# THE TERRITORIES LAW REPORTS

## VOL. IV.

(CITED 4 TERR. L. R.)

CONTAINING

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

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EDITOR:

N. D. BECK, K.C., EDMONTON.

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REPORTERS:

BEFORE THE FULL COURT:

FORD JONES, Advocate, Regina.

BEFORE SINGLE JUDGES:

C. H. BELL, - - Advocate, Regina.
CHAS. A. STUART, - Advocate, Calgary.
E. A. C. McLORG, - Advocate, Moosomin.
J. H. LAMONT, - - Advocate, Prince Albert.



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TORONTO:
THE CARSWELL CO., LIMITED.
30 ADELAIDE ST. EAST,
1902.

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## MEMORANDUM.

The HONOURABLE MR. JUSTICE ROULEAU having died on the 25th August, 1901, JAMES EMILE PIERRE PRENDERGAST, ESQUIRE, St. Boniface, Manitoba, County Court Judge, was appointed to fill the vacancy on the 18th February, 1902.

The North-West Territories Act, R. S. C. c. 50, s. 42, having been amended by 63-64 Vic. c. 44, so as to provide for the appointment of a Chief Justice, The HONOURABLE THOMAS HORACE MCGUIRE was appointed to that office on the 18th February, 1902.

# Table of Cases Reported in This Volume.

VERSUS is always put after the plaintiff's name.

# Table of Cases Cited in This Volume.

*Reverse the reference Nos. 41 and 42 on p. 416.

*Reverse the reference Nos. 41 and 42 on p. 416.

# CORRIGENDA.

(Vol. IV. Terr. L. R.)

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*Genge* v. *Wachter*, p. 131, after "Dart on Vendors and Purchasers" add "6th Ed., p. 825."

*Grindle* v. *Gillman*, p. 182, for "in" in the third line from the bottom, substitute "not the."

*Marey* v. *Pierce*, p. 192, for "Court" in the thirteenth line from the top, substitute "count"; p. 193, for "conditions" in the tenth line from the top, substitute "condition"; p. 193, for "the report" in the eighth line from the bottom, substitute "that report"; p. 194, for "C. O." in the seventh line from the top, substitute "R. O. (1888)"; p. 194, for "fact" in the twenty-third line from the top, substitute "facts"; place a comma and the word "that" after "small" in the same line; and substitute a comma for the period after the word "surety" in the twenty-sixth line.

*Smith* v. *McKay*, p. 212, strike out "of" between "Examination" and "all" in the twenty-sixth line from the top.

*Boardman* v. *Handley*, p. 278, for "argument" in the twenty-fourth line from the top, substitute "agreement."

*The Queen* v. *Cadden*, p. 308, and *The Queen* v. *Pachal*, p. 310. Strike out the name of Wetmore, J., as having taken part in the judgment of the Court.

*Commercial Bank* v. *Fehrenbach*, p. 338, for "out side" in the twenty-third line from the top, substitute "decided."

*Rose* v. *Winters*, p. 354, for "with" in line twenty-three from the top, substitute "without."

*Curry* v. *Brotman*, p. 370, strike out "not" at the end of the sixth line from the bottom.

*Flannaghan* v. *Healy*, p. 391, for "discussed" in the last line of the head note substitute "dismissed."

*Conrad* v. *Alberta Mining Co.*, p. 416, reverse reference Nos. 41 and 42.

# REPORTS OF CASES

DECIDED IN THE

# SUPREME COURT

OF THE

## NORTH-WEST TERRITORIES.

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### IN RE McCARTHY.

### McCARTHY v. WALKER (No. 2).

*Taxation of advocate's bill—Leave to sign judgment—Clerk's certificate—Review of taxation—Time for Review.*

Where a client has obtained an order in the usual form for the taxation of an advocate's bill of costs upon which he has been sued, and for a stay of the action pending the taxation, although he has made no submission to pay the amount found due, the advocate after the taxation is ended and the clerk's certificate signed, is entitled to an order giving him leave to sign judgment against the client for the amount found due.

The certificate of the clerk is final and conclusive as to the amount due to the advocate unless an application be made for a review of the taxation under s. 529 of the Judicature Ordinance, 1893 (†). That section applies to taxations between solicitor and client as well as between party and party. There is no necessity for an application on behalf of the advocate to confirm the certificate of the clerk as a report.

The clerk's certificate is not a report and need not first be set aside before the application for a review, and the intention of section 529 is that a review thereunder should be had after the clerk's certificate has been signed.

Since the repeal of s.-s. 7 of s. 491 of the Judicature Ordinance, 1893, there is no provision in our rules as to the time within

† Ord. No. 6, 1893, now R. 528 Jud. Ord. C. O. 1898, c. 21.

which a review of taxation can be made, and therefore the provisions of English Order 65, Rule 27 (41), so far as they relate to the time within which an application to a Judge for a review shall be made, are now in force in the Territories by virtue of s. 556 of the Judicature Ordinance, 1893.‡

Where the time for review has expired, the Judge has power under section 555,§ in a proper case to extend the time for making the application for review.

[SCOTT, J., *January 7th, February 8th*, 1889.

Statement.

The facts will be found sufficiently set forth in the judgment; and more fully in the same case as reported in Vol. iii. of these Reports.

*P. McCarthy*, Q.C., the advocate in person.

*R. B. Bennett*, for the client.

[*January 7th*, 1899.]

SCOTT, J.—This is an application by Peter McCarthy for an order for judgment against Elizabeth R. Walker for $185.86, being the amount found due by her to the firm of McCarthy & Bangs by the certificate of the clerk, and also for an order that the costs of the action brought by said McCarthy against said Walker be also taxed, and the moneys now standing to the credit of this matter be paid out to said McCarthy, and that in case the amount now in Court be insufficient to satisfy the amount of said judgment and costs, he be at liberty to issue execution against said Walker for the amount remaining unsatisfied.

On 21st April, 1898, said McCarthy, claiming as a member of firms of McCarthy & Harvey and McCarthy & Bangs, and as assignee of the other members thereof, commenced an action in this Court against said Walker to recover certain sums claimed to be due by her to said firms for services rendered as her advocates, the amounts claimed being $87.95 to the firm of McCarthy & Harvey, with interest thereon from 1st September, 1895, and $108.29 to the firm of McCarthy & Bangs, with interest thereon from 6th January, 1898.

‡ See now Jud. Ord. C. O. 1898, c. 21, s. 21.

§ Now R. 548, Jud. Ord. C. O. 1898, c. 21.

Judgment.
Scott, J.

On 21st July, 1898, upon the application of said Walker, I made an order that,upon her bringing into Court the sum of $190.84, the bills of costs of said firms, for the recovery of which said action was brought, be referred to the clerk for taxation, and that he should tax the costs of the reference and certify what should be found due to or from either party in respect of such bills of costs and costs of reference. The order further provided that said McCarthy should not, pending the reference, further prosecute the said action, and that upon payment of what might be found due to him in the said action together with the costs thereof, all further proceedings therein should be stayed, but it did not contain any submission on the part of the said Walker to pay the amount which upon the taxation should appear to be due by her.

On 22nd September, 1898, upon the application of said McCarthy, I ordered that so much of my order of 21st July as related to the bills of costs of the firm of McCarthy & Harvey and to the stay of proceedings upon said bills should be set aside and vacated. The action was then proceeded with in respect of those bills. The defendant by way of defence brought into Court in the action $50.00 of the moneys paid in by her under the order of 21st July,and claimed that it was sufficient to satisfy that portion of the plaintiff's claim, and the plaintiff by his reply accepted it in satisfaction thereof.

On 18th October, 1898, upon the application of said McCarthy, I ordered that he should be at liberty to amend the bills of costs heretofore delivered by the firm of McCarthy & Bangs to said Walker, by adding thereto items amounting in all to $97.22, and directed that the costs of the application should be costs to said Walker in any event. No order was obtained for the amendment of the statement of claim in the action.

On 9th December, 1898, the clerk by his allocatur certified that he had taxed the bills of costs of McCarthy & Bangs under the order of 21st July, and that there was

Judgment. Scott, J.

then due to them, after giving credit for certain sums received by them, the sum of $185.86, the amount being made up as follows:—

| | | |
|---|---|---|
| Amount due them in respect of the bills of costs, for which the action was brought..... ..... .... .....$ | 81 | 34 |
| Amount due them in respect of the items added under order of 18th October.. | 86 | 12 |
| Costs of reference ..... ..... ..... | 18 | 40 |
| | 185 | 86 |

Upon the hearing of the present application it was contended on behalf of said Walker that it is one in the nature of an application to confirm the report of the clerk upon the taxation, and that upon such an application it is open to her to review the taxation and to object to certain items which are claimed by her to have been improperly allowed by the clerk.

I cannot uphold this contention. In my opinion section 529 of the Judicature Ordinance applies to taxations between advocate and client as well as to those between party and party, and its effect is that the taxation by the clerk is final and conclusive unless an application be made under it for review.

In the absence of any such application, said McCarthy is entitled to an order against said Walker for the payment of $185.86, with costs of said action to be taxed on the lower scale, and the costs of this application to be taxed on the higher scale, less the costs which said Walker may be entitled to under the order of the 18th October, 1898, to be taxed on the higher scale, and also those under an order made by me in said action on 31st October, 1898, setting aside a judgment therein which had been irregularly entered by said McCarthy, to be taxed on the scale on which the action was brought, and such other costs as said Walker may be entitled to set off to be taxed on the last mentioned scale. He is also entitled to an order for the payment out to him of the moneys now in Court, which were paid in by

Judgment.
Scott, J.

said Walker under the order of the 21st July, 1898, or so much thereof as may be sufficient to satisfy the amount to which he may be found entitled, and if said moneys are insufficient for that purpose, that he may be at liberty to issue execution against Walker for the amount remaining unsatisfied.

It appears, however, that on 30th November, 1898, said Walker gave said McCarthy notice that she was dissatisfied with the allowance by the clerk upon the taxation of certain specified items in the bills of costs taxed, and that, upon the application by him to confirm the report of the clerk upon the taxation she would object to such items, upon certain grounds specified in the notice, and would ask that same be allowed by the Judge before whom the motion for the confirmation of the report should be made.

I think it is evident from this notice that said Walker intended to obtain a review of the taxation, but I have already expressed the view that she did not take the proper course to obtain it. The omission to take the proper course may have resulted from some misconception of the effect of section 529. If she is still desirous of obtaining the review, I think he should be permitted to obtain it, provided that I have the power under section 555 of the Judicature Ordinance, to enlarge the time for applying for it, and that she make out a proper case for the exercise of that discretion. She may, therefore, apply to me within six days upon notice under section 529 for a review of the taxation. Upon that application if made, I will consider the question of my power to grant the extension of time for the review as well as the question of the propriety of granting it under the circumstances.

Unless such application be made within six days the order will go to said McCarthy in the terms I have already stated that he would be entitled to in the absence of an application for review. If the application for review be made within six days this application will stand until that application is disposed of.

Statement.

After the delivery of the above judgment, the client, Elizabeth R. Walker, pursuant to the leave granted, applied for leave to review the taxation.

*R. B. Bennett*, for the client.

*P. McCarthy*, Q.C., the advocate, in person.

[*8th February*, 1899.]

SCOTT, J.—This is an application by Elizabeth R. Walker, pursuant to leave granted by me in my judgment herein delivered on 7th January, 1899, for leave to review notwithstanding that the time for applying for such review had expired.

On the hearing of the application it was objected on behalf of the above named advocates that I had no power to entertain the application, the grounds of the objection being as follows:—

1. That this is not an appeal against the clerk's report on the reference, but merely an application to review his taxation, and that his report must first be got rid of

2. That I have no power under section 555 of the Judicature Ordinance, to extend the time for the application for review, inasmuch as, since the repeal of sub-section 7 of section 491, there is no time limited within which such an application must be made, and section 555 only applies to cases where a definite time is fixed within which a certain act must be done.

I reserved judgment upon these objections and gave the counsel for the parties leave to put in authorities bearing upon the questions. Counsel for the advocate handed in a memo., and therein raised the following further ground of objection:

3. That the revision of taxation should have been applied for before the certificate of the clerk was signed, and that not having so applied the client is precluded from obtaining it.

I have already expressed the opinion that section 529 is applicable to taxations between advocate and client as well

as to those between party and party. In Cordery on Solicitors, at pp. 279-80, the corresponding provisions in England are shown to be applicable there to taxations between solicitor and client under provisions similar to those contained in Ordinance No. 9 of 1895.|| It is therefore applicable under the order for taxation made in this matter. The clerk's report in this matter is simply a certificate of the taxation by him. It is so treated by the advocate in the summons issued by him on his application for leave to issue execution for the amount taxed to him, and section 34 of Ordinance No. 9 of 1895, contemplates that it shall be nothing more unless perhaps in cases where other matters should be specially referred, which is not the case here. I therefore think that it is unnecessary that the clerk's report on the taxation should be done away with before a dissatisfied party is entitled to a review under section 529.

Judgment.
Scott, J.

If the clerk's certificate is to be treated as something more than a mere certificate upon taxation, viz., as a report upon a reference which cannot be dealt with under section 529, then how is it to be set aside or varied as section 34 of Ordinance No. 9 of 1895 provides that it may be? There is no provision in that Ordinance for an appeal from it, or as to how or when an application to set aside or vary it should be made. It appears to me that in that case the procedure in civil cases would have to be resorted to, and the only provision applicable would be English Order 36, Rule 55. In this view, the client by her notice of 30th November, 1898, appears to have taken the proper course to apply for the variation of the report in so far as it was objectionable to her.

Then, as to the second and third grounds, section 529 appears to have been framed with the object of doing away with the necessity for the preliminary review by the clerk prescribed by English Order 65, Rule 27 (39), and with that object alone. That rule provides that the application for a review by the taxing officer must be made before the

|| "The Legal Profession Ordinance," See now C. O. 1898, c. 51.

Judgment.
Scott, J.

certificate or allocatur is signed, while Rule 27 (41) provides that the application to a Judge in Chambers for a review shall be made within four days from the date of the certificate or allocatur, or such other time as the Court or a Judge or taxing officer at the time he signs the certificate or allocatur, may allow, section 529 makes no provision as to the time within which an application under it must be made, the reason for the omission apparently being that sub-section 7 of section 491, which was first passed in or before 1888 (see R.O. (1888) c. 58, s. 423, s.-s. 7), had already made such provision. This latter sub-section has, however, been repealed by Ordinance No. 6 of 1897. Up to the time of its repeal an application for review under section 529 might have been made at any time within fifteen days from taxation. I think the words "from taxation" must be taken to mean "from the close of the taxation," and I also think that a taxation cannot be said to be closed until the certificate or allocatur is signed. If it were held otherwise then it would necessarily follow that the clerk after taxing all the items of the bill and arriving at the result of the taxation would have had to await a period of fifteen days before stating that result in the form of a certificate. I think this effect was never intended. I am therefore of the opinion that when section 529 was enacted it was intended that a review under it should be had after the certificate or allocatur was signed, and that reading it in conjunction with sub-section 7 of section 491, it should be so construed.

The repeal of the latter sub-section does not affect that construction, but it remains to be considered what effect such repeal has to the time within which an application for review must now be made. Holding the view I have already stated, viz., that the only apparent object of section 529 is to do away with the preliminary review by the clerk leaving only the review by a Judge, I am of the opinion that the provisions of Order 65, Rule 27 (41), so far as they relate to the time within which an application to a Judge for a review shall be made are now in force here by virtue of section 556 of the Judicature Ordinance.

Judgment.
Scott, J.

I am also of opinion that I have the power if not under that rule, then under section 555, to extend the time for making the application for review, and as I am satisfied that the omission to make the application within the proper time resulted from the uncertainty as to the proper procedure to be adopted, I will allow the review to proceed with respect to the items and objections stated in the client's notice of 30th November, 1898.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

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## IN RE McCARTHY.

## McCARTHY v. WALKER (No. 3.)

*Advocate's bill—Review of taxation—Two actions by the same plaintiff in different rights — Consolidation —Proceedings taken without instructions—Retainer—Commission.*

English Marginal Rule 192 provides that claims by or against an executor or administrator as such, may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

Where separate proceedings were taken by plaintiff's advocate upon two mortgages, one made to the plaintiff in her personal capacity, and the other made to a deceased person, of whose will the plaintiff was executrix, and the plaintiff, on taxation at her instance of the advocate's bill of costs, failed to show that the claim upon the first mentioned mortgage rose with reference to the deceased's estate, the advocate was *held* entitled to charge his client, the plaintiff, with separate bills of costs in respect of each of the separate proceedings.

Where proceedings for the sale of property in question in mortgage actions were postponed from time to time upon the solicitation of the mortgagor, and without instructions or consent of the plaintiff, the mortgagee, for the purpose of enabling the mortgagor to raise the necessary money to pay off the mortgage debt, and where these successive postponements resulted in securing for the mortgagee a larger sum than could have been realized by a forced sale, and the mortgagee accepted the benefit thus secured for her, she was *held* liable to pay to her advocate the costs and expenses incurred in connection with the various postponements.

Where the order for taxation on an advocate's bill of costs, obtained at the instance of the client, did not reserve to the client the right to dispute retainer.

*Held*, that the retainer must be taken to be admitted; and where in such a case the advocate had stated in writing that he did not intend to charge anything for certain proceedings taken without special instructions, but it appeared that the statement was made without consideration, the advocate was allowed his costs of such proceedings.

Upon the taxation of an advocate's bills of costs no counsel fee should be allowed in respect to an application made by a clerk of the advocate, and evidence should be given on the taxation that the application for which a counsel fee is asked were in fact made by an advocate.

An application to postpone a sale is a common application for which $2.00 only should be allowed.

Upon the taxation of his bill, the advocate will not be allowed a lump sum as commission upon a collection made for his client unless such evidence is produced before the taxing officer as will enable him to ascertain that the commission represents reasonable and proper charges for services actually rendered.

[SCOTT, J., *January 27th*, 1899.

Statement.

This was a review at the instance of the client of a taxation of an advocate's bill of costs under an order obtained on the client's application.

*R. B. Bennett*, for the client.

*P. McCarthy*, Q.C., the advocate, in person.

[*27th February*, 1899.]

SCOTT, J.—This is a review at the instance of Elizabeth R. Walker, the client, of the taxation by the clerk of the bills of costs in this matter.

The notice of application for review specifies a large number of items which are objected to, the grounds of objection being stated as follows :

1. That the amounts allowed are excessive and not authorized by the tariff of fees of this Court.

2. That the proceedings being taken upon mortgages given by the same mortgagor and by process of law become vested in the same person, the foreclosure actions should have been consolidated.

3. That the postponement of the sales in the said ac-

tion, having been at the request of the mortgagor, and without the instructions of the mortgagee, the costs thereof should not be chargeable against the mortgagee. Judgment. Scott, J.

4. That the bill of costs, fees and disbursements in re Walker v. Smith, was discharged by the said Peter McCarthy, it so appearing from a letter of the said McCarthy and that the same was incurred without authority.

I find it convenient to reserve consideration of the first ground of objection until after I have disposed of the others.

As to the second ground :

Certain of the bills of costs are for services rendered in taking proceedings under the Land Titles Act for the sale or foreclosure of the lands comprised in two mortgages upon different parcels of land, one of which mortgages was made to Mrs. Walker and the other to her deceased husband, the latter mortgage being then held by her as executrix of his will. A separate application under the Act was made in respect of each mortgage, and the proceedings under each were carried on separately.

It was contended on behalf of Mrs. Walker that only one proceeding should have been commenced and carried on in respect of both mortgages, and that even if separate proceedings had been commenced, they should have been consolidated. English marginal rule 192 was referred to as showing that one proceeding in respect of both might have been taken, and *Martin* v. *Martin*,[1] was cited to show that an order to consolidate could have been obtained upon Mrs. Walker's application.

Apart from any question as to whether the procedure under the Judicature Ordinance is applicable to the proceedings in question, I am of opinion that the advocates were right in commencing and carrying on a separate proceeding in respect of each mortgage, and that an order to consolidate them should not have been granted. Mrs. Walker suing or proceeding in her own right, and Mrs. Walker suing or proceeding as executrix of her deceased husband,

[1] (1897) 1 Q. B. 429; 66 L. J. Q. B. 241; 76 L.T. 44; 45 W.R. 263.

Judgment. Scott; J.

and different persons in the eye of the law. Here then is the case of different mortgagees proceeding under different mortgages for the sale or foreclosure of different parcels of land; the only connecting link between them being the fact that the two mortgages were made by the same person. I think it could not be reasonably contended that in all cases where that is the only connecting link both mortgages should proceed jointly, or that, if separate proceedings should be commenced even by the same advocate, they should be consolidated. Marginal rule 192, provides only that in civil actions claims by an executor as such may be joined with claims by him personally in cases where the latter is alleged to arise in respect of the estate of which he is executor. Here the claim of Mrs. Walker under her mortgage is not shown to have even the remotest connection with the estate of her deceased husband, and where this connection does not exist that the rule affords a strong indication of intention that they should not be carried on together, and therefore that they should not be consolidated. I cannot find any authority which goes the length of holding that in civil cases under like circumstances, an order for consolidation should be made or any principle laid down which is wide enough to support such an order. It is true that Mr. McCarthy in his examination stated that in prior proceedings taken upon these mortgages, an order for consolidation was made, but he now claims that he was in error in making this statement, and I am inclined to think that he was in error, but in any event I think I should only consider whether such an order should be made, and not whether one was made under similar circumstances in other proceedings.

As to the third ground, the proceedings under the mortgages were instituted under general instructions from Mrs. Walker for the purpose of collecting the amounts due upon them. After the properties were advertised for sale, the sales were postponed from time to time upon the solicitation of the mortgagor. Mrs. Walker was not consulted as to these postponements, nor does she appear to have assented to them. The object of the postponements appears from the evidence of Mr. McCarthy. He states that he

Judgment.
Scott, J.

thinks they were in the interest of the mortgagees; that through one of them his firm received $400, which he thinks they would not have otherwise received; that, as to the second postponement, it was made on the terms that if the mortgagor could not make a further payment and could not get further time from Mrs. Walker, he would give a transfer in order to save further costs, and that, not being able to do either, he gave a transfer; that if he had proceeded promptly to foreclose, he does not believe that Mrs. Walker would have got the $300, or a sum of $1,200 received by McCarthy & Harvey in 1894; that he acted as he thought best in her general interest; that as a result of not proceeding strictly according to time, he succeeded in getting $1,600 from the mortgagor; that the mortgagor had always expressed a strong desire to prevent foreclosure, and he (McCarthy) had made up his mind that the property was not worth the mortgage, and he was therefore anxious to get all the money he could, and hence granted the asked for postponements which he believes were in the interest of his client, and that he believes the property would not sell for half the balance still due on the mortgages even after collecting the $1,600.

From the statements of account filed, it appears that the only sums received from the mortgagor were a sum of $1,200 received by McCarthy & Harvey on the 18th April, 1894, before the proceedings for foreclosure were instituted, and a sum of $400 received by McCarthy & Bangs on 20th December, 1895, after the first postponement of the sale. It thus appears that the payment of the $1,200 was not the result of the postponement of the sale, although it may have been, as Mr. McCarthy states, the result of not proceeding promptly to foreclose. I must find upon the evidence, however, that the payment of the $400 was the result of the first postponement, and that the giving of the transfer by the mortgagor was the result of the several postponements that were made, and that by reason of this transfer the expenses of carrying on the proceedings to sale and foreclosure were avoided.

Judgment.
Scott, J.

Were it not for the fact that Mrs. Walker received a substantial benefit from these postponements and one which the evidence shows she would not otherwise have received, I think that I would be obliged to hold that as she was not consulted with respect to them, and did not assent to them, she would not be liable for the costs occasioned by them. I think, however, that where she has received and accepted that benefit she should pay the costs and expenses incurred in obtaining it. *In re Snell*,[2] so far as I can gather from the note of it in Morgan & Wurtzberg on Costs, at p. 502, appears to support this view. In that case the solicitor had a retainer to act generally for a company and also a specific retainer to conduct a chancery suit on its behalf. Being employed by another client to go to America he collected information on behalf of that company and in furtherance of their suit, but without special instructions. On his return to England he reported to the company what he had done, and they made use of the information he had obtained. The Court of Appeal held that under the special circumstances of the case he was entitled to charge the company for his professional services in America.

For these reasons I am of opinion that the costs and expenses allowed in respect of the several postponements should stand.

As to the fourth ground: on the 22nd November, 1897, Mr. McCarthy wrote Mrs. Walker with respect to these costs as follows: —

"We issued a writ against Smith at one time hoping that we would be able to make something on the judgment, but we never went on after serving him as we did not see much prospect of making the money just then. We took these proceedings without instructions from you except general instructions we had, and therefore will not charge you anything for what was done in that matter unless you wish to go on and sign judgment, in which case the costs will be about $20.00; we would make them $20.00, although I see by making up the bill that they would amount to $32.00.

[2] 5 Ch. D. 815; 36 L. T. 534; 25 W. R. 736.

We think it would be wise on your part to have judgment signed. This, however, is for you to decide. We shall not do anything further without your instructions, nor shall we charge anything for the work done in that matter without instructions."

Judgment.
Scott, J.

No further instructions appear to have been given by Mrs. Walker, but Mr. McCarthy now contends that the promise contained in this letter not to charge these costs was made without any consideration, and is therefore not binding upon him, and that as the order for taxation did not reserve to Mrs. Walker the right to dispute the retainer to bring the action, the retainer must be taken to be admitted, and that he is therefore entitled to recover them.

It may appear unreasonable, that in the face of his unconditional promise not to charge these costs, he should now seek to charge them, but as he has chosen to rely upon his strict legal right with respect to them, I must hold that he is legally entitled to them.

As to the first ground (after referring to several items in which a counsel fee has been charged on various applications to postpone the sale), I cannot find that there was any evidence before the clerk as to whether any of the applications, in respect of which these fees are charged, were made by an advocate. It is shown that Mr. Bangs, an advocate, made two applications in respect of these proceedings, but I cannot find that any fees are charged in respect of them. In my experience I have never known a counsel fee to be allowed in respect of an application made by a clerk of the advocate or solicitor, and in my opinion such an allowance is improper.

As I am aware that applications such as these are often made by the clerks of the advocates conducting the proceedings I refer the bills to the clerk with a direction to disallow all counsel fees charged in respect of applications which are not shewn to his satisfaction to have been made by an advocate. The advocates are to be permitted to adduce further evidence as to this.

Judgment.
Scott, J.

As to the amount of the counsel fees I am of opinion that not more than $2.00 should be allowed in respect to the applications to postpone the sales, as they are common applications.

Item:—Commission on collection, 10 per cent. on first $200, and 5 per cent. on balance, $33.05.

The evidence as to this item is as follows:—Mr. Bangs, as to the $400 collected from the mortgagor, says:—"That previous to the receipt of said $400, the said firm of McCarthy & Bangs had numerous conferences with and attendances on the said James Walker. Some of these attendances were to try and persuade him to make payments, and others were when he would come to the office of said McCarthy & Bangs making propositions for payments—trying to get time on postponement of proceedings then going on; that the firm had a great amount of trouble with said Walker in trying to get and obtaining the payment of said $400, paid by him which they have not charged in their itemized bill of proceedings for foreclosure, and for which they have charged a commission as shown by their account rendered.

Mr. McCarthy corroborates these statements and also states that his firm received two sums of about $50, which came from a chattel mortgage which had been given by one Brown to Mrs. Walker, which collection was made by reason of numerous letters written by him and his firm to said Brown, and also by letters written to and received from the firm of Beck & Emery, advocates of Edmonton, who were employed by McCarthy and Bangs to make said collection. He also states that the firm of McCarthy & Bangs received no payment whatever for their special services rendered by them for Mrs. Walker in connection with that collection, that they are in his belief justly and truly entitled to claim the amount charged for in the summary, and that had it not been for the special efforts of the firm in that behalf, in respect to the collection from said James Walker the said sum of $400 would not have been recovered.

Judgment.
Scott, J.

It was contended upon this evidence that the item should be allowed, and the judgment of ROULEAU, J., in *Eichorn* v. *Lougheed* (not reported), was cited in support.

In that case the defendants, a firm of advocates, collected a sum of $704 for the plaintiff, and having deducted $70, for commission on collection, remitted plaintiff the remainder. Plaintiff then sued for the $70, whereupon defendants produced what appears to have been an itemized bill of costs for the services rendered by them in making the collection, the bill amounting to more than $70. As the services were proved to have been performed, the plaintiff's action was dismissed.

The learned Judge in giving judgment says as follows: "Although an advocate has no right to charge a percentage for collection to his client unless there be a special agreement to that effect, still he has a right to be compensated for his professional services by producing or tendering a regular bill to that effect."

In the present case no bill of costs for services included in the commission has been produced. There is only a general allegation that services to the value of the amount charged were rendered. There is no means of ascertaining whether those services are properly charged against the client, or whether those charges are reasonable, and in accordance with the tariff. If such a course were permitted I see no reason why an advocate should not be permitted in all cases to render a bill for a lump sum instead of specifying the items of his charges.

In Cordery on Solicitors, at p. 247, it is stated that where a solicitor charges an unexplained gross sum, the solicitor may supply an explanation of it on taxation. I think, however, that the explanation given in this case is not sufficient, and that it must be such an one as will enable the taxing officer to ascertain whether the charges for the services included in the item are reasonable and proper.

In Cordery on Solicitors on the same page referred to it is stated that a charge for "attending a great many

Judgment. Scott, J.

times" is too vague. The explanation given of the item in question leaves the item still open to that objection.

This item must therefore be disallowed.

The bills are referred back to the clerk to make the amendments I have directed and complete the taxation in accordance with the amendments.

As each party has succeeded with respect to certain portions of the items in dispute there will be no costs of the review.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

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## KELLY v. THE ALASKA MINING AND TRADING CO.

*Maritime law—Inland Waters Seamen's Act — Seaman's wages — Maritime lien—Admiralty jurisdiction of Supreme Court N.W.T.*

The Supreme Court of the North-West Territories has concurrent jurisdiction with the Exchequer Court of Canada in Admiralty matters inasmuch as the Court of Chancery in England had on the 15th July, 1870, concurrent jurisdiction with the Court of Admiralty.

[ROULEAU, J., *April 15th, 1899.*

The statement of claim in this action was as follows:

1. The defendants are an incorporated company doing business in the North-West Territories, and during the times hereinafter referred to, were, and still are the owners of two certain vessels which are ships within the meaning of "The Inland Waters Seamen's Act," and are known as the "Alpha" and the "M. M. Chessron," and which are used for navigation on the waters of the Athabasca, Slave and MacKenzie rivers, navigable inland waters of Canada.

2. The plaintiff was a seaman, within the meaning of "The Inland Waters Seamen's Act," on board the said ships from the 30th May, 1898, to the 18th October, 1898.

Statement.

3. Accounts were stated in writing on or about the 30th October, 1898, between the plaintiff and the defendants in respect of the plaintiff's wages, whereby it was stated and agreed that there was on that date due for wages to the plaintiff the sum of $450.

4. The ship "Alpha" is now lying at Fort McMurray, on the Athabasca river, and the ship "M. M. Chessron" at Smith Landing on the Slave river.

The plaintiff claims:—

(1) Payment of the sum of $450 with interest, from the 30th October, 1898.

(2) An order declaring the plaintiff to be entitled to a lien upon the said ships for the amount of his said claim, with interest and costs.

(3) A receiver and injunction order.

*N. D. Beck, Q.C.*, on the 10th March, 1899, applied to SCOTT, J., at Edmonton *ex parte* on affidavit supporting the allegations of the statement of claim for an order appointing a receiver to take and hold possession of the vessels until further order. His contention was as follows:

The Supreme Court of the North-West Territories, by the North-West Territories Act, R. S. C. c. 50, s. 48, has the jurisdiction which was on the 15th July, 1870, used, exercised and enjoyed by the Superior Courts of law or by the Court of Chancery or by the Court of Probate in England.

The Court of Chancery had concurrent jurisdiction with the Court of Admiralty in cases of necessaries and wages creating a lien. Digest of English Case Law, vol. 13, tit. "Shipping," col. 965, citing *Allport* v. *Thomas*;[1] the report of which is, however, inaccessible. (See foot-note 5 *infra*.)

There is a lien for seamen's wages by general maritime law. See cases cited in same volume col. 119, and an article in 12 Can. L. T., p. 201.

There is a general maritime law independently of the Court which may enforce it: *The Patria*.[2]

[1]Gilbert Eq., 227. [2]41 L. J. Adm. 23; L. R. 3 A. & E. 436; 2[illegible] L. T. 849.

Argument.

To preserve and enforce a maritime lien, a receiver order is an appropriate remedy: *Williamson* v. *The Manauense*.[3]

The Merchants Shipping Act, 1854, 17 & 18 Vic. c. 104 (Imp.), extends to the colonies (section 2), *i.e.*, no doubt so far as the conditions make it applicable. Section 288 provides for Colonial Legislatures applying and adapting the Act. The Inland Seamen's Act, R. S. C. c. 75, is such an applying and adapting. Sections 30-35, and section 35*a*, added by the amending Act, 56 Vic. (1893) c. 24, correspond to sections 188-91 of the Imperial Act. The vessels in question are "ships" and the plaintiff a "seaman" under s. 2, ss. (*a*) and (*c*). See also The Merchant Shipping Act, 1876, 41 & 42 Vic. c. 31, s. 44.

The Colonial Courts of Admiralty Act, 1890, 53 & 54 Vic. c. 27 (Imp.)—bound with the Dominion Statutes of 1891—provides section 2, sub-section 2, that the jurisdiction of a Colonial Court of Admiralty shall be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise; section 3 provides that the Legislature of the colony may declare any Court of unlimited jurisdiction to be a Colonial Court of Admiralty; provided that any such colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

The Canadian Admiralty Act, 1891, 54 & 55 Vic. c. 29 (brought into force by Order-in Council 2nd October, 1891), after declaring the Exchequer Court of Canada to be a Colonial Court of Admiralty provides (section 4) that its jurisdiction, powers and authority shall be exercisable and exercised throughout Canada, and the waters thereof, whether tidal or non-tidal or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all the

[3]19 Can. L. T. 23 (Brit. Col.).

Argument.

rights and remedies in all matters, including cases of contract and tort, and proceedings *in rem* and *in personam*, arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under the Colonial Courts of Admiralty Act, 1890.

These Imperial and Canadian Acts show that the general maritime law is applicable to inland non-tidal waters, and the Court of Exchequer has constantly exercised its Admiralty jurisdiction on that assumption. This being so this Court has equal concurrent jurisdiction in Admiralty matters.

Judgment was reserved.

SCOTT, J.—In this action the plaintiff claims that he was a seaman within the meaning of "The Inland Water Seamen's Act," on board the defendant company's ships "Alpha," and "M. M. Chessron," which are used for navigation of the Athabasca, Slave and MacKenzie rivers in the Territories, and that a certain sum is due him as such seaman. He claims payment of the sum due him for wages as such seaman, and also claims an order declaring him to be entitled to a lien on said ships for the amount of his claim with interest and costs, and a receiver and injunction order.

Mr. Beck, Q.C., on behalf of the plaintiff applied to me on 10th instant, at the Edmonton Sittings for the appointment of a receiver to take possession of said ships and to hold possession thereof, until further order. I reserved judgment on the application.

After considering the matter, I cannot satisfy myself that I have jurisdiction to make the order applied for.

It was admitted by Mr. Beck, when making the application, that the order applied for would be in the nature of a proceeding *in rem* for the purpose of enforcing the plaintiff's lien for wages, and could not be supported on any other ground.

The powers and jurisdiction of the Admiralty Division of the High Court of Justice in England have not been

Argument.

conferred upon this Court (see N.-W. T. Act, s. 48). It may be that the Admiralty Division did not possess jurisdiction in the matter for wages by seamen in inland waters; the jurisdiction of that Court with respect to wages of seamen generally must be looked at to ascertain by what Courts here the jurisdiction with respect to wages of seamen in inland waters is possessed.

In Smith's Admiralty Practice, p. 4, the author, after discussing the conflict between the Admiralty Court and the Common Law Courts as to jurisdiction in admiralty matters, says: "Ultimately the Admiralty Judges, although compelled to abandon their claim to exclusive maritime jurisdiction, exercised undisputed authority in those cases in which the common law could give no redress.

The exclusive jurisdiction so left to the Admiralty Court included (5) all suits for seamen's wages."

By The Maritime Jurisdiction Act, 1877, "The Maritime Court of Ontario" was constituted and was given the same jurisdiction within its limits as was possessed by any Vice-Admiralty Court. Section 1 provides that, save as excepted by that Act, all persons should have in the Province of Ontario the like rights and remedies in all matters, including cases of contract and tort, and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade or commerce, on any river, lake, canal or inland water of which the whole or part is in the Province of Ontario, as such person would have in any existing British Vice-Admiralty Court or the process of such Court extended to said Province.

In Can. Law Times, vol. 4, p. 160, it is stated that until the passing of that Act and the establishment of the Maritime Court of Ontario, the seamen had no remedy in that Province, except by a personal action against the master or owner for his wages.

I can find nothing in The Inland Waters Seamen's Act which, either directly or indirectly, confers upon this Court jurisdiction to enforce a seamen's lien for wages.

Argument.

By the Imperial Act, "The Colonial Courts of Admiralty Act, 1890, it is provided that every Court of law in a British possession, which is for the time being declared in pursuance of the Act to be a Court of Admiralty, or, which, if no such declaration is in force in the possession, has therein unlimited jurisdiction, shall be a Court of Admiralty with the jurisdiction mentioned in the Act, and may, for the purposes of that jurisdiction, exercise all the powers which it possesses for the purpose of its civil jurisdiction, and that, subject to the provisions of the Act, its jurisdiction shall be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England.

Power is also given to the Legislature of any British possession to declare any Court of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and also to confer upon any inferior or subordinate Court such partial or limited admiralty jurisdiction as may seem meet.

This Court, although it may be deemed to be a Court of unlimited civil jurisdiction, does not possess any jurisdiction in Admiralty matters under that Act, because the Parliament of Canada has, by The Admiralty Act of 1891, expressly declared that the Exchequer Court of Canada shall be a Colonial Court of Admiralty under that Act, and as such shall have and exercise all the jurisdiction, powers, and authority conferred by that Act and by the Imperial Act referred to.

Section 4 of the Admiralty Act of 1891, further provides that the jurisdiction, power and authority referred to, shall be exercisable *and exercised* by the Exchequer Court throughout Canada, and the waters thereof whether tidal or non-tidal or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court as elsewhere therein, have all the rights and remedies in all matters (including cases of contract and tort and proceedings in *rem* and *in personam*) arising out of, or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial

Argument.

Court of Admiralty under The Colonial Courts of Admiralty Act, 1890."

It was contended by Mr. Beck, that the Court of Chancery in England had—and consequently this Court has—concurrent jurisdiction in Admiralty matters.

I cannot find in any of the Canadian reports any reference to any case where such jurisdiction has been exercised by any Superior Courts of ordinary civil jurisdiction in any of the Provinces, except the Court of Exchequer.

I have been unable to refer to the report of *Allport* v. *Thomas*, which was cited by Mr. Beck on the argument.

The application may be renewed, if thought advisable.

On a later date *Beck*, Q.C., renewed the application at Edmonton before SCOTT, J. He cited the following additional authorities on the concurrent jurisdiction of the Court of Chancery: *Blad's Case*,[4] *Blad* v. *Bamfield*,[5] *Rex* v. *Carew*,[6] *Denew* v. *Stock*.[7]

The learned Judge objected that the jurisdiction conferred upon this Court by the N.-W. T. Act, was that "used, exercised and enjoyed" by the Court of Chancery on the 15th July, 1870; that the cases cited were of very early date and it would appear that the Court of Chancery had not used or exercised such jurisdiction, if it possessed it, for three centuries, and that it was therefore questionable whether, assuming the Court of Chancery in England originally had jurisdiction, the intention of the N.-W. T. Act was to convey a jurisdiction so long obsolete. Counsel contended that if the Court of Chancery ever had the jurisdiction that jurisdiction could be taken away only by express legislative enactment; that the non-exercise by the Court of Chancery of Admiralty jurisdiction for a long period of time was accounted for by the existence of the Admiralty Court with its more convenient and expeditious procedure; that the word "and" in the words in the N.-W. T. Act "used, exer-

[4](1673) 3 Swanst. 603. [5](1674) 3 Swanst. 604; 19 R. R. 285; (see foot-note 2, *infra*). [6](1682) 3 Swanst. 669; 1 Vern 54; (see foot-note 3, *infra*). [7]3 Swanst. 662; Rep. t. Finch, 301, 302, 437; *sub-nom Stock* v. *Denew* Ca. in Chy. 305; (see foot-note 4, *infra*).

cised and enjoyed," must be interpreted "or:" for it could not have been intended that the jurisdiction of the Territorial Courts should be depended on an enquiry—which might extend to many topics—as to what jurisdiction these Courts in England were in fact actually exercising on the 15th July, 1870, or approximately thereto. Argument.

Counsel was proceeding to contend that apart from the authority of these cases the claim of lien, involving in all probability the taking of accounts and the settling of priorities, gave the Court jurisdiction, when, as owing to the pressure of business before the learned Judge it would probably not be possible for him to give a decision for some length of time, it was arranged that the application should be renewed before ROULEAU, J., at Calgary.

On the renewal of the application before ROULEAU, J., at Calgary, *James Muir*, Q.C., for the plaintiff, in addition to the arguments and authorities already mentioned, referred to the following:

On the point that the Court of Chancery had jurisdiction: *Haley* v. *Goodson*,[8] *Stock or Storke* v. *Cullen*,[9] *Love* v. *Baker*,[10] *MacNamara* v. *Macqueen*.[11] On the point that the Court of Chancery had jurisdiction on the ground of lien: Snell's Eq., 6th ed., tit. "Of Liens," p. 328; Story's Eq. Jur., s. 506. On the point that the jurisdiction of a Superior Court could not be ousted except by the clearest legislative enactment: Hardcastle on Statutes, pp. 140-330. On the point that the inland waters are within the admiralty jurisdiction and vessels thereon subject to the general maritime law: *Regina* v. *Sharpe*, 5 P. R. 135, and the decisions of the Court of Exchequer in Admiralty cases.

[*April 15th, 1899.*]

ROULEAU, J., in an oral judgment, adopted the argument of counsel for the plaintiff and made the order as asked.

*Receiver order granted.*

REPORTER:

The Editor.

[8]2 Mer. 77; 16 R. R. 145. [9]Jones, 66; 3 Keb. 598. [10]1 Ch. Ca. 67; Nels. 103. [11]Dick. 223.

Note. (NOTES BY THE EDITOR.)

(1) The case was not defended; but in the distribution of moneys in the hands of the sheriff under the Creditors' Relief Ordinance no exception was taken to the plaintiff's claim to be paid in priority to the execution creditors under whose execution the vessels had been sold subject to the rights of the plaintiff.

(2) In the Revised Reports the passage set out below is omitted from the report of *Blad* v. *Banfield*, following the words: "I said never was any cause more properly before this Court than the case in question":—first, as it relates to a trespass done upon the high sea, which though it may seem to belong to the cognisance of the Admiral, yet I took this occasion to show that the Court of Chancery hath always had an admiral jurisdiction, not only *per viam appellationis*, but *per viam evocationis* too, and may send for any cause out of the Admiralty to determine it here; of which there are many precedents in Noy's MSS. 88; and in my little book, in the preface, *de officio Cancellarii*, s. 18; and in my parchment book in octavo, tit. *Admiralty* (a); secondly, as it had relation to articles of peace, all leagues and safe conducts being anciently enrolled in this Court. That it is very true this cause was dismissed from the Council Board, being not looked on there as a case of state, because for aught appeared to them, it might be a private injury, and unwarrantable, and so fit to be left to a legal discussion; but now, the very manner of the defence offered by the defendants had made it directly a case of state; for they insist upon the articles of peace to justify their commerce, which is of vast consequence to the public; for every misinterpretation of an article may be the unhappy occasion of a war; and if it had been known at Board that this would have been the main part of their case, doubtless the Council would not have suffered it to depend in Westminster Hall.

(3) The following is an extract from the judgment in *Rex* v. *Carew*:—

And first I observed, that this case was properly in Chancery upon many accounts, not only as it was a *scire facias* to repeal letters patent, but as it was a cause of state; and likewise as it was a marine cause, and did concern depredations on the sea, in which cases the Chancery as well as the Admiralty hath a clear jurisdiction, and this appears by what was said in *Peter Blad's* case and by many records and precedents cited in my Parliament MSS., tit. *Admiralty*, and tit. *Chancery*; and is most expressly so settled and enacted in a statute not printed: viz., 31 H. 6 Rot. Pl. No. 68 (5 Rot. Parl. 268).

(4) The following is an extract from the judgment in *Denew* v. *Stock*:—

I said (as before in *Peter Blad's* case, the *Dane*, that the Chancery had undoubtedly an admiralty jurisdiction, but there was no use of it here, for the examination of the fact can now be carried no further; *ergo*, the law being against the plaintiff, equity is so too, and the bill must be dismissed.

(5) The following is the full report of *Allport* v. *Thomas;* Term Paschæ; 12 George I., in Exchequer—On a marine contract, relief prayed against executor.

A person that had furnished tackling for a ship, that was afterwards sold, by his bill prays discovery of the personal estate of one of the part-owners, who was dead, and to have relief against his executor and the surviving part-owners.

Note.

Mr. *Ward*, senior, for the plaintiff said that by the civil law the bottom of the ship was liable to answer for the tackle and furniture which the defendants had contracted for and here they having sold the ship, they were proper to demand satisfaction out of the profits arising by such sale, and as their bill was proper to have a discovery of the personal estate of the part-owner that was dead, so from hence they would be entitled to relief against the others; for in the case of *Dupins* versus *Duke of Kingston*, which was a bill brought by a milliner against the Duke, as administrator of his son, for a discovery of assets, and to have a debt which was due to her from his son discharged, it was laid down as a rule that discovery should draw with it relief.

Mr. *Bunbury* for the defendant said, that if that was to be taken as a general rule the common law would be of little use, for then always after the death of one of the parties, they might bring their bill here upon any contract; besides, here they should have proceeded in the Court of Admiralty to have subjected the bottom of this ship, and that this Court could not do it.

Chief BARON GILBERT said, that the chief distinction upon the Rule, that discovery should draw with it relief, seemed to be, that where a discovery is prayed, and a liquidated debt admitted by the answer, the Court might then proceed to give relief; but where the debt was unliquidated being uncertain, and founding in damages, it was proper for a jury to ascertain it, there being nothing for a Court of Equity to found a determination on; that though this case was within the mercantile law, yet it being admitted by the answer that the charge was for tacking, etc., a Court of Equity must grant them the redress as a Court of Admiralty would, viz., upon the bottom of the ship, and that it would be very hard to send them back again there to obtain relief; and that all the part-owners ought to make satisfaction, having received the profits of the voyage, which the ship was enabled to perform, by the plaintiff's furnishing the tackle, etc.

BARON HALE thought the case of the *Duke of Kingston* should have gone no further than a discovery, and after that should have proceeded at law; that in this case the proceeding in this Court was very proper, and they might go on; for in the Court of Admiralty seamen's wages are recoverable, and they are likewise chargeable properly upon the bottom of the ship, and yet the Court of Chancery retains bills for them; and SIR JOHN TREVOR, late Master of the Rolls, used to say, that a Court of Equity had a concurrent jurisdiction with them.

## TORONTO RAILWAY COMPANY v. BAIN.

*Speedy judgment—Rules 103 and 104—Abridging time for return of summons.*

**Notwithstanding the provisions of Rule 548 a Judge has no power to abridge the time for the return of a summons for speedy judgment taken out under Rules 103 and 104 of the Judicature Ordinance.**

[SCOTT, J., *May 3rd, 1899.*

Statement. The plaintiff, after appearance by the defendant, obtained from ROULEAU, J., a summons under Rule 103 asking for an order that the defendant's appearance be struck out and that judgment be entered for the plaintiff. By special leave the summons was made returnable the next day after the issue thereof.

The application was heard in Chambers by SCOTT, J.

*R. B. Bennett*, for the defendant, took the preliminary objection that Rule 104 provides that the summons should be returnable four clear days after service thereof.

*P. McCarthy*, Q.C., for the plaintiff.

[*May 3rd, 1899.*]

SCOTT, J.—This is an application by the plaintiff company under Rule 103 to strike out the appearance entered by the defendant and for the entry of judgment for plaintiffs.

The summons was granted by ROULEAU, J., yesterday and was by special leave made returnable to-day.

Upon the return of the summons it was objected on behalf of the defendant that under Rule 104 there must be four clear days between the service of the summons and the return day, and that a Judge has no power under Rule 548 to abridge the time for the return.

Rule 104 provides that a copy of the summons and copies of the exhibits referred to, unless service of a copy of the exhibits be dispensed with by a Judge, shall be served at least four clear days before the summons is returnable. This gives the Judge a discretion as to dispensing with the service of the exhibits, but omits to give him any discretion as to abridging the time for the return.

Judgment.
Scott, J.

There are various rules which expressly give the Judge power to enlarge the time for taking certain proceedings. Rule 80 provides that a defendant shall file his defence within six days after appearance, or within such further time as may be allowed by a Judge for the purpose; and Rule 153 provides that a plaintiff shall deliver his reply, if any, within eight days after the delivery of the defence unless the time shall be extended by a Judge or the Court.

Rule 460 provides that, unles the Court or Judge gives special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion. (See Rule 471.) Then there is a rule, 475, which provides that every summons, excepting an originating summons, shall be served two clear days before the return day thereof, unless in any case it may be otherwise ordered.

Comparing the language of Rule 104 with that of Rules 460 and 475, I can come to no other conclusion than that the Legislature intended that in the case of ordinary motions and applications the time for the return may be abridged, but that in case of applications under Rule 103 it should not be abridged.

In my opinion Rule 548 does not give power to a Judge to abridge the time for the return of a summons under Rule 104, because such is not abridging the time for doing an act or taking a proceeding.

The hearing of an application is not the doing of an act or the taking of a proceeding. The fact that in certain cases the power is given for abridging the return day appears to me to support this view.

The application will be dismissed with costs to the defendant in any event on final taxation.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

## ARMOUR ET AL. v. DINNER ET AL.

*Counsel fees—Action for—Liability of solicitor or client—Mistake of legal rights—Principal and agent—Election.*

An advocate of the Territories (in whom are combined the functions of both barrister and solicitor) retained a member of the plaintiff firm (Ontario barristers and solicitors) as counsel, and the firm as solicitors, on an appeal for certain clients to the Supreme Court of Canada from a judgment of the Supreme Court of the North-west Territories.

The plaintiffs brought this action against both the clients and the advocate in the alternative, for their bill of costs as counsel and solicitors on the appeal.

*Held, per* SCOTT, J., the trial Judge—interpreting *Armour* v. *Kilmer*,[1] as holding that the client alone and not the solicitor is liable *prima facie*, *i.e.*, unless there is a special agreement, of which the effect is to transfer the liability from the client to the solicitor—that the contract of retainer, evidenced wholly by correspondence, constituted such a special agreement, and that therefore the advocate alone was liable to the plaintiff.

*Held*,, also, *per* SCOTT, J., following *Armour* v. *Kilmer*,[1] that an action lies for counsel fees.

On appeal to the COURT *in banc*.

*Held, per Curiam*—(1) That the contract was to be spelled out of the correspondence which took place up to the time the services sued for were performed, and that for the purpose of ascertaining the terms of that contract, the subsequent letters should not be looked at. *Lewis* v. *Nicholson*[2] referred to.

(2) That if the clients were liable by virtue of the original contract, the plaintiffs charging the advocate in mistake of their legal rights would not release the clients.

(3) That, differing from the opinion of the trial Judge, the advocates' letters were merely of such character as an advocate engaging counsel in the ordinary course would naturally write, and were not such, as under the decision in *Armour* v. *Kilmer*,[1] would render the advocate personally liable; but

*Held*, MCGUIRE, J., dissenting, and the majority of the Court declining to follow *Armour* v. *Kilmer*,[1] that on the retainer of counsel by an advocate, the advocate, and not the client, is *prima facie* liable.

*Held*, also, *per Curiam*, (1) that an action lies for counsel fees, *McDougall* v. *Campbell*,[3] and *Armour* v. *Kilmer*,[1] (on this point) followed.

(2) That inasmuch as the tariff of the Supreme Court of Canada does not apply as between solicitor and client, the plaintiffs were entitled to recover on a *quantum meruit*, *O'Connor* v. *Gemmell*[4] followed.

*Per* McGuire, J. (1) *Armour* v. *Kilmer*,[1] rightly decided that where a solicitor retains counsel, the liability is *prima facie* that of the client.

[1]28 O. R. 618. [2]21 L. J. Q. B. 311; 18 Q. B. 503; 16 Jur. 1041.
[3]41 U. C. Q. B. 332. [4]29 O. R. 47.

(2) If the plaintiff had the right to elect to charge either the advocate or the clients, the fact of the plaintiffs having drawn on the advocate for the amount of their bill of costs, was not such a definitive election as would release the clients: *Bottomley* v. *Nuttal*,[5] and *Priestly* v. *Fernie*,[6] referred to; nor *semble* would an action short of judgment have been such an election.

(3) The advocate was the agent of the clients, and therefore a contract between them limiting the amount of their liability was not binding on the plaintiffs unless communicated to them, nor were the plaintiffs bound to credit an amount paid to the advocate by the clients for the express purpose of payment to the plaintiffs, but which was not paid to them unless the plaintiffs had misled the clients into believing that the advocate had paid them., or possibly the plaintiffs had definitely elected to look to the advocate. *Davison* v. *Donaldson*,[7] and *Irvine* v. *Watson*,[8] referred to.

(4) The plaintiffs were entitled to judgment against the clients for the balance due the plaintiffs for counsel fees, and against the advocate for the balance due them for solicitor's charges, it being conceded that the clients were not liable for the latter.

[SCOTT, *J.*, *November 4th, 1898.*
[*Court in banc, June 8th, 1899.*

Statement.

The statement of claim alleged that the plaintiffs were barristers in Ontario, and solicitors of the Superior Courts of that Province, and as such entitled to practice as counsel and solicitors in the Supreme Court of Canada; that the defendant Bown retained the plaintiffs as counsel and solicitors practising in the Supreme Court of Canada in and in relation to an appeal by his co-defendants herein to the Supreme Court of Canada, from a decision of the Supreme Court of the North-West Territories in an action of Humberstone v. Dinner, wherein the defendants other than Bown were (with others) defendants; that Bown was the advocate in the case of Humberstone v. Dinner for his co-defendants in this action, and the plaintiffs alleged, as a first alternative, that by reason thereof and also by express verbal authority, Bown was the agent of his co-defendants to retain the plaintiffs, and that the defendants other than Bown were directly liable, and as a second alternative, that the defendant Bown was directly liable to the plaintiffs. Then followed particulars of the claim.

[5]28 L. J. C. P. 110; 5 C. B. N. S. 112; 5 Jur. N. S. 315. [6]34 L. J. Ex. 172; 3 H. & C. 977; 11 Jur. N. S. 813; 13 L. T. 208; 13 W. R. 1089. [7]47 L. T. 564; 9 Q. B. D. 623; 31 W. R. 277; 4 Asp. M. C. 601. [8]49 L. J. Q. B. 531; 5 Q. B. D. 414; 42 L. T. 810; affirming 49 L. J. Q. B. 239; 5 Q. B. D. 102; 42 L. T. 51; 28 W. R. 353.

Statement.

The defences raised to the plaintiff's claim were in substance:—

(1) Traverses of the material allegations. (2) An allegation by Bown that the retainer was that of his co-defendants and by them that the retainer was that of Bown. (3) An objection in law by Bown that the claim, showing he acted as advocate or agent only, disclosed no cause of action against him personally. (4) Objections in law by all defendants that counsel fees could not be sued for. (5) An allegation by the defendants other than Bown that they had retained Bown under a special agreement whereby he had agreed to conduct the appeal for a fixed sum, which had been paid to him. (6) An allegation by defendants Jackson & Grierson, a firm, of a payment to Bown, and a release in consideration thereof.

The case was tried at Edmonton before SCOTT, J., without a jury on the 10th, 11th, 12th, and 13th May, 1898.

*N. D. Beck*, Q.C., for the plaintiffs.

*A. C. F. Bown*, defendant, in person.

*Wm. Short* and *H. H. Robertson*, for the other defendants.

Judgment was reserved.

[*November 4th, 1898.*]

SCOTT, J.—Plaintiffs, who are barristers in the Province of Ontario and solicitors of the Supreme Court of Judicature in that Province and, as such entitled to practice as counsel in the Supreme Court of Canada, allege that defendant Bown retained and employed them in and in relation to an appeal of the other defendants to the Supreme Court of Canada from the decision of this Court *in banc* in the suit of Humberstone v. Dinner, the defendants, other than Bown being defendants in that suit; that, in pursuance of such retainer and employment plaintiffs rendered certain services and made certain disbursements as such counsel and solicitors, the amount of their bill therefor (particulars of which are given in the statement of claim) being $435.05.

Judgment.
Scott, J.

Plaintiffs further allege that defendant Bown was the solicitor in that suit for his co-defendants and claim, as a first alternative, that by reason thereof, and also by express verbal authority in that behalf, he was their agent to retain and employ the plaintiffs; and, as a second alternative, that he is directly liable to the plaintiffs.

In their particulars plaintiffs give credit for $144.62 received by them on account and claim a balance of $290.43. The principal items of the claim are as follows:

| | |
|---|---|
| Paid for printing appeal books and factums | $ 73 00 |
| Fee advising on appeal | 30 00 |
| Drawing factum | 50 00 |
| Fee revising proof of appeal book | 7 50 |
| Fee revising proof of factum | 4 20 |
| Fee on argument of appeal | 250 00 |
| | $414 70 |

The remaining items consist of attendances, letters and postage.

Defendants, other than Bown, among other defences, deny that he was their agent to retain plaintiffs in relation to the appeal, or that they retained the plaintiffs. They allege that Mr. Bown was an advocate of the Territories and as such entitled to practice in the Supreme Court of Canada, and they they employed him and no other for the purposes of the appeal and claim that if they are liable at all, they are liable only to him.

Shortly after the judgment of the Court *in banc* was pronounced, a meeting of the defendants was held at which Mr. Bown was instructed to procure the opinion of a leading counsel in Toronto as to the advisability of appealing therefrom. Mr. Bown recommended Mr. Armour, one of the plaintiffs, as the counsel whose opinion should be obtained, and it appears to have been understood by those present at that meeting that he would be consulted. In Mr. Bown's letter of July 20th, 1895, to Mr. Armour (Exhibit "D,")

Judgment.
Scott, J.

asking for his opinion, besides referring to various legal questions arising in the suit, he states as follows:

"I enclose you per book post this mail copy of appeal book and judgment of full Court, and wish your opinion in regard to the advisability of appealing to the Supreme Court of Canada. In the event of appeal, I shall have notice, bond, etc., prepared by you and have printing of appeal book done under your supervision in Toronto. * * * Kindly let me have your opinion as soon as possible together with a memo. of your fees, also of your fees at Ottawa. I have guarantee from nearly all the defendants to pay same on receipt of account."

Mr. Armour afterwards wrote advising the appeal, but made no reference to his fees at Ottawa, nor to the cost of the appeal beyond stating that the cost of the printing would not exceed $100.

After receipt of Mr. Armour's opinion, meetings of the defendants were held, at one of which they decided to go on with the appeal. Although no express instructions were given to Mr. Bown to retain Mr. Armour, it was understood by the defendants that he would be retained as counsel on the appeal. Any instructions that were given to him respecting it were given by Mr. Bown. He (Mr. Armour) never had any direct communication or consultation with any of the defendants respecting the matter.

On 14th April, 1896, plaintiffs wrote to Mr. Bown respecting a portion of the account now sued upon as follows (Exhibit "6"):

"We enclose herewith memo. of our account against you amounting to $355.27, together with a ledger statement showing a balance in our favour of $328.90, for which a cheque would oblige. Unless we hear from you to the contrary by the 28th inst. we shall assume that it would be convenient to accept our draft at sight for the above amount and bank charges and shall draw on that date."

To this letter Mr. Bown replied on 30th April (Exhibit "E") as follows:

"Humberstone v. Dinner. I duly received your account, but not till 24th inst. I have only something less than

$30 of the defendants' funds in my hands and they owe me much more than that. At present I cannot personally meet draft, so will have to call on defendants. I will personally attend to this matter and advise you further within ten days or a fortnight." Judgment. Scott, J.

On 6th May, 1896, plaintiffs wrote Mr. Bown (Exhibit "7") as follows:

"We have to-day received your letter of the 30th inst., and are disappointed to find that the defendants have not yet provided funds to meet the draft. We wrote you on 13th February, saying that we hoped the funds were on the way, but no remittance reached us. We think the parties should now make the payment which they probably expected to make sometime ago if they thought about it. The amount is only a small one to be paid by each if all contribute equally, and as we are in need of funds we have drawn at three days' sight for $328.90 and bank charges. This will enable you to collect, as the draft will not reach you as soon as this letter. Kindly protect the draft and oblige us."

On the 10th June, 1896, plaintiffs again wrote Mr. Bown (Exhibit "8") as follows:

"The draft, dated 6th May, at three days' sight for $329.70, being the amount of your account and bank charges, has been to-day returned to us unaccepted, the bank giving the reason that you have no funds from your clients to meet this. We have heard nothing whatever from you in answer to our letter, and we must point out that you and your clients are many hundreds of miles away. We have no control over your financial dealings with them, and if you have not collected the amount of our account we are not to blame for that. A considerable portion of our account consists of disbursements which are supposed to be paid in cash, and the counsel fees are also supposed to be cash. The work has now been done for some time, our best efforts were given to it and we are very much disappointed at having this result from our first transaction with you. We must request that you forward us a remittance to cover the account by the 25th inst. Failing this, we must take proceedings against you.

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Scott, J.

We regret very much that the matter should be in this position, but we can see no reason why the money should not have been collected in time to honour our draft."

Mr. Bown, on 10th August, 1896, wrote Mr. Armour (Exhibit "2") as follows:

"Humberstone v. Dinner. I fully expected to have been able to remit amount of your account this week. My clients have collected among themselves sufficient funds, but won't hand same over, asking reduction. Consequently I must face the matter myself, and as times are hard, it will put me about considerably. I shall have to ask you to accept remittances of $50 or so every few weeks and will make first next mail, 13th or 14th."

In answer to this, Mr. Armour, on 17th August, 1896, wrote Mr. Bown (Exhibit "3") as follows:

"I am in receipt of yours of 10th. It will be satisfactory to us if you make monthly payments of $50, all to come due if default made in one. We do not want to be hard on you, but we worked hard to win, as Mr. Justice King's judgment shows."

And again, on 18th August (Exhibit "4"), as follows:

"It occurred to me after I wrote you yesterday that as the delay is for your convenience only, I should add to my letter of yesterday that if you receive payment of your bill from your clients the monthly payments ought not to go on, but we should receive payment in full when you are paid. With that addition you may consider the arrangement made."

I have quoted this correspondence at some length because it appears to me to clearly show how the question of the liability for plaintiffs' account was viewed by them and defendant Bown, and to afford evidence of what their intentions were at the time it was incurred. That they both viewed it as a liability of defendant Bown and not that of the other defendants is beyond question. The account was rendered by plaintiffs to the former and he never repudiated his liability, but, on the contrary, admitted it, and plaintiffs

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Scott, J.

in their letter of 10th June, 1896 (Exhibit "8"), expressly state that they had no control over Mr. Bown's financial dealings with his clients, that they look to him for payment, and that if payment was not made they would take proceedings against him. Up to 2nd April, 1897, a short time before the commencement of this suit, no demand was made by them upon the defendants other than Bown for payment, nor any intimation given of any intention to hold them liable for its payment. Up to that time plaintiffs were continually pressing Mr. Bown for payment. True, they were urging him to obtain the money from his clients for the purpose, but that was because he was relying upon their non-payment to him as an excuse for his own default. Plaintiffs were in effect, saying to him: "Get money from your clients if you can to pay us; but pay us whether you get it or not."

Plaintiffs' counsel relied upon Mr. Armour's letter of 18th August (Exhibit "4") as indicating an intention to look to the other defendants, but I do not so interpret it. Reading that letter in conjunction with that of the previous day (Exhibit "3") what he says is, in substance, merely this: "You say you want time, because you cannot get money from those who owe you. We will therefore, give you time subject to the condition that if your debtors pay up you must pay at once." The words in Mr. Bown's letter of 20th July (Exhibit "D") to the effect that he had obtained a guarantee from nearly all the defendants to pay plaintiffs' account on receipt, were also relied upon by plaintiff's counsel as showing an intention that the other defendants were to be liable, but to my mind they contain no such indication. They do not indicate, for instance, that the other defendants had guaranteed the plaintiffs, but merely that they had guaranteed Mr. Bown. The only indication is that he had obtained the guarantee for his own protection. The plaintiffs' letters which I have quoted and the fact that they rendered their account to Mr. Bown alone, lead to the impression that they interpreted the words referred to in the same manner as I now interpret them.

Judgment.
Scott, J.

In *Armour* v. *Kilmer*,[1] cited by plaintiffs' counsel, it was held by Boyd, C., that a counsel's right of action for counsel fees is *prima facie* against the client of the solicitor retaining him and not against the solicitor. In that case there was no evidence of agreement beyond what arose from implication, and in that respect it differs from this case, because here there is, as I have already shown, strong evidence of the intention of the parties that the solicitor and not the client should be liable.

While the conduct of the plaintiffs subsequent to the retainer may not perhaps be material to the enquiry into the question of the liability of the defendants except in so far as it tends to show the intention of the parties at the time it was given, or that the plaintiffs had made their election, yet it may not be out of place to refer to the position which, as the evidence shows, the defendants other than Bown have been placed in by it. Relying on the fact that plaintiffs were looking to Mr. Bown alone for payment, the other defendants proceeded to deal with him respecting the settlement of his costs and disbursements, including the amount of the plaintiffs' account now sued upon. In addition to the amounts paid by them to him, which were paid over by him to plaintiffs, and credited in the particulars of claim, they paid him a further sum of $150 applied for by him for the purpose of payment to the plaintiffs and paid to him for that purpose, which sum he had failed to pay over. In addition to this, a debt of $104, due by him to two of the defendants, was released by them in consideration of the release by him to them of all claims for costs in the suit of Humberstone v. Dinner, and this was also done in consequence of his application for money to satisfy plaintiffs' demand. Upon the evidence it is open to question whether Mr. Bown has not only received from his co-defendants a sum considerably in excess of the amount he was entitled to apart from the plaintiff's claim. If his co-defendants were held to be liable to the plaintiffs for the amount sued on, the latter should perhaps be compelled to credit the amount received by Mr. Bown for them and not paid over by him.

Judgment.
Scott, J.

as the correspondence quoted shows that they authorized him to collect it, but I doubt whether they would be compelled to credit the contra account of $104, and the result might be that the defendants to whom it was payable would lose the account, having perhaps abstained from taking proceedings upon it in the belief that it was satisfied.

The question whether plaintiffs had elected to look to Mr. Bown as agent or to the other defendants as principals was urged before me, but, if the principle laid down in *Armour* v. *Kilmer*[1] is the true one, it appears to me to follow that plaintiffs never had the right to elect between them. As I understand that decision the client alone is liable and not the solicitor unless there is a special agreement, the effect of which is to transfer the liability from the client to the solicitor. I have already expressed the opinion that such a special agreement or understanding existed in this case, and, having so held, it is unnecessary for me to decide whether plaintiffs had the right of election or whether they did elect. If the right existed, I would be inclined to hold upon the evidence that they had elected to look to defendant Bown alone. At the conclusion of the trial, counsel for the defendants other than Bown applied for leave to amend their defences by setting up the defence that plaintiffs had so elected and thereby discharged these defendants, and also that defendant Bown was the agent of the plaintiffs to collect the money for them. It is, however, unnecessary for me to deal with that application.

The defences of defendant Bown are: That the counsel fees sued for are not recoverable on the ground that counsel cannot sue for their fees. That he did not retain the plaintiffs, but, as solicitor for his co-defendants, he obtained from plaintiff Armour an opinion as to the advisability of appealing, and thereafter employed him to argue the appeal. That under the direction of said Armour and without any request from him (Bown), plaintiffs superintended the printing of the appeal books and factums and forwarded same to defendants' agent at Ottawa and disbursed money in regard to such services. That he (Bown) paid said Armour $144.12,

Judgment.
Scott, J.

who paid same to plaintiffs, which sum is sufficient to cover the services so rendered. That if he (Bown) is liable at all, he is liable only for the plaintiffs' services for superintending, printing, etc., and not for any items charged in their bill of costs as counsel fees in the disbursement column thereof. That plaintiffs have never paid the counsel fees so charged, as paid to said Armour, nor are they in any way liable therefor, or under any promise or obligation to pay the same; and that the charges set forth in their bill of costs are unreasonable and excessive.

As to the right to sue for counsel fees, I agree with the opinion expressed by Boyd, C., in *Armour* v. *Kilmer*,[1] and hold that in the Territories they may be recovered by action.

Mr. Bown, upon being called upon by notice to admit facts duly admitted that all the services charged for by the plaintiffs were performed by them, except one of the two letters charged for by them for forwarding factums, and the fee of $5 charged for attending to hear judgment. He also admitted that the amounts charged by plaintiffs for those services are reasonable, except Mr. Armour's fee of $30 for advising as to appeal, his fee of $50 for drawing factum and his fee of $250 on the appeal. These he claimed to be excessive and unreasonable.

There is no evidence to show that the services charged in the two items wholly disputed by Mr. Bown were performed. As to the fee of $30 for advising on appeal, the evidence shows that when his co-defendants were considering whether this opinion should be obtained, he informed them that Mr. Armour's fee would be from $30 to $40. The only evidence as to the fee of $50 for drawing factum is that the advocate for the respondent was taxed a fee of $40 for drawing his factum, and the only evidence as to the fee of $250 is that the respondents' counsel was taxed a fee of $200 in the same appeal.

There is, however, a further fact bearing upon the question of the reasonableness of all these charges for counsel fees, viz., that a bill of costs in detail showing these charges was rendered by plaintiffs to Mr. Bown nearly a year before this

Judgment.

Scott, J.

action was commenced, and there is nothing to show that up to the time of filing his defence he ever disputed any of these charges, or any portion of the bill so rendered, but, on the contrary, it was shown that he promised payment of the amount of the bill without asking or suggesting that any reduction in the amount thereof should be made. I think this should be taken into consideration in arriving at the amount plaintiffs are entitled to, especially as it is difficult to estimate the exact value of such services. Taking that fact into consideration, I hold that the charges referred to are not unreasonable or excessive.

The ground upon which Mr. Bown disputes the charge of $5 for attending to hear judgment is that his Ottawa agent has charged him for that service.

It may be that he was not made aware of this at the time he promised payment of plaintiffs' bill. I therefore think that he was entitled to put plaintiffs to strict proof of the services having been rendered.

Judgment for plaintiffs against defendant Bown for $285.43, and interest thereon, $31.35, in all $316.78.

Judgment for the other defendants against plaintiffs.

The plaintiffs appealed, moving the Court *in banc* that the judgment against the plaintiffs in favour of the defendants other than Bown be set aside, and, in so far as necessary, that the judgment against the defendant Bown in favour of the plaintiffs should also be set aside, and a judgment entered in favour of the plaintiffs against the defendants other than Bown in such manner, (*a*) that the defendants other than Bown should, either collectively or individually, be declared to be liable to the plaintiffs jointly or severally with Bown, or (*b*) that the defendants other than Bown should be declared to be liable to the plaintiffs alternatively with Bown, but so that the plaintiffs shall not be compelled to elect between the liability of the defendant Bown and that of the other defendants before verdict against both, or (*c*) that the defendants other than Bown should alone be declared to be liable to the plaintiffs.

Argument.

The appeal was argued at Calgary on the 24th and 25th January, 1899.

*N. D. Beck*, Q.C. (*C. C. McCaul*, Q.C., with him), for the appellants, the plaintiffs.

(1) The contract was perfected by Bown's letter to Armour, 20th July, Exhibit "D," and Armour's letter in reply. The contract being once perfected and its expressions unambiguous, though its legal effect be disputed, the subsequent correspondence cannot be overlooked as to construe the contract already made, though no doubt if it were claimed, as, however, is not the case, that it constituted a new substituted contract, this could be done: *Lewis* v. *Nicholson*.[2]

(2) The correspondence shows a contract between Dinner *et al.* (through Bown as their agent) and the plaintiffs that is, the common case of a solicitor engaging counsel and making disbursements (outside of such ordinary disbursements as clerk's fees) for the solicitor's clients. In such cases it is rightly held that the solicitor is merely the client's agent: *Armour* v. *Kilmer*,[1] *O'Connor* v. *Gemmell*,[4] *Robins* v. *Bridge*,[9] *Lee* v. *Everest*,[10] *Royle* v. *Busby*,[11] following *Maybery* v. *Mansfield*,[12] and overruling *Brewer* v. *Jones*,[13] *Hartop* v. *Jukes*,[14] *Ross* v. *Fitch*,[15] *DeBusshe* v. *Alt*,[16] Ency. Laws of England, vol. 10, pp. 379 *et seq.* The evidence shows that Bown was expressly authorized to retain the plaintiffs.

(3) Bown having contracted clearly as agent, was not personally liable at all, and therefore, a case of discharging Dinner *et al.* as principals by electing to charge Bown as agent does not exist. Apart from usage, an agent contracting as such is not liable even where the fact of agency only, though not the name of the principal, appears. The cases relating to brokers are distinguished on the ground of usage. Neither "laxity of practice," *Morris* v. *Cleasby*,[17] nor mistake

[1] 7 L. J. Ex. 49; 3 M. & W. 114; 6 D. P. C. 140; M. & H. 357. [2] 26 L. J. Ex. 334; 2 H. & N. 285; 5 W. R. 759. [3] 50 L. J. Q. B. 196; 6 Q. B. D. 171; 43 L. T. 717; 29 W. R. 315. [4] 16 L. J. Q. B. 102; 9 Q. B. 754; 11 Jur. 60. [5] 24 L. J. Ex. 143; 10 Ex. 655; 3 C. L. R. 369; 1 Jur. N. S. 240; 3 W. R. 215. [6] 1 M. & S. 709; 2 M. & S. 438. [7] 6 O. A. R. 7. [8] 47 L. J. Ch. 381; L. R. 8 Ch. D. 286; 38 L. T. 370. [9] 4 M. & S. 566, p. 575; 16 R. R. 544, p. 550.

as to legal rights, *Morgan* v. *Couchman*,[18] can prejudice the true legal position: *Fairlie* v. *Fenton*,[19] *Southwell* v. *Bowditch*,[20] *Gadd* v. *Houghton*,[21] impugning and in effect overruling *Paice* v. *Walker*,[22] *Fleet* v. *Murton*,[23] *Hutchinson* v. *Tatham*,[24] *Pike* v. *Ongley*,[25] Evans on Principal and Agent, 231, 267-68, 453; Pollock on Contracts, 96 *et seq.*; Smith's Mer. Law, 172; Am. & Eng. Ency. Law, 2nd ed., vol. II., 1119, 1120-21, 1124, 1136 *et seq.*; *Green* v. *Kopke*.[26] That the contract is that of the clients, not of the advocate, is also shown by putting the converse case; for the right of suing and the liability to be sued are correlative. Had the plaintiffs been guilty of negligence the right of action therefor would have been in Dinner *et al.* not in Bown. Argument.

(4) If a case for election can arise, an election to charge Bown solely has not been established. The correspondence subsequent to the perfecting of the contract is such as *a priori* would naturally be expected under the circumstances, and is without colour either way. *Lee* v. *Everest*,[10] and Dinner *et al.* are still liable: *Calder* v. *Dobbell*,[27] annotated in Ruling Cases, vol. II., p. 457.

*Wm. Short*, for the respondents—the defendants other than Bown.

(1) The English authorities are clear that a barrister cannot sue for his fees. *Kennedy* v. *Broun*,[28] *In re Le Brasseur & Oakley, Ex p. Terrell*,[29] and though it is held otherwise in Ontario, *McDougall* v. *Campbell*[3] and in Quebec, *The Queen* v. *Doutre*,[30] yet the English decisions should be held applicable and binding in the Territories.

[18]23 L. J. C. P. 36; 14 C. B. 101; 2 C. L. R. 53; 2 W. R. 59. [19]39 L. J. Ex. 107; L. R. 5 Ex. 169; 22 L. T. 373; 18 W. R. 700. [20]1 C. P. D. 374; 45 L. J. C. P. 630; 35 L. T. 196; 24 W. R. 838. [21]1 Ex. D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975. [22]39 L. J. Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789. [23]41 L. J. Q. B. 49; L. R. 7 Q. B. 126; 26 L. T. 181; 20 W. R. 97. [24]42 L. J. C. P. 260; L. R. 8 C. P. 482; 29 L. T. 103; 22 W. R. 18. [25]56 L. J. Q. B. 373; 18 Q. B. D. 708; 35 W. R. 534. [26]18 C. B. 549; 25 L. J. C. P. 297; 2 Jur. N. S. 1049; 4 W. R. 598. [27]40 L. J. C. P. 89; 224; L. R. 6 C. P. 486; 25 L. T. 129; 19 W. R. 978. [28]13 C. B. N. S. 677; 32 L. J. C. P. 137; 9 Jur. N. S. 119; 7 L. T. 626; 11 W. R. 284. [29](1896) 2 Ch. 489; 65 L. J. Ch. 763; 74 L. T. 717; 45 W. R. 87. [30]6 S. C. R. 342; 9 A. C. 745; 53 L. J. P. C. 85; 51 L. T. 669.

Argument.

(2) Bown undertook to conduct the proceedings for a fixed sum, which was paid to him, and he had, therefore, no authority to pledge his clients' credit generally. The plaintiffs were bound by the limitation of his actual authority; in fact, as the correspondence clearly shows, they looked solely to Bown: *Cole* v. *North-Western Bank*,[31] *Thomson* v. *Clydesdale*.[32] We are agreed that there is no right of election; but it is because Bown alone—not Dinner *et al.*—is liable: *Thompson* v. *Davenport*,[33] Smith's Leading Cases, 13th ed., notes to *Addison* v. *Gandesequi* and *Patterson* v. *Gandesequi*.

(3) A solicitor has no implied authority to retain counsel on the client's credit, and even if he has such implied authority, it will be presumed that he pledged his own credit. *Armour* v. *Kilmer*,[1] so far as it holds the contrary, should not be followed: *Mostyn* v. *Mostyn, Ex p. Barry*,[34] *Scrace* v. *Whittington*,[35] *Waller* v. *Holmes*,[36] *Robbins* v. *Fennell*.[37]

(4) There is no evidence of the services charged for being done, nor of their value.

*Beck*, Q.C., in reply.

Judgment was reserved.

[*June 8th, 1899.*]

Wetmore, J.—While I agree with the learned trial Judge in the conclusion which he has reached in this case, I cannot concur with the reasons by which he has reached that conclusion. If Boyd, C., has laid down the law correctly in *Armour* v. *Kilmer*[1] in holding that in Ontario solicitors who employ counsel have "implied authority to pledge the client's credit for the payment of counsel fees," and that legal privity exists "between client and counsel, though a

[31] L. R. 10 C. P. 354, pp. 371, 376; 44 L. J. C. P. 233; 32 L. T. 733. [32] (1893) A. C. 282. [33] 9 B. & C. 78, p. 85; 4 M. & Ry. 110; 7 L. J. K. B. 134; 32 R. R. 578. [34] L. R. 5 Ch. 457; 39 L. J. Ch. 780; 22 L. T. 461; 18 W. R. 657. [35] 2 B. & C. 11; 3 D. & R. 195; 1 L. J. K. B. O. S. 221. [36] 30 L. J. Ch. 24; 1 Johns & H. 239; 6 Jur. N. S. 1367; 2 L. T. 289; 9 W. R. 32. [37] 11 Q. B. 248; 17 L. J. Q. B. 77; 12 Jur. 157.

solicitor has intervened in the usual way" (page 622), I am of opinion that the plaintiffs are entitled in this action to recover against the defendants other than Bown, at least so much of the counsel fees as are yet unpaid. The contract, so far as the plaintiffs are concerned, is entirely in writing, and is to be spelled out of the letters passing between them and Bown down to the time that the plaintiffs' services were performed; and, assuming that Boyd, C., was correct in holding what I have stated, I fail to discover in that correspondence anything by which Bown held himself out as personally responsible until he wrote the letter of 10th August, 1896 (Exhibit "2"). The letters by Bown previous to that are to my mind exactly of the character, which an advocate, employed to carry on an appeal, would write to counsel to engage his service, and are of a character which, under *Armour* v. *Kilmer*,[1] would not render him personally liable. I am of opinion that this was not the case of an undisclosed principal. With the very first communication to Mr. Armour (a member of plaintiffs' firm) (Exhibit "D"), Mr. Bown enclosed a copy of the appeal book which contained the names of the parties. Bown could not be held liable, if he were not otherwise liable, because the plaintiffs chose to give credit to him and charge him; nor would the plaintiffs by erroneously doing this prevent themselves from recovering against the principals, if they were the parties properly liable. Now, if Bown was not personally responsible under the contract as it stood when the services were performed, he would not be rendered responsible by writing Exhibit No. "2," which was written after such services were performed; because any promise made in that letter was without consideration to support the cause of action sued on; by that I mean if Bown made any promise in that letter which bound him, it was made on the consideration of the plaintiff's accepting the remittances referred to in that letter and that is not the contract sued on. While on the subject of the letters written subsequently to the performance of the services, I will refer to *Lewis* v. *Nicholson*;[2] and I may add, as far as Bown's letters prior to Exhibit "2" are concerned, it seems to me that,

Judgment.
Wetmore, J.

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instead of acknowledging his liability to the plaintiffs, they have a tendency in the direction of denying it and placing the liability on his clients. Having reached this conclusion, I am forced to state whether I agree with the holding by Boyd, C., in *Armour* v. *Kilmer*,[1] which I have hereinbefore quoted. With the very greatest respect for the opinion of so eminent a Judge, I am unable to do so. In view of the great extent of Canada, the character of the legal profession therein, and the nature of the business the members of the profession have to transact, I think that such a holding would lead to very anomalous results. I quite agree in the abstract proposition that counsel fees are recoverable in the North-West Territories as well as in other parts of Canada; and I further agree that when such counsel fees are earned in the Supreme Court of Canada the tariff does not apply; and that the counsel is entitled to recover upon a *quantum meruit*. So far as those questions are concerned, I quite agree with *McDougall* v. *Campbell*,[3] *Armour* v. *Kilmer*,[1] before referred to, and *O'Connor* v. *Gemmill*;[4] and I think that the circumstances in the Territories are very much the same in respect to the right to recover counsel fees as they are in Ontario; but I am of opinion that when a solicitor or advocate is employed to carry on a suit or an appeal, and in the course of carrying on such suit or appeal, he does what is usual to be done in the way of disbursements for that object, he *prima facie* renders himself liable to the persons of whom he demands services to be performed or work to be done. The persons he employs are to look to the advocate and not to his clients for their pay; for instance, in appeals to the Supreme Court of Canada, the appeal books and factums have to be printed, the printer looks to the advocate who employed him and not to his clients. So an agent has to be employed at Ottawa; in this case Messrs. Chrysler & Lewis were employed. It was conceded by plaintiff's counsel that, for services of this sort, the agent must have recourse to the advocate and not to his client; and it seems to me that the employment of counsel, other than the advocate or solicitor retained to carry on the appeal or try the case, when

such employment is ordinary and necessarily usual, stands in a position similar to that of the employment of the printers or the agents so far as the person *prima facie* liable to pay for the services is concerned. It seems to me that the *ratio decidendi* in *Robbins* v. *Fennell*[37] is quite applicable. The counsel "knows nothing of the client but his name." In a large proportion of the appeals taken to the Supreme Court of Canada, although the advocate or solicitor employed is qualified to practice in that Court, counsel living nearer the place where the Court holds its sittings are owing to the distance usually retained, the distances being so great. Now, if Boyd, C., is correct, let me point out what might and frequently would occur. In many instances, as I know from my own experience, the agent employed at Ottawa to do the agent's work is retained as counsel to argue the appeal. We would then have, by the same firm and arising out of the same appeal, two sets of charges and two rights of action, one against the attorney or advocate for agent's fees and disbursements, for which the client would not be liable, but the advocate would; the other for counsel fees against the client, for which the advocate would not be liable, but the client would. Take this very case under consideration, there are charges in the plaintiff's bill which are not counsel fees at all, and for which under the authorities, Bown is clearly the party liable and not the clients; such as disbursements for printing appeal book and factums, revising proof, attending on printers, letters to agents, and the like.

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I have great doubts if the fee for preparing the factums is not a charge, under the same authorities, properly against Bown. If the defendants other than Bown are liable in this action, how much and what are they liable for? Is Bown liable for part and the others for the rest, and, if so, what is each liable for? To whose credit should the several payments on account be applied? Should judgment be given against Bown for part of the claim and against the other defendants for the rest? I quite concede, however, that a client may so act as to render himself responsible directly

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to the counsel employed, as he may so act as to render himself directly responsible to the printer or the agent; as, for instance, if he specially retains the services of the counsel and agrees to make himself liable for his services or authorizes any body else, the advocate, even, to do so. The question then arises did this occur in this case? I cannot discover from the evidence that it did. There were no doubt consultations between Bown and the other defendants as to what counsel it was advisable to retain, and there was a general understanding that Mr. Armour was to be retained. That, however, was merely a consultation, there was no authority to Bown to pledge the credit of the clients to the plaintiffs or to depart from the general rule. Mr. Bown was the person retained to carry on the appeal for them and to see that all that was necessary to be done was done; and to him, and to him alone, they held themselves liable. What the bargain between the clients and Mr. Bown was, it is not necessary to discuss. If Bown has to pay the plaintiffs he undoubtedly has his remedy over against the other defendants for such services and disbursements as he properly rendered and made, unless he has precluded himself by some agreement. I ought to state that I am quite satisfied that the defendants other than Bown rendered themselves liable to the plaintiffs for the opinion as to the advisability of appealing, but I think this may be fairly considered as paid in the first remittance to the plaintiffs.

I think this appeal should be dismissed with costs.

RICHARDSON and ROULEAU, JJ., concurred.

MCGUIRE, J.—I regret that I am unable to agree with the conclusion at which the rest of my learned brethren have arrived in this case. As to the question whether the clients or the solicitor are liable under the circumstances of this case for the fees of counsel employed, I entirely concur in the judgment just read by my brother Wetmore so far as it decides that, if the decision in *Armour* v. *Kilmer*[1] is right, then there is nothing in the correspondence between Bown and Armour constituting the contract to show that

Bown intended to make himself personally liable; that this correspondence is just of the character one would expect to find where a solicitor, having no intention whatever of making himself liable, writes engaging counsel to conduct his clients' appeal; also that the subsequent correspondence in this case, after the work was done, cannot be taken to vary the contract already entered into and under which the work was done. I also agree that in this country counsel can sue and recover for their fees. The only point on which I cannot agree is that the solicitor is to be deemed, in ordinary cases and in the absence of special agreement, the person who is exclusively contracting with the counsel; and I may state my reasons therefor but briefly, as any decision I have arrived at cannot in this case affect the result. As is pointed out by my brother Wetmore, the appellants concede that so far as the charges are for the class of work usually done by a town agent for a country solicitor, the latter is solely liable to the town agent. In *Scrace* v. *Whittington*,[35] it is said by the Lord Chief Justice that this "formed an exception to the general rule that agents are not liable upon a contract made by them in that character, when the name of the principal is disclosed at the time of the contract, because it was the usual course of business between attorneys when employed by another," and, subsequently, he mentioned another reason that the town agent usually shares the charge for such work with the country attorney. Now, I am not aware of any place where counsel fees are shared.

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McGuire, J.

I think it will not be disputed that a solicitor is the agent of his client. In *Lee* v. *Everest*,[10] Pollock, B., said: "It is a clear rule, where a person is presumably acting as agent for another, the principal is bound and not the agent. An attorney is certainly in that position; he is the agent of his clients and is acting in pursuance of instructions," and again, "*prima facie* it is the client who is liable in the absence of an agreement."

In the present case, it is not disputed that the defendants here authorized their advocate Bown to appeal; and not

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only did they authorize him to obtain the opinion of Armour as to the advisability of appealing, but I am also of opinion from the evidence not only of Bown, but of John Kelly (p. 11, Appeal Book, lines 26 and 27) and of Joseph Kelly (particularly p. 15, line 30, and p. 16, line 6), both called for the defence, that not only did the defendants understand that counsel in Ontario was to be employed, but that Mr. Armour was to be that counsel, and that it was not understood that Bown was himself to argue the case at Ottawa. Having express authority from the defendants to appeal, I think that in any case he would have implied authority to employ counsel residing near Ottawa. In *Ross* v. *Fitch*,[15] Burton, J., quotes with approval the language of Lord Thesiger in *De Busshe* v. *Alt*,[16] "that where the exigencies of business require the carrying out of the instructions of the principal by a person, other than the agent originally employed, the reason of the thing requires that the general rule should be relaxed, so as to enable the agent to appoint a substitute, and on the other hand to constitute, in the interest and for the protection of the principal, a direct *privity of contract* between him and such principal." The decision in *Ross* v. *Fitch*[15] is that there was a direct privity of contract between the client, who in Quebec employed a solicitor to collect an account for him from a debtor resident in Ontario, and the Ontario attorney employed by the Quebec solicitor, so that the client could recover from the Ontario attorney the money collected by him. That being so, could not the attorney have sued the client for the value of his services? If, then, the advocate here was the agent of his clients, as laid down in *Lee* v. *Everest*,[10] and had express authority to appeal, then apart from what I have said as to the clients expressly authorizing him to employ counsel, "the exigencies of the business" were here, in the absence of express understanding to the contrary, such as to authorize him to employ counsel. Being then agent, and agent, as we all agree, for principals disclosed at the time, and acting within the express terms of his authority as such agent, when he employed counsel by a contract in which, as we all

agree again, the agent did not express by the form of the contract that he was to be personally and exclusively liable and that no resort was in any event to be had against the principals (Story on Agency, ss. 261, 263), it seems to me that we have the ordinary case of an agent contracting, and known to be contracting, for a disclosed principal. In support of this view I might refer to *Robins* v. *Bridge*.[9] That was an action by a witness subpœnaed by a solicitor to recover from a solicitor his fees as such witness. Lord Abinger said, "The attorney is known merely as an agent—the attorney of the principal * * * the agent acting for and on behalf of his client does not bind himself unless he offers to do so by express words." After explaining why certain services are chargeable personally to the solicitor, he says: "But in the case of a witness it is different; he has no course of dealing"; (*i.e.*, a course of dealing which would show as by custom who was to be looked to) "he knows it is for the party that he is to give evidence; his obligation is to the party, and if he fails to attend it is the party's loss." Apply this latter language to the case of counsel. He, too, knows that it is for the party that he is to argue the appeal, and that if he fails to attend, or is negligent in his duty, it is the party's loss. If, then, the attorney is an agent of his principal, I need not discuss at length what the law is in such a case. It is well settled as laid down in *Morris* v. *Cleasby*,[17] that "the principal must always be debtor, and that whether he is known or not; except where the broker has by the form of the instrument made himself so liable." See also the quotation from Story on Agency in the judgment of Hannan, J., in *Calder* v. *Dobbell*.[27]

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Oral evidence is admissible in such a case to prove a custom in any particular business that the agent is to be personally responsible; this not contradicting the writing. An instance of this is the case of *Pike* v. *Ongley*,[25] where a custom was proved that, in the hop trade, if the agent did not when making the contract disclose the name of his principal, he was understood to be assuming a personal responsibility. So a custom might, I think, have been shown here,

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if any such custom existed, that, under the circumstances of this case, the attorney was presumed to be contracting so as to make himself exclusively liable, and that no resort should be had by or against the client on the part of the counsel; but I do not find any attempt to prove such a custom or usage. As pointed out in *Scrace* v. *Whittington*,[35] the liability of a country attorney to a town agent is based on the usual course of business in such cases. I fail then to find any reason satisfactory to my mind why another exception should be made (in the case of counsel fees) to the general rule that it is the principal and not the agent who is liable. In short, I agree in the judgment in *Armour* v. *Kilmer*.[1]

If the clients in the present case were originally liable, I cannot agree that even if Bown did tell his clients that in his opinion the costs of appeal would not exceed $150, this, not being communicated to Armour & Co., cannot affect the question any more than where a principal employs an agent to buy a horse, the agent, assuring him that he can buy one as desired for $100, subsequently agrees to pay $150 for it, and the principal receives and takes the horse.

Nor do I think that drawing on Bown for the amount of their bill of costs makes any difference. I refer to the law as laid down in *Bottomley* v. *Nuttall*,[5] and *Priestley* v. *Fernie*,[6] in support of this. Apparently even had Armour & Co. begun suit against Bown, that would not have been sufficient, if they chose to abandon such suit before getting judgment.

The fact of the clients having paid $200 to Bown for the purpose, expressed on the face of the cheques, of paying Armour & Co., does not relieve the clients, unless they did so because misled by the conduct of Armour & Co. into believing that Bown had paid them, or (possibly) that Armour & Co. had irrevocably elected to look to Bown alone. I refer to *Davison* v. *Donaldson*,[7] and the judgment of Bramwell, B., in *Irvine* v. *Watson*.[8] In the present case the clients knew that Armour & Co. had not been paid, for their bill was included in Exhibit "12" as part of the sum they

were required to raise, and they, through Mr. Short, paid to Bown $200 expressly towards Armour's costs. Judgment. McGuire, J.

In my view of the case the plaintiffs are entitled to succeed against Bown for so much of the claim as was for services usually performed by town agents for country attorneys, the plaintiffs having conceded that they can look only to Bown for these services, and I am deciding as to these upon that concession without considering the matter further. It seems to me that these would cover about everything in plaintiffs' claim except fee for opinion, fee on factum, and fee on argument. As to these, plaintiffs are entitled to judgment against the defendants other than Bown, and for such amount as those services were worth. I think the case should be referred back to the learned trial Judge to ascertain and settle the amounts chargeable to Bown, and to the other defendants respectively, giving credit for the amounts already paid to Armour & Co. as the evidence may warrant.

*Appeal dismissed with costs.* MCGUIRE, J., *dissenting.*

REPORTER:
The Editor.

## LOUGHEED v. PARRISH AND McLEAN.

*Costs—Taxation—Review — Severing defences — Setting aside judgment—Fi. fa. lands—Examination for discovery—Admissibility of.*

Where an action is tried against two or more defendants and any defendant separates in his defence, and the judgment is against all the defendants, the law is that each of them is liable for the damages awarded by the judgment; and each of them is liable to the plaintiff for all costs taxed by him as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can be a defence for that defendant only as distinguished from the other defendants. The foregoing rule laid down in *Stumm* v. *Dixon*[1], an action for tort, was *held* applicable to an action on a contract.

In an action against two joint makers of a promissory note, who though they set up substantially the same defence, severed in their defences—*Held*, that on the taxation of the plaintiff's costs the following items should be allowed as against both defendants: (1) Costs of a concurrent writ of summons against one of the defendants; (2) Costs occasioned by the separate defences of each defendant; (3) Costs of the examination for discovery of one of the defendants, although as the other defendant had not been notified of the intention to hold the examination the depositions were not admissible in evidence against him.

Where a judgment by default was set aside, and the defendant was given leave to defend on payment of costs.

*Held*, that the defendant was liable to pay the costs of a *fi. fa.* lands issued concurrently with a *fi. fa.* goods.

[SCOTT, J., *June 15th, 1899.*

Statement.

The plaintiff sued the defendants as joint makers of a promissory note and entered judgment in default of pleading. Executions were forthwith issued against the goods and lands of the defendants. Subsequently the defendants obtained an order setting aside the judgment and giving them leave to defend upon payment of costs. They then severed in their defence, but their defences contained substantially the same pleas, viz.:—1st. Denial of making of the note. 2nd. Absence of consideration. 3rd. Non-presentment. 4th. Payment. The defendant McLean also pleaded that he was to the knowledge of the plaintiff an accommodation maker for his co-defendant. The defendant Parrish was

[1]22 Q. B. D. 99, 529; 58 L. J. Q. B. 183; 60 L. T. 560; 36 W. R. 457; 53 J. P. 500.

examined for discovery, though without notice being given to the defendant McLean or to his advocates. Statement.

Upon the trial of the action the defendant Parrish did not appear and judgment was directed to be entered against him. The plaintiff's counsel tendered in evidence as against McLean the examination on discovery of the defendant Parrish. Counsel for the defendant McLean objected on the ground that McLean had had no notice of the examination, and that in any case it could not be received as against a co-defendant. [SCOTT, J.—In the circumstances I cannot see that it would be just to allow this evidence to go in against McLean and I decline to receive it.] After trial judgment was given for the plaintiff against the defendant McLean; and upon the taxation of costs the clerk allowed to the plaintiff the following items:—

1. Costs of a concurrent writ issued for service of Parrish.

2. Costs of the *fi. fa.* lands issued under the judgment which had been set aside.

3. Costs of the examination on discovery of the defendant Parrish.

The defendant McLean applied for a review of the taxation on these three items and the review was heard before SCOTT, J.

*P. McCarthy*, Q.C., for the defendant McLean. One of several defendants is liable only for such costs as are occasioned by his own defence, and not for those occasioned by the other defendant: *Stumm* v. *Dixon*.[1] Further, the defendant McLean had no notice of the examination of Parrish, and he should not have to pay the costs of it. Also the plaintiff is not entitled to costs of *fi. fa.* lands, because he issues that at his own risk until it is known whether he can make the money by *fi. fa.* goods.

*R. B. Bennett*, for the plaintiff, referred to Morgan and Wurtzburg on Costs, p. 121, and discussed the case of *Stumm* v. *Dixon*.[1]

Judgment.

Scott, J.

[*June 15th, 1899.*]

SCOTT, J.—This is an application by the defendant McLean for a review of the taxation by the clerk of the plaintiffs' costs of the action. By consent of counsel, a review was had without a formal application therefor having been made. The objections are:—

1. That all costs in connection with the issuing of the concurrent writ and service on Parrish should be disallowed.

2. That all costs occasioned by the separate pleadings of the defendant Parrish should be disallowed as against defendant McLean.

3. That the plaintiff should only be allowed for *fi. fa.* goods on the setting aside of judgment against the defendants.

4. That all costs in connection with the examination of defendant Parish for discovery should be disallowed as against defendant McLean on the grounds that the examination was *ex parte*, and that the defendant McLean or his advocates were not notified of the examination.

The action is against the defendants as joint makers of a promissory note. Plaintiff recovered judgment by default of pleading and issued executions against goods and lands thereon. Defendants obtained an order setting aside judgment and permitting them to defend. Although they severed in their defences, their defences were substantially the same, viz.:

1. A denial of the making of the note. 2. Absence of consideration. 3. Non-presentment for payment. 4. Payment.

It is true that defendant McLean in his defence of payment alleged that he was to the knowledge of the plaintiff an accommodation maker for his co-defendant, but that allegation was unnecessary to support his defence of payment, and no other relief was claimed by him upon that ground. At the conclusion of the argument, I held that the plaintiff was entitled to the costs of the execution against lands which had been issued by him.

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Scott, J.

As to the other objections, counsel for the defendant McLean relied upon *Stumm* v. *Dixon*.[1]

In that case Lord Esher says, at p. 533: "In my opinion the true rule is this: Where an action is tried against two or more defendants, and any defendant separates in his defence and the judgment is against all, the law is that each of them is liable for the damages awarded by the judgment and each of them is liable to the plaintiff for all costs taxed by him as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can only be a defence for that defendant as distinguished from other defendants."†

Applying that rule to the present case, I understand it to mean that if defendant Parrish had set up a defence which was not open to defendant McLean and costs were occasioned by the defence, defendant McLean would not be liable for them.

As a matter of fact, no defences were set up by defendant Parrish which were not open to defendant McLean, or which were not actually raised by him. I therefore cannot see why, under that rule, defendant McLean should not be liable for all costs properly incurred by the plaintiff in the maintenance of his action. I therefore hold that the first, second, and fourth objections must fail.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

† The judgment quoted from proceeds as follows: "With regard to such costs so caused to the plaintiff, he is entitled by law to recover such costs against that defendant alone who so caused him to incur them. In such case the taxation before the Master should be one taxation with all the parties present; there would be only one *allocatur*; but the Master, on being satisfied that a part of the costs came within the rule above enunciated, should mark them in the margin and on the *postea* accordingly. Then the plaintiff would be entitled to issue execution against either defendants for all costs not so marked, but against the one defendant only who had caused the plaintiff the costs so marked in the margin."

## INGS v. CALGARY GENERAL HOSPITAL.

*Discovery—Action for wrongful dismissal and libel—Relevancy.*

The plaintiff had, as a member of the Medical Board of the defendants' recommended a certain woman as a nurse, and she was employed by the defendants. Subsequently the defendants having been informed that the plaintiff had introduced the woman under an assumed name and had previously been living in adultery with her, dismissed the plaintiff from their Medical Board, and withdrew permission to him to deliver lectures to the nurses, by a resolution of their Board of Directors, in which the grounds of their action were stated to be that the plaintiff had "recommended as a nurse a woman who was not a fit and proper person for the position, and had in doing so done injury to the hospital and for other reasons" not specified in the resolution.

The plaintiff sued for wrongful dismissal and for libel. In their defence the defendants set up that the alleged libel was privileged and that they had received information to the effect that the plaintiff had been living in adultery with the woman in question some time previous to his appointment.

Upon his examination for discovery, the plaintiff was asked several questions as to his former relationship with the woman. These he refused to answer. Upon an application to compel him to answer,

*Held*, that the plaintiff was bound to answer all questions the answers to which would tend to show whether or not the woman in question was or was not a fit and proper person to be employed as a nurse, even though the facts sought to be proven had occurred previously to the plaintiff's appointment, and that evidence tending to show that the woman had been living in adultery or leading an immoral life was evidence bearing on that issue, especially as the adultery was alleged to have been committed with the plaintiff himself, and he would therefore be aware of it and of the fact that the woman was not a fit and proper person when he recommended her appointment.

[SCOTT, J., *June 30th, 1899.*

Statement.

The plaintiff sued the defendants for wrongful dismissal and for libel. The statement of claim and the defence are fully set out in the judgment. Upon his examination for discovery the plaintiff refused to answer certain questions and the examination was adjourned. The defendants then obtained from SCOTT, J., a summons in which they asked for an order that the plaintiff should attend at his own expense for further examination and answer the questions which he had refused to answer. These questions are also set forth in the judgment.

On the return of the summons. Argument.

*J. B. Smith*, Q.C., showed cause. The facts alleged in the statement of defence, having, if true, occurred before the plaintiff's appointment, they cannot justify his dismissal. Examination with respect to them is therefore irrelevant. He cited Odgers' Libel and Slander, Bl. ed., pp. 117, 412, 419, 151, 152; *Martin* v. *Strong*.[1]

*P. McCarthy*, Q.C., in support of the application, cited Bray on Discovery, pp. 458-67; Holmested & Langton, p. 625.

[*June 30th, 1899.*]

SCOTT, J.—This is an application by the defendant company for an order to compel the plaintiff to attend at his own expense for further examination to answer the questions set forth in his examination for discovery which he refused to answer.

By his statement of claim in this action the plaintiff, who is a duly licensed doctor of medicine practising in Calgary, claims, 1st, damages for his wrongful dismissal by the defendants from his position as a member of the Medical Board of the Calgary General Hospital; and 2nd, damages for libel, the libel complained of being contained in a resolution alleged to have been written and published by defendants in the following words:—

"That in recommending as a nurse to the Calgary General Hospital a woman who was not a fit and proper person for the position, Dr. Ings has done an injury to the hospital, and that for this, and other reasons, he be hereby removed from the medical board.

2nd. That the permission given to Dr. Ings to deliver lectures to the nurses at the Calgary General Hospital be hereby withdrawn.

3rd. That a copy of these resolutions be sent to Dr. Ings."

[1] 5 A. & E. 535; 1 N. & P. 29; 2 H. & W. 336; 6 L. J. K. B. 48.

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Scott, J.

Among the defences raised by the defendants was the following, which was pleaded to the whole statement of claim:—

In further answer to the whole statement of claim, the defendants say that if they did write and publish the words set forth in the said statement of claim (which they do not admit), they were written and published without malice and in the belief that they were true, and under such circumstances as to make them a privileged communication; particulars are as follows:—

The defendants are a charitable corporation, and on or about the 30th day of January, 1899, they, by a resolution voluntarily and without any consideration appointed the plaintiff a member of the medical board of the defendants, and also voluntarily and without any consideration gave the plaintiff permission to deliver lectures to the nurses at the defendants' said hospital, neither of which positions was for any definite length of time, and could be cancelled by the defendants at pleasure.

That subsequently, and on or about the 9th day of March, 1899, the plaintiff wrote a letter to the defendants' head nurse in the words and figures following:—

"Dear Nurse Tyer,—This will be handed to you by Mrs. Holt, who informs me that she wishes to enter the General Hospital with a view to nursing. She has come to Calgary recommended to me by a prominent physician, and as far as I can judge, I think will have good nursing abilities.

I have given her a case of minor surgery in town, and as she comes with introductions to me, I will be glad if you can do anything for her.

Yours very truly,

Geo. Arthur Ings.

P.S.—Will be out to-morrow evening for lecture.

Your nurses have done you fairly good credit in their exam. G. A. I."

Which letter was duly laid before the defendants' board of directors at a regular meeting of such board, and

the defendants relying on the truthfulness thereof, duly appointed the said Mrs. Holt on the staff of nurses in the defendants' said hospital. Judgment. Scott, J.

That shortly after the said Mrs. Holt was appointed to the said staff of nurses, the defendants' suspicions were aroused as to the truthfulness of the said letter, and as to the moral relations of the plaintiff and the said Mrs. Holt, and, upon enquiry, the defendants found that the said plaintiff and the said alleged Mrs. Holt had for some time previous to the plaintiff's coming to the city of Calgary to practice his profession, been living in several places in the State of Montana in adultery as alleged husband and wife, the plaintiff at the time having a wife and family residing as the defendants believe, in the city of Montreal, in the Province of Quebec, and the said alleged Mrs. Holt then being a married woman whose husband was still alive.

Upon further enquiry the defendants learned that the said alleged Mrs. Holt was introduced by the said letter under a false name, and that her real name (as well known to the plaintiff when he wrote the said letter) is Annie Grant, the wife of one Duncan Grant, whom she abandoned in New Glasgow, Nova Scotia, several years since, at the same time abandoning her two children, and that at or about the same time the plaintiff also abandoned his wife and several children at New Glasgow aforesaid, where he was practising his profession, and he and the said Mrs. Grant alias Mrs. Holt, had almost ever since, and up to about the time the plaintiff came to reside in Calgary, been living together as husband and wife. And shortly after learning these facts, the directors of the defendants' said corporation, at a regular meeting, passed the said resolution, believing (as was the fact) that in the interest of the public charitable institution it was their duty to do so, which is the libel complained of.

Upon his examination for discovery plaintiff admitted that he wrote the letter referred to in this defence. The questions which he refused to answer were as follows:—

1. Is Mrs. Holt the woman's name, that is, the Mrs. Holt referred to in Exhibit "A" (the letter referred to?)

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2. Did this woman that you call Mrs. Holt obtain the position of nurse in the defendants' hospital?

3. Is it not the fact that you lived for some time in Great Falls, Montana, with the woman referred to as Mrs. Holt as man and wife?

4. Is it not a fact that you also lived with Mrs. Holt at Shelby Junction, Montana, as man and wife?

5. Is it not a fact that you left New Glasgow, Nova Scotia, along with this woman some years since, and have for a greater part of the time since then been living together as man and wife?

6. Is it not a fact that you passed through Calgary on the C. P. R. about the time mentioned in the spring preceding along with this woman and introduced her to W. H. Grant as your wife?

7. Is it not a fact that this woman's name is Mrs. Grant, who was living with her husband in New Glasgow when you were practising your profession there?

8. Is it not a fact that you have a lawful wife now living and who was living with you in New Glasgow when you were practising your profession there?

9. Is it not a fact that during all the time from that date (about 1893 or 1894), you have had and now have a lawful wife living from whom you are separated?

10. Is it not a fact that during almost all the time since you left New Glasgow you have been living with this Mrs. Holt as husband and wife?

During the examination the only objection taken by counsel for the plaintiff to these questions was that they were not relevant to the issue on a defence of justification. Upon this objection being taken the examiner ruled that the questions were relevant, but plaintiff again refused to answer them.

Upon the hearing of this application it was further contended that the facts set out in the defence referred to

did not afford any justification in law for the dismissal of plaintiff, because they relate to matters which occurred prior to the plaintiff's appointment; that the questions above set out relate solely to such prior matters, and they are therefore irrelevant to any material issue in the action. Judgment. Scott, J.

The libel complained of appears to be that the defendants charged that the plaintiff recommended as a nurse for the hospital a person who was not a fit and proper person for the position. It appears to me that upon the pleadings one of the questions to be determined is, whether the person recommended was a fit and proper person. Evidence to show that the person had been living in adultery or leading an immoral life is evidence bearing upon that question, even though such evidence may refer to misconduct of that description at a date prior to the plaintiff's appointment to office.

The fact that the plaintiff was living in adultery before the appointment may not be in issue, and therefore evidence as to his having, prior to his appointment, lived in adultery with any woman other than the person recommended by him as a nurse might possibly be irrelevant, but evidence as to his living in adultery with the latter is, in my view, relevant because it tends to show not only that the latter was not a fit and proper person for a nurse, but also that he must have been aware of the fact.

I therefore hold that the plaintiff is bound to answer questions numbered 3, 4, 5, 6, 7 and 10, above.

Upon the argument my attention was not called to questions numbered Nos. 1 and 2 above. The objections taken by the counsel for the plaintiff do not appear to me to be applicable to them, and I see no reason why they should not be answered as they appear to be relevant.

I think that plaintiff should not now be required to answer questions numbered 8 and 9. I cannot see that they are relevant.

The order will therefore be that plaintiff attend at his own expense before the clerk, at such time and place as he

Judgment.
Scott, J.

shall appoint, and answer questions numbered 1, 2, 3, 4, 5, 6, 7 and 10, as above set out.

Costs of the application and of such further examinations to be costs to the defendants in any event on final taxation.

*Order accordingly.*

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

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## CARGO v. JOYNER.

*Sale of goods—Bailment—Grain—Grain-tickets—Extrinsic evidence—Alterations in documents.*

Plaintiff delivered wheat to the defendants, millers, from time to time, receiving on delivery tickets, of which the following is a sample: "22/11" (date) "H. L. Cargo, 85 B. Wht. J. & E. K.." (defendants' miller). Plaintiff alleged a sale of the whole; defendants a purchase of a part of the wheat delivered and a bailment of the remainder.

*Held*, that the tickets showed delivery only and that the question of sale or bailment must be determined by extrinsic evidence. On the evidence the trial Judge found for the defendants.

The effect of alterations in documents discussed.

[RICHARDSON, J., *June 22nd, 1899.*

In 1898 defendants were trading in partnership as millers at Fort Qu'Appelle. Between 19th November, 1898, and 6th January, 1899, plaintiff delivered at their mill 3,302 bushels of wheat, receiving from defendants' miller when delivering the grain, 37 tickets, of which the following is a sample:

22/11. H. L. Cargo, 85 B. Wht. J. & E. K.

The K. was the initial of defendants' miller who received the wheat, and the J. & E. represented the defendants. On 12th January, 1899, the mill with the wheat in question was destroyed by fire.

Plaintiff then sued to recover $1,364.59 as balance of the price of the wheat at 52c. per bushel. Plaintiff alleged he had sold the grain to defendants by an agreement made

19th November, 1898, whereby it was to be delivered immediately; the price of from 600 to 1,000 bushels to be paid at once, the balance in the spring; the rate to be 2c. per bushel less than was being given at the time of payment, on the railway at Indian Head. Statement.

Defendants contended that no agreement for sale was entered into on 19th November, but that on the 26th they purchased a car load of 664 bushels at 53c. per bushel, being 2c. less than was then being paid at Indian Head; the price of this had been paid before action brought; the remainder of plaintiff's wheat had been admitted to the mill for storage only, to accommodate plaintiff.

The case was tried before RICHARDSON, J., without a jury.

*W. C. Hamilton*, Q.C., for plaintiff, urged that all the circumstances surrounding the transaction should be looked at, and that the following strongly supported plaintiff's case:

Defendants did not conduct a warehouse. One Court was the only person to whom defendants had given storage tickets during a period of one year. The receipts given to plaintiff on delivery of the wheat, by defendants' agent, are not warehouse receipts. Defendants possessed no regular warehouse receipts, and their printed forms did not contain the words "at owner's risk." No charge was made for storage. Defendant Elkington admitted on cross-examination that he fully expected to buy the plaintiff's wheat before spring. In case of sale to anyone other than defendants, plaintiff would have to draw back his grain up a difficult road past his own place, to the railway at Indian Head. He did not insure the grain. Defendants admitted an alteration in the "wheat book." Alterations are at least suspicious and the onus of removing the suspicion lies on defendants. This was not done: *Henman* v. *Dickenson*,[1]

[1] 5 Bing. 183; 2 M. & P. 289; 7 L. J. C. P. O. S. 68; 30 R. R. 565.

Argument.

*Clifford* v. *Parker*,[2] *Falmouth* v. *Roberts*,[3] *Davidson* v. *Cooper*.[4] It has been since held in England that no party can rely on a document which has been altered while in his custody, though he can prove most positively that the alterations are the effect of pure accident or mistake: Taylor on Evidence, 8th ed., *1625. See also A. & E. Encyclopædia of Law, vol. 2, p. 185 *et seq.*; Best on Evidence, 8th ed., pp. 305, 308, 372.

The receipts given by defendants to plaintiff must speak for themselves. Oral evidence to alter or vary them cannot be admitted: *Gilroy* v. *McMillen*,[5] *McKenzie* v. *McLaughlan*,[6] *McNeeley* v. *McWilliams*,[7] *Beam* v. *Merner*.[8]

The receipts and all the other evidence support a sale and not a bailment. As to sale see *McBride* v. *Silverthorn*,[9] *South Australian Ins. Co.* v. *Randall*,[10] *Benedict* v. *Kerr*,[11] *Clark* v. *McClellan*.[12]

*J. A. M. Aikens*, Q.C., for defendants, denied that any sale was shown except as to 664 bushels. Plaintiff sues for 52c. per bushel on all the wheat when, as a matter of fact, he received 53c. per bushel for 664. This indicates either confusion in plaintiff's ideas or an attempt to do away with this distinct sale of a part, in order to establish a sale of the whole with a payment on account. Defendants have established a sale of part on 26th November. Why should there have been one if plaintiff sold all his wheat on the 19th.

If it were a sale by sample as alleged, the wheat would have to be delivered and opportunity given for inspection, before the property would pass. It is unreasonable, if the price was fixed at 2c. less than the price at Indian Head whenever plaintiff might demand it, that defendants should take the chance of the rapid fluctuations of the market. If plaintiff was entitled to the terms he claims, he should

[2]10 L. J. C. P. 227; 2 M. & G. 910; 3 Scott. N. R. 233. [3]9 M. & W. 469; 1 D. P. C. 633; 11 L. J. Ex. 180. [4]13 M. & W. 343; 1 D. & L. 377; 13 L. J. Ex. 276. [5]6 O. R. 120. [6]8 O. R. 111. [7]13 O. A. R. 324. [8]14 O. R. 412. [9]11 U. C. Q. B. 549. [10]6 Moore P. C. N. S. 341; L. R. 3 P. C. 101; 22 L. T. 843. [11]29 U. C. C. P. 410. [12]23 O. R. 465.

have ascertained the price at Indian Head and made a specific demand for that price less 2c. No evidence has been given of the price at the time writ issued; and it is submitted that writ is not a sufficient demand; and if for no other reason, plaintiff could not succeed because the price is unknown and cannot be ascertained from the evidence. Argument.

Defendants' books contradict plaintiff. Plaintiff called for their production and used them as his evidence. The party offering documents in evidence must explain erasures and alterations. It is submitted, therefore, that plaintiff cannot discredit them: *Dunbar* v. *Meek*,[13] *Price* v. *Manning*.[14] In any case it is submitted that erasure has been satisfactorily explained.

Authorities quoted by learned counsel for plaintiff do not apply to books of account. They relate to documents sought to be enforced, or under which a party claims an interest.

All plaintiff's wheat, except the 664 bushels purchased, was stored by itself.

Defendants were gratuitous bailees and would be liable only for gross neglect. Neglect is not raised by the pleadings and none has been shown in evidence.

[*June 22nd, 1899.*]

RICHARDSON, J., after reviewing the evidence, said:

The slips of paper, "tickets" as they are termed, simply supply evidence of delivery; but whether for completion of a sale or otherwise, the intention of the contracting parties had to be supplied by oral evidence. * * * *

The difficulty between plaintiff and defendant, however, arose by reason of the mill with its contents being destroyed, on 12th January, 1899, by fire; and thereon, upon whom the loss should fall. It was shown that except as to the 664 bushels, all the wheat delivered into the mill

[13] 2 U. C. C. P. 195. [14] 58 L. J. Ch. 649; 42 Ch. D. 372; 61 L. T. 537; 37 W. R. 785.

Judgment.
Richardson, J.

by plaintiff had been binned and kept by itself until destroyed by fire.

His Lordship then referred to *Isaac* v. *Andrews*,[15] not cited by counsel.

In my judgment the defendants' position quoad all the wheat delivered into the mill by plaintiff after 26th November, 1898, was not that of purchasers but bailees in trust. This remaining as the situation when the fire occurred, and nothing having been brought to light which would impose liability as such bailees upon defendants, the action fails.

Some stress was urged in the arguments upon an alteration of an entry made by Elkington in defendants' so-called delivery book. This book was called for by plaintiff and produced by Elkington when under cross-examination. In my opinion Elkington satisfactorily explained the alteration. The original pencilling was a mistake and corrected by him immediately after it was made and discovered. While this might perhaps otherwise have some weight in plaintiff's favour, he, plaintiff, was directly contradicted in material matter, not only by Elkington, but by Joyner and three other witnesses, his own evidence being otherwise inconsistent as regards a sale of all the wheat.

The action is dismissed with costs.

REPORTER:

C. H. Bell, Advocate, Regina.

[15]28 U. C. C. P. 40.

## BOCZ v. HUGONNARD.

*Principal and agent — Crown — Contract — Liability of agent — Extrinsic evidence.*

The defendant the Principal of an Industrial School, an employee of the Dominion Government, entered into and signed in his own name a written agreement engaging the plaintiff for a certain period in a certain employment. The factory in which the plaintiff was employed being destroyed by fire, and the plaintiff thrown out of employment, he sued the defendant for wrongful dismissal.

*Held* that evidence of the capacity in which the defendant entered into the agreement and the other surrounding circumstances was admissible.

It appearing that the defendant acted merely as agent for the Government,

*Held* that the defendant was not liable.

[RICHARDSON, J., *June 22nd, 1899.*

Statement.

The action was brought for wrongful dismissal from service. In May, 1896, plaintiff, who was a manufacturer and worker in felt, proposed to defendant, who was the principal of the Indian Industrial School at Lebret, a government institution, that a felt factory should be started at the school with himself as felt maker. Defendant approved of the idea but referred plaintiff to the Indian Commissioner at Regina. On 17th June, 1896, plaintiff met Mr. Reed, the Deputy Superintendent of Indian Affairs at Regina after the interview. An official letter was written by Mr. Reed's direction, to defendant, informing him that plaintiff had been instructed by the Deputy Superintendent of Indian Affairs, to report to defendant for duty, and containing these words: "His salary is to be $45 per month with board and lodging and will be payable from your grant and the proceeds of the manufacture." Plaintiff went to work about 17th September, 1896, and was engaged during the residue of that month in preparing the plant. On 2nd October, 1896, the manufacture of felt was begun and the following writing prepared and signed:—

Indian Industrial School,

Qu'Appelle, 2nd October, 1896.

I, undersigned Rudolph Bocz, hereby agree to manufacture felt, and to oversee others working at it, in this

Statement.

school, from date up till 31st December, 1898, for the consideration of $35 a month and board and lodging.

Rev. Father Hugonnard agrees to add $10 a month if at the end of the first year there is a clear profit of $240 over all expenses and work connected with the felt manufacturing.

I agree to work 10 hours a day and to take in the felt making the same interest as if it were my private business.

Mr. Bocz will give or receive 3 months' notice before to leave after 2 years.

J. Hugonnard. Rudolph Bocz.

In May, 1897, a further agreement in writing was entered into which was as follows:—

14th May, 1897.

I, undersigned, agree to allow to Mr. Bocz above his salary, the rent of the house from 17th May, 1897, and one month he put in to prepare plant, provided that after all expenses paid there is sufficient sum of money, profit of the felt industry, to make for the school the same amount as the rent and month work will come to.

Rudolph Bocz. J. Hugonnard.

During the working of the factory, plaintiff's wages were regularly paid by defendant out of moneys placed to his credit by the Government and out of the parliamentary grant for carrying on the Industrial School. The payments were made by defendants' cheques on D. H. McDonald's private bank, payable to defendant's order and indorsed by him. They were signed "J. Hugonnard," and under the signature was stamped "Industrial School, Qu-Appelle." Plaintiff continued working in the factory until 26th November, 1897, when it was destroyed by fire and he was thrown out of employment.

The case was tried before RICHARDSON, J., without a jury.

On the argument. Argument.

*W. C. Hamilton*, Q.C., for plaintiff. The question arises under a contract to pay, not one to employ. The dismissal is admitted by defendant in his evidence. Defendant says that an engagement by officials of the school is subject to the approval of the Department; and he states that he had no authority to enter into the agreement. Sworder, the book-keeper, proves that the factory was not run by the Department. If a profit were made it was to go to the institution. The agreement is binding on the defendant: see *Regina* v. *Welch*,[1] *Aspdin* v. *Austin*,[2] *Dunn* v. *Sayles*,[3] *Emmens* v. *Elderton*.[4] Plaintiff entered on the second year of the term and is thus entitled to wages for that year, as also to reasonable notice: see *Mansfield* v. *Scott*,[5] *Beeston* v. *Collyer*,[6] *Williams* v. *Byrne*.[7]

*T. C. Johnstone*, Q.C., for defendant. The question was who was the principal, and was he disclosed when the contract was made? He referred to the Indian Act, s. 138, as amended in 1894, and Order-in-Council, 1895. Plaintiff knew the school was a government institution; he admits having seen the Commissioner, and in Exhibit 9, refers to his engagement with the Indian Department.

*Hamilton*, Q.C., in reply. The contract must govern. The section of the Indian Act referred to only concerns the application of the grant.

[*June 22nd, 1899.*]

RICHARDSON, J.—The main question to be determined by me, and upon which the plaintiff's right of action depends, is whether plaintiff's employment was by defendant in his private capacity or as the agent or representative of the Government of Canada.

[2] E. & B. 357; 22 L. J. M. C. 145; 17 Jur. 1007. [3] Q. B. 671; D. & M. 515; 13 L. J. Q. B. 155; 8 Jur. 355. [4] Q. B. 685; D. & M. 579; 13 L. J. Q. B. 159; 8 Jur. 358. [5] C. B. 160; 17 L. J. C. P. 307; 13 C. B. 495; 18 Jur. 21; 4 H. L. Cas. 624. [6] C. & F. 319. [7] 4 Bing. 309; 12 Moore 552; 2 C. & P. 607; 5 L. J. C. P. O. S. 180; 29 R. R. 576. [7] A. & E. 177; 2 N. & P. 139; W. W. & D. 535; 6 L. J. K. B. 239; 1 Jur. 578.

Judgment.

Richardson, J.

Now, the following facts are plain:

1. That plaintiff knew from the commencement of negotiations with the defendant that the latter was the officer in charge of the Industrial School, a government institution.

2. That he arranged for service in that institution with the Deputy Superintendent and the Indian Commissioner, defendant's superior officers, and under this, in September, 1896, became a civil servant of the Crown.

3. That receiving cheques for wages as he did he knew he was not being paid out of defendant's private means, but from grants made to defendant for running the institution, *i.e.*, from the public purse.

4. That, as plaintiff admitted, after the fire he personally applied to the Indian Commissioner for further employment.

5. That on the face of the first agreement there is no express undertaking or promise by defendant personally to pay the plaintiff the wages named.

The consideration, *i.e.*, the services, were to be performed for the Government. While in ordinary cases of contracts between individuals, there would be an implied promise to pay for services undertaken; yet in this case, it is plainly apparent from the contract itself, that the defendant was contracting, not as a principal, but as an agent, notwithstanding he signed the document in his own name without qualification. It is clear that evidence in what capacity and for what purpose defendant did sign it was receivable on the ground that it does not contradict the document itself; it was then proper for me at the hearing to receive it, and now to give effect to the intention of the parties in signing the agreement, which I find was to evidence a contract between plaintiff and the defendant as an agent of the Dominion Government.

This evidence was receivable also because what defendant did was well proved to have been done by defendant in his capacity of a public servant of the Dominion Government; contracts for service with public servants being on a

different footing from the liability of an ordinary agent on his contract, in the absence of special material in evidence of an intention by defendant to be personally liable.† Judgment. Richardson, J.

I refer to 2 Smith's Leading Cases 388, *Young* v. *Schuyler*,[8] *Wake* v. *Harrup*,[9] *Dunn* v. *McDonald*,[10] and cases there cited.

The fact was established that the house referred to in the second agreement was situate on the Industrial School premises, the property of the Dominion Government, and under defendant's control as a public officer.

*Action dismissed.*

REPORTER:

C. H. Bell, Advocate, Regina.

[8]11 Q. B. D. 651; 49 L. T. 546. [9]1 H. & C. 202; 31 L. J. Ex. 451; 8 Jur. N. S. 845; 7 L. T. 96; 10 W. R. 626. [10](1896) 1 Q. B. 401; (1897) 1 Q. B. 555; 66 L. J. Q. B. 209, 420; 76 L. T. 444; 45 W. R. 355. (See also Dunn v. The Queen, 65 L. J. Q. B. 279; (1896) 1 Q. B. 116; 73 L. T. 695; 44 W. R. 243; 60 J. P. 117).

† See Story on Agency, s. 302: "Hitherto we have been considering the personal liability of agents on contracts with third persons, in cases of mere private agency. But a very different rule, in general, prevails in regard to public agents; for, in the ordinary course of things an agent, contracting in behalf of the Government, or of the public, is not personally bound by such a contract even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the Government, or that the party dealing with him in his public capacity means to rely upon his individual responsibility."—Ed.

## ENGLISH v. O'NEILL.

*Municipal law—Licenses—Insurance agents—Powers of Legislative Assembly—Ultra vires.*

The Ordinance incorporating the City of Calgary (No. 33 of 1893, s. 117, ss. 41), empowered the City to pass by-laws "for controlling, regulating and licensing * * * insurance companies, offices and agents * * * and collecting license fees for the same."

*Held*, that the provision was *intra vires* of the Legislative Assembly of the Territories.

[SCOTT, J., *June 25th, 1899.*

Statement. The defendant was, on the 5th day of June, 1899, convicted by W. Roland Winter, Esquire, Police Magistrate for the city of Calgary, of having carried on the business of an insurance agent within the city of Calgary without being the holder of a license in that behalf, contrary to the provisions of By-law No. 337 of the city of Calgary. He then obtained a summons calling upon the informant to show cause why a writ of *certiorari* should not issue to bring up the said conviction and why the same should not be quashed, on the ground that the by-law is *ultra vires* in so far as it seeks to impose licenses on insurance agents doing business for insurance companies licensed under Dominion Acts.

J. A. *Lougheed*, Q.C., in support of the application. The North-West Assembly received its powers under section 13 of the N.-W. T. Act, which expressly states that its legislation shall be subject to the provisions of any Act of the Parliament of Canada. The provisions of R. S. C. c. 124, authorize the insurance companies in question. The powers of the North-West Assembly are not as wide as those of Provincial Legislatures. Its legislation must not conflict with Dominion Acts. He referred to *Bank of Toronto* v. *Lambe*,[1] *Brewers' and Maltsters' Association* v. *Attorney-General of Ontario*,[2] *Severn* v. *Queen*,[3] *Regina* v. *Taylor*.[4]

[1]12 Ap. Ca. 575; 56 L. J. P. C. 87; 57 L. T. 377. [2](1897) Ap. Ca. 231; 66 L. J. P. C. 34; 76 L. T. 61. [3]2 S. C. R. 70; 1 Cartwright, 414. [4]36 U. C. Q. B. 183.

*J. B. Smith*, Q.C., for informant. Section 4 of R. S. C. c. 124, simply permits an act to be done which, without a license, ought not to be done. Sub-sections 2, 5, 6, 9 and 13, of section 13 of the North-West Territories Act, gives the necessary powers to the Assembly. If this license fee is a tax on the insurance companies there is the right under sub-section 2 of section 13 to impose it: Cooley on Taxation, 284, 56, 394, 406-7, 413. *Fortier* v. *Lambe*,[5] *Pigeon* v. *Recorder Court*.[6] Argument.

[*June 25th, 1899.*]

SCOTT, J.—This is an application for a *certiorari* to bring up a certain conviction made by W. Roland Winter, Police Magistrate for the city of Calgary, on the 5th of June, 1899, whereby J. D. O'Neill, the applicant, was convicted "for that he the said J. D. O'Neill between the 7th day of February and the said date, carried on the business of an insurance agent within the said city of Calgary without being the holder of a license in that behalf, contrary to the provisions of By-law 337 of the said city of Calgary," and was adjudged for his said offence to forfeit and pay the sum of $25, to be paid and applied according to law, and also to pay Thomas English, the informant, the sum of $6.10 for his costs in that behalf

It is shown on this application that the offence of the applicant was acting as agent for The London Life Insurance Co. and The London Guarantee and Accident Assurance Co., Ltd., and it was admitted by the counsel for the prosecution that these companies were at the date of the offence charged, duly licensed under the Insurance Act to carry on insurance business in the Dominion.

The only ground upon which the conviction is attacked is that the by-law referred to is *ultra vires* in so far as it seeks to impose a license fee upon insurance agents doing business for insurance companies under the Insurance Act.

The by-law was passed under the provisions of section 117 of Ordinance No. 33 of 1893, intituled "An Ordinance to incorporate the city of Calgary," which enacts that the

[5] 25 S. C. R. 422. [6] 17 S. C. R. 495.

Judgment. Scott, J.

council of the city may pass by-laws (sub-section 41) for the controlling, regulating, and licensing * * * insurance companies, officers and agents, * * * and collecting license fees for the same.

At the time of passing this Ordinance, the North-West Territories Act, as amended by 54-55 Vic. c. 22, defined the legislative power of the Territorial Legislature. Section 13 of the amending Act provided that the Legislative Assembly should, subject to the provisions of the Act or of any other Act of the Parliament of Canada at any time in force in the Territories, have power to make Ordinances for the government of the Territories in relation to the classes of subject next thereinafter mentioned.

Some of the classes of subjects mentioned are:

2. Direct taxation within the Territories in order to raise a revenue for territorial, municipal, or local purposes.

5. Municipal institutions in the Territories.

6. Shops, saloons, taverns, auctioneers and other licenses in order to raise a revenue for territorial or municipal purposes.

I may here mention that these subjects are the same as those in respect of which Provincial Legislatures are given exclusive legislative jurisdiction, except that in the case of the Provinces the powers with respect to direct taxation are merely stated to be for the purpose of raising a revenue for provincial purposes.

It appears to be well settled law, that under the British North America Act the imposition by a Provincial Legislature of a license fee such as that in question is in the nature of direct taxation, and that it would be within the powers of the Legislature: see *Bank of Toronto* v. *Lambe*,[1] *Fortier* v. *Lambe*,[5] *Brewers and Maltsters' Association* v. *Attorney-General of Ontario*.[2]

But it is contended that the decisions in the cases referred to are not applicable here, because the powers conferred by the British North-America Act upon Provincial Legislatures are wider than those possessed by the Territorial Legislative Assembly, the latter being restricted by the

Judgment.
Scott, J.

provision that its legislation must be subject to the provisions of any act of the Parliament of Canada, and that the imposition of a license fee upon an insurance company licensed under the Insurance Act or its agent is an interference with the powers possessed by it under that Act.

In *Bank of Toronto* v. *Lambe*,[1] it was held that the Provincial Legislature, under their power of direct taxation, had the power to impose a direct tax upon incorporated banks, carrying on business in the Province under the Bank Act of the Dominion. Now, under the British North America Act, banks and banking are matters within the exclusive legislative jurisdiction of the Parliament of Canada, and where banks are authorized under the Bank Act to carry on business as such in the Dominion, it might be claimed that the imposition of a tax upon them by the Provincial Legislatures would be an interference without legislative jurisdiction. In fact the Superior Court of the Province of Quebec so held in that case, but upon appeal to the Court of Queen's Bench, and afterwards to the Privy Council, that judgment was reversed.

In my mind the restriction placed by the British North America Act upon Provincial Legislatures with respect to banks and banking is, at least, as great as that placed upon the Territorial Assembly with respect to matters legislated upon by the Parliament of Canada, and if a Provincial Legislature can impose a direct tax upon banks authorized by Act of Parliament to do business in Canada, I see no reason why the Territorial Assembly cannot impose such a tax upon insurance companies similarly authorized.

It appears to me that if effect were given to the contention referred to, and it were followed to its logical conclusion, the result would be that all companies incorporated by special Act of Parliament, as well as under the Companies Act, and thereby authorized to carry on business in Canada, as well as their property and effects in the Territories, would be free from taxation therein.

*Application refused with costs.*

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

## GILLESPIE v. HAMM.

*Conditional sale—Lien note—Destruction of subject matter—Risk of loss—Default.*

Where a mare, the subject of a conditional sale, was drowned while in the actual possession of the buyer after default in payment.
*Held*, that the loss fell upon the buyer and that therefore the seller was entitled to recover the balance of the price.

[RICHARDSON, J., *July 10th, 1899.*

Statement. Plaintiff sued to recover the balance of the price of a mare agreed to be sold by him to defendant.

Defendant signed and gave to plaintiff a "lien note" dated 4th February, 1893, by which he promised to pay to plaintiff $135 within three months after date, with interest at 10 per cent. per annum. The note provided that until payment, the title, property, and right to possession of the mare, was to remain in the plaintiff, who had power, on default, to sell and apply the proceeds of sale towards payment of the price. The mare was delivered to defendant, and produced a colt in 1894, but was accidentally drowned the same year. In 1898, defendant having paid no part of the price, the colt was taken by plaintiff, and sold for $75, he receiving the amount and crediting it upon the note.

The case was tried before RICHARDSON, J., without a jury.

*James Balfour*, for the plaintiff.

*W. C. Hamilton*, Q.C., for the defendant.

[*July 10th, 1899.*]

RICHARDSON, J.—The question is, whether or not the loss of the mare should fall on plaintiff; because, if so, the consideration for defendant's promise to pay would fail.

Had the contract in question occurred since the Sale of Goods Ordinance (C. O. 1898 c. 39) came into force, the

matter would be covered by section 22.† But as it was entered into prior to the Ordinance, the question has to be decided upon the law as it then stood. Judgment. Richardson, J.

By plaintiff's counsel, Mr. Balfour, the Am. & Eng. Enc. of Law, 2nd ed., vol. 6, was sent in, and I was referred to the title "Conditional Sales" of chattels, and special reference was made to the paragraph intituled "Risk of Loss," p. 474. This would seem to show that in some, at least, of the United States, the loss of the chattel conditionally sold, even if the vendee was not at fault, does not relieve him from liability to pay. To this I do not subscribe. *Hesselbach* v. *Ballantyne*,[1] was cited by Mr. Balfour. In appeal that case was decided on a point not decided by the trial Judge.

On the other side, Mr. Hamilton for defendant, referred me to passages in the Am. & Eng. Enc. of Law, 2nd ed., vol. 3, tit. "Bailments," p. 732, but these I do not consider applicable.

In my judgment, the law as now codified by section 22 of the Sale of Goods Ordinance, was the law previously in force and as laid down by Blackburn, L.J., in *Martineau* v. *Kitching*.[2] "By the civil law it was always considered that if there was no weighing or any thing of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in mora*, and it was his default, the civil law said that, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was *in mora*, he shall have the risk just as if the

[1] 28 O. R. 182; 250 A. R. 35. [2] 41 L. J. Q. B. 227, p. 228; L. R. 5 Q. B. 436; 26 L. T. 836; 20 W. R. 769.

† "Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not: Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault, as regards any loss which might not have occurred but for such fault: Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party."

Judgment. Richardson, J.

*emptio* was *perfecta*. That is perfectly good sense and justice." Applying that rule here; the mare was drowned in 1894, and at that time, the defendant was *in mora*. Had he fulfilled the contract on his part, *i.e.*, paid the $135, the transfer would have been absolute. Thus the loss is on the defendant.

*Judgment for plaintiff.*

REPORTER:

C. H. Bell, Advocate, Regina.

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## ROBSON v. THE TOWN OF REGINA.

*Assessment—Income tax—N. W. T. Government official.*

The income which a person receives as an employee of the Government of the North-West Territories is taxable by virtue of the Municipal Ordinance notwithstanding that the General Revenue Fund of the Territories, from which income is paid, is formed in part of a grant from the Dominion Government made "for schools, official assistance, printing, etc."

[RICHARDSON, J., *August 27th, 1899.*

An appeal from the Court of Revision. Appellant was an official of the North-West Government, and appealed against an assessment for taxes upon his income. The following were the grounds set forth in the notice:—

1. That his income during 1898 was not income of the municipality or in the Territories.

2. That income derived from money appropriated by the Dominion Government for the government of the North-West Territories is exempt.

3. That during 1898 he was an employee of the public service, and his income was paid by the Lieutenant-Governor in Council, by vote of the Legislature, out of moneys appropriated as above.

In the Dominion Appropriation Act, 1898, there appears under the heading "Government of the North-West

Statement.

Territories" a grant "for schools, official assistance, printing," etc., which was paid over direct by the Dominion Government to the North-West Government. This sum, together with all other amounts received by the North-West Government, forms the General Revenue Fund of the Territories out of which the appellant's salary was paid.

The appeal was heard before RICHARDSON, J.

*H. A. Robson,* appellant, in person.

*N. Mackenzie,* for the respondents, the Town of Regina.

[*August 27th, 1899.*]

RICHARDSON, J.:—In my judgment neither *Leprohon* v. *Ottawa,*[1] cited by appellant, or the New Brunswick cases of *Ex parte Owen,*[2] and *Ackman* v. *Moncton,*[3] bear here because in them all the parties were appointees and public servants of the Dominion Government, receiving salaries direct from that Government, while in the present case the appellant is an officer of the North-West Government, receiving his salary direct from it out of the General Revenue Fund.

It was then contended that inasmuch as under Cons. Ord. c. 5, s. 18, Mr. Robson's salary is fixed and made payable specially out of a fixed fund, it is not assessable under the Municipal Ordinance. This involves the construction of the two Ordinances.

It is beyond question that the Legislative Assembly might, had they seen fit, have directed that the incomes of the public officers of the Territories should be liable to municipal assessment, and equally so to declare their incomes exempt. They have done neither directly.

In my opinion, the general rule as to the construction of statutes in so far as it is applicable in this instance is laid down by Lord Hatherley in *Garnett* v. *Bradley,*[4] by Mr. Maxwell in his Interpretation of Statutes, at pp. 214, 405,

[1] 2 O. A. R. 522. [2] 4 P. & B. (20 N. B.) 487. [3] 2 True (24 N. B.) 103. [4] 3 Ap. Ca. 944, p. 953; 48 L. J. Ex. 186; 39 L. T. 261; 26 W. R. 698.

Judgment.
Richardson, J.

and 411; in *Inland Revenue* v. *Forrest*,[5] and *Bradlaugh* v. *Clarke*.[6] It is thus summarized by Earl Selborne in *Mersey Docks* v. *Lucas*:[7] "It would be wholly inconsistent with the principles which are well established as to the construction of Acts of Parliament * * * if taxes imposed by the authority of the Legislature by Public Acts for public purposes were held to be taken away by general words in a local and personal Act."

Apply this rule here. The object for which the municipal law was passed was to provide for the raising of revenue by taxation. The intention was that this object was to be attained by assessment of all land, personal property and income, not expressly exempted in the Ordinance. Officers of the public service are not any where expressly exempted, so that the intention, as I gather from the Ordinance, is that they should not be exempt *quoad* income unless the income does not exceed $600. The appeal is dismissed.

REPORTER:

C. H. Bell, Advocate, Regina.

[5]60 L. J. Q. B. 281; 15 Ap. Ca. 334; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772. [6]52 L. J. Q. B. 505; 8 Ap. Ca. 354; 48 L. T. 681; 31 W. R. 677. [7]51 L. J. Q. B. 114; 46 J. P. 388.

## RE SHERAN.

*Marriage—Marriage per verba de presenti—Condition of Territories in 1878—Presumption of marriage—Evidence.*

In the year 1878 a white man and an Indian woman, domiciled in the North-West Territories, entered into a contract of marriage *per verba de presenti* in the Territories without a ceremony of any kind, and cohabited as man and wife until the former's decease.

*Held*, in view of the legal provisions for the organization of the Territories and the actual condition, with reference to the facilities for the solemnization of marriage, at least in the portions of the Territories in the vicinity of the contracting parties' place of residence, that there was not a legally valid marriage.

In bigamy cases, strict proof of marriage is required; a different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required, but may be presumed from cohabitation and repute; but where the evidence shows the actual terms upon which the parents were cohabiting and the facts relied upon as constituting the marriage, no such presumption can arise.

[SCOTT, J., *October 28th, 1899.*

Statement.

One Nicholas Sheran was domiciled in the North-West Territories from 1874 to 1882 when he died. In 1878 he began to cohabit with one Mary Brown, a full blooded Indian of the Piegan tribe, and it was verbally agreed between them that they should live together as husband and wife as long as both lived, he agreeing "never to get another woman" while she lived, and she agreeing "to have no other husband during his life." This agreement was carried out and the two lived together as husband and wife until his death. No marriage ceremony was ever performed. Of this union two children were born, Charles and William Sheran, who, after the death of their father, intestate, claimed to be entitled as next of kin of the deceased, to share in his estate.

This was an application by Joseph McFarlane, the administrator *de bonis non* of Nicholas Sheran, to have the next of kin of the deceased ascertained and the rights of all claimants decided.

The facts are more fully set forth in the judgment.

Argument.

*J. R. Costigan*, Q.C., for the children of the deceased by Mary Brown. A binding marriage according to the law of England is simply a voluntary union of one man and one woman for life, to the exclusion of all others: *Hyde* v. *Hyde and Woodmansee*,[1] *In re Bethell, Bethell* v. *Hilyard*,[2] Bishop on Marriage, vol. I., pp. 225-30, *Regina* v. *Nanequisaka*.[3] There is a presumption in favour of a *de facto* marriage: Taylor on Evidence, sec. 172. *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie or Sambonade*,[4] *Lyle* v. *Ellwood*,[5] *Morris* v. *Davies*.[6] The sister of the deceased must show that the alleged marriage took place before the passing of the Marriage Ordinance of 1878. The facts support a valid marriage: *Connoly* v. *Woolrych*,[7] and article in 8 Can. Law Times, p. 132.

*C. E. D. Wood*, for Ellen Sheran, sister of the deceased. The presumption of marriage does not arise unless the party upholding it shows that the parties cohabited as man and wife before passing of Ordinance of 1878. He cited *Robb* v. *Robb*,[8] *Smith* v. *Young*,[9] Ency. Law of Eng., vol. 5, p. 436, *Warrenden* v. *Warrenden*.[10]

*Costigan*, Q.C., in reply.

[*October 26th, 1899.*]

SCOTT, J.—On the 14th of May, 1899, Joseph McFarland, *administrator de bonis non* of the deceased, obtained an originating summons for the followinng purposes:—

1. That the claimants Ellen Sheran and Charles Sheran appear and state the nature and particulars of their respective claims to the said estate, and either maintain or relinquish the same.

[1]35 L. J. Mat. 57; L. R. 1 P. 130; 12 Jur. N. S. 414; 14 L. T. 188; 14 W. R. 517. [2]57 L. J. Ch. 487; 38 Ch. D. 220; 58 L. T. 674; 36 W. R. 503. [3]1 Ter. L. R. 211; 1 N. W. T. R. pt. 2. 21. [4]50 L. J. P. C. 28; 6 Ap. Ca. 364; 44 L. T. 895. [5]44 L. J. Ch. 164; L. R. 19 Eq. 98; 23 W. R. 157. [6]5 Cl. & F. 163; 1 Jur. 911. [7]11 Lower Can. Jur. 197; 3 Can. L. J. 14; 1 Lower Can. L. J. 253; 1 Rev. Leg. 253. [8]20 O. R. 591. [9]34 Lower Can. Jur. 581. [10]2 Cl. & F. 531; 9 Bligh. 89.

Judgment.
Scott, J.

2. That it may be ascertained and determined which one or more of said claimants is or are the next of kin of said deceased.

3. That the accounts of said administrator may be passed and allowed, and that he may be discharged from his office.

4. That the moneys and other undistributed portion of the estate be paid into Court, or otherwise disposed of as the Judge may direct.

5. That in the meantime no action be brought against said administrator.

6. That for the purposes aforesaid it may be ordered that such issues be directed, accounts and proceedings had and taken, such directions given, and such further or other order made, as the nature of the case may require, or as to the said Judge may seem meet.

On the hearing of the application before me, the applicant and the claimant Ellen Sheran, were represented by counsel and Mr. Costigan, Q.C., who, by order of 28th June, 1897, was appointed guardian *ad litem* to the claimants Charles Sheran and William Sheran, who are infants under the age of 21 years, appeared for them. He also appeared for Mary Brown, the mother of the infant children, who claimed to be the widow of the deceased.

The deceased died in 1882, leaving him surviving one brother and two sisters of whom the claimant Ellen Sheran is one. The brother and the other sister have since died without issue, and Ellen Sheran now claims to be next of kin of the said deceased, and as such entitled to his estate.

The claimants Charles and William Sheran are the issue of the deceased by Mary Brown. They claim that they are his lawful issue, and that they are therefore entitled to his estate. It does not appear that Mary Brown makes any claim to any portion of the estate. The only question argued before me, and apparently the only one to be determined, is whether the deceased was lawfully married to Mary Brown. The only evidence adduced before me which

Judgment.
Scott, J.

bears upon the question of the marriage was the depositions of the applicant and of Mary Brown, the Reverend Louis Lebret and Robert R. Wilson which, by consent of the parties, had been previously taken under oath by the Clerk of the Court.

It was admitted upon the hearing of the application that the domicil of the deceased from 1874 down to the time of his death was in the North-West Territories, and that the South Piegan Indians are a branch of the Blackfeet nation, and that their customs, so far as material to the question involved herein, are the same as those of the Blood tribe.

It was agreed by counsel and by the guardian of the infant claimants that the question of the validity of the marriage should, in so far as the right of the issue of the marriage to inherit the estate is concerned, be determined upon the above evidence and admissions.

The evidence of Mary Brown, so far as it is material to the question involved, is as follows: "I first met Nicholas Sheran at the old town of Macleod. I was then living with my sister, who was the wife of D. R. Brown. Nicholas Sheran was then working at the mine at Coal Banks near Lethbridge. When he was courting me he promised that, if I would go to live with him, we would live together while we both lived; that he would never get another woman while I lived. I never had any other husband than Nicholas Sheran. When we went to live together it was agreed between us, that I was to have no other husband during his life, and that he was to have no other wife during my life. I lived with him in this way during four years until his death by drowning. When the eldest child of this union was christened Sheran told me that we would get married in the white man's way. Sheran belonged to the Roman Catholic Church. The eldest child was baptized in the house we were then living in at the mines. The child was first baptized by a Protestant minister who was travelling towards the Cypress Hills and passed our residence. My husband asked him to baptize the child. There was no Catholic

priest ever came in our house while we lived together. I never saw a Catholic priest during the four years we lived together. The second son was born three months after Nicholas Sheran's death. Nicholas Sheran was the father of these two boys. I had no other children by him. He was my first husband. I had no connection with any other man during the four years he and I lived together. I am a full blooded Indian of the South Piegan tribe."

Judgment.
Scott, J.

Joseph McFarland, the applicant, says as follows:—

"I know the Indian woman who lived with Nicholas Sheran at the time and previous to his death. She was a Piegan woman. It was, I think, in the winter of 1878-9 that she went to live with him. He had never been married before this. I do not personally know how she went to live with him. I only know that she did do so. She lived with him continually from the time she first went to live with him until the time of his death. It was generally known that during all this time they were cohabiting as man and wife. One child was born to them before Nicholas Sheran's death and one about six months after his death. During the time she lived with Nicholas Sheran the woman above referred to was generally addressed as "Mary," I never knew her called "Mrs. Sheran." Nicholas Sheran told me on several occasions that he intended to marry her whenever a clergyman came along. His sister, my wife, used to remonstrate with him for living with this woman in the way he was doing. He was a Roman Catholic. There was no resident Catholic clergyman in the neighbourhood during the time they lived together. Catholics had no means of marrying at that time unless a priest happened to come along. When I was married I met a travelling priest at Macleod and drove him down to the coal banks for the purpose of marrying my wife to me. I was married on the 4th July, 1878. It was the following winter that we knew that the woman and Nicholas were living together at Coal Bank. She was not with him in July, 1878. I went down to the coal banks in the fall and she was there then. This would be about October, 1878.

Judgment.
Scott, J.

The first child was born, I think, in 1880. The nearest Catholic mission at that time would be the Blackfoot reservation some 90 or 100 miles from here (Macleod).

Reverend Father Scollen lived in Macleod in the fall of 1882. Father Lacombe at that time lived, I think, at Edmonton. The police headquarters were then at Macleod. Colonel Macleod was the Police Commissioner in 1878. His headquarters were at the old town. He was a Stipendiary Magistrate at that time, the coal banks were 28 or 30 miles from Macleod. Colonel Macleod used at that time to go to the coal banks. Nicholan Sheran was frequently in Macleod from the coal banks between 1878 and 1882. During this time there was a Methodist clergyman residing at Macleod. My wife urged upon her brother that he should not live with the woman without being properly married to her. He could, by making an effort, have obtained the services of a clergyman of the Roman Catholic church to marry him, but he was indifferent. He could, during that time, have obtained a Protestant clergyman in Macleod to marry him. At the time above referred to, Rev. Father Scollen resided at Macleod, I do not think he was officiating as a clergyman. I do not know whether or not he was under suspension.

The evidence of Rev. Father Lebret relates solely to the rules of the Roman Catholic church with respect to marriages of Catholics by other than Roman Catholic clergymen. He states that the rule of the church is that no Catholic shall present himself for marriage before a clergyman of any other denomination; that if a Catholic is married by a clergyman of any other denomination he grievously infringes the rules of his church; that he would be infringing this rule if no Catholic priest were on hand to perform the ceremony and that there are no circumstances under which a Catholic man and woman would be justified in going before a Protestant clergyman for the purpose of marriage.

The evidence of Robert R. Wilson relates solely to the manners and customs of the Blood Indians with respect to

marriage. This evidence is not material, because there is no evidence tending to show that there had been a marriage according to Indian rites and customs, and it was conceded by Mr. Costigan upon the argument that such a marriage had not been shown. Judgment. Scott, J.

It was, however, contended by Mr. Costigan that the evidence shows that there was a voluntary union between deceased and Mary Brown for life, to the exclusion of all others, and that according to the law of England such a union constituted a binding marriage. Upon referring to the cases cited by Mr. Costigan in support of his contention, of *Hyde* v. *Hyde and Woodmansee*,[1] *In re Bethell, Bethell* v. *Hilyard*,[2] and *Regina* v. *Nanequisaka*,[3] I find that they merely hold that such a union is essential to a valid marriage. In none of them was it held or necessary to hold that such a union was all that was necessary to render a marriage valid.

*Regina* v. *Millis*,[11] appears to be the leading case upon the point. It was there held that at common law, a contract of marriage *per verba de presenti*, though a contract indissoluble between the parties themselves, did not constitute a complete marriage unless made in the presence and with the intervention of a minister in holy orders. Lord Chief Justice Tindal in his judgment in that case says: "There is found no authority to contravene the general position that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage that there must be some religious ceremony; that both modes of obligation should exist together, the civil and the religious: that besides the civil contract, that is, the contract *per verba de presenti* which has always remained the same, there has at all time been a religious ceremony also which has not always remained the same but has varied from time to time." This case was carried to the House of Lords. The members of that tribunal were equally divided in opinion, the result being that the judgment of Lord

[11] 10 Cl. & F. 534; 8 Jur. 717.

Judgment. Scott, J.

Chief Justice Tindal, from which I have quoted, was upheld. It was afterwards followed by the House of Lords in *Beamish* v. *Beamish*.[12] *Regina* v. *Millis*[11] was a bigamy case in which class of cases, strict proof of marriage is required. A different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required, but may be presumed from co-habitation and repute. But in this case where the evidence shows the actual terms upon which the parents were co-habiting, and the facts which are relied upon by the infant claimants as constituting a marriage *de facto*, no such presumption can arise. It can only arise where such evidence is wanting.

There are, however, exceptions to the rule laid down in *Regina* v. *Millis*.[11]

In Dicey's Conflict of Laws, it is stated at p. 625, that a marriage celebrated in the mode or according to the rules and ceremony held requisite by the law of the country where the marriage takes place, is valid so far as formal requisites are concerned: also at pp. 627-34 that a marriage celebrated in accordance with the requirement of the English common law where the use of local form is impossible, such impossibility arising from the country being one where no local form of marriage, recognized by civilized states exists, or where a marriage takes place in a land occupied by savages; also at p. 754, that a marriage made in a strictly barbarous country between British subjects or between a British subject and a citizen of a civilized country and, as it would seem, even between a British subject and a native of such uncivilized country, will be held valid as regards form, if made in accordance with the requirements of the common law of England; and that it is extremely probable that with regard to such a marriage the common law might now be interpreted as allowing the celebration of a marriage *per verba de presenti* without the presence of a minister in orders; and that a local form also,

[12] 9 H. L. Ca. 274; 11 I. C. L. R. 511; 8 Jur. N. S. 770; 5 L. T. 97.

if such there be, would seem to be sufficient at any rate where one of the parties is a native. Judgment. Scott, J.

From this it would appear that it is only in cases where the marriage *per verba de presenti* takes place in a strictly barbarous country, where a marriage according to the English common law, or perhaps according to local rules and customs cannot be effected, that it would be sufficient.

Now, in my opinion, the Territories cannot be considered a strictly barbarous country in 1878, when the alleged marriage took place. It was then far removed from barbarism. In 1873, an Act was passed respecting the Administration of Justice and the establishment of a police force in the Territories (35 Vic. c. 25), under which, shortly after its passing, stipendiary magistrates were appointed and a mounted police force was established, the commissioner and superintendents of which were *ex officio* Justices of the Peace. The evidence shows that in 1878 the headquarters of the police force and residence of the commissioner were at Macleod, which was distant only 28 or 30 miles from the residence of the deceased.

Again, under the North-West Territories Act of 1875, a form of government was established consisting of a Lieutenant-Governor and Council with certain legislative powers, and provision was made for the administration of civil and criminal justice. There is a further fact which I may now mention, viz., that on the 2nd of August, 1878, Ordinance No. 9 of 1878, cited as "an Ordinance respecting marriages," was passed by the Lieutenant-Governor-in-Council. Under its provisions, ministers and clergymen of every religious denomination, duly ordained and appointed and resident in the Territories, as also Justices of the Peace, were authorized to solemnize marriages. The latter were authorized to act only in cases in which the license of the Lieutenant-Governor was obtained and provisions were made for the issue of such licenses and the appointment of issuers thereof. Ministers and clergymen were authorized to act, not only in cases where such license had been

Judgment. Scott, J.

authorized, but also in cases where banns had been published in the manner prescribed by the Ordinance.

The Ordinance also authorized the latter to celebrate marriages without the production of a license or publication of banns in cases where the parties were remote from any issuer of licenses and where there was found to be any reasonable inconvenience or objection to the publication of banns. The evidence does not disclose whether the Ordinance was in force at the time of the alleged marriage of deceased with Mary Brown, the only evidence upon the point being that it took place sometime between the 4th of July, 1878, and about the month of October of the same year.

This much may be said, however, that the infant defendants have not shown either that the Ordinance was not in force at the time or that the circumstances were such that the marriage could not have reasonably been performed under its provisions.

The circumstances of this case differ materially from those in *Conolly* v. *Woolwich*.[7] There Conolly, whose domicile was in Lower Canada, came to the Territories as a servant of the North-West Company. When here he took as his wife an Indian girl. The marriage took place according to the local Indian rites and customs, the only form of marriage, except a marriage *per verba de presenti*, which was possible at the time, as there were then no priests or clergymen in the Territories. It was held to be a valid marriage. That case, therefore, supports the principle which I have quoted from Mr. Dicey's work.

In *Robb* v. *Robb*,[8] the husband who had gone from Ontario to British Columbia was there married according to Indian rites and customs to an Indian woman. They cohabited as man and wife for many years and were recognized by the Indians as such. He afterwards returned to Ontario taking his daughter with him. It was shown in evidence that the husband had declared that he was legally

married in the same manner as he would have been had the marriage taken place in Ontario, and that his daughter was his legitimate child. It was held that apart from the legal marriage, there was evidence from which a marriage according to the recognized form among Christians could be presumed.

Judgment.
Scott, J.

The onus is on the infant claimants to show that deceased was lawfully married to their mother, Mary Brown. The evidence shows that the only marriage between them was a marriage *per verba de presenti*. I now hold that in the state of the Territories at the time it took place, such a marriage did not constitute a valid marriage and, therefore, that the infant defendants are not entitled to share in the estate of the deceased nor is Mary Brown entitled to any interest therein.

Marcella Macfarland and Raphael Sheran, sister and brother of deceased, are shown to have died after his decease. It is shown that they died without issue but it is not shown whether or not they died intestate.

Their shares in the estate became vested before their decease and may have been disposed of by will. It is only in the absence of any such disposition that Ellen Sheran should be declared to be solely entitled to the estate. I therefore cannot upon the evidence before me make any declaration as to the interest to which she is entitled. I see no reason, however, why the administrator should not settle the question of her interest if he is satisfied as to the intestacy of the deceased brother and sister.

Nor do I see any reason why he should not proceed to fully administer the estate, now that the claim of the infant claimants is disposed of. That appears to have been the only difficulty in his way. In this view it would be premature to now make an order to pass and allow his accounts or to discharge him from office.

Both he and the claimant, Ellen Sheran, will have their costs out of the estate. Under Mr. Justice Rouleau's

Judgment.
Scott, J.

order of 7th October, 1897, the guardian of the infant claimants will also have his costs out of the estate.

In the event of the assets being insufficient to pay these costs the administrator *de bonis non* will be entitled to payment of his costs in full before payment of any costs to the others.

REPORTER:
Chas. A. Stuart, Advocate, Calgary.

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## SHARPLES v. POWELL.

*Practice—Place of entering suit—District of Deputy Clerk.*

In a small debt action where the cause of action arises within the district of a Deputy Clerk, and the defendant resides within the said district, the writ must be issued out of the office of the Deputy Clerk of the district, and a writ issued by the Clerk of the District from his own office will be set aside as irregular.

[ROULEAU, J., *December 15th, 1899.*

In this action the defendant resided within the district of the deputy clerk of the court at Edmonton, and the cause of action against him arose within the said district. The plaintiff resided within the district of the clerk of the Court at Calgary. The writ was issued from the office of the clerk at Calgary. The defendant applied by summons to set aside the writ of summons and statement of claim as irregular, on the ground (amongst others) that the writ should have been issued from the office of the deputy clerk of the Court at Edmonton.

*James Muir*, Q.C., for the defendant.

*R. B. Bennett*, for the plaintiff.

[*15th December, 1899.*] Judgment.

Rouleau, J.

ROULEAU, J.—This is a summons to set aside the writ of summons and statement of claim on the ground that the suit should have been entered in the office of and the writ of summons issued by the deputy clerk at Edmonton.

The question is:—Can a plaintiff sue the defendant for a debt under the "Small Debt Procedure" at Calgary when the cause of action arose at Edmonton?

Section 4 of the Judicature Ordinance (C. O. 1898 c. 21) determines where suits shall be entered, to wit, either in the judicial district where the cause of action arose, or where the defendant, etc., resides or carries on business, etc.

Sub-section 2 of section 4 provides that suits shall be entered in the above cases in any district of a deputy clerk, established by Ordinance, etc.

Part III., Order XLVII. of the Judicature Ordinance, called the "Small Debt Procedure," does not alter that law in respect of claims coming within it, except in so far as the defendant's residence is concerned. Rule 607 provides within what time the summons shall be returnable if the defendant resides either in the judicial district from whence the summons issued, or in any other judicial district in the Territories, or in any place in Canada outside the Territories or in the United States of America, or in any part of the United Kingdom.

If under this Order—the Small Debt Procedure—there was no other Rule but Rule 607, I would be inclined to think that a party living in the Territories would be able to sue any other party living in the Territories or elsewhere, in any Clerk's or Deputy Clerk's office, no matter where the cause of action arose, but it seems to me that Rule 620 makes an exception that cannot be overlooked. It says: "Except as to matters especially provided for in this Order the procedure or practice under the preceding

Judgment.
Rouleau, J.

orders and rules, where not inconsistent herewith, shall be adopted and applied in actions brought under this Order."

It appearing that the cause of action arose at Edmonton, and Edmonton being a district of a deputy clerk established by Ordinance, I hold, therefore, that this action should have been entered at Edmonton. The writ and statement of claim are set aside and the defendant is entitled to his order with costs.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

## McINTOSH ET AL. V. SHAW ET AL.

*Interpleader issue—Power to direct trial of by jury—North-West Territories Act, sec. 88—Judicature Ordinance, sec. 170.*

Neither a Judge nor the Court *in banc* has power to direct an interpleader issue to be tried by jury. Judgment of SCOTT, J., affirmed.

[SCOTT, J., *September 17th, 1898.*
[*Court in banc, January 27th, 1899.*

Statement.

Summons on behalf of the plaintiff, to have (*inter alia*) interpleader issue tried by a jury.

*P. McCarthy*, Q.C., for the plaintiffs.

*R. B. Bennett*, for the defendants.

[*September 17th, 1898.*]

SCOTT, J.—This is an ordinary interpleader issue to try the question of title to certain goods seized by the sheriff of the Northern Alberta Judicial District under certain executions in his hands, which goods have been claimed by the defendants.

On the 4th May last, plaintiffs obtained a summons for the issue of a commission to take the evidence of one Taylor and for the trial of the issue by a jury.

On the return of the summons, I made an order for the issue of the commission applied for but reserved judgment on the question whether plaintiffs were entitled to have the issue tried by a jury.

Section 88 of the N. W. T. Act provides that "Every Judge of the Supreme Court shall have jurisdiction, power and authority to hold Courts at such times and places as he shall think proper, and at such Courts, as sole Judge, to hear all claims, disputes and demands whatsoever, except as provided by the Act, which are brought before him and to determine any questions arising thereon, as well of fact, as of law, in a summary manner."

Judgment.
Scott, J.

The exception referred to is contained in sub-section 2 of the same section which provides that in cases where the claim, dispute or demand, arises out of a tort, wrong or grievance, and in which the amount claimed exceeds $500, or, if for a debt or on a contract, in which the amount claimed exceeds $1,000, or for the recovery of possession of real property; if either party demands a jury, or in any such case in which the Judge thinks fit to so direct, he may direct that all questions of fact therein shall be determined by a sworn jury of six in number.

In my opinion the effect of these provisions was to take away the right of trial by jury in civil cases in the Territories except in cases coming within sub-section 2. I am further of opinion that an issue such as this is not within that sub-section. I doubt whether it could be considered a claim, dispute or demand arising out of a tort, wrong or grievance, but, even if it were held to be such, it is not one in which *the amount claimed exceeds $500.* It may be that *the value of the property,* the title to which is in question, may exceed that amount, but I do not see that that fact can make any difference as the words of the sub-section are not broad enough to cover such a case. I think that in order to cover it some such words as are contained in clause 92 of the tariff of fees would be required.

I cannot see that section 155 of the Judicature Ordinance makes any alteration in the law in that respect. That section in so far as it was inconsistent with the provisions referred to was, in my opinion, *ultra vires* by virtue of section 13 of the Act referred to as amended by 54-55 Vic. c. 22, s. 6. The inconsistency is pointed out in the preamble to 60-61 Vic. c. 32, viz., that it applied to *all* actions for slander, libel, false imprisonment, malicious prosecution, seduction and breach of promise of marriage, irrespective of the amount of damages claimed therein, and that, in my view, is the full extent to which it alters the law with respect to trial by jury as prescribed by sub-section 2 of section 88 of the N. W. T. Act.

The application to have the issue tried by a jury is therefore refused. Judgment. Scott, J.

Costs of the application reserved.

Memorandum added 25th October, 1898.

Upon the argument before me Mr. Bennett, counsel for the defendants, stated that he had no objection to the issue being tried by a jury provided that I had power to direct that it should be so tried. He, however, contended that I had no power to make such an order.

The plaintiff appealed. The appeal was argued 26th January, 1899.

*P. McCarthy*, Q.C., for appellants.

*R. B. Bennett*, for respondents.

[*January 27th, 1899.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, and MCGUIRE, JJ.) was given by

WETMORE, J.—An interpleader issue was directed in this matter to try the right to certain personal property seized by the sheriff under executions and claimed by the defendants, Kinnard, Shaw & Co. It is admitted that the value of the property in dispute exceeds $1,000. Application was made to Mr. Justice SCOTT to have the issued tried by a jury. This application was refused by that learned Judge and the plaintiffs appeal from the judgment by which the application was so refused. The whole question turns upon the construction to be given to sub-sections 1 and 2 of section 88 of The North-West Territories Act (R. S. C. c. 50), and section 155 of The Judicature Ordinance (No. 6 of 1893), as confirmed by 60-61 Vic. (1897) c. 32 of the Parliament of Canada. It was urged that this last mentioned provision practically repealed sub-sections 1 and 2 of section 88 of The North-West Territories Act. I am of opinion, however, that it had not that effect: it merely, in the first place, gave the right to trial by jury in cases where it was not given by section 88, and in the next place echoed the provisions of sub-section 2 of that section and prescribed a

Judgment.
Wetmore, J.

mode of procedure to obtain trial by jury. It is claimed on behalf of the appellant that trial by jury is not absolutely taken away in the cases provided for in sub-section 1 of section 88; that that sub-section merely clothes a Judge with jurisdiction and authority solely "to hear all claims, disputes and demands," but that he may in the exercise of his discretion direct any case to be tried by jury. In other words that the language of the sub-section "Every Judge of the Supreme Court shall have jurisdiction, power and authority to hold Courts * * * and at such Courts as sole Judge to hear all claims, disputes and demands whatsoever," is merely permissive and creates no duty in the Judge. Possibly the language of the statute upon which the question arose in *Julius* v. *The Bishop of Oxford*[1] may be considered somewhat analogous to that of the section upon which the question now under consideration arises. The language under consideration in *Julius* v. *The Bishop of Oxford*,[1] was "it shall be lawful." The Court held that these words as used in that statute were merely permissive and enabling and that such would be the effect of such words whenever they appeared in a statute, unless there were considerations sufficiently cogent to establish the fact that the legislation intended to create a duty. Assuming that the language which I have quoted from section 88 to be *prima facie* merely permissive and enabling (a proposition by the way I by no means assent to), I am of opinion that reading sub-sections 1 and 2 together the Legislature intended to create a duty by it. Sub-section 1 gives to the Judge the jurisdiction and authority to try cases alone and without a jury; then sub-section 2 goes on to provide not only the cases in which the parties shall be entitled to jury as a matter of right, but it goes on to provide the cases in which the Judge, apart from any demand from either of the parties, may exercise his discretion and limits such right of discretion to the cases in which either of the parties have the right to demand a jury. Such a provision to my

[1] 5 App. Cas. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.

Judgment.
Wetmore, J.

mind would be entirely unnecessary, if the language of sub-section 1 was only intended to be permissive and enabling; for in that case the Judge could exercise his discretion to have a jury in deciding the cases in which he has been expressly given discretion in sub-section 2. I am of opinion, therefore, that the duty is cast upon the Judge of trying all cases alone, except such cases as come within the provisions of either sub-section 2 of section 88 or of section 155 of The Judicature Ordinance. Now, I do not hold that this matter is not a dispute which arises out of a tort, wrong or grievance; but I hold that it is not a claim, dispute or demand which arises out of a tort, wrong or grievance, in which the amount claimed exceeds five hundred dollars. It is not a claim, dispute or demand, for any amount at all. It is simply a proceeding to determine the right of property; no money amount whatever can be awarded. It is in the same position as far as the demand is concerned as if a suit or action had been brought not to recover damages but to obtain a declaratory decree as to the right of property. If the sub-section had provided that the parties would have a right to a jury when the amount claimed or the value of the property in dispute exceeded $500, then no doubt the right to a jury would be given, but the sub-section does not go that far. I am also of opinion that this is not a claim, dispute or demand for a debt or on a contract in which the amount claimed exceeds $1,000 for the reason that no amount is claimed at all. Mr. Justice SCOTT's judgment therefore is affirmed and this appeal is dismissed with costs.

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

## ROBINSON v. McINTOSH.

*Landlord and tenant—Rent—Seizure under execution—8 Anne c. 14—Interpleader.*

Where goods are seized under execution on leasehold premises and are claimed by a third party, who establishes his title thereto, the Statute 8 Anne c. 14 does not entitle the landlord to be paid rent by the sheriff.

Where, however, goods seized by the sheriff were claimed by a third party, and under an interpleader order were sold and the proceeds paid into Court pending the trial of an issue as to the ownership of the goods, and the trial of a second issue had been directed between the landlord and the execution creditor as to the landlord's right to the rent claimed, and the claimants in the first issue consented to the landlord's claim being satisfied, even if they should be successful in the issue, the landlord was held entitled to be paid out of the fund in Court the arrears of rent not exceeding one year's rent, without awaiting the decision of the issue as to the ownership of the goods. Judgment of ROULEAU, J., affirmed.

[ROULEAU, J., *November 18th, 1898.*

[*Court in banc, January 27th, 1899.*

Statement. On August 1st, 1896, the plaintiff leased certain premises to H. M. Shaw for five years at $15 per month. On August 3rd, 1896, H. M. Shaw sublet the premises to her son J. Y. Shaw, trading as Kinnard, Shaw & Co., for the same period at $20 per month. The goods on the premises were seized under the defendants' executions against Maltman, Shaw & Co., W. Phillips & Co., and Millar & Co., and were removed by the sheriff and sold by order of the Court, the proceeds being paid into Court. Previous to this order Kinnard, Shaw & Co. claimed the goods, and an interpleader issue between them and these defendants was pending. The plaintiff gave notice of his claim for rent only after the removal of the goods. At the trial J. Y. Shaw, the surviving member of the firm of Kinnard, Shaw & Co., who was still carrying on the business in the firm name, consented that the plaintiff should be paid one year's rent and his claim (should he succeed in the pending interpleader issue) be reduced by the amount thereof.

The issue was tried before ROULEAU, J., without a jury at Calgary.

[*November 8th, 1898.*]

Judgment.

Rouleau, J.

ROULEAU, J.—This is an interpleader issue in which Robinson, the plaintiff in the issue, claims one year's rent from the execution creditors, McIntosh & Co., the defendants in the issue.

The facts are these:—On the 1st August, 1896, Helen Maria Shaw leased from the plaintiff the south half of section 4, township 23, range 1, west of the 5th meridian, District of Alberta, North-West Territories, for the sum of $15 per month for five years. On the 3rd August, 1896, Helen Maria Shaw sub-let the same premises to John York Shaw, her son, trading under the name and firm of Kinnard, Shaw & Co., for the same period, at the rate of $20 per month.

The goods on the aforesaid premises have been seized under executions at the instance of the defendants, McIntosh & Co. These executions were against Maltman, Shaw & Co., W. Phillips & Co. and Millar & Co. The goods were removed by the sheriff and sold by order of the Court and the proceeds paid into Court. Previous to the order, Kinnard, Shaw & Co. claimed the goods as their property, and the sheriff interpleaded and an issue was directed, which is still pending. It is admitted that Robinson, the plaintiff in the present issue, gave notice to the sheriff of his claim for rent only after the removal of the goods.

Upon this statement of facts, it is contended by the plaintiff that he is entitled to his claim for one year's rent, no matter whether the goods are declared by this Court to belong to the execution debtors, or whether they are declared to belong to the claimants, Kinnard, Shaw & Co., because in the first instance if it turns out as a result of the interpleader contest that the goods are subject to the executions, the landlord will, nevertheless, have his rent out of the stranger's goods, and in the second instance, if it turns out that the goods belong to Kinnard, Shaw & Co., although the plaintiff would have no right to claim rent from them, John York Shaw, the surviving partner of the said firm, and who still carries on the business in the firm's

Judgment.
Rouleau, J.

name, consents that the plaintiff should be paid his rent, and that his claim if successful be reduced by the amount of one year's rent.

On the other hand, the defendants contend that in such a case as this the landlord must have been paid or at least have claimed his rent before the goods were removed; because, in this case, 1st, the executions were not against the tenant, and the tenant was not a party to these suits; 2nd, the goods are not claimed by the tenant; 3rd, the goods being removed before the sheriff had any notice of the claim for rent, the landlord had ceased to have any claim on these goods, and the statute of Anne does not apply; 4th, notice to the sheriff is not equivalent to a seizure, and therefore a removal of the goods of a third party before actual distress defeats the landlord's claim.

In *Clarke* v. *Farrell*[1] it was held that the statute 8 Anne c. 14, s. 1, only applied to the goods of the execution debtor and not to those of third persons, against whom there must be a distress, notice to the sheriff not being sufficient, and that the sheriff selling incurred no liability, as he was secured under the interpleader order.

The facts of the above case are quite different from the facts of the case under consideration, but the principles of law governing the one are applicable to the other. Cameron, J., in his judgment, says: "As between the landlord and the execution plaintiff, if the money in the sheriff's hands were going to the latter, the landlord would be entitled to be paid the amount of his rent, for the simple reason that under the statute 8 Anne c. 14, s. 1, no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements, which are, or shall be, leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, or any pretense whatsoever unless the *party at whose suit* the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such

[1] 31 U. C. C. P. 584.

sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution issued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of the Act."

Judgment.
Rouleau, J.

It seems to me that the law is clear. In my opinion it means that when goods are sold under an interpleader order by the sheriff, and the proceeds are paid into Court, as in this case, the whole proceeds should be paid in less only the expenses of possession and sale, and the landlord will only be entitled to his rent if the execution creditor succeeds in the issue, but if the stranger succeeds, the latter will be entitled to the whole fund freed from the landlord's claim.

For the purpose of this case, the claimant admits to owe the rent and is willing to pay it if he succeeds in the other interpleader issue pending before me; otherwise I would not have been in a position to render judgment in this case till the other interpleader issue had been decided. But it is different with the execution creditors; if they succeed they have to pay the rent at all events.

I have read carefully all the authorities cited, and I cannot find an authority which would sanction the principle that when the goods are removed from the premises of a landlord, the landlord loses his claim for rent, if the execution is against a stranger, but if the execution is against the tenant, and the creditor succeeds in his execution, then the landlord in this case would be entitled to the arrears of rent to the extent of one year's rent.

The statute of Anne already cited makes no exception. It says:—"No goods or chattels *whatsoever* lying or being in or upon any messuage, lands or tenements," etc.

Whether these goods belong to the tenant or to a stranger it does not matter as long as the execution creditor succeeds. If otherwise, the goods had been removed from the

Judgment. Rouleau, J.

leased premises and the stranger had proven his title to them, then the landlord could not claim any rent against him.

I am therefore of the opinion that the plaintiff in this case is entitled to the arrears of rent to the extent of one year's rent, and consequently to judgment for the sum of $180 and for the costs of this contestation.

The plaintiff appealed. The appeal was argued January 26th, 1899.

*P. McCarthy*, Q.C., and *C. A. Stuart*, for the plaintiff the appellant.

*R. B. Bennett*, for the defendant the respondent.

[*January 27th, 1899.*]

The judgment of the Court (RICHARDSON, WETMORE, MCGUIRE and SCOTT, JJ.) was given by

MCGUIRE, J.—This is an appeal from the judgment of Mr. Justice ROULEAU as to the right of a landlord to claim from the sheriff a year's rent of the premises on which were certain goods seized by the sheriff under executions. The appeal is on the ground that the goods being not the property of the tenant could have been distrained, if at all, only while on the demised premises; that they were not distrained nor was any notice of rent due given to the sheriff until after seizure and removal from the demised premises; and that the goods being removed, even by the sheriff, they ceased to be distrainable.

By the statute of 8 Anne c. 14, when goods are taken under an execution by the sheriff he must pay to the landlord a year's rent. It has been decided in a number of cases that where the goods seized by the sheriff prove to belong not to the execution debtor but to a third person, who has claimed them from the sheriff and established his title thereto, the landlord cannot compel the sheriff to pay a year's rent, and it seems to me this rests on the ground that, though they were taken under the apparent authority of the execution, they were wrongfully so taken, the writ

Judgment.
McGuire, J.

not giving any authority to the sheriff to seize the third person's goods, so that they were not, in the language of 8 Anne, "liable to be taken by virtue of the execution," and so that Act did not apply.

But in this case if the goods were the goods of the judgment debtors, Maltman, Shaw & Co., then they were "liable to be taken by virtue of the execution," and so the case comes fairly within the language of the statute. But it is still a question in dispute in the interpleader action of McIntosh v. Shaw whether these goods belonged to the judgment debtors or to the claimants, Kinnard, Shaw & Co. That being so, and holding as I do that if the goods did not belong to the execution debtors, the landlord would have no claim for rent from the sheriff, the final decision of this case would have to stand until the title to the goods had been settled in McIntosh v. Shaw. But that is not, I think, necessary by reason of the claimants in that issue consenting, in case they are held entitled to the goods, to the landlord being paid a year's rent out of the proceeds of the sale of the goods.

The case resolves itself into this. If the goods are the property of Kinnard, Shaw & Co., the claimants, then the sheriff and the execution creditors have no claim to them and the proceeds of the sale would go to Kinnard, Shaw & Co., and the sheriff cannot be heard to say that Kinnard, Shaw & Co. may not do with their own money as they please. On the other hand, if the goods prove to be the property of the execution debtors, then, as already mentioned, they were liable to be taken by virtue of the executions under which they were taken, and the landlord would be entitled to be paid a year's rent out of the proceeds. But it was further urged by the plaintiff that even if the goods were liable to be taken by virtue of the execution, the statute of 8 Anne will not entitle the landlord to be paid a year's rent by the sheriff unless the goods so taken by him were liable to be distrained by the landlord had they remained on the demised premises, and that as the execution debtors in this case was not the tenant or a person who was liable for

Judgment.
McGuire, J.

the rent, the landlord could not have distrained on them by reason of Ordinance No. 7 of 1896. He argues that assuming the proposition to be correct, the landlord was not prejudiced by the seizure and removal by the sheriff; that when 8 Anne c. 14 was passed any goods on the premises no matter to whom they belonged were distrainable; but, our Ordinance having limited the goods liable to distress, that the landlord should be held entitled to claim from the sheriff only when he took goods and thereby prejudiced the landlord. In the view I have taken of the facts, I do not think it necessary to decide this proposition, because I think that had the goods in question been the property of the execution debtors, they would not have been protected by Ordinance No. 7, 1896, because Maltman, Shaw & Co. were a firm composed of relatives of the tenant, residing on the premises as members of her family as Mr. McCarthy admitted in argument. Had the sheriff not removed the goods and the landlord had distrained, Maltman, Shaw & Co. could not by reason of their said relationship to the tenant have successfully claimed the goods from him.

I think therefore the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

## HOWARD v. HIGH RIVER TRADING CO. ET AL.

*Execution—Chattel mortgage—Creditors' Relief Ordinance—Priorities.*

*Held* (WETMORE, J., *hesitante*), that executions against goods placed in the hands of a sheriff subsequently to the making of a chattel mortgage by the execution debtor, on the goods seized, attach only on the equity of redemption and are not entitled under the Creditors' Relief Ordinance† to share with executions placed in the hands of the sheriff prior to the giving of the mortgage. *Roach* v. *McLachlan*,[1] and *Breithaupt* v. *Marr*,[2] followed. Judgment of ROULEAU, J., affirmed.

[ROULEAU, J., *December 18th, 1898.*

[*Court in banc, June 8th, 1899.*

Statement.

The following executions were duly lodged with the sheriff on the following dates commanding him of the goods and chattels of one Knox to cause to be made the several amounts following, viz.:—

May 28th, 1897—Execution of the High River Trading Co. for $1,204.06. June 9th, 1897—Execution of the High River Trading Co. for $62.10. June 12th, 1897—Execution of Margaret McKay for $465.16. June 12th, 1897—Execution of the North-West Cattle Co. for $78.30. June 29th, 1897—Execution of W. C. Howard for $5,544.28.

The following chattel mortgages made by the said Knox were duly filed on the following dates to the persons and for the amounts following, viz.:—June 12th, 1897—To C. E. Smith, for $3,000. June 12th, 1897—To the Bank of Ottawa, for $4,263.35. June 12th, 1897—To the Imperial Bank of Canada, for $2,230. June 23rd, 1897—To appellant, for $5,500.

On June 5th, 1897, the said sheriff seized goods of the said Knox under the writ of execution then in his hands, and on July 3rd, 1897, sold the same and realized therefrom $3,230. On July 3rd, 1897, the said sheriff made a further levy on the goods of the said Knox, and on September 16th,

† Ord. No. 25 of 1893; see now C. O. (1898) c. 26.

[1] 19 O. A. R. 496. [2] 20 O. A. R. 689.

Statement. 1897, sold the same under order of the Court and realized therefrom $873.50. Howard claimed to share as an execution creditor *pari passu* with the prior execution creditors in the proceeds of the said sales under the Creditors Relief Ordinance.

[*December 18th, 1898.*]

ROULEAU, J., after reciting the above facts: Upon the above statement of facts, I am asked to decide summarily whether the said William Crewdson Howard has the right to share *pro rata* in the moneys realized by the sheriff of said judicial district from the sales of the said goods and chattels.

Section 3, sub-section (*a*) of the Creditors Relief Ordinance says: In case a sheriff levies money upon an execution against the property of a debtor, he shall forthwith enter in a book, to be kept in his office . . . a notice stating that such levy has been made, and the amount thereof; and the money shall thereafter be distributed rateably amongst all execution creditors whose writs were in the sheriff's hands at the time of the levy, or who shall deliver executions to the said sheriff within one month from the entry of notice, etc.‡

It is evident that this sub-section of the Creditors' Relief Ordinance deals only with the levy of money upon an execution against the property of the debtor. This does not interfere with the right of the mortgagees or the rights of the creditors, as they may be affected or altered by a mortgage or sale of such property after the issue of an execution. Although section 2 of Ordinance No. 7 of 1895 (2) says: "That every writ of execution against goods and chattels shall, at and from the time of its delivery to the sheriff to be executed, bind all the goods and chattels or any interest in all the goods and chattels of the judgment debtor within the judicial district of the said sheriff," § still the property remains the debtor's property, and he may

‡ See C. O. (1898) c. 26, s. 3 (*a*).
§ Jud. Ord. C. O. (1898) c. 21, r. 356.

Judgment.
Rouleau, J.

sell or mortgage it as he pleases. If he does so, it ceases to be his property and becomes the property of the purchaser or mortgagee subject to the execution. It becomes still clearer by reading the remainder of the same section. It goes on to say that the said execution "shall take priority to any chattel mortgage, bill of sale or assignment for the benefit of all or any of the creditors of the judgment debtor executed by him after the receipt by the sheriff of such writ of execution," etc. Therefore it is clear that a bill of sale or a chattel mortgage given by the debtor after the receipt by the sheriff of the execution has the effect of cutting out all other executions handed to the sheriff after such bill of sale or mortgage is given.

Section 8 of the Creditors' Relief Ordinance || does not alter this law. It merely provides that "one seizure of the goods and lands of the debtor shall be deemed sufficient and shall be deemed a seizure on behalf of all creditors sharing under such seizure as hereinbefore provided." That is exactly what was done in this case; the sheriff seized once for all the execution creditors whose executions he had in his hands at the time.

The position would be quite different if the sheriff had levied the money before the mortgages had been given by the debtor, then there would have been no doubt that the execution creditors, provided they had handed their executions to the sheriff within thirty days, would have had a right to share in the proceeds of the first executions.

The case of *Roach* v. *McLachlan* [1] does not go any further than to decide that when a levy of money is made by the sheriff under an execution and a mortgage or bill of sale intervenes between the first execution and other executions, such mortgage or bill of sale has the effect of cutting out the latter, and the subsequent execution creditors are not entitled to share *pari passu* in the proceeds of the sale under the first execution.

I have come to the conclusion that William C. Howard has no right to share in the proceeds of the three first ex-

|| See C. O. (1898) c. 26, s. 9.

Judgment.
Rouleau, J.

ecutions which were in the hands of the sheriff when the mortgages were given, because his execution was handed to the sheriff after the mortgages were given, and the mortgages were given before the levy was made.

The costs of this contestation will be paid by William C. Howard.

The plaintiff appealed.

The appeal was argued on the 23rd of January, 1899.

*C. C. McCaul*, Q.C., for appellant:—

*Roach* v. *McLachlan* [1] and *Breithaupt* v. *Marr* [2] are wrong, at any rate so far as the distribution of the moneys levied by the sheriff on the first executions are concerned. The words "against the property of a debtor" in section 3 (*a*) qualify the word "execution." The goods are sold as the property of the debtor, and not as that of the purchaser or mortgagee. Appellant is entitled to share irrespective of the question whether or not further recourse can be had against the goods in the hands of the mortgagees.

The Ontario Act contains no provision corresponding to section 8 of the Creditors' Relief Ordinance. When the sheriff sold he sold under all the writs then in his hands (per Lord Denman, C.J., in *Drewe* v. *Lainson* [3]) and appellant's execution was delivered prior to the sale.

*P. McCarthy*, Q.C., *James Muir*, Q.C., and *H. W. H. Knott*, for respondents. At common law executions bound from the dates of the teste of the writs, and execution creditors were entitled to be paid in the order of such dates. By Ordinance No. 7 of 1895 a writ of execution binds from the date of its delivery to the sheriff, and takes priority to any chattel mortgage executed by the judgment debtor after the receipt by the sheriff of such writ. If appellant should succeed respondents would be deprived of a right they have at common law and under Ordinance No. 7 of 1895. A right is only taken away by express enactment: Hardcastle on Statutes, p. 134; *In re Cuno, Mansfield* v. *Mansfield*,[4] *Regina* v. *Morris*.[5]

[3] 11 Ad. & E. 536. [4] (1889) 43 C. D. 12. [5] (1867) L. R. 1 C. C. R., at p. 95; 36 L. J. M. C. 84.

Argument.

As to the effect of an execution on the goods of the debtor see *Giles* v. *Grover*,[6] *Samuel* v. *Duke*,[7] *Woodland* v. *Fuller*.[8]

Appellant's execution having been delivered subsequent to the making of the chattel mortgages, it attached on the equity of redemption only, and appellant is not entitled to share: *Roach* v. *McLachlan*[1] and *Breithaupt* v. *Marr*.[2]

[*June 8th*, 1889.]

McGuire, J.—This is an appeal from the judgment of Mr. Justice Rouleau.

The Sheriff of the Southern Alberta Judicial District had, on the 28th May, 1897, an execution placed in his hands against the goods of one Knox, under which he at the suit of the High River Trading Co. on the 5th June made a seizure. On the 9th June he received another execution at suit of said company against the goods of Knox. On the 12th June two other executions were received by him, one on behalf of Margaret McKay and the other on behalf of the North-West Cattle Co. On the same day that he received these last two executions chattel mortgages against Knox were registered, one by Crispin E. Smith for $3,000, and by the Bank of Ottawa for $4,263.33, and one by the Imperial Bank for $2,250. Subsequently on the 23rd June the plaintiff Howard's chattel mortgage for $5,500 was registered, and on the 29th June an execution for $5,544.25 in the suit of Howard v. Knox was delivered to the sheriff.

Howard claims to rank as an execution creditor along with the High River Trading Co., Margaret McKay and the North-West Cattle Co., and to share with them *pro rata* in the moneys realized by the sheriff under sales of Knox's goods under the executions in his hands on July 3rd and September 16th, 1899. The other execution creditors say that after the delivery to the sheriff of their executions and

[6] 1 Cl. & F. 72; 2 M. & Sc. 197; 9 Bing. 128; 9 Bligh. N. S. 277. [7] 3 M. & W. 622; 6 D. P. C. 536; 1 H. & H. 127; 7 L. J. Ex. 177. [8] 11 A. & E. 859; 3 P. & D. 570; 4 Jur. 743; 9 L. J. Q. B. 181.

Judgment.
McGuire, J.

before the plaintiff's execution reached the sheriff the above chattel mortgages were registered, and therefore Howard's execution could operate only against the interest of the debtor, that is, his equity of redemption; that the money levied under their execution, being made after the registration of the mortgages, was made, not against or out of the property of the debtor, but out of the property of the mortgagees. Mr. Justice ROULEAU's judgment appealed from decided that Howard was not entitled to share with the prior execution creditors.

The case turns on the construction of the Creditors Relief Ordinance, and especially section 3 (*a*). For the appellant it is contended that in the sentence beginning "in case a sheriff levies monies upon an execution against the property of a debtor" the words "against the property of a debtor" are really descriptive of the word execution and are equivalent to "upon an execution issued upon a judgment against a debtor." On the part of the respondents it is contended that the above words qualify "levies," and mean the same as if they had been arranged in this order: "in case a sheriff levies money against (or out of) the property of a debtor upon an execution." The difference of the two readings is important. If the appellant's reading be taken he says he must succeed because the money was levied by a sheriff and upon an execution, and the execution was issued against the property of a debtor and, that being so, his execution must share *pro rata*. If the respondents are right then the money levied by the sheriff was not levied against (that is, out of) the property of the debtor, but out of the property of the mortgagees, because at the time of the levy, that is the sale, the property had ceased to be the property of the debtor and become that of the mortgagees, and the only reason why the executions, in the sheriff's hands prior to the registration of the chattel mortgages and the consequent change in the ownership of the property, were entitled to be satisfied out of these goods, is because the mortgagees took the property subject to the executions already in the sheriff's hands—

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they did not take subject to later executions. The respondents say therefore that the money levied by the sheriff not being so levied against (*i.e.*, out of) the property of the debtor, section 3 (*a*) does not apply so as to entitle executions reaching the sheriff subsequent to the registration of the chattel mortgage to share *pro rata*. In the Ontario Court similar words were construed according to the meaning sought to be given them by the respondents. I refer to *Roach v. McLachlan*,[1] followed up by *Breithaupt* v. *Marr*,[2] and these decisions, the former in 1892, the latter in 1893, including the opinions of Chief Justice Hagarty and Justices Osler and MacLennan, have been acquiesced in ever since by the Ontario Bar.

It does not appear that in the Ontario cases the point raised by the appellant here was taken. Let us see if there is anything in it. To describe an execution as one "against the property of a debtor" seems a little odd to begin with. All executions under which moneys are levied are "against the property of a debtor," so this, if intended as a description, does not describe—does not seem to do anything to the idea conveyed by the bare word "execution" as used in this place. But we find that the Ordinance had already in the former part of the section described the execution intended to be dealt with as an "execution from the Supreme Court of the North-West Territories." It would seem unnecessary to describe it again in the next line but one. Going over the various sections of the Ordinance I find that, leaving out the disputed phrase, in no place does the Ordinance describe an execution as one "against the property of the debtor." Having in the first lines of section 3 been spoken of as an "execution from the Supreme Court, N. W. T.," it is thereafter mentioned 35 times, twice it is called a "writ of execution," 21 times an "execution," and 13 times a "writ," and in one place an "execution for a claim," but in no case are words added to show what the writ is against except in Form "A," where it is provided that the sheriff shall state under what kind of execution he has levied, and the words "against the goods" or "against the lands" are to be employed. Here the added words

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furnish some information, while "against the property" give no information. When, however, the Ordinance is describing a *levy* it frequently adds words to describe that out of which the levy is to be made. In section 3 (*d*) it uses the words "levy a further amount upon the property of the debtor"—"further" is here used with reference to the levy mentioned in the disputed phrase in section 3 (*a*). Now to be a "further levy upon the property of the debtor" there must have been a previous "levy upon the property of the debtor," and the only previous levy mentioned is that in section 3 (*a*). Evidently "against the property" and "upon the property" are used as synonymous expressions, and both qualify "levy" and not "execution." It is not suggested that "upon the property" are words descriptive of the execution. Again in section 4 the source from which a levy is made is added, but the language is again changed; here it is "levied *from* the property of the debtor." In section 6 the language is again slightly changed to "levy upon the goods or lands of the debtor." In section 17 it is "levied out of the property of a debtor," and in Form A it is "levied and made out of the property of C. D." But it is contended that even if the construction placed on the Ontario Act in the cases mentioned is correct, our Ordinance differs from the Ontario Act; that there is no provision in the latter corresponding to our section 8. I presume reference is made to the first four lines, for the rest of section 8 is taken almost *verbatim* from section 26 of the Ontario Act. The first part of section 8 says "One seizure of the goods and lands of the debtor shall be deemed sufficient, and shall be deemed a seizure on behalf of all creditors sharing under such seizure as hereinbefore provided." The appellent is seeking to show that he is a creditor sharing under such seizure. If he is such a creditor, then by section 8 the seizure is to be deemed a seizure on his behalf as well. By this very thing which he is trying to prove he is here assuming—an instance of arguing in a circle. Is it seriously contended that a seizure under an execution delivered to a sheriff prior to a sale or mortgage by a judgment debtor is to be deemed a seizure as well on behalf of

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certain executions which come to the sheriff after the date of the sale or mortgage? If so, then in the present case the sheriff's seizure under the High River execution would be also a seizure under the Howard execution, and in that case the chattel mortgages here would be cut out, for these combined executions would more than exhaust the whole property. The meaning of section 8 is that one seizure shall be deemed a seizure, not on behalf of all executions that may come into the hands of the sheriff, but only on behalf of those creditors whose writs reached the sheriff not later than one month from the entry in the prescribed book as provided in section 3 (*a*), and are therefore entitled to share in money levied out of the property of the debtor. It must not be strained to mean something that could not have been contemplated in enacting section 8. If the first two lines of section 3 (*a*) refer to money levied out of or from the property of the debtor, and this is to be distributed *pro rata*, then the money here was not levied out of the debtor's property, but out of the property of the mortgagees.

I have come to the conclusion that the money in question levied by the sheriff was not levied out of the property of the debtor, but out of the property of the mortgagees.

The appellant has set up as an alternative ground of appeal, in the event of his main contention, just considered, not being successful, that because, as he alleged, some of the property on which the sheriff's levy was made was not included in the mortgages registered prior to that of Howard, as to so much of said moneys as was the proceeds of this property he was entitled to rank *pari passu* with the prior executions. On the appeal, Mr. McCaul, for the appellant, announced that he abandoned this ground, consequently it is not necessary to consider it.

The appeal should be dismissed with costs, to be paid by the appellant.

RICHARDSON and SCOTT, JJ., concurred.

Judgment.

Wetmore, J.

WETMORE, J.—I must frankly admit that were I to depend on my own unaided judgment, I would have great difficulty in reaching the same conclusion in the case as the other members of the Court have. I fail thoroughly to appreciate the construction put upon the words in section 3 of the Creditors Relief Ordinance "upon an execution against the property of a debtor." These words appear to me to be very plain and have a well understood meaning. The execution is against the property of the debtor. The sheriff is commanded of *the goods and chattels of the debtor* to make the money. It may be true that, a mortgage having been executed after the writ attached, the sheriff made the money out of the property of the mortgagee, but he so made it (and rightly so), by virtue of an execution against the property of the debtor, and that would occur to me to bring the case within the plain meaning of the words of the Ordinance which I have quoted, and that being so, it would appear that the consequences provided for in that section would follow. However, as my learned brethren have unanimously reached the conclusion laid down in the judgment just read, and as the conclusion is most undoubtedly supported by two judgments by the very able judges of the Court of Appeal for Ontario, I have not the temerity to dissent, and I therefore concur in the judgment delivered by my brother MCGUIRE.

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

# THE QUEEN v. ASHCROFT.

*Criminal Law— Certiorari—Recognizance—Sufficiency of Justification by sureties—Appeal taking away right to certiorari.*

An affidavit of justification upon a recognizance given pursuant to Rule of Court† passed under section 892 of the Criminal Code, need not state that the surety is worth the amount of the penalty *over and above other sums for which he is surety.*

A Rule of Court made under section 892 of the Criminal Code requiring sufficient sureties for a specific amount is complied with if the sureties justify as being possessed of property of that value, and as being worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. *Regina* v. *Robinet*[1] *not followed.*

Where a conviction is attacked on the ground of want of jurisdiction, the mere filing of a recognizance by the defendant on an appeal therefrom does not deprive him of his right to a writ of *certiorari.*

The conviction and all other proceedings relating thereto having been filed by the magistrate under section 801 of the Criminal Code, in the office of the clerk of the Court for the judicial district in which the motion is made, a motion to quash the conviction can be made without the issue of a writ of *certiorari.*

Section 892 of the Criminal Code authorizes the requiring of a recognizance only where the conviction is brought before the Court by a writ of *certiorari*, and no recognizance is required where such a writ is not necessary or is dispensed with.

[ROULEAU, J., *January 6th*, 1899.

† The Rule of Court in force at the date of this decision was R. 13 of the Con. Rules, 1895. The Rules were again consolidated in 1900. Rule 13 of 1895 was re-enacted *verbatim* as R. 23 of 1900, and reads as follows:

No motion to quash any conviction, order or other proceeding by or before a justice or justices of the peace, and brought before the Supreme Court of the North-West Territories, or any Judge thereof, by *certiorari*, shall be entertained by such Court or Judge, unless the defendant is shown to have entered into a recognizance in $200 with one or more sufficient sureties, before a justice of the peace, and deposited the same with the registrar or clerk, as the case may be, or to have made a deposit with the said registrar or clerk of $100, in either case with a condition to prosecute such motion and writ of *certiorari*, at his own costs and charges, with effect, and without any wilful or affected delay, and if ordered to do so, to pay to the person in whose favor the conviction, order or other proceedings is affirmed, his full costs and charges, to be taxed according to the course of this Court, where such conviction, order or proceeding is affirmed.

[1] 16 O. P. R. 49; 2 Can. Crim. Cas. 382, where the Ontario Rule is set out.

Statement.

On the return of the rule nisi for a writ of *certiorari*, and to quash the conviction, it appeared that the conviction and all proceedings had been filed in Court by the magistrate under section 801 of the Criminal Code, and among the proceedings returned was a recognizance filed by the defendant to prosecute an appeal from the conviction in question, also a recognizance filed on the present application. In the latter, each of the sureties swore, "That he was possessed of property of the value of $200 over and above all his just debts and liabilities, and over all exemptions allowed by law." Counsel for the magistrate took the preliminary objections:

(1) That the sureties did not swear they were worth $200 over and above any other liabilities as sureties, citing *Regina* v. *Robinet* (1894).[1]

(2) That the appeal recognizance having been produced was evidence of an appeal having been taken, and the right to *certiorari* was taken away: *Regina* v. *Lynch* (1886).[2]

*James Muir*, Q. C., for the defendant.

*P. McCarthy*, Q. C., for the magistrate.

[*Calgary, January 6th*, 1899.]

ROULEAU, J.—Two preliminary objections were taken on this application:—

(1) That the affidavit of justification in the recognizance is bad, because the party does not swear that he is worth two hundred dollars above all liability as a surety.

(2) That the defendant had previously entered into recognizance to prosecute an appeal before a Judge without a jury, and therefore, he had lost his right to *certiorari*.

I am of the opinion that the first objection is bad, because the only duty imposed by law upon a surety is that he should show that he is worth the amount above all liabilities, In this case the two sureties swear that they are possessed of property of the value of two hundred dollars, and that they are worth two hundred dollars over and above all their

[2] 12 O. P. R. 372.

Judgment.
Rouleau, J.

just debts and *liabilities*, and over and above all exemptions allowed by law.

*Regina* v. *Robinet*[1] does not show what was the rule in Ontario as to sureties, nor how the affidavit was drawn. At all events, I am not prepared to go so far, as long as the sureties can swear to their sufficiency under section 892 of the Criminal Code.

The second objection is not tenable under the authorities. A party has always a right to a writ of *certiorari* on the ground of want of jurisdiction, no matter whether an appeal is pending or not.

Besides, I am of the opinion that no recognizance is necessary before a writ of *certiorari* is obtained; and if such a writ is not necessary or is dispensed with, there is no reason why a recognizance should be filed.§ Section 892 of the Criminal Code is too clear to be commented on. It is sufficient for any one in reading it to see that a recognizance is only necessary when an order absolute for a writ of *certiorari* has been made and the writ issued, because it is made under the condition of prosecuting "the said writ."

*Preliminary objections dismissed.*

REPORTER:

The Editor.

§ ROULEAU, J., and SCOTT, J., had previously *held* in *Regina* v. *Monaghan*, 2 N. W. T. R. 298 (which will appear also in the third volume of the present series), that where in pursuance of the Criminal Code section 801 or section 888 (see section 879) the conviction, etc., had been transmitted to the clerk of the proper judicial district, or the registrar of the Court, according to whether the motion was before a Judge or the Court, they were regularly before the Court, and a writ of *certiorari* was unnecessary.

RICHARDSON, J., and WETMORE, J., *held* the contrary, and MCGUIRE, J., being absent, the Court was equally divided.

## GENGE v. WACHTER.

*Attachment of debts—Issue—Debt—Onus of proof—Transfer under seal—Estoppel — Fraudulent Conveyance— Vendor's lien—Execution—Priorities—Subrogation.*

A transfer of land had been made by the judgment debtor to the garnishee, the consideration expressed being a certain sum, the receipt whereof was thereby acknowledged; the transfer was under seal; the oral testimony—that only of the parties to the transfer—was to the effect that the transfer was in fact made in settlement of a debt owing by the transferror to the transferree. A certificate of ownership had issued, pursuant to the transfer, which, however, was marked subject to an execution issued and registered after the execution of the transfer. The transferree afterward paid the amount of the execution.

On an issue, in which the judgment creditor affirmed, and the garnishee denied, that at the date of the service of the garnishee summons there was a debt due or accruing due from the garnishee to the judgment debtor.

*Held, per* RICHARDSON, ROULEAU and MCGUIRE, JJ., affirming SCOTT, J., that the onus was on the judgment creditor to prove the existence of the indebtedness, and the evidence failed to prove it.

*Per* SCOTT, *J.*

(1) *Held.* The intention of the parties to the transfer must govern in the decision as to the existence of an attachable debt; if they intended the transfer as a settlement of the claim of the transferree against the transferror, no matter how vague or shadowy that claim might be, no debt was created by it from the transferree to the transferror; and *semble* even if there had been no just or legal claim for which the transferror was liable to the transferree, and the transfer was made merely for the purpose of defeating creditors, but with the understanding that the purchase money was not be paid, no debt would be created.

(2) *Semble.* The fact, had it been clearly established, which, however, was not the case, that the land was worth more than the consideration expressed, would not have affected the decision of the issue; for if there was a debt at all it could be only for the amount of the consideration expressed.

(3) *Held.* The execution did not constitute a charge upon the land, because, before its registration, the execution debtor had transferred his interest in the land. *Wilkie* v. *Jellett*[1] followed.

(4) *Semble.* Had the execution formed a charge, the garnishee (having paid it), would have been entitled as against the judgment creditor to apply the purchase money, if it were payable, in satisfaction of the judgment.

(5). *Quære.* Whether the execution creditor, having registered his execution before the service of the garnishee summons, would not have had a prior claim on the unpaid purchase money.

[1] 2 N. W. T. R. pt. No. 1, p. 125, affirmed, 26 S. C. R. 282.

*Per* RICHARDSON, ROULEAU and MCGUIRE, JJ. Had the evidence established that the transfer was really voluntary, or made for the purpose of defeating creditors, it would, at most, result in setting aside the sale, and so defeat the claim that a debt existed from the transferree to the transferror.

*Per* WETMORE, J. (1) There was no attachable debt, because in view of the acknowledgement under seal in the transfer, the transferror could not, in the absence of fraud, have maintained an action *at law* against the transferree for the consideration money, as he would by such acknowledgement be estopped; and while the acknowledgement would not be effective as an estoppel in a suit *in equity*, if the consideration were not in fact paid, yet such a suit would be a proceeding *in rem*—not upon his contractual rights but to assert a lien; and although the transferror might in such a case be entitled to a personal order for any deficiency, the transferree's liability in that respect would be contingent on the fact of a deficiency and be incidental to the right of lien.

(2) The omission of the defendant in the issue to object to the reception of evidence of the non-payment of the purchase money did not prevent him from contending that, notwithstanding such evidence, the plaintiff was not entitled to recover in the face of the admission in the transfer.

(3) The Respondent in an appeal is entitled to support the judgment on any available ground, even though it was not raised at the trial, or pronounced on by the Judge.

[SCOTT, J., *January 10th*, 1899.
[*Court in banc, December 9th*, 1899.

Interpleader issue.

Statement.

On March 4th, 1897, the plaintiff, in the issue instituted an action against C. Wachter. On March 17th, 1897, C. Wachter by transfer under seal transferred to the defendant in this issue (his father) certain lands. The transfer purported to be made in consideration of $200 paid by the defendant in the issue to C. Wachter, who therein acknowledged its receipt. On April 12th, 1897, the defendant obtained a certificate of title to the said lands, upon which was endorsed a memorandum stating that the defendant's title thereto was subject to a writ of execution issued at the suit of C. Bros. v. C. Wachter, dated March 22nd, 1897, and registered March 25th, 1897. On November 1st, 1897, the plaintiff served a garnishee summons on the defendant, who denied liability to the judgment debtor, C. Wachter. Thereupon the trial of an issue was directed as to whether or not on November 1st, 1897, there was any debt due or accruing due from the defendant in this issue to C. Wachter, the judgment debtor.

Statement. The issue was tried before SCOTT, J., at Macleod, November 17th, 1898.

*J. R. Costigan*, Q.C., for plaintiff, in issue (judgment creditor).

*C. F. Harris*, for defendant in issue (garnishee).

The plaintiff called the defendant in the issue as a witness, who stated that he had bought the land from his son (the judgment debtor) about six months before service of the garnishee summons; that he had not paid his son anything for the land, because his son owed him the money; that the account between himself and his son had not been made up; that his son had used eleven horses and harness of his in certain trading operations; that he was to have got half the profits of these trading operations, but that his son had never paid him a cent; that he had never had any statement from his son, though he had asked for one several times; that he thought his son had made a profit out of the trading operations; that his son had never denied owing him, and that he owed his son nothing when served with the garnishee summons because his son owed him. He also swore that he paid off the execution of C. Bros. against his son, and produced a receipt for such payment dated April 23rd, 1898. The witness also identified the transfer of the land from his son to himself and the duplicate certificate of title issued thereon, which were put in by plaintiff as evidence. The defendant adduced no evidence.

[*January 10th*, 1899.]

SCOTT, J.—This is an interpleader issue in which the plaintiff affirms and defendant denies that on 1st November, 1897, the time of the service on the defendant of the garnishee summons issued in an action by the plaintiff against one Charles Wachter, there was any debt due or accruing due from the defendant to Charles Wachter.

It was admitted by defendant's counsel, at the trial, that plaintiff's action against Charles Wachter was commenced on 4th March, 1897.

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Scott, J.

On 17th March, 1897, Charles Wachter by a transfer in the form prescribed by the Land Titles Act, 1894, transferred to the defendant certain portions of section 14, township 10, range 5, west of 4th meridian. The transfer purported to be made, in consideration of $200, paid by the defendant to Charles Wachter, who therein acknowledged its receipt. On 12th April, 1897, the defendant obtained a certificate of title to the lands comprised in the transfer, but upon it was endorsed a memorandum stating that the title of the defendant was subject to a writ of execution dated 22nd March, 1897, issued in a suit of C. Bros. against Charles Wachter, and registered on 25th March, 1897.

The only evidence as to the indebtedness, apart from that afforded by the instruments referred to, was that of the defendant, who stated that Charles Wachter was his son and lived with him, that he bought the land from Charles about six months before the garnishee summons was served, that he did not pay Charles anything for the land because Charles owed him the money, that there was no account made up at that time, that Charles used his (defendant's) string team outfit,consisting of ten horses and harness and a saddle horse in his trading operations, that he (defendant) was to get half the profits but that Charles never gave him a cent, that he never had any statement from Charles, though he asked several times for it, that he thinks Charles made a profit out of the venture, that Charles never denied owing him, and that he owed Charles nothing at the time he was served with the garnishee summons, because Charles owed him at that time.

Defendant also states that he paid off the execution of C. Bros. against Charles Wachter. He produced a receipt shewing that the payment was made on 23rd April, 1898.

There was also some evidence to the effect that the lands comprised in the transfer may have been worth more than $200, but it does not clearly appear that they were.

I do not see how in any event the question of the value of the lands can affect the question involved in this issue because, upon the evidence, if there was any debt due by

Judgment. Scott, J.

the defendant to Charles Wachter, it could only be in respect of the consideration mentioned in the transfer.

The onus was on the plaintiff to shew the existence of such an indebtedness, and I am of opinion he has fallen short of proving it. It is true he shews that Charles Wachter conveyed certain lands to the defendant for a consideration of $200, and that this consideration was not paid at or after the transfer, but this does not shew conclusively that a debt from the defendant to Charles was intended by them to be created by the transaction. Although the defendant does not state in express terms that the transfer to him was made in satisfaction or part satisfaction of a debt due by Charles to him, yet he himself appears to have looked upon the transaction in that light, and it may be reasonably inferred from the circumstance that Charles took the same view of it. The fact of Charles having delivered to the defendant a transfer containing an acknowledgement of the receipt of purchase moneys supports this view.

Even in the absence of any evidence as to the intention of the parties, I doubt whether the intention to create an indebtedness should be inferred merely by the giving and acceptance of the transfer, and, from the language of Sedgewick, J., in *Donohoe v. Hull*,[2] at p. 659, it would seem that Charles, having delivered the transfer containing an acknowledgement of the receipt of the purchase money, could not sue at law for it as he would be estopped by his transfer, and that his only remedy would be to sue in equity, not upon his contractional rights, but to obtain a lien upon the lands transferred.

In my view the intention of the parties to the transfer must govern in this issue, and if they intended that the transfer was to be given and accepted on account of a claim of the defendant against Charles, no matter how vague or shadowy that claim might be, there was no debt created by it. I doubt whether it would be going too far to say that, even if there had been no such claim, and that the transfer

[2] 24 S. C. R. 683; reversing S. C. *sub nom* Hull v. Donohoe, 2 N. W. T. R. No. 1, p. 48.

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Scott, J.

was made merely for the purpose of defeating or defrauding creditors of Charles, but with the understanding that the purchase money was not to be paid, no debt would be created.

According to *Wilkie* v. *Jellett*[1] the execution of C. Bros. against Charles Wachter did not constitute a charge upon the land, because, before its registration, the execution debtor had transferred his interest in the land. Had the execution formed such a charge, I think the defendant would be entitled as against the plaintiff to apply the purchase money, if payable, in satisfaction of that execution. It may be open to question, however, whether the execution creditor, having registered his execution before the service of the garnishee order, would not have a prior claim upon the unpaid purchase money.

*Judgment for the defendant.*

The plaintiff appealed. The appeal was argued July 19th, 1899.

*James Muir*, Q. C., for appellant.

The evidence established an indebtedness of $200 owing by the respondent to the judgment debtor. In any event, the evidence raised a presumption of such indebtedness, and the onus was upon the respondent to answer such presumption. The only answer of the respondent is tantamount to a plea of set-off. The respondent could counterclaim against the judgment debtor for the amount due him from the trading operations, (if any), but could not set-off such indebtedness. *Schofield* v. *Corbett*,[3] *Watts* v. *Rees*,[4] *Cavendish* v. *Graves*,[5] *Hammond* v. *Mott*,[6] *Tucker* v. *Tucker*.[7] The subject of counterclaim cannot be set-off as against an attaching creditor: *Stumore* v. *Campbell*.[8] The judgment debtor is not estopped by his acknowledgement of payment contained in the transfer. Estoppel must be specially

[3] 11 Q. B. 799 n; 6 N. & M. 527. [4] 9 Ex. 696. [5] 24 Beav. 163; 27 L. J. Ch. 314; 3 Jur. N. S. 1086; 5 W. R. 615. [6] 8 New Brunswick Reps. 426. [7] 4 B. & A. 745. [8] 61 L. J. Q. B. 463; (1892) 1 Q. B. 314; 40 W. R. 101; 66 L. T. 218; 8 Times L. R. 99.

Argument.

pleaded. An unpaid vendor can file a bill to declare and enforce his lien and the Court will always grant a personal decree for payment of any deficiency. *Skelley* v. *Skelley*,[9] *Sanderson* v. *Burdett*,[10] *Burns* v. *Griffin*,[11] *Flint* v. *Smith*.[12] The payment by respondent of C. Bros.' execution was made after service of the garnishee summons, and in any event that execution did not attach, the transfer having been executed prior to the registering of the execution: *Wilkie* v. *Jellett*.[1]

*P. McCarthy*, Q. C., and *C. F. Harris*, for respondent.

The onus was on the appellant to prove a debt due or accruing due from the respondent to the judgment debtor. The receipt contained in the transfer put in in evidence by the appellant is *prima facie* evidence of payment: *Carpenter* v. *Buller*,[13] *Bowman* v. *Taylor*,[14] *Hill* v. *Manchester & Salford Waterworks Co.*[15] The judgment debtor could not have sued the respondent at law for the purchase price: *Donohoe* v. *Hull*,[2] *Vyse* v. *Brown*,[16] *Webb* v. *Stenton*,[17] *Boyd* v. *Haynes*.[18]

[*December 9th*, 1899.]

McGuire, J.—The appellant Colin Genge appeals from the judgment of Mr. Justice Scott in favor of the garnishee.

The evidence shows that Genge had begun suit against Chas. Wachter on 4th March, 1897; that on the 17th March, 1897, Chas. Wachter made a transfer to the garnishee, who is his father, of certain land for the expressed consideration of $200, payment of which is, by the transfer, acknowledged. The garnishee admits that in fact no money passed from him to his son on that day or at all, and he gives as a reason why he did not pay the $200, that his son was already owing him "the money," which I take it meant a

[9] 18 Grant Chy. Rep. 495. [10] 16 Grant Chy. Rep. 119. [11] 24 Grant Chy. Rep. 451. [12] 8 Grant Chy. Rep. 339. [13] 8 M. & W. 209; 10 L. J. Ex. 393. [14] 2 A. & E. 278; 4 N. & M. 264; 4 L. J. K. B. 58. [15] 2 B. & Ad., 544; 2 N. & M. 573; 1 L. J. K. B. 230. [16] 13 Q. B. D. 199; Cab. & E. 223; 33 W. R. 168; 48 J. P. 151. [17] 11 Q. B. D., 518; 52 L. J. Q. B. 584; 49 L. T. 432. [18] 5 Ont. P. R. 15.

sum at least as great as the $200, the expressed price of the land. The garnishee positively denied owing his son anything on the date of service of the garnishee summons. This witness was called by the judgment creditor and was the only witness who testified as to the transaction between father and son respecting the sale of the land. As the learned trial Judge observes in his judgment, the burden of proof was on the judgment creditor to establish a debt owing by the garnishee to the judgment debtor. The transfer does not help him, for it is admitted there by the transferror that the consideration was paid and this document was under seal. The creditor is forced to rely on the oral evidence of the garnishee, who not only does not admit that he ever for a moment owed his son, but, on the contrary, says he did not owe him anything when served with the garnishee summons. Is not the plaintiff bound by the testimony of his own witness, supported, as it is, by the transfer, which was also put in by him? I am quite satisfied that it was never understood between father and son that the father should pay the son the $200 expressed as consideration or any other sum. The reasonable conclusion to be drawn from the evidence is, that the son agreed to give his father the land as payment on account of what he owed his father for the use of his horses, or his share of the profits in the trading operations. I shall not discuss whether the father could in the absence of any such agreement with his son have, in an action by the son for the $200, set-off what was due him by the son in respect of the trading operations—but it was quite open to the son on the sale of the land to his father to agree that the price should go against such indebtedness to his father. Having regard to the fact that the transfer was made a few days after the son was sued by Genge, there may be room for suspicion that this transfer was really voluntary and with a view to defeat any judgment Genge might recover in that action, but there is no evidence of that, and even if there was it would, at most, in a proper case, result in setting aside the sale and so defeat the present claim that the garnishee was indebted to the judgment debtor for the price of the land.

Judgment.
McGuire, J.

Judgment.
McGuire, J.

I think the judgment of the learned trial Judge was the proper one and that this appeal should be dismissed with costs.

RICHARDSON and ROULEAU, JJ., concurred.

WETMORE, J.—This is an appeal from the judgment of my brother Scott on the trial of a garnishee issue between the parties. The question raised by the issue is whether at the time of the service of the garnishee summons upon the defendant to this issue, Ignatz Wachter, there was any debt due or accruing due from him to his son Charles Wachter, the primary debtor to the plaintiff. The essential facts detailed in evidence are very short. Shortly before the service of the garnishee summons Ignatz purchased from Charles some lands owned by the latter. The price fixed for such purchase was according to the best recollection of Ignatz $250. A transfer of the property to Ignatz was executed under seal by Charles, in which the consideration was expressed to be two hundred dollars, and the transfer acknowledged the receipt of such consideration by Charles. A certificate of title was under such transfer duly issued to Ignatz. The evidence discloses that no purchase money was actually paid by Ignatz to Charles, and the reason assigned for not paying it was that Charles owed Ignatz the money. The debt sought to be attached is the purchase money in respect to the purchase of this property. Certainly this alleged indebtedness from Charles to Ignatz strikes me as being of somewhat doubtful character. All the confirmation vouchsafed is that Ignatz let Charles have a string team outfit consisting of ten horses, three waggons and harness and a saddle horse, to be used in his trading operations, and that Ignatz was to get half of the profits of such operations; that Charles used this outfit for ten years. Nothing whatever was paid to Ignatz on account of profits. No settlement was ever made with respect to such operations, and there is no evidence that Charles ever did make any profits out of them. Ignatz, the only witness called upon this question, swore that he had no idea what the

Judgment.
Wetmore, J.

profits were; that he had asked Charles several times for a statement, but he never got one, and Charles never denied owing him. The learned trial Judge found in favor of the defendant, upon the ground that the onus of proving the indebtedness of Ignatz to Charles was on the plaintiff, and that he failed to do so; he failed to establish that the parties to the transaction ever intended thereby to create an indebtedness from Ignatz to Charles. I am not prepared under the circumstances of the case to state that I agree with the learned Judge, and I put my judgment upon another ground, and that is that there was no attachable debt due or accruing due from Ignatz to Charles. In view of the acknowledgment under seal in the transfer from Charles to Ignatz, that the consideration or purchase money had been paid, Charles could not in the absence of fraud have maintained an action at law against Ignatz for such purchase money; he would be estopped by his deed: *Baker* v. *Dewey*.[19] This is also laid down by Sedgewick, J., in *Donohoe* v. *Hull*,[2] at page 689. It may be urged that it was not necessary in the decision of *Donohue* v. *Hull*[2] to lay this down—possibly not. But Mr. Justice Sedgewick's judgment was concurred in by the whole Court; in fact it was the judgment of the Court; and to say the least I would have very great hesitation in holding directly in the teeth of a deliberately expressed and unanimous opinion of the highest Court of appeal in the land. And I may add (perhaps it may be of no importance) that I follow this holding all the more readily because it is in accord with my own opinions as to the law on the subject. It would seem, however, that the vendor would not be estopped by such an acknowledgment in his deed from proceeding in equity to recover the purchase money if, as a matter of fact, it is unpaid. See Dart on Vendors and Purchasers. But the remedy is *in rem* "to sue in equity, not upon his contractual rights, but to assert a lien on the land sold by reason of the purchase money not having been paid and obtain a decree giving effect to that lien:" *Donohoe* v. *Hull*,[2] at page 689. It

[19] 3 D. & R. 99; 1 B. & C. 704; 1 L. J. O. S. K. B. 193.

Judgment.
Wetmore, J.

is true that it appears to have been held in Ontario in *Sanderson* v. *Burdett* [10] and in *Skelly* v. *Skelly* [9] that the vendor is entitled to a decree for the sale of the land, and that the deficiency, if any, be made good by the purchaser; but that personal liability of the purchaser is only contingent on there being a deficiency from the sale of the land, and is incidental to the relief giving effect to the lien. Now, in garnishee proceedings, there is no procedure by which any such decree or order can be obtained. The Judge or Court has no power in garnishee proceedings to give effect to the lien and incidental to that to order the purchaser, the garnishee, to make good the deficiency on the sale. And it was just considerations of this character which influenced the Court of Appeal in *Donohoe* v. *Hull*,[2] to hold that this Court could not in garnishee proceedings grant the relief asked for in that case. I am of opinion that the *ratio decidendi* in *Donohoe* v. *Hull*,[2] governs this case, and I call attention particularly to what is laid down in that case at p. 697. It was urged on behalf of the plaintiff that the defendant could not in this case rely upon the estoppel, because estoppel must be specially pleaded, and while it was conceded that there are no pleadings in a garnishee issue, it was urged that the defendant ought to have objected to the admissibility of the testimony offered to establish the non-payment of the purchase money, and that not having done so he waived the estoppel. I am unable to take that view of it. I cannot conceive that the omission to object to the reception of the testimony prevents the defendant from contending that, notwithstanding the testimony, the plaintiff is not entitled to recover in the face of what the deed of Charles Wachter admits; and, moreover, having obtained the judgment of the trial Judge, the defendant has the right to support his judgment on any available ground, even though the trial Judge did not pronounce on it, and although the ground was not taken before the trial Judge at all. I therefore think that the defendant has a right to come to this Court and say, practically, this debt is not an attachable debt due or accruing due from

the garnishee to the primary debtor. I take it that by the question raised by the issue, whether there is such a debt due or accruing, we must understand an attachable debt to be intended. In my opinion this appeal should be dismissed with costs. Judgment. Wetmore, J.

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

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## GRADY v. TIERNEY.

*Principal and agent — Partnership—Evidence—Admissions—Credibility of witnesses—Finding of trial Judge—Ratification—Consideration—Estoppel.*

O. purchased goods from the plaintiff on the credit of a partnership, which he represented to the plaintiff existed between himself and the defendant. The trial Judge (ROULEAU, J.), on contradictory evidence of the statements and conduct of the defendant after the goods were supplied, accepted the plaintiff's version of what took place, and *held* that the admissions of the defendant established a partnership.

On appeal, the Court *in banc*, while feeling bound to accept the trial Judge's view as to the credibility of the witnesses, was of opinion that the evidence did not establish a partnership, but established a ratification by the defendant.

*Per curiam:* A ratification is not a contract: it is the adoption of a contract previously made in the name of the ratifying party and it requires no consideration to support it. The dissenting judgment of Martin, B., in *Brook* v. *Hook*[1] must be taken as an accurate statement of law. *Scott* v. *The Bank of New Brunswick*[2] followed.

A statement by T., made after the goods were supplied, that he and the defendant were partners, would not,—though a "holding out" to the same effect made before the goods were supplied would,—constitute an estoppel.

[ROULEAU, J., *January 31st, 1899.*

[*Court in banc, December 9th, 1899.*

This action came on for trial before ROULEAU, J., without a jury, on July 9th, 1898.

*M. McKenzie,* for plaintiff.

*C. F. Harris,* for defendant.

The facts are sufficiently set out in the judgment of the Court *in banc.*

[1]L. R. 6 Ex. 89; 40 L. J. Ex. 50. [2]23 S. C. R. 277.

Judgment.

Rouleau, J.

[*January 31st, 1899.*]

ROULEAU, J.—This is an action for goods sold and delivered for the sum of $187.99, to the defendants as doing business in partnership as contractors under the name, style and firm of Olsen & Tierney.

The defendant Tierney appeared and filed his defence, denying that he ever was in partnership with the said defendant Olsen, and therefore that he is no way responsible for the payment of the goods bought by the said Olsen.

The defendant Tierney was examined on discovery and during his examination he stated: "After supper I went up to Mr. Grady's store with the intention of purchasing some cross-cut saws for Mr. McArthur. I asked Mr. Grady or his book-keeper, but I think Mr. Grady himself, what goods or supplies he sold to Olsen. He turned to his day-book or ledger and showed me the bill. As it was charged to Olsen & Turner, I stated to give no goods or supplies to any one for me without my written order. The reason I gave Mr. Grady these instructions was on account of what I heard about Olsen disposing of supplies, etc. Grady turned this account up and showed me the way it was charged. I don't remember saying anything about the firm name of Olsen & Turner to which Grady had the account charged, although I may have done so. I don't remember telling Grady that Olsen & Turner was not the proper firm name," etc. "I have seen the account upon which I am now sued with Mr. Olsen. Some of the goods were brought up to the camp on my work."

The plaintiff having been examined in Court, said:—"Tierney came to my store and he said: We are going on the road together, and if Olsen do not put up the money, I will, and that account will be all right. He told me also: You have not the name spelt right, it is 'Tierney.' It was when he was looking at the day-book and over the entry in the same. Took the name down on a piece of paper and showed it to him. He said it was right, that was the way to spell his name, etc. He told me it was

right to give the goods to Olsen, as they were going to work together."

Judgment.

Rouleau, J.

Mr. McGeorge, who was present during that conversation, was examined in Court and he corroborated Mr. Grady. The part of his evidence which relates to the conversation between Mr. Grady and Mr. Tierney is as follows:—"The second entry is on the 26th of October last. Tierney came in the evening when Ex. B. was made, and told the plaintiff it was not Olsen & Turner, but Olsen & Tierney. He asked first if Olsen got some goods there; plaintiff said yes. He added: let me see the bill? Plaintiff turned up the entry, Ex. A., and showed it to him, and Mr. Tierney said, "send the bill to me and you will have your money."

According to this evidence, there is no doubt that the defendant Tierney's conduct led the plaintiff to infer that Olsen had authority to use Tierney's name, and although he repudiates this account to-day, he cannot escape liability. The plaintiff never sent for Tierney, nor asked him any questions as to his business relation with Olsen. The defendant Tierney volunteered all these statements, and although there is no positive proof that he said he was a partner of Olsen, still he left the plaintiff, as well as McGeorge, who was present, under the impression that Olsen & Tierney were partners or contractors together on the Crow's Nest Pass Railway. In *Ralph* v. *Harvey*,[3] it was decided that where a party is charged with a debt, as a partner in a mining company, but is not shown to have either contracted such debt personally, or represented himself to the creditor as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of co-partnership, or was legally interested in the mine. Admissions made by him before or after the debt was incurred may be evidence for this purpose. The same principle was carried out also in *Martyn* v. *Gray*.[4] I must add also that the evidence is clear to me, and defendant Tierney did not deny it at the time, that Olsen had

[3] 1 Q. B. 845; 1 A. & E. N. S. 805; 10 L. J. Q. B. 337; 41 E. C. L. R. 805. [4] 14 C. B. N. S. 824; 108 E. C. L. R. 822.

Judgment.
Rouleau, J.

authority to buy these goods in the names of Olsen & Tierney, and therefore that Tierney is liable.

*Judgment for plaintiff with costs.*

The defendant appealed: the appeal was argued July 18th, 1899.

*P. McCarthy*, Q.C., and *C. F. Harris*, for appellant:—Appellant was never a partner of Olsen, and therefore is not liable. If appellant represented to plaintiff that he was a partner of Olsen, such representation was made after the credit had been given, and so would not render appellant liable: *Vice* v. *Lady Anson*,[5] *Baird* v. *Planque*,[6] *Carter* v. *Whaley*,[7] Olsen could not, by stating when purchasing the goods that appellant was his partner, make appellant liable. If appellant subsequently promised to pay, there was no consideration for such promise, nor was such promise in writing pursuant to the 4th section of the Statute of Frauds.

*James Muir, Q.C.*, for respondent:—Olsen had authority to purchase the goods in the name of himself and appellant and so render appellant liable. Appellant by his own conduct led respondent to infer that Olsen had such authority. Appellant subsequently ratified and adopted Olsen's representations to plaintiff, and so rendered himself liable: *Scott* v. *The Bank of New Brunswick*,[2] *McKenzie* v. *The British Linen Company*,[8] *Fox* v. *Clifton*.[9]

[*December 9th, 1899.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE, and SCOTT, JJ.) was delivered by

MCGUIRE, J.—This is an appeal by W. Tierney from the judgment of Mr. Justice ROULEAU in favour of the respondent in an action against S. Olsen and W. Tierney for the price of goods sold and delivered to them.

[5] 7. B. & C. 409; 6 L. J. (O. S.) K. B. 24; 1 M. & R. 113; M. & M. 97; 3 C. & P. 19. [6] 1 F. & F. 344. [7] 1 B. & Ad. 1; 35 R. R. 199; 8 L. J. (O. S.) K. B. 340. [8] 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477. [9] 6 Bing. 776; 31 R. R. 536; 4 M. & P. 676; 8 L. J. (O. S.) C. P. 257.

Judgment. McGuire, J.

The plaintiff's side of the case rests upon the evidence of himself and his clerk, McGeorge, and the effect of this evidence is that the defendant Olsen had in October, 1897, come to the store of the plaintiff and, representing himself to be a member of a firm of Olsen & Tierney, purchased the goods for the price of which this action was brought; that owing to the indistinct way in which Olsen spoke plaintiff understood him to say Olsen & Turner, and the entry in plaintiff's books was made in that way; that in November the defendant Tierney came to the store and enquired if Olsen had got any goods and, being told that he had, asked to see the bill, and was shown the charge in plaintiff's book; that noticing the charge was made against Olsen & Turney, he told plaintiff the name was not spelled right, it should be Olsen & Tierney, and that plaintiff wrote the name on a piece of paper and showed it to Tierney, who said that was the right way to spell it, and then told plaintiff "it was right to give the goods to Olsen, as they were going to work together," and to send the bill to him and plaintiff would have his money.

The evidence of the defence consisted of the testimony of the defendant himself and of his son John Tierney. Defendant positively denies that he and Olsen were ever in partnership, or that he had ever authorized Olsen to so represent; that the business relationship between them was that of contractor and sub-contractor, as shewn by an agreement in writing whereby Olsen undertook to do certain work for Tierney as a sub-contractor. Defendant denied that he said it was right to give Olsen the goods on the credit of Olsen & Tierney, or that he had promised to pay the account, or had told the plaintiff that he and Olsen were in partnership or anything to that effect, but, on the contrary, he says he told plaintiff they were not partners. He admitted asking what goods Olsen had got, and that plaintiff showed him the entry in his book, and he saw the goods were charged to Olsen & Turner. He admits plaintiff may have asked him his name, and if so that he would

Judgment. McGuire, J.

have told him. As to the plaintiff's assertion that defendant had corrected his mistake by saying it should be Olsen & Tierney instead of Olsen & Turner, defendant says, "cannot remember if there was anything said about the firm of Scott & Tierney; if there was I don't remember it at all." Defendant's son John Tierney, who was present with his father in Grady's store on this occasion, corroborates him on one point and on this point only, namely, that Grady asked defendant if he were a partner of Olsen and that defendant said no.

The plaintiff's and defendant's accounts of what took place are so directly contrary to each other that one is forced to reject one or other version. It is evident that the learned trial Judge accepted the account sworn to by plaintiff and McGeorge, and whatever view I might take of the evidence as it appears in the appeal book were I trying the case, thee evidence is not such as satisfies me that the learned Judge was wrong. He had the important advantage of seeing and hearing the witnesses and of observing their demeanor, and was therefore in a better position than I to judge as to their credibility. The case is one of considerable doubt, but on a full consideration of the evidence as it comes before us I am not prepared to disagree with the trial Judge as to which version is more worthy of acceptance.

I think, however, that the weight of evidence is that there was in fact no partnership between Olsen and Tierney, and this is not inconsistent with plaintiff's story that Tierney by his conversation in the store led him to believe they were partners. Accepting, however, that Tierney did say they were partners, he was not estopped from showing the fact to be otherwise. It would have been different had this "holding out" as a partner occurred before the goods were given to Olsen. It cannot be said that the credit was given by reason of anything Tierney said in Grady's store. But here is a fact that Olsen, to Tierney's knowledge, had got goods on the credit of Olsen & Tierney, and, having notice of this, he not only did not repudiate Olsen's right

Judgment.
McGuire, J.

to so get goods, but, on the contrary, ratified and confirmed his act. That is, knowing or believing that Olsen had assumed to have Tierney's authority to order goods on the credit of Olsen & Tierney, he tells the plaintiff that it was right and to send the bill to him and it will be paid. The doctrine of ratification is so well settled that it is quite unnecessary to lay it down at length. I may, however, refer to some cases in which it is clearly set forth—for example: Lord Blackburn's judgment in *McKenzie* v. *The British Linen Co.*,[8] *Wilson* v. *Tumman*,[10] and the judgment of Martin, B., in *Brook* v. *Hook*,[1] "which must now be taken to be an accurate statement of the law," as is said by Chief Justice Strong in *Scott* v. *The Bank of New Brunswick*.[2] As observed by Martin, B., "ratification is not a contract and requires no consideration," † a statement which he says is borne out by the language of Burton, J., in *Wilkinson* v. *Stoney*.[11]

I think, therefore, the plaintiff was by this ratification of Olsen's agency placed in the same position as if Olsen had the authority he in effect claimed to have and is entitled to succeed.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

[10] 6 Man. & G. 236; 6 Scott (N. R.) 894; 1 D. & L. 573; 12 L. J. C. P. 306. [11] 1 Jebb & Symes (Ir.) 509.

† "A ratification of a contract is not a contract; it is an adoption of a contract previously made in the name of the ratifying party. The contract, if a simple contract, must have been made upon a valuable consideration; if it were not, the adoption or ratification of it would be of no avail. * * * If a contract be void upon the ground of its being of itself and in its own nature illegal and void, no ratification of it by the party in whose name it was made will render it a valid contract; but if a contract be void upon the ground that the party who made it in the name of another had no authority to make it, this is the very thing which the ratification cures, and to which the maxim applies that 'omnis ratihabitio retrotrahitur et mandato æquiparatur.' No words can be more expressive—the ratification is dragged back as it were and made equal or equivalent to a prior command. A ratification is not a contract and requires no consideration."

## IN RE BANFF ELECTION—BRETT v. SIFTON (No. 1).

*Territorial election—Court of revision—Judge in appeal—Jurisdiction—Voter's qualification — Territories Election Ordinance — —Residence—Controverted Elections Ordinance.*

In the case of an election under the Territories Election Ordinance,† a Judge sitting in appeal from the court of revision is limited in the exercise of his jurisdiction to the same extent as the court of revision.

The jurisdiction of the court of revision is limited to enquiring whether any of the formal statements, subscription to which the Ordinance provides may be required from a person tendering a vote, is "false in whole or in part;" if false in whole or in part, the vote is to be disallowed; if altogether true, the vote is to be allowed.

New polls were held in two polling divisions; votes were challenged on the following grounds: (*a*) voter was deputy returning officer in another polling division on the day of the general election, (*b*) voter was resident in another polling division on the day of the general election and entitled to vote there, and (*c*) voter was absent from electoral district on day of general election; and in each case the voter could not possibly have voted on that day at either of the two polling divisions in question; the court of revision disallowed these votes; the Judge in appeal held that he had no jurisdiction sitting in appeal (but only in proceedings under the Controverted Elections Ordinance) to consider the validity of these votes, though he doubted their validity.

"Residence" means a man's habitual physical presence in a place or country which may or may not be his home; the word "habitual" does not mean presence in a place for either a long or short time, but the presence there for the greater part of that period.

[ROULEAU, J., *February 16th, 1899.*

Statement. An election under The Territories Election Ordinance was held in the Banff electoral district on the 4th November, 1898.

† The Territories Election Ordinance under which the proceedings in this case took place is Ordinance No. 11 of 1897, c. 3; this was consolidated as C. O. 1898, c. 3; the latter Ordinance has been amended in several respects by chapter 3 of 1899. Of the several sections of the Ordinance of 1897 cited, sections 39, 39 (*a*), 50, 67, 91, s.-s. 2, 106, 109, 111, correspond exactly with the sections of the same number in the C. O. 1898, c. 3, except that forms J1, J2, and J3, are now K No. 1, K No. 2, and K No. 3; sub-sections 106 and 111 are repealed by Ordinance 1899, c. 3, s. 27; section 91 is amended by Ordinance 1899, c. 3, s. 24, by the insertion of "with costs" after the word "reverse."

Statement.

On the hearing of an application for a recount, ROULEAU, J., ordered new polls to be held in the polling divisions of Laggan and North Canmore, pursuant to section 106.

New polls were accordingly held on the 14th February, 1899, in these two polling divisions.

According to the Ordinance, when a voter is challenged, he may be required to sign certain forms of statements. Either of the candidates may then serve the voter with a notice to appear before the court of revision, whose duty it is to enquire whether the statement signed by the voter is true or not; if true, the vote is to be allowed; if not true in every particular, the vote is to be disallowed.

By section 39 (2), "except as hereinafter provided, an elector may only vote at the polling place of the polling division in which he is a resident at the time of voting."

By section 50, "Any deputy returning officer * * * agent, or scrutineer, who is a resident in a polling division other than the one in which he is stationed on the polling day, shall be permitted to vote at the polling station at which he is so stationed * * * after signing statement J 3 in the schedule, etc. Statement J 3 is as follows:—

"I, A. B. hereby state that I am a male British subject * * * of the full age of twenty-one years; that I have resided in the North-West Territories for at least the twelve months, and in this electoral district for at least the three months, immediately preceding the present time, and that I am now residing in polling division No. of this electoral district; that I have not voted at this election, either at this or at any other polling place; * * * and that I am acting at deputy returning officer (or as scrutineer for * * * ) at this polling station."

By section 111 all the provisions of the Ordinance relating to the election proceedings "shall, *mutatis mutandis*, and in so far as they are applicable, apply to a vote held in any polling division under the provision of section 109 hereof, *i.e.*, to a new poll when ordered by the Judge on a recount.

Statement.

At Laggan polling division scrutineers who were resident in other polling divisions, acting for the candidate Dr. Brett, voted; and their votes were challenged before the court of revision by the candidate Mr. Sifton:—

*Lang's case*:—On the ground that he had been deputy returning officer in another polling division, on the 4th November, 1898, and could not possibly have voted in Laggan on that day;

*Kirkendale's case*:—On the ground that on the 4th November, 1898, he was resident and entitled to vote in another polling division, and could not possibly have voted at Laggan;

*Pucock's case*:—On the ground that he was absent from the electoral district on the 4th November, 1898, and could not possibly have voted at Laggan.

The court of revision disallowed all these votes, and Dr. Brett appealed.

The appeal was heard by ROULEAU, J., sitting in appeal from the court of revision under The Territories Election Ordinance, on the 6th February, 1899.

*C. C. McCaul*, Q.C., for the applicant. By section 67, the inquiry before the court of revision is limited to whether the statement made by the voter is true or false. The court exceeded its powers in determining that section 50 did not apply in its integrity to the new poll, under section 111. The judge in appeal has only the same powers as the court of revision.

*A. L. Sifton*, one of the candidates, in person, contra. Section 111 only applies *mutatis mutandis*. As new polls were being held simultaneously in North Canmore and Laggan, section 50 only applies to those two polling divisions, *i.e.*, a resident of North Canmore might vote as scrutineer at Laggan, and *vice versa*; but not a resident of any other polling division not re-opened. The court of revision is to inquire into the "rightfulness" of the vote.

[*February 16th, 1899.*]

Judgment.

Rouleau, J.

ROULEAU, J.—Appeals are submitted to me from the court of revision resulting from the votes cast on the 14th January last in the two polling divisions, No. 1, Laggan, and No. 4, North Canmore, opened after the election of November last, because the conduct of the polls in said polling divisions had not been in accordance with the provisions of the Elections Ordinance.

Before referring to each appeal in particular, I shall decide certain questions of law which have been submitted to me during the hearing of the appeals.

The first and most important question to consider is the scope of these appeals.

The scope of these appeals is determined by section 91, s.-s. 1 and 2 of the Territories Elections Ordinance. Section 91, s.-s. 1, reads: The Judge shall hear such evidence as shall be adduced, and may affirm or reverse the decision of the court of revision, or of the returning officer, as the case may be, with respect to any such vote, and shall render such judgment with respect to the validity of such vote as such court or returning officer ought to have rendered.

Sub-section 2 gives the powers of the Judge in these words, "The Judge sitting in appeal shall be deemed a Court, and shall have and exercise all the powers and authorities by this Ordinance conferred upon the court of revision."

It seems to me that this language is simple and clear; my powers are the same as those conferred by law upon the court of revision.

Section 67 determines the question which can be inquired into by the said Court in the following words: "The question to be determined at any inquiry by the court of revision hereby constituted shall be whether any statement made on polling day under the provisions of this Ordinance by the voter whose vote is the subject of the inquiry, is false, in whole or in part, and if false in part, in what respect it is so false." Sub-section 2 goes on to say that what will

Judgment.
Rouleau, J.

be the judgment of the court according to the proof given: "If it is proved to the satisfaction of the court that any voter whose vote is the subject of inquiry has made any such statement which is false, in whole or in part, the vote of such voter shall be disallowed; but if it is proved to the satisfaction of such court that every such statement so made by such voter is altogether true, such vote shall be allowed."

Therefore my inquiry in these appeals shall be confined to the veracity of the statements signed by the voters, when their votes were objected to, and not to the validity or invalidity of their votes under any other statement which they might have signed. It is not a matter of fancy; it is a matter of jurisdiction. It was contended during the argument that I had jurisdiction to inquire into the validity of the votes of a number of scrutineers who were not residents in either of the polling divisions where the polls were held, I am sorry to say that, at this stage of the proceedings, I have not. I must take the statement of record, and no other. If the deputy returning officers had the voters sign the wrong statement, I cannot remedy it in the course of these appeals. There is no doubt in my mind that there is a defect in the law in that respect. Whether these scrutineers had a right to vote or not is a very serious question, but I do not see any section in the Ordinance which would entitle me to decide it, either in these appeals, or during the recount, except under the Controverted Elections Ordinance.

The court of revision for the polling divisions of North Canmore and Laggan allowed certain votes on the ground of the voter being resident, and disallowed others on the ground that the voter was non-resident.

Appeals were taken by both candidates and argued by the same counsel, on the 6th February, 1899.

[*February 16th, 1899.*]

ROULEAU, J.—Before discussing the facts of the individual cases before me, I propose to lay down certain gen-

eral principles which will guide me in determining the "residence" of the several voters whose right to vote is in question. Judgment. Rouleau, J.

Section 39 gives the qualification of voters, and among other things it says: "The persons qualified to vote * * * shall be male British subjects * * * who have resided in the North-West Territories for at least the twelve months, and the electoral district for at least the three months, respectively immediately preceding the time of voting."

It is to be noted that the Elections Ordinance does not require that a voter should be domiciled or should have his home in the North-West Territories, but should have resided therein for a certain time. It is important therefore to know the exact meaning of the word "residence."

According to the best authorities I can find, "residence" means a person's habitual physical presence in a place or country, which may or may not be his home. So, according to this definition, a man may have his home in Ontario and be a resident of Canmore or Laggan. But in that definition the word "habitual" must not be given too restricted a sense. Dicey on Conflict of Laws, p. 80, says: "The word 'habitual' in the definition of residence, does not mean presence in a place either for a long or short time, but the presence there for the greater part of the period, whatever that period may be (whether ten years or ten days) referred to in each particular case."

As an illustration of the above definition, I may cite the following example: A has resided in Calgary for two years. He goes away on business or a trip of pleasure for four months; his residence is still at Calgary; and if an election were to take place the day after he came back, he would have a vote in Calgary, according to my reading of the Elections Ordinance.

(The learned Judge then disposed of the individual cases upon the facts of each case.)

## THE QUEEN v. HENDERSON.

*Liquor License Ordinance—Open bar in prohibited hours—Evidence of Liquor License—Certiorari.*

A conviction under the Liquor License Ordinance against a hotel-keeper, for allowing his bar to be open during prohibited hours, is invalid, if the information does not allege, nor is proof made, that the accused held a liquor license for the hotel premises.

[ROULEAU, J., *February 27th, 1899.*

Statement. Rule *nisi* for a writ of *certiorari* and to quash a summary conviction made under the Liquor License Ordinance No. 7 of 1897, s. 59, s.-s. 4.†

*James Muir*, Q.C., for defendant.

*P. McCarthy*, Q.C., for justice and private prosecutor.

[*Calgary, February 27th, 1899.*]

ROULEAU, J.—This is a rule *nisi* for a *certiorari*, and a motion to quash the conviction made by Frederick Champness, a justice of the peace.

The principal ground of objection is that there was no evidence adduced on the part of the prosecution that the said Henderson was a person holding a license under the Liquor License Ordinance, nor is it so alleged in the information, charge or minute of judgment, nor was there any evidence produced, nor is the allegation made in any such proceedings that the alleged offence was committed in a place where liquor, intoxicating or otherwise, was licensed to be sold.

The information is, that William Henderson, hotel-keeper, of the town of Lethbridge, of the firm of Henderson & Downer, did allow his bar to be open at Lethbridge during prohibited hours—to wit, between ten and eleven o'clock on Saturday night on the 6th August, 1908, etc.

The summons reads that the said William Henderson did allow intoxicating liquor to be sold in the bar of the

† C. O. 1898, c. 89, s. 64, s.-s. 4 is in precisely the same terms.

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Lethbridge House, at Lethbridge, during prohibited hours —to wit, between the hours of ten and eleven o'clock on Saturday night, the 6th day of August, 1898. The information is for one offence under sub-section 4 of section 59, and the summons is for another offence altogether under section 59. But it seems that Henderson was fined under the charge contained in the information.

I think if the evidence was sufficient I could uphold the conviction, notwithstanding that defect, because it is apparent enough, on the face of the proceedings, that Henderson was tried for keeping his bar open during prohibited hours, as provided in the Liquor License Ordinance, 1897. But there is an objection which I cannot amend, and which is fatal. It is this: that it is not alleged, nor is it proven by the prosecution, that the defendant held a license for the premises where the bar was kept open during prohibited hours.

In order that a man should be found guilty and fined under section 81§ of the Liquor License Ordinance, he must be proven to have violated the provisions of section 59.

Sub-section 4 of section 59 provides that no bar-room or room in which liquors are usually sold, in a licensed hotel, shall be kept open, etc. I think that *Regina* v. *Williams*[1] is a direct authority in support of the objection; also Paley on Convictions, p. 126, and *Regina* v. *Bodwell*.[2]

Therefore I hold it is absolutely necessary, in a case like this, that the prosecutor either allege or prove that the defendant was a keeper of a licensed hotel, so as to make him liable under the provisions of the Liquor License Ordinance.

The conviction will be quashed, and there will be the usual order for the protection of the justice of the peace.

*Conviction quashed.*

REPORTER:
The Editor.

§ Now s. 82, C. O. 1898, c. 89.
[1] 8 Man. R. 342.
[2] 5 O. R. 186.

## IN RE NETTLESHIP.

*Prohibition—N. W. M. P. Act, 189½—Expiration of period of service — Pass, issue and cancellation of — Discharge from force — N. W. M. P. officers as magistrates—Disqualification by interest or bias from trying deserter—Writ of prohibition—Premature application for.*

A Constable in the N. W. M. Police whose term of service would expire in six days, applied to the Superintendent commanding the post for six days' leave of absence. The Superintendent approved of the application, and appointed a Board to verify and record the service of the Constable, who delivered up his kit and signed a receipt in which it was stated that he had been settled with to the end of his term of service. The Board made a favourable report, post-dating it six days, to the ordinary form of which were added the words, under the head of "Remarks of Board and Commissioner": "term of service having expired, he is discharged." The pass for the six days' leave of absence was issued but not delivered to the Constable, and a cheque for the balance of his pay was being prepared when the Superintendent revoked the pass and ordered the Constable to be notified that his pass had been revoked, the Board's report cancelled, and the issue of the cheque for the balance of his pay refused; and he was ordered to continue in duty for the remaining six days of his term of service.

The Constable refused to obey the order to continue in duty, and absented himself from his quarters and duty, remaining absent without further leave. Proceedings for his arrest and trial under section 18 (†) of the Mounted Police Act, 1894, being about to be taken, a summons for a writ of prohibition was taken out.

(†) The sections of "The Mounted Police Act, 1894," 57-58 Vic. c. 27, specially referred to in this case, are as follows:

11. Every Constable shall, upon appointment to the force, sign articles of engagement for a term of service not exceeding five years, and such engagement shall be made with the Commissioner and may be enforced by him; but such Constable may be previously dismissed or discharged by the Commissioner.

18. Every member of the force, other than a Commissioned Officer, who is charged with any of the following offences—

* * * *

(*c*) Deserting or absenting himself from his duties or quarters without leave * * * * may be forthwith placed under arrest and detained in custody, to be dealt with under the provisions of this Act.

(2) The Commissioner, the Assistant Commissioner or the Superintendent, or other Commissioned Officer commanding at any post or in any district, may, forthwith, on a charge, in writing, of any one or more of the foregoing offences being preferred against any member of the force, other than a Commissioned Officer, cause the person so charged to be brought before him, and he shall then and there in a summary manner, investigate the said charge, &c., &c.

*Held, per* ROULEAU, J. (1) That the Superintendent had no authority to cancel the pass.

(2) That the Board having signed the Constable's discharge and his pass for six days' leave of absence having issued, the Superintendent had no power or authority to cancel these proceedings, and that the Constable had ceased to be a member of the Police Force.

(3) That there being an intention on the part of the Superintendent to proceed to arrest and try the Constable as a deserter, it was a proper case for the issue of a writ of prohibition to all officers of the N. W. M. Police, prohibiting them from proceeding to do so.

On appeal to the Full Court, *held, per curiam*, reversing the judgment of ROULEAU, J.:

(1) That the pass was revocable.

(2) That the Superintendent had authority to cancel proceedings of the Board, and that such pass and proceedings having been cancelled, the Constable was still a member of the Force.

*Held*, also *per curiam*, that as the officers mentioned in section 18 of the Mounted Police Act, 1894, had jurisdiction to try a Constable on a charge of desertion, and it had not been established that they were disqualified by interest or bias, the writ of prohibition should not have been granted.

*Per* MCGUIRE, J. (1) No charge in writing having been laid against the Constable, as provided by sec. 18, s.-s. 2, that was no suit or matter depending and prohibition was consequently premature.

(2) That the Court constituted by section 18 of the Mounted Police Act, 1894, was the proper tribunal to decide the questions whether or not at the time the alleged offence was committed the Constable was a member of the Police Force; and whether or not while such a member he deserted; and further had jurisdiction to enter on the trial of the accused, and prohibition should not have issued unless and until that Court had acted wrongly in reference to these questions.

[ROULEAU, J., *February 27th, 1899.*
*Court in banc, December 9th, 1899.*

Statement.

. On November 30th, 1897, N. engaged in the North-West Mounted Police for a term of one year. On November 23rd, 1898, N. applied to Deane, the superintendent in charge of the police post where N. was stationed, for a six days' pass, which application Deane at the time approved of. N.'s object was to proceed at once to British Columbia,

20. * * * *

(2) Whenever, during his engagement, any member of the force has been imprisoned for more than one month for any offence, or has been absent through desertion, the period of his imprisonment or desertion shall not be reckoned as service; and upon the expiry of the term for which he had engaged to serve in the force he shall continue to serve for a period equal to the period of such imprisonment or desertion or both.

Statement.

and to obviate the necessity of his returning at the expiration of the six days, Deane gave instructions that N.'s dealings in the force should be adjusted in conformity with the regulations, and a cheque for the balance of his pay up to and including the 29th of November, 1898, prepared. The pass was prepared and signed by Deane, but was not delivered to N., and a discharge board was appointed, which, on the same day (November 23rd, 1898) made a report but post-dated it November 29th, 1898, to which date the report stated N. had been settled with and paid up. The cheque for N.'s pay had not yet issued. On November 23rd, 1898, and after the board had reported, Deane, for reasons he considered sufficient, revoked N.'s pass and N. was notified that the pass had been revoked, the board's report cancelled, and the issue of a cheque for the balance of his pay refused, and he was ordered to continue in duty for the remaining six days of his term of service. N. refused to obey this order and absented himself from his quarters and duty, and remaining absent without leave, on November 30th, 1898, he was reported as a deserter. Proceedings being about to be taken for N.'s arrest and trial under section 18 of the Mounted Police Act, 1894, ROULEAU, J., on January 9th, 1899, upon an affidavit of N. and one of his advocate setting out the facts and stating that N. believed he would not receive a fair and proper trial, granted a summons returnable on January 30th, 1899, calling on Deane and all other persons concerned to show cause why a writ of prohibition should not issue to prohibit Deane and all other officers of the N.-W. M. Police from arresting, trying or punishing N. for his desertion or refusal to perform duty since November 23rd, 1898, on the grounds (1) that Deane had no jurisdiction to try such charge, and (2) that the alleged offence was committed after N. had ceased to be a member of the N.-W. M. Police force. The summons also "in the meantime and until further order" prohibited Deane and all other officers of the N.-W. M. Police from arresting, trying or punishing N. on such charge. Before the return of the summons a further affidavit of

N., a further affidavit of his advocate, affidavits of Superintendent Deane, Commissioner Herchmer, Inspector Cuthbert, Sergeant Pennefather, Corporal Cunningham, Corporal Roby and Constable Sargent, with exhibits, were filed, and Deane, Cuthbert, Pennefather and Cunningham were cross-examined on their affidavits. The material facts established by these affidavits, exhibits and cross-examinations are set out in the judgments. Statement.

The application was heard at Calgary by ROULEAU, J., who reserved judgment.

[*February 27th, 1899.*]

ROULEAU, J.—This is a summons (with an interim order) to show cause why a writ of prohibition should not be issued to prohibit R. Burton Deane, Esquire, Superintendent of the North-West Mounted Police, and all other officers of the said North-West Mounted Police, from arresting, trying and punishing Basil Ogilvie Nettleship, and from taking any steps against the said Nettleship by reason of the charge or matter against the said Nettleship for desertion, or being a deserter from the North-West Mounted Police, or by reason of the refusal of the said Basil Ogilvie Nettleship to do the duties of a member of the N.-W. M. P. force since the 23rd day of November, A.D., 1898.

On 30th November, 1897, the applicant Basil Ogilvie Nettleship, engaged in the N.-W. M. P. for a further term of one year. According to section 38, p. 53, of the Regulations and Orders for the N.-W. M. P., his time of service would have expired on the 29th November, 1898.

On the 23rd of November Nettleship applied for leave to the end of his time to the commanding officer, Superintendent Deane. On account of some good work that the said Nettleship had done the said superintendent agreed to give him this leave under sub-section 6, of section 37, p. 48, of the said regulations. On the same day the superintendent appointed Inspectors Cuthbert and Begin as a Board of Officers to "assemble and verify and record the services of Constable B. O. Nettleship, who is about to take

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his discharge." Pursuant to that order, Inspectors Cuthbert and Begin assembled, and after all due formalities were gone through, and after Nettleship had given up his kit and also signed a receipt, in which it was stated that he had been settled up with to the 29th of November, 1898, the board of officers duly signed his discharge in these words: "Reg. No. 2844, Const. Nettleship's (B. O.) term of service having expired he is discharged." After all these solemn proceedings Nettleship was told to go to the office and get his cheque. He went to Sergeant Cunningham who was writing out the cheque for his pay and in an annoying tone of voice said: "Hurry up, sergeant, hurry up, I cannot wait here all day." This is the only offence I can find that Nettleship is accused of.

Superintendent Deane, being in the next room, heard the remark, and he says in his report to the commissioner that he thought that Nettleship had enough liquor to make him talkative; that he has a voice like a rasp, and that he could hear him in the outer office talking in a very improper manner. For this behaviour, and not having the advantage of a sweet voice, Nettleship was ordered to finish his term and the proceedings of the board of officers were cancelled. I am of opinion that if Superintendent Deane had taken time to reflect a moment, he would have recalled to his memory section 6, p. 34, of the regulations. He gave a certificate of character to Nettleship when he appointed a board of officers to grant him his discharge, and after all that, for a trivial offence, he punishes him—if he had the power to do so—with undue severity, instead of warning or reproving him. The fact that he had liquor enough in him to make him talkative cannot be considered as an offence, because he was on leave and not punishable as a constable on duty (section 12 of the regulations, p. 34). But in law and in fact, was Constable Nettleship discharged from the force?

Paragraph 6, p. 48, of the regulations, says: "A superintendent may, in the exercise of his discretion, grant leave of absence within the Territories to any non-commissioned

officer or constable under his command for a period not exceeding ten days in any one year without reference to headquarters." It is admitted by Superintendent Deane that he granted six days leave of absence to Nettleship for the purpose of his getting his discharge; in other words, to finish his term of engagement. The law gives a superintendent of the N.-W. M. P. full power and authority to grant ten days' leave of absence to a constable without reference to any other authority. Superintendent Deane had exercised his discretion under the law; does the law give him authority or power to cancel it afterwards? I cannot find that authority anywhere. But suppose he had; after the board of officers duly constituted by him had signed the discharge of Nettleship, taking into consideration the six days' leave of absence that the superintendent had granted him, had the superintendent any power or authority under the law to cancel these proceedings? There is no doubt he had not. The commissioner himself has not such authority, otherwise what would be the meaning of paragraph 23, p. 53, of the regulations? This paragraph contemplates the very case under consideration, and no doubt, when Inspector Cuthbert said in his cross-examination, "Numerous instances I know where a man was allowed to go before his time was up, and the board," meaning the board of officers, "post-dated his discharge," he had a reference to the said paragraph. He was further asked, "By what authority is this custom allowed in the police force?" He answered, "The authority is a general one that the officer commanding has authority to grant a man leave at any time, and may do this for the purpose of rendering a service to the man so that it may not make his return necessary." No doubt Mr. Cuthbert is correct. The said paragraph 23 of p. 53 of the regulations confirms me in this opinion.

Judgment. Rouleau, J.

I am forced therefore to the conclusion that when Nettleship went to the office to receive his pay he was a free man, and did not belong then to the police force. Suppose he had walked away without his cheque for his pay,

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could anyone have arrested him for desertion? It would be absurd to contend it. The powers and authority of the commissioner and the officers of the N.-W. M. P. are limited by statutory law. Outside of that they have no other authority than ordinary citizens.

In his weekly report to the commissioner, Superintendent Deane never referred to the fact that he had granted six days' leave of absence to Nettleship in order to enable the board of officers to give him his discharge, and that Nettleship had in consequence returned his "kit" and signed off his claim for pay, &c.; because if he had, I have no hesitation in saying that the commissioner would have seen at once that he was powerless to retain Nettleship in the force one minute more.

The next question to consider is, when a writ of prohibition is to be granted.

The writ of prohibition is defined as an extraordinary judicial writ issuing out of a Court of superior jurisdiction, and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. This is a preventive rather than a corrective remedy.

The facts of the case are that after Nettleship had been duly discharged by the board of officers, the superintendent took upon himself to cancel the proceedings of the said board, and appointed a second board of officers to declare the said Nettleship a deserter. Armed with that document the superintendent gave orders to have the said Nettleship arrested and brought before him in his ex-officio quality of justice of the peace, and Nettleship would have been liable to the punishment under section 24, p. 85, of Appendix B of the Regulations.

There is not the slightest doubt in my mind that Nettleship was illegally declared a deserter, and that therefore no officer in the N.-W. M. P. in his quality of a justice of the peace had jurisdiction to have him arrested or tried as a deserter.

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High on Extraordinary Remedies, at p. 623, says: "To warrant a Court in granting this extraordinary remedy, it should clearly appear that the inferior tribunal is actually proceeding, or is about to proceed in some matter over which it possesses no rightful jurisdiction." This may be properly shown by alleging any acts on the part of the Court "which indicate an intention to proceed."

Have I not in this case abundant evidence that the superintendent as a magistrate's Court was to proceed to arrest and try Nettleship as a deserter? And, as I stated before, he certainly had no power or authority and consequently no jurisdiction to do so.

The fact of the board of officers having declared him a deserter does not make him a deserter. They had no power or authority to do so under the law as fully demonstrated before.

"Whenever an inferior tribunal takes any step in a cause over which it has no jurisdiction, a prohibition may be applied for at once:" Shortt on Informations, p. 467.

Surely it could not be contended that Nettleship had to wait till he was arrested, tried and sentenced, before he could apply for prohibition. That contention is disposed of in the following case: *In the matter of a Prohibition in the Mayor's Court of London—Broad* v. *Perkins.*[1]

Therefore I am clearly of opinion that in this case, a writ of prohibition should issue to prohibit the commissioner and assistant commissioner in their respective quality of Stipendiary Magistrate, the superintendent in his quality of justice of the peace, or any officer of the force duly appointed a justice of the peace, to have the said Nettleship arrested or tried as a deserter. I will not grant costs to the applicant, because there is no evidence before me that the parties are not consenting to await the result of my judgment before taking any other proceedings.

[1] 21 Q. B. D. 533; 57 L. J. Q. B. 638; 60 L. T. 8; 37 W. R. 44; 53 J. P. 39.

Statement.

Herchmer, Deane and the other officers of the N.-W. M. Police appealed.

The appeal was argued at Calgary, July 17th, 1899.

*C. F. P. Conybeare*, Q.C., for appellants.

The pass, though promised, was never given to the respondent. It was liable to be revoked at any time. Even whilst holding such a pass the respondent would have remained a member of the force until the expiration of his engagement, unless sooner discharged. No one but the commissioner can discharge a man prior to the termination of his time of service, and the proceedings of a board of officers are for enquiry and record only. The proceedings of the board of officers, being post-dated, did not come into force till November 29th.

No case for prohibition was made out. The N.-W. M. Police force is governed by the Mounted Police Act, 1894. In this respect it is analogous to the British army, which is similarly governed by the Mutiny Act. Section 18 of the Mounted Police Act, 1894, creates a Court to deal with certain offences, including desertion or being absent without leave, the one in question herein. In trying the respondent on this charge the Court would not be exceeding its jurisdiction, therefore a superior Court should not interfere by way of prohibition: *Grant* v. *Gould*,[2] *Dawkins* v. *Paulet*,[3] *Dawkins* v. *Rokeby*.[4] The issue and revocation of passes is a matter of police discipline, and so not properly cognizable by a Court of law: Kelly, C.B., in *Dawkins* v. *Rokeby*,[4] and cases cited by him. The N.-W. M. Police Court was competent to determine whether or not the respondent had ceased to be a member of the force: *In re The Charkieh*.[5]

The application for prohibition was made too soon, as the N.-W. M. Police Court was not in a position to proceed and had not attempted to do so: *Ex parte Death*,[6] *Ex parte Kingstown Commissioners*,[7] Shortt on Informations.

[2] 2 H. Bl. 69; 3 R. R. 342. [3] L. R. 5 Q. B. 94; 9 B. & S. 768; 39 L. J. Q. B. 53; 21 L. T. 584; 18 W. R. 336. [4] L. R. 8 Q. B. 255; 45 L. J. Q. B. 8; L. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931. [5] L. R. 8 Q. B. 197; 42 L. J. Q. B. 75; 28 L. T. 190; 21 W. R. 437. [6] 21 L. J. Q. B. 337; 18 Q. B. 647; 17 Jur. 112. [7] 18 L. R. Dr. 509.

*P. McCarthy*, Q.C., and *C. F. Harris*, for the respondent. Argument.

The respondent received proper leave of absence and was allowed to sign off and obtain a discharge. Deane had no authority to cancel the pass and these proceedings. The respondent was no longer a member of the force. The evidence shows that the respondent could not have obtained a fair and proper trial by the N.-W. M. Police Court. The respondent being no longer a member of the force, the Court had no jurisdiction, therefore prohibition was proper: *Worthington* v. *Jeffries*,[8] *Burder* v. *Veley*,[9] *Mayor of London* v. *Cox*.[10]

The appellants were biased, therefore disqualified from acting in the case: *Anonymous*,[11] *R.* v. *Rand*,[12] *R.* v. *Meyer*,[13] *R.* v. *Handsley*.[14] Deane was about to act as both informant and Judge, therefore was disqualified and should be prohibited: *Rex* v. *Great Yarmouth*.[15] The application was made at the proper time: High on Extraordinary Legal Remedies. The applicant is not bound to wait to take the exception in the Court below; *Broad* v. *Perkins*,[1] *Mayor of London* v. *Cox*,[10] Shortt on Informations. The writ of prohibition will issue to military and naval courts, as well as to civil courts.

The Court has power to award costs to a successful applicant in prohibition: *Queen* v. *Justices of the County of London, and London County Council*,[16] *Wallace* v. *Allan*,[17] *In re Hickson* v. *Wilson*.[18]

*C. F. P. Conybeare*, Q.C., in reply.

Judgment was reserved.

[8] L. R. 10 P. C. 379; 44 L. J. C. P. 209; 32 L. T. 606; 23 W. R. 750. [9] 12 A. & E. 233. [10] 2 E. & I. App. 239; 36 L. J. Ex. 325; 16 W. R. 44. [11] 1 Salk. 396. [12] L. R. 1 Q. B. 230; 35 L. J. M. C. 157. [13] 1 Q. B. D. 173; 34 L. T. 247; 24 W. R. 392. [14] 8 Q. B. D. 383; 51 L. J. M. C. 137; 30 W. R. 368; 46 J. P. 119. [15] 5 L. J. (O. S.) M. C. 73; 30 R. R. 487. [16] (1894) 1 Q. B. 453; 63 L. J. Q. B. 301; 9 R. 148; 70 L. T. 148; 58 J. P. 380; 42 W. R. 225. [17] 44 L. J. C. P. 351; L. R. 10 C. P. 607; 32 L. T. 830; 23 W. R. 703. [18] 17 C. L. T. 303; 2 N. W. T. R. 118.

Judgment.

Richardson, J.

[*December 9th, 1899.*]

RICHARDSON, J.—This is an appeal from an order made 27th February, 1899, by Mr. Justice ROULEAU, directing the issue of a writ of prohibition to prohibit the appellants from proceeding to arrest and try the respondent on a charge of desertion and absence from duty without leave.

From the appeal book it appears that on the morning of 23rd November, 1898, the respondent, being then a member of the N.-W. M. Police force under articles of engagement which he had, on 30th November, 1897, under section 11 of the Mounted Police Act, 1894, entered into with the appellant Herchmer, the Commissioner of the Force, whereby the respondent contracted to serve the Government of Canada in the force as a constable for one year, which period of service would expire with 29th November, 1898, applied to the appellant Deane, the Superintendent in command of the Police Post of Macleod, where the respondent was then stationed, for a pass under the protection of which the respondent might be absent from his quarters and duty in the force for six days, which application Deane at the time approved of.

The respondent's object in procuring the pass was to proceed at once to British Columbia (where he had engaged to enter into business when free from his engagement) in advance of the expiry of his term of service in the force he had contracted for, and, so that necessity for returning at the expiry of the six days (*i.e.*, 29th November) might be obviated, the appellant Deane instructed that respondent's dealings in the force should be adjusted in conformity with the regulations, and a cheque for any balance of pay, up to and including 29th November, found due him should be prepared in the office.

A pass for the six days was prepared in the office and signed by Deane but not delivered to the respondent; and for the adjustment of respondent's dealings in the force, what is termed a discharge board was appointed, who later on the same day made a report, but post-dated it 29th November, to which date the report stated the respondent

had been settled with and paid up. As a fact, however, the respondent had not been paid when the board so reported. Judgment. Richardson, J.

For reasons that the appellant Deane considered justified him, after the board had reported and later on the same day, the appellant Deane revoked the pass, and the respondent was notified that his pass had been revoked, the board's report cancelled and the issue of a cheque for the balance of his pay up to and including the 29th November refused; and he was ordered to continue in duty for the remainder of the term of service covered by the articles of service.

Instead of obeying this order the respondent absented himself from his quarters and duty, and, remaining absent without lease, on the 30th November he was reported as a deserter for being absent without leave, and, on the 4th January, 1899, proceedings for such absence being about to be taken, on respondent's application the order now in appeal was granted.

It was urged on the application to Mr. Justice ROULEAU:—1. That after the granting on the 23rd November of the pass authorizing his leave of absence for a period covering the remainder of his service as contracted for, the respondent was legally discharged and no longer amenable to be dealt with under the police law, and the appellant Deane had not the power afterwards of revoking it or proceeding to try him on the charge of desertion.

2. That the respondent being reported afterwards as a deserter, the appellants became so interested as to be practically prejudiced in the case, and should not be allowed to try the respondent on a charge for desertion.

The learned Judge in his judgment held that the pass in question was irrevocable, and that after it was once given as stated the respondent ceased to be a member of the force. With this holding I respectfully differ for the following reasons:—

What is termed in the Police Force Regulations "a pass," is, I believe, the written evidence held by the person named in it of having received from the proper authority

Judgment.
Richardson, J.

permission or license to be absent from duty for the period named in it, and makes the holder's absence lawful, which, without license, would be unlawful. That such a license is revocable I refer to *Wood* v. *Ledbitter*.[19] It therefore follows that after the revocation of the pass the respondent was still a member of the force and his admitted absence from his quarters and duties thereafter an offence under the Act.

Considerable stress is laid upon the wording of the Report of the Discharge Board, in which at its end the members composing the board state that the respondent's "term of service having expired he is discharged," as evidence of respondent's release from further service in the force.

On referring to the original, filed on appellant Deane's cross-examination, it is to be noticed that these words have been added by the members of the board to the printed form provided under the regulations of the force (Form 63), under the head of "Remarks of Board and Commissioner," and form no part of the duty cast on the board.

This report is shown to have been made up and signed by the members on 23rd November, 1898; its date is November 29th, and evidently it is intended not to have effect until that day, and on its back there is a farm with a blank for the commissioner to sign, giving his concurrence in the report as also "granting the discharge of the respondent." This form is not filled in or signed, and at its foot over Deane's signature is the word "cancelled." It is further clear that when the members signed the report the respondent had not been paid off.

But as by the Mounted Police Act, 1894, section 11, the power to discharge a member of the force before his term of service has expired is vested solely in the commissioner without any power to delegate, I do not hesitate in holding that nothing short of a discharge by the commissioner should release the respondent from his contract of

[19] 13 M. & W. 838; 14 L. J. Ex. 161; 9 Jur. 187.

service before the time named in it had expired, which had not happened when the respondent absented himself without leave on 23rd November, 1898. Judgment. Richardson.

Assuming this, was the course the appellant Deane was about to institute 4th January, 1899, justifiable?

The respondent had absented himself on the 23rd November without leave, as I hold, and was then on 4th January still so absent.

By section 20 of the Act this period from 23rd to 29th November is not to be reckoned as service; and consquently he was yet on 4th January, 1899, a member of the force amenable to the provisions of the Act, section 18 of which authorizes the commissioner, the assistant commissioner or other commanding officer at any post to adjudicate upon charges preferred against any member of the force other than a commissioned officer, for deserting or being absent from his duties or quarters without leave.

Whether or not the expressed intention of Deane to have the respondent arrested under the provisions of this section on a charge of desertion was sufficient to warrant interference by prohibition is a point I do not consider necessary to determine here; it is plain that by section 18 a Court is established by positive law invested with authority to try those who by the Act are declared subject (as I hold the respondent was) to such offences as are created by it, and being so established no other tribunal is shown to have any power to deal with offences of that nature. The two grounds upon which prohibition is authorized are those enunciated in *Grant* v. *Gould*,[2] *i.e.*, (1) When the inferior Court assumes a power not within its cognizance, and (2) When the inferior Court acts differently from the method prescribed by the Act of Parliament authorizing the proceeding.

There was nothing in the material before the learned Judge granting the order indicating an intention of any of the appellants to deal with the respondent otherwise than under the express powers created by section 18 above referred to.

Judgment.

Richardson J

In the argument before us of this appeal, counsel for the respondent urged as a ground for sustaining the order for prohibition, that the appellants were so biased and prejudiced against the respondent that he would not receive a fair trial. In the summons for prohibition, the only grounds on which prohibition was asked were:—that the said R. Burton Deane had no jurisdiction to try the said charge or matter for the reasons set forth in said affidavits (of Nettleship and Harris), and "that the alleged offence charged against the said Nettleship occurred after the said Nettleship ceased to be a member of the North-West Mounted Police force, and the said Nettleship is not now a member of the said force;" and I do not find that it is stated anywhere in the affidavits of Nettleship or Harris that the appellants, or any of them, are interested or biased or prejudiced. The only paragraph of either affidavit that it could be argued set up any such ground is the last paragraph of Nettleship's affidavit:—that he "believes" that if Deane tries him he "will not receive a fair and proper trial." He gives no reason for this except his bare "belief," and he nowhere charges that Deane was prejudiced or biased, and his fear that he will not receive a fair and proper trial might be based on ground other than that Deane was biased. There is no evidence before us that bias was relied on as a ground for prohibition until counsel for respondent raised it on the argument of this appeal. The learned Judge who made the order for the writ neither in his minutes of judgment nor in his order, alludes in any way to this ground of prejudice, but rests his judgment solely on want of jurisdiction because, as he finds, Nettleship had ceased to be a member of the force.

And even if bias had been distinctly relied upon in the proceedings before the Court below, where is the evidence of such bias? As has been mentioned, the only paragraph of Nettleship's affidavit which may have alluded to it is the one above mentioned, and it, at best, is only put in as a "belief" without giving the grounds for his belief.

Judgment.
Richardson.

It has been argued that since the summons for prohibition was issued, Deane has expressed an opinion that Nettleship was a deserter, and reference was also made to the "Declaration against Deserters," in which Deane certifies that Nettleship is a deserter.

The declaration is one required to be made by Deane or some other officer as a part of the routine of duty in case of members of the force absenting themselves from duty without leave, and is required to be transmitted to Regina for the information of the commissioner, and does not amount in my opinion, to evidence that Deane had so made up his mind as to Nettleship's guilt that he was thereby disqualified from trying the charge. Neither do I think that Deane's testimony that Nettleship is a deserter amounts to such evidence. On the authorities, it seems that there must be established the existence of a real, a substantial interest such as to make it likely that the justice has a real, not a possible, bias: *Reg.* v. *Meyer.*[13] Having regard to section 26 of the Mounted Police Act, 1894, and the fact that so long as Nettleship is within the North-West Territories the only tribunal that could try him for desertion is that created by section 18 of that Act, and that the persons thereby empowered to try Nettleship were the Commissioner, the Assistant Commissioner, Superintendent or other Officer Commanding, etc., to declare these officers disqualified by interest or bias would be to say that Nettleship was not liable to be tried at all for his alleged offence so long as he chose to remain within the Territories. One must be well satisfied that the evidence satisfactorily establishes such disqualifying interest or bias before declaring them disqualified.

It must not be overlooked that Superintendent Deane in his affidavit declares that Nettleship's alleged "belief" that he would not receive a fair and proper trial has "no justification in fact," and gives in support of his assertion the reasons there set out.

So far as I can ascertain, the only ground for suspecting the impartiality of the commissioner is that he has placed

Judgment.
Richardson J

Nettleship on the roll of deserters, which is also a part of the routine of the force under the rules, and is a proceeding provided for collateral purposes.

As to the Assistant Commissioner and "all other officers of the North-West Mounted Police," I fail to see what evidence exisit of their being biased. It was said by counsel that they would be prejudiced because the commissioner had placed Nettleship on the roll of deserters.

I do not think that the evidence offered or the reasons presented are such as should satisfy the Court that the persons prohibited by the writ herein were disqualified by interest or bias from trying the respondent.

Having already arrived at the conclusion that the respondent was still a member of the police force, and that the tribunal created by section 18 had jurisdiction to try him on a charge of desertion, we must find that the order of Mr. Justice ROULEAU was granted incautiously and in view of what appears above it is not considered necessary to allude to any other questions raised on the appeal.

The judgment of the Court is :—That the order granted by the learned Judge be rescinded and the writ of prohibition issued thereon and all proceedings thereunder set aside with costs, to be paid by the respondent.

WETMORE and SCOTT, JJ., concurred.

MCGUIRE, J.—I agree with the judgment just read, but I desire to say that I think the appellants were entitled to succeed on other grounds, and without enquiring into the question whether the respondent was in fact still a member of the mounted police force or not.

In the first place, I think the law is that a prohibition cannot issue *quia timet*—that "there must be some suit or matter depending, and the writ will not be granted against a person not actually a party to the suit at the time though it may be open to him to join in it at any time." Shortt on Informations, 449.

Judgment.

McGuire, J.

There is no pretence that any one but Deane was intending to try the respondent, and on the latter proposition of the above quotation the prohibition should not have been granted against the appellants other than Deane. As to Deane, there is no evidence that there was any charge in writing actually made against Nettleship. By section 18 of the Mounted Police Act, 1894, before any of the officers there mentioned would have authority to commence proceedings for desertion a charge in writing must first be made. No such "charge" is shown to have existed, and, therefore, Deane could not be regarded as being constituted as a Court to try him. The most that is shewn is that Deane had given verbal orders to have Nettleship "arrested" on a charge of desertion, but not that he had attempted to cause him to be brought before him to be tried, which would be the first step towards a trial after the making of a charge in writing. The prohibition was therefore premature.

There is another objection which I think shows that the prohibition was at best premature.

By section 18 of the Act, the officers there named are given jurisdiction to try a member of the force other than a commissioned officer, for the offences therein named, which includes that of desertion. Now, what facts would it be necessary to allege and prove in any charge preferred against Nettleship for desertion? (1) That he was at the time of the alleged offence a member of the police force, not being a commissioned officer. (2) That while he was such member he deserted. If these facts were alleged, and if they were true, Deane, if he were the superintendent trying the case, would certainly have jurisdiction to proceed with the trial. Now, it is laid down in *Reg.* v. *Bolton*,[20] "Where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction." In another part of the same judgment the following language is used: "We conclude there-

[20] 1 Q. B. 66; 4 P. & D. 679; 5 Jur. 1154.

Judgment.

McGuire, J.

fore that the inquiry before us must be limited to this—whether the magistrate had jurisdiction to inquire and determine *supposing the facts alleged in the information to be true.*" Apply that to the present case. I have indicated what the charge against Nettleship must set forth—that he being a police constable had absented himself without leave. If the facts alleged here were true it is unquestioned that Deane would have jurisdiction.

In *Cave* v. *Mountain*[21] it is said: "But if the charge be of an offence over which, if the offence charged be true, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." In *Lovesy* v. *Stallard*,[22] Colerige, C. J., referring to *Reg.* v. *Bolton*,[20] says: I have already explained from the case of *Reg.* v. *Bolton*,[20] the two principles by which the Court must be guided in respect of the question of the jurisdiction of magistrates being dependent on the facts found by them. They are there admirably stated and there can be no question that those principles are indisputable." *Reg.* v. *Bolton*,[20] has been followed or approved of in several reported cases as late at least as *Ex parte Authers*.[23]

The particular fact in the present case, which it is said Supt. Deane could not decide so as to give himself jurisdiction, is whether Nettleship was or was not still a member of the force; but this was not a fact *collateral* to the charge, but one of the essential ingredients of the offence which the statute gave him jurisdiction to try.

In *Bunbury* v. *Fuller*[24] it was held that "no Court can give itself jurisdiction by a wrong decision on a point *collateral* to the merits of the case upon which the limit to its jurisdiction depends."

In *re Chisholm and the Corporation of Oakville*,[25] Osler, J., says at p. 228: "I think the authorities conclusively

[21] 1 Man. & Gr. 257; 1 Scott (N. R.) 132; 9 L. J. M. C. 90. [22] 30 L. T. 792. [23] 58 L. J. M. C. 62; 22 Q. B. D. 345; 60 L. T. 454; 37 W. R. 320; 16 Cox C. C. 588; 53 J. P. 116. [24] 9 Ex. 111; 1 C. L. R. 893; 23 L. J. Ex. 29. [25] 12 O. A. R. 225.

shows that the appellants status * * * was a question of law and fact combined for the County Judge * * * to determine in the course of the enquiry, and that his decision is not examinable in prohibition," and he repeats this with some variation on p. 232. The learned Judge arrives at that conclusion after a careful consideration of the judgments of the Judicial Committee of the Privy Council in *The Colonial Bank of Australia* v. *Willan*,[26] in which *Reg.* v. *Bolton*[20] is referred to with approval, saying that it establishes "that an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein."

Osler, J. A., refers also to *Re Bowen*,[27] *Mayor of London* v. *Cox*,[10] and *Brittain* v. *Kinnaird*.[28] From the last named he cites: "Whether the vessel in question was a boat or no, was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide, is that which constitutes his jurisdiction."

In *Molson* v. *Lambe*,[29] it was held that, where the Court of Special Sessions of the Peace at Montreal had jurisdiction to try the alleged offence, and were the proper tribunal to decide the question of facts and of law involved, a writ of prohibition did not lie. At p. 260, Ritchie, C. J. says: "Had the Police Magistrate * * * jurisdiction over the matter of the complaint, and jurisdiction and authority to try the offence charged in the declaration or summons? If he had, no prohibition, in my opinion, can be awarded," and he cites *Mayor of London* v. *Cox*.[10]

Whether the decision of the magistrate on a fact, the existence of which is essential to his jurisdiction, is or is not final, is a question which it is not necessary here to decide. It is sufficient to hold that Deane had jurisdiction over the subject matter, and therefore jurisdiction to enter

[26] L. R. 5 P. C. 417; 43 L. J. P. C. 39; 30 L. T. 237; 22 W. R. 516. [27] 15 Jur. 1196. [28] 1 B & B. 432; 4 Moore, 50; Gow, 164; 21 R. R. 680. [29] 15 S. C. R. 253.

Judgment. McGuire, J.

on the trial of the accused, and that he could not be prohibited at least until he had acted wrongly in reference to the fact of Nettleship being still a member of the force.

If that be so, the order for prohibition was at best premature and should be set aside.

Appeal allowed; writ of prohibition and all proceedings thereunder set aside with costs.

REPORTER:

Ford Jones, Advocate, Regina.

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## THE QUEEN v. HOLLINGSWORTH.

*Criminal law—Theft—Goods under seizure—Taken away without authority—Hotelkeeper—Lien for board and lodging—Necessity for tender—"Lawful seizure and detention"—Recent possession as evidence of stealing—Criminal Code 306.*

An hotelkeeper who locks up the room of a guest containing the latter's baggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's baggage, etc., under "lawful seizure and detention," in respect of the landlord's common law lien; and the taking away of such baggage by the guest without the landlord's authority is "theft" under section 306 of the Criminal Code. (But see now section substituted by 63 Vic. 1900, c. 46, s. 3, sched.)

The landlord does not, by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects; and the owner who removes any baggage, as to which the permission does not extend, is guilty of "stealing" the same under section 306 of the Criminal Code.

The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due nor invalidate the lien.

Circumstantial evidence of theft.

[ROULEAU, J., *March 2nd, 1899.*

Stated case under section 900 of the Criminal Code referred by W. Roland Winter, Esquire, Police Magistrate at Calgary, at the request of the defendant for the purpose of

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obtaining the opinion of a Judge of the Supreme Court of the Territories, on a question of law arising upon a prosecution of the defendant before such magistrate, such question being whether the conviction hereinafter referred to was valid or otherwise.

The information was laid by James E. Reilly, proprietor of an hotel at Calgary, against Frank Hollingsworth, charging under section 306 of the Criminal Code, that the latter did on the 10th of January, 1899, at Calgary, steal and unlawfully carry away two valises and certain wearing apparel, then under lawful seizure and detention by the complainant at his hotel.

The magistrate found that the value of the effects in question did not exceed $10, and the accused also consented to be tried summarily.

On the trial before the magistrate, the defendant was convicted and sentenced to one month's imprisonment with hard labor.

The evidence for the prosecution showed that the accused and one Anderson had been guests at the complainant's hotel occupying a room together, and were indebted to the complainant in a balance of about $30 for board and lodging, in addition to which the complainant claimed payment for other items making in all $48.25. Included in this was a disputed charge for $10 for damage done to carpet, and some charges for liquors supplied and money lent, but the complainant had after the seizure offered to abandon the $10 claim, if the balance were paid to him. The hotel bill had been presented to the accused prior to the seizure, but on the same day, and the seizure was effected by the landlord locking the room which the accused and Anderson had occupied, and in which was their baggage, consisting of two valises and some wearing apparel, pictures and apparatus for making pictures. The accused was then told that he must leave the house and settle his bill by six o'clock of that evening; he then asked permission to take out the pictures which were intended for delivery to his customers, so that he could deliver them to the respective

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purchasers and so obtain money to pay his account. The complainant assented to this proposed arrangement with the stipulation that he would not wait longer than six o'clock of that day. On this arrangement being made the room was opened, and the accused and Anderson both had free ingress and egress therefrom, until they left the hotel the same evening. The complainant took precautions, by locking one of the street doors of the hotel to prevent any goods being removed without his knowledge, but notwithstanding this all the chattels were removed.

Anderson owned no part of the baggage in question, but assisted the accussd in removing the pictures.

He was called as a witness for the prosecution at the trial and swore that he did not himself remove the valises nor did he see any one else take them ; that he and the accused after leaving the complainant's hotel went to another hotel in Calgary and roomed together, and that the valises in question were then in their room at the latter hotel.

No evidence was given to shew that the accused had been seen removing the valises.

The accused did not himself give evidence, nor call any witnesses at the trial.

Section 306 of the Criminal Code provides as follows :—

Every one commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention.

The grounds stated by the appellant's counsel on which the conviction was questioned, were as follows :—

1. That there was no evidence that the "valises and sundry wearing appeal" upon which the charge was founded were removed from the Royal Hotel by the defendant or with his knowledge or authority.

2. That the evidence shews that the informant abandoned his lien (if any) before the removal of the goods in question.

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3. That it appears from the evidence that the goods in question were held by the informant for security for the payment of $48.25, of which the sum of $10 was claimed to be due for alleged damage to carpet, and $3 or thereabouts for liquors supplied to the defendant, and one Anderson, by retail, by the said informant; and it is submitted that the informant was not entitled to any lien whatsoever for the payments of these sums, and that consequently his alleged lien was not lawful, and the property was not "lawfully detained."

The grounds on which the conviction was supported were as follows:—

1. The evidence of Anderson proves that the valises, on which the lien was claimed, were at the time of his giving his evidence, in the room then occupied by himself and the appellant at the Atlantic Hotel, where they were rooming together, and that they had not been removed from the Royal Hotel by him (Anderson.) There was a legal presumption therefore that they were carried away or "stolen" by the appellant, and this was in no way rebutted by the appellant, as it easily might have been, if the contrary had been the fact. This justifies the finding that they were in fact so carried away or "stolen" by him: *Regina* v. *Partridge*;[1] *Regina* v. *Langmead*.[2]

2. It is submitted that there is nothing in the evidence to show that the respondent ever abandoned his lien, as suggested in the second ground of objection.

3. It is admitted that a lien could not be legally claimed in respect of certain items in the respondent's bill, but this fact does not vitiate his claim, nor did it excuse the appellant from tendering such a sum as he considered would have cleared his just indebtedness: *vide* judgments of Park, B., and Alderson, B., in *Searle* v. *Morgan*,[3] and *Allen* v. *Smith*.[4]

[1] 7 C. & P. 551. [2] 9 Cox C. C. 464; 10 L. T. 350; Leigh & Cave, C. C. 427. [3] 4 M & W. 270; 1 H. & H. 292; 7 L. J, Ex. 324. [4] 31 L. J. C. P. 306; 12 C. B. N. S. 638; 9 Jur. N. S. 230; 6 L. T. 459; 10 W. R. 646; affirmed 9 Jur. N. S. 1284; 11 W. R. 440.

Statement.

An innkeeper or hotelkeeper has, at common law, a lien for board and lodging on effects brought to his inn or hotel by his guests: *Mulliner* v. *Florence*.[5] The Ordinance of the North-West Territories respecting hotel and boarding-house keepers has no bearing on the present case. This Ordinance does not abrogate the common law right of an hotelkeeper to exercise his lien on the effects of his guests (except in respect of liquors supplied), but is ancillary to that right, by enabling him after compliance with the provisions of the Ordinance, to give effect to his lien by sale of the property over which the lien is claimed.

*A. L. Sifton*, Crown prosecutor, for the Crown.

*R. B. Bennett* and *T. O'Brien*, for the private prosecutor.

*P. J. Nolan*, for the accused.

[*Calgary, March 2nd, 1899.*]

ROULEAU, J.—Upon the same grounds and authorities as those on which the conviction is supported, I am of opinion that the accused has been legally convicted of the offence charged; and the police magistrate is therefore so advised.

*Conviction affirmed.*†

[5] 47 L. J. Q. B. 700; 3 Q. B. D. 484; 38 L. T. 167; 26 W. R. 385.

† See notes to this case in 2 Can. Crim. Cas. 291.

## THE QUEEN v. "BEAR'S SHIN BONE."

*Criminal law—Criminal Code, s. 278 (a)—Polygamy—Indian marriage.*

An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under section 278 of the Criminal Code.†

[ROULEAU, J., *March 9th, 1899.*

Statement.

The prisoner, a Blood Indian, was charged before ROULEAU, J., at Macleod under section 278 of the Criminal Code, ss. (*a*) (i.) and (ii.), with practising polygamy with two women belonging to the same band of Indians, and also with having, according to the marriage customs of the Blood Indian tribe, agreed to enter into a kind of conjugal union with more than one person at the same time.

The evidence showed that the prisoner had been married according to the marriage customs of the Blood Indians to two women, "Free Cutter Woman," and "Killed Herself," both of whom were living with him as his wives, and that there was a form of contract betweem the parties which they supposed binding upon them.

The portion of section 278 considered is as follows,—

278. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who

(*a*) Practices, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i.) Any form of polygamy ;

(ii.) Any kind of conjugal union with more than one person at the same time ;

† See section substituted by 63-64 Vic. (1900) c. 46, s. 3, sched.; and see notes to this case in 3 Can. Crim. Cas. 329.

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(iii.) What among the persons commonly called Mormons is known as spiritual or plural marriage;

(iv.) Who lives, cohabits or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union.

*C. F. P. Conybeare*, Q.C., for the Crown.

*M. MacKenzie*, for the prisoner.

[*March 9th, 1899.*]

ROULEAU, J.—Held that the marriage customs of the Blood Indian Tribe came within the provisions of sub-section (*a*) of section 278 of the Criminal Code, whether their ceremonies are those of a denomination, sect or society, or not, as their marriages are a form of contract, and recognized as valid, and referred to *Regina* v. *Nan-e-quis-a-ka*.[1]

The prisoner was accordingly convicted.

[1] 1 N. W. T. Rep. Vol. I, pt. 2, p. 21; 1 Terr. L. R. 211.

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## OWEN v. JAMES.

*Master and servant—Wages—Monthly rate—Entire contract—Behavior of master to servants.*

It was found as a fact, on contradictory evidence, that the plaintiff hired with the defendant at $18 for the first month, and, if each party was satisfactory to the other, for $20 for the whole working season including the first month, and that the wages, though fixed with reference to the months, were payable only at the end of the period of hiring. The plaintiff after working for some months left, and sued for the wages for the number of months he had worked, less the wages for the first month, which had been paid.

*Held*, that the contract was an entire one and that the plaintiff could not succeed.

Nature of behavior of master towards servant justifying the servant in leaving, discussed.

[WETMORE, J., *March 23rd, 1899.*

Trial of an action before WETMORE, J., without a jury.

*F. F. Forbes*, for plaintiff.

*J. T. Brown*, for defendant.

[*March 23rd, 1899.*] Judgment.

WETMORE, J.—This is an action for wages. The plaintiff and the defendant disagree in their testimony on almost every material fact upon which the question involved in the case turns. Both parties agree that the bargain for hire was made on the 25th of May last, and that it was for one month at $18, and it is not disputed that the plaintiff commenced work on the 26th May. The plaintiff, however, testified in effect that the bargain was that if he stayed longer than a month he was to be paid $20 a month, including the first month, and that it was understood and specially agreed that he was to be at liberty to leave at any time he and the defendant disagreed, and that he was to be paid up to the time he left ; but that he absolutely and expressly declined to bind himself to work for any stated time, but merely stated that if the defendant suited him and he suited the defendant and they agreed, he might stay for the summer. That he left the defendant's employ on the 28th or 29th August. Wetmore, J.

The defendant on the other hand, set up in effect that he hired the plaintiff for the first month on trial at $18 a month, with the understanding that if they were at the end of the month mutually satisfied with each other and the plaintiff stayed, he was to remain with the defendant till the end of the season when it froze up, for which he was to be paid $20 a month including the first month. If the defendant is correct in this, it was, if the plaintiff remained after the first month, a hiring for the entire term, namely, to the end of the season, and the defendant would be liable to make compensation to the plaintiff if he had improperly discharged him before the expiration of the term, and the plaintiff would be liable to the defendant in damages if he left without justifiable excuse before the expiration of such term. The fact that the wages were fixed with reference to the month does not effect the question of the time for which the hiring was made.

Now, before I proceed further, I will determine in whose favor I find the facts in so far as I have stated them wherein

Judgment.

Wetmore, J.

the parties differ. I find the facts as above stated by the defendant. In the first place the corroborative testimony supports him, and in the next place I think the bargain as stated by the plaintiff is most unlikely and impossible. It simply amounts to this, that the defendant agreed if the plaintiff stayed over a month he would pay him $20 as well for the first month as for the further time he stayed; that is, if he stayed the month for which he was to get only at the rate of $18, and then left a week afterwards, he was to be paid $20 for the first month and at the rate of $20 for the week in the second month. I do not think that any sane man would make any such arrangement, and I can quite understand the arrangement for $20 a month from the start being made if the defendant had succeeded in securing a man for the season who had satisfied him during the trial month.

I can find in the evidence no excuse whatever for the plaintiff leaving. The defendant, on the morning the plaintiff left, expressed himself dissatisfied with the manner in which the plaintiff was working and the amount of work he was doing and the plaintiff thereupon left. The defendant does not appear to have done this in an offensive manner, nor, as I stated, can I find anything in the defendant's evidence which justified the plaintiff leaving. Some men have the idea that if their employer "looks crooked" at them they are at liberty to put an end to the most binding agreement. That is not the law. Men are human and when they get into relations such as those which existed between the plaintiff and the defendant they must bear with each other's humanities, unless they become unbearable and unreasonable. A mere expression of opinion by an employer that his hired man is not doing as much work as he ought to do, at any rate unless the remark is couched in language which a reasonable man would not submit to is not sufficient to justify a hired man breaking his contract of hire.

The next question that arises is whether there is anything in the facts of this case, to take it out of the principle on which I decided *Taylor* v. *Kinsey* at this Court.

Judgment.
Wetmore, J.

I am of opinion that there is. The defendant swore that at the time of the bargain he told the plaintiff that "the money (that is his wages) would be ready for him at the end of the season; or, if he left at the end of the first month, that he had it to pay him; that he might give him a little money through the season." The plaintiff does not expressly deny this, but his whole evidence is so entirely inconsistent with it that I quite understand that he denies it. I find that the defendant is correct in this also. The evidence on the part of the defendant does not state whether the plaintiff expressly agreed to this, but I find as a matter of fact that he went to work after this had been said to him and thereby impliedly accepted it. This, in my opinion, notwithstanding the wages were stated at $20 a month, had the effect of postponing the time of payment until the end of the term for which the hiring was made, namely, to the end of the season when it froze up, and brings this case within the principle of *Hulle* v. *Heightman*;[1] *Beale* v. *Thompson*;[2] *Appleby* v. *Dodds*,[3] and *Jesse* v. *Roy*,[4] cited by Montague Smith, J., in *Button* v. *Thompson*.[5] I am of opinion therefore in this case that no part of the wages had accrued due in respect of which he could have maintained an action when the plaintiff left the defendant's employment, except possibly for the $18, the first month's wages (which have been paid); that the plaintiff left said employment without just cause or excuse before his term of service had expired and therefore is, under clear authority, not entitled to recover any part of the outstanding wages. It is not necessary to find whether he left the employ on the 25th August or on the 28th or 29th.

*Judgment for the defendant with costs.*

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

[1] 2 East 145; 4 Esp. 75. [2] 4 East 546. [3] 8 East 300; 9 R. R. 450. [4] 1 C. M. & R. 316; 4 Tyr. 626; 3 L. J. Ex. 268. [5] 38 L. J. C. P. 225, at p. 228.

## TAYLOR v. KINSEY.

*Master and servant—Servant wrongfully leaving employment—Right to past due wages.*

A servant, whose wages are payable periodically and who is dismissed from his master's employment for good cause, or leaves without justifiable cause, after one of such periods has passed, is nevertheless entitled to recover any unpaid wages accrued up to the end of the last of such periods; a right of action accrues at the lapse of each of such periods. The master has only the right to recover damages against the servant for breach of his contract.

[WETMORE, J., *March 23rd, 1899.*

Statement. Trial of an action before WETMORE, J., without a jury.

*F. F. Forbes,* for the plaintiff.

*E. L. Elwood,* for the defendant.

[*March 23rd, 1899.*]

WETMORE, J.—The facts of this case are not disputed and they are as follows:—

The plaintiff hired with the defendant for seven months at $20 a month. At the time of the hiring a conversation took place between the parties about an arrangement as to the plaintiff's right to leave at the end of any month. The plaintiff wanted in the agreement to have it arranged that at any time he and the defendant did not agree the defendant was to settle up with him and let him go. The defendant refused to accede to such arrangement on the stated ground that the plaintiff might stay with him while the wages were low and leave when wages were higher, and after that conversation the time of seven months was fixed. The plaintiff worked under the agreement from the 14th April last to the 7th September, both inclusive, four months and twenty-four days, and he left the defendant's employ without any justifiable cause or excuse. In *Johnston* v. *Keenan,* decided by me on the 20th January, 1894, I held that when a

person was hired for a stated period at a stated sum per calendar month, and he left without justifiable cause before the period for which he hired was up, but after one or more months had elapsed, a right of action accrued at the end of each month, which was not taken away by his leaving. I decided this on the authority of *Taylor* v. *Laird*[1] and *Button* v. *Thompson*;[2] I also drew attention to *The Boston Deep Sea Fishery & Ice Company* v. *Ansell*.[3] In that case the defendant was employed as managing director of the plaintiff's company, for five years at £800 a year. The company had been in the habit of paying him as well as the other employees quarterly—in his case £200 a quarter. He was dismissed for cause during the currency of a year, but after the expiration of a quarter; he claimed a quarter's pay. The Court refused to allow it, but only on the ground that he was paid quarterly by the rules of the company, not by virtue of the agreement between him and the company, which specially provided that his salary was to be paid at the rate of eight hundred pounds a year. I cannot find that *Taylor* v. *Laird*[1] and *Button* v. *Thompson*[2] have been overruled. Judgment. Wetmore, J.

The plaintiff is not entitled to recover for the twenty-four days from the 13th August. The authorities are quite clear on that point. But under the authority of *Johnston* v. *Keenan* the plaintiff is entitled to recover for the four months down to and inclusive of the 13th August unless the proposal made by the plaintiff set forth in the conversation which I have set out, and which the defendant refused to accede to, takes his case out of the decision in *Johnston* v. *Keenan*, and of the cases upon which that case was decided. I am of opinion that what took place at that conversation does not take this case out of the authority of the decision referred to. *Taylor* v. *Laird*[1] and *Button* v. *Thompson*[2] were decided on the ground that a right of action to recover the monthly wages accrued at the end of each month. The cases bearing on the subject were considered in the judgment of Montague Smith, J., in the last mentioned case,

[1] 25 L. J. Ex. 329; 1 H. & N. 266. [2] 38 L. J. C. P. 225; L. R. 4 C. P. 330; 20 L. T. 568; 17 W. R. 1069. [3] 39 C. D. 339; 59 L. T. 345.

Judgment. Wetmore, J.

and it will be observed in all the cases when monthly wages were bargained for, and it was held that the employee was not entitled to recover until the expiration of the time for which the services were agreed to be given, there was an express stipulation that such wages were not to be payable until the expiration of such time. Now there is nothing in the conversation in question which embraces any such stipulation. The effect of the conversation carries the question no further than if it had never taken place, namely, that the plaintiff is liable to an action at the suit of the defendant for damages for breaking his agreement in leaving before the time had expired, but it does not affect the plaintiff's right of action for his wages at the end of each month.

Judgment for the plaintiff for $80 and costs.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

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## GRINDLE v. GILLMAN.

*Costs—Witness fees—Setting aside—False affidavit of increase—Taxation—Setting aside certificate—Review or motion—Affidavit—Information and belief—Refusal to make affidavit—Compulsory examination.*

The English practice requiring proof of actual payment of witness fees as a condition precedent to their being allowed on taxation of costs should be followed.

Where on an affidavit that witness fees have been actually paid they are allowed on taxation without objection on the ground of falsity of the affidavit, the proper mode of attacking the allowance is by an application by way of motion to the Court and not by way of review of the taxation.

On such an application, an affidavit of information and belief stating the grounds thereof, is sufficient foundation for a motion to set aside the certificate of taxation and refer it back to the taxing officer to ascertain whether or not at the time of the taxation the witness fees in question had in fact been paid.

There is authority under Rule 267 of the Judicature Ordinance (C. O. 1898, c. 21) to order a person who has refused to make an affidavit to attend for examination under oath.

[WETMORE, J., *March 30th, 1899.*

This was an application on the defendant's behalf to WETMORE, J., sitting in Court, to set aside the certificate of

taxation of costs on the grounds that it had been discovered subsequently to the taxation of costs that certain witness fees, stated in the plaintiff's affidavit of increase to have been paid, had not in fact been paid. Statement.

*E. A. C. McLorg*, for the motion.

*J. T. Brown*, contra.

[*March 30th, 1899.*]

WETMORE, J.—This is an application on notice of motion to set aside the clerk's certificate of taxation of the plaintiff's bill of costs and to refer the bill back to the clerk for taxation, or for such further order as may seem just. This action was tried before me in January last, and judgment given for the plaintiff on his claim with costs, and for the defendant on his counter claim with costs. On the taxation of the plaintiff's costs, the affidavit of increase was made by the plaintiff, who claimed witness fees for one O. J. Fuller and one John Reid, who were stated to be necessary and material witnesses for the plaintiff, and who were sworn and gave testimony on his behalf at the trial. The affidavit stated in substance, that the plaintiff had paid these witnesses their fees for travel and attendance, amounting in Fuller's case to $4.80, in Reid's case to $4.40.

This application is made on the ground that this latter statement is not true. There is no affidavit or further material before me establishing that this statement is false. The only material used before me was the affidavit of increase in question, and the affidavit of Mr. McLorg, the defendant's advocate, who swears that he was informed by Fuller since the taxation that he was only paid $2.50, and by Reid that he was not paid anything; that he had prepared an affidavit for Fuller to depose to verifying the alleged information so furnished, but that Fuller objected to making the affidavit. He also swears that Reid had informed him that the plaintiff had not paid him any sum whatever on account of said witness fees.

It was claimed on behalf of the defendant that this application should have been made by review under sections 529

Judgment.
Wetmore, J.

and 530 of the Judicature Ordinance 1893.† I am of opinion that a review could not be had. A review under section 529 is allowed when either party is dissatisfied with the allowance or disallowance by the clerk. In this case the question of the clerk's right to tax the items was never raised. So far as the affidavit disclosed the taxation was right. It therefore could not be said that the defendant was dissatisfied with the allowance of these items. It was only from information received subsequent to the taxation that it was brought to the knowledge of the defendant's advocate that possibly the affidavit of increase was erroneous. This application was therefore properly made to the Court: *Harding* v. *Knust*.[1] It occurred to me at the argument of this application whether under the practice here it was material whether or not the fees were paid, that perhaps the witnesses having attended and given evidence were entitled to them and that was sufficient. As between the witnesses and the party subpœnaing them, I conceive that there can be no question that the witness attending is entitled to his fees. But as between the party succeeding, and to whom costs are allowed, and the opposite party, the question is very different. It is quite clear according to the English practice that witness fees must be paid before they are taxed as between party and party: *Trent* v. *Harrison*,[2] *Freeman* v. *Rosher*,[3] *Cross* v. *Durrel*.[4] The English practice is applicable to this country only unless not inconsistent with the provisions of the Judicature Ordinance and the rules of the Court: See Ord. No. 6 of 1897, section 1, subsection 9.§ I can discover nothing inconsistent in this practice with section 532 of the Judicature Ordinance 1893;|| that section deals with the fees which witnesses, etc., are entitled to recover in circumstances under which they are entitled thereto. I must say I had some doubts on the subject, but I am glad to be able

[1] 11 O. P. R. 80. [2] D. & L. 941; 14 L. J. Q. B. 210; 9 Jur. 873. [3] 18 L. J. Q. B. 105; 13 Jur. 427. [4] 29 L. J. Ex. 473; 6 Jur. N. S. 638; 3 L. T. 87; 8 W. R. 630.

† Now R. R. 528. 529 Jud. Ord. C. O. 1898, c. 21.

§ See now Jud. Ord. C. O. 1898, c. 21, ss. 20, 21.

|| Now R. 531; Jud. Ord. C. O. 1898, c. 21.

Judgment. Wetmore, J.

to reach the conclusion I have, because the English practice is founded on grounds which commend it to my mind: See judgment of Erle, C.J., in *Freeman* v. *Rosher*[3] cited above. I may merely add to the remarks in that case that in this country the temptation to defraud would be quite as open to the client as to the advocate, and that another person liable to be defrauded is the person against whom the costs are taxed. The witness fees are not given to the successful party as a perquisite to him, nor is the unsuccessful party required to pay them as such; and I am satisfied that if the English practice did not prevail he would in many cases be forced to pay witness fees which would never get to the witnesses at all.

It was further objected that the evidence on which this application is based is all hearsay. Mr. Brown is quite correct in stating that such evidence is hearsay. The application is really based on the belief of Mr. McLorg, founded on the information received from Fuller and Reid. This application is, I conceive, interlocutory, that is, it does not decide the rights of the parties: Annual Practice 1895, page 753. Were I called upon under the notice of motion absolutely to disallow these fees, I am of opinion that I would not be warranted in doing so upon the material before me. I am merely by the notice asked to set aside the certificate of taxation and to refer the bill back to the clerk for taxation, *or for such other order as may seem just.* No objection was raised to the form of the notice. This application therefore being interlocutory, affidavits containing statements as to deponent's belief, with the grounds thereof, may be admitted: Judicature Ordinance 1893, section 275.§§ This we have in this case, and I call attention to the fact that it was just on material of this character that the rule *nisi* was granted in *Cross* v. *Durrel.*[4] Mr. McLorg's affidavit has not been answered, and I am of opinion that this is a case in which I ought to make an order such as I am about to make.

§§ Now R. 295; Jud. Ord. C. O. 1898, c. 21.

Judgment.
Wetmore, J.

It has been made to appear to me that Fuller has declined to make an affidavit. Under the Common Law Procedure Act (17 & 18 Vic. Imperial 1854, c. 125, s. 48), an order could be obtained for the examination of a person who refused to make an affidavit. This section was repealed (see 1 Arch. Q. B. Practice, 14th ed. 474), but I am of opinion that a Court or Judge has power under rule 267 of the Judicature Ordinance, C. O. 1898, c. 21, to compel an unwilling witness to appear before such person as may be directed to be examined upon oath, "when it shall appear necessary for the purposes of justice." At first sight it might appear from the judgment in *Warner* v. *Mosses*[5] that this rule, which is taken from the English Mar. Rule 487, is very limited in its application, but on closely reading that decision such will not be found to be the case. The Court merely held that under the circumstances of that case the rule did not give jurisdiction to make the order. Jessel, M.R., says at page 29: "I do not intend to cut down the generality of its terms" (that is the terms of the rule), "but it is confined to cases in which it appears necessary for the purposes of justice." I can hardly conceive of a case where an order under the rule would be more "necessary for the purposes of justice," than it would be in an application like this made with the object of discovering whether a person has been placed in a position to obtain what he has no right to by a false statement in an affidavit; and see also *Re Springhall*,[6] where on a summons under the Vendor and Purchasers Act an order was made under this rule for the examination of a witness who refused to make an affidavit.

The order will be that the certificate of taxation of the plaintiff's bill of costs herein be set aside, and that it be referred back to the clerk of the Court to ascertain whether or not at the time of the taxation of the plaintiff's bill of costs the witness fees alleged to have been paid by the plaintiff to the witnesses O. J. Fuller and John Reid, or any part

[5] 50 L. J. Ch. 28; 16 C. D. 100; 28 W. R. 201. [6] W. N. (1875) 225, cited An. Prac. under R. 487.

thereof, were paid, and that if such fees were not so paid that the same or such part thereof as were not paid be disallowed, such inquiry to be held at such time and place as the clerk may appoint, and a copy of such appointment to be served on the plaintiff's advocate. Judgment. Wetmore, J.

And further, that O. J. Fuller do upon being paid or tendered the proper fees for attendance and conduct money attend before the said clerk at such time and place as he may appoint, and submit to be examined *viva voce* under oath as to whether or not he has been paid such fees, and how much thereof he has been paid, and when he has been paid the same. I may also state that if Mr. Reid will not make an affidavit, I am prepared on further application to make a like order for his attendance before the clerk. When the inquiry before the clerk is completed the clerk will report to me, and until that is done I will reserve the question of the costs of this application and of the inquiry before the clerk, and of further directions, and with that object I will adjourn the Court until Monday the 24th April next, at 10 a.m.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

## MARCY v. PIERCE (No. 1).

*Replevin—Affidavit—Bond—Misnomer — Sureties — Justification—Chamber summons.*

On an application to set aside a writ of replevin on the following grounds: (a) the affidavit upon which the writ issued was sworn before the issue of the writ of summons in the action; (b) the replevin bond was executed before the issue of the writ of summons; (c) there was a misnomer of the defendant in the affidavit, writ and other proceedings; and (d) there was but one surety in the replevin bond; the application was dismissed.

Such an application was properly made by summons under R. 458 of the Judicature Ordinance (C. O. 1898, c. 21.).

An affidavit of justification on a replevin bond is not necessary.

[WETMORE, J., *April 1st, 1899.*

Statement. Application by Summons in Chambers to set aside a writ of replevin. The points involved appear in the judgment.

*E. L. Elwood,* for the defendant.

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

[*April 1st, 1899.*]

WETMORE, J.—This is an application to set aside the writ of replevin herein and all subsequent proceedings. The grounds of objection are practically (1) that the affidavit upon which the writ of replevin was issued was sworn before the commencement of the action; (2) that the replevin bond was executed before the commencement of the action; (3) that in such affidavit and in the writ of replevin and throughout the whole proceedings, the defendant is described as "Abraham Pierce," whereas his true name is "Asher Pierce;" and (4) that there is only one surety to the replevin bond. An objection was also raised that the affidavits of justification by the parties to the replevin bond were sworn before the commencement of the action. As I cannot find that the practice anywhere requires any such affidavits to be made, this objection is not material.

Judgment.

Wetmore, J.

It was set up that this application should have been by notice of motion and not by summons, and s. 74 of the Judicature Ordinance of 1893 was relied on. That section, however, was repealed by Ordinance No. 6 of 1897, s. 1, s.-s. 21, and at any rate when the Chamber summons was taken out the Consolidated Ordinances, 1898, were in force, and the application is in proper form under Rule 458 of the Judicature Ordinance, C. O. c. 21.†

The action was brought for the wrongful detention of a piano. The statement of claim was filed and the writ of summons issued, on the 8th day of March, 1899, and the writ of replevin was issued on the same day, but as established by the affidavit of Mr. McLorg after the writ of summons was issued. As a matter of fact, it was not set up that the writ of replevin was issued before the commencement of the action. The affidavit on which the writ of replevin was issued is intituled in the cause of "Herman Byron Marcy plaintiff, and Abraham Pierce defendant," and was sworn on the second day of February last. At the time of the commencement of this action and of the issue of the writ of replevin, the Judicature Ordinance of 1893 and amending Ordinances were in force. Section 401 of that Ordinance provided that "in any action brought for the recovery of any personal property and claiming, * * * that such property * * * is unlawfully detained, the plaintiff may at any time after the issue of the writ of summons obtain a writ of replevin for the delivery of the property to him on his complying with the following sections." Section 402 provides that "writs of replevin shall be issued by the Clerk of the Court upon the plaintiff * * * filing an affidavit," containing certain specified facts set forth in that section. An affidavit containing such facts (there is no contention that it did not) was filed with the clerk before the issue of the writ of replevin. Is the writ founded on such affidavit irregular or void, because such affidavit was sworn before the commencement of the action, and because it was

† Came into effect 15th March, 1899; see proclamation prefixed to C. O. 1898.

Judgment.
Wetmore, J.

intituled in the cause, there being at the time of such swearing no such cause in Court? I am of opinion that the practice in this respect is analogous, in so far as the question under consideration is concerned, to the practice as it existed in England respecting arrest before judgment in an action under the Imperial Statute 1 & 2 Vic. c. 110.

By s. 1 of that Act, arrest on mesne process was abolished; s. 2 provided that all personal actions in the Courts at Westminster should be commenced by writ of summons; s. 3 provided "that if a plaintiff in any action," in any of such Courts, "shall by the affidavit of himself or some other person show to the satisfaction of a Judge," certain specified facts, the Judge might order the defendant to be held to bail, and thereupon a writ of capias might be sued out. It will be observed that the provision was that if a *plaintiff in any action* showed to the satisfaction of a Judge, and that the Judge had the power to order the *defendant* to be held to bail. It was therefore quite obvious that the application for an order to hold to bail must be made after the commencement of the action; because there must be an action before we can have a plaintiff or a defendant. But this question was settled by s. 5 of the Act which provided that the order might be made after the commencement of the action and before the judgment. *Williams* v. *Griffith*[1] was an action brought against the sheriff for not arresting a person in pursuance of a capias purporting to be issued at the suit of the plaintiff under 1 & 2 Vic. c. 110. The action was tried and the plaintiff got a verdict. The Court arrested the judgment on the ground that, in order to hold the sheriff liable for his omission, the plaintiff had to establish that he was a person who had the right to issue the capias and that the declaration did not set out that the plaintiff had such right because it was not alleged therein that the plaintiff was at the time he sued out the capias a plaintiff in a suit against the alleged debtor. In other words, it was not alleged, that an action had at the time of the issue of the capias been commenced by the plaintiff against the alleged debtor. It

[1] 18 L. J. Ex. 195; 3 Ex. R. 584.

Judgment.
Wetmore, J.

is therefore established by authority that the order to hold to bail could only be applied for or obtained after the commencement of an action; just as, according to the practice in the Territories, a writ of replevin can only be applied for or issued after the commencement of an action. In *Schletter* v. *Cohen*[2] an application was made to set aside an order for a capias issued upon an affidavit sworn before the commencement of the action. It does not appear that the order itself was made before the commencement of the action. The application was refused. I must say that the grounds upon which Lord Abinger founds his judgment in that case do not appear to me to be reconcilable with what was laid down in the later case of *Williams* v. *Griffith*[1] hereinbefore cited; but Parke, B., lays it down as follows: "If this objection is good all the orders made by me were erroneous, for I have always thought, when no writ has been issued, that an affidavit need not be intituled in the cause. It is otherwise when a writ has been issued, because then there is a cause in Court, but it has been held that an application to hold to bail under the 3rd section of 1 & 2 Vic. c. 110 may be made before the writ is sued out." This last remark does not strike me as reconcilable with *Williams* v. *Griffith*,[1] though Parke, B., delivered the judgment in this last mentioned case. Parke, B., however, proceeds in *Schletter* v. *Cohen*[2] as follows: "The contrary doctrine would be attended with much inconvenience. It would oblige parties residing in the country, before they could proceed to arrest a defendant, to ascertain whether any writ had been sued out against him." These last observations seem to me to be quite applicable to issuing a writ of replevin by parties residing at a distance from the clerk's office. In *Hargreave* v. *Hayes*[3] the action was commenced on the 18th May, 1855, and an order to hold to bail was made on the same day on an affidavit sworn the previous day (the 17th), intituled in the cause "James Henry Hargreave, plaintiff v. Henry Hayes, defendant." An application was made to set the order to hold to bail aside on

[2] 10 L. J. Ex. 99; 9 D. P. C. 277; 7 M. & W. 389; 5 Jur. 74.
[3] 24 L. J. Q. B. 281; 5 E. & B. 272; 1 Jur. N. S. 521.

Judgment.
Wetmore, J.

the ground, among others, that the affidavit was wrongfully intituled in the cause, it having been sworn before the action was commenced. The Court refused to grant a rule. I am of opinion that this case and *Schletter* v. *Cohen*[2] are quite decisive on the point now under discussion and that the fact that the affidavit, on which the writ of replevin was issued, was sworn before the commencement of the action and is intituled in the cause does not afford ground for setting such writ aside.

I am also of opinion that the misnomer of the defendant does not affect the validity of the writ of replevin. The writ against Abraham Pierce is in accordance with and warranted by the affidavit on which it was issued, Abraham Pierce being the person therein alleged to have possession of the piano. If the writ had under that affidavit been issued against Asher Pierce it might be irregular, but I cannot see how it can be held irregularly issued, as it was, against Abraham Pierce.

I am further of opinion that the misnomer is not a ground for setting aside the seizure. If the sheriff has seized the property out of the possession of a person not named in the writ, the remedy is by action against the sheriff on the same principle that such an action will lie against the sheriff for seizing the goods of A. under an execution against B. Such a seizure under an execution would not be set aside, the party would be left to his remedy by action. I think the same principle applies to the seizure in this case, and I conceive that this is the most obvious answer to the application to set aside the seizure on this ground. I do not wish, however, to be understood as holding that the sheriff is liable to an action in this case. I have great doubts if he is for the following reasons, and, if my doubts are well founded, what I am about to state is an answer to the application to set aside the writ of replevin and the seizure under it by reason of the misnomer.

It is quite clear that the misnomer does not affect the validity of the writ of summons. The person intended to

be sued was Asher Pierce, he was erroneously styled Abraham Pierce. Asher Pierce was served with both the writs. He has recognized the fact that he is the true defendant by intituling his affidavits and his Chamber summons in this application, "Herman Byron Marcy, plaintiff, and Asher Pierce, sued as Abraham Pierce, defendant." If we look at the form of writ of replevin as prescribed by the Ordinance, it is intituled in the Court and cause, and it requires the sheriff to replevy to the plaintiff his goods and chattels, * * * which the *defendant* has taken and unjustly detains." What defendant? Is it not the one described in the writ of summons and writ of replevin as Abraham Pierce—but erroneously so described? — *i.e.*, the person against whom the writ of summons was intended to be issued. Under section 403 of the Ordinance, the bond is "assignable to the defendant by the sheriff endorsing his name thereon, and such endorsement shall enable the defendant to bring action thereon in his own name against the parties who have executed it." To what defendant is the bond so assignable? and by what defendant can this action be brought? Is it not the defendant Asher Pierce, erroneously called Abraham Pierce? There is no other defendant. The amendment to s. 403 by Ordinance No. 7 of 1895, s. 3, makes this more clear, and s. 403 as so amended gives a statutory right of action on the bond to the real defendant. The defendant, if I am correct in this, is by no means prejudiced by the misnomer.

Judgment. Wetmore, J.

I will next discuss the question whether the omission to take more than one surety to the bond is a ground for setting aside the seizure. I am satisfied that this affords no ground for setting aside the writ of replevin, because the writ is not founded on the bond. I cannot find a cause where a seizure has been set aside on such ground. *Norman* v. *Hope*[4] was an action against the sheriff for not taking a replevin bond with sufficient sureties, it was not an application to set aside the seizure; and although Armour, J., held that the sheriff would be liable if he only took one surety, he

[4] 13 O. R. 556; affirmed 14 O. R. 287.

Judgment.
Wetmore, J.

points out at page 558 that although pledges (in the plural) was used, the sheriff might take but one, or even the plaintiff himself because, as he was answerable for the sufficiency of the pledges, he did it at his peril. This is fully borne out by authority. It is true that the learned Judge states that this was not so decided in actions against the sheriff, but by actions brought by him upon the bond. I am not prepared to state that the learned Judge was in error in stating that, because I have been unable to obtain access to the reports in which the cases he cites are to be found, but I will just point out that a note of *Hucker* v. *Gordon*,[5] one of the cases cited by him, is to be found in 2 Mews' Fisher's Dig. Col. 1453, as follows: "A Court stating that the sheriff instead of taking a bond from the plaintiff in replevin and two sufficient sureties, took a bond from the plaintiff and one surety, who was alleged to be insufficient, is bad, for not alleging that the plaintiff in replevin was insufficient." According to the notes of that case in the digest that was an action against the sheriff. If this note is correct, and if in such an action such an averment is necessary, I cannot see how I could hold the taking a bond with one surety would afford ground for an application to set a seizure under the writ aside. In *Taylor* v. *Burpree*,[6] the Act required that the sheriff should take a bond with two sureties, the sheriff took a bond with one surety. The Court in an action by an assignee of the sheriff against the obligors held that such bond was assignable. I have reached the conclusion that the omission to take more than one surety is not a ground for setting aside the seizure, that the defendant will be left to his remedy against the sheriff (if any) if he has been or becomes damnified by reason of such omission. I introduce the last remark, because in the event it may turn out that the defendant has not suffered damage, as it may be proved that the right of property is in the plaintiff. I do not wish to be understood as dissenting from the opinion of Armour, J., as expressed in *Norman* v. *Hope*.[4]

[5] 1 Cr. & M. 58; 2 L. J. N. S. Ex. 47; 3 Tyr. 107. [6] 10 New Brunswick Reports (5 All.), 191.

This case went to an appeal and was affirmed by the Divisional Court; but the question as to the right of action for not taking more than one surety was not touched. Judgment. Wetmore, J.

The only remaining question is, whether the seizure should be set aside because the bond is dated and was as a matter of fact executed (see the affidavits of justification) before the commencement of the action. I must say that I am of opinion that this is a very fatal objection to the bond, because in consequence of it having been so taken it contains an untrue recital, and the conditions as based on such recital is irrelevant to the true state of affairs. The recital I refer to is as follows: "Whereas the said Herman Bryon Marcy has obtained a writ of replevin against Abraham Pierce to obtain possession of certain goods to wit (naming the property), which the said Herman Bryon Marcy asserts to be his property." That recital is untrue, because as a matter of fact when the bond was executed no writ of replevin had been obtained. One condition of the bond among others is that "if the said Herman Bryon Marcy shall prosecute his suit in which the said writ is so issued with effect and without delay," etc., the bond shall be void. This is altogether irrelevant, because the suit so referred to as the suit on which the writ of replevin is based was not commenced and so there was not any such suit. I am therefore of opinion that I must deal with the point I am now discussing as if there was no bond at all. I can only find one case in which a seizure was set aside on the ground that a bond had not been taken and that is *Lawless* v. *Radford*.[1] It does not appear by the report whether or not the question was raised that the omission to take a bond did not afford a ground for setting aside the seizure. The question in the case seems to be whether the sheriff was excused from taking a bond by reason of his having been, as he alleged, misled by the order of the County Court Judge. I am of opinion that the omission to take a bond does not afford a ground for setting aside the seizure. As stated when discussing the preced-

[1] 9 O. P. R. 33.

Judgment.

Wetmore, J.

ing question, the defendant has, if damnified, his remedy by action against the sheriff. In the *King* v. *Lewis*,[8] an attachment against the sheriff for neglecting to take a replevin bond was refused on the ground that the party injured might maintain an action against the sheriff. That was the case of an application for an attachment, and may not be therefore exactly in point, but it is of a little assistance in deciding the question. I am of opinion that s. 403 of the Ordinance is directory merely. If not so and the omission to take a bond would be ground for setting aside the seizure, then any non-compliance with the section would afford ground for doing so. I quite agree with Armour, J., that s. 403 in view of s. 405, and of the form of bond prescribed by the schedule, intends that the sheriff shall take more than one surety. That I think must be taken as established by *Norman* v. *Hope*,[4] and the word "sureties" means sufficient sureties: See that case and C. O. c. 1, s. 8, s.-s. 21. So if it is held that an omission to comply with section 403 is a ground for setting aside a seizure, we will have the Judge compelled if the question is raised to inquire on an application of this nature into the sufficiency of the sureties. I think this would be most inconvenient. I will just add that in view of the fact that the value of the property in question is small the defendant if damnified will have his right of action against the sheriff, and that there is no complaint as to the sufficiency of the surety. I think apart from what I have held I ought to exercise the discretion given me by s. 540 of the Ordinance and refuse to set aside the seizure. See *Dickson* v. *Law*[9] as to my power to waive an irregularity.

*Application dismissed with costs.*

REPORTER:

E. H. C. McLorg, Advocate, Moosomin.

[8] 2 T. R. 617. [9] 64 L. J. Ch. 490; (1895) 1 Ch. 62; 13 R. 431; 72 L. T. 680; 43 W. R. 596.

## KIRKLAND v. RENDERNECHT.

*Detinue—Trover—Negligence—Parent and child.*

A lad borrowed a horse from a person from whom his father had forbidden him to borrow horses. On the son reaching home with the horse, his father told him to tie it up, with the intention that his son should, when through his work, return it. On his father attempting to untie the horse for the purpose of his son returning it, it broke away and was lost, and the father made no effort to find it.

*Held*, the father was not liable to detinue or trover, or in an action for negligence.

[WETMORE, J., *May 25th, 1899.*

Statement.

The facts and points involved sufficiently appear in the judgment.

Trial of an action before WETMORE, J., without a jury.

*W. R. Parsons*, for the plaintiff.

*G. Elliott*, for the defendant.

[*May 25th, 1899.*]

WETMORE, J.—This is an action of detinue or trover (I am not prepared to say which description of action is intended in view of the form of the statement of claim) for depriving the plaintiff of a horse and refusing to give him up on demand. It is immaterial whether the action is trover or detinue, the principles governing the action so far as this case is concerned are the same. The facts as I find them are as follows:—

The plaintiff lent the defendant's son Walter the horse in question to fetch home the defendant's cows. Walter had no authority whatever from the defendant to borrow the horse, on the contrary, he had been expressly forbidden by his father to borrow any horses from the plaintiff. The defendant had borrowed another horse from one Hilburn for the boy to use in going for the cows. Walter is a mere lad, I should judge of about twelve years old. When he came to his father's place with the plaintiff's pony, the defendant,

Judgment. Wetmore, J.

who was engaged doing his evening "chores" about his premises, told him to tie it to a waggon which was there and to take the Kilburn pony and go for the cows. The lad did both of these things, and the defendant after the lad finished his "chores" went to the waggon to untie the plaintiff's horse with the object of returning him to the stable from whence Walter had taken him. For some reason the horse pulled back just at this time and broke the halter and got away and was lost three months. The defendant took no steps whatever in looking for the horse, in fact he stated he would not do so.

The action was brought before the horse was found and brought back to the plaintiff. I make no finding as to whether or not the defendant expressly told the plaintiff not to lend a horse to his son, or whether Walter told the plaintiff that his father sent him to borrow the horse. The evidence is contradictory on these points, and I do not think it material to determine who is correct in view of the fact which I have found that the defendant expressly forbade Walter to borrow any horses from the plaintiff. That being so, Walter had no authority to bind his father and any representations he may have improperly made would not alter that fact, nor was it necessary under the circumstances of this case that the defendant should give express directions to the plaintiff not to lend his horses to his son. There was nothing that I can discover under the evidence in their previous dealings to render such notice necessary. I also find that the defendant's reason in directing his son to tie the plaintiff's horse to the waggon and use the Kilburn horse was that he objected to his using the plaintiff's horse and intended to return him with all convenient speed. The question is whether under such findings the defendant is liable in detinue or trover. The first question that arises is whether the defendant, by giving the direction that he did to his son to tie the horse and by approaching him with the object of returning him, adopted his son's act of borrowing, or so interfered or became a party to the possession of the horse as to render him liable for negligence in respect to it,

Judgment.
Wetmore, J.

because if he did not in this way render himself liable he did not in any other way. I may say that if he did so render himself liable for negligence, I am very doubtful whether detinue or trover is the proper form of action, or whether the action should not be for negligence. It is laid down in Roscoe, N. P. Ev. (16th edition), page 989, that when a defendant has lost the plaintiff's goods by negligence detinue lies, and *Reeve* v. *Palmer*[1] is cited in support of that proposition. That was an action by a client against his solicitor for negligently losing title deeds. Most of the members of the Court in giving judgment laid stress upon the fact that the defendant was a bailee, and that these deeds were given to him for the express purpose of being *safely kept*. However, that question was not raised at the trial in this case, and it seems practically to have been conceded that if the defendant was liable to the plaintiff for negligence this action would lie in the form in which it is brought. I therefore see no reason why I should discuss a possibly somewhat difficult question which the advocates have not raised. Assuming, for the moment, that the defendant might be liable to the plaintiff for negligence, I think the defendant was not guilty of negligence because the horse broke the halter and got loose; that, so far as I can discover from the evidence was a mere accident, but I think he would be guilty of negligence, if at all, in not taking any steps whatever to find the horse after he got away. I am of opinion, however, that the defendant was not liable to the plaintiff for the negligence which I have mentioned. There was no such relationship existing between him and the plaintiff which would render him liable for such negligence. He was not the plaintiff's bailee. His action in directing his son, a mere lad, to tie up the horse, and his act in attempting to untie him in order to return him, was done by virtue of his parental authority and with the object, not of adopting his son's act or participating in it, but of repudiating it and of correcting what he had improperly done. The horse

[1] 5 C. B. N. S. 84; 27 L. J. C. P. 327; 5 C. B. N. S. 91; 28 L. J. C. P. 168.

Judgment. McGuire, J.

having under such circumstances accidentally got away, I am of opinion that there was no legal duty cast upon the defendant to hunt for him.

*Judgment for the defendant.*

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

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## IN RE PRINCE ALBERT TAX SALES.

*Land Titles Act, 1894—Confirmation of tax sale—Municipal Ordinance—Neglect of purchaser to apply for transfer within time limited—Effect of upon authority of treasurer to execute transfer—Construction of statutes.*

*Held*, that though a purchaser at a municipal tax sale did not, within one month after the expiration of the time for redemption, make a demand upon the treasurer for a transfer, nor pay to him the $2.00 for such transfer, and it was not until long after the expiration of the said month that such demand and payment were made and such transfer executed, the treasurer had authority to execute the transfer to the purchaser.

[*Court in banc, June 6th, 1899.*

Applications under the Land Titles Act, 1894, for confirmation of tax sales.

*H. A. Robson*, Deputy Attorney-General, and *R. F. Chisholm*, for applicants.

[*June 8th, 1899.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE, and SCOTT, JJ.) was delivered by

SCOTT, J.:—This is a reference by MCGUIRE, J., under the Land Titles Act.

The following facts are stated:

Lands were sold in January, 1895, and in February, 1896, in each case for the amount of the taxes due to the municipality for the years 1891 and 1892 and 1893 respectively and costs. The purchasers did not within one month after the expiration of the time for redemption

made a demand upon the treasurer for a transfer, nor pay to him the $2 for such transfer, as provided by section 23 of part 5, of the Municipal Ordinance of 1894,† and it was not until long after the expiration of the said month that such demand and payment were made, and that the treasurer executed the transfers of the said lands to the respective purchasers. A number of applications are made on behalf of the said municipality, it having been the purchaser and being the transferee named in such transfers. The remainder of the applications are on behalf of individuals. Certificates of title have issued for some of the lands so sold.

Judgment.
Scott, J.

The first question reserved is: Had the treasurer any authority to execute the transfers he did execute in favor of the municipality or in favor of the said individuals under the circumstances above set forth?

Section 23 of part 5 of the Municipal Ordinance of 1894, under which the sales were made, provides that if the land be not redeemed within the period allowed by the Ordinance (one year from the date of the sale), then on demand of the purchaser, his heirs or assigns or other legal representatives at any time within one month after the expiration of the time limited for redemption and upon payment of the balance of the purchase money as aforesaid, and of the further sum of $2, the treasurer shall prepare and execute and deliver to him or them a transfer of the land so sold; provided that any land sold to the municipality under the provisions of the Ordinance shall be transferred by the treasurer of the municipality immediately upon the expiration of the time allowed for redemption without charge.

Reading this provision alone it might reasonably be contended that the legislature intended that in cases where land is sold to an individual he would forfeit his right to obtain a transfer of the property unless he complied with its provisions within the prescribed time.

† See now C. O. 1898, c. 70, ss. 201, *et seq.*

Judgment.
Scott, J.

But it is a well-settled principle of construction of statute law that in order to arrive at the meaning and intention of a statute its whole scope must be considered.

That principle is stated by Lord Campbell in *The Liverpool Borough Bank* v. *Turner*[1] as follows: "No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try and get at the intention of the Legislature by carefully attending to the whole scope of the statute to be construed." See also *Howard* v. *Bodington*,[2] and *Caldow* v. *Pixell*.[3]

Proceeding upon this principle it will be found that other portions of the Ordinance throw some light upon the intention of the Legislature in enacting the section referred to. Section 13 of part 5 provides that if the land sells for a greater sum than the taxes due, together with all charges thereon, the purchaser shall only be required to pay at the time of the sale the amount of such taxes and charges, and that the balance of such purchase money shall be paid within one month after the time for redemption of the said land shall have expired without the same having been redeemed within the time limited, and that if the said balance of purchase money shall not be so paid by the purchaser, his heirs or assigns within the time above prescribed, he and they shall forfeit all claim to the said land and to any transfer or conveyance thereof, as well as the amount paid at the time of sale, and such land shall thereupon cease to be affected by such sale.

It will be seen that section 23 prescribes that a purchaser shall, in order to become entitled to a transfer, do certain acts within one month after the time for redemption has expired, viz.:—

1. Make a demand for a transfer,

2. Pay the balance of the purchase money, if any, and

[1] 2 DeG. F. & J. 502; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. 494; 9 W. R. 292. [2] P. D. 203. [3] 2 C. P. D. 562; 46 L. J. C. P. 541; 36 L. T. 469; 25 W. R. 773.

3. Pay a further sum of $2, which is doubtless intended as a fee for preparing the transfer. Judgment. Scott, J.

Section 13 provides that if the second of these acts is not done within the time limited the purchaser shall forfeit his claim to the land, but the Ordinance is silent as to the consequences or effect of an omission to perform either of the others within that time. To my mind this affords a reasonably clear indication of intention that the omission to perform the latter within the time limited was not to result in the forfeiture of the purchaser's rights, and that the provision with respect to their performance within that time should be construed as merely directory.

The Ordinance provides that lands sold to the municipality shall be conveyed to it by the treasurer immediately after the time for redemption expires. Nothing is required to be done by it in order to entitle it to such conveyance at that time. It should not be prejudiced by the neglect of the Treasurer to perform his plain duty in that respect.

For the reasons stated I am of opinion that the first question be answered in the affirmative.

This being the answer to that question it becomes unnecessary to deal with the others.

REPORTER:

Ford Jones, Advocate, Regina.

## SMITH v. MacKAY.

*Practice—Contempt of Court—Attachment — Examination for Discovery—Production.*

*Held*, (1) That before an attachment can be issued for contempt in not producing documents for inspection on an examination for discovery, an order for production for inspection has to be made; (2) That an order for production of books for inspection must state the time, or time after service thereof, within which the books are to be produced, and the copy thereof served must be endorsed with notice of the consequence of neglect or refusal to obey the same.

[*Court in banc, June 8th, 1899.*

Statement. The sheriff seized certain goods under an execution in a suit in which the defendant was the judgment creditor and one Knox, the judgment debtor. The plaintiff, an advocate, claimed these goods under a chattel mortgage made by Knox to him to secure payment of Knox's indebtedness to him "for professional and other services." An interpleader issue having been directed, an order was made for the examination of the plaintiff touching the matters in question, and he was served with notice to produce on such examination all books, letters, papers, etc., in his custody, possession or power containing any entry or memorandum relating to the matters in question, and particularly "all books of account, ledgers, dockets, day books and other documents containing any entries of charges against Charles T. G. Knox or showing any dealings between plaintiff and Knox." Upon the examination the plaintiff refused to produce his books, claiming privilege as between solicitor and client. The examiner declining to order production of the books, an appeal was taken from his ruling to a Judge in Chambers, who ruled that the plaintiff was bound to produce all his books of account and papers which might be necessary to show how and in what manner his claim for professional services and moneys advanced was made up. From this decision the plaintiff appealed to the Court *in banc*, which Court varied the Judge's ruling by substituting therefor "that the plaintiff produce to the

examiner all his books of account containing any entries of charges against Charles Gisborne Knox, or against the firm of Knox & Hooper, tending to show how and in what manner his claim for professional services and moneys advanced is made up, and also all papers and documents relating to said charges or tending to show how and in what manner such claim is made up, except such as contain anything of a strictly confidential character, as between advocate and client, and which are by reason thereof privileged." An order of the Court *in banc* to this effect was taken out by the plaintiff's advocate. Upon the examination, which had been adjourned pending the judgment of the Court *in banc*, being resumed, the plaintiff produced a cash book and offered to show the examiner certain entries therein, but refused to produce any other books on the ground that to do so would disclose confidential professional communications which had passed between Knox and Knox & Hooper and himself, in his professional capacity. The defendant obtained a summons returnable before a Judge in Chambers for an order for a writ of attachment against the plaintiff for contempt of Court in not obeying the order of the Court *in banc*. Statement.

[*October 28th, 1898.*]

SCOTT, J.—This is an application for a writ of attachment against the plaintiff, for contempt of Court, in not complying with the terms of an order of the Court *in banc*, made herein on the 15th day of June last, by producing to the examiner upon his examination taken on the 25th day of June last, his docket, ledger, and other books directed and provided for in said order on the grounds:—

1st. That the plaintiff has wilfully ignored the terms of the said order and set the same at defiance.

2nd. That the plaintiff has wilfully and contemptuously disobeyed the terms of the said order in not producing his said books as directed.

This is an interpleader issue to try the title to certain goods seized under execution upon a judgment recovered

Judgment.
Scott, J.

by the defendant against one Knox, and which are claimed by the plaintiff under a chattel mortgage made by Knox to him.

On the 10th March last, on the application of the defendant, I ordered that the plaintiff do attend before the clerk at such time and place as he might appoint for examination touching the matters in question in this issue.

Upon his examination under this order plaintiff produced the chattel mortgage under which he claims the goods in question. It purports to be a chattel mortgage from Knox to him for securing payment of $3,000 and interest, and it contains the following recital:—"Whereas the mortgagor is indebted to the mortgagee in various sums of money for professional and other services amounting in all to the sum of $3,000, and the mortgagee has demanded security for the said sum, and in consequence of said demand the mortgagor has agreed to execute these presents."

Upon his examination plaintiff made the following statement:—

"The recital for the $3,000 indebtedness as mentioned in the mortgage is the true consideration of the mortgage. I can't tell how much of the $3,000 was for professional services. The consideration was arrived at by way of an estimate. It was not all entered in the books. I went through the papers and made up the amounts. I refuse to produce them as I claim privilege between solicitor and client. The other services were various payments made by me for Mr. Knox and Knox & Hooper. I do not know how much they are, but I have entries of them in my books in my office. I won't produce those books on the same grounds as above as between solicitor and client. They (the accounts with Knox) extended over some three years and are distributed through various ledgers, day books and diaries. There are a very large number of papers in my office in connection with this business."

Counsel for the defendant during the examination applied for the production of the documents referred to by the plaintiff in his examination, but the production thereof

was refused. The examiner held that plaintiff was not compelled to produce them on the ground that they were privileged, and protected from production. Defendant appealed to me from the ruling, and upon hearing the parties I gave on 12th March, 1898, the following decision:— Judgment. Scott, J.

"Upon the argument of the above appeal before me, it was admitted that in this issue plaintiff claims under a chattel mortgage from one Knox to him, the consideration of which is partly made up of sums due by Knox to plaintiff for professional services rendered by the latter as an advocate to the former and to the firm of Knox & Hooper, and for moneys advanced by plaintiff to him and them.

"Under these circumstances I rule that the plaintiff is bound to produce all his books of account and papers which may be necessary to show how and in what manner his claim for professional services and moneys advanced is made up."

Plaintiff appealed to the Court *in banc*, and upon the appeal the Court *in banc* on the 5th June, 1898, made the following order:—

"That the plaintiff produce to the examiner all his books of account containing any entries or charges against Charles Gisborne Knox, or against the firm of Knox & Hooper, tending to show how and in what manner his claim for professional services and moneys advanced is made up, and also all papers and documents relating to said charges, or tending to show how and in what manner such claim is made up, except such as contain anything of a strictly confidential character, as between advocate and client, and which are by reason thereof privileged."

Mr. Justice RICHARDSON, who delivered the judgment of the Court *in banc*, in his reasons for judgment, says:—

"As to the other branch of the consideration, *i.e.*, the plaintiff's claim for professional services, he (the plaintiff) admits he has books and papers in his office from which these can be ascertained. From the simple production of these for a like purpose as verifying advances, no privilege

Judgment. Scott, J.

can, I conceive, attach, but in thus holding it must not be assumed that the opposing litigant may enter into and notice every detail, or the contents of every paper, or of every charge entered in the books produced to the examiner. For instance, the plaintiff, on production of a paper may be able to say, 'the matter within is of a private and confidential nature, *i.e.*, advice to a client.' In such cases the plaintiff may, and, it would seem, would be bound, if asked, to state the time he was engaged in looking up and expressing his advice particularly charged for. In suits brought or defended for the client the plaintiff's docket would give the style of suit brought or defended, and what was done on the client's side, if costs were taxed to him, the amount, if not taxed then, applying the tariff between advocate and client to the item entered, the total would show if the sum charged the client corresponded with the entry in the docket."

After the judgment of the Court *in banc* on the appeal, viz., on the 25th June, 1898, the plaintiff's examination was again proceeded with, the following being the proceedings thereat:—

"Mr. Knott, for the plaintiff.

Mr. McCarthy, for the defendant.

Crispin E. Smith said to Mr. McCarthy:—

Q. Will you produce your books of account containing any entries of charges against Charles Thomas Gisborne Knox, or against the firm of Knox & Hooper, tending to show how and in what manner your claim for professional services and moneys advanced is made up? A.—I have a cash book here from which I am prepared to show certain items to the examiner. All the other papers you refer to I consider are privileged, on the ground that they would disclose confidential professional communications which have passed between Knox and Knox & Hooper and myself.

Q.—Do you understand that I have not asked for any papers, but only your books of account, as provided for by

the order of the Court *in banc*, dated the 15th June, 1898? A.—Yes. Judgment. Scott, J.

Q.—Do you refuse to produce your books of account as asked for? A.—I will produce and show certain items from them to the examiner.

Q.—Do you object to allowing me, as counsel for the defendant, to examine these items? A.—No.

Q. Are those items all contained in the cash book which you now produce? A.—Yes.

Q.—Have you any docket, ledger, journal, or other book than the cash book now produced, which contain any entries referring to the matter hereinbefore mentioned in my questions? A.—Yes.

Q.—Will you produce them? A.—No, for the reasons given in my reply to your first question.

Q.—Do you mean to swear that all the entries in these other books contain certain confidential professional communications between yourself and Knox and Knox & Hooper? A.—Yes.

Q.—I want to call your attention to the terms of the said order of the Court *in banc*, that you are directed to produce all your books of account containing any entries of the said charges without any exception, and that it is only papers and documents which contain anything of a strictly confidential character between advocate and client, and which are by reason thereof privileged, which are excepted. Do you understand this?

Mr. Knott states to the examiner that he has advised his client that the cash book, or book of account, now produced, is the only book coming under the denomination of a book of account which he is called upon to produce under the rule issued by the Supreme Court *in banc*.

Q.—Will you give me an answer to my last question? A.—No. I don't understand this.

Q.—Did you carry on any action or suit or defence for Knox or Knox & Hooper in connection with which you

Judgment. Scott, J.

have charges, which are included in your chattel mortgage in question? A.—Yes.

Q.—Will you produce those papers in connection with those suits, actions, or defences? A.—No.

Q.—Do you mean to swear that the pleadings and proceedings in all those actions are of a strictly confidential character, and that they contain nothing but what are of a strictly confidential character? A.—No.

Q.—Why then will you not produce them? A.—I have not refused to produce the pleadings."

Upon the hearing of this application, counsel for the plaintiff raised the objection, that I had no jurisdiction to entertain the application because the contempt complained of is contempt of an order of the Court *in banc*, and therefore that the application should have been made to that Court.

I ruled that the order of the Court *in banc* merely varies the order made by me, and that my order so varied stands as my order.

It was further objected that there was no evidence that the order of the Court *in banc* had been served on the plaintiff.

I cannot find in the documents before me on this application, any direct evidence of such service, but I think I must assume that he had the necessary knowledge of its terms, because in the proceedings before the examiner his counsel stated that he had advised the plaintiff that he was called upon only to produce certain books under it, and Mr. McCarthy also referred to it in one of the questions put by him. Apart from this, plaintiff had notice of the original order made by me, and the order of the Court *in banc* merely restricted the terms of my order.

It was further objected that the order of the Court *in banc* had not endorsed upon it the notice prescribed by section 311 of the Judicature Ordinance.†

† Ord. No. 6 of 1893; now Jud. Ord. C. O. 1898, c. 21, r. 330.

Judgment.
Scott, J.

In my view the order is not one within the meaning of that section, because it does not state, nor is it requisite that it should state, the time within which the act required is to be done. The prescribed form of notice is therefore inapplicable to it.

It was also contended that the summons in the application did not specify the nature of the contempt, and that some specific act must be charged. Upon its face, the summons states that the contempt relied upon is the non-production by the plaintiff to the examiner of his dockets, ledgers, and other books directed and provided for by the order of the Court *in banc*, and one of the grounds of the application specified in the summons is that the plaintiff has wilfully and contemptuously disobeyed the terms of that order in not producing his said books as directed. In my opinion the statement is sufficiently specific.

As plaintiff has admitted that he has in his possession one or more dockets, ledgers or other books other than the cash book produced by him, which contain certain entries of charges against Knox and Knox & Hooper tending to show how and in what manner his claim against them is made up, and has refused to produce them upon his examination, I am of opinion that such refusal is in contempt of the terms of my order of the 12th March, 1898, as amended by the order of the Court *in banc*.

The order will go for the issue of a writ of attachment against the plaintiff, but will provide that the writ shall not issue until the expiration of ten days from this date.

The plaintiff appealed. The appeal was argued on January 23rd, 1899.

*H. W. H. Knott*, for appellant.

The order in question having been made by the Court *in banc*, the application for the writ of attachment should have been made to that Court, and not to a single Judge.

Argument.

The proceedings were irregular in that :

(1) There was no evidence that the order of the Court *in banc* had been served on the appellant : *In re Dunning; Sturgeon* v. *Laurence;*[1]

(2) The order did not state the time after service thereof within which the act prescribed was to be done : *Berry* v. *Donovan.*[2] When the order omits to fix a time a supplemental order should be made fixing it : *Needham* v. *Needham.*[3] Until a time is fixed the order can not be enforced : *Gilbert* v. *Endean.*[4] Where a time was not fixed a motion for attachment for disobeying the order was refused : *Dove* v. *Swindon;*[5]

(3) The order was not endorsed with the notice prescribed by section 311 of the Judicature Ordinance, 1893. This omission is fatal : *Shurrock* v. *Lillie;*[6] *Stockton Football Co.* v. *Gaston;*[7] *Pace* v. *Pace;*[8] *In the goods of Bristow.*[9] The direction of section 311 is "perfectly general in its tone; there is nothing in it limiting it to any particular kind of orders." Baggally, L.J., in *Hampden* v. *Wallis.*[10]

In proceedings of this nature the Rules of Court must be strictly complied with : *Stockton Football Co.* v. *Gaston;*[7] *Taylor* v. *Roe;*[11] *In re Evans; Evans* v. *Noton.*[12]

Appellant has not waived his right to objections on the ground of irregularity by appearing by Counsel on the hearing of the summons : *Mander* v. *Falcke.*[13]

Appellant took objection on the ground of irregularity on the hearing of the summons, and therefore is entitled to raise the point on appeal : *Ellerton* v. *Thirsk;*[14] *Hampden* v. *Wallis;*[10] *Nelson* v. *Worssam.*[15]

[1] 63 L. J. Ch. 784; 71 L. T. 57; 8 R. 756. [2] 21 O. A. R. 14. [3] 1 Hare, 633; 12 L. J. Ch. 371; 6 Jur. 1081. [4] 9 C. D. 259; 39 L. T. 404; 27 W. R. 252. [5] 31 Sol. Jo. 784. [6] 52 J. P. 263; 4 Times Rep. 355. [7] (1895) 1 Q. B. 453; 64 L. J. Q. B. 228; 72 L. T. 490; 15 R. 182. [8] 61 L. J. P. 114; 67 L. T. 383. [9] 66 L. T. 60. [10] 26 C. D. 746; 54 L. J. Ch. 83; 50 L. T. 515; 32 W. R. 808. [11] 68 L. T. 213; 3 R. 259; W. N. (93) 14. [12] (1893) 1 Ch. 252; 62 L. J. Ch. 413; 68 L. T. 271; 41 W. R. 230; 2 R. 216; 9 Times Rep. 108. [13] (1891) 3 Ch. 488; 61 L. J. Ch. 3; 65 L. T. 454; 40 W. R. 31. [14] 1 J. & W. 376. [15] W. N. (90) 216.

Argument.

The order being in general terms and susceptible of more than one meaning, the Courts will not grant attachment where the disobedience arises from a wrong construction : *Fuller* v. *Prentice*;[16] *Campden* v. *Edie*.[17]

As to the exercise of the jurisdiction to commit: Oswald on Contempt : *In re Clements*;[18] *In re Davies*;[19] *Hunt* v. *Clarke*.[20].

*P. McCarthy*, Q.C., for respondent.

Appellant was guilty of contempt of Court; *Merchants Bank* v. *Pierson*.[21] The application for a writ of attachment was properly made to a Judge in Chambers; section 491 of the Judicature Ordinance; *Salm Kyrberg* v. *Posnanski*;[22] *Davis* v. *Galmoye*;[23] *Southwick* v. *Hare*.[24] Section 311 of the Judicature Ordinance does not apply to such an order as the one in question. Appellant has waived his right to object on this ground by having appeared before the examiner and submitted to examination. The order of the Court *in banc* varying the order of the Judge in Chambers was taken out by the advocate for the appellant; therefore the respondent could not have made the endorsement even if it should have been made.

It was not necessary to serve either the order of the Judge in Chambers as originally made or the order of the Court *in banc* varying the same; *Lavery* v. *Wolfe*;[25] *Hannum* v. *McCrae*.[26]

If the endorsement were necessary, the purport thereof was substantially affected by the notice given appellant in the summons for an order for the writ of attachment : *Thomas* v. *Palin*.[27]

Even in proceedings of this nature strict compliance with the Rules of Court is not absolutely necessary. Section 540 of the Judicature Ordinance: *Rendell* v. *Grundy*.[28]

[16] 1 H. Bl. 49; 2 R. R. 715. [17] 1 H. Bl. 21. [18] 46 L. J. Ch. 375; 36 L. T. 332. [19] 21 Q. B. D. 236; 37 W. R. 57. [20] 58 L. J. Q. B. 490; 61 L. T. 343; 37 W. R. 724. [21] 8 O. P. R. 123. [22] 13 Q. B. D. 218; 53 L. J. Q. B. 428; 32 W. R. 399. [23] 40 C. D. 355; 58 L. J. Ch. 338; 60 L. T. 130; 37 W. R. 399. [24] 15 O. P. R. 239. [25] 10 O. P. R. 488. [26] 18 O. P. R. 185. [27] 21 C. D. 360; 47 L. D. 207; 30 W. R. 716. [28] (1895) 1 Q. B. 16; 64 L. J. Q. B. 135; 71 L. T. 564; 43 W. R. 50; 14 R. 10.

Judgment.

Wetmore, J.

[*June 8th*, 1899.]

WETMORE, J.—The plaintiff having appeared before the examiner on the 25th June, refused, according to the contention of the defendant, to produce "his books of account containing entries of charges against Charles Thomas Gisborne Knox, or against the firm of Knox and Hooper, tending to show how and in what manner his claim for professional services and moneys advanced is made up," as directed by the order of this Court made on the 15th June last. Thereupon on a Chamber application to my brother SCOTT, that learned Judge made an order for an attachment to issue against the plaintiff for a contempt. The plaintiff appealed from that order upon a number of grounds. It is only necessary for me to deal with one of these grounds because I am of opinion that upon it the plaintiff is entitled to have his appeal sustained.

The plaintiff was under examination for discovery under the provisions of section 187§ and the following sections and section 420‡ of the Judicature Ordinance of 1893. These provisions of the Ordinance relating to examination for discovery are not to be found in the English Rules; they were taken from the Ontario Practice. Provisions are made for procuring the attendance of a party for examination, and by section 193 the party to be examined "shall, if so required by notice, produce on the examination of all books, papers, and documents which he would be bound to produce at the trial under a subpœna duces tecum." Section 199 specially provides that any party refusing or neglecting to attend at the time and place appointed for examination, or refusing to be sworn or to answer any lawful question shall be deemed guilty of a contempt of Court, and punishable by attachment. But I cannot find any provisions setting forth the consequences of not producing books or papers in compliance with a notice given under section 193. It is important to bear in mind that this section provides for a notice to produce, not an order to produce. Under the ordinary practice of the

‡ Now R. 445. § Now R. 201.

Judgment.
Wetmore, J.

Court a notice to produce is a well known document and the purport and effect of it are well understood. It is a notice given to a party in a cause, or his advocate, requiring production at the trial of documents in the possession of such party, and the effect of it is merely to let in secondary evidence of the documents, provided that it is established that the documents in question are in the possession of the party served with the notice. Non-compliance with such notice never subjected a party to process of contempt. In view of the fact that no provision is specially made subjecting a party to process of contempt for not complying with section 193, and that it is made for non-compliance with the cases mentioned in section 199, I cannot bring my mind to the conclusion that the Legislature ever intended that a party should be liable to such process for not complying with the notice given under section 193. I am of opinion that this section is merely directory. This opinion is strengthened when I consider that I ought not to hold a statutory enactment as interfering with the liberty of the subject, except where the language authorizing it is clear, or at least the inference to be derived from such language is clear. In the *Merchants Bank* v. *Pierson*,[21] Osler, J., held that an attachment could not be issued for non-compliance with a notice to produce given under section 161 of the Revised Statutes of Ontario (1877) cap. 50, but that in order to obtain an attachment proceedings would have to be taken under section 166 of that Act. This section 166 is substantially the same as section 205 of the Ordinance. Now while I entirely coincide with Osler, J., in his holding that an attachment could not be issued for non-compliance with the notice to produce, with the greatest respect for the opinion of such an eminent Judge, I venture to doubt whether an attachment could be issued under section 166 of the Ontario Act, at any rate unless under that section an order for production could be made and until an order so made had been disobeyed. I cannot find any authority for punishing a person by attachment for a contempt of Court, because such person has not complied with the provisions of a statute unless the statute

Judgment. Wetmore, J.

expressly authorizes the party to be so punished. I cannot, however, find in the Ontario Act in question, any section corresponding with section 197 of the Ordinance, and the provision as to notice to produce and producing thereunder is not found in the Ontario Act in an independent section as it is in section 193 of the Ordinance. Section 197 of the Ordinance is more in accord with order 147 of the old Chancery orders in Ontario (see MacLennan's Jud. Act, 2 ed., 360). In fact it seems to me that all the provisions for examination for discovery were rather taken from these Chancery Orders than from the Ontario Rev. Stats. of 1877. Dealing with the provisions of the Ordinance ; an omission to comply with the notice to produce provided by section 193 would be an omission to comply with the requirements of what, for present purposes, we may consider a statute. As before intimated a process for contempt does not lie for such non-compliance, inasmuch as there is no special provision that such non-compliance shall be considered or dealt with as a contempt. Section 199 does not, in my opinion, make such non-compliance a contempt of Court, or authorize the Court to so consider it. Before an attachment can be issued under that section it must be made to appear that the person being proceeded against has committed some contempt of the Court or its process; it is not sufficient to establish that he has failed to comply with the provisions of the Ordinance. I am of opinion that before an attachment can be issued for not producing documents for inspection at an examination for discovery, an order for production for inspection has to be made under section 197 of the Ordinance. I do not wish to be understood as holding that before an order for inspection is made under section 197 a notice to produce should be first served under section 193, because it seems to me that if it appears on the examination that the party has in his custody papers relating to the matters in question an order for inspection may be made notwithstanding a notice to produce has not been served. But if a notice to produce has been served, before a person can be made liable to attachment for not producing the papers,

Judgment.
Wetmore, J.

he has got to admit before the examiner that the papers are in his custody, and then, if he does not produce them, an order for production for inspection may be made under section 197, and if he fails to comply with that order he will be liable to attachment under section 184 §§ of the Ordinance. It may be urged that this last mentioned section is limited to disobedience of orders for inspection or discovery made under the preceding sections, commencing with section 177. I am of a different opinion. The language of section 184 is wide and comprehensive. It provides that "if any person fails to *comply with any* order for discovery or *inspection* of documents he shall be liable to attachment for contempt of Court." It may also be urged that section 197 is limited to a party to the action. (In this respect it is in accordance with the Ont. Ch. Order 147: see McLennan's Jud. Act,2nd ed., 360); and section 193 contemplates that a person other than a party is to produce the documents. The answer to that is, that in the case of a person not a party it is a *casus omissus*. That would not warrant a person's liberty being interfered with unless there is express authority by law or according to the practice to do so. I may just call attention to the fact that under the Rules of Practice in Ontario now in force the provisions of the Chancery Rule 147 have been practically incorporated with the practice with this extension, that it is not confined to the party to the action, but it is extended to "any one who admits upon his examination," etc. (See Rule 452, Holmstead & Langton Jud. Act, 2 ed., 521). What has been laid down by me as to the necessity of obtaining an order for inspection under section 197, before an attachment can be issued seems to me to be in accord with the views of Boyd, C., as expressed in *Lavery* v. *Wolfe*.[25]

It is perhaps important to bear in mind that in this case no order was made by the examiner himself under section 197 of the Ordinance. The facts are that when the plaintiff was first called upon before the examiner to produce his books under the notice to produce, he refused to

§§ Now R. 198.

Judgment.
Wetmore, J.

do so, claiming that they were privileged and the examiner being of the opinion that such claim was well made refused to make any order for production. The defendant *appealed* under section 198, from the ruling of the examiner, to Mr. Justice SCOTT, who held that the examiner was wrong, and an appeal from Mr. Justice SCOTT'S order was then taken to this Court, with the result that the order of the 15th June last, already referred to, was made. I am not satisfied that the order of the Court is in proper form, or that there should have been an order made by this Court. I notice in looking over the appeal book in the appeal in which the order was made that SCOTT, J., made a ruling or direction rather than an order, and I am not satisfied that this was not the correct course, and that this Court ought to have made a ruling or direction rather than an order. However, that question has not been raised, and I will consider the order of the 15th June as properly made. But that being so, it appears quite clear to me that this Court could only on that appeal have made such an order as the examiner ought to have made, and the order so made on the 15th June must be treated just as if it had been made by the examiner; and I am not prepared to say yet that this order of the 15th June can be considered as anything more than a direction to the examiner to make an order under section 197 to appoint a time and place for the production for inspection of the documents which the Court by its order directed should be produced. However, I do not express a decided opinion on this question. I will treat the order of June 15th as if it had been an order made by the examiner. Now in my opinion if this order had been as a matter of fact made by the examiner it would for the purpose of obtaining an attachment for disobedience to it have been bad under section 311|| of the Ordinance, because it did not state the time, or the time after service of the order within which the books were to be produced for inspection, and the proceedings under such order would be insufficient for the purpose.

|| Now R. 330.

The copy served was not endorsed with the memorandum provided for by that section. Section 197 does not contemplate that the order to produce shall order the instant production of the documents, but the section expressly provides that a reasonable time is to be allowed; and if a reasonable time is to be allowed the provisions of section 311 of the Ordinance must be complied with, and the time for production must be specified in the order, and the copy order must be endorsed with the memorandum provided for in that section. The authorities are quite clear that if the copy order is not so endorsed an attachment cannot be ordered: see *Hampden* v. *Wallis*,[10] *Pace* v. *Pace*,[8] and *Stockton Football Co.* v. *Gaston*.[7]

Now the order of this Court is in no better position than that the examiner; that is, if an attachment could not have been issued on an order made by an examiner if the provisions of section 311 had not been complied with, the fact that the order had been made by this Court will not help the matter. It was urged that the plaintiff had waived his right to a strict compliance with the Ordinance because he attended before the examiner and because he took out the order in question. I cannot find in the appeal book any evidence that the plaintiff took out the order, and if he did that would not waive a right to have the memorandum provided by section 311 endorsed. The *intention* of that section is, that the party is to be distinctly notified that he will be liable to process if he does not comply with the order. Nor does the fact that he attended before the examiner waive the right to have the memorandum endorsed. If he had not attended before the examiner he would have been liable to an attachment under section 199, because his examination was not finished. Moreover, in order to support applications of this nature whereby it is sought to interfere with the liberty of the subject, the practice must be strictly complied with: *Stockton Football Co.* v. *Gaston*,[7] and Bowen, L.J., in *Re Evans* v. *Noton*.[12] I am very strongly of opinion that Mr. Justice Scott in holding, as he did, that the order in question was not one to which section 311

Judgment.
Wetmore, J.

applied, was misled by the form in which the order was made. That, however, cannot be allowed to affect the rights of the plaintiff as to his personal liberty. In my opinion this appeal should be allowed, and the order of my brother SCOTT for an attachment and all subsequent proceedings on such attachment be set aside. Although there has not in this case been such strict compliance with the practice as to support the attachment, I am of opinion that there was a deliberate intention on the part of the plaintiff to evade a fair discovery before the examiner, and that the ends of justice would therefore be served by not awarding costs.

MCGUIRE, J.—This is an appeal from an order for attachment of the appellant Crispin E. Smith made by Mr. Justice SCOTT on the 31st October, 1898.

The order was made upon a summons to the appellant to shew cause why an order for a writ of attachment should not issue against said appellant "for contempt of Court in not complying with the terms of the order of the Court *in banc* to produce to the examiner upon his examination had and taken on the 25th day of June, 1898, his dockets, ledger and other books directed and provided for in the said order of the Court *in banc*."

The material before the learned Judge when granting this summons consisted of the pleadings and proceedings in the interpleader issue, the order made by the Court *in banc*, the examination of the plaintiff for discovery taken "under said order" (*sic*) on the 25th June, 1898; and the grounds set out in the summons were: (1) That plaintiff has wilfully ignored the terms of the said order and set the same at defiance; (2) That the plaintiff has wilfully and contemptuously disobeyed the terms of the said order in not producing the said books as directed.

No affidavits were used and no certificate from the examiner, nor any order or ruling of the examiner. The plaintiff had been examined upon an order for discovery made by Mr. Justice SCOTT, before the then clerk of the

Court, Mr. Rogers. Plaintiff had objected to producing his books of account on grounds which seemed sufficient to the examiner who ruled in his favor. From this ruling defendant appealed to Mr. Justice SCOTT, who made an order directing plaintiff to produce all his books of account and papers which may be necessary to show how his claim for professional services and moneys was made up. On appeal to the Court *in banc* this order was varied, and the following order was substituted: "That the plaintiff produce to the examiner all his books of account containing any entries of charges against Charles T. G. Knox, or Knox and Hooper, tending to show how and in what manner his claim for professional services and moneys advanced is made up, and also all papers and documents relating to said charges, or tending to show how and in what manner such claim is made up, except such as contain anything of a strictly confidential character as between advocate and client,and which are by reason thereof privileged." It was for disobedience of this order (not of the original order for discovery dated 10th March on which he was undergoing examination) that he was charged with contempt.

Judgment. McGuire, J.

This order of the Court *in banc* was taken out by plaintiff's advocate, but I find no evidence of it ever being served or shewn to the plaintiff, and it is objected that not only should it have been served, but the copy so served should have had endorsed thereon the memorandum required by section 311 of the Judicature Ordinance warning him of the consequences of neglect to obey. It is further objected that such order should have stated the time, or the time after service of it within which the acts thereby ordered were to be done. The respondent contends that service of the order was not necessary, because it was not in their possession but in the possession of the plaintiff's own advocate. Now, even assuming that the advocate communicated to his client the contents of this order, this at most would dispense with service of it upon him, but if this order comes within section 311, which, however, defendant disputes, not only was service, or at least its equivalent, necessary, but service of a copy with the memorandum referred

Judgment. McGuire, J.

to endorsed and the order should have stated the time for performance. Was this an order within the meaning of section 311? This section says: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall," etc. This seems to be very general. The order here is made in a cause or matter—it requires plaintiff to do an act, *i.e.*, produce books and papers —and it is an "act thereby ordered." Defendant says that this applied not to all kinds of acts, and that the act of producing books is not one of those intended to be included, but the difficulty for the defendant is, the Ordinance says "an act thereby ordered," *meaning any such act*, while the defendant would ask us to read it "some kinds of acts." It seems to me that this would be legislating. Defendant contends that it would not be possible to fix a time by the order for its observance; I see no difficulty—a time after service on the plaintiff would have been a compliance with section 311, or "such time and place as the examiner shall by writing appoint."

I find that the same view as to the generality of the English Order XLI. 5 (identical with our section 311), was taken in *Hampden* v. *Wallis*.[10] Baggally, J., there said, "The order is general in its terms and rule 5 is in general terms and applied to every judgment or order. There is nothing limiting its operation to any class or judgment or order." That was also a case of an order for discovery and Baggally, J., while pointing out that service on a party's solicitor is sufficient in the case of an order for discovery, still "if it is desirable that the party should have notice of the consequence of disobedience, when he is personally served, by means of the memorandum set out in rule 5, Order XLI., it is, in my opinion, equally desirable that he should have such notice when service is effected through his solicitor."

The order here not being the order for discovery, but an ancillary one, may not be one that could be sufficiently served on the advocate, but assuming that it is, this would not relieve from the necessity of the copy served having the

warning endorsement, nor from the want of a time being fixed for obeying the order. Upon this ground alone I think the order for the issue of a writ of attachment should have been refused. Judgme McGuire, J.

There is another ground on which I think the order should have been refused. The order of the Court *in banc* is in reality very little, if anything, more than a statement in different words adopting the language in this particular case of section 197 of the Judicature Ordinance, and does not seem any more explicit. The words in section 197 "relating to the matters in question" seem to me equivalent to the more extended description in the order of the books and papers to be produced, and the same limitation is in both as to documents privileged or protected from production. The order does not name any book or paper which he must produce. His books of account and papers are not ordered to be produced, but only such of them (if any) as contain certain entries, and only such of these (if any) as are not privileged as between solicitor and client. To establish an act of disobedience to the order it must be shewn: (1) that the plaintiff had some of the things required to be produced, so that he could produce them; (2) that he wilfully refused to produce them.

What evidence was there as to what books within the meaning of the order he had? Nothing beyond what appears in his examination on the 25th of June, that is, his own admissions. He admits having a cash book, which he was willing to produce, and no contempt is alleged as to this book. He adds "that all the other papers you refer to are privileged as professional communications." If his statement was true, then they were not required by the order to be produced. He is then asked if he understands that it is "books," not "papers," he is asked for as provided by order of 15th June, and he answers "yes," *i.e.*, he understands the question. He is then asked "do you refuse to produce your books of account as asked for?" which to be a proper question must be taken to mean books coming within the description in the order. His answer is "I will produce

Judgment.
McGuire, J.

and show certain items of them to the examiner,'' and to the next question his answer consents to allowing defendant's counsel to examine those items. His next answer shows that all the items he refers to are in the cash book. The next question asks ''Have you any docket, ledger, journal or other book (than the cash book) which contain and entries referring to the matter hereinbefore mentioned in my questions?'' He answers ''no.'' This is an admission that he has books containing entries referring to the matter mentioned in previous questions. Is this an admission of having books of account containing any entries of charges against Knox, or Knox & Hooper? He does not say ''entries of charges''; the question does not say ''entries of charges''; and I am not satisfied that the words of the question ''entries referring to the matter hereinbefore mentioned in my questions'' are not possibly very much wider than the words of the order, and, if so, ''yes'' to Mr. McCarthy's question would not be equivalent to ''yes'' to a question worded as in the order. If so, there is still no evidence as to his having books as described in the order. But suppose there was an admission as to books within the first part of the order, the next question and answer show that they are excluded as being within the exception in the latter part of the order as being privileged. He swears that all the entries in these other books contain confidential professional communications between himself and Knox or Knox & Hooper. If this be true, then there is still no admission of having books other than the cash books required to be produced. The next question merely attempts to explain the order of the Court and asks if he understands what has been said. Mr. Knox here intervenes—the question being pressed, plaintiff answers ''no, I don't understand this.'' The next question is ''did you carry on an action or suit of defence for Knox or Knox & Hooper in connection with which you have charges which are included in your chattel mortgage in question?'' His answer ''yes'' means he did carry on such action, suit or defence in connection with which he had charges included in his mortgage. There is no admission here of having any books or papers

Judgment
McGuire, J.

or at least any other than his cash book. The next question is " will you produce these papers in connection with those suits, actions or defences?" Plaintiff had not referred to any "papers," so this question would seem to mean "will you produce all papers in connection with those suits, etc.?" This was a much wider demand than the order justified, for it limited production to " papers and documents relating to charges or tending to shew how or in what manner" his claim was made up—this question, in effect, asks for the papers in the proceedings. At any rate, there is still no admission of having any papers or documents coming within the language of the order. The next question is in short " do you swear that the pleadings and proceedings in all those actions are of a strictly confidential nature?" This question shows how general Mr. McCarthy himself regarded his previous question to be. Plaintiff answers he does not refuse to produce the pleadings—and this ends the examination for that day and so far as it came in evidence before the Judge. I fail to find in all this any admission of having any books or papers coming within the meaning of the order which plaintiff refused to produce. On the contrary, it seems to me that he swore that he had nothing which he was ordered to produce except his cash book, and the pleadings and these he did not refuse to produce. Before the plaintiff can be deprived of his liberty it should certainly appear quite distinctly, not only that there was in fact a refusal to produce books or papers required to be produced, and which it was in his power to produce, but also it should be clear that he knowingly and wilfully refused to obey. Now, it seems to me further that the examination should have been carried to an extent to satisfy the examiner that the plaintiff had some particular books or papers which he ought under the order to produce, and the examiner should have then been asked to order him to produce them for his inspection, giving a reasonable time for that purpose; if they were then in the room I presume he could have ordered immediate production (section 197). It is no answer to the objection that his answers did not admit possession or control of

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McGuire, J.

books or papers required by the order to be produced, that his replies might not be true. His answers, true or not, were the only evidence before the Judge as to his having books or papers which he was required to produce.

Again, had the examiner ruled, then either party could have appealed against the ruling as certified under his hand by the examiner (section 198).

Other objections to the order for writ of attachment were offered, but I think enough has been shown to make it unnecessary to examine these other grounds.

I think the appeal should be allowed and the order of 31st October, 1898, and the writ of attachment issued in pursuance thereof should be set aside. I agree there should be no costs.

RICHARDSON and ROULEAU, JJ., both concurred in the judgment of MCGUIRE, J.

*Appeal allowed—no costs.*

REPORTER :

Ford Jones, Advocate, Regina.

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## HOSTETTER v. THOMAS.

*Criminal Code s.* 880—*Notice of appeal from summary conviction —Sufficiency thereof*

Held, that a notice of appeal neither addressed to nor served upon the prosecutor, but addressed and served upon one only of two convicting Justices of the Peace, is insufficient though it appear that when the notice was so served the Justice upon whom it was served was verbally informed that it was for the prosecutor: *Keohan* v. *Cook*[1] followed.

The question whether a notice of appeal to the Supreme Court of the North-West Territories instead of a Judge thereof was valid, was raised but not decided.

[*Court in banc, June 8th,* 1899.

This was a reference by WETMORE, J., for the opinion of the Court.

[1] 1 Terr. L. R. 125; N.-W. T. Reps., vol. 1, No. 1, 54.

Hostetter was convicted on December 27th, 1897, by J. J. Sadler and R. H. Henderson, two justices of the peace, of having sold one bay mare contrary to the provisions of the Ordinance *re* Stray Animals. The notice of appeal was as follows:—"To J. J. Sadler, justice of the peace of Gainsboro, in the N. W. T. of the Dominion of Canada." Statement.

"Take notice that I, Joseph B. Hostetter, of Gainsboro, intend to enter and prosecute an appeal in the Supreme Court of the North-West Territories, at the sittings of the said Court to be holden at Carnduff in the North-West Territories, against a certain conviction bearing date on or about the twenty-seventh day of December, A.D. 1897, and made by you, a justice of the peace in and for the said North-West Territories, whereby I, the said Joseph B. Hostetter, was convicted of having to pay $10 and $9.40 costs for having sold one bay mare contrary to the provisions of Ordinance No. 19 of 1894 of the North-West Territories.

"Dated this third day of January, 1898.

"Joseph B. Hostetter."

This notice was served upon J. J. Sadler, and upon no other person; but it was alleged in the affidavit of service that the party effecting such service informed Mr. Sadler at the time of such service that the notice was for the prosecutor.

The questions reserved for the consideration of the Court are set out in the judgment.

No one appeared for either party.

[*June 8th, 1899.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ.) was delivered by

RICHARDSON, J.—This is a reference by Mr. Justice WETMORE, to this Court to have determined whether or not a notice of appeal from a summary conviction is sufficient to give him jurisdiction to deal with the appeal.

A copy of the conviction, as also the notice of appeal, is submitted and the following questions put for this Court to answer:—

Judgment.
Richardson, J.

1. Was the notice properly addressed, and was the service of it on Mr. Sadler sufficient to give jurisdiction in view of the fact that at the time of the service he was informed that the notice was for the prosecutor?

2. Was the notice valid in view of the fact that it alleged the conviction to have been made by Sadler alone, whereas in point of fact it was made by two justices, Sadler and Henderson?

3. Is the notice of the appeal valid inasmuch as it states that the appeal will be entered and prosecuted in the Supreme Court of the North-West Territories, instead of stating it would be a judge of the Supreme Court of the North-West Territories.

As to the first question submitted—

The notice was neither addressed to, nor served upon, the prosecutor, but was addressed to and served upon Mr. Sadler, one of the justices whose names are signed to the conviction, and by affidavit it appears that when the notice was so served, Sadler was verbally informed that it was for Thomas, the prosecutor. In *Keohan* v. *Cook*,[1] decided in this Court, it was held that where the notice was not addressed to the respondent it was insufficient, and the facts in that case differ from the present only in respect of the justice here having been informed that the notice was for the prosecutor. In the report of *Keohan* v. *Cook*[1] no reasons are given for the decision there arrived at.

Section 880 (*b*) of the Criminal Code requires that notice in the form NNN is to be given "to the respondent or to the justice, who tried the case, for him," and the form NNN shews that it is to be addressed to "C. D.," one "of the parties to whom the notice of appeal is required to be given." C. D. cannot mean the justice, as in the body of the notice he is referred to as "J. S., Esquire," and the word "you" being in brackets would seem to imply that it is not always necessary that the justice's name should have already appeared in the notice. It follows then that the form requires, as one might fairly have expected, that the notice be addressed to the respondent, and on principle it

might be added that compliance with this seems all the more important when the notice is served not on the respondent but on the justice. The fact that the justice when served was told it was for the respondent does not, we think, cure the defect. The notice then being insufficient, it becomes unnecessary to answer the other questions submitted. Judgment. Richardson, J.

REPORTER:

Ford Jones, Advocate, Regina.

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## *IN RE* THE LAND TITLES ACT, 1894, AND THE CANADIAN PACIFIC RAILWAY COMPANY.

*Land Registration—Land Titles Act, 1894—Earlier land registration laws—Title by estoppel—Duty of Registrar.*

The Registration of Titles Ordinance,† the Territories Real Property Act,‡ and the Land Titles Act, 1894,§ discussed.

Title by estoppel also discussed.

The Registrar in issuing certificates of ownership is bound to take notice of instruments registered or filed, previously to the issue of the patent, under the provisions of the Registration of Titles Ordinance, or the Territories Real Property Act.

It was the intention of the Territories Real Property Act and the Land Titles Act, 1894, to recognize and continue, as creating vested interests, the proper effect of all instruments registered or filed under previous legislation in that behalf.

Where an agreement for the sale of land by the Canadian Pacific Railway Company was registered under the Registration of Titles Ordinance, and subsequent instruments, purporting to be executed by the purchaser under the agreement, and persons claiming under him, were also registered or filed under that Ordinance or the Territories Real Property Act; the Registrar, on an application by the company for a certificate of ownership upon a patent subsequently issued to the company, was directed to issue the certificate of ownership to the company endorsed with memoranda of the agreement and other instruments.

Where, on a similar application, a transfer was filed under the Territories Real Property Act, purporting to be executed by the purchaser under an agreement (recited, but not registered or filed) for sale by the Canadian Pacific Railway Company and, after the Registrar's reference, a quit claim deed from the transferee

† No. 2 of 1884: the earlier Ordinances were No. 9 of 1879; No. 3 of 1881; No. 16 of 1883.

‡ 49 Vic. (1886) c. 26 D. which came into effect 1st January, 1887.

§ 57-58 Vict. (1884), c. 28, D., which came into effect 1st January, 1895.

to the company was produced, the Registrar was directed to ssue a clear certificate of ownership to the company.

Where, on a similar application, it appeared than an agreement purporting to be executed by the purchaser under an agreement (recited but not registered or filed) for sale by the company, was registered, and also other instruments purporting to be executed by persons claiming under the purchaser, the Judge, to whom the reference was made, was advised to cause notice to be given, to all persons appearing to be interested, of the time and place when the questions submitted by the Registrar would be investigated. If such parties failed to appear, or having appeared failed to establish the existence of the agreement, the Registrar should be directed to issue a clear certificate of ownership to the company. If the existence of the agreement was properly proved the proof should be filed with the Registrar, and he should be directed to issue a certificate of ownership to the company, endorsed with memoranda showing the interests apparently created by the agreement and other instruments.

[*Court in banc, June 8th, 1899.*

Statement. References by the Registrar of the South Alberta Land Registration District to a Judge under the Land Titles Act, 1894, section 111, and by the Judge to the Court *in banc* under section 140.

Letters patent for 7-24-2 west 5th meridian issued to the C. P. R. Co. on July 27th, 1897, and were forwarded under section 39 of The Land Titles Act, 1894, to the Registrar of the proper land registration district. The following instruments which appeared on their faces to affect the said lands had been registered and filed, viz.:—

(1) Agreement dated 7th September, 1885, and registered 2nd December, 1885, whereby the C. P. R. Co. agreed to sell the said lands to T. Behan and W. T. Mitchell.

(2) Quit claim deed dated 6th April, 1886, and registered 7th April, 1886, from W. T. Mitchell to J. Mitchell of his undivided half interest in the said lands under the above agreement for sale.

(3) Three transfers and a mortgage, which, if they had been *bona fide* and affected the land, vested whatever rights T. Behan and W. T. Mitchell and those claiming under them had under the above agreement for sale in G. M. Rutherford, subject to a mortgage to the Y. G. & S. C. These three transfers and mortgage were filed after The Territories Real Property Act came into force, and before The Land Titles Act, 1894, was passed.

Statement.

The Registrar referred to SCOTT, J., under section 111 of The Land Titles Act, 1894, the question whether the above instruments affected the title of the patentees to the said lands and should appear on their certificate of title thereto, or whether such certificate of title should issue free from any charge of such instruments.

SCOTT, J., referred the question to the Court *in banc*.

Letters patent for N. ½ of 35-24-1 west 5th meridian issued to the C. P. R. Co. on May 20th, 1898, and were duly forwarded as above. The only instrument in the Land Titles Office affecting this land was a transfer dated 27th November, 1889, and filed 29th November, 1889, whereby T. L. Peers, who in such transfer was stated to be entitled to be registered as owner of such land upon performance of the conditions contained in an agreement for sale made between the C. P. R. Co. and himself on 21st March, 1889, transferred his estate and interest therein to A. Traunweiser. After the reference was made to the Judge the C. P. R. Co. produced a quit claim deed from A. Traunweiser to themselves of all his estate and interest to the land.

The Registrar referred the same question as above to SCOTT, J., who referred the same to the Court *in banc*.

Letters patent for W. ½ of 3-22-27 W. 4th meridian issued to the C. P. R. Co. on December 30th, 1897, and were duly forwarded as above. The following instruments affecting this land had been registered and filed, viz.:—

(1) Mortgage dated and registered 9th September, 1886, from J. T. Cable to E. B. Cozens.

(2) Assignment dated 3rd April, 1886, and registered 24th November, 1886, whereby E. B. Cozens assigned to J. T. Cable all her estate and interest in the said lands and all her estate and interest in two certain agreements for sale of the said lands marked Nos. 2552 and 2553, both dated 31st March, 1885, and made between the C. P. R. Co. and the said E. B. Cozens.

Statement.

(3) Quit claim deed dated 19th November, 1886, and registered 24th November, 1886, from J. T. Cable to B. Wright.

(4) Mortgage dated 6th November, 1888, and registered 8th November, 1888, from B. Wright to J. P. Lafferty and F. B. Smith.

(5) Mortgage dated 27th March, 1890, and registered 19th January, 1891, from B. Wright to L. & M.

The registrar referred the same question as above to SCOTT, J., who referred the same to the Court *in banc.*

[*June 8th, 1899.*]

WETMORE, J. — This is a reference by Mr. Justice SCOTT under section 140 of the Land Titles Act, 1894. I do not feel myself called upon, nor indeed is it open to me, to discuss any document of title or other instrument except those which are mentioned by the learned Judge in his reference. Three letters patent were issued by the Crown to the Canadian Pacific Railway Company for three separate parcels of land and forwarded to the Registrar of the South Alberta Land Registration District under section 39 of the Act before mentioned. Certain instruments which appear on their faces to affect the lands mentioned in the letters patent have been registered and filed, and the question submitted is whether these instruments should appear on the certificates of title to be issued to the railway company as affecting its title to such lands or not?

I will deal with each separate parcel of land by itself, and first with section 7, township 24, range 2, west of the 5th meridian. The letters patent for this land are dated the 27th July, 1897. The first instrument registered affecting this parcel of land is an agreement dated 7th September, 1885, and registered 2nd of December of that year whereby the Canadian Pacific Railway Company (which I will hereafter mention as "the company") agreed to sell such land to Thomas Behan and William Thomas Mitchell, subject to certain conditions, for the sum of $2,560, payable as follows:—$554.66 at the date of the agreement, and the re-

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Wetmore, J.

mainder in five equal annual instalments. The next instrument registered affecting this land is a quit claim deed from William Thomas Mitchell to James Mitchell of his undivided half interest in such land under and by virtue of the agreement of sale above specified; this instrument was dated 6th April, 1886, and was registered 7th April, in the same year. Subsequently to the last mentioned date three transfers and a mortgage were filed with the Registrar of land titles, the effect of which would be, if they are *bona fide* and affect the land, to vest whatever rights Thomas Behan and William Thomas Mitchell and those claiming under them acquired under the agreement of the 7th September, 1885, in one George McLean Rutherford, subject to a mortgage to the Yorkshire Guarantee and Securities Corporation, Limited, for securing the payment of $600 and interest. It is only necessary at present to state, as regards the dates of filing these three transfers and mortgage last mentioned, that they were filed after the Territories Real Property Act came into force and before the Land Titles Act, 1894, was enacted. I will first consider what the rights of the several parties as affected by the instruments would be, provided they were binding on them, and apart from any Territorial Ordinances or Acts of the Parliament of Canada affecting such instruments. In the first place, the company could not set up the fact that it had not the title to the land at the time the agreement of 7th September, 1885, was made; the after acquired title would inure by estoppel to the benefit of the purchaser under the agreement (Bigelow on Estoppel, 5th ed., 384), or, if it may be deemed a better mode of putting it, I will say in the language of the text in Bigelow, the company's "new title lies lifeless in its hands against the purchaser." The interest of the purchaser under such agreement would be assignable (1 Dart on Ven. & Pur., 6th ed., 285). The purchaser or his alienees by act *inter vivos* in case of assignment could enforce specific performance of the agreement (2 Dart on Ven. & Pur., 1114) not only against the vendor, but against all persons claiming under him by a title acquired subsequently to the contract, who had notice of the contract at the time of paying

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Wetmore, J.

their money and taking the subsequent conveyance (2 Dart Ven. & Pur., 1115). I have merely cited text books for these propositions because I have not a very complete library in my possession, and also because the propositions are such clear law that it is hardly necessary to cite authority to support them. It is clear therefore that apart from any Territorial Ordinance or Act of the Parliament of Canada, the agreement in question would be a charge or encumbrance on the land as between the company (the vendors) and Messrs. Behan & Mitchell (the purchasers) and those claiming under them. I come now to consider how this is affected by the Ordinances and Acts of Parliament. As before stated, the agreement in question was registered on 2nd December, 1885. The Act affecting the question in force at the time of such registration was 47 Vic. (1884) c. 23, s. 1, which substituted new sections for sections 63, 64 and 65 of the North-West Territories Act, 1880 (43 Vic. c. 25). The substituted section 63 provided among other things for the constitution of registry districts for the purposes of registration of deeds and *other instruments* relating to land situate in the Territories, and the appointment of registrars; and sub-section 5 of such section provided that "the duties of registrars, the *designation of deed and instruments that may be registered,* the mode of registry, the requisites for and the *effect of registration* shall be governed by laws made or *to be made* under the North-West Territories Act, 1880." The Act to which I am referring was passed on the 19th April, 1884. On the 6th August, 1884, the Lieutenant-Governor of the Territories in Council under the provisions of the sub-section of the Act which I have set out and under section 9 of the North-West Territories Act, 1880, and the powers conferred by the Order in Council of the 26th June, 1883, passed an Ordinance No. 2 of 1884, by which, among other provisions, were designated the deeds and instruments which might be registered, and the effect of registration; and these provisions were in force at the time of the registration of the agreement in question and continued in force until the 1st January, 1887, when the Territories Real Property Act (49 Vic. (1886) c. 26) came

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into operation. Section 3 of the Ordinance above mentioned (No. 2 of 1884) designated the instruments which might be registered thereunder and amongst them was specified *every agreement for sale or purchase of land.* I fail to discover, down to the time that the Territories Real Property Act came into force, any provision of the law which required the registrar to inquire as to the right, title or interest of the person presenting an instrument for registration. On the contrary, section 3 of the Ordinance was as wide and broad as it could possibly be. In the absence of any such duty to inquire being cast upon the registrar, I am of the opinion that it was his duty to receive and register every instrument of the character specified in section 3 of the Ordinance which purported to affect lands within his registration district, provided that such instrument was executed and proved as required by the Ordinance. If the person who executed the instrument had no right, title or interest, the registration would not give him any, if he had, then whatever right or interest he had would be given effect to. But whether there was any right, title or interest, to which an effect should be given was not for the registrar to decide; it was a question, if necessary, for the Courts to decide upon, the proper procedure being taken. It was urged on behalf of the company that the agreement in question, and in fact all the transfers and instruments dependent upon it, were improperly registered or filed, as the case may be, because the patent for the land had not issued. At present I will merely deal with the registration of the agreement of sale and purchase. I can find no provision of law which would at the time of the registration of that instrument make it an improper registration. The only provision I can find that would lend any color to such a contention is section 36 of the Dominion Lands Act, 1883 (46 Vic. c. 17). Now, I will have occasion to refer to this section further on in this judgment. At present I will assume that this section avoided for all purposes the agreement in question. That being so, I am of opinion that the registration of the instrument was proper. How was the registrar to know whether or not a patent had issued for

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Wetmore, J.

the land mentioned in the agreement? Patents were not then forwarded to the registrar; they were not so forwarded until after the Territories Real Property Act came into force; when they were forwarded by virtue of section 44 of that Act. Up to the time that that Act came into force it was not necessary for a person wishing to register an instrument to produce to the registrar the evidence of his title, nor was it incumbent on the registrar to inquire into the title. If this agreement was void under section 36 of the Dominion Lands Act, 1883, the registration could not give it any vitality, and the Courts if the question arose would hold it void. This registration being good then merely as a registration, what was the effect of it? On looking at section 32 of the Ordinance, I find that one effect of such registration was to constitute notice of such instrument to all persons claiming any interest in the lands therein mentioned subsequent to such registry. The question now arises, was this agreement void under section 36 of the Dominion Lands Act, 1883? I am of opinion that it was not, on the simple ground that that section only makes void assignments or transfers of and agreements to assign or transfer homestead or pre-emption rights or any part thereof, and the company was not a homesteader, nor had it a pre-emption entry as defined by section 8 of the last mentioned Act. Of course, I assume that the agreement in question was registered in one of the registration offices constituted under 47 Vic. c. 23, s. 1. The reference by the learned Judge does not state that fact in express terms, but I assume that it is taken for granted.

Therefore, at the moment preceding the coming into force of the Territories Real Property Act, this agreement of sale and purchase affected the land in question, and the purchasers or those claiming under them had thereunder a vested established right in such land. Now, it was not intended by the Territories Real Property Act to interfere with vested rights, at any rate beyond what was expressly or by clear implication provided in such Act (if there is any such provision). That

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Act was simply passed in substitution for the previously existing registration laws, and the records of the previously existing registration offices would pass to and be lodged in the land titles office of the registration district in which the land affected was situated. In fact, the registrars of deeds under the previously existing laws were practically continued as registrars under the new law by virtue of section 23 of the new Act. I can discover nothing in that Act which cut down in any way the rights of the purchasers under the agreement or of those claiming under them. In fact I find quite the contrary. I find by the repealing clause of the original Act (49 Vic. c. 26) s. 140, that the repeal does not apply to matters done or pending under the old laws; and such rights were further preserved by clause 36 of section 7 of the Interpretation Act, 31 Vic. (1867) c. 1, and s.-s. 52 of s. 7 of the present Interpretation Act (Rev. Stat. Can. c. 1), which in effect provides that the repeal of an Act shall not affect any right "existing, accruing, accrued or established." Section 44 of the Territories Real Property Act provided that when land was granted in the Territories by the Crown, the letters patent should be forwarded to the registrar, who should issue to the patentee "a certificate of title, as provided by section 54—with any necessary qualification." Section 54 provided that the registrar shall indorse upon the certificate of title and the duplicate "a memorial of every mortgage, encumbrance, lease, rent, charge, term of years or other dealing affecting the land." Section 44 of this Act was repealed and a new section substituted by s. 9 of 51 Vic. (1888) c. 20, but that did not alter the effect of the law in this particular, it still provided that the letters patent should be forwarded to the Registrar and that he should issue a certificate of title to the patentee *with any necessary qualifications*. Therefore, as between the company and the purchasers under the agreement and those claiming under them, such agreement was a dealing affecting the land properly registered, and of which the registrar was bound to take notice, and if he had issued a certificate of title to the company under the Terri-

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Wetmore, J.

torial Real Property Act he would have been bound to indorse hereon a memorial of that instrument.

The next Act to consider is the Land Titles Act, 1894. That Act was passed in substitution for the Territories Real Property Act, and what I have laid down with respect to the last mentioned Act as to its effecting vested rights is equally applicable to the Land Titles Act. The rights under the agreement of purchase and sale are not affected by section 33 or by that section as amended by 61 Vic. (1898) c. 32, s. 4, because those provisions are not intended to have a retroactive operation. Then under section 39 when the letters patent are forwarded to the registrar the certificate of title is to be issued to the patentee (as provided under the Territories Real Property Act) *with any necessary qualification*. Neither does section 73 of the Act affect the rights under the agreement for the same reason; the section is not retroactive. Sections 33 and 73 may, however, be of importance as indicating an intention on the part of Parliament that under certain circumstances lands may be encumbered by documents filed in the Land Titles Office prior to the issue of letters patent, and that the persons who may so encumber lands are those rightfully in possession of the land. In this case, as between the company and the purchasers under the agreement, the company for the reason I have before stated are estopped from setting up that the purchasers were not lawfully in possession of the land when the agreement was made. But it seems to me that the company have in this case themselves created the encumbrance, the purchasers have merely registered it. The company are equally estopped as against the purchasers from setting up that they were not lawfully in possession.

I have referred to section 36 of the Dominion Lands Act, 1883; that section was amended and carried forward into the Dominion Lands Act (Rev. Stat. Can. c. 54) as section 42, and this section was repealed, and a new section substituted by 60 & 61 Vic. (1896-7) c. 29, s. 5; but the provision as it now stands does not affect the question under consideration, because such provision is limited

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Wetmore, J.

to assignments or transfers of or agreements to assign or transfer homestead or pre-emption rights. The same remark is applicable to the proviso added to s. 73 of the Land Titles Act, 1894, by s. 9 of 61 Vic. (1898) c. 32. It is not necessary under the circumstances for me to express any opinion as to the legal effect of these provisions as to persons holding homestead or pre-emption rights.

I am of opinion, therefore, that so far as section 7, township 24, range 2, west of the fifth meridian is concerned the registrar should be directed to endorse on the certificate of title to be issued to the company, that this lot is charged or encumbered with the agreement of sale and purchase between the company and Thomas Behan and William Thomas Mitchell dated the 7th September, 1885, and registered the 2nd December of that year and the subsequent assignments, etc.

As to the north half of section 35, township 24, range 1, west of the 5th meridian, the letters patent for which are dated 20th May, 1898; the only document in the Land Titles Office affecting this land is a transfer filed therein on 29th November, 1889, and dated 27th November, 1889, whereby Thomas L. Peers, who is in such transfer, stated to be entitled to be registered as owner of such land upon performance of the conditions contained in an agreement made between him and the Canadian Pacific Railway Company, dated the 21st March, 1889, transferred his estate and interest therein to one Albert Traunweiser. No one so far as the files or registry disclose appears to be now interested under the alleged agreement respecting this land, except Traunweiser. After the reference was made to the learned Judge the company produced a quit claim deed from Traunweiser to the company of all his estate and interest in this land. That in my opinion disposes of all question as to this land. The quit claim deed should be delivered to the registrar and he should be directed thereupon to issue a certificate of title to the company for the north half of section 35, township 24, range 1, west of the 5th meridian clear of any charge.

Judgment.
Wetmore, J.

The question arising with respect to the west half of section 3, township 22, range 27, west of the 4th meridian, seems to me somewhat more difficult to dispose of. The letters patent for this half section were issued to the company on 30th December, 1897; the first instrument registered with respect to this land is a mortgage thereof dated 9th September, 1886, and registered the same day from John T. Cable to Elizabeth B. Cozens to secure $1,815 and interest; the next is an assignment dated 3rd April, 1886, and registered 24th November, 1886, made by Elizabeth B. Cozens, whereby she assigned to John T. Cable all her estate and interest in such land, together with all her interest in two certain contracts for the sale of the said lands to her marked numbers 2,552 and 2,553, which contracts are of even date and are dated 31st March, 1885, are are respectively made between the Canadian Pacific Railway Company of the first part and her, the aforesaid Elizabeth B. Cozens, of the second part. The contracts of sale and purchase last above mentioned are not registered, they are merely recited or alleged in the assignment from Cozens to Cable in the manner just specified, and this creates the difficulty which presents itself to my mind. The next instrument registered is a quit claim deed from John T. Cable to Bryce Wright, dated 19th November, 1886, and registered 24th November, 1886. These documents were all registered before the Territories Real Property Act came into operations. After this Act came into operation, namely on the 8th November, 1888, a mortgage was filed in the Land Titles office from Bryce Wright to Jessie P. Lafferty and Frederick B. Smith, dated 6th November, 1888, to secure $339.25 and interest, and on the 19th January 1891, another mortgage was filed from Bryce Wright to Lafferty & Moore dated 27th March, 1890, to secure $262.50 and interest. Therefore, if agreements for sale and purchase of this land were made between the company and Cozens, as stated in her assignment to Cable, the rights under such agreements would, according to the face of the documents registered and filed, be in Bryce Wright, subject to the mortgages to Elizabeth B. Cozens,

Judgment.
Wetmore, J.

Jessie P. Lafferty & Frederick B. Smith and Lafferty & Moore respectively in the order named. It is quite clear that the assignment from Cozens to Cable would not create a charge against the land merely because it recited the agreements of sale and purchase mentioned therein; but under the provisions of section 32 of the Ordinance No. 2 of 1884, before referred to, it was notice to all persons claiming interest in the land that there were such agreements, or at least that Cozens claimed that there were such agreements. What I have laid down in dealing with section 27, township 24, is to a very great extent applicable to the question I am now discussing, and I will not repeat it. Assuming that the Territories Real Property Act and the Land Titles Act, 1894, had not been enacted and the company had got a good title to these lands, the persons claiming under the agreements of sale and purchase (if there happened to be any such agreements), could have enforced them against the company. But I am of opinion further, that (if there were such agreements) by virtue of the notice created by the registration of the Cozens' assignments, such agreements could have been enforced against purchasers from the company after it acquired its title; and I am of opinion that such agreements could, since the passing of the two last mentioned Acts, be enforced against the company by virtue of section 130 of the Land Titles Act, so long as the title remained in the company; but they could not be enforced against a purchaser from the company, to whom a clear certificate of title might be issued. But I am of opinion that a valid claim would accrue to those claiming under the agreements (if any), if the registrar, with the notice before him, created by the registration of the Cozens assignment, without any enquiry being made, deprived such parties of their rights by issuing a certificate of title, which would bar them. Of course it would be impossible at present to order any charge created by such agreement of sale and purchase to be indorsed on the certificate, because there is not proper evidence of such agreements. All the registrar had before him is sufficient material to cast suspicion on the company's right to a clear

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Wetmore, J.

title. It was a case, therefore, which the registrar very properly referred to the Judge under section 111 of the Land Titles Act.

I think the proper course would be for the learned Judge to cause notice to be given to the persons who are apparently interested under the agreements of the time and place when and where the question submitted by the registrar, in so far as this piece of land is concerned, would be investigated. If the parties so interested fail at the time and place so appointed to appear, or, having appeared, fail to establish the alleged agreements, the registrar should be directed to issue a certificate of title to the company free from any charge created by such agreements. If the agreements are properly proved, the proof should be filed with the registrar and he should be instructed to issue the certificate with the charge created thereby indorsed thereon. In so far as this piece of land is concerned the matter should be referred back to the learned Judge, with a direction to proceed as pointed out. I do not hold that even if a certificate of title were issued to the company after such investigation that it would prevent the claimants under the assignments from resorting to the Courts to enforce the agreements so long as the company held the title, but it would protect the Assurance Fund. I think the powers to authorize the Judge to deal with the question as I have suggested are fully given by section 111 of the Land Titles Act.

McGUIRE, J.—It was urged by counsel on behalf of the Canadian Pacific Railway that in 1886 (chapter 26) the Acts of 1880 and 1884 were repealed as to the registry offices, and that no provision was made for carrying on the old system; that in consequence the documents mentioned in this reference are not registered or not properly registered under the Torrens System, brought into operation on January 1st, 1887, and so the certificates of title should be issued without any notice being taken of these instruments, because the certificate should show the true state of the title as it appears from instruments properly on the registrar's books.

Judgment.
McGuire, J.

This is substantially his contention. Now s. 140, c. 26 of 1886, did not absolutely repeal the law under which the previous registration system existed—it repeals the former laws only:—

(1) So far as the same are *inconsistent with the provisions of this Act,* except as to "matters done or pending thereunder."

(2) Or retained in operation by express provision in this Act.

This clearly implies that:—

(1) Some of the former law was left unrepealed, and

(2) Some of it was retained (or intended to be retained), in operation by the express provisions of the new Act. So it is incorrect to say that Parliament intended to wipe out and discontinue entirely the old law, to say nothing of vested rights thereunder.

Were there any matters "retained," etc.? Section 23 says, "Every registrar of deeds appointed and acting when this Act comes into force shall—be *ex officio* a registrar under this Act."

*Ex officio* means by virtue of office or position, and without special appointment. If this expression is to be taken strictly it would imply that the existing registrars of deeds were still to hold office, because, it may be urged, they were registrars in the new system by virtue of holding their former office, and on ceasing (if they ceased) to be registrars of deeds, they would also cease to be registrars under the new system. But without relying on this view, at any rate section 23 affords an instance of the old system being retained under the new.

Section 44 deals with patents issued since 1st January, 1887. Here the registrar in issuing a certificate of title is to do so as provided by section 54, and "with any necessary qualifications." If the contention of counsel be correct there would be nothing in the registrar's hands but the patent; what then would be the "necessary qualifications"? Section 54 provided that he must endorse on the

Judgment. McGuire, J.

certificate "a memorial of every mortgage, encumbrance, lease, rent charge or other dealing affecting the land." How is the registrar to know of these? As to mortgages and encumbrances these might under section 125 have been "filed" with him, but how is he to know of any "leases, rent charges or other dealings," etc.? Only in one of two ways:—(*a*) by finding them in his office, or (*b*) by their being brought in by the holders of them. But there is no provision for bringing these in, or for notice calling on the public or notifying them of his being about to issue a certificate, so it cannot contemplate his getting the information in this latter method, but manifestly refers to the former source. Now, if they are in his office, or on books there, they must have got in under the old system, because under the new law these could not be registered before the issue of the certificate of title.

Again, take section 46, dealing with the case where patent issued prior to January, 1887. It provides that the application must be accompanied by "a certificate showing all registrations affecting the title," etc., with copies of any *registered* documents in certain cases. Who was to furnish this certificate? It is obviously an official one. No doubt the registrar. But if counsel's opinion is correct there could be no registrations in the registrar's hands and no "registered documents," for this application would be the only document he would have. How then could he give a "certificate showing all registrations," or give "copies" of documents he had no knowledge of? It seems to me these "registrations" and "registered documents" must (a) be there under the former law, (b) must be now in his office, and (c) he must have means of knowing all that preceded so as to give a certificate.

Section 47 refers to "deeds, mortgages or other encumbrances or instrument or caveat affecting the title" which "appear to have been registered." "Deeds" could not have been "registered" up to this application by the registrar, neither could "mortgages or encumbrances," for section 125 allows these only to be "filed." Besides the

new system does not contemplate the existence of "deeds." Evidently the reference must be to instruments registered under the former law, and he can only know of these from finding a record of them in his office, or from there being produced to him by the applicant or some other person. The applicant could not safely be trusted to bring the hostile documents, and no other person would, except by chance, have any notice of the proceedings. Obviously the section contemplates the registrar having in his office the registrations and books of the previous system.

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Again, look at Form "F," in the Schedule to the Act of 1886, and to R. S. C. c. 51. This is the certificate directed to be issued by sections 45 and 46. The words "name of the first registered owner" refer to some one other than A. B. To be a "registered owner" he must have become so under the former law, for, by hypothesis, there is as yet no owner registered under the new law, though A. B. is just about to become so. The amendments in 1888 to sections 45 and 47, viz., section 10 and 12 of chapter 20 afford further instances of language used which evidently presupposed the registrar having in his offices the registrations and books of the old system. All these sections show matters retained in operation by the new Act from the old system. Again, if the contention of counsel is correct what became of the vested rights acquired lawfully under the laws in force prior to 1887? If the registrar under the new system was to have no right or opportunity to become aware of these, or was to shut his eyes to them and give certificates of title without reference to existing registered rights, it would be confiscation. But this would be the result if the old registry office, with its contents, was to be sealed up.

Another branch of the argument was that no registration of documents prior to the granting of a patent was provided for under the former law. That was so under s. 63 of the Act of 1880, c. 25, but this was amended in 1884 by s. 1, c. 23. The new section omits the provision as to the land being patented. The local Legislature (s.-s. 5,

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s. 1) is given the power to prescribe the "duties of registrars," and "the designation of deeds and instruments that may be registered." Shortly after the passing of this Act an Ordinance of the Territories, No. 2, of 1884, was passed, which, among other things, declared what instruments might be registered, including "agreements for sale of land, mortgages, deeds,—every contract in writing,—every other instrument whereby lands or realty may be transferred — or affected," and there is nothing limiting these to lands for which patent has issued. Section 32 declares that the registration of any instrument shall constitute notice, etc. See also section 34.

I have come to the conclusion that the registrar of land titles must recognize registrations lawfully made under the laws prior to 1887, and that instruments affecting lands, whether patented or not, might be registered after the passing of Ordinance No. 2 of 1884.

Now to examine the instruments in the present case. As to the north half of section 35, township 24, R. 1 west of 5, the only instrument which appears affecting this is one described as a "transfer" from one Peers to one Traunweiser by which the latter acquires all the interest of Peers, and we are informed that Traunweiser has given to the patentees a quit claim of his interest. The certificate of title can therefore issue free from the transfer mentioned. It is not therefore necessary to say what would be the result were there no such quit claim, and the transferee were opposing the issue of the certificate.

As to the west half of section 3, township 22, R. 29, west of 4th, the first three instruments were registered under the old law in 1886; they all deal with an alleged contract of sale from the C. P. R. to Eliz. R. Cozens, which does not itself appear to be registered. Under these instruments the said Cozens, one John T. Cable, and one Bryce Wright, appear to be interested in the said lands. SCOTT, J., should I think, proceed under section 111 to hear these persons Cozens, Cable and Wright, notice being given to them of a time and place when their claims will be heard by him.

Judgment.
McGuire, J.

The mortgages to Lafferty & Smith, and to Lafferty & Moore, may, in the absence of evidence to the contrary, be assumed to have been entitled to be filed with the registrar under section 125, and while they were not entitled to be registered as coming in after the first January, 1887, I think that, as the registrar has in fact notice of the interests and these interests affect the interests of Bryce Wright, the mortgagees should also receive notice. If these persons or any of them appear and establish the alleged contract of sale the certificate should be directed to issue, endorsed subject to the said contract, and the interests of other persons as they may appear. Otherwise the registrar should be directed to issue the certificate clear of any charge.

As to the remaining parcel of land, s. 7, tp. 24, r. 2, what purports to be an agreement of sale thereof from the applicants to Thomas Behan and W. T. Mitchell, appear to have been registered on December 2, 1885, and this, so far as appears, was properly registered.

The certificate of title in this case should be directed to issue, endorsed, subject to this instrument, the endorsement to show the different dealings with the interests of said Thomas Behan and William Thomas Mitchell, as shown by the records.

While the transfers, James Mitchell to Thomas Behan, Thomas Behan to Hugh Behan, and Hugh Behan to Rutherford, were all registered after January 1st, 1887, and, as I have already shown, transfers were not entitled to be registered under the new system until after a certificate had been granted, I therefore question whether these instruments should have been registered. Yet, as they only show the dealings that have taken place affecting the interest of Thomas Behan and W. T. Mitchell, which is properly registered, and as the last mentioned two persons may no longer have any interest in the said agreement of sale, I think it is proper that the endorsement should show the various dealings therewith. The mortgage from Hugh

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Behan to the Yorkshire Guarantee and Securities Corporation, for the same reason and for the further reason that it may have been entitled to be filed under section 125, should I think, also be mentioned in the endorsement.

RICHARDSON, ROULEAU & SCOTT, JJ., concurred.

REPORTER:

Ford Jones, Advocate, Regina.

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## MARCY v. PIERCE (No. 2.)

*Detinue—Conditional sale—Waiver—Intention—Evidence Secondary Evidence—Handwriting.*

On proper evidence as to non-production of the original, secondary evidence of the contents of a letter, given by a witness who had seen the author write once only, was admitted.

On a conditional sale, evidenced by writing, providing that the title should remain in the seller till cash, notes or drafts (for the balance of purchase price) as agreed upon, should be paid.

*Held*, that the question, whether the conditions had been waived and thus the property had vested in the buyer, was entirely a question of intention, and that the facts shown in evidence, one of which was that the seller had accepted, for the balance of the purchase price, the promissory note of a firm of which the buyer was a member, did not show an intention to waive the condition as to property.

[WETMORE, J., *August 13th*, 1899.

This was an action for the detention of a piano. Plaintiff claimed a return and damages.

The statement of defence set up that a written order, by way of conditional sale (set out in the judgment), was given for the piano; that the piano was delivered accordingly, and the defendant had ever since had possession of it; that for the balance of purchase price, plaintiff subsequently accepted, and still held, the promissory note of a firm, of which defendant was a member, in full settlement of all claims, in respect of the piano, on account of which $25 was subsequently paid, and further payments demanded by the plaintiff; and the defendant submitted that these facts showed

the plaintiff had lost all lien on, or right to possession of, the piano. Statement.

The action was tried by WETMORE, J., without a jury.

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

*E. L. Elwood*, for the defendant.

[*August 13th*, 1899.]

WETMORE, J.—Secondary evidence of a letter alleged to have been written by the plaintiff to the defendant was received at the trial, subject to objection on the part of the plaintiff, with the understanding that, if on further consideration I should be of opinion that it was improperly received, the evidence would be struck out. I am of opinion that the evidence was properly received (Roscoe N. P. Ev. 16th ed. 138). The fact that the witness had only seen the plaintiff write once might effect the question of the weight to be given to the testimony,but the evidence was admissible.

I may as well now decide what weight I give to the testimony. I find that the letter was written by the plaintiff and that it contained what the witness said it did. I come to this conclusion because the plaintiff was called as a witness and did not deny writing this letter. There is very little conflict of testimony in this case. The questions that arise are as to the conclusions of fact to be deduced from the testimony and as to the law applicable to such conclusions when so deduced. The facts as I find them are as follows: On the 15th October, 1897, the defendant ordered in writing a piano from the plaintiff, which order is as follows:—"H. B. Marcy, Winnipeg, Man., Canada. The following property shall remain the property of H. B. Marcy until the cash, notes or drafts as agreed upon are paid. Forward the following goods to my address, Oxbow, N. W. T. Style C, Walnut, Stool, $228. Terms, $128 cash on receipt from date of piano from Ingersoll and note four months for $100 from date of receipt of piano. I hereby agree to sign notes; title, ownership and right to possession of property to remain in H. B. Marcy or order on the terms herein mentioned, drawing seven per cent. interest per annum until due

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Wetmore, J.

and ten per cent. thereafter, and agree not to cancel this order. I hereby acknowledge having received a true copy.

A. Pierce."

About the 30th day of November, 1897, a piano was delivered by the plaintiff to the defendant in pursuance of this order and the defendant paid therefor $128, the first instalment of the purchase money, and nothing more has been paid on account thereof, except $25 paid about 4th August, 1898. And up to the 15th September, 1898, no note or other security as contemplated by the order above recited was ever given for the balance of the purchase money due.

The defendant was a member of the firm of Pierce Brothers who did business at Oxbow. About the 15th day of September, 1898, one J. Frank Grundy arrived at Oxbow clothed with authority from the plaintiff to collect the balance due and in default to take possession of the piano. This was the extent of the instructions given to Grundy by the plaintiff and he had, according to such instructions, no authority to receive or accept the notes of the defendant or of any other person for such balance, much less to deprive the plaintiff of any security which he held for insuring payment thereof. But I find that the plaintiff led the defendant or his agent to believe that Grundy had authority beyond what his private instructions were, because he had, in the letter which I have before referred to, informed him that Grundy was coming to Oxbow, and he looked for their arranging a satisfactory settlement for the balance of the claim. When Grundy arrived at Oxbow defendant Asher Pierce was absent and he interviewed Michael Pierce,a member of the firm of Pierce Bros., who had received instructions from Asher Pierce to pay the balance of the claim. The result of the interview between Michael Pierce and Grundy was that Pierce Bros.' note,dated the 1st May, 1898, for $100, payable in six months with interest at seven per cent. per annum payable to the plaintiff's order, was given for the balance due on the piano, and Grundy gave a receipt dated the 15th September, 1898, which is as follows: — "Received from Pierce Bros. note for one hundred dollars,

Judgment.
Wetmore, J.

dated May 1st, 1898, in full settlement for piano purchased by A. Pierce, on account of which note $25 was paid on August 4th, 1898. J. Frank Grundy for H. B. Marcy." The $25 paid on August 4th was also endorsed on this note. The receipt was prepared by Michael Pierce. So far as the evidence discloses, whatever rights the defendant had in the piano under the contract of purchase are still in the defendant, they never were transferred to Pierce Bros. or any other person. Michael Pierce testified on his examination in chief that he informed Grundy that the defendant had written or instructed him to pay the claim, but that he was a little short of funds; and he asked him if he would accept a note in settlement for the piano signed by Pierce Bros., and that Grundy replied that he would. I am not by any means satisfied that this is exactly correct. On his cross-examination, when testifying as to what was said at that particular time, he stated as follows:—"Grundy asked me for cash. I told him that during summer months it was a little quiet, and if he could take a note of Pierce Bros. it would be the best thing; he said that he would do so." I am of opinion and find that this testimony correctly sets forth what took place. This note was forwarded by Grundy to the plaintiff, and I must hold that, so far as this case or the defendant is concerned, the plaintiff accepted this note. It is true that the evidence establishes that it was sent back to Grundy; but it was returned to the plaintiff who kept it until maturity, then presented it for payment at the Banque D'Hochelaga where it was payable, and he still holds it. The plaintiff has never been paid the balance due under the purchase. After this note became due he brought this action against the defendant for wrongfully detaining the piano, scale case and keyboard and replevied them. I ought to state further that the plaintiff, when he received this note from Grundy, was not aware that he had given a receipt for it; that he did not become aware of that fact until sometime in December last, and then he was only aware of the fact that a receipt had been given, and that he did not become aware of the actual contents of said receipt until after he commenced this action.

Judgment.

Wetmore, J.

The defendant claims under the facts above recited that by taking this note from Pierce Brothers the plaintiff waived any right of property he had in the piano, and that such right of property became absolutely vested in him. This case was argued before me as if the plaintiff merely had a lien on this piano by virtue of the order upon which it was obtained. I think this was a mistake. A lien is a right which a person has with respect to another person's property, for instance, a merchant who sells goods to another has a lien on such goods for the unpaid price before they are delivered and can stop them *in transitu* under certain circumstances. An inn keeper has a lien for the price of board and lodging on the personal baggage of his guest brought to his hotel. A common carrier has a lien for the price of carriage for goods carried by him. A mechanic has by statute a lien for work done by him on property upon which the work is done. In every instance where there is a lien the right attaches upon the property not owned by the person claiming the lien as stated by Shaw, C.J., in *Arnold* v. *Delano*:[1] "No man can have a lien on his own goods." Neither Ordinance No. 8 of 1889,† nor No. 39 of 1897, § nor C. O. 1898, c. 44,‖ affects this case at all. Those Ordinances were only passed for the protection of innocent purchasers and mortgagees and creditors; the immediate parties to the transaction are still subject to the common law rules. As between the parties to the order in this case, the sale was a conditional sale which did not take final effect until the conditions provided for were complied with. Now I have not the slightest doubt that the seller may in such cases agree or consent to waive the performance of the conditions and that the right of property may become vested in the buyer; and moreover I have no doubt that, if the seller once waives the performance of

[1] 58 Mass. (4 Cush.) 39; 50 Am. Dec. 754; cited Benjamin on Sales, 4th Am. B. s. 796 (a), s. 1078 note.

† "An Ordinance concerning receipt notes, hire receipts, and orders for chattels."

§ "An Ordinance respecting hire receipts and conditional sales of goods."

‖ "An Ordinance respecting hire receipts and conditional sales of goods."

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Wetmore, J.

the conditions and the right of property becomes vested in the buyer, such right cannot afterwards be revived or become revested in the seller, unless possibly by virtue of some very special agreement providing therefor. The question in this case then is, has the plaintiff under the facts of this case by himself or his properly constituted agent waived the performance of the conditions provided in the order, upon which the right of property was to become vested in the defendant. I am of opinion that this is entirely a question of intention. I will not in this case decide the question, which was very strongly pressed upon me at the trial, that Grundy did not waive the performance of these conditions, because it was beyond the scope of his authority to do so. It is not necessary in view of the conclusion I have reached to decide that question. I have, in view of the additional facts in this case which I have found, come to the conclusion that Grundy never intended that these conditions should be waived; that in taking this note he was acting within what the order contemplated. This order is somewhat peculiarly worded, it provided that the property shall remain the property of H. B. Marcy, until the "cash, notes or drafts as agreed upon are paid." This provision cannot be limited to the note specified on the face of the order; it evidently contemplated that the notes other than that specified on the face of the order might be agreed upon before the piano was paid for. It will be observed that the plural "notes" is used in the provision I have just cited. The order on its face only provides for one note. Moreover, it is contemplated that drafts may be drawn as agreed on. The order does not on its face provide for any particular draft at all. Now, I can only in view of that provision read that order as providing that, if in the course of future negotiations between the parties respecting that piano any notes should be given, whether specially provided for by the agreement or agreed to be given outside of it, or any drafts should be agreed to be given or accepted, the right of property in the piano was to remain in the plaintiff, until such notes or drafts were actually paid; and it is in my opinion immater-

Judgment. Wetmore, J.

ial whether the notes of the defendant or some other person were agreed upon. In fact it was clearly provided that until Marcy actually had the money, the agreed price of the piano, in his hand the right of property was to be and remain in him. It was, however, strongly urged that because the receipt given by Grundy provided that Pierce Bros.' note was received "in full settlement" for the piano, it was in full satisfaction and discharge of the amount due by Asher Pierce and waived the performance of the conditions, which were to attach under the order before the right of property passed. I am of opinion, however, in view of all the facts of this case, including those which I will hereinafter mention, that the words "full settlement" are open to and should receive a different construction. It is to be borne in mind that Asher Pierce the defendant was a member of the firm of Pierce Bros., that he was absent when this arrangement took place between Grundy and Michael Pierce, and was therefore not in a position at the time to give a note, and so far as appears Michael had no authority to sign a note for him. If a note was to be given at once the only note that Michael could give was his own or that of Pierce Bros.

It is also quite clear that there was a dispute as to the balance due in respect to the piano. The defendant was claiming that, because a stool had not been delivered with the piano, and was not delivered until some time after, and because the piano was not in proper tune, the interest should not run on the balance due until these matters were set right. The plaintiff was claiming interest more than the defendant thought he ought to pay, and the result of the interview between Grundy and Michael Pierce was that this difference was fixed and adjusted, and I think that it was in that sense that the words "full settlement" were used in the receipt, and that Pierce Bros.' note was taken simply as a substitute for Asher Pierce's, he not being present, without any intention of cutting down the plaintiff's security by virtue of the order for delivery. I may in this connection refer to the *New Brunswick Railway Co.*, v. *McLeod*.[2] I find

[2] 1 Pugs. & B. 257.

therefore that the right of property continued in the plaintiff and order judgment for the plaintiff with $2 damages and costs. Judgment. Wetmore, J.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

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## IN RE BANFF ELECTION—BRETT v. SIFTON (No. 2.)

*liminary Objections.*

*The Controverted Election Ordinance—Petition—Signature—Pre-*

*Held*, reversing the judgment of SCOTT, J., MCGUIRE, J., doubting, that a petition may be set aside upon summary application upon grounds other than those contained in section 10 of the Controverted Election Ordinance. (†)

[SCOTT, J., *October 18th*, 1899.]

[*Court in banc, December 9th*, 1899.]

An election of a member to represent the Electoral District of Banff, in the Legislative Assembly of the North-West Territories was held on 27th day of June,1899,at which the respondent A.L. Sifton was duly declared elected. Under the provisions of the Controverted Election Ordinance, a petition was filed by or on behalf of the opposing candidate asking that the election be set aside upon various grounds set forth in the petition. The respondent then applied by summons in chambers to Mr. Justice SCOTT for an order asking that the petition be set aside and removed from the file of the Court, upon the ground that the petition had not been signed by the petitioner. The summons was granted upon affidavit in which the deponents swore that they were acquainted with the handwriting and the signature of the petitioner, and that they believed the petitioner's name written at the end of the petition was not written by the petitioner.

Upon the return of the summons,

(†) C. O. 1898, c. 4.

Argument.

*R. B. Bennett*, for the petitioner, took the preliminary objection that the Judge had no jurisdiction in view of the provisions of sections 10, 11, 12 of the Ordinance to entertain the application.

*P. McCarthy*, Q.C., for the respondent:—The provisions of section 18 are wide enough to give the Judge jurisdiction. Section 10 is not exhaustive, but only provides certain special grounds upon which the petition may be set aside in a summary way. The motion was adjourned for judgment upon the point raised by counsel for the petitioner.

[*Calgary, October 18th*, 1899.]

SCOTT, J.—This is an application by the respondent to set aside the petition filed herein and the service thereof upon him upon the ground that the petition is not signed by the petitioner.

Upon the return of the summons, counsel for the petitioner took the preliminary objection that the Controverted Elections Ordinance did not authorize the setting aside of a petition upon that ground, and therefore I had no jurisdiction to entertain the application or to make the order applied for.

Section 10 of the Ordinance provides that upon the application of the respondent the Judge may order the petition to be set aside and removed from the files of the Court upon any of the following grounds, viz.:

(*a*) That the petitioner is not qualified to file a petition.

(b) That the petition was not filed within the prescribed time.

(*c*) That the deposit has not been made as provided in section 5 of the Ordinance.

(*d*) That the petition does not on its face disclose sufficient grounds or facts to have the election set aside or declared void.

(*e*) That service of a copy of such petition has not been made upon him as therein prescribed.

Judgment
Scott, J.

Section 18 of the Ordinance provides that the petition and all proceedings thereunder shall be deemed to be a cause in Court in which the petition is filed, and that all the provisions of the Judicature Ordinance in so far as they are applicable and not inconsistent with the provisions of the Ordinance shall be applicable to such petition and proceedings.

I was at first disposed to consider that the last mentioned section was sufficient to authorize me to make the order applied for, because in a cause in Court I think I would have authority to set aside the writ of summons or statement of claim for non-compliance with certain material requirements of the Judicature Ordinance. It appeared to me that section 10 was not intended to narrow the effect of section 18, but rather might have been intended to confer certain powers upon a Judge, which he might not possess in Causes in Court, because some of the grounds of the application mentioned in section 10, particularly (a) and (d) are not grounds upon which a summary application can be made to set aside a writ of summons or a statement of claim in a civil action.

But upon considering the provisions of the Ordinance I am led to the conclusion that section 10 must be treated as prescribing the only ground upon which a petition can upon a summary application be directed to be set aside and removed from the files of the Court.

Section 11 provides that the respondent may apply for particulars within twenty days after service upon him of the petition, unless he makes an application under section 10, and if he does then within five days after it is refused or dismissed.

Section 12 provides that if the petitioner claims the seat for any other candidate, the respondent may within twenty days after service of the petition (unless he appeals under section 10, and if he does then within ten days after such application is refused or dismissed) file with the clerk a statement in form "B," etc., etc.

Judgment
Scott, J.

The language used in these sections to my mind clearly indicates an intention that nothing but a successful application under section 10 should interfere with the procedure under the petition.

I confess that I am unable to discover why the Legislature should have restricted such applications to only certain defects in procedure, and upon referring to the Controverted Election Acts of the Dominion and Province of Ontario, I find that they contain no such restriction.

If, for instance, a respondent is in a position to shew that a document purporting to be a petition of the petitioner, and filed and proceeded upon as such, is not his petition, surely the respondent should have some remedy. It would, however, be out of place for me to speculate upon what that remedy may be, or whether under the provisions of the Ordinance, it exists at all. I have only to decide as I now do that the procedure the respondent has adopted is not authorized by the Ordinance.

Application dismissed with costs to the petitioner in any event upon final taxation.

The respondent appealed. The appeal was argued December 4th, 1899.

*C. P. Wilson*, for appellant:—Section 10 is merely auxiliary to section 18. The petition is a cause in Court, and therefore the Court has inherent jurisdiction to see if the petition has been regularly instituted. If section 10 is repugnant to section 18, the latter should govern: Hardcastle's Statute Law, 2nd ed., 239; Maxwell on Statutes, 2nd ed., 186.

*R. B. Bennett*, for respondent:—Section 10 conferred on a Judge the only jurisdiction he has to entertain a preliminary objection to the sufficiency of the petition or the status of the petitioner. The aid of section 18 cannot be invoked to found jurisdiction, as it is general legislation and must be subordinated to the particular legislation of section 10. In any event the ground relied upon is not one which can be raised by preliminary objection to the

petition, but is a substantive question of fact—of the *mala fides* or *bona fides* of the petitioner—to be determined at the trial: *North Simcoe Election*.[1] Argument.

[*December 9th, 1899.*]

WETMORE, J.—The petitioner, as is alleged, filed in the office of this Court for the Judicial District of Northern Alberta, what is claimed to be a petition under sections 3 and 4 of the Controverted Elections Ordinance, C. O., 1898, c. 4, against the return and election of the respondent as representative in the Legislative Assembly for the Electoral District of Banff. The respondent took out a chamber summons for an order to set aside such petition on the ground that the petitioner had not signed it. This summons coming on to be heard before my brother SCOTT, that learned Judge held that the Controverted Elections Ordinance did not authorize the setting aside of a petition on that ground; that section 10 of that Ordinance prescribes the only grounds upon which a petition can upon a summary application be directed to be set aside and removed from the files of the Court, and dismissed the summons with costs to the petitioner in any event on the final taxation. The respondent appealed to this Court from this decision. When the appeal came on for argument the petitioner's counsel objected to this Court deciding the matter on the merits in the event of its coming to the conclusion that the learned Judge had authority to set aside the petition on the ground set up in this case, as the petitioner had not had an opportunity of presenting affidavits or furnishing material in answer to those used on the application by the respondent. The Judge's judgment was, as a matter of fact, given on a preliminary objection to the Chamber application taken on the part of the petitioner, and no affidavits or other material were furnished by him. And it was accordingly understood that this appeal should be argued and heard on the question whether section 10 of the Ordinance

[1] Hodgins E. C. 617.

Judgment.

Wetmore, J.

was as restrictive in its operation as the learned Judge held it to be. It is perhaps somewhat difficult to decide this appeal with a strict adherence to this understanding, because one very strong contention made on the part of the petitioner is that it is not under the Ordinance necessary to sign the petition at all. The circumstances of this case, however, are of such a character that I do not think it necessary to express an opinion at present as to whether it is necessary that the petition should be signed by the petitioner. The petition purports on its face to be signed by the petitioner, that is, his name "Robert George Brett" appears writen at the end of it. The respondent has produced *prima facie* evidence that goes to establish that this alleged signature is not in the handwriting of the petitioner. Now this petition being ear-marked in this way by, as we must at present assume, some person other than the petitioner, a case is fairly presented for inquiry whether this is such a petition as the Ordinance contemplates shall be filed. The question then comes down to this: Is a Judge of this Court authorized to hold such an inquiry? And if he reaches the conclusion that it is not such a petition as the Ordinance contemplates, to order it to be set aside or removed from the files of the Court? I am of opinion that he has such authority. Section 10 of the Ordinance is evidently intended to operate on the assumption that a proper petition has been filed as provided for in the preceding sections. That having been done and a copy of it served on the respondent, he may within the prescribed time apply to set the petition or service aside on any one or more of the grounds specified in that section. But I am of opinion that section 18 confers amply powers on the Judge to set aside or remove from the files of the Court a petition which does not comply with the requirements of the Ordinance in particulars not specified in section 10, and *a fortiori* to set it aside when it is an abuse of the process of the Court. This sections is as follows: "The said petition and all proceedings thereunder shall be deemed a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance *in so far as they are applicable and not*

Judgment.

Wetmore, J.

*inconsistent with the provisions of this Ordinance* shall be applicable to such petition and proceedings." Now, if section 10 had never been inserted in the Ordinance, the provisions of section 18, taken together with what is contained in the Ordinance in section 2 to 9, both inclusive, would have enabled the Court to set aside the petition upon at any rate many of the grounds set out in section 10. The only difference would have been that instead of applying within twenty days after service of the petition as prescribed by section 10, the application could have been made within a reasonable time thereafter. Section 10 therefore to that extent alters the practice and procedure prescribed by section 18, but I cannot see that it should be held to alter it to any greater extent than is set forth in such section 10. The Legislature has seen fit to cast upon this Court the power and authority to inquire into the return and election of candidates for the Assembly. It has therefore conferred on the Court jurisdiction over such matters. It has prescribed a procedure in respect to such inquiries, and in doing so it has prescribed a proceeding, for giving the Court seisin of each particular case, well known in the ordinary practice of the Court, namely, by petition. It has provided that such petition and *all proceedings under it* shall be deemed a cause in Court, and then it has practically applied to such petition and all proceedings under it the whole practice applicable to ordinary causes and proceedings in the Court, in so far as they are applicable and not inconsistent with the Controverted Elections Ordinance; because when the Judicature Ordinance is so made applicable to the petition and proceedings, it, in view of section 3 of that Ordinance, means the whole practice and procedure of the Court. I can discover nothing in the ordinary practice of the Court which authorizes the Court or a Judge to lay its hands upon its proceedings when they are not in accordance with the requirements of the law and set them aside, which is inconsistent with section 10, except that in so far as the objections to that section mentioned are concerned, they must be taken in the mode and within the

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time in that section prescribed. Certainly, I can see nothing in section 10 which will deprive the Court of its power to set aside a proceeding which is an abuse of its process by the same means and procedure which it would adopt to set aside any other abuse of its process. And I have no hesitation in holding that if there has been any *mala fides* in presenting this petition, for instance, if some person has used Dr. Brett's name without his authority, there has been an abuse of the process of the Court. I do not intend, however, to lay it down that the only question for inquiry in the merits of this matter is whether there has been an abuse of the process of the Court, because the inquiry will also embrace the question whether the practice prescribed by the two Ordinances in question has been complied with. It was urged that this Court has no jurisdiction over the petition until it is filed. I quite concede that, but I do not just perceive how that consideration affects the question. The Court has no jurisdiction over any petition whatever until it is filed or presented to the Court. The only way an election petition can be presented, is by filing it with the clerk. But the moment any petition, or what purports to be a petition, is filed or presented, the Court has jurisdiction; such jurisdiction is simultaneous with the filing or presentment. There is no space of time allowed after the filing or presentment for the jurisdiction to attach. So the very moment any paper is placed on the files of the Court which ought not to be there, the Court has the jurisdiction to order it to be removed or set aside, or, in other words, if it is not in accordance with the prescribed practice and requirements. I am of opinion that the view I have taken of this question is supported by the observations of Taylor, C.J., in *Re Marquette Election*,[2] at page 390; by those of Wetmore, J., in *Lynds* v. *Turner*,[3] at pp. 289 and 290; by those of Palmer, J., in *Rogers* v. *Wallace*,[4] at pp. 467 and 468; and of Allen, C.J., in the last mentioned case at p. 470.

I expressly refrain from expressing my opinion as to whether an election petition under the Ordinance must be

[2] 11 Man. R. 381. [3] 22 N. B. Rep. 286. [4] 24 N. B. Reps. 459.

argued, or whether it must be signed by the petitioner himself, or whether it may be signed by some person duly authorized by the petitioner to do so. For all we know to the contrary all these questions may when the petitioner's material is brought forward be found unnecessary to determine, because it may be established that as a matter of fact the petition has been actually signed by the petitioner. We will leave these questions to be determined by the learned Judge if they arise. Judgment. Wetmore, J.

I am of opinion that this appeal should be allowed and the order dismissing the Chamber summons should be set aside, and that the parties attend before the Judge in Chambers at such time and place as he may appoint, and proceed with the application under the Chamber summons herein, and that in the meanwhile and until such application is disposed of, all proceedings on the said petition or incidental thereto be stayed, and that the petitioner pay to the respondent Sifton the costs of this appeal.

RICHARDSON and ROULEAU, JJ., concurred.

MCGUIRE, J.—While I do not intend to dissent from the judgment just read by my brother Wetmore, I cannot entirely get rid of a doubt that I feel as to its correctness.

It seems to me that possibly the intention of the Legislature, gathered, not from any express words to that effect, but from what is indicated by the language of certain sections of the Act, was that a form of petition was given which *might* be used (the words of section 4 are "such petition *may* be in the Form A"), and that they, by section 10, specified what they intended should be material to its sufficiency, and that any other defects or omission should not be deemed a ground for setting it aside. The sections I refer to are 11, 12, 13, 14, 15 and 16.

In 11 and 12 the words in parentheses show that it was not contemplated that an application to the Court was open to be made, or, at any rate, would likely be made, under any section other than section 10. For example—take section 11. If an application is made under section

Judgment. McGuire, J.

10, the respondent has five days after the disposal of that application within which to demand particulars. But if the application be made under section 18, it would seem that he has not such five days. Why is such favour extended to him when he makes it under section 10, but not when under some other section? What ever reason existed for extending the time in the one case would exist equally when made under section 18. The answer may be that it was not intended that any application of that kind could be made otherwise than under section 10.

Examine section 11 and the same remarks apply.

Section 13 makes special provision for setting aside a "statement" filed by the respondent, and these are very much like those mentioned in section 10. Then section 14 seems to contemplate that no application against that "statement" is to be made except under section 13, and the remarks already made as to section 10 apply here also. In section 15 the parenthesis limits itself to "applications hereinbefore authorized to be made," which does not of course include section 18, but evidently refers to sections 10 and 13. Section 16 authorizes the fixing of a day for trial after the petition is at issue, and it follows from these last two sections that if an application were made under any section other than 10 or 13, the fact that such application might be still pending would not prevent the petition being at issue and the trial being proceeded with.

I cannot see why such different consequences should follow depending on whether the application is or is not made under section 10 or section 13, or under some other section, *e.g.*, section 18.

But if it was intended that no application to strike out the petition could be made except under section 10, the provisions of the sections 11 to 16 are not open to the comments I have made.

These are the considerations which create a doubt in my mind whether the Legislature did not intend that no application was to be considered unless made under 10 or 13,

This view would seem to me, however, to work a great hardship to a respondent in some cases, and as it is not desirable to take away from a respondent what may be a necessary and proper relief, and as my learned brethren are agreed, I do not intend to dissent. Judgment. Wetmore, J.

*Appeal allowed with costs.*

REPORTER :

Ford Jones, Advocate, Regina.

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## IN RE BANFF ELECTION—BRETT v. SIFTON (No. 3)

*Controverted Elections Ordinance—Practice—Stay of Proceedings Time for particulars — Jurisdiction of Judge to extend— Judicature Ordinance—Typewritten appeal books—Costs.*

Under the provisions of section 18 of the Controverted Elections Ordinance,† and Rule 548 of the Judicature Ordinance,‡ the Judge has jurisdiction to extend the time for applying for particulars even after the time limited by section 11½ of the former Ordinance has elapsed.

Proceedings stayed pending appeal, time for applying for particulars enlarged, typewritten instead of printed appeal books allowed and costs directed to abide result of appeal.

[SCOTT, J., *October 30th, 1899.*

The respondent appealed from the judgment of Mr. Justice SCOTT dismissing an application to remove the petition from the files of the Court, and while the appeal was pending, applied by summons for an order that all the proceedings on the petition other than the said appeal be stayed until 10 days after judgment on the appeal, and that the time for applying for particulars be extended for the same period.

Upon the return of the summons.

† C. O. (1898) c. 4.

‡ C. O. (1898) c. 21.

½ "At any time within twenty days after service upon him of the petition (unless he makes an application under the last preceding section, and if he does then within five days after such application is disposed of, if it is refused or dismissed)."

Argument.

*R. B. Bennett*, for the petitioner, raised the preliminary objection that the Judge had no jurisdiction to extend the time for the particulars.

*P. McCarthy*, Q.C., for the respondent.

[*October 30th, 1899.*]

SCOTT, J.—This is an application by the respondent for an order (1) that the proceedings in this matter other than the appeal from my order be stayed until ten days after the delivery of judgment on the appeal; (2) that the time for applying the particulars under section 11, because Controverted Elections Ordinance be extended for the same period; (3) that the appeal book and factum be allowed to be typewritten; (4) that the time for filing the appeal book and the factum be enlarged. Upon the hearing of the application counsel for the petitioner raised the preliminary objection that I have no jurisdiction to extend the time for applying for particulars under section 11, because my order now appealed from was dated on the 23rd inst., and under section 11, respondent should have applied for particulars within 5 days thereafter, that not having done so the petition is now at issue under section 15, and respondent has forfeited his right to obtain particulars.

In my judgment appealed from I held that the application upon which it was delivered was not one within section 11, and if I am correct in the view, I then expressed, the time for the application by the respondent for particulars would, under that section, expire 20 days after service of the petition, and it is not shown upon this application when the petition was served.

I am however of opinion that I have jurisdiction to entertain such an application even though the time limited for applying for particulars has expired.

Section 18 enacts that all the provisions of the Judicature Ordinance, as far as they are applicable and not inconsistent with the provisions of the Controverted Elections Ordinance shall be applicable to the petitions under the latter Ordinance and the proceedings thereunder.

Judgment.

Scott, J.

And Rule 548 of the Judicature Ordinance provides that the Court or a Judge shall have power to enlarge or abridge the time, appointed by the Ordinance or rules of Court for doing any act or taking any proceeding, and that such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed.

I see no reason why the rule should not apply to application for particulars under section 11. That section provides that the respondent may apply for particulars within a certain time,

I can find nothing in it or in the other provisions of the Ordinance to lead me to the conclusion that an extension of that time under Rule 548 would be inconsistent with or inapplicable to them. The fact that the petition may not be at issue by reason of particulars not having already been applied for does not appear to me to be important. Under a petition particulars are not required for the purpose of pleading ; their only object is to prevent surprise at the trial, and to limit the enquiry to matters set out in them, and in ordinary civil suits they are sometimes applied for and obtained for that purpose, after the pleadings are closed and the cause is at issue.

It was also contended by counsel for petitioner that the respondent should be ordered to give security for the costs of the appeal as a condition precedent to his obtaining the stay of proceedings applied for. I think that I should not impose this condition. I also think respondent is entitled to a stay of proceedings at least unti lthe end of the next sittings of the Court *in banc.*

It was agreed between counsel that in the event of a stay of proceedings being ordered, it should be until 14th December next, with liberty to respondent to apply for a further stay, but if judgment on the appeal from my order be delivered before that date the proceedings shall be stayed until the expiration of five days from the delivery of judgment.

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Scott, J.

The order will go for a stay of proceedings in these terms and for enlarging the time for supplying for particulars under section 11 to the same time.

The respondent will also have leave to file a typewritten appeal book and three copies thereof, in lieu of a printed appeal book and copies, and the time for filing same will be extended until 9th November next. Costs of this application will be costs to the successful party in the appeal.

REPORTER :

C. A. Stuart, Advocate, Calgary.

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## BOARDMAN v. HANDLEY.

*Practice—Pleading—Departure—Striking out—Point of law—"Demurrer ore tenus"—Particulars—Estoppel—Deed absolute in form but in reality a mortgage—Admissibility of evidence—Character of evidence.*

A pleading cannot be struck out on summary application on the ground that it is bad in law, unless it discloses no *reasonable* cause of action or answer (R. 151), or is so framed as to prejudice, embarrass or delay the fair trial of the action (R. 127), but the opposite party may raise the point of law under Rule 149, or the Court or Judge may under Rule 251 direct the question of law, if there appear to be one, to be raised by special case or in such other manner as the Court or Judge may deem expedient or *semble* (†), the opposite party may take the point at the trial, though it has not been otherwise previously taken.

Even assuming that English order 19, r. 6 (Mar. R. 202) (‡) is in force, before an application to strike out a pleading for want of particulars can be made, an application must first be made for further and better particulars under R. 212.

† It is submitted that this is unquestionable; See Annual Practice (1901), Notes to Order 25, r. 3.

‡ In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid (App. C. D. & E.), particulars with dates and items, if necessary, shall be stated in the pleading; provided that if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading.

Upon such an application, the judge may impose the term that if the particulars ordered are not furnished, the pleading shall be struck out.

Where the Statement of Claim set up a case for reformation of a document on grounds other than that of fraud and by the reply fraud was set up, it was *held* that the reply was bad in law, under Rule 117 as being a departure.

*Held*, as against the objection that the plaintiff was estopped by the recitals and other statements in the deed, of which he sought reformation, that parol evidence, to show that a conveyance absolute on its face was intended to take effect as a mortgage only, is admissable, but that such evidence must be of the clearest, most conclusive and unquestionable character.

The evidence on the plaintiff's behalf was in this case *held* to be sufficient to establish the plaintiff's case.

[WETMORE, J., *November 14th, 1899.*

Statement.

The Statement of Claim alleged :—

1. Settlement of accounts by writing between plaintiff and defendant showing debt owing by plaintiff to defendant of $371.03.

2. Subsequent indebtedness of plaintiff to defendant of $66.

3. Subsequent indebtedness of plaintiff to other persons in a total of $325.

4. Verbal agreement between plaintiff and defendant to the effect that a deed (set out later) should be executed as security for the defendant's claim, and also those of plaintiff's other creditors ; the defendant agreeing that he would obtain settlement of the other claims on the most advantageous claims, and that all rebates and margains would be for the plaintiff's benefit.

5. Execution of the deed.

6. Deed verbatim : the substance being as follows :—Date 9th May, 1898 ; parties, 1st, George William Boardman, the plaintiff ; 2nd, John Handley, the defendant; 3rd, the trustee, under will of plaintiff's mother.

Recital: Whereas, the said G. W. B. is indebted to the said J. H. in the sum of £208 6s. 6d., together with interest thereon at the rate of five per centum per annum from the 20th day of June, 1895; And whereas the said G. W. B. is entitled to a certain share and interest in the real and per-

Statement

sonal estate and effects under the will of his mother, Florence Francis Boardman, deceased ; * * * and whereas the said G. W. B. has agreed to assign and charge all his interest in the said share, and interest in the said recited will, to which he is now or hereafter may be, or become entitled, whether in possession, reversion, or expectancy, either at law or in equity, with the payment of the said sum of £208 6s. 6d., and all interest now due or to become due thereon as aforesaid.

Operative words, etc.—Now this, Indenture witnesseth, that in consideration of the premises, and in consideration of the sum of £208 6s. 6d. advanced to him, the said G. W. B. by the said J. H., the receipt whereof is hereby acknowlenged, he the said G. W. B., as beneficial owner, hereby assigns unto the said J. H. all the moiety, or other part interest or shares, of him the said G. W. B. under the said will of and in the residuary real and personal estate, or otherwise of testator, and the stock, funds and securities of which the same may consist, or by which the same respectively be represented, to hold the same unto the said J. H., to secure the repayment of the said sum of £208 6s. 6d. and all interest now due or to become due thereon as aforesaid ; and the said G. W. B. hereby empowers and instructs the trustees of the said will to pay to the said J. H. the said sum of £208 6s. 6d. and interest as aforesaid, and hereby indemnifies them against all claims and demands whatsoever of him the said G. W. B., or any one claiming under him in connection with the payment of the said sum of £208 6s. 6d. and interest as aforesaid.

7. Although the document states an absolute indebtedness of £208 6s. 6d., together with interest from 20th June, 1895, the interest should be computed only from 24th October, 1896, and there was an agreement in writing that the moneys secured by the document should be applied as before stated, and that any balance in the defendant's hands thereafter should be paid to the plaintiff, and an account thereof rendered to him.

Statement.

8. The plaintiff caused to be paid to the defendant the sum of £238 13s. 0d. for the purposes aforesaid, and the defendant settled the said claims, and in this respect carried out the said trust, and there now remains in the defendant's hands a large balance due from the defendant to the plaintiff.

9. Demand for account and payment, and refusal.

10. Alternatively; plaintiff caused to be paid to the defendant £238 13s. 0d. in trust, to pay the said claims and the balance to the plaintiff.

11. Defendant accepted the trust and settled the claims and there remains in his hands a considerable sum, which he refuses to pay to the plaintiff.

12. Claim: Rectification of document, (1) as to date from which interest is to be computed, and (2) in so far as it states an absolute indebtedness; accounts, etc.

The statement of defence, while traversing most of the material allegations of the statement of claim, admitted the deed of the 9th May, 1898, but claimed it to have been intended as an absolute assignment, and alleged a prior deed dated 24th October, 1896, given as an absolute security for £208 6s. 6d. owing from plaintiff to defendant since the 20th June, 1895, and that the document of the 9th May, 1898, was entered into merely at the request of, and to satisfy the requirements of the trustees.

Pursuant to an order giving the defendant leave to amend his statement of defence, the defendant amended by raising the point of law that the plaintiff was estopped from denying the consideration mentioned, as paid, in the deed of the 9th May, 1898, and from denying that he was absolutely indebted to the defendant in the amount mentioned in the deed of the 24th October, 1896.

The plaintiff replied to this amendment to the effect that the plaintiff executed the deed relying solely on the representations and good faith of the defendant made at the time of the execution of the deed of the 9th May, 1898; that

Statement. the representations were those set forth in the 4th paragraph of the statement of claim, and that the defendant had acted fraudulently in making such representations, and in not fulfilling the agreement, and in obtaining the plaintiff's execution of the deed.

The case was tried before WETMORE, J., without a jury.

*E. A. McLorg*, for plaintiff.

*Woolnough Peel*, for defendant.

[*November 14th, 1899.*]

WETMORE, J.—On this cause being called on for trial an application was made on notice of motion on the part of the defendant to strike out the plaintiff's reply to the amended defence on the grounds that it is bad in law in so far as it sets up fraud, and also that particulars of such fraud should have been set out in the pleadings. So far as the application to strike out this reply on the ground that it is bad in law is concerned, I am of opinion that it is not in accordance with the practice.

There are two ways in which a party may raise a question of law, namely: He may raise it by his pleadings under Rule 149 of the Judicature Ordinance, or he can apply to the Court or a Judge under Rule 251 for an order directing the question to be raised in such manner as the Court or Judge may deem expedient, and possibly he may, without raising the question of law by his pleadings or having it raised under Rule 251, raise it at the trial. I can find no authority for an application to strike out pleading because the matter set up is bad in law as a claim or answer, unless it is so bad as to come within Rule 151, or it is embarrassing, or is otherwise open to attack, under Rule 127. I may say that I did not understand this application to be made either under Rule 151 or Rule 127.

As to that part of the application to strike out the reply because the particulars of the alleged fraud are not stated:—Assuming that Rule 6 of Order 19 of the English rules is in force in the Territories, I am of opinion that, before an application can be made to strike out a pleading for

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want of particulars, an application must be made under Rule 112 of the Judicature Ordinance for further and better particulars. Upon such an application, the Judge may, under the power to impose terms, order that, if the particulars as ordered are not furnished, the pleading shall be struck out: See *Davey* v. *Bentinck*.[1] I can find no case where a pleading has been struck out on a substantive application of this nature. The defendant's application is therefore dismissed.

It is satisfactory to feel that no hardship will ensue to the defendant by reason of my having reached this conclusion. The pleading attacked is in my opinion a clear departure from the cause of action set out in the plaintiff's statement of claim, and is therefore bad under Rule 117 of the Judicature Ordinance. The statement of claim contains no allegation of misrepresentation or fraud whatever in respect to the instrument of 9th May, 1898. It sets up that that document is incorrect in some particulars and that it is governed by a collateral agreement or understanding between the parties, and prays to have such document corrected. The reply in question sets up fraud for the first time and asks to have the instrument rescinded—a relief never contemplated by the statement of claim.

I may say now that I can find nothing in the evidence to lead me to the conclusion that there was any misrepresentation or fraud which induced the plaintiff to execute that instrument. At the trial of this cause all the questions of fact and law involved in the case which I dispose of in this judgment were discussed without any objection as if they were properly raised under the pleadings. Under these circumstances, and as the plaintiff has not been put to any inconvenience by reason of the application—he and his counsel had to attend court for the purpose of the trial—I will not make any order as to the costs of the application. The plaintiff's advocate has made a mistake in pleading, the defendant's advocate one in practice, and therefore no injustice will be done by refusing costs.

[1] (1893) 1 Q. B. 185; 62 L. J. Q. B. 114; 67 L. T. 742; 41 W. R. 181; 4 R. 144.

Judgment. Wetmore, J.

I will now deal with the merits of this case. I find the following facts. Along in March, 1896, the plaintiff was largely indebted to various persons. He was indebted to the defendant in the sum of $371.63. Just how this amount was made up, whether it included some notes of hand of the plaintiff's which the defendant held, and some moneys alleged to be loaned or not, is not very clear; I will refer to this again. I am satisfied, however, that this amount of indebtedness $371.63 was admitted, and that it was arranged that the plaintiff should give a charge on some property which he was entitled to, or which he expected under his mother's will, and that in pursuance thereof he, on the 24th October, 1896, executed exhibit No. 1 under his seal. This instrument, after reciting that, on the twentieth day of June, 1895, the lender (the defendant) advanced to the borrower (the plaintiff) the sum of two hundred and eight pounds, six shillings and sixpence, on his agreeing to execute to him whensoever called upon a charge upon his interest under his mother's will to secure the repayment thereof with interest thereon at the rate of five per centum per annum; and that the lender has called upon and requested the borrower to execute and give such security in the manner hereinafter mentioned, witnessed that, in consideration of the sum of £208 6s. 6d., so paid by the defendant to the plaintiff, the plaintiff covenanted to pay the defendant the said sum and interest at five per cent. from 20th June, 1895, on the first day of August then next; and if not then paid interest at the same rate on the principal on the 31st January and 1st August in each year: then charged the plaintiff's interest under his mother's will with the repayment of the same. The recital in this instance was untrue. The defendant never advanced or loaned the plaintiff £208 6s. 6d.; but this recital was not the result of misrepresentation or fraud; neither was it the result of accident or mistake. It was put in deliberately and intentionally so far as both the parties were concerned. The intention was to charge the plaintiff's interest under his mother's will with $1,000. This amount was paid by the plaintiff himself according to his own testimony and £208 6s. 6d. was inserted as representing

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$1,000. This document apparently was not satisfactory to the trustee under the will, and he requested or suggested that another instrument should be executed. Accordingly the plaintiff and defendant met at the defendant's suggestion and executed the instrument of the 9th May, 1898, set out in the sixth paragraph of the statement of claim. This instrument is also under seal, and recites that the plaintiff is indebted to the defendant in the sum of £208 6s. 6d. and, in consideration of the sum of £208 6s. 6d. advanced to the plaintiff by the defendant, charges the interest under the will. On the 29th July, 1898, the defendant received from the trustee of the will by virtue of the said charge £238 13s. 0d. clear of all payments and charges for collecting the same. The plaintiff claims that the instrument of 24th October, 1896, (exhibit No. 1), was in truth given to secure the plaintiff the settled account of $371.63 and interest, and that the balance of the moneys received by the plaintiff under the charge to be paid to him after satisfying such accounts. But he admits that, after executing that instrument, he instructed the defendant to pay his indebtedness to one James Fleming, to McCaul and Rigney and to one Coverton, and also to pay one Nugent $25; and that the defendant is entitled to charge against such balance the amount actually paid or allowed to those persons by the defendant in cash or in kind at its fair value. He claims that the instrument of 9th May, 1898, was in truth executed with identically the same object and for the same purpose as and in substitution for exhibit No. 1, and to carry out its intent, - and this is obviously true no matter with what intention No. 1 was executed—and that exhibit No. 1 was to have been destroyed or cancelled—and I also find this last menioned fact to be true. He also claims that there is a balance coming to him from the defendant out of the proceeds of the charge after payment of the defendant's account and the payments to Fleming, McCaul and Rigney Coverton and Nugent, and he asks for an account and the payment of such balance.

Judgment.
Wetmore, J.

The defendant claims that exhibit No. 1 was intended to absolutely assign and transfer to him for his own use and without any accounting the sum of £208 6s. 6d.; that the amount of $1,000 was made up (*a*) of the plaintiff's indebtedness to him on a store account, notes and otherwise, (*b*) the indebtedness of the plaintiff's brother to him, (*c*) Fleming's account against the plaintiff, which he had paid at the time of the execution of that instrument, and (*d*) that he was to settle with McCaul and Rigney and Coverton and William Young, also a creditor of the plaintiffs, on the best terms he could, and (*e*) have the benefit to himself of any margin he could get in so settling, and (*f*) that he was to settle with one Sherman, another creditor of the plaintiff as far as Sherman's account owing to the defendant would apply. Of course he claims that the instrument of 9th May, 1898, was executed in the stead of and to take the place of exhibit No. 1.

It is also claimed that the plaintiff is estopped, by reason of the recitals in these instruments and from the fact that these instruments purport on their faces to be absolute assignments, from setting up that they are not absolute assignments of the £208 6s. 6d. It was claimed on the part of the plaintiff that an estoppel did not operate because the action was not brought on either of the instruments but was collateral to them. I cannot accept that view. The action is brought to rectify the instrument of 9th May, 1898, and for an account of the moneys received under it, and an order for the payment over to the plaintiff of what is found coming to him out of such monies. *Fullerton* v. *Brydges*[2] is not an authority for the plaintiff on this point. In that case the recital, on which the alleged estoppel was set up, was not in the deed in connection with which the relief sought for was based; it was in another instrument collateral to that deed. The estoppel set up in this case is claimed by reason of the recital in the instrument itself. The general rule is that, as between the parties to an instrument under seal, the party making a recital is, in an action brought upon

[2] 10 Man. R. 431.

Judgment.
Wetmore, J.

the instrument with respect to a subject to which the recital has reference, estopped from denying the matter recited: See Taylor on Evidence, 9th ed., par. 97 and 98 and cases cited there. On the other hand there are many cases where a deed of conveyance absolute upon its face has been held to be merely by way of security and mortgage. The difficulty I have experienced is in view of what is laid down in *Howland* v. *Stewart*,[3] *Greenshields* v. *Barnhart*,[4] and *Matthews* v. *Holmes*,[5] as to the admissibility of parol testimony to establish that such a deed was given merely as security and as to the character of the testimony necessary to establish that such a deed was merely given for such a purpose.

In *Barton* v. *Bank of New South Wales*,[6] the deed in question was an absolute transfer on its face. Lord Watson in giving judgment speaks as follows:—"Undoubtedly the terms of the conveyance may be qualified by collateral evidence; but, in order to set aside the arrangement which the parties have assented to by executing and receiving the deed, very cogent evidence is required in a case like the present. When there is a simple conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply considerations for which the parties interchange such a deed; but when in the deed itself the reasons for making it and the considerations for which it is granted are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution;" and in that case it was held that the evidence adduced was insufficient to overcome the presumption that the deed truly stated the transaction. In *McMicken* v. *the Ontario Bank*,[7] Gwynne, J., states that in *Rose* v. *Hickey*, decided by the Supreme Court of Canada in 1880, it was held that the evidence, necessary to establish that the title as appearing in the written instrument is not in perfect accordance with the intention of the

[2] Grant Ch. R. 61. [4] 3 Grant Ch. R. 1; affirmed on appeal to P. C. 5 Grant Ch. R. 99. [5] 5 Grant Ch. R. 1. [6] 15 Ap. Ca. 379 at p. 380. [7] 20 S. C. R. 548 at p. 575, reported in the Court below 7 Man. R. 203.

Judgment. Wetmore, J.

parties, must be of the clearest, most conclusive and unquestionable character. The other judges in that case do not appear to have laid down any rule on the question. They merely held that the evidence in the case, assuming it to be admissible, was not sufficient to establish the fraud and misrepresentation alleged or that the conveyance was given as a mere mortgage or security. *Rose* v. *Hickey* has not been reported, but it is cited in Cassel's Digest at page 535, as decided 13th March, 1880, and it is there alleged that the Supreme Court held that parol evidence was admissible to show that a conveyance absolute in form was intended to take effect as a mortgage. I assume that the learned author, who was the Registrar of the Court as well, has correctly stated what the Court held. In view of what is contained in these cases the following must be taken as established law, namely:—That parol evidence is admissible to show that a conveyance absolute on its face was intended to take effect as a mortgage only; but that the evidence to establish this must be of the clearest, most conclusive and unquestionable character.

I draw attention to the fact that the instrument under consideration in this case resembles in one respect the deed under consideration in *Barton* v. *The Bank of New South Wales*,[a] namely in the instrument itself the reasons for making it and the considerations for which it is granted are fully and clearly expressed. In both instruments the reasons for making the grant or charge were set forth by way of recital. I must therefore hold that the plaintiff is not estopped from establishing by parol or collateral evidence, that the charge was not an absolute assignment of the £208 6s. 6d.; but such evidence must be strong enough to overcome the presumption that the parties in making the instrument have "truly set forth the causes which led to its execution."

I will now proceed to deal with that question. In the first place the recital in question in exhibit No. 1 is manifestly and clearly untrue. There is not even room for doubt on the subject. The defendant did not on the twentieth day of June, 1895, or at any other time, advance to the

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plaintiff £208 6s. 6d. or any sum nearly equivalent to that amount. It is true that the defendant swore that, when this instrument was signed, he produced some money, being the amount he was to pay persons entitled outside himself; but the plaintiff did not receive it. Assuming this to be true, it was all a pretence and it was understood that the plaintiff would not take it. It is equally clear that the expressed consideration in the instrument of the 9th May, 1898, of £208 6s. 6d., advanced by the defendant to the plaintiff is untrue. It seems to me that having got at the fact that the expressed reasons and considerations for making the instruments are untrue, the whole question is at large and that it is incumbent upon and the clear duty of the Court to ascertain, by evidence *dehors* the instruments, what was the consideration for making them and what was the intention of the parties; there is no other way in the world to arrive at these facts. Of course the difficulty now arises of getting at the truth. The parties are entirely at variance in their testimony. However, I think I begin to see a little glimmer of light. When the parties came to execute the instrument of the 9th May, 1898, according to the plaintiff, when the defendant asked him to execute the instrument he demanded something to shew that there was a balance coming to him, and in consequence the defendant wrote out and gave him the document put in evidence and marked "A," and then he signed the instrument. The defendant swore that this document was given after the instrument was signed. The defendant's testimony, with respect to this document and the circumstances under which it was given, and the purposes for which it was given, is by no means satisfactory. I therefore accept the plaintiff's version as to how it came to be given and when it was given, which seems more in accordance with the contents of the document; and I find that this document was given to the plaintiff practically at the same time that he executed the instrument of 9th May, 1898, and that as between the parties to this suit it formed part of that transaction. The document is dated 8th May, 1898, and is as follows:—"I undertake to hand over to Mr. William

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Boardman on receipt of the proceeds of mortgage in my favor all interest, discounts and margins I am able to obtain in settlement of accounts subsequent. To meet with and compare and settle up with the said William Boardman within a month from settlement."

The defendant gave a most extraordinary account as to how this document came to be signed. It was shewn to him when in the witness box, and he was able to explain how it came to be given and he testified as follows:—"After the solicitor of the estate wrote and asked me to get the plaintiff to sign another document, and to get him to write to his uncle and his sisters as they could not hear from him,I wrote the plaintiff and he eventually came to Broadview. When the plaintiff came to the second document he did all he could to evade signing it; he would not reply to my letters. After the signing of the charge of 9th May, 1898, he talked about *his other indebtedness* and asked me if I would assist him in getting it straightened out. I told him all my best endeavors would be at his service to assist him if he asked me and, if he placed funds at our disposal, that I would assist him and to obtain a settlement of all his subsequent accounts, and in consequence of that I signed the document exhibit 'A'." Now in looking at exhibit "A" it will be seen that it is utterly inapplicable to such an argument. No reference is made in it to funds to be placed at defendant's disposal and what he undertakes to do as to allowances for interest, discounts and margins and to settling up with the plaintiff is to be done on the receipt of the proceeds of the mortgage in his favor. There was no other instrument which the defendant held which could be considered a mortgage in his favor except the charge in question; and it is perfectly clear that the settlement of accounts mentioned in that document must refer to the accounts to which the proceeds of the charge were to be applied and not outside accounts. This is made somewhat clearer—if that is possible—by exhibit "B," a letter written by the defendant to the plaintiff in answer to a demand for an account, wherein he refers to certain payments which he made, all of which were, according to the

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defendant's testimony, those taken into consideration when exhibit No. 1 was executed, or according to the plaintiff's testimony, paid by his instructions after exhibit No. 1 was executed and before the execution of the instrument of the 9th May, 1898, and therefore embraced by the latter instrument under any circumstances, except a payment to one Sherman. I must say that the testimony so given by the defendant in connection with this exhibit "A" has very materially shaken my confidence in the credit to be given to his testimony.

The next matter of importance bearing on the question of the intention of this charge is the amount of the indebtedness of the plaintiff to the defendant at the time, and of that of the other creditors whom the defendant was to pay out of the proceeds of the charge, even assuming that any such creditors were specified when exhibit No. 1 was executed. As to the defendant's own account, there is no doubt that the plaintiff was indebted to him in $371.63; but whether there was any indebtedness outside of that amount is left in the most unsatisfactory state, especially so far as the defendant's testimony is concerned. The plaintiff states that when the amount of $371.63 was settled he considered that it included all his indebtedness to the defendant and he gave his reasons why he so considered, and he most emphatically stated that at that time he did not owe the defendant one dollar for outstanding notes.

The defendant's testimony, as to how the amount for which the charges were given was made up, is exceedingly contradictory and very vague and unsatisfactory. He stated at his examination for discovery that the plaintiff owed him $371.63 on store account and outside of that for borrowed moneys. In another part of his examination he stated he could not state how much was owing on store account, and in another place he says he does not know how the consideration for No. 1 was made up, except that there was the settlement of the account, whatever it was. At the trial he was not sure whether the $371.63 was all the plaintiff's indebtedness to him in notes or otherwise, and he did not know what the notes were which were taken into consideration at

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the time that exhibit No. 1 was executed. I have not really a particle of evidence before me that the defendant held at the time of the arrangement any note of the plaintiffs or any written document evidencing the loan of money other than these among the exhibits put in evidence. The defendant's lack of memory on the subject seems to be phenomenal almost. In his examination for discovery he stated at one place that an indebtedness of the plaintiff's brother to him was included in the charges. At the trial when called upon to state what was included in them he makes no reference whatever to such indebtedness. Then as to Young's claim against the plaintiff, at one time he swears that he is not sure that Young's claim was included in the arrangement, and at another time he swore that it was, and that the offer to pay Young was voluntary on his part, because Young, who was out of the country, was willing to accept anything and therefore it did not go in for anything. This was certainly a very generous proceeding on the part of a person who is getting an absolute assignment of the money in question, assumably as a fair equivalent for what was really due to him, and for what he was expected to pay to other persons. Seeing that Young's claim was said to be $100, and he had released no part of it, to say the least the defendant must have thought he had a pretty fair margin to warrant his fathering this claim in this way. In addition to all this,I accept exhibit "A," in view of the circumstances under which I have found it was given, as having the same effect as a bond or defeasance given at the time the instrument of 9th May, 1898, was executed, and making it obligatory on the defendant to account, and as pointing with great clearness to the fact that the instrument was only intended as a security. I therefore, in view of all the matters I have set out, come to the conclusion that both exhibit No. 1, and the charge of 9th May, 1898, were not intended to be absolute transfers of the moneys charged therein, but were only intended as security for the plaintiff's indebtedness to the defendant, and the moneys he was instructed to pay to other specified creditors of the plaintiff, and that the defendant is bound to account for such indebtedness and payments.

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The usual order under such circumstances would be to direct an account to be taken by some officer of the Court or person appointed by me; but it was stated at the trial that neither party had any further evidence to adduce if such a reference was made, and I was requested by the advocates on either side to make up the accounts and strike the balance on the evidence before me, and I will endeavor to do so.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

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## IN RE DEMAUREZ ESTATE.

*Appeal—Appeal for costs—Leave to appeal—Time to inscribe appeal—Delay—Enlargement of time.*

Rule 500 of the Judicature Ordinance (C. O. 1898 c. 21), provides that "no judgment given, or order made by the Court or Judge * * * as to costs only, which by law are left to the discretion of the Court or Judge, shall be subject to any appeal, except by leave of the Court or Judge giving the judgment, or making the order."

Rule 501 provides that "no appeal shall lie from the judgment or order of the Court presided over by a single Judge, or a Judge of the Court to the Court *in banc*, without the special leave of the Judge or Court, whose judgment or order is in question, unless, &c., but none of the exceptions embrace an appeal, from a judgment or order, as to costs only."

*Held*, that these two rules are independent of each other; that Rule 501 does not apply to an appeal as to costs; that by virtue of Rule 500, an appeal as to costs lies irrespective of any of the limitations contained in Rule 501, (1) *without* leave, where, by law, the costs are not—and (2) *with* leave, where, by law, the costs are—left to the discretion to the Court or Judge.

Where, therefore, the grounds of appeal were that the Judge had ordered costs to be paid out of a fund, out of which he had no power to order them to be paid.

*Held*, that leave to appeal was not necessary.

Time for inscribing appeal, and enlargement of time, discussed.

[*Court in banc, December 9th*, 1899.]

Demaurez made an assignment for the benefit of his creditors of all his property except what was exempt from seizure and sale under execution. The property consisted of a town lot on which were buildings and which was subject to a mortgage. The property was sold subject to the mort-

Statement.

gage under the direction of the Court, and realized $1,530. Demaurez opposed the sale, and an action had to be instituted by the assignee to eject him from the property. Demaurez claimed $1,500 out of the funds as his exemption. The trial Judge found that he was entitled to $1,500 out of the fund, but ordered the costs of all parties to be paid out of this $1,500. Demaurez gave notice of appeal, but was unable to perfect his appeal in time to have it inscribed and heard at the next sitting of the Court *in banc*. He applied to the Court *in banc* by notice of motion to have the appeal inscribed and heard at that sitting. The motion was opposed on the ground (among others) that an appeal did not lie without the special leave of the trial Judge, which leave had not been granted.

The motion was heard December 4th, 1899.

*J. Balfour*, for appellant.

*W. C. Hamilton*, Q. C., for respondent assignee.

*T. C. Johnstone*, for respondent creditors.

*N. Mackenzie*, for respondent lien-holders.

[*December 9th*, 1899.]

The judgment of the Court (ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ.) was delivered by

WETMORE, J.—This is an application on notice of motion to have an appeal on the part of Demaurez inscribed and heard at this sittings of the Court. The application must be refused as the appeal book has not been settled and consequently the practice of the Court has not been complied with. At the argument of this application there was considerable discussion as to whether the appeal would lie without the leave of the Judge who originally heard the matter, and we consider it advisable to express our opinion on the question. We are of opinion that it is not necessary to obtain such leave in this case. The proceeding was by originating summons before the Judge to administer a trust estate, and the substantial ground of appeal is that the Judge, as it is claimed by the appellant, ordered the costs

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of the creditors and assignee amounting to more than $500 to be paid out of a fund which was not part of the trust estate. Section 50 of the North-West Territories Act (R. S.C. c. 50) confers on this Court power among other things, to "hear and determine * * * all appeals or motions in the nature of appeals," and such jurisdiction will be exercised subject to the Rules of Practice prescribed by the Legislative Assembly of the Territories. For the purpose of discussing the question now under consideration, it is only necessary to refer to rules 500 and 501 of the Judicature Ordinance (C. O. 1898 c. 21). These rules are, in our opinion, entirely independent of each other. Rule 500 regulates the question of appeals from consent judgments and orders and as to costs. Rule 501 deals with appeals in other matters. So far as an appeal on the question of costs is concerned, Rule 500 provides that "No judgment given or order made by the Court or a Judge * * * as to costs only *which by law are left to the discretion of the* Court or Judge, shall be subject to any appeal except by leave of the Court or Judge giving the judgment or making the order." It will be observed that this leave is required when the judgment or order is as to costs only "which by law are left in the discretion of the Court or Judge." Reading this Rule together with the section of the Act which I have cited, the inference would be that where the appeal is from a judgment or order as to costs only which by law are *not* left in the discretion of the Court or Judge, leave to appeal would not be necessary. Rule 501 provides that no appeal shall lie from the judgment or order of the Court presided over by a single Judge, or of a Judge without leave except in certain specified cases, and none of the exceptions embrace an appeal from a judgment or order as to costs only. If the intention of the Assembly was that in no case should there be an appeal on the question of costs only without leave, then it was quite unnecessary to insert the provision as to costs in Rule 500. The whole matter would have been so provided for by Rule 501. We are therefore of opinion that the inference which we have stated would arise under

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Rule 500 if it stood alone, and was not intended to be taken away by Rule 501. Now the questions which the appellant seeks to raise by this appeal are: (*a*) That this is not an appeal from an order as to costs only, because behind it is the objection that the learned Judge directed such costs to be paid out of a fund which he had no right to order them to be paid out of. (*b*) That the Judge had no discretionary power to order them to be paid out of the fund.

Of course we express no opinion whether or not the grounds of appeal are well taken, we merely state that they are fairly open to the appellant and that leave to appeal is not necessary.

We are also of opinion that the appellant is not chargeable with such laches in this case as to deprive him of his right of appeal. It is true he was not prompt in giving notice of appeal nor in putting up the security, that is, he delayed doing either of these acts until the last moment. But this cannot be charged against him as laches; he had the right to take the time which the law and practice gave him to attend to these matters. We are not to judge as to what his reasons for doing so were. Possibly he could not make up his mind until the last moment to appeal. Possibly he could not at an earlier date raise the money to deposit for security. As soon as the deposit was made he seems to have shewn anxiety to press his appeal forward. He goes so far as to take the risk of getting his appeal book printed before it is approved, and he was thrown over in getting his appeal book approved by accidents and delays for which it seems to us he was not altogether responsible. We have no doubt that under the circumstances the learned Judge who made the order appealed against will, on application, enlarge the time for perfecting this appeal (and he is the proper authority to apply to for this purpose), and will so make the enlargement that if the advocates cannot settle the appeal book he will do it himself.

Now as to the cross appeal which the respondents' counsel suggested, we express no opinion as to whether or not it is open to him to cross appeal, inasmuch as he has

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not given notice of cross appeal within the time prescribed by Rule 504 of the Judicature Ordinance. If it is, it is yet open to him and the enlarging the time for perfecting the appellant's appeal will not deprive him of that right. We may suggest, however, whether it is not in the power of the Judge below under Rule 504, in the exercise of his discretion, even now to enlarge the time for the respondents to give notice of appeal if they desire to do so.

This application of the Court, however, must be dismissed, but under all the circumstances there will be no order as to the costs of this application.

*Application dismissed without costs.*

REPORTER:

Ford Jones, Advocate, Regina.

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## HUDSON'S BAY COMPANY v. BATTLEFORD SCHOOL DISTRICT.

## MACDONALD v. BATTLEFORD SCHOOL DISTRICT.

## CLINKSKILL v. BATTLEFORD SCHOOL DISTRICT.

*School Ordinance—Assessment and taxation—Debts—Situs—Domicil—Double Domicil.*

The School Ordinance C. O. 1898, c. 75, s. 131, s.-s. 2, interprets "personal estate" and "personal property" as including *inter alia* "accounts and debts contracted within the district"; and section 132 provides that "All real and personal property situated within the limits of any school district * * * shall be liable to taxation"—subject to certain exceptions and exemptions.

*Held*, WETMORE, J., *dissenting*, (against the objections, (1) that debts have no *situs*, and therefore cannot be situated anywhere; and (2) if they can have a *situs*, it is, in the case of a creditor being a person, his domicile; and of a corporation, the place of its head office); that choses in action, including debts, have a *situs*; that debts contracted within a school district are, for the purposes of taxation, situate within the district, and are assessable by the district notwithstanding that the creditor, if a person, has not his domicile therein, or if a corporation has not its head office situated therein.

The question discussed whether the *situs* of a debt is where the debtor resides; where the creditor resides; or where the evi-

dences of the debt are actually situated, or the records of the transactions, from which the debt arises, are kept.

*Per* RICHARDSON, J., (adopting the opinion expressed in Dicey's Conflict of Laws). Debts, choses in action and claims of any kind, must be held to be situate where the debtor or other person, against whom the claim exists, resides; or, in other words, debts and choses in action are generally to be looked upon as situate in the country, where they are properly recoverable and can be enforced.

*Per* ROULEAU, MCGUIRE and SCOTT, JJ. If the *situs* of a debt is the domicile of the creditor, a person as well as a corporation may have, if not for all, at all events, for some purposes, more than one domicile, namely: (1) At the head office of the corporation, and at the actual residences of the person; and also (2) where the business of the corporation, or person, is actually carried on; and, therefore, where the Hudson's Bay Company, whose head office is in London, England, carried on at Battleford an ordinary merchants business, and MacDonald, whose actual residence was in Winnipeg, Manitoba, also did the same, debts contracted to them at the Battleford places of business were, for the purpose of taxation, situated in Battleford.

[*Court in banc, December 9th*, 1899.

Statement.

The three appellants appealed to a Judge from decisions of the Court of Revision, confirming their respective assessments as to debts due them contracted within the school district. On the argument of the appeal it was admitted:—

1. That all the debts were contracted within the district;

2. That all the appellants had stores or agencies within the district where they carried on business;

3. That the headquarters of the H. B. Co. were outside the Territories;

4. That Macdonald resided outside the Territories, and

5. That Clinkskill resided within the district.

The Judge before whom the appeals were brought referred to the Court *in banc* the question whether, in view of the language of section 132 of the School Ordinance as to "accounts and debts" being taxable when "situated within the limits of the school district," these debts were assessable against the appellants respectively.

Statement

The reference was heard at Calgary, July 19th, 1899.

*R. B. Bennett*, for appellants.

*James Muir*, Q. C., for respondent.

Judgment was reserved.

[*December 9th*, 1899.]

McGuire, J.—This matter of these three appeals was referred by me to the full Court, the questions being whether the appellants could legally be assessed in Battleford in respects of debts. Taking up first the case of the Hudson's Bay Co., it was conceded that the "debts" were contracted within the school district, and that the appellants have a store or agency in the district and carry on business there, and that their headquarters are outside the Territories.

The question turns on the construction of sections 131 and 132 of the School Ordinance, appellants contending that "debts" have either no *situs*, and are therefore not "situate" within the district, or the *situs* is where the headquarters of the appellants are, and for this reason these "debts" cannot be said to be "situated within the limits of" the school district, and that only property so "situated" is assessable.

Assuming for the sake of argument that the appellants are correct that no property of any kind (other than income) is assessable unless *situated* within the district, it becomes necessary to enquire if these debts can be regarded as so "situated."

At the outset it seems to me to be beyond serious question that the Legislature intended "debts" to be assessable, for they include "debts" under the term "personal property," but limit them to "debts contracted within the district." This definition is in section 131, and from the place where it occurs it seems clearly to have been placed there in connection with the assessment of property, and for the purpose of declaring what should be included under "personal property," a term about to be used in the next

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section. If "debts contracted within the district" are not to be assessed at all, it would seem idle to have gone to the the trouble of declaring them to be included under "personal property." If, therefore, the words "situated within," etc., were not in section 132, I think there could be no serious ground for contending that such debts were as liable to be assessed as any other kind of personal property. But it is contended that it is only such personal property as is "situated" within the district that can be assessed, and that these debts, unless they can be shown to be so situated, are not assessable.

If, as the appellants contend, "debts" have no *situs*,— that, being intangible, they cannot have a *situs*,— then it seems to me the words "situated," etc., could not have been meant to apply to "debts" at all, and therefore being "personal property" they were assessable, this limiting phrase not applying so as to exclude them. One can hardly imagine the possibility of a legislative body intending that a certain class of property should be taxable, and in the next breath using words of limitation which would from the very nature of the thing entirely defeat this intention. It is a well-known rule in conveyancing that an exception out of the property conveyed must not be repugnant to the grant so as to take away all benefit from it; thus if land were granted except the profits the exception would be void. If the word "situated" means having a locality as a tangible or otherwise cognizable entity, and as it would be assumed that the legislature must have known that "debts" could not be "situated" in that sense, one must come to the conclusion that either it intended to defeat the evident purpose of its own language in section 131 (and if the above rule as to grants applied, the limitation would be repugnant and void), or that the word "situated" was meant to apply only to such property as could have a "local habitation," and therefore not to "debts."

If, however, "debts," *i.e.*, choses in action, can be "situated," using the word in a sense in which it can be applied to the subject matter, let us see if the "debts" here

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assessed can be regarded as having a *situs*, and, if so, is such *situs* within the school district. On a consideration of what has been said on the subject, I think it is agreed that choses in action have a *situs*, but there has existed much conflict of opinion as to where that *situs* is. Prof. Dicey in his Conflict of Laws, p. 318, says that property where it consists of "debts or choses in action may be held to be situate at the place where it can be effectively dealt with," and he comes to the conclusion that "debts * * * must be held situate where the debtor * * * resides; or, in other words, debts * * * are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced." Others, again, hold that choses in action are situate where the creditor resides (Phillimore's Private International Law, p. 586), and this is the view which prevails in the United States Courts. For this view the maxim *mobilia personam sequuntur* is cited. It is urged, too, that debts can in no sense be situated where the debtor resides, but that, being the property of the creditor, they follow his domicile. In Burroughs on Taxation considerable space is devoted to this question, and the conclusion there drawn is that evidences of debt, *e.g.*, state stocks, bonds of municipal corporations * * * and indeed all negotiable instruments, * * * are taxable where the evidence of the debt is actually situate, but that debts not negotiable are taxable where the owner resides, subject to this proviso, that where a person residing in one State has an agent in another who loans or invests money for him and holds the evidences of debt, and so invests the proceeds of the loans when collected in the same State, it is held then to be taxable at the residence of the agent.

It seems to me that if negotiable paper is taxable where it happens to be, debts, a record of which is kept in the books of the creditor, should be assessed where these books are kept. For while it is quite true that, strictly speaking, a merchant's books are not *per se* evidence of the accounts kept in them (with some exceptions), the same may be said

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of a promissory note or a bond, for these do not *per se* prove themselves or the debt represented by them; a witness must be produced to prove the signature, delivery, etc. And it is certain that a merchant's books are in fact a very important, and, in most cases, an indispensable means of establishing his claims. Let a merchant's books be accidentally destroyed and their importance as evidence will be obvious.

In the present case the books of the appellants, in which are kept a record of the debts assessed by the respondents, were in Battleford within the school district.

If, however, choses in action are to be deemed situate at the domicile of the creditor, then we must consider whether the appellants have, *quoad* the Battleford branch of their business, a domicile at Battleford. Appellants contend that their domicile is at their headquarters in London, or possibly at their Canadian headquarters in Winnipeg. It is, I think, well established now that corporations may have more than one domicile, and that when a company or corporation transacts the practical part of its business in a place different from where it is registered, or where its directors meet and which may be called its headquarters, the former and not the latter place may be regarded as its domicile. In the *Keynsham Blue Lias Lime Co.* v. *Baker*,[1] the plaintiffs' head office was in London, and they were registered there and their meetings were held there, but their manufactory and where they sold their goods was elsewhere. It was held that their domicile was at the latter place. Bramwell, B., said: "The question is, where did this corporation carry on its business? It seems preposterous to suppose they carried it on elsewhere than where they made and sold the article for the price of which this action was brought, and that is at Keynsham. I think London was merely the place where the directors met, but not where the business was carried on." Channell, B., agreed "that where the parties carry on their business, and not where they meet

[1] 2 H. & C. 729; 33 L. J. Ex. 41; 9 Jur. (N. S.) 1346; 9 L. T. 418; 12 W. R. 155.

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for the purpose of convenience, is the place to be looked at in this case."

Now, in the case of the Hudson's Bay Co., where do they carry on their business—at London, where the directors meet, or at their various places of business in Canada?

That a corporation may have more than one domicile is established by *Newby* v. *Van Oppen*,[2] discussed and followed by the Court of Appeal in *Haggin* v. *Comptoir d'Escompte de Paris*.[3] The proposition was distinctly laid down by Lord St. Leonards in *Carron Iron Co.* v. *Maclaren*,[4] and was followed in *Newby* v. *Van Oppen*.[2] The authority of this latter case has never been questioned. The defendant company had its headquarters in America, and was incorporated there and not in England, but it had a branch business in England, though the manager of this branch was required to refer all contracts to the American headquarters for approval.

Lord St. Leonard's language in *Carron Iron Co.* v. *Maclaren*[4] is quoted as follows: "If the service on the agent is right, it is because, in respect of their house of business in England, they had a domicile in England and in respect of their manufactory in Scotland they have a domicile there. There may be two domiciles and two jurisdictions * * * and for the purpose of carrying on their business one is just as much the domicile of the corporation as the other." This view is the one adopted in *Newby* v. *Van Oppen*.[2] In Thompson on Corporations, it is said that Lord St. Leonard's view is also accepted in the United States.

To apply the principle laid down in *Newby* v. *Van Oppen*[2] to the present case—The appellants have their headquarters outside the Territories, but they carry on substantial portions of their business at different points in Canada, and one of these points is at Battleford; they have for years had a fixed place of business there with a manager and a staff of clerks—not a mere agency and an agent to

[2] L. R. 7 Q. B. 293; 41 L. J. Q. B. 148; 26 L. T. 164; 20 W. R. 383. [3] 23 Q. B. D. 519; 58 L. J. Q. B. 508; 61 L. T. 748; 37 W. R. 703. [4] 5 H. L. Cas. 416; 24 L. J. Ch. 620; 3 W. R. 597.

Judgment.
McGuire, J.

take orders or to deliver goods or otherwise carry out business transacted substantially at Winnipeg or London, nor is this branch of a transient character, but doing its business as the Hudson's Bay Company—buying, selling and carrying on all the business of a local merchant. It seems to me that the appellants have a domicile at Battleford in respect of their business there, and that if choses in action are to be deemed situate at the domicile of the owner, then, *quoad* the debts arising out of the business of the company at Battleford, and which were assessed there, and at least for the purpose of taxation the *situs* of such debts was at Battleford.

I might add that, taking some of the other tests of *situs* already alluded to, as far as they go they confirm the conclusion I have arrived at. The books, in which these debts are recorded, are kept and are situate in Battleford; and Battleford is the place where these debts would properly be recoverable, rather than in London or Winnipeg; actions to recover these debts would properly be commenced and carried on and tried in Battleford.

It was argued by way of a *reductio ad absurdum* that to hold that all debts contracted within the school district are assessable would result in this: A wholesale merchant resident in Montreal chances to meet in Battleford a retail dealer residing in Edmonton, and while in Battleford sells him a bill of goods on credit—this would be a debt contracted in Battleford and so assessable! I do not think that so wide a proposition as in the above hypothesis could be maintained, nor do I think it was ever sought to be upheld. But the facts in this example differ materially from the facts under consideration in this appeal. If the Montreal wholesale merchant, instead of casually visiting Battleford, had a branch store and business there and was in fact actually carrying on there a portion of his wholesale trade, and he there sold on credit the goods to the Edmonton merchant, the absurdity seems to me to be eliminated.

On the other hand, let us see the contention of the appellants. Because their headquarters happen, for their con-

venience, to be in Winnipeg or London, they can do business in Battleford and enter into contracts in respect of their business there and in every respect practically act just as a local merchant could, and yet escape paying a portion of the taxes which the local merchant doing the same kind of business "across the street" must pay. Would that be a just and equitable imposition of taxes—would that not be giving a substantial advantage to the non-resident?

I have come to the conclusion that choses in action including debts have a *situs*, and may be said to be "situated" in some place; that the debts contracted within the school district of the respondents and assessed as against the appellants were, for purposes of assessment and taxation, "situated" within the limits of said school district, and that the appeal should be dismissed, but without costs.

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MACDONALD V. BATTLEFORD SCHOOL DISTRICT.

This case differs from that of the Hudson's Bay Co.'s appeal in that here the appellant is an individual, and not a corporation, and personally living in Winnipeg, but having, like the Hudson's Bay Co., a store and business place in Battleford, with a manager and a staff of clerks carrying on business there in his name.

The same reasoning by which I arrived at the conclusion that for the purposes of taxation the Hudson's Bay Co. must be regarded as having a domicile at their place of business in Battleford applies also to the present case. For the purpose of the case it may be treated as if the appellant while having his personal residence at Winnipeg had his whole business at Battleford. Sir James Hannen in *Laidlay* v. *Lord Advocate, etc.*,[5] says: "I cannot recognize as sound that the fact that an individual * * * who, owning a business, carried on in India, resides it may be from time to time in different countries, and can from any of those countries control the action of his agents who are

[5] 15 App. Cas. 468.

Judgment. McGuire, J.

carrying on his business for him, transfers the locality of that business from time to time to the particular country in which he happens to reside and from which his orders to his agents would emanate." Mr. Macdonald's business is carried on at Battleford, and the debts in question are part of that business, and, so far as debts can have a *situs*, must be regarded as situated where the business is situated. Mr. Macdonald may have other business places and different kinds of business, but I do not think that would affect this question so far as the particular business carried on at Battleford is concerned, or the debts immediately connected with any part of that business. He may control many units of business from some point distant from the localities of all these units, yet I think it is not doing violence to language to say that each unit is situate where it is carried on and that the debts part of that business are situate there. The other indicia of locality mentioned in the other appeal exist here also—the books which contain a record of these debts are kept at Battleford, and it is at Battleford that properly proceedings could and would be taken to recover the debts contracted at Battleford and the proper place for payment of such debts would be the appellant's store at that point.

I think the appeal in this case should also be dismissed, but without costs.

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CLINKSKILL V. BATTLEFORD SCHOOL DISTRICT.

In Clinkskill's case the only question is as to debts having a *situs* at all, for here the appellant both personally resided and carried on his business within the school district. For the reasons already given, I think they have a *situs* and may properly be said to be situated within the limits of the respondent's school district. The appeal should be dismissed without costs.

ROULEAU and SCOTT, JJ., concurred.

Judgment.
Richardson, J.

RICHARDSON, J.—At the sitting of the Court *in banc* at Calgary in July, 1899, the following question was referred by Mr. Justice MCGUIRE, which had arisen in three several appeals from the court of revision of the 1899 assessment of the Battleford Public School District, namely: —Whether or not, in view of the language of section 132 of the School Ordinance as to "accounts and debts" being taxable when "situated within the limits of the school district," debts contracted and due to the appellants, who have stores or agencies in the district, where they carry on mercantile business, are assessable as against the appellenats.

In his reference the learned Judge points out that one of the appellants, Mr. Macdonald, is a non-resident, but operates through a resident agent a mercantile establishment within the district, and that another of the appellants, the Hudson's Bay Company, is a foreign corporation also carrying on mercantile business through an agent, residing and operating their establishment within the district, while the third appellant, Mr. Clinkskill, is a merchant who resides and carries on business within the school district.

The question submitted and on which Mr. Justice MCGUIRE asks by his reference to be advised, involves the question of what was the interpretation of the word "situated" used in section 132 intended by the Legislature in passing the Ordinance.

This is to be gathered not by taking section 132 independently of every other portion of the Ordinance, but by the scope of the whole law.

This section 132 enacts that "all real and personal property situated within the limits of any school district * * * shall be liable to taxation," subject to certain provisions and exemptions defined, none of which have any reference to accounts and debts or either.

What is personal property is defined by section 131, which enacts that the words "personal property shall include * * * accounts and debts contracted within the district at their actual value."

Judgment.
Richardson, J.

Referring then to the Ordinance, section 72 imposes the duty upon trustees to "(7) make such assessment on the real and personal property of the district, and levy such taxes as may be necessary to defray all lawful expenses and liabilities of the school district for the year, or that part thereof for which such taxes are required to be levied;" and section 130 the preparation of an assessment roll in which shall be set down a list of all the property taxable for their school in the district, such list to contain in one line but in different columns certain fixed information; such as

(2) Name of owner.

(4) Description of taxable personal property,

and it is under this heading that the assessments appealed from are made.

It was strenuously contended on the part of the appellants that accounts and debts due a merchant can have no *situs*, and therefore cannot be held to be situated anywhere, and consequently are not taxable.

The Ordinance, however, has defined the words "personal property" when used in it to include accounts and debts contracted within the school district, and if the appellants' contention were supported, the effect would be that, notwithstanding all personal property except the specific exemptions is to be taxable, such portion as consists of accounts and debts contracted within the district are to be exempted and thus escape taxation.

Had the Legislature so intended they would have excluded the expression from the definition in section 131, or used words to clearly indicate the exemption claimed.

The following extract from Mr. Dicey's work on the Conflict of Laws, page 318, seems directly in point, where it is laid down as a general maxim that: "Whilst lands and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides, or, in other words, debts and choses in

action are generally to be looked upon as situate in the country where they are properly recoverable and can be enforced." Judgment. Richardson, J.

In my opinion the Legislature when using the expression in section 132 "personal property situated" intended them (applied to accounts and debts contracted within the school district) to limit the assessment to those which, at the time of making the assessment, were capable of enforcement within the jurisdiction within which the school district lies.

Mr. Justice McGUIRE should be advised to reject the three appeals.

WETMORE, J.—I see no reason for altering the opinion expressed in my judgment delivered on 17th June, 1898, in the *Hudson's Bay Co.* v. *Battleford School District*, copies of which have been placed in the hands of my brother Judges, except so as to qualify the concluding sentence of that judgment by suggesting that the debts are situated, as therein suggested, "for the purposes of taxation.' The introduction of the words "contracted within the district" into sub-section 1 of section 128 of the School Ordinance in 1896, does not, in my opinion, affect the question. Under the provisions of section 130 of that Ordinance, as amended by section 34 of Ordinance No. 5 of 1897, property must be situated within the limits of the school district in order to render it liable to taxation. These provisions were respectively carried forward into sections 131 and 132 of chapter 75 of the Consolidated Ordinances. Section 131 of the last mentioned Ordinance is simply a defining section. Section 132 is the one that really gives the power to tax, and it provides that the property liable to taxation shall be situated within the limits of "the school district." It was very strongly urged at the argument that a liberal construction should be put on these words. I know of no rule of construction which would authorize the practical elimination of these words from the section, especially in a taxing ordinance. The words are capable of a clear meaning, and the intention is that a ratepayer shall only be taxed in

Judgment.
Wetmore, J.

respect of his property which is actually *situated* in the district, and those words cannot be so construed as to embrace one description of property and not another, that is, to embrace tangible property and not to embrace intangible property. They are too general to be so construed.

It has been urged that the authority to tax is given by sub-section 7 of section 72 of the School Ordinance and will support the assessment. I cannot give effect to that contention. Section 72 defines the general duties of the board of trustees, but when a subsequent section like section 132 points out the manner in which and the extent to which such powers must be exercised it must be complied with; the board can go no further.

The question is were any of the debts in question situated within the limits of the school district? I think that the rule is correctly laid down in 25 Am. & Eng. Encyclopædia of Law, p. 146, as follows:—"Debts in general—The general rule is that debts follow the person of the creditor, and are to be taxed at his domicile." The maxim *mobilia sequuntur personam* applies, and were it not for the limitation in section 132 restricting the right to tax the property situated in the district, I would be inclined to think that all the personal property of a resident of the district wherever situate would be taxable. For the purposes of taxation the *situs* of a debt is, in my opinion, where the creditor resides, and not at a place where he has established an agency or is carrying on business. Take the appellant, Macdonald, for instance. He resides out of the Territories, we will say at Winnipeg. Now he would, unless there is some special legislation in Manitoba to the contrary, be on general principles liable to be assessed in Winnipeg in respect of debts contracted in his favor at his place of business at Battleford. Now, while I have no doubt that legislation could be so framed as to render him liable to assessment and taxation in both places with respect to such debts, I am equally clear in my own mind that he ought not to be made liable to a double taxation, or what *might* be a double taxation, without clear statutory authority to warrant it. It

Judgment.
Wetmore, J.

has been said that section 128 of the Ordinance of 1896 was amended by inserting the words "contracted within the district" in view of my judgment which I have before referred to, and with the very object of rendering such debts taxable that I held not to be taxable. Assuming that to be the fact, the question then arises has the Legislature used apt words to effect such intention? If it has not, the Court cannot assist. In *Brophy* v. *Attorney-General of Manitoba*,[6] the Lord Chancellor lays down the following at p. 215: "It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said." It was also urged that unless the construction contended for on behalf of the trustees is given to the sections of the Ordinance in question, the amendment so made to section 128 of the Ordinance of 1896 will have no meaning at all. I am not prepared to admit that at all. I have very grave doubts if the words so introduced are not words of limitation, restricting the right to assess in respect to debts to such debts only as are contracted in the district. It is not necessary, however, to decide that, as the question was not raised either by the reference or at the argument.

I am of opinion that my brother McGuire should be advised that the assessment against Clinkskill is valid, but those against Macdonald and the Hudson's Bay Company are bad.

*Referring Judge advised to dismiss all three appeals without costs.*

Reporter:

Ford Jones, Advocate, Regina.

[6] (1895) A. C. 202; 64 L. J. P. C. 70; 11 R. 385; 72 L. T. 163.

## IN RE LAND TITLES ACT AND LILLIS.

*Land Titles Act, 1894—Application to bring land under Act—Uncertainty in description of lands.*

A deed in which the land is described as a certain parcel of land "saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others" is, unless supplemented by conclusive evidence of the full extent of the exceptions, too uncertain to justify the Registrar in acting on it on an application to bring the land under the Land Titles Act, 1894.

[*Court in Banc, December 9th, 1899.*

Statement. Lillis duly applied to have the south half and north-west quarter of 26-15-5, west, second meridian, except lots 17, 18, 19, 20 and 21 of Dennis, Sons & Company's survey of the said lands, brought under the application of the Land Titles Act, 1894, and with his application tendered:

(1) A deed of the south half and north-west quarter of 26-16-5 west, second meridian, from the H. Bay Co. to P., dated September 19th, 1882, and registered September 30th, 1882.

(2) An exemplification of the probate of the last will and testament of P., and of the grant of letters testamentary thereof to his wife, the executrix, from which it appeared that P. devised and bequeathed all his real and personal estate to his said wife absolutely.

(3) A quit claim deed dated October 12th, 1897, from B.'s wife, executrix of the last will and testament of P., to B. of the south half and north-west quarter of 26-16-5 west, second meridian, "which said lands and premises have been subdivided into blocks and lots by Dennis, Sons & Company, land surveyors, which said plan of survey is duly filed in the proper registry office in that behalf as plan No. (*sic*),

Statement.

saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others," and

(4) A quit claim deed dated October 28th, 1897, from B. to Lillis, in which the land was described in all respects and with the same exceptions and reservations as in the deed last mentioned.

The abstract of title shewed a memorandum of the following instruments affecting the title to the south half and north-west quarter of 26-16-5 west, second meridian:—the deed first above numbered, quantity of land 480 acres; a plan dated September 11th, 1882, and registered December 30th, 1882, described in the abstract as "addition to Broadview, P.'s survey," and numbered 264; a certificate of title dated April 9th, 1894, to A. of lots 17 to 21 inclusive in block 9.

The registrar forwarded the application to WETMORE, J., under the provisions of section 43 of the Land Titles Act, 1894. Upon application on behalf of Lillis, WETMORE, J., on May 26th, 1899, directed that notice of an application to be made on Lillis' behalf to a Judge in Chambers on July 21st, 1899, for an order directing the registrar to issue a certificate of title to Lillis for the south half and north-west quarter of 26-16-5 west, second meridian, excepting therefrom lots 17 to 21 inclusive in block 9, according to a plan duly registered in the registry office at Regina as No. 264 should be given by publication and posting. Notice was given as directed and at the time and place specified therein counsel appeared for Lillis. No person appeared for any other person interested.

WETMORE, J., referred the application to the Court *in banc* under the provisions of section 140 of the Land Titles Act, 1894.

The application was heard December 4th, 1899.

*J. Balfour*, for applicant.

No one *contra*.

Judgment.

McGuire, J.

[*December 9th, 1899.*

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ.) was delivered by

MCGUIRE, J.—This is an application by Mr. Balfour on behalf of Michael Lillis to bring the south half and the north-West quarter of section 26 in township 16, range 5, west of the second meridian, except lots 17 to 21 inclusive of Dennis, Sons & Company's survey of the said lands under the operation of the Land Titles Act.

The registrar of the Assiniboia Land Registration District referred the application to Mr. Justice WETMORE who has, under section 140 of the Land Titles Act, referred the matter to the Court *in banc.*

The difficulty which stands in the way of allowing said application arises in this way:—

In 1882 the Hudson's Bay Co. by deed conveyed to one Peggott the whole of said half and quarter section. In 1897 Peggott by quit claim conveyed to one Bowen the said land *saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others.* A few days later Bowen by quit claim conveyed to the present applicant Michael Lillis, describing the property in all respects and with the same measurements, exceptions and reservations as in the deed from Peggott to Bowen.

The effect of these two instruments would be to pass to Lillis the title of Peggott to said half and quarter section, excepting any lots or blocks that had been deeded to others prior to the deed from Peggott to Bowen, and excepting also any lots or blocks which had been deeded to others prior to the deed from Bowen to Lillis.

The applicant concedes that lots 17 to 21, both inclusive, had been so deeded to others and were therefore excepted, and he makes no claim to these. But there was nothing before Mr. Justice WETMORE nor is there before this Court, to show that Peggott or Bowen may not have deeded other lots or blocks to others prior to the date of the quit claim deeds given by them respectively, and if it

should turn out that they had done so, then such lots or blocks would not have passed by said instrument, since they purport to convey only so much of said land as had not been so deeded to others. Judgment. McGuire, J.

A notice of the application and of the time and place it would be heard by Mr. Justice WETMORE was directed to be published in five issues of the "Glenfell Sun," and to be posted up in six places in Broadview, in order that persons having interests adverse to the applicant might come in and oppose the application. No adverse claimants appeared. Now the fact that no one appeared, in pursuance of said notice, to oppose the application, does not by any means prove that no lots or blocks other than those admitted by the applicant had been deeded to others prior to the dates of said respective quit claim deeds. The instruments themselves afford no means of ascertaining what lots or blocks were excepted from said instruments, and there was no evidence offered to show how many or what lots or blocks had been so deeded.

It is possible that evidence may exist somewhere to show what these lots or blocks may be, but until that evidence is forthcoming it is impossible to say what land the applicant became entitled to; that is to say, the description is left so vague and indefinite that unless it can be supplemented by exclusive evidence the quit claims on which the applicant relies would be void for uncertainty.

This is a rudimentary proposition of law and an instance of its application may be found by reference to *Pearson* v. *Mulholland*.[1] There a tax sale deed, which purported to convey to the purchasers "forty-five acres of the south half of lot 17," etc., without any words to indicate what particular forty-five acres were intended, was declared to be void for uncertainty.

In the present case it is obvious that owing to the uncertainty as to what lots or blocks are excepted, it is impossible to say of any single lot that it is part of what was intended to be conveyed to Lillis.

[1] 17 Ont. Rep. 502.

Judgment.
McGuire, J.

It therefore follows that upon the evidence at present before the Court the title of the applicant is so uncertain that the registrar should be, and he is hereby directed to refuse said application.

*Registrar directed to refuse application.*

REPORTER:

Ford Jones, Advocate, Regina.

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## THE QUEEN v. CADDEN.

*Criminal law—False pretences—False pretence not actually made by accused himself but in his presence.*

A person who does not otherwise make a false representation himself, but who is present when it is made, knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences.

[*Court in banc, December 9th, 1899.*

This was a Crown case reserved by WETMORE, J. The accused was charged before him, first, with having on January 25th, 1898, unlawfully and with intent to defraud by false pretences, obtained from Dorothy Mapleton a sum of money, to wit $14.95, and, second, with having on the same day unlawfully and with intent to defraud by false pretences through the medium of David J. O'Keefe, obtained from Dorothy Mapleton a sum of money, to wit $14.95. The accused pleaded not guilty and was tried in a summary way and was convicted.

The facts were found by the trial Judge as follows:—

One David J. O'Keefe brought an action under the small debt procedure against Dorothy Mapleton, and a summons was issued under that procedure on December 8th, 1897. The claim was for $35.95 for goods sold and delivered and interest until judgment, and there was a memorandum on the writ of summons that the plaintiff's claim was $35.95 and interest, and that the costs (exclusive of

sheriff's fees) were 85 cents, and judgment by default was duly signed for debt $35.95, costs $1.35 and interest 18 cents; total $37.48. The costs included in the judgment were made up of clerk's fees for summons and copy 85 cents, and sheriff's fees for service of summons 50 cents. On January 21st, 1898, an execution was issued on this judgment against Dorothy Mapleton, and was delivered the same day by David J. O'Keefe to accused, who was the bailiff of the deputy sheriff, but who had no authority to execute a writ of execution unless a warrant to do so was issued to him signed by the deputy sheriff. The writ of execution in question never passed through the deputy sheriff's office or came to his knowledge, and no warrant was ever issued to accused to execute it. The writ of execution was indorsed with a direction to the deputy sheriff to levy, in addition to the amount of the judgment ($37.48) and poundage and incidental expenses, 50 cents for clerk's fee for entering judgment, and 50 cents for clerk's fee on issuing execution. On the evening of January 25th, 1898, the accused met Dorothy Mapleton and produced the execution in question and threatened to go out to her place about thirty miles distant the following day and seize under the execution. She informed the accused that she had sent the money by post office order to the deputy clerk of the Court, and warned him that if he went out to her place and seized he would do so at his peril. The accused persisted in his threat to go to make the seizure. Dorothy Mapleton had, in fact, forwarded to the deputy clerk $36.80, which was the amount of the claim and costs as appeared by memorandum on the writ of summons, and this amount was received by the deputy clerk on January 25th, 1898. Statement.

In consequence of accused persisting in his threat to go out and seize, Dorothy Mapleton went to the residence of O'Keefe the same evening in order to induce him to prevent the accused going out to seize. She then informed O'Keefe that she had sent the $36.80 to the deputy clerk. O'Keefe was satisfied that she had remitted this money as stated, and recognized it as a payment properly made on

Statement

account of the judgment. He refused, however, to withdraw the execution, claiming that there were more expenses attached to it and that there were more costs to pay, and he stated that such costs would probably be about $15. Dorothy Mapleton then requested O'Keefe to go with her and ascertain what the amount of these costs were and she would pay them under protest. They accordingly started out together; she going to her boarding house and O'Keefe going in search of accused. Shortly after this and on the same evening O'Keefe and the accused appeared at Dorothy Mapleton's boarding house and saw her there. O'Keefe, in the presence and hearing of accused, told her that she had $14.95 more costs to pay, and she paid the amount to O'Keefe in the presence of the accused. The accused and O'Keefe then left the boarding house and O'Keefe paid the accused $10, a portion of the $14.95 so received by him from Dorothy Mapleton.

At the time this representation was made to Dorothy Mapleton and she paid the $14.95, there was $1.68 actually due her under the execution, and the amount exacted from her was therefore $13.27 more than she was legally liable to pay.

O'Keefe knew, when he made the representation that there was $14.95 costs to pay, that accused had not made any seizure under the execution, and he and the accused both knew that no fees or costs were payable under the execution for sheriff's fees, and that the only amount really payable by Dorothy Mapleton was the difference between the amount paid by her to the deputy clerk and the amount of the judgment with clerk's fees of signing judgment and issuing execution added. O'Keefe's statement to Dorothy Mapleton that she had $14.95 more costs to pay was absolutely false, and it was known to both O'Keefe and to the accused to be false and was made with the fraudulent intent on the part of both O'Keefe and the accused to induce her to act upon it. The statement constituted the false pretence upon which accused was found guilty and convicted. There was no evidence whatever that the ac-

cused himself made this false statement to Dorothy Mapleton. On the contrary, the evidence was that it was made by O'Keefe and not by him. There was no *direct* testimony that the accused instigated O'Keefe to make the false statement. O'Keefe swore that the whole $14.95, which he stated to Dorothy Mapleton was payable, was made up of sheriff's fees which the accused represented were payable, and that accused had given him a statement in writing showing how this amount was made up, which statement he had lost. The trial Judge did not believe O'Keefe as to this, but stated that there was no evidence produced which satisfied him as to what took place between O'Keefe and the accused between the time that Dorothy Mapleton and O'Keefe separated and the time that O'Keefe and the accused appeared at her boarding house, but he inferred that the accused was a party to the false pretence and to the fraudulent intent from the facts that he appeared at her boarding house with O'Keefe ; that he heard the false statement made ; that he knew it was false ; that he saw Dorothy Mapleton pay the money and O'Keefe receive it ; and that he received part of what was paid from O'Keefe. Statement.

The following questions of law were reserved for the opinion of the Court :—

(1) Was the false statement so made by David J. O'Keefe to Dorothy Mapleton, upon which the conviction was made, under the circumstances a false pretense within the meaning of section 358 of the Criminal Code, 1892 ?

(2) If it was, was the accused liable to conviction inasmuch as he did not himself actually make such false statement to Dorothy Mapleton ?

(3) Was the trial Judge justified in law in finding that accused was a party to the making of such false statement to Dorothy Mapleton, and that it was made with a fraudulent intent on his part ?

The case was argued December 4th, 1899.

*L. Thomson*, for the Crown.

No one for the accused.

Judgment was reserved.

Judgment.

Rouleau, J.

[*December 9th, 1899.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ.) was delivered by

ROULEAU, J.—(after setting out the facts as above) What is a false pretence? A false pretence is a representation either by words or otherwise of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation. (Crim. Code, s. 358.)

According to the facts of this case there cannot be any doubt that a false representation was made by O'Keefe to Dorothy Mapleton as to the amount of money still due, and that he made that representation for the purpose of obtaining fraudulently a sum of money which he knew was not due, and that the said false representation was made to induce Dorothy Mapleton to pay the said sum of money.

In *Reg.* v. *Woolley*[1] it was decided that the secretary of an Odd Fellows' Lodge, whose duty it was to receive money for the members at lodge hours, but not at other times, was guilty of false pretence because he falsely represented to one member that he owed a sum of 13 shillings and 9 pence, which he made him pay, while he owed only 5 shillings. Alderson, B., said, "If a man represents as an existing fact that which is not an existing fact and so gets your money, that is a false pretence." Lord Campbell remarked, "It seems that the Legislature meant to prevent such gross frauds as may easily be perpetrated, though an enquiry might easily be made."

Therefore I have no doubt that the first question should be answered in the affirmative.

But it was contended that if O'Keefe was guilty of that offence, Cadden, the accused, could not be convicted, because it is of evidence that he never made any false representation to Mapleton.

[1] 3 Car. & K. 98; 1 Den. C. C. 559; T. & M. 279; 4 New Sess. Cas. 341; 19 L. J. M. C. 165; 14 Jur. 465; 4 Cox C. C. 193.

Judgment.

Rouleau, J.

Although there is no evidence that he made any false representation himself, still it was found by the learned trial Judge that he was present when the false statement was made, that he knew it to be false, and that he got part of the money so fraudulently obtained. In *Reg.* v. *Young*, [2] where several persons were indicted for obtaining money under false pretences, it was objected that although they were all present when the representation was made to the prosecutor, yet the words could not be spoken by all, and one of them could not be affected by words spoken by another, but that each was answerable for himself only, the pretence conveyed by words being, like the crime of perjury, a separate act in the person using them. The Court of King's Bench, however, held, that as the defendants were all present, acting a different part in the same transaction, they were guilty of the imposition jointly.

It has been laid down as a principle in *Reg.* v. *Moland* [3] and in *Reg.* v. *Kerrigan*,[4] that on an indictment for obtaining money under false pretences, a party who has concurred and assisted in the fraud may be convicted as principal, though not present at the time of making the pretence and obtaining the money.

It seems that the above authorities are very much in point with this case, so that the accused, Cadden, was liable to conviction, and the learned trial Judge was justified in law in finding that Cadden was a party to the making of such false statements to Mapleton, and that it was made with a fraudulent intent on his part. The two last questions are therefore answered in the affirmative.

*All three questions answered in affirmative.*

REPORTER :

Ford Jones, Advocate, Regina.

[2] 1 Leach, C. C. 505; 2 East, P. C. 82, 833; 3 Term Rep. 98. [3] 2 Moody C. C. 276. [4] L & C. 383; 33 L. J. M. C. 71; 9 L. T. 813; 12 W. R. 416; 9 Cox C. C. 441.

## THE QUEEN v. PACHAL.

*Criminal law — Cattle stealing — Trial by jury, right to — N. W. T. Act.*

Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed $200.00, has not the right to be tried by jury.

[*Court in banc, December 9th, 1899.*

Statement.

This was a case stated for the opinion of the Court by WETMORE, J. The accused was charged before him with having stolen one steer, the value of which did not, in his opinion, exceed $200. It was conceded that the charge was one for stealing "cattle" as defined by section 3 (*d*) of the Criminal Code, 1892. The accused claimed that under s. 66 of the North-West Territories Act, as amended by 60-61 Vic. 1897 c. 28, s. 14, and s. 67 as amended by 54-55 Vic. 1891 c. 22, he had the right to be tried with the intervention of a jury, and desired to be so tried. WETMORE, J., tried him in a summary way and without the intervention of a jury, and convicted him of the offence charged, reserving for the opinion of the Court the question whether or not the accused had the right to be tried with the intervention of a jury.

The stated case was argued December 4th, 1899.

*L. Thomson*, for the Crown.

No one for the accused.

Judgment was reserved.

[*December 9th, 1899.*]

The judgement of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ.) was delivered by

SCOTT, J.—This is a case stated by WETMORE, J. The accused was charged before him with having stolen one steer the value of which did not in his opinion exceed $200.

Judgment.

Scott, J.

It was conceded at the trial that the charge was one for stealing "cattle" as defined by paragraph (*d*) of section 3 of the Criminal Code.

The accused by his counsel claimed that under the provisions of section 66 of the North-West Territories Act as amended by 60-61 Vic. 1897 c. 28, s. 14, and s. 67 as amended by 54-55 Vic. 1891 c. 22, s. 9, he had the right to be tried by a Judge with the intervention of a jury of six, and he desired to be so tried. The question reserved for the opinion of the Court is whether he had the right to be so tried.

Section 66, as so amended, provides that where the charge is for having committed or attempted to commit theft, embezzlement or obtaining money by false pretences, or receiving stolen property, in any case in which the value of the whole property stolen, embezzled or received does not in the opinion of the trial Judge exceed $200, the charge shall be tried in a summary way without the intervention of a jury.

The charge in this case being one of theft simply I can see no reason for holding that it is not within the provisions of this section. It is true that the punishment that may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, but the nature of the offence and the value of the property stolen are the only matters which can be taken into consideration in ascertaining whether the charge is within the section referred to.

In my opinion the conviction should be affirmed.

*Conviction affirmed.*

REPORTER:

Ford Jones, Advocate, Regina.

## PARSLOW v. COCHRANE.

*North-West Territories Representation Act—Executory contract referring to an election thereunder—Hiring teams and conveyances—Wife's authority to contract on behalf of her husband—Evidence—Ratification.*

The plaintiff, a livery stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election for a member of the House of Commons of Canada. The evidence showed that to the knowledge of the plaintiff his account was for horses and rigs furnished by him to the defendant during the time he was a candidate and solely for the purposes of and in connection with the election.

*Held*, following *Luke* v. *Perry*,[1] that the contract of hiring was an executory one and that it came therefore within the terms of section 131 of the Dominion Elections Act,† which is incorporated with the North-West Territories Representation Act,‡ by 57-58 Vic. (1894) c. 15, s. 10, and that the contract was therefore void in law, and the plaintiff could not recover.

The plaintiff also sued the defendant on an account for horses and rigs furnished by one Pepper, some of them to the defendant, others to the defendant's wife, and some to both of them, which account Pepper had assigned to the plaintiff. These horses and rigs were not clearly shown to have been furnished in connection with the election, though the evidence led to a strong suspicion to that effect.

*Held*, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred or arisen out of an election, nothing should be intended in favor of such a defence, and it must clearly appear that such contract did refer to an election held under the Act.

Evidence of ratification discussed.

[SCOTT, J., *December 15th, 1899.*

Statement. This action was tried at Calgary on the 27th and 28th days of November, 1899, before the Honorable Mr. Justice SCOTT.

The facts sufficiently appear from the judgment.

*James Muir*, Q.C., for the defendant. With respect to the first account it is an executory contract in connection with an election, and comes within the terms of section 131 of the Dominion Elections Act, and is therefore void. *Luke* v. *Perry*.[1]

† R. S. C. c. 8. ‡ R. S. C. c. 7.

[1] 12 U. C. C. P. 424.

With respect to the second account, the defendant's wife owned separate estate, a fact which was well known to the plaintiff. The wife was therefore alone responsible. Argument.

*C. T. Jones* (*J. B. Smith*, Q.C., with him), for the plaintiff.

Nothing was said at the time of the hiring as to payment and the contract was therefore merely an implied and not an executory contract, and therefore does not come within the terms of the statute ; *Foster* v. *Dawber*;[2] Anson on Contracts, pp. 13 and 14 ; as to the husband's liability for his wife's debts see McQueen, Husband and Wife, pp. 94 and 95 ; besides, the defendant by his ratification of previous dealings constituted his wife his agent.

[*December 15th, 1899.*]

SCOTT, J.—The plaintiff who carries on business as a livery stable keeper at Calgary, claims from the defendant $163.75 for horses and rigs furnished by him to the defendant, and the sum of $83.36 for horses and rigs furnished to the defendant by one Isaac Pepper, who also carries on business as livery stable keeper at Calgary, the last mentioned claim having been assigned by Pepper to the plaintiff.

The defendant besides denying that the horses and rigs claimed for were furnished and disputing the assignment, alleges that if the horses and rigs were furnished, they were so furnished under and in pursuance of an executory contract, promise or undertaking which arose out of a certain parliamentary election for the House of Commons for the electoral district of Alberta, in which election the defendant was a candidate, and that the horses and rigs were furnished for the purposes of, and in connection with, the said election.

The evidence shows that to the knowledge of the plaintiff the whole of his account for $163.75 was for horses and rigs furnished by him to the defendant during the time

[2] 6 Ex. 839 ; 20 L. J. Ex. 385.

Judgment.
Scott, J.

he was a candidate at the election referred to in the defence, and solely for the purposes and in connection with such election.

Section 131 of the Dominion Elections Act, which is incorporated with the North-West Territories Representation Act, by virtue of section 67 of the latter Act, provides as follows:—"131, every executory contract or promise or undertaking in any way referring to, arising out of, or depending upon any election under this Act, even for the payment of lawful expenses, or the doing of some lawful act, shall be void in law."

The effect of an exactly similar provision was considered by the Court of Common Pleas in Ontario, in *Luke* v. *Percy*,[1] in which the work claimed for was the publication of an address by the defendant to the electors, in which he announced himself as a candidate. The Court there held that the publication was a matter referring to a parliamentary election, and that the defendant might lawfully pay for it, but that the defendant could not be compelled by Court of law to keep a promise which is void in law, and that the plaintiff had only the moral honesty of the defendant to rely upon.

I see no reason for dissenting from the opinion expressed in that case, and as I am of opinion that the plaintiff's claim for $163.75 is within the meaning of the provision referred to, I must hold that he is not entitled to recover in respect of it. It is with reluctance, however, that I so hold, because, in my view, the evidence shows that were it not for that provision, the plaintiff would be entitled to recover the full amount.

As to Pepper's account for $89.50, some of the horses and rigs charged for were furnished to the defendant, others to the defendant's wife, and some to both of them. The defendant states that his wife had separate estate and was carrying on a separate business, and that she had no authority from him to hire horses or conveyances on his account. Pepper states that he never had any instructions from the defendant to charge to his account any rigs

furnished to his wife, but that they always charged them to the defendant, and that he had always paid for them before, and the plaintiff, who was at one time in partnership with Pepper in the same stables, states, that he had been furnishing horses and rigs to the defendant for years, and that he gave him, the plaintiff, instructions to enter in the daybook the names of persons to whom rigs were furnished on the defendant's account. Judgment. Scott, J.

I hold upon the evidence that defendant by his ratification of prior transactions of similar nature, and by his conduct, has shown that his wife was authorized to pledge his credit with Pepper for the horses and rigs furnished upon her order.

An item of the account amounting to $10 is for feed for one horse of hay and oats for 17 days. This was ordered by the defendant's wife. There is nothing to show that the horses belonged to the defendant, or that his wife was authorized to pledge his credit in that way. The item must therefore be disallowed.

Another item of $2.50 is for board furnished for a horse of a friend of defendant's wife. As there is no evidence connecting the defendant with this transaction, it must also be disallowed.

Another item is for the hire of team and democrat on the 20th June, 1896. There is no evidence that this was supplied.

Another item is for four teams and rigs supplied on 23rd June, 1896 (the polling day of the election). Pepper says: "These rigs were ordered by defendant personally on the 19th June. He asked me how many teams I could give him on the 23rd June, and I told him I could give him four; that was all that was said. I do not know that any of my teams were used to convey voters to the poll."

The defendant says:—"The item in Pepper's account of 23rd June would lead me to suppose it was for carrying people to the polls."

Mr. McCarter, who appears to have been acting as defendant's agent, says:—"I remember going to defendant's

Judgment.

Scott, J.

stables on different occasions when he had not the necessary rigs and horses himself, and I told him to get them for me." He also says with reference to a charge of the plaintiffs for three horses and rigs supplied on the same day :—"Whether these rigs were used or not on election day I do not know. I should say there were four or five rigs of Mr. Parslow's and Mr. Pepper's."

It was contended that this evidence shows that the teams were furnished by Pepper for the purpose of the election, and that therefore the claim in respect to them was within the statute referred to.

It does not clearly appear that the teams referred to by Mr. McCarter were those which were ordered by the defendant personally on the 19th June. It may be that they were other teams which had been ordered by the plaintiff from Pepper by Mr. McCarter's instructions. No doubt the evidence leads to the suspicion that the teams charged for by Pepper were used for the purpose of the election, but to my mind it falls short of proving that such was the case. I also think that nothing should be intended in favour of the defence which the defendant relies upon to avoid liability.

I give judgment for the plaintiff for $85.25, the amount being made up as follows :—

| | | |
|---|---|---|
| Amount of Pepper's claim ..... | | $89 50 |
| Less items disallowed..... | $10 00 | |
| Less items disallowed..... | 2 50 | |
| Less items disallowed..... | 7 00 | 19 50 |
| Total..... | | $70 00 |
| Interest from 23rd June, 1896..... | | 15 25 |
| | | $85 25 |

REPORTER :

A. Stuart, Advocate, Calgary.

## WRIGHT v. SHATTUCK.

*Practice—Commission to take evidence of witnesses abroad—Examination of party thereunder.*

Under a general commission to examine witnesses abroad on behalf of both parties, the witnesses intended to be examined not being named in the order or the commission, it is not permissible for the plaintiff to give his evidence before the Commissioner, and, where the commission is opened at the trial, the plaintiff's depositions on being tendered in evidence will be rejected.

[ROULEAU, J., *January 27th, 1900.*

Statement.

The plaintiff, who resided at Guelph, in the Province of Ontario, brought an action of detinue against the defendant, a resident of Alberta. The point at issue was the ownership of a certain heifer, and depended upon the question whether the terms of a certain written agreement signed by the parties in the Province of Ontario, had been carried out.

The defendant applied for an order for the issue of a commission to take the evidence of witnesses on his behalf in the Province of Ontario. The plaintiff consented to the order upon the condition that he should also be allowed to call witnesses before the commissioner on his own behalf. The order accordingly provided that a commission should issue for the examination of witnesses on behalf of both the plaintiff and the defendant. It contained the names of none of the witnesses intended to be examined. Upon the taking of the evidence under the commission, the plaintiff's counsel tendered the evidence of the plaintiff himself, having given the two days' notice of his intention to do so provided for in the order, and his evidence was taken subject to objection. The commission was opened at the trial of the action and the defendant objected to the reading of the plaintiff's evidence on the ground that the commission and the order under which it was issued were not wide enough to include the taking of the plaintiff's evidence.

Argument.

*P. McCarthy, Q.C.*, for the defendant. A special application should have been made if it were desired to examine the plaintiff, because the Court requires a stronger case to be made out before it will allow the plaintiff to be examined abroad than is necessary either in the case of an application to examine the defendant or more witnesses: *Nadin* v. *Bassett*,[1] *Light* v. *Anticosti Company*,[2] *Ross* v. *Woodford*,[3] *New* v. *Burns*.[4] The plaintiff is not strictly speaking a witness and does not come within the terms of the commission.

*R. B. Bennett*, for the plaintiff. The plaintiff is a witness and comes within the terms of the order and of the commission, and due notice of the intention to examine him was given. Besides, the objection is taken at too late a stage; the defendant should have moved in Chambers to suppress: Chitty's Archbold, 14th edition, page 541.

*McCarthy*, Q.C., in reply.

[*Calgary, January, 27th, 1900.*]

ROULEAU, J.—Objection was taken by the defendant at the opening of the commission that the evidence of the plaintiff given in said commission should not be read, as there is nothing in the order granting the commission, nor in the commission itself, authorizing the commissioner to take the evidence of any of the parties in the cause.

It was contended by the plaintiff that the commission was issued by the defendant, and that the plaintiff consented to such commission to examine witnesses abroad, and that he had a right under said commission, to examine the plaintiff as a witness on his own behalf.

On the affidavit of defendant stating that Henry Wade, John Kelly and Hugh McMillan were material witnesses, a summons was issued to show cause why a commission should not issue to examine them in the Province of Ontario. On the return of the summons the plaintiff

[1] 53 L. J. Ch. 253; 25 Ch. D. 21; 49 L. T. 454; 32 W. R. 70. [2] 58 L. T. 25. [3] 1894, 1 Ch. 38. [4] 64 L. J. Q. B. 104; 14 R. 339; 71 L. T. 681; 43 W. R. 182.

appeared and a short order was issued giving liberty to the defendant to issue two commissions for the examination of witnesses on his behalf at the city of Toronto and the city of Guelph in the Province of Ontario. Leave was reserved to the plaintiff to call witnesses on his own behalf. Judgment. Rouleau, J.

The long order provides that a commission issue "to J. F. Kilgour of the city of Guelph, and a second commission to Alexander Samson of the city of Toronto, for the examination of witnesses *viva voce* on behalf of the defendant and the said plaintiff respectively at the city of Guelph and at the city of Toronto aforesaid before the said commissioners respectively."

In due course a commission was issued appointing Alexander Samson of the city of Toronto in the Province of Ontario, commissioner, and by that commission he was authorized to examine *viva voce* upon the matters at issue such witnesses as might be produced on behalf of the said plaintiff, and the said defendant. It is no where mentioned that he was authorized to examine any witnesses in particular or any of the parties, either plaintiff or defendant, to the cause. In a word, it was a kind of roving commission. I have no concern with the irregularlty of such a commission, because it appears to have been issued by consent, but did such a commission authorize the commissioner to examine any of the parties to the cause? I have examined closely all the authorities I could find on that point, and as a result, I have come to the conclusion that although a commission may issue to examine witnesses abroad on good grounds shown, the Judges seemed to be a great deal more particular when the commission was issued to examine one of the parties to the case; and in no instance was that authority exercised when either the plaintiff or defendant was not mentioned as a witness on his own behalf in said commission.

In the case of *Castelli* v. *Groome*,[5] it was held that it is discretionary with the Court to grant a commission to examine parties to an action resident abroad, under the 1 Will.

[5] 21 L. J. Q. B. 308; 18 Q. B. 490; 16 Jur. 888.

Judgment.

Rouleau, J.

IV. c. 22, s. 4, and the Court will do so only where it appears from the affidavits in support of the application to be conducive to the due administration of justice. Lord Campbell, C.J., said: "I think it lies upon the person applying to the Court to shew that it would be conducive to the due administration of justice that the commission should issue; and that it is not enough to shew that the plaintiff or defendant lives out of the jurisdiction of the Court. It would lead to most vexatious consequences if constant recourse could be had to this power, and it would be in all cases where the parties wished to avoid the process of examination here."

Lord Justice Cotton in the case of *Lawson* v. *The Vacuum Brake Co.*,[6] says: "If a plaintiff wishes to be examined as a witness on his own behalf, unless there are very strong positive reasons for his not coming over here, leave will not be given to examine him abroad, but he must come here."

In this case there is nothing to show, either by affidavit or otherwise, that the plaintiff wished to be examined abroad as a witness on his own behalf.

Lord Esher, in the case of *Coch* v. *Alcock*,[7] is just as emphatic as Cotton, L.J. After laying down the rule for the examination of witnesses abroad, he says: "With regard to the case of a plaintiff who asks for a commission to be himself examined, the rule is to be more strictly applied."

In the case of *Ross* v. *Woodford*,[8] it was held that "the position of a defendant domiciled abroad, when making an application for the issue of a commission or for the appointment of an examiner to take evidence abroad, is different from that of a plaintiff when making a similar application, in as much as the tribunal here has been selected by the plaintiff himself."

In this connection Chitty, J., says: There are many cases where the Court has been reluctant to accede, on the

[6] 54 L. J. Ch. 16; 27 Ch. D 137; 51 L. T. 275; 33 W. R. 186.
[7] 57 L. J. Q. B. 489; 21 Q. B. D. 178; 36 W. R. 747.

application of a plaintiff, to a commission abroad to take evidence, when it is the plaintiff who has chosen his own tribunal here."

Judgment.
Rouleau, J.

My last reference will be to the case of *Nadin* v. *Bassett*.[1] Cotton, L.J., in his judgment laid down very clearly the difference between the examination abroad of an ordinary witness and the examination of the parties to the action, especially the plaintiff. He says: "A party does not stand in the same position as a mere witness, as it may be very important that a party should be present to be examined at the trial when there is no necessity that a mere witness should be present." Further he goes on: "No case is made out that it is impossible for the plaintiff to come over to this country to attend the trial; and what we have to consider is, whether, under the circumstances of this particular case, justice requires that he should be examined *in the way directed by the order*. In my opinion it is not consistent with the due administration of justice to allow the plaintiff to give evidence on his own behalf without attending to be orally cross-examined."

Lindley, L.J., in the same case says: "The order cannot be treated as equivalent to an order to take evidence *de bene esse*, no materials having been brought forward to justify an order of that nature. Our order, in fact, comes to this; that the plaintiff's depositions on his own behalf are not to be admissable without the consent of the defendant."

For these reasons the evidence given by the plaintiff under the commision must be suppressed, as the commissioner had no authority to examine him.

I hold besides that such application can either be made in Chambers by summons, or to the Court directly: See *Grill* v. *General Iron Screw Collier Co.*[8]

REPORTER:

C. A. Stuart, Advocate, Calgary.

[8] 35 L. J. C. P. 321; L. R. 1 C. P. 600; 12 Jur. N. S. 727; 14 L. T. 711; 14 W. R. 893.

## CONRAD ET AL. v. ALBERTA MINING COMPANY, LIMITED, ET. AL.

*Judgment—Sale of lands thereunder—Setting aside judgment—Leave to defend—Substitutional service of writ—Service on a foreigner—Rights of innocent purchasers under judicial sale.*

The plaintiffs in 1896 issued a writ against the defendant company, and six individual defendants who were shareholders in the company, and in their statement of claim asked that the individual defendants be declared trustees for the defendant company of certain mining locations in Alberta; that the lands be sold under the order of the Court, and the proceeds applied in payment of the plaintiff's claim against the defendant company under a prior judgment which was still unsatisfied. Healy, one of the defendants, was a foreigner and resided outside of the jurisdiction. An order for the substitutional service of the writ by pre-paid registered letter was obtained, but the writ, as a matter of fact, never came to his notice; judgment was entered in default of defence against all the defendants, the lands were sold to one Sills, the sale was confirmed by an order of the Court and a certificate of title was issued by the Registrar to Sills under the Court's direction.

On an application in June, 1899, by the defendant Healy to have the judgment and sale set aside and for leave to defend upon the grounds: (1) that the material upon which the order for substitutional service had been made was insufficient; (2) that he had no actual notice of the proceedings under which the judgment had been pronounced; (3) that the judgment had been fraudulently obtained; (4) that notice of the writ, and not a copy of it, should have been served upon him.

*Held*, (1) That the material upon which the order for substitutional service had been made was sufficient.

(2) That the alleged fraud had not been proven.

(3) That following *Moore* v. *Martin*,[1] the service of the writ itself upon Healy, though a foreigner, and out of the jurisdiction, was neither a nullity nor irregular, inasmuch as the form of writ provided in the Territories is itself a notice.

(4) That although Healy had no actual notice of the proceedings, yet as the substitutional service was effected in the mode prescribed in the order, and the order was made on sufficient material, the Court had jurisdiction to deal with his interest in the property; that the purchaser Sills, was not bound to ascertain that the substitutional service provided for had the effect of bringing the proceedings to the notice of Healy, and that the purchaser's rights should therefore not be disturbed.

(5) That as Healy had disclosed a defence upon the merits, he should be allowed in to defend upon giving security for the plaintiff's costs without prejudice to the purchaser's rights.

[SCOTT, J., *February 23rd, 1900.*†

[1] N. W. T. R. pt. 2, p. 48; 1 Terr. L. R. 236.

† Affirmed on appeal to Court *in banc*: *Vide infra* and 21 Can. L. T. 102.

Statement.

The plaintiffs had, as members of the firm of I. G. Baker & Company, obtained a judgment in 1886 against the defendants, the Alberta Mining Company, for a certain sum of money, and were, under the terms of the dissolution of partnership, entitled to the benefit of the same. After several unsuccessful attempts to obtain satisfaction by execution, the plaintiffs in 1896 commenced another action against the defendants, the Alberta Mining Company, and joined six other individual defendants who were shareholders in the said company, alleging that these six individual defendants held certain mining locations, for which patents had been issued to them, as trustees for the defendant company, and claimed :—

(1) A declaration that the individual defendants were such trustees ;

(2) An order for the sale of the lands in question;

(3) Payment of their claim and costs out of the proceeds.

After several unsuccessful attempts to serve John J. Healy, one of the defendants, with the writ of summons at Seattle, Washington, and at Sitka, Alaska, the plaintiffs upon the affidavit of one of their advocates, alleging that the writ of summons had been sent to one Lytton Taylor, at Sitka, Alaska, for service upon Healy, and that a letter which was produced as an exhibit, had been received from the said Taylor from Nashville, Tennessee, stating that the letter containing the writ had been forwarded to him there; that Healy's headquarters were in the Yukon Territory ; that the plaintiffs might write to one R. C. Rogers, United States Commissioner, at Sitka, Alaska, who was acquainted with Healy and would no doubt be able to find him ; that there was a United States Deputy Collector of Customs at Circle City, Alaska and that Healy was in the employ of the North-West Trading Company, whose headquarters were at Chicago, Illinois ; obtained an order to serve Healy substitutionally by mailing a copy of the writ together wfth copies of the statement of claim and the order in prepaid registered letters addressed to him, Healy: First, in care of

Statement

R. C. Rogers, United States Commissioner, Sitka, Alaska; second, in care of United States Deputy Collector of Customs, Circle City, Alaska; third, in care of North-West Trading Company, Chicago, Illinois.

None of the defendants entered any defence to the action, and on proving compliance with the terms of the order for substitutional service, judgment was entered against Healy and all the other defendants, declaring them trustees of the mining lands in question, and directing a sale of the same and payment of the plaintiff's claim and costs out of the proceeds.

Under this judgment the lands were sold and one John Ham Sills became the purchaser for the sum of $2,200. On December 6th, 1897, the sale was confirmed by an order of the Court, and the lands together with all ore, minerals, and mining rights therein, were vested in Sills by a vesting order which directed a cancellation of the certificates of title previously issued to the defendants, and the issue of new certificates to Sills. This order was carried out by the registrar and new certificates issued as directed. Out of the purchase money $1,580.70 was applied in payment of the plaintiff's claim and costs; $619.30 still remained in Court to the credit of the action.

In June, 1899, the defendant, Healy, made an application by summons in Chambers to have the writ of summons, the copy and service thereof, the various orders for substitutional service, the judgment entered in the action, and the order confirming the sale of the lands, and all other proceedings set aside upon the grounds:—

(1) That the material, upon which the order for substitutional service was granted, was insufficient;

(2) That the proceedings had never actually come to the defendant Healy's notice, before the judgment and sale of the lands;

(3) That the judgment was obtained by the fraud of the plaintiffs, and by imposing on the court;

(4) That the service of the writ upon him was a nullity and void inasmuch as he was not a British subject, and that

notice of the writ only should have been served instead of a copy thereof. Statement.

In his affidavits filed in support of the application, the defendant Healy swore that at the time of the issue of the writ, he was, to the knowledge of the plaintiffs, and of the secretary of the defendant companies, Mr. J. S. Dennis, residing in Chicago, in the employ of the North American Transportation Company; that he had never received any of the letters containing the writ and knew nothing about the proceedings until March, 1899; that he was not a trustee for the company of the lands in question, nor had the company any interest in them; that one of the defendants, W. G. Conrad, had fraudulently attempted to act as his agent and sell the lands in England under a forged power of attorney; that both the plaintiffs knew he was not a trustee, and that he believed they had taken the proceedings with the fraudulent design of deceiving the Court and obtaining the judgment and sale of the lands without his knowledge.

The plaintiff, W. G. Conrad, by an affidavit, denied catagorically all the acts and knowlege with which he was charged in Healy's affidavit.

*R. B. Bennett*, for the defendant, Healy, in support of application.—Healy is not a British subject, and notice of the writ, and not a copy of it, should have been served on him: *Beddington* v. *Beddington*,[2] *Westman* v. *Aktiebolaget Smickarefabrik*,[3] *Hewitson et al.* v. *Fabre*,[4] *Henderson* v. *Hall*,[5] Piggot on Service out of the Jurisdiction, p. 55. The rules for service out of the jurisdiction cannot apply to any but British subjects. The service of the writ was therefore a nullity and void. The evidence shows that Healy was not a trustee and discloses a good defence. He should, therefore, be allowed in to defend.

*P. McCarthy*, Q.C., for the plaintiffs:—The alleged fraud is not proven. The form of writ in the Territories is itself a notice and can be served on a foreigner. *Moore*

[2] 45 L. J. P. 44; 1 P. D. 426; 34 L. T. 366; 24 W. R. 348; [3] 45 L. J. Ex. 327; 1 Ex. D. 237; 24 W. R. 405. [4] 57 L. J. Q. B. 449; 21 Q. B. D. 6; 58 L. T. 856; 36 W. R. 717. [5] 8 O. P. R. 353.

Argument. v. *Martin*.[1] The land has been sold to innocent purchasers and their rights cannot be destroyed : Rorer on Judicial Sales, 2nd ed., pages 63, 235, 241 and 238 ; Watson's Compendium of Equity, 2nd ed., p. 1093 ; Sugden on Vendors and Purchasers, 8 Am. ed. 110 ; Seton on Decrees, 4th ed., p. 1404. A defense would therefore be fruitless. In any case security for costs must be given : *Watt* v. *Barnett*,[6]

*Bennett*, in reply.

[*February 23rd, 1900.*]

SCOTT, J. (after setting forth the facts as stated above the learned Judge proceeded as follows)—The first ground for the application is that the materials upon which the various orders for substitutional service were made, were insufficient. As far as I can ascertain only one such order was made, viz., that of 30th June, 1896, and as to that I am of opinion that in the absence of fraud and concealment on the part of the plaintiffs or their advocates, the applicant has failed to show that the materials upon which it was obtained were not sufficient to warrant it.

The plaintiff's advocates appear to have been under the impression after the commencement of the action that they could procure personal service upon the applicant. Acting upon information they had obtained as to his whereabouts, they first attempted to serve him at Seattle, having obtained further information there, they next attempted to serve him in Alaska. It was after making this second attempt that they received information which, upon being presented to a Judge, satisfied him that personal service could not reasonably be procured, and that the mode of substitutional service prescribed by him in the order would have the effect of bringing the writ to the knowledge of the applicant. In my view, the information was such as would reasonably lead to that conclusion. It appears from the applicant's own affidavit that he left Chicago for Alaska

[6] 3 Q. B. D. 363 ; 38 L. T. 903 ; 26 W. R. 745 ; affirming 47 L. J. Q. B. 329.

more than seven weeks before the date of the order. It is therefore probable that personal service upon him could not have been effected at the time the order was made. It may be however that if the plaintiffs had been aware of his residence and occupation at that time, a better mode of effecting substitutional service might have been devised. I am not satisfied, however, that they possessed this knowledge. The fact that the mode of substitutional service prescribed by the order did not have the effect of bringing the writ to the knowledge of the defendant is not alone sufficient ground for setting it aside : *Watt* v. *Barnett*.[6]

Judgment.
Scott, J.

But it is alleged that the judgment was founded on fraud and that the order for substitutional service was obtained by imposing on the Court. The fraud alleged is that the plaintiffs knew that the defendant company had no interest in the lands patented to the applicant, and that they also knew that he was connected with the North American Transportation Company, and that his residence and place of business was in Chicago.

I am not satisfied upon the materials before me that the plaintiffs possessed this knowledge. It would be difficult for me to believe that the plaintiffs, knowing that they had no cause of action against the applicant, would consider themselves sufficiently astute to conceive, and without the knowledge and assistance of their advocates, carry out a scheme for obtaining a fraudulent judgment against the applicant without his knowledge. It would also be difficult for me to believe that an advocate of the Court would be a party to such a scheme. It is not, however, suggested that the advocates were parties to the fraud or imposition charged ; in fact, to hold that they were I would have to find that not only the plaintiffs and their advocates, but also the secretary of the defendant company, the firm of attorneys in Seattle and Lytton Taylor were parties to it, and that the forwarding of the writ to Seattle for service, the letter from the attorneys there, the forwarding of the writ to Sitka, and the letter from Lytton Taylor formed part of the scheme to mislead the Court.

Judgment.

Scott, J.

I must also hold that even if the applicant were not a British subject, the service upon him of a copy of the writ of summons instead of a notice thereof was not a nullity, or even an irregularity. In *Moore* v. *Martin*,[1] it was held by the Court *in banc* that the common form of writ then and now in use in the Territories is in itself a notice, and that it may be served on a foreigner; that by it he is simply notified that he has been sued. Although that question does not appear to have arisen in the matter then before the Court, and it was not necessary to decide it, yet as the majority of the Court as at present constituted has so decided, I think it advisable to follow their decision even though I may not be bound by it, and may entertain some doubt as to whether their conclusion was correct.

The applicant seeks to set aside not only the order for substitutional service and the judgment against him, but also all proceedings taken upon the judgment, including the order of 6th December, 1897, confirming the sale to the purchaser, Sills, and vesting in him the lands in question and under which he has obtained a certificate of title.

Upon the material before me I must assume that Sills was a *bona fide* purchaser without notice of any defect in the proceedings leading up to the sale. Although not a party to the judgment, he has acquired a substantial interest under it, and I therefore think that he should have notice of any application to set aside the proceedings under which he has acquired that interest. In my view it would be improper for me upon this application of which he has not had notice to set aside the sale to him, or to set aside as against him any proceeding upon which his title to the property purchased may depend.

Apart from the question of notice of this application to the purchaser, the authorities to which I have been in a position to refer, point to the conclusion that in the absence of any defect appearing on the face of the proceedings, a *bona fide* purchaser under a decree or judgment of the Court will be protected in his purchase.

Judgment.

Scott, J.

In Sugden on Vendors and Purchasers, 8th American ed., 156, the following conclusion is stated:

"Although after much contest it may be laid down as a general rule, that a purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause."

In Seton on Decrees, last ed., p. 312, it is stated: "In the absence of fraud, and provided that the Court has jurisdiction, from all the parties interested being before the Court mere irregularity in the proceedings did not operate to set aside the sale nor affect the purchaser's title."

In Rorer on Judicial Sales, 2nd ed., p. 63, the rule in the United States is stated as follows: "Although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment may be in full force and which they authorize, will be protected." Also at page 235: "So if in addition to inadequacy of price there be irregularities coupled with the sale of land, and the owner, without fault, was ignorant of the sale being made, then equity may set a judicial sale aside, although the sale is made subject to redemption and the time for redemption has expired; but a bill for such purpose will not be sustained after confirmation of the sale and transfer of the land to a *bona fide* purchaser."

Also at page 238: "But a sale will not ordinarily be set aside after confirmation and distribution of the proceeds." Also at page 24: "When the sale is to a third person and *bona fide* purchaser and has been fully completed by confirmation, conveyance and payment, it will neither be avoided, nor will it be set aside by reason of a subsequent reversal of the decree. This rule is so generally recognized as to scarcely require authorities to support it."

Referring to the rule I have quoted from Seton on Decrees, it may perhaps be open to question whether the applicant not having had notice of the proceedings under which the property was sold, was properly before the Court. I think, however, that having been served in the manner prescribed by the order for substitutional service which

Judgment.

Scott, J.

was made upon reasonably sufficient grounds, he must be held to have been before the Court, and the Court had jurisdiction to deal with his interest in the property. To hold otherwise would be to hold that the purchaser at a sale under a judgment of the Court in cases where parties to the suit interested in the property have been served substitutionally, must ascertain, not only that the parties so served, were served in accordance with the terms of the order for such service, but also that such service had the effect of bringing the writ to their knowledge.

In *Watt* v. *Barnett*,[6] cited above, Mellor, J., at p. 186, in speaking of the rule authorizing substitutional service says: "It was intended, in my opinion, in such cases to enable the Court to order substitutional service, and that when such substituted service is directed it should have all the effect of personal service."

The applicant having disclosed a defence upon the merits, should be let in to defend upon terms which I shall hereafter state, but such defence must not in any way prejudice the rights of the purchaser Sills.

It was contended on behalf of the plaintiffs that, as the property which was the subject matter of the action, has been sold and disposed of, the applicant can derive no benefit from opening up the proceedings, and that therefore they should not be disturbed.

The answer to that contention is, that, although the lands may have been sold, a portion of the purchase money is still undisposed of The applicant may have an interest in this if he is successful in his defence, as also an interest in the portion which has been paid over to the plaintiffs.

The applicant will be entitled to an order setting aside as against him the judgment obtained by the plaintiffs and letting him in to defend the action, provided that within six weeks from this date, he gives security to the satisfaction of the clerk for the payment of the plaintiff's costs of the action in case they be found entitled thereto, and that if such security be not given within the time limited, this application be discharged with costs. If such security be

given within the time limited, costs of this application to be costs in the cause to the plaintiffs in any event.

Judgment.

Scott, J.

The order will contain also a proviso that nothing therein contained shall in any way prejudice or affect the right or title of John Ham Sills, the purchaser under the judgment herein, to the lands mentioned in the pleadings herein.

REPORTER :

C. A. Stuart, Advocate, Calgary.

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## IMPERIAL BANK OF CANADA v. HULL.

*Third party notice—Service out of the jurisdiction—Partners carrying on business out of the jurisdiction—Amendment—Irregular affidavit.*

After service of the writ the defendant applied for and obtained under Rule 60 (J. O. 1898), leave to issue and serve *ex juris* a third party notice on The P. P. Co., a partnership carrying on business, without and not within the Territories. The notice was directed to them under that name and not to the several partners as individuals, and was served upon an officer of the partnership, and not upon any of the partners individually.

*Held* (1) That the order giving leave to issue the third party notice to a firm not carrying on business within the jurisdiction, in the firm's name, was not authorized under Rule 60; (2) that such a notice must be personally served upon the members of the firm, where the firm does not carry on business within the jurisdiction.

Amendment of the proceedings was allowed.

An affidavit incorrectly intituled was under the authority of Rule 306 (1898), J. O. received and filed.

[SCOTT, J., *March 4th, 1900.*

The defendant purchased from the Parsons Produce Company, which was a co-partnership consisting of several members carrying on business at the city of Winnipeg, in the Province of Manitoba, and at certain other points outside the Territories, a carload of poultry. The poultry was shipped by the Parsons Produce Company from Centralia, Ontario, to the defendant at the city of Calgary. The company then drew upon the defendant through the plaintiffs for the price of the poultry. The plaintiffs discounted

Statement. the draft at their Winnipeg branch, and received as security therefor, a bill of lading for the goods, which the Parsons Produce Company duly endorsed over to them. The draft and the bill of lading were then forwarded to the plaintiff's branch at Calgary, and the draft was there presented to the defendant for acceptance. Before accepting the defendant obtained the bill of lading from the plaintiffs upon an understanding the exact terms of which were disputed, and are not here material. After securing the bill of lading the defendant obtained delivery of the poultry in question from the Canadian Pacific Railway Company and handed over to them the bill of lading. After inspecting the poultry the defendant refused to accept the draft, claiming that the goods had been seriously damaged in transit, and were largely worthless. The plaintiffs then demanded a return of the bill of lading, which the defendant was unable to make. Thereupon the plaintiffs sued the defendant for the amount of the draft. After service of the writ, the defendant applied under Rule 60 to ROULEAU, J., for leave to issue a third party notice directed to the Parsons Produce Company, claiming to be indemnified by them to the amount of any sum for which he might be held liable to the plaintiffs, and also for leave to serve the said notice upon the proposed third parties at the city of Winnipeg. ROULEAU, J., granted leave and the third party notice was accordingly issued addressed to the firm, and was served upon their book-keeper at their Winnipeg office.

The Parsons Produce Company then applied to SCOTT, J., for an order to set aside the order made by ROULEAU, J., upon several grounds, one of which was "that the applicants are co-partners of more than one person not carrying on business within the jurisdiction of said Court, but carrying on business in the city of Winnipeg, under the firm name of the Parsons Produce Company."

*James Muir*, Q. C., for the Parsons Produce Company.

*R. B. Bennett*, for the defendant.

[*Calgary, March 4th, 1900.*] Judgment.

Scott, J.

SCOTT, J.—This is an application by the Parsons Produce Company to set aside the order made by Mr. Justice ROULEAU herein on the 10th February, 1900, directing that the defendant should be at liberty to issue a notice claiming contribution over against the applicants, and giving the defendant liberty to serve said notice upon the applicants at the city of Winnipeg, in the Province of Manitoba, out of the jurisdiction of the Court, and also to set aside the service of such third party notice, copy of order and writ of summons herein upon the applicants.

The application is made upon several grounds which are set out in the summons. Only one of these grounds has yet been argued before me, viz.: "That the applicants are co-partners of more than one person not carrying on business within the jurisdiction of said Court, but carrying on business in the city of Winnipeg under the firm name of the Parsons Produce Company."

It was agreed by counsel that I should dispose of this ground before hearing the argument upon the others.

The only evidence that the applicants are a partnership firm and not an incorporated company, is contained in an affidavit of one Stefel read by counsel for the applicants. My attention was afterwards called by defendant's counsel to the fact that this affidavit was improperly intituled: "In the Supreme Court of the North-West Territories, Eastern Alberta Judicial District," and he objected to its being filed or considered.

I think Rule 306 authorizes me to receive this affidavit notwithstanding this defect in the title, and as I am satisfied that the defect is merely a clerical error I have decided to receive it, and I have so marked it.

I am of opinion that the order moved against was unauthorized in its present shape. It is shewn that these parties are carrying on business in partnership outside the jurisdiction of the Court, and that they are not carrying on such partnership business within it. It is only where

Judgment.

Scott, J.

copartners are carrying on business within the jurisdiction that they can be sued in the firm name; See Rule 37 (J. O. 1898) *et seq.*, and also *Western National Bank* v. *Perez, Triana & Co.*,[1] *Dobson, Barlow & Co.* v. *Fest, Rusini & Co.*,[2] and *Heinemann* v. *S. B. Hale & Co.*[3] It is true that a distinction may be drawn between a writ of summons and a third party notice, but it must not be overlooked that the third party notice may be the foundation of a judgment against the third parties, and if the notice is in the firm name the judgment will also be in that name.

A third party notice may partake so much of the nature of a writ of summons that the procedure will authorize its issue to a firm in the name of the firm where the firm is carrying on business within the jurisdiction, but I doubt whether rule 60 can be so construed as to authorize its issue to a firm outside the jurisdiction in a manner that a writ of summons cannot be issued, viz., to a firm outside the jurisdiction in the firm name.

Defendant's counsel applied for leave to amend the order and third party notice by subitituting the names of the members of the applicants' firm for that of the firm.

As far as the objection to the order which I have heard argued is concerned I think the amendment should be granted; but I cannot direct that the service of the order, notice and proceedings, which has been made upon the firm's clerk at its place of business in Winnipeg, shall stand as a service upon the members of the firm. I think they should be personally served unless a case be made out for substitutional service, which has not been done.

I think it will be necessary for me to hear the other objection argued before making any order.

REPORTER:

C. A. Stuart, Advocate, Calgary.

[1] 60 L. J. Q. B. 272; (1891) 1 Q. B. 304; 64 L. T. 543; 39 W. R. 245; 7 Times R. 177. [2] 60 L. J. Q. B. 481; (1891) 2 Q. B. 92; 64 L. T. 551; 39 W. R. 481; 7 Times R. 595 [3] 60 L. J. Q. B. 650; (1891) 2 Q. B. 83; 64 L. T. 548; 39 W. R. 485; 7 Times R. 497.

## COMMERCIAL BANK OF MANITOBA v. FEHRENBACH—BOAKE Claimant.

*Interpleader— Bills of Sale ordinance — Form of affidavit — Irregularities —Claimant's affidavit— Amendment.*

The Bills of Sale Ordinance, C. O. 1898, c. 43, s. 7, provides that "except, &c., a mortgage * * * *may* be made in accordance with form A * *." Form A., in the place intended for the witness' signature, has the words, "Add name, address and occupation of witness."

No form of affidavit of execution is given.

*Held*, that neither (1) the omission to state the address and occupation of the witness after his signature ; nor (2) the omission of the deponent's name and occupation in the body of the affidavit of execution, which was signed by him : nor, (3) the omission to state in the jurat a more definite place than "the North-West Territories "; rendered the registration of the mortgage invalid.

The claimant was allowed an adjournment to amend the affidavit supporting his claim.

[WETMORE, J., *March 6th, 1900.*

**Statement.**

Return of a Sheriff's Interpleader Summons.

*E. L. Elwood*, for execution creditor.

*J. T. Brown*, for claimant.

[*March 6th, 1900.*]

WETMORE, J.—The deputy sheriff at Yorkton under an execution issued at the suit of the plaintiff against the defendant seized 2 roan yearling heifers, 2 red yearling heifers, 1 roan yearling steer, 3 roan cows, 2 red cows, 1 red heifer, 2 roan heifers, 1 white pony aged, 1 black mare 10 years old, 1 brown horse 9 years old, 1 waggon, 1 buckboard, and a set of double harness. The claimant Boake put in a claim to all this property except the white pony. The deputy sheriff after taking the usual preliminary steps applied for an interpleader summons. At the hearing of the summons it was represented to me by the advocates for the execution creditor and the claimant, that the claimant had abandoned his claim to the two roan yearling heifers, the two red yearling heifers and the roan yearling steer and the red heifer, and had served the deputy sheriff with a notice that he so abandoned his claim. The claimant supported his claim by an affidavit in which he stated in substance, that he is the

Judgment.

Wetmore, J.

claimant, that the defendant mortgaged to him certain goods and chattels by a mortgage which was presented as an exhibit to his affidavit, that only fifty-five dollars had been paid on account, and that the mortgage had not been assigned. This mortgage purports to have been executed by the defendant in the presence of Hugh Ray Hatch, whose name appears as the subscribing witness. The affidavit of excution purports to be signed by Hugh Ray Hatch, and sworn at the village of Saltcoats in the North-West Territories, before "A. E. Boake, a Commissioner in N.-W. T." The address and occupation of Hatch does not appear, after his name where he signed the mortgage as subscribing witness, nor does his occupation appear in the affidavit of execution, and his name does not appear in the body of such affidavit. This affidavit commences as follows:

"I of the Village of Saltcoats in the North-West Territories, make oath and say:" The mortgage filed with the Registration clerk and the affidavit of execution are of the same character as the exhibit to the claimant's affidavit, except that the jurat is as follows: "Sworn before me at Village in the North-West Territories, the tenth day of April in the year of our Lord 1899, A. E. Boake, a Commissioner in N.-W. T."

The plaintiff's advocate sets up that the claimant has not shown any right whatever to the property seized; because (1) there is nothing to identify the property set out in the mortgage with the property seized by the deputy sheriff; (2) the omission to state the address and occupation of the subscribing witness after his signature as such witness renders the mortgage void as against the plaintiff; (3) the omission to state the name, address and occupation in the affidavit renders registration void; and (4) the omission to state the place in the North-West Territories where the affidavit was sworn attached to the mortgage filed renders the registration void. I am not very much impressed with the second objection. *Parsons* v. *Brand*[1] and *Archibald* v. *Hubley*[2] were relied on. Both those cases were decided

[1] 59 L. J. Q. B. 189; 25 Q. B. D. 110; 62 L. T. 479; 38 W. R. 388. [2] 18 S. C. R. 116.

Judgment.
Wetmore, J.

upon statutes that made it imperative to substantially follow the forms prescribed, and the prescribed forms had not been followed. While the Bills of Sale Ordinance, C. O. c. 43, prescribes the form, and such form indicates that the name, address and occupation of the subscribing witness is to be added under his signature, there is nothing in the Ordinance which makes it imperative to follow that form or lays it down, as in the English Act on which *Parsons* v *Brand*[1] was decided, that the mortgage shall be void if the form is not followed. Section 7 of the Ordinance merely provides that the mortgage or conveyance may be made in accordance with the form A.

At first blush I was inclined to think that the third objection was fatal, but upon examining the authorities I have reached a different conclusion. I think the authorities are clear that where an affidavit is required by the statute or ordinance to be made of a character such as that required by s. 6 of the Bills of Sale Ordinance, it is not necessary that it should comply with all the technicalities required in an affidavit to be used in proceeding in Court. See *Ex parte Johnson, In re Chapman*,[3] *Cheny* v. *Courtois*,[4] *Moyer* v. *Davidson*,[5] *De Forest* v. *Bunnell*.[6]

Now, take the affidavit in question. It commences as I have stated: "I make oath and say," and the facts are set forth to which the witness deposes and he signs it; surely it makes good English, and one would be justified in construing the document that the person who signed the name was the person meant by "I." If a person draws a note of hand, "for value received I promise to pay," etc., and signs it, we have no difficulty in coming to the conclusion that the party who signs that note is the person who promises to pay; so a person signs a contract as follows: "I contract with A. B. to build a house for him," specifying when, and the materials, and it is otherwise in all respects a good contract, but C.D., the contractor's name, does not appear

[3] 53 L. J. Ch. 762; 26 C. D. 338; 32 W. R. 693. [4] 13 C. B. N. S. 643; 32 L. J. C. P. 116; 9 Jur. N. S. 1057; 7 L. T. 68. [5] 7 U. C. C. P. 521. [6] 15 U. C. Q. B. 370.

Judgment. Wetmore, J.

in the body of the contract, it only appears signed at the end of it, one has no difficulty in reaching the conclusion that C. D. has agreed to build the house for A. B. in the terms of the contract. I can therefore see no more difficulty in reaching the conclusion that Hugh Ray Hatch has deposed to the facts sworn to in that affidavit, although his name does not appear in the body of the affidavit, but is only signed at the end of it, and I am of opinion that perjury could be assigned on such an affidavit. But it is alleged that the address and occupation is not stated. I am not so sure that the address is not stated; I am inclined to think that it is. The affidavit is "I of the Village of Saltcoats in the North-West Territories.' Now, if "I" means Hugh Ray Hatch, then he is described as of Saltcoats. But anyway, if in an affidavit used in a proceeding in Court there was an omission to comply with Rule 300 of the Judicature Act it would only be an irregularity; it would not make the affidavit void: *Ex parte King.*[3]

It seems to me, therefore, that to hold that an irregularity in an affidavit, which even on strict technical principles could be waived, would be sufficient to defeat a man's right of property, would be holding against the *ratio decidendi* of outside cases. Of course when the statutory enactments are of such a character that the irregularity must be treated as a nullity effect must be given to the legislation.

As to the fourth objection, the affidavit purports to be sworn in the North-West Territories and that is sufficient. In *Cheny* v. *Courtois,*[4] the objection in substance was that it did not appear that the commissioner who administered the oath was a commissioner of the Court in which the affidavit was intituled. Erle, J., in delivering the judgment of the Court, lays down the law as follows: "Unless it was shown to my satisfaction that the person before whom the affidavit was sworn had not jurisdiction, I should hold that he had on the presumption *omnia rite esse acta.*" I also on this point refer to *De Forest* v. *Bunnell.*[5]

[3] 41 L. J. C. P. 59; L. R. 7 C. P. 74; 25 L. T. 935; 20 W. R. 316.

Judgment.
Wetmore, J.

As to the first objection. The claimant's affidavit used on the hearing of the summons does not identify the property seized (the claim to which is not abandoned) with that set out in the mortgage. The mortgage includes two roan cows only, described as light roans. The deputy sheriff has seized and the claimant has claimed three roan cows; there appears to be a white cow mentioned in the mortgage, but no white cow appears to have been seized. A late experience I have had, however, in trying a case has led me to the conclusion that in some cases it may be just a matter of opinion whether a bovine should be described as white or roan. Two red cows were seized and claimed; the mortgage contains two red cows, one red and the other dark red; two roan heifers were seized and claimed, the mortgage only contains one roan heifer, a dark roan; there is another heifer described as snow white. The horse and mare seized as described by the deputy sheriff in his affidavit do not seem to correspond with the horse and mare mentioned in the mortgage at all. There is a buckboard and Snowball waggon mentioned in the mortgage. There is no harness mentioned in the mortgage at all.

It is most annoying that this affidavit should have been so slovenly drawn, especially in view of the indulgence that has been shewn the claimant.

I was very much disposed at the hearing of the summons to bar the claimant on the insufficiency of the affidavit. I cannot, however, help but feel that the difficulty has not been so much the fault of the claimant as that of his advocate at Saltcoats, and on reflection I feel that I ought not to punish the claimant and deprive him of his property because his advocate has been careless. In this case there are no expenses running, and therefore no injustice will be done by giving the claimant opportunity to furnish a sufficient affidavit.

I will allow the claimant to take the exhibit to his affidavit off the file and to prepare and furnish another affidavit identifying, if he can, the property seized and still claimed by him with that covered by the mortgage. This will not

Judgment.

Wetmore, J.

apply to the harness. With respect to that the claimant will be barred.

This indulgence will, however, materially affect the question of costs. My conclusion as to them will be announced later.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

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## TEMPLETON v. WALLACE.

*Trade-mark—Infringement—Use of similar name — Misrepresentation—Injunction to restrain—Secondary evidence—Inconvenience in producing primary evidence.*

The plaintiff, a chemist and druggist, manufactured and sold certain pills put up in paper boxes, labelled in red ink "Simpson's Kidney Pills," which name was registered as his specific trade mark, and these pills were extensively advertised by him.

He began the manufacture of them under this name in 1893, but did not obtain the registration of his trade mark until 1898.

The defendant, also a chemist and druggist, in 1897 ordered three dozen bottles of Kidney Pills from a wholesale house, which had for some time been manufacturing and selling pills in bottles labelled "Buchu Juniper Kidney Pills," and in his order directed the firm to label the bottles "Simpson's Buchu Juniper Kidney Pills, the original," which was accordingly done, the name being printed on the label in blue ink and the defendant's name and address being also printed on the label in smaller type in red ink. Defendant sold these pills and on several occasions sold them as the Simpson's Kidney Pills advertised; no other such pills were advertised in the locality except those advertised by the plaintiff. The only bond of resemblance between the boxes sold by the plaintiff and those sold by the defendant was in the use of the name "Simpson"; in respect to size, shape and style of printing on the labels they were easily distinguishable. It also appeared that long prior to the registration of the plaintiff's trade mark the name "Simpson" had in 1873 been registered by one J. B. Simpson in connection with medicinal pills, and the name was, at the time of the plaintiff's application for registration, owned by one Stark who had, however, consented to the plaintiff's registration. The pills sold by Stark under the name of "Simpson's" were not intended or advertised as a remedy for kidney complaints, but for other diseases. The plaintiff had in his advertisements published fictitious testimonials from persons alleged to have derived benefit from the use of his pills, and had upon certain occasions advertised himself merely as the agent for "Simpson's Kidney Pills."

*Held*, that the fact that the word "Simpson" had been, previously to the plaintiff's registration, used and registered as a trade mark for pills as a cure for one complaint, did not disentitle the plaintiff to obtain registration of the name as a trade-mark for pills

Statement.

to cure another ailment, and that the registration was therefore good.

*Held*, also, that the fact that the name "Simpson" was entirely fictitious and was not the name of the real manufacturer, did not constitute any such misrepresentation as would disentitle the plaintiff to an injunction.

*Held*, also, following *Ford* v. *Foster*,[1] that only misrepresentations contained in the trade-mark itself will disentitle the plaintiff to an injunction, and that therefore the fictitious testimonials published by the plaintiff were not such misrepresentations as would defeat his right.

*Semble*, that the prior user outside of Canada of the word "Simpson" in connection with Kidney Pills was not sufficient to disentitle the plaintiff to its exclusive use within Canada.

*Held*, also, upon the evidence that the defendant had adopted the word "Simpson" wilfully, and solely to induce the public to believe that the pills he sold were those advertised by the plaintiff, and that therefore the plaintiff was entitled to an injunction, with costs.

One of defendant's witnesses stated that he had in the year 1891 seen the name "Simpson's Kidney Pills" inscribed upon a wire door mat in London, England. This evidence was objected to on the ground that it was secondary evidence, and that the door mat itself should be produced.

*Held*, that the evidence should be admitted because the production of the door mat would be highly inconvenient.

[SCOTT, J., *March 8th, 1900.*

This action was tried at Calgary, before SCOTT, J., on the 30th November and 1st and 2nd December, 1899. The facts and points involved sufficiently appear from the judgment. The case came on for argument, on the points of law involved, on the 16th February, 1900.

*J. B. Smith*, Q.C., for the plaintiff, referred to *Wotherspoon* v. *Currie*,[2] *Metzler* v. *Wood*,[3] *Seigert* v. *Findlater*,[4] *Farina* v. *Silverlock*,[5] *Boulnois* v. *Peake*,[6] *McCaul* v. *Theal*,[7] *Reddaway* v. *Banham*,[8] *Brinsmead* v. *Brinsmead*,[9] *Saxlehner* v. *Appolinaris Co., Ltd.*,[10] *Smith* v. *Fair*,[11] *Barsalou* v. *Darling*,[12] *Ford* v. *Foster*.[1]

*P. J. Nolan*, for the defendant, referred to *Pidding* v. *How*,[13] *Perry* v. *Truefit*,[14] and *Partlo* v. *Todd*.[15]

[1] 41 L. J. Ch. 682; L. R. 7 Ch. 611; 27 L. T. 891; 20 W. R. 818. [2] 42 L. J. Ch. 130, at p. 137; L. R. 5 H. L. 508; 27 L. T. 393. [3] 47 L. J. Ch. 625; 8 Ch. D. 606; 38 L. T. 544; 26 W. R. 577. [4] 47 L. J. Ch. 233; 7 Ch. D. 801; 28 L. T. 349; 26 W. R. 459. [5] 6 DeG. M. & G. 214; 26 L. J. Ch. 11; 2 Jur. N. S. 1008. [6] 13 Ch. D. 513n. [7] 28 Grant Ch. 48. [8] 65 L. J. Q. B. 381; 1896 A. C. 199; 74 L. T. 289; 44 W. R. 156. [9] 12 Times L. R. 631. [10] 66 L. J. Ch. 533; 1897, 1 Ch. 893; 76 L. T. 617; 13 Times L. R. 258. [11] 14 O. R. 729. [12] 9 S. C. R. 677. [13] 6 L. J. Ch. N. S. 345. [14] 6 Beav. 66. [15] 12 O. R. 171; 14 A. R. 444; 17 S. C. R. 196.

Judgment.

Scott, J.

[*March 8th, 1900.*]

SCOTT, J.—Plaintiff, who carries on business as a chemist and druggist at Calgary, alleges that he manufactured at Calgary and sold for profit, large quantities of pills in boxes wrapped in labels having the words "Simpson's Kidney Pills" printed thereon, said words being his trade-mark, to denote that the pills were manufactured by him, and to distinguish them from articles of the same kind manufactured by other persons; that he enjoyed great reputation from the public on account of the good quality of his pills, and made large profits by the sale of them; that said trade-mark was duly registered in the trade-mark registry at Ottawa, and he is the registered proprietor thereof; that the defendant wrongfully and fraudulently and without the consent of the plaintiff, manufactured at Calgary large quantities of pills and caused them to be wrapped in boxes with a label thereon containing the words "Simpson's Buchu Juniper Kidney Pills," in imitation of plaintiff's trade-mark, in order to cause it to be believed that such last-mentioned pills were manufactured by the plaintiff; that the defendant wrongfully and fraudulently sold such pills as and for pills manufactured by the plaintiff; that by reason thereof the plaintiff was prevented from selling great quantities of the pills manufactured by him, and lost the profits he would have made from the sale thereof, and that the defendant continues the manufacture and sale of his pills so marked in such manner as to induce the belief that they are of plaintiff's manufacture.

Plaintiff claims damages and an injunction restraining the defendant from manufacturing and selling pills with a label bearing the word "Simpson's" thereon, or any similar label inducing the belief that the same are of plaintiff's manufacture.

The defendant, who also carries on business as a chemist and druggist at Calgary, denies that the pills sold by the plaintiff labelled "Simpson's Kidney Pills" were manufactured by him, or that these words were intended to or did denote that same were of plaintiff's manufacture, or that such

Judgment.
Scott, J.

words were a trade-mark of the plaintiff's, or that such trade-mark was ever registered, or that defendant ever manufactured or sold pills in boxes with a label thereon in imitation of plaintiff's trade-mark, or that he has by means of any such label or otherwise attempted to cause it to be believed that any pills sold by him were manufactured by the plaintiff, or that he has ever sold any pills as and for pills of plaintiff's manufacture, or that the label on the pills sold by him is in anyway an infringement of plaintiff's trade-mark, or that the plaintiff was by any act of the defendant prevented from selling any appreciable quantity of his pills, or that he lost any profit by reason of any act of the defendant.

The defendant admits that long prior to the registration of plaintiff's trade-mark and since that time, he has sold pills in boxes or bottles bearing a label containing the words "Simpson's Buchu Juniper Kidney Pills," but he claims that for a long time prior to and at the time of the registration of plaintiff's trade-mark, a label bearing these words as a wrapper for kidney pills was in common use in the trade, and was in reality public property, and the plaintiff was not entitled to procure the registration of the words "Simpson's Kidney Pills" as a trade-mark, and that if such registration was granted to him, it was granted in error and improvidence, and by reason of plaintiff falsely representing to the Minister of Agriculture, that such trade-mark was not to his knowledge in use by any other person at the time of his adoption thereof, and that such registration should therefor be declared void as against the defendant.

The defendant also claims in the alternative that for a long time prior to and at the date of the registration of plaintiff's trade-mark, the label used by the defendant was used by wholesale druggists and their customers, including the defendant, as a label for kidney pills, and that plaintiff was not entitled to become the proprietor of a trade-mark which would prevent the use of such label by such wholesale druggists and their customers, including the defendant, and that if plaintiff did procure such registration, the same was granted in error and should be declared void as against the defendant.

Judgment.
Scott, J.

The defendant further claims that the plaintiff was not entitled to be registered as proprietor of his trade-mark:

(1) Because there are no words, mark or symbol in such trade-mark indicating that said pills are the manufacture of the plaintiff or of any particular person.

(2) Because said trade-mark, being a specified trade-mark, was not used in connection with the sale of a class of merchandise of a particular description.

The name "Simpson's Kidney Pills" was first adopted by plaintiff about the year 1893. In that year he prepared a formula for kidney pills and procured the firm of Parke, Davis & Co., manufacturing chemists at Detroit, Michigan, and Windsor, Ont., to manufacture them for him. He started in to advertise them extensively under the name of "Simpson's Kidney Pills" in the Calgary newspapers, and by means of posters, calendars, circulars, bill heads, etc., having spent up to the time of the trial between $2,500 and $3,000 in advertising that particular medicine. All the pills advertised and sold by him were manufactured for him by Parke, Davis & Co. at Detroit or Windsor. They were colored pink and were put up in oblong telescopic paper boxes with a wrapper upon which the words "Simpson's Kidney Pills" were printed in red ink, and other printed matter in black ink. It was not until after he learned that the defendant was selling kidney pills in a wrapper bearing the word "Simpson's" that plaintiff applied for registration of his label as a trade-mark. On 13th September, 1898, he obtained registration for a specific trade-mark consisting of the words "Simpson's Kidney Pills" in red letters on glazed paper or wrapper and in red letters on label.

The pills which were sold by the defendant were also colored pink, and were put up in round wooden bottles, wrapped in a label upon which were printed in blue ink the words "Simpson's Buchu Juniper Kidney Pills, the original," together with the name and the address of the defendant. Other words were printed with smaller type in red ink. These pills were manufactured by Frederick Stearns

& Co., a firm of manufacturing chemists at Windsor, Ont. That firm had apparently been manufacturing kidney pills put up in bottles similar to those sold by the defendant, and with similar labels, except that the words "Simpson's" and "the original," and defendant's address did not appear thereon. It appears from the evidence that on the 4th February, 1897, the defendant ordered three dozen Buchu Juniper Kidney Pills from that firm, and in his order he instructed them to make them pink tinted and to name them "Simpson's Buchu Juniper Kidney Pills, the original."

Judgment. Scott, J.

It is also apparent from the evidence of the manager of that firm that the only kidney pills manufactured by them which bore the word "Simpson's" on the label were those which were manufactured for the defendant and bore that word at his request. There is no evidence that pills by the name of "Simpson's Buchu Juniper Kidney Pills" were ever sold or known except those which were manufactured by Stearns & Co. for the defendant. The evidence shows that packages of pills styled "kidney pills" were advertised and sold by Robert Simpson & Company of Toronto, and that the name of that firm appears upon the packages, but it does not appear that such packages were advertised or sold prior to the commencement of this action. The evidence with respect to them is therefore not material.

Defendant in his evidence states that he wanted to get a kidney pill to put on the market and selected the name "Simpson's" because it was a familiar name known with pills; that he never heard of "Simpson's Kidney Pills" before he gave the order to Stearns & Co., nor did he know that plaintiff was advertising them. I cannot believe this statement. His knowledge of the fact that plaintiff was advertising these pills, is, to my mind, conclusively proved, and the only reasonable conclusion from the evidence is, that, not only did the defendant know at the time he gave the order referred to, that plaintiff was advertising "Simpson's Kidney Pills,' but also that his object in directing Stearns & Co. to put the word "Simpson's" and "the original" on the labels of the pills he ordered from them,

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Scott, J.

was solely to induce the public to believe that they were the pills which plaintiff was advertising. The evidence also shows that on more than one occasion he sold "Simpson's Buchu Juniper Kidney Pills" as the "Simpson's Kidney Pills" which were advertised, and the only such pills, advertised in the vicinity of Calgary, were those of the plaintiff.

The packages of plaintiff's pills were, as I have shewn, of a shape different to those of the defendant and the labels were also different. The only point of resemblance between them being the use of the word "Simpson's." No one having once seen a package of plaintiff's pills could reasonably mistake a package of defendants for it. It is apparent, however, that the use of the word "Simpson's" alone, even on a dissimilar package and label, would have the effect intended by the defendant, viz., of inducing intending purchasers who had not previously seen plaintiff's packages to believe that they were obtaining the pills advertised by the plaintiff.

In *Wotherspoon* v. *Currie*,[2] Lord Chancellor Hatherley says: "The offence consisted in putting on the labels that which naturally led, and from evidence of suspicious conduct we are justified in saying was intended to lead, to the conclusion on the part of the public that when they buy the defendant's goods, they are buying an article manufactured by the plaintiff; they are led to this conclusion in consequence of a name being used, the celebrity of which was first acquired by the plaintiff, and the value of which was first acquired by its being applied to the plaintiff's manufacture, which of course, they think it continues to be."

Lord Chelmsford says, at the same page: "Where a trade-mark is not actually copied fraud is a necessary element, and the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark. For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects

corresponding with that which another person has acquired the exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs."

Judgment. Scott, J.

In *Farina* v. *Silverlock*,[15] Lord Chancellor Cramworth says: "There may be a question here as in all other cases as to the manner in which Judges may have occasionally applied the law to particular facts, but I apprehend the law is perfectly clear that anybody who has acquired a particular mode of designating his particular manufacture has a right to say not that other persons shall not sell the same article, better or worse, or looking exactly like it, but they shall not so sell it as to steal the plaintiff's trade-mark and make purchasers believe it is the manufacture of somebody else."

In *Johnston* v. *Orr-Ewing*,[16] Lord Watson says, at p. 804: "I am of opinion that having regard to what they knew about the trade and trade-mark of the respondents, it was eminently the duty of the appellants in adopting a ticket of their own to avoid every feature of the older trade-mark which could by possibility create the risk of their yarns being sold by some unscrupulous dealer, as the respondents, and failure in that duty will necessarily give rise to inference unfavourable to the honesty of their intention, unless the owners of the new ticket can and do give some reasonable explanation of their conduct."

Plaintiff before commencing this action registered his trade-mark under "The Trade-mark and Designs Act," R. S. C. c. 63, section 8 of which provides that the proprietor of a trade-mark may have it registered on forwarding to the Minister of Agriculture a drawing and description in duplicate of such trade-mark, and a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof. Section 19 provides that no person shall institute any proceeding to

[15] 51 L. J. Ch. 797; 7 App. Cas. 219; 46 L. T. 216; 30 W. R. 417.

Judgment.
Scott, J.

prevent the infringement of a trade-mark unless such trade-mark is registered in pursuance of the Act.

From the evidence it appears that on 11th July, 1898, plaintiff made application under section 8 to register his trade-mark for kidney pills; that he was then informed by the registrar that the name "Simpson" was already registered in connection with pills since February, 1873, by one Stark of Hamilton, Ont., who had acquired it from James Bell Simpson, the original proprietor thereof, and that plaintiff's application for registration could not be granted until Stark's assent was procured. Plaintiff afterwards obtained Stark's consent and his trade-mark was then registered.

It was contended on behalf of the defendant that, as plaintiff was aware before the registration of his trade-mark that the name "Simpson" had been used in connection with pills prior to his user thereof, he was not entitled to obtain registration thereof as part of his trade-mark in connection with kidney pills.

The evidence does not show that the pills in respect of which Stark obtained registration were styled kidney pills, or were intended or known as a specific for kidney complaints. On the contrary, a box of pills put in by the defendant at the trial is labelled "J. Bell Simpson's Specific Pills," and contain an advertisement stating that they were manufactured at Hamilton, Ont., and that they, as also his tonic pills, were intended as specifics for weakness of the generative organs and nervous complaints.

In my opinion the plaintiff is not debarred from using the name "Simpson" upon his trade-mark for kidney pills, or from acquiring the exclusive right to use that name in connection therewith merely because that name had previously been used in connection with pills intended as a specific for some complaint not in any way connected with the kidneys. I think it would be unreasonable to hold that because a certain person had acquired the right to use a certain name in connection with pills for the cure of a certain complaint, no other person could acquire the exclu-

sive right to use that name in connection with pills for the cure of any other ailment.

Judgment.
Scott, J.

One of the defendant's witnesses (Simpson) states that in the year 1891 he saw the name "Simpson's Kidney Pills" inscribed upon a wire door mat in London, England. The evidence as to this inscription was objected to by the plaintiff's counsel on the ground that secondary evidence thereof was inadmissible. I received it subject to the objection. I now rule that the evidence should be admitted on the ground that the production of the door mat at the trial would have been highly inconvenient (see Taylor on Evidence, sections 438 and 439*a*). That evidence, which was the only evidence of the prior use of the name "Simpson" in connection with kidney pills, is not sufficient to convince me that Simpson's Kidney Pills were known or sold in England prior to the adoption by plaintiff of that name. If such had been the case, surely some stronger evidence than the uncorroborated testimony of one man to the effect that he had seen them advertised on a door mat, could have been procured. The witness states that his attention was drawn to the advertisement by the fact that his own name appeared in it; but that would not account for the fact of his recollection after such a long interval of time of the particular class of pills he saw advertised.

Defendant put in as evidence at the trial a drug catalogue of 500 pages, issued in 1892 by a firm of wholesale drug dealers carrying on business in London, England. In it the name "Simpson" appears in connection with anti-bilious pills, herbal pills and other medicinal preparations, but Simpson's Kidney Pills are not mentioned. In addition to this, Mr. Bott, one of plaintiff's witnesses who now carries on a drug business in Calgary, and who prior to his coming to Calgary about six years ago, appears to have been for thirteen years engaged in the drug business in nearly all parts of England, and to have seen all the drug catalogues and trade lists of any importance that were issued there, states that he never heard of Simpson's Kidney Pills until he saw them advertised by the plaintiff.

Judgment.
Scott, J.

It is also open to question whether the prior user outside of Canada of the word "Simpson" in connection with kidney pills would disentitle plaintiff to its exclusive use here in that connection. I am under the impression that it has been held that it would not, but I cannot at present ascertain where it has been so held.

It is further contended on behalf of the defendant that the plaintiff has been guilty of misrepresentation in connection with his trade-mark and the goods sold by him under it, and that by reason thereof, he is not entitled to the relief claimed by him.

In my opinion there is no misrepresentation in the trade-mark itself which would have the effect of misleading the public as to the quality of the goods or their mode of manufacture. It might be urged that the use of the word "Simpson" constitutes a representation that the pills were manufactured by or from a formula prepared by a person of that name. There is no magic in the name, and I cannot believe that any person would be induced to buy plaintiff's pills in preference to any other kidney pills because they bore that name. The public bought "Simpson's Kidney Pills" merely because they were advertised by plaintiff in that way, and not because they believed them to be manufactured or concocted by any person named Simpson.

In *Ridding* v. *Howe*,[13] the plaintiff, a tea merchant in England, sold a mixture of tea which he prepared himself and sold under the name of "Howqua's mixture." Howqua was a tea merchant at Hong Kong with whom plaintiff had dealings, but plaintiff had no authority from him to use his name. The action was for an injunction to restrain the defendant from using the name of "Howqua's Mixture," but the injunction was refused on the ground that plaintiff in advertising his mixture, had represented that it was prepared by Howqua. The use by plaintiff of Howqua's name did not appear to have been considered in itself an objection.

In *Perry* v. *Truefit*,[14] plaintiff sought to restrain the defendant from using the trade-mark "Mexican Balm," which plaintiff advertised as having been prepared from

herbs procured from Mexico. It was shewn that this advertisement was untrue. The injunction was refused on the ground of misrepresentation, and upon the ground apparently that the name "Mexican Balm" was in itself a misrepresentation.

Judgment. Scott, J.

Plaintiff states that he did not name his pills after any particular person named Simpson, and he cannot account for having selected that name. It is therefore a fictitious name so far as his trade-mark is concerned, but I cannot find any authority to show that a person may not adopt a fictitious name as part of his trade-mark, so long as there is no intention to deceive, or that his adoption of such a name would disentitle him on the ground of misrepresentation to relief against a person infringing it.

Plaintiff in advertising his pills appears to have published from time to time what purported to be testimonials from persons who had derived benefit from their use. He admitted that he had not received these testimonials and that they were fictitious. This was undoubtedly a misrepresentation but not, as in *Ridding* v. *Howe*[13] and *Perry* v. *Truefit*,[14] a misrepresentation as to the mode of manufacture of the goods. I must admit, however, that, notwithstanding this distinction I would have had some difficulty in arriving at the conclusion that plaintiff's misrepresentation was not such as should under the principles laid down in those cases, disentitle him to the relief claimed; but it is unnecessary for me to decide that question, because in *Ford* v. *Foster*,[1] it has been held that it is only a misrepresentation contained in the trade-mark itself which will disentitle the proprietor to maintain an action for its infringement, and that fraud or misrepresentation with respect to matters merely collateral to it would not be a bar to his action.

It is also shown that plaintiff had upon occasion advertised himself as agent merely for "Simpson's Kidney Pills" and not as proprietor thereof. This action upon his part, even if it amounted to misrepresentation, would be within the principles laid down in *Ford* v. *Foster*.[1]

Judgment.

Scott, J.

Defendant's counsel made no reference in his argument to the objections set forth in the statement of defence to plaintiff's right to obtain registration of his trade-mark.

The trade-mark appears to me to be (adopting the words of section 3 of the Act referred to) "A label adopted for use by the plaintiff in his business for the purpose of distinguishing a manufacture offered for sale by him, and applied in a certain manner to the package containing such manufacture." Upon that ground, if upon no other, it was one, the registry of which was authorized by the Act.

The evidence also shows that the trade-mark was used in connection with the sale of a class of merchandise of a particular description.

For the reasons I have stated, I hold that plaintiff is entitled to an injunction restraining the defendant from applying the name "Simpson's" or "Simpson," to any kidney pills or pills intended as a specific for kidney complaints, manufactured or sold by him, unless same be applied by plaintiff's sanction, and from affixing without such sanction any label or card or design containing said name to or upon any package containing such pills.

Plaintiff's counsel stated at the trial that he did not intend to offer any evidence as to loss of profits sustained by plaintiff by reason of the defendant's act. I therefore assume that it is not plaintiff's intention to press his claim for such damages. Evidence was given at the trial from which the actual loss of profits sustained by the plaintiff might be arrived at, but as the amount is small I think it unnecessary in view of the statement made by plaintiff's counsel to make any computation.

Plaintiff is entitled to the costs of the action. Not only did the defendant knowingly infringe the plaintiff's trade-mark, but he has also contested throughout the plaintiff's right to the injunction claimed.

REPORTER:

C. A. Stuart, Advocate, Calgary.

## ROSE v. WINTERS.

*Master and servant—Contract of hiring — Statute of Frauds — Quantum meruit.*

*Held*, following *Giles* v. *McEwen*,[1] that where a contract of hiring is not enforceable by reason of the Statute of Frauds, inasmuch as it is not to be performed within a year of the making thereof, the servant is entitled to recover on a quantum meruit where he is dismissed without justifiable cause.

Justifiable grounds for dismissal discussed.

[WETMORE, J., *March 31st, 1900.*

Trial of a "small debt" action before WETMORE, J.

*J. T. Brown*, for plaintiff.

*E. L. Elwood*, for defendant.

[*March 31st, 1900.*]

Statement.

WETMORE, J.—On the third day of April last the defendant hired the plaintiff to work for him as a farm laborer and general man about the house and stable for a year for $150. He was to commence work on the tenth of that month and did so commence on that date and worked down to the 28th December, when the defendant dismissed him.

The defendant had paid him his wages down to the date of dismissal at the rate of $150 a year or $12.50 a month; that is not disputed. This being an "agreement that is not to be performed within the space of one year from the making thereof," is by virtue of s. 4 of the Statute of Frauds (29 Car. 2, c. 3) not enforceable by action, and the plaintiff claims to be remunerated on a *quantum meruit* for the value of his services for the time he hired at the rate of wages during that time, which he alleged to be $19 a month. The defendant claims among other things that it was an expressed part of the bargain that he was to have the right to dismiss the plaintiff at any time, providing that he was not satisfactory, and the plaintiff was to have the right to leave

Judgment. Wetmore, J.

any time he thought that the defendant was not using him right. This the plaintiff denies. I make no finding on this question of fact; in view of the conclusion I have reached it is not necessary to do so, or to decide what would have been the effect of such a provision upon the rights of the parties. The plaintiff claims the right to bring this action in the form he has under the authority of *Giles* v. *McEwen*.[1] That case is not strictly speaking binding upon me, and I can conceive that the soundness of the decision may be open to question. It is to some extent worthy of comment that no English decision can be found holding just what was held in that case and cases of similar circumstances must have arisen frequently. But I am of opinion that the decision does fair justice between man and man, and I think it is reasoned out with good legal logic, and I am prepared to follow it. That is, I hold that when an agreement of hiring and services has been made, such as in this case, not enforceable by action, and the servant has been dismissed *without justifiable cause* before the expiration of the year, he can recover for the value of his services on a *quantum meruit;* but I am not prepared to go any further than that. That is, I am not prepared to hold that if the servant is dismissed for justifiable cause, or leaves the service with a justifiable cause before the end of the year, he can recover on a *quantum meruit* for the services he has performed. To hold that would put a servant in a better position under a contract not enforceable by action than he would be in under one that is.

The key to the whole question seems to me to be this. Such a contract as is not to be performed within a year is not void, it still exists, only it is not enforceable by action. That is the result of the latest authorities on the subject. Therefore it is subject to the same consequences as a contract of the sort which is to be performed within a year. In the case of such a contract as last mentioned, if the servant is dismissed without justification, he can treat the contract as rescinded and recover for the work he has done on a

[1] 11 Man. R. 150.

*quantum meruit*, but if he is dismissed for justifiable cause or he leaves without justifiable cause before the end of the term (when the wages are payable only at the end of the term) he cannot recover anything.

Judgment.
Wetmore, J.

In the case under consideration, the defendant sets up that he had justifiable cause for dismissing the plaintiff. I am not prepared to say that the weight of evidence does not establish that he had. I am rather inclined to the view that it does, although I have not given the matter full consideration, and might, if I did, come to a different conclusion. I am quite convinced, however, that it is not open to the defendant to support the right to dismiss upon acts of disobedience to lawful orders committed a long period before the dismissal and known to the defendant long before the dismissal. Neither the *Boston Deep Sea Fishery and Ice Company* v. *Ansell*,[2] or *Ridgway* v. *The Hungerford Market Co.*[3] bear that out. In the first named case the servant had been guilty of fraud in his employment, which the employer was not aware of at the time of the dismissal. In the other case the servant had been guilty of misconduct in his official capacity, only a very short time before the dismissal. I am not prepared to hold at present that the one act of omitting to feed the pigs and cow, assuming that it was an act of forgetfulness and carelessness, would in itself afford ground for dismissal. A single act of forgetfulness may or may not afford a ground for dismissal, it depends on circumstances: *Baster* v. *London & County Printing Mnfg.*[4] Of course, if the omission to feed the animals was a wilful disobedience of orders, it would afford sufficient grounds for dismissal, and anyway, assuming it to be forgetfulness, it might, coupled with other acts of negligence, afford sufficient grounds.

I have reached the conclusion that the weight of evidence establishes that the plaintiff was not a satisfactory servant by any means. I think he acted in a most casual way

[2] 39 C. D. 339; 59 L. T. 345. [3] 4 N. & M. 797; 3 A. & E. 17; 1 H. & W. 244; 4 L. J. K. B. 157. [4] (1899) 1 Q. B. 901; 68 L. J. Q. B. 622; 80 L. T. 757, 47 W. R. 639; 63 J. P. 439.

Judgment.
Wetmore, J.

even by his own admissions. Take for instance the occasion of his going away at seeding time. It is clear he asked no permission, at any rate from the defendant or Mrs. Winter on that occasion, and I am satisfied that he went away on that occasion without feeding or unharnessing his horses; the weight of evidence establishes that. Then he was directed to clean out the stables and when asked if he had done so stated he had, but when Mrs. Winters discovered that this was not true, and asked him what he meant by stating that he had cleaned them out, he replied "he was just codding." This he admits. Then when he was directed to cut wood to do her two or three days, and was asked if he had done so, he replied that he had; as a matter of fact, he had not done it, and when taxed with it, he said he had not time; I cannot see why under the evidence he had not time to do it. The evidence for the defence, however, goes further, for it sets out that the plaintiff refused to do it, and was somewhat inclined to be insolent in his refusal, stating that there was lots of wood there and plenty of people to cut it besides himself. The plaintiff denies that, but the weight of evidence is againt him. Every member of the Winters family called testifies to it, there were four of them; they appear to be respectable people and I cannot ignore their sworn testimony. This is true of other matters, where the plaintiff is contradicted, which I have not referred to, but I have referred to sufficient to dispose of this case.

The evidence establishes also that he was negligent about cleaning out the stables. I also find that he was very casual in his going away over Sundays. It is possible that the evidence does not establish that the defendant even expressly forbade his going, but it does establish to my satisfaction that he objected to it and stated his objections to the plaintiff. Then we have the omission to feed the pigs and cow. Now, as I stated before, I do not hold whether all these matters afforded justifiable ground for dismissal, or whether they did not, I merely hold that they satisfy me that the plaintiff's conduct was not satisfactory, and I hold that I have a right to take that into consideration in fixing the

value of the services he performed, and in the view of these facts, I think he has been paid enough, and possibly he may consider himself in luck that he got anything at all for his services. Judgment. Wetmore, J.

*Judgment for the defendant with costs.*

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

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## CARTE v. DENNIS ET AL.

*Examination for discovery—Production of documents.*

In an action against some of the members of an unincorporated Musical Society for infringement of the copyright of a musical composition, the Secretary-Treasurer, one of the members sued, stated in his examination that he had taken minutes of meetings of the members of the society, at which proceedings took place relating to the performance of the composition in question, and that he had handed these and other documents referring to the same matters to the advocate for all the defendants.

*Held*,—against the objection that this defendant was not bound to produce these documents because they concerned persons other that the defendants, viz., the members of the Society, not sued,—that this defendant was bound to produce them.

It is not a ground for resisting production that a person, not before the Court, has an interest in the document.

[RICHARDSON, J., *April 28th, 1900.*

This was an appeal from the ruling of the clerk of the Court refusing to order production of documents on an examination for discovery.

The action was brought upon an alleged infringement of copyright in a musical composition entitled "The Pirates of Penzance," plaintiff claiming such right as assignee of the composer.

Defendants denied that the composition was copyrighted, and that plaintiff was assignee. They also denied infringement.

T. A. Briggs, one of the defendants, was examined before the clerk of the Court under Rule 201 of the Judicature Ordinance. On such examination Mr. Briggs stated

Statement. that a performance of "The Pirates of Penzance" was given on the dates alleged, by an unincorporated body known as "The Regina Musical Society," of which he and the co-defendants, besides a number of other persons, were members, and of which he had been, and was still, the secretary-treasurer; that minutes in writing of the proceedings at meetings of the society were kept by him as secretary-treasurer, and that these minutes contained entries relating to the performances mentioned in the statement of claim; that he had handed over these minutes and certain other documents relating to the performances, to his, and the other defendants', advocate, about two weeks prior to the examination.

Production of the minutes and other documents was asked for by plaintiff's advocate, but objected to by defendants' advocate on the ground that they concerned persons other than defendants, *i.e.*, all the members of the society. The examiner declined to order production, and gave a certificate of his ruling.

*W. C. Hamilton*, Q.C., for plaintiff.

*T. C. Johnstone*, Q.C., for defendant.

[*April 28th, 1900.*]

RICHARDSON, J.—Under Rule 212 of the Judicature Ordinance, it is to be observed that when a party under examination admits that he has in his custody or power, any writings or documents relating to the matters in question in the cause, he shall, upon the order of the examiner, produce the same for the latter's inspection, unless the writings or documents are protected from production.

By Rule 207 the party to be examined shall, if so required by notice, produce on the examination all papers and documents which he would be bound to produce at the trial under a subpœna *duces tecum*.

The intention aimed at by Rule 212, in my opinion, is, that where on an examination the existence of documents is admitted, but a question arises as to whether or not they

Judgment. Richardson, J.

are protected from production in the ordinary way, then they are to be inspected by the examiner, who will determine if the party would be bound to produce them on the trial of the action, and if so bound Rule 207 applies.

In refusing to order production therefore, I conceive the examiner committed an error. Mr. Briggs, by his statement to the examiner, showed he had some possession or control of documents or papers containing entries relating to the matters in question in the cause. This being so he was bound to give all the information in his power: *Clinch* v. *Financial Corporation*[1]; even if the ownership of these papers is joint between the defendants and others not sued.

*Plant* v. *Kendrick*,[2] "Where in answer to interrogatories, the defendant admits he has papers in his possession, custody or control, relating to the matters in question in the cause, it is not competent to him to urge that others have an interest in them, and therefore he cannot produce them."

*Kettlewell* v. *Barstow*:[3] "It is no ground for resisting production that a person not before the Court has an interest in the documents."

*Steadman* v. *Arden*:[4] "Documents not in the exclusive possession of a defendant, but in that of the solicitor of the whole company of which defendant is part, must be produced. It is no breach of duty to their clients to produce them. A defendant to avoid production must show, not only that they are not in his possession, but that they are not within his power or control."

That the principle decided by the English cases bearing upon interrogatories are applicable here on examinations held under our Order 21: see *Smith* v. *MacKay*.[5]

The appeal must therefore be allowed with costs in the cause to the plaintiff, and an order made rescinding the

[1] L. R. 2 Eq. 271; 12 Jur. N. S. 484; 14 W. R. 685. [2] L. R. 10 C. P. 692. [3] 40 L. J. Ch. 375; affirmed L. R. 7 Ch. 86; 27 L. T. 258; 20 W. R. 917. [4] 15 M. & W. 587; 4 D. & L. 16; 15 L. J. Ex. 310; 10 Jur. 553. [5] *Ante* p. 202.

Judgment. Richardson, J.

clerk's ruling appealed from, and directing production to the clerk of the material in question, at such time as he may direct, for which purpose the examination is to be re-opened.

REPORTER:

C. H. Bell, Advocate, Regina.

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## McNEILLY v. BEATTIE.

*Small debt procedure—Claim or demand for debt—Claim for wrongful dismissal—Setting aside or allowing the proceedings to stand.*

A claim by a servant hired by the month against his master for wrongful dismissal in the middle of the month does not fall within the meaning of the words "all claims and demands for debt" in Rule 602 of the Judicature Ordinance, 1898, and proceedings to recover the same cannot be taken under the small debt procedure.

Where, however, the plaintiff has brought an action for such a claim under the small debt procedure, and it appears that the defendant has not been in any way prejudiced, the Court or a Judge will under the power given by Rule 538, direct that the Writ of Summons and the service thereof, shall stand, but that the action shall continue as an action under the ordinary procedure.

[SCOTT, J., *May 4th, 1900.*

The plaintiff issued a writ of summons under the provisions of Rule 602 of the Judicature Ordinance, 1898, against the defendant. The material allegations in the statement of claim were as follows:—

3. On or about the 13th day of October, 1899, the defendant agreed to employ the plaintiff as a driver of one of the defendant's rigs, and to pay him for such services the sum of $40 per month.

4. The employment above mentioned in paragraph 3 continued until the 8th day of January, 1900, when the defendant, without previous notice, wrongfully dismissed the plaintiff from his service, and refused to pay him his wages for the month beginning the 13th day of December, 1899, and amounting to $40.

5. The said sum of $40 is still wholly due and unsatisfied.

6. The plaintiff therefore claims the said sum of $40 and costs of suit. Statement.

Instead of filing a dispute note, the defendant made application to set aside the writ of summons and the statement of claim and the service thereof upon him, on the ground that the claim or demand was not one for debt, but was a claim for damages, and did not come within the small debt procedure provided in the Judicature Ordinance.

*James Muir*, Q.C., for defendant.

*C. T. Jones*, for plaintiff.

[*Calgary, May 4th, 1900.*]

SCOTT, J.—This is an application on the part of the defendant to set aside the writ of summons and statement of claim herein, and the service thereof upon the defendant, on the ground that the claim or demand herein is not one for debt, but is one for damages, and does not come within the small debt procedure provided by the Judicature Ordinance.

The action is brought under the small debt procedure (rules 602 *et seq.* of the Ordinance).

The statement of claim alleges that the defendant, who is the proprietor of the Dominion Cartage Company at Calgary, on 13th October last agreed to employ the plaintiff as driver of one of defendant's rigs, and to pay him $40 per month for such services, that such employment continued until the 8th January last, when defendant without previous notice wrongfully dismissed the plaintiff from his service, and refused to pay him his wages for the month beginning on 13th December, 1899, amounting to $40, which amount the plaintiff claims to recover from the defendant.

As plaintiff is suing for more than the wages due to him for the term actually served by him, the action must be looked upon as one for damages for wrongful dismissal: (see Smith's Master and Servant, p. 166).

Rule 602, in its original form as Ordinance No. 5 of 1894, section 27, provided that the small debt procedure

Judgment.
Scott, J.

should apply to "all claims and demands for debt or breach of contract, whether payable in money or otherwise, where the amount or balance claimed does not exceed $40." The words "or breach of contract," were struck out by section 20 of Ordinance No. 2, of 1896. I think the reasonable deduction from that amendment is that the small debt procedure should no longer be applicable to such breaches of contract as were not included in the term debt.

The usual meaning attached to the word "debt" is, "a sum payable in respect of a liquidated demand" (see Stroud's Judicial Dictionary). The words "debt," and "liquidated demand" in the provision of the English procedure respecting the special endorsement of writs of summons, appear to be used as synonymous terms, and I see no reason why the word "debt" in Rule 602 should be interpreted otherwise than as a liquidated demand.

It is, however, contended on behalf of the plaintiff that the claim, though one for damages for wrongful dismissal, is, in reality, a liquidated demand, because the plaintiff being a menial servant is by custom entitled, if dismissed without good cause and without notice, to a month's wages in lieu of notice.

In Smith's Master and Servant it is stated at p. 82, that in the case of menial or domestic servants, there is a well-known rule founded solely on custom that their contract of service may be determined at any time by giving a month's warning or paying a month's wages; and at p. 170 that the amount of damages which such a servant would recover in an action for wrongful dismissal would be a month's wages. But at p. 171 it is stated in referring to *Jacquot* v. *Boura*,[1] that a claim for wrongful dismissal being a claim for unliquidated damages, was not triable before the sheriff under 3 & 4 Wm. IV. c. 42, s. 17, as the probable limit of the damages did not render it the less a claim for unliquidated damages.

[1] 5 M. & W. 155.

Judgment.
Scott, J.

Adopting the last view, I hold that the action was improperly brought under the small debt procedure and should have been brought under the general procedure; but as I cannot see that the defendant has been in any way prejudiced by its having been so brought, I think I should not set aside the writ of summons or the service thereof. I think I have power under Rule 538 to direct that they shall stand; and the order I make is that they shall stand and that the action shall hereafter be continued as an action under the general procedure; defendant to have eight days from the service of the order to file his appearance and statement of defence. Costs of this application to be costs in the cause to the defendant in any event on final taxation.

REPORTER:

C. A. Stuart, Advocate, Calgary.

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## EHMAN v. THE NEW HAMBURG MANUFACTURING COMPANY.

*Practice—Writ of summons—Foreign corporation—Agent—Service.*

A writ of summons for service within the jurisdiction was, with the service thereof, set aside, where it appeared that the defendant was a foreign corporation, having no agent within the jurisdiction, who could be served.

[RICHARDSON, J., *May 4th, 1900.*

This was an application to set aside the writ of summons and service thereof.

A writ of summons for service *infra juris*, was issued, and service effected upon one Hyde, of Balgonie, as agent of defendant company within the Territories. In default of appearance by defendants, plaintiff took out a summons in Chambers for final judgment and assessment of damages against the company. The summons was also served upon Hyde, and upon its return counsel appeared in Chambers on behalf of defendants and asked for and obtained an adjournment.

Statement.

The present application was made on the grounds that the defendants were a corporation resident and carrying on business *ex juris*, and had no branch or agency in the Territories; and that Hyde was not an officer, clerk, agent, or other representative of the company within the meaning of the Judicature Ordinance, upon whom service of a writ issued against the company could be made.

Plaintiff opposed the application, contending that defendants having, by their advocate, appeared upon the return of the summons for judgment, and having asked for an enlargement without in any way questioning the regularity of the writ or service, had waived their right to object thereto.

In support of the application, the affidavit of one Winn was read, who stated that he was the secretary-treasurer of the company, which was incorporated by letters patent of the Province of Ontario, with its head office and principal place of business at New Hamburg, Ontario; that the company carried on their business at New Hamburg, and never had a branch agency, or any office of its business, in the Territories, nor any clerk, agent, or other representative at Balgonie, or elsewhere in the Territories, who carried on, or was authorized to carry on, the business of the company therein; and Hyde was employed by the company to sell its goods at Balgonie on commission, but in no other way was he authorized to carry on the company's business.

*W. C. Hamilton*, Q.C., for the defendant.

*James Balfour*, for the plaintiff.

[*May 4th, 1900.*]

RICHARDSON, J.—The allegations contained in Winn's affidavit are in no way controverted, so it must be assumed that Hyde's employment is of a purely limited nature; *i.e.*, the selling of machinery made by defendants, at Balgonie in the Territories, on commission.

Rule 14, s.-r. 3 of the Judicature Ordinance (C. O. 1898 c. 21) enacts that " * * * every person who within the said Territories transacts or carries on any business of or for any corporation whose chief place of business is without

the said Territories, shall, for the purpose of being served with a writ of summons * * * in an action against * * * the corporation, be deemed the agent thereof," upon whom service of such writ may be made. In Ontario, the corresponding provision is in the same words, and the Court of Appeal of that Province has held in *Murphy* v. *Phoenix Bridge Co.*,[1] and I agree with that judgment and adopt the principle there laid down, that the words, "any business of or for," clearly demand service upon some chief or principal officer of the corporation, whose knowledge would be that of the company; one who transacts or carries on in the Territories, or controls or manages for the corporation, some material part of its business, or who represents or superintends its interests—which, in my opinion, an agent only empowered to sell on commission is not. Judgment. Richardson, J.

The application is resisted on the ground of waiver, but in my judgment, the request for enlargement of the summons in Chambers was not such a fresh step as is contemplated by Rule 539; and until the facts were known, which does not appear to have been until Winn's affidavit was received in the Territories, 2nd May, lapse of time would not render the application too late.

The more serious question however, is, was the issue of the writ authorized; because, if not, it was, in view of the holding of Herschell, L.C., and Russell, C.J., in *Smurthwaite* v. *Hannay*,[2] more than irregular, it was an abuse of the process of the Court. In *Fowler* v. *Barston*,[3] it was held that a defendant may show want of jurisdiction in moving to set aside an *ex parte* order for service *ex juris;* and if so, surely on such an application as the present, he may show absence of jurisdiction for the issue of a writ for service *infra juris*. This he has done by establishing that, (1) defendants are a foreign corporation and, (2) they cannot be served with a writ of summons under Rule 14, s.-r. 2. It is, I conceive, beyond my power to accede to Mr. Balfour's request to allow

[1] 18 O. P. R. 406, 495. [2] (1894) A. C. 494; 63 L. J. Q. B. 737; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 285; 6 R. 299; 10 Times R. 649. [3] 51 L. J. Ch. 103; 20 C. D. 240; 45 L. T. 603; 30 W. R. 113.

Judgment.
Richardson, J.

the writ to be amended, for the reason that the material prescribed by Rule 19, which is made indispensable by Rules 18 and 20, for granting an order for service *ex juris*, is not before me.

The writ, and the service, must therefore be set aside with costs to the defendants.

*Writ of summons, etc., set aside.*

REPORTER:

C. H. Bell, Advocate, Regina.

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## SPARLING v. THE TRUSTEES OF SPRING COULEE SCHOOL DISTRICT.

*School trustees—Agreement with teacher—Necessity for adoption at meeting duly assembled.*

An agreement between a Board of School Trustees and a teacher, which appeared not to have been adopted at a meeting of the Board, was *held* to be void as against the Board by reason of the provisions of the School Ordinance.†

[RICHARDSON, J., *May 14th, 1900.*

The statement of claim alleged that on 28th December, 1896, plaintiff was engaged as a teacher by defendants, one of the terms of the agreement being that the contract should remain in force from year to year until terminated by three months' notice given by either party on the 1st October in any year; that he served under the agreement until 4th January, 1899, when, although willing to continue in service he was discharged without notice for which he claimed damages. As an alternative claim plaintiff asserted a right to recover one year's salary under the agreement for the year 1899.

Defendants, besides denying all the material allegations of the statement of claim, asserted that the contract

† Ordinance No. 2 of 1896, ss. 77, 78; now C. O. 1898, c. 75, ss. 80, 81; the former section is amended by Ord. 1900, c. 26, s. 9.

was not in writing as required by the Masters and Servants Ordinance; that it was insufficient under the Statute of Frauds; that it was not adopted at a regular or special meeting of the board of trustees as required by the School Ordinance, and that the claim for a year's salary was bad in law. Statement.

At the trial, which took place before RICHARDSON, J., plaintiff produced a document commencing "Memorandum of Agreement made this 28th December, 1896, between" defendants and plaintiff, by which defendants "do hereby contract with, and employ the said teacher (the plaintiff) from 1st January to 31st December, 1897, at a salary of $550 for the whole period." Following stipulations as to the teacher's duties, appeared these words:—"This agreement shall remain in force from year to year unless terminated by the said trustees or the said teacher by giving a notice in writing of three months to the other of them on the 1st day of October." The attestation clause was:—"As witness the corporate seal of the said trustees and the hand and seal of the said teacher on the day and year first above mentioned." The corporate seal and the teacher's seal were affixed, and the document was signed: "L. D. Sparling, Teacher; Chs. Travis, W. D. Harvey, Richard Davis, Trustees."

It was shown that during the years 1897 and 1898 plaintiff performed the duties of teacher in defendants' school, and would have continued to do so during 1899 but for the prevention of the defendants.

It also appeared that on 28th September, 1898, a meeting of the defendant board was held, at which the secretary was instructed "to advertise in three consecutive issues of the Free Press for a teacher. Duties to commence 2nd January, 1899," and that on the 29th September, 1898, plaintiff received from the secretary the following letter:—"I am directed by the Trustee Board of Spring Coulee School District to notify you that they have decided to advertise for a teacher for the ensuing year. This decision does not in any way bar you from putting in an application

Statement.

for the position on the terms of the advertisement, which will appear in next week's Free Press.

The minutes of the defendant board contained a record of a meeting held 6th October, 1896, at which a resolution was adopted re-engaging plaintiff as teacher for the year 1897 at a salary of $550, and of a meeting held 29th October, 1897, at which a resolution was passed re-engaging plaintiff as teacher for 1898, "subject to the same terms as 1897."

*W. C. Hamilton*, Q.C., for the plaintiff.

*N. Mackenzie*, for the defendant.

[*Regina, May 14th, 1900.*]

RICHARDSON, J.—As, at the hearing, no no services were shown to have been rendered by plaintiff during 1899, his alternative claim for such must be dismissed. Plaintiff's real case is under the agreement, but, in my judgment, were the matter between individuals, the letter received by plaintiff from defendants' secretary, constituted a sufficient notice of intention to terminate the contract at the end of the then current year.

It is contended, however, that this letter, even if otherwise a good and sufficient notice, is not binding on plaintiff without proof of its adoption by the board of trustees at a meeting called in conformity with section 77 of the School Ordinance, 1896, or at which notice was waived under section 78.†

On the other hand, defendants contend that the agreement of 28th December, 1896, is, for the same reason, invalid, and that plaintiff, having been paid for all services rendered by him, his claim cannot be sustained.

In my judgment, as the imperative word "shall" is used in this section 77, any act or proceeding of a board of trustees not adopted at a meeting convened in accordance therewith, or at which notice is waived under section 78, is void and not binding on any party, including the corporation. That there was no meeting of the corporation on 28th December, 1896, is beyond question, and I find as a

fact that never subsequent to that date, or at any meeting recorded in the minutes, is there any reference to an agreement of that date from which its adoption as a complete contract for an unlimited period subject to determination on notice can be inferred. Judgment. Richardson, J

The evidence does not shew whether the meetings of 6th October, 1896, and 29th October, 1897, at which the resolutions re-engaging plaintiff as teacher were passed, were regularly convened or not; but, assuming that they were, then, in my opinion, the proper inference to be drawn is, that the board by using the word "re engaged" in the resolutions, particularly in the latter one, intended to make fresh or new bargains for the succeeding year. If the document of 28th December, 1896, had been considered binding, no necessity would have existed for any resolution at all, plaintiff's service continuing from year to year and until notice should be given for its termination.

In my judgment the agreement of 28th December, 1896, is void against the defendant corporation, and plaintiff's action must be dismissed with costs.

REPORTER:

C. H. Bell, Advocate, Regina.

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## CURRY v. BROTMAN.

*Small debt procedure—Writ of summons—Failure to serve—Expiry—Abatement—Alias writ of summons—Limitation of actions.*

A writ of summons (under the small debt procedure) had been issued in an action on a debt before the period, after which it would become barred by the Limitations Ordinance, had expired; it was, however, never served; but after the expiry of the period fixed by the Ordinance an *alias* writ of summons was issued.

*Held*, in view of the provisions of Rule 542 of the Judicature Ordinance (C. O. 1898, c. 21), the issue of the alias writ of summons prevented the operation of the Limitations Ordinance, and that therefore, the Ordinance afforded no defence to the action.

WETMORE, J., *May 31st, 1900.*

Statement

Trial of an action before WETMORE, J., without a jury.

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

*E. A. C. McLorg*, for the defendant.

[*May 31st, 1900.*]

WETMORE, J.—This is an action on a promissory note made by the defendant in favor of the plaintiff. One of the defences is the Statute of Limitation.

The note became due on the 7th November, 1893. The statement of claim herein was filed on the first day of October, 1896, and on that date a writ of summons under the small debt procedure was issued, which was delivered to the sheriff for service in the following November. This writ was never renewed, it was never served on the defendant and has never been returned to the sheriff's office or filed in the clerk's office.

On the 7th March, 1900, an alias writ of summons was issued, which was served on the defendant on the 14th March. By virtue of Rule 542 of the Judicature Ordinance (C. O. 1898 c. 21), the expiry of any writ or process without service or execution does not abate the suit, but it may be continued by the issue of an alias or pluries writ or process. This practice appears to have been taken in this case. Under the old process in the Courts of Common Law at Westminster, suits were commenced by Bill of Middlesex† or *capias ad respondendum* or some similar process which was directed to the sheriff and returnable on a common day in term. The writ had to be served before the expiration of the return day, and if not served the sheriff returned *non est inventus* and an *alias* might issue directed and returnable in the same way, and if the *alias* was not served or was not returned *non est inventus* a *pluries* might issue, and so on from time to time until one of the *pluries* writs was served.

The writ of summons by which a suit is now commenced under the practice is addressed to the defendant, and does not command the sheriff to do anything as the old writs

† See Blackstone's Com. iii., 285.

alluded to did. I cannot therefore see how the sheriff can return *non est inventus* to a writ of summons. I am of of opinion that a writ having issued for service and an action having thus been commenced and the writ having expired, an *alias* under Rule 542 may issue at any time. The *alias* writ issued in this instance was marked "*alias*" at the top and that was all there was to designate it as an *alias* writ. No objection was taken to the form and I am not prepared to say that the form is not correct at present ; I do not see in what other way it could be better designated as an *alias*. I am of opinion, however, that this writ was irregularly issued because the original writ, or if lost, a copy of it sealed under Rule 8 of the Ordinance should have been filed. The omission to do this however is only an irregularity and would have afforded grounds for setting aside this writ, and even if an application had been made to set it aside, it seems to me that the requisite document might have been filed before the application was heard : 1 Archibald Q. B. Prac. 14th ed. 868. Judgment. Wetmore, J.

However that might be, an irregularity in practice cannot be taken advantage of to defeat a right of action, and if the opposite party does not apply to set it aside he waives it. If the defendant had applied to set the *alias* aside and succeeded he would not have defeated the right of action because the plaintiff could after that have filed the original writ or sealed copy and then issued a regular *alias*. I must therefore hold that this action is not barred by the Statute of Limitations.

REPORTER :

E. A. C. McLorg, Advocate, Moosomin.

## SIMINGTON v. COLBOURNE.

*Liquor License Ordinance—Conviction involving forfeiture of license—Appeal therefrom—Effect thereof upon forfeiture.*

*Held*, (RICHARDSON, J., *dissenting*), that where a licensee is convicted under s. 122 (3) of the Liquor License Ordinance, of supplying liquor to an interdicted person, with a knowledge of such interdiction, the effect of such conviction being that "his license shall be forfeited," an appeal from such conviction is a stay of proceedings, and suspends all the consequences of the conviction, including the forfeiture of the license.

[*Court in banc, July 21st, 1900.*

Statement. This was a case stated by a Justice of the Peace under the provisions of section 900 of the Criminal Code, for review by the Honourable Mr. Justice RICHARDSON and by him referred to the Court *in banc*.

The information alleged that Colbourne on April 27th, 1900, did unlawfully sell liquor without a license therefor by law required. Upon the hearing before the Justice of the Peace the following facts were admitted :—

"1. On the 28th day of November, 1899, the said Francis Colbourne was the holder of a license for the sale of intoxicating liquors in the Ottawa Hotel in the town of Moose Jaw in the North-West Territories, which license has not been revoked or otherwise affected except as herein mentioned.

2. On the said 28th day of November, 1899, at Moose Jaw aforesaid, the said Francis Colbourne was convicted before W. C. Sanders, a Justice of the Peace for the said Territories, for that he, the said Francis Colbourne, on the 31st day of October, 1899, at Moose Jaw aforesaid, did, with the knowledge that the sale of liquor to one John Hawkins was prohibited, sell liquor to the said John Hawkins contrary to the provisions of section 122 (3) of the Liquor License Ordinance.

3. An appeal from said conviction to the Supreme Court of the North-West Territories has been duly entered and is still undisposed of.

4. The said Francis Colbourne did on the 27th day of April, 1900, sell intoxicating liquors at the Ottawa Hotel in the said town of Moose Jaw. Statement.

5. On the said 27th day of April, 1900, the said Francis Colbourne was not the holder of any license for the sale of intoxicating liquors other than the one mentioned in paragraph one hereof."

The defendant pleaded guilty for the purpose of this stated case, which recites:—

"By the said judgment the defendant was convicted of the offence charged in the said information on the ground that under the provisions of section 122 (3) of the Liquor License Ordinance, the license of the defendant mentioned in the said admissions herein had become by reason of the conviction mentioned in the said admissions, on the 28th day of November, 1899, forfeited and void, and therefore the defendant had not the license to sell intoxicating liquors by law required.

The said judgment is questioned on the ground that by reason of an appeal having been entered from the conviction made on the 28th day of November, 1899, mentioned in the said admissions, the forfeiture of the said license did not operate, and that the said license was, on the 27th day of April, 1900, in full force and effect."

The case was argued on the 4th June, 1900.

*W. B. Willoughby*, for the accused.

*The Deputy Attorney-General*, contra.

[*July 21st, 1900.*]

WETMORE, J.—Colbourne, a licensed liquor dealer, having been convicted under section 122, sub-section 3, of the Liquor License Ordinance (C. O. 1898, c. 89), appealed against such conviction. After so appealing he sold liquors and was charged with selling liquor without license, it being claimed that his license was, under the sub-section referred to, forfeited by the conviction just mentioned. Colbourne claims that the appeal has the effect of suspending the

Judgment.

Wetmore, J.

operation of the forfeiture. I will deal with this case on the assumption that a conviction under the sub-section in question *ipso facto* operates to forfeit the license, but I refrain from expressing a decided opinion on the question.

It seems to be quite clear that an appeal would not suspend the right to execution unless there is a provision in the statute under which the conviction is made providing that it shall effect such a suspension, or the provisions of the statute are such as to shew an intention to be gathered from them that they shall have that effect. It is contended that sections 880 and 885 of the Criminal Code, 1892 (which are applicable to the conviction in question), shew intention that the operation of the conviction shall be suspended until the appeal is decided. In *Kendall* v. *Wilkinson*,[1] which was an action brought against a justice of the peace for causing the arrest of the plaintiff on a warrant issued by him on a bastardy order, the plaintiff having appealed against such order, Campbell, C.J., who delivered the judgment of the majority of the Court, held that the appeal did not suspend the jurisdiction given to a justice of the peace by 7 & 8 Vic. c. 101, s. 3, to grant a warrant against the putative father for the purpose of enforcing payment under the order. That section, after providing for the making of an order in bastardy upon due proof and for payments by the putative father, went on to provide that "if at any time after the expiration of one calendar month from the making of such order . . . it shall be made to appear to any one justice upon oath or affirmation that any sum to be paid in pursuance of such order has not been paid, such justice may by warrant . . . cause such putative father to be brought before any two justices," and such justices were empowered to deal with him as in the section pointed out. Lord Campbell laid it down in 24 L. J. at p. 91, "there is no universal judicial maxim or rule that an appeal or writ of error is a stay of execution pending the appeal or writ or error;" and at

[1] 4 El. & Bl. 680; 3 C. L. R. 668; 24 L. J. M. C. 89; 1 Jur. (N. S.) 538; 3 W. R. 234.

Judgment.

Wetmore, J.

p. 92 he states: "from the 27th section of the statute 11 & 12 Vic. c. 43, it might be argued that pending an appeal justices are not at liberty to grant a warrant in execution, as they are thereby expressly authorized to grant the warrant after the appeal is determined, but section 35 enacts that the Act shall not extend to any complaints, orders or warrants in matters of bastardy made against the putative father of any bastard child, with certain exceptions which do not include the warrant in question." Now 11 and 12 Vic. c. 43 is a general Act in the nature of which we would now call a Summary Convictions Act. Section 27 of it is a lenghty section, but what it contains in substance is set forth in Lord Campbell's judgment which I have quoted. It will be seen therefore that this section contains in substance what is enacted by section 885 of the Criminal Code, 1892. Now what the learned judge might have held were it not for section 35 of the Act which he has also correctly quoted, one is not prepared to state. Coleridge, J., while he agreed that the plaintiff should be nonsuited, declined to express any opinion as to the effect of the appeal to suspend the issuing of the warrant. He is reported at p. 93 of the Law Journal Report, as follows:—"The short point to determine, therefore, is whether on the trial it appeared that what the defendant had done was 'in the execution of his duty as a Justice of the Peace with respect to a matter within his jurisdiction, as such'; and as in my opinion this question ought to be answered in the affirmative it seems to me proper to decide the case simply on that ground, and not to enter upon other questions which on this supposition it is not necessary now to decide, and upon which after much consideration I entertain very great doubts, both on the principles on which they must stand and the consequences they would involve." In *ex parte Wilmott*,[2] Wilmott had been convicted under 39 & 40 Geo. III. c. 89, by the Captain Superintendent of the dock yard, of an offence provided for in that statute, and sentenced to imprisonment. He appealed from such conviction and

[2] 7 Jur. (N. S.) 1053; 1 B. & S. 27; 30 L. J. M. C. 161.

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Wetmore, J.

applied in a *habeas corpus* to be discharged from such imprisonment, on the ground that the appeal suspended the imprisonment. The applicant was forthwith, after the commitment, conveyed to prison under a warrant issued for the purpose. The Court held that the appeal did not operate as a suspension of the execution. Cockburn, C.J., in giving his judgment refers to s. 27 of 11 & 12 Vic. c. 43, but expresses the opinion that because the warrant of commitment had been already issued before the recognizance with a view to the appeal was entered into, 11 & 12 Vic. c. 43 did not apply, and was only intended to apply to a case where the proceeding was suspended pending the appeal. Crompton, J., laid it down (see L. J. Rep. at p. 164), "It is clear that there is no suspension of the warrant unless it is clearly so expressed to be. Upon this point I need only refer to *Kendall* v. *Wilkinson*." [1] I am not prepared to agree with this. It is quite doubtful what the decision in *Kendall* v. *Wilkinson*,[1] would have been if s. 35 of the Act 11 & 12 Vic. c. 43 had not taken the case of section 27." Blackburn, J., lays it down in *ex parte Wilmott*,[2] (see L. J. Rep. at p. 165), "I think also that an appeal is given by s. 21 (of 39 & 40 Geo. III., c. 89), but if that be so there is still the question whether the appeal would operate as a suspension. Now there is nothing in the Act to show that this is so, and it is clear from *Kendall* v. *Wilkinson*[1] that a general right of appeal does not give a suspension of the execution."

I quite agree with that; that general abstract rule is so laid down in *Kendall* v. *Wilkinson*;[1] but Blackburn, J., proceeds "I do not think that 11 & 12 Vic. c. 43 applies to this case at all, and therefore it is unnecessary to consider whether by implication the provision in section 27 may extend to it." I presume that Blackburn J., held that 11 & 12 Vic. c. 43 did not apply to the case because the conviction was made by the Captain Superintendent of the dock yard, and not by a Justice of the Peace. I notice that that point was raised by counsel. It seems to me, therefore, that in cases where there is a section such

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as s. 27 of 11 & 12 Vic. c. 43, or 885 of the Criminal Code, the question submitted in the case now before the Court has not been by any means satisfactorily settled. In fact it strikes me as being yet very much at large. I can find no cases that throw any further light upon the subject. Referring to Cockburn, C.J.'s remark in *ex parte Wilmott*,[2] before quoted, that 11 and 22 Vic. c. 43 (I assume he intended section 27), was only intended to appiy to a case where the proceeding is suspended pending an appeal, I presume by that he does not mean suspended by virtue of an Act or Statute, but suspended because the officer who has the jurisdiction to enforce it has not exercised his powers.

I have already pointed out that section 885 of the Code is a provision similar to what is contained in s. 27 of 11 & 12 Vic. c. 43, but section 880 of the Code contains provisions which I *cannot* find in any of the Imperial Statutes under discussion in the cases I have cited, and upon reading this section with 885 I have reached the conclusion that the appeal referred to in that section does have the effect of suspending the operation of the conviction or order appealed against. In the first place, under par. c. of section 880 "the appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody *until the holding of the Court to which the appeal is given*," or he shall give a recognizance with sureties as provided in the paragraph conditional to appear personally at the Court to which the appeal is taken "to try such appeal, and to *abide the judgment of the Court thereupon*, and to pay such costs as are awarded by the Court." If the appeal is against any conviction or order for the payment of a penalty or sum of money, instead of remaining in custody or giving the recognizance, the appellant may deposit with the Justice convicting or making the order such sum of money as the Justice deems sufficient to cover *the sum adjudged to be paid*, together with the costs of the conviction or order, and the costs of appeal, and "upon such recognizance being given, or such deposit being made, the Justice before whom such recognizance is entered into

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or deposit made, *shall liberate* such person, if in custody." This has all to be done as a precedent to the appeal. The language of the paragraph is imperative, but as soon as the provisions have been complied with, it seems to me to be the clear intention of Parliament that they shall operate as a suspension of the issuing of execution upon the conviction or order. It is clear that it never could have been intended that the party, if he was in custody, being liberated the Justice could turn around and issue a commitment, or that having taken the security provided either by recognizance or deposit, he could turn around ond issue either a distress warrant or warrant of commitment. But when we come to the powers of the Court of Appeal, as provided in paragraph (*e*) of the same section, the matter seems to be concluded, because it is there provided that such Court shall "in case of the dismissal of an appeal by the defendant, and the affirmance of the conviction or order * * * order and adjudge the appellant *to be punished according to the conviction*, or to pay the amount adjudged by the said order." Now there is no exception to this ; it is imperative, and it is to be done in every case where a conviction order is affirmed in the case of an appeal by a defendant. This is entirely inconsistent with any power in the Justice to issue process of execution pending an appeal. It may be urged, however, suppose the appellant remains in custody he may have undergone his term of imprisonment before judgment is given in appeal and how in that case can the Court of Appeal order him to be punished according to the conviction ? But if he remains in custody after he gives the notice of appeal is he undergoing sentence? Suppose that the sentence is for one month and the Court to which the appeal is taken does not sit for two months. The provision of paragraph *c* of section 880 is, if he remains in custody that he "shall * * * remain in *custody* until the holding of the Court." There is no alternative provision whereby the imprisonment is determined at the expiration of the sentence, and the provision I have quoted is imperative. And then paragraph (*e*)

Judgment.
Wetmore, J.

provides that if the conviction is confirmed the Court shall order the party "to be punished according to the conviction." It seems to me that imprisonment after notice of appeal is by way of securing the presence of the appellant at the Court of Appeal in case he does not enter into a recognizance, so that he may be dealt with in case the conviction is affirmed or an order made against him. It is somewhat akin to the case where a party, being convicted of an offence in the Higher Courts, a case is stated under section 743 of the Code, and the party convicted is committed to prison pending the decision on the stated case. I do not wish to be understood as holding that if a person imprisoned by virtue of the conviction has served out a portion of his term of imprisonment before the notice of the appeal and the recognizance are given, the time so served shall not count if the conviction is affirmed and the appellant ordered to be punished according to the conviction. Having reached the conclusion that the appeal suspends execution on the conviction, does it also suspend the operation of the conviction respecting the forfeiture of the license? I am of opinion that it does. As before pointed out when the conviction is affirmed and appeal, the appellant Court must order the party to be *punished* according to the conviction. Now in making this order the Court does not point out the particular nature of the punishment; it does not recite the punishment and order it to be inflicted. The Court would simply make an order somewhat in the following form: "That the appeal be dismissed, the conviction appealed against affirmed, and that the said A. B. be punished according to such conviction." Now in the present instance how and in what manner was the party to be punished according to the conviction? In the first place and upon the face of the conviction, he was to pay a penalty, and in default to be imprisoned, and in the next place and not upon the face of the conviction, but by operation of law, by reason of such conviction his license was to be forfeited. It seems to me that the one is just as much a punishment "according to"

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Wetmore, J.

(that is, "by virtue of") the conviction as the other, and that if such punishment is suspended in the one case, it is suspended in the other. It may be that if the licensee sells liquor in the meanwhile he does so at his own peril, and that when the conviction is affirmed it might relate back to its date, and the party selling be liable to conviction for doing so. I express no opinion on that point. I am of opinion that under the facts stated in this case Colbourne was not liable to conviction, and that the conviction of 2nd May, 1900, should be quashed.

McGUIRE, J.—Case stated by a Justice of the Peace. The question is whether the fact of a licensee being convicted under section 122 of the License Act is a forfeiture of his license, notwithstanding an appeal duly entered against such conviction and before the hearing and disposal of such appeal, so that for thereafter selling liquor he can be convicted of so selling without a license.

The accused contends that the appeal and his entering into recognizance pursuant to section 880 operates as a stay of proceedings—as a supersedeas—as to the conviction under section 122.

In practice it has always been considered that an appeal duly entered operates as a stay pending the appeal. The Criminal Code does not in terms say it shall or shall not be a stay. Lord Campbell, C.J., in *Kendall* v. *Wilkinson*, [1] said that "in the vast majority of cases it would be exceedingly improper in the Justice to grant a warrant after the notice and recognizance, and before the hearing of the appeal, or before the time for hearing it has expired; and acting from a corrupt motive, he might be liable to an action on the case for maliciously granting it."

In the same judgment Lord Campbell observes "there is no universal judicial maxim or rule that an appeal or writ of error is a stay of execution pending the appeal or writ of error." It is true that in Courts of Equity an appeal was in England no stay of execution without a special order for that purpose. And a writ of error is not a supersedeas of execution

Judgment.

McGuire, J.

in criminal cases. But in all these cases there is an opportunity to apply, for an order staying execution, to a Court or Judge, and there is an obvious convenience in the rule and in the various statutory provisions on the subject that, unless there is an order to that effect, an appeal shall not operate to suspend execution, as otherwise frivolous and dilatory appeals would thereby be invited, and in any case where the justice of the case seems to justify a stay, a Judge can be applied to and will grant the order. But in the case of appeals from summary convictions there is no mode that I am aware of by which such an order can be got, and unless there can be implied from the language of the Code that an appeal was intended to suspend execution, the right of appeal would be in many cases a barren right, for his goods might in the meantime be distrained to satisfy a conviction which it might turn out ought never to have been made. We have been referred to *ex parte Wilmott*,[2] but the judgment there avoided deciding on the effect of s. 27 of 11 & 12 Vic. c. 43, as to suspending execution, because in that case the warrant had issued prior to the appeal proceedings. *Kendall* v. *Wilkinson*,[1] was a matter of bastardy, and s. 35 of 11 & 12 Vic. c. 43, exempts such matters from the operation of the Act. But for section 35 there must have been a decision on section 27, and Lord Campbell remarks that "from the 27th section * * * it might be argued that pending an appeal Justices are not at liberty to grant a warrant or execution as they are expressly authorized to grant the warrant after the appeal is determined." Our section 885 corresponds to English section 27.

In *Rex* v. *Brooke*,[3] the reason given by Buller, J., against treating an appeal as a stay of execution was that as a sentence of imprisonment would run from the date of the conviction the term imposed might expire before the hearing of the appeal, and even if the conviction was confirmed the appellant would escape punishment. This reason does not apply to appeals under section 880, when an appeal has been begun and recognizance duly entered into,

[3] 2 Term Rep. 190.

Judgment.

McGuire, J.

Let us see if we can gather from the language of the Code as to such appeals what was the intention of Parliament. First, as to the imprisonment; it is expressly provided that an appeal accompanied by the recognizance or deposit shall suspend execution so far as any imprisonment is concerned. Unfortunately the section is silent as to the enforcing of the pecuniary penalty. We are not lightly to suppose that Parliament intended an appeal to be a stay of one part, the more serious part of a conviction, and yet not a stay as to the fine. That such was not its intention may be inferred from the fact that the recognizance or deposit (as the case may be), must cover not only the costs of the appeal but also the pecuniary penalty, if any, and the recognizance also provides for the personal appearance of the appellant to abide the judgment of the Court on the appeal. If the appeal did not stay execution as to the fine it would not have been necessary to require that the deposit should be "sufficient to cover the sum so adjudged to be paid," as well as "the cost of the appeal." The recognizance in *Kendall* v. *Wilkinson* [1] was only for payment of *costs*, a circumstance which Lord Campbell considered entitled to "some regard." Then we find in section 880 (*e*), it is provided that "in case of dismissal of an appeal by the defendant and the affirmance of the conviction or order" the Court "shall order and adjudge the appellant to be punished according to the conviction, or to pay the amount adjudged by the said order." There is no proviso contemplating the possibility of the fine having been levied pending the appeal; the language used seems to assume that the conviction or order has not been enforced pending the appeal. Section 885 provides that "if an appeal * * * is decided in favor of the respondent the Justice * * * may issue the warrant of distress or commitment for execution of the same as if no appeal had been brought." This is not language in harmony with the view that the Justice could issue his warrant without waiting to see how the appeal would be decided. It is only "if the appeal is decided, etc.," that is, after the appeal is determined, that

this section authorizes issues of warrant. Section 889 provides that an appeal may be abandoned, and in such case that "the costs of the appeal shall be added to the sum, if any, adjudged against the appellant * * and the Justice shall proceed on the conviction, etc , *as if there had been no appeal.*" Why is this provided if, without this section, he was always at liberty to proceed as if there had been no appeal? Does this section not contemplate that enforcement of the conviction or order had been suspended? One's sense of justice speaks strongly in favor of the view that the appeal was intended to operate as a stay ; then we have the weighty utterance of Lord Campbell as to its being "exceedingly improper" in the vast majority of cases for the Justice to proceed pending the appeal. If it was not intended that he should stay his hand why would it be "improper" for him to proceed?

Judgment.

Wetmore, J.

I have come to the conclusion that Parliament intended that an appeal and recognizance suspended the conviction or order not only as to any imprisonment but also as to the pecuniary penalty or sum adjudged to be paid, that, in short, it intended the appeal should suspend and stay all the consequences of the conviction or order, and has by its language evidenced such intention.

Now, one of the consequences of the conviction in the present case, it is said, is that the appellant's license is forfeited. Assuming for the present that such is the effect of section 122, the forfeiture of license is added by the Ordinance to the penalty imposed by the conviction, though not set forth in the conviction. It is urged that as the forfeiture is no part of the conviction, the appeal, if even it be admitted to operate to suspend the enforcement of the imprisonment or penalty which the Justice can direct by his conviction, could not have been intended to suspend the forfeiture which is something added by the Ordinance. If, however, my first conclusion be right the conviction was intended to be suspended entirely, and, so would, while so suspended, be ineffectual to forfeit the license. In one case at least the Ordinance seems to have expressed that

Judgment.

McGuire, J.

what it means is not the decision of the tribunal of first instance unless and until it has become "final." Section 79 provides that "in the event of final judgment being recovered in an action" the license "shall thereupon be forfeited," which probably means that it is only when the judgment has become "final," either by not being appealed from, or if appealed, has been confirmed, it is reasonable to infer that what it meant in section 122 is a conviction which has become "final." Without however, expressing any opinion on this, I am of opinion that the suspension created by the appeal is as to all the consequences, and if forfeiture of license be one of the consequences of the conviction, it also is suspended pending the appeal, and that the forfeiture had not taken effect, the appeal being still undisposed of.

I have questioned whether forfeiture is a consequence of the conviction at all, and I wish to avoid appearing to acquiesce in that proposition. It is open to question whether section 122 expressly makes forfeiture to follow upon conviction. In all other sections, as *e.g.*, sections 111, 12 (3), 77, 79, 92 and 93, the Ordinance makes clear by express language that the forfeiture follows as a consequence of the conviction or judgment. It is not necessary in the view already expressed to decide this latter question, and, I therefore give no judgment thereon. I think the conviction should be quashed.

ROULEAU and SCOTT, JJ., concurred.

RICHARDSON, J.—The facts leading up to the submission of the stated case are briefly :—

That on the 28th November, 1899, Francis Colbourne, a hotel keeper of Moose Jaw, holding a license to sell spirituous liquors between 1st July, 1899, and 30th June, 1900, was convicted before Mr. Sanders, J.P., at Moose Jaw, with having sold intoxicating liquor to one John Hawkins, an interdicted person, in violation of s.-s. 3 of s. 122 of the Liquor License Ordinance.

Judgment.
Richardson, J.

That within the time allowed therefor Colbourne gave notice of appeal from such conviction to the then next sitting of the Court, at which the appeal could be heard, to be held at Moose Jaw on the 10th of April, 1900, and perfected the security required for his appeal.

That in the interval between the conviction and the time for hearing the appeal, Colbourne continued selling liquor, and for one of such acts he was convicted; the charge being selling without a license, the prosecution alleging and the J.P. holding that, as by s.-s. 3 of s. 122, on conviction of a licensee for such an offence as Colbourne had been convicted of, his license should be forfeited, he was not thereafter a licensee or entitled to sell liquor.

The question this Court has to determine is whether or not, pending an appeal from such a conviction as above stated, the license held by the person convicted continues in force.

In support of his contention that pending the appeal there is no forfeiture of license, Colbourne's counsel referred to section 885 of the Criminal Code. This provides that if, as a result of an appeal, the conviction is sustained, either the Justice who made it or any other Justice having territorial jurisdiction may issue the warrant of distress or commitment for execution of the conviction, as if no appeal had been brought. This only regulates proceedings after an appeal a conviction is sustained, and does not, so far as I conceive, support counsel's contention, nor does either of the cases *Re Wilmott* or *Kendall* v. *Wilkinson*' assist.

Counsel on both sides of the argument referred the Court to various paragraphs in Mr. Endlick's work on the Construction of Statutes, as to how penal laws should be construed.

These summarized in my view establish as a maximum or rule that penal laws are to be interpreted according to the language used in them, and in construing the question is always "does the case fall within the scope and fair

Judgment. Richardson, J.

meaning of the language used in the Act." Now under section 880 of the Criminal Code, sub-section (*c*), if the conviction adjudges imprisonment the appellant may on complying with defined conditions obtain his liberty pending adjudication of his appeal, or if only a penalty or sum of money is adjudged to be paid, may either deposit with the convicting Justice money sufficient to cover the penalty and costs of the proceeding, including those on appeal, or give security Form O.O.O. by recognizance for their ultimate payment and obedience to the judgment in appeal; then if the conviction be quashed, sub-section (*e*), the deposit is to be paid the appellant. This does not assist the view of Colbourne's counsel. It only imposes conditions upon which execution of the adjudication made by the justice may be stayed.

With the contention of Colbourne's counsel that his appeal from conviction for selling to an interdict, until the appeal is disposed of, suspends the operation of the enacting words in s.-s. 3 of s. 122 (which, following the conviction of a licensee for selling liquor to an interdicted person, are "his license shall be forfeited") because the law never could have contemplated at the stage of a J.P.'s conviction an absolute forfeiture of license inasmuch as by the appellate tribunal the J. P.'s adjudication might be reversed, I do not acquiesce, for the reason that Colbourne when accepting his license must be taken to have known the law to be that, should a J.P. during its currency adjudicate him guilty of selling intoxicating liquor to an interdicted person, by such adjudication his license would become forfeited. The language used in the section I conceive admits of no other fair sense of construction than that Colbourne, after the conviction referred to, ceased to be a licensee; that his license was forfeited. I interpret the law as laid down by Sir Robert Phillimore, in *The Annandale*[4] (followed on appeal), to be that the forfeiture accrued "at the time when the illegal act" (*i.e.*, that for which Colbourne was convicted by the J.P. 28th November, 1899)

[4] 2 P. D. 179, 218; 47 L. J. A. & M. 3; 37 L. T. 139, 364; 26 W.R. 38.; 3 Asp. M. C. 504.

"was done," and that it (the conviction) diverted out of Colbourne whatever property and rights he, up to that time, held under the license in question, and that as a result he, by his admittedly selling thereafter, violated the law. Judgment. Richardson, J.

Consequently in my opinion the conviction in respect of which the case has been stated should be affirmed. As, however, the other Judges of this Court are unanimously of a contrary opinion I yield to them.

*Conviction quashed.*

REPORTER:

Ford Jones, Advocate, Regina.

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## SMITH v. HAIGHT.

*Landlord and tenant—Distress—Distress remaining unsold—Suspension of action for rent.*

It being found on the evidence that a distress had been made, and that the goods distrained remained unsold in the plaintiff's hands.

*Held*, following *Lehain* v. *Philpot*,[1] that the right of action for the rent was suspended.

[WETMORE, J., *October 25th*, 1900.

Trial of a "small debt" action before WETMORE, J.

*G. Watson*, for plaintiff.

*G. Elliott*, for defendant.

[*October 25th*, 1900.]

WETMORE, J.—This is an action brought to recover sixteen dollars rent of a house. The matter of defence set up is that the plaintiff distrained certain goods upon the demised premises for such rent and still holds the said goods. I find the following facts:

On the morning of the day the defendant left the house and before he had removed any of his furniture and effects, the plaintiff forbid him removing them until he paid him his rent; afterwards the plaintiff procured a distress war-

[1] 44 L. J. Ex. 225; L. R. 10 Ex. 242; 33 L. T. 98; 23 W. R. 876.

Judgment. Wetmore, J.

rant to be made out with a view of distraining on the defendant's goods for such rent. This distress warrant was made out to William Simpson, the deputy sheriff, as bailiff, and he and the plaintiff proceeded to the demised premises, I have no doubt with a view of making the distress. Before they got there, however, for some reason not explained, Simpson handed the distress warrant back to Smith, who put it in his pocket. When they reached the premises they found that all the furniture and effects had been removed out of the house except a few articles, and there was some wood in the yard of the rented premises and forming part of them. I find that Simpson went there not merely as a friendly adviser of both the parties, but went there in the interest of the plaintiff to assist him in securing his rent, and forbade Hamilton, the defendant's man from removing any more stuff from the premises, and that he did this in the plaintiff's presence and with his approval. The wood was left on the premises and subsequently the defendant sent his boys with the team to bring the wood away; they were accosted by the plaintiff after they got the wood partly loaded on their conveyance, who said to them "don't you know you are doing wrong, you had better go and see Mr. Simpson;" and he swore that he thought his boys were doing wrong, because they owed him rent for the place. By "they" of course he meant the defendant. In consequence of what the plaintiff said the boys threw off the wood and went away, and this wood is still on the demised premises.

I am of opinion and hold under *Cramer* v. *Mott*,[2] that all this amounts to a distress upon the wood for the rent in question, and this property still remaining in the hands of the plaintiff is a pledge unsold, and I hold under *Lehain* v. *Philpot*[1] that the right of action to the rent is suspended and affords a defence to such action.

*Judgment for the defendant.*

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

[2] 39 L. J. Q. B. 172; L. R. 5 Q. B. 357; 22 L. T. 857; 18 W. R. 947.

## BURNS v. USSHERWOOD.

*Contract—Special—Quantum meruit—Amendment. ..... ..*

The plaintiff agreed to build, for a fixed lump sum, a foundation for a building, the defendant supplying materials on the ground, and the plaintiff, owing to non-supply of lime, abandoned the work, though it was found on the evidence that the defendant had got what he bargained for, with some shortcoming, for which damages would compensate him.

Held, that although the plaintiff was not entitled to succeed on his claim under the original special contract, he was entitled to recover on a *quantum meruit*, and the pleading were directed to be amended accordingly.

[RICHARDSON, J., *April 19th*, 1901.

Statement.

Plaintiff claimed $38, less a credit of 50 cents, being the contract price of building a stone foundation for a house upon defendant's land.

It appeared at the trial that the plaintiff did not complete his contract in every particular, but it was shown that the work he did gave the defendant what he bargained for with some shortcomings, estimated by an architect called as a witness, at one-third of the value of the whole. It was clear that defective performance went only to part of the consideration, inasmuch as defendant had used the work by building his house upon it. Further, it appeared, that by the terms of the contract defendant was to supply materials on the ground as required, and that the plaintiff left before the work was completed in consequence of the supply of lime becoming exhausted.

*Wm. Grayson*, for plaintiff, contended that the work was completed by plaintiff in so far he was able to do so. Non-completion was owing to defendant not supplying materials as he agreed to do. The architect called by defendant testified that the work was worth $30 to defendant, and plaintiff is entitled to recover as on a *quantum meruit*.

Argument. Addison on Contracts, 9th ed., pp. 802-841; *Lucas* v. *Goodwin*;[1] *Cutler* v. *Close*.[2]

*W. B. Willoughby*, for defendant, submitted that no acceptance of the work was to be implied from user because it was done on defendant's land, and referred to the following cases:—*Brydon* v. *Lutz*;[3] *Munro* v. *Butt*;[4] *Pattison* v. *Luckley*;[5] *Oldershaw* v. *Garner*;[6] *Gearing* v. *Nordhimer*;[7] *Wood* v. *Stringer*.[8]

[*April 19th*, 1901.]

RICHARDSON, J.— Under the circumstance it seems plain that on the contract itself, it not having been performed entirely, plaintiff's claim as entered cannot in strictness be supported. But as the real question in dispute between the parties is whether or not the plaintiff is entitled to any remuneration for the work he has done, and, if any, what, and as a Judge has the power of so amending pleadings that the real dispute may be adjusted, I so treat it and dispose of the real dispute upon the evidence taken, as a claim for work and labor.

Defendant has got what he bargained for with some shortcomings, for which damages will compensate him: Pollock on Contracts 251. The failure by plaintiff is not so vital that his expectation is in substance defeated; besides defendant by neglecting to keep plaintiff supplied with lime to proceed with his work amply justified plaintiff in leaving as he did, and entitled him to a judgment for two-thirds of $38, or $25.33, and costs.

REPORTER:

C. H. Bell, Advocate, Regina.

[1] 3 Bing. N. C. 737; 4 Scott 502; 3 Hodges 114; 4 L. J. C. P. 205. [2] 5 C. & P. 337. [3] 9 Man. R. 463. [4] 3 E. & B. 738; 4 Jur. N. S. 1231. [5] 44 L.J. Ex. 180; L. R. 10 Ex. 330; 33 L. T. 360; 24 W. R. 224. [6] 38 U. C. Q. B. 37. [7] 40 U. C. Q. B. 21. [8] 20 O. R. 148.

"was done," and that it (the conviction) diverted out of Colbourne whatever property and rights he, up to that time, held under the license in question, and that as a result he, by his admittedly selling thereafter, violated the law. Judgment. Richardson, J.

Consequently in my opinion the conviction in respect of which the case has been stated should be affirmed. As, however, the other Judges of this Court are unanimously of a contrary opinion I yield to them.

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Ford Jones, Advocate, Regina.

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[1] 44 L. J. Ex. 225; L. R. 10 Ex. 242; 33 L. T. 98; 23 W. R. 876.

Judgment.
Wetmore, J.

rant to be made out with a view of distraining on the defendant's goods for such rent. This distress warrant was made out to William Simpson, the deputy sheriff, as bailiff, and he and the plaintiff proceeded to the demised premises, I have no doubt with a view of making the distress. Before they got there, however, for some reason not explained, Simpson handed the distress warrant back to Smith, who put it in his pocket. When they reached the premises they found that all the furniture and effects had been removed out of the house except a few articles, and there was some wood in the yard of the rented premises and forming part of them. I find that Simpson went there not merely as a friendly adviser of both the parties, but went there in the interest of the plaintiff to assist him in securing his rent, and forbade Hamilton, the defendant's man from removing any more stuff from the premises, and that he did this in the plaintiff's presence and with his approval. The wood was left on the premises and subsequently the defendant sent his boys with the team to bring the wood away; they were accosted by the plaintiff after they got the wood partly loaded on their conveyance, who said to them "don't you know you are doing wrong, you had better go and see Mr. Simpson;" and he swore that he thought his boys were doing wrong, because they owed him rent for the place. By "they" of course he meant the defendant. In consequence of what the plaintiff said the boys threw off the wood and went away, and this wood is still on the demised premises.

I am of opinion and hold under *Cramer* v. *Mott*,[2] that all this amounts to a distress upon the wood for the rent in question, and this property still remaining in the hands of the plaintiff is a pledge unsold, and I hold under *Lehain* v. *Philpot*[1] that the right of action to the rent is suspended and affords a defence to such action.

*Judgment for the defendant.*

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

[2] 39 L. J. Q. B. 172; L. R. 5 Q. B. 357; 22 L. T. 857; 18 W. R. 947.

## BURNS v. USSHERWOOD.

*Contract—Special—Quantum meruit—Amendment. .... ..*

The plaintiff agreed to build, for a fixed lump sum, a foundation for a building, the defendant supplying materials on the ground, and the plaintiff, owing to non-supply of lime, abandoned the work, though it was found on the evidence that the defendant had got what he bargained for, with some shortcoming, for which damages would compensate him.

Held, that although the plaintiff was not entitled to succeed on his claim under the original special contract, he was entitled to recover on a *quantum meruit*, and the pleading were directed to be amended accordingly.

[RICHARDSON, J., *April 19th*, 1901.

Statement.

Plaintiff claimed $38, less a credit of 50 cents, being the contract price of building a stone foundation for a house upon defendant's land.

It appeared at the trial that the plaintiff did not complete his contract in every particular, but it was shown that the work he did gave the defendant what he bargained for with some shortcomings, estimated by an architect called as a witness, at one-third of the value of the whole. It was clear that defective performance went only to part of the consideration, inasmuch as defendant had used the work by building his house upon it. Further, it appeared, that by the terms of the contract defendant was to supply materials on the ground as required, and that the plaintiff left before the work was completed in consequence of the supply of lime becoming exhausted.

*Wm. Grayson*, for plaintiff, contended that the work was completed by plaintiff in so far he was able to do so. Non-completion was owing to defendant not supplying materials as he agreed to do. The architect called by defendant testified that the work was worth $30 to defendant, and plaintiff is entitled to recover as on a *quantum meruit*.

Argument.

Addison on Contracts, 9th ed., pp. 802-841; *Lucas* v. *Goodwin*;[1] *Cutler* v. *Close*.[2]

*W. B. Willoughby*, for defendant, submitted that no acceptance of the work was to be implied from user because it was done on defendant's land, and referred to the following cases:—*Brydon* v. *Lutz*;[3] *Munro* v. *Butt*;[4] *Pattison* v. *Luckley*;[5] *Oldershaw* v. *Garner*;[6] *Gearing* v. *Nordhimer*;[7] *Wood* v. *Stringer*.[8]

[*April 19th*, 1901.]

RICHARDSON, J.— Under the circumstance it seems plain that on the contract itself, it not having been performed entirely, plaintiff's claim as entered cannot in strictness be supported. But as the real question in dispute between the parties is whether or not the plaintiff is entitled to any remuneration for the work he has done, and, if any, what, and as a Judge has the power of so amending pleadings that the real dispute may be adjusted, I so treat it and dispose of the real dispute upon the evidence taken, as a claim for work and labor.

Defendant has got what he bargained for with some shortcomings, for which damages will compensate him: Pollock on Contracts 251. The failure by plaintiff is not so vital that his expectation is in substance defeated; besides defendant by neglecting to keep plaintiff supplied with lime to proceed with his work amply justified plaintiff in leaving as he did, and entitled him to a judgment for two-thirds of $38, or $25.33, and costs.

REPORTER:

C. H. Bell, Advocate, Regina.

[1] 3 Bing. N. C. 737; 4 Scott 502; 3 Hodges 114; 4 L. J. C. P. 205. [2] 5 C. & P. 337. [3] 9 Man. R. 463. [4] 3 E. & B. 738; 4 Jur. N. S. 1231. [5] 44 L.J. Ex. 180; L. R. 10 Ex. 330; 33 L. T. 360; 24 W. R. 224. [6] 38 U. C. Q. B. 37. [7] 40 U. C. Q. B. 21. [8] 20 O. R. 148.

## FLANNAGHAN v. HEALEY.

*Sale of goods and lands—Entire contract—Passing of property—Dominion Lands Act — Assignment of unrecommended homestead—Void assignment.*

Plaintiff signed a written memorandum as follows: " I hereby agree to sell, and make and execute the necessary papers to convey, all my right, title and interest in (describing his homestead for which he had not been recommended), also (3 horses, a wagon and a plow), and any other implement or chattel of which I am now the owner to (the defendant) for the sum of $480.00 to be paid as soon as the necessary papers are executed."

The defendant, without the plaintiff's knowledge, took possession of the horses; the plaintiff immediately objected to this. The plaintiff sued for conversion and the defendant counterclaimed for damages for breach of the agreement.

*Held*, (1) That the contract was an entire one and that, according to its terms, the property in the personal property would vest only on a proper conveyance of the land.

(2) That the agreement, being one for the assignment of an unrecommended homestead was void, and that although an agreement may be void in part and valid in part, yet this being an entire contract was wholly void.

Judgment was therefore given for the plaintiff for damages for conversion of the horses; and the defendant's counterclaim for damages for breach of the agreement was discussed.

[WETMORE, J., *May 31st, 1900.*

Trial of an action without a jury before WETMORE, J. **Statement.**

The facts sufficiently appear in the judgment.

*E. L. Elwood*, for plaintiff.

*Geo. A. Watson*, for defendant.

[*May 31st, 1900.*]

WETMORE, J.—This is an action brought by the plaintiff to recover damages for the wrongful taking by the defendant of three horses, which the plaintiff alleges to be his property.

For the purpose of determining the question of the plaintiff's right of property in these horses, it is only necessary to find one or two very simple facts. It was urged that the agreement as to the land was void under section

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42 of the Dominion Lands Act, as substituted by the Act of 1897, c. 29, s. 5, and, therefore, that the whole agreement became void. I may say that for the purpose of deciding the question of the plaintiff's right of property in the horses, I do not consider it necessary to express any opinion on this question. When I come to consider the question of the defendant's counterclaim it may be necessary to do so.

I find as a fact that the parties came together, and one agreed to sell and the other agreed to buy the property mentioned in the agreement; that their minds came together and their conclusions were properly expressed in that agreement, and by that written document, viewed in the light of the surrounding circumstances, the rights of property and other rights of the contracting parties must be determined That agreement is as follows:—"Yorkton, March 22nd, 1899. I hereby agree to sell, and make and execute the necessary papers to convey, all my right, title and interest in the south-west quarter of section twenty-eight, township twenty-six, range four, west of the second meridian in the North-West Territories, Dominion of Canada; also one horse aged, one three-year-old colt, one colt rising two years old, one lumber wagon, one plow and any other implement or chattel of which I am now owner to Ezran Anson Healey, implement agent, for the sum of four hundred and eighty dollars, the said four hundred and eighty dollars to be paid as soon as the necessary papers are executed."

No transfer papers as contemplated by this agreement were ever executed, and no delivery of any of the property embraced in such agreement was ever made by the plaintiff. The defendant some few days (from four days to a week) after the agreement was made, took possession of the horses, finding two of them on the prairie and one at the place of one Garry. This was done entirely without the knowledge of the plaintiff, and without any instructions from him to do so, and he, as soon as he became aware of it, claimed that the defendant had no right or authority to do it.

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Wetmore, J.

It is claimed on the part of the defendant that by virtue of the agreement, the right of property in the horses and other chattels mentioned therein became forthwith vested in him. The rule respecting the passing of the right of property on the sale of a specific chattel is laid down by Holyroyd, J., in *Tarling* v. *Baxter*,[1] as follows:—"In all cases of the sale of goods, it is a rule that, when nothing remains to be done by the seller as between him and the buyer before delivery, the property in the goods passes to the buyer, and the property in the price to the seller. If any act remains to be done by the seller, the property does not pass until the act has been done." This seems to have been held a good exposition of the law ever since. Of course this rule may be varied by the intention of the parties as expressed in the contract or gathered from its character, Blackburn, J., in the *Calcutta and Burmah Steam Navigation Company* v. *Mattos*,[2] at page 329, quotes with approval from the judgment of Sir Cresswell Cresswell in *Gilmour* v. *Supple*,[3] as follows:—"By the law of England by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer and a right to the price in the seller, unless it can be shown that such was not the intention of the parties, etc., etc. Various circumstances have been treated by our Courts as sufficiently indicating such contrary intentions."

Looking at the terms of the contract in question and taking into consideration the circumstances under which it was made, I am of opinion that it is an entire contract; that the intention was to sell out the whole property mentioned in it. It embraced all the property the plaintiff owned; he wanted to dispose of everything and leave the country. He would not have sold one part without the other, and that the defendant well understood. It would to my mind be utterly inconsistent with such intention that the title to a portion of the property should vest in

[1] 6 B. & C. 360; 9 D. & R. 272; 5 L. J. (O. S.) K. B. 164; 30 R. R. 355. [2] 32 L. J. Q. B. 322; 33 L. J. Q. B. 214. [3] 11 Moore P. C. 551; 6 W. R. 445.

Judgment. Wetmore, J.

the buyer forthwith, and that the title to the other property should not. It is clear that the plaintiff's title to the land would not vest in the defendant until a proper conveyance was executed. Apart from such being the law, even if there had been no stipulation in the contract, it is expressly provided therein that the plaintiff was to make and execute the necessary papers to convey his right and title, and therefore the contract itself conveys the intention that the title was not to vest in the defendant until such papers were executed. I am of opinion that the right of property to these horses did not vest in the defendant for another reason, namely, that something remained to be done by the seller with respect to the property sold, that is necessary papers had to be made to convey the plaintiff's right and title therein to the defendant. It was urged that this provision only applied to the land. I am not so clear that this is correct. In fact, the inclination of my mind is rather the other way: that this provision embraces all the property mentioned in the contract both real and personal; if so, it very much strengthens the idea that the parties did not intend that the title or right of property should pass under the agreement—that something else should be done before it passed. But assuming that this provision applies only to the land as before stated, this contract was an entire one, and if anything was required to be done by the seller with respect to any part of the property embraced by it, no title would pass to any of it until that thing was done. Such is my view of the law, because, as before stated, I cannot conceive how the title to one portion of an entire sale, made under the circumstances as stated, could pass and not the other, unless, of course, there was something to express or indicate such an intention. And in connection with the question of the passing of the right of property, I refer to The Sale of Goods Ordinance (C. O. 1898, c. 39) s. 19. I am of opinion that under that section in view of the terms of the contract and the circumstances of the case, it was not the intention that the right of property should pass to the defendant, at any rate until the conveyance provided for was executed.

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I hold, therefore, that the defendant was a trespasser and is liable in damages. One of the animals died shortly after the defendant took possession of it. The other two horses he had traded away.

The defendant counterclaimed for damages by reason of the plaintiff's refusal to carry out the contract on his part by executing the necessary papers contemplated thereby. It was not denied at the trial that the plaintiff had refused to execute these papers. In fact the plaintiff's pleadings were that he had repudiated the contract. It appeared, however, in evidence, and it was conceded that the plaintiff homesteaded the land set out in the agreement in 1883 under the Acts then in force affecting Dominion lands. No patent has ever issued for it, and no certificate from the local land agent recommending the issue of the patent countersigned by the Commissioner of Dominion Lands or a member of the Dominion Lands Board has ever been granted. It was therefore contended on behalf of the plaintiff under the section 42 of the Dominion Lands Act (R. S. C. c. 54), as substituted by 60 and 61 Vic. (1897), c. 29, s. 5, that the contract *quoad* the land is void, and therefore that under the circumstances of this case the contract being entire, and there being no intention that one part of the property should pass and not the other, the whole contract is void — that it could not be void as to one part and valid as to another. I may also state that there was no evidence of my declaration by the Minister as provided in the substituted section 42.

The first question that arises is, is this contract *quoad* the land void as between the parties to it? I have with very great hesitation arrived at the conclusion that it is. I had occasion to discuss this question in *In re Harper* (not reported), decided by me on the 18th September, 1894. I expressed no decided opinion upon it, as I disposed of that application on another ground, but I gave a very strong intimation that I was inclined to differ from the judgment of the majority of the Court of the Queen's Bench of Manitoba in *Harris* v.

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*Rankin*,[4] that under a somewhat similar provision in the Dominion Lands Act of 1879, a transfer of homesteaded land before the issue of a patent, or a recommendation for such issue, was void between the parties to such transfer, and adopt the view taken by Wallbridge, C.J., and Dubuc, J., that this provision was only intended to operate as between the Crown and the homesteader. Of course when I delivered my judgment in *Re Harper*, the original section 42 of the Dominion Lands Act was in force, and I was very much inclined to the view that that section only rendered the assignment or agreement as the case may be void as between the Crown and any party to the contract; or, in other words, that the section was only intended to operate as between the Crown and the homesteader or pre-emptor. There is nothing that I can perceive in the language of section 5 of the Act of 1897 which leads me to a different conclusion. In fact, were it not for the provisions of s. 9 of 61 Vic. (1898) c. 32, I would have no hesitation in holding that section 42 of the Dominion Lands Act, as substituted by the Act of 1897, was only intended to operate as between the Crown and the homesteader or pre-emptor. But that section of the Act of 1898 very materially interferes with my views. I decided *Re Harper* upon the construction to be put on section 42 of the Dominion Lands Act, as it then stood, and section 125 of the Territories Real Property Act (R. S. C. c. 51), and I held that a mortgage was not a transfer or an assignment. Upon reading section 9 of the Act of 1898, which enacts a proviso to section 73 of the Land Titles Act of 1894, I cannot avoid the conclusion that Parliament when it enacted it considered that section 42 of the Dominion Lands Act rendered the transfer or agreement void as between the parties and for all purposes, unless a patent or a proper recommendation for one had been issued at the time the transfer was made or the agreement entered into. In view of what was decided in *Harris* v. *Rankin*,[4] and of what Parliament has considered to be the effect of section 42 of the Dominion

[4] 4 Man. R. 115.

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Lands Act, I have come to the conclusion that I ought to yield my individual opinion and hold the contract in question in this case void as between the parties and for all purposes *quoad* the land.

Having reached this conclusion, I am of opinion that I must hold the whole contract to be void; of course a contract may be good in part and bad in part, but when the contract is, as I have held it to be in this case, entire, when one part of it cannot be separated from the other; when it was never contemplated that one portion of the property should pass without the other, I cannot conceive how any portion of the contract can be supported when it is void as to a portion of the property intended to be embraced in it.

Having reached this conclusion, I hold that the defendant fails as to his counterclaim.

The only question remaining for consideration is the value of the horses. Under all the circumstances, I think I will be doing justice by taking the valuation of the witness Reid, which amounted to $185.

Judgment for the plaintiff as to the statement of claim, for $185 and costs; and also judgment for the plaintiff on the counterclaim for costs. One taxation of costs.

REPORTER:

E. A. C. McLorg, Advocate, Moosomin.

## QUEEN v. FORSYTHE.

*Criminal law—Theft—Evidence of ownership of article stolen—Brand—Earmark—Deposition taken at preliminary enquiry—Reading of, in evidence at trial—Evidence of absence of deponent from Canada—Sufficiency of.*

*Held*,—(ROULEAU, J., dissenting), that the production of a steer's hide with the prosecutor's brand and ear-marks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, was sufficient to justify the trial Judge in finding that the steer in question was the property of the prosecutor. (See now 63-64 Vic. (1900) c. 46, s. 707 A, and 1 Edw. VII. c. 42, s. 707 A.

*Held*,—*per curiam*—that evidence that a witness at the preliminary enquiry was a corporal in the N. W. M. Police, that he had been sworn in as a member of Strathcona's Horse, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary enquiry; and that the question was one to be decided by the trial Judge.

[*Court in banc, July 21st, 1900.*

Statement. This was a Crown case reserved. The defendant was tried before SCOTT, J., at Maple Creek, on April 25th and 26th, 1900, upon the following charge:—"That the said Harry Reginald Forsythe, at Maple Creek aforesaid, on or about the eighth day of November, 1899, one steer, the property of John Lawrence, senior, unlawfully did steal," and was convicted and sentenced to imprisonment in the penitentiary at Stony Mountain, Manitoba, for the term of two years and eight months.

It was proved to the satisfaction of the learned trial Judge by several witnesses, that the steer in question was branded with the letters "J.L." in the form of a monogram, similar to the brand described in the evidence of John Lawrence, senior, the alleged owner, that it bore the ear marks described by him in his evidence, and that after a careful inspection of the hide of the animal no other brands could be found upon it.

Statement.

The only evidence which in any way tended to show that the animal in question was the property of any person other than Lawrence was the statement of the defendant to the effect that he had purchased it from one Lamon, and the production of a document in defendant's handwriting purporting to evidence the sale to him, and which he stated was signed by Lamon. This statement the learned trial Judge stated he did not believe.

The evidence of John Lawrence, senior, was as follows:—

To Mr. Conybeare:—

"I am a rancher; my ranche is on Fish Creek, 8 miles from Maple Creek; I examined the hide, exhibit "A," to-day; the animal that it came from was owned by me; I never parted with it; I recognize the hide by the marks upon it, viz., by the brand and the ear marks; exhibit "C" is a representation of the brand upon it; the right ear is square-cropped and there is an overslope on the left ear."

To Mr. Nolan:—

"I have lived at Fish Creek about ten years; I have between 500 and 600 head of cattle of all ages and color. It is by reason of the brand and the ear marks alone that I recognize the hide as that of an animal owned by me; my brand is "J.L." in the shape of a monogram on the left hip or thigh; sometimes on one and sometimes on the other; my vent is a bar under the brand; I do not always vent the beef cattle when I sell them in large bunches; Benallick is a buyer in Winnipeg to whom I sometimes sell; I also sell to Wilson, a Toronto buyer; I do not vent the cattle I sell to them; they can either ship them or sell them here as they please, but I do not think they sell them here. All I sold them last year were shipped to Winnipeg; I went with them; I have sold cows that I did not vent; I never sold any steers singly; I always sell my steers in bunches. I usually vent cows when I sell them; I sold James Labbing a cow; I did not vent it, but Labbing afterwards put his brand upon it; my cattle run about 12 or 15 miles from here. I believe exhibit "A" to be the hide of the steer; it does not

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look like the hide of a cow; I think it is the hide of a three-year-old steer; I think it is not that of a five-year-old; I sell my three and four-year-old steers for beef; all the steers I sold last year and the year before were shipped by rail from here; I brought them down and saw them shipped from here."

To Mr. Conybeare:—

"The two branding irons I now produce are branding irons I use in branding my cattle; I have two others which I also use, the brand being of the same device and shape, but one is larger than these and the other smaller; a brand mark increases in size as the animal grows older."

To Mr. Nolan:—

"I have not my certificate of the registration of my brand; I could not find it; I have no branding iron with a loop at the end of the curve of the J as shown in exhibit "B;" when I made exhibit "B" I did not give a proper description of the brand in that respect; the brand mark will increase with the growth of the animal in all cases."

The learned trial Judge was satisfied that the hide produced in Court was the hide of a steer.

Counsel for the Crown proposed to put in as evidence for the prosecution under section 687 of the Criminal Code, the depositions of David Nicol taken by Frank Harper, the justice of the peace who presided at the preliminary investigation of this charge, contending that the evidence of David Paterson established the fact that Nicol was absent from Canada.

So far as material to the questions submitted, the evidence of David Paterson was as follows:—

To Mr. Conybeare:—

"I am orderly-room clerk in the North-West Mounted Police Barracks at Maple Creek; I occupied the same position in November last.

"I know Frank Harper; he is a justice of the peace; he presided at the preliminary hearing of this charge; the defendant was present at the hearing and the depositions

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were taken in his presence; Mr. Nolan, his counsel, was also present and representing him; I think the defendant had a full opportunity of cross-examining the witnesses; I know there was a dispute, but the difficulty was got over in the afternoon; David Nicol left here to join Strathcona's Horse; I am not sure whether he is in Canada or not; when he left here his destination was South Africa; he was sworn in here as a member of that force in my presence."

To Mr. Nolan:—

"I have heard that some of those who joined that force were discharged before it left; I will not swear that he is not in Canada at the present time.

"Nicol was a corporal in the police force stationed here when he joined the Strathcona Horse, and was acting quartermaster sergeant; if he had left that force I think he would have returned here; he was shown on the rolls here as absent on leave, but on the first April all those who went with the force to South Africa and returned as absent on leave were transferred to the depot division of the police force."

Counsel for the defendant objected to the admission of the depositions as evidence on the ground that it had not been shown that Nicol was absent from Canada. The learned trial Judge ruled that the evidence established beyond a reasonable doubt that Nicol was absent from Canada, holding that the fact of the witness not being able to swear positively that Nicol was absent at that time was immaterial, so long as the facts stated by him reasonably led to the conclusion that he was so absent; that, in fact, it would under ordinary circumstances be impossible for any person to swear positively that at the time of his giving evidence another person was absent from Canada.

The questions of law submitted for the opinion of the Court were:—

1. Was the evidence as above stated sufficient to justify the learned trial Judge in finding as he did that the steer in question was the property of John Lawrence, senior?

Statement.

2. Was the evidence as to the absence of David Nicol from Canada at the time of the trial sufficient to justify, on the ground of such absence, the admission under section 687 of the Criminal Code of his depositions taken at the preliminary investigation of the charge?

The case was argued at Calgary, July 19th, 1900.

*C. F. P. Conybeare,* Q.C., for the Crown.

*P. J. Nolan,* for accused.

The following cases were referred to:—*Queen* v. *Graham,*[1] *Queen* v. *Farrell,*[2] *Regina* v. *Nelson,*[3] *Regina* v. *Stephenson.*[4]

Judgment was reserved.

[*July 21st, 1900.*]

McGuire, J.—This is a case reserved by Mr. Justice Scott for the opinion of this Court.

As to the first question, we are of opinion that the fact of the prosecutor's brand being upon the hide was a means of identifying it as his property. The practice of branding has become the recognized mode of marking animals so that the owner may recognize them, and so widely used is it that it has become almost the only means employed for that purpose. Where a person has but a few animals he may be able from frequently seeing them to become well enough acquainted with their appearance to recognize them without, perhaps, being able to point out the various peculiarities by which he knows them. But when the herd is a large one and no one may have had sufficient opportunities to become acquainted with the many little peculiarities which may distinguish the members of that herd from all other animals, then it becomes necessary that some practically indelible mark should be placed on them, and branding has been found to be the best mark for that purpose. It is in every cattle country a well recognized mode of identification, and

[1] 2 C. C. C. 388. [2] 43 L. J. M. C. 94; L. R. 2 C. C. 116; 30 L. T. 404; 22 W. R. 578; 12 Cox, C. C. 605. [3] 1 O. R. 500. [4] 31 L. J. M. C. 147; L. & C. 165; 8 Jur. (N. S.) 522; 6 L. T. 334; 10 W. R. 546; 9 Cox, C. C. 156.

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to say that it is not a reasonable means is to say that all cattle dealers are wrong in recognizing it as such. It is, of course, not an infallible mark. It may have been put on by mistake, or by fraud, or the animal, though the property of the owner of the brand at one time, may subsequently have been parted with. But these remarks apply equally to whatever marks may be relied upon as proof of identification. The weight of the evidence afforded by a brand may be reduced by circumstances of various kinds even on the vanishing point. A person's name written or stamped on the books in his library may be fairly strong evidence that a particular book with his name in it is the property of the owner of that name, but if it be shown that he has been selling his books so marked, and might have sold this one, its value as proof would be weakened. Again, a bookseller puts a label inside all the books on his shelves. In such a case the finding of a book so labelled in the possession of another might be taken as very weak evidence of it being still the property of the bookseller. A common way among lumbermen to mark their logs is to impress a particular letter or stamp on them, and logs having such mark are in practice admitted to be the property of the person whose mark they bear. But here, too, the weight of this as evidence may be impaired or destroyed by various circumstances needless to mention. In short, the reasons given by a witness for saying that an animal is his must be considered by the tribunal trying the matter, and their weight is entirely for that tribunal. In this case the prosecutor swears that the animal, the hide of which he had examined, was owned by him. Then he gives his reasons for saying this; he recognized the hide by the brand and ear marks. He also swears this was a steer, and in his opinion a three-year-old, and that he sells steers only in bunches, and that all the steers he sold for the two preceding years were shipped away by rail. I think this was clearly evidence proper to be submitted to a jury, and for the same reason proper to be considered by Mr. Justice SCOTT sitting as a jury, and such weight should be given to it as

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all the circumstances will seem to warrant. Mr. Justice SCOTT was satisfied as to the identification, and we think he was justified in so being.

As to the second point—the admission of the deposition of Nicol—it was shown by a member of the N.W.M.P. that Nicol was a corporal in that force stationed at Maple Creek and was sworn in there as a member of "Strathcona's horse," and as such left Maple Creek, his destination being South Africa. While some of those who sought to go with that force were discharged before leaving Canada, the witness (the orderly room clerk at Maple Creek) was of opinion that had Nicol been so discharged he would have returned to that place. That he did not so return up to 1st April may be inferred from the statement of the witness that he was not sure whether Nicol was in Canada or not—he would have known had Nicol returned there. Had proof been given of his not having returned after April 1st to Regina, the proof would have been stronger, but it is not necessary to accumulate testimony if that already produced is sufficient to satisfy the Judge and was reasonably sufficient for that purpose. It must be borne in mind further that Nicol was not an ordinary person free to go where he pleased. A civilian starting for South Africa might change his mind before leaving Canada, but Nicol was sworn in as a member of Strathcona's Horse and was not a free agent, and, unless discharged, had no choice but to go with that force. Again, a civilian desirous of joining that force and rejected, say at Halifax, might not be presumed to return to the point he started from, but Nicol was still a member of the N.W.M. Police, and while with Strathcona's Horse was regarded as "on leave," and if discharged from Strathcona's Horse it would be his duty to return to his service as a member of the N.W.M. Police. He had, it seems, not done so at least up to April 1st, and the trial took place on April 25th.

The proof of absence from Canada is a matter for the Judge at the trial, and if it is such as reasonably to satisfy him, and he is satisfied, the fact is proved.

Judgment. McGuire, J.

We were referred by counsel for the prisoner to the cases of *Reg.* v. *Graham*[1] and *Reg.* v. *Farrell*.[2] In the former case the only evidence of the absence of the witness was very weak, being that of a constable who had been unable to find the deponent to serve a subpœna on him, and who had been told by a man who was not produced to testify that the deponent had left the country. This was secondary evidence where the primary evidence might have been produced. The other case decides only that proof of old age and nervousness of the witness is not proof that that she was so ill as not to be able to travel. It was proved she could travel to London to see her doctor, and that she was at the time of the trial in the assize town and not far from the Court. That was clearly not evidence reasonably such as to satisfy the Court that she was so ill as to be unable to travel. On the other side, Mr. Conybeare, for the prosecution, referred us to *Reg.* v. *Nelson*.[3] The proof there was, we think, not nearly so satisfactory as in the present case, yet the majority of the Court held it sufficient. In *Reg.* v. *Wellings*,[5] Lord Coleridge said: "It is in each case a matter for the presiding Judge to determine. The presiding Judge has in this case decided that the evidence was sufficient to satisfy him that the deponent was 'so ill as not to be able to travel,' and we see nothing to lead us to the conclusion that he was wrong." In *Reg.* v. *Stephenson*,[4] Sir W. Earle, C.J., said:—"We are all of the opinion that the question of whether the illness proved is or is not within the statute is a question for the determination of the presiding Judge, and that if, to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, this Court ought not to interfere with his decision." In *Reg.* v. *Nelson*,[3] Cameron, J., dissented from the opinion of the majority of the Court, and one is not surprised at that. The evidence was fairly open to the criticism that it was not reasonably sufficient. We agree with Cameron, J., that in a case reserved the Court ought to answer whether the evidence

[5] 47 L. J. M. C. 100; 3 Q. B. D. 426; 38 L. T. 652; 26 W. R. 592; 14 Cox, C. C. 105.

Judgment. McGuire, J.

was sufficient to justify the Judge in finding as he did, and not merely to say that it was a matter in his discretion, and that having exercised that discretion as he did the Court would not interfere. We think the Court should consider whether the evidence was such as would *reasonably* satisfy the Judge in finding that the fact of absence has been proved. As already pointed out, we think the evidence in this case was of that character. In our opinion the conviction should be confirmed.

RICHARDSON and WETMORE, JJ., concurred.

ROULEAU, J. — I am sorry I cannot come to the same conclusion as my brother Judges on the first question submitted by Mr. Justice SCOTT.

The only evidence as to property which was adduced in this case was this:—"It is by reason of the brand and ear marks alone that I recognize the hide as that of an animal owned by me." There is no evidence that he branded that animal himself, or that he had in his bunch any of the class of animals which the skin was supposed to belong to. I hold that a simple mark or brand on any animal, without any other corroborative evidence, is not sufficient to convict. Suppose a man lost a coat and a person was found in possession of it, and the owner of the coat swore that he knew the coat was his because a button was sewed on it bearing his initials. When asked if he put the button there himself, he would answer "No;" whether he knew the coat otherwise, he would say "No." I don't think any Judge would contend that this evidence would be sufficient to convict of theft. The evidence no doubt would prove that the button was his, but it would not be sufficient to prove property in the coat. It is some proof that the coat bearing that button belongs to him, but not *prima facie* proof that the coat belongs to him; I mean not sufficient evidence to oblige the incriminated individual to adduce evidence to contradict that statement or explain it. I hold, therefore, that the brand and ear-marks on an animal are not *prima facie* evidence of ownership, so as to find a man

guilty of theft, unless there is corroborative evidence in support. It is a well-known fact that any man can put the brand of another man on cattle, and it would be a very dangerous precedent to say that because his brand is on these cattle he is supposed to be the owner of them. The brand or marks put on cattle is for the purpose of general identification, not for the purpose of ownership. It is a common practice in this country to put a man's brand on cattle that he does not own at all, but is owned by somebody else who has no brand of his own.

Judgment. Rouleau, J.

As to the second question, I agree with my brothers.

*Conviction affirmed,* ROULEAU, J., *dissenting.*

REPORTER:

Ford Jones, Advocate, Regina.

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## THE UNION BANK OF CANADA v. THE MUNICIPALITY OF THE TOWN OF MACLEOD.

*Municipal ordinance—Assessment — Personal property — Chartered bank—Notes and cheques of other banks.*

The failure of an assessor to make "diligent enquiry" is not fatal to the validity of the assessment; the provision in the Municipal Ordinance in that respect being merely directory.

Commercial paper (such as notes and cheques on other banks) held by a branch of a chartered bank are "personal property," and a branch bank holding such paper is liable to assessment in respect thereof.

[*Court in banc, July 21st, 1900.*

The Macleod branch of The Union Bank of Canada was assessed by the municipality of Macleod for personal property to the value of $15,000 and for $5,000 income. Upon appeal to the Court of Revision both assessments were confirmed. The bank thereupon appealed against both assessments to the Honorable Mr. Justice ROULEAU. The appeal was heard at Macleod July 4th, 1900. The evi-

Statement.

dence of the manager of the Macleod branch of the bank established that the fixtures in the branch of the bank at Macleod were the property of the bank and were worth $600 or $700; that the amount of gold and silver in the bank would average about $600, and the amount of Dominion notes about $700; and that the bank held at least $15,000 of assets in Macleod consisting of notes, legal tender, gold, and notes of and cheques on other banks. By consent of all the parties the Honorable Mr. Justice ROULEAU on June 5th, 1900, referred the appeal to the Court *in banc*.

The appeal was argued at Calgary, July 19th, 1900.

*Jas. Muir*, Q.C., for appellant:—The assessment was not duly performed, as the assessor made no enquiries—*Peters* v. *City of St. John*.[1] The words "personal property" are not to be construed as including every thing but real estate: *Wood* v. *McAlpine*.[2] A double assessment is never intended: *Ex parte Lewin*,[3] *City of London* v. *Watt*,[4] *City of Brantford* v. *Ontario Investment Co.*[5] Cheques on other banks and notes under discount are not assessable as personal property of the bank.

The bank has only one income, which is that of the head office and is derived from all the branches of the bank: *Lawless* v. *Sullivan*,[6] *Russell* v. *Town and County Bank*,[7] *City of Kingston* v. *Canada Life Assurance Co.*[8]

*C. F. Harris*, for respondent:—Even if the assessor omitted to make enquiry, the Court of Revision heard evidence and confirmed the assessment. Such an omission by an assessor would not annul the assessment: *Canadian Land & Emigration Co.* v. *Municipality of Dysart*.[9]

As to the assessment of personal property: *Bank of Toronto* v. *Lamb*,[10] *Dow* v. *Black*,[11] *Hodge* v. *Regina*,[12] *In*

[1] 21 S. C. R. 674. [2] 1 O. A. R. 234. [3] 11 S. C. R. 484. [4] 22 S. C. R. 300. [5] 15 O. A. R. 605. [6] 50 L. J. P. C. 33; 6 App. Cas. 373; 44 L. T. 897; 29 W. R. 917. [7] 58 L. J. P. C. 8; 13 App. Cas. 418; 59 L. T. 481; 53 J. P. 244. [8] 19 O. R. 453. [9] 9 O. R. 495; 12 O. A. R. 80. [10] 12 App. Cas. 575; 56 L. J. P. C. 87; 57 L. T. 377. [11] L. R. 6 P. C. 272; 44 L. J. P. C. 52; 32 L. T. 274; 23 W. R. 637. [12] 9 App. Cas. 117; 53 L. J. P. C. 1; 50 L. T. 301.

*re The North of Scotland Canadian Mortgage Co.*,[13] *Phœnix Insurance Co. of London* v. *City of Kingston*.[14] Commercial paper is personal property. Argument.

Counsel agreed that if the appeal as to personal property were dismissed the appeal as to income should be allowed.

[*July 21st, 1900.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ.) was delivered by

WETMORE, J.—The Union Bank was assessed by the municipality for personal property for $15,000. On appeal to the Court of Revision this assessment was confirmed. The bank thereupon appealed to Mr. Justice ROULEAU, who, after hearing the evidence, referred the matter to this Court. One of the grounds of appeal is founded on s. 122 of the Municipal Ordinance (C. O. 1898 c. 70), which provides that "the assessor or assessors shall prepare an assessment roll after revision by the assessment committee as in form "F" in the schedule to this Ordinance, setting down in each column as accurately as may be after diligent enquiry, the information called for by the heading thereof."

It is urged that the evidence established that the assessor did not assess the bank "after diligent enquiry." Assuming for the purposes of this case that the evidence did establish this, we are of opinion that it is not fatal to the assessment, the provision in this respect being merely directory. We did not understand the learned counsel for the bank to contend that this omission on the part of the assessor rendered the assessment void. His contention was that it merely shifted the burden of proof as to the amount of assessable property from the appellant to the respondent. Assuming this to be correct, we are of opinion that the amount or value of the property assessable against the bank was proved. Mr. Anderson, the manager of the bank at Macleod, was

[13] 31 U. C. C. P. 552. [14] 7 O. R. 343.

Judgment.

Wetmore, J.

called as a witness, and established that the bank was possessed of fixtures in the bank worth six or seven hundred dollars, that the amount of gold and silver would be about $600, and that they had Dominion notes averaging about $700. Counsel admitted that the bank was assessable in respect to these items, and admitted that what was intended as fixtures was in the nature of what is usually termed shop or store furniture, such as counters and the like. So admittedly say $2,000 worth of assessable property was proved against the bank. But the manager went further, he swore as follows: "I admit the bank has at least $15,000 of assets in Macleod—it consists of notes, legal tender, gold, notes and cheques of other banks." The evidence he gave to the Court of Revision was put in, and in that he swore in substance that the bank had $15,000 of money, consisting of gold, silver, and commercial paper in the bank in Macleod. We think that all this testimony abundantly established that the bank had assessable property to the value of at least $15,000.

It was contended that the commercial paper such as notes and cheques on other banks was not assessable. Section 118 of the Ordinance provides that "all land and *personal property* and income in the Territories shall, when no other express provision has been made in this respect, be liable to taxation, subject to the exemptions hereinafter mentioned." The question that arises is, are notes and cheques on other banks and property of that description "personal property" within meaning of the Ordinance? Sub-section 4 of section 2 of such Ordinance, defines land, real property and "real estate" respectively to include "all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any buildings as to form in law part of the realty, and all moneys, minerals, quarries, fossils, in and under the same except mines belonging to Her Majesty." Sub-section 5 of the same section defines "personal estate" and "personal property" to include "all goods, chattels, shares in incorporated companies, interest on mortgages, dividends from bank stock, income and *all other pro-*

Judgment.

Wetmore, J.

*perty except land and real estate and real property as above defined,* and except property herein expressly exempted." It is urged that notes and cheques of other banks do not come within this definition. Notes and cheques of other banks are property. They have a commercial value, they are the subject of theft, and may be the subject of an action of trespass for an unlawful taking, or of an action for an unlawful conversion, and the damages in any such action would be not merely the value of the paper on which they are written, but the commercial value of the security. In construing sub-section 5 of section 2, it is impossible to narrow the broad definition therein given to the words, by practically eliminating the language hereinbefore underscored. It has been urged that the effect of holding this will be to authorize a double assessment in some instances. Without admitting that it will have this effect, we cannot perceive that this can affect the operation to be given to sub-section 5 before cited. The property in question is not included in any of the exceptions or exemptions specified. We are of opinion that Mr. Justice ROULEAU should be advised that the assessment of $15,000 personal property should be confirmed.

As the counsel for the town consented in the event of the Court reaching this conclusion as to personal property, that the appeal as to the assessment respecting the $5,000 income should be allowed, Mr. Justice ROULEAU should be advised to allow the appeal as to such $5,000 income.

Mr. Justice ROULEAU advised accordingly.

REPORTER:

Ford Jones, Advocate, Regina.

## CONRAD ET AL. v. THE ALBERTA MINING CO., LTD., ET AL.

*Practice—Service of writ of summons ex juris on a foreigner—Writ or notice—Setting aside order for service—Bona fide purchaser under decree of Court—Protection of.*

The question in what circumstances and to what extent provisions in the Rules under the English Judicature Act are to be held incorporated with the Judicature Ordinance discussed.

English Order XI. (Marginal Rules, 64-70), is not in force in the Territories.

The Judicature Ordinance, 1893, s. 32,† authorizes an order for the service of a writ of summons *ex juris*, though the party to be served is not a British subject, and the order should provide for service of the writ of summons, not of a notice thereof.§

Judgment of SCOTT, J., reported *ante* p. 322, on this and other points affirmed.

[*Court in banc, December 8th, 1900.*

Statement. The defendant Healy appealed from the decision of SCOTT, J., *ante* p. 322. The appeal was argued July 18, 1900.

*R. B. Bennett,* for appellant:—No writ of summons for service *ex juris* can be issued without the leave of a judge having first been obtained, both for its issue and its service. This Court has no inherent jurisdiction to issue a writ of summons for service *ex juris*. The Courts at Westminster have no such jurisdiction. It is a purely statutory right: *In re Anglo African Steamship Co.*,[1] *In re Busfield, Whaley* v. *Busfield*,[2] *Re Maugham*,[3] *Lenders* v. *Anderson*,[4] *In re Cliff, Edwards* v. *Brown*,[5] *Tassell* v. *Hallen*,[6] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*,[7] and

† Now Rules 18, 19, 20 and 21, Jud. Ord. C. O. 1898, c. 21.

§ See Ordinances, 1901, c. 10, s. 12, striking out "commanded" in the form of writ and substituting "notified."

[1] 32 C. D. 348; 55 L. J. Ch. 579; 54 L. T. 807; 34 W. R. 554. [2] 32 C. D. 123; 55 L. J. Ch. 467; 54 L. T. 220; 34 W. R. 372. [3] 22 W. R. 748. [4] 12 Q. B. D. 50; 53 L. J. Q. B. 104; 49 L. T. 537; 32 W. R. 230; 48 J. P. 136. [5] (1895) 2 Ch. 21; 64 L. J. Ch. 423; 72 L. T. 440; 43 W. R. 436; 13 R. 425; 11 Times Rep. 311. [6] (1892) 1 Q. B. 321; 61 L. J. Q. B. 159; 66 L. T. 196; 40 W. R. 221; 56 J. P. 520; 8 Times Rep. 210. [7] (1894) A. C. 670; 11 R. 340; 10 Times Rep. 621.

depends upon sections 32, 33 and 34 of the Civil Justice Ordinance of 1893.† Unless the plaintiffs made out such a case as brought it within some one of the sub-sections of section 32, the Court has no jurisdiction in the premises. The granting of leave to issue a writ for service *ex juris* constitutes an act of jurisdiction, upon the proper exercise of which depends the validity of the judgment of the Court: *In re Eager, Eager* v. *Johnstone*,[8] *In re Cliff, Edwards* v. *Brown*,[6] *Hadad* v. *Bruce*,[9] *Preston* v. *Lamont*,[10] *Tassell* v. *Hallen*.[6] Argument.

"The whole subject matter of the action" was not land situate within the judicial district, nor was it sought in the action to construe, rectify, set aside or enforce any deed, will, contract, obligation or liability affecting land in the district: *Casey* v. *Arnott*,[11] *Agnew* v. *Usher*,[12] *Kaye* v. *Sutherland*,[13] *Tassell* v. *Hallen*.[6]

Sections 32, 33 and 34 of the Civil Justice Ordinance, 1893, are limited in their application, in any event, to a defendant who is a British subject beyond the territorial jurisdiction of the Court, and express language to that effect must be employed to bring a foreigner abroad within the purview of our legislation, even if the legislative jurisdiction in the premises is possessed by the Territorial Assembly, which is denied: *Russell* v. *Cambefort*,[14] *Western National Bank of New York* v. *Perez Triana & Co.*,[15] *Dobson, Barlois & Co.* v. *Festi, Rusini & Co.*,[16] *Heinemann & Co.* v. *Hale & Co.*,[17] *Indigo Co.* v. *Ogilvie*,[18] *Grant* v. *Anderson*,[19] *St. Gobain, Channy and Cirey Co.* v. *Hoyermann's Agency*,[20] *De-*

[8] 22 C. D. 86; 52 L. J. Ch. 56; 47 L. T. 685; 31 W. R. 33. [9] 8 Times Rep. 409. [10] 1 Ex. D. 361; 45 L. J. Ex. 797; 35 L. T. 341; 24 W. R. 928. [11] 2 C. P. D. 24; 46 L. J. C. P. 3; 35 L. T. 424; 25 W. R. 46. [12] 14 Q. B. D. 78; 54 L. J. Q. B. 371; 51 L. T. 576; 33 W. R. 126. [13] 20 Q. B. D. 147; 57 L. J. Q. B. 68; 58 L. T. 56; 36 W. R. 508. [14] 23 Q. B. D. 526; 58 L. J. Q. B. 498; 61 L. T. 751; 37 W. R. 701. [15] (1891) 1 Q. B. 304; 60 L. J. Q. B. 272; 64 L. T. 543; 39 W. R. 245; 7 Times Rep. 177. [16] (1891) 2 Q. B. 92; 60 L. J. Q. B. 481; 64 L. T. 551; 39 W. R. 481; 7 Times Rep. 538. [17] (1891) 2 Q. B. 83; 60 L. J. Q. B. 650; 64 L. T. 548; 39 W. R. 485; 7 Times Rep. 497. [18] (1891) 2 Ch. 31; 64 L. T. 846; 39 W. R. 646. [19] (1892) 1 Q. B. 108; 61 L. J. Q. B. 107; 66 L. T. 79; 8 Times Rep. 111. [20] (1893) 2 Q. B. 96; 4 R. 441; 62 L. J. Q. B. 485; 69 L. T. 329; 41 W. R. 563; 9 Times Rep. 481.

Argument. *Bernales* v. "*The New York Herald*,[21] *MacIver* v. *Burns*,[22] *Ex parte Blain*,[23] *In re Pearson*,[24] *In re A. B. & Co.*[25]

Section 556 of the Ordinance‖ incorporated into the Civil Justice Ordinance the provisions of the English law as of 1st January, 1894, "subject to the special provisions" of that Ordinance. The extra-territorial jurisdiction of the English Courts is founded on order XI. of the Judicature Act, which makes specific and definite provisions for absent foreigners. Under the Common Law Procedure Act, 1852, a notice only of the writ could be served upon an absent foreigner, and the same practice was continued by the Judicature Act: *Beddington* v. *Beddington*.[26]

A foreigner resident abroad should not be served with the writ, but with notice of the proceedings: *Fowler* v. *Barstow*,[27] *Westman* v. *Aktiebolaget*,[28] *Padley* v. *Camphausen*,[29] *Hewitson* v. *Fabre*.[30] In *Moore* v. *Martin*,[31] the defendant, a British subject, was resident within the jurisdiction when the writ issued, but, being temporarily absent, an order was made granting leave to serve him abroad. This case is entirely different, Healy being a foreigner within a foreign state.

The material before Mr. Justice ROULEAU did not justify his making the order of 30th June, 1896. At the date of the issue of the writ Healy was at home in Chicago, where he remained till 10th May.

As to the principle on which substituted service is directed: *In re Slade, Slade* v. *Hulme*.[32] In England such

‖ Now section 21 of the Judicature Ordinance, C. O. 1898, c. 21. [21] (1893) 2 Q. B. 97, n; 62 L. J. Q. B. 385; 68 L. T. 658; W. R. 481; 5 R. 339; 9 Times Rep. 381. [22] (1895) 2 Ch. 630; 64 L. J. Ch. 681; 73 L. T. 39; 44 W. R. 40; 12 R. 467; 11 Times Rep. 506. [23] 12 C. D. 522; 41 L. T. 46; 28 W. R. 334. [24] (1892) 2 Q. B. 263; 61 L. J. Q. B. 585; 67 L. T. 367; 40 W. R. 532; 9 Morrell, 185. [25] (1900) 1 Q. B. 541; 69 L. J. Q. B. 375; 82 L. T. 169; 48 W. R. 424; 7 Manson 134. [26] 1 P. D. 426; 45 L. J. P. 44; 34 L. T. 366; 24 W. R. 348. [27] 20 C. D. 240; 51 L. J. Ch. 103; 45 L. T. 603; 30 W. R. 113. [28] 1 Ex. D. 237; 45 L. J. Ex. 327; 24 W. R. 405. [29] 10 C. D. 550; 48 L. J. Ch. 364; 27 W. R. 217. [30] 21 Q. B. D. 6; 57 L. J. Q. B. 449; 58 L. T. 856; 36 W. R. 717. [31] 1 N. W. T. Reps., Pt. 2, 48; 1 Terr. L. R. 236. [32] 18 C. D. 653; 50 L. J. Ch. 729; 45 L. T. 276; 30 W. R. 28.

an order would not be made on such material: *Skegg* v. *Simpson*,[33] *Hope* v. *Carnegie*.[34] Argument.

In any event there could not be substituted service of the writ, because it could not be personally served: *Fry* v. *Moore*,[35] *Field* v. *Bennett*,[36] *DeBernales* v. *"The New York Herald,"*[21] *Wilding* v. *Bean*,[37] *Worcester Banking Co.* v. *Firbank*,[38] *Jay* v. *Budd*,[39] and therefore the granting of leave for substituted service of the writ abroad was a nullity, and the plaintiffs acquired no status in the Court enabling them to proceed to judgment in the suit.

The initial step taken to found the jurisdiction of the Court not having been within the jurisdiction of the Court, all subsequent proceedings are a nullity and not a mere irregularity: *Hewitson* v. *Fabre*,[30] *Field* v. *Bennett*,[36] *Padley* v. *Camphausen*,[29] *Henderson* v. *Hall*,[40] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*.[7]

The purchaser's position should be determined hereafter when the proceedings are taken to set aside his certificate of title.

*P. McCarthy*, Q.C., for respondents: — The subject matter of this action being land situate wholly within the judicial district, the Judge has jurisdiction under section 32 (1) of the Civil Justice Ordinance of 1893 to allow the issue of the writ of summons for service *ex juris;* under section 21 (4)‡ to allow the issue of the concurrent writ of summons for service *ex juris;* and under section 34 (1) to order substitutional service. The question as to the sufficiency of the material used on the application for the order for substitutional service is left to the discretion of the Judge. The service having been effected as ordered, it is immaterial whether or not Healy ever received the writ or

‡ Now Rule 5 (2) Jud. Ord. C. O. 1898, c. 21.

[33] 2 De G. & Sm. 454. [34] L. R. 1 Eq. 126. [35] 23 Q. B. D. 395; 58 L. J. Q. B. 382; 61 L. T. 545; 37 W. R. 565. [36] 56 L. J. Q. B. 89; 1 Times Rep. 374. [37] (1891) 1 Q. B. 100; 60 L. J. Q. B. 10; 64 L. T. 41; 39 W. R. 40. [38] (1894) 1 Q. B. 784; 63 L. J. Q. B. 542; 70 L. T. 102, 443; 42 W. R. 402; 9 R. 367; 10 Times Rep. 345. [39] (1898) 1 Q. B. 12; 66 L. J. Q. B. 863; 77 L. T. 335; 46 W. R. 34; 14 Times Rep. 1. [40] 8 Ont. P. R. 353.

Argument.

notice of it: *Watt* v. *Barnett*.[41] No fraud on the respondents' part in connection with the order for substitutional service has been established. The English practice of serving a notice of writ, instead of a writ, in such cases is not in force here: *Moore* v. *Martin*.[31] The purchaser should be protected in his purchase under section 10 (10): *In re Hall Dare's Contract*,[42] especially as he has not been made a party to these proceedings. The terms imposed by the order are just: *Watt* v. *Barnett*.[41]

[*December 8th, 1900.*]

The judgment of the Court (RICHARDSON, ROULEAU, WETMORE and MCGUIRE, JJ.) was delivered by

WETMORE, J.—The questions involved in this appeal arise under the Judicature Ordinance, 1893, this action having been commenced under the provisions of that Ordinance and the proceedings attacked having been taken thereunder. My future references herein are, therefore, to sections of that Ordinance. The cause of action *quoad* the defendant Healy is embraced by paragraph 2 of section 32 of that Ordinance, it being an action to enforce a liability affecting land situate within the judicial district of Northern Alberta.

The defendant Healy is not a British subject and was not at the time of the commencement of the action, or at the time of the making of the order for a concurrent writ to issue for service *ex juris*, or at the time of the making of the order for substitutional service resident within the North-West Territories, but was resident in the United States of America. The action was commenced on March 19th, 1896, by the ordinary writ of summons prescribed by the Ordinance for service within the judicial district. On the same day and after the commencement of the action, my brother SCOTT made an order under section 21, sub-section 4 of the Ordinance, among other things, for leave to

§§ Now section 10 (10) of the Judicature Ordinance, C. O. 1898, c. 21.

[41] 21 C. D. 41; 51 L. J. Ch. 671; 46 L. T. 755; 30 W. R. 556.
[42] 3 Q. B. D. 183, 363; 38 L. T. 903; 26 W. R. 745—C. A. affirming 47 L. J. Q. B. 329.

Judgment.
Wetmore, J.

issue a concurrent writ of summons for service on the defendant Healy in the State of Washington, one of the United States of America. Not having succeeded in effecting service of such writ, my brother ROULEAU, on application made for the purpose on the 2nd May, 1896, made an order for leave to issue a concurrent writ of summons for service on the defendant Healy in Alaska, one of the territories of the United States. Personal service of the last mentioned writ not having been effected, my brother ROULEAU on the 30th June, 1896, made an order under section 34, sub-section 1 of the Ordinance for substitutional service.

It is urged on behalf of the appellant that there was no jurisdiction in the learned Judge to make the order for leave to issue the concurrent writs for service *ex juris* on the defendant Healy because he was not a British subject. It was contended in view of the language of subsection 4 of section 21, that there was no jurisdiction to grant leave to issue a concurrent writ under that section, unless the case was one in which leave to serve without the jurisdiction could be made under section 32. For the purpose of this appeal, I will concede that proposition to be true. It was contended that an order for service *ex juris* on the defendant Healy could not be made under section 32 because Healy was not a British subject, and there was nothing in the section which authorized in express words service of a writ of summons on a person not a British subject, and that the order should have been for service of a notice of the writ under Order XI. of the English Rules of 1883. I am of opinion that Order XI. was not in force in the Territories at the time that the proceedings in question were taken, and is not now in force here. Section 556 of the Ordinance provided that "subject to the special provisions of this Ordinance, the procedure and practice existing in the Supreme Court of Judicature in England at the time of the coming into force of this Ordinance (January 1st, 1894), shall, as nearly as may be, be held to be incorporated herewith." Now, I do not wish to lay down any hard and fast rule for construing this section. I do not wish even to

Judgment.
Wetmore, J.

go so far as to lay it down that when the Ordinance has dealt with any particular branch of practice, the English practice respecting that branch is excluded, because it is quite clear that in many instances where the Ordinance has dealt with a particular branch of practice or procedure it has not done so exhaustively, and in such cases resort must be had to the English procedure and practice in order to work out that branch of procedure or practice in the Territories successfully. But I do hold that when the Ordinance has dealt exhaustively, or shown any intention to deal exhaustively, with a particular branch of practice or procedure, the practice or procedure so laid down must prevail to the exclusion of the English practice. It is notorious that the several Ordinances passed since the creating of the Supreme Court of the North-West Territories prescribing the practice and procedure in that Court have been largely, I may say with some few exceptions altogether, taken from the English Rules of 1883, and in fact in a very great many sections reference is made to the English Marginal Rule from which the section is taken. Sections 32, 33 and the first paragraph of section 34 of the Ordinance were evidently, in so far as their general provisions are concerned, taken from Order XI. of the English Rules. Section 33 is taken from Rule 1 of the Order; its wording is exactly the same with some important omissions and one or two additional provisions, and, of course, altered when necessary to make the provisions applicable to the Territories. The words "or a notice of a writ of summons" which are in the rule have, however, been left out of the section of the Ordinance. This is important in view of other provisions of the order which have been omitted from the Ordinance. Rules 2 and 3 have not been incorporated in the Ordinance, because they are not at all applicable to the Territories. Section 33 is evidently taken from Rule 4, with these exceptions, that the section provides, which the rule does not, that the application shall be made before the writ is issued except as hereinbefore provided, and the section omits the provision respecting notice contained in the rule. The first part of

section 34 is the same word for word with rule 5, excepting that the provision as to notice which is in the rule is not in the section. The rules 6 and 7, which apply entirely to service of notice instead of the writ where the defendant is neither a British subject nor in British dominions, are omitted altogether from the Ordinance. This careful omission in every instance from these sections of the Ordinance of all provisions respecting notice of the writ of summons clearly indicates the intention of the Legislature that these provisions should not be in force in the Territories. Therefore the contention for the appellant that order XI. is in force in the Territories, and that notice of the writ should have been ordered to be served cannot be upheld, as such an order would not have been in accordance with the practice.

It was further urged that an order for serving the writ of summons *ex juris* could not have been made under section 32, because there are no express words in that section authorizing such an order to be made for service on a person not a British subject, and not being within British dominions. There are undoubtedly expressions of learned Judges to be found which would seem to bear out that contention. These expressions are to be found in cases turning upon the construction to be put upon some other rule that those embraced by order XI. No question of the sort could arise under order XI., because the rules in that order expressly provide for service on a person not a British subject, and what is to be served on him.

In *Ex parte Blain*,[23] James, L.J., dealing with the question as to the circumstances under which English legislation may or may not be applicable to a foreigner, is reported as follows: "It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or *so plainly implied* as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who, by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction,"

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and further down on the same page he lays it down that no doubt English legislation "has a right to say to . . . any . . . foreigner—If you make a contract in England or commit a breach of a contract in England, under a particular Act of Parliament a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country." The same principle would, in my judgment, apply if a foreigner never came within England, but acquired land therein with respect to which a liability attached: procedure could be taken under a particular Act of Parliament according to the procedure thereby prescribed to enforce such liability. In *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency*,[20] Lord Esher M.R., dealing with the same subject at page 102, is reported as follows: "The words 'any person' are, of course, large enough to include a foreigner, and a foreigner who is resident abroad, and to include one who has never been in England in his life, and has never had what has been called the protection of the English law, and merely carries on business in England by his agents. But the question is, ought the Court to give an interpretation to the words which would include such a person? If the rule had contained words expressly in terms including a foreigner resident abroad, then an English Court would be bound to obey the directions of its own legislature, but when the words used *are capable of one or other construction*, then the Court ought to adopt the construction which will prevent an infringement upon the principles of international law by extending the jurisdiction of the English Courts against foreigners residing abroad, who have in no way submitted to that jurisdiction." Of course if express words are used authorizing service of a writ *ex juris* upon a foreigner resident abroad, although not a British subject, it is clear under recent decisions that the Court must obey the directions of its own legislature. But I fail to discover why those directions may not be given by clear implication. It was so laid down by James, L.J., in the language which I have above quoted

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from *Ex parte Blain*. Then applying the test given by Lord Esher as above quoted, are the words of section 32 of the Ordinance capable of one or other construction? I am of the opinion that they are not; they are only capable of one construction. When we consider from whence the legislation was derived, the manner in which it was framed, and the deliberate departures from the legislation from which it was derived, which I have before mentioned; when we further consider that in England, Nova Scotia and New Brunswick provisions are made for the commencement of actions against persons not British subjects resident abroad, for the causes of action specified in section 32 of the Ordinance (see Revised Statutes of Nova Scotia, 5th series, rules 1 & 4, pp. 828 and 829, and Consolidated Statutes of New Brunswick, c. 37, ss. 15 and 16), and that in Ontario similar provisions have been made, except that there is no express provision for service on persons not British subjects resident abroad, but provision is made for service of notice of a writ of summons (see Cons. Rules 271, *et seq.*, and, no doubt, following *Westman* v. *Aktieholaget*,[28] notice would be ordered to be served on such a person); when we consider all these things, is it conceivable that the Legislative Assembly of the Territories ever intended that causes of action such as those specified in section 32 should exist against persons non-resident and not British subjects, and that there should be no means of enforcing the right or no means for bringing such persons into Court? Are the words of the section then, in view of what I have set forth, capable of any other construction to any logical mind than that the legislature intended that the notice of writ of summons should not be necessary, and that such persons should be brought into Court by being, with the leave of a Judge, served with the writ of summons? I am of opinion that they are capable of no other construction.

This disposes of the question of jurisdiction. My brothers ROULEAU and SCOTT had jurisdiction to make the orders for the concurrent writs to issue for service *ex juris*.

Judgment.
Wetmore, J.

No question was raised as to any defect in the material on which these orders were made. Having power to order those writs to issue, there was authority under section 34, sub-section 2 of the Ordinance, upon sufficient material being produced, to order substitutional service. This is not disputed. But this last mentioned order is attacked upon the ground that it was obtained by fraud, and that the mode of substituted service directed was not of such a character as to be likely to reach the defendant Healy. As to the fraud, in order to set aside the order actual fraud must be proved; it must be of such a character as shows an intention to impose on the Court or Judge. I am of opinion that no fraud of that character is shown. On the other hand, I think the plaintiff's advocates exhibited great diligence to ascertain the whereabouts of the defendant in order to have him personally served. They made two attempts in two different directions to get him served personally, and I think the affidavits presented to the Judge a clear case where service out of the jurisdiction as ordered could not be made, and that reasonable efforts were made to effect such service. It certainly does not affect the question that Mr. Dennis, the secretary of the Alberta Mining Company, one of the defendants, gave the advocates of the plaintiffs wrong information. If any fraud was practised with respect to knowledge of the whereabouts of the defendant, it must have been practised by the plaintiff's advocate; that is, that they must have submitted to the Judge material to show that the defendant would likely be found in one place when, as a matter of fact, they knew he was to be found at another and more accessible place. No such fraud as that is established. The defendant Healy appears to have been a person somewhat unsettled as to his whereabouts. The first concurrent writ was sent to Seattle where, according to information given by Mr. Dennis, the defendant was residing. The advocates received a communication from their agent at Seattle stating that defendant Healy had been for a year residing in Alaska, and that it was not probable he would return for another year. So far as the advocates could judge, Mr. Dennis' information had put them on the track

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of the defendant, and they proceeded to have him served in Alaska. A writ is sent to Alaska to be served, and then further information is received stating where the defendant's headquarters were, namely, in a remote place in the Yukon. W. G. Conrad expressly contradicts the defendant as to his having knowledge that the defendant was connected with the North American Transportation Company and resided in Chicago on the 30th June, 1896. It is, perhaps, a matter of regret that an affidavit of C. E. Conrad was not furnished. But the character of the material used before the Judge satisfies me that there was no intention whatever to impose on him or to abuse the process of the Court. Another ground of fraud is alleged, namely, that the plaintiffs knew that they had no cause of action against the defendant Healy. No reason whatever is stated for that;—any defendant might say it. That fraud is not sufficiently alleged.

I am of opinion that in view of the material the learned Judge had before him, his order for substitutional service was of such a character that he might reasonably believe that the writ would reach the defendant. He directed it to be mailed by registered letter prepaid to three separate addresses, and I am inclined to think that the fact that the defendant did not get it was owing to an error in the information that the plaintiffs' advocate had obtained, namely, that the defendant's headquarters were the North-West Trading Company in Chicago, instead of the North American Transportation Company. But that does not affect the validity of the order for substitutional service. If on the material before the Judge he made an order under which, so far as the material before him disclosed, it was reasonably likely that the defendant would receive the process, such order is not affected, in the absence of fraud, if there was an error in the material or information on which he acted. When substitutional service is ordered there is always a possibility that the defendant may not receive the summons or any notice of it, and in some cases this actually happens. In such cases, if the order is made on proper

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Wetmore, J.

material, the defendant's only remedy, if he has a meritorious defence, is to have the judgment set aside and to be allowed to defend on the merits. The defendant has obtained an order for leave to defend, and I think it was all that he was entitled to get under the law, and that Mr. Justice SCOTT's judgment appealed against was correct, and that this appeal should be dismissed with costs.

The appellant's title has been swept away by virtue of the judgment in the case and subsequent proceedings, and has, by virtue of a sale under such judgment, duly confirmed, become vested in the purchaser at such sale, and it is difficult for me to see in view of sub-section 10 of section 10 of the Ordinance of 1895, and of section 10, sub-section 10 of the Judicature Ordinance, c. 21, Consolidated Ordinances, how the purchaser's title could be invalidated, even if we held the orders attacked to have been made without jurisdiction. I mention this because it is satisfactory to me to feel that the order of my brother SCOTT appealed against has given all the substantial relief open to the defendant, and on this point see *In re Hall Dare's Contract*.[42]

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

## THE QUEEN v. DAVIDSON.

*Certiorari—Security—Deposit of cash without written condition—Liquor License Ordinance—Keeping bar open during prohibited hours—Want of allegation and proof of accused being a licensee.*

A deposit by the accused with the proper officer of $100 cash, though unaccompanied by any written document, is a sufficient compliance with the requirements of Rule 13 of the Consolidated Rules of Court, 1895.†

After a writ of certiorari has issued preliminary objections thereto should be raised promptly and by means of a substantive motion to quash the writ.

Upon a charge of having had a bar-room open and sold liquor during prohibited hours the prosecution must either allege or prove that the defendant was a licensee.

[*Court in banc, December 8th, 1900.*

Statement.

The information alleged that the defendant "proprietor of the Royal Hotel at Indian Head, did on Sunday, the 22nd day of October, A.D. 1899, unlawfully have his bar open and sold liquor during prohibited hours contrary to section 64 of the Liquor License Ordinance." There was no evidence that the defendant was a licensee, or that the offence was committed in a place where intoxicating liquor was licensed to be sold. The defendant was convicted. The notice of motion for *certiorari* specified that the application would be made "to a Judge of the Supreme Court in and for the North-West Territories at the Court House in the town of Regina," etc., and was signed by the defendant, but did not state upon whose behalf the application would be made. The defendant deposited with the proper officer $100 in cash pursuant to rule 13 of the Consolidated Rules of Court 1895,† but such deposit was unaccompanied by any written document. The return to the writ of *certiorari* having been duly made, an order was made returnable before the Court *in banc* at Calgary on July 16th, 1900, calling on the Justices and informant to show cause why the conviction should not be quashed on the ground that it was not alleged in the

† Now Rule 23 the Consolidated Rules of Court, 1900. It is set out verbatim, *ante* p. 119.

Statement.

information, nor was there any evidence adduced, that the defendant was a licensee, nor was it alleged or proved that the offence was committed in a licensed place.

The matter was argued at Calgary July 16th and 18th, 1900.

*Horace Harvey*, Deputy Attorney-General, showed cause:—The defendant, who moves against the conviction on the ground of irregularity, must himself be regular: *Scott* v. *Burnham*.[1] The proper security has not been given under rule 13 of the Consolidated Rules of Court, 1895, no condition having been filed. Whether the security is given by recognizance or by deposit of cash, it must be accompanied by a written condition. The notice of motion for *certiorari* does not state on whose behalf the application will be made, nor whether it will be to a Judge in Chambers or in Court. The order for *certiorari* should not have been made *ex parte* unless special circumstances were shown; but a summons or order *nisi* should have been taken out: *Ex parte Ross*.[2] Notice of the application should have been given to the Attorney-General. The writ of *certiorari* is not in the form nor does it follow the terms of the order. No place is specified for the return, consequently the papers are not before the Court: *Regina* v. *Wehlan*,[3] *Regina* v. *McAllan*.[4] The objections are properly taken at this time: *Regina* v. *McAllan*.[4]

*W. C. Hamilton*, Q.C., for defendant:—If there were any irregularities the informant should have moved to quash the writ. The proceedings, being before the Court, can be dealt with on this motion: *Regina* v. *Monaghan*.[5] The conviction is bad on the grounds taken in the order *nisi*: *Regina* v. *Henderson*,[6] *Regina* v. *Williams*,[7] *Regina* v. *Granius*,[8] *Regina* v. *Rodwell*,[9] *Regina* v. *Fleming*.[10]

[1] 3 U. C. Ch. Chs. Reps. 399. [2] 1 C. C. C. 153. [3] 45 U. C. Q. B. 396. [4] 45 U. C. Q. B. 402. [5] 2 C. C. C. 488. [6] 4 Terr. L. R. 146; 2 C. C. C. 364. [7] 8 Man. R. 342. [8] 5 Man. R. 153. [9] 5 O. R. 186. [10] 15 C. L. T. 244.

[*December 8th, 1900.*]

Judgment.

Rouleau, J.

ROULEAU, J.—On the motion to make absolute the rule *nisi*, several preliminary objections were taken on behalf of the prosecution. First, that there was no proper security given under rule No. 13 of the Rules of Court. It is admitted that there was $100 in cash deposited with the Registrar of the Court for the purpose of this appeal; but it is objected that there was no writing with such deposit showing that the amount was deposited with the condition to prosecute the motion and writ of *certiorari*.

I do not think it necessary under the statute and the rules. The cash deposit is in the hands of the Registrar for the purposes provided by law; he could not use that money for any other purpose than for the purpose of this case. In the case of a recognizance the law provides that the condition should be in writing, because the recognizance may require to be enforced by process of law; the same proceeding is not intended nor necessary when the security is in cash.

Secondly: that the notice does not give the name of the party who intends to apply; nor does it state whether the motion is to be made to the Court or to a Judge in Chambers.

I am of opinion that these objections are not well taken. Even if they were, there is a direct authority to prevent this Court now entertaining them. The case of *Regina* v. *Fordham*[11] decides that after a writ of *certiorari* has issued, the objections should be raised by a substantive motion to quash the writ. This rule applies also to all the other objections. It is a principle laid down in the case of *Regina* v. *The Inhabitants of Basingstoke*,[12] that the rules of practice require a prompt application for these objections to be given effect to. But when over three months have elapsed, as in this case, without objection having been taken after the case has been brought up, the preliminary facts must be taken to be admitted and the application is then too late.

[11] 9 L. J. M. C. 3; 11 A. & E. 73; 3 P. & D. 95; 4 Jur. 218.
[12] 19 L. J. M. C. 28; 3 New Sess. Cas. 693; 6 D. & L. 303.

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Rouleau, J.

It is taken as a ground in the rule *nisi* that it is not alleged in the information, nor was there any evidence adduced that the said Davidson was a person holding a license under the Liquor License Ordinance, nor was it alleged or proved that the offence was committed in a place where intoxicating liquor was licensed to be sold.

I held already in *Regina* v. *Henderson*,[6] that under sub-section 4 of section 64, which provides that no bar-room or room in which liquors are usually sold, in a licensed hotel, shall be kept open, etc., the prosecutor must either allege or prove that the defendant was a keeper of a licensed hotel, so as to make him liable under the provisions of the Liquor License Ordinance, 1891-2. I have no reason to change my views, which were based on the following authorities: *Regina* v. *Williams*,[7] Paley on Convictions, 126, and *Regina* v. *Rodwell*.[8]

In this case I find that the information does not allege, nor is proof made, that the accused held a liquor license for the hotel premises. I am of opinion, therefore, that the rule *nisi* should be made absolute and the conviction be quashed, with usual protection to the magistrates under section 891 of the Criminal Code.

WETMORE, J.—In showing cause against the rule *nisi* to quash the conviction herein, the learned counsel for the prosecution took a number of preliminary objections, and among others that no written document had been deposited with the registrar at the time the sum of $100 was deposited with him or at any other time, stating the conditions upon which such deposit was made. It was made to appear to the Court by the certificate of the registrar that $100 cash, the security required by rule 13 of the then Consolidated Rules of Court, had been deposited in this matter with the registrar by the defendant, and that such sum stood to the credit of this matter in the Bank of Montreal, Regina. As a matter of fact, no such written document as the learned counsel contends ought to have been deposited was lodged. Section 892 of the Criminal Code, 1892, provides that, "The Court having authority to quash any conviction, order or

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Wetmore, J.

other proceeding by or before a Justice may prescribe by general order that no motion to quash any conviction . . . before a justice and brought before such Court by *certiorari*, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction . . . has been made, or before a Judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction . . . is affirmed, his full costs and charges to be taxed." In pursuance of that section of the code this Court promulgated rule 13 referred to, whereby it was provided that no motion to quash a conviction before a justice and brought before the Court by *certiorari* shall be entertained unless the defendant is shown to have entered into a recognizance in $200, with one or more sufficient sureties, before a justice of the peace, and deposited the same with the registrar . . . or to have made a deposit with the said registrar . . . of $100, *in either case* with a condition to prosecute such motion and writ of *certiorari*, &c. . . " as set out in the section of the Act. It will be observed that the words " in either case " are inserted in the rule; they are not in the section of the Act. The Court in promulgating the rule must have been of the opinion not only that the condition referred to was to be the condition of the recognizance, but was also to be the condition of the cash deposit; and that to my mind was in accordance with the intention of the section of the Code. I am not at all surprised that the idea has been conceived that a written document specifying the conditions subject to which the money was deposited should be lodged, and I am free to confess that for a time I was greatly impressed with that idea. On reflection, however, I have arrived at the conclusion that the rule has been substantially complied with. The defendant himself deposited the money with the registrar, and he deposited it in this matter. There

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was no other purpose for which he could deposit it in this matter or for which the registrar had authority to receive it except as security under the rule, and that may fairly mean that he deposited the money subject to the condition prescribed by the rule. Moreover the registrar received the money as paid under the rule, and may fairly be held to have received and to hold it subject to such condition.

A number of other preliminary objections were taken, but in view of the length of time that the writ and return laid in the registrar's office before the motion was made for a rule *nisi* to quash (from March 2nd, 1900, to June 4th), and of the character of these objections, I am of opinion that they ought to have been urged by a substantive motion and ought not to be allowed to prevail at this stage of the proceedings, and to that extent I agree with my brother ROULEAU.

I also agree with my brother ROULEAU that the conviction should be quashed for the reasons stated by him.

RICHARDSON, MCGUIRE and SCOTT, JJ., concurred.

*Conviction quashed.*

REPORTER:

Ford Jones, Advocate, Regina.

## WOOLF v. ALLEN.

*Agreement—Construction of—Sale of an "entire herd of cattle" at a price "per head"—Unbranded calves under six months old—Usage.*

On the evidence it was found that, by usage among cattle-men in the McLeod District, calves under six months old and unbranded are, in the buying or selling of a herd of cattle by the head, included with the cows with which they are running.

Where an agreement related to two classes of things, and one of which alone was subsequently dealt with by a substituted agreement, and a new agreement dealing with the other class was made for the purpose of continuing the first agreement regarding it, the first agreement was properly looked at to interpret the second.

The same expressions used in different parts of the same document should ordinarily be interpreted in the same sense.

[ROULEAU, J., *April 26th, 1900.*

[*Court in banc, December 8th, 1900.*

Statement.

On May 23rd, 1899, the defendant agreed in writing to sell to the plaintiff "all of my cattle with the exception of four cows and calves, which will leave about 150 head, for and in consideration of $24.50 per head. All calves that are less than six months old are not to be counted." The agreement also provided for the sale of certain horses by the defendant to the plaintiff. On June 9th, 1899, the defendant stated to the plaintiff that he intended to back out of the whole bargain. On June 20th, 1899, the plaintiff and defendant entered into a new agreement respecting the sale and purchase of the defendant's horses, and also into a further agreement in writing by which the defendant agreed to sell to the plaintiff "my entire herd of cattle with the exception of four head of cows and calves which I am to have the privilege of selecting, for the sum of $24.50 per head." The cattle were to be delivered not later than July 5th, 1899. The plaintiff paid the defendant $25 on account, and the balance was to be paid on delivery of the cattle. On July 5th, 1899, the plaintiff went to the defendant's ranch for the purpose of taking over the cattle, but the defendant refused to deliver them unless the plaintiff paid

Statement. him for the calves as well as the cows at the rate agreed upon. The plaintiff thereupon sued for specific performance or damages.

The action was tried at Macleod before ROULEAU, J., on November 10th, 1899.

*E. P. McNeill,* for plaintiff.
*C. F. Harris,* for defendant.

The evidence established that the herd of cattle consisted of 156 head and 27 suckling calves—that on July 5th, 1899, the market price of similar cattle was $28 per head—that the defendant had stated that if the plaintiff had not been so mean towards him over another transaction he would not have attempted to make him pay for the calves. It was found to be established by the evidence that by the usage of cattle-dealers young unbranded calves go with the herd on a sale and are not counted as cattle.

[*April 26th, 1900.*]

ROULEAU, J. — The plaintiff sues the defendant for specific performance for the delivery of cattle under a certain agreement; or in the alternative, for the refund of $25 with interest paid on account of the purchase of said cattle, from 23rd May, 1899, until payment, and the sum of $825 damages.

On 23rd May, 1899, plaintiff and defendant entered into an agreement by which the defendant sold to the plaintiff all his cattle—with the exception of four cows and calves —about one hundred and fifty head at $24.50 a head — calves less than six months were not to be counted. That agreement also provided for the sale of defendant's horses to plaintiff, but as that part of the agreement has been amicably settled between the parties, I need not refer to it.

Afterwards, to wit, on 20th June, 1899, the same parties passed another agreement, which no doubt was intended to supersede the other agreement of the 23rd May, 1899. By this agreement of the 20th June, the defendant agreed to

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sell to the plaintiff his entire herd of cattle, with the exception of four head of cows and calves which he had the privilege of selecting, for the sum of twenty-four dollars and fifty cents per head. Defendant also acknowledged to have received on account of said purchase $25, the balance to be paid when said cattle are counted and taken over.

In order to get rid of this agreement the defendant contended that the plaintiff should pay the same price for suckling calves as for other cattle. This contention is preposterous. Not only is it in evidence that when a man buys a herd of cattle at so much per head, the suckling calves are not counted, and in fact they are not counted until they are branded, but the agreement of the 23rd May showed clearly that it never was the intention to count the calves less than six months old, because in that agreement it was specially provided that they should not be counted. Besides several witnesses swore that the defendant himself admitted that if the plaintiff had not been so mean in his dealings with him about the horses, he would not have counted the calves. There is no question that the defendant refused to fulfil his contract, and that under s. 49 of the Sale of Goods Ordinance (C. O. 1898, c. 39), the plaintiff is entitled to recover damages if he has suffered any against the defendant.

It is of evidence that the plaintiff was to pay $24.50 per head of cattle to the defendant, and that these cattle had a market value on 5th July, 1899, the day defendant refused to deliver the cattle, of $28 a head. The plaintiff swears positively that he counted 147 head of cattle across the river, and that the defendant had admitted to him milking 9 cows at his house, leaving, besides the four cows the defendant had reserved, 152 head of cattle which the plaintiff was entitled to have and was ready to pay for. Consequently the plaintiff suffered damage to the extent of $3.50 per head. One hundred and fifty-two head of cattle at $3.50 per head would make a total of $532, which amount is the damage suffered by plaintiff. Moreover, having paid on account $25, which amount the defendant never re-

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Rouleau, J.

paid, the plaintiff is entitled to judgment for that amount with interest from the 20th June, 1899.

Judgment for the plaintiff for the sum of $557 altogether, with costs, and interest on the sum of $25 from 20th June, 1899.

The defendant appealed. The appeal was argued at Calgary July 20th and 21st, 1900.

*C. F. Harris*, for appellant:—The agreement of May 23rd was absolutely cancelled, and the defendant entered into the new agreement on June 20th only because of the fact that under it he was to get the same price per head as in the former agreement, but calves were to be counted as well as grown cattle. There was no evidence of any custom or usage of cattle-dealers whereby young unbranded calves are not counted in buying or selling a bunch of cattle. Even if there was evidence of such a usage, there was no evidence that the agreement of June 20th was made with reference to the same. The former agreement expressly provided that the young calves were not to be counted, but this provision was omitted from the latter agreement. The former agreement was terminated in law by the latter: *Sanderson* v. *Graves*,[1] *Goss* v. *Lord Nugent*,[2] *Hobson* v. *Cowley*,[3] *Harvey* v. *Grabham*.[4] The meaning of the latter agreement must be decided irrespective of the language of the former agreement: *Carroll* v. *Provincial Natural Gas and Fuel Co. of Ontario*.[5] The agreement must be construed according to the strict natural meaning of the words used: *Mallan* v. *May*,[6] *Bowes* v. *Shand*,[7] *Baines* v. *Woodfall*[8]—and irrespective of the opinion of the parties: *Simpson* v. *Margitson*,[9] *Hamlyn* v. *Wood*,[10] *Scott* v. *Liverpool Corporation*,[11]

[1] 44 L. J. Ex. 210; L. R. 10 Ex. 234; 33 L. T. 269; 23 W. R. 797. [2] 2 B. & Ad. 58; 2 N. & M. 28; 2 L. J. K. B. 127. [3] 27 L. J. Ex. 205; 6 W. R. 334. [4] 5 L. J. K. B. 235; 5 A. & E. 61; 6 N. & M. 154; 2 H. & W. 146. [5] 26 S. C. R. 181. [6] 14 L. J. Ex. 48; 13 M. & W. 511; 9 Jur. 19. [7] 46 L. J. Q. B. 561; 2 App. Cas. 455; 36 L. T. 857; 25 W. R. 730. [8] 28 L. J. C. P. 338; 6 C. B. (N.S.) 657; 6 Jur. (N.S.) 19. [9] 17 L. J. Q. B. 81; 11 Q. B. 23; 12 Jur. 155. [10] 60 L. J. Q. B. 734; (1891) 2 Q. B. 488; 65 L. T. 286; 40 W. R. 24—C. A. [11] 28 L. J. Ch. 230; 5 Jur. (N. S.) 105; 7 W. R. 153—L.JJ.

Argument.

*Griffiths* v. *Rigby*,[12] *Midland Great Western Railway* v. *Johnson*,[13] *Wood* v. *Copper Miners Co.*,[14] *Hitchin* v. *Groom*,[15] *Baynham* v. *Guy's Hospital*,[16] *Eaton* v. *Lyon*.[17] The plaintiff having refused to pay for the calves, the defendant was justified in refusing to deliver the whole herd and in treating the contract as at an end: *Danube and Black Sea Railway and Kustndjie Harbor Co.* v. *Xenos*,[18] *Cost* v. *The Ambergate, Nottingham and Boston and Eastern Junction Railway Co.*[19] The agreement cannot be rectified on the ground of mistake unless the mistake is mutual: *Whitla* v. *Phair*,[20] *Sylvester* v. *Porter*.[21] As to how far evidence of usage may be admitted to extend or explain a written contract: *Whittaker* v. *Mason*,[22] *Trueman* v. *Loder*,[23] *Hayton* v. *Irwin*,[24] *The Alhambra*,[25] *Hodgson* v. *Davies*,[26] *Yates* v. *Pym*,[27] *Cross* v. *Elgin*,[28] *Lewis* v. *Marshall*,[29] *Smith* v. *Jeffryes*,[30] *Simpson* v. *Margitson*.[9] Where evidence of usage is received, the evidence must be not repugnant to or inconsistent with the contract: *Plaice* v. *Alcock*,[31] *Hutton* v. *Warren*,[32] *Webb* v. *Plummer*,[33] *Kirchner* v. *Venus*,[34] *Roberts* v. *Barker*,[35] *Ford* v. *Yates*,[36] *Cumming* v. *Shand*,[37] *In re Leigh, Rowcliffe* v. *Leigh*,[38] *Abbott* v. *Bates*.[39]

*E. P. McNeill*, for respondent: — The former agreement was not rescinded in so far as the same relates to the

[12] 1 H. & N. 237; 25 L. J. Ex. 284. [13] 6 H. L. Cas. 798; 4 Jur. (N.S.) 643; 6 W. R. 510. [14] 18 L. J. C. P. 293; 7 C. B. 906. [15] 17 L. J. C. P. 145; 5 C. B. 515. [16] 3 Ves. 299; 3 R. R. 96. [17] 3 Ves. 690. [18] 31 L. J. C. P. 84; 11 C. B. (N. S.) 152; 5 L. T. 527. Affirmed on appeal, 13 C. B. (N. S.) 825; 31 L. J. C. P. 284; 8 Jur. (N. S.) 439; 10 W. R. 320—Ex. Ch. [19] 20 L. J. Q. B. 460; 17 Q. B. 127; 15 Jur. 877. [20] 12 Man. R. 122. [21] 11 Man. R. 98. [22] 2 N. C. 369. [23] 11 A. & E. 589; 3 P. & D. 567; 9 L. J. Q. B. 165. [24] 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665—C. A. [25] 6 P. D. 68; 50 L. J. P. 36; 43 L. T. 636; 29 W. R. 655—C. A. [26] 2 Camp. 530; 11 R. R. 789. [27] 6 Taunt. 446; 16 R. R. 653; S. C., nom. Yeats v. Pym, 2 March. 141; Holt, 95. [28] 2 B. & Ad. 106; 9 L. J. (O. S.) K. B. 145. [29] 7 Man. & G. 729; 8 Scott (N. R.) 477; 13 L. J. C. P. 193; 8 Jur. 848. [30] 15 M. & W. 561; 15 L. J. Ex. 325. [31] 4 F. & F. 1074. [32] 1 M. & W. 466; 2 Gale, 71; 1 Tyr. & G. 646; 5 L. J. Ex. 234. [33] 2 B. & Ald. 746; 21 R. R. 479. [34] 12 Moore, P. C. 361; 5 Jur. (N. S.) 395; 7 W. R. 455. [35] 1 C. & M. 808; 3 Tyr. 945; 2 L. J. Ex. 268. [36] 2 Man. & G. 549; 2 Scott (N. R.) 645; 10 L. J. C. P. 117. [37] 5 H. & N. 95; 29 L. J. Ex. 129; 1 L. T. 300; 8 W. R. 182. [38] 6 Ch. D. 256; 37 L. T. 557; 25 W. R. 783. [39] 43 L. J. C. P. 150; 30 L. T. 99; 22 W. R. 488.

Argument.

cattle. A rescission of an agreement requires proof of an actual agreement to rescind: *Rockcliffe* v. *Pearce*.[40] The defendant's refusal to deliver the cattle was a breach of the contract. Evidence of usage is admissible to annex incidents to written contracts: *Robinson* v. *Mollett*,[41] *Brown* v. *Byron*.[42] The evidence of usage is a question of fact: *Kingslake* v. *Beviss*.[43] The evidence of one witness as to usage, if uncontradicted, is sufficient: *Hanmer* v. *Chance*.[44] There being no evidence that the defendant was ignorant of the usage, he must be presumed to have contracted with reference to it: *Place* v. *Alcock*.[31]

[*December 8th, 1900.*]

SCOTT, J.—On 23rd May, 1899, the parties entered into an agreement in writing in the following words:

"This certifies that I have this day sold to J. W. Woolf of Cardston all of my cattle with the exception of four cows and calves, which will leave about one hundred and fifty head, for and in consideration of twenty-four dollars and fifty cents per head. All calves that are less than six months' old are not to be counted. I have also sold the said J. W. Woolf all of my horses (amounting to about one hundred and fifty head) with the exception of ten which I am to select from the herd in the following manner, viz.—I am to select six head, after which J. W. Woolf will select twenty head, then I will select four more head. The consideration that I sell the horses for is $15 per head. I hereby acknowledge the receipt of $50 as part payment on said cattle and horses. I hereby agree to have said cattle and horses gathered and deliver them to said J. W. Woolf at my ranch at such time as he shall direct, which shall not be later than July 5th, 1899. Cattle and horses to be paid for in full when received."

[40] 1 F. & F. 300. [41] 44 L. J. C. P. 362; L. R. 7 H. L. 802. [42] 23 L. J. Q. B. 313; 3 El. & Bl. 703; 2 C. L. R. 1599; 18 Jur. 700; 2 W. R. 471. [43] 18 L. J. C. P. 128; 7 C. B. 456. [44] 34 L. J. Ch. 413; 4 DeG. J. & S. 626; 11 Jur. (N. S.) 397; 12 L. T. 163; 13 W. R. 556.

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Scott, J.

On 9th of June following, plaintiff went to defendant's ranch for the purpose of obtaining a carload of the horses he had purchased, but defendant refused to deliver them claiming that their agreement did not provide that he should deliver a carload. He also stated that he intended to back out of the whole bargain no matter what the consequences were.

The parties again met upon the 20th June and after some negotiations between them they entered into a new and different agreement respecting the sale and purchase of defendant's horses. This new agreement was afterwards performed by them and therefore nothing turns upon it. At that meeting, however, they entered into the following agreement respecting the cattle, viz.:—

"I hereby agree to sell to John W. Woolf my entire herd of cattle with the exception of four head of cows and calves, which I am to have the privilege of selecting, for the sum of $24.50 per head. The said John W. Woolf is to become the absolute owner of said cattle on the execution of this agreement, and I agree to round them up for him at my ranch not later than the fifth day of July next. I acknowledge the receipt of $25 on account of purchase price of said cattle, balance to be paid me when said cattle are counted and taken over.

"Dated at Carston, this 20th day of June, 1899.

(Sgd.) Peter Allan.
(Sgd.) John W. Woolf."

Up to the time the second agreement was entered into, the defendant's sole objection to carrying out the first agreement appears to have been his dissatisfaction with that portion of it which related to the sale of the horses. He does not appear to have at any time expressed dissatisfaction with its terms so far as they related to the sale of the cattle. During the negotiations leading up to the second agreement relating to the horses, no mention was made of any changes in that portion of the first agreement which related to the cattle. It was not until after the second

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Scott, J.

agreement respecting the horses was entered into that the cattle were mentioned, and they were then mentioned only because the parties appear to have been under the impression that the new agreement respecting the horses would have the effect of annulling that portion of the first agreement which related to the cattle. Even then, the new agreement respecting them was drawn up by the plaintiff and signed by the parties without any proposal having been made by either party that the terms of the first agreement should be varied in any particular. These facts point to the conclusion that, notwithstanding the difference in the wording of the two agreements respecting the cattle, the parties intended that the second was entered into merely to affirm the first and not to be substituted for it, and it is open to question whether, such being the case, effect should not be given to their intention.

On 5th July, 1899, plaintiff went to the defendant's ranch for the purpose of taking over his cattle under the agreement. The defendant refused to deliver them unless plaintiff paid him for the calves as well as the cows at the rate agreed upon. Plaintiff thereupon brought this action claiming damages for the non-performance of the agreement. The sole question in dispute between the parties, as well as the only one for determination upon this appeal, is whether the defendant was entitled to be paid at the agreed rate for his calves under six months old.

If the second agreement were held to be merely an affirmation of the first no difficulty would arise, because it is admitted that, under the first, the defendant would not be so entitled. But even if the second agreement were held to be substituted for the first, I am of opinion that he would not be so entitled.

Taking the second agreement as the subsisting agreement between the parties, the whole question turns upon what they meant by the words "per head." If they were intended to bear their ordinary meaning they would undoubtedly mean each animal in the herd whether cow or calf, but, in another part of the agreement, there are found words which appear to indicate that such meaning was not

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intended. It contains a provision that defendant should be entitled to reserve "four head of cows and calves." It is not disputed that these words were intended to mean, not four animals in all, but eight animals, viz.: four cows and four calves. In the absence of anything indicating such an intention it is difficult to believe the parties intended that in one part of the agreement the word "head" should mean two animals and in another part it should mean one animal only.

But, apart from the agreement itself, the evidence satisfies me that there exists in the locality where the parties live a well known custom or usage to the effect that, in the buying and selling of a herd of cattle, certain calves which are sold with the herd are not to be paid for, that is, each is included in the price of the cow to which it belongs. It is true that the evidence shows that the usage may lead to uncertainty in some cases as to what calves are so included, but it also shows that all unbranded calves under the age of six months would be so included and the evidence satisfies me that all the defendant's calves under that age were unbranded.

It is a well recognized principle that evidence may be admitted to show that by common usage certain words or terms in a contract bear a meaning different from their ordinary signification, and that they were intended by the parties to be used in such different sense. In *Meyers* v. *Sarl*,[45] this principle is stated by Cockburn, C.J., at p. 315, as follows:—

"Where the terms of a contract under consideration have, besides their ordinary and popular sense, also a peculiar scientific meaning the parties who have drawn up the contract with reference to some particular department trade or business, must have intended to use the words in the peculiar sense.

This is but an application of the well known rule that the interpretation of contracts must be governed by the intention of the parties. And from the nature of the case,

[45] 3 El. & El. 306.

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the peculiar meaning of the terms used can be discovered only by means of parol evidence."

In Taylor on Evidence §1188 the following is stated:—

"In order to constitute such a custom or usage as will be admissible to explain the terms of a written instrument it is not necessary that it should be immemorial, or even established for a considerable period, or uniform or capable of being defined with precision and accuracy."

In *Bowes* v. *Shand*,[7] Lord Hatherley says:—

"Our duty as judges is this: That when we have to adjudicate upon a contract which bears a plain natural meaning we ought not to deviate therefrom except upon strong evidence of a custom of the trade giving an unusual, or, as it has been termed, non-natural meaning to the contract."

Owing to the view I have taken it is unnecessary to speculate as to the cause of the omission from the second agreement of the words "All calves that are less than six months old are not to be counted," which are contained in the first. According to the defendant's own statement the second agreement was drawn up by the plaintiff and submitted to the defendant, who signed it without comment. The omission was therefore the act of the plaintiff, and was not preceded by any previous demand or even request from the defendant for an increased price for the herd. It is incredible that the plaintiff should under those circumstances, have voluntarily offered a price which amounted to $60 more than the price for which he had previously purchased. This fact alone affords an indication that in view of the usage shown to exist the parties intended that their agreement should be subject to it rather than as an indication that their agreement should be altered by the omission as was contended on the part of the defendant.

I am therefore of opinion that the appeal should be dismissed with costs.

RICHARDSON, WETMORE and MCGUIRE, JJ., concurred.

*Appeal dismissed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

## LIVINGSTONE v. COLPITTS.

*Sale of Goods Ordinance—Sections 6, 19, 20—Acceptance and delivery—Principal and agent—Statute of Frauds—Cross-examination of party on affidavit filed—Use of in evidence at trial by opposite party.*

*Held, per* ROULEAU, J., (1) That where a party has been cross-examined on an affidavit made by him, the opposite party can use such examination at the trial as evidence in rebuttal of the evidence of the same party.

(2) That, on the evidence, the plaintiff gave credit solely to the defendant, and that therefore he was personally liable though it was stated in evidence that he was a director of a mining prospecting company, and it was contended that he acted only as agent for the company; the trial Judge being, however, of opinion that there was no sufficient evidence of the incorporation of the company.

In an action for the price of 43 head of horses at $23 per head, the evidence established that the plaintiff and defendant drove to the plaintiff's ranche and saw the plaintiff's bunch of horses; that the defendant specified such horses as were unsuitable for his purpose; which were thereupon marked and separated from the others; that the defendant gave the plaintiff $3 with which to purchase oats to feed the horses, and also bought and gave the plaintiff some rope with which to make halters for the horses; but that the horses never left the possession of the plaintiff.

*Held*, reversing the judgment of ROULEAU, J., without dealing with the other points, that, though these may have been a sufficient acceptance, there was not such an actual receipt by the defendant of the horses as to establish a contract binding under section 6 of the Sales of Goods Ordinance.

[ROULEAU, J., *April 25th, 1900.*

[*Court in banc, December 8th, 1900.*

Statement.

This was an action for the price of 43 horses sold and delivered April 17th, 1898, at $23.00 per head. The defendant pleaded (1) that the horses were not sold and delivered, (2) that if he did buy, he bought as agent only, as the plaintiff knew, and (3) that such sale, if any, did not conform to the requirements of the Statute of Frauds. The action was tried at Calgary before ROULEAU, J., July 5th, 1899.

*R. B. Bennett*, for plaintiff.

*C. A. Stuart*, for defendant.

Statement.

The defence, besides calling one witness, put in the defendant's own examination taken *de bene esse* on July 8th, 1898. The plaintiff tendered in rebuttal the cross-examination of the defendant had on May 25th, 1898, on his affidavit filed. Such cross-examination was received subject to the defendant's objection thereto. The facts are sufficiently set out in the judgments.

[*April 25th, 1900.*]

ROULEAU, J.—The plaintiff claims the sum of $920.00, being the amount of the purchase price of forty head of horses at $23.00 per head. The defendant says that he never purchased and never was delivered the said horses; and that if he did, he was acting only as agent for the Klondyke Co-operative Grubstake Mining Company, as the plaintiff was well aware. The defendant pleads, besides the Statute of Frauds, 29 Car. 2, chap. 3.

The first point to ascertain is, was there a sale and delivery of these horses? Before reviewing the evidence on this point I have to decide a question which was raised during the trial, viz.: Can the plaintiff file the cross-examination of the defendant on one of his affidavits in this case as rebuttal evidence to his examination *de bene esse* filed by the defendant in his behalf? I am of the opinion that the plaintiff can do it as former admissions made by the defendant. I think the case of *Richards* v. *Morgan*,[1] is sufficient authority to show that such evidence is admissible as admissions made by a party to the suit against himself.

The evidence upon which the plaintiff and defendant agree is that both parties drove out to see the horses; that the defendant went there a second time with two other men, members of the so-called "Klondyke Co-operative Grubstake Mining Company;" that defendant went to see the horses a third time and had horses which he did not want cut out and their foretops cut, with the exception of two or three horses, which were well known to the plaintiff, and

[1] 4 B. & S. 641; 33 L. J. Q. B. 114; 10 Jur. (N.S.) 559; 9 L. T. 662; 12 W. R. 162.

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Rouleau, J.

that the 40 horses left in the corral were accepted by the defendant subject, as he says, to be passed upon by some other members of the said Company, and, as plaintiff says, absolutely accepted by the defendant without reference to anybody else. Both parties agree that the price of the horses was to be $23.00 a head. In a word, plaintiff swears that it was an absolute sale and acceptance of the horses; and the defendant that it was only a conditional sale. The defendant's evidence as to the bargain is as follows:—"I went over with him (Livingstone) and he had the horses driven into the corral and I pointed out to him such horses as I was positive would not suit the purpose of the Company according to my judgment, and as I pointed them out, he roped them and cut a piece out of their foretop and turned them out of the corral. He turned out about ten or twelve. There were some colts in the corral; they were also turned out without being clipped and there were two or three left in, which I pointed out as objectionable, and which he knew by sight without being clipped. There were left in the corral about 40 horses. I said that so far as I was concerned, the horses then in the corral, excepting those two or three mentioned as the ones he knew well, would be acceptable to me for the purpose for which the Company intended them, if they were acceptable to the other members of the party who would have as much or more to do with the horses than I would." Before defendant swore this, he admitted that he had gone to plaintiff's ranche a previous time with two men of his party, Crane and Conro, and that plaintiff told them the price of the horses, viz., $23.00 a head. Another witness, John Livingstone, swore that, after defendant had picked out the horses, he went there again with two other gentlemen to see the horses; that his brother, the plaintiff, was not there; that defendant told him that he just drove out to have a look at the horses and see how they were getting along. Plaintiff swore besides that defendant said he would pay for the horses within a week, also that he wanted the horses to be fed with oats and for that purpose that he gave him $3.00 to purchase

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Rouleau, J.

some oats, and also that he bought some rope from Carson & Shore to make halters for the horses. All this, with the exception of the time of payment for the horses, is admitted by the defendant, but he accounts for the purchasing of the oats and ropes for the halters in this wise: "We then came back to Calgary. I next saw the plaintiff that evening (after the horses had been picked out), about 9 o'clock, and he talked about the pasture being bad, and the horses thin, and I asked him why he did not feed his horses. He said he was hard up and had not money to buy feed, and said he had been to a great deal of expense in the last year and asked me if I would mind buying ten bushels of oats so that he might feed them. I told him that I did not care about feeding other people's horses, and I asked him how much ten bushels of oats would be. He replied he could get ten bushels for $3.00. I gave him the $3.00 and said to him:—what if I should not take these horses? and he replied, that I would only be out my $3.00 on the oats. I told him if I did take the horses, I wanted strong horses, horses that were grain fed. He came to me next morning and said that the horses would waste the oats and that though he did not like to ask me for money, if I would get some rope to tie them up, it would be better. He complained about being hard up and of not having money to purchase these things himself. I got him some rope." This is no doubt a plausible account of what occurred, but it is hardly credible that a perfect stranger would buy oats to feed horses, and halters to tie them up, when he had not purchased them and did not own them. The plaintiff's evidence as to that is likely what had occurred, and this plausible story of the defendant was only an afterthought. The same thing might be said of the passing of the horses by two other members of the party; besides, it is of evidence that he had at least two members of his party with him when he went to see the horses the second time, and that the plaintiff then fixed the price of them. These reasons look to me as likely reasons given by a party that wants to get rid of a definite bargain made. At all events, the plaintiff's evidence is corroborated in all the essential facts, whilst the evidence of

the defendant is not. So I come to the conclusion that the horses were purchased by and delivered to the defendant. Judgment. Rouleau, J.

The second contention is, that the defendant was acting only as agent, to the knowledge of the plaintiff, and therefore was not personally liable. It is of evidence that the defendant was one of the directors of the alleged Company, but no legal evidence was produced that that Company was incorporated; for aught I know this Company may only be a Company on paper. But one thing is certain that the plaintiff never intended to deal with a Company of whose legal existence he knew nothing. The defendant was the man he dealt with and necessarily the man he held responsible. In *Ferguson* v. *Wilson*,[2] Lord Justice Cairns dealt with the position of Directors of a Company: "It ought," he said, "very clearly to be understood upon what principle, and to what extent, directors in suits of this kind," (that is, when they are sued personally) "are liable to the jurisdiction of this Court. This is a bill filed upon a contract. With whom has the contract been made? The bill alleges that the contract is made with and binds the Company. What is the position of directors of a public Company? They are merely agents of the Company * * and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the Company."

Apply the same principles to this case: It seems to me that defendant is liable even though he may perhaps be an agent. It is not established that he was acting only in his quality of agent, when there is no evidence to show that the principals whom he alleged he was acting for were an incorporated Company. I think, therefore, that the defendant must be held personally liable.

The third and last contention was that if the agreement took place no delivery was made to satisfy the Statute of Frauds or rather the Sale of Goods Ordinance (C. O.

[2] L. R. 2 Ch. 77; 12 Jur. (N. S.) 912; 15 W. R. 80.

Judgment. Rouleau, J.

1898, c. 39). That Ordinance declares the law. It defines what a contract of sale is and how made. Section 6 deals with a contract of sale of goods for $50.00 and upwards; and sub-section 2 of section 6 declares the section to apply to cases of future delivery; and sub-section 3 declares that there is an acceptance of goods within the meaning of said section 6 if the buyer does an act in relation to the goods which recognizes a pre-existing contract of sale.

Believing as I do, and having already found so, that the defendant did an act with relation to the purchase of these horses by which he recognized a pre-existing contract of sale, I am of opinion that he is debarred now from saying there was no acceptance of the horses. The evidence which I refer to in this connection is that the defendant purchased oats to feed the horses and some rope to make halters for them.

For these reasons I am of the opinion that the plaintiff should have judgment for the full amount claimed.

Judgment for the plaintiff for the sum of $920, and costs.

The defendant appealed. The appeal was argued at Calgary, July 20th, 1900.

*C. A. Stuart*, for appellant:—This Court has power to reverse the findings of the trial Judge, even on questions of fact; *North British & Mercantile Insurance Co.* v. *Tourville*,[3] *Iefeunteum* v. *Beaudoin*,[4] *Coghlin* v. *Cumberland*.[5] There was not sufficient evidence to establish a binding contract. The defendant was acting as an agent only. Even if the alleged principal did not exist, the plaintiff's remedy would be only by action of deceit: *Hollman* v. *Pullin*,[6] *Sharman* v. *Brandt*.[7] As to the liability of principal and agent: *Armstrong* v. *Stokes*.[8] There was no sufficient delivery of the goods: *Goodall* v. *Skelton*,[9] *Boulter* v. *Arnot*,[10] *Holmes* v.

[3] 25 S. C. R. 177. [4] 28 S. C. R. 89. [5] (1898) 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 540. [6] 1 Cab. & E. 254. [7] L. R. 6 Q. B. 720; 40 L. J. Q. B. 312; 19 W. R. 956. [8] L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; 26 L. T. 872; 21 W. R. 52. [9] 3 R. R. R. 379; 2 H. Bl. 316. [10] 2 L. J. Ex. 97; 3 Tyr. 267; 1 C. & M. 333.

*Hoskins*,[11] *Baldey* v. *Parker*,[12] *Phillips* v. *Bristolle*,[13] *In re Roberts, Evans* v. *Roberts*,[14] *Martin* v. *Haubner*,[15] *Cusack* v. *Robinson*.[16] Argument.

*R. B. Bennett*, for the respondent. The findings of the trial Judge on questions of fact should not be disturbed unless he was plainly in error: *Colonial Securities Trusts Co.* v. *Massey*,[17] *Savage* v. *Adam*.[18] As to the distinction between acceptance under sec. 6 of the Sales of Goods Ordinance, and acceptance in performance of the contract see *Abbott* v. *Wolsey*,[19] and *Edan* v. *Dudfield*.[20]

[*December 8th, 1900.*]

McGUIRE, J.—In this case plaintiff sues for the price of forty head of horses "sold and delivered" to the defendant at $23 a head. There was no agreement in writing nor anything paid as part payment or as an earnest, so that to establish a contract of sale it was necessary for the plaintiff to prove an acceptance and an actual receipt by the defendant of at least a part of the goods. The learned trial Judge found in favour of the plaintiff for the full price of the horses. On the question of acceptance he finds that the defendant did certain acts in relation to the goods which recognized a pre-existing contract of sale, and by section 6 (3) of the Sales of Goods Ordinance this constitutes an acceptance within that section. In view of the decision I have come to on another branch it is unnecessary to express my opinion on this finding of the trial Judge. But assuming that he was right in finding that there had been an "acceptance," the next question is, was there an "actual receipt" of any part of the goods. It was contended for

[11] 9 Ex. 753; 2 W. R. 376. [12] 26 R. R. 260; 3 D. & R. 220; 2 B. & C. 37; 1 L. J. (O. S.) K. B. 229. [13] 2 B. & C. 511; 26 R. R. 433; 3 D. & R. 822; 2 L. J. (O. S.) K. B. 116. [14] 36 Ch. D. 196; 56 L. J. Ch. 952; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757. [15] 26 S. C. R. 142. [16] 1 B. & S. 299; 30 L. J. Q. B. 261; 7 Jur. (N. S.) 542; 4 L. T. 506; 9 W. R. 735. [17] (1896) 1 Q. B. 38; 65 L. J. Q. B. 100; 73 L. T. 497; 44 W. R. 212—C. A. [18] C. A. (1895) W. N. 109. [19] (1895) 2 Q. B. 97; 64 L. J. Q. B. 587; 14 R. 455; 72 L. T. 581; 43 W. R. 513; 59 J. P. 500—C.A. [20] 1 Q. B. 302; 4 P. & D. 656; 5 Jur. 317.

Judgment.
McGuire, J.

the appellant that there had been no express finding by the trial Judge on this point. As he decided in favour of the plaintiff he must have come to the conclusion that there had been such actual receipt, whether or not he had distinctly and in express terms set it forth in his written judgment. As this is a rehearing it is not material to discuss this. If we are of opinion that there was no evidence sufficient to support such a finding, this court may reverse his finding, assuming that he did so find on the question of receipt.

Looking at the evidence I fail to find any evidence whatever of any actual receipt by the defendant—either actual or constructive. The horses were in the plaintiff's corral on the occasion of the third visit of the defendant—when for the first time it is claimed by the defendant that a sale was orally agreed upon—the horses, about forty, which plaintiff says defendant bought, were still in plaintiff's corral when plaintiff and defendant drove away to town and there is no evidence whatever that the defendant had anything to do with the horses after that. There is no suggestion by the plaintiff that he changed in any way his position, as, for example, that he thereafter or at any time kept possession as bailee or servant of the defendant. He says, in his evidence, "was to keep the horses until they were paid for, but had no direct agreement not to give them till paid for." Evidently his understanding was that he was to keep them till paid for—and as he was not paid he still kept them—and may be keeping them till the present time so far as appears. He never lost his lien. The evidence even of an oral contract or sale is extremely meagre and unsatisfactory. On the second visit the price was mentioned and the defendant said "he would take forty head of horses." But plaintiff does not pretend that there was any agreement orally concluded on that day. It was on the third day that the plaintiff says he had "gathered about fifty horses in the corral, and he, defendant, looked the horses over and he pointed out the horses he did *not want* and we cut a piece of the foretop and let them go. Defendant took that day forty head. I separated these horses from the others

and *kept the forty horses in the corral.*" They then went to town. There is no evidence that defendant ever again saw these horses. There is evidence that he drove out, sometime after, to the plaintiff's premises and that he said "he came to have a look at the horses, how they were getting along," but it is not said whether or not he saw them. Even then "the biggest part of the horses were in the corral and the others were in the pasture half a mile away." This was at the last of April. The horses were therefore still in plaintiff's possession. I fail to see the slightest trace of evidence to show "an actual receipt" by defendant of any of the horses—or that defendant ever touched or handled or in any way had any kind of control or possession of any of the horses. Could the defendant have by right, taken away any of these horses without payment? No, for plaintiff says he was to keep them till payment. The plaintiff having failed to prove any actual receipt, he failed to establish a contract binding under section 6 of the Sales of Goods Ordinance. See Judgment of Strong, C.J., in *Martin* v. *Haubner*.[15]

Judgment. McGuire, J.

In my opinion the appeal should be allowed with costs. The judgment of the trial Judge will therefore be reversed and judgment entered for the defendant with costs.

RICHARDSON, WETMORE and SCOTT, JJ., concurred.

*Appeal allowed with costs.*

REPORTER:

Ford Jones, Advocate, Regina.

## IN RE EDMONTON BY-LAW.

*Municipal Ordinance—Money by-law—Debentures, form of—Practice—Stated Case—Parties—Lieutenant-Governor in Council.*

A by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures are to run, and for the same being met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is not in accordance with the Municipal Ordinance,† (C. O. 1898, c. 70), and for that reason the Lieutenant-Governor in Council is warranted in withholding his assent thereto.

*Quære*—Whether the Lieutenant-Governor in Council can be a proper party to a cause or matter, and therefore whether the Court should entertain a stated case to which the Lieutenant-Governor is a party.§

[*Court in banc, December 8th, 1900.*

Statement. The following case was agreed upon and stated by the town of Edmonton and the Attorney-General of the North-West Territories for the purpose of the opinion of the Court under and in pursuance of section 250 of the Judicature Ordinance:—

1. The municipal council of the town of Edmonton duly passed on the 15th May, 1900, a by-law numbered 133 intituled "A By-law for the borrowing of the sum of $8,077 upon the credit of the municipality at large," and to take effect on the 1st June, 1900.

2. The said by-law provided for the borrowing of the said sum of $8,077 by the issue of debentures to that amount to be made payable on the 1st June, 1910, and the interest (for the payment of which coupons are to be attached) half yearly in the meantime.

3. For the purpose of raising the amount in the said by-law stated to be required to be raised annually for paying the interest and creating an equal yearly sinking fund to provide for the payment of the principal, a special rate

†But see now Ord. 1901, c. 23, s. 9, amending s. 218 of the Mun. Ord. §See now Ord. 1901, c. 11.

over and above all other rates and taxes to be levied at the same time and in the same manner as the general municipal taxes is by the by-law provided for. Statement.

4. The said by-law has been submitted to the Lieutenant-Governor in Council of the Territories, accompanied by proof in the customary form, showing that all necessary formalities in respect to the passing thereof have been complied with, unless the objection raised thereto and hereinafter specified be valid.

5. The Lieutenant-Governor in Council has withheld assent to the said by-law, on the ground that the said by-law provides for the postponement of the payment of the principal to the end of the term over which the debentures run, providing at the same time that the same is to be met by the accumulation in the meantime of a sinking fund, instead of providing for the payment of the principal in equal instalments.

6. The Town of Edmonton submits the said by-law is valid as against the said objection.

7. No application has been made to quash the said by-law.

8. The Lieutenant-Governor in Council by the Attorney-General and the Town of Edmonton, submit the said question for the opinion of the Court and respectively submit to the jurisdiction of the Court."

The case was argued before the Court *in banc* July 20th, 1900.

*N. D. Beck*, Q.C., for the municipality:—As to the jurisdiction of the Court: *In re The Massey Manufacturing Co.*,[1] *London Association of Shipowners* v. *London and India Docks*,[2] *Attorney-General* v. *Cameron*.[3] The imperative words of section 218 of the Municipal Ordinance must be interpreted to mean that debentures shall be in the form specified or adapted so as to meet the circumstances: *Dean* v.

[1] 11 O. R. 444; 13 O. A. R. 446. [2] (1892) 3 Ch. 242; 62 L. J. Ch. 294; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195. [3] 26 O. A. R. 103.

Argument.

*Green*,[4] *Regina* v. *Baines*,[5] *Bartlett* v. *Gibbs*,[6] *Henna* v. *Whyman*.[7] The intention of the Legislature must be drawn from the terms of the Ordinance itself: *South Eastern Railway* v. *Railway Commissioners*,[8] *Martin* v. *Hemming*.[9] The intention of the Legislature was not to do away with the sinking fund system.

*Horace Harvey*, Deputy Attorney-General, contra: — The alteration in the law made by the Municipal Ordinance of 1897 shows that the Legislature intended that thereafter the sinking fund was not to be allowed in respect to debentures other than those in respect of local improvements.

[*December 8th, 1900.*]

McGUIRE, J. — This is a case stated by the town of Edmonton and the Attorney-General of the North-West Territories for the opinion of this Court pursuant to section 250 of the Judicature Ordinance.

The simple question to be answered is, whether under the Municipal Ordinance as it stood when the by-law in question was passed, a by-law (not being for local improvements) is valid which provides for the postponement of the payment of the principal to the end of the term over which the debentures run, and providing that the same is to be met by a sinking fund, instead of providing for the payment of the principal by equal instalments.

By the Municipal Ordinance of 1894, Part VI. s. 10, it was provided that such a by-law shall recite certain things among others "(*b*) The total amount to be raised annually by special rate" for "paying said debt and interest," and section 11 gave the council discretion "to make the principal repayable by equal annual instalments during the currency of such period," and to issue debentures for the amounts

[4] 8 P. D. 79; 46 J. P. 742. [5] 12 A. & E. 210; 4 P. & D. 362; 10 L. J. Q. B. 34; 5 Jur. 337. [6] 5 Man. & Gr. 81; Barr. & Arn. 98; 1 Lutw. Reg. Cas. 73; 7 Scott (N. R.) 609; 13 L. J. C. P. 40. [7] 2 C. M. & R. 239; 3 D. P. C. 673; 1 Gale, 105; 5 Tyr. 792; 4 L. J. Ex. 200. [8] 50 L. J. Q. B. 201; 6 Q. B. D. 586; 44 L. T. 203; 45 J. P. 388. [9] 18 Jur. 1002; 10 Ex. 478; 24 L. J. Ex. 3; 3 W. R. 29.

and payable at the times corresponding with such instalments, together with interest annually or semi-annually as may be set forth and provided in such by-law," but it was not imperative on the council to do so. In 1897 a change was made in the Ordinance. Section 11 was left out and the above recited section 10 (*b*) was struck out and a new one substituted as follows:—" (*b*) The number of years over which such indebtedness is to be spread," no other change having been made in said section 10 (see section 221 of 1897); but a new section (222) was enacted, now consolidated as section 218, as follows: "Debentures shall be in the form following or to the like effect.

Judgment. McGuire, J.

(Full Corporate name of Municipality).

"$..... Debenture No. ....

The Municipality of ..... promises to pay the bearer at the ..... at ..... the sum of ..... dollars of lawful money of Canada in ..... equal instalments from the date hereof, with interest at the rate of .... per cent. per annum on the terms and in the amounts specified in the coupons attached hereto.

Signed .....
Mayor or (Reeve).

Signed .....
Secretary-Treasurer.

(Coupons)

Coupon No. .... Debenture No. ....

The Municipality of ..... will pay to the bearer at the Bank of ..... at ..... on the ..... day of ..... .... the sum of .... dollars, being the .... payment with the total interest, at the rate of .... per cent. per annum, due on that day on Debenture No. ....

Signed .....
Mayor or (Reeve).

Signed .....
Secretary-Treasurer.

Judgment.
McGuire, J.

Dealing first with the above recited sub-section (*b*), it will be seen that the "indebtedness" is to be "spread" over the given number of years.

It is the "indebtedness" which is to be spread. A sinking fund spreads not the "indebtedness" but the burden of the taxpayer,—the indebtedness is payable in one lump sum at the end of the period. The use of the word "spread" indicates that the "indebtedness," *i.e.*, the principal sum, is to be distributed or divided over the given number of years, and, *prima facie*, uniformly or equally. So that without reference to the form given in section 218, the language of (*b*) and the omission of the discretion formerly given by section 11, Part VI. of 1894, make it obvious that no longer is there to be any discretion left to the council—any choice between a sinking fund and equal annual payments of principal. This view is confirmed by the form provided by section 218, which shows clearly that the whole principal is to be payable by a given number of equal instalments, and the coupons attached, one for each year, are to be numbered, and each coupon is for a particular "payment," as "first, second, third payment," with the total interest at the rate fixed on the particular debenture. Frequently a "form" is given for the guidance of those interested and is usually placed at the end of an Act. But here it is embodied in the Ordinance itself and prefaced with the direction that "debentures *shall* be in the form" given, "or to the like effect," the latter words allowing some verbal departures not affecting the substance.

By section 230 of the Consolidated Ordinance, all by-laws for contracting debts not made payable within the financial year require the "assent of the Lieutenant-Governor in Council." This assent is refused to this by-law because it provides for payment by a sinking fund, and not as required by the present Ordinance. I think the by-law is not in accordance with the Ordinance, and that for that reason the Lieutenant-Governor in Council was warranted in withholding assent to it.

RICHARDSON, ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ., concurred.

Judgment.

Richardson, J.

RICHARDSON, J., the President of the Court, made the following remarks:—In agreeing with the judgment just read by Mr. Justice MCGUIRE, it is thought proper to state that the members of the Court have serious doubts as to whether this is a case which can be properly stated under Rule 250 of the Ordinance. The doubts we have are caused by the suggestion that the Lieutenant-Governor in Council cannot be a proper party to a cause or matter, and therefore the entertaining of a stated case such as is presented to the Court is simply making the Court or Judges the legal advisers of the Executive. Possibly that duty might be cast upon the Court by legislation, but in the absence of such legislation we have doubts. As all the members of the Court have considered the question submitted and are agreed, we have given the result of such consideration. Should a case of a similar character be hereafter submitted to us we will consider fully, before investigating the question submitted, whether the case is properly before the Court.

REPORTER:

Ford Jones, Advocate, Regina.

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## WRIGHT v. SHATTUCK.

*Sale upon condition—Waiver of condition—Passing of property—Detinue—Demand and Refusal.*

**The plaintiff sold to the defendant his one-half interest in a heifer named Irene and registered as a thoroughbred, the defendant already being owner of the other half. The defendant subsequently charged the plaintiff with having wrongfully secured the registration of the heifer as a thoroughbred when, as he claimed to be the fact, she was not. The charge was laid before the Executive Committee of the Dominion Shorthorn Breeders' Association at Toronto. The parties then entered into a written agreement, which provided: (1) that the heifer should be resold to the plaintiff at a certain price, (2) that on payment of the price the heifer was to become the property of the plaintiff, (3) that the defendant agreed to withdraw the charge above referred to, and upon all proceedings in respect to it being dropped by the Association the "foregoing part" of the agree-**

ment was to be carried out. The defendant did not withdraw the charge, nor were the proceedings dropped. The plaintiff twice tendered the purchase price of the heifer to the defendant, which was refused. He then, without making a formal demand for the heifer, sued the defendant in detinue.

*Held*, that, as the condition contained in the third clause of the agreement was inserted for the plaintiff's benefit, he could waive it; that he had waived it, by proferring payment; that on refusal to accept the price the defendant became *ipso facto* the wrongful detainer of the heifer; that a demand and refusal was therefore not essential to the plaintiff's right of action, and that the plaintiff was, therefore, entitled to succeed.

[ROULEAU, J., *January 8th*, 1901.

Statement. The plaintiff and defendant were partners in the enterprise of buying thoroughbred cattle in Ontario and shipping them to Alberta for sale. The plaintiff did the buying and shipping in Ontario while the defendant received the cattle in Alberta and attended to the selling of them. Five out of a certain shipment remaining for some time unsold, the defendant bought out the plaintiff's interest in them and became the sole owner thereof. Among these five was a heifer named Irene, which had been registered by the plaintiff as a thoroughbred in the books of the Dominion Short Horn Breeders' Association at Toronto. Sometime in March, 1899, the defendant being in Ontario, received information that led him to believe that the heifer in question was not a thoroughbred, and on the 25th of that month he went before the executive board of the above named association and made a statutory declaration to that effect. On the 27th the plaintiff was informed of this action and on the same day the plaintiff and defendant signed an agreement with respect to the matter, which, omitting the formal parts, was as follows:—

" 1. The contract for the sale of the said heifer to be cancelled and the said Wright is to repay the said Shattuck the sum of $115, being the purchase price of the said heifer, and $25 for expenses, making in all $140, to be paid by the said Wright to the said Shattuck.

2. When the said sum of $140 is paid the heifer and her calf are to be the property of Mr. Wright to do with as he pleases.

Statement.

3. Mr. Shattuck agrees to withdraw the charge made by him to the Shorthorn Breeders' Association in respect to the said heifer; and upon all proceedings being dropped by the said association in connection with the matter, the foregoing part of this agreement is to be carried out; and when so carried out the parties mutually agree to release each other from any and all claims and demands in connection with the said transaction."

After this agreement was signed, the plaintiff tendered to the defendant the sum of $140, but it was refused. On the 28th the plaintiff received formal notice of the charge from the secretary of the association, and replied by saying he would be pleased to appear before the executive board at any time. A meeting of the board was called on April 5th, 1899. The plaintiff went to the meeting and took with him a number of witnesses and placed before the board their statutory declarations tending to prove that the heifer was a thoroughbred. The defendant also attended this meeting but neither plaintiff nor defendant announced that there had been a settlement. The defendant did not withdraw the charge. In his evidence he stated:—"Had evidence not been given at that meeting I would have withdrawn the charge as soon as the association had taken some action on it. If the executive had dropped the charge I would have withdrawn it." The plaintiff swore in his evidence as follows:—"Did not tell the executive that this matter was settled; instead of telling them that the matter was settled I commenced to show that Shattuck's charge was not true. Went for that purpose before the executive with my witnesses to show that Shattuck's charge was untrue." The minutes of the meeting showed that the executive adjourned without taking any action. Subsequently on April 12th the plaintiff again tendered the defendant the sum of $140 at Guelph, and it was again refused. The plaintiff then proceeded to Alberta and commenced an action against the defendant for wrongful detainer of his property, viz., the heifer and her calf. The defendant in his defence denied that the heifer and calf were the property of the plain-

Statement.

tiff, but did not deny the detention. The writ was issued on April 17th, 1899. On the 19th of May the plaintiff's solicitor appeared before the executive committee above named at Toronto, and asked that the president and secretary should sign a certificate stating that the committee would take no further action in the matter. A motion to that effect was lost and an amendment carried directing a copy of the minutes of the meeting of April 5th should be given to each party. At the trial there was conflicting evidence by the members of the executive committee as to whether the committee had dropped the matter or not.

The cause was tried before Mr. Justice ROULEAU without a jury at the Calgary Sittings on May 31st, 1900.

*R. B. Bennett*, for the plaintiff.

*P. McCarthy*, Q.C., and *C. A. Stuart*, for the defendant.

[*January 8th*, 1901.]

ROULEAU, J.—This is an action of detinue instituted by the plaintiff against the defendant in order to obtain possession of one shorthorn two-year-old heifer "Irene," of a light red color with white markings on hind foot; also her calf about six months old. A writ of replevin was issued in due course and the plaintiff took possession of said heifer and calf.

The defendant denies that the goods and chattels or any part thereof were the plaintiff's.

This action is based on an agreement, exhibit "A," made by plaintiff and defendant on the 27th day of March, 1899, by which the parties settled their differences about the sale by plaintiff to defendant of the said heifer "Irene" as follows:

"1. The contract for the sale of said heifer is to be cancelled and the said Wright is to repay to the said Shattuck the sum of $115, being the price of said heifer, and $25 for expenses, making in all $140, to be paid by the said Wright to the said Shattuck.

Judgment.
Rouleau, J.

"2. When the said sum of $140 is paid the heifer and her calf are to be the property of Mr. Wright to do with as he pleases.

"3. Mr. Shattuck agrees to withdraw the charges made by him to 'The Shorthorn Breeders' Association' in respect of the said heifer; and upon all proceedings being dropped by the said association in connection with the matter, the foregoing part of the agreement is to be carried out, and when so carried out the parties mutually agree to release each other from all claims and demands in connection with the said transaction."

This last paragraph of the agreement is the paragraph relied upon by the defendant. The defendant agreed to withdraw the charges made by him against the plaintiff to the Shorthorn Breeders' Association in respect of the heifer in question. There is no evidence to show that he even attempted to do so. There is no doubt that the agreement casts a duty to be performed on the defendant, to wit, the withdrawal of the charges, and if the Association had not dropped the charges then his position before this Court would have been quite different. It is a well-known principle that "if a debtor bound under a certain condition have impeded or prevented an event, it is held as accomplished. If the creditor has done all that he can to fulfil a condition which is incumbent upon himself, it is held sufficient impliment:" *McKay* v. *Dick*.[1] It is contended by the defendant that the plaintiff went to Toronto on the 5th April with four or five witnesses to appear before the association, and therefore prevented the condition to be accomplished. The agreement had been executed on the 27th March before, and the defendant knew or must have known that if he did not withdraw the charges within that time, between the 27th March and the 5th April, the association were in duty bound to take them up and proceed with them. It was the complainant's duty to withdraw the charges. It is of evidence that Mr. Guthrie, the plaintiff's solicitor, prepared on the 10th May following, a resolution to the effect

[1] 6 App. Cas. 251; W. R. 541.

Judgment Rouleau, J.

that the proceedings be withdrawn. The Association refused. Why? Because it was not competent for the accused or his solicitor to have the accusation withdrawn without the consent of the complainant. It is clear to me, therefore, that the defendant was in default and did not comply with that part of the agreement by which he agreed to withdraw the charges he had made against the plaintiff.

This condition, no doubt, was in favor of the plaintiff, and he subsequently waived it as he had a right to do, by tendering the amount stipulated in the agreement. The evidence on this fact is overwhelming, and I am of the opinion that as soon as the tender was made the agreement became operative, and that the plaintiff was entitled to all the rights which he could claim under said agreement.

In the case of *Frost* v. *Knight*,[2] Cockburn, C.J., says: "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interest. The rights acquired under it may be dealt with by him in various ways for his benefit and advantage."

It is contended by the defendant that, as this is an action of detinue, there must be a demand and refusal.

It seems to me that after the tender of money was made to the defendant and his refusal to accept it, the plaintiff became the owner of the goods in question, and that the defendant from that date became the unlawful detainer of the same. By the fact that the agreement became operative as soon as the plaintiff complied with his obligations, the defendant from that moment became the unlawful detainer of the plaintiff's property; and I am of opinion that he knew the consequences without any further demand. If he had been an innocent bailee of the property, there is no doubt then a demand and refusal would have been necessary, before the cause of action would arise. Section 426 of the Judicature Ordinance provides only for the recovery of personal

[2] 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.

Judgment.
Rouleau, J.

property unlawfully detained; and there is no necessity in such a case as this, to make a formal demand, unless the defendant proves that he was an innocent holder of the said property.

The real issue in this case is whether the plaintiff or defendant is the owner of the property in question; if the plaintiff is the owner the defendant has no right to detain the property and therefore must abide by the consequences. I am not concerned in any other issue raised, and as I decide that the plaintiff is the owner of the property in question he is therefore entitled to his judgment with costs. No damages proved nor allowed.

The sheriff having a deposit of a marked cheque made by the plaintiff is ordered to pay $140 to the defendant, amount agreed upon by the said agreement, and to return the balance to the said plaintiff.

REPORTER:

Chas. A. Stewart, Advocate, Calgary.

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## BROWN v. CRAFT.

*Master and Servant's Ordinance—Non-payment of wages—Counterclaim by master—Production.*

On the hearing of a complaint before a Justice of the Peace, under the Ordinance respecting Masters and Servants, (C. O. 1898 c. 50) by a servant against his master for non-payment of wages, the Justice has no jurisdiction to allow against the amount of wages any sum by way of damages sustained by the master by reason of the servant's neglect or refusal to perform his duty.

[RICHARDSON, J., *January 15th*, 1901.

A justice of the peace under the provisions of s. 900 of the Criminal Code, stated a case involving the question of law whether or not on the hearing of a complaint by a servant against his master for non-payment of wages, the master is entitled to bring in and prove damages sustained by him, consequent upon the servant's refusal or neglect to

Statement.

perform his just duties, and to have these damages set off against the wages found due the servant.

The facts set out in the case were briefly that Brown, the servant, under the provisions of s. 3 of Consolidated Ordinance, c. 50, the Masters and Servants Ordinance,lodged with the justice a complaint against Craft for non-payment of wages, and on the hearing, besides that bearing on the question of wages, some evidence was introduced tending to show that, by reason of Brown's neglect to obey Craft's directions in regard to some oats, the oats became entirely lost and destroyed, and, notwithstanding the objection of Brown's counsel, the justice expressed his determination to allow the claim for damages as set-off to the wages; and it was for the purpose of having a Judge's direction upon this determination that the case was stated.

*Ford Jones*, for Brown.

*N. MacKenzie*, for Craft.

*January 15th*, 1901.]

RICHARDSON, J.—Mr. Trant, J.P., under the provisions of s. 900 of the Criminal Code, has stated a case involving the question of law whether or not on the hearing of a complaint by a servant against his master for non-payment of wages, the master is entitled to bring in and prove damages sustained by him consequent upon the servant's refusal or neglect to perform his just duties, and upon proof by adjudication of the justice to have these damages set-off against the wages found due the servant.

The facts set out in the case are briefly that Brown the servant under the provisions of s. 3 of c. 50 of the Consolidated Ordinance, the Masters and Servants Ordinance, lodged with Mr. Trant a complaint against Craft for non-payment of wages; and on the hearing before Mr. Trant, besides that bearing on the question of wages, some evidence was introduced tending to show that by reason of Brown's neglect in regard to some oats as directed by Craft, the oats became entirely lost and destroyed; and, notwithstand-

Judgment.
Richardson, J.

ing the objection of Brown's counsel, Mr. Trant expressed his determination to allow the claim for damages as set-off to the wages; and it is for the purpose of having a Judge's direction upon this determination that the case is stated.

It is beyond question and free from doubt that whatever jurisdiction to hear and determine complaints is vested in justices of the peace is derived under and founded entirely on legislative enactment. Paley on Convictions, says, p. 16,—upon special authority conferred and regulated by statute given either in express words or in words from which the jurisdiction may reasonably be implied.

On the hearing of the case, 24th December, 1900, Mr. Jones appeared for Brown and Mr. MacKenzie for Craft.

Turning to the Masters and Servants Ordinance, section 2, among others, makes it an offence punishable summarily by fine before a justice of the peace, for a servant to refuse or neglect his just duties toward his master, and on non-payment of the fine, which belongs to the Government, and costs of prosecution forthwith after conviction makes the servant liable to imprisonment.

In this section no jurisdiction to entertain or determine the civil liability of a servant for damages sustained by the master is expressly given, nor does it contain words so far as I can observe from which such jurisdiction can be reasonably implied.

Then follows section 3, under which Brown's complaint was laid against Craft for non-payment of wages. In this there are not, so far as I can see, any words authorizing, directly or by reasonably implied inference, a justice of the peace to enter upon a counterclaim for damages. This section expressly authorizes the justice of the peace to examine into the matter of the complaint, *i.e.*, non-payment of wages, and upon due proof of the cause of the complaint, *i.e.*, that any wages were due, to direct the payment to the servant of any wages found to be due and make such order for the payment of the wages as to the justice of the peace seems just and reasonable.

Judgment.
Richardson, J.

That the Legislature did not intend investing justices of the peace with the power of hearing and determining questions of damages such as I have alluded to is, to my mind, clear from section 6 of the Ordinance, which enacts "That nothing in this Ordinance shall in any wise curtail, abridge or defeat any civil or other remedy for the recovery of damages which masters may have against servants," thus directly excluding civil claims for damages from the operation of the Ordinance.

In my judgment Mr. Trant exceeded the power conferred on justices of the peace by the Ordinance, in holding that upon hearing of an information laid under section 3, damages claimed for any of the causes set out in section 2 can be adjudicated upon by a justice of the peace, and if found set-off against wages proved under section 3.

And his determination in respect of which the case has been stated must be reversed with costs of Brown at the hearing when taxed to be paid by Craft.

REPORTER:

C. H. Bell, Advocate, Regina.

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## DOIT v. DOWLING ET AL.

*Company—Contract on behalf of, before incorporation—Ratification—Principal and agent—Implied warranty of authority—Consensus ad idem—Evidence—Burden of Proof.*

In the absence of a new agreement made by a Company after its incorporation, a contract made before its incorporation by a person purporting to contract for the Company is not binding on the Company, although the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the Company. *In re Sully's Case, Re Northumberland Avenue Hotel Company, Limited*;[1] followed.

A person who enters into contract, expressly as agent for a principal impliedly warrants his authority; and if he has in fact no such authority he may be sued under the implied contract, and

[1] 33 Ch. D. 16; 54 L. T. 77.

is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. *Collen* v. *Wright*,[2] followed.

In an action on a verbal contract, the evidence as to its terms being contradictory, and showing that, if each of the parties to the contract gave in evidence a truthful statement of its terms according to his recollection, there was a misunderstanding between them as to whether a certain important provision (the existence of which was the whole basis of the action) formed part of it, the trial judge declared himself unable to ascertain the truth, and, applying the principle laid down in *Falck* v. *Williams*[3]—that it is for the plaintiff in an action for breach of contract to show that his construction is the right one—dismissed the action.

[ROULEAU, J., *January 28th*, 1901.

Statement.

Trial of an action by ROULEAU, J., without a jury, at Edmonton.

The action was one of contract against one Ezra Dowling and the Dowling Milling Company, Limited, alternatively.

*C. deW. MacDonald*, for plaintiff.

*N. D. Beck*, K. C., for the defendant.

[*January 28th*, 1901,]

ROULEAU, J.—This is an action of damages for breach of contract.

It is alleged that on or about the 6th day of October, 1899, as agent for and on behalf of the Dowling Milling Co., Ltd., Ezra Dowling entered into a verbal contract with the plaintiff, whereby the plaintiff agreed to furnish to the defendant company all the slack coal and coal required for use in the business of the said defendant company for the space of one year from said day, at least one-half of the same to be slack coal at the price of $1 per ton, and $2.25 per ton for coal.

In answer the defendant company objects that the statement of claim shows no cause of action, inasmuch as (1) it appears that the defendant company was not incorporated at the date of the alleged contract, therefore they could have no agent; no contract could be made on their behalf, and no

[2] 8 El. & Bl. 647; 27 L .J .Q. B. 215; 4 Jur. N.S. 357; 6 W. R. 123. [3] 69 L. J. P. C. 17; 1900 A. C. 176.

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ratification or adoption could be made after incorporation; (2) assuming there could be adoption or ratification, the facts alleged from which it is sought to infer such adoption or ratification are insufficient for that purpose.

It is useless for me to enter into a long dissertation about the two following propositions of law that an unincorporated company cannot contract by a supposed agent or future president or director, and that after incorporation a company cannot ratify or adopt a contract made before its incorporation, because these propositions have been virtually accepted by the plaintiff's advocate, and also fully laid down in the case which I am going to refer to presently.

The Dowling Milling Co., Ltd., was incorporated by Letters Patent on the 14th October, 1899, and the contract alleged to be entered into with the said company was made on the 6th October, 1899, eight days before its legal existence. The two propositions of law mentioned above are borne out by the case of *In re Sully, Re Northumberland Avenue Hotel Company, Limited.*[1] It was held that "in the absence of a new contract made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract as trustee for the company is not binding on the company, though the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company." Lopes, L.J., said: "There no doubt was an agreement between a man called Nunneley, who was agent for Wallis, and a man named Doyle, who described himself as trustee for the company, but at that time the company was not incorporated, and therefore it is perfectly clear that the agreement was inoperative as against the company. It is also equally clear that the company, after it came into existence, could not ratify that contract, because the company was not in existence at the time the contract was made. No doubt the company, after it came into existence, might have entered into a new contract upon the same terms as the agreement; and we are asked to infer such a contract from the conduct and transactions of the company after they came into existence. It seems to me impossible to infer such a con-

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tract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the former contract was in existence, and was a binding, valid contract."

If I apply these words to the case under consideration, they exactly fit with the evidence and with the position of the parties, and therefore this case *quoad* the defendant company, is not tenable.

As to the personal liability of Ezra Dowling, it is clear to me that according to the rule, established by the case of *Collen* v. *Wright*,[2] if there is a contract proven, he is personally liable. The rule established by the case of *Collen* v. *Wright*,[2] above cited, is that "A person who enters into a contract expressly as agent for a principal named impliedly warrants his authority; and if he has in fact no such authority, he may be sued under that implied contract; and is bound to make good to the other contracting party what that party has lost or failed to obtain, by reason of the non-existence of the authority." It was so held by the unanimous judgment of the Court of Queen's Bench, and by a majority in the Exchequer Chamber; although Cockburn, C. J., dissented on the ground that the decision created a new species of liability on an implied promise in a written contract. Now this rule has been so well established by numerous authorities, that it is not necessary for me to refer to any other case.

The next question for me to consider is whether there was a contract for a year between the plaintiff and the defendant Dowling. The evidence is very contradictory. The plaintiff swears that: "On the 6th day of October, 1899, he met the defendant, Ezra Dowling, at the mill and asked him about the contract. He told me he had seen Mr. Martin, and he, Martin, agreed to put coal in cheaper than I said. I asked him, how much cheaper? He said $1.25 for slack coal. Asked him what Martin said about the lump coal. Dowling answered that he was to put it in for the same price, $1.25, but he was not quite sure. I remarked that I could not understand how Martin could deliver coal

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for that price. Asked him then if the contract would be for six months or one year. He said that he did not want to be bothered with the contract for less than a year. After figuring in the engine room, told Dowling that I would put in slack for $1.25 a ton, and that I would see Mr. Martin to know what he agreed to deliver the lump coal for. Then Dowling said that he would also see Mr. Martin. Dowling asked me if I could furnish half of slack; I said I could furnish more than half of slack in the winter time, but not so much in the summer time. Then he said: you are sure to furnish half slack. I said: yes. Went to see Martin and had a conversation with him. Saw Dowling again afterwards in Edmonton. Told Dowling that I had seen Martin, and that he had said he could furnish slack for $1.25 and other coal for $2.25 a ton. Mr. Dowling said: I must have misunderstood Martin: all right then. After that date, went on to deliver slack and coal till the last day of January, 1900."

Martin having been examined, said that the only time he saw the plaintiff was two or three weeks before he was discharged, and that then he spoke to him about the price of coal.

This would show that on the 6th October there was only one part of the contract agreed upon, to wit, to furnish slack at $1.25 a ton for one year, and that the plaintiff's memory is not very reliable as to the circumstances of the alleged contract.

On the other hand, the defendant gave his version of the transaction, which is as follows: "Met plaintiff again at the mill, and he asked me if I had seen any coal miners. Told him I had seen Mr. Martin, and that he had told me he could furnish the mill with slack for $1.25 a ton. Plaintiff then said: he could not do it for that; nobody could furnish coal for $1.25. Told plaintiff that Martin had said: if he could not furnish all slack he would not mind a load or two of lump coal for the same price. That is the reason the plaintiff made the above answer. Plaintiff said he would come back in a little while and let me know. Somewhere

about half an hour the plaintiff came back, and he said he would do it the same as Mr. Martin would do. I said then: go on and draw the coal. Plaintiff never spoke about a contract to furnish coal for a year. The first conversation took place outside the mill; the second conversation was inside the mill. There was no word used as to the length of time, either six months or a year. The word "contract" was never used in my conversations with the plaintiff. There was nothing said about furnishing not less than one-half of slack. Sent word by Byers to Martin that I would let the other man go on that had been hauling coal."

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In this examination Martin corroborates the conversation had with Mr. Dowling in the same words as related by the latter.

Byers was also examined and he said that he would not be dead sure that Dowling used the word "contract" when he sent word to Martin that he would let the other man go on, but that that was the way his recollection was.

Under the evidence, am I in a position to decide whether the contract to supply coal was for a year or any length of time? Assuming that both plaintiff and defendant Dowling are telling the truth according to their recollection, there was undoubtedly a serious misunderstanding between them. I regret very much that this important contract was not made in writing. The plaintiff has nobody to blame but himself, he should not have trusted to his memory, or to the memory of the party with whom he was contracting. He showed by his evidence that his memory was not very faithful, because he was contradicted in an important particular by a disinterested witness. I think the principle applied to the case of *Falck* v. *Williams*[3] should be applied to this case at least as to the length of time the plaintiff should supply coal to the mill. The principle referred to is that "Where words in a proposal for a contract are understood and acted upon by the parties in different senses there is no contract, and it is for the plaintiff, in an action for breach of contract, to show that his construction is the true one." In this case there was no doubt that there was an agreement to

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supply coal to the mill at so much per ton, but whether it was for a year or not, I am not in a position to determine.

*Case dismissed with costs.*

REPORTER:
The Editor.

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## CLAVERIE ET AL. v. GORY.

## PAGNAC v. CLAVERIE.

*Practice—Evidence on Commission or order—Special examiner—Appointment in person as an office-holder—Successor in office—Authority to take depositions—Irregularity—Suppression.*

An order appointed "E. K. A. of Neihart, Montana, U. S. A., a Justice of the Peace," a special examiner to take the depositions of certain witnesses; the depositions were in fact taken by one G. P. M., a Justice of the Peace, it appearing that E. A. K. had ceased to hold office, and that G. P. M. was his successor in office. An agent for each party appeared on the taking of the depositions, and it did not appear that any objection was made to G. P. M. taking the depositions.

*Held*, that the depositions were taken by G. P. M. without authority and, therefore, could not be used in evidence.

*Held*, also, that the depositions being taken without authority and being not merely irregular, a substantive motion to suppress was not necessary, and that the objection could be taken upon their being tendered in evidence.

[SCOTT, J., *February 5th*, 1901.

This was a stated case.

An arbitrator, to whom these actions had been referred, received certain depositions tendered on behalf of the plaintiff. Objection being taken to their reception, this case was stated for the opinion of the Court. It was argued at Edmonton before SCOTT, J.

*N. D. Beck*, K. C., for plaintiff.

*C. deW. MacDonald*, for defendant.

[*February 5th, 1901.*] Judgment.

Scott, J.

SCOTT, J.—This is a case stated under section 15 of the Arbitration Ordinance (C. O. 1898, c. 35) by the arbitrator to whom the matters in question in these suits have been referred.

On the 16th July, 1900, plaintiffs in the first mentioned suit obtained from ROULEAU, J., an order that E. K. Abbott, of Neihart, Montana, a justice of the peace, be appointed a special examiner for the purpose of taking the examination of Jean Lamarque, the order providing that the depositions be returned to the arbitrator, and that either party should be at liberty to give such depositions in evidence before the arbitrator, saving all just exceptions.

The examination of the witness Lamarque was not taken by or before E. K. Abbott, the special examiner named in the order, but was taken by one George P. Mills, a justice of the peace.

It appears from certain correspondence filed, and it is admitted by the parties, that E. K. Abbott had in the meantime resigned his position as justice of the peace, and that George P. Mills had been elected his successor in that office. It is also admitted that each justice in Montana has a limited territorial jurisdiction.

It also appears that an attorney at Neihart, who had been retained by the advocate for the defendant Gory, appeared upon the examination before Geo. P. Mills and represented the defendant Gory thereat. It is not shown that at the time of the examination he objected to the authority of Mills to take it.

The depositions upon being returned to the arbitrator were opened by him in presence of counsel for both parties, and subsequently tendered in evidence on behalf of the plaintiff Claverie, whereupon counsel for defendant Gory objected to their being received, upon the ground that they were not taken pursuant to the order, but were taken before another examiner not named in the order, there being no provision

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in the order for substitution. The arbitrator received the depositions, and he now submits the question whether his ruling was correct and whether said depositions are admissible in evidence.

In *Wood* v. *Foster*,[1] it was held by Galt, J., that a reference to "R. S. F., Esq., Judge of the County Court," was a reference to R. S. F. personally, and not to him as County Court Judge, the words "County Court Judge" being merely words of description. The question involved in that case was whether the arbitrator was entitled to fees as such. If the reference had been made to him personally he was so entitled, but he would not have been so entitled if the reference had been made to him as County Court Judge.

In *Wilson* v. *Wilson*,[2] a commission to take the evidence of witnesses in India issued by the petitioner was directed to "The Judges of the Supreme Court at Calcutta." Before the evidence was taken, an Act was passed abolishing that Court and establishing a new Court called The High Court of Judicature, to which the jurisdictions and powers of the former Court were transferred, the Judges of the former Court becoming Judges of the latter. The Commission was executed by a Judge of the latter Court, who had been a Judge of the former. The respondent appeared on the examination, and cross-examined the petitioner's witnesses. The Court of Appeal (Cotton and Lindley, L.JJ.) held that the commission was properly executed. Cotton, L.J., says, "The commission . . . although directed to the Supreme Court of Calcutta purported, in my opinion, to refer not so much to the Court which had ceased to exist, as to certain Judges who had not ceased to exist . . . and there being now no Court called the Supreme Court the description was in my opinion sufficient to warrant the new Court acting upon it." Lindley, L.J., says, "I think it right to mention that I do not concur in the view taken by the petitioner's counsel, that the fact of the respondent to the petition having appeared and cross-examined the petitioner's wit-

[1] 6 P. R. 175. [2] 9 P. D. 8; 49 L. T. 430; 32 W. R. 282.

nesses on the commission barred his right to raise the question as to the validity of the evidence. In my opinion this objection is not a good one."

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Upon the final authority of these cases, I hold that the power to take the examination was given to E. K. Abbott personally, and not to him as a justice of the peace, and that therefore his successor in that office was not authorized to take it, and that having been taken by his successor it is invalid; also that the fact that the defendant Gory having appeared upon the examination and taken part therein does not preclude him from objecting to its validity.

It was contended on the part of the plaintiffs that a substantive motion should have been made before the trial to suppress the depositions, and that it was too late to take the objection at the trial.

In *Grill* v. *General Iron Screw Colliery Co.*,[3] it was held that the trial Judge could not refuse to accept depositions purporting to be taken under a commission, unless they were taken without authority; that if they are taken with authority, but there is some irregularity in the mode of taking them, the proper method of taking advantage of the irregularity is to apply to the Court to have them suppressed.

As I have already held that the examination in question was taken without authority, an application to suppress the depositions was unnecessary.

Counsel for defendant Gory raised the objection before me for the first time that under Rule 280 the arbitrator before receiving the depositions must be satisfied that the witness is either dead or out of the country, and that there was no evidence to show this.

It is unnecessary for me to decide the question owing to the view I have taken of the other questions involved. I may state, however, that I doubt whether the objection is open to him on the case as stated, as there is nothing in it or in the material before me to show whether or not there was any evidence on that point before the arbitrator.

[3] 35 L. J. C. P. 321; L. R. 1 C. P. 600; 12 Jur. N. S. 727; 14 L. T. 711; 14 W. R. 893.

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I hold that the depositions were improperly received by the arbitrator, and should be rejected. Costs of and incident to the special case to be paid by the plaintiffs in first mentioned suit in any event on final taxation.

REPORTER:
The Editor.

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## ROBERTSON v. TAYLOR.

*Sheriff—Execution seizure under direction of advocate—Advocate's liability to indemnify—Sheriff's fees—Illegal charges—Recovery back—Mistake of law.*

Where, by direction of the Advocate for an execution creditor, the Sheriff had seized and advertised for sale certain lands under the writ of execution, as being the property of a third party, and the third party recovered a judgment against the execution creditor and the Sheriff for the costs of an action to clear his title from the cloud created by the seizure and to enjoin the sale;

*Held*, that the Advocate was bound to indemnify the Sheriff and, therefore, in an action by the Sheriff claiming indemnity against the Advocate, the execution creditor being made a party defendant, the Advocate was ordered to pay the execution creditor direct the amount owing on the execution against the Sheriff.

The same Advocate had acted for the Sheriff in defending the action of the third party against him, and the execution creditor.

*Held*, that, inasmuch as the Advocate was bound to indemnify the Sheriff for all damages, he had sustained, by reason of his direction to seize, the Advocate could not recover his costs against the Sheriff.

Judgment of ROULEAU, J., affirmed.†

An Advocate in the course of his practice had paid the Sheriff many items of charges for Sheriff's fees, on and in connection with writs placed in his hands, which it was afterwards discovered the Sheriff was not entitled to charge. The Advocate sued for the aggregate amount.

*Held*, that these moneys having been paid under a mistake of law could not be recovered back.§

[ROULEAU, J., *April 11th, 1900.*
[*Court in banc, March 7th, 1901.*

The statement of claim was as follows:

1. At the times hereinafter referred to, the plaintiff has been and still is the deputy sheriff at Edmonton, North-

† Reversed on appeal to S. C. of Canada.
§ Sustained on another ground on appeal to S. C. of Canada.

ern Alberta Judicial District of the Supreme Court of the North-West Territories, and the defendant Taylor an advocate of the said Court. Statement.

2. On or about the 29th day of May, 1893, the defendant Taylor, an advocate for one Jellett, placed in the hands of the plaintiff as deputy sheriff a writ of execution against the lands of the Edmonton and Saskatchewan Land Company, issued in a certain action in this Court wherein Jellett was plaintiff and the company defendants, whereby the sheriff was commanded to levy a large sum of money of the lands of the said company in this judicial district.

3. On or about the 20th June, 1893, the defendant Taylor by writing directed the plaintiff to charge certain lands specified therein with the execution pursuant to the Territories Real Property Act.

4. Accordingly on the 20th day of June, 1893, the plaintiff delivered a copy of the execution certified under his hand, together with a memorandum in writing, of the said specified lands, as being the lands intended to be charged thereby to the registrar of the North Alberta Land Registration District, being the registration district within which the said lands lay: and thereupon the registrar entered a memorandum thereof in the register of the said lands.

5. Subsequently the defendant Taylor directed the plaintiff as deputy sheriff to advertise the said specified lands for sale under the execution, and the plaintiff accordingly did so on the 19th day of April, 1894.

6. Subsequently the defendants in this action, other than the defendant Taylor, notified the plaintiff that they were the owners of the said specified lands and that legal proceedings would be taken against him if he attempted to sell said lands under the execution.

7. The plaintiff notified the defendant Taylor of his co-defendants' notice, whereupon the defendant Taylor directed the plaintiff to proceed to sell the said lands: thereby, the plaintiff submits, impliedly agreeing to indemnify him.

8. The plaintiff accordingly advertised the said lands for sale.

Statement.

9. On the 26th day of June, 1894, the plaintiff having been again threatened with an action by the defendants herein, other than the defendant Taylor, notified the defendant Taylor of the threatened action, whereupon the defendant Taylor verbally expressly agreed to indemnify the plaintiff and directed the plaintiff to continue to proceed under the execution, which the plaintiff did until restrained as hereinafter mentioned.

10. The defendants, other than the defendant Taylor, commenced actions against Jellett and the plaintiff on or about the 3rd day of July, 1894, and ultimately, the same having been consolidated, judgment was given therein declaring the said lands to be the lands of the defendants in this action, other than the defendant Taylor, and restraining the sale thereof under the said executions and ordering Jellett and the plaintiff to pay the costs of the said actions incurred therein by the defendants herein, other than the defendant Taylor, which costs were taxed and allowed at the sum of $715.52; for which amount writs of execution against the goods and lands of Jellett and the plaintiff were issued upon the said judgment, and now remain for execution in the hands of the sheriff of the Northern Alberta Judicial District unsatisfied.

11. The said Jellett had no goods or lands out of which the said sum of $715.52 or any part thereof can be made; and the said writs if returned by the sheriff would be returned "no goods" and "no lands" respectively.

12. The defendant Taylor acted in the several actions as the advocate and counsel for both the said Jellett and the plaintiff.

13. The plaintiff says the defendant Taylor acted as advocate and counsel for him in the said action, not upon the plaintiff's retainer in that behalf, but in pursuance of the agreement of the defendant Taylor to indemnify him from loss in consequence of his following the directions of the defendant Taylor as hereinbefore mentioned.

Statement.

14. If the plaintiff fail to establish an implied or express agreement or indemnity on the part of the defendant Taylor, the plaintiff says that the defendant Taylor in acting as advocate in the said several actions was guilty of a breach of duty, misconduct and negligence therein, whereby the plaintiff became liable to pay to the defendants, other than the defendant Taylor, the said sum of $715.52, or a large part thereof.

The particulars of the breach of duty, misconduct and negligence of the defendant Taylor are as follows:

(1) He ought to have declined to act for the plaintiff while acting for Jellett, the interest of the plaintiff and Jellett being in conflict, inasmuch as the plaintiff was entitled to be indemnified by Jellett.

(2) He did not advise the plaintiff of Jellett's liability to him, or of the plaintiff's rights in the event of Jellett not indemnifying him.

(3) He procured no proper nor any indemnity from Jellett.

(4) He was personally interested to a large amount in the judgment of Jellett against the Edmonton and Saskatchewan Land Company, and agreed to indemnify Jellett against costs in the actions against Jellett the plaintiff, and he did not so inform the plaintiff and advise him accordingly.

(5) He did not advise the plaintiff to retain an advocate other than himself.

(6) He joined the plaintiff in all the defences set up by Jellett.

The plaintiff therefore claims:

(1) A declaration that the defendant Taylor is bound to indemnify the plaintiff against his liability to the defendants, other than the defendant Taylor, or alternatively against such part thereof as shall be found to have been incurred by the breach of duty, misconduct or negligence of the defendant Taylor.

(2) An order that the defendant Taylor do pay to his co-defendants the amount in respect of which it shall be declared the plaintiff is entitled to be indemnified.

Statement.

The defendants other than Taylor put in no defence.

The statement of defence of the defendant Taylor was as follows:

1. The first paragraph of the statement of claim is admitted.

2. The second paragraph of the statement of claim is admitted with the exception that the defendant Taylor did not do the acts therein complained of, but the same was performed by the firm of S. S. & H. C. Taylor, of which the defendant Taylor was a member.

3. The facts set out in paragraph 3 of the statement of claim are denied, and the defendant Taylor alleges that the said firm of S. S. & H. C. Taylor as advocates for and under the instructions of the said St. George Jellett on the 29th day of May, A.D. 1893, delivered to the plaintiff as said deputy sheriff a paper in the following form and words:

In the Supreme Court of the North-West Territories, Northern Alberta Judicial District: between St. George Jellett, plaintiff, and Edmonton and Saskatchewan Land Company (Ltd.), defendants.

Requisition to charge lands: Mr. Sheriff,—Required the following lands to be charged under the Territories Real Property Act, as to the defendants' interest therein as the same may appear:

* * * * * *

S. S. & H. C. Taylor, Plaintiff's Advocates.

To the sheriff of the Northern Alberta Judicial District.

And on the same date another paper writing in the following form and words: In the Supreme Court of the North-West Territories, Northern Alberta Judicial District: between St. George Jellett, plaintiff, and Edmonton and Saskatchewan Land Company (Ltd.), defendants.

Requisition: We hereby require you to register against the following described lands the execution in the above suit:

* * * * * *

Dated this 29th day of May, A.D., 1893.

S. S. & H. C. Taylor, Advocates for the plaintiff.

Statement.

And the said paper writings constituted the only instructions given to the plaintiff as said deputy sheriff with reference to said execution against said lands.

4. Paragraph 4 of the statement of claim is admitted with the exception of the plaintiff acting because of the facts set out in paragraphs 1, 2 and 3 of the statement of claim, which is denied, and the defendant Taylor says that the plaintiff acted as set out in paragraph 4 of the statement of claim, because of the fact set out in the foregoing paragraph of the statement of defence.

5. Neither the defendant Taylor nor the said firm of S. S. & H. C. Taylor directed the plaintiff as alleged in the 5th paragraph of the statement of claim, or in any other manner.

6. The defendant Taylor denies specifically all the facts alleged in paragraph 6 and 7 of the statement of claim.

7. As an alternative defence to the 7th paragraph of the statement of claim, the defendant Taylor says that if the said direction or any directions were given to the plaintiff it was or they were given by the said firm of S. S. & H. C. Taylor as advocates for and acting under the instructions of the said Jellett, and the plaintiff received the said directions and acted upon the same knowing them to be the direction of the said Jellett.

8. As a further alternative defence to the said 7th paragraph of the statement of claim, the defendant Taylor will contend that if the said or any direction was given to the plaintiff, the same does not constitute an implied or any agreement on the part of the defendant Taylor, or the firm of S. S. & H. C. Taylor, to indemnify the plaintiff on the grounds following:

(1) That the advocates on the record in any cause do not bind themselves personally when acting as such for a party to the cause, unless there is an express and binding agreement to that effect.

(2) The implied agreement set up by the plaintiff is without consideration to support it.

Statement.

(3) The 4th and 17th sections of the Statute of Frauds have not been complied with.

9. The facts set out in the 8th paragraph of the statement of claim are denied, and the defendant Taylor further says that the plaintiff did not advertise the said lands, or any of them, for sale, and if he did advertise the same he did so without receiving from the said Jellett or the defendant or said S. S. & H. C. Taylor any directions or instructions to that effect.

10. The facts set out in paragraph 9 of the statement of claim are specially denied, and the defendant Taylor further says that he did not verbally expressly agree, nor in any manner agree to indemnify the plaintiff as alleged or otherwise, and did not direct the plaintiff to proceed as alleged or in any other manner.

11. The defendant Taylor denies that the judgment referred to in paragraph 10 of the statement of claim declared all the lands referred to in the said paragraph 10 to be the lands of the defendants other than the defendant Taylor, and the defendant Taylor further denies that the executions, goods and lands, referred to in said paragraph do and did remain for execution in the hands of the sheriff of the North Alberta Judicial District unsatisfied.

12. As an alternative defence to the 10th paragraph of the said claim, the defendant Taylor says that the said executions were delivered to the plaintiff as deputy sheriff of the Northern Alberta Judicial District at Edmonton, and he will contend that by reason of the said deputy sheriff being a defendant named in the said executions against whose goods and lands the said respective executions were directed, the executions were improperly directed, the said executions were improperly delivered to the said plaintiff as aforesaid, and that the said delivery to him was and is of no effect.

13. The defendant Taylor denies that the said Jellett has no goods or lands of which the said sum of $715.52 can be made, and further says that the said executions have never been returned "no goods" and "no lands" respectively.

Statement.

14. As to the 12th and 13th paragraphs of the statement of claim, the defendant Taylor denies that he acted as counsel as therein stated, and further says that he acted solely and only in the capacity of an advocate of the said Court for the plaintiff and the said Jellett, and in no other manner.

15. The defendant Taylor denies that there was any agreement between him and the plaintiff, as set out in the 13th paragraph of the statement of claim, and says that the only agreement between him and plaintiff was one made verbally with S. S. & H. C. Taylor, to the effect that they should in all said actions file and deliver a defence for the said plaintiff and said Jellett, the defences each and all being the same for the plaintiff and said Jellett, and in which defence there should be a paragraph to the effect that the plaintiff was not in those actions a proper defendant, and that as against him there was no cause of action, and they the said S. S. & H. C. Taylor further agreed verbally with the plaintiff to make an interlocutory application to have the plaintiff struck out as a defendant in said action, all of which the said S. S. & H. C. Taylor did. And the said Taylor nor said S. S. & H. C. Taylor did not as alleged, nor in any other manner nor at any time, agree to indemnify the plaintiff from loss as alleged or otherwise.

16. All the facts set out in paragraph 14 of the statement of claim are denied, and the defendant Taylor further states that the plaintiff never requested indemnity from said Jellett or any other person in the said actions or in respect to the said executions of the said Jellett against the Edmonton and Saskatchewan Land Company, and the defendant Taylor was never requested by the plaintiff to give or guarantee indemnity, or to advise the plaintiff upon the same, but the plaintiff was willing to allow his interest to be protected in the manner set out in paragraph 15 of this defence, and upon the trial of said actions as consolidated against the plaintiff and the said Jellett, judgment was given in favour of the said Jellett and the plaintiff, dismissing the said actions of the defendants other than said Taylor against the

Statement.

said Jellett and plaintiff. And the said defendant Taylor further says, that the said interlocutory application to have said plaintiff struck out as defendant with said Jellett in said actions against them was made without delay, and was argued before Mr. Justice McLeod, since deceased, but by reason of his death occurring before judgment could be delivered, the matter never reached judgment on the interlocutory motions.

17. As a further defence to the 14th paragraph of the statement of claim, the defendant Taylor says, that he was never and is not now interested to any amount in the said judgment of said Jellett, and never agreed to indemnify said Jellett against costs in said actions against Jellett. And that if the defendant Taylor as a member of the said firm of S. S. & H. C. Taylor was interested in the taxed costs of the defendant Jellett included in said judgment of said Jellett against the Edmonton and Saskatchewan Land Company, the said execution against lands of the said Jellett had then under seizure one-half of a section of land in the said judicial district, being the lands of the said company, and not claimed by the said defendants other than said Taylor in their said actions afterwards started against said plaintiff and said Jellett, which lands were sufficient to satisfy said taxed costs including in said judgment, and did so satisfy the same by sale of the said lands under the said executions by the plaintiff as deputy sheriff as aforesaid.

18. For a further defence to the 7th, 9th, 13th and 14th paragraphs of the statement of claim, the defendant Taylor will contend that the plaintiff as deputy sheriff having charged the said lands with said executions against lands of said Jellett, against the Edmonton and Saskatchewan Land Company by depositing a copy of said executions certified under his hand and a memorandum of the lands to be charged thereby with the registrar of the North Alberta Land Registration District at Edmonton, including in said lands the lands claimed afterwards by the said defendants herein, other than the said Taylor, and not having then demanded or obtained an indemnity from the said Jellett or any other person, was not entitled afterwards to demand

the same, and when the said defendants, other than the said Taylor, threatened or brought their said actions against the plaintiff and said Jellett, the plaintiff could not compel indemnity to be given to him as affecting said executions, and its remaining in effect against said lands as a charge against the same, and, in any event, the said plaintiff could not compel indemnity to be given to him by said Jellett excepting by action against said Jellett. Statement.

19. As a further alternative defence to the entire statement of claim, the defendant Taylor says that if he did any of the acts complained of, he did the same as the advocate for the said Jellett, and the plaintiff so understood and acted upon his instructions obtained, and not the said directions or instructions as the instruction of the said Taylor.

The defendant Taylor counterclaimed (1) for his bill of costs (schedule A) against the plaintiff, in the case of *Wilkie et al.* v. *Jellett et al.*; and (2) as follows:

The defendant Taylor further says that the plaintiff Robertson while acting as deputy sheriff of the Northern Alberta Judicial District, and while doing work as such for the said S. S. & H. C. Taylor, and at their request, in the serving of certain writs of summons, injunctions and other suit papers and proceedings, and in the receiving, entering, filing, executing and releasing said writs of summons and injunctions and also certain writs of execution against goods, and certain writs of execution against lands, and making seizures and sales thereunder, all of which were issued by the said S. S. & H. C. Taylor in their capacity as practising advocates, represented that he was entitled to costs, expenses and disbursements and certain fees with respect to said services, and was paid the same, but the said representations were false and the plaintiff was only entitled to certain lower fees, charges, expenses, costs and disbursements, and the defendant Taylor and the said H. C. Taylor, doing business as aforesaid, believing the plaintiff's representations, improperly and unnecessarily and in mistake and in error, paid to the plaintiff, and he wrongfully and improperly received from them in respect of the said services the sum

Statement.

of $225, to which the said plaintiff was not entitled, and for which according to the sheriff's tariff prescribed by the Judicature Ordinance and the rules of Court in that behalf promulgated, and the Land Titles Act of 1894, the said plaintiff had not rendered to or for the defendant Taylor and the said H. C. Taylor, doing business as aforesaid as practising advocates or in any other capacity, any services or benefit, and the said deputy sheriff, the plaintiff herein, unlawfully, wrongfully and improperly charged and received said fees and expenses and costs to the said S. S. & H. C. Taylor acting as aforesaid, which according to the said tariff and the said Land Titles Act, 1894, he was not entitled to, and were exclusive of the fees, charges, costs and disbursements therein prescribed, and the defendant Taylor and said H. C. Taylor doing business as aforesaid have since many times demanded the return of the said sums of money, being in the total the sum of $225, but the said plaintiff has refused and neglected to return or pay the sum to them or any part thereof, and the defendant Taylor avers that the said H. C. Taylor was interested in the said moneys in an undivided one-third share, which one-third share he is writing on the 2nd day of January, A.D. 1897, assigned, sold and set over to the said defendant Taylor, of which the plaintiff had verbal notice, and the plaintiff refused to pay the same or any part thereof to the said defendant Taylor although frequently requested so to do.

Particulars of the said items followed (schedule "B").

(SUMMARY OF SCHEDULES.)

| | |
|---|---|
| Costs of defence of W. S. Robertson, set out in schedule "A" ..... | $453 24 |
| Overcharge in sheriff's account, set out in schedule "B." ..... ..... | 225 00 |
| | $678 24 |

CR.

| | |
|---|---|
| By amount unpaid deputy sheriff at dissolution of the firm S. S. & H. C. Taylor ..... | 77 58 |
| | $600 66 |

And the defendant Taylor counterclaims the sum of $600.66 and interest and the costs. Statement.

Reply. The plaintiff as the defence of the defendant Taylor, says that: He joins issue.

The plaintiff as to the counterclaim of the defendant Taylor says:

1. As to the second paragraph thereof, that he did not request the defendant Taylor and H. C. Taylor, or either of them, to act as his advocate in relation to the matters mentioned in the said paragraph or any of them.

2. As to the said second paragraph, that and if the plaintiff did retain the defendant Taylor and H. C. Taylor as alleged in the said paragraph, they acted in so negligent and improper a manner therein that the service rendered and the disbursements made were useless and valueless to the plaintiff.

3. As to the said second paragraph, that the defendant Taylor and H. C. Taylor at the time of the alleged retainer by the plaintiff were the advocates for the said Jellett, and the interests of the said plaintiff were in conflict with those of the said Jellett.

4. As to the said second paragraph, that the defendant Taylor and H. C. Taylor did not, nor did either of them, render the services or make the disbursements charged for.

5. As to the said second paragraph, that the charges made are exorbitant, unreasonable and excessive.

6. As to the said second paragraph, that no bill of the fees, charges and disbursements for the business done by the defendant Taylor and H. C. Taylor as advocates for the plaintiff has been delivered to the plaintiff; that if any such bill was delivered it was not subscribed as required by law, nor was it delivered one month before the commencement of this action, nor before the delivery of the counterclaim herein.

7. As to the said second paragraph, H. C. Taylor did not assign his interest in the claim to the defendant Taylor.

Statement.

8. As to the said second paragraph, that as to the alleged agreement the requirements of Ordinance No. 58 of the Revised Ordinances of the Territories have not been complied with.

9. As to the said second paragraph, Jellett was, as the defendant Taylor well knew, liable by reason of the facts and circumstances set out in the statement of claim, to indemnify the plaintiff against the costs of the proceedings mentioned in the counterclaim, and the defendant Taylor discharged the plaintiff by discharging Jellett by agreement in writing, from his liability to pay the said costs.

10. As to the third paragraph, that he did not make the representations alleged or any of them.

11. As to the third paragraph, that the defendant Taylor and H. C. Taylor were in the several matters referred to, acting merely as advocates and agents for certain named principals and not on their own behalf.

12. As to the said third paragraph, that the defendant Taylor and the said H. C. Taylor made the payments voluntarily and with full knowledge of what the lawful fees were.

13. As to the said third paragraph, that neither before the commencement of this action, nor before the delivery of the counterclaim herein, was notice of action and the cause thereof given in writing by the defendant Taylor and H. C. Taylor, or either of them, as required by the 538 section of the Judicature Ordinance.

14. As to the said third paragraph, that the action was not commenced nor was the counterclaim herein delivered within six months after the alleged wrongful acts of the plaintiff were committed, as required by the said section of the Judicature Ordinance.

15. As to the third paragraph, that before action the plaintiff satisfied and discharged the claim by payment.

16. As to the said third paragraph, that H. C. Taylor did not assign his interest in the said claim set up in the said paragraph to the defendant Taylor.

Statement.

17. As to the said third paragraph, that as to the said alleged assignment, the requirements of Ordinance No. 58 of the Revised Ordinances of the Territories have not been complied with.

18. As to the said third paragraph, that on or about the 12th December, 1895, a taxation of the charges of the plaintiff in the said several matters was held before the deputy clerk of this Court at Edmonton, and the Honourable Mr. Justice SCOTT, who found in respect of the claim of the defendant Taylor, that there was owing by the plaintiff the sum of $29.50, which the plaintiff before action satisfied and discharged by payment.

19. As to the said third paragraph, that disputes having arisen between the plaintiff and the defendant Taylor and H. C. Taylor, as to the correctness and propriety of the plaintiff's charges, the plaintiff's account in that behalf was examined and discussed by the plaintiff and defendant Taylor and H. C. Taylor on or about the first of January, 1896, and the amount owing thereon to the plaintiff verbally agreed upon and voluntarily paid by the defendant Taylor and H. C. Taylor to the plaintiff.

The action was tried at Edmonton before ROULEAU, J., without a jury.

*N. D. Beck*, Q.C., for plaintiff.

The defendant Taylor in person and *H. C. Taylor*, for the defendant Taylor.

[*April 11th, 1900.*]

ROULEAU, J.—The plaintiff claims that the defendant Taylor is bound to indemnify him against his liability to the defendants other than the defendant Taylor, or alternatively against such part thereof as shall be found to have been incurred by the breach of duty, misconduct, or negligence of the defendant Taylor, and also an order that the defendant Taylor do pay to his co-defendants the amount in respect of which it shall be declared the plaintiff is entitled to be indemnified.

Judgment.

Keuleau, J.

On 29th day of May, 1893, the defendant S. S. Taylor, as advocate for one Jellett, placed in the hands of the plaintiff, as deputy sheriff, a writ of execution against the lands of the Edmonton and Saskatchewan Land Company. About the 20th of June, 1893, the defendant Taylor directed the plaintiff to charge certain lands, of which he gave him a list, with the execution pursuant to the Territories Real Property Act. On the said 20th of June, 1893, the plaintiff delivered a copy of the execution certified under his hand, together with a memorandum in writing of the said specified lands, as being the lands intended to be charged, and thereupon the registrar entered a memorandum thereof in the register of the said lands. Subsequently the defendant Taylor directed the plaintiff as deputy sheriff to advertise the said specified lands for sale under the execution, and the plaintiff accordingly did so on the 19th of April, 1894. The defendants other than the defendant Taylor notified the plaintiff that they were the owners of the said specified lands and that legal proceedings would be taken against him if he attempted to sell said lands under the execution. The plaintiff notified the defendant Taylor of his co-defendants' notice, whereupon the defendant Taylor directed the plaintiff to proceed to sell the said lands, and the plaintiff accordingly advertised the said lands, for sale. The defendants, other than the defendant Taylor, commenced actions against Jellett and the plaintiff on or about the 3rd day of July, 1894, and the same having been consolidated, judgment was given therein declaring the said lands of the defendants, other that the defendant Taylor, to be the lands of the plaintiff therein, and restraining the sale thereof under the said execution, and ordering Jellett and the plaintiff to pay the costs of the said action, which costs were taxed and allowed at the sum of $715.52, for which amount writs of execution against the goods and lands of Jellett and the plaintiff were issued, and now remain in the hands of the sheriff of the Northern Alberta Judicial District unsatisfied. The defendant Taylor acted in the said several actions as the

advocate and counsel for both the said Jellett and the plaintiff, and as such joined the plaintiff in all the defence set up by Jellett. Under this statement of facts it is quite clear from the authorities that the attorney has no privilege. There is no distinction between the client and the attorney and where, as in this case, the attorney orders the seizure to be made he is responsible in trespass. In this case the defendant Taylor urged that in issuing the writ he was acting only in discharge of his duty as an attorney and cannot therefore be made responsible. Williams, J., *Codrington* v. *Lloyd*,[1] says: "The foundation of the action of trespass is the taking without authority. There is no distinction between the party and the attorney. Indeed the proceedings may be more emphatically said to be under the attorney's conduct, the party in general merely tells the attorney that he wishes the action to be prosecuted." There are a great many other authorities that can be cited, but I merely refer to the following: *Bates* v. *Pilling*,[2] *Green* v. *Elgie*,[3] *Phillips* v. *Findlay*.[4]

Judgment.

Rouleau, J.

As to the question of counterclaim, although I cannot see any adverse interest between Jellett, defendant Taylor's client and the deputy sheriff Robertson, so that defendant Taylor could not act for both, I think however that defendant Taylor was wrong in advising the deputy sheriff to dispute the whole case. He should have advised him to abide by the judgment of the Court. Mr. Justice McGuire in *Wilkie* v. *Jellett*, points that out in saying: "As to the defendant Robertson the deputy sheriff, I think he was a proper party. He might have severed in his defence and submitted himself to the judgment of the Court, but instead of doing that he joins in the defence set up by his co-defendants and contests the plaintiff's claim. Had he adopted the other course, I am not prepared to say that a Court would order him to pay costs." I am of the same opinion. I do not see any reason why the deputy sheriff has contested the

[1] 8 A. & E. 449; 3 N. & P. 442; 1 W. W. & H. 358; 4 D. Q. B. 196; 2 Jur. 593. [2] 9 D. & R. 44; 6 B. & C. 38; 5 L. J. O. S. K. B. 40. [3] 5 Q. B. 99; D & M. 199; 14 L. J. Q. B. 162. [4] 27 U. C. Q. B. 32.

Judgment.
Rouleau, J.

plaintiff's claim, as he was acting only in his official capacity, and, no doubt, by asking the protection of the Court and abiding by the judgment to be rendered, such protection would have been granted to him and no costs awarded against him. I am of opinion therefore that the defendant Taylor acted in so negligent and improper a manner that the services rendered and disbursements made were useless and valueless to the plaintiff. For these reasons I will not allow schedule "A" as a counterclaim against plaintiff. As to schedule "B" of the statement of claim, I find that there is a balance due to defendant Taylor of $147.42, which bill has been delivered to the plaintiff, and some reference made to Mr. Justice SCOTT as to the right of the deputy sheriff in charging certain items; besides I have nothing in evidence or of record to show that the plaintiff does not owe that amount to the defendant Taylor.

The judgment of the Court is that the plaintiff is entitled to be indemnified by the defendant Taylor for the amount of the costs awarded against him, to wit, seven hundred and fifteen dollars and fifty-two cents and interest from 14th day of May, 1896, less the amount found to be due by the plaintiff to the defendant Taylor on his counterclaim, to wit, one hundred and forty-seven dollars and forty-two cents, and costs of an action of that class to be deducted from the said amount of $715.52 with interest from 14th May, 1896, and costs, leaving a balance for which the plaintiff is entitled to judgment and costs of this action. The said balance and costs to be paid to the defendants other than the defendant Taylor.

The form of the judgment was afterwards settled on motion as follows:

This action coming on for trial on the 9th, 10th and 12th days of May, 1899, before the Honourable Mr. Justice ROULEAU, at the sittings of this honourable Court holden at the town of Edmonton in the presence of counsel for the plaintiff, and in the presence of the defendant Taylor in person, no one appearing for the defendants, Daniel R. Wilkie,

Judgment.
Rouleau, J.

James J. Foy, Margaret Morris, Christina Morris, The Scottish Ontario and Manitoba Land Company, Limited, R. W. Powell and J. Errat; and upon hearing read the pleadings and hearing the evidence adduced, and what was alleged by counsel aforesaid, and by the defendant Taylor, and the said the Honourable Mr. Justice ROULEAU having been pleased to direct that this action stand over for judgment, and the same coming on this day for judgment:—

This Court doth order and declare that the plaintiff is entitled to be indemnified by the defendant Taylor for the amount of costs awarded against the plaintiff in the several consolidated actions of the other defendants: Daniel R. Wilkie, James J. Foy, Scottish Ontario and Manitoba Land Company, Limited, R. W. Powell and J. Errat, against the plaintiff and one Jellett, with interest from the 11th day of May, 1896, the day of the entry of judgment therefor amounting to the sum of $715.52.

And this Court do further order and adjudge that the defendant Taylor do forthwith pay to the plaintiff his costs of this action to be taxed; and this court doth further order and adjudge that the defendant Taylor is entitled to recover against the plaintiff under his counterclaim (schedule "B") the sum of $147.42, with costs to be taxed, and doth direct that the said sum with costs to be taxed be deducted from the said sum of $715.52, with interest and costs to be taxed as aforesaid.

And this Court doth further order and adjudge that the defendant Taylor do forthwith pay to the defendants, Daniel R. Wilkie, James J. Foy, Margaret Morris, Christina Morris, William Morris, The Scottish Ontario and Manitoba Land Company, Limited, R. W. Powell and J. Errat, the balance of the said sum of $715.52, with interest and taxed costs as aforesaid, in satisfaction of the indemnity ordered to be given to the plaintiff as aforesaid.

From this judgment the defendant appealed. The plaintiff also appealed so far as the judgment related to schedule "B" of the counterclaim.

Argument.

The appeal was argued at Calgary on 17th and 18th July, 1900.

*N. D. Beck*, K.C., for the plaintiff.

The defendant Taylor in person, *contra*.

The defendant *Taylor* contended (1) as to the alleged agreement to indemnify, whether implied or express, that the evidence showed that he had contracted, if at all, expressly as agent, and therefore was not personally liable; (2) as to the alleged express agreement to indemnify, that it was not proved; (3) as to the alleged misconduct and negligence, that none was shown. He discussed and distinguished the authorities cited by counsel for the plaintiff before the trial Judge, and again cited *infra*.

*N. D. Beck*, K.C., for the plaintiff, contended, as to the first point, that the treating of the action as being one of contract, had arisen as a matter of convenience and as a fiction of law, while in reality the action was founded on principles of equity, and that therefore the question of agency had no place. He cited, amongst other cases, *Adamson* v. *Jarvis*,[6] *Humphreys* v. *Pratt*,[7] *Betts* v. *Gibbons*,[8] *Toplis* v. *Grane*,[9] *Evans* v. *Collins*,[10] *Childers* v. *Wooler*,[11] *Dugdale* v. *Lovering*,[12] De Colyar on Guarantees, pp. 305 *et seq.*, Am. & Eng. Ency. Law, 2nd ed., vol. vii., tit. Contribution and Exoneration, p. 326 *et seq.*; (2) as to the second point, that the evidence established an express contract; and (3) as to the third point, that there was legal misconduct and negligence. He cited Am. & Eng. Ency. Law, 2nd ed., vol. iii., pp. 295, 299, 300, 387, *Taylor* v. *Blacklow*,[13] *Barber* v. *Stone*,[14] *Donaldson* v. *Haldane*,[15] *Graham* v. *Lawrence*,[16] *Godefroy* v. *Dalton*,[17]

[6] (1827) 4 Bing. 66; 12 Moore C. P. 241; 5 L. J. O. S. C. P. 68; 29 R. R. 503. [7] (1831) 5 Bli. N. S. 154; 35 R. R. 41. [8] (1834) 2 Ad. & E. 57; 4 N. & M. 64; 4 L. J. K. B. 1; 41 R. R. 381. [9] (1839) 7 Sc. 620; 2 Arn. 110; 5 Bing. N. C. 636; 9 L. J. C. P. 180; 50 R. R. 814. [10] (1843) D. & M. 72; 5 Q. B. 805; 7 Jur. 743; 12 L. J. Q. B. 339, reversed on appeal *sub nom* Collins v. Evans (1844), 13 L. J. Q. B. 180. [11] (1860) 29 L. J. Q. B. 129; 2 El. & Bl. 287; 6 Jur. N. S. 444; 2 L. T. 49; 8 W. R. 321. [12] (1875) 44 L. J. C. P. 197; L. R. 10 C. P. 192; 32 L. T. 155; 23 W. R. 391. [13] 3 Bing. N. C. 235; 3 Scott. 614; 2 Hodges. 224; 6 L. J. C. P. 14. [14] 50 L. J. Q. B. 297. [15] 7 Cl. & F. 762. [16] 1 F. & F. 285. [17] 6 Bing. 469; 4 M. & P. 149; 8 L. J. O. S. C. P. 79; 31 R. R. 467.

Taylor acting for Robertson, should have obtained indemnity for him, as deputy sheriff, from Jellett. Robertson had a legal right to such indemnity. This being so, Taylor could not, without legal misconduct, act for both. On this point, he cited Am. & Eng. Ency. Law, 1st ed., vol. xxii., tit. Sheriffs, p. 537; *ib.* vol. x., tit. Indemnity; 2 Freeman on Executions, 2nd ed. pp. 254, 275; *King* v. *Bridges*,[18] *Burr* v. *Freethy*,[19] *Bernasconi* v. *Farebrother*,[20] *Probrinia* v. *Roberts*,[21] *Beavan* v. *Dawson*,[22] *Holmes* v. *Mentze*,[23] *Ex p. Sheriff of Middlesex*,[24] *Child* v. *Mann*.[25] As to the counterclaim for alleged illegal fees, it is barred: Jud. Ord., Ord. No. 6, 1893 s. 538. The sheriff acting in taking fees is a public officer: Churchill on Sheriffs, *Humphreys* v. *Pratt*,[7] *Hooper* v. *Lane*,[26] Russell on Crimes, 1-200. Notice of action necessary irrespective of the form of action, *Greenway* v. *Hurd*,[27] *Judge* v. *Selmes*,[28] *Waterhouse* v. *Keen*,[29] *Midland Railway Co.* v. *Withington L. Board*.[30] Argument.

The defendant *Taylor*, in reply.

[*March 7th, 1901.*]

McGuire, J.—This is an appeal by the defendant Taylor from the judgment of Mr. Justice Rouleau in so far as the same is in favor of the plaintiff, and a cross appeal by the plaintiff so far as said judgment upon defendant's counterclaim is in favor of the defendant.

The plaintiff is deputy sheriff of the Judicial District of Northern Alberta, and sued the defendant, an advocate, for indemnity against a certain judgment in an action of *Wilkie* v. *Jellett and Robertson*. One Jellett had recovered a judgment. S. S. & H. C. Taylor as his advocates, having issued an execution against lands, delivered the same to the plaintiff in the present action, in his capacity as deputy sheriff.

[18] 7 Taunt. 294; 1 Moore, 43. [19] 1 Bing. 71; 7 Moore, 368. [20] 7 B. & C. 379. [21] 1 Chit. 577. [22] 6 Bing. 566; 4 Moore & Payne, 387; 8 L. J. C. P. 226. [23] 4 A. & E. 127. [24] L. R. 12 Eq. 207; L. R. 10 C. D. 575. [25] L. R. 3 Eq. 806. [26] 6 H. L. Ca. 443; 27 L. J. Q. B. 75; 3 Jur. N. S. 1026; 6 W. R. 146. [27] 4 Term R. 553; 3 R. R. 355 (n). [28] L. R. 6 Q. B. 724; 40 L. J. Q. B. 287; 24 L. T. 905; 19 W. R. 1110. [29] 4 B. & C. 200; 6 D. & R. 257. [30] 11 Q. B. D. 788; 52 L. J. Q. B. 689; 49 L. T. 489; 47 J. P. 789.

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McGuire, J.

Said S. S. & H. C. Taylor also delivered to said deputy sheriff directions in writing, styled in the cause in which said execution issued; one of the said directions was as follows:—

"Requisition to Charge Lands. Mr. Sheriff: Required the following lands to be charged under the Territories Real Property Act as to the defendant's interest as the same may appear.

Here follows the description of the several parcels of lands so required to be charged.

The other direction delivered on the same day was also styled in the said cause and was as follows:—

"Requisition. We hereby require you to register against the following described lands, the execution in the above suit."

Here follows the description of certain lands.

These requisitions were signed by S. S. & H. C. Taylor, plaintiff's advocates.

The present defendant is a member of the said firm of advocates, and is the S. S. Taylor referred to in said requisition.

The plaintiff as such deputy sheriff and in pursuance of said requisition, delivered to the registrar of land titles at Edmonton, a memorandum of the lands to be charged pursuant to the Territories Real Property Act, being the lands so required by said requisition to be charged. Subsequently the said deputy sheriff advertised these lands for sale. There is conflicting evidence as to whether he so advertised without further instructions, or did so on instructions to that effect from S. S. & H. C. Taylor. Plaintiff swears that he did get such instructions, but cannot say whether verbally or in writing, while the defendant and H. C. Taylor each deny giving any such instructions.

I do not consider it necessary to say which side is right, for, assuming the defendant's contention that he gave no directions to advertise, such directions would, in the absence of any instructions to the contrary, be fairly implied from the delivery of the execution to the sheriff, the requisitions

pointing out the lands which the defendant informed the sheriff were chargeable with the execution and the leaving it in his hands. It would be his duty in due course to proceed and sell the lands of the execution debtors unless otherwise instructed, and he was justified in assuming that he was required to sell the lands which the defendant had required him to charge. I think, however, that if it is necessary to connect the defendant with the advertisement, he was well aware of the advertisement and approved of it. About this time plaintiff received notices, amongst others, from the advocates of Messrs. Wilkie *et al.*, claiming certain of the lands proposed to be sold under said execution. These notices, plaintiff says he showed to the defendant, who told him to pay no attention to them. On July 3rd, 1894, actions were begun against the plaintiff and said Jellett by several persons claiming certain of said lands, and to have the execution filed by the registrar declared a cloud upon their title, and to restrain the plaintiff from proceeding to sell. Defendant and his law partner accepted service of the writs in these actions on behalf of Jellett and Robertson. Judgment. McGuire, J.

Defences were put in by S. S. & H. C. Taylor for both defendants, the same for each. The defendants were successful at the trial, but upon appeal to the Court *in banc*, this judgment was reversed, and upon further appeal by defendant Jellett to the Supreme Court of Canada, the decision of the Court *in banc* was sustained. In the result it was declared that the charging of the lands in question with the execution at suit of Jellett was wrong, and an injunction was granted restraining the intended sales. Judgment was given with costs against both defendants, and an execution for these costs amounting to $715.52 issued against their goods and lands.

The plaintiff in the present action claims to be indemnified against such executions by the defendant Taylor, he being the person who gave him the directions acting on which he became liable to the costs in *Wilkie* v. *Jellett*. He claims indemnity on three grounds: (1) That Taylor and he being joint tortfeasors, and he having acted by direction of

Judgment. McGuire, J.

Taylor, and such action being not apparently illegal in itself, and being done honestly and *bona fide*, he is entitled to be indemnified against the consequences by Taylor; (2) That Taylor expressly agreed to so indemnify him; and (3) That Taylor in acting as advocate for Robertson in *Wilkie* v. *Jellett*, was guilty of a breach of duty, misconduct and negligence, whereby Robertson became liable to pay the costs in *Wilkie* v. *Jellett*, and is entitled to be indemnified against the same by Taylor.

To the first ground, Taylor replies that the directions as to charging the lands in question were expressly given as advocate for Jellett, and the plaintiff knew Taylor was then acting as such advocate. The law is, I think, quite settled by authority, that the relation of principal and agent is not recognized as existing among wrongdoers, and that the solicitor personally giving directions to a sheriff as to the property to be levied upon, as Taylor did in this case, is liable if the property turns out not to belong to the execution debtor. It was decided by the House of Lords in *Humphreys* v. *Pratt*,[7] that where the execution creditor pointed out to the sheriff the goods to be seized, a promise to indemnify the sheriff might be implied and the learned trial Judge has found accordingly.

In *Childers* v. *Wooller*,[11] Cockburn, C.J., referring to the decision in *Humphreys* v. *Pratt*,[7] says: "It cannot be questioned that the principle of this decision applies to the attorney in the cause giving such directions equally with the party to the suit."

While the sheriff and those who set him wrongly in motion are all equally responsible to third persons injured thereby, as between themselves the sheriff may under certain circumstances look to the person who gave him directions, to indemnify him against the consequences. In *Betts* v. *Gibbons*,[8] Lord Denman said: "The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself." Tindal, C.J., in *Toplis* v. *Grane*,[9] referring with approval to the decision just cited, states the principle

in these words, "Where an act has been done by plaintiff under the express directions of the defendant, which occasions injury to third persons, yet if such an act is not apparently (*i.e.*, evidently) illegal in itself, but is done honestly and *bona fide* in compliance with defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." This statement of the law is adopted by Brett, J., in *Dugdale* v. *Lovering*,[12] as the expression of "one of the most careful expositors of the law ever known." It seems to me that the present case comes within this principle and that the deputy sheriff Robertson is entitled to be indemnified by the defendant Taylor. Judgment. McGuire, J.

Having come to this conclusion it is unnecessary to enquire whether there was in fact any express promise to indemnify. The evidence is conflicting as to this. Nor need I discuss the third ground for indemnity, namely the alleged breach of duty of defendant as advocate for Robertson in *Wilkie* v. *Jellett*.

As to the counterclaim of Taylor for his costs as such advocate for Robertson in *Wilkie* v. *Jellett*, if these were allowed they would simply go to increase the amount against which I have already decided that Robertson is entitled to be indemnified by Taylor. To avoid therefore circuity of action, I think the counterclaim as to these costs should be disallowed.

As to the portion of the counterclaim included in schedule "B," these appear to be payments voluntarily made by the defendant's firm. As to some of them at least they were paid after objection and after some modification of the sheriff's bill. They are all in respect of alleged overcharges —that is, charges in excess of what the law provided for such services. The alleged mistake under which they were paid, was not a mistake of fact but of law as to what the legal charges should have been. But assuming that there was an error in the charges, there is no evidence that Taylor was not aware of such error when he made the payments. If so they cannot be recovered back. If again they were charges in the nature of extortion, as the counterclaim seems to say,

Judgment. McGuire, J.

for it says they were paid in consequence of false representation by the sheriff, then there would be a further reason why they are not recoverable by reason of no notice of action having been given. *Waterhouse* v. *Keen*,[29] *Midland Railway Company* v. *Withington Local Board*.[30] I am, however, resting my decision on former ground.*

The plaintiff should therefore succeed upon his cross appeal.

In the result the defendant's appeal should be dismissed with costs against the appellant; the respondent's (Robertson) cross appeal should be allowed with costs of such cross appeal, and he should have judgment entered for him on the counterclaim with costs in the Court below.

RICHARDSON, WETMORE and SCOTT, JJ., concurred.

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## IMPERIAL BANK v. HULL.

*Bank Act—Bill of lading with draft attached—Surrender of bill of lading before acceptance of draft—Right to examine goods—Liability of drawee—Amendment of pleadings.*

*Held*, (1) Where a consignor of perishable goods draws through a Bank upon the consignee at sight for the amount of the contract price and attaches the bill of lading to the draft the consignee is entitled to examine the goods before accepting them or paying the draft;

(2) If it is necessary to obtain the bill of lading from the Bank and surrender it to the carriers in order to make the examination, the fact that the consignee does so, and thereby makes it impossible to return the bill of lading to the Bank, does not render him liable to pay the draft;

(3) Under sec. 73 of the Bank Act the bank has no other or higher rights than the consignors.

(4) The fact that the Bank endorses the bill of lading to the consignee in order to enable him to examine the goods does not transfer the right of property in them to the consignee, and if the latter deals with the goods as his own by reshipping and selling them he becomes liable to the bank, in an action for conversion, for the goods or their value;

* It was not brought to the attention of the Court that when money is paid under an illegal demand, *colore officii*, the payment can never be voluntary. *Steele* v. *Williams*, 8 Ex. 625; 22 L. J. Ex. 225; 17 Jur. 464.—ED.

Where, therefore, the Bank, in such circumstances, sued for the amount of the draft, and the defendant pleaded that a large portion of the goods were worthless, and paid into Court the invoice price of the portion sold by him, and it appeared in evidence that the portions unsold were absolutely worthless, the Court directed an amendment of the statement of claim so as to make it an action of detinue, and gave judgment for the amount paid into Court, but without costs.†

[ROULEAU, J., *April 19th, 1901.*

The pleadings were in substance as follows. Statement of claim:— Statement.

1. The plaintiffs are a corporation carrying on a general banking business at Winnipeg, Manitoba, and Calgary, and the defendant a purveyor of meat, carrying on business in Calgary as Hull Bros. & Co.

2. Some time prior to the 30th November, 1899, the defendant purchased from the Parsons Produce Company, who were doing business in Winnipeg, and also in the Province of Ontario, a carload of poultry, and the said company, on the 30th November, 1899, shipped a carload of poultry at Centralia, Ontario, by the Grand Trunk Railway Company, addressed to the Molsons Bank, Calgary (which carload of poultry reached Calgary on the 18th December, 1899) and secured a bill of lading therefor, and the said company procured the Molsons Bank to endorse the bill of lading over to the plaintiffs, and the carload of poultry reached Calgary by the Canadian Pacific Railway, on the 18th December, 1899.

3. On the 11th December, 1899, the Parsons Produce Company at Winnipeg drew a bill of exchange upon the defendant as Hull Bros. & Co., at Calgary, for the sum of $2,885.89 payable at sight to the order of the plaintiffs, and the plaintiffs at Winnipeg then discounted the bill for the company and paid them the amount thereof, and took from the company the bill of lading of the poultry as additional security for the moneys advanced on the bill of exchange, and the bill of exchange and bill of lading were forwarded by the plaintiffs at Winnipeg to their branch at Calgary.

4. The bill of exchange was on the 14th December presented to the defendant for acceptance, but the defendant

† This case stands for judgment on appeal to the Court *in banc.*

Statement.

declined to accept it stating that the carload of poultry had not yet arrived.

5. When the bill of exchange was presented to the defendant for acceptance, there was attached thereto the bill of lading.

6. On the 18th December, 1899, the bill of exchange (with the bill of lading attached thereto) was again presented to the defendant for acceptance, and the defendant then declined to accept as he wished to have the bill of lading in order to examine the goods, and subsequently on the same day the defendant having asked for the bill of lading so that he could examine the goods, it was endorsed over and delivered to the defendant for that purpose, and that purpose only.

7. Several times on the 19th and 20th December, 1899, the plaintiffs applied to the defendant for the payment of the said bill of exchange, but the defendant then declined to pay the bill of exchange, stating that the goods were not satisfactory, and that he had telegraphed to the company to that effect, and the plaintiffs thereupon requested the defendant to return them the bill of lading, which he promised to do.

8. On the 21st December, 1899, the defendant not having returned the bill of lading, the plaintiffs applied again to him for the same, when the defendant first informed the plaintiffs that he could not give them back the bill of lading as the carload of poultry had been unloaded, and the plaintiffs then first learned that defendant had delivered over the bill of lading to the Canadian Pacific Railway Co. and had taken possession of the goods.

9. As soon as the defendant took possession of the carload of poultry, he commenced to sell and did sell a large part thereof.

10. The plaintiffs have since applied to the defendant for payment of the bill of exchange, but the defendant refused and still refuses to pay the bill of exchange or deliver back the bill of lading, and the plaintiffs are unable to return the bill of lading to the company.

The plaintiffs therefore claim payment of the amount of the said bill of exchange, namely, $2,885.80, and interest thereon from the 18th day of December, 1899. Statement.

To this claim the defendant, after denying all the allegations contained in the statement of claim, set up a number of special defences, the substance of which was as follows:—that it had been agreed between the Parsons Produce Company and himself that the poultry should be of a certain quality and condition, and that upon examination of the goods they were found to be largely worthless; that even if the plaintiffs did discount the bill of exchange as alleged, it was done entirely upon the credit of the Parsons Produce Company, and not upon the security of the bill of lading or upon the credit of the defendant and it was so discounted, subject to the defendant's right to examine the goods and refuse acceptance of them, and to refuse also the payment of the draft; that the bill of lading was not a form of security which, under the Bank Act, could be taken by the plaintiffs' bank; that the plaintiffs were well aware of all the terms of the contract between the defendant and the Parsons Produce Company, and they were merely the agents of that company to transmit the bill of lading to the defendant to enable him to take delivery according to the contract; that the plaintiffs well knew that the bill of lading would have to be surrendered to the carriers, the Canadian Pacific Railway Company, and that it had been given to them for that purpose and not otherwise; that the bill of lading had been endorsed to the defendant by the plaintiffs in order to enable him to get delivery of the goods and not otherwise; that the defendant was entitled to get the bill of lading and surrender it to the carriers in order to examine the goods and the plaintiffs well knew that it was necessary for him to obtain it and to surrender it to the Canadian Pacific Railway Company for that purpose; that the railway company refused to give up the bill after it had been cancelled by them and the goods delivered; that the plaintiffs were well aware of this fact; that after examining the goods the defendant notified both the Parsons Produce Company and

Statement.

the plaintiffs that the goods were unsatisfactory and that they were held at the risk of the Parsons Produce Company; that the defendant sold a portion of the goods on behalf of the Parsons Produce Company, the value of which was $827.62, which amount he paid into Court in full satisfaction of the plaintiffs' claim, denying all further liability. The defendant also pleaded that the plaintiffs were bound to exhaust their remedy against the Parsons Produce Company which they had not done. He also counterclaimed against the plaintiffs the sum of $2,500 for damages by reason of loss of profits arising from the worthless condition of the poultry.

At the trial the counterclaim was abandoned.

It appeared in evidence that the Parsons Produce Company had first obtained the bill of lading at Centralia, Ontario, in favor of the Molsons Bank, but that that bank, having no interest in the bill, had, at the request of the said company, endorsed it over to the plaintiffs' bank. It also appeared that the plaintiffs at their Winnipeg branch had discounted the bill of exchange, with the bill of lading attached, by allowing the Parsons Produce Company credit in their current account for the amount of the draft, less exchange, the draft going in on deposit as so much cash. It also appeared that the draft had been forwarded to the Calgary branch of the plaintiff bank with the bill of lading attached, and with instructions to surrender the bill of lading only on payment of the draft; that on the 18th December the defendant's manager, Mr. Gillies, learning that the goods had arrived at Calgary went to the Canadian Pacific Railway Company's office and asked to be allowed to open the car in which they were, in order to inspect them, but was informed that the bill of lading was at the Imperial Bank, and that he would have to produce it and deliver it up before he would be allowed to examine. He then went to the plaintiffs' branch at Calgary where the defendant kept his account and did a large banking business, and after stating that a draft had been presented to him asked for the bill of lading as he wished to examine the goods; that plaintiff's acting

Statement.

manager, Mr. Morgan, endorsed the bill of lading as follows: "On payment of freight and all other charges deliver to the order of Hull Bros. & Co., Imperial Bank of Canada, Calgary, (sgd.) H. H. Morgan, Manager, P."

The acting manager Mr. Morgan then handed the bill of lading to Mr. Gillies, saying to the latter as he left the office: "You will let us have a cheque, as usual," to which Mr. Gillies did not reply. It further appeared that Mr. Gillies took the bill of lading to the Canadian Pacific Railway Company and delivered it up to them and that it was cancelled. He then opened the car and made a partial examination of the goods, and immediately reshipped a portion of them to various stations of the Canadian Pacific Railway line west of Calgary at which the defendant had branches, where it was sold to his customers. The remainder was unloaded and taken to the defendants' shops at Calgary, where a further examination was made, the result of which proved that a large part of the poultry was spoiled and was practically worthless. On the afternoon of the 19th December he wired the Parsons Produce Company that the poultry was very unsatisfactory and asked them to send a man to inspect. On the 20th Mr. Gillies, being in the plaintiff's office, was asked by Mr. Morgan for a cheque, and he then informed the latter that he could not pay as the goods were unsatisfactory. He was then asked by Mr. Morgan to return the bill of lading, and promised to do so, but on applying to the Canadian Pacific Railway for it, it was refused.

On the 21st he Gillies told Morgan that he could not return the bill of lading. Morgan then saw the defendant personally, and the latter refused to pay the draft. The draft was returned to Winnipeg, but the Parsons Produce Company refused to take it up on the ground that the bill of lading should not have been surrendered until the draft was paid. The plaintiffs then brought this action. Subsequently the defendant sold other portions of the goods and at the trial paid into Court a further sum of $376.90 as proceeds of these sales.

Statement.

The action tried at Calgary on December 11th, 1900, before Mr. Justice ROULEAU, sitting without a jury.

*P. McCarthy*, Q.C., and *C. A. Stuart*, for the plaintiffs.

*J. A. Lougheed*, Q.C., and *R. B. Bennett*, for the defendant.

[*April 19th, 1901.*]

ROULEAU, J.—The plaintiffs sue the defendant for the amount of a bill of exchange to which was attached a bill of lading as collateral security.

The facts are these : The defendant contracted with the Parsons Produce Company on or about November 4th, 1899, for a carload of poultry, at the price and of the quality mentioned in letters produced of November 2nd, 1899, from the Parsons Produce Company, and of November 4th from the defendant W. R. Hull.

On the 9th of December, 1899, the Parsons Produce Company forwarded the invoice of said poultry to the defendant and told him that the bill of lading had not yet been presented here (Winnipeg), but that it would be got off on Monday.

On the 18th December, 1899, the defendant was notified that the carload of poultry had arrived, and he went to the Canadian Pacific Railway station to inspect the said poultry, but was told by the agent that he would not be allowed to do so, unless he delivered up the bill of lading. He consequently went to the Imperial Bank of Canada, the plaintiffs, and asked for the bill of lading for the purpose of examining the goods. The bill of lading was duly endorsed and delivered to the defendant for that purpose. The defendant delivered the bill of lading to the Canadian Pacific Railway who cancelled it, and allowed him to examine and unload the poultry. As the poultry was in crates and frozen, the defendant could not determine then in what condition it was. It was only when the crates were opened in the warehouse on the evening of the 18th and on the morning of the 19th December, 1899, that he first became aware of the condition

Judgment.
Rouleau, J.

of the poultry. He found that the poultry had spoiled in the centre of the crates, some had sweated and soured and some were mouldy and mildewed. He also found that the poultry had not been prepared and shipped in quality and condition mentioned in the contract. On the 19th December, the defendant notified the Parsons Produce Company by telegram as follows: "Poultry received, opening very unsatisfactory, portion worthless, send man to inspect." On the next day the following telegram was sent to the Parsons Produce Company by the defendant: "Further examination proves great portion of the poultry worthless, hold same at your disposal, great disappointment, will expect compensation, freight yet unpaid, settle same Winnipeg." In the meantime the defendant had refused to accept the bill of exchange for the reason that the quality of the goods was not as ordered, and the greater part was unsalable.

The plaintiffs contend that as the defendant got possession of the bill of lading for the purpose of examining the goods, and had not returned the same, he become responsible for the payment of the bill of exchange, although he did not accept it.

Section 73 of the Bank Act provides that the bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business; and the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof, all the right and title of the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favor of the bank, instead of the previous holder or owner of such goods, wares or merchandise."

According to this law the parties to this suit are exactly in the same position as if this action had been brought by the shippers of the goods for their value against the defendant. The statute does not alter the rule that a bill of lading gives, in general, no better right to the endorsee than the

Judgment.

Rouleau, J.

endorser himself had under the bill of lading: *Gurney* v. *Behrend*,[1]

The bill of lading was indorsed by the plaintiffs to the defendant without consideration for the purpose only of examining goods, as he had a right to do under s. 33, s.-s 2 of the Sale of Goods Ordinance. The defendant never contended for a moment that the plaintiffs divested themselves of their right by so doing. The Canadian Pacific Railway Company were justified in refusing to deliver up the goods without the bill of lading, because the holder of the bill of lading might have come forward afterwards and said that he was entitled to the delivery of the goods. Therefore the bill of lading had to be given up before the delivery of the carload was granted.

The defendant having the right to examine the goods, the plaintiffs afforded him full opportunity to do so for the purpose of ascertaining whether the goods were in conformity with the contract. As soon as he found that the goods were damaged and the greater part unsalable, and also that they were not of the quality agreed upon by the contract, he not only notified the plaintiffs but he refused to accept the bill of exchange for these reasons; he also notified the sellers, the Parsons Produce Company, of the facts, thereby complying with s. 35 of the Sale of Goods Ordinance.

What was the behavior of the plaintiffs after such notification? Instead of telling the defendant not to dispose of the goods, and keep possession of the same for them and on their account, they immediately sent back the bill of exchange to be charged to the account of the Parsons Produce Company at Winnipeg. These goods being of a perishable nature, the defendant was compelled to dispose of the part that was salable under the shortest delay possible; and he kept a strict account of the money received for the goods so sold, and deposited the amount to the credit of the plaintiffs in this cause.

[1] 3 El. & Bl. 622; 23 L. J. Q. B. 265; 18 Jur. 856; 2 W. R. 425.

Judgment.
Rouleau, J.

The conduct of the Parsons Produce Company all through this transaction seems to have been a most extraordinary one. In the first place they transferred their bill of lading to the Molsons Bank at Exeter, Ont., without any consideration whatsoever, and the Molsons Bank then on the advice of the manager of the Parsons Produce Company endorsed the same bill of lading to the Imperial Bank of Canada at Winnipeg, and the Parsons Produce Company got consideration for the same, and attached it to the draft in question as collateral security. When the draft was returned to them for non-payment they refused to take it up on the following grounds: "Your branch at Calgary had no authority from us to unload the poultry or pass over the bill of lading, other than on payment of the draft and I must ask you to insist on the bill being satisfied. Had your Calgary branch wired for instructions the car would have been diverted to some other point and disposed of. We refuse to take up the bill here." This letter was written on the 29th December, 1899, long after the Parsons Produce Company knew the reason why the defendant refused to pay the draft, and their interpretation of the law is quite amusing, when they declare that the plaintiffs had no authority to pass over the bill of lading for "there was nothing on the bill of lading itself to indicate that it is not to be transferred till the bill of exchange has been accepted." *Gurney* v. *Behrend*,[1]

On the other hand, suppose that the defendant had accepted and paid the bill of exchange, before he got possession of the bill of lading for the purpose of examining the goods, would the plaintiffs be in a better position than they are now? Would not the defendant have his recourse against the plaintiffs for money paid without consideration? Does the bill of lading give a better title to the plaintiffs than the Parsons Produce Company had? The simple enunciation of such a proposition is sufficient to show that not only in law, but in reason that contention cannot be sustained. If for instance, these crates of poultry had contained only a few fowls on the top, and the rest had been straw and sawdust, could the defendant be obliged to pay the draft

Judgment.

Rouleau,J.

because the bill of lading was delivered to him for the purpose of examining the goods by emptying them in the warehouse. If the security is worthless the only recourse of the plaintiffs, in such a case as this, is their recourse against the drawer when the draft is not accepted. If the draft is accepted the drawee would have his recourse against the payee for money paid without consideration, and in damages for breach of contract against the drawer. It seems to me that these principles were followed in the case of *Borthwick* v. *Bank of New Zealand*. [2]

But under the circumstances of this case, did the transfer of the bill of lading by the plaintiffs to the defendant, give a right of property in the goods to the defendant? I am of opinion that it did not, and I base my opinion on the case of *Shepherd* v. *Harrison*. [3] In that case the law was declared to be that, "where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading acquired in that manner gives no right of property to the person so acquiring it." There is no doubt in this case that the bill of lading had been acquired by the defendant only for the purpose of examining the goods, without any intention on the part of the plaintiffs or the defendant to alter their respective rights in any manner at all. Besides it would be a monstrous proposition of law, that a bank could sue the drawee on a bill of exchange before he would accept the said bill. There would be no privity of contract between plaintiffs and defendant. So it is in this case, the bill of exchange not having been accepted, the plaintiffs only right to sue the defendant was under the title to the property covered by the bill of lading. Otherwise they would have no *locus standi* in this Court whatever. But believing as I do that the transfer of the bill of lading did not give the defendant any right of the property to the goods, before he accepted the draft, I am of opinion that the proper form of action to be taken by the plaintiffs is an action for wrongful conversion, with an alternative claim for the proceeds of the goods sold and disposed of.

[2] 17 Times L. R. 2; 6 Com. Cas. 1. [3] L. R. 5 H. L. 116; 40 L. J. Q. B. 148; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66.

Judgment.

Rouleau, J.

As by s. 189 of the Judicature Ordinance I have the power to order all necessary amendments for the purpose of determining the real question or issue raised by or depending on the proceedings I hereby amend the statement of claim so as to determine the real question at issue according to the evidence adduced with costs to the defendant.

The counterclaim in this action having been withdrawn the costs of the counterclaim are to be set off against the cost of this action.

The plaintiffs are therefore entitled to receive the amount deposited in Court to the credit of this cause, to wit : the sum of $827.62 deposited with the filing of the defence and a further sum of $376.90, of which $125.08 was for goods delivered to the Parsons Produce Company without the consent of the plaintiffs, making in all the sum of twelve hundred and four dollars and fifty-two cents ($1,204.52), for which sum the plaintiffs are entitled to judgment without costs.

REPORTER :

Chas. A. Stuart, Advocate, Calgary.

## RE TOWN OF PRINCE ALBERT.

*Land Titles Act—Execution—Renewal—Refiling with Registrar—Statute—Construction—Tax sale—Confirmation—Notice.*

The Land Titles Act, 1894, s. 92, s-s. 1, is amended by 63-64 Vic. (1900) c. 21, s. 2 (assented to July 7th, 1900), by the addition of a proviso, "that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the Registrar * * * unless before the expiration of such period of two years a renewal of such writ is filed with the Registrar in the same manner as the original is required to be filed with him."

This proviso is not retroactive so as to apply to a writ of execution, which would have expired but was renewed before the 7th July, 1900; such a writ, therefore, remains in full force though a renewal thereof has not been filed with the Registrar either before or after that date.

The execution creditor in such a writ should consequently be notified of an application for the confirmation of a tax sale of land of the execution debtor.

McGUIRE, J., *May 7th, 1901.*

**Statement.** This was an application made on behalf of the town of Prince Albert to McGUIRE, J., to confirm the sale of certain lands sold for arrears of taxes on the 22nd day of October, 1897.

The abstract of title showed that one T. M. was the registered owner of the lands in question having a certificate of title thereto. It also showed that there were two writs of execution registered against the said T. M., one at the instance of the McCormick Harvesting Machine Co., which had been registered on March 31st, 1898, and the other at the instance of T. J. Agnew, registered June 18th, 1898.

T. M. had been served with notice of the application to confirm, but no notice had been served upon either of the execution creditors.

*J. H. Lamont*, on behalf of the town of Prince Albert, contended that under s. 92 of the Land Titles Act as amended by chapter 21 of 63-64 Victoria, s. 2, both these executions had ceased to bind the lands of the said T. M., inasmuch as

Statement.

both had been in the registrar's hands for more than two years from the receipt thereof by him, without a renewal of the writs having been filed with the registrar as required by s. 2 of 63-64 Vic., and the writs having ceased to bind the lands, the execution creditors were not entitled to notice of the application, and the registrar should not have entered on the abstract of title a memorandum of either of these writs.

[*May 7th, 1901.*]

McGuire, J.—It is necessary to serve notice on the execution creditors, unless it be proved that the executions have not been renewed. Under the Land Titles Act as it stood before the amendment of 63-64 Vic. c. 21, there was no obligation on the part of the execution creditor or the sheriff, upon the renewal of a writ of execution, to deliver to the registrar a copy of the renewed writ. Section 92 of the Land Titles Act, 1894, requires that a copy of the writ be delivered or transmitted to the registrar as a condition precedent to the land being bound by the writ, only where "a copy of such writ has not already been delivered or transmitted to the registrar."

In this case a copy had been delivered or transmitted to the registrar, one on March 31st, 1898, the other on June 18th, 1898, and both writs may have been regularly renewed before their expiration in 1900, and before the coming in force of the amendment 63-64 Vic. c. 21. There was no obligation to refile the renewed writ with the registrar, and the writs, if renewed, would be good and valid executions and would now be binding upon the land, even although they have been in the registrar's hands for more than two years and no renewal filed with him. To hold that the amendment of 1900 applied to the executions above mentioned would be to take away from the execution creditors the rights they had up to its passing, assuming of course that they had duly renewed their writs, for at the passing of the amendment—7th July, 1900—the execution had already been over two years in the registrar's office and without a moment's notice

Judgment.

McGuire, J.

or a moment's grace these writs would cease to bind the land. To have filed with the registrar their renewals the moment after the Act became law would not have revived and continued the original binding effect of these writs. There are no words in the Act which indicate that this section 2 is to have a retroactive effect, and to give it that effect might be confiscation.

I require service of a notice of this application upon the execution creditors whose writs of execution are set out in the abstract, or proof that the executions have not been renewed.

REPORTER :

J. H. Lamont, Advocate, Prince Albert.

## THE KING v. McLEOD.

*Liquor License Ordinance—Appeal—Affidavit of Merits—ultra vires—Jurisdiction.*

Chapter 32 of Ordinance of 1900, s. 22, amending the Liquor License Ordinance (C. O. 1898, c 89), requires that a special affidavit of the party appealing shall be transmitted with the conviction to the Court to which the appeal is given.

*Held*—against the contentions, (1) that this provision is applicable only where the appeal is based on a denial of the facts established in evidence, and not where a question of law arising on such facts is involved; and (2) that the provision is *ultra vires* of the Legislative Assembly of the Territories—that there was no jurisdiction to entertain an appeal where this provision had not been complied with.

[RICHARDSON, J., *July 2nd, 1901.*

Statement.

This was an application for leave to enter an appeal from a conviction by a justice of the peace under the Liquor License Ordinance. The facts and arguments sufficiently appear from the judgment.

*T. C. Johnstone*, K. C., for the appellant.

*Horace Harvey*, Deputy Attorney-General, *contra.*

[*July 2nd, 1901.*]

RICHARDSON, J.—At the opening of the June sittings of the Supreme Court held at Regina on June 18th, 1901, Mr. Johnstone, representing the above named Annie McLeod, moved to have an appeal entered from the conviction of her, the said Annie McLeod, made on the 25th April, 1901, by Wm. Trant, Esq., one of His Majesty's Justices of the Peace in and for the North-West Territories, whereby the said Annie McLeod was convicted of having, on 20th April, 1901, at Regina, on her premises known as the Windsor Hotel, being a place where liquor may be sold, unlawfully sold liquor during the time prohibited by the Liquor License Ordinance for the sale of the same, without any requisition for medicinal purposes being produced by the vendee or his agent as required by law.

Judgment.

Richardson, J

For the purpose of effecting the entry of such appeal notice of intention to appeal was produced, dated 30th April, 1901, with proof of service on that day upon the prosecutor and the convicting justice. There was an affidavit of the said Annie McLeod, sworn on 18th June, 1901, before N. Mackenzie, Esq., a commissioner for taking oaths, and not before the convicting justice, asserting that on the evening of Saturday the 20th April, 1901, a few minutes before 7 o'clock, she went to her bartender in the barroom of the said hotel, and gave him explicit instructions to close the said bar at 7 o'clock of the said day ; that said bar was closed at the said hour on the said day, and was not afterwards opened with her knowledge or consent ; and if opened it was so opened contrary to her express and explicit instructions and against her wishes. It was also shown that a deposit of $150 had been paid into Court by order of the convicting justice under s. 888, s.-s. (c) of the Criminal Code.

Mr. Harvey, Deputy Attorney-General, representing the prosecution, objected to the granting of the application on the ground that by s. 22 of c. 32 of Ordinance of 1900 amending the Liquor License Ordinance, "no appeal shall lie from a conviction for any violation or contravention of any of the provisions of the Ordinance, unless the party appealing shall within the time limited for giving notice of such appeal make an affidavit," before the justice who tried the cause, "that he did not by himself or his agent, servant or employee, or any other person, with his knowledge or consent, commit the offence charged in the information ;" and negativing the charge in the terms used in the information ; and further negativing the commission of the offence by the agent, servant, or employee of the accused, or any other person, with his knowledge or consent ; "which affidavit shall be transmitted with the conviction to the Court to which the appeal is given ;" and that no such affidavit is shown to have been made or returned to this Court.

In support of the application, Mr. Johnstone urged that the s. 22 cited by Mr. Harvey applies only when the appellant has a defence on the merits, and not where the right is one

Judgment.

Richardson, J.

of law; that this s. 22 is inconsistent with s. 881 of the Criminal Code, and therefore not binding upon the intended appellant; and that as the provisions of s. 880 of the Criminal Code have been complied with the appeal should be entered.

The conviction in this case is for an offence created by the Liquor License Ordinance passed by the Legislative Assembly of the Territories in respect of a matter within its legislative authority, and a right of appeal is given by c. 32, Consolidated Ordinances, s. 8, which enacts that except it be otherwise specially provided, all the provisions of Part LVIII. of the Criminal Code shall apply to all the proceedings before justices of the peace under or by virtue of any Ordinance. It was competent to the Legislative Assembly in providing for appeals from convictions under the authority of its own Ordinances, to impose such conditions and prescribe such practice and procedure in respect thereof as it considered proper; and of course to vary the same from time to time. Instead of enacting an independent code of practice, it chose to adopt the practice and procedure under the Criminal Code, but that did not preclude it from thereafter prescribing new conditions or otherwise altering the practice and procedure so adopted.

Under s. 840 of the Criminal Code, the provisions of Part LVIII. apply only to offences and matters over which the Parliament of Canada has legislative authority, and for which a person charged therewith is liable to be summarily convicted by a justice of the peace. But for c. 32, s. 8, Consolidated Ordinances, Part LVIII, of the Code would not apply to an offence like the present against a Territorial Ordinance not punishable under any Dominion Statute.

In 1900 the Legislative Assembly chose to amend the conditions under which an appeal from a conviction for any violation of the Liquor License Ordinance could be entered, by requiring the making of an affidavit by the appellant as above referred to, and specially providing that unless such condition is complied with no appeal shall lie.

Judgment.

Richardson, J.

As stated in Paley on Convictions, p. 282, a right of appeal must be given by express enactment and cannot be extended to cases not distinctly enumerated, and (p. 292) all the statutory requirements must be accurately fulfilled.

The appellant here has admittedly not complied with the conditions prescribed by the Ordinance of 1900, and in consequence her appeal cannot lie, and she is not entitled to have the same entered or heard.

Since arriving at this conclusion the case of *The Queen* v. *Bigelow*[1] has come under my notice. The Nova Scotia Liquor License Act, 1895, restricts the right to a writ of *certiorari* in proceedings instituted for breach of that Act, to those cases only where the party applying therefor makes an affidavit similar in terms to that prescribed by s. 22, Ordinance 32 of 1900. The Supreme Court of Canada affirmed a judgment of the Nova Scotia Supreme Court holding that in the absence of the affidavit thus provided for, an application made for a writ of *certiorari* by Bigelow, who had been convicted before a justice of the peace of an offence created by that Act, must be rejected.

REPORTER:

C. H. Bell, Advocate, Regina.

[1] 31 S. C. R. 128 reported below 31 N. S. R. 436; 35 Can. L. J. 249.

## MAIN BROS. v. McINNIS; TOWN OF REGINA, GARNISHEES.

*Attachment of debt—Garnishee summons—Salary— "Due or accruing due."*

Where the salary of an employee was a fixed amount per month payable at the end of the month,

*Held*, that a garnishee summons served on the last day of the month did not bind the current month's salary, inasmuch as no part of the amount was due, that is, recoverable by the employee, till the last day of the month had expired, nor was any part accruing due, inasmuch as the liability of the employer to pay was contingent upon the completion of the month's service by the employee.

[RICHARDSON, J., *July 31st, 1901.*

**Statement.**

Defendant was a servant of the corporation of the town of Regina, engaged by the month at $60 per month, payable at the end of each month. The garnishees were served before 3 o'clock p. m. of 31st July, 1900, and having filed a statement under rule 390, claiming that the debt was not attachable, an appointment was granted for the summary determination of the question.

*W. C. Hamilton*, K.C., for plaintiffs, put in an admission of the facts and urged that under rule 385 a debt was due or accruing due by the garnishees to defendant when the summons was served; or if not, that the proceeding being a judical one was binding from the first moment of the day to the last, and was therefore still effective at midnight: *Converse* v. *Michie*,[1] *Jones* v. *Thompson*,[2] *Stanley* v. *Moore*,[3] *Tapp* v. *Jones*,[4] *Deidrick* v. *Ashdown*,[5] *McLean* v. *Bruce*,[6] *Sato* v. *Hubbard*,[7] *Poucher* v. *Donovan*,[8] *McPherson* v. *Tirdale*.[9]

*J. Balfour*, contra, cited *Webb* v. *Stenton*,[10] *Hall* v. *Pritchett*,[11] *Davis* v. *Freethy*,[12] *Chatterton* v. *Whatney*,[13] *Central Bank* v. *Ellis*,[14] *Beatty* v. *Hackell*.[15]

[1] 16 U. C. C. P. 167. [2] 1 E. B. & E. 63; 27 L. J. Q. B. 234; 4 Jur. N. S. 338; 6 W. R. 443. [3] 9 Can. L. J. 264. [4] L. R. 10 Q. B. 591; 44 L. J. Q. B. 127; 33 L. T. 201; 33 W. R. 604. [5] 4 Man. L. R. 151. [6] 14 O. P. R. 190. [7] 8 O. P. R. 445. [8] 19 C. L. J. 97. [9] 11 O. P. R. 261. [10] 52 L. J. Q. B. 584; 11. Q. B. D. 518; 49 L. T. 432. [11] 3 Q. B. D. 215; 47 L. J. Q. B. 15; 37 L. T. 671; 26 W. R. 95. [12] 24 Q. B. D. 522; 59 L. J. Q. B. 318. [13] 50 L. J. Ch. 535; 17 C. D. 259; 44 L. T. 391; 29 W. R. 573. [14] 20 Ont. App. R. 364. [15] 14 O. P. R. 395.

Judgment.

Richardson, J.

[*July 31st, 1901.*]

RICHARDSON, J.—An attachable debt has long been held to be one which is actually due from the garnishee to the judgment debtor ; one either presently payable, or payable in the future by reason of a present obligation, and one which the judgment debtor could not only have compelled but effectually enforced payment of : *Chatterton* v. *Whatney*.[13]

As to salaries, in delivering the judgment of the full Court in *Hall* v. *Pritchett*,[11] Lord Coleridge says, "salary which has not yet been fully earned is not attachable."

Now in this instance, the judgment debtor could not, had he sued the garnishees at any hour of 31st July, 1900, have enforced payment of the $60, for the reason that it was not actually due him, and his debtors, the corporation, had the whole of that day to pay in, which would extend to midnight of that day. Had he, unless dismissed, failed to serve out the full day of the 31st, the contract to pay being contingent upon complete service, he could have recovered nothing. Again, his position was on 31st July the parallel of payee versus maker of a promissory note payable on that day, and had he issued a writ to enforce payment, say at 4 p.m., the action would not have lain because the payment day had not expired : *Kennedy* v. *Thomas*.[16]

REPORTER :

C. H. Bell, Advocate, Regina.

[16] 9 R. 564 ; 1894, 2 Q. B. 749 ; 63 L. J. Q. B. 761 ; 71 L. T. 144 ; 42 W. R. 641.

# DIGEST OF CASES REPORTED

## IN THIS VOLUME.

### ADMIRALTY

*See* MARITIME LAW.

### ADVOCATE

*See* SOLICITOR AND CLIENT.

### AFFIDAVIT.

**Refusal to Make**—*Examination.*]—There is authority under rule 267 of the Judicature Ordinance (C. O. 1898 c. 21) to order a person who has refused to make an affidavit to attend for examination under oath. *Grindle* v. *Gillman* (Wetmore, J., 1899) p. 180.

### ALTERATION IN DOCUMENTS.

*See* SALE OF GOODS, 1.

### AMENDMENT.

*See* BILLS OF SALE AND CHATTEL MORTGAGES—CONTRACT, 4—PRACTICE, 8—SALE OF GOODS, 5.

### APPEAL.

**Appeal for Costs**—*Leave to Appeal—Time to Appeal—Time to Inscribe Appeal—Delay—Enlargement of Time.*]—Rule 500 of the Judicature Ordinance (C. O. 1898 c. 21), provides that "no judgment given, or made by the court or Judge * * * as to costs only, which by law are left to the discretion of the court or Judge, shall be subject to any appeal, except by the leave of the court or Judge giving the judgment, or taking the order." Rule 501 provides that "no appeal shall lie from the judgment or order of the court presided over by a single Judge, or a Judge of the court to the court in banc, without the special leave of the Judge or court, whose judgment or order is in question, unless, &c., but none of the exceptions embrace an appeal, from a judgment or order, as to costs only:—Held, that these two rules are independent of each other; that rule 501 does not apply to an appeal as to costs; that by virtue of rule 500, an appeal as to costs lies irrespective of any of the limitations contained in rule 501. (1) Without leave, where, by law, the costs are not; and (2) with leave, where, by law, the costs are, left to the discretion of the court or Judge. Where, therefore, the grounds of appeal were that the Judge had ordered costs to be paid out of a fund, out of which he had no po wer to order them to be paid:—Held, that leave to appeal was not necessary. Time for inscribing appeal, and enlargement of time, discussed. *In re Demaurez Estate* (Ct., 1899), p. 281.

*See* CERTIORARI, 1 — CONVICTION — ELECTION — (TERRITORIAL), 2 — LIQUOR LAWS, 4.

### ASSESSMENT AND TAXATION.

**School Ordinance**—*Assessment and Taxation — Debts — Situs—Domicil—Double Domicil.*]—The School Ordinance, s. 131, s.-s. 2, interprets "personal estate" and "personal property" as including inter alia "accounts and debts contracted within the district:" and s. 132 provides that "All real and personal property situated within the limits of any school district * * * shall be liable to taxation"—subject to

certain exceptions and exemptions:—Held, Wetmore, J., dissenting, (against the objections, (1) that debts have no situs, and therefore cannot be situated anywhere; and (2) if they have a situs, it is, in the case of a creditor being a person, his domicil; and of a corporation, the place of its head office); that choses in action, including debts, have a situs; that debts contracted within a school district are, for the purposes of taxation, situate within the district, and are assessable by the district notwithstanding that the creditor, if a person, has not his domicil therein, or if a corporation has not its head office situated therein. The question discussed whether the situs of a debt is where the debtor resides; where the creditor resides; or where the evidences of the debt are actually situated, or the records of the transactions, from which the debt arises, are kept. Per Richardson, J., (adopting the opinion expressed in Dicey's Conflict of Laws), debts, choses in actions and claims of any kind, must be held to be situate where the debtor or other person, against whom the claim exists, resides; or, in other words, debts and choses in action are generally to be looked upon as situate in the country, where they are properly recoverable and can be enforced. Per Rouleau, McGuire and Scott, JJ.:—If the situs of a debt is the domicil of the creditor, a person as well as a corporation, and a person may have, if not for all, at all events, for some purposes, more than one domicil, namely: (1) At the head office of the corporation, and at the actual residence of the person; and also (2) where the business of the corporation, or person, is actually carried on; and, therefore, where the Hudson's Bay Company, whose head office is in London, England, carried on at Battleford an ordinary merchant's business, and MacDonald, whose actual residence was in Winnipeg, Manitoba, also did the same, debts contracted to them at the Battleford places of business were, for the purposes of taxation, situated in Battleford. *Hudson's Bay Company* v. *Battleford School District*, *Macdonald* v. *Battleford School District*, *Clinkskill* v. *Battleford School District* (Ct., 1899), p. 285.

**Assessment**—*Income Tax—N. W. T. Government Official.*]—The income which a person receives as an employee of the Government of the North-West Territories is taxable by virtue of the Municipal Ordinance, notwithstanding that the general revenue fund of the Territories from which the income is paid is formed in part of a grant from the Dominion Government made "for schools, official assistance, privileges, &c." *Robson* v. *Town of Regina* (Richardson, J., 1899), p. 80.

**Municipal Ordinance**—*Assessment—Personal Property—Chartered Bank—Notes, Legal Tender, Gold, Notes and Cheques of other Banks held by.*]—The failure of an assessor to make "diligent inquiry" is not fatal to the validity of the assessment: the provision in the Municipal Ordinance in that respect being merely directory. Commercial paper, (such as notes and cheques on other banks) held by a branch of a chartered bank are "personal property," and a branch bank holding such paper is liable to assessment in respect thereof. *The Union Bank of Canada* v. *The Municipality of the Town of Macleod* (Ct., 1900) p. 107.

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## ATTACHMENT OF DEBTS.

**Attachment of Debts**—*Issue—Debt—Onus of Proof—Transfer under Seal—Estoppel—Fraudulent Conveyance—Vendor's Lien—Execution—Priorities—Subrogation*—A transfer of land had been made by the judgment debtor to the garnishee, the consideration expressed being a certain sum, the receipt whereof was thereby acknowledged; the transfer was under seal: theoral testimony—that only of the parties to the transfer—was to the effect that the transfer was in fact made in settlement of a debt owing by the transferor to the transferee. A certificate of ownership had issued, pursuant to the transfer, which, however, was marked subject to an execution issued and registered after the execution of the transfer. The transferee afterwards paid the amount of this execution. On an issue, in which the judgment creditor affirmed, and the garnishee denied, that at the date of the service of the garnishee summons, there was a debt due or accruing due from the garnishee to the judgment debtor:—Held, per Richardson, Rouleau, and McGuire, JJ., affirming Scott, J., that the onus was on the judgment creditor to prove the existence of the indebtedness and the evidence failed to prove it. Per Scott, J.: (1) Held:—The intention of the parties to the transfer must govern in the decision as to the existence of an attachable debt; if they intended the transfer as a settlement of the

claim of the transferee against the transferor, no matter how vague or shadowy that claim might be, no debt was created by it to the transferee to the transferor; and semble even if there had been no just or legal claim for which the transferor was liable to the transferee, and the transfer was made merely for the purpose of defeating creditors, but with the understanding that the purchase money was not to be paid, no debt would be created. (2) Semble. The fact that it had been clearly established, which, however, was not the case, that the land was worth more than the consideration expressed would not have affected the decision of the issue; for if there was a debt at all it could be only for the amount of the consideration expressed. (3) Held, The execution did not constitute a charge upon the land, because, before its registration, the execution debtor had transferred his interest in the land. Wilke v. Jellett, 2 N. W. T. Rep. 1, p. 125, affirmed 26 S. C R. 282, followed. (4) Semble. Had the execution formed a charge, the garnishee (having paid it) would have been entitled as against the judgment creditor to apply the purchase money, if it were payable, in satisfaction of the judgment. (5) Quære. Whether the execution creditor, having registered his execution before the service of the garnishee summons would not have had a prior claim on the unpaid purchase money. Per Richardson, Rouleau and McGuire, JJ. Had the evidence established that the transfer was really voluntary, or made for the purpose of defeating creditors, it would at most, result in setting aside the sale, and so defeat the claim that a debt existed from the transferee to the transferor. Per Wetmore, J. (1) There was no attachable debt because, in view of the acknowledgment under seal in the transfer, the transferor could not, in the absence of fraud, have maintained an action at law against the transferee for the consideration money, as he would by such acknowledgment be estopped; and while the acknowledgment would not be effective as an estoppel in a suit in equity, if the consideration were not in fact paid, yet such a suit would be a proceeding in rem—not upon his contractual rights but to assert a lien; and although a transferor might in such a case be entitled to a personal order for any deficiency, the transferee's liability in that respect would be contingent on the fact of a deficiency and be incidental to the rights of lien. (2) The omission of the defendant in the issue to object to the reception of evidence of the non-payment of the purchase money did not prevent him from contending that notwithstanding such evidence, the plaintiff was not entitled to recover in face of the admission in the transfer. (3) The respondent in an appeal is entitled to support the judgment on any available ground, even although it was not raised at the trial, or pronounced on by the Judge. *Genge* v. *Wachter* (Scott, J., 1899, Ct., 1899), p. 122.

**Attachment of Debt**—*Garnishee Summons—Salary—"Due or Accruing Due"*]—Where the salary of an employee was a fixed amount per month payable at the end of the month:—Held that a garnishee summons served on the last day of the month did not bind the current month's salary, inasmuch as no part of the amount was due, that is, recoverable by the employee till the last day of the month had expired, nor was any part accruing due inasmuch as the liability of the employer to pay was contingent upon the completion of the month's service by the employee. *Main Bros.* v. *McInnes, Town of Regina Garnishees* (Richardson, J., 1901), p. 117.

## BAILMENT.

*See* SALE OF GOODS, 1—BANK—ASSESSMENT AND TAXATION, 3—SALE OF GOODS, 5.

## BILLS, NOTES AND CHEQUES.

*See* ASSESSMENT AND TAXATION, 3—SALE OF GOODS, 5.

## BILL OF LADING.

*See* SALE OF GOODS, 5.

## BILLS OF SALE AND CHATTEL MORTGAGES.

**Interpleader**—*Bills of Sale Ordinance—Form of Affidavit—Irregularities — Claimant's Affidavit—Amendment.*]—The Bills of Sales Ordinance, C. O. 1898 c. 43, s. 7, provides that "except, &c., a mortgage * * * may be made in accordance with Form A * * * ." Form A, in the place intended for the witness's signature, has the words,

"Add name, address and occupation of witness." No form of affidavit of execution is given. Held, that neither (1) the omission to state the address and occupation of the witness after his signature; (2) the omission of the deponent's name and occupation in the body of the affidavit of execution, which was signed by him; nor, (3) the omission to state in the jurat a more definite place than "the North-West Territories:" rendered the registration of the morgage invalid. The claimant was allowed an adjournment to amend the affidavit supporting his claim. *Commercial Bank of Manitoba* v. *Fehrenback, Boake, Claimant* (Wetmore, J., 1900), p. 335.

*See* EXECUTION.

## BRAND.

*See* CRIMINAL LAW, 5.

### CASES SPECIALLY CONSIDERED.

Armour v. Kilmer, 28 O. R. 618, interpreted, followed in part and dissented from in part. *Armour* v. *Dinner*, p. 30.

Bottomley v. Nuttall, 28 L. J. C. P. 110; 5 C. B. N. S. 112; 5 Jur. N. S. 315; referred to. *Armour* v. *Dinner*, p. 30.

Breithaupt v. Marr, 20 O. A. R. 689, followed. *Howard* v. *High River Trading Corporation*, p. 109.

Brook v. Hook, L. R. 6 Ex. 89; 40 L. J. Ex. 50, dissenting judgment of Martin, B., followed. *Grady* v. *Tierney*, p. 133.

Collen v. Wright, 8 El. & B. 647; 27 L. J. Q. B. 215; 4 Jur. N. S. 357; 6 W. R. 123, followed. *Coit* v. *Dowling*, p. 464.

Davidson v. Donaldson, 47 L. T. 564; 9 Q. B. D. 623; 31 W. R. 277; 5 Asp. M. C. 601, referred to. *Armour* v. *Dinner*, p. 30.

Dougald v. Campbell, 41 U. C. Q. B. 332, followed. *Armour* v. *Dinner*, p. 30.

Falck v. Willians, 69 L. J. P. C. 17; 1900 A. C. 176, applied. *Coit* v. *Dowling*, p. 464.

Ford v. Foster, 41 L. J. Ch. 682; L. R. 7 Ch. 611; 27 L. T. 891; 20 W. R. 818, followed. *Templeton* v. *Wallace*, p. 341.

Giles v. McEwen, 11 Man. R. 150, followed. *Rose* v. *Winters*, p. 353.

Irvine v. Watson, 40 L. J. Q. B. 531; 5 Q. B. D. 414; 42 L. T. 810; affirming 49 L. J. Q. B. 531; 5 Q. B. D. 102; 42 L. T. 51; 28 W. R. 353, referred to. *Armour* v. *Dinner*, p. 30.

Keohan v. Cook, 1 Terr. L. R. 125; N. W. T. Rep. Vol. 1, No. 1, 54, followed. *Hostetter* v. *Thomas*, p. 224.

Lehain v. Philpot, 44 L. J. Ex. 225; L. R. 10 Ex. 242; 33 L. T. 98; 23 W. R. 876, followed. *Smith* v. *Haight*, p. 387.

Lewis v. Nicholson, 21 L. J. Q. B. 311; 18 Q. B. 503; 16 Jur. 1041, referred to, *Armour* v. *Dinner*, p. 30.

Luke v. Perry, 12 U. C. C. P. 424, followed. *Parslow* v. *Cochrane*, p. 312.

Moore v. Martin, 1 Terr. L. R. 236; 1 N. W. T. Rep. Pt. 2, p. 48, followed. *Conrad* v. *Alberta Mining Co.*, p. 322.

O'Connor v. Gemmell, 29 O. R. 47, followed. *Armour* v. *Dinner*, p. 30.

Priestley v. Fernie, 34 L. J. Ex. 172; 3 H. & C. 977; 11 Jur. N. S. 813; 13 L. T. 208; 13 W. R. 1089, referred to. *Armour* v. *Dinner*, p. 30.

R. v. Robinet, 16 O. P. R. 49; 2 Can. Crim. Cas. 382, not followed. *R.* v. *Ashcroft*, p. 119.

Roach v. McLachlan, 19 O. A. R. 496, followed. *Howard* v. *High River Trading Co.*, p. 109.

Scott v. The Bank of New Brunswick, 23 S. C. R. 277, followed. *Grady* v. *Tierney*, p. 133.

In re Sully's Case, Re Northumberland Avenue Hotel Co., 33 Ch. D. 16; 54 L. T. 77, followed. *Coit* v. *Dowling*, p. 464.

Wilkie v. Jellett, 2 N. W. T. Rep. Pt. 1, p. 125, affirmed 26 S. C. R. 282, followed. *Genge* v. *Wachter*, p. 122.

## CERTIORARI.

**Certiorari**—*Recognizance—Sufficiency of Justification by Sureties—Appeal taking away Right to Certiorari.*]—An affidavit of justification upon a recognizance given pursuant to rule of court passed under s. 892 of the Criminal Code need not state that the surety is worth the amount of the penalty over and above other sums for which he is surety. A rule of court made under s. 892 of the Criminal Code requiring sufficient sureties for a specific amount is complied with if the sureties justify as being possessed of property of that value, and being worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. Regina v. Robinet, 16 O. P. R. 49; 2 Can. Crim. Cas. 382, not followed.

Where a conviction is attacked on the ground of want of jurisdiction, the mere filing of a recognizance by the defendant on an appeal therefrom does not deprive him of the right to a writ of certiorari. The conviction and all other proceedings relating thereto having been filed by the magistrate under s. 801 of the Criminal Code, in the office of the clerk of the court for the judicial district in which the motion is made, a motion to quash the conviction can be made without the issue of a writ of certiorari. Section 892 of the Criminal Code authorizes the requiring of a recognizance only where the conviction is brought before the court by a writ of certiorari, and no recognizance is required where such a writ is not necessary, or is dispensed with. *The Queen* v. *Ashcroft* (Rouleau, J. 1899), p. 119.

**Certiorari** — *Security — Deposit of Cash Without Written Condition—Liquor*—A deposit by the accused with the proper officer of $100 cash, though unaccompanied by any written document, is a sufficient compliance with the requirements of rule 13 of the Consolidated Rules of Court, 1895. After a writ of certiorari has issued preliminary objections thereto should be raised promptly and by means of a substantive motion to quash the writ. *The Queen* v. *Davidson* (Ct. 1900), p. 425.

### COMMISSION EVIDENCE.

*See* PRACTICE.

### COMMISSION FOR SERVICES.

*See* SOLICITOR AND CLIENT, 2.

**Company** — *Contract on Behalf of, before Incorporation—Ratification*]—In the absence of a new agreement made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract for the company is not binding on the company, although the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. In re Sully's Case, Re Northumberland Avenue Hotel Company, Limited. 33 Ch. D. 16; 54 L. T. 77, followed. *Coit* v. *Dowling et al.* (Rouleau, J., 1901), p. 464.

*See* PRACTICE, 12.

### CONDITIONAL SALE.

**Lien Note**—*Destruction of Subject Matter—Risk of Loss — Default*]—Where a mare, the subject of a conditional sale, was drowned while in the actual possession of the buyer, after default in payment:—Held, that the loss fell upon the buyer and that therefore the seller was entitled to recover the balance of the price. *Gillespie* v. *Hamm* (Richardson, J., 1899), p. 78.

**Waiver**—*Intention*]—On a conditional sale, evidenced by writing, providing that the title should remain in the seller till cash notes or drafts (for the balance of purchase price) as agreed upon should be paid:—Held, the question, whether the conditions had been waived and thus the property had vested in the buyer, was entirely a question of intention, and that the facts shewn in evidence, one of which was that the seller had accepted, for the balance of the purchase price, the promissory note of a firm of which the buyer was a member, did not shew an intention to waive the condition as to property. *Marcy* v. *Pierce*, No. 2 (Wetmore, J., 1899), p. 246.

### CONSTITUTIONAL LAW.

**Municipal Law**—*Licenses—Insurance Agents—Powers of Legislative Assembly—Ultra Vires.*]—The Ordinance incorporating the city of Calgary (No. 33 of 1893, s. 117, s.-s. 41), empowered the city to pass by-laws "for controlling, regulating and licensing * * * insurance companies, offices and agents * * * and collecting license fees for the same." Held, that the provision was intra vires of the Legislative Assembly of the Territories. *English* v. *O'Neill* (Scott, J., 1899), p. 74.

### CONTEMPT OF COURT.

*See* PRACTICE, 2.

### CONTRACT.

**School Trustees** — *Agreement with Teacher—Necessity for Adoption at*

*Meeting Duly Assembled.*]—An agreement between a board of school trustees and a teacher, which appeared not to have been adopted at a meeting of the board, was held to be void as against the board by reason of the provisions of the school ordinance. *Sparling* v. *The Trustees of Spring Coulee School District* (Richardson, J., 1900), p. 366.

**Agreement**—*Construction of—Sale of an "Entire Herd of Cattle" at a Price "per Head"—Unbranded Calves under Six Months Old—Usage*]—On the evidence it was found that, by usage among cattle-men in the McLeod District, calves under six months old and unbranded are, in the buying or selling of a herd of cattle by the head, included with the cows with which they are running. Where an agreement related to two classes of things, and one of which alone was subsequently dealt with by a substituted agreement, and a new agreement dealing with the other class was made for the purpose of continuing the first agreement regarding it, the first agreement was properly looked at to interpret the second. The same expressions used in different parts of the same document should ordinarily be interpreted in the same sense. *Woolf* v. *Allen* (Rouleau, J., 1900, Ct., 1900), p. 431.

**Consensus Ad Idem**—*Evidence—Burden of Proof—Uncertainty.*]—In an action on a verbal contract the evidence as to its terms being contradictory, and showing that, if each of the parties to the contract gave in evidence a truthful statement of its terms according to his recollection, there was a misunderstanding between them as to whether a certain important provision (the existence of which was the whole basis of the action) formed part of it, the trial Judge declared himself unable to ascertain the truth, and, applying the principle laid down in Falck v. Williams, 69 L. J. P. C. 17; 19 A. C. 176, that it is for the plaintiff in an action for breach of contract to shew that his construction is the right one, dismissed the action. *Coit* v. *Dowling* (Rouleau, J., 1901), p. 464.

**Contract**—*Special Quantum Meruit—Amendment.*]—The plaintiff agreed to build, for a fixed lump sum, a foundation for a building, the defendant supplying materials on the ground, and the plaintiff, owing to non-supply of lime, abandoned the work, though it was found on the evidence that the defendant had got what he bargained for, with some shortcoming, for which damages would compensate him:—Held, that although the plaintiff was not entitled to succeed on his claim under the original special contract, he was entitled to recover on a quantum meruit, and the pleadings were directed to be amended accordingly. *Burns* v. *Usherwood* (Richardson, J., 1901), p. 389.

*See* ELECTION—DOMINION—MASTER AND SERVANT—PRINCIPAL AND AGENT, 2, 3—SALE OF GOODS.

## CONVICTIONS

**Criminal Code, s. 880**—*Notice of Appeal from Summary Conviction—Sufficiency Thereof.*]—Held, that a notice of appeal neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor. Keohan v. Cook, 1 Terr. L. R. 125; N. W. T. Rep. vol. 1, No. 1, 54, followed. *Hostetter* v. *Thomas* (Ct., 1899), p. 224.

*See* LIQUOR LAWS.

## COSTS.

**Costs**—*Witness Fees—Setting Aside—False Affidavit of Increase—Taxation—Setting Aside Certificate—Review or Motion—Affidavit—Information and Belief—Refusal to Make Affidavit—Compulsory Examination.*]—The English practice requiring proof of actual payment of witness fees as a condition precedent to their being allowed on taxation of costs should be followed. Where on an affidavit that witness fees have been actually paid they are allowed on taxation without objection on the ground of falsity of the affidavit, the proper mode of attacking the allowance is by an application by way of motion to the Court and not by way of review of the taxation. On such an application, an affidavit of information and belief, stating the grounds thereof, is sufficient foundation for a motion to set aside the certificate of taxation and refer it back to the taxing officer to ascertain whether or not at the time of taxation the witness fees in question had in fact been paid. *Grindle* v. *Gillman* (Wetmore, J., 1899), p. 189.

*See* APPEAL — ELECTION (TERRITORIAL), 2—SALE OF GOODS, 5—SOLICITOR AND CLIENT.

## COUNSEL FEES.

**Counsel Fees**—*Action for—Liability of Solicitor or Client—Mistake of Legal Rights—Principal and Agent—Election.*]—An advocate of the Territories (in whom are combined the functions of both registrar and solicitor) retained a member of the plaintiff firm (Ontario barrister and solicitor) as counsel, and the firm as solicitor, on an appeal for certain client to the supreme court of the North-West Territories. The plaintiffs brought this action against both the clients and the advocate in the alternative, for their bill of costs as counsel and solicitors on the appeal :—Held, per Scott, J., the trial Judge—interpreting Armour v. Kilmer, 28 O. R. 618, as holding that the client alone and not the solicitor is liable prima facie, i.e., unless their is a special agreement of which the effect is to transfer the liability from the client to the solicitor— that the contract of retainer, evidence wholly by correspondence, constituted such a special agreement, and that therefore the advocate alone was liable to the plaintiff. Held, also per Scott, J., following Armour v. Kilmer, 28 O. R. 618, that an action lies for counsel fees. On appeal to the court in banc : —Held, per Curiam : (1) That the contract was to be spelled out of the correspondence which took place up to the time the services sued for were performed, and that for the purpose of ascertaining the terms of the contract, the subsequeut letters should not be looked at. Lewis v. Nicholson, 21 L. J. Q. B. 311 referred to. (2) That if the clients were liable by virtue of the original contract, the plaintiff charging the advocate in mistake of their legal rights would not release the clients. (3) That, differing from the opinion of the trial Judge, the advocates' letters were merely of such character as an advocate engaging counsel in the ordinary course would naturally write, and were not such as under the decision in Armour v. Kilmer, 28 O. R. 618, would render the advocate personally liable ; but, held, McGuire, J., dissenting, and the majority of the court declining to follow Armour v. Kilmer, that on the retainer of counsel by an advocate, the advocate, and not the client, is prima facie liable. Held, also, per Curiam, (1) that an action lies for counsel fees. McDougall v. Campbell, 41 U. C. Q. B. 332, and Armour v. Kilmer, 28 O. R. 618 (on this point), followed. (2) That inasmuch as the tariff of the supreme court of Canada does not apply as between solicitor and client, the plaintiffs were entitled to recover on a quantum meruit. O'Connor v. Gemmell, 2 O. R. 47, followed. Per McGuire, J. (1) Armour v. Kilmer rightly decided that where a solicitor retains counsel, the liability is prima facie that of the client. (2) If the plaintiff had the right to elect to charge either the advocate or the clients, the fact of the plaintiffs having drawn on the advocate for the amount of their bill of costs, was not such a definite election as would release the clients. Bottomley v. Nuttall, 28 L. C. P. 110, and Priestly v. Fernie, 34 L. J. Ex. 192, referred to ; nor, semble, would an action short of judgment have been such an election. (3) The advocate was the agent of the clients, and therefore a contract between them limiting the amount of their liability was not binding on the plaintiffs unless communicated to them, nor were the plaintiffs bound to credit an amount paid to the advocate by the clients for the express purpose of payment of the plaintiffs, but which was not paid to them unless the plaintiffs had mislead the clients into believing that the advocate had paid them, or possibly the plaintiffs had definitely elected to look to the advocate. Davidson v. Donaldson, 9 Q. B. D. 623, and Irvine v. Watson, 49 L. J. Q. B. 531, referred to. (4) The plaintiffs were entitled to judgment against the clients for the balance due the plaintiffs for counsel fees, and against the advocate for the balance due them for solicitor's charges, it being conceded that the clients were not liable for the latter. *Armour* v. *Dinner* (Scott, J., 1898, Ct., 1899). p 30.

## CRIMINAL LAW.

**Criminal Law**— *Theft—Goods under Seizure — Taking Away without Authority —Hotelkeeper— Lien of Board and Lodging—Necessity for Tender — "Lawful Seizure and Detention" — Recent Possession as Evidence of Stealing—Criminal Code, 306.*]—An hotelkeeper who locks up the room of a guest containing the latter's baggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's baggage, &c., under "lawful seizure and

detention," in respect of the landlord's common law lien; and the taking away of such baggage by the guest without the landlord's authority is "theft" under s. 306 of the Criminal Code. (But see now new section, substituted by 63 Vict. c. 46, s. 3 sched.) The landlord does not by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects; and the owner who removes any baggage as to which the permission does not extend, is guilty of "stealing" the same under s. 306 of the Criminal Code. The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due nor invalidate the lien. *The Queen* v. *Hollingsworth* (Rouleau, J., 1899), p. 168.

**Criminal Law**—*Criminal Code, s. 278 (a) — Polygamy—Indian Marriage*] —An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under s. 278 of the Criminal Code *The Queen* v. *"Bear's Shin Bone"* (Rouleau, 1899), p. 73.

**Criminal Law** — *False Pretences — False Pretence not Actually Made by Accused Himself, but in his Presence.*] —A person who does not make a false representation himself, but who is present when the false statement is made, knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such money by false pretences. *The Queen* v. *Cadden* (Ct. 1899), p. 304.

**Criminal Law**—*Cattle Stealing—Trial by Jury, Right to—N. W. T. Act.*]—Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value which did not, in the opinion of the trial Judge, exceed $200, has not the right to be tried by jury. *The Queen* v. *Pachal* (Ct., 1899), p. 304.

**Criminal Law**—*Theft — Evidence of Ownership of Article Stolen—Brand—Earmark—Sufficiency of; Deposition taken at Preliminary Inquiry—Reading of, in Evidence at Trial—Evidence of Absence of Deponent from Canada—Sufficiency of.*]—Held, (Rouleau, J., dissenting), that the production of a steer's hide with the prosecutor's brand and ear-marks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, was sufficient to justify the trial Judge in finding that the steer in question was the property of the prosecutor. (See now 63 & 64 Vic (1900) c. 46, s. 707A and 1 Edw. VII. c. 42, s. 707A.) Held, per curiam, that evidence that a witness at the preliminary inquiry was a corporal in the N. W. M. Police, that he had been sworn in as a member of Strathcona's Horse, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary inquiry. *Queen* v. *Forsythe* (Ct. 1900), p. 398.

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**CROWN.**

*See* PRINCIPAL AND AGENT, 2.

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**CUSTOM.**

*See* CONTRACT, 2.

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**DEBENTURE.**

*See* MUNICIPAL LAW.

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**DEBT.**

*See* ASSESSMENT AND TAXATION, 1, 3—ATTACHMENT OF DEBTS.

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**DEPOSITIONS.**

*See* CRIMINAL LAW, 5—PRACTICE.

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**DETINUE.**

*See* PARENT AND CHILD — SALE OF GOODS, 4.

**DISCOVERY.**

*See* PRACTICE.

**DOMICIL.**

*See* ASSESSMENT AND TAXATION, 1—ELECTION (TERRITORIAL) 1.

**DOMINION LANDS ACT.**

*See* SALE OF GOODS, 3.

**ELECTION—(DOMINION)**

**North-West Territories Representation Act**—*Executory Contract Referring to an Election Thereunder—Hiring Teams and Conveyances—Wife's Authority to Contract on Behalf of Her Husband*]—The plaintiff, a livery-stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election for a member of the House of Commons of Canada. The evidence shewed that to the knowledge of the plaintiff his account was for horses and rigs furnished by him to the defendant during the time he was a candidate and solely for the purposes of and in connection with the election:—Held, following Luke v. Perry, 12, U. C. C. P. 424, that the contract of hiring was an executory one, and that it came therefore within the terms of s. 131 of the Dominion Elections Act, R S. C. c. 8, which is incorporated within the North-West Territories Representation Act R. S. C. c. 7, by 57 & 58 Vict. (1894) c. 15, s. 10, and that the contract was therefore void in law, and the plaintiff could not recover. The plaintiff also sued the defendant on an account for horses and rigs furnished by one Pepper, some of them to the defendant, others to the defendant's wife, and some to both of them, which account Pepper had assigned to the plaintiff. These horses and rigs were not clearly shewn to have been furnished in connection with the election, though the evidence led to a strong suspicion to that effect:—Held, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred or arisen out of an election, nothing should be intended in favor of such a defence, and it must clearly appear that such contract did refer to an election held under the Act. Evidence of ratification discussed. *Parslow* v. *Cochrane* (Scott, J., 1899), p. 312.

**ELECTION—TERRITORIAL.**

**Territorial Election**—*Court of Revision Judge in Appeal—Jurisdiction—Voter's Qualification—Territories Election Ordinance — Residence—Controverted Elections Ordinance*]—In the case of an election under the Territories Election Ordinance, a Judge sitting in appeal from the court of revision is limited in the exercise of his jurisdiction to the same extent as the court of revision. The jurisdiction of the court of revision is limited to inquiring whether any of the formal statements, subscription to which the Ordinance provides, may be required from a person tendering a vote, is "false in whole or in part;" if false in whole or in part, the vote is to be disallowed; if altogether true, the vote is to be allowed. New polls were held in two polling divisions; votes were challenged on the following grounds: (*a*) voter was deputy returning officer in another polling division on the day of the general election, (*b*) voter was resident in another polling division on the day of the general election and entitled to vote there, and (*c*) voter was absent from electoral on day of general election; and in each case the voter could not possibly have voted on that day at either of the two polling divisions in question; the court of revision disallowed these votes; the Judge in appeal held that he had no jurisdiction sitting in appeal (but only in proceedings under the Controverted Elections Ordinance) to consider the validity of these votes, though he doubted their validity. "Residence" means a man's habitual physical presence in a place or country which may or may not be his home; the word "habitual" does not mean presence in a place for either a long or short time, but the presence there for the greater part of that period. *In re Banff Territorial Election, Brett* v. *Sifton, No. 1*, (Rouleau, J., 1899), p. 140.

**Controverted Election Ordinance**—*Practice — Stay of Proceedings — Time for Particulars — Jurisdiction of Judge to Extend—Judicature Ordinance — Typewritten Appeal Books—Costs.*]—Under the provisions of s. 18 of the Controverted Elections Ordinance and rule 548 of the Judicature

Ordinance, the Judge has jurisdiction to extend the time for applying for particulars even after the time limited by s. 11 of the former Ordinance has elapsed. Proceedings stayed, pending appeal time for applying for particulars enlarged, typewritten instead of printed appeal books allowed and costs directed to abide result of appeal. *In Re Banff Election, Brett* v. *Sifton*, No. 3 (Scott, J., 1899), p. 263.

**The Controverted Election Ordinance—** *Petition — Signature — Preliminary Objections.*]—Held, reversing the judgment of Scott, J., McGuire, J., doubting, that a petition may be set aside upon summary application upon grounds other than those contained in s. 10 of the Controverted Election Ordinance. *In Re Banff Election, Brett* v. *Sifton*, No. 2, (Scott, J., 1899, Ct., 1899), p. 253.

## ESTOPPEL.

*See* ATTACHMENT OF DEBTS, 1—LAND TITLES, 2—PRACTICE, 4—PRINCIPAL AND AGENT, 1.

## EVIDENCE.

**Evidence**— *Secondary Evidence — Handwriting*—On proper evidence as to non-production of original, secondary evidence of the contents of a letter, given by a witness who had seen the author write once only, was admitted. *Marcy* v. *Pierce*, No. 2 (Wetmore, J., 1899), p. 246.

**Cross-Examination for Discovery**]—Held, per Rouleau, J., (1) That where a party has been cross-examined on an affidavit made by him, the opposite party can use such examination at the trial as evidence in rebuttal of the evidence of the same party. *Livingston* v. *Colpitts* (Rouleau, J., 1900), p. 441.

*See* CONTRACT, 3—CRIMINAL LAW, 5—HUSBAND AND WIFE—LIQUOR LAWS, 1, 3—PRACTICE, 4—PRINCIPAL AND AGENT, 1, 2—SALE OF GOODS, 1—SOLICITOR AND CLIENT, 3.

## EXECUTION.

**Execution**—*Chattel Mortgage — Creditors' Relief Ordinance—Priorities*]—Held, (Wetmore, J., hesitante), that executions against goods placed in the hands of a sheriff subsequently to the making of a chattel mortgage by the execution debtor, on the goods seized, attach only on the equity of redemption and are not entitled under the Creditors' Relief Ordinance to share with executions placed in the hands of the sheriff prior to the giving of the mortgage. Roach v. McLachlan, 19 O. A. R. 496, and Breithaupt v. Marr, 20 O. A. R. 689, followed. Judgment of Rouleau, J., affirmed. *Howard* v. *High River Trading Co. et al.* (Rouleau, J., 1898, Ct., 1899), p. 109.

*See* ATTACHMENT OF DEBTS, v—LAND TITLES, 4—LANDLORD AND TENANT, 1—SHERIFF—SOLICITOR AND CLIENT, 3.

## FRAUDULENT CONVEYANCE.

*See* ATTACHMENT OF DEBTS, 1.

## FORFEITURE.

*See* LIQUOR LAWS, 2.

## GARNISHMENT.

*See* ATTACHMENT OF DEBTS.

## HOMESTEAD.

*See* SALE OF GOODS, 3.

## HUSBAND AND WIFE.

**Marriage**—*Marriage per Verba de Presenti—Condition of Territories in 1878 — Presumption of Marriage—Evidence.*]—In the year 1878 a white man and an Indian woman, domiciled in the North West Territories, entered into a contract of marriage per verba de presenti in the Territories without a ceremony of any kind, and cohabited as man and wife until the former's decease:—Held, in view of the legal provisions for the organization of the Territories and the actual condition, with reference to the facilities for the solemnization of marriage, at least in the portion of the Territories in the vicinity of the contracting parties' place of residence, that there was not a legally valid marriage. In bigamy

cases, a strict proof of marriage is required; a different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required but may be presumed from cohabitation and repute; but where the evidence shews the actual terms upon which the parents were cohabiting and the facts relied upon as constituting the marriage, no such presumption can arise. *Re sheran* (Scott, J., 1899), p. 83.

*See* CRIMINAL LAW, 2—ELECTION (DOMINION).

### IMPLIED TERMS IN CONTRACT.

*See* PRINCIPAL AND AGENT, 3.

### INDEMNITY.

*See* SHERIFF.

### INDIAN.

*See* CRIMINAL LAW, 2—HUSBAND AND WIFE.

### INTERPLEADER.

**Interpleader Issue**—*Power to Direct Trial of by Jury—North-West Territories Act, s. 88—Judicature Ordinance, s. 170.*]—Neither a Judge nor the court in banc has power to direct an interpleader issue to be tried by jury. Judgment of Scott, J., affirmed. *McIntosh* v. *Shaw* (Scott, J., 1898, Ct., 1899), p. 97.

*See* BILLS OF SALE AND CHATTEL MORTGAGES — LANDLORD AND TENANT, 1.

### JUDGMENT.

*See* PRACTICE—SOLICITOR AND CLIENT, 3.

### JURISDICTION.

*See* MARITIME LAW.

### JURY.

*See* CRIMINAL LAW, 4—INTERPLEADER.

### JUSTICE OF THE PEACE.

*See* CONVICTION—PROHIBITION.

### LAND TITLES.

**Land Titles Act, 1894**—*Confirmation of Tax Sale—Municipal Ordinance—Neglect of Purchaser to Apply for Transfer Within Time Limited—Effect of Upon Authority of Treasurer to Execute Transfer.*]—Held, that, though a purchaser at municipal tax sale did not, within one month after the expiration of the time for redemption, make a demand upon the treasurer for a transfer, nor pay to him the $2.00 for such transfer, and it was not until long after the expiration of the said month that such demand and payment were made and such transfer executed, the treasurer had authority to execute the transfer to the purchaser. *In re Prince Albert Tax Sales* (Ct. 1899), p. 198.

**Land Registration**—*Land Titles Act, 1894 — Earlier Land Registration Laws — Title by Estoppel—Duty of Registrar.*]—The Registration of Titles Ordinance, the Territories Real Property Act and the Land Titles Act, 1894, discussed. Titles by Estoppel also discussed. The registrar in issuing certificates of ownership is bound to take notice of instruments registered or filed previously to the issue of the patent, under the provisions of the Registration of Titles Ordinance, or the Territories Real Property Act. It was the intention of the Territories Real Property Act and the Land Titles Act, 1894, to recognize and continue, as creating vested interests, the proper effect of all instruments registered or filed under previous legislation in that behalf. Where an agreement for the sale of land by the Canadian Pacific Railway Company was registered under the Registration of Titles Ordinance, and subsequent instruments, purporting to be executed by the purchaser under the agreement, and persons claiming under him, were also registered or filed under that Ordinance or the Territories Real Property Act; the Registrar, on an application by the company for a certificate of ownership upon a patent subsequently issued to the company, was directed to issue the certificate of ownership to the company indorsed with memoranda of the agreement and other instruments. Where, on a similar application, a transfer was filed under the Territories Real Property Act, purporting to be executed by the purchaser

under an agreement (recited, but not registered or filed) for sale by the Canadian Pacific Railway Company, and after the Registrar's reference, a quit claim deed from the transferee to the company was produced, the Registrar was directed to issue a clear certificate of ownership to the company. Where, on a similar application, it appeared that an agreement purporting to be executed by the purchaser under an agreement (recited but not registered or filed) for sale by the company, was registered, and also other instruments purporting to be executed by persons claiming under the purchaser, the Judge, to whom the reference was made was advised to cause notice to be given, to all persons appearing to to be interested, of the time and place when the questions submitted by the Registrar would be investigated. If such parties failed to appear, or having appeared failed to establish the existence of the agreement, the Registrar should be directed to issue a clear certificate of ownership to the company. If the existence of the agreement was properly proved the proof should be filed with the Registrar, and he should be directed to issue a certificate of ownership to the company, indorsed with memoranda shewing the interests apparently created by the agreement and other instruments. *In re the Lands Title Act, 1894, and the Canadian Pacific Railway Company* (Ct. 1899), p. 227.

"**Land Titles Act,** 1894,"—*Application to Bring Land Under Act—Uncertainty in Description of Lands*]—A deed in which the land is described as a certain parcel of land "saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others" is unless supplemented by conclusive evidence of the full extent of the exceptions so uncertain to justify the Registrar in acting on it in an application to bring the land under the Land Titles Act, 1894. *In re Land Titles Act and Lillis* (Ct., 1899), p. 360.

**Land Titles Act**—*Execution—Renewal—Refiling with Registrar—Statute—Construction—Tax Sale—Confirmation—Notice.*]—The Land Titles Act, 1894, s. 92, s.-s. 1, is amended by 63 & 64 Vict. (1900), c. 21, s. 2, (assented to July 7th, 1900), by the addition of a proviso, "that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the Registrar * * * unless before the expiration of such period of two years a renewal of such writ is filed with the Registrar in the same manner as the original is required to be filed with him." This proviso is not retroactive so as to apply to a writ of execution, which would have expired but was renewed before the 7th July, 1900; such a writ, therefore, remains in full force though a renewal thereof has not been filed with the Registrar either before or after that date. The execution creditors in such a writ should consequently be notified of an application for the confirmation of a tax sale of land of the execution debtor. *Re Town of Prince Albert* (McGuire, J., 1901), p. 510.

## LANDLORD AND TENANT.

**Landlord and Tenant**—*Rent—Seizure under Execution—8 Anne c. 14—Interpleader.*]—Where goods are seized under execution on leasehold premises and are claimed by a third party, who establishes his title thereto, the Statute 8 Anne c. 14 does not entitle the landlord to be paid rent by the sheriff. Where, however, goods seized by the sheriff were claimed by a third party, and under an interpleader order were sold and the proceeds paid into Court pending the trial of an issue as to the ownership of the goods, and the trial of a second issue had been directed between the landlord and the execution creditor as to the landlord's right to the rent claimed, and the claimants in the first issue consented to the landlord's claim being satisfied, even if they should be successful in the issue, the landlord was held entitled to be paid out of the fund in court the arrears of rent, not exceeding one year's rent, without awaiting the decision of the issue as to the ownership of the goods. Judgment of Rouleau, J., affirmed. *Robinson* v. *McIntosh* (Rouleau, J., 1898, Ct. 1899), p. 102.

**Landlord and Tenant**—*Distress—Distress Remaining Unsold—Suspension of Action for Rent*]—It being found on the evidence that a distress had been made, and that the goods distrained remained unsold in the plaintiff's hands:—Held, following Lehain v. Philpot, 44 L. J. Ex. 225, that the right of action for the rent was suspended. *Smith* v. *Haight* (Wetmore, J., 1900), p. 387.

## LAWS OF ENGLAND.

*See* HUSBAND AND WIFE.

**LICENSES.**

*See* CONSTITUTIONAL LAW.

**LIEN.**

*See* ATTACHMENT OF DEBTS, 1—CRIMINAL LAW, 1—MARITIME LAW.

**LIEN NOTE.**

*See* CONDITIONAL SALE.

**LIEUTENANT-GOVERNOR IN COUNCIL.**

*See* MUNICIPAL LAW.

**LIMITATION OF ACTIONS.**

*See* PRACTICE, 13.

**LIQUOR LAWS.**

**Liquor License Ordinance**—*Open Bar in Prohibited Hours — Evidence of Liquor License—Certiorari*]—A conviction under the Liquor License Ordinance against a hotel-keeper, for allowing his bar to be open during prohibited hours, is invalid, if the information does not allege, nor is proof made, that the accused held a liquor license for the hotel premises. *The Queen* v. *Henderson* (Rouleau. J., 1899), p. 146.

**Liquor License Ordinance**—*Conviction Involving Forfeiture of License—Appeal Therefrom—Effect Thereof Upon Forfeiture.*]—Held, (Richardson, J., dissenting), that where a licensee is convicted under s. 122 (3) of the Liquor License Ordinance, of supplying to an interdicted person, with knowledge of such interdiction, the effect of such conviction being that "his license shall be forfeited," an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction, including the forfeiture of the license. *Simington* v. *Colbourne* (Ct. 1900), p. 372.

**Liquor License Ordinance**—*Bar Open During Prohibited Hours.*]—Upon a charge of having had a bar-room open and sold liquor during prohibited hours the prosecution must either allege or prove that the defendant was a licensee. *The Queen* v. *Davidson* (Ct. 1900), p. 425.

**Liquor License Ordinance**—*Appeal—Affidavit of Merits—Ultra Vires—Jurisdiction.*]—Chapter 32 of Ordinance of 1900, s. 22, amending the Liquor License Ordinance (C. O. 1898, c. 89), requires that a special affidavit of the party appealing shall be transmitted with the conviction to the Court to which the appeal is given:—Held, against the contentions, (1) that this provision is applicable only where the appeal is based on a denial of the facts established in evidence, and not where a question of law arising on such facts is involved; and (2) that the provision is ultra vires of the Legislative Assembly of the Territories—that there was no jurisdiction to entertain an appeal where this provision had not been complied with. *The King* v. *McLeod* (Richardson, J., 1901), p. 513.

**MAGISTRATE.**

*See* PROHIBITION.

**MARITIME LAW.**

**Maritime Law**—*Inland Waters Seaman's Act—Seaman's Wages—Maritime Lien—Admiralty Jurisdiction of Supreme Court N. W. T.*]—The Supreme Court of the North-West Territories has concurrent jurirdiction with the Exchequer Court of Canada in Admiralty matters inasmuch as the Court of Chancery in England had on the 15th July, 1870, concurrent jurisdiction with the Court of Admiralty. *Kelly* v. *The Alaska Mining and Trading Co.* (Rouleau, J., 1899), p. 18.

**MARRIAGE.**

*See* HUSBAND AND WIFE.

**MASTER AND SERVANT.**

**Master and Servant** – *Wages—Monthly Rate—Entire Contract Behavior of Master to Servants.*]—It was found as a fact, on contradictory evidence, that the plaintiff hired with the defendant at $18 for the first month, and, if each party was satisfactory to the other, for $20 for the whole working season including the first

month, and that the wages though fixed with reference to the months, were payable only at the end of the period of hiring. The plaintiff after working for some months left, and sued for the wages for the number of months he had worked, less the wages for the first month, which had been paid:—Held, that the contract was an entire one and that the plaintiff could not succeed. Nature of behavior of master towards servant justifying the servant in leaving, discussed. *Owen* v. *James* (Wetmore, J., 1899), p. 174.

**Master and Servant**—*Servant Wrongfully Leaving Employment—Right to Past Due Wages.*]—A servant, whose wages are payable periodically and who is dismissed from his master's employment for good cause, or leaves without justifiable cause, after one of such periods has passed, is nevertheless entitled to recover any unpaid wages accrued up to the date of the last of such periods; a right of action accrues at the lapse of each of such periods. The master has only the right to recover damages against the servant for breach of his contract. *Taylor* v. *Kinsey* (Wetmore, J., 1899), p. 178.

**Master and Servant**—*Contract of Hiring — Statute of Frauds — Quantum Meruit.*]—Held, following Giles v. McEwen, 11 Man. R. 150, that where a contract of hiring is not enforceable by reason of the Statute of Frauds, inasmuch as it was not to be performed within a year of the making thereof, the servant is entitled to recover on a quantum meruit where he is dismissed without justifiable cause. Justifiable grounds for dismissal discussed. *Rose* v. *Winters* (Wetmore, J., 1900), p. 353.

**Master and Servant's Ordinance**—*Non payment of Wages — Counterclaim by Master— Production*]—On the hearing of a complaint before a Justice of the Peace, under the Ordinance respecting Masters and Servants (C. O. 1898 c. 50), by a servant against his master for non-payment of wages, the Justice has no jurisdiction to allow against the amount of wages any sum by way of damages sustained by the master by reason of the servant's neglect or refusal to perform his duty. *Brown* v. *Craft* (Richardson, J., 1901), p. 461.

*See* PRACTICE, 11.

**MISNOMER.**

*See* PRACTICE, 9.

**MISTAKE OF LAW.**

*See* COUNSEL FEES—SHERIFF.

**MORTGAGE.**

*See* PRACTICE 4.

**MUNICIPAL LAW.**

**Manicipal Ordinance**—*Money By-law—Debentures, Form of — Practice—Stated Case — Parties — Lieutenant-Governor in Council.*]—A by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures are to run, and for the same is being met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is not in accordance with the Municipal Ordinance, (C. O. 1898, c. 70), and that for that reason the Lieutenant-Governor in Council is warranted in withholding his assent thereto. (But see now Ord, 1901, c. 23, s. 9, amending s. 218 of the Mun. Ord.:—Quære, whether the Lieutenant-Governor in Council can be a proper party to a cause or matter, and therefore whether the Court should entertain a stated case to which the Lieutenant-Governor is a party. *In re Edmonton By-law* (Ct., 1900), p. 450.

*See* CONSTITUTIONAL LAW — LAND TITLES, 1

**NEGLIGENCE**

*See* PARENT AND CHILD.

**N. W. M. POLICE.**

*See* PROHIBITION.

**PARENT AND CHILD.**

**Detinue**—*Trover—Negligence — Parent and Child.*]—A lad borrowed a horse from a person from whom his father had forbidden him to borrow horses. On the son reaching home with the horse, his father told him to tie it up, with the intention that his son should, when through his work, return it. On his father attempting to untie

the horse for the purpose of his son returning it, it broke away and was lost, and the father made no effort to find it:—Held, the father was not liable to detinue or trover, or in an action for negligence. *Kirkland* v. *Rendernecht* (Wetmore, J., 1899), p. 195.

## PARTNERSHIP.

*See* PRACTICE, 8 — PRINCIPAL AND AGENT, 1.

## PRACTICE.

**Speedy Judgment**—*Rules 103 and 104—Abridging Time for Return of Summons.*]—Notwithstanding the provisions of Rule 548 a Judge has no power to abridge the time for the return of a summons for speedy judgment taken out under Rules 103 and 104 of the Judicature Ordinance. *Toronto Railway Company* v. *Bain* (Scott, J., 1899), p. 28.

**Practice** – *Contempt of Court—Attachment—Examination for Discovery—Production.*]—Held, (1) that an attachment can be issued for contempt in not producing documents for inspection on an examination for discovery, an order for production for inspection has to be made, (2) that an order for production of books for inspection must state the time, or time after service thereof, within which the books are to be produced, and the copy thereof served must be indorsed with notice of the consequence of neglect or refusal to obey the same. *Smith* v. *McKay* (Ct., 1899), p. 202.

**Discovery** — *Action for Wrongful Dismissal and Libel—Relevancy.*]—The plaintiff had, as a member of the Medical Board of the defendants, recommended a certain woman as a nurse, and she was employed by the defendants. Subsequently the defendants having been informed that the plaintiff had introduced the woman under an assumed name, and had previously been living in adultery with her, dismissed the plaintiff from their Medical Board and withdrew permission to him to deliver lectures to the nurses, by a resolution of their board of directors, in which the grounds of their action were stated to be that the plaintiff had "recommended as a nurse a woman who was not a fit and proper person for the position, and had in doing so done injury to the hospital, and for other reasons" not specified in resolution. The plaintiff sued for wrongful dismissal and for libel. In their defence the defendants set up that the alleged libel was privileged and that they had received information to the effect that the plaintiff had been living in adultery with the woman in question some time previous to his appointment. Upon his examination for discovery, the plaintiff was asked several questions as to his former relationship with the woman. These he refused to answer. Upon an application to compel him to answer:—Held, that the plaintiff was bound to answer all questions the answers to which would tend to show whether or not the woman in question was or was not a fit and proper person to be employed as a nurse, even though the facts sought to be proven had occurred previously to the plaintiff's appointment, and that evidence tending to show that the woman had been living in adultery or leading an immoral life was evidence bearing on that issue, especially as the adultery was alleged to have been committed with the plaintiff himself, and he would therefore be aware of it and of the fact that the woman was not a fit and proper person when he recommended her appointment. *Ings* v. *Calgary General Hospital* (Scott, J., 1899), p. 58.

**Practice**—*Pleading—Striking Out—Point of Law—Particulars—Estoppel—Deed Absolute in Form but in Reality a Mortgage—Admissibility of Evidence—Character of Evidence.*]—A pleading cannot be struck out on summary application on the grounds that it is bad in law, unless it discloses no reasonable cause of action or answer (R. 151), or is so framed as to prejudice, embarrass or delay the fair trial of the action (R. 127), but the opposite party may raise the point of law under Rule 149, or the Court or Judge may direct the question of law, if there appear to be one, to be raised by special case or in such other manner as the Court or Judge may deem expedient; or semble, the opposite party may take the point at the trial, though it has not been otherwise previously taken. Even assuming that English order 19, r. 6 (Mar. R. 202), is in force, before an application to strike out a pleading for want of particulars can be made, an application must first be made for further and better particulars under R. 212. Upon such an application, the Judge may impose the term that if the

particulars ordered are not furnished, the pleading shall be struck out. Where the statement of claim set up a case for reformation of a document on grounds other than that of fraud and by the reply fraud was set up, it was held that the reply was bad in law, under Rule 117 as being a departure:—Held, as against the objection that the plaintiff was estopped by the recitals and other statements in the deed, of which he sought reformation, that parol evidence, to show that a conveyance absolute on its face was intended to take effect as a mortgage only, is admissable, but that such evidence must be of the clearest, most conclusive and unquestionable character. The evidence on the plaintiff's behalf was in this case held to be sufficient to establish the plaintiff's case. *Boardman* v. *Handley* (Wetmore, J., 1899), p. 266.

**Practice**—*Place of Entering Suit—District of Deputy Clerk*]—In a small debt action where the cause of action arises within the district of a deputy clerk, and the defendant resides within the said district, the writ must be issued out of the office of the deputy clerk of the district and a writ issued by the clerk of the district from his own office will be set aside as irregular. *Sharples* v. *Powell* (Rouleau, J., 1899), p. 94.

**Practice**—*Commission to take evidence of Witnesses Abroad—Examination of Party Thereunder*]—Under a general commission to examine witnesses abroad on behalf of both parties, the witnesses intended to be examined not being named in the order or the commission, it is not permissible for the plaintiff to give his evidence before the commissioner, and, where the commission is opened at the trial, the plaintiff's depositions on being tendered in evidence will be rejected. *Wright* v. *Shattuck* (Rouleau, J., 1900), p. 317.

**Judgment**—*Sale of Lands thereunder—Setting Aside Judgment—Leave to Defend — Substitutional Service of Writ—Service on a Foreigner—Rights of Innocent Purchasers Under Judicial Sale.*]—The plaintiffs in 1896 issued a writ against the defendant company, and six individual defendants who were shareholders in the company, and in their statement of claim asked that the individual defendants be declared trustees for the defendant company of certain mining locations in Alberta; that the lands be sold under the order of the Court, and the proceeds applied in payment of the plaintiff's claim against the defendant company under a prior judgment which was still unsatisfied. Healy, one of the defendants, was a foreigner and resided out of the jurisdiction. An order for the substitutional service of the writ by pre-paid registered letter was obtained, but the writ, as a matter of fact, never came to his notice; judgment was entered in default of defence against all the defendants, the lands were sold to one Sills, the sale was confirmed by an order of the Court and a certificate of title was issued by the registrar to Sills, under the Court's direction. On an application in June, 1899, by the defendant Healy, to have the judgment and sale set aside and for leave to defend upon the grounds: (1) that the material upon which the order for substitutional service had been made was insufficient; (2) that he had no actual notice of the proceedings under which the judgment had been pronounced (3) that the judgment had been fraudulently obtained; (4) that notice of the writ, and not a copy of it, should have been served upon him:—Held, (1) that the material upon which the order for substitutional service had been made was sufficient. (2) That the alleged fraud had not been proven. (3) That following Moore v. Martin, 1 N. W. T. R. pt. 2, p. 48; 1 Terr. L. R. 236, the service of the writ itself upon Healy, though a foreigner, and out of the jurisdiction, was neither a nullity nor irregular, inasmuch as the form of writ provided in the Territories is itself a notice. (4) That although Healy had no actual notice of the proceedings, yet a substitutional service was affected in the mode prescribed in the order, and the order was made on sufficient material, the Court had jurisdiction to deal with his interest in the property; that the purchaser Sills was not bound to ascertain that the substitutional service provided for had the effect of bringing the proceedings to the notice of Healy, and that the purchaser's rights should not therefore be disturbed. (5) That as Healy had disclosed a defence upon the merits, he should be allowed in to defend upon giving security for the plaintiff's costs. *Conrad et al.*, v. *Alberta Mining Company, Limited, et al.* (Scott, J., 1900, Ct. 1900), p. 322. Affirmed on appeal to court in banc (Ct. 1900), p. 412.

**Third Party Notice**—*Service out of the Jurisdiction—Partners Carrying on Business out of the Jurisdiction—Amendment — Irregular Affidavit.*]—After service of the writ the defendant

applied for and obtained under Rule 60 (J.O. 1898), leave to issue and serve ex juris a third party notice on the P. P. Co., on a partnership carrying on a business without and not within the Territories. The notice was directed to them under that name and not to the several partners as individuals, and was served upon an officer of the partnership, and not upon any of the partners individually:—Held, (1) that the order giving leave to issue the third party notice to a firm not carrying on business within the jurisdiction, in the firm's name, was not authorized under Rule 60; (2) that such a notice must be personally served upon the members of the firm. Where the firm does not carry on business within the jurisdiction amendment of the proceedings was allowed. An affidavit incorrectly intituled was, under the authority of Rule 306 J. O. 1898, received and filed. *Imperial Bank of Canada* v. *Hull* (Scott, J., 1900), p. 331.

**Replevin** —*Affidavit— Bond—Misnomer — Sureties — Justification — Chamber Summons.*]—On an application to set aside a writ of replevin on the following grounds: (a) the affidavit upon which the writ issued was sworn before the issue of the writ of summons in the action; (b) the replevin bond was executed before the issue of the writ of summons; (c) there was a misnomer of the defendant in the affidavit, writ and other proceedings; and (d) there was but one surety in the replevin bond; the application was dismissed. Such an application was properly made by summons under R. 458 of the Judicature Ordinance (C. O., 1898, c. 21). An affidavit of justification on a replevin bond is not necessary. *Marcy* v. *Pierce*, No. 1 (Wetmore, J., 1900), p. 186.

**Examination for Discovery** — *Production of Documents.*]—In an action against some of the members of an unincorporated Musical Society for infringement of the copyright of a musical composition, the secretary-treasurer, one of the members sued, stated in his examination that he had taken minutes of meetings of the members of the society at which proceedings took place, relating to the performance of the composition in question, and that he had handed these and other documents referring to the same matters to the advocate for all the defendants: — Held, against the objection that this defendant was not bound to produce these documents because they concerned persons other than the defendants, viz., the members of the society, not sued,—that this defendant was bound to produce them. It is not a ground for resisting production that a person, not before the Court, has an interest in the document. *Carte* v. *Dennis, et al.* (Richardson, J., 1900), p. 357.

**Small Debt Procedure** —*Claim or Demand for Debt—Claim for Wrongful Dismissal—Setting Aside or Allowing the Proceedings to Stand.*] — A claim by a servant hired by the month against his master for wrongful dismissal in the middle of the month does not fall within the meaning of the words "all claims and demands for debt" in the Judicature Ordinance, 1898, and proceedings to recover the same cannot be taken under the small debt procedure. Where, however, the plaintiff has brought an action for such a claim under the small debt procedure, and it appears that the defendant has not been in any way prejudiced, the Court or a Judge will under the power given by Rule 538, direct that the writ of summons and the service thereof, shall stand, but that the action shall continue as an action, under the ordinary procedure. *McNeilly* v. *Beattie* (Scott, J., 1900), p. 360.

**Practice** —*Writ of Summons—Foreign Corporation—Agent —Service.*]—A writ of summons for service within the jurisdiction was, with the service thereof, set aside, where it appeared that the defendant was a foreign corporation, having no agent within the jurisdiction, who could be served. *Ehman v. The New Hamburg Manufacturing Company* (Richardson, J., 1900), p. 363.

**Writ of Summons** — *Small Debt Procedure—Failure to Serve—Writ of Summons—Expiry— Abatement—Alias Writ of Summons—Limitation of Actions.*]—A writ of summons (under the small debt procedure) had been issued in an action on a debt before the period, after which it would become barred by the Limitations Ordinance, has expired; it was, however, never served;

but after the expiry of the period fixed by the Ordinance an alias writ of summons was issued:—Held, in view of the provisions of Rule 542 of the Judicature Ordinance (C. O. 1898, c. 21), the issue of the alias writ of summons prevented the operation of the Limitations Ordinance, and that therefore, the Ordinance afforded no defence to the action. *Curry* v. *Brotman* (Wetmore, J., 1900), p. 369.

**Practice** —*Service of Writ of Summons Ex Juris on a Foreigner—Writ or Notice—Setting Aside Order for Service—Bona Fide Purchaser Under Decree of Court—Protection of.*]— The question in what circumstances and to what extent provisions in the Rules under the English Judicature Act are to be held incorporated with the Judicature Ordinance discussed. English Order XI. (Marginal Rules, 64-70), is not in force in the Territories. The Judicature Ordinance, 1893, s. 32, authorizes an order for the service of a writ of summons ex juris, though the party to be served is not a British subject, and the order should provide for service of the writ of summons, not of a notice thereof. See Ordinances, 1901, c. 10, s. 12, striking out "commanded" in the form of writ and substituting "notified." Judgment of Scott, J., reported ante p. 322, on this and other points affirmed. *Conrad et al.* v. *The Alberta Mining Co., Ltd., et al.* (Ct., 1900), p. 412.

**Practice** —*Evidence on Commission or Order—Special Examiner—Appointment of Person or Office-holder—Successor in Office—Authority to take Depositions — Irregularity — Suppression.*]—An order appointed "E.K.A., of Neihart, Montana, U. S. A., a Justice of the Peace," a special examiner to take the depositions of certain witnesses; the depositions were in fact taken by one G.P.M., a Justice of the Peace, it appearing that E.K.A. had ceased to hold office, and that G.P.M. was his successor in office. An agent for each party appeared on the taking of the depositions, and it did not appear that any objection was made to G.P.M. taking the depositions:—Held, that the depositions were taken by G.P.M. without authority, and, therefore, could not be used in evidence. Held, also that the depositions being taken without authority and being not merely irregular, a substantative motion to suppress was not necessary and that the objection could be taken upon their being tendered in evidence. *Claverie et al.* v. *Gory, Pagnac v. Glaverie* (Scott, J., 1901), p. 470.

Examination of witness refusing to make affidavit—See AFFIDAVIT.

Action by plaintiff in two different capacities—See SOLICITOR AND CLIENT, 2.

Severing defences — See SOLICITOR AND CLIENT, 3.

*See* ELECTION (TERRITORIAL), 2 — SOLICITOR AND CLIENT, 1.

## PRINCIPAL AND AGENT.

**Principal and Agent** —*Partnership—Evidence —Admissions— Credibility of Witnesses—Finding of Trial Judge — Ratification — Consideration —Estoppel.*]—O. purchased goods from the plaintiff on the credit of a partnership, which he represented to the plaintiff existed between himself and the defendant. The trial Judge (Rouleau, J.), on contradictory evidence of the statements and conduct of the defendant after the goods were supplied, accepted the plaintiff's version of what took place, and held that the admissions of the defendant established a partnership. On appeal, the Court in banc, while feeling bound to accept the trial Judge's view as to the credibility of the witnesses was of opinion that the evidence did not establish a partnership, but established a ratification by the defendant. Per curiam: A ratification is not a contract; it is the adoption of a contract previously made in the name of the ratifying party, it requires no consideration to support it. The dissenting judgment of Martin, B., in Brook v. Hook, L.R. 6, Ex. 89, must be taken as an accurate statement of law. Scott v. The Bank of New Brunswick, 23 S.C.R. 277, followed. A statement by T., made after the goods were supplied, that he and the defendants were partners, would not, though a "holding out" to the same effect made before the goods were supplied would, constitute an estoppel. *Grady* v. *Tierney* (Rouleau, J., 1899, Ct., 1899) p. 133.

**Principal and Agent** —*Crown — Contract—Liability of Agent—Extrinsic Evidence.*]—The defendant,the principal of an Industrial School, an employee of the Dominion Government,

entered into and signed in his own name a written agreement engaging the plaintiff for a certain period in a certain employment. The factory in which the plaintiff was employed being destroyed by fire, and the plaintiff thrown out of employment, he sued the defendant for wrongful dismissal: — Held, that evidence of the capacity in which the defendant entered into the agreement and the other surrounding circumstances was admissible. It appearing that the defendant acted merely as agent for the Government:—Held, that the defendant was not liable. *Bocz* v. *Hugonnard* (Richardson, J., 1899), p. 69.

**Implied Warranty of Title.**] — A person who enters into a contract, expressly as agent for a principal impliedly warrents his authority; and if he has in fact no such authority he may be sued under that implied contract, and is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. Collen v. Wright, 27 L.J.Q.B.215, followed. *Coit v. Dowling, et al.* (Rouleau, J., 1901), p. 464.

*See* COMPANY — COUNSEL FEES—ELECTION (DOMINION)—PRACTICE, 12—SALE OF GOODS, 2.

## PROHIBITION.

**Prohibition** — *N. W. M. P. Act, 1894—Expiration of Period of Service—Pass, Issue and Cancellation of—Discharge from Force—N. W. M. P. Officers as Magistrates — Disqualification by Interest or Bias from Trying Deserter—Writ of Prohibition, Premature Application for.*]—A constable in the N. W. M. Police, whose term of service would expire in six days, applied to the superintendent commanding the post for six days' leave of absence. The superintendent approved of the application, and appointed a board to verify and record the service of the constable, who delivered up his kit and signed a receipt in which it was stated that he had been settled with to the end of his term of service. The board made a favourable report, post-dating it six days, to the ordinary form of which were added the words, under the head of "Remarks of Board and Commissioner:" "term of service having expired, he is discharged." The pass for the six days' leave of absence was issued but not delivered to the constable, and a cheque for the balance of his pay was being prepared when the superintendent revoked the pass and ordered the constable to be notified that his pass had been revoked, the board's report cancelled, and the issue of the cheque for the balance of his pay refused; and he was ordered to continue in duty for the remaining six days of his term of service. The constable refused to obey the order to continue in duty, and absented himself from his quarters and duty, remaining absent without further leave. Proceedings for his arrest and trial under s. 18 of the "N.W.M. Police Act, 1894," being about to be taken, a summons for a writ of prohibition was taken out:—Held, per Rouleau, J., (1) That the superintendent had no authority to cancel the pass. (2) That the board having signed the constable's discharge and his pass for six days leave of absence having issued, the superintendent had no power or authority to cancel these proceedings, and that the constable had ceased to be a member of the police force. (3) That an intention on the part of the superintendent to proceed to arrest and try the constable as a deserter, it was a fair open case for the issue of a writ of prohibition to all officers of the N.W.M. Police, prohibiting them from proceeding to do so. On appeal to the Full Court in banc, held per curiam, reversing the judgment of Rouleau, J.: (1) That the pass was revocable; (2) that the superintendent had authority to cancel proceedings of the board, and that such pass and proceedings having been cancelled, the constable was still a member of the force. Held, also, per curiam, that as the officers mentioned in s. 18 of the "N. W. M. Police Act, 1894," had jurisdiction to try a constable on a charge of desertion, and it had not been established that they were disqualified by interest of bias, the writ of prohibition should not have been granted. Per McGuire, J. (1) No charge in writing having been laid against the constable, as provided by s. 18, s.-s. 2, there was no suit or matter pending and prohibition was consequently premature. (2) That the Court constituted by s. 18 of the "N. W. M. Police Act, 1894," was the proper tribunal to decide the questions whether or not at the time the alleged offence was committed the con-

stable was a member of the police force; and whether or not while such a member he deserted, and further had jurisdiction to enter on the trial of the accused, and prohibition should not have issued unless and until that Court had acted wrongly in reference to these questions. *In re Netleship*: Rouleau, J., 1899, Ct., 1899), p. 148.

## PUBLIC OFFICER.

*See* SHERIFF.

## RATIFICATION.

*See* COMPANY—PRINCIPAL AND AGENT, v.

## REPLEVIN.

*See* PRACTICE, 9.

## SALE OF GOODS.

**Sale of Goods**—*Bailment—Grain—Grain Tickets—Extrinsic Evidence—Alterations in Documents.*]—Plaintiff delivered wheat to the defendants, millers, from time to time, receiving on delivery, tickets of which the following is a sample: "22-11" (date) "H. L. Cargo, 85 B. Wht. J. & E. K." (defendants' miller). Plaintiff alleged a sale of the whole; defendants a purchase of a part of the wheat delivered and a bailment of the remainder:—Held, that the tickets shewed delivery only and that the questions of sale or bailment must be determined by extrinsic evidence. On the evidence the trial Judge found for the defendants. The effect of alterations in documents discussed. *Cargo* v. *Joyners* (Richardson, J., 1899), p. 64.

**"Sale of Goods Ordinance"**—*Sections* 6, 19, 20—*Acceptance and Delivery—Principal and Agent— Statute of Frauds.*]— Per Rouleau, J.,— That, on the evidence the plaintiff gave credit solely to the defendant, and that, therefore he was personally liable, though it was stated in evidence that he was a director of a mining prospecting company, and it was contended that he acted only as agent for the company; the trial Judge being, however, of opinion that there was no sufficient evidence of the incorporation of the company. In an action for the price of 43 head of horses at $23 per head, the evidence established that the plaintiff and defendant drove to the plaintiff's ranch and saw the plaintiff's bunch of horses; that the defendant specified such horses as were unsuitable for his purpose, which were thereupon marked and separated from the others; that the defendant gave the plaintiff $3 with which to purchase oats to feed the horses, and also bought and gave the plaintiff some rope with which to make halters for the horses; but that the horses never left the possession of the plaintiff: Held, reversing the judgment of Rouleau, J., without dealing with the other points, that there was not such an actual receipt by the defendant of the horses as to establish a contract binding under s. 6 of the Sales of Goods Ordinance. *Livingstone* v. *Colpitts* (Rouleau, J., 1900, Ct. 1900), p. 441.

**Sale of Goods and Lands**—*Entire Contract—Passing of Property—Dominion Lands Act—Assignment of Unrecommended Homestead—Void Assignment.*]—Plaintiff signed a written memorandum as follows: "I hereby agree to sell and make and execute the necessary papers to convey all my right, title and interest in (describing his homestead for which he had not been recommended), also (3 horses, a wagon and a plow), and any other implement or chattel of which I am now the owner to (the defendant) for the sum of $480 to be paid as soon as the necessary papers are executed." The defendant, without the plaintiff's knowledge, took possession of the horses; the plaintiff immediately objected to this. The plaintiff sued for conversion, and the defendand counterclaimed for damages for breach of the agreement:— Held, (1) That the contract was an entire one, and that, according to its terms, the property in the personal property would vest only on a proper conveyance of the land. (2) That the agreement, being one for the assignment of an unrecommended homestead was void, and that, although an agreement may be void in part, yet this being an entire contract was wholly void. Judgment was therefore given for the plaintiff for damages for conversion of the horses; and the defendant's counterclaim for damages for breach of the agreement was discussed. *Flannaghan v. Healey* (Wetmore, J., 1900), p. 391.

**Sale Upon Condition**—*Waiver of Condition—Passing of Property—Detinue—Demand and Refusal.*] — The plaintiff sold to the defendant his one-half interest in a heifer named Irene, and registered as a thoroughbred, the

defendant already being owner of the other half. The defendant subsequently charged the plaintiff with having wrongfully secured the registration of the heifer as a thoroughbred when, as he claimed to be the fact, she was not. The charge was laid before the Executive Committee of the Dominion Short Horn Breeders' Association at Toronto. The parties then entered into a written agreement, which provided: (1) That the heifer should be resold to the plaintiff at a certain price, (2) that on payment of the price the heifer was to become the property of the plaintiff, (3) that the defendant agreed to withdraw the charge above referred to, and upon all proceedings in respect to it being dropped by the Association the "foregoing part" of the agreement was to be carried out. The defendant did not withdraw the charge, nor were the proceedings dropped. The plaintiff twice tendered the purchase price of the heifer to the defendant, which was refused. He then, without making a formal demand for the heifer, sued the defendant in detinue:—Held, that, as the condition contained in the third clause of the agreement was inserted for the plaintiff's benefit, he could waive it; that he had waived it, by proffering payment; that on refusal to accept the price, the defendant became ipso facto the wrongful detainer of the heifer; that a demand and refusal was therefore not essential to the plaintiff's right of action, and that the plaintiff was, therefore, entitled to succeed. *Wright* v. *Shattuck* (Rouleau, J., 1901), p. 455.

**Bank Act** — *Bill of Lading with Draft Attached—Surrender of Bill of Lading Before Acceptance of Draft — Right to Examine Goods—Liability of Drawee— Amendment of Pleadings — Costs.*]—Held, (1) Where a consignor of perishable goods draws through a bank upon the consignee at sight for the amount of the contract price and attaches the bill of lading to the draft consignee was entitled to examine the goods before accepting them or paying the draft. (2) If it is necessary to obtain the bill of lading from the bank and surrender it to the carriers in order to make the examination the fact that the consignee does so, and thereby makes it impossible to return the bill of lading to the bank does not render him liable to pay the draft. (3) Under s. 73 of the Bank Act the bank has no other or higher rights that the consignors. (4) The fact that the bank indorses the bill of lading to the consignee in order to enable him to examine the goods does not transfer the right of the property in them to the consignee, and if the latter deals with the goods as his own by reshipping and selling them he becomes liable to the bank, in an action for conversion, therefore, the bank, in such circumstances, sued for the amount of the draft, and the defendant pleaded that a large portion of the goods were worthless, and paid into Court, the invoice price of the portion sold by him, and it appeared in evidence that the portion unsold were absolutely worthless, the Court directed an amendment of the statement of claim so as to make it an action of detinue, and gave judgment for the amount paid into Court, but without costs. *Imperial Bank v. Hull* (Rouleau, J., 1901), p. 498.

## SALE OF LANDS (JUDICIAL)

*See* PRACTICE, 4, 14.

## SCHOOL LAW.

*See* ASSESSMENT AND TAXATION, 1—CONTRACT, 1.

## SEAMEN.

*See* MARITIME LAW.

## SHERIFF.

**Sheriff** — *Execution Seizure under direction of Advocate — Advocate's Liability to Indemnify—Sheriff's Fees —Illegal Charges— Recovery Back — Mistake of Law.*]—Where, by direction of the advocate for an execution creditor, the sheriff had seized and advertised for sale certain lands under the writ of execution, as being the property of a third party, and the third party recovered a judgment against the execution creditor, and the sheriff for the costs of an action to clear his title from the cloud created by the seizure and to enjoin the sale:—Held, that the advocate was bound to idemnify the sheriff, and, therefore, in an action by the sheriff claiming indemnity against the advocate, the execution creditor being made a party defendant, the advocate was ordered to pay the execution creditor direct the amount owing on the execution against the sheriff. The same advocate had acted for the sheriff in defending the action of the third

party against him, and the execution creditor. Held, that, inasmuch as the advocate was bound to idemnify the sheriff for all damages he had sustained, by reason of his direction to seize, the advocate could not recover his costs against the sheriff. Judgment of Rouleau, J., affirmed. (Reversed on appeal, 31 S.C.R. 615.) An advocate in the course of his practice had paid the sheriff many items of charges for sheriff's fees, on and in connection with writs placed in his hands, which it was afterwards discovered the sheriff was not entitled to charge. The advocate sued for the aggregate amount. Held, that these moneys having been paid under a mistake of law could not be recovered back. (Affirmed on another ground, *Ib.*) *Robertson* v. *Taylor* (Rouleau, J., 1900; Ct., 1901), p. 474.

## SITUS.

*See* ASSESSMENT AND TAXATION, 1.

## SOLICITOR AND CLIENT.

**Taxation of Advocate's Bill** — *Leave to Sign Judgment—Clerk's Certificate—Review of Taxation — Time for Review.*]—Where a client has obtained an order in the usual form for the taxation of an advocate's bill of costs upon which he has been sued and for a stay of the action pending the taxation, although he has made no submission to pay the amount found due, the advocate after the taxation is ended and the clerk's certificate signed, is entitled to an order giving him leave to sign judgment against the client for the amount found due. The certificate of the clerk is final and conclusive as to the amount due to the advocate unless an application be made for a review of the taxation under s. 529 of the Judicature Ordinance, 1893. That section applies to taxations between solicitor and client as well as between party and party. There is no necessity for an application on behalf of the advocate to confirm the certificate of the clerk as a report. The clerk's certificate is not a report and need not first be set aside before the application for a review, and the intention of s. 529 is that a review thereunder should be had after the clerk's certificate has been signed. Since the repeal of s.-s. 7 of s. 491 of the Judicature Ordinance 1893, there is no provision in our rules as to the time within which a review of taxation can be made, and therefore the provisions of English Order 65, Rule 27, (41), so far as they relate to the time within which an application to a Judge for a review shall be made are now in force in the Territories by virtue of s. 556 of the Judicature Ordinance, 1893. Where the time for review has expired, the Judge has power under s. 555 in a proper case to extend the time for making the application for review. *In re McCarthy, McCarthy* v. *Walker* (No 2) (Scott, J., 1899), p. 1.

**Advocate's Bill**—*Review of Taxation—Two Actions by the same Plaintiff in Different Rights— Consolidated —Proceedings taken without Instructions — Retainers — Commission.*] — English Marginal Rule 192 provides that claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator. Where separate proceedings were taken by plaintiff's advocate upon two mortgages, one made to the plaintiff in her personal capacity, and the other made to a deceased person, of whose will the plaintiff was executrix, and the plaintiff, on taxation at her instance of the advocate's bill of costs, failed to show that the claim upon the first mentioned mortgage arose with reference to the deceased's estate, the advocate was held entitled to charge his client, the plaintiff, with separate bills of costs in respect of each of the separate proceedings. Where proceedings for the sale of property in question in mortgage actions were postponed from time to time upon the solicitation of the mortgagor, and without instructions or consent of the plaintiff, the mortgagee, for the purpose of enabling the mortgagor to raise the necessary money to pay off the mortgage debt, and where these successive postponements resulted in securing for the mortgagee a larger sum than could have been realized by a forced sale, and the mortgagee accepted the benefit thus secured for her, she was held liable to pay to her advocate the costs and expenses incurred in connection with the various postponements. Where the order for taxation of an advocate's bill of costs, obtained at the instance of the client, did not reserve to the client the right to dispute retainer:—Held, that the retainer must

be taken to be admitted, and where in such a case the advocate had stated in writing that he did not intend to charge anything for certain proceedings taken without special instructions, but it appeared that the statement was made without consideration, the advocate was allowed his costs of such proceedings. Upon the taxation of the advocate's bill of costs no counsel fee should be allowed in respect of an application made by a clerk of the advocate, and evidence should be given on the taxation that the application for which a counsel fee is asked were in fact made by an advocate. An application to postpone a sale is a common application for which $2 only should be allowed. Upon the taxation of his bill the advocate will not be allowed a lump sum as commission upon a collection made for his client unless such evidence is produced before the taxing officer as will enable him to ascertain that the commission represents reasonable and proper charges for services actually rendered. *In re McCarthy, McCarthy* v. *Walker* (No. 3) (Scott, J., 1899), p. 9.

**Costs**— *Taxation —Review—Severing Defences—Setting Aside Judgment —Fi. fa. Lands—Examination for Discovery—Admissibility of.*]—Where an action is tried against two or more defendants and any defendant separates in his defence, and the judgment is against all the defendants, the law is that each of them is liable for the damages awarded by the judgment; and each of them is liable to the plaintiff for all costs taxed by him as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can be a defence for that defendant only as distinguished from the other defendants. The foregoing rule laid down in Stumm v. Dixon, 22 Q.B.D. 99, 529, an action for tort, was held applicable to an action on a contract. In an action against two joint makers of a promissory note, who, though they set up substantially the same defence, severed in their defences:—Held, that on the taxation of the plaintiff's costs, the following items should be allowed as against both defendants: (1) costs of a concurrent writ of summons against one of the defendants; (2) Costs occasioned by the separate defences of each defendant; (3) costs of the examination for discovery of one of the defendants although as the other defendant had not been notified of the intention to hold the examination, the depositions were not admissible in evidence against him. Where a judgment by default was set aside, and the defendant was given leave to defend on payment of costs. Held, that the defendant was liable to pay the costs of a fi. fa. lands issued concurrently with a fi. fa. goods. *Lougheed* v. *Parrish and McLean* (Scott, J., 1899) p. 54.

*See* COUNSEL FEES—SHERIFF.

## STATUTE OF FRAUDS.

*See* MASTER AND SERVANT, 3 —SALE OF GOODS, 2.

## SUBROGATION.

*See* ATTACHMENT OF DEBTS, 1.

## TAX SALE.

*See* LAND TITLES, 4.

## TENDER.

*See* CRIMINAL LAW, 1.

## TIME.

*See* APPEAL—PRACTICE, 1.

## TRADE-MARK.

**Trade-Mark**— *Infringement— Use of Similar Name—Misrepresentation — Injunction to restrain—Secondary Evidence — Inconvenience in Producing Primary Evidence.*]—The plaintiff, a chemist and druggist, manufactured and sold certain pills put up in paper boxes, labeled in red ink "Simpson's Kidney Pills," which name was registered as his specific trade-mark, and these pills were extensively advertised by him. He began the manufacture of them under this name in 1893, but did not obtain the registration of his trade-mark until 1898. The defendant, also a chemist and druggist, in 1897, ordered three dozen bottles of kidney pills from a wholesale house which had been for some time manufacturing and selling in bottles labeled "Buchu Juniper Kidney Pills," and in his order directed the firm to label the bottle "Simpson's Buchu Juniper Kidney Pills, the original," which was accordingly done, the name being printed on the label in

blue ink and the defendant's name and address being also printed on the label in smaller type in red ink. Defendant sold these pills and on several occasions sold them as Simpson's Kidney Pills advertised,no other such pills were advertised in the locality except those advertised by the plaintiff. The only bond of resemblance between the boxes sold by the plaintiff and those sold by the defendant was in the use of the name "Simpson"; in respect to size, shape and style of printing on the labels they were easily distinguishable. It also appeared that long prior to the registration of the plaintiff's trade-mark the name "Simpson" had, in 1873, been registered by one J. B. Simpson in connection with medicinal pills, and the name was, at the time of the plaintiff's application for registration, owned by one S., who had, however, consented to the plaintiff's registration. The pills sold by S. under the name of "Simpson's" were not intended or advertised as a remedy for kidney complaints, but for other diseases. The plaintiff had in his advertisements published fictitious testimonials from persons alleged to have derived benefit from the use of his pills, and had upon certain occasions advertised himself merely as the agent for "Simpson's Kidney Pills:"—Held, that the fact that the word "Simpson" had been, previously to the plaintiff's registration, used and registered as a trade-mark for pills as a cure for one complaint, did not disentitle the plaintiff to obtain registration of the name as a trade-mark, for pills to cure another ailment, but the registration was therefore good. Held, also, that the fact that the name "Simpson" was entirely fictitious and was not the name of the real manufacturer, did not constitute any such misrepresentation as would disentitle the plaintiff to an injunction. Held, also, following Ford v. Foster, 41 L.J. Ch. 682; L. R. 7 Ch. 611; 27 L. T. 891; 20 W. R. 818; that only misrepresentations contained in the trade-mark itself will disentitle the plaintiff to an injunction, and that therefore the fictitious testimonials published by the plaintiff were not such misrepresentations as would defeat his right. Semble, also, that the prior user outside of Canada of the word "Simpson" in connection with kidney pills was not sufficient to disentitle the plaintiff to its exclusive use within Canada. Held, also, upon the evidence that the defendant had adopted the word "Simpson" wilfully, and solely to induce the public to believe that the pills he sold were those advertised by the plaintiff, and that therefore the plaintiff was entitled to an injunction, with costs. One of the defendant's witnesses stated that he had in the year 1891 seen the name "Simpson's" Kidney Pills inscribed upon a wire door mat in London, England. This evidence was objected to on the ground that it was secondary evidence and that the door mat itself should be produced. Held, that the evidence should be admitted, because the production of the door mat would be highly inconvenient. *Templeton* v. *Wallace*: (Scott, J., 1900), p. 340.

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## TRANSFER ABSOLUTE IN FORM.

*See* PRACTICE, 4.

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## TRIAL.

*See* PRINCIPAL AND AGENT, 1.

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## TROVER.

*See* PARENT AND CHILD.

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## ULTRA VIRES.

*See* CONSTITUTIONAL LAWS— LIQUOR LAWS, 4.

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## UNCERTAINTY.

*See* LAND TITLES, 3.

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## WAGES.

*See* ATTACHMENT OF DEBTS, 2—MARITIME LAW — MASTER AND SERVANT.

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## WAIVER.

*See* CONDITIONAL SALE.