having to decide hastily upon its course without full information of the state of the accounts.

It has been contended for the plaintiff that the defendant will not be precluded of any of its rights by failing to get in its plea. The plaintiff, then, can hardly object to give the undertaking which I shall propose. Under the circumstances, I think that the best order to make will be to dismiss the appeal if the plaintiff will undertake not to raise in bar of any suit or proceeding for an account or against the reduction of the plaintiff's claim by any sum which may be found due to the defendant upon other portions of such account the objection that such account should have been sought in this action or such sum set up by way of payment, set-off or counterclaim in this action, and that I should then give the defendant a few days within which to pay the costs of the application to the referee, on which the appeal is taken, and all the plaintiff's costs in the action after the examination of the plaintiff except costs of judgment and execution and to pay into court the balance of the judgment debt and costs of execution with a small additional sum to cover estimated costs of getting it out and the excess of legal interest on the judgment debt over that allowed on sums in court for, say six months, and stay proceedings until further order, the defendant to have a week after such payments to file its bill for an account and injunction, after

which time the plaintiff shall be entitled, upon notice, to an order to withdraw from court the amount due upon the judgment and execution, unless the defendant shall show such cause as would induce the court to grant an interlocutory injunction to stay the action or execution of the judgment or such other cause as a judge shall consider sufficient.

If the plaintiff will not give the undertaking, I will set aside the judgment and admit the defendant to plead such plea setting up a right to an account from the plaintiff as the defendant shall be advised to entitle it to relief on equitable grounds in this action, upon the defendant within a few days to be fixed paying all costs since the plaintiff's examination, including costs of said application to the referee.

I would not, in either case, include the costs of this appeal which have been occasioned by the raising of the objection to the jurisdiction of the referee. If the defendant should fail to comply with the terms offered, the appeal to stand dismissed with costs.

McLAREN v. McCLELLAND.

Ejectment.—Plaintiff losing title pending action.—Evidence without objection.

When inadmissible evidence is received at the trial without objection, the opposite party cannot afterwards object to its having been received.

In ejectment, if at the trial the evidence shows title out of both parties, although in plaintiff when writ issued the plaintiff is entitled to judgment for costs only.

The facts appear in the judgment.

J. A. M. Aikins, Q.C., for plaintiff. The defendant can only deny plaintiff's title, he cannot show title in himself, as he did not assert title in himself. Ejectment Act 44 Vic. c. 5, s. 20;

Cole on Ejectment, 289; *Fairman* v. *White*, 24 U. C. Q. B. 123; *Burke* v. *Battle*, 17 U. C. C. P. 478.

T. D. Cumberland for defendant. Plaintiffs have not proved service of the notice required to be given to make the probate evidence instead of the original will, and the fact of the notice being put in evidence without objection does not prove service of it on the defendant. *Taylor on Evidence*, 1498. The defendant is not seeking to set up title in himself, he merely shows that since this suit began the plaintiff's title has expired and that he is, therefore, not entitled to judgment in possession, but only for costs. Ejectment Act, s. 31.

J. A. M. Aikins, Q.C. The probate has been put in without objection.

(*7th March, 1890.*)

DUBUC, J.—This is an action of ejectment commenced on the 26th July, 1888.

On the 16th August, 1888, the defendant put in an appearance but no notice asserting title in himself.

The plaintiffs claim title to the lands in question through the following documents:

(1) Two patents from the Crown to William McClelland, dated 6th October, 1884.

(2) Deed from W. McClelland to the Rev. Ebenezer D. McLaren and David Heggie, dated 5th September, 1885.

(3) Deed from G. D. McLaren and D. Heggie to Sarah Ann Warring, dated 27th March, 1886.

(4) Will of Sarah Ann Warring bequeathing the property to the plaintiffs, and probate thereof entered the 7th May, 1889.

On the 4th July, 1889, the plaintiffs gave to the defendant's attorney notice of their intention on the trial of the cause, to give in evidence as proof of a testamentary disposition of the said lands to the said plaintiffs, the probate ancileary of the will of the said Sarah Ann Warring, deceased.

The said notice with admission of service by the agents of the defendant's attorney, indorsed thereon, was also put in by the plaintiffs, without objection from the defendant's counsel.

The plaintiffs having closed their case, the defendant's counsel moved for a nonsuit on the ground that the plaintiff had not

proven the service of the notice required to be given to prove the will by the production of the probate and copy of the will instead of producing the original will itself. He argued that the admission of service of the notice purporting to be signed by Hough & Campbell, agents for the defendant's attorney, does not constitute proof of the said service, as the said signatures had not been proven.

I think that the mere putting in of the notice with admission of service, would not, if it had been objected to at the time, be considered as sufficient evidence of the service of said notice. But it was not objected to when put in; and it makes quite a difference. *Taylor on Evidence*, (Bl. Ed.) 1592, says: "When inadmissible evidence is received at the trial without objection, the opposite party cannot afterwards object to its having been received."

In *Reed* v. *Lamb*, 29 L. J. Ex. 452, the action was brought for penalties under the Corrupt Practices at Elections Act, 17 & 18 Vic. c. 102, a copy of the writ and return from the office of the clerk of the Crown, bearing a memorandum by a clerk in the office, that it was a true copy was put in without objection. It was held that the objection taken afterwards was too late.

Under the said authorities, I think the notice and service thereof, not having been objected to when put in, must be considered as sufficiently proven.

To establish his defence, the defendant produced a tax sale deed from the Rural Municipality of South Dufferin to David G. McClelland, dated the 4th December, 1889. This was objected to on the ground that the defendant not having given notice of title in himself, can only deny the plaintiff's title, but cannot be allowed to assert title in himself nor to any one through whom he claims. The cases of *Fairman* v. *White*, 24 U. C. Q. B. 123, and *Burke* v. *Battle*, 17 U. C. C. P. 478, were quoted in support of that contention. But, I have been unable to find any English authority establishing that broad proposition. In answer to the objection, it was, however, urged that by that document the defendant does not assert title in himself; his name on the record being David McClelland, while the grantee of the tax sale deed is David G. McClelland. The deed is offered to show that if the plaintiff's title is proven to have existed when the writ was

issued, it has expired and ceased to be valid since, by the issuing of the said tax sale deed.

Cole on Ejectment, 287, says: "If it appear by the evidence that neither party is entitled to possession, but that the right is vested in some third person, not a party to the record, the defendant is entitled to the verdict, although he does not pretend to claim under or on behalf of such third person."

From what transpired, it is easy enough to conclude that the same person is meant and that it is nothing more than a variance in the name. But, at the same time, the defendant claiming to prove only by said deed that the title of the plaintiffs has expired and ceased to be valid, I do not think that, under all the circumstances, I should refuse to receive the said deed in evidence.

Now, it being proven that the plaintiffs, although they have no title at present to the lands in question, had a good title when the action was brought, the case comes within the provision of 44 Vic. c. 5, s. 31, of the Manitoba Statutes, which said section is in substance the same as 15 & 16 Vic. c. 76, s. 181, found in *Cole on Ejectment*, 289-290. Under the said section, the plaintiffs are entitled to judgment for their costs of suit.

McRAE v. CORBETT.

Extending time to appeal.

Time for appeal to the Supreme Court was extended where there had been only three days default; where no sittings had been lost; and where such efforts to obtain security had been made that negligence could not be reasonably charged.

At the hearing a decree was made dismissing the plaintiff's bill with costs. The Full Court affirmed the decree. A motion was afterwards made for permission to appeal to the Supreme Court notwithstanding the lapse of 60 days since the pronouncing of judgment appealed from.

C. P. Wilson and *R. W. Dodge*, for plaintiff, referred to *Platt* v. *Grand Trunk Ry. Co.*, 12 Pr. R. 383; *Blythe* v. *Young*, 13 Ch. D. 201; *Collins* v. *Paddington*, 5 Q. B. D. 378; *In re New Callao*, 22 Ch. D. 484. The defendant's affidavit shews that after expiry of 60 days be entered into an agreement to sell the land in question.

J. Stanley Hough, for defendant. The plaintiff has not shewn due diligence. Nor has he shewn that security was not furnished owing to any mistake, accident or misconduct of respondent.

C. P. Wilson in reply. Plaintiff is willing to join in proposed sale so that same may be carried out. By section 42 if special circumstances shewn, an appeal will be allowed as a matter of right. The material shows that, owing to no fault of plaintiff, a party who had promised to furnish security, failed in doing so, and that, therefore, the security now offered was promptly obtained and filed within three days after expiry of 60 days. No sitting of court will be lost and defendant not prejudiced. *Dedrick* v. *Ashdown*, 4 Man. R. 349.

(*29th May, 1890.*)

BAIN, J.—In this matter I have come to the conclusion, after considerable hesitation, that I should allow the appeal notwithstanding that the time limited for appealing had expired several days before the proposed security was filed and the motion made for its allowance.

From the affidavit and examination of Mr. Dodge, the plaintiff's solicitor, it appears that the plaintiff is a man in poor circumstances, and that, although he instructed his solicitor to appeal soon after the judgment was pronounced, he was unable himself to give or procure security, and that Mr. Dodge has been acting for him in procuring it. Mr. Dodge first tried to raise $500 to pay into court by applying for subscriptions to a number of persons in the city who, he thought, were interested in tax sales, but none of them appear to have been sufficiently interested to subscribe. One of those he says he applied to was the defendant McArthur, who, as he holds a mortgage on the lands in question for an amount four or five times more than they are worth, would, one would think, be more interested in prosecuting the appeal than the plaintiff himself. Failing in obtaining subscriptions, Mr. Dodge then applied to a person who, from his being "inter-

ested in the principles involved in the suit," he thought might likely assist, and from this person he obtained a promise that he would advance $500 out of the proceeds of the sale of some property that he was about completing. Relying on this promise Mr. Dodge expected the money would be forthcoming in time, but on the day just before the time limited expired, he was told by this person that the sale had not been completed and that he could not let him have the money. Then Mr. Dodge suggested a "new course" to this person, with the result that next morning he was instructed to prepare and send the bond now offered to the defendant McArthur. When the bond was returned to Mr. Dodge it was executed by the sureties, and Mr. Dodge lost no time in sending for the plaintiff, and he came in at once and signed it.

There is a good deal in Mr. Dodge's evidence taken in connection with the circumstances of the case, to lead to the inference that it is the defendant McArthur, rather than the plaintiff, who is prosecuting the appeal. It was McArthur who, at the last moment, when Mr. Dodge's efforts to obtain security on behalf of and on the credit of the plaintiff, had failed, arranged for the bond now offered, and as far as he is concerned, there is nothing shewn to excuse the security not having been given in time. Still Mr. Dodge states that the plaintiff *bona fide* desires to appeal, and assuming that he does, I do not think the few days delay there has been can reasonably be charged to his negligence or that of his solicitor. The plaintiff could do nothing himself towards getting security, and Mr. Dodge having obtained a definite promise that the $500 would be advanced in time for its being paid into court within the sixty days, seems to have been justified in depending on the promise, and it was not his fault that the money was not forthcoming.

The security now offered was filed, and the notice of this application served, only three days after the expiration of the time limited, and if the appeal is allowed, it will come on for hearing at the same time as if the application had been made within the sixty days.

It appears from the affidavit of the defendant Corbett that on the day the time limited for appealing expired, he entered into an agreement for the sale of the lands in question for $1000, and the plaintiff is willing to submit to its being made a condition of

the appeal being now allowed, that this agreement shall be carried out. If the defendant Corbett desires that this shall be made a condition, I shall so order.

Leave to appeal granted.

MILLER v. McCUAIG.

(IN CHAMBERS.)

Mortgagee buying at tax sale.—Action on covenant.—Removal by mortgagee of buildings.

After a mortgagee had taken possession under his mortgage, purchased the land at tax sale and obtained a conveyance, and removed valuable buildings from the land, he obtained judgment upon the covenant in the mortgage.

Upon a motion to stay proceedings on the ground that the judgment had been satisfied,

Held, 1. A mortgagee may purchase at tax sale and then resist redemption. The effect of the purchase is the same as if he had obtained a final order of foreclosure. It does not satisfy the covenant, but an action on the covenant would let in redemption.

2. The removal by the mortgagee of buildings does not prevent an action upon the covenant. Waste is a matter of account.

3. An application to stay proceedings upon a judgment on the ground of its satisfaction can properly be made in Chambers.

This was an appeal by the plaintiff, from an order made by the referee, staying proceedings on writs of execution, on the ground that the judgment under which they were issued had been satisfied.

J. H. Munson for plaintiff. The matters involved should not have been tried in chambers on affidavit, but the subject of a suit to restrain the mortgagee from proceeding on his judgment, or to have it declared satisfied, *Clark* v. *Scott*, 5 Man. R. 291. The plaintiff did not buy as mortgagee. He was not obliged to pay taxes, and

could legally buy at the tax sale, as he could buy from the mortgagor himself, or at a sheriff's sale, or a sale under another mortgage on the land. *Kelly* v. *Macklem*, 14 Gr. 29. If he could not legally buy so as to acquire the mortgagor's estate he is a trustee, and can still sue for the mortgage money. *Smart* v. *Cottle*, 10 Gr. 59. In that case he is in the same position as a mortgagee of a lease who has obtained a renewal of the term in his own name. A mortgagee after foreclosure may deal with the property as his own, and may recover on the covenant if the estate has not been conveyed so as to prevent its reconveyance, *Munsen* v. *Hauss*, 22 Gr. 279. The removal of the building was not an alienation of the estate. It could be replaced, and at most was matter for reduction of the mortgage debt on accounts being taken. *Sandon* v. *Hooper*, 6 Beav. 246. Cited also *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, *Rushworth's Case*, Freeman, 12, *Rakestraw* v. *Brewer*, 2 P. Wms. 512. *Fisher on Mortgages*, ss. 1697, 1698.

J. S. Hough, for defendants. The Court has control over its own proceedings. *Freeland* v. *Brown*, 9 L. J. O. S. 299. Where such changes have been made that the mortgagee cannot reconvey the property, as it was, that would be a satisfaction of the debt. *Coote on Mortgages*, 742 1027, *Palmer* v. *Hendrie*, 27 Beav. 349, *Munsen* v. *Hauss*, 22 Gr. 281, *Burnham* v. *Galt*, 16 Gr. 417. In *Smart* v. *Cottle*, 10 Gr. 59, Vankoughnet, C., held distinctly that a mortgagee buying at a tax sale was a trustee.

(*17th March, 1890.*)

TAYLOR, C.J.—The facts, as alleged by the defendant, are, that in February, 1883, he executed a mortgage payable in twelve months, over certain lots in Portage la Prairie, to the plaintiff, who, a short time after the mortgage became due, took possession of the property; that in 1885 the lands were sold for taxes and bought by the plaintiff who, in 1887, obtained a deed, that in November, 1887, the plaintiff brought an action on the covenant in the mortgage and signed judgment for the amount due under the mortgage in January, 1888, being the judgment in this suit. Also, that there was on the property when the plaintiff took possession, a large grain warehouse which, in August or September, 1888, he moved from off the property to other land owned by him.

It was objected for the plaintiff that the questions now raised could not be raised by a summons to set aside the executions or

to stay proceedings under them, and that the defendant can only proceed by a suit on the equity side of the court for an injunction to stay further proceedings at law. I think the referee was right in holding that, if the judgment has been satisfied, an application may be made in this action to stay proceedings under the writs of execution.

It seems now settled that a mortgagee may buy the mortgaged property at a tax sale just as a stranger can. Taxes are, by statute, a first charge on the land, and where a mortgagee buys, it is just the same as if he were buying on a sale by a prior mortgagee, and it seems to me he can, having so bought, resist a suit brought by the mortgagor to redeem. The effect of the sale to him is the same as if he had obtained a final order of foreclosure. But if he buys as mortgagee, that is, if he in any way uses his position as mortgagee to enable him to buy, or, as it was said in *Kelly* v. *Macklem*, 14 Gr. 29, if he makes his interest in the land a ground for being allowed to purchase, he cannot set up the title thus obtained against the mortgagee's right to redeem. So, if after having bought at tax sale, he sues upon the covenant, he must, in my opinion, be regarded as having elected to treat the mortgage as still redeemable. The mortgagor should in that case, be placed in the same position as if the mortgagee was suing after having obtained a final order of foreclosure.

The cases in Ontario I think bear out the views I have expressed. In *Scholfield* v. *Dickenson*, 10 Gr. 226, Esten, V.C., did not hold that the mortgagee could not buy for taxes. The bill there was to set aside a tax sale on account of undue practices preventing fair competition. The V.C. dismissed the bill, but it appearing on the evidence that the defendant was a mortgagee of the land, counsel seem to have asked that the decree should be without prejudice to the plaintiff's right to file a bill for setting the sale aside on that ground. This the V.C. held unnecessary, saying, "If the plaintiff should be advised that he is entitled to relief on this ground, the dismissal of the present bill will not preclude him from seeking such relief." He expressed no opinion as to whether he was or was not entitled to the relief. So, in *Smart* v. *Cottle*, 10 Gr. 59, the defendant Cottle having recovered a judgment on a mortgage made by the plaintiff, bought the land at a tax sale, but assigned his judgment to the defendant Miller who was proceeding to enforce it, and the bill was to stay

further proceedings at law. Chan. Vankoughnet held that no equity was disclosed which would warrant the court making the decree asked. He said, "If the plaintiff proceeds at law he will be treated as still mortgagee, and I think he has a right to maintain that position, and thus become trustee of the property bought at the sale." He added, "I question if this court would not so treat him if the plaintiff had filed a bill claiming a right under the circumstances to redeem." Any question as to the mortgagee's right to buy seems, however, set at rest by *Kelly* v. *Macklem*, 14 Gr. 29, in which Spragge, V.C., held that a mortgagee may purchase as a stranger may, and may say that his being a mortgagee shall not place him in a worse position than he would be in if he were not a mortgagee, because he is not a trustee for, and owes no duty to the mortgagor. He at the same time held, as before stated, that having made use of his position as mortgagee, as a means of being allowed to buy, he could not afterwards set up his right to hold as if he had purchased as a stranger. This is just giving effect to the old and well known rule of equity in the case of a mortgage of leaseholds, that, if the mortgagee renews the lease, it is for the benefit of the mortgagor, and it makes no difference if the lease had expired before the renewal.

It is, however, further objected that plaintiff cannot prosecute his action at law because it is not now in his power to re-convey the mortgaged property upon being paid the amount of the debt.

There is no doubt of the rule that a mortgagee cannot sue for the mortgage money where he has put it out of his power to re-convey the property, *Lockhart* v. *Hardy*, 9 Beav. 349; *Palmer* v. *Hendrie*, 27 Beav. 349; *Gowland* v. *Garbutt*, 13 Gr. 578; *Burnham* v. *Galt*, 16 Gr. 417. But, is the plaintiff in that position here? He still holds the land under his mortgage and the tax deed, and can, on being paid the amount due, re-convey it. The objection really is that he is said to have removed from off the property to other land of his own, a building which constituted the chief value of the mortgaged property, so that if the property is now re-conveyed it will be of greatly diminished value. It seems to me that is simply a question of account, *Munsen* v. *Hauss*, 22 Gr. 279. If the mortgagee has so dealt with the property as to render himself liable for waste, then so much should be charged against the amount claimed as still due on the mortgage. If the parties cannot agree upon the amount

of reduction, if any, which should be made, the mortgagor must file his bill to redeem, and have the accounts taken.

The mortgagee here, can on being paid the amount due re-convey the mortgaged estate, and his having become the purchaser at tax sale is no satisfaction of the covenant to pay the mortgage money, so he is entitled to sue on it.

The appeal must be allowed with costs, and the summons in Chambers dismissed with costs.

Appeal allowed.

MERCHANTS BANK v. GOOD.

Amendment at trial.—Mis-joinder of defendants—Statute of Limitations.

Plaintiffs issued a writ upon a note signed J. G. & Co., against J. G. and W. G. Afterwards they struck out W. G., and moved to strike out the defence of J. G. He defended on the ground that he had a partner but declined to give his name. Plaintiffs then amended by adding W. B., and went down to trial. The plaintiff's evidence showed that not W. B. but S. B was the partner, whereupon plaintiffs moved to amend by striking out W. B. Since the commencement of the action the statute of limitations would have barred the remedy against S. B. The plaintiff's evidence as to the circumstances under which the note was made was contradictory.

Leave to amend was refused, and a non-suit entered.

This was an action brought by the plaintiffs to recover the amount of a promissory note for $475, made by John Good & Co., dated the 15th day of May, 1883, payable two months after date to the order of A. D. McLean & Co., and by them indorsed to the plaintiffs.

The writ was first issued against John Good and Wm. Good, Sr., trading as John Good & Co. Both defendants appeared, and the plaintiffs having ascertained that Wm. Good had never

been in partnership with John Good, obtained an order to strike out his name. The plaintiffs then moved to strike out the defence of John Good, and in reply he filed an affidavit stating that he had never carried on business alone as John Good & Co. Having been examined on this affidavit, he admitted he had had a partner, but declined to state who he was, as the question was one that did not arise on the affidavit, and subsequently the plaintiffs obtained an order to amend their writ by inserting the name of the present defendant W. Beach. Both defendants pleaded *non-fecit*, but they were not examined on their pleas.

The action came on for trial before Mr. Justice Bain with a special jury. A. D. McLean was called for the plaintiffs and stated that in May, 1883, the defendant Good and his partner, who, as Good stated to the witnesss, was one Beach, owed A. D. McLean & Co. an account of about $98, and that John Good and his father owed them another account of about $900, and that Good signed the note sued on on or about the day it bears date, the 13th of May, 1883, and that when it was paid, the proceeds were to be applied, first, in payment of the account of John Good & Co., and the balance on the account of John and Wm. Good. The defendant John Good was then called by the plaintiffs, and he stated that about the end of 1881, he and one Samuel Beach entered into partnership for the purpose of getting out logs at Whitemouth, for one Ross and that in February, 1882, the firm owing McLean & Co. for some supplies, McLean told him he would have to give a note for the amount, and that he then signed the name John Good & Co., to a blank note and left it with McLean who said he would fill it up with the amount of the account. He further stated that the partnership was dissolved about April, 1882, that he last saw Samuel Beach in 1882, and has since heard that he was in the N. W. T., and that he had never been in partnership or had any dealings with the defendant William Beach, and that the indebtedness of himself and Beach to McLean & Co., was paid by an order which he gave on Ross in March or April, 1882, and that he afterwards saw this order with Ross, and it was charged up to them by Ross in the settlement of accounts.

The plaintiffs, thereupon, moved to amend by striking out the name of the defendant William Beach out of the declaration and all subsequent proceedings, and the amendment being

opposed, and it being evident that in any case the trial could not proceed, his Lordship discharged the jury, and took time to consider whether he should allow the amendment or not.

H. M. Howell, Q.C., and *F. H. Phippen*, for plaintiffs referred to Day's C. L. P. Act, 76. *Cooper* v. *Saunders*, 1 F. & F. 13; *Crauford* v. *Cocks*, 6 Ex. 287.

J. S. Ewart, Q. C., and *C. P. Wilson*, for defendants. The amendment should not be allowed. The plaintiffs are barred as against S. Beech. Defendant is entitled to be sued with his partner; if sued jointly he could have contribution, *Roberts* v. *Bate*, 6 Ad. & E. 778. If the other defendant is in the jurisdiction he must be added.

(*23rd June, 1890.*)

BAIN, J.—In sec. 37 of the C. L. P. Act, 1852, it is provided that "in case it shall appear at the trial of any action on contract, that there has been a mis-joinder of defendants, such mis-joinder may be amended as a variance at the trial, in like manner as the mis-joinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court or a judge by whom such amendment is made, shall think proper." Sec. 35 of the Act had provided that the mis-joinder or non-joinder of plaintiffs might be amended at the trial, if it shall appear to the court or judge that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment.

This section further requires in the case of plaintiffs, the consent of those proposed to be struck out, and in *Burritt* v *Hamilton*, 17 U C. Q. B. 443, Robinson, C. J., was of opinion that before a defendant could be struck out his consent had to be first obtained, but in practice this consent is not required either in England or Ontario. *Lake Sup. Nav. Co.* v. *Beatty*, 34 U. C. Q. B. 201.

It is evident the defendant Wm. Beach has been joined here only by mistake and not for the purpose of trying, with a full knowledge of the facts of the case, to fasten a doubtful liability upon him, and so the case is in no way similar to *Wickens* v. *Steel*, 2 C. B., N. S. 488, where an amendment was refused. There is no reason to think either that the mis-joinder of the defendant Beach was for the purpose of obtaining an undue advantage;

and had the evidence been clear that Good was alone liable on the note, then, perhaps, it would have been right to strike out the name of the other defendant, and so amend the variance between the pleadings and the evidence. But the note was given on partnership account, and the plaintiffs assume that Good's partner is, or was, liable upon the note, and thought they were suing this partner, so if I amend the mis-joinder of the defendant Beach, there still is a variance arising from the non-joinder of Samuel Beach, I have no power to add the latter as a defendant, and if I were amending the mis-joinder of the present defendant it would have to be on the terms that Good should be allowed to plead in abatement, and also to plead to the action *de novo*. See *McKee* v. *Toli*, 20 U. C. C. P.; 517. But since the writ issued, the liability of Samuel Beach on the note has been barred by the statute of limitations, and even if he were within the jurisdiction, the 9 Geo. IV, c. 14, s. 2, would make it useless for Good to plead his non-joinder, and the plaintiffs could go on with the suit against Good alone.

And then besides, it is impossible for me to leave altogether out of consideration, the extraordinary discrepancy there is between the evidence of McLean and Good as to the circumstances under which the note was given, and Good's statement that the indebtedness of himself and Beach to McLean & Co., for which he intended to give the note, was paid in full eight years ago. The plaintiffs are innocent holders for value, but still they are themselves to blame for the position in which they now are. Good has been living in the province ever since he signed the note, and no good reason has been given why they should have deferred suing the note as long as they did, and they cannot complain if the Court leaves them in the position in which it finds them.

I cannot satisfy myself that I would not be doing an injustice were I now to allow the amendment asked for, and I therefore refuse the application.

Application refused.

HAFFIELD v. NUGENT.

(IN EQUITY.)

Property of convicted felon.—Imp. Act 33 & 34 Vic. c. 23.—Pleading.—Allegations of fraud.—Multifariousness.

Irrespective of the Imperial Act 33 & 34 Vic. c. 23, all chattel property, including choses in action, possessed by a felon at the time of his conviction or acquired thereafter during the currency of his sentence, passes to the Crown.

Quære, Whether the Imperial Act prohibiting a convict from suing; and vesting the right to sue in an administrator, is in force here.

Precision in pleading fraud discussed.

A bill by a client against solicitors for an account, and to set aside a conveyance of land made by the client at the instance of the solicitors to the wife of one of them, is multifarious.

The bill was by a client against the solicitors and another, for an account of moneys received for the use of the client and to set aside a conveyance of lands, made at the instance of the solicitors to the wife of one of them, as having been fraudulently obtained.

The bill shewed that the plaintiff was a convicted felon and was serving his sentence in the penitentiary.

The defendants demurred for want of equity.

J. S. Ewart, Q.C., and *F. S. Nugent* for defendants F. S. Nugent and C. M. Nugent. The Imperial Act 33 & 34 Vic. c. 23, is only an enabling Act. It does not give a right of suit. The property was not the plaintiff's; it was forfeited to the Crown. *Taschereau's Crim. Law*, 1069; *Bullock* v. *Dodds*, 2 B. & Ald. 258; *In re Bateman's Trust*, L. R. 15 Eq. 355. See statutes. 7 Anne c. 21, s. 10; 17 Geo. 2, c. 39, s. 3; 54 Geo. 3, c. 145; 32 & 33 Vic. (D.) c. 29, ss. 55, 56; R. S. C. c. 181, ss. 36, 37; Con. Stat. U. C. c. 82, s. 7; R. S. O. 1877, c. 105, s. 8; R. S. O. c. 108, s. 17; 51 Vic. (D.) c. 33. There is no equity in the bill as it stands. The period of five years has not yet elapsed. As to an account, plaintiff should proceed to get a bill of costs and to tax it. It is not shown that the mortgages were not given for the purposes of the trust. All pre-

rogatives of the Crown can be exercised by the Governor-General. Canada Gazette, June 23rd, 1888. 22 & 23 Vic. c. 21, s. 29, makes conviction equivalent to attainder. *Cooley's Blackstone*, vol. 4, p. 385.

N. F. Hagel, Q.C., for plaintiff. The demurrer is irregular, as filed after the time allowed, without leave. *Daniel*, 508. It is not shown that the estate is a legal one. An equitable estate is not forfeited on attainder. *Attorney-General* v. *Sands*; *Tudor's L. C. Real Property*, 760. The statute 33 & 34 Vic. c. 23, is not wholly enabling, it is in some respects disabling. *Griffith* v. *Pritchard*, 5 B. & Ad. 781; *Rex* v. *Bridger*, 1 M. & W. 145; *Lewin on Trusts*, 26.

(*20th May, 1890.*)

KILLAM, J.—This bill is clearly demurrable for multifariousness, as there is no connection whatever between the two transactions upon which it is based. But no objection has been made on that ground, and I proceed, therefore, to consider the demurrer for want of equity.

While the allegations would appear insufficient to support a plea that the plaintiff is a convicted felon, I think them sufficient in a bill of complaint, to show, as against the plaintiff, that he has been convicted of felony by a court of competent jurisdiction, that he is still undergoing the sentence imposed under that conviction, and that the goods referred to were goods possessed by him before his conviction or since acquired.

Now, by the law of England before the Act 33 & 34 Vic. c. 23, all the chattel property, including choses in action, possessed by a felon at the time of his conviction, or acquired thereafter during the currency of his sentence, passed to the Crown. *Bullock* v. *Dodds*, 2 B. & A. 258; *Roberts* v. *Walker*, 1 Russ. & M. 752. This law has been held to extend to the colonies. *In re Bateman's Trust*, L. R. 15 Eq. 355. Under the Act mentioned the convict is expressly prohibited from suing, and the right of action is vested wholly in an administrator. Thus, whether that statute has or has not been extended to Manitoba, the plaintiff has no *locus standi* to maintain a suit for the proceeds of the goods referred to in the bill.

Then, as to the lands the bill is wholly insufficient, apart altogether from the effect of the plaintiff's status.

There is no allegation that the plaintiff was ever possessed of any interest in the lands. This would be necessary to support the bill as showing a constructive fraud arising from the relation of attorney and client and the position of the plaintiff. So far as appears by the bill, the plaintiff's interest in the lands arises solely from the very contract under which he executed the deed of conveyance. That interest was only an equitable term of five years, for it does not in any way appear that he was to have any right to the land after the expiration of that period. Probably, if it were shown that the plaintiff had a greater estate, there would be room for inferring an intention that the lands were to be reconveyed to him at the end of the five years. But still the prior possession of the greater interest would be required, and an agreement to so reconvey should probably be alleged in the bill although the proof might not show such an agreement to have been expressly made.

Then, it does not positively appear that the instrument executed by the plaintiff does not set out the trust and the true agreement of the parties. The allegation is only of the plaintiff's information and belief that the conveyance was absolute in form. If it was absolute in form, it does not appear that the plaintiff was deceived in this. For all that is shown, he may have executed it with full knowledge of this and intending to rely upon the collateral agreement.

Further, the dates of the conviction and sentence are not given, and it may be that the term of five years has expired and that the plaintiff has had the full benefit of the agreement and he may have no further interest in the property.

Finally, I can find no breach of trust shown, although the bill is to some extent based upon such. To say that the defendant has mortgaged the lands is in itself a very indefinite expression; but it is sufficient to say of it that this does not show that any conveyance has been made or any charge created affecting or inconsistent with the plaintiff's equitable term.

Under the circumstances, then, I think that it is better that I should express no opinion upon the important question raised respecting the statute 33 & 34 Vic. c. 23. It is a very difficult question and one which should only be decided, if possible, in a suit in which it could be carried to the highest court the parties

might desire without the danger of being thrown out upon objections so clearly fatal to the present bill.

I must allow the demurrer with costs, upon payment of which the plaintiff may amend as he may be advised.

Demurrer allowed.

GRANT v. HUNTER.

Real Property Act.—Issue.—Security for costs.

A. applied for a certificate of title. B. filed a caveat. Both parties claimed under conveyances from the patentee.

Held, That in an issue to try the right, A. should be plaintiff, and being out of the jurisdiction, should give security for costs.

(*McCarthy* v. *Badgley*, 6 Man. R. 270, considered.)

C. M Bradshaw for applicant.

H. M. Howell, Q.C., for caveatee.

KILLAM, J.—Upon reference to the Chief Justice, I find that he did not intend in the case of *McCarthy* v. *Badgley*, 6 Man. R. 270, to lay down an absolute general rule that every applicant for a certificate of title under the Real Property Act must necessarily be taken to occupy the position of a plaintiff towards a caveator, in respect of any issue under a petition to enforce the caveat. It appears to me that this must depend upon the circumstances of each case and the nature of the issue which it is found necessary to direct.

In the present instance, while each party admits the original right of the patentee, each disputes the assignment or grant to the other

I am, therefore, of opinion that the proper issue upon the main point will be whether the caveator acquired by conveyance from the patentee, an estate in fee simple, absolute in the lands

in question as against the caveatee, subject to such lien or charge (if any) as the caveatee may have for any rates or taxes in respect of such lands paid by the caveatee. It appears to me that upon this issue a verdict for either party would leave wholly open the questions of there being any such lien or charge or of there having been any such payment. These latter questions should be settled if the caveatee desires to raise them, by a further issue as to whether "the lands in question as between the caveator and caveatee are free from any lien or charge in favor of the caveatee for" $—(giving the amount claimed) "claimed by the caveatee to have been by him paid for rates and taxes assessed and levied upon" the lands. A verdict for the caveator upon this would negative the existing of such a lien or charge. If it were found that such a lien or charge existed for a less amount than that named in the issue, the issue could be taken distributively and a verdict rendered for the caveatee for a less amount.

The caveatee having initiated proceedings by applying for the certificate of title and thus claiming the land as against the world, having reference to the questions in dispute between the parties, must be taken as substantially in the position of a plaintiff towards the caveator, and should give security for costs to the satisfaction of the master, with the option of paying $200 into court. Issues to be delivered by caveator within three days after notice of the completion of security and to be returned within three days. Issues to be tried before a judge sitting in court on any Tuesday upon the usual notice of trial by either party and entry of record in usual time, subject to any further or other order altering or enlarging the time for trial.

CASE v. STEPHENS.

Law stamps.—Papers annexed to affidavit.

Papers annexed to an affidavit are not filings distinct from the affidavit, and do not require to be stamped.

C. P. Wilson for plaintiff.

J. R. Haney for defendant.

(*12th June, 1890.*)

DUBUC, J.—Appeal from an order of the referee.

The question to be determined is, whether on filing an affidavit with papers referred to in the same and annexed thereto, each paper should be considered as a distinct filing, and a law stamp of the proper denomination should be affixed thereto.

The Order in Council fixing the law stamps to be put on papers required to be filed, says: "Filing each paper (other than affidavit) ten cents, Filing each affidavit, ten cents."

The referee held that the first above mentioned item applies to every paper annexed to an affidavit.

The practice with regard to filing or depositing documents referred to in affidavits is laid down in *Lowndes & Maxwell Bail Court Cases*, 13, note *d*, as follows:

"It is optional with the party making the affidavit to annex to it the document or not. If he does annex it, the document is filed with the affidavit and cannot afterwards be taken off the file without a judge's order to that effect.

"If he does not, he refers to it in his affidavit as a document 'marked A and exhibited to this deponent at the time of swearing this affidavit.' In the latter case he must produce the document at the time of swearing the affidavit, and must deposit it in the Rule office, there to remain until the rule, to obtain which the affidavit is filed, is disposed of. As soon as that occurs, the party is entitled to have the document delivered back to him, whether the rule is drawn up or not."

From this it would appear that the document annexed to an affidavit is filed with it and is not considered as a distinct filing.

I think the above mentioned item in the Order in Council respecting "each paper other than an affidavit," does not apply to documents annexed to affidavits.

The appeal should be allowed without costs.

Appeal allowed without costs.

THE WESTBOURNE CATTLE COMPANY v. THE MANITOBA & N. W. RY. COMPANY.

Railways.—Liability to fence.—Adjoining Owners.

The liability of a railway company to fence arises by statute only. There is no common law liability to fence, either as respects the highway, nor as respects adjoining proprietors.

A statute provided that "When a Municipal Corporation for any township has been organized, and the whole or any portion of such township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township" &c.; and further that "Until such fences and cattle-guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals not wrongfully on the railway and having got there in consequence of the omisssion to make, complete and maintain such fences and cattle-guards as aforesaid."

Held, That having regard to the current of previous legislation, the liability of the railway to fence existed only in favor of the owners or occupants of lands adjoining the railway.

The first count in the declaration alleged that the defendants before, and at the time of the grievances complained of were, and are an incorporated company, subject to the provisions of the Railway Act of the Dominion, and were then the owners of and operating a railway through certain townships for which

municipal corporations had been and then were organized, and which had been and then were surveyed and sub-divided into lots for settlement, and the defendants at the time of said grievances, had omitted and neglected to erect and maintain fences through such townships, on each side of their railway and cattle guards at highway crossings as required by the Act, and a cow of the plaintiffs got on said railway, in said township, by reason of the defendants said neglect and omission, but was not otherwise wrongfully there and being on said railway on account of said omission and neglect, was killed by one of the defendants locomotive engines and trains, which the defendants were then running and operating on said railway. The second and third counts were the same, except that one alleged the killing of a mare and colt, the other the killing of a calf. To these counts the defendants demurred.

J. S. Tupper, Q.C., and *F. H. Phippen*, for defendants. At common law a railway company was not bound to fence, the liability is statutory entirely. 1 *Wm. Saund.* 561, 559 note (b.) An owner is bound to take care of his cattle and keep them on his land. An intruder is also bound to take care of his. *Dovaston* v. *Payne*, 2 H. Bl. 531; 14 & 15 Vic. c. 51, s. 13; Con. Stat. Can., c. 66, s. 13. The statute 31 Vic. c. 38, s. 11, limited the time for erecting fences. In 1883 the statute 42 Vic. c. 9, s. 16, was amended by 46 Vic. c. 24, s. 9. *McMillan* v. *Man. & N. W. Ry.*, 4 Man. R. 220, decided under this amended Act, 51 Vic. c. 29, s. 194. Defendants contend the only substantial change is as to when the liability to erect fences begins. Under the Con. Stat. Can., it began from the time of construction of the railway. Under 31 Vic. c. 38, s. 11, the liability began six months after being required to fence. 46 Vic. c. 24, s. 9, provided for railways previously constructed and for cases of lands occupied. Under 51 Vic. c. 29, liability begins, from the time when municipality organized or surveyed, to fence against persons to whom company liable at common law, and under previous statutes. Liability less under 51 Vic. c. 29, than under Con. Stat. Can. Under Con. Stat. Can. c. 66, the liability is unlimited, apart from decisions on the Act. The courts decided the intention of the statute was to place railway companies in the same position as private parties were at common law. The statute 51 Vic. c. 129, s. 94, s-s. 3, provides the com-

pany shall be liable as therein mentioned, for damages done to cattle, &c., "not wrongfully on the railway, and having got there in consequence of the omission to make complete and maintain such fences and cattle guards as aforesaid." *McAlpine* v. *G. T. R.*, 38 U. C. Q. B. 546; *Douglass* v. *G. T. R.*, 5 Ont. App. R. 585; *Conway* v. *C. P. R.*, 12 Ont. App. R. 710. The effect of Con. Stat. Can. c. 66, was to raise a presumptive right to fence. There must be a positive obligation by statute. *McMillan* v. *Man. & N. W. Ry.*, 4 Man. R. 220; *Elliott* v. *Buffalo & L. H. Ry.*, 16 U. C. Q. B. 291.

J. A. M. Aikins, Q.C., for plaintiffs. There is no common law liability on railway companies to fence either as to highways or adjoining owners. *McAlpine* v. *G. T. R.*, 38 U. C. Q. B. 446. The liability of a railway company depends wholly on statute. It can fairly be contended that in Manitoba there is no obligation on any person to keep cattle from trespassing on open prairie lands of others. Laws of Assiniboia, Con. Stat. Man. LV, s. 5. Also Con. Stat. Man. c. 18, ss. 7, 9, 11, 22, 23, under head of Stray animals. Herding animals, s. 32. Liability for damages, s. 44. The statute shows the common law liability as to animals trespassing is not in force in this Province. 43 Vic. c. 15, s. 4, Line fences. Con. Stat. Man. c. 25, s. 6. The law as to trespass laid down in 1 *Wm. Saund.* 561, was not introduced here and may not be in force here because inapplicable to the condition of the country. As to common law liability and statutory liability. *Ricketts* v. *East & West India Dock Co.*, 12 C. B. 160; *Dolrey* v. *Ontario, Simcoe & Huron Ry.*, 11 U. C. Q. B. 602; *Gillis* v. *G. W. R.*, 12 U. C. Q. B. 427; *McLennan* v. *G. T. R.*, 8 U. C. C. P. 411; *Douglass* v. *G. T. R.*, 5 Ont. App. R. 585, and others were decided under statutes which in terms impose on the railway company the obligation of fencing only as against adjoining owners and occupants. Under 31 Vic. c. 38, request to fence necessary, and the fencing to be for the use of the proprietors of adjoining lands. Under 46 Vic. c. 24, s. 9, the request must be in writing. *Douglass* v. *G. T. R.*, 5 Ont. App. R. 592; *Conway* v. *C. P. R.*, 12 Ont. App. R. 710, turned upon the question, who was occupant of the adjoining land. *Davis* v. *C. P. R.*, 12 Ont. App. R. 724; *Daniels* v. *G. T. R.*, 11 Ont. App. R. 471. Former statutes limited the railway companys' liability to cattle of adjoining

owners. 51 Vic. c. 29, was very different; there was not one word about adjoining owners, the section 194 of the statute is absolute in its terms as to fencing in organized municipalities. *Fawcett* v. *York & North Midland Ry. Co.*, 16 Q. B. 610; *Renaud* v. *G. W. R.*, 12 U. C. Q. B. 408, are directly in point. See also *Daniels* v. *G. T. R.*, 11 Ont. App. R. 471.

(*1st March, 1890.*)

TAYLOR, C.J.—Upon the argument, it was stated by counsel that no technical objections are raised, nor any question as to cattle-guards, their desire being to obtain a decision upon the question whether under sec. 194 of the present Railway Act, 51 Vic., c. 29 D., the defendants are, in consequence of neglect to fence, liable to all persons owning land within the municipality, and having cattle thereon, although the lands are not adjoining the railway?

The common law liabitity as to fences is stated thus in 1. Wm. Saunders, 559 note (b) "I am bound to take care that my beasts do not trespass on the land of my neighbor, and he is only bound to take care that his cattle do not wander from his land and trespass on mine." See *Dovaston* v. *Payne*, 2 H. Bl. 1. 527; *Boyle* v. *Tamlyn*, 6 B. & C. 337. The liability of a railway company to fence arises by statute only, there is no common law liability to fence, either as respects the highway nor as respects adjoining proprietors, *McAlpine* v. *G. T. R.*, 38 U. C. Q. B. 446; *Conway* v. *C. P. R.*, 12 Ont., App. R. 721.

The first general railway Act in Canada, was the Act of the old Province of Canada, 14 & 15 Vic. c. 51. Before that, each Act incorporating a railway company, contained special provisions as to fences and such matters.

It was under one of these 4 Wm. 4, c. 29, incorporating the London & Gore Railroad, afterwards the Great Western, sec. 9 of which said, that the company should "erect and maintain, during the continuance of this corporation, sufficient fences upon the line of the route of their single or double railway or way," that such cases as *Bradley* v. *G. W. R.*, 11 U. C. Q. B 220; *Renaud* v. *G. W. R.*, 12 U. C. Q. B. 408; *Gillis* v. *G. W. R.* 12 U. C. Q. B. 427; *Parnell* v. *G. W. R.* 4 U. C. C. P. 517; *McDowell* v. *G. W. R.*, 6 U.C.C.P. 180; and *Wolverton* v. *G. W. R.*, 6 U.C.C.P. 181 were decided. In the cases of *Renaud*,

Parnell, McDowell & Wolverton, the animals injured were on the highway, and got upon the line in consequence of the company's failure to have proper fences or gates where the line crossed the highway. The Court held there was an absolute duty to provide these ; and following *Fawcett v. York & North Midland Railway Company*, 16 Q. B. 610, that as against the defendants they were lawfully on the highway, although in one case in violation of a municipal regulation. In the Gillis case, a mare escaped from the stable, wandered to a farm two lots off, and from there got upon the railway through a defective fence, and the Court held the plaintiff could not recover "the obligation being to fence in each case between the railway track and the adjoining close." The Court, in so holding, followed *Ricketts* v. *E. & W. India Dock Railway*, 12 C. B. 160, and *Wallis* v. *Manchester & Lincolnshire Railway*, 18 Jur., 268, cases decided under Imp. Act 8 & 9, Vic. c. 20, s. 68, and in both of which it was held that so far from varying the responsibility of the defendants, the statute had most properly taken the common law rule, as the measure of their liability.

Dolrey v. *O. S. & Huron Railway*, 11 U. C. Q. B. 600, and *Auger* v. *O. S. & Huron Railway*, 16 U. C. Q. B. 92 were decided under sec. 18 of 12 Vic. c 196, the Act incorporating that Company. The Court held that the section "follows the common law principle, and only creates an obligation as between the company and the owner of each adjoining close," saying it could not be distinguished in that respect from sec. 68 of the English Act, under which the *Ricketts* case was decided.

The 14 & 15 Vic. c. 51 passed in 1851, was the first General Railway Act in Canada, and sec. 13 was the only one relating to fences. This afterwards appeared as secs. 13, 15, 16, 17, 18 and 19 of c. 66 Con. Stat. of Canada. As it stood in 14 & 15 Vic. c. 51, it consisted of two sub-sections. The first provided that, "Fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence, with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of the lands adjoining the railway, and also cattle guards at all road crossings suitable and sufficient to prevent cattle and animals from getting on the railway." It then went on to provide that until such fences and cattle guards should be duly made, the company should be liable for all damages done

by engines or trains to cattle, &c., and after they should be made and maintained, there should be no liabitity for any such damage, unless negligently or wilfully done. The remainder of that sub-section had reference to persons trespassing upon the track. The second sub-section provided, that "Within six months after any lands shall be taken for the use of the railway, and if thereunto required by the proprietors of the adjoining lands respectively, but not otherwise, the lands shall be by the company divided and separated—and kept constantly divided and separated—from the lands or grounds adjoining thereto; with a sufficient post or rail, hedge, ditch bank, or other fence, sufficient to keep off hogs, sheep or cattle, to be set and made on the lands so taken; and which the company, shall, at their own cost and charges, from time to time maintain, support and keep in sufficient repair."

C. J. Robinson referred to this section in *Bradley* v. *G. W. R.*, and expressed the opinion that it had chiefly, if not solely, in view the guarding of the cattle of private proprietors from meeting with accidents from the railway trains and left the company six months to do this in, after they should take possession of the land, making them answerable for any accidents, however, that might happen in the meantime, from their leaving the railway exposed.

But the first case directly decided under the Act, seems to be *Elliott* v. *Buffalo & L. H. Railway*, 16 U. C. Q. B. 289. The declaration alleged that the plaintiff was the owner of land adjoining the railway, that defendants had not erected or maintained fences, but refused to make same, whereby divers cattle, &c., broke and entered into the lands and fields of the plaintiff, and trampled down and destroyed the grain and crops. The defendants demurred on the ground that the declaration attempted to impose on them the duty and obligation to fence, immediately upon taking the land for the use of the railway, whereas no such duty arose until within six months after taking the land, and unless required by the proprietor of the adjoining lands to fence. C. J. Robinson said, the first and second sub-sections of section 13, related to distinct objects, each of which was provided for in a different manner. He said "The object of the first is to compel the company to fence in their railway track, in order that cattle, horses or other animals may not be

able to get upon it, while the trains are running, and so be killed or injured. The object of the second is to compel the company to divide not only their railway track, but whatever lands they may take, for the purposes of their railway, from the adjacent lands of private proprietors, so that the latter may not be exposed to have their farms trespassed upon, and their crops injured, by cattle and other animals coming in upon them, from the lands belonging to the company." Burns, J., after agreeing that the two matters provided for were distinct, proceeded to say: "The first provision not only applies to the proprietors of the lands adjoining the railway, but to every one, and until such fences and cattle guards shall be duly made the company shall be liable for all damage which shall be done by their trains and engines to cattle horses or other animals on the railway. . . . The second provision is of a different description and that applies solely to the proprietors of lands adjoining the railway." The next case was *McLennan* v. *G. T. R.*, 8 U.C.C.P. 411, in which Draper, C. J. delivering the judgment of the Court said "The obligation on the part of the defendants is only to fence against the owners of the adjoining lands." No doubt the presence in the first subsec. of sec. 13 of the words "for the use of the proprietors of the lands adjoining the railway" had an effect in his coming to that conclusion as in his reference to the statute he puts these words in italics. He evidently extends the application of these words to all that goes before, including the fences and does not limit them to the openings or gates or bars and farm crossings. In *Wilson* v. *Northern Railway*, 28 U. C Q. B. 274, it was contended that the 20 Vic. c. 143, had made a change in the liability of the company. The preamble to that Act recited, that it was necessary to amend the 12 Vic. c. 196, the Act incorporating the company in order to afford a just and proper protection, not only to the owners of lands adjoining the line of the railway but to all persons whatever from damage to their horses cattle or animals by trains and engines on the railway and the Act repealed sec. 18 of 12 Vic. c. 196 and enacted that thereafter the clauses of Con. Stat. of Canada c. 66, "with respect to and entitled Fences shall be incorporated with the Acts incorporating the said Company." Wilson, J., after remarking upon the clauses of c. 66, that other railway companies subject to them" are not held to be bound to fence against all

persons whatever because the provisions do not entail such a responsibility upon them" went on to cite cases showing that an enacting clause shall not be restrained by the preamble if the enacting words are large enough to comprehend the case. He then proceeded "our opinion is the sections of the statute do expressly specify against whom the defendants are to fence and that they are not bound to fence against all persons whatever." These cases were followed in *McIntosh* v. *G. T. R.*, 30 U. C. Q. B. 601.

In the cases of *Kilmer* v. *G W. R.* 35 U. C. Q. B. 599, *Douglass* v. *G. T. R.*, 5 Ont. App. R. 585, and *Conway* v. *C. P. R.*, 12 Ont. App. R. 708, it was said to be settled by a long and uniform line of decisions that railway companies were liable only to the proprietors of the lands adjoining the railway. It seems to have been so, however, with doubt on the part of some judges and only in deference to the weight of authority. Thus in *McIntosh* v. *G. T. R.*, Richards C. J. after saying it had been so held in *McLennan* v. *G. T. R.*, *Auger* v. *O. S. & Huron Railway*, and *Wilson* v. *Northern Railway*, went on to say "We are not prepared to say that this doctrine is wrong, or that railway companies under our statute in this respect owe greater obligation to the general public than at common law." In *Douglass* v. *G. T. R.*, Patterson J. A. after saying that the law is now settled added, "It is now too late to raise the question whether the statute would not have borne a wider construction." And Moss C. J. said "It is settled law, which, whatever may be our independent view of the true construction of the statute, we ought not now to disturb, that the statutory obligation to fence could only be invoked where the cattle of an adjoining proprietor had been injured."

When the first Railway Act of the Dominion was passed 31 Vic. c. 68 in the year 1868 a change was made in the provision as to fences. The first sub-section of sec. 11 provided that "Within six months after any lands have been taken for the use of the railway, the company shall if thereunto required by the proprietors of the adjoining lands at their own costs and charges erect and maintain on each side of the railway, fences, &c., for the use of the proprietors of the lands adjoining the railway; and also cattle guards," &c. There maining sub-sections are the same as secs. 15 to 18 inclusive of c. 66 Con. Stat. of Canada. There

is no section corresponding to sec. 19 of that Act. The section 11 in the act of 1868 appears in the subsequent Act of 1879, the 42 Vic. c. 9 as sec. 16 there being no change in the language. In 1883 the first three sub-sections of that sec. 16 were repealed by 46 Vic. c. 24 s. 9, and new provisions made on the subject of fences. By the first subsec. of the new section it was provided that "Within three months from the passing of the Act, in the case of a railway already constructed on any section or lot of land any part of which is occupied, or within three months after construction hereafter, or before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon (and in the last case after the company has been so required in writing by the occupant thereof) fences shall be erected &c., with openings or gates &c., at farm crossings of the railway and also cattle guards &c., but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars." By the second subsection "If after the expiry of such delay such fences &c. are not duly made and until they are so made and afterwards if they are not duly maintained the Company shall be liable for all damage &c. to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, gates or guards have not been made or maintained, as the case may be, in conformity herewith." These provisions afterward appeared as sec. 13 in c. 109 of R. S. C.

It was under this Act that the cases of *Conway* v. *C. P. R.*, 7 Ont. 673, 12 Ont. App. R. 708, and *Davis* v. *C. P. R.*, 12 Ont. App. R. 724 were decided. The main question in each of these cases was, whether the plaintiff was an occupant within the meaning of the statute, but in the Conway case the question of the persons against whom the company was bound to fence was dealt with. In the Queen's Bench Division, Armour, J., said (7 Ont. R. 695) "Are the Railway Company bound to fence as against any one but an 'owner' as required by the Act? He is no longer required to be the owner of adjoining lands; it is sufficient if he be the owner of any part of a section or lot upon which the railway has been constructed or a part of which has

been taken possession of by the company for the purpose of constructing a railway thereon." But this view did not find favor in the Court of Appeal. Hagarty, C. J., held that the protection intended to be given was not to a person occupying say the south corner of a lot crossed by a railway on the north and having no title to the rest of the lot, but to a person the owner or claimant of the lot although he might be in actual occupation of only a part. Burton, J. A., after stating the query, whether the Act was intended to confer rights upon a person a mere occupant having no title to the land and if so was it intended to extend the right of such occupant beyond that which the law, under the decisions, accorded to a proprietor, namely, that he had to be a proprietor of lands adjoining the railway said, "I confess I find it very difficult to see how any other construction can be placed upon the words, than, at most, to extend to persons occupying land adjoining the railway the same protection which a proprietor so situated enjoyed under the former enactment." And Paterson, J. A. said "The occupation contemplated must, as I take it, be the occupation of land adjoining the railway. The fence was to be between the railway land and the land of the occupant. The policy of the law found expression in words in the Act of 1879 which spoke of the request by the proprietors of the adjoining lands. That policy was changed by detaching the right from mere ownership without occupation, but there is no evidence of a change so great and so uncalled for as to extend the right to either owner or occupant of lands that did not adjoin the railway."

The present Railway Act, 51 Vic. c. 29, has a new section relating to fences. It is sec. 194 and provides, in the first sub-section, "Where a municipal corporation for any township has been organized and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township . . . with openings . . . at farm crossings of the railway and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway," then follows a proviso relating to the Maritime Province. The third subsection provided that "Until such fences and cattle guards are duly made and completed, and if after they are so made and completed they are

not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals not wrongfully on the railway and having got there in consequence of the omission to make complete and maintain such fences and cattle guards as aforesaid."

In this enactment there is no reference to the fences, gates, &c. being "for the accommodation of the owners and occupiers of lands adjoining the railway" as in the Imp. Act 8 & 9 Vic. c. 20 s. 68, or as in Con. Stat. of Can. c. 66, s. 13 and in sec. 11 of the Railway Act of 1868 and sec. 16 of the Act of 1879 "for the use of the proprietors of the lands adjoining the railway." Nor, is the obligation to fence in any way connected as in the Acts of 1868 and 1879 with the company being thereunto required by the proprietors of the adjoining lands. Neither is the liability of the company where there has been default in the erection and maintenance of fences expressed to be as it is in sec. 16, as amended by 46 Vic. c. 24, "for all damages . . . to the cattle &c. of the occupant of the land in respect of which such fences &c. have not been made or maintained."

Was it then the intention of the Legislature to extend the liability held by the Courts to be imposed upon railway companies by previous Acts, and require them to fence against other persons than adjoining proprietors or occupants? Their liability to fence has existed by statute ever since the construction of railways began, and what it seems to me the Legislature has been dealing with in the more recent and varying enactments has been, the time when the fencing shall be done. By the Con. Stat., of Canada no time was specified, but the company was required to erect and maintain fences, and until it did so was liable for damages. This provision for fencing, Robinson, C.J., considered in *Elliot* v. *Buffalo & Lake Huron Railway*, would come in operation as soon as the locomotives should begin to run. Then as railways began to be projected running through large tracts of new and unsettled country, the Legislature seems to have been inclined to make the obligation easier on companies. So, by the Acts of 1868 and 1879, fencing was to be erected within six months after any lands were taken for the use of the company if the proprietors of the adjoining lands required it to be done. Then by 46 Vic. c. 24 s. 9, substituting a new section for sec. 16 of the Act of 1879, the erection of fences was to be, in the case of

railways already constructed, within six months after the passing of the Act, in the case of those afterwards constructed within three months after construction or before construction in case of the company being required in writing to do so, within six months after possession taken. What I think shows further that the case of the company was in view is, that the notice to fence could no longer be given by a proprietor resident it might be a long way off, requiring the company to fence vacant land, but "by the occupant thereof." Then came the 51 Vic. c. 29, s. 194, by which the liability to fence is imposed upon all companies constructing a railway through a township in which a municipal corporation has been organized and the whole or any part of which has been surveyed and sub-divided into lots for settlement. No time for erecting the fence is specified though the company are liable for damages until they are, except, that if the lands are occupied at the time of the construction they must be made as the rails are laid.

I do not think that it can be supposed the Legislature intended by such change of language as is found here to alter entirely the liability of companies and to impose upon them so much heavier burden. Yet that is what has been done, if the construction contended for by the plaintiffs is the correct one. The Legislature must be presumed to have known the construction put upon the former statutes by the Courts and that under that, companies were liable to fence only as against adjoining owners. Is it then too much to say, that if the intention was to change all that, it should have been done in plain and explicit terms.

The Legislature has said, that where a railway is constructed through a township with an organized municipal corporation surveyed and open for settlement, it shall erect and maintain fences along the line, without saying for whose use or benefit these fences shall be erected and maintained. The uniform decisions of the Courts have been, that the liability to fence, imposed by the various statutes, is only as against adjoining owners or occupants. As the Legislature has not said that the liability under the present Act shall be wider, and for the benefit of another class, it must be assumed that they intended to impose the liability for the benefit of those held by the Courts entitled to it.

Reference was made to the words in the third sub-sec., "Not wrongfully on the railway and having got there in consequence

of the omission to make complete and maintain such fences " &c , I do not see that those words in any way affect the construction to be put upon the liability of the company under the first sub-section. If these words were not in the third sub-section the company would, until the line is fenced, be liable for all cattle injured by engines or trains no matter how they came to be on the line, but cattle might be there wrongfully. Under the decisions in the earlier statutes cattle trespassing on the lands of adjoining proprietors and from the lands getting on the line would be wrongfully there. Cattle driven along the track by their owner and such a thing seems from sec. 292, contemplated as possible even after the fencing of the line would be wrongfully there. In all such and other similar cases the sub-section says, no liability shall attach to the company, on the other hand the obligation to make cattle guards at highway crossings is absolute and cattle getting on the line from neglect to do so would as against the company, be not wrongfully on the railway and there would be the liability in case of their being injured.

The weight of authority is against the contention of the plaintiffs, so the demurrer must be allowed.

RYAN v. WHELAN.

(IN APPEAL.)

Tax sales.—Statutes confirming.—Irregularities.

Land was sold in 1882 for the taxes of 1880 and 1881. No by-law levying a rate was passed in either year after the revision of the assessment roll. The statute then in force authorized a sale when two years arrears were due. Upon the deed in pursuance of such sale being attacked.

Held, 1. (Overruling TAYLOR, C.J.)—That the sale and deed were invalid.

2. That the Act 47 Vic. c. 11, s. 340, providing that "all lands heretofore sold for school, municipal and other taxes, for which deeds have been given to purchasers, shall become absolutely vested in such

purchasers . . . . unless the validity thereof has been questioned . . . . before the 1st day of January, 1885," and the Act 49 Vic. c. 52, s. 673, as amended by 50 Vic. c. 10, s. 52, only applied where there were two years arrears legally due.

Per BAIN, J.—The Act 51 Vic. c. 101, s. 58, which provides that "all assessments heretofore made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby," only extends to remedying and supplying irregularities and defects in assessments and rates that were actually made and struck in substantial conformity with the directions of the statutes.

Per KILLAM, J.—That Act having been passed after the execution of the deed could not operate to pass to the purchaser a title which previously he had not obtained.

This was an issue under the Real Property Act.

On the 4th of December, 1879, the land in question being then in the hands of the local Dominion land agent at Nelson, for sale as part of the lands known as Dominion lands, it was sold to Adam Wilson Graham, the purchase money being paid in full. On 27th September, 1881, the patent issued to Graham, which recited the cancellation of a previous patent issued to him on 8th April, 1881, by the erroneous name of Adam William Graham. Graham on 17th January, 1882, conveyed the land to George E. Casey, and the deed was duly registered. On 10th May, 1882, Casey made a mortgage to Mary Ryan, which was also registered, and this was the instrument under which she claimed.

The title set up by Whelan was a tax sale deed dated 12th March, 1883, from the warden and treasurer of the Municipality of Lorne to John D. McIntosh, purporting to be made in pursuance of a sale to him in March, 1882, of the land for the unpaid taxes of 1880 and 1881, then a deed of 14th July, 1887, from McIntosh to Alfred Watts and Robert Henry, followed by a deed, 19th April, 1888, from Watts and Henry to Whelan. These were all duly registered. Whelan on purchasing went into possession, had broken 175 acres, put up a building and made other improvements.

The contention of the caveator was that there were no taxes due for the years 1880 and 1881, first, because at that time the title to the lands was in the Crown, and the Municipality had no power to tax lands until patented; and second, because the proceedings taken by the Municipality during these years were

so irregular, that no tax was ever, in fact, levied or assessed upon the land. Also, that the proceedings in connection with the advertising and selling were so defective and irregular, that there was no sale conducted in a fair, open and proper manner.

At the trial TAYLOR, C.J., entered a verdict for the defendant: the plaintiff applied to the Full Court to set aside this verdict and enter a verdict for the plaintiff.

Hon. Joseph Martin, Attorney-General, for plaintiff. Validating statutes have the same effect here as in Ontario. TAYLOR, C.J. in his judgment relied on 47 Vic. c. 11, s. 340. See also the Ontario Act, R. S. O. 1877, c. 180, ss. 155, 156. 47 Vic. c. 11, s. 340, amended by 49 Vic. c. 52, s. 673, and 50 Vic. c. 10, s. 52. Section 747 of 49 Vic. c. 52, repeals former Municipal Acts. The effect of the repeal is shown by 46 & 47 Vic. c. 48, s. 53. There is a similar provision in the Municipal Act of 1886 to section 340 of the Municipal Act of 1884, which must prevail. Section 672 of the Act of 1886 refers to past sales. See amendment of 1885, s. 52. The effect of 46 & 47 Vic. c. 48, was to wipe out section 340 of the Act of 1884 except as preserved by the Act of 1886. The evidence shows the sale was not conducted in a fair, open and proper manner. The advertisement named no hour for the sale to be held. There were no taxes due for which the land could be sold. The lands were sold under 44 Vic. c. 3, ss. 53, *et seq.* There was no by-law levying a rate. Ontario Act, R. S. O. 1877, c. 174, s. 343. The sale was for $7.80, should have been for $4.80. There was no power to sell for road tax. 44 Vic. c. 3, ss. 139, *et seq*; *McKay* v. *Crysler*, 3 S. C. R. 436; *Cotter* v. *Sutherland*, 18 U. C. C. P. 357, 390; *Hamilton* v. *Eggleton*, 22 U. C. C. P. 536; *Connor* v. *Douglas*, 15 Gr. 456. As to assessment *en bloc*. *Doe d. McGill* v. *Langton*, 9 U. C. Q. B. 91; *Ex parte Aldwell* v. *City of Toronto*, 7 U. C. C. P. 104; *Beckett* v. *Johnston*, 32 U. C. C. P. 301. As to no by-law. *McAdie* v. *Corby*, 30 U. C. Q. B. 349; *Munro* v. *Grey*, 12 U. C. Q. B. 647; *Deverill* v. *Coe*, 11 Ont. R. 222; *Church* v. *Fenton*, 5 S. C. R. 239; *Donovan* v. *Hogan*, 15 Ont. App. R. 432; *Gemmill* v. *Sinclair*, 1 Man. R. 85; *Reed* v. *Smith*, 1 Man. R. 341; *Nicholls* v. *Cumming*, 1 S. C. R. 395; Municipal Act, 1888, c. 27, s. 58. The power is not to sell when any portion of the taxes is in arrear, there must be two years arrears. The lands were Domin-

ion lands when they were assumed to be assessed. The sale of the lands was made in 1879, patent issued on 27th September, 1881. 42 Vic. c. 31, s. 75, authorizes cancellation. The Manitoba Legislature cannot affect any rights of the Crown, either directly or indirectly. B. N. A. Act, s. 125, exempts Dominion lands from taxation. Section 91, sub-section 1, gives exclusive authority over public property to Dominion Parliament. Section 80 of Dominion Lands Act provides for the registration of an assignment. Dominion lands not taxable. *Street* v. *Kent*, 11 U. C. C. P. 255; *Street* v. *Lambton*, 12 U. C. C. P. 294; *Street* v. *Simcoe*, 12 U. C. C. P. 284; 2 E. & A. 211; Municipal Act of 1886, s. 14; Ontario Act, 1869, 32 Vic. c. 36, s. 127; *Ryckman* v. *Voltenburg*, 6 U. C. C. P. 385; *Charles* v. *Dulmage*, 14 U. C. Q. B. 585; *O'Grady* v. *McCaffray*, 2 Ont. R. 309; *Stevenson* v. *Traynor*, 12 Ont. R. 804. The defendant relies on the Municipal Act of 1880, s. 39, s-s. 11, and the Municipal Act of 1881, s. 66. There was no right to the land acquired before patent. The Municipality passed a by-law levying a rate. The resolution was before the revision. There was really no assessment. The patentee, before patent, obtained no interest in the land binding on the Crown; even if he did the local Legislature could not deal with it.

W. R. Mulock, Q.C., for defendant. The mere production of the mortgage under which plaintiff claims is insufficient. *McRae* v. *Corbett*, 6 Man. R. 434; admit the execution is sufficiently proved the mortgage may have been paid. The caveator abandoned the land. The mortgage was obtained in May, 1882, after the land was sold for taxes. No taxes have been paid since. The caveatee has been in possession for two years, has built a house on the land, dug a well, and cultivated 175 acres. The caveator has asserted no right since 1889. Under 43 Vic. c. 1, s-s. i, the rate is to be levied on all real and personal property on the roll. Section 23 gives an exemption of lands vested in Her Majesty. 42 Vic. (D.) c. 31, s. 30. The right to patent can be proved. Dominion Lands Act, s. 81; *Church* v. *Fenton*, 28 U. C. C. P. 384; 4 Ont. App. R. 159; 5 S. C. R. 339; *Totten* v. *Truax*, 16 Ont. R. 490; *Jones* v. *Cowden*, 34 U. C. Q. B. 361.

The valjdating Acts are, 44 Vic. c. 3, s. 65; 45 Vic. c. 16, s. 7; 46 & 47 Vic. c. 1, s. 317; 47 Vic. c. 11, s. 340; 49 Vic. c. 52, ss. 681, 747. The word "arrears" is used for the first time in

the Municipal Act of 1886. This word is the whole basis of *McKay* v. *Crysler*, 5 S. C. R. 436. Defendant had a vested right under the Act of 1884. Interpretation Act, Con. Stat. Man. s. 7, s-s. 33, repealed by 46 & 47 Vic. c. 49, s. 3, see also section 1, and 52 Vic. c. 35, s. 23; *Walker* v. *Walton*, 1 Ont. App. R. 579; *Jones* v. *Cowden*, 36 U. C. Q. B. 501. The tax sale deed, not the sale, carries the right and the patent being issued, the legal estate then existing is vested in the purchaser. As to assessment. 51 Vic. c. 57, s. 58; *Wood* v. *Birtle*, 4 Man. R. 415. The statute declares the sale shall be at noon. The assessor denies the resolution being passed fixing uniform rate per acre. In *Church* v. *Fenton*, the lands had reverted to the Crown. In *Jones* v. *Cowden*, the taxes were sufficiently in arrear, but the question was of the effect of the Registry Act. As to section 681 of the Municipal Act of 1886, it does not alter the effect of section 673 of the same Act. It legalizes sales not deeds. The Chief Justice's judgment should be followed.

(*25th July, 1890.*)

KILLAM, J.—The plaintiff made a *prima facie* case by proving the issue of the letters patent from the Crown, the conveyance from the patentee to Geo. E. Casey and grant in fee by way of mortgage from Casey to the plaintiff. If the mortgage was discharged or defeated in any way, it was for the defendant to show it.

The defendant claims under a sale made by the treasurer of the Municipality in March, 1882, for the municipal taxes of the years 1880 and 1881, and a deed made in pursuance thereof in March, 1883, and relies upon the 65th section of the Municipal Act of 1881, 44 Vic. (3rd sess.) c. 11, as amended by the Act 45 Vic. c. 16, s. 7, and the 317th section of The Municipalities Act, 1883, 46 & 47 Vic. c. 1, as making that deed valid notwithstanding any of the objections urged.

The proper construction of similar validating sections in the Ontario Assessment Acts has received much consideration in the courts of that Province. It has there been clearly established that it is not sufficient that the party claiming title under sales of lands for taxes should prove the execution of the deed by the proper officers, but that he must in addition show an actual sale and the existence of arrears of taxes at the time of the sale.

Hamilton v. *Eggleton*, 22 U. C. C. P. 536; *Proudfoot* v. *Austin*, 21 Gr. 567; *Kempt* v. *Parkyn*, 28 U. C. C. P. 123; *Stevenson* v. *Traynor*, 12 Ont. R. 804. This view was unanimously affirmed by the Supreme Court in *McKay* v. *Crysler*, 3 S. C. R. 436.

In the latter case, Fournier and Gwynne, JJ., expressly held that, notwithstanding the validating section, it was necessary that the taxes should have been in arrear for the period prescribed by the statute as warranting a sale, and Strong, J., was of opinion that it was sufficient that it be shown that there were some arrears of taxes at the date of the sale. While the Chief Justice and Henry, J., found it unnecessary to decide definitely between these two conflicting views, there was much in their remarks to support the opinion of Fournier and Gwynne, JJ., upon this point. In the same case, in the Court of Appeal of Ontario, Patterson, J., seemed reluctant to coincide with the extreme view that it was necessary that the claimant under the tax title should prove affirmatively that the taxes were in arrear for the prescribed period, but he appears to have admitted that the deed would be invalid if it were proved that there were not arrears for that period.

Both in *Kempt* v. *Parkyn* and *Stevenson* v. *Traynor*, it was definitely held that to support the deed, notwithstanding the validating sections, it was necessary that there should have been arrears for the prescribed period. This view is strongly supported by several decisions of courts in the United States. *Jackson* v. *Morse*, 17 John. 441; *Varick* v. *Tallman*, 2 Barb. 113; *Doughty* v. *Hope*, 3 Den. 594.

After careful consideration of the judgments in these cases, and particularly of the strong argument of Mr. Justice Gwynne in *McKay* v. *Crysler*, I am prepared to hold that, notwithstanding the sections cited from our Acts of 1881, 1882 and 1883, it was necessary for the defendant to prove that there were at the time of the sale, the prescribed arrears of taxes due to warrant the sale.

This sale was made under the Act of 1881, 44 Vic. (3rd sess.) c. 3, s. 53, which required that there should be two years' arrears of taxes due to warrant advertisement and sale.

Neither by the Act of 1880, 43 Vic. c. 1, nor by that of 1881, were taxes absolutely imposed upon the property in the various

municipalities. By sub-section i of the 22nd section of the former statute, and the 34th section of the latter, the council of the municipality was required and empowered, after the final revision of the assessment roll in each year, to pass a by-law levying a rate. Without such a by-law, then, the lands could not be liable for any rate, except, perhaps, the commutation tax for statute labor. As to the latter, I have failed after a careful examination of the statutes, to find any legislation in force in 1880, making the statute labor assessment, or the commutation charge in lieu thereof, a lien or charge upon lands, or authorizing a sale of the lands by officers of municipalities for its enforcement. There is great reason to doubt whether owners of land in organized municipalities were liable to perform any statute labor in 1880.

There is, however, room for the argument that what is called in the Act of 1881, the "commutation tax," is included in the "two years' arrears of taxes," for which land might be sold under that statute, and that it is sufficiently shown that the land in question was liable for that tax for the year 1881. I prefer to leave these questions open.

Even if there be considered to be sufficient *prima facie* evidence, by production of the collector's roll, of there having been a rate levied in the year 1880, (as to which I express no opinion) it appears to me sufficiently established that there was no by-law of the council levying a rate for the year 1880, unless the adoption of the motion of the 2nd August, 1880, can be held to constitute the passing of such a by-law. It appears, however, that the assessment roll had not at that time been revised. On the contrary, there was a meeting of the Court of Revision on the 11th October, at which changes were made in the assessment roll. I am of opinion that the final revision of the assessment roll was a necessary condition precedent to the validity of a by-law levying a rate, and that there was no rate levied for the year 1880.

This being the case there were not two years' arrears of taxes due when the treasurer assumed to sell, and the sale and deed were invalid and could give the defendant no title, notwithstanding the validating sections referred to.

It is contended, however, that this objection is remedied by the 58th section of the Act 51 Vic. c. 27, which provides that "All assessments made and rates heretofore struck by the muni-

cipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby." But it does not appear to me that this section can operate to pass to the defendant the title to this land if he did not previously possess it. The position was, that on account of there not having been a valid rate levied there was no power in the officers of the municipality to dispose of the land. Such an enactment must be interpreted very strictly, and while it must be held to make past rates valid so as to make them attach upon the lands and to warrant future action upon them, it would be contrary to the principles upon which such enactments are construed to give it an effect which would pass the title in the land at once to the defendant.

The 681st section of the Municipal Act of 1886, protected sales made valid by former Acts, but went no farther. But the 673rd section, both originally and as amended by the Act, 50 Vic. c. 10, s. 52, applied to all "tax deeds or sales for arrears of taxes" theretofore "executed, registered or held," and it is necessary to consider whether there was thus given to the deed in question an effect greater than it had previously had.

By those sections the deed is made "conclusive evidence of the validity of the sale and of all the proceedings prior to the same," except "the sale had not been conducted in a fair, open and proper manner, or there were no taxes due and in arrear upon such land at the time of the sale for which the same could be sold by such municipality."

It appears to me, however, that upon the same principles upon which were based the decisions respecting the effect of the previous validating sections, we must interpret this to require that there should have been arrears existing for such a time as to warrant the sale, and that it would not be sufficient to make valid a deed under this section that there should have been at the time of the sale some taxes in arrear for which the sale could at a subsequent date be properly made. It should be construed as if it read "that there were no taxes due and in arrear upon such land at the time of the sale for which it could then be sold by such municipality."

In my opinion, then, the defendant fails to show any title to the land and the verdict must be set aside and a verdict entered for the plaintiff with costs of the application.

BAIN, J.—The learned Chief Justice before whom the issue in this matter was tried, held that there were taxes due and in arrear upon the land at the time of the sale, for which it could have been sold, and that it had not been shown that the sale was not conducted in a fair, open and proper manner, and that, therefore, whatever defects or irregularities there were in the proceedings for levying the taxes and advertising and selling, the tax deed to McIntosh, through which the defendant claims, is now, by the effect of section 673 of the Municipal Act of 1886 as amended by section 52 of the Act of 1887, unimpeachable, and further, that as the validity of the deed had not been questioned before the 1st of January, 1885, the land had become absolutely vested in the purchaser under section 346 of the Municipal Act of 1884, which provides that "all lands heretofore sold for school, municipal or other taxes, for which deeds have been given to purchasers, shall become absolutely vested in such purchasers, their heirs or assigns, uuless the validity thereof has been questioned in the manner above mentioned, before the first day of January, 1885." The Act of 1884 was repealed by section 747 of the Act of 1886; and the learned Attorney-General argues that the defendant cannot now invoke the aid of this section to support his title, but that he must rely upon the above section 673, as amended, to validate the tax deed. But section 747 expressly provides that all rights acquired under any of the Acts which are repealed by the section, shall remain valid; and, at all events, such rights would be saved under the Interpretation Act, as amended by 52 Vic. c. 35, s. 23. The defendant then, as the Chief Justice held, is entitled to rely upon section 340, but the Attorney-General contends that even this section will not make a tax sale deed valid if, at the time of sale, there were no taxes legally due on the land for which it could have been sold, and that the deed can be impeached on this ground under this section, just as it can under the express provision in section 673.

It is contended that the evidence shews that no taxes were legally due or in arrear on the land at the time of the sale, because, in the first place, the lands were never assessed in the manner prescribed by law, and secondly, that no by-law striking a rate was passed by the council, after the final revision of the roll, in either of the years for the taxes for which the land was sold.

The sale took place at Norquay in March, 1882, and the land

was sold for the taxes for the years 1880 and 1881. The taxes for 1880 would have been imposed under the authority of c. 64 of the Consolidated Statutes, and those for 1881 under 44 Vic. c. 3. It would seem from the evidence that, while assessment rolls were prepared for both years, no actual assessment was made by an assessor or assessors "after diligent inquiry," as the statutes required, and we find that in both years the council passed resolutions that all lands be assessed at a uniform rate of $3. It is not distinctly proved, however, that an assessment was not actually made, but as regards the levying of the rate, it is clearly shewn, I think, that the directions of the statute were not complied with in either year, and that in fact no rate was legally struck, and that, therefore, no taxes were legally imposed.

By section 25, s-s. i, of c. 64 of the Consolidated Statutes, and by s. 34 of 44 Vic. c. 3, it is provided that "the council shall in each and every year, after the final revision of the roll, pass a by-law for levying a rate on all the real and personal property on the said roll," and it is evident that until this by-law has been passed, no taxes can be legally due and chargeable. Section 121 of the 44 Vic. required that every by-law should be under the seal of the corporation and should be signed by its head officer, and it is clear, therefore, that the resolution passed on the 11th July, 1881, that the rate of taxation for that year should be five mills on the dollar, was not a by-law, and that for that year no taxes were imposed at all. *In re Croft*, 17 U. C. Q. B. 269; *In re Mottashead*, 30 U. C. Q. B. 74; *Reg. ex rel Allemaign* v. *Zoeger*, 1 P. R. 219. There does not seem to be anything in c. 64 of the Consolidated Statutes prescribing the formalities under which by-laws were to be passed, but I should hesitate to hold, upon the evidence, that the resolution passed on the 2nd of August, 1880, that a rate of five mills on the dollar be struck on the total of the assessment roll, could be considered to be a by-law, but even if it could, it was passed as the evidence shews, before the roll for that year had been revised, and so did not comply with the essential direction of the statute. Under these circumstances then, I think no taxes were legally imposed for either year.

Then the sale took place in the month of March, 1882. But s. 53 of 44 Vic. c. 3, the enactment under which the sale was made, provided that, "when two years' arrears of taxes are due

on any of the above lands," the treasurer should proceed to advertise and sell such lands in the manner pointed out in the section, and under this it is clear that, before there could be a sale, taxes for two years must have been overdue and unpaid. By 45 Vic. c. 16, s. 5, this section was repealed and the section substituted provided that "whenever taxes or any portion thereof have been due for two years on any lands," the lands might be sold, but the sale took place before this amendment was made.

I cannot see that there is any substantial diff[illegible] the above section 340, on which the defendant relies, and the corresponding validating section of the Ontario Assessment Act, section 155, which provides that, "whenever lands are sold for arrears of taxes and the treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding, except against the Crown, if the same has not been questioned," &c., and it is evident that the same principles of construction should be applied to our section as have been applied to the Ontario one. Now if, as I think, no taxes were legally imposed on this land for either of the two years, there were no arrears of taxes at the time of sale, and the decision of the Supreme Court in *McKay* v. *Crysler*, 3 S. C. R. 436, is conclusive that we must hold that the section will not vest the land in the purchaser, for all the judges then agreed that before the section 155 could be invoked there must have been some arrears of taxes at the time of sale. The appellant's case had set up that the sale for taxes in question was invalid because five years' arrears of taxes were not due when the sale took place; but as the majority of the court held that the evidence was not sufficient to shew that the land had been properly assessed or that when sold there were any taxes in arrear, it was not necessary to decide whether, before the section applied, it would be necessary to shew that taxes had been allowed to remain in arrear and unpaid for the whole period at the expiration of which a sale of the lands was authorized. Strong, J., held that the section would apply when any taxes were in arrear at the date of sale, but Gwynne and Fournier, JJ., expressly held that some portion of the taxes had to be due and unpaid for the whole of the prescribed period before the section would operate, and I gather from the judgment of Henry, J., and from what he afterwards said in *Church* v. *Fenton*, 5 S.C.R. 339, that he also was of this opinion. Gwynne, J., at p. 472,

says, "The fair and legitimate conclusion resulting from the judgments of all the courts in Ontario, ... according to my understanding of the reported decisions is, that the section can only be construed to remedy all irregularities and defects existing when the event, the happening of which the statute has made an essential condition precedent to the creation of the power to sell, has occurred, namely, when some portion of the taxes imposed has been suffered to remain in arrear and unpaid for the prescribed period," and this, he held, was the true construction of the section. The case of *Jones* v. *Cowden*, 36 U.C. Q. B. 495, was relied on by Mr. Mulock, but in *Fleming* v. *McNab*, 8 Ont. App. R., Burton, J.A., at p. 667, speaking of *McKay* v. *Crysler*, said, "I concur in the view taken of the statute by Mr. Justice Gwynne, and take this opportunity of confirming his impression of what was actually intended to be decided by this court in *Jones* v. *Cowden*, when the fact that the taxes had been legally imposed and were in arrear for the prescribed period, was assumed by all parties, and that being so, that mere irregularities in the procedure were cured by the delay and the Act of Parliament. In the present case, it appears to me there never was a tax legally imposed, the non-payment of which would justify a sale; in other words, there was no tax in arrear for three years, which would alone give rise to and authorize the exercise of the power to sell." See also, *Austin* v. *Armstrong*, 28 U. C. C. P. 47; *Kempt* v. *Parkyn*, 28 U. C. C. P. 123; *Deverill* v. *Coe*, 11 Ont. R. 222.

From the evidence it appears that in the collector's roll for both years, an amount is stated as chargeable against this land for road tax. It might possibly have been argued, although it was not, that under the enactments relating to the road tax or statute labor, this tax was legally chargeable against the land for 1881, and that under s. 144 of 43 Vic. c. 3, the land would be liable to be sold for its non-payment. But even if this were so as regards 1881, I find nothing that would make the road tax for 1880 a charge against the land, and as, on the authorities I have referred to above, I would feel it incumbent on me to hold that the section will not apply unless there had been two years' arrears of taxes at the time of sale, I need not decide if this tax for 1881 was legally chargeable. It is not necessary either, that Mr. Martin's further objection that the land was not legally liable to

be assessed and taxed at all until after the issue of the Crown patent in September, 1881, should be considered.

The defendant relies on s. 58 of 51 Vic. c. 101, which provides that, "all assessments heretofore made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby." It is not easy to say what is the extent of such a provision, but if it is applicable to the present case at all, it must be construed strictly. The same principles of construction will have to be applied to it as have been applied to the above section 340 and other validating sections in Municipal Acts, namely, that it will only remedy and supply irregularities and defects in assessments and rates that were actually made and struck in substantial conformity with the directions of the statutes, and cannot apply to cases when, in fact, no assessment was made or rate struck.

I think, therefore, it must be held that the sale of the lands for taxes and the deed given in pursuance of it were void, and that the section 340 has not operated to vest the land in the defendant as the assignee of the purchaser, and that the verdict entered for the defendant should be set aside and a verdict issued for the plaintiff.

The plaintiff should also, I think, be allowed the costs of the application.

Dubuc, J., concurred.

Application allowed with costs.

ASHDOWN v. THE MANITOBA FREE PRESS CO.

(IN APPEAL.)

Libel.—Affidavit or affirmation.—Authority of commissioner.—Truth of contents of affirmation.—Pleading.—Special damages.—Benefit of an Act.

50 Vic. (M.) c. 23, enacts that no person shall publish a newspaper until "an affidavit or affirmation . . . . shall have been delivered to the prothonotary." . . . . The affidavit or affirmation was to set forth truly certain particulars, and power was given to any justice of the peace or commissioner to take the affidavit or affirmation.

Held, That an affirmation was sufficient although made by a person not entitled to substitute an affirmation for an affidavit

Such an affirmation was made by the managing director of a company. In the absence of evidence as to his duties,

Held, That the affirmation was sufficient.

The affirmation was entitled, "In the matter of The Manitoba Daily Free Press (a daily newspaper) and of chapter 23 of the statutes of Manitoba passed in the fiftieth Victoriæ;" commenced, "I, W. F. L., of ——, journalist. do solemnly declare and affirm;" and concluded, "and I make this solemn declaration, conscientiously believing the same to be true, and by virtue of 'The Act respecting Extra Judicial Oaths.'" The commissioner's certificate was as follows:—"Solemnly declared and affirmed before me at the City of Winnipeg, in the County of Selkirk, this 19th day of December, A.D. 1887, John B. McKilligan, a commissioner, &c."

The authority of the commissioner to take the affirmation was derived, not from the Act respecting Extra Judicial Oaths, but from the Act above quoted or 49 Vic. (M.) c. 23.

Held, That the affirmation was, nevertheless, valid.

There was no proof that the person before whom the affirmation was taken was a commissioner.

Held, That the onus of proof was on the person asserting the lack of authority.

There was no proof of the truth of the affirmation.

Held, That such proof was unnecessary.

The Act 50 Vic. (M.) c. 22, provided that, "Except in cases where special damages are claimed, the plaintiff in all actions for libel in newspapers shall be required to prove either actual malice or culpable negligence in the publication of the libel complained of." And the Act 50 Vic. (M.) c. 23, provided

that, "No person . . . . who has . . . . not complied with the provisions of this Act shall be entitled to the benefit of any of the provisions of the" other Act.

Held, 1. That it was not necessary to plead compliance with chapter 23 in order, upon the trial, to obtain the benefit of chapter 22.

2. That "cases where special damages are claimed," means not merely claimed in the declaration, but also by evidence at the trial.

3. Allegations of loss of business are allegations of general damages only. Where special damages are claimed the names of the customers whose business has been lost must be set out.

This was an action for libel brought by the plaintiff, a merchant, against the defendants, an incorporated company engaged in publishing a newspaper.

The first and second counts in the declaration set out the alleged libel as published in the Manitoba Weekly Free Press, and the Manitoba Daily Free Press, respectively. The third and fourth counts alleged the publication of the same libel, in the same newspapers, respectively, in relation to the plaintiff and his business as a merchant. Three pleas were pleaded by the defendants, not guilty, denial of the plaintiff carrying on business and justification. The case was tried by a special jury, to whom the learned judge left five questions, two of which they answered, as to three they could not agree, and they found a unanimous verdict for the plaintiff, with $500 damages. For that amount the learned judge entered a verdict in the plaintiff's favor, against which the defendants moved upon several grounds.

H. M. Howell, Q.C., and *T. D. Cumberland*, for defendants. As to special damages. None are claimed by the declaration, nor were any proved. As to "actual malice," the only case where that can come up is where the communication is privileged; if malice is proved, then the privilege is taken away, and the ordinary law of libel remains. *Clarke* v. *Molyneux*, 3 Q. B. D. 237. Malice is not what is called malice in law, but what is popularly called malice. The answer to the 5th question disposed of the question of malice in the defendant's favor. As to culpable negligence; there was none if the editor of the paper actually and bona believed the facts alleged. As to hearsay evidence being relied on; *Lister* v. *Perryman*, L. R. 4 H. L. 521. If from information received innocence or guilt may be inferred, a person may infer guilt. *Spill* v. *Maule*, L. R. 4 Ex. 233. A

reply to the alleged libel was published in a rival newspaper, the Sun, and that reply was reprinted in the defendant's paper, the Free Press. This was evidence of no malice on part of defendants. *Gilpin* v. *Fowler*, 9 Ex. 615. The article in itself is not evidence of malice, and the onus is on the plaintiff of proving malice entirely. *Caulfield* v. *Whitworth*, 16 W. R. 936. There was no evidence of malice given, so a nonsuit should have been entered. As to mere exaggeration. *Clarke* v. *Molyneux*. The The judge did not in any way decide the question whether the communication was privileged or not. Plaintiff must prove actual malice if the judge holds the publication is privileged. *Kelly* v. *Sherlock*, L. R. 1 Q. B. 690. The damages given by the jury, $500, are excessive. There was no evidence of any actual damage suffered by the plaintiff. There was no pretence that the publication did any damage at all to the plaintiff. The judge should have entered a verdict for defendants, because the onus was on the plaintiff to prove malice, and he did not prove any. Special damages must be claimed in the declaration, so as to admit evidence, and particulars must be given in the declaration. Loss of reputation cannot be given as special damage. *Odgers on Libel*, 302, 303; *Palmer* v. *Solmes*, 45 U. C. Q. B. 15. There was no evidence given at the trial, of special damages. A corporation cannot be guilty of actual malice. It is not a question of whether a corporation can be guilty of implied malice, but of actual malice. *Abrath* v. *N. E. Ry. Co.*, 11 App. Cas. 253; *Wilson* v. *Winnipeg*, 4 Man. R. 193; *Edwards* v. *Midland Ry. Co.*, 6 Q. B. D. 287; *Carmichael* v. *Waterford Ry. Co.*, 13 Ir. L. R. 313; *Henderson* v. *Midland Ry. Co.*, 24 L. T. N. S. 881.

J. S. Ewart, Q.C., and *W. H. Culver, Q.C.*, for plaintiff. The conduct of a case may show malice, as pleading justification, then not withdrawing that plea, and giving no evidence except by insinuation. Actual malice may be proved from the article itself, taken with indirect motive, or a direct one. The statutes 50 Vic. c. 22 and c. 23 are not pleaded; they are not of general application, only apply to such newspapers as propose to take advantage of them, therefore they must be pleaded. Until defendant's case is reached, plaintiff does not know whether advantage will be taken of the statute unless pleaded. Too late then for plaintiff to prove actual malice. If he can give evidence

of that in reply, defendant cannot meet the case, no chance of doing so. If the question is whether a newspaper is entitled to the benefit of an Act, then the pleadings must be looked at to see if an issue on that point is raised. As to claim for special damages. *Bullen & Leake*, 306; *Evans* v. *Harries*, 1 H. & N. 251. Malice may be inferred from the article itself. It may be proved by extrinsic or intrinsic evidence. *Odger on Libel*, 201, 412; *Roscoe Nisi Prius Evidence*, 792; *Plaed* v. *Graham*, 24 Q. B. D. 53; *Phillips* v. *Martin*, 15 App. Cas. 192; *Caulfield* v. *Whitworth*, 16 W. R. 937; *Spill* v. *Maule*, L. R. 4 Ex. 233; *Laughton* v. *Bishop of Sodor & Man*, L. R. 4 P.C. 495; *Colvin* v. *McKay*, 17 Ont. R. 212; *Parnell* v. *Walter*, 24 Q. B. D. 441. As to corporation being guilty of actual malice. *McLay* v. *Corporation of Bruce*, 14 Ont. R. 398; *Tench* v. *G. W. R.*, 33 U. C. Q. B. 8; *Merrill on Newspaper Libel*, 51, 142; *Odger on Libel*, 316; *Addison on Torts*, 6th ed. 120. The Act was not complied with, the affirmation being informal in various respects.

(25th July, 1890.)

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

The first question to be determined is, Are the defendants within the protection of 50 Vic. c. 22, the Act respecting the law of libel? The answer to that depends on whether they have or have not, complied with the provisions of 50 Vic. c. 23. From the language of both Acts there can be no doubt that a corporation complying with the provisions of chapter 23 is entitled to the benefit of chapter 22.

Section 1 of chapter 23, provides that, "No person shall print or publish . . . . any newspaper . . . . until an affidavit or affirmation made and signed as hereinafter mentioned, containing the matters hereinafter mentioned, shall have been delivered to the prothonotary of the Court of Queen's Bench, or the deputy clerk of the Crown and pleas for the district in which such newspaper . . . . is printed or published." A document purporting to have been delivered under that section has been produced from the proper office, but the question is, whether it is such an affidavit or affirmation as is

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

meant in the Act. No objection seems raised to it as not containing the particulars required by the Act.

It is not an affidavit. There is some evidence given by the deponent that he was sworn before the commissioner whose name is subscribed to it, though even as to that he says, "I am not positive," but it does not purport on the face of it to be a statement made on oath, and it has no jurat, *Shaw* v. *St. Lawrence Ins. Co.*, 11 U. C. Q. B. 73.

The Act requires an affidavit or affirmation, these are the terms used throughout. Is the document an affirmation? The term in the Act must mean something more than a mere statement or declaration, such as is required by Con. Stat. c. 17, s. 1, for the registration of a co-partnership. Section 5, which says, "Every such affidavit or affirmation . . . . . may be taken before any justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench," shows that what is meant is what is generally known as a "solemn affirmation," a solemn declaration without oath, the being allowed to make which was at first confined to Quakers and Moravians, but afterwards extended to all persons objecting to take an oath, 9 Geo. 4, c. 32, s. 1; 3 & 4 Wm. 4, c. 49; 17 & 18 Vic. c. 125, s. 20. Is the Act then, to be construed as meaning an affirmation in the case of a person entitled by law to affirm, or is the meaning wider, leaving the deponent in any case the option of making a solemn affirmation instead of an affidavit, even though he may not be a person entitled under 17 & 18 Vic. c. 125, s. 20, to insist on his right to do so. In many Acts the expression "affirmation," has coupled with it limiting words.

In Con. Stat. c. 35, s. 1, the court is given power to appoint commissioners to take and receive affidavits, and "affirmations in cases in which by law an affirmation is allowed." So R. S. C. c. 112, s. 3, says, "All persons allowed by law to affirm instead of making oath in civil cases . . . . . shall be received to take an affirmation," &c. In R. S. C. c. 140, s. 6, the language used is, "affirmation in cases in which by the law of the Province wherein such examination is taken, affirmation is allowed instead of oath," and numerous other instances could be given. Here there are no such limiting words annexed, and that being so, I do not think the right to make an affirmation was intended to be confined, or should be confined, to the class

of persons who refuse or are unwilling from alleged conscientious motives to be sworn, and in whose case the affirmation must be prefaced with a solemn declaration that the taking of an oath is according to their religious belief, unlawful. *Re Prince Henry*, 49 L. J. Prob. 67, a case in which an affirmation not prefaced by such a declaration, was rejected, was a proceeding in court, and there are authorities showing that the courts will not scrutinize affidavits required by statutes, with the same strictness as those to be used on a proceeding in court. *De Forest* v. *Bunnell*, 15 U. C.Q.B. 370; *Mann* v. *Western Ass. Co.*, 17 U.C.Q.B. 190; *Moyer* v. *Davidson*, 7 U. C. C. P. 521; *Mowat* v. *Clement*, 3 Man. 585. Here the object of the statute has been answered, the spirit of it has certainly been complied with, and there is no suggestion of fraud.

The affirmation was properly made by Mr. Luxton. He is the managing director of the company, and so the person by whom it would naturally be made.

A commissioner had power to take the affirmation. He did so not by virtue of a commission under Con. Stat. c. 35, s. 1, which speaks of affirmations in cases in which by law an affirmation is allowed, for commissioners appointed under that section, or under 48 Vic. c. 15, s. 64, are only to take affidavits or affirmations "in or concerning any cause, matter or thing depending in the Court of Queen's Bench or in the county courts." The authority of a commissioner to take an affidavit or affirmation required by 50 Vic. c. 23, is derived from section 5 of the Act, or from 49 Vic. c. 23, s. 2. In the latter Act also the word affirmation is used without any restrictive words following it.

The objection that the person before whom the affirmation was taken was not shown to be a commissioner cannot prevail. In answer to this it was argued that the court will take judicial notice of its own commissioners. In *Frost* v. *Hayward*, 10 M. & W. 673, on an objection being taken that the person before whom an affidavit had been sworn signed the jurat as a master extraordinary of the Court of Chancery, and not as a commissioner in the Court of Exchequer, Lord Abinger in answer to a suggestion that the court would refer to the list of its own commissioners, said, "We cannot take judicial notice of the names of our officers." But in *Burdekin* v. *Potter*, 9 M. & W. 13, on a similar objection being taken, the same learned judge said the

court would do just what counsel in *Frost* v. *Hayward* suggested should be done. In my opinion, where the objection taken here is taken, the onus should be on the party taking it. In *Sharpe* v. *Johnson*, 4 Dowl. 324, the objection was supported by an affidavit verifying a letter from the commissioner before whom an affidavit had been sworn in Ireland. in which he admitted that he was not a commissioner for the English courts. And in *Cheney* v. *Courtois*, 13 C. B. N. S. 639, Erle, C.J., dealing with such an objection, said, "unless it were shown to my satisfaction that the person before whom the affidavit was sworn had no power to administer an oath, I should feel bound to presume *omnia rite esse acta*."

That the affirmation contains a clause that the deponent made it, "by virtue of the Act respecting Extra Judicial Oaths," should not, in my opinion, invalidate it, when it is in other respects such an affirmation as satisfies the requirements of the Act.

I do not think it was incumbent on the defendants to prove the truth of the matters contained in the affirmation. The Act does not require a party claiming the benefit of it to do so. The defendants have proved that they filed a document containing the necessary information, to prove the statements untrue so as to deprive them of the benefit of it would properly rest on the plaintiff.

I cannot see that it was necessary for the defendants to plead the statute. There is on the record, a plea of not guilty under which the defendants could raise the defence of privileged communication, *Lillie* v. *Price*, 5 A. & E. 645, and if so, they should surely be at liberty to show under the same plea that they have the protection of privilege, though not by the occasion or under the circumstances in which they published the alleged libel, yet by thus having complied with the provisions of a statute giving them protection.

The 11th section of 50 Vic. c. 22, provides that, "Except in cases where special damages are claimed the plaintiff in all actions for libel in newspapers shall be required to prove either actual malice or culpable negligence in the publication of the libel complained of." That must mean not merely claim special damages by the declaration, but also by evidence at the trial. To hold otherwise would be to hold that a plaintiff by inserting

in his declaration a claim for special damages, however unfounded or incapable of proof, would relieve himself from having to prove either actual malice or culpable negligence.

But I do not think that the plaintiff has here claimed special damages even by his declaration. Any pretence of such a claim can be only under the third and fourth counts. These begin by alleging that the plaintiff carried on the business of a hardware merchant and that the defendants falsely and maliciously printed and published of the plaintiff in relation to himself and to his said business and the carrying on and conducting thereof by him the words following, setting out the alleged libel. The counts then conclude, whereby the plaintiff has been and is greatly injured in his credit and reputation, and also has been greatly injured in his credit and reputation as a hardware merchant and in his said business and has experienced and sustained sensible and material diminution and loss in the custom and profits of his said trade and business by divers persons whose names are to the plaintiff unknown, having in consequence of the committing of the said grievances by the defendants, avoided the plaintiff's said shops, stores and warehouses, and abstained from being customers of the plaintiff, as such merchant as aforesaid, as they otherwise would have been but for the committing of the said grievances by the defendants. This, it seems to me, is only an allegation of general damages having been sustained.

The plaintiff relies on *Evans* v. *Harries*, 1 H. & N. 251, in support of his declaration as a claim of special damages. There the declaration as given in that report was the same as in the present case. The plaintiff when examined as a witness at the trial, was asked whether he had found any difference in the profits of his business since the uttering of the slander, to which, after an objection to the question had been overruled, he replied "that his business was less, and that many customers had ceased to come to his house." The jury rendered a verdict of £15 for the slander and £5 for the loss of business. This was moved against one ground being, that the evidence of the loss of business was improperly received. The judgment is reported, "The rule must be discharged," that is all. During the argument, it is true, Martin, B., said, how is a public house keeper whose only customers are persons passing by, to show a damage resulting from the slander unless he is allowed to give general evidence of a loss

of custom? And Pollock, C.B., said, "Here there was evidence of a loss of custom, and no other reason could be assigned for it but the slander." But in *Bullen & Leake*, 306, after saying, that if the plaintiff fails in proving the special damage alleged he may still resort to and recover his general damages, there is added, "Thus in an action for defamation, the plaintiff was held entitled to prove and recover for a general loss of trade, though the declaration also alleged a loss of particular customers which he failed to prove," *Evans* v. *Harries*, being cited as the case in which he did so. The declaration in that case as given in 26 L. J. Ex. 31, did set out the names of persons whose custom the plaintiff alleged he had lost.

No doubt in *Riding* v. *Smith*, 1 Ex. D. 91, Kelly, C.B., Pollock, B., and Huddleston, B., held, that special damage might be proved by general evidence of the falling off of the plaintiff's business, without showing who the persons were who had ceased to deal with him; or that they were the persons to whom the statements were made In the declaration persons who had ceased to deal with the plaintiff were named. In the more recent case of *Clarke* v. *Morgan*, 38 L. T. N. S. 354, it was held by the Divisional Court that these cases of *Evans* v. *Harries* and *Riding* v. *Smith*, have not varied the old rules of pleading as to special damages. Now, as I understand, where special damages were claimed in consequence of the loss of custom or business, the names of the customers whose business had been lost, were required to be set out. The forms of counts given, 2 *Chitty on Pleading*, 543, 548, and *Bullen & Leake*, 308, give names. In *Odger on Libel*, it is said, p. 302, "to allege generally that in consequence of the defendant's words the plaintiff had lost a large sum of money, or that his practice or business has declined is not a sufficiently precise allegation of special damage. The names of the persons who have ceased to employ the plaintiff, or who would have commenced to deal with him, had not the defendant dissuaded them must be set out in the statement of claim, or on the particulars; and they must themselves be called as witnesses at the trial to state their reason for not dealing with the plaintiff." And again, "Loss of custom is special damage, and must be specifically alleged, and the customers names stated on the record."

The defendants are within the protection of the statute. Special damages are neither claimed nor proved. Then it was incumbent upon the plaintiff to prove actual malice or culpable negligence. The second question left to the jury was, "Was the defendant guilty of actual malice in the publication of the article complained of?" And the third, "Was the defendant guilty of culpable negligence in its publication?" To both these they answered, that they could not agree. To the fourth question, "Was the article complained of merely a fair and reasonable defence against attacks previously made upon the defendant company or its publications by the publishers of the Sun newspaper?" They answered "no." To the last question, "Did Mr. Luxton when the publications were made, *bona fide* believe them to be true in fact? If it is not proved to your satisfaction that he did not so believe, answer the question in the affirmative," they answered, "Luxton did believe them true in fact."

It was claimed that if the answer to this last question is also an answer to the second, then the verdict should have been entered for the defendants. I do not see how, the jury having disagreed on the question whether there was actual malice, the answer given to the last question can be taken as equivalent to a finding that there was not actual malice. It is the more difficult to hold that when the jury have found on the whole case a unanimous verdict of $500 in favor of the plaintiff.

The proper conclusion, as it seems to me, to draw from the answers is, that the jury disagreed. They certainly have done so on the two main questions submitted to them.

There should, therefore, be a new trial.

New trial granted.

REGINA v. STARKEY.

Certiorari. — County Judge or Magistrates. — Amendment of Notice.

S. having been convicted before magistrates, took proceedings to appeal to the County Judge and procured the papers to be sent to his clerk. Afterwards and before any proceeding by the judge he had the papers returned to the convicting justices. Upon notice to the justices of an application for a *certiorari* to be directed to them he now moved for the writ.

Held, 1. That the return of the papers to the justices was irregular and that the *certiorari* should go to the county judge, he being the legal custodian of the papers sent to him for the purpose of the appeal.

2. That the notice for a *certiorari* to be directed to the convicting justices could not be amended.

It was then contended that the statute 13 Geo. 11, c. 18, s. 5, entitles the convicting justices only to the six days notice, and that the county court judge was not entitled to any notice of motion for the writ and that the notice to the justices might be treated as a nullity and the order now made for the writ to go directed to the county court judge. But:

Held. That although the justices only may be entitled to the statutory notice, yet, where the records of the conviction have passed into the custody of another officer not entitled to notice the justices ought to have notice of the motion for the writ proposed to be directed to such officer, and that a new motion must be made for *certiorari* to the county judge and notice thereof given to the justices. Present application dismissed without costs.

It is not necessary that the affidavits by which objections are raised should be sworn and filed before service of the notice on the magistrates. The notice must show who the party moving is.

The practice of arguing the validity of the conviction upon the application for the certiorari does not apply, except when the parties consent.

The pendency of an appeal to the county judge does not interfere with *certiorari*: unless at all events, the question of jurisdiction is not raised upon the appeal.

This was an application for a writ of *certiorari*. The applicant had been convicted before magistrates of an offence under "The Liquor License Act 1889," 52 Vic. (Man.) c. 15, subsequently he commenced an appeal to the judge of the county court and procured the papers to be sent to the clerk of that court for such

purpose. Before any action had been taken by the county judge, the applicant procured the papers to be returned to the magistrates. The applicant then served on the magistrates notice of an application for a *certiorari* directed to them.

KILLAM, J.—In *Rex* v. *The Inhabitants of Warminster*, 1 Str. 470, the chairman of the sessions had returned an order of two justices on *certiorari*, and objection was made that the *certiorari* should have been directed to the justices who had made the order and not to the sessions, as it did not appear that any act had been done at the sessions either to confirm or reverse the order. The Court held the order well returned by the sessions, Eyre, J., saying that it had been so determined already, for the justices were supposed to return all the orders they make to the sessions.

In *The Queen* v. *Caswell*, 33 U. C. Q. B. 303, a conviction had been made within twelve days of the next succeeding sessions, and a notice of appeal had been given for the next sessions, when, by the statute, it should have been for the second sessions following the conviction. The sessions had refused to entertain the appeal. A *certiorari* had issued to the convicting justice and to the chairman of sessions to return the conviction. It was returned by the chairman. On motion to quash the *certiorari* as issued without the statutory notice to the justices present at the sessions when the appeal was refused, it was held that such notice was unnecessary as the appeal was a void proceeding and the sessions in refusing to entertain it had made no order affirming the conviction; but that the conviction was properly returned by the chairman of the sessions, the convicting justice having properly returned it to the sessions.

Here, apparently the conviction and proceedings were properly transmitted by the convicting justices to the clerk of the county court under 52 Vic. c. 15 s. 126, subsec. b. Apparently, also, nothing has been done by the judge of the county court under the notice of appeal. I agree with the decision in *Regina* v. *Smith*, 35 U. C. Q. B. 518, as to the power of amendment being taken from the convicting justices after the return to the sessions. It is supported by the remarks in *Gude's Crown Practice*, Vol. 1 p. 221.

In my opinion, then, the conviction and other proceedings passed wholly out of the custody or power of the convicting

justices upon their transmission to the clerk of the county court and the papers were improperly sent back to them by the clerk. They now form records of the appellate court and cannot properly be returned under writ of *certiorari* by the convicting magistrates, notwithstanding their temporary possession of them. They should be retransmitted at once to the clerk of the county court.

Any *certiorari* to return them should, therefore, be directed to the judge of the county court. But I do not think that it follows that there should be the statutory notice given to him, or that the notice to the convicting justices should be dispensed with. It appears to me that until, at least, some order has been made by the judge, there should be notice to the justices. This would seem the necessary corollary of the decision in *The Queen* v. *Caswell*, for under the circumstances of that case it could not be said that no justice should receive notice.

I should doubt very much if the county court judge comes within the Act 13 Geo. 2 c. 18 s. 5, so that notice should be given to him. But it appears to me that the onus was on the applicant to show that some order had been made by the judge in respect of the appeal which would dispense with the necessity of notice to the convicting justices, even if in the event of his having made an order such notice could be dispensed with. Now the notice in the present instance is a notice that application would be made for a *certiorari* directed to the convicting justices, which I cannot grant. It will not avail to support a motion for a *certiorari* directed to the judge of which motion the convicting justices should still, in my opinion, have notice under the circumstances here shown. There does not appear to be any power to amend the notice. I must, therefore, refuse the motion; but, under the circumstances, without costs.

New notices having been given, the application was renewed.

W. R. Mulock, Q.C., for the justices, took the objection that the motion could not be heard. It was returnable the previous day Thursday, which was Arbor Day, and being a statutory holiday, was a *dies non*, a judge had no jurisdiction to sit on that day and adjourn the motion. *Morrison* v. *Manley*, 1 Dowl. N. S. 773; *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

TAYLOR, C. J.—In my opinion I may hear the motion to-day as a judge in chambers may sit to-day, yesterday being a holiday.

Mulock, Q.C., then objected to the motion being heard as there was no affidavit filed; there was no verification of the conviction.

R. Cassidy, for applicant. A notice of the intention to move must be served, similar to a notice of action. The magistrates are in the possession of the originals. A notice of the grounds on which the motion is to be made was given. That course not necessary in England. *Paley on Convictions*, 437.

TAYLOR, C.J.—It is not, in my opinion, necessary that the affidavit by which objections to a conviction are raised, should be sworn and filed before service of the notice on the convicting magistrate. The notice which must by statute be served gives the magistrate no information as to the grounds on which the conviction is objected to, so that he is not entitled to such information before the motion for a *certiorari* is made. But it must show who the party moving is, so that the magistrate may be in a position to object, if need be, that he is not an interested party. In the present case the notice set out the grounds of objection in detail.

The practice has grown up here, of arguing the whole question of the conviction and its sufficiency on the motion for the *certiorari*, but that can be done only if the magistrate appears on the notice. If he does not, then the court can only grant the rule for the *certiorari*. If the magistrate appearing objects that not having seen any affidavit or had notice of the grounds of objection he is unprepared to argue the question, that would be a sufficient reason for granting him an enlargement, but nothing more.

The conviction is, I think sufficiently verified. The conviction is part of the record at the hearing before the magistrate. It is true the formal conviction may be drawn up afterwards, but where, as here, there is no minute of conviction, it must be assumed that the formal conviction was drawn up at that time. Unless it was so then there has been no conviction at all.

The matter was then argued upon the merits.

W. R. Mulock, Q.C., for the justices. The clerk of the county court should have been served, he is the sole custodian and there can be no *certiorari* without notice to him, 52 Vic. c. 9 s. 32 "Clerk" is *persona designata*, it differs from the clerk of

the Peace in Ontario. *Reg.* v. *Clennan*, 8 Pr. R. 418. There is no one who can certify to the proceedings. In *Re Sheffield Waterworks Act. Collis' claim*, L. R. 1 Ex. 54; *Re Owen* and *London & N. W. R.*, L. R. 3 Q. B. 54; *Re Tennant* v. *Mayor of Belfast*. 11 Ir. L. R. 290; In *Re Queen City Refining Co.*, 10 Pr. R. 415; *Rex* v. *Fylingdales*, 7 B. & C. 438. The conviction is not in the hands of the magistrates. There is no power in the statute for the abandonment of the appeal. On the appeal, the right to *certiorari* was taken away. Summary Convictions Act, s. 84.

R. Cassidy, for applicant. Before the statute of 13 Geo. II. c. 18, s. 5, no notice was required. In England a *certiorari* issues to a number of persons. *Queen* v. *Caswell*, 33 U.C.Q.B. 305. The appeal can be abandoned at any time. The want of jurisdiction is alleged so the writ of *certiorari* is not taken away. *Gude's Crown Practice*, 201. Though the appeal may be dismissed, the applicant can still have a writ of *certiorari* for want of jurisdiction.

(*2nd June, 1890.*)

TAYLOR, C.J.—The applicant is entitled to a writ of *certiorari* addressed to the judge of the county court of Carman. That he is so was held by my Brother Killam when this matter was formerly before him. He then said, that when the notice of appeal was given, the depositions and papers were properly transmitted by the justices to the clerk of the county court of Carman. I do not wish to be considered as expressing dissent from that statement, but it is worthy of notice, that if the appeal is to be heard, not as a proceeding in the county court, but by the judge of that court, as *persona designata*, then clause (b) of sec. 126, which directs the transmission of the papers does not necessarily require them to be sent to the clerk of the county court. It directs them to be sent "to the clerk of the court before which the appeal is to be tried." I have no doubt they were properly sent to him, but it would be to him as clerk for the judge, so they are under the control of the latter.

It is not necessary for the applicant to show what has been done in the matter of the appeal. Even if an appeal is now pending and being proceeded with, his right to a writ of *certiorari*

is not thereby affected. At all events it is not so unless the question of jurisdiction is the one raised on the appeal. It could not be so on an appeal under sections 126 and 127. In *Reg.* v. *Allan*, 4 B. & S. 915, an appeal was actually pending in the Court of Common Pleas, yet the Court of Queen's Bench made absolute a rule for a writ of *certiorari*. When the pendency of the appeal was urged as a reason why no writ should issue, Cockburn, C.J., said, "Unless we can see that the case before the Common Pleas involves this question whether the justices had jurisdiction, we ought not to withhold the *certiorari*."

In *The Queen* v. *Caswell*, 33 U. C. Q. B. 303, the writ was addressed to the chairman of the Quarter Sessions and the convicting justices. Here it may go to the justices as well as the judge of the county court if the applicant desires it, though it seems to me that addressing it to the county judge is all that is necessary.

RE THE SASKATCHEWAN COAL MINING CO.

Winding up.—Allowance to liquidator.—Reference to Master.

The court has no power to refer to the master, the consideration of the amount to be allowed to the liquidator.

The scale of remuneration of liquidators fixed in England will be followed here, not as absolutely binding, but as a guide.

Amount of remuneration under certain circumstances discussed.

W. R. Mulock, Q.C., for the liquidator.

(*31st July, 1890.*)

KILLAM, J.—This is an application by the liquidator of the Company to have his accounts passed, and his remuneration fixed, and then to be allowed to resign. He has realized from the assets of the Company all that can be obtained except by proceeding against the contributories and it is said that any pro-

ceedings for that purpose would be very expensive and would be likely to lead to protracted litigation. The original motion came before the Chief Justice, and he made an order referring it to the master to take the accounts, and tax the costs, and fix the remuneration of the liquidator. Upon this reference the master made a report and the motion then came before me to be disposed of, the liquidator seeking to have the report treated as binding and an order made upon that basis. I was attended by counsel for only one creditor who made no objection to what the liquidator sought. However, as I was of opinion that when the order of reference was made (which was before the Act 52 Vic. c. 32, D.) there was no power in the court or a judge to delegate to the master the consideration of the matters referred, I declined to treat the report as binding and intimated that I felt bound to consider the matters *de novo*. Counsel for the liquidator then asked me to receive further evidence upon the question of the remuneration of the liquidator. For this purpose the motion stood from time to time, and the evidence was only lately given. No interest has been shown by any of the creditors in the matter and I was attended only once by counsel for the creditor referred to, who made no objection to the request of the liquidator.

I am convinced that the liquidator has discharged his duty with zeal, fidelity and discretion, and that he has succeeded in doing for the estate the best that could have been done. The result, however, has been very disappointing and only a small amount is available for division among the creditors.

After careful consideration and upon consultation with my brother judges, I am of opinion that there is no reason why higher rates of remuneration should be given to liquidators in this country than are allowed in England. There the court has adopted a scale of rates varying according to the time actually occupied in the work of liquidation and the amount realized for division among unsecured creditors. It is to be observed that even in England the scale is not a hard and fast one, but it is used merely as a guide. In *Re Mysore Reefs Gold Mining Co.*, 34 Ch. D. 14.

Until some other system shall be adopted, I shall use it, in general, to guide me upon any such applications as may be brought before me. I shall not, however, feel absolutely bound

by it, or bound, even, to allow the lowest rate of remuneration in it.

By that scale there is allowed to a liquidator £1 per day of eight hours, where the assets divisible among the unsecured creditors do not amount to £500. Here the amount so far available for such division, falls much short of that sum. Upon the statement of the liquidator, it is extremely improbable that any more will be realized for that purpose. I think that he should be dealt with upon that basis.

The master allowed to the liquidator $1 per hour for the time for which he was actually engaged in the work of, or arising out of the liquidation, with an extra amount of $100 for making out his report, and for interest upon moneys advanced by the liquidator in the expenses of winding up before he realized from the assets of the Company. The latter allowance was a liberal one, considering that the principal purpose for which the extended report is really useful is to show clearly how the liquidator has discharged his duty, and how so much of his time was occupied. Any remuneration based upon a fair rate of commission upon the proceeds of the Company's property would, evidently, be wholly inadequate in this instance, while at the same time it is desirable that liquidators should have held out to them an inducement to realize as much as possible ftom the assets of the Company. I can find no circumstance warranting me in going beyond the lowest rate allowed in England, except that of the advance of moneys, for which, with the report, I will make the allowance named by the master.

'I allow $5 for each 8 hours of time occupied, making $725, to which I add $100 as mentioned, and I fix the remuneration at $825.

There will be an order allowing the accounts and costs of the liquidator as found by the master, and the sum of $825 for remuneration and for payment into court of the balance in his hands, which, after deducting amount already paid in, should be $425. Upon payment of which the resignation of the liquidator should be allowed, and the questions of the appointment ot another liquidator and of the distribution of the amount in court will stand to abide further order.

EDEN v. EDEN.

Costs.—Answer instead of demurrer.

A bill prayed foreclosure and ejectment. The answer attacked the mortgage and claimed title in defendants. At the hearing defendants submitted to foreclosure, but contended that ejectment ought not, upon the frame of the bill, to be decreed and plaintiff did not press for it.

Held, That the plaintiff should have the costs of a simple foreclosure merely.

If a defendant answers when he might have demurred and the case goes to a hearing no costs will be given to either party.

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

J. S. Ewart, Q.C., and *G. A. Elliott*, for defendants Roe and Jackson.

(*2nd August, 1890.*)

TAYLOR, C.J.—The bill is to foreclose a mortgage from the defendant Eden to the plaintiff. It alleges that by a quit claim deed, subsequent to the mortgage, one John S. Roe purported to convey the mortgaged lands to the defendants Roe and Jackson as trustees, that they claim to be entitled to an equity of redemption in the lands, and that the defendant Roe is in possession of them. The prayer is that the defendants may be ordered to pay the amount secured by the mortgage forthwith, for foreclosure and for delivery of possession forthwith. The bill has been taken *pro confesso* against the defendant Eden, the other defendants have answered. Their answers set up, that neither the plaintiff nor the defendant Eden have, or ever had, any title to or estate or interest in the land. They allege that the defendant Eden claims to be entitled to the lands under a deed from John S. Roe, but that the interest of Roe at the time he made that deed was such as he had acquired by a homestead entry for part of the land and a pre-emption entry for the remainder, and the deed was therefore wholly illegal null and void, that subsequently the patents for the homestead and pre-emption issued, and they became under the deed of 24th March, 1886, trustees of the land for the purposes of the marriage settlement of John S. Roe. By way of cross-

relief they pray that the conveyance from John S. Roe to the defendant Eden and the mortgage to the plaintiff may be declared to be illegal, null and void.

At the hearing the defendants submitted to a decree for simple foreclosure, the only question raised being as to the costs of the suit. The plaintiff claims to be entitled to these, while the defendants Roe and Jackson claim they should have them, or at all events, that as against them, the decree should be without costs. The ground taken by the plaintiff is, that the defendants by filing such an answer as they have, instead of demurring to the bill, have compelled him to go to a hearing at greatly increased expense. The defendants on the other hand say, that as against them the bill is an ejectment bill, and that the plaintiff not having pressed for that relief at the hearing, it is practically dismissed against them. They rely mainly on such cases as *Pearce* v. *Watts*, L. R. 20 Eq. 492; *Bush* v. *Trowbridge Water Works Co.*, L. R. 10 Ch. 459, in which defendants, not demurring, but succeeding at the hearing on grounds which might have been raised by demurrer, were still held entitled to their full costs. In both these cases the bill was dismissed, and the plaintiff wholly failed to obtain any relief. *Bush* v. *Trowbridge Water Works Co.*, is remarked on and explained by the late Chancellor Spragge in *Gildersleeve* v. *Cowan*, as a case in which the Master of the Rolls might properly exercise, and having exercised a judicial discretion as to costs, the Lord Justices declined to interfere. The case of *Raven* v. *Lorelass*, 11 Gr. 435, is also relied on and is more in point. There, an objection having been taken at the hearing which might have been taken by demurrer, in consequence of which the plaintiff got only partial relief, the decree was made without costs. The same principle seems to have been acted upon in numerous cases since. So, where a demurrer is filed which is overruled, but the defendant succeeds on a demurrer *ore tenus*, it is usual to overrule the demurrer on the record with costs, and allow the demurrer *ore tenus* without costs. The only exception I have found in Ontario is *Wylie* v. *McKay*, 20 Gr. 421, where the demurrer *ore tenus* was allowed with costs, but that case has not been followed. In *Longeway* v. *Mitchell*, 17 Gr. 190, no costs were given on either demurrer. *Kelly* v. *Ardell*, 11 Gr. 579; *Roche* v. *Jordan*, 20 Gr. 573; *Prince* v. *Lough*, 24 Gr. 276, are all cases following

Raven v. *Lovelass*. Even if the case should be regarded, as the defendants contend it should be, as one in which the plaintiff failing to get against them the special relief he sought, the bill is practically dismissed against them, still there are authorities that it would be so without costs. In *Nesbitt* v. *Berridge*, 32 Beav. 282, the bill was dismissed without costs, even though it was argued that on account of fraud being charged, the defendant was justified in answering instead of demurring. Mowat, V.C., laid down in *Saunders* v. *Stull*, 18 Gr. 590, the rule that where a defendant answers a demurrable bill and the cause goes to a hearing, the bill is dismissed without costs. This case was followed by Spragge, C., in *Gildersleeve* v. *Cowan*, 25 Gr. 460. It seems a reasonable rule to follow. If the bill is one in which the plaintiff fails, he should not have costs, and where the defendants instead of demurring, answer, and the case goes to a hearing, they put the plaintiff to greatly increased and unnecessary costs, and so may well be deprived of costs.

In the present case there should be a decree with reference to enquire as to incumbrances, take accounts, to tax costs as of an ordinary foreclosure suit, to appoint a day for payment, and on default, foreclosure. If the plaintiff is satisfied there are no incumbrances, the reference may be dispensed with, the account may be taken by the registrar, the costs taxed in the usual way and the day for payment fixed by the decree.

RE CANADIAN PACIFIC RAILWAY.
RE DOUGLAS LOTS.

Company.—Provincial License to hold real estate.

Certain property having been brought under the Real Property Act, a certificate of title was issued to the C. P. R. Co. The Company had not taken out a Provincial license, and desired to transfer a part of the property.

Held, That the question was settled when the certificate of title issued, and could not now be raised.

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

(*25th July, 1890.*)

TAYLOR, C.J.—Upon the case stated by the Deputy District Registrar for Brandon, the questions are asked: Have the Canadian Pacific Railway Company power to take, hold, acquire and dispose of real estate, not necessarily required for the purpose of operating their railway, situate within that portion of the Province of Manitoba known as the "added territory," forming part of the lands granted to it as a subsidy for the construction and operation of the railway referred to, without the license of the Lieutenant-Governor in Council enabling it so to do; and, Ought I to permit a transfer by the Railway Company of the above lots to be registered, and issue a certificate of title to the transferee?

I do not see how, on the facts stated, the question can arise, at all events, in the broad form in which it is put.

From the case stated it appears that the lots in question are under the Real Property Act of 1889, and that the Railway Company are the registered owners. The certificate granted to the Company has been registered, and under section 64, it is conclusive evidence that the Company is entitled to the land. It is conclusive evidence of their title, "as against Her Majesty as represented by the Government of Manitoba and all persons whomsoever." If so, I cannot see how any difficulty arises under 49 Vic. c. 11, s. 4, the Act referred to in the case, as to the Company disposing of the land. Any question under that Act seems to me to have been settled when the Company were registered as owners. If the Company are entitled to the land, and the Real Property Act says, that under the circumstances they are so, I am not aware of any law in this Province which prevents them from disposing of it.

I am, therefore, of opinion that the transfer of the lots by the Company should be registered and a certificate of title issued to the transferee.

ONTARIO BANK v. SMITH.

Married women.—Next friend.—Commissions.—Material on application.

A married woman defendant applied for a commission. Her husband who was also a defendant appeared and supported the motion.

Held, That a next friend was necessary for the purposes of the application, but the order was made as upon the application of both husband and wife.

It is not always necessary upon an application for a commission to shew the nature of the evidence proposed to be given.

C. W. Bradshaw, for plaintiffs.

C. P. Wilson, for defendants.

(*4th August, 1890.*)

KILLAM, J.—Upon the authority of *Pearse* v. *Cole*, 16 Jur. 214, and *McMicken* v. *The Ontario Bank*, 5 Man. R. 152, I must hold that in this case the wife could not make the motion alone without a next friend. I wish, however, to guard against being understood to apply this to a case in which the plaintiff has made a married woman a sole defendant.

Here the husband, also, is a defendant, he appears by the same solicitor and supports the motion. The defendant did not rely wholly on the objection named, but filed an affidavit partially directed to meeting the application on other grounds, which, therefore, I feel at liberty to consider.

I am not prepared to accept the principle alleged to be laid down in *Smith* v. *Greey*, 10 P. R. 531, that in all cases the applicant for a commission or order to examine witnesses abroad must show in the first instance the nature of the evidence proposed to be given. Such has never been the rule here, and I do not think it has been so in Ontario. In the case referred to it may have been required on special grounds, though the fragmentary report appears to lay down a general proposition. The forms of affidavits for use on such applications, found in the books, appear to indicate that this is not in general necessary either at law or in equity. I think that the applicant made a *prima facie* case for the order and that it should be made.

I grant it as made on the joint application of husband and wife to examine the witnesses on behalf of the latter, or of both, without costs to either party of this motion in any event.

RE R. A., AN ATTORNEY.

Attorney.—Striking off the rolls.—Delay.—Civil action pending.

A delay of six months is not a bar to a motion to strike off the rolls where an unsuccessful motion for an order to compel the attorney to answer, had meanwhile been made.

The pendency of civil proceedings upon a cause of action arising out of the same matters is not an answer to a motion to strike off.

Nor is the fact that the matter complained of involves a criminal charge. (*Re R. A., an Attorney*, 6 Man. R. 398 commented on.)

The charges being denied, a reference to enquire and report was ordered.

J. S. Ewart, Q.C., for the attorney. The proceedings are taken too late; they must be made within a reasonable time. *Archbold Pr.*, 152. Where three terms had elapsed, the application was held to be too late. *Garry* v. *Wilks*, 2 Dowl. 649. A rule to strike off the rolls will not be granted when the facts charged might form the foundation of an indictment. *Anon*, 3 N. & P. 389; *In re* ——— , 5 B. & Ald. 1088; *In re Knight and Hall*, 1 Bing. 142. At any rate it will not be granted if the charge is denied, as it is in this case. *Re Hill*, L. R. 3 Q. B. 543, 545. As the affidavit filed by the attorney shows that he is acting in a civil suit for one of the parties arrested in the criminal prosecution in connection with which the charges of misconduct are made, he cannot be required to disclose in his own defence matters, the disclosure of which may affect the interest of his client.

H. M. Howell, Q.C., and *F. C. Wade*, for the Law Society. The delay is not great enough to come within the cases quoted. Even if it were, it has been accounted for. The Law Society had moved for a rule calling upon the attorney to answer the matters in the affidavits filed on that motion, and that proceeding had to be disposed of before any new step could be taken. The objection that the attorney is acting for one of the parties in a civil suit and must not be compelled to answer the charges against him because his client's interest might thereby be affected, is clearly untenable. The attorney in this case is not charged

with a crime, but with extortion and subverting the administration of justice, and must, therefore, be proceeded against without indictment. *Keir* v. *Leeman*, 6 Q. B. 314. Even if a crime were charged an indictment would not be necessary before these proceedings would lie, if the crime complained of had been committed in a professional act and could, therefore, be better inquired of by a judge than a jury. *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl. N. S. 669; 6 Jur. 585. Followed, *Re Attorney*, 12 W. R. 311. Even if the crime is not one committed in a professional matter, an application to strike him off the rolls may now be made before indictment and conviction. *In re an Attorney*, 17 Sol. Jour. 269. This has been the practice for the last fifty years. *In re a Solicitor*, 37 W. R. 598. The fact that the attorney simply denies the charges does not make a conviction a preliminary requirement. The attorney must clear himself. *In re a Solicitor*, 37 W. R. 598. If the court entertains even a suspicion, there would be a reference to the Prothonotary. *Cordery*, 145; *Dicas* v. *Warne*, 2 Dowl. 812. In this case the attorney does not deny the charges as a matter of fact. The statement in his affidavit denying improper conduct does not say "in this matter," or in what matter, but simply "in the matter," and two matters are dealt with in the affidavit. It is an attempt to mislead the court. For the list of what constitutes misconduct as an attorney see *Re J. B., an Attorney*, 6 Man. R. 23; *Lush Pr.*, 320; *Re O'Reilly*, 1 U.C.Q.B. 392; *Re Currie*, 25 Gr. 345; *Re Aitken*, 4 B. & Ald. 47; *Re Bodenham*, 8 A. & E. 959; *Hands* v. *Law Society*, 16 Ont. R. 634 & 636. In this case the defendant acted as both barrister and attorney, and should be struck from both rolls. *Re Titus*, 5 Ont. R. 87. If he acted as an attorney only, he cannot be struck off one roll and left on the other. If he is unfit to practice in one capacity, he must not practice in the other. *Hands* v. *Law Society*, 16 Ont. R. 634 & 636; 170 Ont. R. 316; 17 Ont. App. R. 41.

(*August 2nd, 1890.*)

TAYLOR, C.J.—This is a rule calling upon an attorney to show cause why a rule should not issue to strike him off the roll, on the grounds, that his conduct in and about a certain criminal proceeding before the police magistrate, in which certain persons were charged with an attempt to kill and murder, was such as to render him unworthy of remaining on said roll, was contrary to

public good and unlawful, and on the ground that his conduct therein was calculated to subvert the administration of justice, and was extortionate.

A number of affidavits are filed in support of the rule, the substance of them being, that four men having been arrested on a serious charge, the attorney who was acting for the prosecutor had interviews with them, when an agreement was come to that, in consideration of a large sum of money being paid, $500 of which was to go to the attorney, the serious charge was not to be pressed, but a lesser charge for the destruction of property to be substituted for it. This payment these men say they made, because, although innocent, they were afraid, from statements made by the attorney, false evidence would be brought against them, on which they might be convicted and severely punished, and they would, at all events, be detained in prison awaiting trial from November until the following March assizes. In answer to these, the attorney files an affidavit verifying a rule issued some time ago, calling upon him to answer the matter of certain affidavits and which was dismissed. Also setting up that an action has been begun by one of the men arrested against the prosecutor for malicious arrest, and which concludes by saying, he has been guilty of no improper conduct in the matter.

Cause has been shown, the chief grounds urged being, that the proceeding is too late, that if the charge is now investigated the person against whom the action has been begun may be prejudiced in his defence, and that the charge being a criminal one, the court will not interfere before there has been a conviction.

In support of the contention that the proceedings are too late, reference is made to *Archbold's Pr.*, 152, where it is said the application must be made within a reasonable time. The case cited for that is,—2 B. & Ad. 766, which was an application against an attorney for misconduct and want of regular service during his clerkship, but not made until three years and a half after his admission. A case of *Garry* v. *Wilkes*, 2 Dowl. 649, is also cited, where three terms having elapsed, the application was held too late. The application there was one by the defendant calling on the attorney to show cause why he should not pay over a sum of money he had received on the 1st of June, 1833, and the motion was not made until the close of the next Hilary Term, and as the report says, "There was no attempt at

explaining the delay." Here, three terms have not elapsed, it appears that proceedings were taken before by the Law Society in the milder form of calling upon the attorney to answer the matter of the affidavits, which failed for the reasons set out in the report of the case, 6 Man. R. 398.

I do not see how it can be urged as a bar to the present proceedings by the Law Society, that an investigation into the charges against the attorney may affect the defendant in the action for malicious arrest.

Nor can it now be urged that where the charge is one which may be made the subject of an indictment, the court will not entertain it until after a conviction.

That seems to have been the practice at one time, although possibly it will be found there was a distinction where the act was done *qua* solicitor, and where it was not. But the court has for a long time been in the habit of dealing with cases in their nature criminal.

In *Re Solicitor*, 37 W. R. 599, Lord Coleridge said, "Over fifty years ago the practice was first introduced of the court dealing in a disciplinary manner with cases which were in their nature criminal. Prior to that time a conviction had first to be obtained before the court would interfere. No doubt both practices have their difficulties, but, for myself, I cannot help thinking that the earlier practice was the better. The other is, however, now inveterate and cannot be disturbed." That case reported 37 W. R. 574, before the Divisional Court, and at p. 599, before the Court of Appeal, shows that the court now interferes before conviction even when the criminal act was not done *qua* solicitor. In that case the solicitor was not struck off, but the reason for refusing was, that the Divisional Court had formerly suspended him from practice for a lengthened period, on a criminal charge when acting as clerk to another solicitor. The only new circumstance was that he had after that been prosecuted and convicted. It is evident that the Law Society made the motion and carried the case to the Court of Appeal for the purpose of getting a decision upon this point, whether the mere fact of a conviction is, in itself, a sufficient ground for striking off the roll.

In *Re Attorney*, 6 Man. R. 398, a case of Anon, 17 Sol. J. Q. B. 269, was referred to as having decided that the court will call upon an attorney to answer the matter of affidavits even when the matters charged may be the subject of an indictment. I did not then follow that case as I had been unable to see a report of it, and it seemed to stand alone. I have now had an opportunity of reading the judgment and find that it was a unanimous and considered decision of such eminent judges as the late Chief Justice Cockburn and Justices Blackburn, Mellor, and Quain. The rule was not at once granted, but stood over for further argument by counsel. Chief Justice Cockburn, delivering the judgment of the court said, "The court would grant a rule *nisi* on the ground that, if the court declined to interfere in a case of misconduct amounting to what might be the subject matter of a criminal indictment, and if the parties interested in the matter did not choose to move and put the criminal law in force, then a man who had been guilty of an indictable offence would remain undisturbed as an attorney of this court which clearly was a state of things which ought not to exist. The objection that arises is, that you may put the man under the necessity in answering the matters of the affidavit, of stating or admitting facts that may be used against him on a future criminal prosecution, but he may raise the objection that as the matter he is called upon to answer tends to show that he is guilty of a criminal offence, he is entitled, though an attorney of this court, to the common privilege that every person has of refusing to criminate himself. If he chooses to do that he is safe against anything that has passed in this court in the exercise of its jurisdiction, being made the materials out of which to convict him on any future indictment. If he can clear himself upon affidavits, of course he has the advantage of doing so. If he declines to answer on the ground of privilege, the court will probably say, you are entitled to that privilege, but as you do not choose, or cannot clear yourself in the matter the court may still exercise the power it possesses of striking off the rolls in respect of misconduct you have not vindicated yourself from."

This case and the one in 37 W. R., show that the court goes much further in such matters now than formerly.

In the present case the affidavits raise, to put it in the mildest form a case of suspicion, one which is feebly met by the affidavit

in answer. It does seem as if, the criminal proceedings having been honestly taken, the attorney determined to make money for himself out of them. No explanation is offered of how it came that the men prosecuted having paid a large sum of money in settlement, the prosecutor got $15, and then, after all the costs had been provided for, there was in addition for the attorney no less a sum than $500. That appears from a memorandum sworn to have been produced by himself.

The charge is, however, denied, and where that is the case, the usual course is, I believe, to direct the master to enquire into the matter and to report to the court, the rule being enlarged until the report is made.

That is what I now order.

THE WESTERN CANADA L. & S. CO. v. SNOW.

Fraudulent conveyance.—Abolition of fi. fa. lands.—Multifariousness.—Bill by execution creditor on behalf of all others.

A judgment creditor, although entitled to priority over others, may file a bill on behalf of himself and the others, to have a deed declared fraudulent against creditors.

An Act repealed the only statutory provisions under which real estate became bound by, and could be sold under writs of *fi. fa.* The same Act provided that writs then in the sheriff's hands "shall remain in full force, virtue and effect, and may be renewed from time to time." During the following session another Act empowered sheriffs to sell lands under writs remaining in his hands. Between these Acts a bill was filed by an execution creditor on behalf of himself and all others to set aside a deed.

Held, That under the former Act writs remained in the sheriff's hands in full force, but awaiting further legislation to enable the sheriff to proceed; and that even prior to such further legislation, the plaintiff had a sufficient *locus standi*.

The bill which was by the plaintiffs, suing on behalf of themselves and all the other creditors of Robert Gerrie, alleged that they in 1885, recovered a judgment against Gerrie and Bathgate, on which execution against lands was issued, placed in the sheriff's hands and kept duly renewed, but under which he was unable to make any money. It then alleged, that by certain conveyances made by Gerrie while insolvent, with the fraudulent intent of defrauding, hindering and delaying the plaintiffs and other creditors, the lands in question were vested in the defendant Snow. It submitted that the deeds were fraudulent and void as against the plaintiffs and other creditors, and should be declared to be so. The prayer was, that the conveyances might be declared fraudulent and void as against the plaintiffs and other creditors, and set aside and cancelled, that the defendant might be ordered to pay costs, that all proper enquires might be made and accounts taken, and for further and other relief. The defendant demurred for multifariousness and want of equity.

J. H. Munson, for plaintiffs.

Howell, Q.C., for defendant Snow.

(*2nd August, 1890.*)

TAYLOR, C.J.—The objection raised under the demurrer for multifariousness is, that the plaintiffs being judgment creditors, cannot sue on behalf of themselves and all the other creditors. It is, perhaps, rather an objection of the misjoinder of plaintiffs, than that the bill is multifarious. I cannot see that the objection is well founded. Where a bill is filed by a simple contract creditor seeking to have a conveyance set aside as fraudulent, he must sue on behalf of himself and all other creditors. Apparently, where the bill is by a judgment creditor, he may do so. It is true the judgment creditor may have a claim in priority to the other creditors by virtue of his judgment and execution, while they would be entitled to share only in any surplus, but they have all a common interest to some extent, at all events, in having the conveyance set aside, and that is all that is sought by this bill.

Goldsmith v. *Russell*, 5 D. M. & G. 547, is an English authority for a bill so framed. *Scott* v. *Hunter*, 14 Gr. 376, and *Sawyer* v. *Linton*, 23 Gr. 43, are cases in which judgment creditors having executions in the sheriff's hands sued on behalf of

themselves and all other creditors. In neither of them was any objection taken to the bill being so framed, although *Sawyer* v. *Linton*, came before Blake, V.C., on a demurrer. In *Knox* v. *Travers*, 24 Gr. 477, where the plaintiff sued on behalf of himself and all other creditors, the report does not show that he was a judgment creditor, but reference to a former case reported in 23 Gr. 41, leads to the conclusion that he was. In *Morphy* v. *Wilson*, 27 Gr. 1, the objection was, that the plaintiff, a judgment creditor, not alleging that he had an execution in the sheriff's hands, must sue on behalf of himself and all others.

The objection urged under the demurrer for want of equity is, that by the course of legislation in this Province, lands were not at the time this bill was filed, saleable under execution. Against this it was argued, that the question is not, whether the property can be seized under execution, but the proper expression is rather, property available for creditors. But it is said in *May on Fraudulent Conveyances*, p. 17, that under the description of property in the statute, are included all kinds of property which are subject to payment of debts, or liable to be taken in execution at the time of the fraudulent conveyance, but in general not any not so liable. And again at p. 23, "The principle is, that to convey away any property against which execution can issue is a fraud on creditors, but not a conveyance of that which they could not (but for the conveyance) have touched." Numerous cases might be cited to bear out these statements of the law. Thus, in *Sims* v. *Thomas*, 12 A. & E. 536, the Court of Queen's Bench held that the statute of 13 Eliz. c. 5, only extends to the assignment of such effects as are available to be taken in execution. As Chancellor Spragge expressed it in *Labatt* v. *Bixell*, 28 Gr. 593, "It must be something that may be in some way reached by creditors, otherwise it is not withdrawn from creditors, or, in the words of the statute of Elizabeth, creditors are not hindered, defeated or delayed. But, if what is assigned could be reached by creditors by any process of any court, then it is in the proper sense of the term exigible."

In this Province the sale of land under a writ of execution is solely by virtue of an Act of the Legislature. There was no such writ in England on the 15th of July, 1870, so none could be introduced when English law was introduced by 34 Vic. c. 2, and 37 Vic. c. 12. The first Act which gave power to sell lands

under execution was the 34 Vic. c. 5, which allowed an execution to be levied on the real estate of the debtor, and to be issued when any judgment had been duly registered for one year. This was followed by the 38 Vic. c. 5, ss. 53 & 54, then by Con. Stat. c. 37, ss. 82 & 83, the previous Acts being repealed. Then came The Administration of Justice Act, 1885, by section 106 of which the sheriff could sell real estate when the product of the sale of the debtor's personal property failed to satisfy the debt. Section 108 then provided that every writ of execution against lands should at and from the time of its delivery, bind the lands of the judgment debtor and all his estate, right, title and interest therein, both legal and equitable; and section 110, amended by 49 Vic. c. 35, s. 13, provided for the sale of land under writs of *fi. fa.* But in 1889, by 52 Vic. c. 36, s. 7, these sections, 106, 108 & 110 as amended, were all repealed. It is true that by section 13, it is provided that after the coming into force of the Act, writs against lands then in the hands of any sheriff, "shall remain in full force, virtue and effect, and may be renewed from time to time."

It is not easy to say what meaning should be attached to these words. It was said they may be treated as providing that the writs shall continue in the sheriff's hands for the purpose of binding lands, whatever that may amount to, though no active steps can be taken to realize the debts under them. But the section under which such writs bind lands having been repealed as well as the section under which lands could be sold, why should it be supposed that they are continued in full force, virtue and effect to bind the lands any more than it should be supposed that they are so continued as writs under which the lands may be sold, although for the present, no officer has power to proceed with the sale, nor is there any machinery for effecting one. Some meaning must, if possible, be given to the 13th section, and it seems to me the only one to put upon it is, that as the writs were then in the sheriff's hands as writs under which lands could be sold, they were to continue there, to be renewed from time to time and kept ready, in full force, virtue and effect for use for their original purpose whenever the Legislature might permit them to be used. That this is the proper construction to put upon the section seems tolerably certain from the fact that, at the next session, the Legislature by 53 Vic. c. 3, empowered sheriffs

to proceed and sell lands under writs, proceedings upon which had been stayed by the Act of the previous session.

At the time the conveyances complained of were made, the property conveyed by them could have been sold under legal process to satisfy the debt of the plaintiffs, it has continued so ever since, although for a time the power of actively enforcing the remedy against it appears to have been in suspense.

The demurrer on both grounds should be overruled.

Demurrer overruled.

GRANT v. HUNTER.

(IN CHAMBERS.)

Commission.—Issue under Real Property Act.

The court has no power to issue a foreign commission to take evidence upon an issue directed under the Real Property Act.

This was a matter under the Real Property Act of 1889, in which an issue had been directed to be tried before a judge. The defendant moved for an order for a commission to examine a witness at Edmonton, in the Northwest Territories, and to postpone the trial until it had been returned. The granting of a commission was opposed by the plaintiff on the ground among others, that there was no jurisdiction to order a commission except in an "action" depending in the court, and an interpleader issue, to which the present was similar was not an action.

C. W. Bradshaw, for defendants.

T. D. Cumberland, for plaintiff.

(*25th July, 1890.*)

TAYLOR, C.J.—The power of the court to issue foreign commissions, at least on the common law side, is derived from the

1 Wm. 4, c. 22, which says, "in every action depending in such court" a commission may be ordered to issue. That an interpleader issue is not an action within the meaning of this Act, seems to have been decided in *Re Mersey Dock Board*, 11 W. R. 283, where the court directed an action to be brought in order that a commission might be executed. The head note in *Douglas* v. *Burnham*, 5 Man. 261, is wider than the judgment which was merely that "cause" included an interpleader issue. *Hamlyn* v. *Betteley*, 6 Q. B. D. 66, and *Mason* v. *Wirrall Highway Board*, 4 Q. B. D. 459, are both authorities that a proceeding may be a cause depending in a court and yet not be an action. An action is a proceeding commenced by writ of summons.

Cause is a wider term and includes "any suit, action, matter or other proceeding competently brought before and litigated in a particular court." Per Lord Selborne in *Green* v. *Penzance*, 6 App. Cas. 671.

Bordieu v. *Rowe*, 1 Scott, 608, is relied on for the defendant. There, an issue had been sent by the Court of Chancery to the Common Pleas for trial, and a motion was made for a commission to examine a witness abroad, which was opposed on the ground that the proceeding could not be said to be an action depending in the court, The rule was, however, made absolute, Tindal, C.J., saying, "I think an issue out of Chancery is a cause depending in the court in which it is to be tried, within the meaning of this statute." There the learned judge spoke as if "cause" was the expression in the statute and not "action."

The later authorities seem clear that an interpleader issue is not an action, and if not, then the statute does not empower the court to grant a commission.

I, therefore, discharge the summons, but as commissions have been issued before in interpleader matters, I do so without costs.

Application refused.

FORREST v. GIBSON.

Mortgage.—Conveyance of equity of redemption in discharge of debt.—Pleading.

To an action upon covenant in a mortgage defendant pleaded that he had conveyed the equity of redemption to B., who conveyed it to the mortgagee in discharge of the debt.

Held, A good equitable plea.

After the conveyance to B there was an implied obligation in equity on his part to indemnify the mortgagor against the debt.

Quære, Whether in such a case the relation of principal debtor and surety, as between the mortgagor and B., was constituted.

This was an action upon a covenant in a mortgage.

Defendant pleaded as follows:—

"For a defence on equitable grounds the defendant says, that before the accruing of the plaintiff's alleged claim and long before the commencement of this action, the defendant with the privity and consent of the plaintiff transferred his equity of redemption in the whole of the lands covered by the mortgage sued on herein, subject to said mortgage, to one Bailey, and the plaintiff afterwards received and accepted part of the money due on said mortgage from said Bailey, and afterwards and long before the commencement of this action and with full knowledge of the facts above set out, took to herself an absolute conveyance in fee simple of all of said lands covered by said mortgage from the said Bailey in discharge of said mortgage."

George Patterson and *G. W. Baker* for plaintiff.

The plea shows no answer to plaintiff's claim. It must show accord and satisfaction. It does not show payment. *Parkinson* v. *Higgins*, 37 U. C. Q. B. 308; 40 U. C. Q. B. 274. There is nothing to show that Bailey was liable to pay the mortgage money. *Finlayson* v. *Mills*, 11 Gr. 218; *Barker* v. *Eccles*, 18 Gr. 440, 523; *North of Scotland Mortgage Co.* v. *German*, 31 U. C. C. P. 349. There is a distinction between this case as alleged, and one where the purchaser of the equity of redemption agreed to indemnify the mortgagor. *Kinnaird* v. *Trollope*, 39 Ch. D. 636; *Macdonald* v. *Bullivant*, 10 Ont. App. R. 582.

N. F. Hagel, Q.C., and *R. A. Bonnar*, for defendant. There was merger and a suretyship, and accord and satisfaction in equity. The plea sufficiently shows that Bailey was liable to defendant to pay the mortgage, and the discharge of him discharges defendant. *Campbell* v. *Robinson*, 27 Gr. 684; *Fisher*

on Mortgages, 801; *De Colyar on Guarantees*, 445; *Woodruff* v. *Mills*, 20 U. C. Q. B. 51; *Burnham* v. *Galt*, 16 Gr. 417; *Mathers* v. *Helliwell*, 10 Gr. 172; *Titus* v. *Durkee*, 12 U.C.C. P. 367; *Stewart* v. *Clark*, 13 U. C. C. P. 203.

George Patterson, in reply. What is alleged does not set up that defendant became surety and Bailey principal debtor. *Real Estate* v. *Molesworth*, 3 Man. R. 116.

(24th June, 1880.)

KILLAM, J.—The plea would not be a sufficient answer at law, for it is pleaded to counts in covenant for payment of definite sums of money, and simple accord and satisfaction is in such case no defence at law, *Massey* v. *Johnson*, 1 Ex. 241; *Webb* v. *Hewitt*, 3 K. & J. 438.

In the latter case, however, where there had been accord and satisfaction in fact by the principal debtor, though with an attempt to reserve rights as against the surety, the latter was granted an injunction to stay proceedings against him at law, on the ground that in equity the cause of action was extinguished.

The plea asserts that the lands covered by the mortgage were conveyed to Bailey subject to the mortgage. The authorities show, that in such case a court of equity implies an obligation on the part of the grantee to indemnify the mortgagor against the mortgage debt. *Barry* v. *Harding*, 1 J. & Lat. 485; *Waring* v. *Ward*, 7 Ves. 338; *Jones* v. *Kearney*, 1 Dr. & War. 155; *Campbell* v. *Robinson*, 27 Gr. 634; *Real Estate Loan Co.* v. *Molesworth*, 3 Man. L. R. 116.

The plea also alleges that the plaintiff took the conveyance of the equity of redemption in discharge of the mortgage. Although there may be some doubt whether the mortgagor is rightly termed in such case a surety for the grantee of the equity of redemption when the latter has never become debtor directly to the mortgagee, the principle of the decision in *Webb* v. *Hewitt*, appears equally applicable, and the defendant to be entitled in a court of equity to claim that the debt has been wholly discharged.

I prefer to treat the matter as one of equitable accord and satisfaction rather than of merger, though the latter principle was [illegible] in *North of Scotland Mortgage Co.* v. *German*, 31 U.C. C. P. 349, and *Id.* v. *Udell*, 46 U. C. Q. B. 514. I would suggest that the doctrine of merger is applicable rather to the charge

on the land than to the debt, and can be of importance in an action on the covenant only when by the effect of the merger, other charges or interests have been so let in, that the mortgagee cannot give the mortgagor an opportunity to redeem and reassign to him the full original interest conveyed by the mortgage except on payment of more than the amount due on the mortgage itself.

The case last cited, however, may offer valuable suggestions in the conduct of the present action, the question being, as here, really one of satisfaction, though spoken of as one of merger.

I overrule the demurrer to the amended plea.

WINNIPEG WATER WORKS CO. v. WINNIPEG STREET RAILWAY CO.

(In Appeal.)

County Court appeal.—Certificate of judge.—Evidence "in substance."

Accompanying an appeal book upon a County Court appeal was a certificate from the County Judge, that it contained "the evidence in substance taken at the trial."

Held, That the certificate was insufficient, and the appeal was struck out of the list.

This was an appeal from a decision of a County Judge of the County of Selkirk.

The certificate of the judge accompanying the appeal book was as follows: "I certify that the foregoing is a true statement of the cause of action in the suit of The Winnipeg Water Works Co. against The Winnipeg Street Railway Co., numbered 7585, in the County Court of the County of Selkirk, and of the proceedings therein in said court, the evidence in substance taken at the trial or hearing with the objections of counsel and my judgment or decision thereon, and upon the application or applications of either party herein." The County Courts Act, 50 Vic. c. 9, s. 245, provided, as to procedure on appeals, that the "judge shall certify under his hand the cause of action,

. . . all motions, rules or orders made, granted or refused therein, together with his own ruling, judgment or decision thereon; and when a trial has been had, and when any matters of fact therein are brought in question, the evidence and all objections and exceptions thereto, which shall form the appeal book."

T. D. Cumberland, for the defendants, the respondent, took the objection that the certificate of the county judge was not sufficient to bring the case before the court. The judge had no power to certify the evidence in substance; he must certify the evidence itself.

C. W. Bradshaw, for plaintiffs.

The court (*a*) held, (Dubuc, J., dissenting) that the certificate of the county judge was insufficient and the appeal must be struck off the list with costs of a motion to strike off.

Appeal struck out.

HOWE v. MARTIN.

Interpleader order.—Rescission, because of sheriff giving up possession.

An interpleader order, besides providing for an issue, required the execution creditor to give security for costs by a certain day, otherwise he should be barred, and directed the sheriff to sell unless the claimant gave security for the goods. After lapse of the prescribed period the referee made an order enlarging the time. Upon appeal a judge discharged this order, holding that the creditor had become barred, and that there was no jurisdiction to extend the time. The full court, however, restored the referee's order. After the order of the single judge the sheriff withdrew from possession and the goods were dissipated. The creditor then finding it useless to proceed with the issue, moved to rescind the interpleader order.

Held, That the order should not be rescinded, but that the creditor's remedy was by action against the sheriff if he had done wrong.

This was an application to an execution creditor to rescind an interpleader order under the circumstances referred to in the head note.

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

C. P. Wilson, for claimant.

A. Monkman, for execution creditor.

H. M. Howell, Q.C., for sheriff.

(*4th August, 1890.*)

KILLAM, J.—The cases of *Lewis* v. *Jones*, 2 M. & W. 203; *White* v. *Binstead*, 13 C. B. 303; *Henderson* v. *Wilde*, 5 U. C. Q. B. 585; *Black* v. *Reynolds*, 43 U. C. Q. B. 398, show that relief can be obtained for the action of the sheriff without rescinding the interpleader order. That order protects the sheriff in respect of his acts prior to its being made, but not for acts in contravention of that order or in breach of duty under it. If the sheriff has improperly committed an act from which the execution creditor has suffered damage, the latter should have such relief as he may be entitled to, but the sheriff should not on that account lose the protection which the order gives in respect of his prior acts. If that order were rescinded he would be exposed to the risk of any action by the claimant as well as by the creditor. This might be a wholly excessive penalty for what the sheriff has done, if the claimant be entitled to the goods.

The claimant too, has to be considered. He has been deprived for some period of any right of action against the sheriff, and has been remitted to proceedings under the interpleader order. He has got ready for a trial of the issue, which was entered on and postponed. There is no reason why he should now be turned back to another mode of proceeding in order to establish his right of property.

I dismiss the application with costs, to be costs to the sheriff and claimant at the conclusion of the interpleader proceedings in any event, but I do not allow any costs of examination of Mr. Monkman on his affidavit, a wholly unnecessary proceeding.

END OF VOLUME VI.