THE

MANITOBA LAW JOURNAL

VOL. I. MARCH, 1884. No. 3.

DISTRESS.

PRIVILEGES, although sanctioned by the custom of centuries, must, in this practical, equalizing, democratic age, give reasons for their existence, or finally succumb to attack. While landlords made the land laws, no argument in favor of the right of distress was necessary. *Sic volo, sic jubeo* was then sufficient. Times have changed, and now the name of landlord seems to many to carry with it a certain undefined opprobrium, gathered, it may be, from its frequent association with such adjectives as Irish, absentee, rack-renting, &c. It would be impossible, at such a period, that any privileges accorded peculiarly to landlords, especially if without parallels or analogies to sustain them, should escape criticism.

The law of distress is now a favorite subject of attack, and it will be the object of this paper to separate that which is deemed to be the reasonable and defensible portion of that law, from that which must soon be abrogated.

As the law stands at present, a landlord has the right to seize for payment of his rent, all goods upon the premises demised, whether they belong to the tenant or not. There are, of course, some exceptions to the generality of this statement, but it is sufficiently accurate for our purpose.

This law is attacked, not only on the ground that it gives legal sanction to the indefensible practice of robbing Peter to pay Paul (or rather, permitting Paul himself to commit the robbery, a permission not accorded to any creditor other than a landlord), but on the ground that no better reason can be given why a landlord should be his own bailiff, than that a grocer or a banker should enforce payment of his account by peremptory seizure and sale.

We have no answer to make to the first ground of attack. It is, we believe, unanswerable, and the Legislature should protect the Peters from the Pauline raids. It is just and reasonable that a man's goods should be exigible for payment of his own debts, but not for those of others whose liabilities he never assumed and perhaps never knew of.

Here, however, the force of the attack ends. Let us examine the remaining argument. If a man purchase groceries and agrees with the grocer that, in case of default in payment at a given time, it shall be lawful for the grocer to seize and sell the debtor's goods and chattels for payment of the debt, the grocer would have all the rights which a landlord ought to have. Such an agreement would be perfectly legal, and might perhaps with profit to grocers come into general use. Why should a grocer be obliged to incur the expense and risk of loss entailed by a law suit, and why should the debtor be at liberty to bid the grocer defiance for weeks or months, while he is endeavoring to obtain that which the law says he is entitled to, namely, the sale of the debtors goods for payment of his debts.

Irrespective of a special agreement, the grocer cannot act as his own bailiff, while, unless there is an agreement to the contrary, a landlord can do so. This is all the difference that would exist if the Pauline depredations were stopped, and that this is the full extent of the distinction must be kept in mind if confusion is not to attend the argument.

The difference, then, between the positions, is one solely of agreement, and exists because it has been found to be beneficial. If it were not so, custom would long ago have

made an anti-distress clause a part of every lease, and attached a right of distress to grocers' bills.

Is there, however, any reason for the distinction? The custom may have been forced by the landlords. Can it offer any good *raison d'etre?*

If people were all accurate and honest, so that there could never be any doubt as to the existence or amount of a debt, there could be no good reason for requiring the routine of litigation prior to seizure, but every creditor should have a right to go to the sheriff direct, to acquaint him with the facts and require him to perform his office; for it must be remembered that the whole outcome of a suit is, after all, only a similar direction authorized or sanctioned by the court. Many people, however, are not honest, and very few of them are accurate, and the law requires that, unless the parties otherwise agree, the right to seize and sell goods must be established before it is enforced. To this rule it makes an exception in favor of rent, but at the same time, it requires, as one of the inseparable incidents of rent, that it should be *certain.* If there be any uncertainty, it is not technically rent, and cannot be distrained for. It is then a mere debt and must be litigated in the usual way. The object of a suit is to establish the certainty of the debt. Rent is certain without a suit. Why then should it be sued for? It may be objected that there is here a play upon the word *certain,* and to some extent the objection must be admitted. It is not contended that rent must certainly or necessarily be due and unpaid. It is asserted, however, apart from the technical meaning of the word *certain,* that there are few of the elements of uncertainty which naturally attach to a grocer's account. It may be asked why, if a man make a promissory note, and fail to pay it, there is not as much certainty as if a tenant agree to pay rent and make a like default. A legal mind will at once recognize the dissimilarity of the cases. The law does indeed recognize the fact that *prima facie* there is no defence to a suit upon a promissory note, and will not permit any appearance to be entered until satisfied that there is some *bona fide* defence, although in other cases it makes

no such presumption. But are there not numbers of defences usual in note cases which would be unapplicable in actions for rent? For example, the note may have been given for accommodation, in which case the plaintiff may have given no value for it; there may have been an agreement for renewal; it may have been given in payment for goods never delivered; it may have been given for a particular object and diverted from the purpose of the maker; the books are full of defences to such actions.

There are two defences common to actions for rent and upon notes.

First: the agreement or note may never have been made or signed. If the agreement was never made, the tenant most probably is not in possession of the premises, and in that case no distress can take place, and no question can arise.

Secondly: the rent or note may have been paid. When this is the case it is very seldom that there is any doubt upon the subject, and where, as in the case of rent, the payment would be of recent date, if made at all, the fact that a landlord might distrain although paid in full, would not form a very cogent argument against the existing law.

Let us examine now the arguments: (1) that under the present law landlords may abuse their power—may distrain on the day immediately after the due date; (2) may distrain in case of dispute according to their own view of the contract; and (3) may by having a shorter remedy obtain priority over other creditors.

No doubt landlords may distrain in a hasty and summary way, if the agreement has not provided for a delay; and if it were proposed to give them for the first time a power of distress this argument would seem to be somewhat formidable. But the system having been tried, experience is a complete answer to the objection. Landlords have not abused their power in the past, and will not in the future for the best of reasons, that it is not for their interest to harass

their tenants. The same argument may be advanced against the right of any creditor to issue a writ on the first day after default, and so to harrass his debtor, but we do not find that this is often done, and no one proposes to alter the law in that respect. The only difference between the cases is that the landlord's remedy is more direct, but the delay in the other case is not because the law prescribes days of grace, but that the time is necessary for the investigation of the right.

Then it is said that there may be a matter in difference between the landlord and tenant which ought to be tried. We have already answered this objection and re-state it merely for the purpose of pointing out that the law contains a provision which imposes the exercise of caution on the part of the landlord, and which in almost all cases proves to be a sufficient deterrent in cases of real and *bona fide* disputes. We refer, of course, to the clause of the statute of 2 W. & M., Sess. 1, cap. 5, sec. 5, which provides that "in case any such distress or sale as aforesaid shall be made by virtue and color of this present Act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained and sold as aforesaid, his executors and administrators, shall and may by action of trespass, or upon the case to be brought against the person or persons so distraining, any or either of them, his executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

The last point mentioned, viz., that having a shorter remedy landlords have a priority over other creditors, must be based upon the view that a ratable distribution of assets among all creditors should always be made. This argument, of course, does not affect nineteen out of every twenty distresses, because it only relates to cases in which the tenant is insolvent and is being stripped of his whole estate. But even in such cases, in the absence of an insolvent law, the race is not only

to the swift but also to the vigilant; and if it be said that a landlord should not have a shorter remedy than the holder of a note, it may be answered that the practice is as defensible as that which distinguishes the holder of a promissory note from a creditor with a liquidated account, and the latter from one whose claim lies in damages. The law prescribes more delay for cases in which there is more likely to be dispute and less delay where probably less dispute, and no delay at all where experience has shown that disputes are of extremely rare occasion. There seems to be some reason and common sense in this.

The assertion that bailiffs are often extortionate is probably true. In this they resemble the rest of the world, and in this they should be controlled, and their charges regulated by law. Perhaps certain persons might be licensed to act as landlord's bailiffs, in which case their actions could be more readily supervised, but this we would not recommend.

THE TORRENS SYSTEM.

(Contributed.)

THE nineteenth century has witnessed a good many important changes in the laws of the Anglo-Saxon races, but we venture to doubt whether any such change which has been effected, is so important and so beneficial in its consequences as that accomplished in the Australian colonies regarding the transfer of land.

In countries like the British colonies, where the ownership of the land is so widely diffused amongst the inhabitants, it must always be a matter of vast importance to the community to have the laws regulating the ownership and transmission of land simple, easily understood, and effective in protecting owners in the rightful enjoyment of their property.

Any improvement in the laws affecting these rights and interests, have a wide reaching effect. It is not merely those who own land who are benefitted, but also the large class which in various ways of business is concerned in transactions with land owners, and in which the land forms the basis of contract. The simplification of the tenure, and transfer of land, and the securing of indefeasibility of title, mean an important addition to the wealth of a community, and the opening up of a source of capital which may be otherwise rendered practically useless by means of the difficulties in the way of effectually and safely dealing with it.

We do not think, therefore, that any apology is due to our readers for discussing this new method of land transfer which has been introduced in the Australian colonies. Its success there, has been established by upwards of 25 years experience of its working, and it behoves us in Manitoba, to know, as soon as may be, the advantages we may derive from an early adoption of it, and it is for this purpose that we wish to point out the principles upon which it is based.

This method of land transfer is commonly called "The Torrens' System," after Sir Robert R. Torrens, its inventor,

and is based on the principles of the registration of title—as distinguished from the registration of *deeds*. But perhaps the words, "registration of title" do not sufficiently convey the idea we wish to express, and it is therefore necessary to explain more in detail the principles of the system.

In order to make the matter clearer, it will be as well to show the way in which it differs from our present system of registration. Some might hastily assume that the registration system at present in force in Manitoba is a registration of title; but this is a mistake. Our present registry offices are mere depositories for deeds, where, it is true, you may find the various documents recorded which collectively constitute what is called the title. But the registry office is no further help than a tin box in the work of ascertaining the state of the title to a parcel of land. It does not afford any guarantee that the various deeds recorded have been drawn in proper form, or that they really carry out what may have been the intention of the parties. Some skilled person must examine all the recorded instruments, and then make up his mind whether, as a matter of law, those documents do or do not, in fact confer a legal title. But, as man is at the best a fallible creature, mistakes are often made, and titles which are thought to be good, turn out to be bad.

Now the registration of titles under the Australian system of transfer is a vastly different thing. Under that system the registry office ceases to be a mere depository of deeds, and becomes an active living agent in the work of conferring and transmitting title to land. In the register is recorded, not the fact that a deed has been made, but the legal effect of that deed—so that, on every transfer recorded, the register does not merely preserve a record of the transaction, leaving its legal effect to be gathered by inspection, but the public officer determines at once whether it is sufficient for the purpose intended by the parties, and if sufficient he records, not the fact of its being made, but the legal result which it has accomplished.

Now it may be reasonably asked: How is the method worked out? Assuming that land has been granted by the

Crown, and that it is desired to bring it under the system of transfer, the title must first be submitted to examination by a public officer appointed for the purpose, any defects he may point out have to be remedied, an advertisement of the application is then published, and if no objection be made the title is registered, that is to say: the property in question is entered upon the register and the applicant certified to be the owner absolutely, or with qualification, according as to how he may have shown his title to be absolute or subject to qualification. Each title constitutes a separate folium of the register, and upon this folium are recorded all transactions short of an absolute transfer of the estate; *e. g.*, all mortgages, leases, etc. The registered owner is furnished with a certificate of title, which is an exact counterpart of the entry in the register. And on any transaction taking place this certificate of title is required to be produced so that the entries made in the register may also be endorsed on the certificate of title. By this means a glance at the folium containing any given piece of land shows the present state of the title to it. For instance, that A. B. is owner, that his title is subject to a mortgage to C., and a lease to D., &c., &c.

Upon an absolute transfer taking place, the entry in the register and the certificate of title are cancelled, and a new folium opened whereon is recorded the title of the transferee, to whom a new certificate title is issued.

Each absolute transfer, therefore, operates as a new starting point.

Let us, for the sake of further illustrating the difference between the system which at present prevails in Manitoba and the Torrens System, pay an imaginary visit to a registry office in Manitoba, and then to one conducted under the Torrens system. In the former, on asking to search the title to a parcel of land, we shall be shown a book called the abstract index; in this book we shall find perhaps, a list more or less lengthy, of the various deeds recorded upon the lot in question; we shall then have to refer to each one of those instruments, carefully weigh its contents, see that it is duly

executed, and determine for ourselves whether or not the person who claims to be the owner is so or not. But however careful we may be, unforeseen, and altogether unexpected, perils may exist. One of the deeds we have so carefully examined, and which seems so perfectly right and proper, may thereafter prove to be a base forgery; or our vigilance may have failed to notice that an important word or two has been omitted from one of them, either of which facts, or many others which might be suggested, would have the effect of rendering the title worthless. Yet all these risks must be run and all this trouble incurred whenever the state of a title has to be ascertained under our present system.

Now let us go to the Torrens Registry Office and ask the state of a title, and what a different reception do we meet. The register is produced, and on one page is to be found all the information necessary to be known in order to our perfect absolute safety in dealing with the property.

Here you have not to search and examine, and critically weigh, various documents, to determine what may perhaps be a very nice and subtle question of law, but you have the fact, absolute and undeniable, presented to you, and it is the fact you want to get at.

We think we have sufficiently displayed the superior merits of Torrens' system.

The necessity for the early consideration of this important question by the Legislature of this Province we do not think can be reasonably questioned.

One of the great difficulties in the way of its introduction in the older provinces arises from the complication of the titles, and the growth of vested interests which are concerned in the maintenance of the old system.

Here these difficulties are comparatively few; with the lapse of time, however, they must inevitably increase. While we are in the spring tide of youth let us by all means avail ourselves of the advantages which the Torrens system holds out, and the full benefits of which we shall the sooner enjoy.

JUDICIAL WORK.

THE following is an extract from a report made by His Honor Judge Ardagh respecting the County Courts of the Eastern Judicial District, and the business transacted in them during the half year ending the 31st of December last:—

"This Judicial District contained last year seven Judicial Divisions having County Courts, the sittings of which numbered eighteen for the half year; the business of which during that period may be given in the aggregate as to six of the Divisions, and as to Selkirk by itself as follows:—

Selkirk Court, held at Winnipeg monthly:—

Number of suits entered	1,975
The remaining Courts of the District	782
Total number of suits entered in last half-year . . .	2,757

Selkirk Court:—

Total amount of claims entered	$ 94,540
In the remaining Courts	44,671
Total amount claimed by plaintiffs in half year	$ 139,211

Selkirk Court:—

Amount received in suits	$ 21,820
In the remaining Courts	9,050
Total amount received	$ 30,880
Of which paid over to suitors at date of returns	$ 30,188

It may be assumed that of the balance of the whole amount claimed a large portion was settled between the parties out of court.

A considerable number of the suits brought to trial are reheard either in Court or in Chambers, and in very many instances they come before the Court a second and third time under garnishee and judgment summons proceedings.

The number of judgment summons issued during the six months is returned as 440, of which 425 were from the Selkirk Court. Out of the whole number 21 orders for commitment were entered, of 30 days each (630 days in all), and of these 21 commitments only one was put into force, the imprisonment lasting but a few hours. I learn also that no commitment from any other District in the Province was enforced during the same period. The orders of commitment were in every instance made for default of appearance before the Court, of the person summoned, to submit to examination, and on the issue of a second summons. The inference to be drawn from the non-attendance, and the subsequent payment or settlement of the debt, being, that the debtor had been able, but was unwilling to pay, until driven to do so by the fear of imprisonment.

The largest sum received by any clerk (paid by fees) in fees for the half year appears to be $870.90; and the smallest amount $33.16. The largest amount received for bailiff's fees (outside of the Selkirk Court) is $1,031 (divided between two persons), and the smallest $40.

These sums are supposed to include mileage, and it should be remembered that no mileage is allowed on executions returned *nulla bona.*

It is evident from these figures that neither the clerks nor the bailiffs of the Court are in receipt of unnecessarily large incomes. Some of the former, whose fees are small, have in the past been subsidized by the Government, and I think in some particulars the latter would be entitled to some consideration in the direction of an amended and improved tariff. In the case of execution, for instance, I see no reason why a bailiff who is set in motion by a judgment creditor, should not (subject to certain restrictions) be paid at least sufficient to cover disbursements.

As to this and other matters connected with the administration of the law in the County Courts, I may have the honor before closing this report, or, otherwise, before the meeting of the Legislature, to offer some suggestions for your consideration.

In the former part of this communication I mentioned that there were seven Judicial Divisions in this District, and I may now go on to state that at present it comprises 14 counties, or 11 counties and union of counties, divided into 48 municipalities, including cities and incorporated towns.

Of the eleven County Court or Judicial Divisions nine are fully organized and have altogether 47 sittings appointed for the year. When the two remaining Divisions of Lorette and Carillon are organized for Court purposes, the sittings in the District for the year will number 55, or over one for each week in the year.

The number of miles required to be travelled in order to hold these Courts is nearly 1200 for each round trip, and over 5000 in the year. Of this mileage 3800 is by rail, and 1200 by driving. The attendance at the Courts outside of Winnipeg, without taking into account special ones for hearing assessment appeals, revising voters' lists and trials of election petitions, occupies nearly two months out of the six. In the Selkirk Courts the number of cases entered on the list for trial each month has latterly averaged about two hundred. Each open sitting occupies about three days, and every remaining working day, not occupied in attending outside Courts, is taken up with trials and other business in and belonging to Chambers.

I have touched upon this subject of personal work (to which may be added that of a large number of speedy criminal trials) as a prelude to the statement, that even without the large increase in Court sittings over those of last year it would be a physical impossibility, on my part, to keep up with the business of the County Courts in this District, and the work otherwise devolving upon me under certain statutory provisions."

MORE JUDGES.

THERE was an extraordinary scene in Court upon the last day of Term. A large number of the Bar appeared, and by their spokesmen expressed to the Bench their sense of the impossibility of procuring justice for their clients. Justice delayed, is, in very many cases, justice refused; and it was of the tardiness that the barristers complained. They bore generous tribute to the ability and assiduity of the judges, and extended to them their appreciation of the indefatigable efforts unremittingly put forth to overtake the work. But why complain to the Bench?—the Bench is powerless to appoint, and can only labor on. A common acknowledgement of the hopelessness of the situation, and a common loyalty to the administration of justice, brought judges and barristers together, to formally and publicly protest against the continuance of the present condition of affairs. It may be difficult for members of the Government at Ottawa to understand Manitoba and its requirements, although the constantly increasing revenue derived from the Province ought to be of much assistance in the necessarily constant expansion of their ideas of corresponding necessities. At the commencement of the agitation for additional judges it was said that the amount of business was abnormal, attendant upon the real estate excitement, and would soon shrink to its proper volume. Two years have elapsed since "the boom" left us, but the increase of ordinary litigation has more than supplied the abatement in real estate actions. In England the Courts sit at eleven and rise at half past four, and a week of work is followed by two wherein judgements may be prepared and studies prosecuted. Judges should not be subjected to the narrowing influence of total engrossment in legal work. They should have leisure, not only for the complete mastery of all cases they may have to decide, but also for the pursuit of such literary or scientific subjects

as may relieve the monotony of their work and keep their minds enlarged and vigorous. In Ontario this is to some small extent held in view, but in Manitoba the judges may live, work and die, unknown and unseen beyond the court house walls, leaving nothing for posterity but a number of hastily written judgments and arrears of work that should render a successor impossible—there could be no accumulation of salary! We must not be misunderstood when we speak of hastily written judgments. The Bar has often been surprised at the exhaustive and able judgments which are from time to time delivered, but we imagine that no one would more readily assent to the language than those who have to work in haste that they may sleep at all.

We hope that our judges may not be much longer left without assistance. The arrangement said to have been made with the Dominion Government appears for some reason to have fallen through.

REVIEWS.

"Instructions and Suggestions to the Clerks and Bailiffs of the County Courts of the Eastern Judicial District, Manitoba," is the title of a sixteen-page pamphlet prepared by His Honor Judge Ardagh. It is primarily intended, no doubt, for those to whom it is addressed, but there will be found in it instruction and suggestion for all those who are accustomed to practice in the County Courts. Several forms for use in cases of substitutional service, suits against railways, &c., are given in the appendix.

The Acts respecting the registration of deeds, railway maps and books of reference, by-laws, land tax sales, judgments, partnerships, mechanics' liens, naturalization papers and debentures have all been gathered together under one cover. The amendments to the Registry Act are printed in smaller type, and the Amending Acts are noted in the margin. The Registration Divisions, with the names and addresses of the Registrars, and the statute of last session prescribing the new boundaries, are to be found in the same pamphlet.