THE TERRITORIES LAW REPORTS

VOL. II.

(CITED: TERR. L. R.)

CONTAINING

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

INCLUDING

REVISED REPORTS OF ALL CASES HITHERTO REPORTED IN "THE NORTH-WEST TERRITORIES REPORTS."

EDITOR:

N. D. BECK, K.C.

PUBLISHED UNDER THE AUTHORITY OF THE LAW SOCIETY OF THE NORTH-WEST TERRITORIES.

TORONTO:
THE CARSWELL CO., LIMITED.
30 ADELAIDE ST. EAST,
1906.

TORONTO
PRINTED BY THE CARSWELL CO. LIMITED
28-30 Adelaide St. East.

TABLE OF CASES REPORTED

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CORRIGENDA.

Volume i., p. 286, line 21 should be deleted and there should be substituted: "caveat against the transfer by the owner of the land. If at"

Volume i., p. 290, line 25 should be deleted and there should be substituted: "stead Exemption Act, that the intention of Parliament was."

Volume i., p. 294, line 9, read "matter" for "master."

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

NORTH-WEST TERRITORIES.

VOLUME II.

LOUGHEED v. TARRANT ET AL.

Landlord and tenant—Surrender of lease—Sub-tenant—Liability of tenant for rent—Amendment.

Where a tenant by arrangement with his landlord secured another occupant for the premises, but was given to understand at the time that he would still be liable for the rent,

Held, that this did not amount to a surrender of the lease.

In order to constitute a surrender it must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee in the place and stead of the original lessee by the mutual agreement of the parties.

Held, also, that the fact that the landlord at the request of the tenant has issued a distress warrant against the sub-tenant is not sufficient to constitute a surrender by operation of law.

Amendment allowed so as to include a claim for additional rent which fell due after the commencement of the action.

[ROULEAU, J., *November 7th, 1893.*

Statement. Trial of an action before ROULEAU, J., without a jury, at Calgary.

The facts appear sufficiently from the judgment.

Argument. *G. A. McCarter*, for the plaintiff.

J. B. Smith, Q.C., for the defendants.

[*November 7th, 1893.*]

Judgment. ROULEAU, J.—The plaintiff claims $45 for three months' rent, alleged to be due by virtue of a certain lease under seal, dated 15th April, 1892.

Judgment.
Rouleau, J.

The plaintiff moved to amend his statement of claim by adding $15, making all $60, one month's rent having accrued since this action has been instituted. I reserved decision on that motion till after evidence should have been taken.

The defence in this case is shortly that the plaintiff allowed the defendants to quit the premises and accepted a surrender of their lease.

In *Thomas* v. *Cooke*[1] it was decided that the circumstances may constitute a surrender of the lease by operation of law. The acceptance of a subsequent lease by parol operates as a surrender of a former lease by deed. It must, therefore, be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law. In other words, anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises amounts to a surrender by operation of law. Also it must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee, in the place and stead of the original lessee, by the mutual agreement of all parties; for the mere change of the possession is no evidence of the grant and acceptance of a new lease, the *prima facie* presumption being that the incoming tenant has entered and taken possession as the under-tenant or assignee of the original lessee (Addison on Contracts, p. 645). Woodfall, at p. 304, says that the mere fact that the landlord has received the key, and attempted unsuccessfully to relet the premises, does not estop him from alleging that the tenancy still subsists, and if, afterwards, before the expiration of the term, the landlord relet, the surrender by operation of law takes effect from such reletting, and does not relate back to the receipt of the key. So it was held by the Court of Appeal in *Oastler* v. *Henderson*.[2]

I think I have carefully laid down all the law applicable to this case, and I will now review the facts. The defendants

[1] 2 B. & Ald. 119; 2 Stark 408; 20 R. R. 374. [2] 46 L. J. Q. B. 607; 2 Q. B. D. 575; 37 L. T. 22.

contend that the plaintiff released them from their agreement because, through his agent, he accepted another tenant. This is positively denied by the agent and by the plaintiff himself, who says that he told Tarrant, one of the defendants, in presence of O'Brien (the agent) that he would not release them from the lease. Tarrant himself, in cross-examination, admitted that he understood from the conversation with O'Brien that he would be still liable for the rent, even if he got another tenant. Then the following question was asked Tarrant: "Did you give O'Brien to understand that if Desormeaux took the place you would not be responsible for the rent?" He answered: "No, nothing said about that. He said before, if I got him a tenant he would let us out of the place." If Tarrant believed that he was released from all liability, why did he go in the middle of the night and get O'Brien to issue a distress for rent, and take it himself to Forest to get it executed? I think that he did so act for his own protection; and the fact that he got his landlord to issue a distress against a sub-tenant, is not in law sufficient to create a surrender by operation of law. The case of *Thomas* v. *Cooke*[1] is quite different. There the landlord accepted payment from the sub-tenant after distress with the assent of Cooke, and said that he would have nothing more to do with Cooke. The Court there considered that the lease was surrendered.

Judgment. Rouleau J

I cannot, therefore, come to any other conclusion than that the defendants are not released, and are still liable to pay the rent, according to their lease.

In order to avoid further costs I allow the motion for the amendment of the statement of claim, that is, the claim, instead of being for three months' rent, will be for four months' rent at $15 per month, being $60 instead of $45.†

Judgment for plaintiff shall, therefore, be entered for $60 and costs.

Judgment accordingly.

REPORTER :

Chas. A. Stuart, Advocate, Calgary.

†See Bourke v. Davis, 44 C. D. 110; 62 L. T. 34; 38 W. R. 167; Bray v. Gardiner, 56 L. J. Ch. 497; 34 C. D. 668; 56 L. T. 292; 35 W. R. 341. ED.

NEWSON v. McLEAN.

Practice—Jury—Verdict—Setting aside—Mis-direction—Non-direction—Questions to jury—Special or general verdict—Contract—Evidence—Consensus ad idem—Mistake.

The terms of a verbal contract were in question. The plaintiff and defendant being the only witnesses on the point, each swore positively to his version of the contract.

Counsel for each of the parties at the trial proposed certain questions, asking that they be submitted to the jury and objecting to the submission of the questions proposed by the other side.

ROULEAU, J., submitted both sets of question, but directed the jury that they were at liberty either to answer the questions and thus give a special verdict or to give a general verdict. The jury gave a general verdict for the plaintiff.

On a motion by the defendant to set aside the verdict,

Held, that the question of there being a mistake or no *consensus ad idem* did not arise, and that the verdict depended on the jury's view of the credibility of the parties, and that, therefore, the verdict should not be disturbed.

[ROULEAU, J. *July 17th, 1893.*

[*Court in banc, December 7th, 1893.*

Statement. The plaintiff and defendant had carried on separate businesses as druggists. Plaintiff, being about to retire from business, negotiated with defendant for the sale to him of his stock. Defendant agreed to purchase and the stock was delivered. When the parties came together to settle, a dispute arose as to prices. Plaintiff contended that all goods of a certain class were sold at one hundred cents on the dollar of his invoice price, that certain other goods were sold at fifty cents on the dollar of the price mentioned in the price list of a wholesale firm and the remainder were sold at fifty cents on the dollar of the plaintiff's invoice prices. The defendant's contention was that a certain portion of the stock was sold at one hundred cents on the dollar of defendant's regular invoice prices and all the other goods at fifty cents on the dollar of such price. According to defendant's prices the amount due to the plaintiff would have been $900. The defendant was to give his notes at four, six and eight months for the purchase money. He offered notes for $900, which plaintiff refused to accept. Defendant notified plaintiff that he was willing to carry out the agreement according to his version of it, and if that was not satisfactory he declared the

agreement at an end, and stated that he was ready to return the goods. Defendant set up alternatively mutual mistake in the contract as to prices. Statement.

The case was tried before ROULEAU, J., with a jury at Calgary on 17th July, 1893.

The only evidence of the contract was that of plaintiff and defendant.

Counsel for each of the parties proposed certain questions which they asked should be submitted to the jury, each objecting to those proposed by the other.

The learned Judge, in charging the jury, submitted both sets of questions proposed, but directed them that they were at liberty to give either a special verdict by answering the questions or a general verdict.

The jury returned a verdict "for plaintiff for the sum of $1,015.92, payable by three notes of equal amounts two, four and six months from date of judgment without interest."

Defendant moved to set aside this verdict, among other grounds, for misdirection. (*a*) Because the trial Judge, having left certain questions to the jury, directed them that they were at liberty to disregard the questions and render a general verdict, whereas they could not have rendered a general verdict without answering the questions. (*b*) Because he neglected to charge them that any general verdict they might render depended on their findings on the questions. (*c*) Because he omitted to charge the jury that if there was no *consensus ad idem*, or if there was a mistake between plaintiff and defendant as to the terms of the alleged contract, a verdict could not be rendered for plaintiff. (*d*) Because the verdict was perverse, unintelligible and unwarranted and against evidence.

The motion was argued on December 7th, 1893.

C. C. MacCaul, Q.C., for defendant. Argument

J. A. Lougheed, Q.C., for plaintiff.

[*December 7th, 1893.*]

WETMORE, J.—I am of opinion that there is nothing in this appeal, Mr. MacCaul having made the admission that if Judgment.

Judgment.
Wetmore, J.

the only real question to be left to the jury was upon the credibility of the witnesses,—that is, that if they believed the statement of the plaintiff their judgment should be for the plaintiff for $1,015.92, or that if, on the other hand, they believed the statement of the defendant, their judgment should be for the defendant for $900,—the learned Judge left the question properly to the jury. I think that is all there was in this case to be left to the jury. It was simply a matter of credibility. Here are the parties to the case, who are the only material witnesses called, apart from the evidence of the witness James, one party swearing to one statement and the other party swearing equally positively to another. That being so, the whole question was one of credibility, whether the jury would believe the plaintiff or the defendant, and the jury have seen fit to believe the plaintiff.

A good deal of authority was cited upon the question of the contracting minds of the parties, to show that there was not a *consensus ad idem*. I don't think that that question arises here. Taking the evidence of either party, there were consenting minds, their minds came to the one thing, the plaintiff swears distinctly that the bargain was that the goods were to be sold at his invoice prices, that that was the agreement, not that he understood it was, but that it was the agreement, that is, by that he must be taken to have been satisfied that that was the proposition and that it was accepted.

On the other hand, the defendant swears that the prices were to be according to *his* invoices; he doesn't say simply that that was his understanding of it, but that it was the agreement. Therefore how could the learned Judge have left to the jury the question whether there was *consensus ad idem*? He must have told the jury that, whichever evidence they believed, there was a *consensus ad idem*.

So again there is no evidence of mistake in this matter. The plaintiff and the defendant each state positively what the agreement made was, that that was the agreement made and assented to. Under these circumstances there could only be the same question left to the jury, that of the credibility of the witnesses.

Judgment.
Wetmore, J.

As to the verdict being against the weight of evidence, there are certainly some suspicious circumstances, such as the destruction of his invoices by the plaintiff.

It would be naturally supposed that, if the prices were to be regulated by them, he would keep them to produce to the defendant. But we are told that these are both respectable men, and the jury have heard their testimony and have seen the manner in which the witnesses have testified, and were in a position to draw their own conclusions, and I am not prepared, for one, to say that these conclusions are so utterly at variance with reason and common sense that we should interfere with them, and besides that, the learned Judge informs me that he was satisfied with the verdict, and that puts the question beyond doubt in my mind. I, therefore, think that this Court should not interfere with the verdict, but that the application should be dismissed with costs.

McGUIRE, J.—It is not necessary for me to deal with the points dealt with by my brother Wetmore. I concur, but I may say that I think there is no such ambiguity here as in the case cited. In that case one man had in his mind one class of goods, and the other party had another class. Here there is no such ambiguity; neither side alleges mistake; each is, in fact, clear; with each one the terms of the bargain are distinctly and emphatically sworn to, and it comes down to this—simply the question which of the parties the jury would believe, and that was the real question that was left to the jury.

Then on the question of *consensus ad idem*, while I think it questionable whether it should have been left to the jury at all, still it does not appear to have confused them, and it was distinctly in favour of the defendant's contention that it was so left, and, therefore, he, at all events, should not complain if it was left, as in fact it was. I understand that the question was left and that it was given to them in writing. It was not withdrawn from them, and they had the benefit of counsel's arguments upon it. But I think that if there was a motion made to-day based on the contention that the judgment was wrong, because the Judge had not submitted

Judgment. McGuire, J.

that question, I would have to say that he was right. But he did submit it, so I think there is still less reason for the defendant asking that the verdict should be disturbed.

As to the conflict of evidence, if I were called upon to weigh the evidence of the parties I would have great hesitation. We are informed by counsel that they are both respectable men, and I should hesitate very long before making up my mind as to which of them is right, and therefore I concur in the observations of my brother Wetmore, and in thinking that the application should be refused, and with costs.

RICHARDSON, J.—I concur, also, and I put my concurrence on the law as laid down by this Court in a case decided here not very long ago, *McDonnell* v. *Robertson*,[1] based upon *Brown* v. *The Commissioner of Railways*.[2] The principle there stated, which guides this Court in similar applications, is reaffirmed by a case, *Ferrand* v. *Bingley Local Board*.[3]

This principle is, that the verdict of a jury should not be disturbed where there is evidence both ways unless it is a verdict which the jury, having the evidence before them, could not reasonably and properly find.

Here we have a case presented to us where the evidence on plaintiff's side says that the contract was so-and-so, but the defendant says No, it was altogether another way, it was so-and-so. The question is left to the jury, "What was the contract? Is it as sworn to by the plaintiff or by the defendant," and they find for the plaintiff.

Therefore I concur with my brothers in dismissing the application with costs.

MACLEOD, J., and ROULEAU, J., concurred.

Appeal dismissed with costs.

[1]Terr. L. R. 438. [2]15 App. Cas. 240; 50 L. J. P. C. 62; 62 L. T. 469. [3]8 Times L. R. 70; 56 J. P. 277.

DAVIS ET AL. v. PATRICK ET AL.

Practice—Pleading — Defence — Embarrassing pleading — Reasonable cause of action or defence —Striking out.

McEwen v. *The North-West Coal and Navigation Co.*[1] followed.

Matter in a statement of defence, attacked as tending to prejudice, embarrass or delay, will be struck out less freely than in a statement of claim.

Statement of claim set up a partnership between plaintiff D. and defendant P., a mortgage by D. & P. of partnership goods to C. and a mortgage of P.'s interest therein to C. Bros.

The 1st paragraph of the defence of C. Bros. denied the partnership.

The 2nd paragraph set up that, "whatever relationship existed" between D. & P., that relationship was put an end to and the entire ownership of the goods mortgaged then vested in D. free from any interest of P.

Held, that the 2nd paragraph was embarrassing inasmuch as, while it assumed some relationship to have existed between D. and P., and alleged it to have been put an end to and the property to have vested in D., it did not allege (1) the nature of the relationship, and (2) the mode in which the relationship had been terminated and the property become vested in D., i.e., whether by operation or implication of law or by agreement of dissolution or other agreement stating the nature of such other agreement.

The 7th paragraph of the defence of C. Bros. alleged that, even if the mortgage to C. constituted a partnership liability, C. Bros. had a separate claim against D. before C. acquired any such partnership liability.

Held, that the 7th paragraph was embarrassing inasmuch as it did not allege that the separate claim of C. Bros. was the same as that for which they held the chattel mortgage, and as if that was not the case the whole paragraph was entirely immaterial.

The 8th paragraph of the defence alleged that the mortgage to C. was void, and did not comply with the Bills of Sale Ordinance and no affidavit of *bona fides* accompanied it.

Held, that the 8th paragraph was embarrassing inasmuch as it was uncertain whether it intended that the mortgage was void on the ground only of the absence of an affidavit of *bona fides*, or as well for non-compliance with other requirements of the Bills of Sale Ordinance, or on grounds apart from that Ordinance.

[*Court in banc, December 9th, 1893.*

Statement.

The statement of claim alleged: That the plaintiff Davis and defendant Patrick had been in partnership. That the partnership was dissolved. That the plaintiff Cowan, acting as administrator of one S. deceased, was a creditor of the firm, holding as security a chattel mortgage on all the horses and stallions belonging to the partnership. That the defendants Cowdry Bros. were creditors of the plaintiff Davis, and held a chattel mortgage on his interest in the partnership

[1] 1 Terr. L. R. 203; 1 N. W. T. R. No. 2 p. 15.

Statement.

stock. That there were other creditors of the partnership whose claims were due and unpaid and the affairs of the partnership had never been wound up. That the defendants Cowdry Bros. had seized and taken possession of all the horses and stallions and intended to remove and sell the same to satisfy the indebtedness of Davis. The plaintiffs claimed that the affairs of the partnership should be wound up; that the assets of the partnership be sold and the proceeds applied in due course according to the priorities of the parties interested; an injunction restraining the defendants Cowdry Bros. from remaining in possession of the stock and from removing or selling or attempting to remove or sell the same; a declaration that the plaintiff Cowan's chattel mortgage be declared prior to that of defendants Cowdry Bros.

The defendants Cowdry Bros. delivered a statement of defence substantially as follows:

1. Denial of the partnership.

2. That whatever relationship existed between the plaintiff Davis and the defendant Patrick as to the ownership of the band of horses, that relationship was put an end to, and the entire ownership of the whole of the horses, except 13, was vested in the plaintiff Davis ever since the 2nd day of June last past, and he then became, and has ever since remained, the sole and absolute owner thereof, freed from all claims of every nature and kind of Patrick, and the horses so seized by these defendants are the horses which became vested in Davis as above mentioned.

3. The partnership which it is alleged existed between Davis and Patrick was, on the said 2nd day of June, dissolved, and by the agreement of dissolution, if such partnership did exist, the plaintiff Davis covenanted and agreed that he would pay and satisfy all the liabilities of the firm which existed at that time, and save Patrick harmless therefrom.

4. The band of horses was not partnership property, but the sole property of the plaintiff Davis, to which Patrick was to be entitled to a share only in case he paid off certain liabilities which are called in the dissolution of partnership the liabilities of the firm.

Statement.

5. That Davis was the sole owner of this property, and had a sole right to mortgage the same, and that Patrick was not to have, and did not have, any right or interest therein unless and until he paid one-half of the various debts, which are called debts of the firm, and that in joining with Davis in executing the alleged mortgage to Cowan, he did so merely by leave and with the permission of Davis.

6. Alternatively, if it should appear that the relationship between Davis and Patrick was really that of partners as alleged, then the debt, which the plaintiff Cowan as administrator had, was a debt of Patrick alone and not a debt of the firm, and Davis, individually, merely joined in his individual name in the note and in the mortgage held by Cowan as surety for the payment by Patrick of the separate debt of the latter, and Cowan was not entitled to receive, and did not receive, a partnership liability, nor did he become a creditor of the said partnership.

7. Further alternatively, even if the giving of the note and mortgage by Davis and Patrick constitute a partnership liability to Cowan, these defendants had a separate claim against Davis before Cowan acquired any such partnership liability.

8. The Cowan chattel mortgage is wholly void, and does not comply with the requirements of chapter 18 of the Ordinances of 1889, and there was no affidavit of *bona fides* attached to or endorsed upon that mortgage as required by the said Ordinance.

9. By an indenture dated 24th March, 1893, and made between Davis of the first part, and these defendants of the second part, Davis mortgaged to these defendants a certain band of horses to secure a debt then owed by Davis to them, and in and by that indenture of mortgage Davis agreed to warrant and defend that property unto and to these defendants (setting out the warranty), and the band of horses so mortgaged is the property seized and taken possession of by these defendants.

10. The said mortgage to these defendants is overdue and unpaid, and pursuant to the terms thereof, the defendants

Statement.

seized and entered into possession thereof as they lawfully might, and submit that even if Davis did not, when the mortgage was executed, have a right to mortgage the said property, he has no right now to set up such defect of title, and he is estopped from disputing the validity of the mortgage upon the band of horses of which he is now the sole owner.

11. Repeated paragraphs 6 and 7 and alleged that the giving of the mortgage to Cowan was, as to Davis' interest in the said band of horses, fraudulent and void as against these defendants, and contrary to the Statute of 13 Elizabeth, chapter 5.

12. Repeated the same paragraphs and alleged that the giving of the said mortgage was as to Davis' interest in the said band of horses fraudulent and void, as it gave and had the effect of giving the said Cowan a preference over other creditors of the said Davis.

13. The plaintiff Cowan has made out no cause of action against these defendants by which he is entitled to an injunction. Without his mortgage he has no cause of action, and the mortgage is void upon the ground above set forth and even with the mortgage in force, there is no cause of action for an injunction.

14. These defendants have the right under their mortgage to sell the interest of the plaintiff, Davis, in the goods and chattels mentioned, and should not be enjoined or restrained from selling the said interest, nor should they be prevented from taking any proceedings which they are entitled to under it until the accounts between the said Davis and Patrick are taken, or the said partnership, if any existed, wound up by the Court.

A summons was taken out in chambers by the plaintiffs and an order was made thereon by MACLEOD, J., striking out all this statement of defence except the first and sixth paragraphs thereof, on the ground that the same tended to prejudice, embarrass and delay the fair trial of the action and disclosed no reasonable answer to the plaintiff's statement of claim. The defendants appealed from this order.

The appeal was heard on the 5th December, 1893. Statement.

H. M. Howell, Q.C., for appellants. Argument.

C. C. MacCaul, Q.C., for respondents.

The judgment of the Court was delivered by WETMORE, J.

[*December 9th, 1893.*]

WETMORE, J.—This Court held in *McEwen* v. *The North-West Coal & Navigation Co.*,[1] that section 125 of the Judicature Ordinance, R. O. 1888, c. 58,† is to be used when the whole proceeding is to be struck out, not certain paragraphs of it; consequently that part of the order appealed against in this cause which orders the paragraphs of the defence in question to be struck out as disclosing no reasonable answer to the plaintiff's statement of claim, is erroneous. Judgment.

That, however, will not vitiate the order if these paragraphs tend to prejudice, embarrass and delay the fair trial of the action, but it only renders it necessary for us to discuss the question whether these paragraphs do so prejudice, embarrass and delay.

The Court in the case above referred to also held that a pleading should not be struck out under section 125 of the Ordinance if there is a substantial question of law raised by it, that is, that that section is not intended to take the place of demurrers; *a fortiori* a pleading is not to be struck out summarily under section 103‡ of the Ordinance merely because it may be argued that it is bad, if a substantial question of law is raised by it.

Now I desire to carry the principle one step further in the case of defences. If a defendant in his statement of defence sets forth "such facts as may be deemed sufficient to entitle him to defend," although it may not be clear that there is a defence—if he may plausibly argue that there is a good defence, the pleading ought not to be struck out under section 103, unless it is so framed as to tend to prejudice or embarrass.

†Now Jud. Ord. C. O. 1898 c. 21, r. 151.
‡Jud. Ord. C. O. 1898 c. 21, r. 127.

Judgment.
Wetmore, J.

Suppose in an action for a liquidated demand an application is made to strike out a defence under section 79§ of the Ordinance, and the defendant at the return of the summons discloses in his affidavit facts of a character which I have just specified, the Court will allow him to defend. See the judgment of Cotton, L.J., in *Ray* v. *Baker*.[2] So in such cases the Court will let in a defendant to defend under the section if he discloses facts sufficient to entitle him to interrogate the plaintiff, or to cross-examine the plaintiff's witnesses. See Archibald's Q. B. Practice (14th ed.), 270, and cases cited in the notes. Would it not be an extraordinary thing, then, if, in such cases, a defendant would be allowed to defend under such circumstances, yet if he pleaded such facts he would be liable to have his pleading struck out as embarrassing by a summary application under section 103. The same principle which would apply to actions for a liquidated demand would be applicable to other actions, in so far as any application to strike out the defence under that section is concerned.

Now, coming to the pleadings in question in this action, I am free to confess that when I first read these pleadings it struck me that they were all objectionable.

I read the statement of claim as substantially setting up a cause for relief by Cowan against Cowdry Brothers, and that Davis and Patrick were merely joined incidentally as parties properly brought before the Court in order that the Court might grant the relief that Cowan was seeking, and I apprehend that this view of the case must have influenced my brother Macleod.

On close examination I have arrived at the conclusion that I quite misunderstood the cause of action. In fact the learned counsel for the plaintiffs, in his argument before us, argued as follows, "Suppose Cowdry Brothers out of it, this action is simply a case to wind up the partnership. If we did not ask for an injunction, Cowdry Brothers would be improper parties." Again, in answer to a question put by myself, he replied, "I do not think that a third person, a

[2] 4 Ex. D. 279; 48 L. J. Ex. 569; 40 L. T. 265; 27 W. R. 745.
§Jud. Ord. C. O. 1898 c. 21, r. 103.

creditor, can apply to have a partnership wound up." Now if all this is correct, and I am inclined to agree with him (at any rate, since he has put this forward I do not feel myself called upon to examine the question further), the gist of the action is Davis' application to have the partnership wound up, and Cowdry Brothers are only incidentally parties in order that an injunction might issue against them to preserve the partnership property in the meantime. Now, surely in such a case Patrick, and Cowdry Brothers as well, have the following rights:—

1st. To deny the partnership altogether; because, if there never was a partnership between Davis and Patrick, Davis has no right to have wound up what never existed.

2nd. On plausible grounds at least, to show that Davis has so acted, or the alleged partners have made such agreements, that Davis is estopped, or otherwise prevented by law, from obtaining the relief claimed.

3rd. If the plaintiffs have not set forth the facts lucidly or there are other facts than those set out in the claim, to bring the true facts and all the facts before the Court, provided of course that it can be reasonably urged that these facts are material, or that the Court should be apprised of them in order that the rights of the several parties may be properly disposed of. Of course, however, these facts must be so alleged as not to embarrass, prejudice or delay the fair trial of the action.

I will now proceed to examine the several paragraphs of the defence to which exception is taken. But let me state first that there are a number of these paragraphs which apparently do not affect Cowdry's rights under his mortgage. In fact I might almost say that they do not affect it; but they do affect the question of Davis' right to have the partnership wound up, and are therefore for that reason properly pleaded.

As to the 2nd paragraph of the defence, I am of opinion that it is objectionable and should be struck out. It will be observed that the defendants start out with their first paragraph by denying the partnership between Davis and

Judgment. Wetmore, J.

Patrick. This paragraph is not objected to; but in the second paragraph and for the purposes of that paragraph the defendants assume *some* relationship to have existed between Davis and Patrick; they do not state what that relationship is; they do not allege it to be a partnership. Now if it was not a partnership what was it? If it was a partnership they must know it. If something else than a partnership Patrick must know it. Why not allege it? I could quite understand a paragraph commencing in this way: "If the relationship of partnership existed between, etc.," and then going on to allege what the rest of the paragraph contains—subject, however, to my observations stated further on.

I could also understand the paragraph commencing with an allegation denying the partnership, but setting up some other relationship and describing it, and then going on. But surely a paragraph such as this, leaving it open to the defendants to set up at the trial some relationship other than a partnership, and then insisting upon the effect of such relationship without notice to the defendants, must tend to embarrass or prejudice the trial.

Again, the paragraph alleges that on the 2nd June last the property in question or a large portion of it became vested in the plaintiff Davis. Now how did that vesting take place? Was it by agreement between Davis and Patrick? or was it by operation of law? or was it by implication? The plaintiffs allege that the partnership was dissolved on the 2nd June, the very date this alleged vesting in Davis is stated to have happened.

Do the defendants wish it to be understood that that was the effect of a dissolution by operation of law? or that it was agreed by the articles of dissolution? or was the property vested by some other and what agreement?

How can the plaintiffs meet an allegation of that sort without being apprised of what they have to meet? In *Phillips* v. *Phillips*,[3] Cotton, L.J., is reported as follows: "In my opinion it is absolutely essential that the pleading, not to be embarrassing, * * * should state those facts

[3] 4 Q. B. D. 127; 48 L. J. Q. B. 135; 39 L. T. 556; 27 W. R. 436.

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which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial." Of course the same principle would apply to a defence. In Cunningham & Mattinson's Precedents, p. 26, I find the following: "It is obvious that one of the first cares of the pleader must be to consult brevity in his statement of his claim or defence, but at the same time he must not sacrifice accuracy and fulness of statement when they are necessary. He is bound to state all the material facts on which he relies, and if in his pursuit of brevity he omits to do so, he is liable to have his whole action or defence defeated, or in the most favourable view to amend upon onerous terms as to costs." In *Harris* v. *Jenkins*,[4] Fry, L.J., is reported as follows:—

"The right of way, to which the plaintiff alleges that he is entitled, might be the result either of a grant or of prescriptive user; and it is very desirable that, before the trial of the action, the defendant should know by which title the plaintiff claims the right, otherwise the defendant might be seriously embarrassed." Again in Cunningham & Mattinson, p. 38, I find the following:—"It is not enough for him to say he has such or such right, or that the defendant is under this or that liability to him, he must show, by a consecutive though brief and summary statement of the facts on which he relies, how his title to relief arises and how the defendant comes under any liability to him."

The learned counsel for the defendant referred to paragraphs 9 and 10 of the defence and claimed that they should be read together with paragraph 2. Assuming that this could be done, I can find nothing in these paragraphs that throws the slightest light on paragraph 2 in respect to the objections that I have stated.

As to paragraph 3 of the defence, I can discover no objection to it whatever, in fact the only objection urged to it at the argument was that it had nothing whatever to do with Cowdry's right to claim priority. Possibly not, but it seems

[4] 22 C. D. 481; 52 L. J. Ch. 437; 47 L. T. 570; 31 W. R. 137.

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to me that to say the least it is very material matter to bring before the Court in relation to Davis' application for winding up, and I can find nothing which, to my mind, is objectionable in the way of stating it.

I am of opinion, but with some hesitation, that paragraph 4 is not objectionable. I think it would have been better if the pleader had alleged that these horses were not and never had been partnership property, or that they were not at the time of the mortgage to Cowan, or since, partnership property. I then would have had no hesitation in holding the paragraph good for the same reason that I have held paragraph 3 to be good. But I am of opinion that the reasonable intendment of the paragraph is an allegation that the property never was partnership property. I am also of opinion that the pleading is not embarrassing because it does not allege that Patrick did not pay off the liabilities, that is a matter within Davis' knowledge to which he could reply if he had paid them off.

My remarks on paragraph 4 are applicable in principle to paragraph 5.

I think paragraph 7 is bad, because it is not alleged that the separate claim that the defendants (by which I assume they mean the defendants Cowdry Brothers) had against Davis was the claim which the chattel mortgage was given to secure, and if it were not I think the allegations in that paragraph are entirely immaterial. If they intend to set up that it is the same claim they should say so, otherwise it is embarrassing.

I am of opinion that paragraph 8 is embarrassing. I will again draw attention to Cotton, L.J.'s, remarks in *Phillips* v. *Phillips*,[3] which I have before quoted, and without repeating them, I will add that in my opinion a pleading so framed as to leave the opposite party in doubt as to what is intended by it must be embarrassing. Now, looking at this paragraph, I must say I have difficulty in arriving at the conclusion whether on the trial the defendants would be confined to objecting to the mortgage simply because there was no affidavit of *bona fides*, or whether they might not also set

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up that it was bad because it did not comply with other requirements of the Bills of Sale Ordinance, and also whether they might not also set up that the mortgage was void for other reasons apart from that Ordinance altogether. I am at present inclined to think, in view of the manner in which it leads up to the objections respecting the affidavit, that it is limited to that. However, I express no opinion, I merely say that the pleading should not be drawn so ambiguously; that it is therefore embarrassing. I could quite understand the pleader stating generally that the mortgage does not comply with the Ordinance; that might be objectionable, but it would put the opposite party on the alert and would, therefore, be preferable to the paragraph in question, which, in my opinion, might have the effect of deceiving the opposite party.

I can see no objection whatever to paragraphs 9 and 10. In arguing this case the counsel for the defendants asked "What wrong have Cowdry Brothers done that you complain of?" The counsel for the plaintiffs' answer was, "The wrong which Cowdry Brothers are guilty of is that, being the mortgagees of the interest of one of two partners in partnership property, they are seeking to dispose of such property." Surely, then, Cowdry Brothers have a right to say to Davis, who charges this wrong, "You have no right to set up that this is partnership property, because you are estopped by your agreement from doing so."

At any rate, there is plausible ground for their doing so. What the effect of this may be I am not prepared to say, but I think it is a proper matter to bring under the notice of the Court.

As to paragraphs 11 and 12, as paragraph 7 ought to be struck out the reference to that paragraph is of no use, but striking that out I see nothing in paragraphs 11 and 12 embarrassing, they cannot be misunderstood, they cannot mislead. By paragraph 11 the defendants say that by reason of the facts alleged in paragraph 6, the mortgage was fraudulent and void as against the defendants under the Statute of Elizabeth. We all know what that must mean, namely, that it was given with the intention of hindering,

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delaying or defeating creditors. By paragraph 12 they set up the same facts and claim that they render the mortgage void under the Preferential Assignments Ordinance. Possibly these grounds of defence might not be expressed as I would like to have them, but that is not a reason for striking them out if they are not embarrassing. Possibly too these paragraphs may not be good in law, as some of the others may not be. If so let the question of law be raised in the proper way as provided by section 123 of the Judicature Ordinance.

The 13th paragraph raises questions of law and states the questions. It sets forth in substance that Cowen has made out no cause of action for an injunction because, 1st, his mortgage is void upon the grounds previously set out; 2nd, even if the mortgage is in force there is no cause of action for an injunction.

I think Cowdry Brothers ought to be entitled to raise this question of law, and I can see no objection to the way they have done it.

Paragraph 14 is merely a general assertion of the rights of the defendants Cowdry Brothers.

I am of opinion that the order of Mr. Justice Macleod should be varied by directing that paragraphs 2, 7, and 8 only of the statement of defence, together with the words and figures "and 7," in the 11th and 12th paragraphs, should be struck out, and as both parties have been partially successful and have failed in part, that there should be no costs of the appeal or of the application before my brother MACLEOD.

The defendants to have leave to amend before the first of January next as they may be advised.

RICHARDSON, J., ROULEAU, J., and MCGUIRE, J., concurred.

MACLEOD, J., expressed no opinion.

Judgment accordingly.

BONIN v. ROBERTSON.

Bills of Sale Ordinance—Foreign chattel mortgage—Removal of goods to Territories—Non-registration in Territories—Bona fide purchaser—Conversion.

A chattel mortgage made in a foreign country upon goods there, which is valid and binding there as against not only the mortgagor but also subsequent mortgagees and purchasers, is valid and binding to the same extent on the Territories, notwithstanding that the provisions of the Bills of Sale Ordinance of the Territories have not been complied with.

Where, therefore, goods then being in a foreign country were comprised in such a mortgage and subsequently removed to the Territories, and there taken by the agent of the mortgagee out of the possession of a *bona fide* purchaser for value without notice of the mortgage, and the latter sued the agent for conversion,

Held, reversing the judgment of ROULEAU, J., that the plaintiff could not succeed.

[*Court in banc, December 11th, 1893.*

Statement.

Trial of action before ROULEAU, J., at Edmonton without a jury. The action was for the conversion of a team of horses, the defendant having seized the team as bailiff of the First National Bank at Red Lake Falls under a chattel mortgage.

The facts established in evidence and about which there was no dispute were as follows:

That on the 4th March, 1891, the horses were the property of Elizabeth Malette, who was then domiciled and actually residing in the State of Minnesota; that the horses were also then in Minnesota; that on that date Elizabeth Malette, in order to secure a debt due by her to the First National Bank of Red Lake Falls, executed a chattel mortgage in their favour in the form and under the conditions required by the laws of Minnesota to constitute a good, valid and binding mortgage not only against the mortgagor, but also against subsequent purchasers or mortgagees from her; that the mortgagor (but whether with or without the consent of the mortgagees did not appear in the evidence) brought the horses to South Edmonton in the North-West Territories, and on or about the 15th day of November, 1893, at a time being

Statement.

several months subsequent to the said horses and said Elizabeth Malette arriving in South Edmonton, sold them to the plaintiff, who was a *bona fide* purchaser for value without notice of the mortgage; that the defendant, subsequently to the said sale to the plaintiff, seized the horses under the authority of the mortgage, which was as follows:

"Know all men by these presents that Elizabeth Malette, of the town of Terrebonne, county of Polk, State of Minnesota, party of the first part, being justly indebted to the First National Bank of Red Lake Falls, Minn., party of the second part, in the sum of eleven hundred and forty-five dollars, which is hereby confessed and acknowledged, has for the purpose of securing the payment of said debt, granted, bargained, sold and mortgaged, and by these presents does grant, bargain, sell and mortgage unto the said party of the second part and his assigns, all that certain personal property described as follows, to wit:

"One bay mare colt 1 1-2 years old. One bay mare colt 1 1-2 years old, white star on forehead and one white front foot.

"All the said property being now in the possession of Ferdinand Gauthier, in the town of Terrebonne, county of Polk and State aforesaid, and free from all incumbrance.

"To have and to hold all and singular the personal property aforesaid, forever. Provided always, and these presents are upon this express condition: That if the said party of the first part shall pay or cause to be paid unto the said party of the second part his executors, administrators or assigns, the sum of eleven hundred forty-five dollars, according to the condition of a certain promissory note payable to the First National Bank of Red Lake Falls, Minnesota, viz., etc. Then these presents to be void and of no effect. But if default shall be made in the payment of said sum of money or the interest thereon, at the time the said note shall become due, or if any attempt shall be made to remove, dispose of or injure said property or any part thereof, by the said party of the first part or any other person, or if said party of the first part does not take proper care of said property, or if said

Statement.

party of the second part shall at any time deem himself insecure: Then, thereupon and thereafter it shall be lawful, and the said party hereby authorizes said second party, his executors, administrators or assigns, or his authorized agent, to take said property, wherever the same may be found, and hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law, and on such terms as said party of the second part or his agent may see fit, and said party of the second party may become the purchaser of said property at said sale, retaining such amount as shall pay the aforesaid note and interest thereon, and an attorney's fee of ten dollars, and such other expenses as may have been incurred, returning the surplus money, if any there may be, to the said party of the first part, or his assigns. And as long as the conditions of this mortgage are fulfilled, the said party to remain in peaceful possession of said property, and in consideration thereof he agrees to keep said property in as good condition as it now is, at said first party's cost and expense.

"In testimony whereof, the said party of the first part has hereunto set her hand and seal this 4th day of March, A.D. 1891."

Argument.

S. S. Taylor, for the plaintiff.

N. D. Beck, for the defendant.

Judgment was reserved.

[*October 9th, 1893.*]

Judgment.

ROULEAU, J.—The only question to decide in this case is—whether or not a chattel mortgage given in Minnesota, U.S., has any effect as such here and can be enforced against innocent purchasers? After consulting all the authorities cited, I am of opinion that the comity of nations does not extend so far as to protect mortgagees, unless the mortgagees comply strictly with our laws.

"Therefore judgment must be entered in favour of the plaintiff for the sum of $150, value of the horses, and the further sum of $15 for special damages; with interest on the sum of $160 from 31st day of March, 1893, till date of

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judgment, and on the whole sum from date of judgment until paid, and the costs of this suit."

From this judgment defendant appealed.

The appeal was argued at Regina on the 4th day of December, 1893.

D. L. Scott, Q.C., for appellant.

S. S. Taylor, for respondent.

[*December 11th, 1893.*]

McGUIRE, J.—This is an appeal from a decision of the Hon. Mr. Justice ROULEAU in an action for conversion of a team of horses.

The facts are very simple. One Elizabeth Malette being the owner of a span of horses then in the State of Minnesota where she then resided, gave a chattel mortgage thereon to the First National Bank of Red Lake Falls in the same State, in the form and under the conditions required by the laws of Minnesota to constitute a good valid and binding mortgage, not only against the mortgagor but also against subsequent purchasers from her, the mortgagor (whether with or without the mortgagee's consent does not appear), brought the horses to South Edmonton in the North-West Territories, and several months thereafter sold them to the plaintiff who was a *bona fide* purchaser for value without actual notice of the mortgage. The defendant subsequently seized the horses under the authority of the mortgage, and the plaintiff then brought this action for the conversion. The mortgage is under seal and "grants, bargains, sells and mortgages" the horses to the bank, "to have and to hold * * forever, provided always," etc., to be void on compliance with the condition stated as to payment. The mortgage was in default at the time of the sale to plaintiff. There was no filing of the mortgage or a copy of it in the Territories. The simple question came to be, was this mortgage void as against the plaintiff an innocent purchaser for value without notice by reason of its not being filed in the Registration District at Edmonton, as would

have been the case had the mortgage been made in the Territories on horses then in the Territories. The learned Judge was of opinion that it was void as against the plaintiff and gave judgment in his favour accordingly. Judgment. McGuire, J.

The North-West Territories Ordinance No. 18 of 1889† Section 3 is expressly limited to mortgages "made in the Territories,"‡ and does not therefore seem to apply to a mortgage made, as here, outside the Territories by persons resident in a foreign state on property then in that state. Moreover, there is no provision in the Ordinance by which the mortgagees under such circumstances could file their mortgage here or file a copy of it. This was conceded on the argument. But it was contended for the plaintiff that the mortgagees were not without remedy, as they could have taken possession of the chattels under the condition against removing them, but instead of doing so they allowed the mortgagor to have them in possession here for several months as if they were her own property, thereby enabling her to sell to the plaintiff. Of course, it was not suggested that the mortgagees knowingly permitted this, but merely that they did not promptly pursue the horses and take possession. We do not think that any presumption of laches arises here in the absence of any evidence that the mortgagees slept upon their rights for an unreasonable time after knowledge of the removal. There is no evidence of when they became aware of the removal.

It was urged for the plaintiff that the mortgage made in, and under the laws of, a foreign state can be enforced here only by virtue of the comity of nations and that that comity did not extend so far as to favour foreigners more than our own citizens; that our own citizens are compelled to comply with the Bills of Sale Ordinance and the policy of our law is that, unless the provisions of the Ordinance are complied with, subsequent purchasers in good faith are

†Now C. O. 1898, c. 43.

‡These words were struck out by Ordinance No. 13 of 1893. It is submitted that the amendment has made no difference in the law.—Ed.

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McGuire, J.

not affected by the mortgage; that our Courts have a discretion as to how far they will give effect to foreign laws and that they ought not to exercise that discretion so as to work injustice to our own citizens. This is, I think, putting the grounds urged on behalf of the plaintiff as strongly as it was placed before us by Mr. Taylor. Even agreeing for the moment with the proposition that it is only out of regard for the comity of nations that the laws of a foreign state will be given effect to, we do not agree that the laws of Minnesota in this behalf are such that it would be inequitable and unjust to treat the mortgage here as valid and ineffective. It was not contended that this mortgage was not perfectly good as between the parties to it even here. If so, up to the moment of the completion of the sale to the plaintiff it is conceded that the bank was the owner of the horses. What law of the Territories, then, did the mortgagees neglect to comply with, which exposed them to a loss of their property by the sale to the plaintiff? They could not have filed their mortgage under the provisions of the Ordinance, for it declares (section 9) that the proper registration officer for such instruments shall be the clerk of the registration district in which, at the time of the execution of the instrument, the property was. Clearly there was no such officer in the Territories, nor could they have filed a copy of the mortgage in the clerk's office at Edmonton upon the horses being brought there, under section 19. To say, then, that the only remedy the mortgagees had was to seize the horses, before the mortgagor could effect a sale or disposal of them, would be to place foreigners at a very great disadvantage as compared with our own citizens for whose benefit we have made provision by the Ordinance in question. It would be very hard indeed for us to say to a foreigner, we recognize you as owner of certain chattels but we will make it possible for you to be deprived of your property by an act of the mortgagor, because you have not complied with an Ordinance which we have in advance so framed that it was impossible for you to comply therewith.

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McGuire, J.

We have been referred to the decisions of the Courts of Louisiana and Pennsylvania, which have held that a mortgage made outside these states respectively would not be enforced therein as against innocent subsequent purchasers. It appears, however, that in both these states the law does not recognize a mortgage of chattels unless accompanied by delivery to the mortgagee, while our laws do. Without admitting that the decisions in question are such as meet with our approval, we are not of course bound by them; and, moreover, the overwhelming weight of opinion and judicial decisions in the United States Courts is entirely the other way. I can find only one other state (Michigan) in which effect is not given to a foreign mortgage, while it appears from the American and English Encyclopædia of Law, Volume 3, at page 190, that the Courts of no less than eleven States, and in addition the Federal Court, have taken the opposite view. These State Courts include Courts in New York, Massachusetts, Connecticut and Ohio.

We might in passing quote the observations of Lord Chelmsford in *Liverpool Marine Credit Company* v. *Hunter*,[1] when, referring to the Louisiana law, he says, "It appears to be peculiar to the State of Louisiana, no such application of the law having been shown to exist in any other State or country; and it has been disapproved of by eminent American jurists." Lord Chelmsford further points out "The transfer of personal property must be regulated by the law of the owner's domicil, and if valid by that law ought to be so regarded by the Courts of every other country where it is brought in question. It was therefore the application of the peculiar law of Louisiana to a case which by the comity of nations ought to have been excluded from its operations," etc.

The learned Savigny, in his "Conflict of Laws," at page 183, says, "In the forms of alienation—*i.e.*, of the voluntary transmission of property—very different rules of law occur; and, on the principle above considered, we must apply the rule of law in force at the place where the thing is situated,

[1] L. R. 3 Ch. 479, at p. 483; 37 L. J. Ch. 386; 18 L. T. 749; 16 W. R. 1030.

Judgment, McGuire, J.

without regard to the domicil of the one or of the other person, and without regard to the place where the contract is entered into." In this case it matters not which law is to prevail, the *lex rei sitae* or the *lex domicilii*—because here they were the same—the law of Minnesota. On page 85, Savigny further says, "If the transmission has once taken place every subsequent change of the locality of the thing is immaterial for the destiny of the property, since the right of property once acquired cannot be affected by such a change of place." That the laws in force where the property is situate and where the contracting parties reside must govern as to the passing of the property is clearly laid down by Crompton, J., in *Cammell* v. *Sewell*.[2] He quotes with approval the opinion expressed in the Court below by the Chief Baron. "If personal property is disposed of in a manner binding according to the laws of the country where it is, that disposition is binding everywhere." In *River Stave Company* v. *Sill*,[3] Armour, J., quotes approvingly the decision in *Clarke* v. *Torbell*,[4] by Foster, J., that the *lex rei sitae* must prevail. Without uselessly heaping up authorities, it must be said that the overwhelming weight of judicial opinion, as well of the most eminent jurists, is to the effect that in such a case as this the property duly passed from the mortgagor to the mortgagees and that the removal of the horses to Canada did not impair in any way the mortgagees' title.

If, then, the mortgagees were entitled to the horses at the time of the sale by the mortgagor, and if she in fact had no right to sell the same, or, at most, only her equity of redemption therein, I fail to see what title the purchasers from her could acquire greater than she then had. Our Ordinance only regulates transfers of chattels by the owners of them; it does not presume to authorize a person who has no title to pass a good title to even an innocent purchaser by simply executing an instrument in a certain form and filing it in a certain way.

Again, at common law and in the absence of any Ordinance such as we have here governing bills of sale and

[2] 5 H. & N. 728; 29 L. J. Ex. 350; 6 Jur. N. S. 918; 2 L. T. 799; 8 W. R. 639. [3] 12 O. R. 557 at p. 570. [4] 58 N. H. 88.

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mortgages of chattels, no particular form of instrument, or in fact any instrument in writing, would be necessary to the transfer of personal property, and of course no filing of such an instrument, if the transaction were reduced to writing. The bank would have had a good title and the purchaser from the mortgagor could not seriously have attempted to rely on his purchase from the mortgagor. If such a purchase can now give him a title it must be by virtue of some provision of the Ordinance in question. But I cannot find anything there saying that a person with no title or a limited title can, because in visible possession of a chattel, pass a good title of it to a purchaser. It is a curious fact that section 3 of the Ordinance does not even, in terms, prescribe that a mortgage shall be in writing, but merely says that every mortgage, etc., shall (unless, etc.) be registered, etc., but a verbal mortgage could not be registered and it may be that what cannot be done is not required to be done, and that it applies only to instruments capable of being registered. Section 5 is not open to this observation, for it says "every sale," etc., "shall be in writing," etc. I merely draw attention in passing to this peculiarity of section 3, a peculiarity which exists in the corresponding Acts in Ontario and in Manitoba. It is, however, a fact that there is no provision permitting a person by any form of instrument or by any dealing therewith to pass a title to a chattel which he does not own to even an innocent purchaser.

In this view of the case it is possibly unnecessary to invoke here the comity of nations or to consider how far our Courts will extend that comity, for if we once recognize the mortgagees as entitled to the property at any time after it was brought here, it would be confiscation to deny to them all the consequences of their title, and to say that some one else, some one who has it in possession say, can so deal with it without the owner's knowledge or consent as to rob them entirely of their property. This view of the matter is, I find, not original, for in *Warrender* v. *Warrender*,[5] speaking of the *lex loci* governing personal contracts, Lord

[5] 9 Bligh. 89 at p. 110; 2 Cl. & Fin. 488; 2 S. & M'L. 154.

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Brougham questions the accuracy of saying that there is in such cases a comitas shown by the Courts of our country towards the laws of another. In certain cases he conceded such is the case, "as where the French Courts inquire how English laws would deal with a Frenchman in similar or parallel circumstances and upon proof of it, so deal with an Englishman in those circumstances. After discussing the question in other cases he concludes: "Therefore the Courts of the country where the contract was made act not *ex comitate* but *ex debito justitiae*."

But even placing the rights of the mortgagees on no other or higher ground than the comity of nations it seems to me that it is no stretch of comitas to recognize that a citizen of a neighboring friendly state whose property is brought by someone else into this country should be treated as still the owner and that we should fully respect his rights. To say that he must do something that our citizens are not required to do is to treat him with but scant courtesy indeed. If a thief brings property stolen in Minnesota into this country he surely cannot take advantage of our laws to enable him to turn his stolen property into cash by passing, to even an innocent purchaser, a title which he has not, and so defeat the title of the original owner. For a mortgagor, in defiance of a solemn agreement entered into by him that he will not remove property or dispose of it in fraud of the mortgage, to remove and (as far as he can) dispose of that property, may not yet in this country bring him in conflict with our criminal laws, but is he not morally just as much a thief as the more vulgar criminal who furtively deprives his neighbor of his property?

Are we then to help him to convert this property so as to complete his attempt to deprive the mortgagee of his rights by selling it to a purchaser here—innocent or otherwise? I humbly submit not. If the contention of the plaintiff here were to prevail, that once chattels come across our boundary it is only a question of speed between the mortgagee in his pursuit after the fly-by-night mortgagor and this usually alert individual in finding an innocent purchaser obligingly

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ready to purchase without too much enquiry or too many troublesome questions, the property he has brought with him in his flight. It may have been under peculiar circumstances deemed justifiable to "spoil the Egyptians," but at least it may be said that no such circumstances are shown to exist here, and it will be time enough when that is done to consider how we shall then act.

I think this appeal should be allowed and the judgment of the trial Judge should be reversed with costs.

RICHARDSON, J., MACLEOD, J., and WETMORE, J., concurred.

ROULEAU, J., retained his opinion expressed on the trial.

Appeal allowed with costs.

HAMILTON v. McNEILL.

Sale of Land—Vendor's title—Title in third party—Incumbrance—Repudiation — Penalty—Forfeiture — Practice — Evidence—Commission—Order for commission — Irregularities—Suppression of commission evidence—Waiver — Postponement of trial to supply defect in evidence.

Where at the time of an agreement for sale and purchase of land, the title to the land stood in the name of the vendor's wife, but the vendor obtained and tendered a transfer from his wife to the purchaser before the purchaser repudiated the agreement.

Held, following *Paisley* v. *Wills*,[1] that the purchaser was liable in an action for balance of purchase money.

Right to repudiate discussed.

If a thing be agreed to be done, though there be a penalty annexed to secure its performance, yet the very thing itself must be done, and the Court will not permit the person on whom the penalty rests to resist specific performance by electing to pay the penalty.

Where a commission to take evidence was issued without a formal order therefor, but merely on an informal memorandum of a Judge, containing no direction as to the commissioner's name or the time, place or manner of taking the evidence, but the commission, before being sent out, had been shown to the advocate for the opposite party, and due notice of the time and place of taking the evidence under the commission had been served on him, and on the return of the commission it had been opened at his instance.

[1] 19 O. R. 303; affirmed 18 O. A. R. 210.

Held (1) that the irregularities in connection with the issue of the commission, which might at an earlier stage have been taken advantage of by motion to suppress, were waived by the advocate for the opposite party, with knowledge of the irregularities, causing the commission to be opened; that being a fresh step within the meaning of s. 541 of the Judicature Ordinance.†

(2) That in any case, the trial Judge having received the evidence and s. 501 ‡ of the Judicature Ordinance providing that a new trial shall not be granted on the ground of the improper admission or rejection of evidence unless on the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial, and the Court being of the contrary opinion, no effect should be given to the objection.

Trial of action adjourned to enable plaintiff to supply defect in the evidence in the support of his case under s. 236 of the Judicature Ordinance.§

[WETMORE, J., *February 19th, 1894.*
[*Court in banc, June 8th, 1894.*

Statement. This was an action to recover from the defendant a balance of purchase money under an agreement in writing dated April 1st, 1893, executed by the plaintiff and the defendant, whereby the plaintiff agreed to sell and the defendant agreed to purchase for the sum of $500 a quarter section of land in the Province of Manitoba.

The agreement provided for the payment of £25 down and of the balance upon a satisfactory conveyance being placed in the purchaser's hands; it also provided that the seller should "within three months execute and transmit to the first party (the purchaser), a full and complete title and assignation or conveyance of his whole rights and interest in and to "the said land" free of all burdens, claims or mortgages affecting the same."

The plaintiff, in addition to the above facts, alleged that he caused a conveyance to be executed, tendered and delivered to the defendant, who refused to accept the same and to pay the balance of the purchase money.

The statement of defence alleged in substance:—

(1) That the plaintiff had not any title to the land and could not convey in accordance with the agreement, and that the defendant had repudiated the agreement as soon as he discovered the plaintiff's want of title.

† Ord. No. 6 of 1893, now Jud. Ord. C. O. 1898 c. 21, r. 539.
‡ Ord. No. 6 of 1893, now Jud. Ord. C. O. 1898 c. 21, r. 508.
§ Ord. No. 6 of 1893, now Jud. Ord. C. O. 1898 c. 21, r. 258.

(2) That the plaintiff was estopped from claiming the balance of the purchase money inasmuch as the defendant's liability was limited to a forfeiture of the down payment according to the terms of the agreement. Statement.

The defendant also, by way of counterclaim, asked for a rescission of the agreement and repayment of the down payment of £25.

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

It appeared that the title at the time of the agreement was in the name of the plaintiff's wife, but that a transfer had been executed by her to the defendant, and that this transfer had been tendered to and refused by the defendant. It also appeared that the land had been subject to a mortgage, which had been satisfied prior to the agreement, but that a discharge had not then been registered; it had, however, been registered prior to the defendant's repudiation of the agreement. The provision in the agreement, upon which the defendant based his second ground of defence, was the usual provision that, in default of payment of the balance of the purchase money, the agreement should be void and the vendor at liberty to re-sell.

The plaintiff tendered, as evidence showing the title to be clear, a copy of the discharge of mortgage certified by the deputy registrar of the proper registry office in Manitoba. The learned Judge refused to receive this document as evidence, but proceeded with the trial, and under section 236 of the Judicature Ordinance adjourned the trial for the purpose of allowing the discharge to be proved, and directed the issue of a commission for that purpose.

No formal order for the commission was issued, the only order being that made by the learned Judge by way of memorandum at the trial, in which nothing was said as to the name of the commissioner, the time, place or manner of taking the examination.

The plaintiff's advocate took out a commission, which was shown to the defendant's advocate, whom he served with notice of the time and place of taking the examination. The

Statement. commission when returned was opened at the instance of the defendant's advocate. No steps were taken to suppress the commission or to set it aside for irregularity. The learned Judge, on the trial being resumed pursuant to the adjournment, admitted the commission evidence and gave judgment for the plaintiff.

The defendant appealed. The appeal was argued on the 5th June, 1894.

Argument. *T. C. Johnstone* and *D. H. Cole*, for the defendant, the appellant.

D. L. Scott, Q.C., and *F. F. Forbes*, for the plaintiff, the respondent.

[*June 8th, 1894.*]

Judgment. McGUIRE, J.—This is an appeal from a judgment of Mr. Justice WETMORE in an action brought by the respondent Hamilton to recover from the appellant McNeill the balance of the purchase money agreed to be paid by the latter to the former for a certain parcel of land. The agreement sued upon was in writing, dated April 1st, 1893, signed by both the parties, whereby Hamilton agreed to sell to McNeill for the sum of $500 a certain parcel of land situate in Manitoba. By the terms of the agreement £25 was then paid to Hamilton, the balance to be paid upon a satisfactory conveyance being placed in the hands of McNeill. It was further agreed that Hamilton was within three months "to execute and transmit to the first party a full and complete title and assignation or conveyance of his whole right and interest in and to" the said land "free of all burdens, claims or mortgages affecting the same."

It turned out that at the time this agreement was signed the legal title to the land was in Ann Hamilton, the respondent's wife, but the evidence of the respondent is that he had taken up this land as his homestead and had done all things necessary under the laws of Canada to entitle him to a patent, and that he had been duly recommended for patent.

Having borrowed some $300 from his wife, however, he arranged that the patent should issue in her name as security

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for the repayment of that loan, it being agreed that upon repayment she would reconvey to him. This evidence was uncontradicted. The respondent says that, to save expense, instead of getting a reconveyance from his wife, and then his giving a conveyance to the appellant, he caused a conveyance to be prepared direct from Ann Hamilton to McNeill, which conveyance was duly executed by her on the 16th of May, 1893.

This, together with a draft on McNeill for the balance of the purchase money, was forwarded through the Union Bank at Moosomin to the Union Bank of Scotland at Glasgow, where the appellant lived, for him, and on the 12th of June, 1893, the latter bank sent him a notice of the draft and document attached, and about that time appellant went with his solicitor, Mr. Gray, and inspected the deed. Shortly before that, namely, 31st May, this Mr. Gray had written on behalf of McNeill a letter to Mr. White, solicitor for Hamilton, in reply to a letter of 15th May from White to McNeill and to a letter from Hamilton to McNeill. Neither Hamilton's nor White's letter is produced, but evidently they mentioned the sending of a draft and that the conveyance was to be from Mrs. Hamilton, as Mr. Gray refers to these facts. He points out that by the agreement the purchase money is not to be paid till a satisfactory conveyance is placed in his client's hands, and he adds that as soon as that is done "Mr. Hamilton's draft will be honored."

He also asks why Mrs. Hamilton is the grantor, and makes some enquiries as to the law of Canada affecting married women in regard to real estate. He concludes by saying, "On Mr. McNeill being satisfied on the above points the draft will be honored and the matter settled." Mr. White did not reply to this until July 6th, when he mentions that there are certain objections to the title which are not yet removed.

On August 18th Mr. White again writes to appellant's solicitor saying he encloses abstract and pointing out that the property is now free from encumbrances and explaining why the conveyance was from Mrs. Hamilton. There had been a mortgage on this land given by Alexander G. Hamilton to certain persons named Maxwell to secure payment

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of $140.80 and interest, but this had been satisfied by payment prior to the date of the agreement for sale. It had not, however, been released at the time of payment and respondent endeavored to show that by a discharge executed by the mortgagees dated 29th July, 1893, and registered in the proper office on 14th August, 1893, this mortgage had been released. The appellant, shortly after the date of Mr. White's last letter and before it could have reached Scotland, arrived in Moosomin and had several conversations with the respondent. The learned trial Judge has found as a fact that there had been no repudiation by McNeill of the agreement to purchase until after the 1st of September, 1893, and I think the evidence quite justifies such a finding. The appellant sought to show that he had repudiated the agreement promptly upon seeing it in Scotland in June, but even upon his own showing his objection was to the fact that the conveyance was from Ann Hamilton and not from her husband. Mr. Gray's letter of 31st May, however, shows that he did not consider that a ground for refusing absolutely to accept the deed, as he wrote asking for the reason and as to the law in such cases and promises that, upon being satisfied on these points, the draft would be honored. Had the appellant repudiated the agreement upon learning that the title was in Ann Hamilton and not in the respondent, he might, perhaps, have been justified in so doing, but the learned Judge, very properly, I think, has found that the appellant did not repudiate or attempt to do so until after the 1st September, at which date the title was made clear from encumbrances and a satisfactory conveyance made to the appellant. *Paisley* v. *Wills*[1] is authority that the appellant could not object to the title on the ground that the conveyance was from Ann Hamilton. It was urged by counsel for the appellant that the agreement called for a conveyance from Alexander G. Hamilton. What it does literally call for is "a full and complete title and assignation or conveyance of his (*i.e.*, Alexander G. Hamilton's) whole right and interest." A conveyance literally in compliance with these terms might not have been reasonably satisfactory to the appellant, seeing that the title was in his wife's name. What I think the appellant was entitled

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to on a reasonable construction was, not a conveyance of Mr. Hamilton's "right and interest" in the land, which might be little or nothing, but a conveyance which would vest in him a good title to the land free from encumbrances, and this is what the deed from Ann Hamilton on the 1st of September conveyed to him. It was too late then to repudiate the agreement—a good title had been made out to him —one which should have satisfied him. He was offered all that he had bargained for and should have accepted it and paid the balance of the price.

There is one point raised by the appellant which requires consideration. The plaintiff offered in evidence a copy of the discharge of the Maxwell mortgage and of the affidavit of execution thereof annexed, certified to be a true copy by Alfred Morton, deputy registrar at Shoal Lake, where the said mortgage was registered. The learned Judge refused to accept the copy as evidence of the execution of the original discharge, but under section 236 of the Judicature Ordinance proceeded with the trial, and ordered that a commission should issue for the examination of witnesses at Birtle, and adjourned the Court till the 19th of February to allow the plaintiff to prove the discharge. A commission was accordingly issued and evidence taken thereunder and at the adjourned sittings on 19th February the learned Judge, being satisfied by the evidence there produced that the discharge had been duly executed and registered, gave judgment for the plaintiff. The only order made for the issue of the commission was that contained in the written judgment of the trial Judge delivered on 20th of January. No commissioner was named, nor was the time, place or manner of the examination set out in the order, but these are, it seems, at most, irregularities which may be waived by agreement of the parties or by the conduct of the opposite party (Archbold's Queen's Bench Practice, vol. 1, page 548, 14th ed.).

There is evidence that the commission was shown to the defendant's solicitor, Mr. Cole, and that a notice of the time and place of taking the examination was served upon Mr. Cole at least twenty-four hours prior thereto, and that upon

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the return of the commission it was, upon the 12th of February, at Mr. Cole's instance, opened. Mr. Cole took no steps to suppress the commission or to set it aside for irregularity, but on the contrary, after knowledge of the facts, he caused the commission to be opened. Sections 540 and 541 of the Judicature Ordinance deal with irregularities and provide that application to set aside the proceedings shall be made within a reasonable time and before taking any fresh step after knowledge of the irregularity. It seems to me that causing the opening of the examination was a step taken by Mr. Cole after knowledge of the irregularity in the issue of the commission, also, that he had a reasonable time to have moved to set the proceedings aside, but instead of doing so he raised no objections until the adjourned sittings of the Court on the 19th of February. Section 540 provides that irregularities of the kind here existing shall not render any proceedings void unless the Court or a Judge shall so direct.

The Judge, however, admitted the evidence, and I do not think that he was wrong in so doing in view of the conduct of Mr. Cole. Had Mr. Cole objected to the commission promptly upon having notice of it the irregularity might have been cured in time to have the examination taken and returned before the 19th of February, but by his laches and acquiescence and subsequent dealing with the examination he deprived himself of the right to object to its reception at the adjourned sittings on the 19th.

By section 510 of the Judicature Ordinance a new trial shall not be granted on the ground of the improper admission or rejection of evidence unless, in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial.

I am satisfied that no wrong or miscarriage has been occasioned here.

The defendant urges that, by the terms of the agreement, the only consequence of his breach of it is the forfeiture of the £25 paid by him. As my learned brother RICHARDSON has dealt in his judgment with this matter I content myself

with expressing my concurrence in the conclusion at which he has arrived. Judgment. McGuire, J.

The appeal will be dismissed with costs.

RICHARDSON, J.—The question whether or not there was a repudiation being one of fact and the learned trial Judge having, on evidence reasonably sufficient to support his finding, determined there was no repudiation, this Court will not disturb his finding.

As to the question whether or not the £25 penalty, if it may be termed such, which had been paid on the execution of the agreement as part of the purchase price, enabled the purchaser to resist specific performance of the contract:—in the face of the rule of law long ago laid down by Lord St. Leonards and never since, so far as known, reversed, that if a thing be agreed to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done, and the Court will not permit the person on whom the penalty rests to resist specific performance by electing to pay the penalty, the judgment of the trial Judge cannot be held wrong in point of law.

The only other question arises upon the reception of the evidence taken *ex juris* under the commission. This was ordered by the trial Judge for obtaining proof of a particular fact and no question arises as to the proper exercise of his discretion in this case. But it is urged that, because the plaintiff's advocate omitted to take out the formal order at the clerk's office, and because the clerk issued the commission without such order, the evidence taken under this commission was improperly received and read by the Judge.

If anything, this was but an irregularity in non-compliance with practice, and one capable of cure, on terms if necessary, by the trial Judge, and also by this Court if necessary.

Nothing has been urged against the substance of the evidence thus taken, which simply was to verify a document on record in a public office *ex juris*. The defendant urges nothing which would lead the Court to assume that if the practice had been strictly obeyed any other result would

Judgment. Richardson, J.

have followed. The objection is too technical for this Court at this stage to allow, and had this Court arrived at the conclusion that the trial Judge was bound, under the circumstances, to have rejected this evidence, in my opinion it would not have allowed effect to be given to the technical irregularity and thus thwarted plain justice, but have ordered to be done what the trial Judge could have done when the matter came finally before him, and afforded another opportunity for taking the evidence *ex juris* in a strictly regular manner.

I concur with McGuire, J., and that the appeal be dismissed with costs.

Macleod, J., and Rouleau, J., concurred.

Appeal dismissed with costs.

THE WESTERN MILLING CO. v. DARKE & BALDERSON.

Appeal—Special leave—Notice of appeal—Amendment—Lien-Note—Conditional sale—Bills of Sale Ordinance—Description.

Notwithstanding the case is of such a character as to require special leave to appeal, the Court in banc has power to amend the notice of appeal; such an amendment is a matter for the exercise of the discretion of the Court, and such discretion will not, in such a case, be exercised without any great precautions.

The Ordinance respecting receipt notes, hire receipts, and orders for chattels (No. 8 of 1889)† requires such instruments to be registered "where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee." The instrument in question in this case provided that "the title, ownership and right to the possession of the property, for which this note is given, shall remain in" the bailors.

Held, that inasmuch as the "receipt note" in question in this case provided that the bailors might on certain contingencies take possession of the property, it was clear on its face that, though the *right* of possession was in the bailors the *actual* possession was to pass to the bailee, and that, therefore, the instrument was one which came within the terms of the Ordinance.

Sutherland v. *Mannix*[1] and *Boyce* v. *McDonald*[2] considered.

[1] 8 Man. R. 541. [2] 9 Man. R. 297. †Now C. O. 1898 c. 44.

The said Ordinance provides (s. 2) that the provisions of the Ordinance respecting Mortgages and Sales of Personal Property (No. 18 of 1889) ‡ and amendments thereto shall apply to such receipt notes, hire receipts, or orders for the purposes of this Ordinance, in so far as the provisions thereof may not be incompatible with or repugnant to this Ordinance.

Held, affirming the judgment of RICHARDSON, J., that this provision made applicable to such instruments s. 8, Ord. No. 18 of 1889,‡ which provides that mortgages, sales, assignments or transfers of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished.

The receipt note in question in this case stated that it was "given for one team of oxen."

Held, reversing the judgment of RICHARDSON, J., before whom the point was not fully argued, that inasmuch as the instrument itself showed further that the team of oxen was one bought by the bailee from the bailors for the price therein mentioned, that the team immediately previous to the bailment had been owned by the bailors and at the time thereof was taken over by, and was in possession of, the bailee, the team of oxen was sufficiently described.

[*Court in banc, June 8th, 1894.*

Statement.

The plaintiffs sold one T. W. Randle a team of oxen and took from him a document in the following form:

$75. Regina, Assa., June 16th, 1893.

On or before the first day of December, 1893, for value received, I promise to pay to The Western Milling Company, Limited, or order, the sum of seventy-five dollars, at their office, Regina, and one per cent. per month after due till paid. Given for one team of oxen.

The title, ownership, and right to the possession of the property for which this note is given shall remain at my own risk in Western Milling Company, Limited, until this note or any renewal thereof is fully paid with interest, and if I make default in payment of this, or any other note in their favor, or should I sell or dispose of, or mortgage my landed property, or if Western Milling Co., Limited, should consider this note insecure, they have full power to declare this, and all other notes made by me in their favor, due and payable forthwith, and they may take possession of the property and hold it until this note is paid, or sell the said property at public auction or private sale, the proceeds thereof to be applied in reducing the amount unpaid thereon, and the holders hereof,

‡ Now C. O. 1898 c. 43.

Statement. notwithstanding such taking possession or sale, shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance then found to be due thereon.

(Signed) T. W. RANDLE.

The document was duly filed in the proper office. Randle thereafter sold the oxen to defendants. Plaintiffs sued defendants, claiming $130 damages for conversion. The action was tried before RICHARDSON, J., without a jury, who gave judgment for defendants,, holding that section 8 of the Bills of Sale Ordinance was incorporated with Ordinance No. 8 of 1889, respecting hire-receipts and conditional sales of goods, and that the document filed did not contain such a description of the oxen upon its face that they could thereby be readily and easily known and distinguished.

The plaintiffs appealed. The appeal was argued on the 4th day of June, 1894.

Argument. *D. L. Scott*, Q.C., and *W. C. Hamilton*, Q.C., for appellants.

R. Rimmer, for respondents.

Scott, Q.C., moved for leave to add a ground of appeal not contained in the notice of appeal, to the effect that the lien note in question is not within Ordinance No. 8 of 1889, inasmuch as it was not a condition that the possession of the chattels should pass without any ownership therein being acquired by the bailee. He cited *Warnock* v. *Kloepfer*.[1]

Rimmer, contra. The grounds of appeal in cases under $200 are only such as are allowed by the trial Judge; section 503, Judicature Ordinance.

The judgment of the Court on the application to add ground of appeal was delivered by

Judgment. WETMORE, J.—I had some doubts as to whether the application having been made to the learned Judge for leave to appeal, where the amount is under $200, and he not having granted leave to appeal on the ground now asked to be added,

[1] 15 O. A. R. 324.

Judgment.

Wetmore, J.

we had any power to interfere with the decision of the learned Judge, but I am of opinion now, that when the appeal has been allowed by the trial Judge and brought before this Court, and this Court is properly seized of it, we have the power to make the amendment asked for, whether asked by the appellant or not. In addition to section 508 of the Judicature Ordinance,§ which provides that "any notice of appeal may be amended as the Court may think fit," I will also refer to section 507 of the same Ordinance, which provides that the notice, which is the notice of motion or appeal provided for by section 505—the terms notice of motion and notice of appeal I am taking to be synonymous,—provides that it may be amended "at any time by leave of the Court or Judge, on such terms as the Court or Judge thinks just." In *Pfeiffer v. The Midland Railway Company*,[4] in a notice of motion for a new trial "on the ground of misdirection," the grounds were not properly set forth, and the Court there held that the grounds should have been specifically set forth instead of the general ground being stated, and refused leave to amend. This notice of motion was given under English Rule 555, from which our Rule 507 was taken. Now, in delivering judgment, while the Court held that the notice was bad and the amendment was not allowed, they stated as follows: "We have indeed power under order 39, Rule 5, to amend the notice of motion, but the exercise of that power is in our discretion, and when we see that the grounds suggested are absurd, or do not go to the ground of the enquiry or of the right in question, the amendment should not be made." We see, therefore, that the amendment was not made on that ground, but it was declared that it was in the discretion of the Court to make it or any amendment. Now, the question here is one of great public importance in the Territories, as it affects the whole operation of the Lien Note Ordinance. The learned Judge, in granting leave to appeal, did so on the ground of the importance of the question raised, and I am disposed on the same ground to allow the addition of the ground of appeal as asked for by Mr. Scott. It has been

[4] 18 Q. B. D. 243; 35 W. R. 335.

§ No. 6 of 1893, now C. O. 1898 c. 21, see Rules 503 *et seq.*

Judgment.
Wetmore, J.

suggested that it is dangerous to open a door to applications of this sort by allowing such amendments as this when the matter comes before us, but I think the answer to that may be this, that if persons making an application of this sort are driven to do so from the negligent manner in which they have drawn up their notice of appeal, this Court will exercise its discretion and disallow it, or the Court might impose terms, the postponement of the hearing of the appeal, the party who makes the application bearing the costs of the application made. I think that would be sufficient safeguard against these applications being made for such reasons. For these reasons, therefore, we have come to the conclusion to grant this amendment asked for, but it must be understood, however, that it is a matter in the discretion of the Court and that it is one which will not be exercised without very great precautions. In this case also I may say that Mr. Rimmer has not set up that he is not prepared to argue this ground or that he is taken by surprise and that therefore may be a reason for allowing it.

The argument of the case on the merits was then proceeded with.

[*June 8th, 1894.*]

McGUIRE, J.—The learned Judge before whom this case was tried was of opinion that the effect of section 2 of Ordinance No. 8 of 1889 is that chattels mentioned in receipt notes, etc., must be so described as to satisfy the requirements of section 8 of the Ordinance respecting Bills of Sale and Chattel Mortgages, and if so that the description of the oxen in this case was not sufficient.

The appellants say that the Receipt Note Ordinance does not require any such description, and secondly, even if it does, then the description in this case is still sufficient.

This is the first case in which has been raised the question of the sufficiency of the description of chattels in receipt notes, etc.

If the description here would have been sufficient if contained in a chattel mortgage, then it will be unnecessary to

decide as to whether the learned trial Judge was or was not right in his construction of the Receipt Note Ordinance. Judgment. McGuire, J.

Looking at the judgment appealed from it is obvious that the question which engrossed nearly all his attention was whether the description must be such as would be sufficient in a bill of sale.

Assuming that to be so, there was certainly considerable authority to justify his decision that the description "One team of oxen" was not sufficient. For example, in *Holt* v. *Carmichael*,[5] "one single buggy" was held insufficient. In two American cases cited in Barron on Bills of Sale, at page 498, "three yoke of oxen" and "one sorrel horse" were held insufficient descriptions. These were decisions upon chattel mortgages. Bnt in the present case it was pointed out in the argument before this Court that the receipt note contained material on its face which made what might otherwise be too general a description, sufficiently definite. It may also be pointed out that in mortgages, the chattels undergo no change of locality or visible possession, whereas here there was a change of both locality and visible possession, circumstances which facilitate the identification of the animals. It does not appear that this line of argument was resorted to at the trial or that the learned Judge's attention was directed to the other matters of description suggested by the instrument and which served to make definite that which would otherwise have been too vague and general. The short description given in the receipt note is "one team of oxen." But is there in this document nothing else which characterizes and distinguishes this particular "team of oxen" from all other teams of oxen?

Let us see. The note is expressed to be "given for one team of oxen," words which point to a purchase by Randle from the Western Milling Company of a team of oxen for the amount of the note, $75; that is to say, this team of oxen is one bought by Randle from the company for that price.

Again, it states that the "title, ownership," etc., shall "remain" * * * in the company, indicating that the

[5] 2 O. A. R. 639.

Judgment. McGuire, J.

oxen were animals which had been up to that time owned by the company.

Again it states that on the happening of certain events the company might "take possession" of these oxen, and, impliedly, that until that event the company could not so take possession, words which show that the animals were no longer in the actual possession of the company, and from the whole tenor of the document one can hardly resist the inference that they were then in the actual possession of Randle.

Taking these expressions together they show that the oxen referred to were animals which had been owned by the Western Milling Company, had been in their possession, had been sold by the company to Randle for $75 and had passed out of the actual possession of the company into that of Randle and were then in his possession, were to remain in his possession until default, etc., and in that event were animals which the company might "take possession" of and hold, etc.

Is it at all likely that there was another team of oxen in the world of which these things could all be predicated?

It would be much easier to imagine the existence of another "brown horse ten years old," as described in *Corneill* v. *Abell.*[6]

Now a careful and intelligent reading of the document here, without going outside of its four corners, affords, as we have seen, a rather lengthy and detailed description of this property, and one which may fairly be said to distinguish it from all other chattels in the world. It may be said that a mere view of the oxen would not identify them as the oxen of which the above description was predicated. But it has been held that mention of the locality, added to what would otherwise be a vague and general description, is sufficient. For example, in *Nattress* v. *Phair,*[7] "one kitchen table, four chairs," etc., a very vague description, was held to be sufficient when joined to these words "all contained in

[6] 31 U. C. C. P. 109. [7] 37 U. C. Q. B. 153.

and about the dwelling house and barn of the mortgagor situate at or on lots," etc. Had that kitchen table been removed to a neighbor's house it would surely not carry with it anything to proclaim it as the one which had been in that "dwelling house" of the mortgagor, but extrinsic evidence that, for example, of someone who had seen it in the mortgagor's dwelling house, might be obtained, and its identification would thus be possible.

So, in the present case, extrinsic evidence could be obtained to show that this "team of oxen" was the team sold by the Western Milling Company to Randle, and the actual possession of which had been changed from the company to Randle. In an American case, *Pettis* v. *Kellogg*,[8] cited in Barron on Bills of Sale, at page 497, "all the staves I have in M., the same which I purchased from F.," was held sufficient, though the staves were not at M., but near it, the statement that they had been "purchased from F." being deemed sufficient to identify them. It is well known that a very common method of distinguishing things is to call them by the name of the person from whom they were purchased, as, for example, "the Jones horse." It may be observed that words of description which would be insufficient in a bill of sale or chattel mortgage may be sufficient in a lien note, because in the former the chattels remain in the possession of the person who had them, and in the same place where they were before the instrument was executed, whereas in the case of the lien note there has been a change of possession from the vendor to the vendee, and usually a corresponding change of locality, both of which circumstances furnish ready means of identifying and distinguishing them from all others of the same kind. In *McCall* v. *Wolff*,[9] Chief Justice Ritchie says that the description need not be such "that, with the deed in hand, without other enquiry, the property could be identified, but there must be such material on the face of the mortgage as would indicate how the property may be identified if proper enquiries are instituted, as, for instance, 'all the property now in a certain shop,' etc." And Strong, J.,

[8] 7 Cush. 456.

[9] 13 S. C. R. 130 at p. 133.

Judgment. McGuire, J.

in the same case quotes with approval a decision of an American Court that "it is sufficient that the mortgage points out the subject matter of it so that a third person by its aid, together with the aid of such enquiries as the instrument itself suggests, may identify the property covered." I think the instrument in this case "suggests such enquiries" and has "such material upon the face of it as would indicate how the property may be identified if proper enquiries are instituted."

Having arrived at this conclusion, it is unnecessary to consider the other question raised upon the appeal, though I may say that I agree with the judgment thereon of my brother WETMORE.

The appeal will therefore be allowed with costs.

WETMORE, J.—I concur in the judgment delivered by my brother MCGUIRE. As, however, the learned trial Judge gave leave to appeal in this case in view of the general importance of the question as to whether section 8 of the Bills of Sale Ordinance (No. 18 of 1889) is incorporated into Ordinance No. 8 of 1889 by virtue of the provisions of section 2 of the last mentioned Ordinance, and as this Court also, in view of the general importance of the question, gave leave to amend the notice of appeal by adding a ground raising the question whether the note sued on is a document which came within the provisions of the last mentioned Ordinance, I deem it advisable to express my opinion on those questions.

I agree with the learned trial Judge that section 8 of the Bills of Sale Ordinance is incorporated into Ordinance No. 8 of 1889 for the purpose of providing that the documents mentioned in that Ordinance shall contain such sufficient and full description of the chattels mentioned in them that the same may be readily and easily known and distinguished. It is unnecessary to repeat the reasoning of the learned Judge or to refer to the authorities which he has cited. It will be quite sufficient for me to say that in my opinion the Legislature intended to provide by section 2 of that Ordinance that the provisions of the Bills of Sale Ordinance shall, in

so far as they are applicable, apply to receipt notes, hire receipts and orders for chattels. Of course there may be, and I think there are, provisions in the Bills of Sale Ordinance that are entirely inapplicable to the documents mentioned in Ordinance No. 8 of 1889, and when that is the case, to use the language of section 2 of the last mentioned Ordinance, incompatible with the provisions of that Ordinance. But I can discover nothing in section 8 of the Bills of Sale Ordinance incompatible with the provisions of Ordinance No. 8, in so far as it relates to the matter of description of the chattels, and when we come to apply its provisions to receipt notes, hire receipts and orders for chattels, we must, so far as this matter of description is concerned, read it as if the words receipt notes, hire receipts, and orders for chattels, were incorporated in it.

Judgment. Wetmore, J.

It is not necessary at present to go any further than I have gone in stating the extent to which the provisions of the Bills of Sale Ordinance are applicable to Ordinance No. 8.

The other ground of appeal to which I refer is that the note in question is not a lien note or receipt note under Ordinance No. 8, inasmuch as it is not a condition of the note in question that the possession of the chattel should pass without the property being acquired by the bailee.

Upon inspecting this note it will be observed that it provides that the right to the possession of the property for which the note is given shall remain in the plaintiffs.

It was urged, therefore, that this was not such a note as required to be registered, and *Sutherland* v. *Mannix*,[1] and *Boyce* v. *McDonald*,[2] were relied on for this contention. These cases were decided under section 2 of chapter 87 of the Revised Statutes of Manitoba, which provided that from and after a certain date "receipt notes, hire receipts, and orders for chattels, given by bailees of chattels where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee were and shall be only valid" in certain specified cases.

Judgment.
Wetmore, J.

It will be observed that the language of this statute down to the word "bailee" and of section 1 of Ordinance No. 8 are identical. The note in the Manitoba case provided as follows:—"It is distinctly understood and agreed that the title, ownership, right of property and right of possession of and in the property for which the within note is given shall remain in the vendor or holder of this note until this note shall be fully paid." It will also be observed that the note in question in this case contains almost similar language. The Court of Queen's Bench of Manitoba held in *Sutherland* v. *Mannix*,[1] and Dubuc, J., following that case in *Boyce* v. *McDonald*,[2] held that the note in question there was neither a receipt note, hire receipt or an order for a chattel under the Manitoba Act, because it was provided in express terms that the ownership, right of property and right of possession in the property should remain in the vendor. There is a distinction, however, between the Manitoba Act and our Ordinance in one respect, because the Manitoba Act provides in section 2 that "no such bailment shall be valid unless it be evidenced in writing signed by the person then taking possession of the chattel," and there was nothing whatever in the note in question in *Sutherland* v. *Mannix*[1] or any other writing which afforded any evidence that the vendee had taken possession or was to have possession of the chattel. Although that circumstance is not mentioned in the judgment it is quite possible it might have influenced the Judges in arriving at the conclusion they reached. There is, as I have stated, no such provision in our Ordinance, and there is ample evidence on the face of the note in question in this case that the vendee was to have and did take possession of the oxen, because it provided that the vendors might, on certain contingencies arising, take possession of the property, which would be altogether unnecessary if the vendors held or were to have possession all the time. If, however, the Court of Queen's Bench of Manitoba intended to decide that, notwithstanding the possession may have passed to the vendee, because the note provided that the right of possession should remain in the vendor, no possession passed to the vendee, and therefore the note was not

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within the Act, I must state with the very greatest respect that I do not agree with the decision. I think that possession is one thing and a right of possession is quite another. Now, what is the bailment contemplated by the Ordinance? It is the delivery of the property intended to be sold by the vendor to the vendee. That bailment is complete when the property is so delivered, the vendee—if I may call him a vendee—becomes the bailee at once, he is not the owner and still he has lawful possession, the owner cannot treat him as a trespasser, and what else can he be but bailee? The receipt note is not the bailment or evidence of the bailment, it is simply the written evidence or statement of the conditions on which the bailment was made or is intended to be made. The vendee has the actual visible possession and words can have no magic to change the facts. If he has the actual visible possession it is none the less such a possession because a form of words says that the right of possession is in someone else.

Then what have we as a matter of fact? We have the bailment and then we have the condition as expressed in the note that the ownership is not acquired by the bailee. So the statute is filled. To hold the contrary would open a wide door to evade the Ordinance altogether, which I am not disposed to do.

I am therefore of opinion that this note is a document embraced by the Ordinance.

I am at liberty to state that my learned brethren concur in this judgment.

MACLEOD, J., and ROULEAU, J., concurred.

Appeal allowed with costs.

HULL ET AL. v. DONOHOE.

Attachment of debts—Garnishee summons—Issue—Attachable debt—Extent of issue—Fraudulent conveyance—Future creditors.

An issue was directed to try the question whether certain moneys in the hands of a garnishee—being part of the purchase price of certain designated lands in respect of which moneys a garnishee summons had been issued against the garnishee—were, at the time of the service of the garnishee summons, the moneys of the plaintiff in the issue, a creditor of the judgent debtor, as against the defendant in the issue.

The moneys sought to be made subject to the garnishee summons were the balance of the purchase price of land sold by the judgment debtor's wife to the garnishee.

Held, per ROULEAU, J., the trial Judge, that the Court on such an issue could not enquire into the question whether the land, having formerly been that of the judgment debtor, had been fraudulently conveyed to his wife.

On appeal to the Court *in banc*,

Held, reversing the judgment of ROULEAU, J., who adhered to his former opinion that the Court could so enquire. (Reversed and judgment of ROULEAU, J., restored, 24 S. C. R. 683.)

Per MCGUIRE, J.—It was not open to the defendant in the issue to contend that the moneys sought to be attached did not constitute an attachable debt, because the form of the issue, which might have been so drawn as to have raised that question, was based on the assumption that the moneys were attachable if a debt at all, and the defendant was bound by the form of the issue; and *semble*, the moneys did constitute an attachable debt.

Per WETMORE, J.—The moneys in question did not constitute an attachable debt; but it was not open to the defendant in the issue so to contend, because she was estopped by reason of having applied for and obtained an order for the payment into Court of these moneys by the garnishee in the garnishee proceedings.

Per ROULEAU, J.—The moneys did not constitute an attachable debt, and it was open to the defendant to raise that question upon this issue; the question whether the moneys were attachable was a question of law involved in the issue; if the moneys were those of the judgment debtor they were attachable; if those of the defendant they were not.

WETMORE and MCGUIRE, JJ. (RICHARDSON, J., concurring) found as a fact upon the evidence that a certain business alleged to have been the separate business of the defendant (the judgment debtor's wife) was not in fact her separate business; and that consequently moneys derived from that business were not her separate property; and that the land, the proceeds of which were in question, was in truth the land of the judgment debtor, and had been fraudulently conveyed to his wife.

Per MCGUIRE, J.—(1) If at the time of a voluntary settlement the settlor were either insolvent, or became so immediately on the making of the settlement, and he was indebted at the time, so that the then existing creditors could have impeached the settlement, then if any of these debtors still remain unpaid, subsequent creditors may also impeach it.

(2) Furthermore a voluntary conveyance, made under such circumstances, may be set aside at the instance of a subsequent creditor, notwithstanding that no debts contracted before the conveyance remain unpaid: *Jenkyns* v. *Vaughan*,[1] *Taylor* v. *Coenen*,[2] *Holmes* v. *Penny*,[3] and *Newman* v. *Lyons*[4] considered.

Per ROULEAU, J.—In order to set aside a voluntary conveyance as against future creditors it is necessary to show that it was made with the view of entering into a risky business, and in the event of failure for the purpose of securing the property against future creditors.

[ROULEAU, J., *November 11th, 1893.*

[*Court in banc, June 8th, 1894.*

Statement.

The plaintiffs Hull Brothers & Co. and four others had severally obtained judgments against E. Donohoe, and had severally issued garnishee summonses against one J. H. Milward, who suggested Catharine Donohoe as a claimant of the moneys in question. These moneys were the balance of purchase money owing by Milward as the purchaser from Catherine Donohoe, the judgment debtor's wife, of certain land which some time previously had been caused to be conveyed by the judgment debtor to his wife.

By order the five cases were consolidated for the purpose of the trial of an issue between the several plaintiffs, as plaintiffs in the issue, and Catherine Donohoe, the claimant, as defendant in the issue. The issue prepared in pursuance of the order was as follows:—The plaintiffs severally affirm and the defendant denies that certain moneys in the hands of one J. H. Milward (being part of the purchase price of certain lands mentioned in the affidavit of Catherine Donohoe, the defendant, made in the garnishee proceedings hereinafter mentioned and in respect of which the said J. H. Milward was garnisheed in certain actions brought by the said plaintiffs respectively against one Edward Donohoe) were at the time of the service of the garnishee summonses in said several actions the moneys of the several plaintiffs, or any of them, as creditors of the said Edward Donohoe as against the defendant.

The issue was tried before ROULEAU, J., without a jury at Calgary on the 14th July, 1893, and several succeeding days.

[1] 3 Drew, 419; 25 L. J. Ch. 338; 2 Jur. N. S. 109; 4 W. R. 214.
[2] 1 Ch. D. 636; 34 L. T. 18. [3] 3 K. & J. 90; 26 L. J. Ch. 179; 3 Jur. N. S. 80; 5 W. R. 132. [4] 12 Can L. T. 262.

Argument. *Peter McCarthy*, Q.C., and *George S. McCarter*, for the plaintiffs.

C. C. McCaul, Q.C., for the defendant.

On counsel for the plaintiffs proceeding to prove that E. Donohoe, the defendant's husband, had previously been the owner of the land sold to the garnishee, the balance of the purchase price of which was in question, counsel for the defendant objected that the proposed evidence was irrelevant and immaterial to the issue, because the title to the property, in March, 1889 (the date of the certificate of title to the defendant) was in the defendant, and plaintiffs could not go behind that, because the Court was not trying the question of a fraudulent conveyance but the ownership of the money; and that the only way to try the question of a fraudulent conveyance was by a direct suit in Court, and not in a summary manner unless there be a special law to that effect.

The evidence was taken subject to the objection.

[*November 14th, 1893.*]

Judgment. ROULEAU, J.—A garnishee summons was taken out by the plaintiffs against the moneys in the hands of J. H. Milward, and Catherine Donohoe, the wife of the defendant, filed a claim to the moneys as being her property. There are four other proceedings of the same nature, which by order of the 12th December, 1892, were consolidated for the purpose of the trial of the issue directed to be tried, and of all proceedings necessary or consequent upon the result of such trial, and so far as the claim of Catharine Donohoe to the moneys in the hands of the garnishee, J. H. Milward, in the said several actions is concerned.

It was ordered that the said several plaintiffs in the various actions be plaintiffs and the said Catherine Donohoe be defendant in the issue, and that the question to be tried was whether at the time of the service of the garnishee summons on J. H. Milward, the garnishee above named, the moneys in the hands of the said garnishee—being part of the purchase price of the lands mentioned in the affidavit of Catherine Donohoe—were the moneys of the said plaintiffs, or any of

them as creditors of the above named E. Donohoe as against the claimant.

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Rouleau, J.

J. H. Milward has deposited in Court the amount, which he admitted he owed to Catherine Donohoe, to be disposed of according to the decision of the Court.

The facts of the case are in short as follows:—

On the 23rd day of March, 1887, Edward Donohoe for the consideration of $900, transferred lot 7 in block 63, and lot 7 in block 50, of the town of Calgary, to George K. Leeson. On the 24th of March, 1888, the said G. K. Leeson transferred the same property for the sum of eleven hundred dollars to Catherine Donohoe, wife of Edward Donohoe. On 2nd of March, 1889, a quit claim deed of the same lots was given by Edward Donohoe to his wife Catherine Donohoe, and on the 16th day of March, 1889, a certificate of ownership was granted to Catherine Donohoe of the same property. Afterwards, on the 1st September, 1892, Catherine Donohoe transferred lot 7 in block No. 63, of the town of Calgary, to Joseph H. Milward, who got a certificate of ownership for the said lot on the 8th day of September, 1892. Milward, it appears, assumed the encumbrances on said lot and the balance due on the same was garnisheed in his hands by the several plaintiffs in the five actions already mentioned.

As soon as the plaintiffs on the trial of the issue attempted to go behind Catherine Donohoe's certificate of ownership to prove the different prior transactions which took place, the claimant objected to the evidence as being irrelevant and immaterial to the issue, because the title to this property in March, 1889, was in Catherine Donohoe, and the Court could not go behind the title, because it was not trying the question of a fraudulent conveyance but only the question of the ownership of the money; that the only way to try the question of a fraudulent conveyance was by direct suit in Court, and not in a summary manner unless under a special law to that effect.

A transfer of real estate by a husband to his wife, and *vice versa*, is authorized by the Territories Real Property Act,

Judgment. Rouleau, J.

R. S. C. c. 51, ss. 10, 11, and 13. If so, then how can I declare that such a transfer is fraudulent, unless an issue be taken to that effect, assuming that the law would authorize such an issue? On a proceeding of this description. am I in a position to declare that such money is due by the garnishee to Edward Donohoe, when the documentary evidence shows me that, on the contrary, there is a legal debt due to Catherine Donohoe by the garnishee?

No precedents were cited to me going to show that under the above issue, I am empowered to investigate whether the conveyance in this case is a voluntary settlement, or is for valid consideration, or that I am in a position under the circumstances, to consider the question of fraud. I think that the objection taken to that evidence was properly taken, and that the motion for nonsuit should be granted. The plaintiffs' case is, therefore, dismissed with costs; the costs, as far as the contestation of this issue is concerned, to be divided between the five cases; and the moneys deposited in Court by the garnishee to be paid to the claimant.

From this judgment the plaintiffs in the issue appealed. The appeal was argued on the 6th June, 1894.

Peter McCarthy, Q.C., (*D. L. Scott*, Q.C., with him), for the appellants.

C. C. McCaul, Q.C., for the respondents.

[*June 8th, 1894.*]

McGuire, J.—This is an appeal from a judgment of Mr. Justice Rouleau, on an interpleader issue as to the ownership of certain money attached by garnishment process.

Plaintiffs are creditors of one Edward Donohoe, who in 1887 was the owner of two lots in Calgary, and on 23rd March of that year borrowed $900 from one Leeson, but instead of giving a mortgage on the lots in question to secure repayment of this loan and interest, gave him an absolute transfer, taking back an agreement by which it was provided that Donohoe should purchase back said lots within one year for the sum of $1,100, which sum Donohoe bound himself to pay, and on payment thereof Leeson covenanted to convey

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McGuire, J.

said lots to Donohoe, "his heirs and assigns," time to be of the essence of the contract. Shortly before the expiration of the year Donohoe repaid to Leeson the $1,100, and on the 24th March, 1888, Leeson, by a document in writing, transferred the lots to Catherine Donohoe, wife of Edward Donohoe, in consideration of $1,100 expressed to be paid to him by said Catherine Donohoe. This document is not under seal, and is signed by Leeson and by Edward Donohoe. These lots had not then been brought under the Territories Real Property Act, but upon an application on behalf of Catherine Donohoe made in February, 1889, her title was registered, and on the 16th March, 1889, a certificate of title was granted to her. In the application the value of the property is placed at $3,250. One of these lots with the buildings thereon was, on 1st September, 1892, sold to one Milward for $4,800, the transfer being signed by both Edward and Catherine Donohoe. Three thousand dollars of the consideration was to be paid by assuming a mortgage for that amount then on said land, and the balance, $1,800, was to be paid in cash.

At this point, and before the payment by Milward of the $1,800 several creditors of Edward Donohoe took out garnishee summonses and had them served on Milward, on the ground that this money was really owing to Edward Donohoe. Catherine Donohoe gave notice to Milward that she claimed the money as hers.

Milward thereupon interpleaded, and an interpleader order in the suit of Hull Brothers & Company against Edward Donohoe, defendant, was, on 16th November, 1892, made by Mr. Justice ROULEAU, in which the said plaintiffs Hull Brothers & Company and said Catherine Donohoe were ordered to proceed to the trial of an issue, the said Hull Brothers & Company to be plaintiffs and Catherine Donohoe defendant, the question to be tried being "whether at the time of the service of the garnishing summons on J. H. Milward the moneys in the hands of the garnishee (being part of the purchase price of the lands mentioned in the affidavit of Catherine Donohoe) were the moneys of the said claimant as against the plaintiffs."

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McGuire, J.

In the interpleader issue delivered on 27th December, 1892, the issue is somewhat changed, plaintiffs affirming and the claimant denying that said moneys were, at the time of the service of the garnishing summons, the moneys of the plaintiffs or any of them "as creditors of the said Edward Donohoe as against the defendant." In the meantime, between the date of the first interpleader order and the delivery of the above issue an order had been made consolidating five garnishing proceedings, the question to be tried being in the same words as the above issue.

Shortly thereafter, "upon the application of the claimant," an order was made directing the garnishee to "pay into Court to the credit of the above consolidated actions all moneys in his hands in respect of which the said garnishee was garnisheed in the said several actions," to abide the result of the trial of the issue directed by the said order of the 12th December, 1892, or to abide the further order of the Court or Judge, and this order appears to have been "approved" of by the advocates for all parties, plaintiffs, claimant and garnishee.

This, then, was the question which the Judge was asked by all parties to try: Were these moneys the moneys of the plaintiffs as creditors of Edward Donohoe, as against the claimant Catherine Donohoe?

The trial of this issue began in July, 1892, before Mr. Justice ROULEAU without a jury. Plaintiffs claimed that Catherine Donohoe was only a trustee for her husband. It was objected on behalf of the claimant that the only way to set aside a conveyance as fraudulent was by a direct suit in Court, and her advocate objected to going into evidence as to the title to the land prior to the certificate of title to claimant in March, 1889. Subject to these objections, the evidence was taken showing the history of the dealings with the land as already set out. The learned Judge gave judgment in favour of the claimant, on the ground that the Territories Real Property Act authorizes a conveyance from husband to wife, that in March, 1889, the title was in the claimant and the Court cannot go behind that title, because it is not "trying the question of a fraudulent conveyance but

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only of the ownership of money; that the only way to try the question of a fraudulent conveyance is by direct suit in Court and not in a summary manner, unless under a special law to that effect."

Obviously the learned Judge was of opinion that to impeach Mrs. Donohoe's title to the money it was necessary to have the conveyance to her declared fraudulent, and that a formal suit in Court must be brought for that purpose. He consequently did not express any opinion as to whether these conveyances were or were not fraudulent as against creditors.

The plaintiffs appeal from this judgment. They contend that it is open to them to show that the various proceedings and transfers, by which Catherine Donohoe was enabled to obtain a certificate of title to these lands, were fraudulent as against the creditors of said Edward Donohoe; that it is open to them to show that the effect of the evidence is that Catherine Donohoe is only a trustee for her husband, who always was the true owner of the land, and, as such, entitled to the proceeds of the sale to Milward.

It is to be observed that the question which all parties agree was to be tried was not whether the title to Catherine Donohoe was obtained by fraud or whether there was any debt due by Milward to Edward Donohoe which could be garnisheed, but the question was as to the ownership of the money then in Court to abide the trial of that issue.

It was not necessary for the plaintiffs to set aside any conveyances. Had they done so, then Milward would have had no title and would not owe any money to either Edward Donohoe or his wife.

The advocate of the claimant on this appeal contended that this money, even assuming that the transfer to Catherine Donohoe is impeachable, is not an attachable debt, but that it is no part of the issue. The claimant might have had that question made part of the issue. If he was right and there was no debt due from Milward which was subject to attachment, he could have applied to have the garnishing summonses set aside. But instead of taking that position,

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or of asking that the attachability of this money should be part of the issue, he consents to an issue in which it is assumed that this money is subject to attachment, and the only question to be tried is, to which of these parties, the plaintiffs as creditors, etc., or Catherine Donohoe, these moneys belong.

Now, that was an issue which the Judge had power to direct. By section 310 of the Judicature Ordinance then in force the Judge had power, among other things, "to order * * * any issue or question to be tried or determined in manner aforesaid," and these last three words refer to section 308, and mean that it may be "tried or determined in any manner in which any issue or question in an action may be tried or determined."

Having, then, settled the issue and that by consent of the present claimant, the Judge was next to try or determine this question in any manner in which any issue or question in an action could be tried or determined; any evidence or argument pertinent to that question or issue was receivable by him.

It was contended for the respondent that the Judge could not try whether the proceedings by which Catherine Donohoe became apparent owner of that land were fraudulent or not in such a proceeding as this, but that the parties must proceed in Court by an action to have her title impeached.

But the whole subject matter was in Court, the Judge had authority to direct and to try or determine the issue directed here. Moreover, by section 8, sub-section 5 of the Judicature Ordinance he not only had jurisdiction but it was his duty to grant * * * all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward * * * so that as far as possible all matters so in controversy between the parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided" (see *Re Tharp*; *Tharp* v. *Macdonald*[5]).

[5] 3 P. D. 76; 38 L. T. 867; 26 W. R. 770.

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McGuire, J.

The spirit of the Ordinance is that parties shall not be sent from Court to Court, but that, if possible, all questions shall be disposed of in the one proceeding. There was no reason why the Judge sitting to try that issue was not as competent to try whether there was fraud against creditors in the dealings between Donohoe and his wife, than if he were sitting to try a suit brought formally and specially to try that particular question. The proving of fraud in the title of Mrs. Donohoe was merely one of the ways of showing that she was not entitled to claim this money; it was a question which arose only incidentally. The plaintiffs did not ask that any conveyances should actually be set aside, and it was competent for them to adopt the sale to Milward, but to show that in effect it ought to be treated as a sale direct from the real owner, Edward Donohoe, to him.

If any authority is required that the Court can dispose of questions thus incidentally arising in the course of a trial, and that it can treat instruments as if they had been set aside, reference may be made to *Mostyn* v. *West Mostyn Coal and Iron Co.*[6]

If the plaintiffs were able to establish by any appropriate evidence that, notwithstanding the paper title of the claimant, her husband was the real owner of the land and so the person really entitled to the proceeds of the sale of it, then the issue, I submit, must be found in favour of the plaintiffs. Any evidence, therefore, which showed that Mrs. Donohoe was not the real owner was pertinent to the issue. The plaintiffs were not forced to set aside the title. If they could show that they were in a position to do that—that the evidence would have justified the setting aside of her title—for the purpose of determining the true ownership of that money, the Judge could treat the whole transaction as virtually a sale by Edward Donohoe to Milward. It might well be that the sale to Milward might be unimpeachable and yet the Judge might determine that, while letting that stand good, he could lay hold on the proceeds and declare them to be the

[6]45 L. J. C. P. 401; 1 C. P. D. 145; 34 L. T. 325; 24 W. R. 401.

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property of the creditors of Edward Donohoe. In *Masuret* v. *Stewart*[7] the sale was not disturbed, but the money part of the proceeds of the sale, which Lampman admitted he still had in his hands, was ordered to be paid into Court for the creditors.

I think, therefore, that the learned Judge should have gone into an enquiry into the transactions by which Catherine Donohoe became apparent owner of the land.

Two courses are now open, either to refer the matter back to the learned Judge to determine that question, or for this Court, under the powers given it by section 509 of the Civil Justice Ordinance, 1893, to determine that question itself. I think we have all the evidence before us that the parties thought proper to produce before the trial Judge, and it will save further expense and possibly a second appeal to this Court to deal with the whole matter and dispose of it on this appeal.

It is a fact that in March, 1887, Edward Donohoe was the absolute owner of this land. He desired to borrow $900 from Leeson. No reason is given why, instead of a mortgage, an absolute transfer, with an agreement for transfer back, was resorted to. Where the loan approximates the fair value of the land a transfer instead of a mortgage is frequently taken to save the cost of foreclosing or realizing on the mortgage. But this property is in 1891 valued at $3,250. Improvements to the extent of $1,050 had in the meantime been put upon it by O'Keefe. Deducting this, it would appear that the land was in March, 1887, probably worth twice the amount of the loan. Was this particular form of dealing resorted to for any fraudulent purpose? There is no evidence to enable one to answer. About the time of the transfer to Leeson, Edward Donohoe employs O'Keefe to make certain improvements on the land, and O'Keefe states in the mechanic's lien which he registered in April, 1887, that the price of the work was to be $1,050, and that it was done between 28th March, 1887, and 20th April, 1887. Shortly before the expiration of a year from the

[7] 22 O. R. 200.

transfer to Leeson, Edward Donohoe comes to Leeson with $1,100, and, although the evidence does not show it, it may be assumed that he requested the conveyance from Leeson to be made to Catherine Donohoe, for we find an instrument in writing signed by Leeson and Edward Donohoe purporting to transfer the land to Catherine Donohoe in consideration of $1,100, therein expressed to be paid by her to Leeson. Donohoe and his wife both say that this money was Mrs. Donohoe's, and that he simply acted as her agent in handing the money to Leeson. Assuming for a moment that the money was her separate property, she was getting for $1,100 two lots which, in her own application to have her title registered, are valued at $3,250, and one of which lots is, in 1892, sold for $4,800 to Milward. She was not likely, for obvious reasons, to exaggerate the value of the land in her application to the registrar. She, therefore, got for $1,100 property worth in the following year $3,250. Why was Edward Donohoe so generous? He says he told his wife he had no money, but if she liked to buy it she might do so. He was at that time indebted to several persons. Mrs. Donohoe says the only debts she knew her husband owed then were, a balance to O'Keefe, an execution at the suit of the Imperial Bank and an account for freight to the Canadian Pacific Railroad Company. She says she paid off these by a loan of $500 which she got from one Marsh, and which appears from her certificate of title to have been borrowed about 27th October, 1888. By reference to her certificate of title it seems the Imperial Bank execution was withdrawn on 31st October, 1888, the O'Keefe mechanic's lien was cancelled by certificate of non-prosecution on 13th February, 1889, but the Canadian Pacific Railway Company delivered to the registrar an execution against Edward Donohoe on 12th July, 1889, and it was not withdrawn until 6th May, 1891. If this were the same claim she is probably mistaken in saying that it was paid off by the proceeds of that Marsh mortgage. In her evidence she says she never collected any rent personally from the property up to its sale to Milward. "The rent went to pay the debts I and my husband owed—think it was at first rented at $50 a month—never got any rent myself—never

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got the money proceeds of the mortgage to Marsh." There were two mortgages to Marsh each for $500, the former being realized before the second was made, it is uncertain which she refers to. "Did not get any of the money for which the two properties were mortgaged to the Canada Permanent Loan Company"—from the certificate of title that appears to have been for $3,500—"didn't get any of that money, didn't know who got it." If she were the real owner this evidence would seem very strange, but not so strange if it were only nominally hers and really her husband's, and the inference would be that her husband got these moneys, for she tells us, when saying she never got the rents, "my husband used to do business for me here in Calgary," and later on she says she "took no part in the management or control of the property until it was sold." Is it not a fair inference that it was her husband who got the proceeds of the two mortgages totalling $4,000? If so, we find the husband treating the land as really his own, the nominal title in his wife being a mere matter of form to be practically disregarded whenever it suits his purpose it should be so. The $3,500 loan was obtained as late as June, 1892. But on September 1st, 1892, he was sued by four creditors for claims aggregating $739.10, and on September 6 by another firm for $46.50, making a total of nearly $800. It is a circumstance that in the transfer to Milward both Edward Donohoe and his wife represent themselves as "registered owners," and both execute the transfer. He might easily be mistaken as to his being a registered owner, but was he likely to say that he was an "owner" at all if he was not? Or, is this merely a clerical error? Possibly so.

Hitherto I have been assuming that the $1,100 paid to Leeson was her money, made by her, as she says, in a hotel kept by her at Anthracite. In 1887, she says, they moved up to Anthracite and remained there three years.

She says her husband was working at his trade of blacksmith at the mines, and that he had nothing whatever to do with the hotel, which was hers, and part of the time the business of herself and a partner, one Gorman. She says it was from the profits of that hotel or boarding house she

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McGuire J.

earned and saved the $1,100. Now, let us see what the evidence of herself and husband discloses as to this business. Edward Donohoe was examined in November, 1891, in a suit brought by one Olaf Johnson against him in connection with the purchase of this hotel property. He denies entering into any agreement with the plaintiff as to this property. He says he does not know if there was any between his wife and plaintiff—that Gorman was running the bar—not for him (Donohoe), "but I believe for himself." He says he (Donohoe) put improvements on the property but no money of his own—later on he says the value of these "including my work is about $600 or $700." "I did not intend to rent the hotel from any person because I did not know from whom to rent it. * * * I don't know to whom the property belongs." "My wife was working in the hotel. Gorman was running the hotel, I think. She was not running it for herself or for me. * * * I don't know that Gorman and my wife were running the hotel together." Both Donohoe and his wife seem anxious to make a display of Gorman's presence in the business. But he commenced about 19th October, 1887, and sold out on December 1st of the same year. He was there, consequently, only a little over a month. "I don't know whether she was getting wages or not." "I don't know whether my wife claims it (the property) or not." After saying he had talks with his wife about the property, he adds "she did not make any claim to the property that I heard her say."

What will be thought of these statements when we are shown an agreement of sale from Johnson to Catherine Donohoe and James Gorman under date 19th October, 1887, of the dwelling and contents for $1,950—two receipts, one for $20 from Catherine Donohoe, per Edward Donohoe, being first payment on lots 22 and 23, block 1, the land on which the hotel stood, the other dated July 18th, 1891, for $100 (McArdle's cheque), and $114, an order on McNeil & Company, and when we see his own statements in the course of the same examination where he says, "I paid some money to Mr. Pugh on these lots, I think it was $300, and it

Judgment. McGuire, J.

was paid since the writ in this action was served on me. I made that payment of $300 for my wife * * * she gave me the $300, and I turned in my wages to pay part of it." In explanation of one of the above receipts he says "some of the money was got by my borrowing for my wife $100 from Wm. McArdle, of Anthracite." The $114 order on McNeil & Company was, no doubt, what he referred to when saying "I turned in part of my wages." He was working for McNeil & Company. Remembering that he was living in the hotel with his wife, that he admits talking with her about the property, it seems incredible that he should have been ignorant of whether she even claimed the property or not. Considering, however, that Donohoe was being sued by Johnson for the unpaid portion of the purchase money of the hotel and contents, we may understand why he was anxious not only to deny any liability on his own part but also to avoid implicating his wife. Mrs. Donohoe wishes it to appear that the hotel business was her business quite separate from her husband, who, she says, was working as a blacksmith and was merely a boarder at her hotel. But in the quit claim from Donohoe to his wife, executed in March, 1889, Edward Donohoe is described as of the town of Anthracite, "saloon-keeper," and in her own application to have her title registered, made about the same time, he is described as "hotel-keeper"; in the transfer from Leeson to Mrs. Donohoe she is described as the wife of "Edward Donohoe, of the said town of Calgary, hotel proprietor"; in the mortgage in October, 1888, to Marsh, Edward Donohoe is called a "hotel-keeper."

In her cross-examination she says "accounts were run in these stores (at Anthracite), and they were run in my husband's name. My husband used to go there to purchase, and sometimes I went. I did most of the buying myself." "During this time I was carrying on the hotel business. I did the business with Carlin, Lake & Co. and King & Co. in my husband's name. The account at Hull Brothers was carried on in my husband's name at Anthracite." "The bills came in first to Gorman and Donohoe and after Gorman left they

came in charged to Ed. Donohoe." So much as to the Anthracite business. Judgment. McGuire, J

Under the authorities I think it cannot be said that the hotel and boarding house business there was Mrs. Donohoe's separate business. The reasoning of Boyd, C., in his judgment in *Campbell* v. *Cole*,[8] seems to apply to the circumstances of this case, and I feel bound to come to the conclusion that the Anthracite business was in truth and in fact the business of Edward Donohoe.

That being so, the $1,100 paid to Leeson was Edward Donohoe's money, and the transfer from Leeson to Mrs. Donohoe was purely voluntary. So far as appears from the evidence the Calgary property was the only property Edward Donohoe owned. He may have owned other property, but there is no evidence of it. He swears he did not own the Coulbraute property. If it was all he owned, then the moment Leeson transferred to Mrs. Donohoe, Edward Donohoe was left without anything wherewith to pay his debts, that is to say, he was "insolvent." We have only the evidence of the Donohoes, as to what debts were then owing. They say there were only three debts, namely, to O'Keefe, to the Imperial Bank, and to the Canadian Pacific Railway Company for freight. The O'Keefe claim ought not possibly to be considered, as he had filed a mechanic's lien, although it does not appear from the abstract of title and the certificate of title to Mrs. Donohoe that he took any further steps in respect to that lien beyond filing it, and it was eventually disposed of by the registration of a certificate of non-prosecution. Leaving that out, there were still two debts unpaid, both of which were sued to judgment and executions in respect thereof delivered to the registrar, that of the Canadian Pacific Railway Company being so delivered on April 30th, 1889, and not withdrawn until 6th May, 1891.

But it is said all these debts have since been paid. True, they have, but before this Canadian Pacific Railway Company's execution was released Edward Donohoe had become indebted to at least one of the plaintiffs, namely, Hull

[8] 7 O. R. 127.

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Brothers & Co., whose claim we see from the evidence of McCarter began 1st September, 1890. It is fairly well settled that if, at the time of a voluntary settlement, the settler were either insolvent or became so immediately on the making of the settlement, and he was indebted at the time, so that the then existing creditors could have impeached the settlement, then, if any of these debts still remain unpaid, subsequent creditors may also impeach it (*Freeman* v. *Pope*,[3] *Jenkyn* v. *Vaughan*.[1]) But suppose all the old debts have been paid off before any of the subsequent creditors attack the settlement, will this affect the situation? The point was raised in *Jenkyn* v. *Vaughan*,[1] and the Vice-Chancellor said that there was no clear authority upon the subject; and he continues: "If at the time of filing this bill no debt remained due which was due at the time when the deed was executed it might be the rule—I do not say it is, but it might be the rule—that the Court could not decide that the intention was to delay the subsequent creditors. I do not find any such rule laid down in any of the cases." But in a later case of *Taylor* v. *Coenen*[2] the Judge says: "It is further argued that a voluntary settlement cannot be set aside unless some debts are due which existed at the time of the deed being executed—from that proposition I entirely dissent." There is also a case of *Holmes* v. *Penney*,[3] the report of which I have not seen, but the head-note seems to indicate that the decision was in the same direction as *Taylor* v. *Coenen*[2] (see also *Newman* v. *Lyons*.[4]) In the present case it looks as if Hull Brothers & Co.'s claim began before the satisfaction of the Canadian Pacific Railway Company's claim, which existed at the date of the transfer from Leeson to Mrs. Donohoe. But it seems to me that the decision in *Taylor* v. *Coenen*[2] commends itself to one's common sense. The question of fraud is to be determined with reference to the date of the impeached transaction —if it was done with a fraudulent intent can the mere payment afterwards of the then existing debts wipe out the fraud? If so, a dishonest settler, having gone on and incurred large subsequent liabilities, and learning that these subsequent

[3] 39 L. J. Ch. 148; affid. 39 L. J. Ch. 689; L. R. 5 Ch. 538; 21 L. T. 816; 18 W. R. 906.

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McGuire, J.

creditors were contemplating an attack on the settlement, might, acting under legal advice, pay off the old debts, for the very purpose of preventing the subsequent creditors impeaching the settlement. Assuming, then, that subsequent creditors can still impeach the settlement, let us see the circumstances under which Mrs. Donohoe was made the apparent owner of this land. I have already pointed out that there were debts in existence and that after the transfer to Mrs. Donohoe it does not appear that Edward Donohoe had any property left out of which he could pay these debts.

From the evidence I have already partly noticed, which Mrs. Donohoe gives as to her husband collecting the rents and his doing all the business in connection therewith right down to the sale with Milward, and especially his receiving the proceeds of those two mortgages, is it not reasonable to infer that it was never intended that she should be the beneficial owner, but that all along he retained and intended to retain the practical ownership and control of that property? In other words, was she not intended to be a mere trustee—a merely nominal owner, while her husband always remained the real, the beneficial owner? It is not the case of a man settling property on his wife, intending it to be for her benefit. Here, I think, he never had any such intention.

It was he who telegraphed to Marsh to close the sale to Milward, and he joins in the transfer to Milward, and therein asserts that he is one of the "owners."

From a consideration of all these facts, must we not regard the sale as really a sale by him to Milward, and was not the purchase money in Milward's hands a debt due to Edward Donohoe? Suppose that, as sometimes happens, there had arisen a disagreement between Donohoe and his wife, and he feared she was going to sell and appropriate the proceeds, could not Edward Donohoe, before actual payment to her, have invoked the assistance of the Courts to show that he was the person really entitled to this money and so prevent it getting into her hands? The Court would probably not listen to him if it were necessary for him to show that he had been guilty of express fraud, but in the absence of that, I am not prepared to say that he might not make out such a case that

Judgment.
McGuire, J.

the Court would direct payment to him by Milward. But I do not rest my judgment on that. I think that if the Court becomes satisfied that the intermediate conveyances have not been, and were never intended to be, real transactions, but mere devices for some collateral and fraudulent purpose, such as to defeat creditors, it ought, for the purpose of deciding the ownership of the proceeds of the sale, to treat the matter as if the fraudulent paper devices had never existed, and as if the conveyance had been direct from Edward Donohoe to Milward.

It is objected that by reason of the fraudulent transfers to Mrs. Donohoe the money payable by Milward is not an attachable debt because, even admitting that the true owner is Edward Donohoe, creditors cannot garnish a debt due to the trustee of the debtor. But we are assuming that the Court finds the transfer to Mrs. Donohoe to have been a fraudulent device. Is it not strange, then, to say in the same breath that by virtue of this fraudulent device—this void device—it still has the effect (with a persistence rivalling that of original sin) of altering the nature of Milward's liability so that what, but for this fraudulent device, would have been an attachable debt, is now not attachable?

The devices are held fraudulent and void and yet some effect, and in this case it might be a fatal effect—the very effect the rogues wanted to bring about—would follow, and the creditors be, in this proceeding, as effectually barred out as if the device had been shown to be honest and *bona fide*. Why must a Court stop to weigh and consider the effect of what it has decided to be a mere fraudulent attempt? Why not sweep it, as an unclean thing, from its path?

As well might Lord Kenyon have been expected to sit to take an account between two robbers on Hounslow Heath.

I think the appeal should be allowed, and that the interpleader issue should be found in favour of the plaintiffs, and judgment be entered in their favour with costs of the appeal and in the Court below of this issue. The money being found to be the property of the creditors to the extent of their respective claims, and any costs, the Judge below can dispose of the garnishing proceedings.

Judgment.

Wetmore, J.

WETMORE, J.—I agree with my brother MCGUIRE that the business alleged to have been carried on by the defendant at Anthracite as a boarding house keeper was not an occupation carried on by her separately from her husband, and apart from section 36 of the North-West Territories Act, I am of opinion that this business was not the defendant's. The facts that the accounts for supplies to the house were charged to the husband, that he paid for them, that he bought some of such supplies, that he must have been almost altogether supported out of this business (because, according to their own showing, or, at any rate, they wish the Court to believe that he expended his earnings as a blacksmith in gambling), and that in some of the instruments put in evidence the husband describes himself as of Anthracite, saloon-keeper, and she describes herself as wife of Edward Donohoe, of Anthracite, hotel-keeper, lead me to this conclusion, and I am, therefore, of opinion that this business was Edward Donohoe's business and not the defendant's. Therefore, the transfer of the Calgary property in question from Leeson to her was not purchased with the proceeds or profits of any occupation carried on by the defendant, it was purchased with Edward Donohoe's money.

I am also of opinion that the transfer from Leeson to the defendant of the Calgary property was not intended by Edward Donohoe nor was it received by the defendant as a *bona fide* settlement upon her of that property. In the first place the testimony of the defendant and of Edward Donohoe is of the most unsatisfactory character, and I do not feel disposed to place very much confidence in it. Of course, that alone would not be sufficient to establish fraud, it only makes one suspicious. According to the testimony of Sutton, the defendant's witness, Edward Donohoe did not appear to be very anxious to pay his debts, because he objected very much to the executions which were lodged against the property being paid. Edward Donohoe seems to have been, I might almost say, in a chronic state of financial trouble. Property he brings into the Territories is seized, some is lost, a lien has to be filed against property for work done, he is sued and he has to let the suits run to judgment. In view of all this,

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and in view of the fact that after the transfer of this property to the defendant, she, at any rate down to the time of the sale to Milward, gets no benefit from it, but that Edward Donohoe deals with it just as if the title was not in her, he collects the rents and appropriates them to his own purposes, she executes a mortgage and does not know what is done with the money realized from it, and similar transactions, lead one to the conclusion that it was not *bona fide* intended to settle this property upon her, but that it was a mere pretext to protect the property from Edward Donohoe's creditors, and I cannot help but believe that he had in view the hindering and delaying of future creditors as well as those existing at the date of the transfer. At any rate, assuming that he had not the hindering and delay of future creditors in his mind, as the transfer was never intended as a *bona fide* settlement I cannot discover any authority or law which prevents Edward Donohoe's subsequent creditors from following the proceeds of the sale of this property. In my opinion the law is the other way. In view of my brother McGUIRE'S very exhaustive judgment on this branch of the case I do not consider it necessary to add anything further, except to express my opinion that it was open to the plaintiffs on equitable principles to follow the money in question, and that for this purpose and *quoad* the creditors the defendant was merely the trustee of her husband, and that the Court would in a proper suit so hold.

But I am of opinion that this money was not an attachable debt under section 305 of chapter 58 of the Revised Ordinances (the Ordinance in force when this proceeding was taken), and, therefore, that the garnishee summons was not authorized. Because there was nothing in the nature of a debt, either legal or equitable, due or accruing due from Milward to Edward Donohoe (*Vyse* v. *Brown*[10] and *Webb* v. *Stenton*.[11]) I have also very great doubt whether a debt due by a garnishee to a person who is trustee for the judgment debtor can be attached (*Boyd* v. *Haynes*.[12]). I will merely add that

[10]Cab. & E. 223; 13 Q. B. D. 199; 33 W. R. 168; 48 J. P. 151. [11]52 L. J. Q. B. 584; 11 Q. B. D. 518; 49 L. T. 432. [12]5 O. P. R. 15.

as, in my opinion, as between Edward Donohoe, his wife, and Milward, Edward Donohoe could not at law or in equity compel Milward to pay him, the money in Milward's hands was not attachable, as I have before stated. Judgment. Wetmore, J.

But, assuming that to be correct, I see no reason why the parties concerned could not treat it as an attachable debt if they saw fit to do so, and if the defendant wished to set up that it was not an attachable debt, I doubt if she took the proper steps to do so. It is possible that she might have applied to set the garnishee summons aside on that ground. It is quite clear that instead of asking for or consenting to an issue such as was ordered in this case she might, under section 310 of the Ordinance, have applied for an order that the question be determined whether or not the debt was attachable, as was done in *Webb* v. *Stenton*[11] and *Vyse* v. *Brown*,[10] before cited. I am not prepared to say that if nothing else had been done, and no further light had been shed upon the issue that was ordered, that that question might not have been raised upon that issue; but the defendant took a step which, to my mind, prevents her from setting up that the debt was not attachable, and that was her applying to the Judge and obtaining his order for Milward, the garnishee, to pay the money into Court. Milward might have paid the money into Court himself and that would not have prejudiced her. But what right had the Judge under the garnishee proceedings, if the money was not attachable, to deal with it at all? I therefore consider her application to the Judge and her obtaining such order as showing that she assented to treat the money as attachable, and that she was willing that the only question to be determined would be the right in law and conscience to the money, and in the light of the application and order I read the issue as raising that question only. Then, having assented to such an issue, and the money being in Court, I am of opinion that it became subject to all equities, and that the learned Judge ought to have dealt with it on equitable principles.

Under section 509 of the Judicature Ordinance (No. 6 of 1893), I have no doubt of our power to finally dispose of

Judgment. Wetmore, J.

this case (*Millar* v. *Toulmin*,[13] *Allcock* v. *Hall*[14]), and I think this is a case where that should be done.

I think the judgment of my brother ROULEAU should be reversed and judgment entered for the plaintiffs upon the issue with costs and the money paid into Court ordered to be paid out to the plaintiffs, and that the defendant should pay the costs of this appeal.

RICHARDSON, J., concurred.

ROULEAU, J.—Notwithstanding the opinion of the majority of the Court, I still believe that my judgment rendered on the 14th November, 1893, is correct.

I stated then that the transfer and conveyance of real estate by a husband to his wife, and *vice versa*, is authorized by chapter 51, section 10, 11 and 13 of the Revised Statutes of Canada, and that unless such conveyance be attacked and set aside, I was in duty bound to accept it as good and legal.

Then, if such a conveyance was legal on the face of it, how can a Judge declare that the money received under a perfectly good title becomes the money of the first transferor when the title to his wife is not even attacked, either directly or indirectly? Therefore, I reiterate my proposition of law, that unless the parties by their issue placed me in the position to declare that the title was fraudulent between Edward Donohoe and his wife, I could not take upon myself to declare so. But in this case there is more than that.

The creditors who attached that money became creditors from one to three years after Mrs. Donohoe had the certificate of title in her possession. Under section 62 of chapter 51, Revised Statutes of Canada, "Every certificate of title granted under this Act shall, so long as the same remains in force and uncancelled under this Act, be conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever that the person named in such certificate is entitled to the land included in such certificate," etc.

[13]17 Q. B. D. 603; 55 L. J. Q. B. 445; 34 W. R. 695; 12 App. Cas. 746; 57 L. J. Q. B. 301; 58 L. T. 96. [14](1891) 1 Q. B. 444; 60 L. J. Q. B. 416; 64 L. T. 309; 39 W. R. 443; 7 Times R. 260.

Judgment.
Rouleau, J.

The claimant in this case got her certificate of ownership on the 16th March, 1889, and it was only on the 1st September, 1892, that the said Catherine Donohoe transferred the said property to Joseph H. Milward.

In the face of the law above cited, how can I declare the money in the hands of said Joseph H. Milward, which he owed for that same property to Mrs. Catherine Donohoe, the money of her husband? As I stated before, the creditors who attached that money became only creditors of Edward Donohoe between one and three years after the certificate of ownership was issued to Catherine Donohoe. So in a case like this, it does not matter what amount of fraud was proven between Donohoe and his wife, if that fraud was not in view of defrauding future creditors, it does not avail.

Where is the evidence in this case to prove that the sale of the land by Edward Donohoe to his wife was with the object to defraud one or any of the present creditors? The debts were contracted at the following dates, to wit: Hull Bros., from 1st September, 1890, to 30th June, 1892; Brener Bros.' note, 8th February, 1892, at five months, due on July 11th, 1892; Fisk's note, March 10th, 1893, due in one month; W. H. Cushing, 26th November, 1891; Tarrant & Kerr, August 4th, 1891; and as I stated before, the certificate of ownership was issued to Catherine Donohoe on 16th of March, 1889.

In order to succeed in their contention the creditors had to prove that Donohoe had transferred his property to his wife in view of his entering into a risky business, and, in the event of his failure in that business, for the purpose of securing that property against his future creditors.

It was proven beyond a doubt that with the hotel business, whether it was Edward Donohoe's or Catherine Donohoe's, large sums of money were made, and that it proved to be a very paying business. That business was closed at Anthracite in the spring of 1890. Till then there is no evidence that all debts contracted were not paid. From the spring, 1890, till the spring, 1891, both Edward Donohoe and his wife, Catherine Donohoe, lived in Calgary. There is no evidence to show that they were doing any business.

Judgment. Rouleau, J.

In the spring of 1891 they went back to Anthracite and entered into the same kind of business; Mrs. Donohoe kept the hotel and Edward Donohoe worked at his trade as blacksmith. If the transfer had been made by Donohoe to his wife in that interval, it might have been possible that it might have been made for the purpose of defrauding future creditors, *i.e.*, if there had been evidence that in the interval the nature and conditions of the Anthracite business had so changed that the resumption of it might be characterized as a risky speculation, leading the Court to believe an intentional fraud on subsequent creditors. But even of this there is not any evidence adduced.

It seems to me that it requires a great deal of imagination to say that the transfer by Edward Donohoe to his wife, as a question of fact, was made with a view to defraud future creditors. In a word, I cannot find such evidence on record, or any presumption that such was the case. As I said before, it is immaterial how much fraud there was between Donohoe and his wife, the present creditors cannot avail themselves of it, except if they prove that it was with a view to defraud them.

Was there a debt due by Milward to Edward Donohoe which could be garnisheed?

Under section 305 of chapter 58 of the Revised Ordinances, that money was certainly not attachable.

The test is this: Was there a debt, either legal or equitable, due or accruing due from Milward to Edward Donohoe? I think the cases of *Vyse* v. *Brown*[10] and *Webb* v. *Stenton*[11] have definitely settled that question. No person could contend for a moment that Edward Donohoe could in law or in equity compel Milward to pay him, and therefore, under the authorities already cited, the money in the hands of Milward was not attachable.

But brother WETMORE thinks that, the defendant in this issue having applied to the Judge and obtained his order that the money should be paid into Court by the garnishee, she is prevented now from raising that question.

Judgment.
Rouleau, J.

I cannot agree with the holding of my learned brother as he puts the facts of the case.

The interpleader issue was ordered on the 12th and delivered on the 27th day of December, 1892. The payment into Court was ordered on the 14th day of January, 1893, by consent of all parties, to abide the result of the trial of the issue directed by the said order of 12th December, 1892. This order was approved of by Messrs. Costigan, MacCaul & Bangs for claimant and defendant, and by Messrs Lougheed, McCarthy & McCarter for plaintiffs and garnishee. As a matter of fact, the garnishee appeared before me by his advocates and stated that he had no personal interest in the case and that he wanted to deposit the money into Court to abide the order of the Judge. The claimant in the case prepared the order and it was consented to by all parties interested.

It never entered into the head of any party, and it never was even hinted to me, that by so doing the claimant waived any of her legal rights. Besides, I fail to find any law or rule of Court which says that if the claimant gets an order from the Judge or Court to compel a garnishee to deposit the money into Court, he waives thereby any of his legal rights.

On the other hand, brother McGUIRE tells us that that question, whether the money was attachable or not, might have been made part of the issue, and therefore, the claimant having failed to take that position, she cannot avail herself of that right.

It seems to me that this is simply a question of law arising from the issue itself. It is evident as noon-day light that if the money belonged to Edward Donohoe it was attachable, but if it belonged to Catherine Donohoe it was not attachable.

Brother McGUIRE goes on to say further as follows: "The spirit of the Ordinance is that parties shall not be sent from Court to Court, but that if possible all questions shall be disposed of in the one proceeding. There was no reason why the Judge sitting to try that issue was not as competent

Judgment.
Rouleau, J.

to try whether there was fraud against creditors in the dealings between Donohoe and his wife, than if he were sitting to try a suit brought formally and specially to try that particular issue."

I always understood that fraud could not be proven except it be alleged. There may be perhaps an exception to that rule in a case of an interpleader issue, but I have not been able to find it to be so, more especially when a solemn title is in question.

I am therefore of opinion,

1. That no issue having been taken so as to have the certificate of ownership of Catherine Donohoe set aside or declared fraudulent, I had no power to investigate whether the conveyance in this case was a voluntary settlement, or was for valid consideration;

2. That if I had such power under the present issue, there is no evidence adduced to show that there was any intention on the part of Donohoe and his wife to defraud his future creditors; and

3. That the money in the hands of Joseph Milward is not an attachable debt.

For the above reasons I am of opinion this appeal be dismissed with costs.

Appeal allowed with costs, ROULEAU, J., *dissenting.*

THE QUEEN v. WILSON.

The Liquor License Ordinance—Summary conviction—Criminal Code—Direction as to one or more Justices—Conviction—Appeal—"Shall" and "may."

The Liquor License Ordinance (No. 18 of 1891-92) provides by s. 105 that "all informations or complaints for prosecution of any offence against this Ordinance, except as herein specially provided, *shall* be laid or made . . . before a Justice of the Peace," and by s. 106, that "such prosecution *may* be brought for hearing and determination before any two Justices of the Peace."

The Criminal Code, part LVIII (Summary Conviction), which has been made applicable to summary proceedings under the Liquor License Ordinance, provides (s. 842) that "every complaint and information shall be heard, tried, determined and adjudged by one Justice or two or more Justices, as directed by the Act or law upon which the complaint or information is framed, or by any other Act or law in that behalf," and that if there is not such direction in any Act or law then the complaint or information *may* be heard, tried, determined and adjudged by one Justice."

Held, on an appeal from a conviction that s. 106 constituted a "direction," that prosecutions should be heard, &c., before two Justices of the Peace, and that, therefore, one Justice had no jurisdiction to convict, except in the certain cases specially provided for in the Ordinance.

[*Court in banc, December 4th, 1894.*

Statement. Defendant was convicted by a single Justice of the Peace for selling liquor without a license.

On an appeal coming on before RICHARDSON, J., he referred to the Court *in banc* the question whether a single Justice of the Peace had jurisdiction to hear and convict of the offence charged.

The matter was argued on the 4th December, 1894.

Argument. *W. C. Hamilton*, Q.C., for the prosecution.

T. C. Johnstone, for defendant.

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

Judgment. WETMORE, J.—Mr. Justice RICHARDSON must be advised that a single Justice of the Peace had not the power of hearing and convicting for an offence such as that set out in this case.

Section 105 of the Liquor License Ordinance, 1891-92, provides that informations or complaints for offences under

Judgment.
Wetmore, J.

that Ordinance shall be laid or made before a Justice of the Peace. But section 106 provides that "such prosecution may be brought for hearing and determination before any two Justices of the Peace. Section 120 provides in effect that the provisions of the Act of Parliament relating to Summary Convictions shall apply to all prosecutions under the Ordinance so far as the same are not inconsistent with the Ordinance. Consequently the provisions of the Criminal Code relating to Summary Convictions are applicable to the enforcement of penalties under the Liquor License Ordinance in so far as they are not so inconsistent. Section 842 of the Code provides that "every complaint and information shall be heard, tried, determined and adjudged by one Justice or two or more Justices as directed by the Act or law upon which the complaint or information is framed * * * 2. If there is no such direction in any Act or law then the complaint or information may be heard, etc., by any one Justice."

As pointed out, the Liquor License Ordinance directs that the prosecution may be brought before two Justices, and except in some special instances which I will refer to, there is no other direction upon the subject; therefore prosecutions under the Ordinance, unless otherwise specially directed or authorized, must be heard and determined by two Justices. There are no special provisions allowing the prosecution for the offence charged against the defendant to be heard by one Justice. There are, however, offences under the Ordinance which may be heard by one Justice, see section 60 subsection (a), sections 85 and 86, consequently there are provisions to fill the words, "the Justice or Justices," in section 112 and several other sections of the Ordinance.

THE QUEEN v. BANKS.

Certiorari—Municipal Ordinance—Transient trader—By-law—Proof of by-law—Costs.

The Municipal Ordinance (R. O. 1888 c. 8, s. 68, s.-s. 31) authorizes municipal councils to pass by-laws for "licensing, regulating and governing transient traders and other persons who occupy premises in the municipality for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality, and the time the license shall be in force."

The defendant was convicted "for that he, the said (defendant) whose name had not been entered on the last revised assessment roll of the municipality on, &c., within said municipality, was a sewing machine agent, carrying on his business, occupation and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of By-law No. 25 of the said municipality."

On an application for a writ of *certiorari* it appeared from affidavits filed that the original by-law was produced before the convicting justice, but that neither the original nor a copy was put in as evidence, and it was sought to prove the by-law on this application by affidavit.

Held (1), that the by-law could not be proved by affidavit on the application for the writ of *certiorari*.

(2) That therefore the only means available of ascertaining the provisions of the by-law was by reference to the information and conviction.

(3) That the offence stated in the conviction was not one which could be created by a by-law passed under the above quoted clause of the Municipal Ordinance, inasmuch as it did not allege that the defendant was "a transient trader or other person occupying premises in the municipality for a temporary period."

(4) That costs of quashing a conviction on *certiorari* will not be granted, unless there be misconduct on the part of the informant or of the Justice.†

[*Court in banc, December 15th, 1894.*

Statement. Motion for a writ of *certiorari*.

Argument. *C. C. MacCaul*, Q.C., for the motion.

C. F. Harris, contra.

[*December 15th, 1894.*]

Judgment. SCOTT, J.—This was a motion for a writ of *certiorari* to remove into this Court a conviction made at Macleod on 24th October, 1894, "where the said Charles Henry Banks

†See *King* v. *Bennett*, 5 Can. C. C. 456; 4 O. L. R. 205.

Judgment. Scott, J.

was convicted for that he, the said Charles Henry Banks, whose name had not been entered on the last revised assessment roll of the municipality of the town of Macleod, on the 22nd day of September, 1894, within said municipality, was a sewing machine agent, carrying on his business, occupation and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of by-law No. 25 of the town of Macleod," and to quash such conviction upon its return under the writ of *certiorari*.

Several objections were taken to the conviction, only one of which it is necessary to consider, namely, that the alleged by-law is *ultra vires* of the municipality.

It appears from the affidavits filed that the original by-law under which the conviction was made was produced at the hearing before the Justice, but that the same was not, nor was any copy thereof, put in or filed as evidence of its contents.

Counsel for the defendant sought to prove the by-law by affidavit, but the counsel for the informant objected to the proof as being insufficient, and after due consideration I am obliged to sustain the objection.

It follows, therefore, that, so far as this application is concerned, the only means of ascertaining the provisions of the by-law is by reference to the information and conviction, copies of which have been filed.

Counsel for the informant admitted during the argument that the by-law was passed under the provisions of subsection 31, section 68 of the Municipal Ordinance, being R. O. 1888 c. 8, which is as follows:

"68. The council of every municipality may pass by-laws for * * * (31) licensing, regulating and governing transient traders and other persons who occupy premises in the municipality for temporary periods and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality and the time the license shall be in force."

Judgment.
Scott, J.

The offence stated in the conviction is not one which can be created by a by-law passed under the provisions of the sub-section referred to, because it is not alleged that the defendant was a transient trader or other person occupying premises in the municipality for a temporary period, and I am therefore of the opinion that the conviction should be quashed.

As to the costs of the application, the counsel for the defendant cited a number of cases both in England and Ontario in which costs had been awarded to the defendant in similar cases. In England the law now appears to be well settled that the Court has no jurisdiction to award costs in such cases: *Regina* v. *Whitchurch*,[1] *Regina* v. *Parlby*.[2] Of the Ontario cases cited *Regina* v. *Coutts*[3] shows that the usual rule is not to award costs, and, as to the other cases cited in which costs were awarded, they are shown to have been awarded by reason of some misconduct on the part of the Justice or informant. It is not suggested that there is any such misconduct in this case.

The rule will, therefore, go for the issue of a writ of *certiorari* and for the quashing of the conviction upon its return thereunder without further order. There will be no costs. The rule will provide that no action shall be brought against the Justice who made the conviction.

RICHARDSON, J., WETMORE, J., and MCGUIRE, J., concurred.

Conviction quashed without costs.

[1]50 L. J. M. C. 99; 7 Q. B. D. 534; 45 L. T. 379; 29 W. R. 922; 45 J. P. 617. [2]53 J. P. 744; 6 Times R. 36. [3]5 O. R. 644.

RE THE MASSEY MANUFACTURING COMPANY v. HUNT AND THE McCORMICK HARVESTING MACHINE COMPANY v. HUNT.

Execution—Creditors Relief Ordinance—Territories Real Property Act Priorities—Instrument—Constitutional law—Ultra vires.

Per ROULEAU, J.—In so far as it purports to affect executions against lands the Creditors Relief Ordinance† is *ultra vires* of the Legislative Assembly of the Territories inasmuch as in that respect it is inconsistent with the Territories Real Property Act.‡

Per WETMORE, J.—This is so *quoad* lands which have been brought under the operation of the Territories Real Property Act, because the latter Act provides (s. 41) that instruments . . . shall be entitled to priority the one over the other according to the time of registration, and the copy-writ of execution, with the accompanying memorandum of lands to be charged, delivered by the sheriff to the Registrar is an "instrument" within the meaning of s. 41.

Per RICHARDSON and MCGUIRE, JJ.—The copy-writ of execution, with the accompanying memorandum of lands to be charged, is not an "instrument" within the meaning of s. 41, and, therefore, there is no conflict between the Creditors Relief Ordinance and the Territories Real Property Act, and the Creditors Relief Ordinance is, therefore, not *ultra vires*.

There having been lodged with the registrar a copy of *fi. fa.* lands in two several actions, with memoranda of the same land to be charged; the land standing in the defendant's name at the time of the lodging of the first *fi. fa.*, but having been transferred to and standing in the name of a purchaser from the defendant at the time of the lodging of the second execution, and the lands having been sold under the first *fi. fa.*:

Held, on a first argument for the reasons given above, *per* ROULEAU and WETMORE, JJ., that the first execution creditor was entitled to the whole proceeds of the sale; *per* RICHARDSON and MCGUIRE, JJ., that the proceeds should be distributed between the two execution creditors pursuant to the Creditors Relief Ordinance.

The question having again come before RICHARDSON, J., alone, and he having made an order, in accordance with his opinion as above stated, for the distribution of the proceeds of the sale between the two execution creditors. On appeal ROULEAU and WETMORE, JJ., adhered to their former opinions, and MCGUIRE, J., followed *Roach* v. *McLachlin*[1] and *Breithaupt* v. *Marr*,[2] which had not, on the former argument, been called to the attention of the Court, and it was therefore

Held, per Curiam, reversing the decision of RICHARDSON, J., that the first execution creditor was entitled to the whole proceeds of the sale.

[*Court in banc, December 15th, 1894—June 10th, 1895.*

Statement. This was a special case stated for the opinion of the Court.

† Ord. No. 25 of 1893, now C. O. 1898 c. 26.
‡ R. S. C. 1886, c. 51.
[1] 19 O. A. R. 496. [2] 20 O. A. R. 689.

Statement.

The facts stated were substantially as follows :—

The defendant was the owner of certain land for which he held a certificate of ownership under the Territories Real Property Act.

The Massey Manufacturing Co. obtained judgment against the defendant, issued executions, delivered them to the sheriff, who lodged a copy of the *fi. fa.* lands with the registrar accompanied by a memorandum of the said land as that to be charged, which was duly entered by him on the 3rd March, 1893.

On the 4th March defendant transferred the land to one Stewart, and accordingly a certificate of ownership issued to Stewart, marked subject to the execution of the Massey Co. The McCormick Harvesting Machine Co. obtained judgment against the defendant, issued executions, delivered them to the sheriff, who lodged the *fi. fa.* lands with the registrar. accompanied by a memorandum of the said land as that to be charged, which was duly entered by him on the 25th March, 1893.

The sheriff sold the land under the Massey Co. execution.

The question submitted to the Court was: Whether the Massey Manufacturing Co. is entitled to the whole proceeds of the sale or whether such proceeds should be distributed according to the provisions of the Creditors Relief Ordinance.

The stated case having come before RICHARDSON, J., he referred it to the Court *in banc*, before whom it was argued on the 8th June, 1894.

Argument.

W. C. Hamilton, Q.C., for the Massey Manufacturing Co.

N. McKenzie, for the McCormick Harvesting Machine Co.

[*December 15th, 1894.*]

Judgment.

ROULEAU, J.—In this case the execution of the Massey Co. was issued on the 16th day of February, 1893, and on the 3rd day of March, 1893, a memorandum of said execution was entered against the land of William Hunt.

On the 4th day of March, 1893, the said land was transferred by the defendant Hunt to one D. C. Stewart, and

Judgment.
Rouleau, J.

Hunt's certificate of title was duly cancelled and a new certificate of title issued to the defendant Hunt.

The McCormick Co. issued an execution against the goods and lands of defendant Hunt, a memorandum of which was delivered to the registrar on 25th March, 1893, and entered against the said land then standing in the name of D. C. Stewart.

The sheriff, on the 14th day of April, 1894, sold the lands under the first execution for the sum of $240.

The question to be answered is: Whether the Massey Company is entitled to the whole proceeds of the said sale or whether such proceeds should be distributed according to the provisions of the Creditors Relief Ordinance.

That Ordinance came into effect on the first day of January, 1894, and it is contended that the money having been realized after that date all the execution creditors should share in it, according to the provisions of the said Ordinance.

On the other hand it is contended that the Territories Real Property Act deals with the question of priority among execution creditors, whose executions against lands are duly entered by the registrar, and that under section 13, sub-section 2, of the North-West Territories Act,§ the said Ordinance, as far as it deals with executions against lands, is *ultra vires* of the Legislative Assembly.

Section 39 of the Territories Real Property Act reads as follows: "The registrar shall also keep a book or books which shall be called the 'Day Book,' and in which shall be entered by a short description every instrument which is given in for registration, with the day, hour and minute of filing; and for purpose of priority between mortgagees, transferees and others, the time of filing shall be taken as the time of registration," etc.

Apart from this the whole object and policy of the Act, as shown by all the sections referring to registration, is for the purpose of determining the priority of every instrument—mortgages as well as all encumbrances—in the order of their

§R. S. C. 1886, c. 50.

entry in the register. The Act seems to me very clear on that subject.

Judgment.

Rouleau, J.

The priority between execution creditors against lands having been determined by the Territories Real Property Act, in my opinion section 8 of the Creditors Relief Ordinance, as far as it affects executions against lands, is *ultra vires* of the Legislative Assembly.

In conclusion, I am of opinion that RICHARDSON, J., should be advised to declare that the execution of the Massey Manufacturing Company has priority, and that the said company is entitled to the proceeds of the sale under the said execution.

WETMORE, J.—As the special case is silent on the subject, I assume that the proceeds of the sale of the land in question were not sufficient to do more than satisfy the execution of the Massey Company with the sheriff's fees and the purchaser's costs of confirming the sale. At any rate, no question is stated as arising between either of the execution creditors and Stewart, the purchaser from Hunt, the execution debtor.

I am of opinion that, as against the McCormick Company, the Massey Company is entitled to the whole proceeds of the sale after deducting such sheriff's fees and costs of confirmation.

I have arrived at this conclusion because, in my opinion, the Creditors Relief Ordinance, in so far as it provides that there shall be no priority among execution creditors is *ultra vires* of the Legislative Assembly, *quoad* lands which have been brought under the operation of the Act, against which a certified copy of the Writ has been delivered to the registrar together with the memorandum in writing as provided by section 16 of 51 Vic. (1888), c. 20, which was substituted for section 94 of the Territories Real Property Act.

The powers of the Legislative Assembly, in so far as the question under discussion is concerned, are set out in section 6 of 54-55 Vic. 1891, c. 22, which is substituted for section 13 of the North-West Territories Act, and provides that the powers of legislation there given shall be "subject

Judgment.
Wetmore, J.

to the provisions of this Act or of any other Act of the Parliament of Canada at any time in force in the Territories." I take it that the meaning of that is that no legislation by the Legislative Assembly can contravene or be inconsistent with any Act of Parliament in force here; that what Parliament has enacted must prevail. Now, section 41 of the Territories Real Property Act provides as follows: "Except as hereinafter otherwise provided, every instrument presented for registration shall, unless a Crown grant, be attested by a witness and shall be registered in the order of time in which it is presented for that purpose; and instruments registered in respect of or affecting the same estate or interest shall, notwithstanding any express, implied or constructive notice, be entitled to priority the one over the other, according to the time of registration and not according to the date of execution."

The first question that occurs to me is, whether the certified copy of writ and memorandum delivered by the sheriff to the registrar under section 94 of the Act as substituted by section 16 of c. 20 of 51 Vic. is an "instrument presented for registration," (and I may say that wherever I refer to section 94 of the Territories Real Property Act, I mean the section so substituted, and by the words "the Act" I mean the Territories Real Property Act.) By section 3, paragraph (1) of the Act the expression "instrument" means "* * * any * * * document in writing relating to the * * * dealing with land." We find the word "encumbrance" frequently used in the Act, and unquestionably it is intended that an encumbrance may be registered. By section 3, paragraph (*g*) "the expression 'encumbrance' means any charge on land created for any purpose whatever inclusive of mortgage, unless expressly distinguished." The writing delivered by the sheriff unquestionably creates an encumbrance on the land. By section 94 it operates as "a caveat against the transfer by the owner of the land mentioned in such memorandum, or of any interest he has therein; and no transfer shall be made by him of such land or interest therein except subject to such writ or other

Judgment.
Wetmore, J.

process." Then the Act evidently contemplates that the interest of the owner may be sold; see sections 96, 97 and 98. Therefore the writing delivered by the sheriff is "a document in writing relating to the dealing with land." It creates an interest in the lands mentioned therein in favour of the execution creditor by charging it with the amount of his claim, just as a mortgage or any other encumbrance would. The writing is, therefore, an "instrument" as defined by the Act. I think under section 94 that it is an instrument "presented for registration," because when it is presented, if as here, the title of the owner of the land has been registered, it is the duty of the registrar to enter a memorandum thereof in the register. I know of no other way of registration under the Act.

Section 41 of the Act, as before stated, provides that "instruments" shall "be entitled to priority the one over the other according to the time of registration." Now, what is the meaning of the term "priority"? It is a word with a well understood meaning in law and frequently used. It is not a mere matter of formal procedure, it means something substantial, namely, that the party holding the priority has the right to have his claim paid out of the property against which his security attaches before any other person is paid. Parliament having given execution creditors this right, the Legislative Assembly has no power to deprive them of it.

One argument, it has occurred to me, might be advanced against the view I have taken, which I think is worthy of attention, and I will, therefore, consider it. It might be urged that section 41 did not intend to establish priorities at all. But in order to understand what Parliament meant we should consider the history of transfers, mortgages and encumbrances of and upon lands. At common law these transfers, mortgages and encumbrances operated and had priority in the order in which they were executed and delivered, executions in the order in which they were delivered to the sheriff to be executed. Registration laws had changed all this, and provided that they should operate and have priority from the time of registration instead of from the time of delivery. Such, I may say, in a general way was the state

Judgment. Wetmore, J.

of the law on the subject when the Territories Real Property Act was passed. It might then be contended that all that Parliament intended to do was to declare that the same state of things should continue; that it did not intend to create priorities; and that, therefore, the Legislature, without interfering with the intention of Parliament, could declare that so far as executions were concerned there should be no priorities, and the execution creditors should all participate *pro rata* in the proceeds of the property levied upon.

It seems to me, however, that this operation cannot be given to section 41 of the Act, because the effect of the language is to secure to persons registering their instruments priority from the time of registration. It never contemplated such a radical change as that the right of priority should be taken away.

But carry the question further. If the Assembly can by its legislation affect the priority of executions against lands which have been duly registered, they could also affect the priority of any other encumbrance, or of mortgages and of transfers as well; because it has the same powers to legislate with respect to Property and Civil Rights in the Territories (see 54-55 Vic. 1891, c. 22, s. 6, par. 9), and with the same limitations, as it has to legislation with respect to "the administration of Justice * * * including procedure" in the Courts (see ibid. s. 10 and North-West Territories Act, s. 15).

Now, I should be surprised if it should be held that the Assembly, in the teeth of section 41 of the Act, had power to enact that there should be no priorities with respect to mortgages, but that all mortgagees against the same property should participate *pro rata* in the proceeds of the sale of the property, or that there should be no priority among transfers but that all transferees of the same property from the same owner should rank as tenants in common or as joint owners. But if the Assembly could not so legislate with respect to mortgages or transfers, on what principle of construction can they be held to have power to so legislate with respect to executions, seeing that they are all embraced in and governed by the same language in section 41 of the Act, for

that is the section that governs the priority of all instruments under the Act. I know of no other.

It may, too, be urged that the effect of the Assembly's legislation is not to affect the priority so far as the registration is concerned; that it merely deals with the monies, the proceeds of the sale. That, I conceive, is simply making a shadow, and taking away the substance, of what I understand the right of "priority" to be. Of course, my views do not affect the question of the right of priority of executions as against personal property. I merely hold that when the writing is delivered by the sheriff under section 94 of the Act it creates a priority in favour of the execution creditor against the interest in the land of the owner of the land mentioned in the writing; and the Assembly have no power to deprive him of it.

In my opinion judgment upon the case should be in favour of the Massey Manufacturing Company, Limited, and the McCormick Harvesting Machine Company should be ordered to pay the costs of the reference.

But, assuming that I am wrong in the view I take as to this Ordinance being *ultra vires*, I agree with the judgment of my brother RICHARDSON that the proceeds of the sale of the property should be distributed between the execution creditors under the Creditors Relief Ordinance.

MCGUIRE, J.—For the reasons which will be given by my brother RICHARDSON, I have come to the conclusion that an execution against lands does not come within the meaning of the word "instrument" as defined by section 3 (1) of the Territories Real Property Act, and as used in sections 39, 40 and 41 of that Act, and that section 94 does not give one execution any priority over another execution, and that there is, consequently, no conflict between the Creditors Relief Ordinance and that Act.

The corresponding Act in the Province of Ontario for the relief of creditors contains a provision exempting from its operation executions which were in the hands of the sheriff when the Act came into operation. Our Ordinance, unfortunately, I think, contains no such provision, and the effect

Judgment. McGuire, J.

of the Ordinance in distributing rateably among all creditors having executions in the sheriff's hands at the times named in section 3 of the Ordinance is, in reality, to deprive the first execution creditor of a right which, under the law as it existed when he handed his execution to the sheriff, he then had. That being so, unless the language of the Ordinance is perfectly clear, a Court should not construe it so as to give it a retroactive effect. But the language here used is quite distinct, that it was intended to apply to all moneys levied, that is, received by the sheriff, upon an execution upon and after the first day of January, 1894.

I thought at first that the word "levies" in section 3 might include all the proceedings employed by the sheriff for the purpose of making the money on an execution, commencing with the seizure. If so, the result might be that, as the proceedings of the sheriff in this case began in 1893, they would not come within the Ordinance. But the language is not "a levy for money," but "levies money," which means, I think, "raises or collects money," and means the actual getting of the money into his possession.

In section 18 it is provided that "all moneys then or thereafter realized under execution in the sheriff's hands shall be distributed" etc., which can have no other meaning than that all moneys, no matter when collected or levied, which were in his hands and not paid over to the person or persons entitled on the 1st of January, 1894, and all moneys thereafter coming to his hands under execution, shall be distributed under the provisions of the Ordinance.

It will be noted that this section says, "on and from which day all priorities shall cease." This must refer to moneys with respect to which there would otherwise have been a priority—for a thing to "cease" it must have existed. As between executions coming in after the day named no priority exists. This language must, therefore, be construed as retroactive—as intended to be retroactive—and to apply to all moneys then or thereafter in the sheriff's hands as the fruit of an execution or executions. A reference to Form A confirms the view that "levies money" refers to

Judgment
McGuire, J.

the receipt thereof by the sheriff, and not to the whole proceedings under the execution.

I have also considered the argument, addressed to us by Massey execution to the registrar and the delivery of the Massey execution to the registrar and the delivery of the McCormick execution to the sheriff the judgment debtor transferred his interest in the land to one Stewart, as he was entitled to do under section 94 of the Territories Real Property Act, subject, of course, to the Massey execution, so that when the McCormick execution reached the sheriff the judgment debtor had no interest whatever in this land and it bound nothing, since the defendant had no lands which it could bind.

Had there been more than enough money realized at the sheriff's sale to satisfy an amount equal to the Massey execution, I take it the residue could be claimed by the transferee Stewart. Had the Massey Company withdrawn their execution before sale the sheriff could not have sold the land under the other execution.

It seems anomalous, therefore, that this second execution creditor should, under these circumstances, be entitled to share. But again we must look at the plain words of the Ordinance. The moneys in the sheriff's hands here are moneys levied "upon an execution against the property of a debtor" (section 3), it is in his hands after the 1st of January, 1894, it is money "realized under execution in the sheriff's hands" (section 18), and that being so it is distributable under the provisions of the Ordinance.

It is a hardship, unquestionably, from one point of view upon the Massey Company, but it is to be remembered that but for the law neither company could have collected their debt, and the Legislature has the right to enact and vary from time to time as its wisdom may dictate the remedies it sees fit to provide for the benefit of creditors.

The question referred to this Court should, therefore, I think, receive this answer: That the proceeds referred to should be distributed according to the provisions of the said Ordinance.

Judgment.

Richardson, J.

RICHARDSON, J.—By the special case submitted to the Court it appears that :

1. On 3rd March, 1893, the Massey Company having previously obtained a judgment against one Hunt, lodged a *fi. fa.* lands in the sheriff's office, and on that day the sheriff lodged a copy of the *fi. fa.* in the Land Titles Office, Regina, with a memorandum charging certain lands, a certificated title to which was outstanding, issued to Hunt, the execution debtor.

2. On 4th March, 1893, Hunt transferred his title to one Stewart, and on this day the registrar cancelled Hunt's certificate and issued one to Stewart, on which was endorsed a memorandum that the title was subject to the Massey Company's execution.

3. On 20th March, 1893, the McCormick Company, having on 2nd March, 1893, obtained a judgment against Hunt, lodged with the sheriff a *fi. fa.* lands, and the sheriff on 25th March, 1893, delivered to the registrar a copy of the writ and a memorandum charging the same lands as the Massey Company had.

4. The sheriff, having duly advertised the lands, on 14th April, 1894, sold the same, received the purchase money and executed the usual transfer to the purchaser, the sum realized not being sufficient to cover the first execution, that of the Massey Company.

5. The sheriff having intimated his intention to distribute the purchase money, less expenses, fees, etc., under the Creditors Relief Ordinance, between the two execution creditors, the Massey Company and the McCormick Company, the former company protested, they claiming the whole net proceeds, the result being this reference by special case to the Court by the two claiming companies of the question whether or not the moneys realized by the sheriff were distributable under that Ordinance.

6. Last Term the case was heard, both companies being represented by counsel.

7. For the Massey Company, their counsel, Mr. Hamilton, urged :

Judgment.
Richardson, J.

That the Creditors Relief Ordinance was *ultra vires*, because it conflicted with sections 41 and 62 of the Territories Real Property Act, citing section 6 of the North-West Territories Amendment Act, 1891, which confers powers upon the Legislative Assembly of the North-West Territories to make Ordinances for the government of the Territories in relation to:—(9) Property and Civil Rights in the Territories; (10) The administration of Justice in the Territories; (13) Generally all matters of a merely local or private nature in the Territories, subject to the provisions of that Act or of any other Act of the Parliament of Canada at any time in force in the Territories, and declaring by sub-section 2 that nothing in that section gives or shall be construed to give to the Legislative Assembly any greater powers with respect to the subjects therein mentioned than are given to Provincial Legislatures by section 92 of the British North America Act.

8. In Ontario a law similar in every respect so far as the North-West Territories goes, save one—the last section, has been in force for over ten years unquestioned, as appears from many cases in the Provincial Courts, and held by the Privy Council in the recent case of *The Atty.-Gen. of Ontario* v. *The Atty.-Gen. for the Dominion of Canada*[3] to be within Provincial powers, as it relates merely to local matters, the administration of Justice and Property and Civil Rights. It would appear, therefore, that no greater powers are attempted to be exercised than are held by the Provinces under the British North America Act.

9. But, then, does the Ordinance conflict with either section 41 or 62 of the Territories Real Property Act? Section 41 regulates how instruments presented for registration are to be attested, the order of priority of registration of such instruments, and the effect of registration of instruments in conformity with the Act; section 62 declares that Certificates of Title shall be conclusive evidence of the holder's title subject (section 61) * * * to executions against or affecting the interest of registered owners in the

[3][1894] A. C. 189; 63 L. J. P. C. 59; 6 R. 409; 70 L. T. 538; reversing 20 O. A. R. 489.

Judgment. Richardson, J.

land described, and thus merely defines to what executions the lands in the certificate outstanding are subject beyond those noted upon it.

Is the instrument delivered to the registrar pursuant to section 94, that is, a copy of an execution with a memorandum in writing of the lands intended to be charged thereby, an "instrument" within the meaning of sections 39, 40 and 41 of the Act?

"Instrument" as defined by sub-section (1) of section 3 "means" (not "includes") "any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, or any other document in writing relating to the transfer or other dealing with land or evidencing title thereto.

It is obviously not one of the documents there mentioned by name. Is it an "other document in writing," that is, is it a "document in writing" *ejusdem generis* with those previously mentioned? The use of the word "other" puts that limitation upon it.

All those named documents are instruments *inter partes*—the acts of the parties—an execution, or its copy delivered by the sheriff, is, I think, not of the character of those documents mentioned.

But, even if it were, it is not all such "other" "documents" that are included, but only those "relating to the transfer or other dealing with the land or evidencing title thereto." Does it do any of these things?

"Transfer" means (section 3, sub-section (*c*)) "the passing of an estate or interest in land under this Act." Does an execution relate to "the passing of an estate or interest"? and to whom? It seems to me that it does not.

Then does it relate to any "other dealing" of the same character as "the passing of an estate or interest," etc.? I think not.

Lastly, does it "evidence title" to land? It is not evidence of anything except that the sheriff is commanded to cause to be made certain moneys out of the lands of the defendant; it is merely a warrant to the sheriff.

Judgment.
Richardson, J.

For these reasons I think it does not come within the definition of "instrument."

But even if it did it is not every instrument that is given priority by section 41. It must be "instruments registered."

Now an instrument to be registered must (section 39) have been "given in for registration," and is "deemed registered" as soon as a memorial thereof, as provided by section 42, is entered on the register.

Section 41 describes a certain requisite of an "instrument presented for registration," unless it be a Crown Grant (section 41), or an Order-in-Council, Order of a Court or Judge, or a certificate of a judicial proceeding (section 101)—it must be "attested by a witness."

Possibly an execution may come within these exceptions, but is it "given in for registration"?

Section 94 says "deliver to the registrar." Is there a memorial thereof in the form required by section 42 to be entered in the register, that is, has the registrar any authority to enter such a memorial?

Section 94 lays down that he shall "enter a memorandum thereof in the register." Does this authorize him to enter a memorial as described by section 42? I doubt that.

If it does not, then the instrument (if it were an instrument) would not be registered.

Reading down the section we observe reference to "date of execution," which seems to contemplate instruments which in their nature are "executed"—that is, signed or sealed, or both.

Then again, when an instrument is registered and so constructively embodied and stamped with the seal of the registrar, shall thereupon "create, transfer, surrender or discharge"—what? "The estate or interest therein mentioned in the lands mentioned in the said instrument." Is it not evident that the Act is dealing with such instruments as purport to create, transfer, surrender or discharge an estate or interest therein mentioned, in land mentioned therein? Is this language applicable to the document delivered by the

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Richardson, J.

sheriff? It describes no land—that is, the execution itself—and if the memorandum of the sheriff must be taken, then the whole document ceases to be an order of a Court or Judge, and must be attested by a witness before being entitled to registration, and this is not so attested.

Does it mention any estate or interest intended to be affected? The execution mentions "the lands of," etc., and the sheriff's memorandum describes the lands he wants charged, but no "estate or interest therein" is mentioned.

And, finally, is this document one of which it can aptly be predicated that it "creates, transfers, surrenders or discharges" an interest or estate in lands? If this document can be registered, then, as a consequence, it would, immediately on completion of the registration, create, etc., a mentioned estate or interest in mentioned lands. Can it be contended, in face of section 94 and the limited effect therein expressly stated, that the document delivered by the sheriff is one intended to have the effect which section 41 would thus give it? I cannot bring myself to the conclusion that this document delivered by the sheriff was intended to be capable of becoming an "instrument registered" within the meaning of section 41.

If so, then section 41 gives it no priority over other executions, and the Creditors Relief Ordinance is not in conflict with section 41.

And does it conflict with section 94? The effect of the delivery of the execution to the registrar and his entering a memorandum thereof in the register is expressly stated there. It operates as a *caveat* against the transfer of—that is, "the passing of any estate or interest in"—the land by the owner, so that if he does transfer it he does so subject to the execution. Not a word here that any subsequent execution delivered to and dealt with by the registrar is to be subject to this prior writ. Consequently this section gives no priority in such cases. The Ordinance, therefore, does not conflict with section 94.

But, then, it was further argued that as the two executions were in the sheriff's hands before 1st January, 1894, the Massey one then having priority, the money realized

from the sale of the land after that date should go to the plaintiffs in that action, in other words, that such priority was a vested right which extended to and included the fruits derived by means of their execution. Judgment. Richardson, J.

I admit that laws which deprive persons of vested rights in order to have retrospective operation must, from the provisions, clearly show that such was the intention of the Legislature.

Did the Ordinance go no further than the Ontario Creditors Relief Act there would probably be no question that the contention of counsel for the Massey Company would be sustained and that company take the whole fund, but section 18 of the Ordinance expressly declares "This Ordinance shall come into effect on the 1st January, 1894, on and from which date all priorities shall cease as hereinbefore provided: and all moneys then" (*i.e.*, on that date) or thereafter realized under executions in the sheriff's hands" (which surely means executions previously to 1st January, 1894, in his hands) "shall be distributed under the provisions of the Ordinance."

On 1st January, 1894, both the Massey Company and the McCormick Company had *fi. fa.* lands against the same defendant, Hunt, in the sheriff's hands, and both executions remained in his hands in force up to and after 14th April, 1894, when the sheriff sold the land and realized the purchase money.

The Ordinance directs that this money shall be distributed under the provisions of the Ordinance, which by section 3, sub-section (*a*) provides that "In case a sheriff levies money on an execution against the property of a debtor * * * 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." * * *

As a result I hold that the money realized by the sheriff on 14th April, 1894, is subject to distribution.

Statement.

The Court being thus equally divided, RICHARDSON, J., subsequently made an order for distribution under the Creditors Relief Ordinance, holding that the McCormick Company

Statement. was entitled to share with the Massey Company. An appeal was taken from this order by special leave.

The appeal was argued on the 8th June, 1895.

Argument. *W. C. Hamilton*, Q.C., for appellant, referred to *Re Claxton*,[4] *Re Rivers*,[5] Maxwell on Statutes, *Roach* v. *McLachlan*,[1] *Breithaupt* v. *Marr*.[2]

N. Mackenzie, for respondent, referred to the *Attorney-General for Ontario* v. *The Attorney-General for the Dominion of Canada*.[3]

[*June 10th, 1895.*]

Judgment, ROULEAU, J.—This case is one in which I have already given a written judgment. I do not see any reason to alter my judgment as given then. I say, therefore, the appeal should be allowed with costs.

WETMORE, J.—I see no reason to change my mind in respect to the judgment I delivered in this case when it was referred to the Court by my brother RICHARDSON. I am therefore of opinion that the appeal should be allowed, and that the order appealed against should be reversed, and that it should be ordered that the whole of the proceeds of the sale of the lands in question to the extent of satisfying the execution of the Massey Manufacturing Company with the sheriff's costs under the execution and incidental thereto and of confirming the sale after deducting the sheriff's fees and costs of sale, and the purchaser's costs of confirming such sale, should be paid to the Massey Manufacturing Company, and that the McCormick Harvesting Machine Company should pay to the Massey Manufacturing Company the costs of this appeal and the costs before the Judge below, not, however, to include the costs of the reference to this Court in December last.

MCGUIRE, J.—This is an appeal from a judgment of Mr. Justice RICHARDSON. The plaintiffs, the Massey Manufacturing Company, recovered judgment against the defendant,

[1] 1 Terr. L. R. 282. [5] 1 Terr. L. R. 464.

Judgment.
McGuire, J.

and delivered an execution against lands to the registrar pursuant to section 94 of the Territories Real Property Act. Shortly after such delivery the defendant made a transfer of his land to one Stewart, who took the same subject to the Massey execution. The *bona fides* of this transfer is not in question. Subsequently thereto the McCormick Company, under a judgment against the defendant, delivered an execution to the registrar. The land was thereafter sold by the sheriff. The money realized was insufficient to satisfy the amount of the first or Massey execution, but the McCormick Company claimed to share rateably with the Massey Company in the distribution of such money. By consent a case was stated for the opinion of Mr. Justice RICHARDSON, who referred the matter to the full Court, and the same came on for hearing at the sittings in June, 1894. Mr. Justice SCOTT, having been engaged in the case while at the Bar, took no part. After argument the Court was divided, ROULEAU and WETMORE, JJ., being of opinion that the McCormick Company were not entitled to share, RICHARDSON, J., and myself, being of the opposite opinion. Mr. Justice RICHARDSON subsequently delivered judgment that the McCormick Company were entitled to share, and from that judgment the Massey Company now appeal.

In the opinion delivered by me on the reference I came to the conclusion, as did also my learned brother RICHARDSON, that the Creditors Relief Ordinance was *intra vires* of the Legislature, and that, notwithstanding the fact that the McCormick execution did not bind the land, and that the Massey execution alone bound it, and notwithstanding the apparent hardship that the Massey Company would, under my view of the case, be forced to share with the subsequent execution creditors the money which was the fruit of the first execution, still, the words of the Creditors Relief Ordinance seemed to allow of no means of avoiding that result. But on the present appeal Mr. Hamilton, for the appellant, has referred us to the case of *Roach* v. *McLachlan*,[1] which was followed in the case of *Breithaupt* v. *Marr*,[2] in which a new view of the matter is presented, a view which I think I am

Judgment, McGuire, J.

correct in saying was not presented, nor were these cases cited, when this Court was considering the reference, nor, as I am informed by my brother RICHARDSON, was it presented or these cases cited to him. While in no way bound by the decisions referred to, I cannot help feeling the force of this new line of argument, supported as it is by a Court of such recognized ability as the Court of Appeal in Ontario.

The Creditors Relief Ordinance, section 3, sub-section (*a*), says: "In case a sheriff levies money upon an execution against the property of a debtor," etc. In this case the property, shortly after the delivery to the registrar of the first execution, ceased to be the "property of the debtor," but passed to the purchaser Stewart subject to that execution, and to that execution only, for the second execution came in subsequent to the transfer to Stewart. As pointed out in *Roach* v. *McLachlan*,[1] the money levied by the sheriff by the sale was, therefore, levied out of the property, not of the debtor, but of Stewart, and was not, therefore, money which, under the language of sub-section (*a*) of section 3 of the Creditors Relief Ordinance, the sheriff was required to "distribute rateably among all execution creditors," etc. The McCormick execution never bound this land, for by section 94 of the Territories Real Property Act no execution binds till a copy is delivered to the registrar, and here the land had ceased to be the property of the execution debtor when this execution was so delivered. Had it not been for the fact that the Massey Company had delivered their execution previously to the transfer, the McCormick Company would never have had a pretence of claim to recover anything under the writ. In considering this same case on Mr. Justice RICHARDSON'S reference both he and I felt pressed with what seemed a clear case of hardship on the first execution creditors, but we then saw no means of escape, and I may say that I am glad to be now able to concur, though on entirely different grounds, in the result arrived at by the other members of this Court sitting on this appeal. I may remark that except as above stated I do not depart from the opinions expressed by me on the reference. I think, therefore, the McCormick Company are

not entitled to share in the moneys in the sheriff's hands, and this appeal should be allowed with costs. Judgment. McGuire, J.

SCOTT, J., having been engaged in the case at the Bar, took no part in the judgment.

Appeal allowed with costs.

THE QUEEN v. WYSE.

Criminal law—Seduction of girl under 16—Corroboration—Judge—Jury.

In a prosecution under Criminal Code, s. 181, for the seduction of a girl under sixteen, in addition to the evidence of the girl, evidence was given by other witnesses to the following effect:—That the accused and the girl were found in a house alone; that the accused came out partially dressed; that he was then leaving sheep (which were in his charge) unattended and refused to go with the witness to where the sheep were; that before he was charged with any offence he stated to the witness "that he had been advised if he could get the girl away and marry her, he would escape punishment."

Held, that the girl was corroborated in some material particular by evidence implicating the accused within the intention of Criminal Code, s. 684.

Semble, that the fact that the accused, in giving evidence on his own behalf, stated that he had first had connection with the girl at a date after she had reached sixteen; while one of the witnesses for the prosecution stated that the accused, two months before that date, had admitted with reference to the girl that he had "got there," might, though this admission was made after the girl had reached sixteen, be taken into consideration with the other facts as tending to implicate the accused.

Where there is any corroborative testimony is a question for the Judge, but if there is any such testimony, the sufficiency of it, and the weight to be given it, is for the jury, unless of course the corroboration is so slight that it ought not to be left to the jury at all.

[*Court in banc, June 10th, 1895.*

This was a Crown case reserved by RICHARDSON, J., for the opinion of the Court under section 743 of the Criminal Code. Statement.

The points involved sufficiently appear in the judgment.

John Secord, Q.C., for Crown. Argument.

T. C. Johnstone, for the prisoner.

Judgment.

Wetmore, J.

[*June 10th, 1895.*]

WETMORE, J.—The learned trial Judge, having convicted the defendant, must have found that the testimony of the prosecutrix was true, otherwise he could not have convicted.

The only question reserved, then, is whether she was corroborated in some material particular by evidence implicating the accused to satisfy section 684 of the Criminal Code.

The alleged connection, on which the charge is founded, was alleged by the prosecutrix to have taken place on the 10th June, 1894. The prosecutrix was then under sixteen years of age. She became of the age of sixteen years on the 14th July following.

There is no doubt that there is corroborative testimony to establish the fact that the accused had illicit connection with the prosecutrix. But it is claimed that there is no corroborative testimony implicating the prisoner in having such connection before the girl reached the age of sixteen years, and that it was necessary to have corroborative testimony of that character to satisfy the section of the Code referred to.

I do not think that it is necessary for the purposes of this case to lay down any broad rule for the construction of that section, because, to use the language of such section, there was in my opinion corroborative evidence implicating the accused in having connection with the girl before she reached the age of sixteen years.

It must be borne in mind that the word "implicating" is used in the section. The mere fact that the party accused had the opportunity of committing the offence would not in itself amount to corroborative testimony implicating the accused, but that fact, coupled with other facts, might have weight to establish the implication.

Here we have the important fact established beyond all question that the accused did have illicit connection with the prosecutrix. Then we have the fact testified to that on the 10th June, the day the girl especially testified to, she and the accuser were away together as testified to by her; then we have the further fact testified to that on the 17th

June, which was before the prosecutrix became of age, on the occasion of McLean going to Naismith's house, he found the accused and the prosecutrix in the house alone and the accused came out partly dressed, that he was leaving the sheep unattended to and refused to go with McLean to where the sheep were. Then we have further the statement to McLean, made before he was charged with any offence, that "he had been advised if he could get the girl Annie away and marry her he would escape punishment." Punishment for what? If he had not had illicit connection with the girl until after she was sixteen he had committed no offence, he had committed no act for which he would be liable to punishment. If this case had been tried before a jury, all these facts and circumstances would have been proper to have been left to the jury, as corroborative evidence implicating the accused in having had connection with the girl before she arrived at the age of sixteen years—if the jury chose to so consider it; and if the jury under such circumstances convicted, I think the conviction would not have been interfered with. I can quite imagine that a good many reasons might be urged to the jury against their considering the evidence sufficiently corroborative, but it would be a matter entirely for them and, if they found it sufficiently corroborative, their finding would not be interfered with. No doubt the question whether there is any corroborative testimony is a question for the Judge; but if there is any such testimony, the sufficiency of it, and the weight to be given it, is for the jury, unless, of course, the corroboration is so very slight that it ought not to be left to the jury at all. In this case the learned Judge acted as Judge and jury, and we must assume that he found every question of fact necessary to secure a conviction against the prisoner, otherwise he would not have convicted.

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Wetmore, J.

The question which the learned Judge submitted, and the only one he could submit under section 743 of the Code, was the question of law, not the question of fact.

Although it is not necessary for the decision of the case in view of what I have above stated, I may add that I cannot help but think that the fact that the prisoner gave testimony

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Wetmore, J.

in his own behalf, and swore that he first had connection with the girl at the end of September, while, according to the evidence of Matchett, he admitted at a conversation in July, two months before, that he had "got there" with the prosecutrix, are facts (although this admission was made after the girl reached the age of sixteen) which might be taken into consideration with the other facts, as tending to implicate the accused in having connection with the girl before she became of that age.

I am of opinion that the conviction should be affirmed and that the case should be remitted to the Court below with directions to pass such sentence upon the accused as justice may require.

ROULEAU, J., MCGUIRE, J., and SCOTT, J., concurred.

Conviction affirmed.

HUMBERSTONE v. DINNER ET AL.

Constitutional law—Legislative Assembly of the Territories—B. N. A. Act—Ferries—Exclusive privilege—License—Tolls—Highway — Infringement—Private ferry—Municipal law—By-law—Resolution.

The Legislative Assembly of the Territories has power to pass an Ordinance providing for the issue of an exclusive license to ferry over a navigable river and for the imposition of tolls for the use of such ferries on such rivers. Such power is conferred upon the Assembly by one, if not both, of the following provisions of the Dominion Order-in-Council of 26th June, 1893—made under the authority of the North-West Territories Act—which authorizes the passing of Ordinances in relation to:

3. Municipal Institutions in the Territories—subject to any legislation by the Parliament of Canada as heretofore or hereafter enacted. (See B. N. A. Act. s. 92, s.-s. 8.)

8. Property and civil rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects. (See B. N. A. Act, s. 92, s.-s. 16.)

The power of the Legislative Assembly to delegate its powers discussed.

The question of the extent of the jurisdiction of the Legislative Assembly over surveyed highways, the control of which has been given by Parliament to the Legislative Assembly, discussed.

A municipality having by Ordinance been given, with respect to a certain portion of a navigable river, all the powers of the various officers named in the Territorial Ordinance respecting ferries.

Held, that it was not necessary for the municipality to exercise its powers by by-law; and that an agreement with, and a license to, the licensee both under the corporate seal of the municipality were sufficient.

The plaintiff held an exclusive license for a ferry. Another ferry was operated within the plaintiff's territory by an unincorporated association of persons, which issued tickets to its members to the amount of their respective "shares" in the association.

Held, this latter ferry was not a private ferry and that the plaintiff's right was thereby infringed.†

Judgment of ROULEAU, J., reversed.

[ROULEAU, J., *February 2nd, 1895.*
Court in banc, June 13th, 1895.

Statement.

Trial of an action before ROULEAU, J., without a jury, at Edmonton.

S. S. Taylor, Q.C., and *E. C. Emery*, for the plaintiff.

J. C. F. Bown and *P. L. McNamara*, for the defendant.

The Town of Edmonton was incorporated by Ordinance No. 7 of 1891-92. By this Ordinance it was provided that "all rights, powers, authority, duties and privileges of the Lieutenant-Governor in Council or of the Lieutenant-Governor or of the clerk of the Legislative Assembly under and by virtue of the Ferries Ordinance, and any Ordinance now or hereafter to be made in relation thereto, shall become and be vested in the municipality hereby erected in so far only, however, as regards any ferry or ferries now or at any time hereafter operated to or from any place or places on the north or northwesterly edge of the North Saskatchewan River, where it forms one of the boundaries of the municipality hereby erected."

The Ferries Ordinance is R. O. 1888, c. 28.‡

Pursuant to resolutions of the municipal council of the town of Edmonton, the corporation entered into an agreement under the corporate seal with the plaintiff to grant him an exclusive license to ferry across the North Saskatchewan River within certain defined limits, comprised within

† Affirmed 26 S. C. R. 252.

‡Consolidated c. 18, C. O. 1898 repealed by c. 4 of 1901, which re-enacts most of its provisions with some changes.

Statement

the larger limits defined by the incorporating Ordinance, and a license to that effect under the corporate seal was accordingly granted to the plaintiff. The defendants established a ferry within the limits defined by the plaintiff's license.

The plaintiff's action was for an injunction, account and damages. The defendant besides traversing all the allegations of the statement of claim and raising questions of law as to the plaintiff's *locus standi*, which are dealt with in the judgments, claimed that their ferry was their own private property, operated between *termini* which were upon their own private property and used only for the carriage of themselves and their own goods.

With regard to this defence, it appeared that the defendants, who as draymen, hotel keepers, physician, etc., had occasion to cross the river frequently, had associated themselves together as an incorporated company. Each associate subscribed for shares in the company, the amount of a share being fixed at $5. A person could join the company by signing the subscription list and taking at least one share. For each share so taken he was entitled to 100 tickets. These tickets were to be delivered to the ferryman in charge of the company's ferry in payment of tolls. Tickets were issued to shareholders only. The ferryman had orders not to carry any but members of the company. These orders were, however, in some instances, disregarded. The ferryman also carried persons not subscribers when in a subscriber's conveyance. Guests going to and from hotels conducted by some of the subscribers were carried free in the subscriber's busses. Merchandise of merchants was carried by subscribers on subscribers' drays.

Judgment was reserved.

[*February 2nd, 1895.*]

Judgment.

ROULEAU, J.—This is an action for damages against the defendants for infringing the plaintiff's rights in a ferry.

The facts in short are these:—

The plaintiff, on the 3rd January, 1894, was granted by the municipality of the town of Edmonton, a license to use

Judgment.
Rouleau, J.

and operate two ferries on the River Saskatchewan, with the exclusive right to ferry upon the said river within certain limits.

The defendants, calling themselves the Edmonton Ferry Co., on the 11th July, 1894, the plaintiff alleges, constructed, established, maintained and used a cable ferry on said river, within the said limits at a distance of about 100 yards of the Eastern Ferry, being one of said plaintiff's two ferries.

The defendants contend that the municipality has no power to grant the license in question:

1st. Because the Legislative Assembly had no authority to pass the Ferries Ordinance, R. O. 1888 c. 28, in so far as it affects navigable rivers, and

2nd. Even if the Legislative Assembly had that right, they had delegated that power to the municipality to be exercised in a special manner, to wit, by by-law.

By section 91, sub-section 10, of the British North America Act "navigation and shipping" are under the exclusive powers of the Parliament of Canada.

It is admitted that the River Saskatchewan is a navigable river. I am at a loss to know by what authority or power the Legislative Assembly can give to municipalities the right to license ferries over such rivers, with the exclusive right of operating such ferries. I would readily understand that the Legislative Assembly had the power to regulate ferries within the limits of the Territories, under the Act amending the North-West Territories Act 54-55 Vic. 1891 c. 22, s. 6, s.-s. 13, of the substituted s. 13, but that power cannot be extended so as to mean that the Legislative Assembly can give the exclusive right to any person to use and operate a ferry on a navigable river. In order to be more explicit, I mean that the Legislative Assembly may regulate the fares that ferrymen may charge; the conduct, running, size and management of ferries; it may also, I believe, exact a certain tax from all ferries plying on any navigable streams, within the Territories; but it cannot prevent any man, or any set of men, from working, using or operating ferries, unless such special authority or power be

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given by the Dominion Parliament to the Legislative Assembly. Besides, how can it be contended that a local legislature can exercise authority over a river which it does not own or control?

I have come to the conclusion that the Ferries Ordinance R. O. 1888 c. 28, is *ultra vires* in respect of that part of section 2, which purports to give power to grant exclusive right to ferry upon any navigable water.

By section 4 of Ordinance No. 7, of 1891-92, incorporating the town of Edmonton, the municipality of the town of Edmonton is given the same powers, rights, authority, duties and privileges as those provided in the Ferries Ordinance. There is no provision in the Incorporation Ordinance of the town of Edmonton stating how such powers, authority, etc., are to be exercised. However, section 2 of the said Ordinance provides that all the provisions of the Municipal Ordinance are incorporated therein. I have, therefore, to refer to section 60 of the Municipal Ordinance, which enacts that municipalities may control and license ferries, erected or authorized by them within their jurisdiction, and pass by-laws allowing the collection of tolls thereon for periods not exceeding five years. In this case nothing of the kind was done. No by-law was passed allowing the collection of tolls. The council thought that a simple resolution was sufficient and allowed the plaintiff to collect tolls when he had no right to do so. A corporation has by law a certain way of binding itself, and unless it follows the law its acts are *ultra vires*. In this instance the law provides that the collection of tolls on ferries should be authorized by by-law, and when the corporation attempted to authorize the same thing by resolution it had no power to do so.

I am of the opinion that

1st. The municipality had no power or authority to give an exclusive right of ferry on the River Saskatchewan, because it is a navigable stream.

2nd. The municipality had no right or power to authorize by resolution the collection of tolls on said ferries; it should have been authorized by by-law.

For these reasons the plaintiff must fail in his action, and judgment must be entered in favour of the defendants with costs. Judgment. Rouleau, J.

From this judgment the plaintiff appealed.

The appeal was argued on the 11th June, 1895.

S. S. Taylor, Q.C., for the plaintiff, the appellant, referred to *Longueuil Navigation Company* v. *City of Montreal*,[1] *Queddy River Driving Boom Company* v. *Davidson*,[2] *McMillan* v. *Southwest Boom Company*,[3] *Bernardin* v. *Municipality of North Dufferin*,[4] *The Waterous Engine Works Company* v. *The Corporation of the Town of Palmerston*,[5] *Newton* v. *Cubitt*,[6] *Ives* v. *Calvin*,[7] Beach on Corporations, 484. Argument.

J. C. F. Bown, for the defendants, the respondents, commented on the same authorities, and referred to Dillon on Municipal Corporations, Vol. 1, p. 384.

[*June 13th, 1895.*]

SCOTT, J.—On 19th December, 1893, the municipality of the town of Edmonton, by writing under the corporate seal of the municipality, which recited that, by Ordinance incorporating the municipality, the same was invested with all the rights, powers and authorities of the Lieutenant-Governor in Council or of the Lieutenant-Governor or of the clerk of the Legislative Assembly, under and by virtue of the Ferries Ordinance in so far as regards any ferry or ferries then or at any time thereafter operated to or from any place or places on the north-westerly edge of the North Saskatchewan River, where it forms one of the boundaries of the said municipality, agreed with the plaintiff to grant to him upon the terms therein mentioned, an exclusive license, for the season of 1894, to establish and use two ferries upon said river between the north or north-westerly banks thereof, being within the limits of the municipality, and the opposite side of said Judgment.

[1] 15 S. C. R. 566. [2] 10 S. C. R. 222. [3] 1 Pug. & Burb. (N.B.) 715. [4] 19 S. C. R. 581. [5] 21 S. C. R. 556. [6] 12 C. B. N. S. 32; 31 L. J. C. P. 246; 6 L. T. 860, affirmed; 13 C. B. N. S. 864; 9 Jur. N. S. 544; 11 W. R. 468. [7] 3 U. C. Q. B. 464.

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Scott, J.

river, and authorized him to collect certain tolls thereby specified for the use of said ferry, and thereafter, in pursuance of said agreement, issued to the plaintiff a license under the corporate seal of the municipality, granting to the plaintiff the exclusive right to ferry upon said river within the limits and during the time specified in said agreement and subject to the terms thereof.

No formal by-law was passed by the council of the municipality providing for the granting of such or any ferry license or authorizing the collection of tolls for the use of any such ferry, but the entering into of the agreement of the 19th December, 1893, appears to have been authorized by a resolution of the council. The Saskatchewan River at Edmonton is a navigable river. The plaintiff duly maintained two ferries under said agreement and license during the season of 1894. About 15th June, 1894, the defendants established another ferry near one of those of the plaintiff and maintained it during the season of 1894.

The plaintiff in this action, which was commenced on 1st August, 1894, seeks to restrain the defendants from operating or using the ferry so established by them, or any other ferry within the municipality during the time limited by the plaintiff's license, and claims damages for the violation of plaintiff's rights by using such ferry established by them.

So far as material to this appeal, the defences set up by the defendants are as follows:

1. That the municipality did not issue or grant to the plaintiff the alleged license or any license.

2. That the alleged license granted no exclusive privilege.

3. That the municipality had no power or authority to grant the alleged license.

4. That the municipality never passed any by-law authorizing the entering into of the agreement of 19th December, 1893, or the issuing or granting of the alleged license or any license to the plaintiff.

6. That the defendants never carried or ferried across said river themselves or their goods or any other person or persons or the goods of such person or persons.

Judgment. Scott, J.

8. That the plaintiff had no power or authority to charge the fares set forth in the tariff set out in the statement of claim or to make any charge whatever for ferrying across said river. And there was the further defence by some of the defendants that the defendants' ferry was their own private property and was used only for the carriage of the defendants and their goods, and that they had the right to do so, and in doing so, they were not interfering with any rights of the plaintiff.

The plaintiff joined issue upon these defences, and replied that if a by-law was not passed authorizing the plaintiff's license such by-law was unnecessary.

From the evidence it appears that the defendants, twenty-one in number, were business men of the town of Edmonton, and had formed themselves into an association or partnership for the purpose of establishing and maintaining the ferry complained of by the plaintiff. There was no regular partnership agreement drawn up between them. All a person had to do to join the defendants' company was to sign the list of the association and take at least one share of $5, which entitled him to 100 ferry tickets. The shareholders were entitled to as many tickets as the amount of shares they had. When a member had consumed all his tickets he had to buy another share or shares. He was not confined to any number of shares. The money was paid by members sometimes before they got their tickets, sometimes when they got them and sometimes after.

It further appears that, although the ferryman employed by the defendants had orders not to cross on the ferry anyone but members of the defendants' association, those orders were not strictly adhered to and others crossed at various times. It also appears that James Dinner, one of the defendants, who carried on a cartage business between Edmonton and South Edmonton, and who had sixteen teams and who was then doing all the cartage business for nearly all the merchants in Edmonton, was in the habit of crossing his teams on the defendants' ferry after its establishment, carrying the goods of his customers, and that he was paid so much

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Scott, J.

per pound for carrying such goods, and that such payment included the ferry charges. His account with the plaintiff for ferriage, presumably before the establishment of the defendants' ferry, was about $40 per month. Mariaggi, another defendant, who was a hotel-keeper, crossed his hotel guests on the defendants' ferry and never charged them anything for ferriage. His account with the plaintiff was about $10 per month.

At the trial it was contended on behalf of the defendants, in addition to the defences raised by the pleadings, that the Ferries Ordinance being chapter 28 of the Revised Ordinances, under the provisions of which the agreement of 19th December, 1893, purported to be made, was *ultra vires* of the Legislative Assembly in so far as it affected navigable rivers.

The learned trial Judge held that section 2 of that Ordinance which provides for the granting of exclusive right to ferry upon any navigable water was *ultra vires* and therefore that the municipality could not grant the exclusive right to ferry on the Saskatchewan River, because it is a navigable stream. He also held, for the reasons fully stated by him in his judgment, that the council of the municipality had no power to authorize the collection of tolls on ferries without passing a by-law for that purpose and gave judgment for the defendants with costs.

From this judgment the plaintiff now appeals.

The questions argued on the hearing of the appeal were:

1. Whether the Ferries Ordinance was, to the extent referred to, *ultra vires* of the Legislative Assembly.

2. Whether the municipal council could grant a ferry license and authorize the collection of tolls thereon without passing a by-law for that purpose.

3. Whether a sufficient by-law for that purpose had been passed.

4. Whether, in case the plaintiff's license entitled him to the exclusive right of ferry within the limits therein specified, the use of the defendants' ferry within those limits in the manner shown by the evidence was an infringement of the plaintiff's right.

Judgment.
Scott, J.

The Ferries Ordinance was passed under the authority of the Order in Council of 26th June, 1883, made under provisions of the North-West Territories Act of 1880, similar in effect to section 13 of the North-West Territories Act, chapter 50, of the Revised Statutes. That Order in Council authorizes the Legislative Assembly to legislate as to (sub-section 3) municipal institutions in the Territories, subject to any legislation by the Parliament of Canada theretofore or thereafter enacted, and (sub-section 9) generally, matters of merely a local or private nature in the Territories. The statute, under which the Order in Council referred to was passed, further provided that the powers of legislation conferred by any Order in Council should not at any time be in excess of those conferred by the 92nd and 93rd sections of the British North America Act.

It will be observed that the powers of legislation mentioned as having been conferred by the Order in Council referred to are identical with those conferred upon the Provinces by sub-sections 8 and 16 of section 92 of that Act, except that those conferred upon the Provinces are not restricted by Federal Legislation.

It may reasonably be presumed that the power to establish ferries and grant exclusive rights in respect thereof would fall within one, if not both, of the two sub-sections quoted of the Order in Council referred to, provided there is nothing in any of the sub-sections of section 91 of the British North America Act showing a contrary intention. The power to legislate with respect to municipal institutions, without doubt, includes the power to establish municipalities and clothe them with the ordinary municipal powers, and the power to establish and license ferries appears to be one which, apart from the exception hereinafter referred to, is possessed and exercised by municipalities in the Provinces.

It may also be reasonably presumed that ferries are matters merely of a local and private nature.

Is there anything in any of the sub-sections of section 91 to show that it was intended that the power to establish and license ferries should not be exercised by the Provinces?

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Scott, J.

Sub-section 13 assigns to the Federal Parliament ferries between two Provinces or between a Province and a foreign country, but this would appear to indicate that all ferries other than those specified were intended to be placed under Provincial control.

It was, however, contended that sub-section 10 of section 91, which gives the Federal Parliament legislative control over navigation and shipping, necessarily included the control of navigable waters and ferries thereon. I do not so interpret it. That ferries were not intended to be included in the terms of "navigation and shipping" appears from the fact that the subject of ferries is treated and disposed of in sub-section 13. In order to control navigation and shipping it is not necessary to possess absolute control over navigable waters, but merely such control as may be necessary in order to deal fully with those subjects. It might be urged with equal force that the right to build and maintain wharves upon navigable waters, a right possessed by municipalities in Ontario apparently without ever having been questioned, is one affecting navigation and shipping.

The question of legislative control over ferries was discussed in *Longueuil Navigation Company* v. *The City of Montreal*,[1] and Mr. Justice Fournier there held that under the British North America Act, with the exceptions mentioned in sub-section 13 of section 91, the power to legislate with respect to ferries was one possessed by the Provinces.

Counsel for defendants contended that the powers of legislation conferred upon the Legislative Assembly being delegated powers, the maxim *delegatus non potest delegare* applies, and the Assembly cannot therefore delegate its control over ferries, but must itself exercise such control. I have already expressed the opinion that the power to establish municipalities includes the power to clothe them with the ordinary powers of municipalities, of which the control of ferries is one; but, apart from that view, the language of Sir Barnes Peacock in *Hodge* v. *The Queen*,[8] goes far in support of such a power of delegation. He says, "It is obvious that such a

[8] 9 App. Cas. 117; 53 L. J. P. C. 1; 50 L. T. 301, reported in Court below; 46 U. C. Q. B. 366; 7 O. A. R. 246.

power is ancillary to legislation, and without it an attempt to provide for its varying details and machinery to carry them out might become oppressive or fail."

Judgment. Scott, J.

It was also contended that the title to the surveyed highways in the Territories being in the Dominion, and some ferries being a continuation of such highways and therefore part thereof, the Legislative Assembly could not authorize the collection of tolls thereon. I think a reasonable answer to this objection is that as the control of such highways was by the combined effect of section 107 of the North-West Territories Act, and section 2 of 51 Vic. c. 19, placed in the hands of the Legislative Assembly, that body could, in the exercise of such control, provide for the imposition of tolls thereon, and I also think, for the reasons I have already stated, that such power could be delegated by it to municipalities.

As to the second objection:—Section 2 of the Ferries Ordinance enacts that the Lieutenant-Governor in Council may at any time issue a license to any person or persons for the establishment and usage of a ferry or ferries upon any river or stream or navigable water in the Territories, granting the exclusive right to ferry over the same during the time and within the limits specified and described in such license, and upon such terms with such security and other arrangements as are hereinafter specified.

Section 4 specifies the maximum rate of tolls which may be charged for each crossing by means of a licensed ferry, the rate so specified being higher that that specified by the agreement of 19th December, 1893, and section 11 provides amongst other things that the Lieutenant-Governor in Council shall express in every ferry license granted the maximum rate of tolls on payment of which persons and property shall be ferried over the river or stream within the limits of which the license applies.

Section 4 of Ordinance No. 7 of 1891-92, intituled An Ordinance to Incorporate the Town of Edmonton, is as follows :

" Immediately after the coming into force of this Ordinance, all the rights, powers, authorities, duties and privileges

Judgment.
Scott, J.

of the Lieutenant-Governor in Council or of the Lieutenant-Governor or of the Clerk of the Legislative Assembly, under and by virtue of the Ferries Ordinance and any Ordinance now or hereafter to be made in relation thereto, shall become and be vested in the municipality hereby erected, in so far only, however, as regards any ferry or ferries now or at any time hereafter operated to or from any place or places on the north or north-westerly edge of the North Saskatchewan River where it forms one of the boundaries of the municipality."

It was contended by counsel for the defendant that as by section 2 of the last mentioned Ordinance the provisions of the Municipal Ordinance were incorporated with and declared to form part of Ordinance No. 7 of 1891-92, the powers conferred by section 4 thereof must be exercised in the manner prescribed by section 60 of the Municipal Ordinance, which is as follows:

"Municipalities may control and license ferries and bridges authorized by them within their jurisdiction, and pass by-laws allowing the collection of tolls thereon for a period not exceeding five years."

In *Bernardin* v. *Municipality of North Dufferin*, Gwynne, J., in referring to a provision of the Municipal Act of Manitoba enacting that the council of certain municipalities may pass by-laws in relation to roads and bridges and the construction and maintenance thereof, says: "Now, it has been argued that as these sections authorized the municipal council to exercise their jurisdiction over roads and bridges by by-laws they are precluded from exercising their jurisdiction otherwise than by a by-law. * * * Affirmative words in a statute saying that a thing may be done in one way do not constitute a prohibition to its being done in any other way. * * * The word 'may' in the section of the Manitoba Act is, by the Manitoba Interpretation Act, to be construed as permissive only, not as imperative. Although, therefore, a by-law is a mode by which councils may exercise their jurisdiction over roads and bridges within the municipality, still there is nothing in the above Act affecting municipalities in

Manitoba which prohibits the councils from exercising them in any other way."

Judgment. Scott, J.

By the Interpretation Ordinance, R. O. c. 1, s. 8, s.-s. 2, the expression "may" in every Ordinance shall be construed as permissive unless the context otherwise requires.

I, therefore, see no reason why the word "may" in section 6 of the Municipal Ordinance should be construed otherwise than as merely permissive, or why the powers conferred by section 60 should not be exercised by the council of the municipality otherwise than by by-law.

There is also the further fact that as section 11 of the Ferries Ordinance provides that the Lieutenant-Governor in Council shall express in every ferry license granted the maximum rate of tolls, and as the powers, authority and duties of the Lieutenant-Governor in Council in that respect have been vested in the municipality, it, therefore, was only necessary for the council to express such rate in the license.

Owing to the opinion I have formed as to the other questions it is unnecessary for me to answer the third question.

As to the fourth question: The evidence shows that the defendants' ferry was used for the carriage of the goods of persons other than the defendants, and also for the carriage of persons other than the defendants, and that the defendants, either directly or indirectly, received payment for such carriage. The defendant Dinner paid the defendants for the carriage of such goods, or at least, paid the defendants for the crossing of his team engaged in carrying such goods, and the defendant Mariaggi paid the defendants for the crossing of the guests of his hotel.

In my view, the formation of the defendants' association and the provisions made for the subscription of stock therein and for the holder receiving the equivalent of such stock in ferry tickets, was merely a scheme devised by the defendants for the purpose of evading any legal responsibility that might arise by reason of their establishing the ferry. If such a scheme should be permitted to prevail, I see no reason why the defendants could not practically open their ferry to the general public by simply providing that each purchaser

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Scott, J.

of stock in the association to the value of one ferry ticket instead of $5 should become a shareholder therein until such time as he has used the ticket in crossing the ferry.

Therefore, in my view, the establishment of the defendants' ferry and the use thereof in the manner shown by the evidence was an infringement of the plaintiff's right accruing to him by virtue of his license, and that the defendants are liable to him for the damages sustained by reason of such infringement.

In my opinion the judgment of ROULEAU, J., should be set aside, and the appeal allowed with costs.

Upon the hearing of the appeal the parties by their counsel agreed in writing that, in the event of the appeal being allowed, the damages the plaintiff is entitled to recover in this action shall be $500. In view of this agreement, I am of the opinion that the plaintiff is entitled to judgment in this action for $500, together with his costs of suit.

RICHARDSON, WETMORE, MCGUIRE, JJ., concurred.

Appeal allowed with costs.

TORONTO RADIATOR MANUFACTURING CO. v. ALEXANDER.

Contract—Essential term—Condition precedent—Substantial performance—Waiver—Quantum meruit—Allowance for defects — Notice to contractor or his assignee — Admission — Admissions made under mistake.

Plaintiffs sued as the assignees of the balance of the contract-price for putting in a hot-water heating apparatus by N. D. M. & Co. for the defendant. The contract provided amongst other things, "as the essence of the contract," that "the heating of the entire building shall, easily and without forcing the boilers, maintain throughout the building a temperature of not less than 65 degrees Fahrenheit in the most severe cold."

SCOTT, J.—The trial Judge charged the jury to the following effect:

1. That the effect of the contract between the parties, was that N. D. M. & Co. were bound to supply a system which would easily maintain 65 degrees without forcing the boilers; that they were bound to put in a radiating surface to the percentage named in the contract in any event, and if a greater surface was necessary

in order to produce the 65 degrees, they were bound to furnish the greater quantity necessary for that purpose.

2. That the maintenance of the 65 degrees in the manner mentioned was an essential of the contract, the performance of which was necessary to entitle the plaintiffs to recover; not only was it made essential by the terms of the contract, but even had it not been specially provided for, it was so much a substantial element of the contract that non-performance would disentitle the contractors to recover.

3. That if they found that the system was not capable of maintaining the required temperature, they must find for the defendant and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature.

4. That if the system was capable of supplying the required temperature, they should find a verdict for plaintiffs for $621.66 (*i.e.*, contract price, less payments on account and expenses of completing some plumbing work plus interest).

5. That if the jury found that the casing for water-tanks should have been supplied and was not supplied, and that the cost thereof as sworn to by the defendant was $28, the verdict for the plaintiffs should be reduced by that amount and interest thereon.

6. That the defendant was not bound by the admission in his letters as to the amount due by him, so long as the plaintiffs had not altered their position by reason of the admission, and the defendant consequently was not precluded from showing that the admission was a mistake.

7. That notwithstanding the statements in his letters to the effect that the only work not done was some plumbers' work, the defendant was not precluded from resisting payment on the ground of some defect which was unknown to him at the time he made the admission, provided the plaintiffs' position had not been altered by reason of such admission.

8. (The jury having asked for further instructions as to whether they could find for the plaintiffs for a sum less than that already specified) that if they found for plaintiffs they would not be justified in finding for a less amount than $621.66, or for that sum less the cost of the casing for the water-tanks.

9. That the defendant was not bound to notify plaintiffs that the system was defective.

The jury found a verdict for the defendant.

On appeal: *Held*, that there had been no misdirection.

The questions of the "substantial performance" of a contract and of the waiver of a special contract and the substitution of a new contract to pay according to a *quantum meruit* discussed.

[SCOTT, J., *December 22nd, 1894.*

[*Court in banc, June 13th, 1895.*

Statement.

This was an action by the plaintiffs, as assignees from N. D. McDonald & Co., of the balance claimed by the latter to be owing by the defendant under a special contract for the putting into a building of the defendants a hot water heating apparatus and the doing of certain plumbing in connection therewith.

Statement. The action was tried at Calgary before SCOTT, J., with a jury.

Hon. *J. A. Lougheed*, Q.C., and *Geo. S. McCarter*, for plaintiffs.

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

The points of law involved turned upon the learned Judge's charge to the jury, which being set out in the head-note is not here repeated. The jury gave a verdict for the defendant.

The plaintiffs moved to set aside the verdict for the defendant and to enter a verdict for the plaintiffs.

Argument. The motion was argued on the 11th June, 1895.

Hon. *J. A. Lougheed*, Q.C., for the plaintiffs referred to: *Oxford* v. *Provand*,[1] *Lucas* v. *Godwin*,[2] *Hamilton* v. *Raymond*,[3] *Cutter* v. *Powell*,[4] *Munro* v. *Butt*.[5]

James Muir, Q.C., for the defendant referred to: *Neale* v. *Radcliffe*,[6] *Lakin* v. *Nuttall*,[7] *Oldershaw* v. *Garner*,[8] *Jones* v. *St. John's College, Oxford*.[9]

[*June 13th, 1895.*]

Judgment. ROULEAU, J.—This is a motion to set aside the verdict rendered by the jury in this case, and to enter judgment for the plaintiffs.

In the month of August, 1891, an agreement under seal was made and entered into between N. D. McDonald & Company and the defendant, by which agreement the said N. D. McDonald & Company were to supply and erect a complete system of hot water heating and plumbing in a stone building then being erected by the defendant in Calgary, and known as the "Alexander Corner," for the price or sum of $3,491 for the heating, and $791 for the plumbing; in all $4,282.

[1]L. R. 2 P. C. 135; 5 Moore P. C. N. S. 150. [2]3 Bing. N. C. 737; 4 Scott 502; 3 Hodges 114; 6 L. J. C. P. 205. [3]2 U. C. C. P. 392. [4]6 Term. R. 320; 3 R. R. 185. [5]8 El. & Bl. 738; 4 Jur. N. S. 1231. [6]15 Q. B. 916; 20 L. J. Q. B. 130; 15 Jur. 166. [7]3 S. C. R. 685. [8]38 U. C. Q. B. 37. [9]L. R. 6 Q. B. 115; 40 L. J. Q. B. 80.

Judgment.
Rouleau, J.

On the 19th November, 1892, N. D. McDonald gave the following order to the Toronto Radiator Manufacturing Company :

"George Alexander, Esqr., Calgary.

"Dear sir,—Will you kindly pay to the Toronto Radiator Manufacturing Company (Limited) all moneys due or owing to me with respect to the contract for work done upon your premises in Calgary, and for your so doing this will be your sufficient authority.

"Yours truly,

"(Sgd.) N. D. McDonald."

On the 21st January, 1893, the plaintiffs sued the defendant for the sum of $768.70, the amount contended to be still due on the said contract. On 13th November, 1893, the statement of claim was amended and the plaintiffs claimed $955.30.

The trial took place with a jury, and after evidence had been taken on both sides and the jury addressed by the advocates of both parties, the learned trial Judge laid before the jury the following propositions:

"I charged the jury that the effect of the contract between the parties is that N. D. McDonald & Company were bound to supply a system which would easily maintain 65 degrees without forcing the boilers; that they were bound to put in a radiating surface to the percentage named in the contract in any event; and if a greater surface was necessary in order to produce the 65 degrees, they were also bound to furnish the greater quantity necessary for that purpose."

"I also charged that the maintenance of the 65 degrees in the manner mentioned was an essential of the contract, the performance of which was necessary to entitle the plaintiffs to receive payment. Not only was it made essential by the terms of the contract, but even had it not been especially provided for it was so much a substantial element of the contract that non-performance would disentitle the contractors to recover.

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"I also charged the jury that if they found that the system was not capable of maintaining the required temperature they must find for the defendant, and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature."

In consequence of this charge and the jury having found, no doubt, that the heating system was not capable of maintaining the required temperature, they gave their verdict in favour of the defendant.

Before commenting on the objections taken to the learned Judge's charge to the jury by the plaintiffs, I think it is necessary to refer to the contract upon which the learned Judge seems to have based his charge.

The contract between the parties reads thus: "That the parties of the second part contract with the party of the first part to supply and erect a complete system of hot water heating and plumbing in the new stone corner block now in course of erection at Calgary by the party of the first part in accordance with the specifications hereto annexed and subject to the following provisions as the essence of the contract."

"1. The heating of the entire block shall easily and without forcing the boilers maintain throughout a temperature of not less than 65 degrees (Fahrenheit) in the most severe cold," etc., etc.

It seems to me incredible that such a solemn contract should be entered into by men who call themselves competent tradesmen, and instead of providing a system that would give the agreed degree of heat they supply a system quite inadequate, and still claim that they have completed their contract. Or, in other words, because the system of heating has been completed by the defendant himself and declared so by his letter of 26th September, 1892, thinking then that the said system would be effective to give the number of degrees of heat agreed upon by the contract, the plaintiffs refuse to recognize the said contract and base their claim on said letter.

Judgment. Rouleau, J.

As a matter of law, the plaintiffs cannot claim any more than what is due to their assignors, and if nothing is due under the contract to N. D. McDonald & Co., the plaintiffs cannot claim anything from the defendant. And, as a matter of law, also, there was no duty imposed on the defendant to notify the plaintiffs that the contract had not been completed and the system was defective. The duty imposed on the defendant was to pay the contract price or balance of it only upon the completion of the heating system according to the contract, and after completion only, could the plaintiffs have any claim against the defendant. I think, therefore, that the first objection taken to the learned Judge's charge by the plaintiffs cannot be maintained.

It is contended also that the learned trial Judge should have charged the jury that if they found the contract to have been substantially performed by N. D. McDonald & Co., their verdict should be for such sum as they found unpaid upon the contract after deducting such sums as were properly expended by the defendant in finishing the contract.

The best answer to this objection is contained in *Cutler* v. *Close*,[10] where a party contracted to supply and erect a warm air apparatus for a certain sum. Tindal, C.J., said: "The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent and unfit for the purpose, and, either from that or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay."

It seems from the evidence in this case, and it is not denied, that the apparatus did not at all answer the end for which it was intended. The apparatus was intended for the purpose of heating by means of radiators a certain block up to a certain number of degrees. The evidence is that it did not heat the said block, consequently the apparatus was useless for the purpose. The defendant had, therefore, a right to refuse to pay.

This action is brought by the plaintiffs under the contract; in such an action can the plaintiffs recover as on a *quan-*

[10] 5 C. & P. 337.

Judgment.

Rouleau, J.

tum meruit? I think that *Ellis* v. *Hamlen*[11] is sufficient authority to show that they cannot for not having complied with the condition, made of the essence of the contract, that the heating apparatus was to give 65 degrees of heat during the coldest weather. Besides, it cannot be here a question of *quantum meruit*, for the contract is entire. The question here is not whether the heating system is complete or not, but whether the heating system can give a sufficient quantity of heat to be of any use. If, therefore, the contract was entire, the plaintiffs could not recover in this form of action: *Sinclair* v. *Bowles*.[12] The same principle was decided in *Neale* v. *Radcliffe*.[6]

Hudson on Building Contracts says: "When the contract is entire and completion is a condition precedent to payment no English case has yet decided that any allegation of substantial performance will enable the builder to recover, unless there is some act of the employers, such as acceptance, waiver or prevention, or evidence from which a new contract can be implied to pay for the work as performed and according to value, although it is not entirely completed."

N. D. McDonald & Co. in this case, having contracted to do an entire work for a specific sum, can receive nothing, unless it be shewn the work be done and that it answers the purpose for which it is done. This seems the principle under which *Appleby* v. *Meyers*[13] and *Stubbs* v. *The Holywell Ry. Co.*[14] have been decided, also *Lakin* v. *Nuttall*.[7]

I think, therefore, that under the facts of this case and under the authorities referred to, the learned trial Judge was justified in law to charge the jury as he did, and that the verdict of the jury was correct.

This appeal is dismissed with costs.

WETMORE, J.—By agreement dated 24th August, 1891, N. D. McDonald & Co. contracted with the defendant to supply and erect a complete system of hot water heating and

[11]3 Taunt. 52; 12 R. R. 595. [12]4 M. & Ry. 1; 9 B. & C. 92; 7 L. J. O. S. K. B. 178. [13]36 L. J. C. P. 331; L. R. 2 C. P. 651; 16 L. T. 669, reversing 14 W. R. 835. [14]36 L. J. Ex. 166; L. R. 2 Ex. 311; 15 W. R. 869.

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Wetmore, J.

plumbing in a building of the defendant's then in the course of erection at Calgary, in accordance with certain specifications and subject to certain provisions which were expressly declared to be of the essence of the contract, among which provisions were the following: The heating of the entire block (meaning the building in question) shall easily and without forcing the boilers maintain throughout the building a temperature of not less than 65 degrees (Fahrenheit) in the most severe cold.

All plumbing and heating shall be maintained in good order and repair for one year without charge by the contractors.

As a guarantee of the fulfilment of the conditions of the contract 80 per cent. of the contract price only was to be paid on completion of the work, the remaining 20 per cent. being payable subject to the complete fulfilment of all conditions on the 1st May, 1892.

Subject, as last provided, the contract price payable to the contractors by the defendant was to be; for the heating, $3,491, for the plumbing, $791. The work was to be commenced within two weeks from notice by defendant to the contractors that the building was ready for the same, and the entire work was to be completed within seven weeks, subject to a specified payment for default by the contractors as liquidated damages.

The specifications contained the following clause:

Radiation—The heating surface to be calculated as follows, exclusive of mains or risers: Ground floor 7 per cent., second floor 6 per cent., third floor 5 per cent., but should the above not be sufficient to heat the building the contractor for the heating to furnish sufficient; but it is distinctly to be understood that at least the above amount of radiation to be put in.

There is no evidence as to the condition the building was in when this contract was made, but in view of the provisions for payment which I have set out I assume that the parties contemplated that the heating system would be put in in the fall of 1891, or the very early part of 1892, so that

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Wetmore, J.

they would have the winter of that year to ascertain whether the system maintained the temperature provided for, and if it did and all other conditions were fulfilled the final 20 per cent. of the contract price would be paid. Evidently this work was not completed before May, 1892, because that is the time that Irvine, the contractor's man, left the building. No complaint is made in this respect, however, and I only mention it as I consider it may possibly be of some importance in determining what the parties meant by the contract. A large amount has been paid on this contract, and under no circumstances is there any more due on it than 20 per cent., which was reserved as payable subject to the complete fulfilment of all its conditions. N. D. McDonald & Co. assigned all moneys due on the contract to the plaintiffs who brought this action to recover the same.

The learned trial Judge charged the jury that the effect of the contract between the parties was that N. D. McDonald & Co. were bound to supply a system which would easily maintain 65 degrees without forcing the boilers, that they were bound to put in a radiating surface to the percentage named in the contract, in any event, and if a greater surface was necessary in order to produce the 65 degrees they were bound to furnish it; that the maintenance of the 65 degrees was an essential of the contract, the performance of which was necessary to entitle the plaintiffs to recover, and that if they found the system was not capable of maintaining the required temperature they must find for the defendant, and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature, but if they found that the system was capable of supplying the required temperature they should find for the plaintiffs. The jury found for the defendant; they must, therefore, have found that the system was not capable of supplying the required temperature. We must, therefore, take that part as established. It is quite clear that there was abundant evidence to warrant the jury in this finding, and it was not contended that there was not. The complaint is that the learned Judge ought to have instructed the jury that if they found that the system

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Wetmore, J.

was not capable of maintaining the required temperature, then it was a question for them to consider whether there was a substantial performance of the contract, or whether the defendant had treated it as substantially performed, and that if they found either of these questions in the affirmative they should find a verdict for the plaintiffs for the balance of the contract price less the amount that it would cost the defendant to make the system furnish the required temperature. I am of opinion that the learned Judge's directions were correct.

In the first place, the parties to this contract had expressly provided in it that the provision as to the heating of the building to the specified temperature should be of the essence of the contract; they had further provided that 20 per cent. of the contract price was only payable subject to the complete fulfilment of all conditions. I cannot conceive of any language that could be used which could more clearly express the intention of the parties that the provision that the heating system was to furnish the specified temperature was to be a condition precedent to the payment of this 20 per cent.

The authorities are clear that when parties choose to so expressly contract the Courts will give effect to it. Blackburn, J., is quoted in Pollock on Contracts (5th ed.) 251, as having thus expressed himself in *Bettini* v. *Gye*.[15] "Parties may think some matters apparently of very little importance essential; and if they sufficiently express an intention to make the literal fulfilment of such thing a condition precedent it will be one." Now, in connection with this heating system, furnishing the temperature specified was not a matter of little importance, it was a matter of the greatest importance, and the evidence disclosed that the system in question, in failing in this respect, was productive of the greatest discomfort. I am of opinion that the contractors, and of course the plaintiffs are in their shoes, are bound by these provisions in the contract, at any rate unless they can show that the defendant waived them.

[15]45 L. J. Q. B. 209; 1 Q. B. D. 183; 34 L. T. 246; 24 W. R. 551.

Judgment.
Wetmore, J.

But it is contended that the defendant did waive them, or at least that there was evidence from which the jury could find that he waived them. Assuming that "waiver" is a correct expression to use, I have been unable to find any evidence of such waiver that could be submitted to the jury. It is clear that the mere fact of the defendant taking possession of the building is no waiver, neither is it evidence of a mutual abandonment of the special contract, and the substitution of a new implied contract to pay for the work done and materials supplied according to their value, which I think is the more correct way of expressing it. This is clearly established by *Munro* v. *Butt*,[5] a leading case on the subject, and this case was followed in *Oldershaw* v. *Garner*.[6] But it is further urged that there was evidence which, coupled with the fact of taking possession, was sufficient to be left to the jury on this question, namely, the letters written by the defendant, and generally the correspondence put in evidence and the fact that the defendant moved the radiators from one room to another, took out some of the radiators and put in coils in their stead and changed radiators from one room to another, and that he omitted to notify the plaintiffs that the heating system would not heat to the specified temperature. It must, however, be borne in mind that, as I have before stated, the heating system was not completed before May, 1892, and, I am inclined to think, a good deal later. Norman McDonald, one of the plaintiffs' witnesses, who put the system in the building, states he never made a test of it during the spring he completed the contract, as the weather was then too mild. The defendant did not occupy the building until May, 1892, and he first began to use the heating system in September or October, 1892. We who live in this country are aware that the cold weather which would thoroughly test the capability of the system would not regularly set in until after October. None of the correspondence which was put in evidence, and on which the plaintiffs rely, was dated later than the 26th September, 1892. It was, therefore, all written before the defendant had an opportunity of testing the system or of ascertaining whether it filled the terms of the contract. The correspondence,

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therefore, could not by any possibility be evidence of waiver or of the mutual abandonment of the special contract and the substitution of a new implied contract. I cannot see that it was incumbent on the defendant to notify the plaintiffs that the system was not up to contract. The contract was not with the plaintiffs, but with N. D. McDonald & Co.; the defendant could not call upon the plaintiffs to make the system right. Moreover, I am of opinion that it was not the duty of the defendant to chase around after the contractors to see that they carried out the terms of their contract; the contractors themselves ought to have looked after that. It was their duty, when the proper time came to test the system, to attend to that duty and ascertain whether it could do what they agreed it would do, and if it was found not according to contract to make it so. And surely what the defendant said when he discovered that the system was defective cannot be considered evidence of a waiver or of the substitution of a new implied agreement. He was in possession of the building; he had tenants in a great part of it. He had to do something to keep the building warm or lose his tenants, and all he did was with a view of endeavouring to warm the building; the replacing of radiators that had burst by accident, was a work of necessity almost, and it is to be borne in mind that a great deal of this, and probably the greater portion, was done after the action was brought, and that even down to the time of trial the defects continued. It is also to be borne in mind that this work was all done after N. D. McDonald & Co. had got into financial difficulties, and after they had, to say the least, omitted to do other work in connection with the contract that the defendant had to do. If what the defendant did do can possibly be construed as evidence of waiver or of the substitution of a new implied contract, the only way the defendant could have obtained the benefit of the express clause in the contract on which he relies would have been by moving himself and his tenants out of the building, or at a great expense, putting a new system of heating in, leaving the one now there unused.

But I think the charge of the learned Judge was correct on another principle. Lord Campbell, C.J., in

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Munro v. *Butt*[5] lays down the following rule: "If, indeed, the defendant had done anything coupled with the taking possession which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work or if the failure in complete performance being very slight, the defendant had used any language or done any act from which acquiescence on his part might have been reasonably inferred, the case would have been different." Harrison, C.J., is reported in *Oldershaw* v. *Garner*,[8] as follows: "I must say that *Munro* v. *Butt*[5] is a decision which recommended itself to my reason ever since it appeared in 8 E. & B., and one which I am prepared, whenever applicable, willingly to follow. In this case it is, I think, strictly applicable. The land on which the work was done was the land of the defendant. He was never, therefore, out of possession. It is not shown that defendant, when, in popular language, he took possession, did anything to prevent the architect from entering to inspect the work, nor is it shown either that the failure in performance is very slight or that defendant, when taking possession, had used any language or done any act from which acquiescence might be reasonably inferred."

In the case before this Court it has not been shown that the failure in performance has been very slight. On the contrary, such failure is of a very serious character, and is one for which, by the express terms of the contract, the defendant is authorized to retain 20 per cent. of the contract price.

I think this appeal should be dismissed with costs.

RICHARDSON, J., and MCGUIRE, J., concurred.

Appeal dismissed with costs.

WILKIE ET AL. v. JELLETT ET AL.

Territories Real Property Act—Unregistered Transfer — Execution — Priority—Cloud on Title—Sheriff—Parties—Costs.

Held, reversing the judgment of ROULEAU, J., that the Territories Real Property Act has not altered the law that a writ of execution binds only the beneficial interest of the execution debtor; and therefore a transferee (whose transfer is unregistered) from the certificated owner is entitled to have an execution, filed subsequently to the making of the unregistered transfer, declared to be a cloud upon his title; so likewise is entitled a person who, though he has received no actual transfer, is entitled to one under an enforceable agreement.†

To such an action the sheriff, against whom an injunction is asked to restrain proceedings upon the execution, is a proper party.

Where in such an action the sheriff joined in, and set up, the same defences as the execution creditor, he was ordered to pay the costs as well as the execution creditor.

[*Court in banc, June 13th, 1895.*

Statement.

These four actions were consolidated and tried together before ROULEAU, J., at Edmonton without a jury.

The statement of claim in the first action was as follows:

1. On the 7th March, 1891, the Edmonton & Saskatchewan Land Company of Canada were the owners in fee simple in possession of the following lands * * * and held certificates of ownership for the said lands under the Territories Real Property Act.

2. On the said 7th March, 1891, the said company for valuable consideration executed a transfer to the plaintiffs under the said Act of the said lands which was immediately delivered to the plaintiffs.

3. On the 20th June, 1893, the defendant Robertson, who is the deputy sheriff at Edmonton, had in his hands a writ of execution against the lands of the said company, issued in a certain action in the Supreme Court of the North-West Territories, wherein the defendant Jellett was plaintiff and the said company were defendants, and on that day the defendant Robertson, in his capacity as deputy sheriff, by the direction of the defendant Jellett, delivered a copy of the said

†Affirmed 26 S. C. R. 282.

Statement.

writ of execution certified under his hand together with a memorandum in writing of the said lands, as being the lands intended to be charged thereby, to the registrar of the Northern Alberta Land Registration District, being the registration district within which the said lands are situate, and thereupon the said registrar entered a memorandum thereof in the register of the said lands.

4. On the 14th December, 1893, the plaintiffs registered the transfer of the said lands to them from the company, but the registrar refused to issue certificates of ownership to the plaintiffs except marked as being subject to the said execution, and accordingly certificates of ownership for the said lands in favour of the plaintiffs were issued, but marked as aforesaid.

5. The defendant Jellett has caused the said execution to be maintained in force and the entry thereof to be maintained upon the register of the said lands, and both the defendants refuse to withdraw the said execution, or permit the entry thereof on the register of the said lands to be cancelled, or otherwise to be removed therefrom.

6. The said execution is a cloud upon the plaintiffs' title to the said lands.

7. The defendant Robertson, as deputy sheriff, has, by direction of the defendant Jellett, advertised the said lands under the said execution, and will, unless restrained by this honourable Court, proceed to sell the said lands accordingly.

8. The plaintiffs have suffered and continue to suffer damage by reason of the said cloud upon their title, and the plaintiffs have been, and are likely to be, prevented from making advantageous sales of the said lands, which otherwise they could have made.

The plaintiffs claim :

(1) A declaration that the said execution is a cloud on the plaintiffs' title.

(2) An order that the entry of the said execution be cancelled and removed from the register of the said lands.

(3) An injunction restraining the sale of the said lands under the said execution.

(4) An inquiry as to the damage suffered, and which will be suffered, by the plaintiffs by reason of the defendants causing the said cloud to be placed and maintained on the register of the said lands, and an order that the defendants do pay the amount of such damages. Statement.

The statements of claim in the second and third actions were substantially the same, and that in the fourth also, except the second paragraph, which was as follows:

"2. On or about the said 7th March, 1891, the said company for valuable consideration agreed by writing in that behalf to transfer to the plaintiff the said lands, and the plaintiff has ever since been and is now entitled to have executed and delivered to him a transfer from the company in his favour of the said lands in pursuance of the said Act, and the defendants are both fully aware of these facts, and do not deny or contest them."

The two defendants joined in their defence and traversed all the allegations of the statements of claim, raising also questions of law.

On the trial all the allegations of fact in the statements of claim were admitted, and the whole case turned upon questions of law arising under the Territories Real Property Act, R. S. C. c. 51.

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

S. S. Taylor, Q.C., for the defendants. Argument.

[*February 14th, 1895.*]

ROULEAU, J.—This is an action by the plaintiffs to obtain a declaration that the execution against their lands filed by the defendants is a cloud on their title; and to obtain an order to have the entry of the said execution cancelled and removed from the register of the said lands, etc., etc. Judgment.

The facts of the case are very simple. The Edmonton & Saskatchewan Land Company were the owners in fee simple in possession of certain lands described in the statement of

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claim, and held certificates of ownership for the said lands under the Territories Real Property Act.

On the 7th March, 1891, the said company for valuable consideration executed a transfer to the plaintiffs under the said Act of the said lands.

On the 20th June, 1893, the defendant Robertson, who is the deputy sheriff at Edmonton, had in his hands a writ of execution against the lands of the said company issued in a certain action in the Supreme Court of the North-West Territories, wherein the defendant Jellett was plaintiff and the said company were defendants, and on that day the defendant Robertson in his capacity as deputy sheriff, by the direction of the defendant Jellett, delivered a copy of the said writ of execution certified under his hand, together with a memorandum in writing of the said lands, as being the lands intended to be charged thereby, to the registrar of the Northern Alberta Land Registration District, being the registration district within which the said lands are situate, and thereupon the said registrar entered a memorandum thereof in the register of the said lands.

On the 14th December, 1893, the plaintiffs registered the transfer of the said lands to them from the company, but the registrar refused to issue certificates of ownership to the plaintiffs except marked as being subject to the said execution, and accordingly certificates of ownership for the said lands in favour of the plaintiffs were issued, but marked as aforesaid.

Under section 59 of the Territories Real Property Act, "No instrument, until registered under this Act, shall be effectual to pass any estate or interest in any land, etc."

It seems to me that the language of that section is as clear as it can be. The plaintiffs in this case had a transfer of the lands, but that instrument, until registered under the Act, was not effectual to pass any estate or interest in such lands. On the other hand, the defendant Jellett having entered or registered his execution against the said lands, the said lands become liable as security. Otherwise section 62 of the said Act, which says that "Every certificate of title granted under

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Rouleau, J.

this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity, as against Her Majesty and all persons whomsoever, that the person named in such certificate is entitled to the land included in such certificate, for the estate or interest therein specified," etc., would be meaningless, would be a trap to deceive the public. A man having an execution against another man, who is considered before the world to be the proprietor at law and in equity of certain lands, registers his execution against those lands. Afterwards he is met by another person who claims the same lands in equity, because he holds an unregistered transfer. If such was the law it would entirely defeat the object and the policy of the Act. A registered execution against land affects the interest of the registered owner in such land. Under section 59, "No instrument, until registered, is effectual to pass any estate or interest in any land." The interest of the registered owners was, therefore, intact, and was only affected when the defendant Jellett registered his execution in compliance with section 94. According to this section, as soon as the sheriff delivers a copy of a writ of execution, certified under his hand to the registrar, the land is bound by such writ, and the same shall operate as a caveat against the transfer by the owner of such land, or of any interest he has therein; and no transfer shall be made by him of such land or interest therein except subject to such writ.

I think this is a positive enactment of the statute, and in the face of it how can I attempt to decide otherwise on mere inference from other sections of the Act, which may perhaps give grounds for an argument, but which are not explicit enough to base a decision of a Court of justice.

In *Re Herbert and Gibson*,[1] Bain, J., is entirely of the same opinion as I am. His remarks are as follows: "Apart from the Real Property Act, the land would not be bound by the execution, but looking at the provisions and the policy of that Act, I am of opinion that Gibson being the registered

[1] 6 Man. R. 191.

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Rouleau, J.

owner of the land at the time the copy of the execution was filed and registered, the previously executed transfer from Gibson to Herbert will not avail to prevent the execution binding the land.

"If the copy of the writ of execution delivered to the Registrar-General under section 102 is an 'instrument,' in the meaning of the word under the Act, as I think it is, then section 33 provides that its registration prior to that of the transfer shall give it priority.

"But apart from this, the whole object and policy of the Act, as shown by section 62 and various other sections is, for all purposes and against all the world, to vest the beneficial ownership of the land in the person named in the certificate of title, that is, the registered owner, and there can be no other estate or interest in any one else. The ownership, which is the creation of the statute, is changed, not as in the case of land which has not been brought under the Act by the execution of the deed of conveyance, but only by the registration of a transfer which has been executed in accordance with the Act. A properly executed transfer gives the transferee the right to have the land registered in his name, but as regards the land itself, until it is registered it has no effect whatever, and the land still remains the property of the transferor, the registered owner, both at law and in equity."

True this is a judgment given under the Real Property Act of Manitoba, but it is almost in every particular the same as the Territories Real Property Act.

In *Re Rivers*[2] the language of this Court as expressed by WETMORE and MCGUIRE, JJ., is unequivocal. It was held that an unregistered transfer did not pass or affect land, and that an execution registered against the registered owner had priority, and that such transfer could not be registered afterwards, except subject to such execution.

A great stress has been given to two cases reported in the Victorian Law Reports: *The National Bank of Australia* v.

[2] 1 Terr. L. R. 404.

Morrow[3] and in *Re Shears and Alder*.[4] After careful perusal of the judgments given in these cases, I fail to see that the principle laid down by the plaintiffs is carried out. On the contrary, the Judges seem to be of the same opinion as the Judges of the Territories, that as soon as a party has complied with the Real Property Act by registration of his transfer, mortgage, lease or execution, his position cannot be affected by any other unregistered document, except, as in our Act, in case of fraud, omission or error, etc. Judgment. Rouleau, J.

So I have come to the conclusion that the plaintiffs are not entitled to the relief asked for. The interim injunction is, therefore, dissolved and judgment must be entered in favour of the defendants with costs.

From this judgment the plaintiffs appealed. Statement.

The appeal was argued 5th June, 1895.

The grounds of appeal were as follows:

1. The Territories Real Property Act recognizes the creation and existence of equitable, as well as legal, estates and interests in land.

By virtue of the agreements of sale from the Edmonton & Saskatchewan Land Company to the several plaintiffs, the land in question became vested in equity in the several plaintiffs, the company continuing to hold merely the bare legal estate, and the plaintiffs becoming the owners of the entire equitable and beneficial interest in the lands;

A writ of execution is not given a greater effect by the Territories Real Property Act than it previously had, that is to say, it binds the beneficial interest only of the execution debtor in the property intended to be charged;

Although neither the registrar nor the Judge or Court, while acting on a reference from the registrar, has power to enquire into or adjust the rights of parties founded upon claims to equitable or beneficial estates, the Court, when its

[3] 13 Vic. L. R. 2; Hunter's Torrens' Title Cases, 306. [4] 17 Vic. L. R. 317.

Statement.

general jurisdiction is invoked by action in the ordinary way, has such power in certain cases, of which the case of conflicting claims of an execution creditor and a *cestui qui trust* of land, whether under an express, implied or constructive trust, is one.

Therefore, the several plaintiffs in the present cases are entitled to have the lands in question freed from the cloud upon their equitable or beneficial titles created by the execution of the defendant Jellett.

2. That the defendant Robertson is a proper party defendant on the ground of the necessity for claiming an injunction against him, and also on the ground that being a wrongdoer, he is liable equally with the defendant Jellett; and at all events, inasmuch as he did not apply to the Court for protection, as he might have done as an officer thereof, he will not now receive any special consideration, but will be left to such right of indemnity as he may have against the defendant Jellett.

Argument.

N. D. Beck, Q.C., for the plaintiffs the appellants, referred to the following additional authorities: Jones on the Torrens System, pp. 82 and 128, *Re Maloney*,[5] *McEllister* v. *Biggs*,[6] *Massey* v. *Gibson*,[7] *Morton* v. *Cowan*,[8] *Eyre* v. *McDowell*,[9] *Ontario Industrial Loan and Investment Co.* v. *Lindsey*.[10]

Taylor, Q.C., referred to Armour on Titles, pp. 59-60 and 61, *Forrester* v. *Campbell*,[11] *Registrar of Titles* v. *Paterson*.[12]

[*June 13th, 1895.*]

Judgment.

McGUIRE, J.—The question of law to be decided in this case is simply this:—Is an execution against lands duly delivered to the registrar binding as against a prior but

[5]14 Can. L. T. 240. [6]8 App. Cas. 314; 52 L. J. P. C. 29; 49 L. T. 86; Hunter's Torrens' Title Cases, 29. [7]7 Man. R. 172. [8]25 O. R. 529. [9]9 H. L. Cas. 619. [10]4 O. R. 473; 3 O. R. 66. [11]17 Grant's Chy. R. 11. [12]46 L. J. P. C. 21; 2 App. Cas. 110; 35 L. T. 642.

unregistered transfer for value to a *bona fide* purchaser? By section 94 such a transfer can be registered subsequent to the coming in of the execution, but the registrar would, in issuing a certificate of title to the transferee, express thereon that it was subject to the execution. A transferee taking such a certificate would not be practically affected unless and until a sale had been made by the sheriff and such sale had been duly confirmed by a Judge, for by section 96 no such sale "shall be of any effect until the same has been confirmed by a Judge," and it is only (if at all) upon the production to the registrar of a duly executed transfer having endorsed thereon an order of confirmation that the purchaser is "entitled to be registered as owner and to a certificate of title to the same." So that it would seem that the holder of such a transfer, on receiving a certificate expressed to be subject to an execution, might not, by accepting such a certificate, be barred from contesting the right of the transferee from the sheriff to a confirmation of the sale or his right to be registered thereunder as the owner. However that may be, it is obvious that if the holder of the prior transfer is not affected by the delivery to the registrar of the execution, he might rightly decline to accept a certificate subject thereto and may come at once to the Court to have the execution removed from the register as being a cloud upon his title.

Judgment. McGuire, J.

It is clear, I think, that the receipt by the registrar of a copy of an execution against lands does not pass any title or any interest in the land. Certainly not to the execution creditor, for otherwise it might have been necessary for such creditor to join in the transfer to the purchaser at the sheriff's sale; not to the sheriff and not to the purchaser from the sheriff, because at the time of delivery to the registrar the person who may become purchaser is unascertained. So that one is not surprised to find section 94 declaring that the execution "shall operate as a caveat," etc.

Let us now consider what is the effect of such an execution as against a prior *bona fide* purchaser for value who has

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omitted to register his transfer. It is contended by the execution creditor that so long as the certificate of title of the judgment debtor is in force and is uncancelled the land mentioned therein must be deemed as against all the world, including persons interested under unregistered instruments, the property absolutely of the person named therein, subject only to certain matters set out in sections 60, 61 and 62, one class of which is [section 61, (e)] "executions against or affecting the interest of the registered owner in such land which have been registered and maintained in force against such registered owner." Section 59 is read as showing that the transfer, "until registered," shall not be "effectual to pass any estate or interest in any land," and that the result is that the land still remained, at the date of the delivery of the execution to the registrar, the property of the judgment debtor and so liable to satisfy the execution.

That seems to have been the view pretty generally accepted throughout the Territories and in Manitoba. The decision of Bain, J., in *In re Herbert* v. *Gibson*,[1] was that a transfer has no effect upon the land until registered and that the registrar was right in issuing a certificate to the transferee subject to an execution theretofore delivered to him. In *Massey* v. *Gibson*[7] it was held that Bain, J., was, in the case last recited, merely giving a direction for the guidance of the registrar, and the Court there decided that it was still open for the parties to seek the establishment of their rights in a Court of equity. They held also that under the Manitoba statute, which is substantially like ours, trusts may exist and be recognized by the Court as between the parties, and Mr. Justice Killam, in his judgment on p. 178, cites approvingly among other things a statement in Mr. A'Becket's work that, "as against the proprietor, trusts and contracts may be enforced as formerly, and although a trustee may be absolute proprietor under the Act, a Court of equity will reduce or deprive him of his interest or compel him to apply the proceeds as justice may require," and again, "the land may be reached through the trustee, although the trust will

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not be attached to the land in such a manner as to be enforced against a person acquiring it without fraud on his part." Mr. Justice Bain, in his judgment, qualifies his general remarks in the former case by saying they had reference only to his opinion given for the guidance of the registrar-general and only went to the length that the registrar-general could not recognize any interest in any one but the registered owner. It must be remembered that both these cases were under the Real Property Act of Manitoba and were brought expressly to control the registrar-general in the exercise of his functions. No case was brought to our notice where the Court in Manitoba, in a suit upon its equity side, has dealt with the rights of the transferee under an unregistered instrument. The question was raised before me many years ago in *In re Thompson*,[13] partly reported in the Canadian Law Times, but while I was of opinion then that the point was well taken I found it unnecessary for the purposes of that case to expressly so decide. Bain, J., in *Massey* v. *Gibson*,[7] is of opinion that "equitable interest can be created and will arise by implication in these lands just as in the case of lands that have not been brought under the Act, and that courts of equity acting upon the registered owner in *personam* will still recognize and give effect to them. Killam, J., by quoting approvingly the words cited above from A'Becket's work, seems to go a little further and to admit that "the land may be reached."

No doubt the language of section 59 seems very strong and to permit no effect whatever to an instrument until registered. Section 62 seems very emphatic that so long as the certificate of title is in force and uncancelled it is conclusive evidence that the person therein named is entitled to the estate or interest mentioned subject only to exceptions not affecting an unregistered instrument. One must not forget, however, that the Act is largely framed for the guidance of registrars and that as far as that officer is concerned the meaning of the Act is that he shall regard only

[13]10 Can. L. T. 44.

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instruments such as he is directed to receive or register, and when substantially in accordance with the provisions of the Act (section 34) and when brought in and presented for registration or delivered to him as provided, and I think that the positive language employed was not intended to prevent a Court from giving effect to rights equitable or otherwise whether evidenced by any instrument or by one not capable of being registered or by one which has been merely omitted to be registered. Before giving to sections 59 and 62 the meaning contended for by the respondent we must see what the logical consequences would be; and if that would lead to a palpably absurd conclusion, such as it could not be conceived the framers of the Act could have intended, we must then return and consider whether the language of those sections is not capable of an interpretation which would not lead to such a conclusion.

The Act provides for a person having no beneficial interest in land being registered as owner; for example, section 91 allows the personal representative of a deceased owner of land to apply for and obtain a certificate to himself of such land, and he is thereupon "deemed to be the owner." Now then, for purposes of registration doubtless he would be treated as the owner, so that if he executed a transfer or mortgage such instrument would be dealt with by the registrar exactly as if he were the absolute beneficial owner. But it would surely not be contended for a moment that if an executor contemplated dealing with the land contrary to the interests of the devisee, the latter could not by injunction or order restrain him from so doing. Yet if literally as against "all persons whomsoever" he is to be deemed the owner, how could he be interefered with? It will not do to say that the only remedy of the devisee is to bring an action for damages against him; such a remedy might be a very empty one. Or will it be said that the execution creditors of such an executor could, by delivering their executions to the registrar, reach this land? Yet if the respondent's contention is right, since the executor is to be deemed the owner and his certificate, if still in force, is to be conclusive evidence of his ownership

Judgment McGuire, J.

and the execution when delivered binds whatever land he owns, how could the result be otherwise than that such land would be taken to satisfy the executor's debts? Possibly, if the person beneficially interested did not intervene and there was a sale by the sheriff and the transfer to the purchaser was confirmed by a Judge and then presented to the registrar and a certificate were issued to the purchaser, the title to the latter might become absolute. This, I think, illustrates how the apparently general words of sections 59 and 62 may be given effect to as being addressed to the registrar and to be observed by him so far as he is concerned in the performance of his duties. I do not mean to say that they have no further effect, but I cannot accept the proposition that a Court exercising equitable jurisdiction is powerless, when confronted with a certificate, to question the ownership therein set forth, notwithstanding section 62.

But I find that section 130 expressly provides that "nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of actual fraud, or over contracts for the sale or other disposition of land."

I find also that there are many sections which would be needless if sections 59 and 62 had the wide meaning attempted to be given them. For example, section 64 provides that as against a *bona fide* transferee no instrument shall be effectual unless two conditions are complied with; first, that it be executed in accordance with this Act, but section 34 had already provided that no instrument could be registered unless it is substantially in accordance with the provisions of the Act; and second, that it be "duly registered, *i.e.*, if not duly registered it shall not be effectual against a *bona fide* transferee, but the respondent says the effect of section 59 is that if not duly registered it is not effectual as against anybody, whether he be a *bona fide* transferee or not. Section 64 leaves us to infer that an unregistered instrument may be effectual against a person other than a *bona fide* transferee. An execution creditor *quoad* his execution in the registrar's hands is not a *bona fide* transferee. Again, section 126 seems to make provision for the

Judgment.
McGuire, J.

protection of persons who would be perfectly safe without this section, if section 62 is as absolute as it appears to be; but we here find that the persons in the case there mentioned are protected, "any rule of law or equity to the contrary notwithstanding."

Considering now the particular case of an execution delivered to the registrar. It is unquestioned law that an execution affects only the debtor's interest in the property, and by this interest is meant "an interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, *i.e.*, over which he had a right at law and equity to consider himself the beneficial owner." *Kinderley* v. *Jarvis*.[14] Erle, J., in *Watts* v. *Porter*,[15] takes the same position that all the execution attaches is the interest which the debtor could honestly convey. Now after an owner has made a transfer for value to a *bona fide* purchaser, could he thereafter honestly convey any interest in that land to any one? In equity the purchaser, pending the passing to him of the title, is deemed the beneficial owner, and the vendor as a trustee for him of the legal estate. In Bacon's Abridgment, vol. iii., p. 365, it is said, "for the statute says * * * all his lands shall be extended * * * which still must be understood of those only which he has a power over and may charge; and consequently those he has disposed of for valuable consideration before his entering into the statute are not liable in the hands of the purchaser, for they really in no sense can be called his lands."

Under the former law when lands could only be conveyed by deed, if the instrument purporting to convey was not under seal the legal estate did not pass to the vendee and at law the vendor was deemed the owner, just as under section 62 the person named in the uncancelled certificate of title is to be deemed the owner. Yet courts of equity treated the purchaser as the real owner.

[14]22 Beav. 1; 25 L. J. Ch. 538; 2 Jur. N. S. 602; 4 W. R. 579.
[15]3 El. & Bl. 743; 2 C. L. R. 1553; 23 L. J. Q. B. 345; 1 Jur. N. S. 133.

Judgment.
McGuire, J.

In *Parke* v. *Riley*,[16] Andrews, the execution debtor entered into an agreement, binding under the Statute of Frauds, to sell to Riley prior to the execution. Mowat, V.C., in delivering judgment, said, "As to executions coming in after the contract to sell, I do not think they can possibly affect the devolution of title as between vendor and purchaser."

In *Morton* v. *Cowan*,[8] a very recent case, there was a *bona fide* assignment for value of shares in a certain company, but no entry of the assignment as made in the company's books; the sheriff seized and sold those shares under an execution against the assignor subsequent to the assignment. The execution creditor relied on R. S. O. ch. 157, s. 52: "No transfer of stock, unless made by sale under execution or under the order or judgment of some competent Court in that behalf, shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, etc., until entry thereof has been made in the books of the company." One is struck with the resemblance of this section to our section 59. It is not contended that section 59 interferes with the effect of an unregistered instrument as exhibiting the rights of the parties thereof towards each other, so that the two sections seem almost identical in their character, yet it was held by Boyd, C., that the seizure and sale did not affect the interest of the assignee. He says, "This very section (section 52, above quoted) admits, recognizes or declares that a transfer may be valid as exhibiting the rights of the parties towards each other, and that concedes all that has to be ascertained in this case." He had already referred to the fact that the rule "as to sales by the act of the law is that the measure of what is sold is the extent of the debtor's interest in the property sold, and not the exact specific property itself." On motion before the Divisional Court this judgment was upheld. The reasoning of Boyd, C., commends itself to my mind, and is, I think, applicable to the present case.

The decision in *National Bank of Australia* v. *Morrow*[3] in the Supreme Court of Victoria, under a somewhat similar

[16] 12 Grant's Ch. R. 69, affirmed 3 E. & A. 215.

Judgment. McGuire, J.

Act there, was upon a state of facts the same in effect as in the present case. It was there held that a purchaser for valuable consideration prior to notice of the execution being served on the registrar, but whose transfer is not tendered for registration until after such service, is not affected by a sale of the land under the execution until the transfer by the sheriff to the purchaser has been registered, and that the person having the unregistered instrument and presenting it for registration before the purchaser at the sheriff's sale gets his transfer registered, is entitled to a certificate of title.

There is another view of the case which may be considered in deciding whether the execution affects the equitable title of a prior purchaser. Section 94 says the execution shall operate as a caveat against the transfer by the owner of the land, etc. But can a vendor in such a case as the present be said to be the "owner"? In the quotation above given from Bacon's Abridgement it is asserted that under such circumstances the land "in no sense can be called his lands." In *Roach* v. *McLachlan*,[17] Osler, J., says: "Notwithstanding the execution the property remains the debtor's property to sell or mortgage as he pleases. If he does so, it ceases to be his property, and becomes the property of the purchaser * * * subject to the execution. If it is then sold under the execution it is sold not as the property of the debtor, but as that of the purchaser."

In *Breithaupt* v. *Marr*,[18] *Roach* v. *McLachlan*[17] was followed. Hagarty, C.J., at p. 693, says: "Whether the transfer is made by sale, mortgage or voluntary assignment the debtor's title is gone, and executions subsequently coming in against him do not affect the property that has been previously sold." Section 62 of the T. R. P. Act, it is true, says that the land in a certificate of title shall impliedly be subject among other things to an execution "against or affecting the interest of the registered owner in the land," which has been registered and kept alive. But where the "registered owner," that is, the person who appears, so far as the

[17] 19 O. A. R. 496, at p. 501. [18] 20 O. A. R. 689.

Judgment.
McGuire, J.

register shows, to be the "owner," has become a mere trustee for some one else who is the real, the beneficial, owner, is the execution in such a case one which "is against or affects the interest of the registered owner," since he has at the time no interest in the land? If the execution affects the land at all it does so to the prejudice of the purchaser, and he alone, not the registered owner, would be concerned whether the execution takes the land or not. After the sale, so far as the vendor is concerned, "the subsequent proceedings interested him no more." In the view, however, already taken, it is not necessary to decide whether this latter view of the matter would alone dispose of the respondent's claims.

In all the cases now under consideration, with the exception of Erratt's, transfers were executed and nothing remained to perfect the transferees' titles under the Act but to register these transfers. In Erratt's case there has been no transfer, but we think there was an agreement between the company and Erratt binding under the Statute of Frauds, and which would entitle him to maintain an action against the company for specific performance. The transfers given in the other cases are, after all, little, if anything, more than agreements binding on the vendors, for a transfer not under seal would not, apart from the Territories Real Property Act, pass any title, and it, being a creature of the statute, can become effectual formally to pass the estate only when it is duly registered. So that I think there is in reality no difference between Erratt's case and the others, except that they are in a position at once to complete their registered title, whereas Erratt must first procure a transfer and may possibly have to bring an action to compel the company to give him one.

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.

Judgment.
McGuire, J.

As to damages, I think the plaintiffs have suffered none which will not be sufficiently compensated with costs.

I think this appeal should be allowed, with costs to be paid by the defendants to the plaintiffs both of this appeal and in the Court below, and it should be declared that the executions registered are clouds on the titles of the plaintiffs, and that the registrar should be and is hereby ordered to cancel and remove from the register of the lands in question in these several actions the entries made by him of the said executions, and that the said deputy sheriff be enjoined from selling the said lands under the said executions.

RICHARDSON, J., WETMORE, J., and SCOTT, J., concurred.

Appeal allowed with costs.

HAMILTON v. McNEILL (No. 2).

Practice — Costs — Advocate and client—Advocate's right to recover counsel fees from client by action—Allocatur for counsel fees before Court in banc—Notice to client of application for allocatur.

The Judicature Ordinance (R. O. 1888, c. 58), s. 462, enacted: In all causes and matters in which duly enrolled advocates holding certificates as such and resident in the Territories are employed, they shall be entitled to charge and be allowed the fees in the "Advocates' Tariff" appended to this Ordinance, or as the same may be from time to time varied by the Judges of the Supreme Court *in banc*.

In view of this provision, on a taxation of a bill of costs by an advocate against his client it was *held*,—

1. That counsel fees are on the same footing as other fees allowed by the tariff, and an advocate can recover them from a client by action.
2. That an allocatur can be granted for such fees only as are prescribed by the tariff.
3. That any Judge of the Court may grant an allocatur for counsel fees before the Court *in banc*, and the giving of notice to the client of application for an allocatur for fees is discretionary.

[*Court in banc, December 7th, 1894.*

Statement

This was a reference to the Court *in banc* by WETMORE, J., in connection with the taxation of the costs of the plaintiff's advocate against his client.

The advocate applied to the trial Judge (WETMORE, J.) for an allocatur for counsel fees, which he granted in the following words:—

"I allow a counsel fee of two hundred and twenty-five dollars, to cover all counsel fees as between attorney and client, on taxation of attorney and client's bill of costs herein on the part of the plaintiff."

This allocatur was intended, as stated in the reference, to include trial fee, counsel fee on appeal to the Court *in banc*, counsel fees on motions, settling pleadings and on retainer, attending at Birtle Registry Office to inspect documents there and obtain copies thereof, and attending at Birtle to

Statement. examine witnesses on a commission. Most of the time occupied by the attendances at Birtle was taken up by travelling to that place from Moosomin and returning.

WETMORE, J., directed the clerk not to allow the amount of such allocatur, with a view to having an advocate's rights to counsel fees as between solicitor and client settled, and the clerk, acting on his instructions, refused to allow the amount of such allocatur. The advocate thereupon, according to the practice, brought the question up on review of taxation of costs before WETMORE, J., who referred the same to the Court *in banc*.

The questions referred for the consideration of the Court are set out in the judgment.

The reference was heard December 6th, 1894.

Argument. The advocate, in person.

W. White, Q.C., for client.

[*December 7th, 1894.*]

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

MCGUIRE, J.—This is a reference by Mr. Justice WETMORE as to the granting of an allocatur for costs as between advocate and client.

The questions for the consideration of the Court are:—

First, whether an advocate can recover counsel fees from his client by action at law? Ans. Yes—Counsel fees are on the same footing as other fees allowed by the tariff.

Second. Is the tariff of fees as prescribed by the Rule of Court binding between advocate and client respecting counsel fees; in other words, is a Judge authorized to grant an allocatur for such counsel fees as fee on retainer, refreshers and consultations and for attendances at Birtle? Ans.—The Judge may grant an allocatur for such counsel fees only as are prescribed by the tariff. As to the attendances at Birtle, see answer to fourth question *post*.

Judgment. McGuire, J

Third. Assuming that an advocate is entitled to recover counsel fees from his client, is a Judge authorized to grant a counsel fees at all — and, if yes, — is the client entitled to notice before he does so? Ans. Yes—for such counsel fees only as are prescribed by the tariff. As to giving notice, that is a matter in the discretion of the Judge.

Fourth. Are the attendances for travelling to Birtle in the nature of counsel fees at all? or are they fees for loss of time merely for which the advocate can recover on a *quantum meruit*? Ans. There are two attendances, (*a*) attending at registry office to inspect documents and obtain copies thereof, and (*b*) attending to examine witnesses on a commission. As to the former, it can be allowed only under item of tariff 64†, or possibly under 62§, but such time only to be allowed as if the advocate a resident of Birtle. As to (*b*), the advocate is entitled to the fees provided by item 88,‖ subject to increase as therein directed in the discretion of the Judge.

Fifth. Was I justified in granting an allocatur for a counsel fee on appeal to the Court *in banc*, or ought the allocatur for such fee to have been granted by the President of the Court? Ans. Any Judge of the Court may grant such allocatur, but for sake of uniformity it is better to apply to the senior Judge sitting on the appeal.

REPORTER:

Ford Jones, Advocate, Regina.

		H.S.	L.S.
(†) 64.	Every other necessary attendance	$ .50	$ .25
(§) 62.	Attendance in special matters or on examination of witnesses per hour	2.00	1.00
(‖) 88.	Fee attending upon references to clerk or other person or upon examination of witnesses, or taking evidence under order or commission where attendance of counsel necessary ..... To be increased in the discretion of a Judge in special and important cases.	5.00	3.00

FRASER v. McLEOD.

Promissory note—Irregular indorsement — Presentment — Notice of dishonour—Waiver of—Endorser becoming administrator.

The defendant A. M. put his name on the back of a promissory note made by M. M. in favour of the plaintiff, which was then delivered to the plaintiff.

Held, that defendant A. M. was an endorser of the note, liable as such to the payee and entitled to notice of dishonour.

M. M. died before maturity of the note, and defendants A. M. and H. were appointed two of his administrators; after their appointment and before maturity, they had a conversation with the plaintiff in respect of the note, and plaintiff swore that he told them when it would be due, and one of them asked for an extension of time, which was granted. Defendant A. M. swore that plaintiff told him not to worry that he would not look to him for payment, but take whatever the estate was able to pay, and he did not ask for an extension, nor did he hear defendant H. ask for any. Defendant H. could not remember what took place.

Held, insufficient to prove that defendant A. M. waived presentment or notice of dishonour.

The plaintiff also, before maturity, pursuant to administrators' advertisement for creditors, filed with their solicitor a copy of the note and a statutory declaration that it was unpaid.

Held, that this is not such a presentment as is required by section 45 of "The Bills of Exchange Act, 1890."

Held, also, that notwithstanding the endorser became one of the deceased maker's administrators before maturity of the note, presentment and notice of dishonour were nevertheless necessary.

[SCOTT, J., *May 14th, 1895.*

Statement. The action was tried at Edmonton on the 4th of March, 1895, before SCOTT, J., without a jury.

Argument. *Wm. Short*, for plaintiff.

S. S. Taylor, Q.C., for defendant.

The pleadings and evidence sufficiently appear from the judgment.

[*May 14th, 1895.*]

Judgment. SCOTT, J.—Plaintiff's claim is upon a promissory note for $900 dated 18th October, 1893, made by Malcolm McLeod, deceased, payable twelve months after date to the order of the plaintiff with interest at 8 per cent. Plaintiff alleges that Malcolm McLeod, deceased, in order to guarantee the payment of this note, procured defendant Alex. McLeod

to indorse the same, and thereupon delivered same to plaintiff, that before maturity of the note, Malcolm McLeod died intestate and the defendants were appointed administrators and administratrix of his estate, and that the plaintiff thereupon and before maturity of said note, gave particulars of the said note to the defendants, and said Alex. McLeod thereupon waived further or other presentment thereof. The plaintiff also alleges that said note was presented for payment at maturity but was dishonoured, whereof the defendant Alex. McLeod had due notice.

Judgment has already been recovered against the defendants as administrators and administratrix of said deceased.

Defendant Alex. McLeod, by his defence, denies that he guaranteed the payment of the note in question, and claims that it was only endorsed by him for the accommodation of deceased, of which plaintiff had due notice. He also claims that before maturity of the note, the plaintiff notified him that he was released from all liability upon the note, and that the estate of deceased alone, would be held liable therefor. He denies that he received particulars of said note from plaintiff or that he waived presentment for payment or notice of dishonour. He also denies presentment for payment and notice of dishonour, and claims that he is released from liability upon the note, by reason of plaintiff having claimed payment thereof from the estate of deceased.

Upon the evidence at the trial I have already held upon the authority of *Ayr American Plough Co.* v. *Wallace*,[1] that defendant Alex. McLeod must be treated as an endorser of the note.

The note was not presented for payment at maturity nor was notice of dishonour given.

Plaintiff states that after defendants had been appointed administrators of estate of deceased, and before maturity of the note, he met defendants, Alex. McLeod and Hourston, and after some conversation about the note and the affairs of deceased, defendant Alex. McLeod asked him when the

[1] 21 S. C. R. 259.

Judgment.
Scott, J.

note would be due; that he told him that it would be due on 18th October; that Alex. McLeod then said there would be no use in paying it at that time, as the estate would not be able to pay it; that one of them then asked plaintiff for longer time and he (plaintiff) promised to give four or five weeks after it was due, and they then led him (plaintiff) to believe that it would be paid then.

Alex. McLeod states that during the conversation referred to plaintiff stated that there was no need to worry about the note, that he would take his percentage of whatever the estate was able to pay, that he has no knowledge or recollection of either Hourston or himself asking plaintiff for an extension of time for payment; that he did not ask plaintiff for an extension nor did he hear Hourston ask him; that he heard nothing about an extension of time.

Defendant Hourston remembers but little of that conversation. All three agree that Hourston opened the conversation by asking plaintiff, "What about the note that Alex. McLeod is breaking his heart about," and yet he remembered nothing of what took place, nor whether anything was said about an extension of time.

In pursuance of an advertisement by the administrators for claims against the estate of deceased, plaintiff took the note to Mr. S. S. Taylor, the solicitor for the administrators, who took a copy of it. Plaintiff made a statutory declaration at the time, to the effect that the estate was indebted to him upon it and that it was unpaid. This was before the maturity of the note.

Upon the evidence I must hold that the plaintiff has failed to prove that defendant Alex. McLeod waived presentment of the note for payment or notice of dishonour.

I hold also that the leaving by plaintiff with the solicitors for the administrators a copy of the note before the maturity thereof and his making claim thereon was not such a presentment as is required by section 45 of The Bills of Exchange Act, 1890, and was, therefore, insufficient to hold Alex. McLeod as indorser.

Judgment.
Scott, J.

It was contended by counsel for the plaintiff that defendant Alex. McLeod, by reason of his having become one of the administrators of the estate of the deceased maker, as such administrator was bound to pay the note at maturity without presentment for payment, and if the estate of deceased was not in a position to pay it at maturity, he was aware of the fact, and that, therefore, presentment for payment to hold him was unnecessary, and he was not entitled to notice of dishonour. Counsel for plaintiff also, in support of his contention, referred me to the note in Byles on Bills, ed. 1891, p. 244, wherein it is stated that an endorser who, before the note becomes due, takes an assignment of all the estate of a debtor for the purpose of meeting his responsibilities, is not entitled to notice of dishonour.

There appears to me to be some force in his contention, but I cannot find that it is borne out by any of the authorities to which I have been able to refer. In no case can I find that presentment for payment was dispensed with under the circumstances, and, although it may be fairly open to argument, that there is no necessity for presentment under those circumstances, I am not prepared in the absence of any precedent to hold that it is necessary.

In *Caunt* v. *Thompson*[2] the defendant was sued as indorsee of a bill, and pleaded that he had not received notice of dishonour. When the bill became due, it was taken to the defendant, who said that he was the executor of the acceptor, and asked for time, saying that he would see the bill paid. It was held that this was sufficient evidence of notice of dishonour. It will be noticed that in this case both presentment for payment and notice of dishonour were considered necessary to hold the endorser.

I give judgment for the defendant Alex. McLeod, with costs.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[2] 7 C. B. 400; 18 L. J. C. P. 125; 6 D. & L. 621; 13 Jur. 495.

HOWLAND ET AL. v. GRANT.

Bills, notes and cheques—Debtor and creditor—Agreement for composition and discharge—Alterations in terms of agreement—Default—Payment of composition—Renewal of original debt—Payment into Court—Costs.

The defendant being in difficulties procured from all his creditors, among whom were the plaintiffs, a deed of composition and discharge on the terms that within sixty days he should give them secured promissory notes representing 75 cents on the dollar. Before the expiration of the 60 days the defendant, under pressure from his creditors and by an arrangement with them, sold his entire assets on certain terms, which netted to the creditors 64½ cents on the dollar, payable and paid by the purchaser's promissory notes. All the creditors except the plaintiffs, upon receiving the 64½ cents on the dollar, gave a formal discharge to the defendant. The plaintiffs sued upon the promissory notes for the balance of their original debt, or alternatively, for the difference between 64½ and 75 cents on the dollar. The defendant among a number of other defences paid the amount representing this difference into Court together with costs up to defence. The jury found in answer to certain questions, (1) that the plaintiffs did not receive the 64½ cents in full of their claim; (2) that they did receive it on account of the 75 cents; and (3) that the 64½ cents were not paid on account of the original claim.

Held, that the plaintiff's action on the promissory notes was discharged by the agreement for composition and discharge, although its terms had not been fulfilled; and the trial Judge, ROULEAU, J., dismissed the action with costs.

An appeal by the plaintiffs was dismissed with costs. (†)

Effect of payment into Court upon form of judgment and disposition of costs, discussed.

[ROULEAU, J., *January 11th, 1895.*
[*Court in banc, June 13th, 1895.*
Ib., December 5th, 1895.

Statement.

Plaintiffs sued to recover the balance due on two promissory notes.

Defendant, besides denying the making of the notes, alleged that being indebted to a large number of persons, including the plaintiffs, he entered into an agreement with them, dated 21st August, 1889, that the creditors executing should accept 75c. on the dollar in full settlement, defendant giving secured promissory notes therefor, and that the re-

(†) Affirmed on appeal to S. C. of C., 26 S. C. R. 372.

ceipt of the composition notes within 60 days should operate as full release and discharge of defendant's indebtedness; that subsequently and before the expiration of the 60 days, defendant under pressure from plaintiffs and his other creditors, sold his assets under an arrangement which netted 64½c. on the dollar and plaintiffs and the other creditors accepted the purchaser's promissory notes, which were paid in full of all claims; that by reason of that arrangement the assets were sacrificed and by reason thereof defendant was released; that by the agreement plaintiffs and the other creditors covenanted not to prosecute any suit against defendant in respect of the indebtedness, and the covenant was a bar to the action, and that before action the defendant had "under protest" tendered the plaintiffs the difference between 64½c. and 75c. on the dollar and, while denying liability, paid the same, with interest from the date of the agreement, into Court. Statement.

In answer to questions submitted by the learned trial Judge the jury found, (1) That the plaintiffs did not receive the 64½c. on the dollar as full payment of their claim. (2) That they received it on account of the 75c. as provided by the deed of composition. (3) That the 64½c. was not paid to plaintiffs on account of original debt.

[*January 11th, 1895.*]

Upon these findings the learned trial Judge gave judgment as follows:

ROULEAU, J.—The plaintiffs sue the defendant for the sum of $959.30, being a balance due on two promissory notes, and also for the sum of $163.80, being the interest due on the said sum up to date of writ, making a total sum of $1,123.10. Judgment.

To this action the defendant pleads a certain agreement of the 21st of August, 1889, by which the plaintiffs as well as the other creditors had agreed to accept in full settlement of their respective claims seventy-five cents on the dollar, payable in equal sums in six, nine and twelve months from the date of said agreement without interest, for which sums

Judgment. Rouleau, J.

the defendant was to give his promissory notes to be secured to the satisfaction of the creditors, and that the receipt of said promissory notes within sixty days should operate as a full release and discharge of the defendant.

Further, the defendant says that he was willing and ready to comply with the terms of said agreement, but owing to the action of the plaintiffs and other creditors placing the control and management of his business in the hands of their agents, and the said agents or trustees disposing of the whole of the assets of said business to J. H. Ashdown of Winnipeg, for a sum sufficient to realize 64½ cents on the dollar of the claims of the plaintiffs and the other creditors, he, the said defendant, was prevented by their said action from complying with the terms of the said agreement.

The defendant also alleges that the said Ashdown duly paid to the plaintiffs the three promissory notes which he had given at six, nine and twelve months from August 21, 1889, and that the notes of $563.67, $563.68 and $563.67 respectively mentioned in the statement of claim were given to and accepted by the plaintiffs in full of all claims or, in the alternative, on account of the 75 cents on the dollar, and the defendant brings into Court the sum of $330.50, being the amount of the difference, with interest thereon, and being the amount which he tendered to the plaintiffs before action.

A motion for non-suit was made by the defendant's counsel, when the plaintiffs closed their case. I refused to entertain that motion at that stage of the case, and ordered the defendant to adduce his evidence. After his evidence had been adduced, the defendant renewed his motion for non-suit, but I thought that I would submit the case to the jury on the facts and reserve the question of law till after verdict.

The questions submitted to the jury were the following:—

1st. Do you find that the plaintiffs received 64½ cents on the dollar in full payment of their claim?

2nd. Do you find that the plaintiffs received 64½ cents on the dollar on account of 75 cents on the dollar as provided by the deed of composition? Judgment. Rouleau, J.

3rd. Do you find that the 64½ cents was paid to the plaintiffs only on account of the original debt?

The jury returned the following answers as their verdict:

To the first question we answer, No.

To the second question we answer, Yes.

To the third question we answer, No.

On the above verdict the defendant moved that the Court enter judgment in his favour. On the other hand the plaintiffs moved for judgment in their favour on the ground that the agreement calls for the notes to be given in 60 days, and the agreement not having been complied with by the defendant, it had become null and void, and therefore the plaintiffs were entitled to sue for the full amount of their debt.

In answer to this the defendant contended that the plaintiffs could not be remitted in their original position as they had accepted additional security, to wit: Ashdown's notes for the amount of 64½ cents on the dollar, and therefore the plaintiffs could only sue on the original agreement of the 21st August, 1889.

I think the two propositions of law are correct. At common law, when a debtor and his creditors have agreed that a composition shall be paid and accepted in satisfaction of his debts to them, if he makes default in paying the composition on the appointed day, the creditors' original rights in respect of their debts will thereupon revive and they will be entitled to sue for the whole amount. In some cases, however, the terms of the composition agreement are such as to provide that the mere agreement of the debtor to pay the composition, as distinguished from the actual payment by him of the composition, is to be accepted in satisfaction of the debts; and where the composition agreement contains such provisions, the mere non-payment of the composition at the agreed time will not remit the creditors to their original rights of action in respect of their debts, but will merely give them a

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right of action for the breach of the substituted agreement to pay the composition.

The composition deed of the 21st August, 1889, is, in my opinion, one of those agreements which provide for a mere agreement on the part of the debtor to pay the composition. So, according to the authorities, the mere non-payment of the composition at the agreed time will not remit the creditors in their original rights of action in respect of their debts: *Good* v. *Cheeseman*,[1] *Boyd* v. *Hind*,[2] *Evans* v. *Powis*,[3] *In re Hatton, Ex parte Hodge*,[4] and *Edwards* v. *Hancher*.[5]

Besides the question of law, there are also the questions of fact which the jury have answered: that the payment of 64½ cents on the dollar was a payment made on account of the composition deed, and not on account of the original debt. Of course, before arriving at that conclusion, the jury have considered the fact that the creditors had accepted Ashdown's notes at six, nine and twelve months, according to the very terms of the composition deed, for the sum of 64½ cents on the dollar. There is no doubt, and it was the view taken by the jury, that that amount would never have been paid by Ashdown if it had not been at least on account of the composition agreement, if not in full satisfaction of their debts. All the other creditors understood it that way and signed their discharge accordingly.

In view of the verdict of the jury and in view of the law —judgment is ordered to be entered for the defendant with costs.

From this judgment plaintiffs appealed.

The appeal was argued on the 11th day of June, 1895.

Argument.

Peter McCarthy, Q.C., for the plaintiffs, the appellants, referred to *Day* v. *McLea*,[6] *Mason* v. *Johnston*,[7] *Slater* v.

[1] 2 B. & Ad. 328; 4 C. & P. 513; 9 L. J. O. S. K. B. 234. [2] 26 L. J. Ex. 164; 1 H. & N. 938; 3 Jur. N. S. 566; 5 W. R. 361. [3] 1 Ex. 601; 11 Jur. 1043. [4] 42 L. J. Bk. 12; L. R. 7 Ch. 723; 27 L. T. 396; 20 W. R. 978. [5] 1 C. P. D. 111; 33 L. T. 375. [6] 58 L. J. Q. B. 293; 2 Q. B. D. 610; 60 L. T. 947; 37 W. R. 483; 53 J. P. 532. [7] 20 O. A. R. 412.

Jones,[8] *Bayley* v. *Homan*,[9] *Parker* v. *Ramsbottom*,[10] *Edwards* v. *Coombe*.[11] Argument.

Hon. J. A. Lougheed, Q.C., for the defendant, the respondent, referred to *Webb* v. *Hughes*,[12] *Crawford* v. *Toogood*,[13] *Green* v. *Sevin*,[14] *Lewis* v. *Leonard*.[15]

[*June 13th, 1895.*]

RICHARDSON, J.—The action is brought to recover a balance of $1,123.10 and interest, unpaid upon two promissory notes $1,250 each made by defendant to plaintiffs after crediting thereon the amounts of three notes each for $563.67, as set out in the statement of claim. Judgment.

The defendant sets up that on 21st August, 1889, being indebted to divers creditors, including plaintiffs, and then unable to pay such creditors in full, a composition deed between the creditors and defendant was executed, by the terms of which defendant was to give his own notes, satisfactorily endorsed, to the extent of 75 cents on the dollar, to the said creditors respectively, payable in equal sums at 6, 9 and 12 months, and that the receipt of such notes within 60 days should operate as a discharge and full release of the creditors' claims as then existing. Defendant then asserts that, although willing to carry out his part of the composition deed in accordance with its provisions, before the 60 days had expired, at the request of his creditors, including the plaintiffs, the assets of his (defendant's) business were sold outright to one Ashdown for a sum sufficient to realize 64½ cents on the dollar of the original claims of the creditors, for which Ashdown gave his notes at 6, 9 and 12 months direct to the creditors, including plaintiffs, and that these were given and accepted in discharge of the

[8] 42 L. J. Ex. 122; L. R. 8 Ex. 186; 29 L. T. 56; 21 W. R. 815. [9] 3 Bing. N. C. 915; 6 L. J. C. P. 309; 3 Hodges, 184; 5 Scott, 94. [10] 3 B. & C. 257; 5 D. & R. 138; 3 L. J. O. S. K. B. 16. [11] 41 L. J. C. P. 202; L. R. 7 C. P. 519; 27 L. T. 315; 21 W. R. 107. [12] 39 L. J. Ch. 606; L. R. 10 Eq. 281; 18 W. R. 749. [13] 49 L. J. Ch. 103; 13 Ch. D. 153; 41 L. T. 549; 28 W. R. 248. [14] 18 Ch. D. 589. [15] 49 L. J. Ex. 308; 5 Ex. D. 165; 42 L. T. 351; 28 W. R. 719.

Judgment.
Richardson,J.

original debts. The defendant further sets up, that by the acts of the plaintiffs and other creditors, the defendant's assets were disposed of at a sacrifice, and by such acts and the acceptance of the notes aggregating the 64½ cents on the dollar, defendant is discharged from all claims by plaintiffs.

He further alleges that inasmuch as the composition deed of 21st August, 1889, executed by plaintiffs, contained a covenant or agreement not to sue in respect of the theretofore existing indebtedness, the present action fails.

As an alternative defendant alleges that before action he tendered plaintiff the difference between 64½ cents and 75 cents on the dollar and brings into Court $330.50, which covers such difference.

In the further alternative defendant pays into Court the $330.50 and $30 for plaintiff's costs of the action up to date of the defence, alleging the same to be sufficient to answer plaintiff's claim.

Issue being joined the case was heard before ROULEAU, J., and a jury, when, after the evidence was closed, the Judge left three questions to the jury:

1. Did plaintiffs receive 64½ cents on the dollar in full of their claim. To which the jury gave an answer in the negative.

2. Was the 64½ cents on the dollar received by plaintiffs on account of the 75 cents on the dollar as provided by the deed of composition? To this the jury answer, Yes.

3. Do you find that the 64½ cents was paid to plaintiffs only on account of the original debt? To which the answer of the jury was, No.

It is proper to state at this stage that plaintiff's counsel, Mr. McCarthy, stated to this Court that he had no objections to either the questions or the answers to them, as also that had defendant paid the 75 cents on the dollar at the time the 64½ cents on the dollar were paid, plaintiffs would have given defendant a release.

It appears from the Judge's notes reported to this Court that after delivery by the jury of the above answers

Judgment.
Richardson, J.

the plaintiffs' counsel contended that the judgment should go for them on the ground that as by the composition deed the notes aggregating the 75 cents on the dollar were to have been given inside 60 days, and were not so given, the deed *quoad* the plaintiffs became null and void and plaintiffs became entitled to sue for their full debt. On the other hand, the defendant's counsel contended that as plaintiffs had accepted additional security, namely, the Ashdown notes for the 64½ cents on the dollar, they could not be remitted to their original position, and could only sue on the composition deed of 21st August, 1889.

The grounds urged in the notice of appeal are:

(a) That as the jury by their answer to the first question found that plaintiffs had not accepted the 64½ cents on the dollar in full payment of their claim, and as they did not receive the promissory notes at 75 cents on the dollar as provided for in the composition deed, they were entitled in law to the difference between the 64½ cents on the dollar and the full debt as claimed.

(b) That as the jury found by their answer to the second question submitted that plaintiffs only received the 64½ cents on the dollar upon the debt as provided in the composition deed, they are entitled to recover the full balance of their original debt.

The other objections, c, d, and e, worded differently, amount to a contention that, inasmuch as the terms of the composition deed were not strictly complied with, plaintiffs' original rights were restored.

By (f) Plaintiffs urge that the Judge erred in holding that the payment of the Ashdown notes was payment in full.

(g) That he was wrong in holding that the receipt by plaintiffs of the Ashdown notes was payment in full of the 75 cents on the dollar as provided in the composition deed.

(h) That the Judge should have withdrawn the case from the jury and given judgment for the plaintiffs' claim.

And in his notice of appeal plaintiff asks that the judgment of the learned trial Judge be reversed and judgment

Judgment. Richardson, J.

entered for the plaintiffs: 1. For their claim in full, or 2. For the amount paid into Court.

The evidence as reported to this Court discloses these facts:

1. Defendant made the notes sued on.

2. The composition deed as set out was executed by plaintiffs, as also by defendant's other creditors, on August 21st, 1889, and by its terms on the receipt by plaintiffs of promissory notes satisfactorily secured at 6, 9 and 12 months aggregating 75 cents on the dollar, the same should operate as a release and discharge of their debt, *i.e.*, the notes now sued for.

3. The notes named in the composition deed were never given.

4. On 18th November, 1889, in pursuance of an agreement of 26th October, 1889, the defendant sold out his assets to Jas. H. Ashdown.

5. Plaintiffs were apprized of at least some negotiations for the sale to Ashdown before it culminated, this appearing from the letter in which, on 28th September, 1889, defendant wrote plaintiffs, "In reply to yours of 23rd, Ashdown has been here but did not complete arrangements."

6. On 25th November, 1889, plaintiffs wrote Pettigrew, referred to hereinafter, "It seems to us necessary that something should be done to compel Grant and Ashdown to complete the arrangement, else it will be a very long time before anything comes of it. For our part our patience with Grant is nearly exhausted, and unless we see something to indicate a speedy completion of his sale we will take proceedings to collect our debt. He has had ample time to complete the stock-taking."

7. On 17th December, 1889, Ashdown enclosed to W. D. Pettigrew, who, from the correspondence as well as the verbal evidence, it appears, had been selected as the receiver and distributor among the creditors of the proceeds of the sale made by defendant to Ashdown, "notes to the total of $11,630.20, being the amount required in full to cover the

unsecured debts of Mr. A. Grant, of Calgary, and which I turn over to you in accordance with an order from him to that effect. Please see the various amounts properly placed, and let me have receipts in full to cover all indebtedness of Grant to the respective parties." Judgment. Richardson, J.

The notes were thus to be distributed by Pettigrew, as I construe this letter, in liquidation of defendant's indebtedness to the respective parties, of whom plaintiffs were a firm interested.

8. Then we find "plaintiffs (10th December, 1889) authorizing Pettigrew to receive for us from J. H. Ashdown *the amounts of settlements as per arrangement* of the estate of A. Grant, Calgary . . . but it is understood nothing the said Pettigrew shall do shall discharge the said Grant from his debt to us without by our further consent."

9. In reply to this is Pettigrew's letter to plaintiffs of 18th December, 1889: "I wrote you a few days ago through J. Robertson & Co. for to obtain your signature so as to allow me to obtain you notes. If you wish me to send them please send the necessary authority, also power for me to sign discharge to A. Grant. Dividend is 64½ cts. on the $. Statement enclosed."

10. On 23rd December, 1889, plaintiffs wrote Pettigrew, "Your favour of the 18th received. We did not understand that the sale of Grant's assets to J. H. Ashdown was to include the former's discharge, and it must be left with us for future consideration. If you require more than the enclosed please notify us."

The enclosure was as follows: "In the matter of the disposal of the assets of A. Grant, of Calgary, to J. H. Ashdown, of Winnipeg, we hereby authorize W. D. Pettigrew, of Winnipeg, to receive our share of the consideration therefor, giving J. H. Ashdown a full receipt, and also to do such further acts as may be necessary to give the said Ashdown quiet possession, as far as we are concerned, of the various properties transferred."

Judgment.
Richardson, J

11. Other correspondence appears to have taken place between plaintiffs and Pettigrew. The former pressing for a closing up of the Ashdown purchase and the latter explaining the cause of delay, but these do not appear of particular importance here. But

12. On 6th January, 1890, plaintiffs wrote Pettigrew, "Will you be good enough to send us at once the notes for our share of the amount realized from the sale of the assets of A. Grant, Calgary. There has been as much delay in this matter as we feel we should consent to." Evidently some correspondence had occurred which is not given the Court, except a letter 31st December, 1889, from plaintiffs to Pettigrew.

13. Following this appears a telegram from defendant to Pettigrew, 13th January, 1890. "Pay over notes. I will write them." and next day, 14th January, 1890, Pettigrew wrote plaintiffs, "Yours to hand, we are in receipt of instructions from Mr. Grant to pay over the composition notes without asking you to sign discharge. In accordance with this we now enclose you the three notes. Kindly acknowledge receipt of same by return. Mr. Grant says he will write you."

14. From 14th January, 1890, up to 29th June, 1893, when writ issued, nearly three and a half years, the appeal book gives us no further correspondence between plaintiffs and Pettigrew or plaintiffs and defendant, but in giving evidence before the clerk defendant states there was some. The tenor of this is not given except in one instance, where defendant states, "I think in my letter of 27th July, 1892, I offered to pay plaintiffs the difference between 64½ and 75 cents on the $." Defendant had previously sworn, "It was no fault of mine that the agreement of 21st August, 1889 (composition deed) was not carried out within the 60 days. Why the arrangement was not completed in that time I can hardly say. It was so completely in the hands of the trustees I had no control over it. As soon as the creditors knew Ashdown was

coming to Calgary they insisted on my selling out to him. All the creditors except plaintiffs accepted Ashdown's notes at 64½ cts. on the $. Plaintiffs accepted Ashdown's notes for 64½ cts., but not in full of their claim. I understood they stood out for the 75 cts. before signing the discharge."

Then at the hearing, when in the witness box, defendant stated: "The plaintiffs never notified me that they cancelled the agreement (*i.e.*, 21st August, 1889). Never heard from the plaintiffs until the summer of 1892. Then the senior member of the plaintiffs' firm called on me and asked me how I was getting on, and I showed him how the creditors had lost, and especially myself, by the acts of the creditors. He seemed to regret it and never asked me for any money . . . When I found in 1892 that plaintiffs wanted to take proceedings against me for the balance of my debt I offered them (without prejudice) the difference between 64½ cts. and 75 cents; did not want to have a law suit over it."

Again, defendant states in answer to a question, "Did you ask them (plaintiffs) for their consent to the sale to Ashdown prior to 26th October, 1889," " . . . I called on them and talked the matter over in August or September. . . . I did not ask Ashdown to endorse my notes prior to 26th October, 1889, because I was given to understand by the trustees that Ashdown's personal notes were to be taken in lieu of the endorsed notes."

In the examination, taken on commission, of Peleg Howland, one of the plaintiffs and the active partner in any dealings with defendant relating to the composition deed and subsequent correspondence, he states in reference to the acceptance of the Ashdown notes, "We received them only on account of our claim. They had no connection with the deed of composition. We distinctly refused to take them in connection with the deed."

At the close of the plaintiffs' case on the hearing the objection was taken by defendant's counsel that by the terms of the composition deed of the 21st August, 1889, plaintiffs'

Judgment. Richardson, J.

original debt became extinguished and plaintiffs' action must fail.

It would appear, however, there was no ruling upon this point, and it is to be assumed from the way in which the Judge charged the jury that the pleadings were treated by the counsel on both sides so as to include, as an alternative, a claim by plaintiffs for the difference between 64½ and 75 cents on the dollar, founded upon the composition deed of 21st August, 1889, if such were necessary.

The Judge submitted to the jury the questions:—

1. Do you find that the plaintiffs received the 64½ cents on the dollar in full payment of their claim? The answer, being No, means that the jury found that the 64½ cents on the dollar was not received in payment in full of the claim sued for.

2. Do you find that the plaintiffs received the 64½ cents on the dollar on account of 75 cents on the dollar as provided by the deed of composition? By the answer to this of Yes, the jury found that the 64½ cents on the dollar was paid on account of the composition deed, by the terms of which 75 cents were stipulated for as an extinguishment of the original debt.

Then to the 3rd question—Do you find that the 64½ cents on the dollar was paid to plaintiffs only on account of their original claim? By their answer to this of No, coupled with the previous answers, the jury meant that the 64½ cents was neither paid nor received on account of the original debt, but on the 75 cents on the dollar, and that the jury must have considered that the plaintiffs had continued the offer of 75 cents on the dollar after 21st August, 1889.

Upon these findings the learned trial Judge should not have dismissed the action as he did, but have given judgment for the plaintiffs against the defendant for the sum paid into Court, with the general costs of the action to the defendant.

In my opinion the judgment in appeal should be

1. Appeal allowed.

2. Judgment in the action for the plaintiffs against the defendant for $360.50, together with the costs of appeal to be taxed. Judgment. Richardson, J.

3. Defendant to have the general costs of the action against the plaintiffs, which, when taxed, are to be set off against the plaintiffs' judgment and costs of appeal.

4. After such set off, if the balance coming to plaintiff exceeds $360.50, the same to be paid out to plaintiffs and they to have execution for such balance; but if less than $360.50, plaintiff to have payment out of the amount thus awarded and the surplus to be paid out of Court to defendant.

WETMORE, J., MCGUIRE, J., and SCOTT, J., concurred.

The entry of judgment in accordance with the foregoing opinion was, however, subsequently stayed till December Term, during which the following further judgment was delivered by

[*December 5th, 1895.*]

RICHARDSON, J.—On the last day of June Term, 1895, the opinion of the Court on this appeal was expressed in writing, but in consequence of the attention of members of the Court being drawn to the decision of *Wheeler* v. *The United Telephone Company*,[16] before this opinion was formally acted on, judgment was stayed until the present term.

As a result of reading that case both appellant and respondent come now and agree that, assuming the view taken by this Court on the appeal on its merits to have been right, the appeal should, on the authority of that case, have been dismissed, and if so that the costs of appeal should be paid by the appellant, and they consent that we vary the judgment of this Court accordingly.

The decision in the case above cited was not brought to our attention on the argument, nor was there any discussion as to what should be the consequence of our deciding that the

[16] 53 L. J. Q. B. 466; 13 Q. B. D. 597; 50 L. T. 749; 33 W. R. 295.

Judgment.
Richardson, J.

payment into Court was sufficient. The judgment of the Court below being merely a dismissal of the action without stating on which branch of the defence, it seemed to be conceded on the appeal, that, as the judgment stood, the plaintiff would not be entitled to the money paid into Court, and one of the things asked for by the notice of appeal was that there should be a judgment to that effect, and the respondent seemed to take the same view. As both parties agree that in view of our finding on the merits the appeal should have been dismissed with costs to the respondent, and ask us to vary our judgment accordingly, we deem it unnecessary to consider whether we are bound by *Wheeler* v. *The United Telephone Co.*, or whether the effect of that decision is that in this case the appeal should have been dismissed.

The judgment of this Court will therefore be that the appeal be dismissed with costs to the respondent.

ROULEAU, J., WETMORE, J., and MCGUIRE, J., concurred.

Appeal dismissed with costs.

PRINCE v. MALONEY.

Controverted Elections ordinance—Practice—Clerk or Deputy Clerk—Petition filed with Clerk of Court—Writ of Summons issued by Deputy Clerk—Deposit—Bank bills.

A petition under the Controverted Elections Ordinance (C. O. 1888 c. 5) was filed with the Clerk of the Court at Calgary under section 3,* he being the Clerk whose office was nearest to the residence of the returning officer, and afterwards forwarded to the Deputy Clerk at Edmonton. The deposit of $500 required by section 5† was made with the Deputy Clerk, who thereupon issued the Writ of Summons under section 7.‡

Held, that the Deputy Clerk was, by virtue of section 3§ of Ordinance 10 of 1891-2, the proper person to receive the deposit and issue the Writ of Summons.

The deposit was made in bills of a chartered bank.

Held, that a payment or deposit of a sum of money required by statute need not, in the absence of express provision, be made in gold or legal tender; and that, therefore, the deposit was sufficient.

[SCOTT, J., *September 20th, 1895.*

Application to set aside a Writ of Summons issued under the Controverted Elections Ordinance. The facts appear from the judgment. Statement.

J. C. F. Bown, for the plaintiff.

S. S. Taylor, Q.C., for the defendant. Argument.

* 3. Upon the receipt of such petition . . . the Lieutenant-Governor shall cause the petition and a copy of all the books, papers and documents relating to the election complained of, certified by the Clerk of the Legislative Assembly, to be transmitted by registered letter to the Clerk of the Supreme Court, whose office is nearest the residence of the returning officer at such election.

† 5. Within ten days . . . the petitioner shall deposit with such Clerk the sum of five hundred dollars for the payment of all costs . . . that may become payable by the petitioner. . . .

‡ 7. The said Clerk of the Supreme Court shall, upon receipt of the said deposit, issue an ordinary Writ of Summons, against all parties complained of in the petition, and thenceforward the matter of the said petition shall become a cause in the Supreme Court, to be tried and determined as in civil actions.

§ 3. All actions, suits or other proceedings commenced in the office of any of the said Deputy Clerks shall be carried on in the same office, and in respect thereof such Deputy Clerk shall in all respects have and perform all the powers, duties and obligations of the Clerk of the Court for his Judicial District. . . .

Judgment.

Scott, J.

[*September 20th, 1895.*]

SCOTT, J.—This is a proceeding under the Controverted Elections Ordinance (R. O. 1888 c. 5), whereby plaintiff seeks to avoid the election of the defendant as member of the Legislative Assembly for the Electoral District of St. Albert.

Under sec. 3 of the Ordinance plaintiff's petition was forwarded to the clerk of the Supreme Court at Calgary, being the clerk whose office is nearest to the residence of the returning officer. The deputy clerk at Edmonton, an officer appointed under the provisions of Ord. 10 of 1891-92, is the deputy clerk whose office is nearest the residence of the returning officer. The deposit of $500 required by sec. 5 of R. O. c. 5, was made with the deputy clerk of Edmonton, who thereupon issued the Writ of Summons under section 7 of that Ordinance.

The deposit was made in bills of the Imperial Bank of Canada. It was stated on the argument, but is not shown on the materials before me, that prior to the issue of the Writ of Summons, plaintiff's petition and the papers accompanying the same had been forwarded by the clerk of the Court at Calgary to the deputy at Edmonton.

Defendant now applies to set aside the Writ of Summons on the grounds:—

(1) That the deputy clerk at Edmonton had no power or authority to issue the writ.

(2) That proper and sufficient security in legal tender was not deposited in accordance with R. O. c. 5.

(3) That the deputy clerk at Edmonton had no power or authority to receive the deposit or issue the writ.

Mr. *Taylor*, Q.C., for defendant, contends that Ord. No. 10 of 1891-92 gave to deputy clerks appointed under it only certain limited powers which are clearly defined by its provisions, and that the authority and powers of the clerk under R. O. c. 5 were not included among those so given to deputy clerks.

Judgment.
Scott, J.

Section 3 of that Ordinance enacts that all actions, suits and other proceedings commenced in the office of a deputy clerk shall be carried on in the same office and in respect thereof such deputy clerk shall in all respects have and perform all the powers, duties and obligations of the clerk of the Court for his judicial district. This appears to be the only authority contained in the Ordinances for a deputy clerk to issue a Writ of Summons in an ordinary civil action. It has been the practice in the Territories for them to issue such writs, and as their authority to do so was not questioned on the argument, I may assume for the purposes of the application that the section referred to gives them the necessary authority. In fact to give it any other construction would be to hold that the deputy clerk's powers and authority only extend to the particular proceedings mentioned in the several sub-sections of section 4; and that section 3 only applies to those particular proceedings. It might be contended that section 3 only applies to actions, etc., which had been commenced before the passing of the Ordinance; but I think such was not the intention, because the office of the deputy clerk was created by the Ordinance itself, and therefore no proceedings could have been commenced in the office before it was passed.

It will be noticed that the powers and authority of the deputy clerk as to actions, etc., commenced in his office are not confined to any particular form of action, suit or proceeding. Now section 7 of R. O. c. 5, enacts that the clerk shall upon receipt of the deposit issue an ordinary Writ of Summons against the parties complained of, and thenceforth the matter of the petition shall become a cause in the Supreme Court to be tried and determined as in civil actions. A cause in the Supreme Court is an action, suit or proceeding therein. True a petition does not become a cause in Court until the issue of a summons, but the same may be said of an ordinary civil action. And if the deputy clerk can under section 3 commence an ordinary civil action by issuing a Writ of Sum-

Judgment.
Scott, J.

mons, I see no reason why he could not under the same section commence this proceeding in the same way.

In my view, therefore, the deputy clerk at Edmonton was the proper officer to receive the deposit and issue the Writ of Summons, and had authority to do so.

I am also of opinion that the deposit required by section 5 of R. O. c. 5 was duly made. That section merely requires that the petitioner shall deposit with the clerk the sum of $500. I find that the Dominion Controverted Elections Act prescribes that in cases under that Act the deposit shall not be valid unless it is made in gold or legal coin or Dominion notes, being a legal tender under the statutes. Section 22 of the Dominion Act provides for the deposit by a candidate of $200 upon nomination, and section 64 for the deposit of $100 on a recount, but says nothing about their being made in gold or legal tender. The Territories Elections Ordinance by sections 48 (*a*) and 69 makes provision for the deposit of security upon the taking of certain proceedings, but makes no provisions as to its being made in gold or legal tender. I see no reason for holding that, when a Statute or Ordinance requires the payment or deposit of a sum of money, it must be so made. No authorities bearing on the question were cited by Mr. Taylor nor can I find any.

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

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

McDONALD ET AL. v. DUNLOP (No. 1).

Practice—Action to set aside conveyance—Parties.

The execution debtor is not a necessary nor a proper party to an action by execution creditors to set aside a conveyance made by him as fraudulent and void as against them, no relief being claimed against him except costs.

Participation in fraud is not a sufficient ground for adding a party for purpose of rendering him liable for costs.

[SCOTT, J., *September 29th, 1895.*

Statement. This is an application by the defendant Alexander Dunlop to have his name struck out as a defendant upon the ground that he is neither a necessary nor a proper party. The action is brought by the plaintiffs as execution creditors of the said defendant Alexander Dunlop against him and Nellie C. Dunlop his wife to have it declared that certain transfers of land to the latter, made by one Charles V. Alloway and one Joseph Hursell are fraudulent and void as against the plaintiffs, as such creditors, the consideration for the same having passed from the execution debtor; for a declaration that the defendant Nellie C. Dunlop is a trustee of the lands in question for him, and for a judgment vesting the said lands in him, no relief being claimed against him otherwise except costs.

Argument. *N. D. Beck*, Q.C., for the defendant.

S. S. Taylor, Q.C., for the plaintiffs.

[*September 20th, 1895.*]

Judgment. SCOTT, J.—The order must go as applied for with costs. *Weise* v. *Wardle*[1] and a number of other cases cited on the argument show that before the Judicature Acts Dunlop would not have been a proper party. Counsel for plaintiff admitted that such was the case, but relied upon *Gibbons* v. *Darvil*[2] as showing that since the Judicature Acts, a different

[1] L. R. 19 Eq. 171; 23 W. R. 208. [2] 12 P. R. 478.

Judgment.
Scott, J.

rule must prevail. That was an action by a simple contract creditor to set aside a fraudulent conveyance, and it was there held that it was no longer proper for a simple contract creditor to bring the action against the fraudulent grantee alone merely to set aside the conveyance, but that all persons interested should be made parties so that the whole matter may be disposed of at one time.

I can readily understand why this course should be pursued in the case of an action by a simple contract creditor, because it avoids the necessity, which would otherwise exist, for the creditors instituting other actions in order to obtain execution. In cases like the present, where the plaintiffs have already obtained judgment and execution, I can see no reason why the judgment debtor should be made a party where no relief is claimed against him. It seems that the mere fact of his participating in the fraud is not a sufficient ground for adding him as a party for the purpose of rendering him liable for the costs of the action.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

MASSEY v. McCLELLAND.

BAKER v. McCLELLAND.

Homestead—Exemption Ordinance—57 & 58 Vic., c. 29—Seizure—Construction of statutes.

The Exemption Ordinance, c. 45, R. O. 1888, s. 1, s.-s. 9, exempted from seizure under execution the homestead, to the extent of 160 acres, of the execution debtor. This sub-section having been declared *ultra vires* of the Legislative Assembly *In re Claxton*,[1] the Dominion Parliament by 57 & 58 Vic. (1894) c. 29 (D.), declared that the territorial legislation on this subject "shall hereafter be deemed to be valid, and shall have force and effect as law."

Held, that an execution filed against the homestead of the defendant prior to the passing of the validating statute constituted—but that an execution against the lands of the defendant filed subsequently to the passing of the said Act, did not constitute—a charge upon the homestead.

Rules for construction of statutes considered.

[*Court in banc, December 5th, 1895.*

Argument.

H. A. Robson, for Massey.

T. C. Johnstone, for Baker.

J. Secord, Q.C., for defendant.

[*December 5th, 1895.*

Judgment.

WETMORE, J.—This was a special case stated by the parties and referred by my brother RICHARDSON to this Court.

Massey & Co. are in a different position from Baker & Co. The execution of Massey & Co. was placed in the sheriff's hands and a copy of this writ with the accompanying memorandum under section 94 of The Territories Real Property Act as amended by section 16 of 51 Vic. (1888) c. 20, was delivered to the Registrar prior to the enactment of 57 & 58 Vic. (1894) c. 29. It is conceded that this writ was duly renewed as provided by section 327 of The Judicature Ordinance as amended by Ordinance No. 5 of 1894, s. 12.

As the case is silent on the question, and it was not contended to the contrary, it must be taken for granted that the

[1] 1 Terr. L. R. 282.

Judgment. Wetmore, J.

land in question or any part of it was not registered as a homestead under The Homestead Exemption Act, R. S. C. c. 52.

I do not think it necessary to discuss the question whether the delivery of the copy of the execution with the accompanying memorandum to the registrar was a seizure by the sheriff of the land in question or not.† It is sufficient for the decision of this case as I view it that the delivery of such execution and memorandum created a charge on the land. In substance I held in *Re Claxton*,[1] that the delivery of these documents to the registrar created such a charge, and I see no reason to change my opinion. I may add to what I have stated in *Re Claxton*[1] on that point that section 61 of The Territories Real Property Act, having especial reference to paragraph (e), clearly indicates to my mind that Parliament intended that the filing of the copy-execution and memorandum should be a charge and not merely a warning. It there speaks of the execution being *registered*. I can find in the Act no method of registering an execution other than that specified in section 94. In *re Claxton* the Court held that s.-s. 9 of s. 1 of c. 45 of The Revised Ordinances (1888) was *ultra vires* of the North-West Legislature and that the homestead not having been registered under The Homestead Exemption Act, it was liable to seizure and sale under execution. It follows then that on the 14th October, 1893, when this copy-execution and memorandum were so delivered to the registrar a charge was created on the land in question in favour of the execution creditors. That created a substantial right in their favour, quite as substantial as if a mechanics' lien or other encumbrance had been created or registered in their favour. I think it is clear law that a statute should not be construed so as to give it an *ex post facto* operation to effect vested rights, unless it is so expressly provided by the words of the Act, or unless it is a necessary implication from the language used. See *Martindale* v. *Clarkson*,[2] and *Ings* v. *Bank of Prince Edward Island*.[3] I

(†) See *McDonald et al.* v. *Dunlop* (No. 2), ante.

[2] 6 O. A. R. 3.

[3] 11 S. C. R. 271.

Judgment.
Wetmore, J.

can find no language in 57 & 58 Vic. (1894) c. 29 which has the effect of giving sub-section 9 of section 1 of c. 45 of The Revised Ordinances, which was then brought into force as an effective law, operation before the time it was so made effective. In fact, I think it enacts just the contrary. It provides in effect that this sub-section of the Ordinance shall hereafter, that is, after the passing of the Act, be deemed to be valid, and shall have force and effect as law. It is not to be deemed as valid and have force and effect as law before the passing of the Act. Any time before the passing of that Act the execution creditors Massey & Co., could have enforced their charge in the usual way by proceeding to sell the land under the execution, and their position and rights are not altered by that enactment. The defendant therefore cannot claim exemption as against their execution.

Baker & Co., I think, are in a different position. Their charge was not created until after the Act was passed, and sub-section 9 of section 1 of the Ordinance had the effect of law, and, therefore, *quoad* that execution, the land was exempt from seizure.

Judgment must be for the plaintiffs Massey & Co. as to their execution, and for the defendant as regards the execution of Baker & Co.

Baker & Co. did not appear before this Court. I therefore think that the defendant ought to pay to Massey & Co. their costs of the reference to this Court.

The learned Judge informs me that some questions may arise as to the costs before him, and I think the question of these costs should be left to his discretion.

McGuire, J.—This is a case stated for the decision of the Court in the words following:—

Between:—Massey & Company, plaintiff; and James McClelland, defendant;

and

E. A. Baker & Company, plaintiff; and James McClelland, defendant.

Judgment.
McGuire, J.

"Special case stated by the parties to the above actions for the decision of the Court.

"1. The plaintiffs are respectively execution creditors of the defendant for sums each exceeding $200.

"The Massey Company's execution was received by the sheriff of the said Judicial District on 7th October, 1893, and was renewed on 21st August, 1895. A copy thereof was duly transmitted to the registrar of the Assiniboia Land Registration District under section 94 of The Territories Real Property Act, and was received by him on 14th October, 1893, with a memorandum stating that the south-west quarter of section 12, township 17, range 26, west of the 2nd meridian, was the land intended to be charged by the said execution.

"E. A. Baker & Co.'s execution was received by the sheriff on 6th March, 1895, and a copy thereof transmitted by the sheriff under section 92 of The Land Titles Act, 1894, was received by the said registrar on 8th March, 1895.

2. "The said writs were duly transmitted by the said sheriff to the deputy sheriff of the Moose Jaw sub-judicial district within which the lands are situate pursuant to Ordinance No. 7 of 1894, section 5, sub-section (*a*).

3. "The defendant in August, 1891, obtained entry for the said lands as a homestead under the Dominion Lands Act, which quarter section does not contain more than 160 acres, and the defendant having fulfilled the requirements of said Act, as to the said homestead, a grant or patent thereof issued from the Crown in favour of the defendant dated 19th December, 1893, and was received by the said registrar on the 22nd day of January, 1894.

4. "The defendant is now residing on said land and has been so residing since obtaining his said entry.

5. "No steps or acts other than as aforesaid were taken or done under or in respect of the said writs until 17th September, 1895, on which day the said deputy sheriff, under the belief that such a step was necessary to constitute a

seizure, went on to the said land and afterwards on the same day by notice and advertisement as required by section 345 of The Judicature Ordinance, stated that he would offer the said land for sale on 21st December, 1895.

"The defendant claims that this land is exempt under chapter 45 of the Revised Ordinances and 57-58 Victoria, c. 29.

"The question between the said plaintiffs and the defendant is,

"Can the defendant claim the said land as an exemption under the said Ordinance and Act?"

The Court is asked, "Can the defendant claim the said land as an exemption under the said Ordinance and Act?"

This Court has already decided *In re Claxton*[1] that section 1, sub-section 9 of the Ordinance in question was then *ultra vires*. But it is urged by the defendant that since that decision c. 29 of 57-58 Vic. (1894) s. 2 has given to that subsection of the Ordinance the "force and effect of law," and that now it is to "be deemed to be valid."

That Act was assented to on 23rd July, 1894. But the execution in the Massey case had been placed in the sheriff's hands long prior to that date, and that officer had, pursuant to section 94 of The Territories Real Property Act, delivered a copy of such execution to the registrar on the 14th October, 1893. Now in October, 1893, could the sheriff have seized and advertised for sale the land in question? Under the decision *In re Claxton*[1] he certainly could. Now did c. 29 of 57-58 Vic. on its passing in the following July relate back so as to give the Ordinance the force of law in October, 1893? Bearing in mind the well-established principle of law that a statute is not to be considered retroactive in the absence of a clearly expressed intention by the Legislature that it shall so operate, let us see if there is anything in this Act evidencing such an intention. The words are that the exemption provisions of the Ordinance "shall hereafter be deemed to be valid and shall have force and effect as law." Does that

Judgment. McGuire, J.

not mean that it is "hereafter" that these exemption provisions shall "be valid" and shall "have force and effect as law"?

Is there anything to indicate an intention to give to them validity or force or effect as law at any time in the past or to give them life from the date of their enactment? I think not. By *In re Claxton*[1] sub-section 9 was pronounced to have been stillborn. Chapter 29 it is true breathes into it the breath of life, but only from the moment when that Act itself came into existence. Laying aside metaphor, Parliament might have passed an Act declaring that the Territorial Legislature should be deemed to have always had the power to pass the Exemption Ordinance in question and that said Ordinance should be deemed to have always been valid and in force as law from its passing, but clearly no such language was in fact employed in chapter 29. The Exemption Ordinance, sub-section 9, was, therefore, not valid in October, 1893, and the land was subject to the Massey execution.

But the defendant says that, apart from the delivery of a copy of the execution to the registrar, nothing was done by the sheriff until 17th September, 1895, when the deputy sheriff went on the land to make a seizure and shortly thereafter advertised the land for sale. This was after the passing of chapter 29, and he says that the Massey execution then for the first time was attempted to be enforced, and that then it was too late as the land had become exempt. It is replied that the delivery by the sheriff of the copy-execution to the registrar, together with a memorandum of the land intended to be charged under the hand of the sheriff, was an inception of seizure. If it was, then the plaintiffs the Massey Company clearly had acquired rights under their execution which were not taken away from them by the subsequent Act.

But I do not think it is necessary for the decision of this case to decide whether the delivery of the copy-execution and memorandum to the registrar was or was not an inception

Judgment.
McGuire, J.

of execution. On the writ being delivered for execution to the sheriff on 7th October, 1893, he could undoubtedly have done whatever, if anything, was necessary to constitute an inception of execution, whether by going on the land or advertising or otherwise. No Exemption Ordinance then stood in his way as to the land in question. The Massey Company therefore had then a right and had begun the exercise of it whether they promptly followed it up or not.

In *Clarkson* v. *Sterling* the defendant had by agreement acquired a right to a certain security, but did not in fact obtain the security until after the passing of an Act which became law in the interim. Prior to that he had merely the *right*, under an agreement, to have security given him, yet the Court of Appeal held that the Act was not retroactive so as to render invalid the security subsequently given. Osler, J., in giving judgment says: "Under that Act such an agreement to give security was not invalid, and the defendant's right to enforce it accrued long before the present Act came into operation. That Act is not retrospective and therefore the defendant's right to take the security contracted for, as and when he did take it, is not affected." I think that is good law. Let us apply it here. Massey & Co. had an execution capable of seizing this land; their right to enforce their execution "accrued long before the present Act came into operation," etc., etc., I need not set out the remainder of the quotation.

As to the Baker execution the case is different. It was first delivered to the sheriff after the passing of chapter 29, and at a time when the Exemption Ordinance, s.-s. 9, was to be deemed valid and in force.

There therefore never was a time when the sheriff could have seized the defendant's land under, or in any way made it subject to, that execution.

I think therefore the question should be answered by saying that the defendant cannot claim the said land as an exemption under said Ordinance and Act as against the

Judgment. McGuire, J.

Massey execution, but can do so as against the Baker execution.

I agree with my brother WETMORE in his opinion as to costs.

RICHARDSON, J.—By decision of this Court *In re Claxton*,[1] s. 1, s.-s. 9 of c. 45 of The Revised Ordinances (1888) was held *ultra vires* for the reasons given in the judgment rendered in that case.

I agree that the Dominion Act, 57-58 Vic. 1894, c. 29, s. 2, is not retroactive; consequently as to an execution against lands delivered to the sheriff and filed by him under The Territories Real Property Act before the passing of that Act, there is no exemption from seizure and sale. This applies to the Massey but not to the Baker execution, which issued subsequently to the passing of that Act. Against the latter execution the exemption claimed holds good.

ROULEAU, J., and SCOTT, J., concurred with RICHARDSON, J.

CONGER v. KENNEDY.

Marriage — Domicile — Married Women's Property Ordinance, N. W. T. Act—Construction of statutes—Ultra vires.

Whether a husband and his wife are living together or apart, her domicile in legal contemplation follows his.

Where, therefore, a man domiciled in the Territories married in Ontario a woman domiciled there, and thereafter they resided in the Territories, it was *held* that as to furniture belonging to the wife brought by her to the Territories, the question whether it passed to the husband *jure mariti* or was the wife's separate property, depended upon the law of the Territories. Ordinance No. 16 of 1889, enacted: A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate and by will or otherwise deal with personal property as if she were unmarried.

Held (WETMORE, J., dissenting), affirming the judgment of ROULEAU, J., that this Ordinance referred only to such property of a married woman as was covered by the provisions of the N. W. T. Act, R. S. C. (1886), c. 50, ss. 36-40. (†)

(†) Reversed on appeal to the S. C. C., 26 S. C. R. 397.

Per WETMORE, J. The Court held in *Re Claxton*[1] that a provision in an Ordinance exempting as a homestead 160 acres of land, without limit as to value, was *ultra vires* of the Legislative Assembly on the ground that it was inconsistent with the Homestead Exemption Act (R. S. C. 1886, c. 52), inasmuch as the latter Act expressly provided in effect that a homestead exempt from seizure should not exceed 80 acres nor exceed a certain value. The Married Women's Ordinance in question is not inconsistent with the Dominion Legislation on married women's property in the Territories; it does not assume to take away from a married woman any right given her by the Dominion Act; it goes further and gives her rights with respect to other property. The Assembly has power to legislate as to "property and civil rights" in the Territories; to hold the Ordinance *ultra vires* would be to hold that if the Parliament of Canada legislated upon a particular subject included in the terms "property and civil rights," the Assembly would have no power to legislate upon the subject at all.

[*Court in banc, December 5th, 1895.*

Trial of an action before ROULEAU, J., without a jury. Statement.

[*February 5th, 1895.*]

ROULEAU, J.—This is an action by the plaintiff to recover from the administrator of the estate of the late William Cox Allan a certain quantity of goods and chattels described and specified in the plaintiff's statement of claim, under an assignment from Janet C. Allan, the wife of the deceased; the contention being that these goods and chattels were her separate personal estate. Judgment.

The facts of the case are these:—

On the 11th December, 1889, William Cox Allan married at Napanee, in Ontario, Janet C. Conger, and they both came to the Territories on or about 9th January, 1890. Allan had his residence, at the time of his marriage, at Macleod, in the Territories, and continued to live in the Territories till his death. The furniture claimed by the plaintiff arrived in the Territories on or about the 19th day of January, 1890, and was in the house occupied by Mr. and Mrs. Allan. Mrs. Allan left the Territories on the 23rd October, 1890.

On the 17th November, 1892, Janet C. Allan gave a bill of sale to her son, the plaintiff, of all the furniture she

[1] 1 Terr. L. R. 282.

Judgment.
Rouleau, J.

claimed then to own as her personal property. The defendant was appointed administrator of the estate of the late William Cox Allan on the 15th December, 1893, and as such administrator took possession of all the goods and chattels found on the premises occupied by Allan at the time of his death.

As soon as the plaintiff closed his case the defendant moved for a non-suit on the following grounds:—

1. The law of the domicile of the husband governs this case and not the *lex loci contractus*.

2. Parties married in Ontario and domiciled in the Territories are governed *quoad* their personal property by the law of the Territories.

In support of the first proposition, the defendant referred to Bishop's Law of Married Women, p. 157, which says: "It is familiar law that, whether a husband and his wife are living together or apart, her domicile in legal contemplation follows his; and she is not capable of establishing a separate domicile of her own."

That principle of law has been definitely settled by the House of Lords in the case of *Harvey* v. *Fernie*.[2] The language of the Lord Chancellor, Selborne, is very clear; it reads thus:

"Let it be granted (and I think it is well settled) that the general rule internationally recognized as to the constitution of marriage is that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere if it is well constituted *secundum legem loci contractus*. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife what is the

[2] 52 L. J. P. 33; 8 App. Cas. 43; 48 L. T. 273; 31 W. R. 433; 47 J. P. 308.

character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract if we are to inquire into it that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicile." Judgment. Rouleau, J.

In this case there is no doubt that the domicile of the late William Cox Allan was in the Territories at the time of his marriage; that he came and lived here with his wife, and that at the time of his death his domicile was still in the Territories. True Janet C. Allan swore in her evidence that her husband had stated to her that his intention was to go back and live in Ontario; but if that intention ever existed it never was acted upon. The fact remains that he never changed his domicile after his marriage. Having determined that the law of the domicile of the husband governs in a question of this kind and not the *lex loci contractus*, I have only to refer to the second proposition to determine it, because it is really only the corollary of the first. Therefore the law of the Territories must govern in this case. According to the law of the Territories the personal property of a married woman is determined by ss. 36, 37, 38, 39 and 40 of c. 50, R. S. C. 1886.

Ordinance No. 16 of 1889 does not in any way declare what is or what is not the separate property of married women, but merely says that a married woman shall in respect to her personal property have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate, and by will or otherwise deal with, personal property as if she were unmarried.

Judgment. Rouleau, J.

As soon as Janet C. Allan brought her property into the Territories it became by force of the marriage the property of her husband: *Milner* v. *Milnes*,[3] *Carne* v. *Brice*,[4] *Brittlebank* v. *Gray-Jones*.[5] The latter case was an appeal from the decision of RICHARDSON, J., where the question of the separate property of a married woman in the Territories was involved, and although a stronger one than the case under consideration, upheld the law that a married woman's personal property becomes her husband's property by force of the marriage, and that she cannot claim any other separate property than the property mentioned in c. 50, R. S. C. ss. 36, 37, 38, 39 and 40.

I am of opinion that under the above authorities and upon the facts in evidence the plaintiff must fail in his action.

Judgment for the defendant with costs.

Statement.

The defendant appealed.

Argument.

P. McCarthy, Q.C., for the appellant.

C. C. McCaul, Q.C., for the respondent.

[*December 5th, 1895.*]

Judgment.

MCGUIRE J.—The facts are not in dispute. One William Cox Allan, now deceased, was on the 11th December, 1889, domiciled in the North-West Territories, and so continued to be until his death. On the said 11th December, 1889, the said Allan married one Janet C. Conger, then residing in the Province of Ontario, the marriage taking place at Napanee in that Province, and shortly thereafter, namely, on or about 9th January, 1890, they both came to Macleod in the North-West Territories, where the said William Cox Allan had up to the time of his marriage been residing and where he continued to reside until his death. The said Janet C. Allan just prior to her said marriage owned and was in possession of certain personal property then situate in New York, but which was removed therefrom

[3] 3 Term R. 627. [4] 7 M. & W. 183; 8 D. P. C. 884; 10 L. J. Ex. 28. [5] 1 Terr. L. R. 70.

Judgment.
McGuire, J.

to Macleod, reaching there about 19th January, 1890, and was placed in the house then occupied by William Cox Allan and his said wife, and continued to remain there until taken possession of by the defendant as administrator of the estate of the said William Cox Allan.

Janet C. Allan left the Territories in October, 1890.

On 17th November, 1892, prior to the death of her husband, Mrs. Allan gave a bill of sale of the said personal property to the plaintiff, who thereunder claims the same from the defendant.

The defendant contends that under the law of the North-West Territories, by virtue of the marriage the said personal property, which up to that time had been the property of said Janet C. Conger, became the property of said William Cox Allan; that it is the law of the Territories, the domicile of the husband, that should prevail.

The plaintiff conceding that the law of the husband's domicile applies, I have simply assumed that to be the law. But he replies that at the date of the marriage the said personal property did not under the Territorial law become the property of the husband, by reason of the Ordinance No. 16 of 1889, which came into force before the marriage.

It was admitted for the plaintiff that had that Ordinance not been in force the marriage would have operated as a gift to the husband of the property in question.

That Ordinance says that "a married woman shall in respect of her personal property have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate and by will or otherwise deal with personal property as if she were unmarried."

The defendant contends that this does not alter the law as to what is to be deemed the personal property of a married woman, but merely effects her rights and liabilities as to "her personal property," that is, whatever was then under the law as it existed "her personal property."

Revised Statutes of Canada, 1888, c. 50, ss. 36, 37, 38, 39, 40, provides that in the Territories certain property

Judgment
McGuire, J.

(wages, personal earnings, etc.) should be, in effect, the wife's personal property; but in respect to all other personal property the common law rule, that marriage operates as a gift to the husband of the personal property owned by the woman prior to the marriage, was the law of the Territories: *Brittlebank* v. *Gray-Jones*.[5]

The goods in question are admittedly not affected by R. S. C. c. 50. It seems then to be a question what does Ordinance No. 16 mean? Did it intend to define what should be deemed "her personal property," or did it merely regulate her rights and liabilities in respect of whatever then was "her personal property?"

It seems to me that it merely says that in respect of whatever is her personal property she shall have certain rights and liabilities. Had it intended to change the operation of the marriage as a gift by the wife to the husband of what had been her personal property, it seems to me some apt words would have been used to manifest that intention.

The English Married Woman's Property Act of 1882 says, "Every woman . . . shall be entitled to hold as her separate property . . . all her real and personal property which shall *belong to her at the time of the marriage*." C. S. U. C. 1859, c. 73 used these words: "all her real and personal property whether *belonging to her before marriage* or acquired . . . after marriage."

The Ontario Act of 1872 employs similar words:—"The real and personal estate of any married woman *which is owned by her at the time of her marriage*." I can only find one word in the Ordinance which is descriptive of the personal property in respect to which she is to have the rights and liabilities mentioned, and that is the monosyllable "her."

Can that word be expanded into embracing property which up to that time was clearly not "hers?" If this is to be treated as an Ordinance intended to vary the common law by making that, which would otherwise be the husband's, the property of the wife, it comes within the rule that sta-

tutes in derogation of the common law are to be construed strictly. Judgment. McGuire, J.

It is argued that unless such was the intention of the Legislature Ordinance No. 16 is of no value, for it did not, it is urged, give a married woman any greater rights than had already been given her by the North-West Territories Act. While not admitting this, I do not feel under obligation to show that the Ordinance has any value; it is conceivable that absolutely useless Ordinances may be passed.

It surely does not follow because the obvious meaning of an Act is of little or no value that it must be held to have some other meaning of which its plain language in its ordinary sense does not admit. Where the language used is open to more than one construction, a Court may select that meaning which seems most consonant with the obvious intention of the Legislature. In *Brophy* v. *Atty.-Gen. of Manitoba*,[6] the Lord Chancellor says that "it was not doubted," what was the object of the Act there under consideration, yet he says: "but such considerations cannot properly influence the judgment of those who have judicially to interpret a statute"; and further on, "it is quite legitimate where more than one construction of a statute is possible to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention." He had, however, already said, "The question is not what may be supposed to have been intended, but what has been said."

The words "her personal property" do not seem to me to be ambiguous—they are plain words, and do not appear to be open to more than one construction. There is another rule of construction which may be invoked here, namely, that an affirmative statute shall not be construed to repeal the prior law by reason of repugnance, where the old and new can reasonably be construed to stand together. Here at the date of the Ordinance a married woman had under the North-West Territories Act certain property which

[6] 64 L. J. P. C. 70; (1895) A. C. 202; 11 R. 385; 72 L. T. 163.

Judgment. McGuire, J.

could be properly called "her personal property," and the Ordinance can without forcing its language be read as defining her rights and liabilities in respect thereof.

It was urged that even if the Ordinance in question could be read as desired, it would be inconsistent with the North-West Territories Act, and consequently *ultra vires* of the Assembly. I cannot concur in that contention. The Assembly had power to legislate as to property and civil rights subject to any legislation thereon by the Parliament of Canada and not inconsistent therewith. The North-West Territories Act is in its nature a remedial Act for the benefit of married women. It altered the common law in certain particulars; if the Assembly chose to alter it still further, but not affecting the change made by the Dominion statute, I see no objection to its doing so. However, it is not necessary to give any express decision on this question in view of the conclusion previously arrived at.

I think the appeal should be dismissed with costs.

RICHARDSON, J., and SCOTT, J., concurred.

WETMORE, J.—I have the misfortune of differing.

After the passing of Ordinance No. 16 of 1889 and before its repeal the deceased William Cox Allan was married to Janet C. Conger. Just before, and at the time of such marriage, Janet C. Conger was possessed of a quantity of personal property, none of which was of the character of that specified in sections 36 to 40, inclusive, of The North-West Territories Act (R. S. C. 1886 c. 50).

Mrs. Allan assigned this property to the plaintiff, who seeks to recover it, or the value of it, from the defendant, who is Allan's administrator.

It is claimed on behalf of the defendant that on the marriage this property vested in Allan, and now belongs to his estate. The learned trial Judge gave effect to that contention. The plaintiff contends that by virtue of Ordinance No. 16 of 1889 the right and title to this property continued

to remain in Mrs. Allan as before the marriage, and she had the right to dispose of it, and that it belongs to him. Judgment. Wetmore, J.

The only questions raised on the appeal are as to the effect and validity of that Ordinance. The defendant claims, as to the effect of that Ordinance, that inasmuch as Parliament has by the provisions in the North-West Territories Act, to which I have referred, made the wages and personal earnings of a married woman and any acquisitions therefrom, and all profits or proceeds from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys or property, her separate property free from the debts or disposition of her husband; and inasmuch as the Court of Queen's Bench of Manitoba had in *Brittlebank* v. *Gray-Jones*,[5] held under an exactly similar statute (43 Vic. 1880 c. 25) that the words at the end of section 58 of that statute (which corresponds to section 36 of The North-West Territories Act) referring to personal property, and the reference to chattels in section 62 of 43 Vic. (which corresponds with section 40 of The North-West Territories Act) could not be taken as extending the provisions of the Act to personal property generally, the words "her personal property" in Ordinance No. 16 must be construed to mean only the property which the North-West Territories Act has in those sections declared in substance to be the separate personal property of the wife.

I am unable to place this limited construction on the Ordinance. The Legislature must be intended to have had some object in view when it passed that Ordinance.

It cannot be possible that it was merely intended to give rights with respect to the property which Parliament had already given. By sections 36 to 40 of the North-West Territories Act Parliament had already in substance given to married women in respect to the property therein mentioned, all the rights and made her subject to all the liabilities of a *feme sole*, and enabled her to alienate and dispose of the same in any way as if she were unmarried. The

Judgment.
Wetmore, J.

learned counsel for the defendant was unable to point out any additional rights which were conferred on a married woman by the Ordinance with respect to such property which she did not have by the Act, or any liabilities imposed by the Ordinance on her which were not imposed by the Act, except that possibly the Act did not enable her to contract. But I am of opinion that the Act did enable her to contract, because section 40 provides that she may be sued in respect of any of her separate contracts. Under the authority of *Brittlebank* v. *Gray-Jones*,[5] that must mean contracts in respect of property such as that specially mentioned in the Act. She certainly could not be sued on such contracts, unless the statute intended that she should be able to contract. I have no moral doubt, and the learned counsel for the defendant had to concede at the argument that there was no moral doubt, that the Legislature intended to make all personal property of every description that a married woman had at the time of her marriage, or which might come to her after marriage, her own to be enjoyed, used and disposed of as a *feme sole* could enjoy, use and dispose of it. But he contended, and very properly contended that, notwithstanding this, effect could not be given to such contention unless apt words were used to carry it out. I am disposed, and I think I am correct on principle in doing so, to so construe this Ordinance as to carry out the intention of the Legislature if the language used is capable of such a construction, and if it can be gathered from the words of the Ordinance that such was the intention of the Legislature. I am of the opinion that the language of the Ordinance is capable of such construction and discloses such an intention. I also in this connection draw attention to the Interpretation Ordinance (R. O. 1888 c. 1, s. 7, s.-s. 56). It is a very well known rule that in construing statutes, words are generally presumed to be used in their popular sense: Endlich on Statutes, section 76. Applying that rule in this case, what is meant by the words "her personal property"? It is urged that as the law immediately on the marriage vested the personal property of the wife in the

husband, and any property she might acquire after marriage became instantly vested in the husband, such property was her husband's and not the wife's. Of course I am not alluding to choses in action or chattels real of the wife. Judgment. Wetmore, J.

That may be technically so: but when we speak in ordinary conversation of such property as the husband acquires through the wife, we describe it in popular parlance as the property of the wife. I am of opinion, therefore, that the Legislature intended to use the words "her personal property" in the Ordinance in the popular sense, as describing all the personal property of every description of the wife, whether in her possession at the time of marriage or acquired by her after marriage. I must not be understood by this, however, to lay down that the Ordinance was intended to embrace property in the possession of or acquired by a wife before the Ordinance came into force. C. S. U. C. 1856 c. 73, s. 1. (Walkem on Married Women, p. 15) I think, bears out what I mean. There the words are shall "have, hold, and enjoy all *her* real and *personal* property." It is true the section goes on to use the words "whether belonging to her before marriage or acquired by her by inheritance, devise, etc., after marriage." And it is quite true that these words make the intention of the Legislature quite clear. All I wish to point out is that the Legislature in that case used the words "her personal property" in their popular sense. And it seems to me that if the intention of the Legislature can be carried out by a fair construction of the words used, that intention ought not to be defeated because they have not used the clear language to carry out that intention which other Legislatures have used. But it is further contended that the language of the Ordinance only confers on the married woman such right of a *feme sole* as will enable her to alienate and will or otherwise deal with such personal property; and for that contention the remarks of Sir G. Jessel in *Howard* v. *Bank of England*[7] were cited. It may be that if it were not for the word "all" in the second

[7] L. R. 19 Eq. 295 at p. 301; 44 L. J. Ch. 329; 31 L. T. 871; 23 W. R. 303.

Judgment. Wetmore, J.

line of the Ordinance—and if that word was eliminated—the Ordinance had enacted that "a married woman shall in respect of her personal property have the rights and be subject to the liabilities of a *feme sole* and may alienate by will or otherwise deal with personal property as if she were unmarried," the effect might have been as contended for on behalf of the defendant. The words "and may alienate," etc., might control the preceding part of the section, and the powers of a married woman in respect to such property would be merely powers of disposition. But I think the use of the word "all" makes all the difference in the world. It was very ingeniously argued that there are three distinct rights in respect to property, namely, the right of acquiring, the right of holding, and the right of disposing. Granted. But what are the rights of a *feme sole?* They are the rights of acquiring, holding and disposing. The Ordinance says that a married woman shall in respect to such property have *all* the rights of a *feme sole,* she therefore has all these rights or powers and, in my opinion, they are not cut down by the following words of the Ordinance.

It was also urged that the Legislature must have been of opinion that it did not carry out its intention by this Ordinance, because it repealed it and substituted other provisions by Ordinance No. 20 of 1890. I am not impressed by that argument. If, as a matter of fact, the language of the Ordinance did carry out the intention, it cannot be cut down because possibly the representative who introduced the measure may have been advised that the Ordinance did not carry out his intention, and he, out of prudence, introduced other provisions.

It was further urged that this Ordinance is *ultra vires* of the Legislature because it is inconsistent with the provisions of section 36 to 40 of the North-West Territories Act, that is, that Parliament having legislated and determined in respect to what personal property a married woman shall have the rights of a *feme sole,* had disposed of the question, and legislation by the Assembly giving such rights with respect to other personal property was inconsistent. This presents a question not free from doubt by any means. When

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this Ordinance was passed section 13 of the North-West Territories Act was in force, and the Orders-in-Council made thereunder governed the legislative powers of the Assembly. This Court held, *In re Claxton*,[1] that s.-s. 9 of c. 45 of the Revised Ordinances, which exempted 160 acres of land as a homestead from execution, was *ultra vires* as being inconsistent with the Homestead Exemption Act (R. S. C. c. 52), because that Act expressly provided in effect that a homestead exempt from execution should not exceed 80 acres, and only extended that to exemption of land of certain specified value, and gave the execution creditor the benefit of the surplus value, and, therefore, the Ordinance which exempted more was inconsistent with that Act. I merely refer to this case to point my line of argument. I cannot find anything in Ordinance No. 16 of 1889 which is inconsistent with, alters or repeals any of the provisions of sections 36 to 40 of The North-West Territories Act. If the Ordinance had taken away any rights which were given to a married woman by those sections it would have been *ultra vires*, but the Ordinance does not do that, it does not affect a single right given to a married woman by that Act. She has them all yet. But it goes further and gives her rights with respect to other property; and I see no objection to the Assembly doing so under the powers conferred by the Orders-in-Council to legislate in relation to "Property and Civil Rights in the Territories." If these sections of the Act had in express terms provided that married women should have no further rights and privileges in respect to personal property than as therein provided, then this case would be governed by *In re Claxton*.[1] But to hold this Ordinance *ultra vires*, would be simply to hold that if the Parliament of Canada legislated upon a particular subject included in the terms "Property and Civil Rights," the Assembly would have no power to legislate upon the subject at all. I am not prepared to go that length.

I am of opinion that this appeal should be allowed.

Appeal dismissed with costs.

PRUDEN v. SQUAREBRIGGS.

Judicial sale of land—Party purchasing without leave—Confirmation refused.

In the absence of any order or direction, plaintiff and not the Clerk of the Court is to be considered to have the conduct of a judicial sale.

Where plaintiff who had conduct of such a sale purchased the land without leave, confirmation was refused.

Such a sale is void, not merely voidable, and it is unnecessary for the person opposing to shew that the purchaser has perpetrated fraud, or acquired the property at less than its value, or obtained undue advantage, or that the lands should have realized sufficient to give him an interest in the proceeds.

Any person having any interest in the proceeds of a sale, whether a party or not, has a right to object to confirmation.

[SCOTT, J., *February 8th, 1896.*

Statement. Application by the plaintiff for confirmation of the sale to him of the lands in question in this action. By judgment of the Honourable Mr. Justice ROULEAU, dated the 23rd day of August, 1895, a partnership between the plaintiff and the defendant James C. Squarebriggs was dissolved; the plaintiff recovered against the said defendant $1,200.07, being the amount found due on the taking of the partnership accounts, and against all the defendants his costs of the action; certain transfers, mortgages and assignments made by certain of the defendants to others of them were declared fraudulent, null and void, and were ordered to be delivered up to be cancelled and set aside; the lands in question were directed to be sold and the proceeds of the sale thereof to be applied as follows: (1) In payment of the balance due on a mortgage thereon to Les Corporation des Reverend Peres Oblates de Marie Immaculée, the amount at the time of the sale being $1,154.72; (2) One quarter of the total selling price to be paid to the plaintiff for his one-quarter interest in the partnership; (3) In payment of the said sum of $1,200.07; (4) In payment of the plaintiff's costs of the suit, and (5), the balance (if any) to be paid to the defendant James C. Squarebriggs.

Argument. *S. S. Taylor*, Q.C., for the plaintiff.

N. D. Beck, Q.C., for Moore & MacDowall, execution creditors of defendant James C. Squarebriggs, *contra*.

[*February 8th, 1896.*]

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SCOTT, J. (after referring to the judgment above mentioned).—The lands appear to have been duly advertised for sale by auction on 25th September, 1895, and at such sale plaintiff became the purchaser for $1,000. The advertisement stated that the sale was a judicial sale pursuant to the judgment referred to. It did not state by whom the property was offered for sale, but the names of the plaintiff's advocates and the auctioneer were appended to it.

The application for confirmation of the sale was opposed by Moore & MacDowall, upon whom notice of the application was served. It was stated upon the argument that they were execution creditors of defendant James C. Squarebriggs, and upon the argument, plaintiff's counsel treated them as such, and except as hereafter mentioned, no question was raised by him as to their right to oppose the confirmation of the sale. It does not appear that any of the defendants had notice of the application, nor does it appear that they assented to the sale to plaintiff. None of them were represented on the application.

The main objection taken by counsel for Moore & MacDowall to the confirmation was that the purchaser had the conduct of the sale, and had not obtained leave to bid thereat. It was admitted by counsel for plaintiff that plaintiff had not obtained leave to bid, but he contended:

1st. That it was the clerk of the Court, not the plaintiff, who had the conduct of the sale.

2nd. That even if plaintiff had the conduct of it, the purchase by plaintiff was not void but merely voidable.

3rd. That Moore & MacDowall, before they can be heard, must show that the lands are of such value as to leave a surplus for the defendant James C. Squarebriggs after payment of the charges, which by virtue of the judgment have priority over him.

In the absence of any order or direction respecting the conduct of the sale, I must hold that plaintiff had the con-

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Scott, J.

duct of it. I have always understood the practice to be that where the person having the conduct of the sale desires to bid at it, he must obtain leave to do so, and that when such leave is granted, the conduct of the sale is usually given to another party to the suit. The general rule is clearly stated by Lord Justice Giffard in *Guest* v. *Smythe*,[1] as follows:

"As regards the rules of this Court, of course it is very well known that a vendor who has conduct of the sale himself, cannot buy. . . . It is equally well known that parties to the suit cannot buy without special leave of the Court. . . . There are other well known rules also, such as that a trustee for sale cannot buy . . . and, generally speaking, that where a man's duty and interest in respect of the purchase conflict, he cannot become a purchaser."

In the present case, plaintiff's duty and interest clearly conflicted, his duty being to endeavour to secure the best possible price for the property and his interest being to secure it for himself at the lowest possible price.

In my view it is not necessary for the person opposing confirmation of such sale to show that the purchaser has perpetrated a fraud, or that he has so conducted the sale as to enable him to acquire the property for less than its value, or that, by reason of his having the conduct of the sale, he has obtained an undue advantage to the detriment of any person interested in the proceeds. To hold that it is necessary to show this would be, in effect, to hold that the rule referred to was of no effect, for it is reasonable to assume, that even in the absence of any such rule, the sale would be avoided upon any such misconduct being shown. The apparent object of the rule is to prevent the possibility of any such misconduct.

For the same reason I think it is not incumbent upon the person opposing the confirmation to show that the lands should have realized a sum sufficient to give him an interest

[1] L. R. 5 Ch. 551; 39 L. J. Ch. 536; 22 L. T. 563; 18 W. R. 742.

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in the proceeds after payment of all the prior charges. The affidavits filed on this application show that, since plaintiff purchased the property, he has leased it at an annual rental of $600. True, it has also been shown that the rent is payable in flour, shorts, etc., but such commodities have a market value, and it may be presumed that the tenant is obtaining the market value for them when delivered in payment of his rent. The proportion which the rent bears to the price paid by plaintiff for the property might reasonably give rise to the suspicion that plaintiff may have acquired the property for less than its actual value. It was also stated by counsel for Moore & MacDowall on the argument, that plaintiff in his evidence at the trial of this action, stated that the property was worth $4,000, but upon referring to the notes of the trial, I cannot find that defendant so stated, or that any statement was made by him as to the value of the property.

Counsel for plaintiff, in support of his contention that the sale was not void but merely voidable, referred to *Crawford* v. *Boyd*.[2] The Referee in Chambers in his judgment in that case, after reviewing a number of cases bearing upon the question, expresses the opinion that such a sale should not be confirmed if any of the parties to the suit object. It is true that on this application none of the parties to the suit are objecting, but objection is made by persons who, it is conceded, would, in the event of the property selling for more than sufficient to satisfy certain prior changes, have an interest in the proceeds of the sale. I think a more reason-question, expresses the opinion that such a sale should not be confirmed if it is objected to by any person having an interest in the proceeds.

For the reasons I have stated, I think I ought not to make an order confirming the sale. The application is, therefore, dismissed with costs.

[2] 6 P. R. 278.

MORAN v. GRAHAM.

Practice — Pleading — Amendment of statement of claim at trial—New case — Application after close of defendant's case refused—Civil Justice Ordinance, section 164.

In an action for damages for trespass and for an injunction the statement of claim alleged that the defendant, who was in occupation of adjoining property, which was being operated as a coal mine, had entered upon and under Lots B. and C. owned by the plaintiff, and had removed coal and minerals therefrom. From the evidence for the defence it appeared that no excavations had been made on Lots B. and C. since the date trespass was alleged to have commenced, but that the defendant's tunnel had extended into other adjoining lands owned by the plaintiff in respect of which no complaint had been made. The plaintiff at the close of the defendant's case applied for leave to amend the statement of claim under section 164 (†) of the Judicature Ordinance by alleging that the trespass had been committed upon these last mentioned lands.

Held, that the real controversy between the parties was whether the defendant had committed trespass upon Lots B. and C. and no amendment was necessary for the purpose of determining that question, and it would be an unreasonable exercise of the powers conferred by the section to allow the plaintiff after the close of the evidence to amend by setting up a new cause of action discovered from the evidence for the defence.

Held, also, that a refusal by defendant to allow inspection by plaintiff of the workings of the mine was not sufficient reason for allowing the amendment as the defendant might have obtained an order for inspection.

Greater latitude should be allowed to a defendant in amending by setting up new grounds of defence than to a plaintiff in setting up new causes of action, because a defendant cannot afterwards avail himself of such defence, while a plaintiff does not lose his claim in respect of such cause of action.

[SCOTT, J., *February 14th, 1896.*

Statement. Application by the plaintiff at trial after close of defendant's case to amend statement of claim. The facts appear from the judgment.

Argument. *S. S. Taylor*, Q.C., for plaintiff.

N. D. Beck, Q.C., for defendant.

[*February 14th, 1896.*]

Judgment. SCOTT, J.—This is an action for damages for trespass to lots B and C, according to a plan of a portion of River lot 14,

(†) See now Rule 178 of Judicature Ordinance, C. O. 1898, c. 21.

in the Edmonton Settlement, and for an injunction to restrain further trespasses thereon.

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These lands are coal lands, and the trespasses complained of are that defendant on November 23rd, 1894, and daily thereafter entered upon, and under the same, and excavated and dug pits, holes, shafts, drifts and coal rooms, and removed therefrom the coal and minerals of the plaintiff. Defendant among other defences denies the trespasses complained of. Defendant is in occupation of lots A and D, parts of same River lot and adjoining B and C on the west side thereof. At the time of the trespasses complained of, defendant was operating a coal mine, the mouth of which was upon lot A.

A number of witnesses for the plaintiff, including the plaintiff himself, testified that the tunnel of defendant's mine crossed the boundary line between lots A and D and B and C, and that a quantity of coal had been taken by defendant from the east side of the boundary line.

For the defence, one Chalmers, a Dominion Land Surveyor, testified that he had made a survey of defendant's tunnel. He produced a plan of it made from his notes of the survey. The plan shows that although the tunnel crossed the boundary between lots C and D, yet it only crossed a small portion of lot C, and from thence it extended into another portion of River lot 14. If Mr. Chalmers' plan shows correctly the location of the tunnel, it would appear from the evidence of the plaintiff's witnesses that no excavations had been made by defendant upon lots B and C since a date prior to November 23rd, 1894.

After defendant's case was closed, the plaintiff's counsel applied to amend the statement of claim by alleging that the trespasses complained of had been committed by defendant upon another portion of River lot 14. No description was given of the portion of lot 14 in respect of which plaintiff desired to claim, but I understood that he desired to claim for that portion beyond lot C, which, by Mr. Chalmers' plan, defendant's tunnel and works were shown to have penetrated. Counsel for the defendant opposed the application; and I reserved judgment upon it.

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Scott, J.

I am now of opinion that the amendment should not be allowed.

Section 164 of the Judicature Ordinance, which is taken from English Ord. 28, Rule 1, provides that, "The Court or a Judge may at any stage of the proceedings allow either party to alter or amend his statement of claim or pleadings in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

In my view, the real question in controversy between the parties is whether defendant had committed a trespass upon lots B and C, and no amendment is necessary in order to determine that question. I think there can be no reasonable doubt from the nature of the evidence, that his cause of complaint was the trespass upon these lots. Had he felt that he had grounds for complaining of a trespass on other land, he would have included such trespass in his claim. It would appear that it was only from the evidence of witnesses for the defence, he discovered that such a ground of complaint might exist.

I think it would be an unreasonable exercise of the powers given by section 164, to allow the plaintiff after the evidence is all in to amend his claim by setting up a new cause of action, because he has discovered from the evidence for the defence, that such new cause of action may exist. I cannot find any case where such an amendment has been directed at that stage of the action.

In *Bourke* v. *Davis*[1] plaintiff originally claimed to be entitled to the bed of a certain portion of the River Mole. After action commenced, he ascertained that the soil and bed of the river was vested in other persons. He then purchased the rights of these persons and at the hearing, sought to rely upon the new title thus acquired, and applied for leave to issue new writ. Kay, J., after argument, allowed

[1] 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167.

the application, leaving it for defendant to say whether he would require any further pleadings or not. Defendant waived the adjournment of the trial and the two actions were consolidated, and the hearing proceeded with, the question of costs being reserved. Plaintiff was successful, but got no costs and had to pay defendant's costs up to issue of the second writ. That case would doubtless be a precedent for allowing a plaintiff to amend by claiming the same property under a different title, but I doubt whether it can be reasonably contended that it is a precedent for allowing plaintiff to amend by claiming in respect of another property.

Further, the question in controversy in that action appears to have been the right of the public to the user of that portion of the River Mole, and the amendment should properly have been made in order to determine that question.

In *Budding* v. *Murdock*,[2] that principle appears to have been followed in granting the amendment. The plaintiff in that case claimed to be entitled under a deed and by prescription to a flow of water in a certain artificial water course. On the hearing, plaintiff failed to prove the title, upon which he relied, but the evidence disclosed a possible case of acquiescence on part of defendant under circumstances which showed that he stood by while plaintiff's predecessor in title had incurred expense in constructing the water course, and that it would be inequitable for him to resist plaintiff's claim. Plaintiff was allowed to amend by setting up these facts.

Bourke v. *Alexandra Hotel Company*[3] (referred to in the Annual Practice) was a suit to restrain interference with light coming to thirteen windows. The case as to eight of these had been introduced by amendment, and it was held that the case was properly so introduced although new matter. I cannot refer to the report of this case, but from the reference to it in the Annual Practice, I gather that the amendment was made under Order 28, Rule 2. If I am cor-

[2] 45 L. J. Ch. 213; 1 Ch D. 42; 24 W. R. 23. [3] Weekly Notes (77) p. 30.

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Scott, J.

rect in this, it cannot be relied upon as a precedent for allowing such an amendment after evidence closed.

In *King* v. *Corke*,[4] the bill was amended before hearing by charging the defendant, a trustee, with wilful default, but no specific instances of such default were alleged. Upon motion for decree, plaintiff was allowed to amend by charging specific instances of such default, but on terms that he should not be allowed to give new evidence, and that he must pay the costs of the hearing.

In *Nobel's Explosive Company* v. *Jones*,[5] the plaintiffs purchased in April, 1877, from the liquidator of a company, a certain patent for an invention. They brought an action against the defendants for infringing this patent, claiming that defendants had bought some of the patented commodity in Germany, which they had caused to be delivered to them at London, and that they had shipped it from thence to Australia and sold it there. Defendants by their defence admitted purchasing the commodity prior to April, 1889 (the date of plaintiff's purchase of the patent of invention), but denied that they had been concerned in the importation since that date, and denied the infringement of plaintiff's patent. Plaintiff's counsel applied to amend by adding the company's liquidator as co-plaintiff in respect of the infringement prior to April, 1887, which was admitted by defendants. This amendment was refused because the defendants had taken the objection by the pleadings. On the evidence being taken, it appeared that there was evidence that defendants were not the importers of the commodity, but had only acted as custom house agents in clearing it on behalf of another firm. Plaintiff's counsel then asked leave to amend by charging the defendants with the user shown by the evidence. The amendment was allowed by Bacon, V.-C., but subject to the terms that defendants should not go into further evidence. It would seem from the remarks of Bacon, V.-C., that the amendment was allowed because the question in controversy was

[4] 45 L. J. Ch. 190; 1 Ch. D. 57; 33 L. T. 375; 24 W. R. 23.
[5] 49 L. J. Ch. 726; 17 Ch. D. 721; 42 L. T. 754; 28 W. R. 653.

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Scott, J.

the infringement of the patent, and not the manner of the infringement.

It appears reasonable that greater latitude should be allowed a defendant in amending by setting up new grounds of defence, than to a plaintiff in setting up new causes of action because a defendant cannot afterwards avail himself of the ground of defence while a plaintiff does not lose his claim in respect of such a cause of action. But even in the case of a defendant an amendment setting up a new ground of defence is not always allowed.

In *James* v. *Smith*,[6] defendant pleaded section 4 of the Statute of Frauds as a defence to the action. Kekewich, J., held that section 7 of that Statute would have been a good answer, but refused to allow defendant to amend, by setting it up on the ground that the application was too late.

Upon the trial of this action it appeared from the evidence, that plaintiff had applied to defendant for permission to inspect the workings of defendant's mine, but defendant refused permission. I was for a time in doubt whether this was not a circumstance which should be taken into consideration in disposing of the application to amend, but I now think it is not entitled to any weight, because first it was also shown that plaintiff inspected defendant's mine without his consent, and apparently satisfied himself that the trespasses were committed on the lands mentioned in the statement of claim, and second, if plaintiff had any doubt as to the locality of trespass he might under the authority of *Bennett* v. *Whitehouse*[7] have so framed his statement of claim as to entitle him to an order for the inspection of defendant's mine. Having omitted to take this course, he should not now claim any indulgence by reason of the refusal to inspect.

For the reasons stated, I refuse leave to plaintiff to amend as applied for.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[6] (1891) 1 Ch. 384; 63 L. T. 524; 39 W. R. 396; 65 L. T. 544.
[7] 28 Beav. 119; 29 L. J. Ch. 326; 6 Jur. (N. S.) 528; 2 L. T. 45; 8 W. R. 251.

DEGAGNE v. CHAVE.

Mechanics' lien — Building contract — Pretended tender—Estoppel—Owners' default—Discharge of penalty clause.

Where a tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a *quantum meruit*.

The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers did not estop the plaintiff from disputing its *bona fides* as against the defendant.

Failure by the owner to supply material which the contract provides he shall supply discharges a penal clause.

Where a building contract provides for the certificate of an architect and no architect is appointed the provision is inoperative.

[SCOTT, J., *18th February, 1896.*

Statement. Action tried on the 9th, 11th and 22nd October, 1895, to realize a mechanics' lien on the east half of lot 7 in the town of Edmonton, according to registered plan E. The pleadings and evidence sufficiently appear from the judgment.

Argument. *N. D. Beck*, Q.C., for plaintiff.

J. C. F. Bown, for defendant.

[*February 18th, 1896.*]

Judgment. SCOTT, J.—Plaintiffs, by their statement of claim, allege that they were employed by Chave & Co. to erect a brick building upon the lands in question and furnish the materials required therefor, for the sum of $3,375, exclusive of extras; that defendant, the bank, are the registered owners of the lands in question, but Chave & Co. have an equitable interest therein, under an agreement between them and the bank; that plaintiffs completed the building before 17th December, 1894; that during the course of the work Chave & Co. ordered plaintiffs to do extra work and supply extra materials to the value of $51; that after deducting from the contract price the sum of $2,947.05 for payments, contra accounts

Judgment.
Scott, J.

and moneys retained for a portion of the work postponed by mutual consent, there remains due by Chave & Co. to plaintiffs, $427.98 for balance of contract price and $51 for extra work and materials; that the plaintiffs are entitled to a lien on the lands and building for said sums under the provisions of the Mechanics' Lien Ordinance; that on 20th January, 1895, they duly registered their claim of lien; that plaintiffs do not seek to affect any claim or interest of defendants the bank in the lands, but have made them parties merely for the purpose of affecting the equitable interest of Chave & Co. therein. An amendment of the statement of claim was allowed at the trial, whereby plaintiffs claimed in the alternative, that no price was agreed upon for the work and materials, and that the reasonable value thereof is $3,375, exclusive of extras. The plaintiffs claim (1) a declaration of the estate or interest of Chave & Co. in the lands; (2) an order that Chave & Co. pay plaintiffs $478.95 with interest from 17th December, 1895; (3) that in default of such payment, all the estate and interest of Chave & Co. in the lands and buildings, may be sold and the proceeds applied in payment of plaintiff's claim and costs; (4) all proper directions and accounts for the purpose aforesaid, and (5), such further relief as the case may require.

The issues raised by the defence of Chave & Co., and plaintiff's reply thereto, will be referred to hereafter. So far as appears by the proceedings before me, the defendants the bank have made no defence to the action. At the trial plaintiffs put in an admission by Chave & Co., that before the expiration of 30 days after the completion of the contract, plaintiff's claim of lien was duly registered, and that this action was commenced, and a certificate to that effect duly registered as required by The Mechanics' Lien Ordinance. Counsel for Chave & Co. also admitted on the trial that the claim of $51 for extra work and materials was not disputed.

One of the issues was as to the price of the work.

Judgment.
Scott, J.

Chave & Co., by their defence, denied that they contracted with plaintiffs as alleged by them, and alleged that they called for tenders for the erection of the building; that plaintiff Degagne tendered thereon, and by his tender he offered to erect it for $2,975, which tender was accepted by Chave & Co., who furnished him with the plans and specifications, and that he thereupon proceeded with the work. Plaintiffs, by their reply, allege that this tender was never intended by him or by Chave & Co. to be binding on him, but by agreement between them was made as a mere form, and on the distinct condition that it should not be binding upon him, and that he should be awarded the contract at the price which should be named in the tender next higher to his, and that the price named in such next higher tender was $3,375; that by mutual consent of the plaintiff and Chave & Co., plaintiff withdrew his said tender, and the agreement alleged in plaintiff's statement of claim was thereupon entered into.

Plaintiffs, in their evidence, both admit that Degagne did put in a tender for $2,975, but both state that it was understood between them and Chave & Co., that plaintiffs or Degagne were not to be bound by it. Degagne states that in conversation with Chave about the proposed building, he asked Chave if he was going to call for tenders for it, to which Chave replied, "Yes, we will have to, because we keep a lumber yard, and if we let a job to one contractor by private contract, it will hurt our business with the others, but we will do the same as we did the last time." Degagne explains the latter part of this statement, by stating that, during the previous year, he had built a house for Chave and his then partner, Corriveau, who were then keeping a hardware store. He agreed to do the work for $300. They said they would have to call for tenders as they were keeping a hardware store, and they did not want to offend their other customers. Chave asked him to put in a low tender to show the other fellows. Degagne then put in a tender for $225, but was afterwards paid the $300 agreed upon. Degagne's statement as to this arrangement between him and Chave

and Corriveau is fully corroborated by Corriveau in his evidence, and is not denied by Chave. Judgment. Scott, J.

Plaintiffs agreed together to go in for the Chave & Co. building. Each put in a tender, Cassan's being lower than Degagne's. Plaintiffs both state that, after putting in their tenders, they went to Chave & Co.'s office, that when they got there, Chave said to Degagne, "Well, you are the lucky man; another tender is lower than yours, but we know you are working together;" that Hetu then said, "We will say $3,000 for the job;" that both then stated they could not do the job for that price, and Degagne then showed Hetu his estimate for the work, which amounted to $3,388; that Hetu asked for the estimate, but Degagne said he would give him a copy of it, or he could see it at any time; that Hetu then said it was all right, and that plaintiffs must start work on Monday morning, as they had to collect their material and they only had a little over two months to finish the work. Degagne also states that when Cassan told Hetu they could not do the work for $3,000, Hetu replied, "Anyhow you have no time to lose; go on with the work."

At the interview referred to, there were present the plaintiffs, Chave and Hetu and Dorais, their clerk, and Joseph and Francis Lamoureau, all of whom gave evidence. Dorais states that Degagne's tender was the lowest, and that he never heard any mention made of any price other than the price named in Degagne's tender. Hetu does not deny any of the statements made by Degagne and Cassan as to what occurred during the interview. He merely states that they let the job to Degagne, and that he was to get the amount of his own tender. He also states that before the tenders were put in he told Degagne that the lowest tender would get it. He admits that Degagne's was not the lowest, but states that they would not give the job to Cassan, because he was not a responsible person.

Chave also does not deny the statement of Degagne and Cassan as to what occurred, beyond stating merely that they let the job to Degagne for $2,975. Joseph Lamoureau does

Judgment Scott, J.

not seem to have any clear recollection as to what occurred during the interview. He states that on one occasion he heard Hetu say to Chave that they would give Degagne the preference on the work, and also heard Chave and Hetu tell plaintiffs to go to work as quickly as possible as they had only a short time to do it.

Francis Lamoureau's evidence as to what occurred is not satisfactory. He states that he heard Hetu telling Degagne that he had the contract, and also heard either Chave or Hetu state that Degagne was going to get the preference; that he was to put in a low tender, and that he was to get the job at the next highest tender. He states that they talked about the contract price. Witness asked Hetu what the contract price was, but Hetu did not tell him. Witness at first states that it was during this conversation that Degagne was told that he would get the job at the next highest tender, but he afterwards admitted that it might have been on a subsequent occasion.

Degagne himself admits that there was no agreement or promise made during that interview that he was to get the job at the next highest tender. After the work was begun, the architect employed by Chave & Co., on more than one occasion, asked Degagne to sign a contract for the work, but he refused to do so, stating that he was waiting to have an understanding with them about the price; the first occasion was a few days after the tenders were opened.

Degagne states that about two weeks after the work was started, plaintiffs had an interview with Chave and Hetu. Degagne told them that the architect was pressing plaintiffs to sign the contract, and that they could not expect plaintiff to sign it, and that they must bring up the price to the next highest tender. Hetu said they could not do that. He and Chave then left the room to consult. When they returned they offered $150 more and to supply the lumber at cost price. Plaintiffs declined to accept this offer, and they separated without reaching an agreement. Cassan substantially corroborates this statement, but states that when the offer of $150 was made, he stated he would look over it; that no

arrangement was made at that interview, and that next morning they went on with the work. Neither Chave nor Hetu make any reference to this interview in their evidence.

The evidence satisfies me that the tender put in by Degagne to erect the building for $2,975 was not a *bona fide* tender, and that neither he nor Cassan ever intended to do the work for that price. I am also satisfied that both Chave and Hetu were aware, either before the tender was put in, or at all events during the first interview after the tenders were opened, that plaintiffs did not intend to do the work at that price. Their conduct and statements during that interview leads to the suspicion that, while knowing this they induced plaintiffs to enter upon the work without any agreement as to price, thinking they might afterwards hold them to the price mentioned in Degagne's tender.

During the argument I expressed the view that plaintiffs, having by an arrangement with Chave & Co., put in a pretended tender for the purpose of deceiving others, might now be estopped from claiming, even as against Chave & Co., that it was not *bona fide*, but I cannot find any authority which goes the length of establishing that view. There is nothing in the evidence which shows that there was at any time any agreement between the parties as to the price of the work. Francis Lamoureau states that he heard either Chave or Hetu state that the price was to be the amount of the next highest tender to Degagne's, but I doubt whether that statement can be relied upon.

There being no agreement as to price, plaintiffs are entitled, unless otherwise disentitled, to recover for the work done.

Chave & Co. claim that it was a condition of the contract that the building should be completed before 1st December, 1895, and that Degagne should pay them, as liquidated damages and not by way of penalty, $25 for each week the building remained uncompleted, and they allege that the building is not yet completed. Plaintiffs by their reply deny this,

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and allege that if they did so agree, such agreement was discharged in whole or in part for the reasons set out in their pleadings.

Chave & Co., by their defence, claim a deduction at the rate of $25 per week from 1st to 17th December, 1894, for non-completion. On the latter date their architect certified that there were some defects in the plastering which required going over, but which could not be done until spring, and in their certificate they suggested to plaintiffs that if they gave Chave & Co. security they would complete the work as early in the spring as possible, this should not stand in the way of a settlement.

Degagne in his evidence shows that a delay of more than 17 days was occasioned by the default of Chave & Co. not supplying materials, which, by the terms of the contract, they were bound to supply, and which plaintiffs could not obtain elsewhere within the periods of delay. This evidence is not contradicted or questioned, and, to my mind, it is a sufficient answer to the claim for liquidated damages.

The language of the provision in the contract respecting the payment of damages for non-completion, is peculiar. It is as follows: "And the contractor further agrees to pay the proprietor the sum of $25 per week until such time as the work is completed." It does not provide that the payment shall be by way of liquidated damages. Neither does it provide that the payment shall be computed from the time fixed for the completion. Construing it literally, it apparently provides that the contractor shall pay $25 per week from the time the contract was entered into until the time the building was completed. It is, however, unnecessary for me to decide what is the effect of such a stipulation.

Chave & Co. further claim that, by the terms of the contract it was a condition precedent to the right to sue, that a certificate should be furnished by plaintiffs, signed by the architect of defendants *the bank*, showing the amount due under the contract. Plaintiffs, besides denying this, allege

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that the building was completed to the satisfaction of the architect, and that he so certified.

The only contract put in was the specifications which contained sundry stipulations, but I cannot find in it any such provision as that alleged by Chave & Co. Even if such a provision was contained in the contract, it has not been shown that any architect was ever appointed by the bank. In fact the only architect appointed was the one appointed by Chave & Co. *Hunt* v. *Bishop*[1] shows that, where no architect is appointed by the person to whom the power of appointment is given, such provision becomes inoperative.

Chave & Co. also claim that they never entered into any agreement with plaintiff Cassan. I am satisfied from the evidence that they knew all along that he was interested in the work, and that they were dealing with him as well as with Degagne. Their architect's certificate is addressed to both plaintiffs. Besides this, it has been shown that he has an interest in the subject matter, and apart from any knowledge by Chave & Co. of that fact, he is entitled to be joined as a plaintiff.

Chave & Co. have paid into Court $180, claiming that it is sufficient to satisfy plaintiffs' claim and costs.

I find, upon the evidence, that the value of the work, if completed in accordance with the contract, would be $3,375, exclusive of the extras claimed. Degagne in his evidence states that the amount which should be deducted for unfinished work is $63, and that deductions to that amount were included in the credit of $2,947.91. Dorais, the clerk of Chave & Co., states that deductions only to the amount of $56 were included in that credit, and that the architect furnished him with a statement, showing that $68 should be deducted. The architect was not called. I therefore hold that only $63 should be deducted for work undone or improperly done. I think the onus was on plaintiffs to show that the whole of this was included in the credit of $2,947.91, and it has not been shown to my satisfaction that more than $56 was so included.

[1] 8 Ex. 675; 22 L. J. Ex. 337.

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The account, therefore, stands as follows:—

Building, per contract		$3,375 00
Extra work		51 00
		$3,426 00
Less amount credited	$2,947 00	
Less balance of deductions not included	5 00	2,592 91
Balance		$473 00

Plaintiffs are therefore entitled to an order for payment by Chave & Co. of $473.09 and cost of suit. Plaintiffs are also entitled to a declaration that they are entitled to a lien upon the estate or interest of defendants, Chave & Hetu, in the lands in question herein for $473.09, and their cost of suit, less the amount paid by them into Court. The amount paid into Court by defendants, Chave and Hetu, will be paid out to plaintiffs on account of the amount found due to them.

Plaintiffs claim, also, a declaration of the estate and interest of defendants, Chave and Hetu, in the lands in question, and for an order that in default of payment by them of the amount found due to plaintiffs, such lands may be sold and the proceeds applied towards payment of such amount and cost. I cannot, upon the materials before me, make such a declaration or order. Plaintiffs charge that defendants, Chave and Hetu, are entitled to an equitable interest in the lands in question, and it may be, that defendants, the bank, by not defending the action, have admitted the existence of such an interest; but, in any event, the nature and extent of the interest is not admitted, and there is nothing to show me what it is or its value. There will, therefore, be a reference to the clerk to ascertain and report upon the nature, extent and probable value of such interest. I reserve further order herein, until after the clerk has made his report.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

McDOUGALL v. CAIRNS.

Sale of land—Agency—Ratification—Statute of Frauds—Part performance.

One T., who had been appointed agent for the management of the plaintiff's estate at E. by the plaintiff's wife, which appointment was expressly ratified by the plaintiff, had appointed, with her authority, one M., a real estate agent, as agent for sale. M. made several sales, all of which were confirmed by the plaintiff, and, on the 3rd February, 1904, sold to the defendant C., the land in question, of which sale the plaintiff was duly notified; and the defendant went into immediate possession and commenced making improvements, of which the plaintiff was also notified on the 19th of February. On the 8th of June after a large sum had been spent in improvements, the plaintiff notified the defendants that he repudiated the sale and brought action for possession.

Held, (1) That M. had authority from plaintiff through T. to make the sale to the defendant.

(2) That if M. had not been authorized to make the sale, the plaintiff had ratified it by his conduct in standing by and allowing defendant to make improvements under the arrangement of purchase, and not immediately repudiating it and giving notice within a reasonable time.

(3) That the part performance of the agreement of purchase by the defendants was sufficient to take it out of the Statute of Frauds.

Quære, whether non-compliance with the Statute of Frauds comes in question in an action of ejectment or whether the plaintiff could recover possession in such an action by reason of a breach of any of the terms of the agreement.

[SCOTT, J., *February 25th, 1896.*

Statement. The action was tried at Edmonton on the 14th, 15th, 16th and 17th October, 1895.

Argument. *N. D. Beck*, Q.C., for defendants.

C. M. Woodworth, for plaintiff.

The pleadings and evidence are sufficiently set forth in the judgment.

[*February 25th, 1896.*]

Judgment. SCOTT, J.—In this action the plaintiff claims that the defendants on or about the 1st May, 1894, without his authority, entered upon and occupied a portion of River lot 8 in the town of Edmonton, owned by him, and dug a cellar and

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erected a brewery thereon; that they still continue to occupy same and refuse to give up possession to plaintiff; that by their acts and occupation of the premises they have greatly damaged same and have prevented plaintiff from surveying same and laying same off into streets or lots or selling same. Plaintiff claims possession, an injunction restraining further trespasses, $250 for damages to the premises, $150 for preventing the survey and sale and $50 per month for mesne profits.

Defendants, besides denying plaintiff's title and the acts complained of, claim that they are entitled to possession under an agreement for sale by plaintiff, and they also claim that, if the plaintiff is not bound by the agreement for sale, they are, by reason of the improvements having been made by them under the *bona fide* belief that such agreement was valid and binding upon the plaintiff, entitled to a lien upon the property for the purchase money paid thereon and interest and the value of the improvements made by them thereon, and to retain possession until payment of the amount and value thereof.

The lands in question are part of the undivided portion of River lot 8, and consist of about one-fourth of an acre on the south-west corner of that lot and fronting on the River Saskatchewan.

Plaintiff proved title to the lands in question under a certificate of title issued to him on 24th November, 1901.

On the 3rd February, 1894, one James Macdonald, a real estate agent in Edmonton, entered into an agreement with defendant Cairns for the sale to him of parts of River lots 6 and 8. The following memorandum of agreement was drawn up by Macdonald at that time and signed by defendant Cairns:

"February 3rd, 1893.

"Thomas Cairns,—

"Agmt of sale for part of River lots 6 and 8, having a frontage of 150 ft. on the river, from Donald Ross' place east, and of sufficient depth to cover a superficial area of one

square acre, the east line to run parallel to Ross, the consideration $150; one-third cash, balance in one year. Int. 8 per cent.; purchaser to pay cost of survey.

"Sgd. Thomas Cairns."

At the time of entering into the agreement, defendant Cairns paid Macdonald $50 on account of the purchase money, and received from Macdonald the following receipt:

"Edmonton, February 3rd, 1894.

"Received from Mr. Thomas Cairns the sum of fifty dollars, first payment on an acre lot on River lot 6 & 8.

"$50. "Sgd. James Macdonald, Agt."

The portion of River lot 8 included in this agreement is the portion in question herein. The date "1893" mentioned in the memorandum of agreement is an error and should have been 1894.

On the day after entering into this agreement, defendant Cairns took possession of the premises under it. On that day he took some lumber thereon and started to build an ice house thereon, and on the same day he let a contract to dig a cellar thereon for his brewery. It is not shown whether the ice house was erected on River lot 6 or on River lot 8; but the cellar was afterwards dug on River lot 8 during the month of March, 1894.

On 6th February, 1894, defendant Cairns left for Portage la Prairie, where he then resided, and did not return to Edmonton until 8th May following. His post office address was known to Macdonald.

The portion of River lot 6 included in the agreement was, on 20th May, 1895, transferred to the defendants under the agreement, defendant Cairns having in the meantime conveyed an interest in the purchase to his co-defendant.

About 24th November, 1891, plaintiff's wife came to Edmonton and employed Mr. S. S. Taylor, advocate, to act as agent for plaintiff in respect of his Edmonton property, which consisted of River lot 8. She then authorized him to

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make sales of the property, and the terms of the agency are set forth in a letter then written by Mr. Taylor to the plaintiff and delivered to the plaintiff's wife. The letter is as follows:

"Edmonton, November 24th, 1891.

"David Macdougall, Esq.,

"Morley, Alta.

"Sir.—I will manage your estate in Edmonton and attend to and make all sales for a commission of 5 per cent. on selling price of each piece of property sold.

"The firm of S. S. & H. C. Taylor will do all transfer business and conveyancing at $5 for each conveyance where lot sold for $300 and upwards, and $4 for each conveyance where lot sold for $150 to $300, and $3.50 for each which sold under $150.

"The percentage includes the settling of all disputes (except suits, if any, and conduct of the same) and the general management and advising concerning estate matters."

"Yours very truly,

"S. S. Taylor."

Plaintiff afterwards expressly ratified the authority conferred by his wife upon Mr. Taylor, and no restrictions were afterwards placed upon the authority so conferred upon him except that, upon a plan of River lot 8 obtained by Mr. Taylor from plaintiff's former agent, along with the other papers relating to the property, certain lots and parcels shown thereon were marked in pencil with the letter "R," and plaintiff's wife informed Mr. Taylor that plaintiff desired to reserve from sale the lots so marked. That was the only intimation Mr. Taylor appears to have had that any portion of the lots were reserved from sale, but the letter "R" was afterwards placed on other lots and parcels in accordance with suggestions made from time to time by Mr. Taylor that such should be reserved.

The letter "R" was not at any time placed upon the unsurveyed portion of which the premises in question formed a part.

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At the time of Mr. Taylor's appointment as agent he suggested to plaintiff's wife that Macdonald should be appointed as selling agent of the property. She then assented to his being so employed and authorized Mr. Taylor to arrange with Macdonald to sell for plaintiff.

Taylor afterwards employed Macdonald to make sales of the property and, under this authority, Macdonald made some fifteen different sales of other portions of the property, all of which were afterwards ratified by plaintiff.

It does not appear however that, at the time these portions were sold, Macdonald had any instructions from Taylor to sell any of the unsurveyed portion.

Taylor appears to have referred to plaintiff from time to time the question of the propriety of making sales of different portions of the property and, as each sale was made, to have sent plaintiff a formal agreement of sale for his signature, but no such reference was made to him as to the sale to defendant Cairns except as hereinafter mentioned.

It also appears that, at the time of the purchase by the defendant Cairns, Taylor was acting as agent for the owners of River lot 6, and had employed Macdonald to make sales thereof.

Macdonald states that when he received from defendant Cairns an application to purchase the property mentioned in the memorandum of agreement, he submitted the offer to Taylor, who then consented to the sale. Taylor states that when Macdonald submitted Cairns' offer he told Macdonald to make the sale in the usual manner and submit his memo. of agreement and the cash payments and papers would be prepared and sent to the parties for signature.

On 18th February, 1894, Mr. Taylor wrote in the name of his firm to plaintiff a letter of which the following portion relates to the matters in question.

"Edmonton, February 18th, 1894.

"David Macdougall, Esq., Morley.

"Sir,—We have two applications to purchase river front of River lot 8, and have made arrangements to purchase

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from you one acre, having a frontage of 150 feet, which will start from the westerly limit of your river front and run east 150 feet, and will take in quite a portion of the Methodist Mission property, as it runs back about north-west, making a rectangular piece of ground and running in the most convenient direction to suit your interests. . . . The brewery man has consented to give for the whole acre with the frontage of 150 feet the sum of $150, and pay the costs of survey. This $150 will be divided two-thirds to you and one-third to the Methodist Church upon the ground that, notwithstanding that your portion of the land is about one-third of the portion bought, it is on the river front and consequently worth about twice as much as the Methodist Church portion, although theirs is the largest portion of the acre.

"This we consider a first class proposition and would like to have you ratify our action in the matter . . ."

No reply to this letter was received from plaintiff, but his wife wrote on 21st February, 1894, to Taylor's firm stating that plaintiff was away from home, that he would return in about ten or twelve days, and that she could do nothing until his return.

On 1st March, 1894, Taylor again wrote to plaintiff a letter which contained the following:—

"*Re* Electric light station and brewery—As before stated, I trust you will assist me in closing this matter. You can readily see that it would be a great advantage to have these two large industries on your estate. Others have tried to get them on their land, but so far have been unsuccessful."

On 29th March, 1894, Taylor again wrote plaintiff as follows:—

"Kindly let me have your reply at once to the Cairns brewery offer for lot near electric light station, also *re* new electric light site. Cairns has started to dig his cellar, but without my consent or knowledge. Would strongly advise acceptance. . . ."

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On 2nd April, 1894, M. McKenzie, who appears to have been acting as confidential adviser to plaintiff, came to Edmonton and took over plaintiff's business from Taylor and appointed one Heiminck plaintiff's agent, but Taylor continued to act as solicitor for plaintiff in respect of his Edmonton estate.

On 6th April, 1894, Taylor wrote Macdonald stating that the management and sale of the plaintiff's estate was transferred to Heiminck, and asking him to prepare a statement of the number of lots that were open for sale. Macdonald on 7th April, 1894, furnished Taylor with a statement headed as follows, "List of lots offered for sale on River lot 8, Edmonton, April 20th, 1892." There is no reference in this statement to the sale to the defendant Cairns; but Macdonald states that its omission was an oversight and that he forwarded to Taylor with the statement a cheque for the cash payment made by defendant Cairns, and he produces the cheque therefor, which bears same date as the letter enclosing the statement.

Taylor forwarded this statement to plaintiff on 9th April, 1894, with a letter in which he says, "You will notice by such list that Mr. Macdonald only received a portion of the lots of your estate, the balance being reserved by you from sale. It therefore cannot be expected that Mr. Macdonald could make the same breach of faith that Mr. Young made with you and sell the property which you had expressly reserved from sale."

On 29th May, 1894, Taylor wrote to Heiminck as follows: "*Re* T. Cairns lot. There has been paid on this lot by the vendee the sum of $44.50. This we presume will be sufficient information to you. It was paid April 9th, 1894."

On 30th May, 1895, Heiminck wrote Taylor in reply to last mentioned letter. In this letter Heiminck states as follows, "We informed him (Cairns) that if he had not made any definite arrangements with you for the purchase of the property. . . . we on Mr. McDougall's behalf could not approve of the sale."

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On 8th June, 1894, Taylor wrote to Heiminck as follows: "With reference to your inquiry *re* Cairns lot, we would say that when Mr. Cairns made application to purchase the same through Mr. Macdonald, that he was instructed that David McDougall's consent would first have to be obtained before the sale could be confirmed. Pending that confirmation Mr. Cairns made the first payment to Mr. James Macdonald, which was afterwards handed over to us, and which we still hold pending Mr. McDougall's decision, and which we will have to return to Mr. James Macdonald for Mr. Cairns, and he in turn to Mr. Cairns if Mr. McDougall does not confirm the sale. It was distinctly understood by all parties that he had no power to close the sale without Mr. McDougall's consent, and when Mr. Cairns called upon us about one month ago for the first time we informed him of the condition of affairs, and to call upon you to arrange the same. Instead of doing this we understand that he has taken it into his head to dig a cellar there and build a building, notwithstanding he has no title or agreement of sale of the property. . . ."

On the same day Taylor sent a copy of this letter to defendant Cairns, and in his letter therewith advised him "to call on Mr. Heiminck at once and complete arrangements for said land, or we will advise an action of ejectment to compel you to remove said buildings."

On 2nd August, 1894, Taylor wrote to plaintiff enclosing a cheque for $43.61 "in full of Thos. Cairns' first payment *re* his unsurveyed lot on the Methodist Mission and your estate."

On 4th August, 1894, plaintiff wrote Taylor returning the cheque and stating as follows:

"Messrs. S. S. and H. C. Taylor, Esqs., Edmonton.

"Dear Sirs,—I enclose cheque, $43.61, from Thomas Cairns. As this is the first I know of this transaction, as Mr. McKenzie seen P. Heiminck & Co., he was to have that all surveyed, and at that time he placed that part of the

business all in Mr. Heiminck's hands, so you will refer to him." Judgment. Scott, J.

On 15th August, 1894, Taylor's firm wrote plaintiff, and in this letter they made the following statement respecting the sale to defendant Cairns.

"We are surprised that this matter is not carried out, because we believe that Mr. Macdonald had proper instructions and proper authority to make the sale."

On 22nd August, 1894, plaintiff wrote Taylor's firm as follows:

"Yours of August 15th to hand, *re* Mr. Cairns. As you transferred all to Mr. P. Heiminck & Co. of my property that was sold by you and your agent to Heiminck and myself, with no mention made of Mr. Cairns, I consider myself out of the Cairns transaction all together as I turned all sale of the property over to Heiminck."

Taylor continued to act as solicitor for plaintiff, and in respect of River Lot 8 until some time in the month of September, 1894.

Upon the evidence I hold that Taylor had authority from plaintiff to sell the premises in question. It does not appear from the evidence that plaintiff ever questioned the existence of such authority, and his letter of 22nd August, 1894, to Taylor shews that he did not repudiate the sale on that ground, but merely on the ground that Taylor, when transferring the business of the estate to Heiminck, made no mention of that sale.

I also hold that Macdonald, at the time he made the sale to defendant Cairns, had authority from Taylor and from plaintiff through Taylor to make such sale.

I also hold that the sale by Macdonald to defendant Cairns on 3rd February, 1894, was and was intended by the parties to be an absolute sale of the property, and was not dependent or conditional upon plaintiff's ratification thereof.

The acts and conduct of Taylor subsequent to the sale are only material as tending to throw doubt upon the state-

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ment that he had authorized Macdonald to make the sale, but notwithstanding the doubt which might thus be created, I believe the statement, corroborated as it is by the evidence of Macdonald, whose testimony as to the existence of the authority has not been impeached, and also by the evidence of defendant Cairns, who states that the understanding was that, as soon as he got the land surveyed, he was to get the proper papers, and shows that, from the date of his agreement with Macdonald, his acts and conduct throughout were inconsistent with any other view than that he considered himself to be the absolute purchaser.

Taylor's letter of the 18th February, 1894, to plaintiff is not inconsistent with the view that he then looked upon the sale as absolute. He states, "one man wants to build a brewery, and has made arrangements to purchase from you." If all that had been done at that time was the making of an offer to purchase by the defendant Cairns it could not be said that he had made arrangements to purchase. Then, again, Taylor states, "we would like to have you ratify our action in this matter." If no sale had been made there does not appear to have been anything to ratify.

I am also of opinion that even if Macdonald had not been authorized to sell to defendant Cairns, or the sale had been made subject to plaintiff's ratification, such ratification is to be implied from his conduct.

Plaintiff knew by Taylor's letter of 29th March, 1894, that defendant Cairns was then digging a cellar on the premises, and plaintiff must have known that this work was being done under the arrangement for purchase referred to in Taylor's letter of 19th February, 1894. If plaintiff intended to repudiate the sale it was his duty to have caused Cairns to be notified without delay of such repudiation. Cairns states that the first intimation he had of his purchase being disputed was when he received Taylor's letter of the 8th June, 1894. In the meantime he had erected his brewery on the premises, and expended about $3,000 in improvements.

I believe Cairns' statement as to the time he first received notice of his purchase being disputed. It is true Taylor states that he told Cairns some time in May, 1894, that he had better not go so fast with his improvements until he had got his agreement of sale signed, but it does not appear from his evidence that he intended to convey the impression that the sale would not be carried out. And Cairns states that Taylor told him on that occasion that the sale was all right.

Heiminck states that during the month of May, 1894, he warned Cairns not to build, but this Cairns denies. If Heiminck's letter of the 30th May, 1894, could be relied upon as correctly stating what he did say to Cairns, there was nothing in the statement to indicate to Cairns that there was anything wrong with the purchase, because he then supposed that he had made definite arrangements with Taylor, through Macdonald, to purchase the property.

In my opinion the plaintiff did not give notice of repudiation within a reasonable time, and, such being the case, he must be taken to have ratified the sale.

I doubt whether it is necessary for me to decide whether the agreement relied upon by the defendants complies with the requirements of the Statute of Frauds. In my view, the part performance by them of the agreement is sufficient to entitle them to rely upon it, even if it does not comply with the statute.

I think also that it is open to question whether, apart from this, the objection raised as to non-compliance with the statute is tenable. No action is being brought upon the agreement. It only comes in question by reason of the fact that defendants are claiming by way of defence that they are entitled to possession under it. In *Leroux* v. *Brown*[1] it was held that section 4 of the statute does not render an informal contract void, but merely provides that no action shall be

[1] 12 C. B. 801; 22 L. J. C. P. 1; 16 Jur. 1021; 1 W. R. 22.

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brought upon it, and the same view was expressed in *Miles* v. *New Zealand Alford Estate Co.*[2]

The evidence shows that defendant tendered to plaintiff through his agent Heiminck the balance of the purchase money, and that same was refused. It is doubtful, however, whether, in the absence of such a tender, the plaintiff in this form of action would be entitled to recover possession by reason of any breach by the defendants of the agreement to purchase.

I give judgment for the defendants.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[2] 54 L. J. Chy. 1035; 32 Ch. D. 266; 53 L. T. 219; 34 W. R. 669.

McCARTHY v. BRENER.

Constitutional law—Colonial Legislatures—Powers of—Extra territorial laws—Judicature Ordinance—Service out of the jurisdiction—Small debt procedure.

A colony having authority to establish Courts of civil jurisdiction and to provide for procedure therein has also the power necessarily incident thereto of providing for service of process upon defendants residing out of its jurisdiction.

The Legislature of the Territories has authority under the powers conferred by the N. W. T. Act to make such provisions.

Section 32 of Ordinance 5 of 1894 (amending J. O. 1898) relating to Small Debt Procedure provides:

"The summons shall be returnable,

"(c) Where the defendant resides in any place in Canada outside the Territories, or in the United States of America, at the expiration of 20 days from the service thereof;

"(d) Where the defendant resides in any part of the United Kingdom, at the expiration of 30 days from the service thereof;

"(e) In any of the above cases it shall not be necessary to obtain an order for service out of the jurisdiction."

Held, (1) Neither an order for leave to issue a writ for service out of the jurisdiction, nor an order for leave to serve such a writ, is necessary under this procedure.

(2) Nor is it necessary that a proper case for service out of the jurisdiction should be shown by the statement of claim; but *semble*, if a defendant served out of the jurisdiction can show affirmatively that the action is not one in which service out of the jurisdiction would be allowed under the ordinary practice of the Court, he would be entitled to an order setting aside the service.

[SCOTT, J., *March 5th, 1896.*

Statement. Application to set aside a Writ of Summons issued under the Small Debt Procedure and served out of the jurisdiction. The grounds on which the application was founded sufficiently appear in the judgment.

Argument. *Peter McCarthy*, Q.C., for the plaintiff.

C. C. McCaul, Q.C., for the defendants.

[*March 5th, 1896.*]

Judgment. SCOTT, J.—This is an application by defendants, to set aside the summons herein and the service thereof upon them on the following grounds:

1. That defendants are resident and domiciled out of the jurisdiction of the Court, which has no inherent jurisdiction over them.

2. That the legislature of the Territories has no power to pass an Ordinance or enact a law subjecting persons who are resident and domiciled out of the Territories to the jurisdiction of the Territorial Courts.

3. That no Ordinance authorizes the service out of the jurisdiction of a summons such as was served on the defendants.

4. That the summons was not issued for service out of the jurisdiction and no leave to issue a writ for service thereout has been obtained.

5. That service out of the jurisdiction has not been allowed by a Judge nor was leave obtained for such service.

6. That it does not sufficiently appear from the pleadings and proceedings that this case is a proper one for service out of the jurisdiction.

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7. That section 32, sub-section (*e*) of Ordinance No. 5 of 1894, has not altered the law respecting service out of the jurisdiction.

The plaintiff sues in his own right and as assignee of several other persons to recover $62.79 for work and services done and performed by him and such other persons as advocates in the prosecution of a certain action in this Court, wherein the defendants were plaintiffs and one Donohue was defendant, particulars of which claim were rendered to these defendants.

The Writ of Summons purports to have been issued under the provisions relating to Small Debt Procedure contained in Ord. No. 5 of 1894, and was served on the defendants in Ontario where they are domiciled.

It appears that no order was made directing the issue of a Writ of Summons for service out of the jurisdiction nor for the allowance of service thereof thereout.

As to the first ground, it was contended that the colonies have not under their constitutions any legislative power or authority over persons resident or domiciled outside the colony, and therefore that colonial legislatures cannot provide for service without the limits of the colony of the writs of the colonial Courts.

Defendant's counsel referred to Pigott on Service out of the Jurisdiction at p. 201. There the author says, "An important constitutional question however arises . . . as to the whole body of rules for service out of the jurisdiction: Do the powers delegated to a colonial legislature include the passing of such extra-territorial laws at all? Is its jurisdiction unlimited? or is it limited to legislating for a class, which might for convenience be called 'colonial subjects'? These questions are likely to be considered in an appeal pending before the Judicial Committee and the consideration of them must therefore be postponed. It is sufficient to notice for the present that in *MacLeod* v. *Attorney-General of New South Wales*,[1] the Judicial Committee has held that the juris-

[1] 60 L. J. P. C. 55; (1891) A. C. 455; 65 L. T. 321; 17 Cox 341.

diction of colonial legislatures in criminal matters is limited not only to persons in the colony but also to offences committed within their Territories." Judgment. Scott, J.

It does not appear that this constitutional question has yet been settled by the Judicial Committee, and in the absence of any direct authority I cannot uphold the contention.

In *Jeffreys* v. *Boosey*,[2] Baron Parke defines this principle, "The Legislature has no power over any persons except its own subjects, that is, persons natural born subjects or resident or whilst they are within the limits of the kingdom."

The same authority, Pigott, p. xlviii., shows that procedure relating to service out of the jurisdiction, though conflicting with the general principle referred to, is now universal in the codes of procedure of all nations, and says, "The principle of assuming jurisdiction over absent defendants in certain cases is part of the universal practice of nations and should be recognized as a principle of the law of nations." He also states, at page 201, that such jurisdiction is assumed by all the colonies of the Empire.

I see no reason why a colony having authority to establish Courts of civil jurisdiction and to provide for procedure therein, should not be held to have authority to include in such procedure a practice which forms part of the code of procedure of every civilized nation.

As to the second ground, it is contended that even if the Dominion Parliament possessed the necessary power, it has not clothed the Legislative Assembly with authority to provide for such a procedure.

The Judicature Ordinance was passed under the authority of section 15 of the N. W. T. Act (R. S. C. 1886 c. 50) and Ord No. 5 of 1894 under the authority of sub-section 10 of section 13 of the same Act, as amended by 54-55 Vic. (1891) c. 22. Under each of these sections the Territorial Legisla-

[2] 4 H. L. Cas. 815; 3 C. L. R. 625; 24 L. J. Ex. 81; 1 Jur. (N.S.) 615.

Judgment.
Scott, J.

ture had power to provide by Ordinance for the administration of justice in the Territories and for procedure in Territorial Courts of Civil Jurisdiction. Service out of the jurisdiction is merely a matter of procedure, and in my view the power to make provision for it must be taken to be included in the powers given by the sections referred to.

As to the third, fourth, fifth and seventh grounds, Ord. No. 5 of 1894, sub-sections (*c*) and (*d*) of section 32, provide that the summons shall be returnable at the expiration of thirty days from the service thereof where the defendant resides in any place in Canada outside the Territories or in the United States of America, or in the United Kingdom. To my mind this plainly indicates that the summons may be served out of the jurisdiction. Sub-section (*e*) however puts the matter beyond doubt by enacting that in the cases referred to it shall not be necessary to obtain an order for service out of the jurisdiction. English Order 2, Rule 4, which is in force here by section 556 of the Judicature Ordinance, provides that no Writ of Summons for service out of the jurisdiction shall be issued without leave of the Court or a Judge; and section 32 of the Judicature Ordinance provides that service out of the jurisdiction may be allowed by a Judge in certain cases therein specified.

Both here and in England, the practice is to combine both applications and to apply for and obtain an order giving leave both to issue the writ and to serve out of the jurisdiction. The order specifies the number of days after service within which the writ shall be made returnable. If such order is obtained it is not necessary to obtain another order for the allowance of service.

Such being the practice at the time of the passing of Ord. No. 5 of 1894, and in view of the fact that sub-sections *c* and *d* of section 32 provide for fixing a return day for a summons issued for service out of the jurisdiction (a provision which would be unnecessary if an order for the issue of the summons were necessary), and of the further fact that sub-section *e* provides that in such cases it shall not be necessary to obtain

Judgment.
Scott, J.

an order for service out of the jurisdiction, I think the intention of the Ordinance is that an order to issue a writ for service out of the jurisdiction shall not be necessary.

This mode of procedure is not new. According to Pigott, at p. 44, under the General Orders of the Court of Chancery of May, 1845, and the Consolidated Orders of 1860, it appears that it was unnecessary to obtain an order for the issue of a subpœna for service out of the jurisdiction and, unless my memory is at fault, the rules of the Court of Chancery in Ontario provided for the filing of a bill of complaint and the service thereof out of the jurisdiction without any order being required.

I do not wish to be understood as holding that in any suit brought under the provisions of Ord. 5 of 1894 a defendant may be served out of the jurisdiction. It appears to me that if a defendant so served can show affirmatively that the action is not one in which service out of the jurisdiction would be allowed under section 32 of the Judicature Ordinance he would be entitled, upon an application showing this, to an order setting aside the service.

As to the sixth ground, I am of opinion that it is not necessary that the pleadings or proceedings should show that the case is a proper one for the allowance of service out of the jurisdiction. There is no provision of the Judicature Ordinance which requires that such shall be shown by the pleadings. The only proceeding which shows it is the affidavit upon which the order is obtained. I have already held that an order is unnecessary in this case and therefore no affidavit need be filed. There is no provision that where no such affidavit is filed the fact that the action comes within section 34 shall be disclosed in some other way.

Application refused.

REPORTER.

J. E. Wallbridge, Advocate, Edmonton.

THE QUEEN v. WEBSTER.

Criminal law—Trial—Election to be tried by Judge or Judge and jury—Withdrawal of election—New election—Effect of election—Refusal of Judge to dispense with a jury.

The N. W. T. Act, R. S. C. 1886 c. 50, s. 67 (section substituted by 54-55 Vic. 1891 c. 22, s. 9), provides that: "When the person is charged with any other criminal offence the same shall be tried, heard and determined by the Judge with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury.

Held, that in the event of the accused electing to be tried by a Judge alone the Judge is not bound so to try the case, but may insist upon the intervention of a jury. So *held* where the accused was first tried with the intervention of a jury who disagreed, and upon a second trial coming on withdrew his first election and elected to be tried by the Judge alone.

[*Court in banc, June 2nd, 1896.*

Statement. Crown case reserved.

Argument. *C. C. McCaul*, Q.C., for the Crown.

J. A. Lougheed, Q.C., for the prisoner.

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

[*June 2nd, 1896.*]

Judgment. RICHARDSON, J.—Brewster was duly charged before Mr. Justice ROULEAU with theft of a number of cattle, the value exceeding, as appears, $200, on the 7th January, 1896, and was then tried before that Judge with the intervention of a jury. The jury upon that occasion being unable to agree upon a verdict were discharged by the Judge. That trial thus failing results, Brewster was subsequently, on the 19th February, again brought before the same Judge, for trial on the charge, with the intervention of another jury, when Brewster expressed his consent and applied to be tried by the Judge alone in a summary way and without the intervention of a jury. The Judge refused this application and the trial took place with a jury. The Judge having some doubts after the

trial as to the correctness of his ruling has referred the following questions to the Court for Crown Cases Reserved. Judgment. Richardson, J.

1. When an accused person, under section 67 of the North-West Territories Act as amended, consents to be tried by the Judge alone in a summary way without the intervention of a jury, can the Judge refuse to so try him, and is he bound to comply with the prisoner's request?

2. Did the Judge's action result in a mis-trial?

The answer to the first question propounded by the Judge depends upon the construction which this Court gives to section 67, and particularly as to whether or not the word "may" used in that section has an imperative or discretionary meaning; in other words, whether an accused has an absolute power of determining the manner of trial, or has only the right of consenting if the Judge be willing and considers the case before him a proper one, and is willing to assume the whole responsibility of trying it alone.

The North-West Territories Act, ss. 66 and 67, provides procedure for the trial of all criminal charges. As to the class of cases falling within those described in section 66 the charge shall be tried in a summary way and without the intervention of a jury. Section 67 then enacts that when the person is charged with any other criminal offence the same shall be tried, heard and determined by the Judge with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury. Now it is plain that unless the accused consents the trial must in those cases comprised within section 67 be with a jury, but waiving his rights by consent to the other form of trial the accused may be tried by the Judge alone. No imperative duty is by the section cast upon the Judge, as in the previous section, to try. There is nothing in the context by which the intention of Parliament (as appears to this Court) can be construed to require a Judge to depart from the definition of the word "may" in the Interpretation Act, and to assume the undivided responsibility of trying

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Richardson, J

alone. The sentence is to be construed as authorizing the Judge, on an accused so consenting, to assume the province of a jury, if he thinks fit.

This disposes of the questions put for the consideration of this Court by the learned Judge, the result being that his ruling is affirmed.

Ruling affirmed.

McDONALD ET AL. v. DUNLOP (No. 2).

Execution—Renewal — Seizure — Registration of writ—Transfer in fraud of creditors—Bona fides—Evidence—Costs.

The Judicature Ordinance (No. 6 of 1893), s. 327, enacted: "Every writ of execution shall bear date the day of its issue, and shall remain in force for *one year* from its date (and no longer, if unexecuted, unless renewed), but such writ may, at any time before its expiration, and so on from time to time during the continuance of the renewed writ, be renewed by the party issuing it for one year from the date of such renewal, etc. This section was amended by Ordinance No. 5 of 1894, s. 12 (which came into effect 7th September, 1894), by substituting "two years" for "one year" in both instances.

Held, that the amendment could not be construed as reviving or enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two years an execution which had been renewed only for one year.

The registration by the sheriff of a writ of execution against lands in the Land Titles Office under sec. 94 of the Territories Real Property Act, as amended by s. 16 of 51 Vic. c. 20 (†) cannot be construed as a seizure, and is not sufficient to continue the execution in force without renewal.

An execution issued on 20th October, 1893, was renewed on 20th October, 1894.

Held, that the renewal was made in time and the execution continued in force.

In an action to set aside a conveyance of lands as a fraud upon creditors, if the action is not brought on behalf of all the creditors of the debtor, the plaintiffs must shew that they have obtained both

(†) For the terms of these provisions, see *Re Claxton*, 1 Terr. L. R. 282.

judgment and execution, and if their executions have lapsed for want of renewal before the commencement of the action, the action will fail.

A. D. made a homestead entry on certain lands, but by mistake his homestead duties were performed on adjoining lands. The government cancelled his entry, but agreed to sell the lands to the nominee of A. D. at $1.00 an acre. In pursuance of this agreement the lands were sold by the government to one Alloway, as A. D.'s nominee, and Alloway received a patent for the same.

Held, that Alloway held the lands as trustee for A. D. and that a transfer of the lands from Alloway to the defendant, the wife of A. D., for which the defendant gave no consideration and which was made at a time when A. D. was, to the knowledge of the defendant, in insolvent circumstances, should be set aside as fraudulent and void.

A letter written by A. D. to one of the plaintiffs subsequently to the date of the transfer attacked was held to be inadmissible as evidence against the defendant.

Costs in case of partial success of plaintiff.

[SCOTT, J., *September 15th, 1898.*

Statement.

In this action the plaintiffs who were judgment creditors of one Alexander Dunlop, the husband of the defendant, sought to have it declared that a certain transfer of the west half of sec. 30, tp. 52, range 23 west 4th meridian, made by one Charles V. Alloway to the defendant, and a certain other transfer of the east half of the same section made by one Joseph Hursell, the defendant's brother, to the defendant, were fraudulent and void as against the plaintiffs as such creditors, and that the defendant was a trustee of the lands in question for the said Alexander Dunlop. They also claimed an order directing the sale of the lands under the executions issued upon their judgments and a decree vesting the lands in the said Alexander Dunlop, subject to a certain mortgage made by the defendant to the "Manitoba Mortgage and Investment Company."

It appeared in evidence that the execution against lands upon the judgment of the plaintiff Macdonald was issued on 15th July, 1888; that it was duly renewed from year to year up to 2nd June, 1893, at which date it was renewed for one year therefrom; that it was registered against the lands in question on 27th March, 1893; that on 2nd June, 1894, it was renewed for one year, and that on 30th May, 1896, it was renewed for two years.

Statement

It also appeared that the execution against lands upon the judgment of plaintiffs Norris & Carey was issued on the 20th October, 1893, registered against the lands in question on 23rd October, 1893, renewed for two years on the 20th October, 1894, and again renewed for two years on 19th October, 1896.

It also appeared that the execution against lands upon the judgment of the plaintiffs, the Hudson's Bay Company, was issued on the 6th April, 1893, registered against the lands in question on 11th April, 1893, renewed for one year from 4th April, 1894, and for two years from 2nd April, 1896.

It also appeared that on 24th November, 1884, Alexander Dunlop had made homestead and preëmption entries on the west half of the section referred to, and applied for his patent in 1890, but failed to obtain it owing to the fact that by mistake his homestead buildings had been erected and his improvements made on the east half of the section. The Government then agreed to cancel the entries and to sell the west half to Dunlop's nominee for $1 per acre. Dunlop nominated Charles V. Alloway, and the payment was made in land scrip which Alloway supplied, but for which Dunlop paid Alloway partly in cash and partly by note. The patent issued to Alloway, who held the same as security for payment of the note. On 19th January, 1892, Alloway transferred the property to the defendant for an expressed consideration of $800, but it appeared that no such consideration was ever paid. At the date of this transfer Dunlop was, to the knowledge of the defendant, insolvent.

It also appeared that Joseph Hursell, the brother of the defendant, had made homestead and preëmption entries on the east half of the section referred to in 1885, and subsequently secured a patent for the same. There were a number of transactions between Hursell and Alexander Dunlop in the nature of partnership dealings, but there was no evidence to show that Dunlop had any interest in the east half of the section. Hursell afterwards transferred the east half to

Statement. the defendant; no consideration passed at the time, but Hursell and the defendant both stated that the transfer was made to satisfy a previous debt due by Hursell to the defendant. The action was commenced on 15th July, 1895, and was tried before SCOTT, J., at Edmonton, on November 22nd, 1897.

Argument. *N. D. Beck*, Q.C., for the defendant. None of the executions were in force at the date of the commencement of the action. Where the plaintiffs have no specific charge on the lands, the action is improperly brought unless brought on behalf of all creditors, which is not the case here: *Gibbons* v. *Darvil*,[1] *Oliver* v. *McLaughlin*,[2] *Bank of Montreal* v. *Black*.[3] The renewal of the execution of Norris & Carey on 20th October, 1894, was one day too late. *Bank of Montreal* v. *Taylor*,[4] *Lawson* v. *Can. Farmers' Ince. Co.*[5]

Ordinance No. 5 of 1894, s. 12, did not come into force until after the renewals and its effect would not extend a renewal already made for one year. *Ontario Bank* v. *Gagnon*,[6] *Miller* v. *Beaver Mutual*,[7] *Spice* v. *Bacon*.[8]

Lands cannot be seized under execution until patent issues, therefore Dunlop had a perfect right to cut out a creditor's claim by transferring to his wife or another before issue of the patent. Besides, one quarter is exempt under the Exemptions ordinance, and a man may do what he likes with exempted property: *Osler* v. *Hunter*,[9] *Field* v. *Hart*.[10] The evidence shows that defendant's money was used in purchasing the scrip with which the land was paid for. As to the transfer from Hursell the evidence shows that there was no fraud.

S. S. Taylor, Q.C., for the plaintiff. There is no evidence to show that defendant's money was used in payment of the land. A homestead is not exempt after the homesteader has ceased to live upon it. The executions were pro-

[1] 12 O. P. R. 475. [2] 24 O. R. 41. [3] 9 Man. Rep. 439. [4] 15 U. C. C. P. 107. [5] 9 O. P. R. 309. [6] 3 Man. Rep. 46. [7] 14 U. C. C. P. 399. [8] 2 Ex. Div. 463; 46 L. J. Ex. 713; 36 L. T. 896; 25 W. R. 840. [9] 19 O. A. R. 94. [10] O. A. R. 449.

Argument. perly renewed: *Quirk* v. *Thompson*.[11] The effect of the amendment to s. 27 is to extend the life of a writ then in force for two years from issue or last renewal. In any case the registration binds the lands until the executions are removed from the Registry office.

Beck, Q.C., in reply, referred to *Jackson* v. *Bowman*,[12] *Coulthard* v. *Bennett*,[13] *Bradburn* v. *Hall*,[14] *Robinson* v. *Bergin*.[15]

[*September 15th, 1898.*]

Judgment. SCOTT, J. (after referring to the facts above set forth).—Unless there was such an inception by the sheriff of execution under the executions of Macdonald and the Hudson's Bay Company as would be sufficient to maintain their force without renewal, they expired before the commencement of this action. Section 12 of Ordinance No. 5 of 1894 amended section 27 of the Judicature Ordinance by providing that executions may *at any time before their execution* be renewed for two years (instead of one year as theretofore), but in my opinion that amendment cannot be construed as enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two years an execution which had been renewed only for one year.

There was no evidence of any such act done by the sheriff by way of inception of execution under the Macdonald or the Hudson's Bay Company executions, beyond the fact that during their currency they had registered them against the lands in question under section 94 of the Territories Real Property Act as amended by section 16 of 51 Vic. c. 20. It was, however, contended on the part of the plaintiff that such registration was such an inception of execution as would be sufficient to continue those executions in force without renewals.

I cannot uphold this contention. In my view, the registration of an execution by the sheriff is merely intended to give

[11] 1 Terr. L. R. 159; 18 S. C. R. 695. [12] 14 Gr. Chy. 156. [13] 28 Gr. Chy. 556. [14] 16 Gr. Chy. 518. [15] 10 O. P. R. 127.

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Scott, J.

it the same effect as to lands in respect of which it is registered as, before the passing of The Territories Real Property Act, the delivery to him of the execution would have had as to all the lands of the execution debtor in his bailiwick. Such registration cannot be construed as a seizure or anything equivalent thereto, or as anything beyond what the statute authorizing it implies, viz., as a caveat to prevent the transfer of the lands by the execution debtor except subject to such rights and powers of the execution creditors and sheriff under the execution as they may see fit to exercise during its currency.

I cannot think that Parliament ever intended that the registration of an execution would be sufficient to maintain it in force for all time without renewal, and it certainly has not expressed that intention. On the contrary, sub-section (*e*) of section 56 of The Land Titles Act indicates a contrary intention by providing that the lands mentioned in a certificate of title shall, by implication, be subject to any decrees, orders or executions against, or affecting the interest of the owner which have been registered and *maintained in force against the owner*, thus implying that registration alone would not be sufficient to maintain an execution in force.

During the argument my attention was called to the fact that, in the Province of Ontario, by virtue of a statutory enactment to that effect in force there, the advertisement of sale of lands by the sheriff under an execution is deemed a commencement of execution. I have been unable to refer to the statutes, but if such is the case, it might reasonably be inferred that such legislation was necessary to constitute the advertisement a commencement of execution, and to my mind, the advertisement of sale is a much stronger indication of intention to execute than registration is.

I am, however, of opinion that the execution upon the judgment of the plaintiffs Norris and Carey was in force and bound Dunlop's interest in the lands in question at the time this action was commenced. It was contended on the part of the defendant that, having been issued on the 20th

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October, 1893, it expired on the 19th October, 1894, and that its renewal on the following day was, therefore, too late. The Ontario cases cited support this contention, but the judgment of the Court *in banc* in *Quirk* v. *Thomson*,[11] affirmed by the Supreme Court of Canada, appears to me to be a strong authority against it. It is true that was a decision upon the section of the Bills of Sale Ordinance then in force providing for the renewal of chattel mortgages, the language of which differs from that of section 327 of The Judicature Ordinance, the one providing that a mortgage shall cease to be valid to the extent therein mentioned "after the expiration of one year from the filing thereof, unless, etc.," and the other that a writ of execution shall remain in force "for one year from its date (and no longer if unexecuted unless renewed)," but I cannot see that the difference is a material one, and it appears to me that the grounds upon which McGUIRE, J., bases his judgment are as much applicable to the one enactment as to the other. He does not go the length of holding that the mortgagee had the whole of the same day of the following year to renew his mortgage, because in that case it was unnecessary for him so to hold, but Mr. Justice Patterson in the Supreme Court of Canada does go that length.

For the reasons I have stated I hold that the execution had not expired at the time of its renewal on the 20th October, 1894.

In actions of this nature, which are not brought on behalf of all the creditors of the debtor, it appears to be necessary for the plaintiffs to show that they have obtained both judgment and execution. See *Smith* v. *Hurst*,[16] *McCall* v. *Macdonald*,[17] *Oliver* v. *McLaughlin*.[2]

Alexander Dunlop entered for the west half of the lands in question on the 24th November, 1884. He applied for his patent in 1890, but failed to obtain it apparently because

[11] 22 L. J. Ch. 289; 10 Hare 30; 17 Jur. 30; [17] 13 S. C. R. 247, reported below, 9 O. R. 185; 12 O. A. R. 593.

he had by mistake made his improvements on the other half of the section. In 1891 he was notified by the Dominion Land Board that it was decided to cancel entries for the west half, and to sell the same to his nominee for $1 per acre. Thereupon he nominated Charles V. Alloway, a member of the firm of Alloway & Champion, bankers, Winnipeg. The purchase money was paid in what is known as Dominion Land Scrip which cost $304. Dunlop had then a current deposit with Alloway & Champion with a small balance at his credit. At the time of the payment of the purchase money he discounted with them his notes for $250 at 90 days, and the proceeds, amounting to $240, were carried to his credit. He then gave a cheque on his account for the amount of scrip required. One half of the note was paid by Dunlop at its maturity, and a renewal was given by him for the remainder. Alloway received the patent for the lands, and held the same merely by way of security for the payment of the note and renewal. He never had, or claimed to have, any further interest therein, and I hold that subject to that security he held the lands as trustee for Dunlop. I cannot find anything in the Dominion Lands Act which leads to the inference that they could not be subject to such a trust. On 19th January, 1892, he transferred the lands to the defendant for the expressed consideration of $800, but no such consideration passed or was agreed upon, the only consideration being the payments of the notes for which the lands were held by him as security.

Judgment. Scott, J.

Defendant in her examination states that she understood from her husband that Alloway had purchased the land for himself, and that her husband had no longer any interest in it; that about six months after Alloway's purchase she instructed her husband to purchase the land from Alloway for her for $320; that in order to raise the money she took the money she had for housekeeping expenses, saved up all she could get hold of and pawned her jewelry; that she gave the whole $320 in bills to her husband at one time, which was about six months after Alloway had purchased, but she was

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unable to state any of the circumstances attending the payment of that money to her husband. She also states that the debts incurred by her in raising the money were paid out of the proceeds of the loan raised by her on the lands in question.

I cannot believe her statements as to the payment by her of the $320 or as to her agreement to purchase from Alloway, as they are utterly at variance with the statements of Alloway and Dunlop respecting the transaction. The whole evidence satisfies me that there was no such agreement made by her, that she did not become the purchaser from Alloway, that the transfer from him to her was merely a scheme or device on the part of Dunlop to protect the land from his creditors, and thus defeat and delay them, and that she was a party to the scheme.

Defendant states that at the time of her marriage she had about $500, which shortly before her marriage went into the purchase of a lot in Winnipeg, and the erection of a house thereon in which they lived after their marriage; that there was a verbal agreement between them that she was to have a deed of the place when it was paid for. She is unable to state whether she ever acquired any title to the property, but she states that her husband about the year 1882 sold the property for $8,000, out of which he placed $2,000 to her credit in the bank; that out of this latter sum she lent her brother Joseph Hursell $275, and that the remainder was chequed out by her and her husband for various purposes.

The evidence as to the agreement between the defendant and her husband by which she was to become entitled to the house and lot is far from satisfactory. I think, however, that it is unnecessary for me to decide in this action whether such an agreement existed, or whether the husband became a creditor of the wife for the proceeds of the sale or any part thereof. It is not asserted or contended by either of them that the transfer from Alloway to the defendant of Dunlop's interest was made either in satisfaction of or as security for any such indebtedness.

Judgment Scott, J.

The defendant asserted that the transfer was made in pursuance of an absolute purchase by her from Alloway without any reference to any interest of her husband in the property, and in the light of her evidence to that effect it cannot now be reasonably contended on her behalf that it was made to cover her husband's indebtedness.

In my opinion, the plaintiffs have failed to establish that the transfer made by Hursell, defendant's brother, to her of the east half of the lands in question were fraudulently made with intent to defeat or delay the creditors of Dunlop. So far as appears by the evidence the consideration for that transfer was a debt due by him to her and an agreement on her part to raise money on a loan on the security of the whole section, and out of the proceeds to pay off a mortgage on certain stock which he owned or had an interest in.

There were, it is true, transactions between him and Dunlop in the nature of a partnership in working the lands in question and in the stock acquired in connection therewith, and also certain other transactions between them in respect of which Hursell may have been indebted to Dunlop, but there is nothing to show Dunlop ever had any interest in the east half or that the transfer by Hursell to him was intended to be in satisfaction of any such indebtedness, nor is there anything to show that Hursell ever intended that Dunlop should have any interest in this property. It is true that the mortgage on the stock was not paid by the defendant, but the fact does not in any way affect the *bona fides* of the transfer so long as the intention at the time it was made was that she should pay it.

Counsel for plaintiffs tendered in evidence a letter written by Dunlop to plaintiff Macdonald on 1st January, 1893. This was objected to by defendant's counsel on the ground that it was written after the date of the transfers complained of. I reserved the question, but I now hold that it is not admissible as evidence against the defendant.

Judgment.
Scott, J.

I hold upon the evidence that, at the date of the transfer from Alloway to the defendant, Dunlop was to the knowledge of the defendant in insolvent circumstances, and unable to pay his debts in full.

Plaintiffs Norris & Carey are entitled to a declaration that the transfer from Alloway to the defendant is fraudulent and void as against them. It does not appear to be necessary to go further than this as it was stated on the trial that after the commencement of this action the lands in question had been sold under the mortgage to the Manitoba Mortgage and Investment Company.

Plaintiffs Norris & Carey will have the general costs of the action. Defendant to be entitled to set off against them any extra costs occasioned to her by reason of the joinder of the plaintiffs Macdonald and the Hudson's Bay Company, and by reason of the claim that the transfer from Hursell to her was fraudulent and void.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

CALDWELL v. McDERMOTT.

Promissory note—Endorsement without value — Fraud — Set-off defeated.

Action by an endorsee against the maker and the endorser of a promissory note. Defence that the endorser, for whose benefit the note was made, and who had received the consideration, endorsed it to the plaintiff's brother, who when he was indebted to the endorser, in collusion with the plaintiff, and for the purpose of defrauding the endorser, and preventing him from collecting the sums due by the plaintiff's brother, endorsed the note to the plaintiff without consideration.

Held, that the plea was no defence to the action and must be struck out as embarrassing.

[SCOTT, J., *May 14th, 1895.*

Statement

The plaintiff, among other claims, claimed against the defendants Patrick McDermott and John S. McDermott as maker and endorser respectively of a promissory note for $220. The defendants in their defence admitted the making and the endorsement of the note, but claimed:

2. That it was endorsed by John S. McDermott to one John F. Caldwell, a brother of the plaintiff; that John F. Caldwell knew at the time of the making and endorsement that it was the sole transaction of and for the sole benefit of John S. McDermott; that John F. Caldwell knew that John S. McDermott had received the consideration for which said note was endorsed; that at the time the note was endorsed to John F. Caldwell, and at the time plaintiff acquired it, John F. Caldwell was, as the plaintiff knew, indebted to John S. McDermott in the sum of $105 on account of his half liability for the outstanding debts and liabilities of a partnership theretofore existing between them—John S. McDermott and John F. Caldwell—but which had been dissolved, and which said half liability John F. Caldwell had agreed to pay, but did not do so, and which by reason of his default John S. McDermott was compelled to pay, and John F. Caldwell thereby became indebted to him in the sum of $210.25, and John S. McDermott was still liable to pay a further sum of

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$90 in respect of such half liability; that the plaintiff and John F. Caldwell together colluded and wrongfully and fraudulently planned, contrived and performed a fraudulent means of defeating, delaying and defrauding John S. McDermott from collecting said sums due and owing to him by John F. Caldwell by fraudulently transferring and disposing of by fraudulent sale and endorsement the said note; that plaintiff and John F. Caldwell together have fraudulently transferred and disposed of their property seizable under execution, and John F. Caldwell with the fraudulent intent of defeating, delaying and hindering John S. McDermott in obtaining payment of his said present and future claim, and by the fraudulent means referred to, plaintiff and John F. Caldwell have fraudulently and with fraudulent intent together attempted to defeat and hinder the said John S. McDermott in claiming a set off and counterclaim of said sums of $210.95 and $90.00 against said note.

3. That plaintiff is not a *bona fide* holder for value.

4. That John F. Caldwell when in insolvent circumstances and unable to pay his debts in full, with intent to defeat, delay and prejudice John S. McDermott, his creditor, fraudulently transferred said note to the plaintiff, who had full knowledge of such fraudulent intent, and was a party to same, and was in fraudulent collusion with John F. Caldwell for that purpose contrary to the provisions of chapter 49 of the Revised Ordinances; that, therefore, the transfer of the note to the plaintiff was utterly void, and the plaintiff was not entitled to bring action upon it.

At the trial the plaintiff applied to strike out the paragraphs set out in substance above, on the ground that they were embarrassing and did not disclose any defence to the action. An order was accordingly made, but leave was given to the defendants, upon filing an affidavit alleging the truth of the facts set out in the 2nd paragraph, and also that the partnership therein referred to had been dissolved and the partnership affairs settled and adjusted, and that under such settlement and adjustment John S. McDermott had a valid claim against John F. Caldwell in respect of the partnership

estate to the amount mentioned, and that in order to ascertain the amount of such claim it would not be necessary to inquire into the accounts and dealings of the partnership, to amend their defence by setting up said facts either by way of defence or counterclaim or both. Statement.

In giving judgment on the other issues in the action the question of these defences was dealt with.

P. L. McNamara, for plaintiff. Argument.

S. S. Taylor, Q.C., for defendant.

[*May 14th, 1895.*]

SCOTT, J.—After referring to the facts as set out and the other issues in the action.) My reason for striking out paragraph 2 of the defence was because it appeared to me that so far as appeared by the allegations therein it might be necessary to go into the partnership account in order to ascertain what amount was due in respect thereof by John F. Caldwell to John S. McDermott and I was of opinion that it could not be done in this action. Judgment.

But upon further consideration I must now hold that the matter set out in the second paragraph, even with the further allegations suggested by me when giving leave to apply to amend, would not be an answer to the action.

In *Oulds* v. *Harrison*,[1] which was an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that after the bill became due and before indorsement the drawer was indebted to the defendant in a sum exceeding the amount of the bill, and that the drawee in order to defraud the defendant and in collusion with the plaintiff endorsed the bill to the plaintiff after it became due in order to enable him to sue the defendant and without consideration, and that plaintiff sued merely as the agent of the drawer and in collusion with him, and that the sum due from the drawer to the defendant has not been paid. It was held that this was no answer to the action.

[1] 10 Ex. 572; 3 C. L. R. 353; 24 L. J. Ex. 66; 3 W. R. 160.

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Scott, J.

Parke, B., in his judgment in that case, says: "This plea we think amounts to an averment that both the indorser and indorsee knew that there was a debt due, and that the defendant would probably set it off if the action were brought by the indorser against the defendant . . . but in order to defeat the set off, they fraudulently, so far as it was a fraud in law, and no further, agreed that the bill should be indorsed; and it was therefore indorsed without value to the plaintiff. Although the plaintiff gave no value, the bill is transferred to him by indorsement, and he has a right to sue upon it as much as any indorsee who is the holder for value. There is, therefore, no defect in his title on that account. The only question then is, does the supposed fraud vitiate the title, and in what way? Is it really a fraud though called so? We think it is no fraud. The holder is under no legal obligation to allow the debt to be set off against the claim on the bill, unless he has entered into a contract to that effect to the defendant."

Metropolitan Bank v. *Snure*[2] is a decision to the same effect.

Upon the authority of the two cases referred to I refuse the application to amend.

It appears to me also that the proposed defence is open to another objection, viz., that in order to give effect to the set off or counterclaim sought to be set up John F. Caldwell would be a necessary party to the proceeding, and even if he could be added as a party no steps have been taken to have him added.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[2] 10 U. C. C. P. 24.

MORRIS v. BENTLEY.

Territories Real Property Act—Omission of registrar to enter memorial of mortgage in register—Subsequent mortgagee paying off prior mortgage—Subrogation—Laches—Effect of Memorial—Assurance fund—Section 108—Costs—Several issues—Divided success.

On the 26th September, 1899, one G. applied to the plaintiff for a loan of $500, and executed a mortgage to him of the lands in question of which he was the owner. The plaintiff's advocates made search in the Land Titles Office on the 14th of October, and, ascertaining that the only encumbrance on the register was a mortgage to one P., registered the plaintiff's mortgage and a discharge of the other, which had been obtained on their undertaking to pay the amount due, and the registrar endorsed memorials accordingly on the certificate of title, on receipt of which certificate the plaintiff's advocates paid the amount due to P., and advanced the balance to G. No other memorial appeared on the certificate at the time of the advance nor were the plaintiff's advocates aware of any other incumbrances, but there had in fact been filed with the registrar a mortgage from G. to the defendant B. for $2,000, which had been entered in the day book only.

Subsequently on an application to MAGUIRE, J., under the T. R. P. Act, on behalf of the defendant B. by way of a summons to the registrar and the plaintiff to show cause, it was held that the $2,000 mortgage to B. had been registered within the meaning of the Act at the time of filing, and had priority over the plaintiff's mortgage, and an order was made to amend the memorials on the certificate accordingly. Then default having been made by G. in payment of the mortgage to defendant B. the lands were offered for sale, and a foreclosure order obtained on the 15th September, 1900, notice of application for which having been duly served on the plaintiff.

Held, that the plaintiff was entitled as against the defendant B. to be subrogated to the rights of P. in respect of the mortgage held by him and paid by the plaintiff, and to be entitled to a first mortgage upon the lands in question for the amount thereof with interest: so held, against the contention of the defendants that the question of the plaintiff's priority was *res judicata* either by the judgment of MAGUIRE, J., or the foreclosure order. *Brown* v. *McLean*,[1] and *Abell* v. *Morrison*,[2] followed. Laches discussed.

Held, also, that the endorsement on the certificate of title of the plaintiff's mortgage was equivalent to a certificate that there were no prior encumbrances affecting the land other than those appearing on the certificate, and that the plaintiff was entitled to be paid out

[1] 18 O. R. 533. [2] 19 O. R. 669.

of the Assurance Fund the balance of his claim with interest under sec. 108 * of the Territories Real Property Act.

It is unnecessary for the plaintiff, in order to recover against the Assurance Fund, to show that he has been deprived of any land or any interest therein by the mistake or omission of the registrar, it being sufficient if loss or damage is shewn. Nor is it necessary for the plaintiff to shew that he has been barred from all other remedies before proceeding under sec. 10, it is enough that his principal remedy has been barred. Section 108 discussed. *Oakden* v. *Gibbs*,[1] referred to.

[SCOTT, J., *September 11th, 1895.*

And *held* in a subsequent judgment as to costs, that the plaintiff and the Registrar were both entitled to tax as against defendant B. the costs of the issue as to the right of subrogation, and the plaintiff against the Registrar the other costs of the action.

[SCOTT. J., *September 27th, 1895.*

Statement. Action tried at Calgary before SCOTT, J., against the Registrar of South Alberta as nominal defendant, for compensation out of the Assurance Fund under the Territories Real Property Act, for loss caused by an omission to enter a memorial of a mortgage on the certificate of title; and as to part of the loss against Henry Bentley, the then owner of the lands, under an order of foreclosure of the mortgage in question, claiming to be subrogafed to the rights of a prior mortgagee whose mortgage he had paid.

Argument. *C. F. P. Conybeare*, Q.C., and *G. S. McCarter*, for the plaintiff.

Jas. Muir, Q.C., and *C. C. McCaul*, Q.C., for the Registrar.

Peter McCarthy, Q.C., and *Horace Harvey*, for defendant Bentley.

[1] 8 Vic. L. R.

* 108. Any person sustaining loss or damage through any omission, mistake or misfeasance of the registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and any person deprived of any land or of any estate or interest in land, by the registration of any other person as owner of such land, or by any error, omission or misdescription in any certificate of title, or in any entry or memorial in the register, and who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of such land, estate or interest, may, in any case in which the remedy by action for recovery of damages, as hereinbefore provided, is barred, bring an action against the registrar as nominal defendant, for recovery of damages; . . . (Now s. 106 L. T. Act, 1894).

The statement of claim was in substance as follows: Statement.

On and prior to the 26th September, 1889, William F. Gay was seised in fee simple to his own use of the west half of lot eight, block "H," Lethbridge, and a certificate of title for the said land had been issued to him by the Registrar as No. C. 121.

2. On or about the said day Gay applied to the plaintiff for a loan of $500 upon the security of a mortgage to be made by Gay to the plaintiff upon the said land, and the plaintiff agreed to make such advance upon such security should the title of Gay appear to be good.

3. Thereupon a mortgage was prepared from Gay to the plaintiff upon the said land, securing the said $500, repayable with interest at twelve per centum per annum, and the mortgage was thereupon executed by Gay.

4. Thereafter on or about the 14th October, 1889, the plaintiff caused the title of Gay to be searched in the Land Titles Office, and caused the said mortgage to be duly registered therein; and the mortgage was duly entered and registered in the said Land Titles Office on the 14th October, 1889, and a memorial thereof indorsed upon the certificate of title in the Land Titles Office, and upon the duplicate of the certificate of title held by the plaintiff.

5. At the time of such registration the only encumbrance of which any memorial or notice appeared upon the register of title in the Land Titles Office was a mortgage to one Primrose.

6. There had been, however, filed with the Registrar for registration on the 7th October, 1889, a certain other mortgage made by Gay to Bentley for $2,000, and it was and had been the duty of the Registrar to enter a memorial of the Bentley mortgage upon the said certificate of title prior to the time at which he entered the memorial of the plaintiff's mortgage; nevertheless the Registrar had neglected to enter such memorial of the Bentley mortgage, and the plaintiff had no notice or knowledge of the Bentley mortgage, or that Bentley claimed to have any lien or encumbrance.

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7. After the plaintiff had caused the title to be searched he advanced the amount payable to said Primrose under his said mortgage, being the sum of $307, and procured and registered a discharge thereof; and after the registration of the plaintiff's mortgage the plaintiff advanced to Gay and paid to him the balance of the sum of $500 agreed to be loaned and secured to him by the said mortgage.

8. Afterwards, on or about the 3rd March, 1890, Bentley obtained from the plaintiff the duplicate certificate of title held by him for the purpose of having registered thereon, as he alleged, the mortgage given by Gay to him; the duplicate certificate was afterwards returned to the plaintiff with a memorandum of the Bentley mortgage indorsed thereon; this memorandum, which stated that the mortgage was registered on the said 7th October, 1889, was indorsed upon the duplicate certificate of title and upon the register in the Land Titles Office upon a part thereof subsequent to the indorsement of the memorandum of the plaintiff's mortgage.

9. On the 1st October, 1891, a summons was granted by Maguire, J., whereby the Registrar, Bentley and the plaintiff, were summoned to appear and shew cause why an order should not be made to correct and amend the certificate of ownership No. C. 121, by cancelling the memorial thereon of the mortgage to the plaintiff, and indorsing upon it a new memorial of the said mortgage as of the 14th day of October, 1889, after the memorial of the Bentley mortgage, and for such further or other order as should be deemed meet.

10. Such proceedings were thereupon had and taken, that afterwards on the 10th February, 1892, Maguire, J., ordered and directed that the said Bentley mortgage had priority to that of the plaintiff.

11. The priority of his mortgage being thus established, and Gay having made default in payment thereof, Bentley proceeded under notice of sale to offer the lands for sale by public auction, and the amount due under the Bentley mortgage being in excess of the value of the land, the plaintiff was unable to protect himself or his security, and the land being put up for sale at an upset price was not disposed of,

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and has since been foreclosed and vested in Bentley by an order of MacLeod, J.

12. The plaintiff thus lost all security for the money advanced, together with moneys due thereon for interest and for insurance premiums paid by him for the protection of his security, and Gay having left Canada in insolvent circumstances he is also unable to recover from him under his personal covenant.

13. The plaintiff claims that he has sustained loss and damage through the omission, mistake and misfeasance of the Registrar, his officers and clerks, in the execution of their duties under the Territories Real Property Act, in that he, or they, by his, or their, neglect and omission to complete the registration of the Bentley mortgage, and to enter the same on the register on the 7th October, 1889, and before the registration of the plaintiff's mortgage and the search and examination of title in connection therewith, whereby the plaintiff was then induced to advance the sum of $500 to Gay on mortgage, relying on the correctness of his title and the priority of the plaintiff's mortgage as then shewn on the register, and, relying on such priority, to subsequently pay insurance premiums for keeping up and maintaining insurance for the protection of his security.

14. On the 9th and 23rd June, 1892, three calendar months before bringing action herein, the plaintiff caused notice to be served on the Registrar and the Attorney-General of the Dominion of Canada respectively of his intention to commence this action, and of the cause thereof, claiming in such notice the sum of $500 for principal and $234.77 insurance premiums paid and interest due under the plaintiff's mortgage computed to the 18th May, 1892, making in all $734.77.

15. As to the defendant Bentley, the plaintiff claims that he, the plaintiff, having advanced the moneys necessary for the payment of the Primrose mortgage, which was registered earlier than and had priority over the mortgage of Bentley, is entitled to be subrogated to the rights of Primrose, and to a first mortgage or lien upon the land to the extent of the

Statement.

moneys so advanced by him for the payment of the Primrose mortgage, and for insurance premiums paid by him for the protection of his lien, and for interest on the mortgage moneys from the 14th October,. 1889.

The plaintiff therefore prays:

1. That the Registrar be ordered to pay to him the sum of $734.77, together with interest on the principal sum of $500, to be computed from the 18th May, 1892, to the date of actual payment.

2. Or that it may be declared that the plaintiff is, as against Bentley, entitled to a first mortgage or lien for the sum of $307, with interest thereon from the 14th October, 1889, and the moneys paid by him for insurance premiums; and that the Registrar be ordered to pay to the plaintiff the sum of $200, with interest thereon from the 14th October, 1889, and that the certificate of title granted to Bentley be called in by the Registrar for correction for the purpose of having such lien indorsed thereon.

3. And that Bentley be ordered to pay to the plaintiff the said sum of $307, with interest thereon as aforesaid, together with such other moneys as the plaintiff may be found entitled to recover in respect thereof.

4. And that the defendants (Bentley and the Registrar), or such one or other of them as to this Court may seem meet, shall be ordered to pay the plaintiff his costs of suit.

5. And for such further or other relief as this Court may think meet.

The statement of defence of the Registrar was in substance as follows:

1. This defendant admits the 1st paragraph of the plaintiff's statement of claim, but says that at and prior to the date therein mentioned the land was subject to and charged with the Primrose mortgage, which was duly registered, and so appeared on the said certificate of title.

2. This defendant admits the 2nd and 3rd paragraphs.

3. In answer to the 4th paragraph this defendant denies that the plaintiff's mortgage was duly registered on the 14th

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October, 1889, inasmuch as the memorial then entered in the register and on the duplicate certificate of title did not state the day, hour, and minute of the presentation of the plaintiff's mortgage, for registration as required by section 42 of the Territories Real Property Act, and further says that the plaintiff had thereby notice that the registration of his mortgage was not complete and was put on enquiry; and that the plaintiff did not make or cause to be made any search after the Bentley mortgage had been filed on the 7th October, 1889, and wholly neglected to search or cause to be searched the day-book or day-books prescribed by said Act, in which a memorandum of the filing of the Bentley mortgage was made on the 7th October, 1889.

4. In answer to paragraph 5, this defendant says that notice of the Bentley mortgage appeared in the register on and prior to the 14th October, 1889, to wit, in day-book B., folio 232, No. 1311, which was open to the inspection of the plaintiff, and which it was his duty to have inspected.

5. In answer to paragraph 6 this defendant denies that it was his duty to enter a memorial of the Bentley mortgage upon the register prior to the time at which he entered a memorial of the plaintiff's mortgage, and that the plaintiff before advancing any moneys to Gay on his mortgage had notice of the Bentley mortgage.

6. Of the moneys alleged to have been advanced to Gay by the plaintiff the sum of $320 or thereabouts was paid to Primrose for the purpose of procuring a discharge of his mortgage, which was prior to either the mortgage to Bentley or that to the plaintiff, and Bentley took his mortgage with knowledge of, and the same was subject to the Primrose mortgage; and the plaintiff, by paying off the Primrose mortgage under the circumstances mentioned in the statement of claim, became and was entitled to the amount thereof to stand in the position of Primrose under his mortgage, and was entitled to all the priorities and to be subrogated to all the rights of Primrose as against Bentley, and in equity to be reimbursed by Bentley such sums of money as the plaintiff paid to secure a discharge of the Primrose mortgage; and if

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the plaintiff is not now so entitled to be subrogated and reimbursed as aforesaid, he has lost such rights by his own laches, and in any event the defendant is not liable to pay the amount advanced by the plaintiff to discharge the Primrose mortgage.

7. This defendant denies that the amount due to Bentley on his mortgage was in excess of the value of the lands, or that Gay was in insolvent circumstances when he left Canada.

8. This defendant denies that the plaintiff has suffered any loss or damage through the alleged omission, mistake or misfeasance of this defendant as alleged.

9. The Bentley mortgage, prior to the registration of the plaintiff's mortgage, was only delivered to the defendant to be filed; and the same was so filed as requested by Bentley, and was not delivered or given in to be registered, and in respect thereof there was no omission, mistake or misfeasance on the part of this defendant or any of his officers or clerks in the execution of his or their duties under the provisions of said Act.

10. No notice in writing of plaintiff's action, or the cause thereof, was served upon the Attorney-General of Canada, and upon this defendant three calendar months at least before the commencement of this action, as required by section 108 of the Territories Real Property Act.

11. This defendant will object that it does not appear by the plaintiff's statement of claim that he searched the register at any time after the mortgage to Bentley had been filed.

12. This defendant will also object that it is not stated in the plaintiff's statement of claim, nor does it appear that the Bentley mortgage was given in to the Registrar for registration at any time prior to the registration of the plaintiff's mortgage, and it was not incumbent upon nor the duty of the Registrar to register the Bentley mortgage until the same was given in for registration.

13. This defendant will also object that it is not alleged that the plaintiff searched, or caused to be searched, the day-book or day-books.

14. This defendant will also object that it is not stated, nor does it appear by the plaintiff's statement of claim, that he ever had any estate or interest in the land in question, of which he had been deprived by the alleged omission, mistake or misfeasance of this defendant, his officers or clerks, in the execution of their respective duties under the provisions of said Act. Statement.

15. This defendant will further object that it is not stated, nor does it appear by the plaintiff's statement of claim, that this is a case in which the remedy by action for recovery of damages within the meaning of or as provided by section 108 of the Territories Real Property Act is barred.

16. This defendant will also object that it does not appear from the plaintiff's statement of claim that any application was made by or on behalf of the plaintiff to a Judge or otherwise, to correct or cancel the memorial of the Bentley mortgage and the entry thereof in the day-book, on the ground that the same was simply given in to be and was filed, and not given in for registration prior to the alleged registration of the plaintiff's mortgage as appears by the statement of claim.

The defence of the defendant Bentley was in substance as follows:

1. He admits the 1st, 2nd and 3rd paragraphs of the plaintiff's statement of claim.

2. In further answer to the said 1st, 2nd and 3rd paragraphs, this defendant says that on and prior to the 19th July, 1889, Gay was the owner in fee simple of the said land; and on the said 19th July, 1889, he executed to this defendant a mortgage thereon to secure the indorsation by this defendant of a promissory note of the said Gay and his partner McFarquhar for $1,500, and also securing any further advance that would be made from time to time by this defendant to the said Gay and McFarquhar during the fulfilment of a certain contract; and that this defendant was subsequently forced to pay the full amount of the said promissory note, and at the completion of the said contract there was due to this defendant by the said Gay and McFarquhar

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the sum of $12,476.41 for moneys and goods which had been advanced by this defendant to them on said contract over and above the said note, and more than half of which sum has never been paid; that said mortgage was on the 7th October, 1889, duly filed with the Registrar, and on the same day was duly entered in the day-book, and a certificate of such filing was duly indorsed on the duplicate of the said mortgage as follows:—"Received and filed at 11.10 o'clock a.m. on the 7th October, 1889, No. 1311, D. Book B., folio 232."

3. In answer to the 4th paragraph this defendant denies that the plaintiff's mortgage was duly registered on the 14th October, 1889, inasmuch the memorial then entered on the register and on the duplicate certificate of title did not state the day, hour or minute of the presentation of the plaintiff's mortgage for registration, as required by section 42 of the Territories Real Property Act, and further says that the plaintiff had thereby notice that the registration of his mortgage was not complete and was put on inquiry; that the plaintiff did not make, or cause to be made, any search after the said Bentley mortgage had been filed on the 7th October, 1889, and wholly neglected to search, or cause to be searched, the day-book or day-books prescribed by said Act, in which a memorial of the filing of the Bentley mortgage was made on the 7th October, 1889.

4. In answer to the 5th paragraph this defendant says that notice of the Bentley mortgage appeared in the register on and prior to the 14th October, 1889, to wit, in day-book B., folio 232, No. 1311, which was open to the inspection of the plaintiff, and which it was his duty to have inspected.

5. In answer to the 6th paragraph this defendant says that the mortgage is the mortgage set forth in the 2nd paragraph hereof.

6. In answer to the 7th paragraph this defendant says that if the plaintiff ever did pay the amounts mentioned therein (which this defendant denies), he, the plaintiff, had notice of this defendant's mortgage prior to making any such

payments, and only made such payments after he had become aware of the plaintiff's mortgage, and that the plaintiff made such payments voluntarily and with notice and knowledge as aforesaid. Statement.

7. This defendant admits the truth of the facts alleged in the 8th, 9th and 10th paragraphs, and says that the plaintiff ought not to be admitted to say that he is as against this defendant entitled to a first mortgage or lien on the said lands prior to this defendant's mortgage, or to have any claim against this defendant for repayment of the said moneys, because, by reason of the facts set forth in the said 8th, 9th and 10th paragraphs, and the judgment of McGuire, J., which still remains in full force, the plaintiff is estopped from setting up the claims sought to be enforced against this defendant, or in respect to the land in question in this action.

8. This defendant admits the truth of the facts alleged in the 11th paragraph, and says that the plaintiff had notice and knowledge of all the proceedings set forth in the said paragraph; and that the said foreclosure and vesting order therein mentioned was a judgment of this Court, and is still in full force, and that by reason thereof the plaintiff is estopped from setting up the claims sought in this action to be enforced against this defendant or in respect to the said land.

9. This defendant repeats the 7th and 8th paragraphs hereof, and further says that the money advanced, if any, under the plaintiff's mortgage was voluntarily advanced by him after the registration of the Primrose mortgage, and after the filing in the Land Titles Office of this defendant's mortgage, and was a voluntary payment made by the plaintiff for and on behalf of Gay, and that the plaintiff had notice of the filing of the defendant's mortgage; and so this defendant says that the plaintiff is not for the reasons aforesaid entitled to any priority over the defendant's mortgage for any sum whatever.

10. This defendant will object that the statement of claim does not shew any cause of action against this defendant personally whereby the plaintiff is entitled to an order against

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this defendant for the payment of any sum whatever, or that this defendant is personally liable to the plaintiff for the repayment of any of the moneys advanced by the plaintiff under his said mortgage.

Reply to the defence of the Registrar:

1. As to the 3rd paragraph of the Registrar's statement of defence, that if the registration of the plaintiff's mortgage was in any way incomplete or defective, which he denies, such omission was due to the omission and neglect of the Registrar, his officers, clerks or representatives, in omitting and neglecting to complete the memorial of said mortgage, which it was his duty to indorse on the register, and the duplicate certificate of title then presented to him, by stating in such memorial the day, hour and minute of the presentation of the plaintiff's mortgage to him for registration, as it was his duty to do; and it had been, and then was, a common and usual practice of the Registrar to indorse memorials or mortgages upon the register and upon the duplicate certificate of title without stating in such memorials the day, hour and minute of the presentation of the mortgages therein referred to, to him for registration; and in consequence thereof there was nothing in the omission of the Registrar in completing the memorial of the plaintiff's mortgage to put the plaintiff on inquiry, and the plaintiff charges that the Registrar is thus estopped from setting up the defence contained in said paragraph.

2. Further in regard to the said paragraph, that by an order of Maguire, J., bearing date the 10th February, 1892, it was ordered that the memorials in the register and on the certificate of title relating to the plaintiff's mortgage should be amended by the Registrar; and the memorial was shortly after the making of the order, and before the commencement of this action, so amended by the Registrar in pursuance of such order.

3. As to the 5th paragraph the plaintiff denies that he, before advancing any moneys to Gay on his mortgage, had notice of the Bentley mortgage.

4. And as to the 16th paragraph, that the Bentley mortgage having been by the Registrar entered on the day-book on the 7th October, 1889, the plaintiff believed that such mortgage was on such date given in for registration, having no knowledge or information to the contrary. Statement.

5. The plaintiff joins issue.

[*Sept. 11th, 1895.*]

SCOTT, J.—On the 26th Sept. 1889, one Gay was the registered owner of the west half of lot 8, block H, in the town of Lethbridge, subject to a mortgage thereon to one Primrose, to secure $300 and interest. On that date Gay applied to the plaintiff for a loan of $500 on the security of the property. Plaintiff agreed to advance the amount, and a mortgage on the property to secure the amount was executed by Gay and forwarded to the agent of the plaintiff's advocates at Calgary. Judgment.

After receiving the same the agent on the 14th day of October, 1889, made a search at the Registry Office, and having ascertained that the only incumbrance appearing in the Register therein as affecting the property was the Primrose mortgage, registered the plaintiff's mortgage, together with a discharge of the Primrose mortgage, which plaintiff's advocates had obtained upon their undertaking to pay the amount due on the mortgage in case the title proved satisfactory. At the same time the agent handed to the Registrar the certificate of title issued to Gay.

The Registrar thereupon registered the plaintiff's mortgage and the discharge of the Primrose mortgage, and indorsed memorials thereof on the certificate of title.

On receipt of the certificate of title with the memorials so indorsed, plaintiff's advocates paid the Primrose mortgage and advanced the balance of the mortgage moneys to Gay.

At the time of such payment and advance the certificate of title contained no memorial or memorandum shewing that there was any incumbrance upon or affecting the property other than the plaintiff's mortgage, nor had the plaintiff no-

Judgment.
Scott, J.

tice, nor was he aware that there was any other incumbrance affecting the property, and I find that the plaintiff advanced the mortgage moneys to Gay relying upon the fact that the certificate of title disclosed no other incumbrance.

There had, however, been filed with the Registrar on the 7th Oct., 1889, a mortgage made by Gay to defendant Bentley on the same and other property, to secure $2,000 and interest, which mortgage had been entered by the Registrar in his day-book, but no memorial thereof or memorandum relating thereto was entered or made in the register or upon Gay's certificate of title until March, 1890, when the certificate of title having been produced to him by or on behalf of the defendant Bentley, the Registrar indorsed thereon, and upon the duplicate in the registry, a memorial of such mortgage under the memorial thereon of the plaintiff's mortgage.

In none of the memorials indorsed upon the certificate of title or upon the duplicate thereof in the Registry Office, except in that of the Bentley mortgage, was the day, hour, or minute of the filing of the documents stated.

On the 1st October, 1891, defendant Bentley obtained from MAGUIRE, J., a summons calling upon the Registrar and plaintiff to shew cause why an order should not be made directing the Registrar to correct and amend the certificate of title by cancelling the memorial of plaintiff's mortgage and indorsing upon the certificate a new memorial of plaintiff's mortgage as of Oct. 14th, 1889, after the memorial of defendant Bentley's mortgage.

The learned Judge upon that application held that defendant Bentley's mortgage was registered at the time of filing, on the 7th Oct., 1889, and therefore, had priority over the plaintiff's mortgage, and ordered that the Registrar should amend the memorials upon the certificate of title by stating the time of registration of the documents therein referred to. This amendment was afterwards made.

Default having been made by Gay in payment of his mortgage to defendant Bentley, the latter, after due notice to

Judgment.
Scott, J.

the plaintiff and Gay, caused the lands comprised therein to be offered for sale, and same remaining unsold afterwards, upon notice to the plaintiff applied for, and on 15th September, 1892, obtained an order for foreclosure under the provisions of section 81 of the Territories Real Property Act, which order was duly registered and a certificate of title to the lands comprised was issued to him thereon.

I find that the Registrar omitted to enter the memorial of the Bentley mortgage in the register at the time of the filing thereof, under the belief that the filing thereof without the production of the certificate of title was not a registration thereof.*

I find that the plaintiff paid and discharged the Primrose mortgage under the mistaken belief that there was no other incumbrance affecting the land prior to his mortgage, and that by payment and discharge of the Primrose mortgage he was obtaining a first mortgage upon the lands.

I find that at no time subsequent to the registration of the Bentley mortgage was the property comprised therein of sufficient value to realize the amount secured thereby.

I also find, if necessary so to do, that from the time that plaintiff first learned that the Bentley mortgage had been filed, up to and after the commencement of this action, Gay was in insolvent circumstances, and the plaintiff could not have recovered from him the amount advanced upon his mortgage.

The plaintiff seeks to recover from the assurance fund created by the Act the damages sustained by him by reason of the Registrar's omission, and also claims as against defendant Bentley a declaration that he is entitled to a first mortgage or lien on the property comprised in the Primrose mortgage for the amount paid by him in satisfaction of that mortgage.

It will be convenient to first consider the claim of the plaintiff to be subrogated to the right of Primrose under his mortgage.

* See now Land Titles Act, 1894, 57-58 Vic. c. 28, s. 33 (2).

Judgment.
Scott, J.

Following the principle laid down in *Brown* v. *McLean*,[1] and in *Abell* v. *Morrison*,[2] the plaintiff is, in my opinion, entitled as between defendant Bentley and himself, to stand in the position of Primrose in respect to the security held by him. The circumstances of the present case are much stronger in favor of the plaintiff than those of the cases referred to, inasmuch as in this case the mistake of plaintiff was not caused by any neglect or omission on his part.

But it is contended that the question of plaintiff's priority over defendant Bentley in respect of plaintiff's rights under the Primrose mortgage is *res judicata;* first, by the judgment of MAGUIRE, J., and 2nd by the order of foreclosure obtained by defendant Bentley.

I cannot agree with the first contention. The order of MAGUIRE, J., was merely a direction for the guidance of the Registrar, and the learned Judge on that application could not enter into or dispose of any question affecting the equitable right of the parties.*

Nor can I uphold the second contention, though I am not free from doubt with respect to it. The effect of an order for foreclosure under section 81 is to cut out the equity of right of redemption. It cannot affect the right of persons claiming under incumbrances prior to that under which it was obtained. The plaintiff's mortgage was undoubtedly cut out by the order; but he is not claiming under that mortgage. His claim is to be established as a prior incumbrance. His right to be so established could in no sense be looked upon as a right or equity of redemption, and as such barred by the order for foreclosure. Hence I think he was not bound, in order to preserve his right, to oppose the application for the order.

It was also contended by defendant Bentley that the plaintiff had by his laches and delay forfeited any right he may have had to be subrogated, and *McLeod* v. *Wadland*[4] was

* This same view was subsequently sustained in *Wilkie* v. *Jellett* 2 Terr. L. R. 133; 26 S. C. R. 282; and see note to *Re Rivers*, 1 Terr. L. R. 464.

[4] 25 O. R. 118.

cited in support of that contention. The judgment in that case is based on the fact that there was not only a delay of four years on the part of the plaintiff in enforcing his claim, but there was also such acquiescence on his part in the defendant's priority, that it would have been a fraud on the defendant to deprive him of his legal right; and there was the additional fact in that case that during the interval between the acquiring of the right, and the proceedings to enforce it, the property had depreciated in value and the mortgagor had become bankrupt. In the present case no such depreciation has been shewn, nor has the position of the parties been materially altered since the right accrued, nor has the delay been excessive. I, therefore, think that the laches of the plaintiff has not been such as to debar him from enforcing his right, and I hold that the plaintiff is entitled as against the defendant Bentley to stand in the position occupied by Primrose under his mortgage at the time of the payment and discharge thereof by the plaintiff, and to a first lien or mortgage to the amount thereof and the interest thereon on the lands mentioned in the pleadings.

Judgment.
Scott, J.

Plaintiff's claim against the assurance fund is under section 108 of the Act referred to. Using the words of the section as they appear in the statute, the following is the construction which I think should be placed upon it.

"108. (1) Any person sustaining loss or damage through any omission, mistake or misfeasance of the Registrar, or of any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and

(2) Any person deprived of any land or of any estate or interest in land by the registration of any other person as owner of such land, or by any error, omission or misdescription in any certificate of title, or in any entry or memorial in the register, and who by the provisions of this Act is barred from bringing an action of ejectment, or other action for the recovery of such land, estate or interest

"may in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred, bring

Judgment.
Scott, J.

an action against the Registrar as nominal defendant for the recovery of damages," etc., etc.

The words "And who by the provisions of this Act, etc.," refer merely to persons deprived of land or of an estate or interest therein, and do not refer to the person mentioned in the first clause of the section, viz., persons sustaining loss or damage through any omission, etc., of the Registrar, etc.

It is, therefore, in my view, unnecessary that the plaintiff should in order to recover under this section shew that he was deprived of land, or of any estate or interest therein, by the mistake or omission.

If it had been the intention to confine the remedy under section 108 to persons deprived of land, or an estate or interest therein, I cannot but think that such intention would have been made plainly apparent, and that the section would have been simpler in its form and would not have contained unnecessary words. An "error, omission or misdescription in any certificate of title, or in any entry or memorial in the register" must result from the omission, mistake or misfeasance of the Registrar, or some of his officers, and such errors and omissions having been provided for in the first part of the section the words quoted would, therefore, be unnecessary.

Section 112 enacts that the assurance fund shall not be liable for compensation for any loss, damage or deprivation in certain cases.

The use therein of the words "loss" and "damage" in addition to the word "deprivation" supports the view that in certain cases not therein provided for, the fund may be liable for loss and damage where there has not been any deprivation.

I see no reason why mortgagees who have sustained loss or damage by the mistake or omission of the register, even though not thereby deprived of an interest in land, should be excluded from the benefit of the assurance fund, nor why so far as the fund is concerned any distinction should be drawn between them and the persons deprived of an interest

Judgment.
Scott, J.

in land. If it were held that the mortgagees were so excluded, a mortgage would at best be but a perilous security.

Counsel for the Registrar referred me to a decision in the Victoria Court (*Oakden* v. *Gibbs*[3]) upon a section of the Victoria Act in some respects analogous to section 108 of our Act, in which it was held that similar words in the section of the Victoria Act restricted the remedy against the assurance fund to persons deprived of land, or an estate or interest therein, but in the judgment in that case, particular stress is laid upon certain words in the section of the Victoria Act, which do not appear in section 108, as indicating an intention so to restrict its operations.

In that case, Higinbotham, J., dissented from the judgment of the majority of the Court as to the construction to be placed upon the section in question, and in construing section 108 as I have done, I have to some extent adopted his construction as being, in my view, the more reasonable one.

By the terms of section 108 the remedy under it is applicable only to cases where "the remedy by action for recovery of damages as hereinbefore provided is barred." It was contended on behalf of the Registrar that the words "as hereinbefore provided" referred to sections 104 and 105, and that as the effect of these sections was to bar only certain actions by persons deprived of land or an estate or interest therein, the right of action under section 108 must be confined to persons so deprived.

I see no reason for holding that the words "as hereinbefore provided" refer only to the actions barred by sections 104 and 105, if any remedies which a person might otherwise have had are barred by any of the other provisions preceding section 108. Section 32 * as effectually bars the remedy against the Registrar in certain cases for certain acts and omissions as any remedy is barred by section 105, and the

* 32. The registrar shall not, nor shall any deputy registrar or any person acting under authority of the registrar, be liable to any action or proceeding for or in respect of any act *bona fide* done or omitted to be done in the exercise or supposed exercise of the powers given by this Act, or any order or general rule made in pursuance of this Act. (Now s. 134 L. T. Act, 1894).

Judgment. Scott, J.

words referred to are, in my view, applicable as well to section 32 as to section 105.

The loss sustained by the plaintiff was occasioned by the Registrar having *bona fide* omitted to do an official act which he should have done. But for the provisions of section 32 the plaintiff would have had a right of action against him for the loss sustained, and in such action, it would not have been necessary for plaintiff to shew that he had exhausted his personal remedy against the mortgagor. The remedy under section 108 is confined to cases where the remedy by action for damages is barred by the preceding provisions. I see no reason for holding that, in order to entitle plaintiff to recover, all his remedies, whether direct or indirect, should have been so barred. In my view it is sufficient for him to shew that his principal remedy, viz., that against the Registrar has been barred.

Upon referring to the Victorian and New South Wales Acts, I find that in the sections thereof analogous to section 108 of our statute, the words used are "in any case in which the remedy by action for the recovery of damages as hereinbefore provided is inapplicable." Why the word "barred" is used in our Act instead of "inapplicable" I cannot understand. In no case in our statute is the remedy by action for the recovery of damages, entirely barred. It is only barred as against certain persons, viz., against the Registrar and his officers in certain cases by section 32, and against purchasers and mortgagees in good faith for value by section 105. A person sustaining loss by deprivation or otherwise may have other remedies direct and indirect, which are not in any way barred by the statute, and if it were to be held that, to entitle a person to recover under section 108, all his remedies would be barred by the provisions of the statute, the assurance fund would be well guarded from attack.

It was contended by counsel for the Registrar that under sections 40 and 42 of the Act the Bentley mortgage could not be deemed to be registered on 7th October, 1889, inasmuch as documents must be registered in the order in which they are presented for registration, and that the evidence shews

Judgment.
Scott, J.

that it was not given in for registration on that date; that the plaintiff with knowledge through his agent of the circumstances under which it was handed in was negligent in not presenting the facts to Mr. Justice MAGUIRE on the hearing of the application to him, and that by reason of such negligence, the plaintiff lost priority over Bentley.

The evidence of Mr. Barker, who was acting as Registrar at the time the Bentley mortgage was handed in, is not clear as to what occurred at that time. His recollection is that he refused to take the document because a certificate was not produced for a portion of the lands comprised, and that Mr. West, who brought in the document, then asked him to receive and file it as to a portion of the land comprised which was not under the Act; that he then received it, and entered in the day-book a description of all the lands comprised, and that at the time he received the mortgage Mr. West told him he would procure the certificate of title in order to procure its registration.

Accepting Mr. Barker's statement, I think there was sufficient tender of the document for registration at that time. The refusal to accept must have been preceded by a tender or handing in for the purposes of registration, and the reason for refusing it was as already has been decided by Mr. Justice MAGUIRE, untenable. I cannot see that there is anything in the circumstances under which the document was tendered which, if they had been submitted to Mr. Justice MAGUIRE, would have led him to arrive at a different conclusion.

It was also contended that it was not alleged or proved that any abstract of title had been demanded by plaintiff under section 30 of the Act, plaintiff having relied upon a search.

It is open to question whether under section 30 plaintiff was entitled to obtain an abstract shewing all the uncancelled instruments affecting the land. It might reasonably be contended that he must point out the instruments of which he requires an abstract, and that the Registrar could not be compelled under section 30 to certify that there were no such instruments, or that certain instruments and no others affected the lands.

Judgment.
Scott, J.

But I have already held that plaintiff relied upon the state of the certificate of title, which shewed his mortgage and no other incumbrances affecting the lands, and I hold that he was justified in so relying, and that the indorsement by the Registrar of the memorial of plaintiff's mortgage was equivalent to a certificate that there were no prior incumbrances affecting the land, other than those appearing upon the certificate of title.

It was further contended that the plaintiff in this action is relying upon the search made by him, and does not complain of the omission of the Registrar to enter the memorial of the plaintiff's mortgage, but in my view, clause 6 of the statement of claim shews that such omission is relied upon by the plaintiff as a ground of action.

It was also contended that even if plaintiff was relying upon the state of the certificate of title, he would not be entitled to recover, because, (1) section 43 provides that the entry of the memorial on the certificate of title is only evidence of the due registration of the instrument, and could have no other effect; and (2) because there was no new certificate issued, or no re-dating of the certificate, and the certificate only shews that Gay had a good title on the date on which it was issued.

Section 43 does not provide that the entry of the memorial shall be evidence of registration. It provides that the certificate indorsed upon the instrument registered shall be evidence of its registration. What then is the object of indorsing upon the certificate of title a memorial of an instrument affecting the lands? Is it not to give notice to those dealing with them that they are so affected, and to what extent they are affected?

It is unnecessary for me to deal with the second branch of this contention, in view of the fact that I have already held that the indorsement of the certificate of the plaintiff's mortgage, was equivalent to a certificate that there were no prior incumbrances affecting the land, other than these appearing in the certificate of title.

It was also contended that the evidence shews that there was an agreement on the part of the defendant Bentley to

take an assignment of plaintiff's mortgage, which agreement plaintiff could have enforced. Judgment. Scott, J.

It is true that an offer was made by the defendant Bentley to take over the plaintiff's mortgage, but it does not appear that this offer was accepted or that there was any agreement to that effect entered into.

The acceptance of Bentley's offer might possibly have opened for plaintiff an avenue of escape from loss, but I think he was not bound to take that course, and that his omission to do so should not debar him from recovering in this action as against the assurance fund. Even though he may at that time have known that his mortgage was a doubtful security, he was entitled to rely upon it, and refuse to dispose of it.

Even if there had been a valid agreement on the part of Bentley to take over the mortgage, the plaintiff's failure to enforce it, does not, in my view, preclude him from claiming against the assurance fund, because as I have already stated, section 108 does not provide that all remedies by action for damages shall have been barred by the statute in order to entitle a person to claim against the funds.

It was also contended that the plaintiff should have proceeded under sections 114, 115, 116, 117, but I do not see how such a proceeding would have availed him, because in it the equitable right of the parties could not have been entered into or disposed of.

Holding the views I have expressed, I find that the plaintiff is entitled to payment against the Registrar for the amount of his mortgage, less the amount for which I have already held him entitled to a charge upon the lands comprised therein in respect of the Primrose mortgage. It was agreed at the trial that if plaintiff was found entitled to recover against the Registrar, he was to be entitled to the interest on the amount from the 1st January, 1890. The amount paid to discharge the Primrose mortgage was $307, leaving a balance of $193, which with interest from the date mentioned, amounts to $259.60, for which plaintiff will take judgment against the Registrar.

Judgment.
Scott, J.

The matter of costs was subsequently dealt with as follows:

[*September 27th, 1895.*]

SCOTT, J.—The position of the parties is practically as follows:—

Plaintiff says, "I claim from the Registrar the full amount of my loss. I also claim that I am entitled to a mortgage on Bentley's lands for a portion of my loss, and if this latter claim is established, then I claim from the Registrar only the portion of my loss in excess of the mortgage."

The Registrar says, "I am not liable for any portion of the loss. Bentley's lands are liable for a portion of it, and if I am liable at all, I am only liable for the portion in excess of the amount chargeable on Bentley's lands."

Bentley says, "My lands are not liable."

Plaintiff and Registrar, therefore, both affirm, and Bentley denies that his lands are liable. Bentley having failed in his defence, he should pay the costs both of the plaintiff and the Registrar of that issue.

Bentley's lands having been found liable for the mortgage, plaintiff succeeded against the Registrar only for the portion of his loss in excess of the mortgage, such portion amounting to over $200. The Registrar contends that, having succeeded against plaintiff to the amount of the Bentley mortgage, he should have costs against plaintiff in respect of that portion of the claim, but I think he is not entitled to anything more than his costs against Bentley in respect of it.

Plaintiff also claimed a personal remedy against Bentley for the amount of the Primrose mortgage. Bentley disputed his liability and plaintiff failed to establish it. The question was not raised at the trial, and the costs of that issue are so small that I need not consider them.

Plaintiff will tax as against Bentley, such costs of the action as were incurred in respect of the claim for subrogation, and as against the Registrar, the other costs of the action.

The Registrar will tax as against Bentley, the costs incurred in respect of plaintiff's claim for subrogation.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

CRAIG v. NEW OXLEY RANCHE CO.

Costs—Taxation—Review—Abortive and irregular proceedings—Insufficient affidavit on production—Several subpœnas.

It is not open to a party on taxation of costs to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows: (1) the costs of an order *de bene esse*, irregularly obtained were allowed to defendant where no application had been made to set it aside, and plaintiff's advocate had attended on the examination;

(2) The costs of an insufficient affidavit on production where an application for a better affidavit had been dismissed and no appeal taken;

(3) The costs of an order to examine plaintiff issued *ex parte* and without notice, where an application to set it aside had been refused and the grounds of the refusal were not shewn on the review.

A subpœna for each of several witnesses may be allowed where they reside in different parts of the country, and the same original cannot be conveniently produced to them all.

[SCOTT, J., *September 28th, 1895.*

Statement. Review of taxation of defendant's costs; the nature of the objections sufficiently appear from the judgment.

Argument. *C. F. Harris*, for plaintiff.

C. C. McCaul, Q.C., for defendant.

[*Sept. 28th, 1895.*]

Judgment. SCOTT, J.—First item: Costs of order for examination of Hill *de bene esse*. Objection: that order was obtained *ex parte* and was irregular. I overrule the objection as it is shewn that no application was made to set aside the order and that plaintiff's advocate attended on the examination under it.

Second item: Costs of affidavit on production of A. R. Springatt. Objection: affidavit insufficient and false, misleading and fraudulent, etc. I overrule this objection. In my view the affidavit was insufficient, but it appears that plaintiff applied for a better affidavit, and that his application was dismissed with costs. The grounds of dismissal of the application do not appear, but as plaintiff did not appeal from that order I think the objection is not open to him.

Judgment.
Scott, J.

Third item: Costs of order to examine plaintiff at Maple Creek. Objection: Order issued *ex parte* and without notice, sharp practice contrary to the terms of an agreement between advocate for parties, abortive and without result and abuse of process of the Court.

Plaintiff applied to set the order aside and his application was refused with costs. All the objections, except that it was an abortive proceeding, could have been and probably were taken and disposed of on that application. If they were not taken then I think it is now too late to take them.

The proceeding appears to have been abortive because plaintiff did not attend, though he appears to have been duly called upon. In the absence of any information as to the grounds upon which the application to set aside was refused, I cannot find that defendant is not entitled to the costs of the order taxed to him. I therefore overrule the objection.

Third item: Two subpœnas issued, each for one person. Objection: Only one should have been issued.

The clerk finds that it was necessary, one for service south and the other for service north of Macleod.

English Rule 511 provides that every subpœna other than a subpœna *duces tecum* shall contain three names where necessary or required, but may contain any larger number of names.

I think this rule means that a party may issue one subpœna for each three witnesses, but where witnesses reside in different parts of the country, and the same original cannot reasonably be produced to them all as required by English Rule 514,[1] the clerk may in his discretion allow for extra subpœnas. I therefore overrule the objection.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[1] J. O. 1893, s. 268; J. O. 1898, C. O. 1898, c. 21, r. 289.

ALLISON v. CHRISTIE.

Costs—Review of taxation—Scale of—Action for detention of goods —Judgment for return—Miscellaneous items—Previous taxation not appealed against.

Plaintiff in an action for detention of a horse alleged to be of the value of $1,000, recovered judgment for its return and $10 for damages.

Held, against the contention of the defendant that costs should be taxed as in an action under $100, or in the lower scale of the tariff, that in the absence of evidence to the contrary the value alleged in the statement of claim should be treated as the real value for purposes of taxation.

The following items were allowed to plaintiff against the contention of the defendant:

1. Instructions for affidavit of writ of replevin.
2. Two separate affidavits on production by co-plaintiffs where they resided in different parts of the country.
3. An order postponing trial on application of defendant on terms of payment of costs taken out by plaintiff where defendant had neglected to take out order.

An application by the defendant to have deducted from the bill certain costs of the day, claimed to have been improperly allowed on a previous taxation not appealed from, was not entertained.

[SCOTT, J., *September 28th, 1895.*

Statement. Review by defendant of taxation of plaintiff's costs. The objections taken appear from the judgment.

Argument. *C. F. Harris*, for plaintiff.

C. C. McCaul, Q.C., for defendant.

Judgment. SCOTT, J.—Objection is made to the whole bill on ground that costs should be taxed as in an action under $100; or, if not, then in the lower scale of the tariff.

The action is for the detention of a horse which statement of claim alleges to be of the value of $1,000. The affidavit upon which writ of replevin issued alleges that it was of that value.

Plaintiff obtained judgment for return of the horse with $10 damages for its detention.

At the trial there was evidence that the horse was not well when it was delivered to the defendant some months before the action brought, and that it died shortly after having been replevied. Beyond this there was no evidence of value.

In the absence of further evidence contradicting the allegation as to the value contained in the affidavit, I think the

Judgment.
Scott, J.

value there stated should be treated as the real value at least for the purposes of taxation of costs.

I, therefore, overrule the objection.

Item: Instructions for affidavits for writ of replevin. Objection: This is not a special affidavit.

I overrule the objection.

Items: Two affidavits on production allowed, one by each plaintiff. Objection: Both could have joined in one affidavit.

The plaintiffs resided in different parts of the country. Such being the case, I think it was not unreasonable to allow for an affidavit made by each. It appears that both were sworn at Macleod, but on different days. It was not shewn that they were present at Macleod on the same day. I overrule the objection.

Items: Defendant obtained leave to amend defence on terms of postponement of trial and payment of costs of the day. Upon costs being taxed, defendant refused or omitted to pay and did not take our order. Plaintiff, therefore, had to take out an order for judgment for the costs. This is objected to as unnecessary. I overrule the objection.

Items: Plaintiff Allison subpœnaed his co-plaintiff Mudiman as a witness. The defendant now contends that the fees for this subpœna are not taxable against him.

At the time of the trial the two plaintiffs were represented by different advocates on the record. Under these circumstances I think that Allison was reasonably justified in issuing a subpœna to insure the attendance of his co-plaintiff as a witness. I overrule the objection.

Defendant also applies to have deducted from this bill the amount of certain costs taxed against him as costs of the day on a previous taxation, on ground that same should not then have been allowed.

I cannot entertain this application. If costs were improperly allowed the former taxation, he should have appealed against it. To allow his application would practically be allowing an appeal from that taxation long after the time for appeal had expired.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

THE QUEEN v. LALONDE.

Criminal law—Habeas corpus — Summary conviction — Warrant of commitment—No conviction alleged—Prisoner discharged.

On an application for a writ of *habeas corpus*, and for discharge of prisoner, detained in custody, under a warrant of a Justice of the Peace in Form V. Criminal Code, sec. 596 (committal for trial), the warrant did not allege a conviction but only that the accused had been charged before the justice. The conviction upon which the warrant was issued was admittedly bad, but an amended conviction was returned to the clerk by the justice after the argument.

Held, that where a warrant of commitment upon a conviction does not allege that the prisoner has been convicted of an offence, the conviction cannot be referred to in order to support the warrant.

Order made discharging prisoner.

Semble, that had the warrant shewn the prisoner to have been convicted of some specific offence, even though insufficiently stated, the conviction could have been referred to to support it.

An application to discharge a prisoner held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view to supporting the warrant, if the prisoner has been actually brought up on a *habeas corpus*, *aliter* where he has not been brought up.

[SCOTT, J., *November 15th, 1895.*

Argument.

J. C. F. Bown, for the prisoner.

N. D. Beck, Q.C., Crown Prosecutor, shewed cause.

[*November 15th, 1895*]

Judgment.

SCOTT, J.—Defendant on 1st November, 1895, obtained a *rule nisi* calling upon all parties concerned to shew why a writ of *habeas corpus* should not issue, directed to the keeper of the common gaol at Fort Saskatchewan, to bring up the body of the defendant, and why, in the event of the summons being made absolute, he should not be discharged without the writ of *habeas corpus* actually issuing, and without his being personally brought before a Judge of the Court.

Judgment
Scott, J.

The warrant of commitment under which the defendant was detained in custody is as follows:

"Canada,

"North-West Territories,

"District of Alberta.

"To the Constable of the N.W.M.P., Wetaskiwin, and to the keeper of the common gaol at Fort Saskatchewan, in said District of Alberta.

"Whereas Leon Lalonde was this day charged before me John F. McNamara, one of Her Majesty's Justices of the Peace, in and for the said District of Alberta, on the oath of Edward Nunely, constable N.W.M.P., and others, for that he did Wednesday, the 16th day of October, 1895, kindle a fire and allow it to escape from his control.

"These are therefore to command you the said constable to take the said Leon Lalonde and him safely to convey to the common gaol, Fort Saskatchewan, aforesaid, and there to deliver him to the keeper thereof, together with this precept.

"And I do hereby command you the said keeper of the said common gaol, to receive the said Leon Lalonde into your custody in the said common gaol, and there safely keep him until he shall thence be delivered by the course of law.

"Given under my hand and seal this 23rd day of October, in the year 1895, at Wetaskiwin, in the said District aforesaid.

"Sgd. John F. McNamara. (seal)"

Mr. Beck, who shewed cause, admitted that the warrant was bad, and could not be upheld, but claimed that if the conviction was good, or if a good conviction could be made, the warrant can and should be amended, and asked that the application should stand over until the justice had returned a proper record of conviction to the clerk.

Judgment.
Scott, J.

Mr. Bown, in support of the rule, contended that the application should not stand over for that purpose, and cited *Re Tinson*.[1]

Since the argument, the justice has returned an amended record of conviction to the clerk of the Court.

In *Re Tinson*[1] it was held that when a prisoner is brought up under a writ of *habeas corpus*, and the warrant is insufficient, and the conviction has not been brought up by *certiorari*, the Court is not justified in looking at the conviction for the purpose of amending the warrant by it, nor in detaining the prisoner in custody until the conviction is brought up.

This decision is not applicable to the present case, because here the prisoner is not brought up by *habeas corpus*. This is merely an application for the issue of such a writ.

In Paley on Convictions, 6th ed., pp. 344, 345, it is laid down that "if a warrant of commitment in execution, manifestly defective on the face of it, shews that there has been a conviction, the Court will not notice the defect, until the conviction is returned into Court, if the defect be one that the conviction may cure, and if the applicant is in a position to remove the conviction by *certiorari*." The language in *Re Tinson*[1] clearly shews that the Court merely decided that after the prisoner had been brought up and application had been made for his discharge, such application must be disposed of without waiting for the conviction to be brought up by *certiorari*.

The amended record of conviction has been returned by the clerk presumably either under section 102 of the N. W. T. Act, or under section 888 of the Criminal Code.

In either case it is properly in Court, and being in Court it is there for all purposes. A *certiorari* to bring it up is therefore unnecessary.

I am, however, unable to find any authority to support the contention that the conviction may be referred to in order to support the warrant in this case.

[1] 39 L. J. M. C. 129; L. R. 5 Ex. 257; 22 L. T. 614; 18 W. R. 849.

Judgment.
Scott, J.

Section 886 of the Criminal Code enacts that "No warrant of commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted and there is a good and valid conviction to sustain the same. The warrant in question manifestly does not come within this section, because it does not allege that the defendant has been convicted.

The words I have already quoted from Paley on Convictions shew that defects in a warrant will not be noticed until the conviction is returned, provided the warrant itself shews that there has been a conviction.

In the same work, at page 344, it is laid down that it is not "necessary in the warrant to state the conviction in a precise or technical form; but only so as to shew that the party has been convicted of some specific offence."

Had the warrant alleged that there had been a conviction, it may be that the conviction could have been referred to in order to support it, even though the offence were insufficiently stated in the warrant; but, as it contains no such allegation, I must hold in the absence of any authority to the contrary that the conviction cannot be referred to.

An order will, therefore, issue for the discharge of the defendant.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

ALLAN v. KENNEDY.

Practice—Application for administration—Order to render proper account under O. 55, R. 10a (Eng.) — Affidavit verifying — Not filed—Application to cross-examine.

Upon an application for administration an order was made under English O. 55, R. 10*a*,* that the application stand over for six weeks, and that the defendant within one month render to the plaintiff a proper statement of his accounts and dealings with the estate, which was duly furnished and verified by affidavit. The plaintiff did not appear on the further hearing of the application, and some months had elapsed when this application was made to cross-examine the defendant on the affidavit.

Held, that as the affidavit was not filed when notice of the application was served, but only (if at all) by the plaintiff himself on the return, the application must be refused.

Quære, whether the rule authorizes a direction that such accounts be verified under oath, and whether such an affidavit is an affidavit "used or to be used on any proceeding in the cause or matter." (J. O. 1893, sec. 261, now r. 282, J. O. 1898).

The proper practice in order to obtain explanations of any of the items of accounts so furnished seems to be to formulate objections on the further hearing and have the disputed items adjudicated upon in Chambers.

[SCOTT, J., 31*st December, 1895.*

* 10*a*. Upon an application for administration or execution of trusts by a creditor or beneficiary under a will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Court or a Judge may, in addition to the powers already existing,—

(*a*) Order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings:

(*b*) When necessary, to prevent proceedings by other creditors, or by persons beneficially interested, make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without leave of the Judge in person.

(Now r. 487, J. O. C. O. 1898, c. 21).

Statement. Application by plaintiff upon notice for an order to cross-examine defendant upon his affidavit filed. The facts sufficiently appear from the judgment.

Argument. *C. F. Harris*, for applicant.

C. C. McCaul, Q.C., for administrator.

Judgment. SCOTT, J.—On 22nd March, 1895, plaintiff obtained an originating summons calling upon defendant, the administrator of the estate and effects of deceased, to shew cause why an order for administration should not be granted upon certain grounds therein set forth.

Upon the return of the summons on 30th April, 1895, an order was made under the provisions of English Ord. 55, Rule 10a, directing (1st) that the application for administration should stand over for six weeks from that date; (2nd) that defendant should within one month from that date furnish the plaintiff with a proper statement made under oath of his accounts and dealings with the estate as the administrator thereof, and, (3rd) that if defendant should omit to comply with the terms and requirements of said order to pay the costs of the proceedings.

Defendant in pursuance of this order delivered to plaintiff a statement under oath of his dealings with the estate. As there is nothing to shew the date of delivery, I think I should assume that it was delivered within the time limited by the order.

Plaintiff did not appear on the originating summons at the date to which it was enlarged (11th June, 1895), and no further step or proceeding was taken by him until 21st December, 1895, when he gave notice of this application. The affidavit of defendant proving the statement of account furnished by him to plaintiff and delivered therewith, was not filed when notice was given of this application. It is therefore not within the scope of the application. Even if it had been I doubt whether a cross-examination upon it could be directed, 1st because it is open to question whether O. 55, Rule 10a, authorizes a direction that the statement to be de-

livered under the provisions shall be verified under oath, and 2nd, because it is also open to question whether an affidavit so delivered is an affidavit used in Court on any proceeding. *Re Lockwood*[1] shews that the proceeding under that Rule is a vouching of accounts out of Court.

Judgment. Scott, J.

I think the object and intention of Order 55, Rule 10a, is to afford a means of avoiding the expense of an administration suit, and when making the order of 30th April, 1895, I thought that if the accounts directed by it to be furnished were satisfactory to the plaintiff, it might be unnecessary to proceed further under the originating summons. By that order, a period of two weeks was allowed between the time fixed for the delivery of the statement of account and that fixed for the further hearing of the application for administration, in order that the plaintiff might have ample time to consider the account, and be prepared to formulate his objections to it, if any, on the hearing. That this is the course that should have been pursued appears from the judgment of Mr. Justice Sterling in *Re Lockwood*,[1] referred to above, in which he states that "the present practice is to direct accounts to be furnished and vouched out of Court and only to allow the disputed items to be adjudicated on in Chambers."

It is not shewn why this course was not pursued by the plaintiff, nor is any explanation given of the extraordinary delay of nearly seven months after the delivery of the statement before any exception was taken by him to the statement furnished by the defendant.

An order having been made under Order 55, Rule 10a, and a statement of account delivered in pursuance thereof, I think that the disputed items of the account, if there are any such, should be settled and adjusted before plaintiff should be permitted to otherwise proceed under his originating summons. It appears to me that to hold otherwise would be to defeat the object and intention of the rule.

[1] 92 L. T. Jo. 237, 8 Times Rep. 293.

Judgment.

Scott, J.

The ground urged by plaintiff for procuring the cross-examination of defendant is that the statement of account furnished by him shews that certain payments claimed to have been made by him appear in the absence of explanation to have been made improperly, and plaintiff is desirous of obtaining further information respecting them. A persual of the account leads me to the view that some further explanation might reasonably be required in order to shew that some of the payments made were properly made on account of the estate, but as I have already shewn, the plaintiff has not taken the proper course to obtain such explanation.

The application will, therefore, be dismissed with costs to the defendant in any event on final taxation of costs under the originating summons.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

BROOKS v. BROOKS ET AL.

Husband and wife—Separate estate of wife—Personal property—Jus disponendi—Matrimonial domicil—Removal—Conflict of laws—International Law.

The law of the matrimonial domicil regulates the rights of the husband and wife as to the movable property of either of them.

Held, therefore where the matrimonial domicil was Ontario that personal property, which by the law of Ontario was the separate property of the wife, remained such on the removal of the parties to the Territories; and furthermore was subject to the provisions of the Ordinances of the Territorial Legislature, subsequently passed relating to the personal property of married women.

[RICHARDSON, J., *3rd July, 1896.*

Statement.

This was an action of detinue, wherein the plaintiff alleged that he was the owner of 27 head of cattle which the defendants wrongfully detained. Plaintiff and defendant Mary Brooks were married in October, 1869, in the Province of Ontario, and at the time of the marriage the wife owned a cow, a heifer, some sheep and some pigs. The cattle in question represented the increase of the cow and heifer, and the proceeds of the sheep and pigs. The parties left Ontario and came into the Territories in 1887, where they appear to have lived together until 1895, in which year a disagreement occurred between the husband and wife as to the selling of a steer, and they separated. On the night of 4th October, 1895, defendant J. W. Brooks, by direction of the wife, drove the cattle off and they remained in his charge until the commencement of this action.

Argument.

Norman Mackenzie, for plaintiff.

John Secord, Q.C., for defendants.

[*July 3rd, 1896.*]

Judgment.

RICHARDSON, J.—The plaintiff here alleges that the defendants detain from him 27 head of cattle, his property,

Judgment.
Richardson, J.

and claims a return or their value, and $50 damages for their detention.

In defence, the defendant Mary Brooks asserts:—

1. That she is the wife of the plaintiff.

2. That the cattle sued for are not the plaintiff's.

3. That the cattle are the proceeds of wages, personal earnings, and profits arising from the occupation or trade of raising cattle, butter making and otherwise, which she has heretofore carried on and now carries on separately from her husband, and investments of such wages, earnings, money and property.

Both defendants deny the several acts complained of.

The defendant J. W. Brooks denies that the cattle are the plaintiff's property.

In reply, the plaintiff admits that defendant Mary Brooks is his wife, and otherwise joins issue.

The controversy between these litigants is thus defined.

Both defendants deny the act, *i.e.*, the detention of the plaintiff's property, as also that the cattle for whose detention the action is brought, belong to the plaintiff; and Mary Brooks, who by the record, is admitted to be the plaintiff's wife, asserts that the cattle in question are her separate property, derived from the occupation of cattle raising and butter making which she carried on separately from her husband.

It is to be observed that the plaintiff claims to be the owner absolutely of the cattle, the subject of the suit, and that the defendant Mary Brooks, by her first defence which the plaintiff admits on the record to be true, asserts that she is the plaintiff's wife; and were there no other defendant or other defences on the record, the crucial point upon which the result of the suit depended would have been whether the objection raised on the argument by Mr. Secord, the defendants' counsel, that a man cannot successfully maintain an action against his own wife for detention of his property against his will, must prevail. Failing to discover any au-

thority for such an action I should have felt bound to give effect to Mr. Secord's contention, leaving the plaintiff, if so advised, to move to have my opinion reversed on appeal. But there is another defendant, J. W. Brooks, who, in positive terms, contests the plaintiff's ownership of the cattle. Thus it happens that the plaintiff's rights have to be determined by the evidence. Judgment. Richardson, J.

From this evidence I find as facts:—

1. The plaintiff and defendant were residents of Ontario, and were married there in October, 1869, and until they removed to the Territories in 1887 they constantly resided there.

2. When the plaintiff married the defendant she owned a cow, a heifer, some sheep and pigs. The increase of the cow and heifer, together with other cattle representing the proceeds of the sheep and pigs and their offspring, less some disposed of in Ontario, and one since bought in the Territories, are the cattle in question in the suit.

The law in force in Ontario at the time of the marriage relating to married women was 22 Vic. c. 34, by section 1 of which every woman who marries after its passing "shall and may, notwithstanding her coverture, have, hold, and enjoy all her . . . personal property . . . belonging to her before marriage . . . after marriage, free from the debts and obligations of her husband, and from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding."

It thus appears that the property the wife owned prior to her marriage became settled by law as her separate property after marriage, and this, with the natural increase and substitutions I have alluded to, continued such separate property up to the removal from Ontario. Being such in leaving Ontario, it continued so in the Territories.

Mr. Westlake in his work on Private International Law thus expresses the situation: "In the absence of express contract the law of the matrimonial domicil regulates the right

Judgment.
Richardson, J.

of the husband and wife in the movable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage. In the inception of the marriage there is included a tacit contract, or. as Savigny says, 'a voluntary submission to the law of the domicil,' that the conjugal rights of property shall be immutably settled according to the law of the present domicil. The woman has accepted the conjugal rights as fixed by the law of domicil, and naturally has reckoned on its perpetual continuance."

Then what are the facts? As I have stated, the cattle in question are, as the plaintiff himself stated in his evidence in chief, "the increase and offspring of the stock brought in at marriage by the wife," and which in 1887 came with the family from Ontario to the Territories. The husband and wife lived together here for some time on a rented farm. Then the husband homesteaded and in performance of his homestead duties was on the homestead during the summer, and, as the daughter stated, "at home in the winter."

A disagreement latterly occurred between the husband and wife consequent, it was stated, on the former finding fault with his wife's action in selling off a steer, and finally they appear to have separated, the cattle in question then remaining apparently in charge of the husband until the night of the 4th October, 1895, when, under direction of the wife, they were driven off to Touchwood by the other defendant, J. W. Brooks, where at the commencement of this suit the cattle in question remained in his immediate care under Mrs. Brooks, who asserted right thereto.

Now by the law of domicil in Ontario at the time of marriage, the cattle in question were as between herself and her husband, the wife's separate property, in my judgment; and had the law as regards the personal property of married women not been extended after the domicil of the parties had changed, under the legislative powers conferred upon the Territorial Legislature, it is probable that the principles

laid down as governing the husband's rights of interference with his wife's separate property in *McGuire* v. *McGuire* would have an important bearing on this matter. But whether or not the Legislature have wisely ordained, they have so extended the right of married women over separate personal property as to give the wife the *jus disponendi* of it, in my humble opinion, by virtue of Ord. 20 of 1890, passed 29th October, 1890, when the wife here attained all the rights in respect thereof of a *feme sole*. Judgment. Richardson, J.

Under the extensive power thus conferred, assuming it did not previously exist by the law of Ontario, which up to that date governed, the wife attained, as I am bound to hold, absolute control, which carries with it the *jus disponendi*, independent of her husband, one of the rights of a *feme sole quoad* her personal property, and thus she had the right to direct the defendant, J. W. Brooks, to do what he did, to which the plaintiff here cannot object.

Any reference to the 3rd paragraph of the defence is thus rendered unnecessary.

The action is therefore to be dismissed with costs.

REPORTER:
C. H. Bell.

PATTON v. ALBERTA COAL CO.

Execution—Seizure—Stay—Appeal—Irregular notice of—Execution for costs—Undertaking by advocate to repay—Costs of levy—Costs of application—Terms of order.

Defendants having served notice of motion to the Court *in banc* for a rule to shew cause why the verdict for plaintiff should not be set aside, or for a nonsuit or a new trial applied to the trial Judge, under J. O. Ord. 512,* after seizure under execution issued upon the judgment, for a stay of proceedings upon the grounds of irreparable loss and inability of plaintiff to repay amount levied in case the appeal should be successful.

Held, (1) That there was jurisdiction to entertain the application although the notice of motion was perhaps irregular in form.

(2) That the fact that plaintiff would not be able to repay the amount levied in case of an adverse decision on appeal is sufficient ground for granting stay. Stay ordered on security being given.

(3) That execution for costs should be stayed unless the advocates give personal undertaking to repay them in case appeal succeeded.

(4) That defendant having delayed making application until after issue of execution and seizure, should pay the costs and expenses incurred by reason of the delivery to the sheriff of the execution.

(5) The costs of application must be paid forthwith by party applying. *Merry* v. *Nickalls*,[1] and *Cooper* v. *Cooper*,[2] followed.

[SCOTT, J., *August 19th, 1896.*

Statement.

Application by defendants to stay the execution issued by plaintiff, and all proceedings had and taken thereunder, until "the final disposition of the notice of motion" given by defendants for the next sittings of the Court *in banc*, for a rule to show cause why the verdict obtained by plaintiff

* 512. When notice of motion for a new trial or notice of appeal has been served, the further proceedings on the verdict, finding, order, or judgment may be stayed, in whole, or in part, until the decision on such motion or appeal by the Court or by the Judge who presided at the trial on such terms as the Court or Judge may think fit. The applicant, however, shall be entitled to an order so staying the proceedings on filing sufficient bail, or security, or making deposit of money, to the approval of the Court or Judge, in such reasonable amount as the Court or Judge shall direct, to respond to the judgment to be finally given in the cause or matter. An application to the Judge for such stay of proceedings shall not prejudice the applicant's right to apply to the Court for such stay. (Now J. O. 1898, C. O. 1898, c. 21, r. 510.)

[1] 42 L. J. Ch. 479; L. R. 8 Ch. 205; 28 L. T. 296; 21 W. R. 305.
[2] 45 L. J. Ch. 667; 2 Ch. D. 492; 24 W. R. 628.

should not be set aside, and for a nonsuit or for judgment of defendants, or for a new trial. Statement.

C. C. McCaul, Q.C., for the plaintiff. Argument.

C. F. P. Conybeare, Q.C., for the defendants.

[*August 19th, 1896.*]

SCOTT, J.—This action was tried before a jury at the Lethbridge Sittings on 24th July last, when plaintiff obtained judgment for $400. After the trial plaintiff's advocate agreed to delay for 15 days the levying of execution upon the judgment to enable defendants, if they desired to move against the judgment, to obtain a stay of proceedings. On 8th inst. defendants served the notice of motion already referred to; but did not then apply for a stay of proceedings. On 10th inst., after the expiration of the 15 days, plaintiff issued execution upon his judgment, and placed the same in the hands of the Sheriff, who seized thereunder a locomotive of the defendants and advertised the same to be sold on 23rd inst. On 13th inst. defendants served notice of this application. Judgment.

The grounds of the application are, 1st, that irreparable loss and damage will result to defendants if the execution and proceedings thereunder are not stayed; and second, that the plaintiff will be unable to repay the amount levied under execution if defendants' appeal is successful. And in support of these grounds, it is shown by the affidavits filed on the application that the plaintiff is a person of no means and will be unable to repay the amount if the appeal is successful; and that Charles F. Harris, who appears to be the assignee of the judgment in trust for plaintiff, is also a person of little or no means and will be unable to repay the amount.

Mr. McCaul, Q.C., contended on behalf of plaintiff that I had no jurisdiction to entertain the application under section 512 of the Judicature Ordinance, because it has not been shewn that any notice of motion for a new trial or notice of appeal has been served; that the notice served cannot be treated as such a notice by reason of the fact that it is merely a notice of motion for a rule to shew cause.

Judgment.

Scott, J.

It may be open to question whether the notice given by defendants is a notice of motion within the meaning of sections 509 and 512 of the Ordinance, but I am not prepared to treat it for the purposes of this application as a nullity, and unless I so treat it, I think I should not refuse to entertain the application upon that ground.

It was also contended by Mr. McCaul that no sufficient grounds were disclosed to entitle defendant to a stay of proceedings, but *Barker* v. *Lavery*[3] appears to hold that the fact that plaintiff would be unable to repay the amount of the judgment in case the appeal is decided against him, is in itself a sufficient ground for making the order.

Upon the argument before me both parties treated this application as one not only to stay the proceedings under the execution already issued by the plaintiff, but also as one to stay execution for the plaintiff's costs of the action. It may be open to question whether the notice of the application covers that ground, but as the counsel for the parties have so treated it I think I should dispose of the question.

Following *Merry* v. *Nickalls*,[1] *Morgan* v. *Elford*,[4] and *Atty.-Gen.* v. *Emerson*,[5] I think the only order I should make as to the costs of the action is that execution for them shall be stayed unless the advocates for the plaintiff give their personal undertaking to defendants to repay them to the defendants in case they eventually succeed in the action.

Defendants having delayed making this application until after the issue of the execution by plaintiff, and the levy thereunder should pay all the costs and expenses incurred by reason of such levy.

As to the costs of this application, in my view, the reasonable course would be to direct that they should be made costs in the cause to the successful party, but I am bound by the decision of the Court of Appeal in England in *Merry* v. *Nickalls*,[1] and *Cooper* v. *Cooper*,[2] and must direct that they be paid by the defendants. I cannot understand,

[3] 14 Q. B. D. 769; 54 L. J. Q. B. 241, 33 W. R. 770. [4] 4 Ch. D. 352, 25 W. R. 136. [5] 59 L. J. Q. B. 192; 24 Q. B. D. 56; 62 L. T. 21; 38 W. R. 102.

Judgment.
Scott, J.

however, why defendants should be called upon to pay them in any event. In making the application they are taking a proceeding which appears to be reasonably necessary for their own protection, and if they eventually succeed in the action they ought to be recouped for the costs reasonably incurred by them, except such as may have been incurred by reason of their neglect or default.

The order will, therefore, be that the execution issued by plaintiff and all further proceedings thereunder be stayed pending the application by defendants to the next sittings of the Court *in banc* by way of appeal, or for a new trial upon defendants paying to the Sheriff of the Southern Alberta Judicial District all such fees, charges and expenses as he may be entitled to by reason of the delivery to him of the execution issued herein, and of the levy by him thereunder; and upon defendants giving to plaintiff or his assignee security to the satisfaction of the clerk of this Court for the payment of the amount of the verdict herein, in the event of plaintiff succeeding on said application to the Court *in banc,* that no sale under said execution shall be had for a period of 14 days pending the payment by defendants of the Sheriff's fees, charges and expenses, and the perfecting by them of such security; that execution for the costs of the action be stayed until plaintiff's advocates give defendants their personal undertaking to repay them to defendants in the event of defendants succeeding in this action; that no execution shall issue for such costs until the expiration of five days from the giving of such undertaking to permit of the defendants paying the same, and that defendants shall pay to plaintiff the costs of this application forthwith after taxation thereof.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

GOLDIE v. TAYLOR.

Chattel mortgage—Description—Interpretation—Construction—General following particular words—Ejusdem generis rule—Inferior following superior.

Held, that the following description in a chattel mortgage, "All office fixtures, lamps, desks, chairs, furniture, stationery and all goods, chattels and effects now in the store and office of the mortgagors," did not include a safe, the general words being restricted by the preceding words.

[SCOTT, J., *September 10th, 1896.*

Statement. Action for damages for conversion by the defendant of the plaintiff's safe. The defendant denied the conversion, claiming to have seized and sold the safe under the powers contained in a chattel mortgage made by Dickson & Wilkie, in whose possession it was at the time of making the mortgage. The description in the mortgage was as follows: "All and singular the goods and chattels described as follows:—All office fixtures, lamps, desks, chairs, furniture, stationery, and all goods, chattels and effects now in the store and office of the mortgagors on Whyte Avenue in South Edmonton aforesaid, and all stock in trade, groceries, glass-ware and crockery-ware, lamps, chandeliers, grain, farm produce, stationery, fancy goods, scales, stoves and stove pipes, and all tools, implements and machinery connected with the business of grocers, and all book debts due to said mortgagors, or which may be due to them hereafter, and all securities, notes and bonds now in their possession or which they may hereafter acquire, and all live stock, buggies, buck boards or waggons now in possession of the mortgagor, and all private stock, goods or possessions of either of the members of said firm of Dickson & Wilkie, their household furniture, stoves, stove pipes, ornaments, carpets, house decorations, horses, cattle, carriages, buggies, waggons, sleighs, cutters, harness, which said goods, chattels, personal property and effects are now in the possession of said mortgagors, and are now situate, lying and being upon and about the premises of the mortgagors in South Edmonton aforesaid, and at other

places in the District of Alberta." The evidence shewed that Dickson & Co. had obtained the safe from the plaintiffs and held possession of same in pursuance of an agreement for purchase by instalments, under which the title was not to pass until paid for in full. This agreement was not registered. Statement

N. D. Beck, Q.C., for plaintiff. Argument.

S. S. Taylor, Q.C., for defendant.

[*Sept. 10th, 1896.*]

SCOTT, J.—(After referring to the facts) I think it is unnecessary to consider in this case whether this description is one which complies with the provisions of the Ordinance respecting Bills of Sale and Chattel Mortgages, but merely to consider whether, as between the parties to the mortgage, it is wide enough in its terms to include the safe. It appears to me to be obvious that, no matter whether or not the parties intended to include it, if it was not so included, the defendant cannot claim to be a mortgagee. Judgment.

The safe is not specifically mentioned in the description, although many articles of trifling value as compared with its value are so mentioned. It is not an office fixture, because a fixture means something affixed, and safes are not usually affixed to anything, nor was this one shewn to be. It is not an article of furniture in the ordinary meaning of the term. It might, however, be contended that the adjective "office" was intended to apply not only to fixtures but also to the other articles specified, such as office desks, office lamps, office chairs, office furniture, etc., but I do not think that such a restrictive meaning was intended, and it is shewn that there was no office in the store, that there was merely a desk in the back part of the store, and that the place where it stood was never called an office. Neither is it a "tool, implement, or machine connected with the business of grocers."

The words "and all goods, chattels and effects now in the store," would undoubtedly include the safe, if their scope and effect are not restricted by the preceding words, but the

Judgment. Scott, J.

authorities I have been able to refer to appear to hold that they should be so restricted.

In *Moore* v. *Magrath*,[1] Lord Mansfield, C.J., says: "It is very common to put in a sweeping clause, and the use and object of it in general is to guard against any accidental omission, but in such cases it is meant to refer to estates or things of the same nature and description with those that have been already mentioned."

In *Lyndon* v. *Stanbridge*,[2] Pollock, C.B., says, at p. 389:

"There is a general rule of construction that where you begin with one class and then go on with others, in the enumeration of articles, you generally begin with the superior and end with the inferior. Thus with reference to the words 'barge, boat or other vessel,' there is no doubt that 'vessel' does not include a vessel of a capacity or size superior to a barge."

In *Harrison* v. *Blackburn*[3] an assignment by way of a mortgage of "all and every the household goods and furniture, stock-in-trade, and other household effects whatsoever, and all other goods, chattels and effects now being, or which shall hereafter be in, upon or about the messuage, etc., and all other the personal estate whatsoever of the mortgagor," was held not to pass the lease of the house in which the goods were.

Applying the reasoning of Pollock, C.B., in *Lyndon* v. *Stanbridge* to the present case, it follows that the general words in the description were not intended to include anything of greater importance than the preceding articles specified.

I cannot but think that as the description expressly mentions a large number of articles of trifling value intended to be included in it, the safe would also have been specifically mentioned if it had been intended to be included.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

[1] Cowp. 9. [2] 2 H. & N. 45, 26 L. J. Ex. 386. [3] 17 C. B. (N. S.) 678; 34 L. J. C. P. 109, 10 Jur. (N. S.) 1131; 11 L. T. 454; 13 W. R. 135.

IN RE F. H. MARTIN (No. 1).

Criminal law—Extradition—Larceny—False pretences.

In extradition proceedings the Judge is to find (1) whether there is *prima facie* evidence of the commission by the accused of an offence, which if committed in Canada would be an indictable offence by the law of Canada; and, if it be so found, then (2) whether there is *prima facie* evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition.

"Grand larceny in the second degree" is an extradition crime under the extradition arrangement between Great Britain and the United States of 1889-90.

[RICHARDSON, J., *16th February, 1897.*

Statement

An information having been laid that accused had on 26th December, 1896, obtained certain cattle in the State of Minnesota by false pretences, the accused was brought up on warrant. It appeared from the evidence that on 26th December, 1896, accused had purchased a yoke of oxen from one James Hance, and had given his cheque for $44 on The Merchants' National Bank of Crookston, Minnesota, therefor; that accused had assured Hance that he had funds in the bank to meet the cheque, whereas in fact he had neither funds nor credit; and that accused having obtained the oxen, disposed of them and absconded to Canada with the proceeds. It was also shown that this constitutes a criminal offence in the State of Minnesota, classified as grand larceny in the second degree.

By the Extradition Act (R. S. C. 1886, c. 142), section 2 (*b*), "the expression 'extradition crime' may mean any crime which, if committed in Canada or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act—and in the application of this Act to the case of any extradition arrangement means any crime described in such arrangement whether comprised in the said schedule or not."

Statement. The first schedule includes "5. Larceny; 6. Embezzlement; 7. Obtaining money or goods or valuable securities by false pretences."

By Article I. of the Extradition Convention of 1889-90, between Great Britain and the United States of America, extradition was extended to certain specified crimes including, "3. Embezzlement; Larceny; Receiving any money, valuable security, or other property knowing the same to have been embezzled, stolen, or fraudulently obtained." The article does not, however, include in express terms "obtaining money or goods, or valuable securities by false pretences."

Argument. *T. C. Johnstone*, for the accused. He contended that grand larceny was no offence in Canada, and therefore was not an extraditable offence. The arrangement of 1889-90 does not include the charge of obtaining property under false pretences. Extradition Act, section 3. *Re Hall*,[1] *Re Martin*.[2]

Norman Mackenzie, for the State of Minnesota. He urged that false pretences is included in section 3 of Article I. of the Imperial order-in-council of 1890. See Crankshaw's Criminal Code, p. 1096. In the Criminal Code, Title 6, the present charge is designated as theft. *Re Murphy*,[3] *Re Bellencontre*.[4]

[*February 16th, 1897.*]

Judgment. RICHARDSON, J.—Assuming that what is charged is an extraditable crime, I hold that the evidence produced would, if given under the provisions of the Criminal Code, justify the committal of the accused for trial.

But it is urged by Mr. Johnstone that the evidence does not establish *prima facie* an extraditable offence; that it amounts to what in Canada would be the offence of obtaining property by false pretences; that this, not being larceny, now termed theft by the Code, and obtaining property by false pretences not being included in Article I. of the extended treaty between Great Britain and the United States of 1889-90, there is no jurisdiction to grant the order.

[1] 8 A. R. 31. [2] 26 O. R. 163. [3] 26 O. R. 176; 22 A. R. 386. [4] 1891, 2 Q. B. 122; 60 L. J. M. C. 83; 64 L. T. 461; 39 W. R. 381; 55 J. P. 694; 17 Cox C. C. 253.

Judgment. Richardson, J.

Section 24 of the Extradition Act reads thus: "The list of crimes in the first schedule to this Act" (the schedule includes larceny, embezzlement, and obtaining money or goods or valuable securities by false pretences); "shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act, and as including only such crimes of the descriptions comprised in the list as are under that law indictable offences."

Then by the interpretation clause, section 2, sub-section (*b*) extradition crime means any crime, which, if committed in Canada, would be one of the crimes described in the first schedule of the Act; and in the application of the Act to the case of any extradition arrangement, means any crime described in such arrangement (*e.g.*, larceny), whether comprised in the said schedule or not.

Now applying the construction given by Cave, J., in *Re Bellencontre*,[4] adopted by the Court in *Re Murphy*,[3] in Ontario, the first question to be answered appears to be—Is there *prima facie* evidence of the commission of an offence which if committed in Canada would be against Canadian law? and I am satisfied there is such evidence in this case. Then, Has it been shewn *prima facie* that the accused is guilty of a crime under the foreign law, *i.e.*, that of Minnesota, as described in the arrangement? Answering this again in the affirmative as I must do, I hold the extradition law applies, and accused must be committed for extradition.

See also *In Re Martin*, No. 2, *infra*.

REPORTER:

C. H. Bell, Advocate, Regina.

IN RE F. H. MARTIN, No. 2.

Habeas corpus — Extradition — Larceny—False pretences—Form of warrant.

"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act, and the extradition arrangement between Great Britain and the United States of America.

A warrant of committal under the Extradition Act which recited the Judge's determination that the prisoner should be surrendered in pursuance of the Act "on the ground of his being accused of grand larceny in the second degree within the jurisdiction of the State of Minnesota," was held sufficient.

[RICHARDSON, J., *17th February, 1897.*

Statement.

The accused had been committed for extradition to the State of Minnesota (See *Re Martin*, No. 1, *supra*), and this was an application for a writ of *habeas corpus*.

Accused was *prima facie* shewn to have committed acts in Minnesota, which, if committed in Canada, constitute the offence of obtaining property under false pretences. It was also shewn that these acts constituted under Minnesota law the offence of grand larceny in the second degree.

Obtaining property under false pretences is an extradition crime under the Extradition Act, section 2 (*b*) and schedule 1. "Larceny" is included as an extraditable offence under the Extradition Convention of 1889-90 between Great Britain and the United States of America, Article I, section 3, but obtaining property under false pretences does not expressly appear therein.

The accused having been committed on these facts, under a warrant, which stated that the committal was "on the ground of his being accused of grand larceny in the second degree," the prisoner's counsel moved for a writ of *habeas corpus* upon the grounds:—

1. That obtaining money or property by false pretences is not an extraditable offence;

2. That the warrant of committal does not disclose the offence for which the accused is to be surrendered.

T. C. Johnstone, for accused urged that false pretences was not an extraditable offence; it is a separate offence, Criminal Code, part 27; while theft is defined in part 24. The offence must appear in the schedule to the Extradition Act, and also in the arrangement of 1889-90. There is no offence in the arrangement covering false pretences under Canadian law. Argument.

The warrant does not state the Canadian offence, does not follow the form given in the Act, and does not state the actual crime with reasonable certainty. Under it, accused might be tried for other offences. The Minister of Justice, under sections 15 and 16, could not discharge accused. The form of surrender in the Act requires the offence to be stated.

Norman Mackenzie, for the State. This offence is larceny by Minnesota law, and larceny is included in the Convention, Article I., section 3; false pretences comes under Title 6 of the Criminal Code and is thus classified with theft.

If the warrant is insufficient section 20 authorizes amendment, but it is sufficient. It describes the offence for which accused is to be extradited. *Re Murphy*,[1] *Re Bellencontre*.[2] Whether accused on surrender is triable for another offence is not for this Court to consider.

RICHARDSON, J.—In delivering judgment as Judge in Extradition I held that evidence had been adduced in support of the charge of obtaining property by false pretences, which would have amply warranted the accused's committal for trial had the alleged offence been committed in Canada; and that as this evidence supported a like charge, defined by the law of Minnesota as grand larceny, the prisoner was liable to extradition. Judgment.

Was this ruling correct? In *Re Murphy*,[1] the prisoner had been committed for extradition by a County Court Judge, and applied to the Divisional Court, composed of

[1] 26 O. R. 176; 22 A. R. 386. [2] 1891, 2 Q. B. 122; 60 L. J. M. C. 83; 64 L. T. 461; 39 W. R. 381; 55 J. P. 694; 17 Cox C. C. 253.

Judgment.
Richardson, J.

Meredith, C.J., Rose and McMahon, JJ., for a writ of *habeas corpus*, which was unanimously refused. He then appealed to the Court of Appeal, composed of Hagarty, C.J., and McLennan, J., who rejected the appeal, and of Burton and Osler, JJ., who were in favour of allowing it, but only on the ground that the crime charged, forgery, was not shewn to have been such by the law of the foreign State. There were thus six eminent Judges approving of the committal against two who disapproved.

Burton, J., at p. 392, says: "Although it is perfectly clear that the offence charged is forgery according to our law, that, . . . would not justify an order for extradition unless it be made to appear to the tribunal dealing with the matter that it is also an offence according to the law of the country where it is alleged to have been committed."

In the opinion of Meredith, C.J., in the Divisional Court, and also of some of the other Judges, it was not necessary to decide the question of what the foreign law was.

In *Re Bellencontre*[2] the application was for a writ of *habeas corpus* to discharge the applicant. Wills, J., said: "The substance of the Extradition Act seems to me to require that the person whose extradition is sought should have been accused of doing something in a foreign country which is a crime by English law, and that there should be a *prima facie* case made out that he is guilty of a crime under the foreign law, and also of a crime under English law. If these conditions are satisfied the extradition ought to be granted. We cannot expect that the definition or description of the crime when translated into the language of the two countries should exactly correspond . . . In this case the man has been accused of a number of things which clearly fall within article 408 of the French Code, and therefore are crimes in France, and crimes which clearly fall under No. 18 of the French part of the Extradition Treaty. One looks to see then whether in the corresponding section, No. 18 of article 3, there is a crime described by English law, which crime has been made out by the evidence. . . . If an exact corre-

spondence were required in mere matter of definition, probably there would be great difficulty in laying down what crimes could be made subjects of extradition." Judgment. Richardson, J.

Now in this matter there was no doubt in my mind that the accused was identified as the person against whom such an offence was charged, as if committed in Canada, he would in respect of it be amenable to our criminal law. In his affidavit he states he is a British subject, and this being so he must be assumed to have known what the British law was, and in doing what he was *prima facie* proved to have done, knew he could not commit such an act with impunity in Canada. Having gone into the United States he knew that when in that country he was amenable to its laws.

As Judge in Extradition I decided that sufficient evidence was given to warrant his committal for trial had the alleged offence been committed in Canada, and there is no doubt whatever that this alleged offence was committed, if at all, in the State of Minnesota, and was covered by clause 7 of the first Schedule to the Extradition Act. Being thus one of the crimes described in that schedule, the question arose, Did the alleged crime come within the description of "any crime described in the extradition arrangement of 1889-90?" and I held that it did, the expert evidence establishing clearly to my mind that "obtaining goods by false pretences" came within the description of, and became when proved, larceny by Minnesota law. It is, therefore, one of the crimes included in the treaty by the extradition arrangement. From this view, bearing in mind also that by section 3, the Act is to be read and construed so as to provide for the execution of the arrangement, I find no reason to depart.

The other objection is as to the sufficiency of the warrant of committal. As I comprehend this, it is that because in the arrangement of 1889-90 "obtaining property by false pretences" is not included as a distinct article, this case is non-extraditable, inasmuch as by our criminal code that offence is not pointedly included under the generic term of theft, which has supplanted the term of larceny; also because

Judgment. Richardson, J.

the description of the exact offence is not given in the warrant, Mr. Johnstone urging that, by use of the term grand larceny, the prisoner, if surrendered, might be tried for other offences coming within the general description, in violation of the treaty. As to this I have only to remark that by article 3 of the treaty, the solemn undertaking of the United States is given that if surrendered the prisoner shall not be tried for any crime or offence other than that for which his surrender is ordered until he has had an opportunity of returning to Canada, which in this case means that his trial will be confined to the particular offence disclosed and dealt with by the Judge in extradition. We must not anticipate bad faith.

The warrant in this matter follows the form in our statute. It uses the words "on the ground of his being accused of." These are to be followed by, as I comprehend, the technical term for the crime used in the foreign country, covering or including the actual offence alleged against the accused. It has been held in reported cases in Quebec, that no further particularity in the warrant is necessary. In England a similar rule evidently prevails.

In the *Bellencontre Case* the accused was charged before the commissioner with 19 separate charges, all violations of French law, of which the commissioner found only four to be punishable by English law. The form of warrant provided by the Imperial Act is that adopted by the Canadian Act in substance, the words in the Imperial Act being "accused of the commission of the crime of," etc. The commissioner's warrant, which was attacked on a motion for *habeas corpus*, used these words, "on the ground of his being accused of the crimes of fraud by a bailee, and frauds as an agent within the jurisdiction of the French Republic." This the Divisional Court held a good warrant. Wills, J., said: "The warrant is statutory in its form, and is not to be construed as an ordinary English common law document, and it is not at all necessary . . . that there should be anything like the same particularity that there would be in re-

spect of warrants of committal to the jails of this country under ordinary circumstances." Judgment. Richardson, J.

I adopt this construction applied to our own Act, and hold the warrant sufficient for the purpose intended; while I think, now that it has been under revision, that it goes beyond the requirement of the Act by including a reference to the Canadian law. I now consider this unnecessary and mere surplusage. If, however, otherwise, an amended warrant could be supplied in order that faith with the treaty on the part of Canada should be kept.

REPORTER:

C. H. Bell, Advocate, Regina.

NOTE.—After two months, the fugitive not having been surrendered and conveyed out of Canada, application was made for an order for discharge under sec. 19, Extradition Act.

No cause being shewn by the Minister of Justice, upon whom notice of the application had been served, the order was granted.

SLATER v. RODGERS—SHEPPHARD GARNISHEE.

Attachment of debts—Garnishee—Exemptions—Proceeds of exempted property—Voluntary sale by debtor of chattels exempt from seizure—Right of creditor to garnish proceeds.

The proceeds of chattels, exempt from seizure and sale under execution, voluntarily sold by a debtor, are attachable.

[RICHARDSON, J., *29th June, 1897.*

Statement. The plaintiffs had recovered a judgment against defendant, but all the property of the latter was exempt from seizure under writ of execution by virtue of chapter 45 Revised Ordinances 1888 (now chapter 27, R. O. 1898). The defendant had this property sold at public auction by the garnishee, who was an auctioneer, and the proceeds of the sale were garnished by the plaintiffs in the auctioneer's hands. The garnishee paid the moneys into Court.

A special case was stated by plaintiffs and defendant, the question submitted being whether or not the money paid into Court, being proceeds of the sale of exemptions, was attachable.

Argument. *Norman Mackenzie* for defendant referred to the exemption ordinance, and urged that the money in question being the exact proceeds of goods exempt and earmarked as such, it likewise was exempt. See Barron on Bills of Sale, p. 171; *Michie* v. *Reynolds*,[1] Thompson on Exemptions, s. 860.

Ford Jones for plaintiff contended that these cases did not apply here. See Thompson on Exemptions, sections 745-748. The debtor's right was waived by his own act.

Mr. Mackenzie in reply referred to the English Bankruptcy cases.

[1] 24 U. C. Q. B. 303.

[*June 27th, 1897.*]

Judgment.

Richardson, J

RICHARDSON, J.—The facts are that under a judgment against the defendant, the plaintiffs procured a garnishee summons against Shepphard, who admitted he owed defendant $110.85, and paid that sum into Court. Defendant, however, claimed that the debt was not attachable, and a case was stated wherein it is admitted that the debt in question arose from the sale by garnishee as an auctioneer of certain chattels of defendant, which were by law exempt from seizure and sale under execution.

Under the Ordinance debts due or accruing due from the garnishee to the judgment debtor are attachable. There is no distinction as to how the debts originated.

The test it seems to me is that defined by Mr. Cababe in his work on attachment: "Could the debtor maintain an action for the debt against the garnishee had not the proceedings to attach been taken?" There being no doubt as to this, I have to hold that the money in Court goes to the execution creditors.

REPORTER:

C. H. Bell, Advocate, Regina.

McLEOD v. WILSON.

Building contract—Construction—Architect's certificate—Binding on proprietor—Delay in completion—Penalty clause—Waiver of.

Where under the terms of a building contract, the work is to be done under the direction and to the satisfaction of the architect, who is given authority to grant a final certificate, and the architect certifies to its completion,

Held, that in the absence of fraud or collusion, the certificate of the architect is so far binding upon the proprietor that he cannot contend that the work was not done in accordance with the plans and specifications, and it is immaterial whether the proprietor had knowledge of his intention to grant it or that he consented to or forbade its being granted; if the certificate is untrue, the remedy is against the architect.

A provision in a building contract providing that the architect's certificate should not lessen the contractor's total or final liability, was held as a matter of construction to apply not to the final certificate but only to progress certificates.

A provision in a building contract for liquidated damages for non-completion within the prescribed time, subject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications, is not discharged by delays caused by such changes. *Aliter*, if no provision been made for such extensions.

Where the contract gives to the architect authority to settle all disputes, matters about which no dispute had been raised when he gave his final certificate are not concluded thereby.

As a matter of construction it was held that the contract gave the architect no authority to grant extensions of time on account of changes in plans, except upon a dispute arising.

Where the contractor is to "pay or allow to the proprietor" a certain sum as liquidated damages, it is not necessary that it should be retained from the contract price or fixed by the final certificate.

Delay in the completion of the contract caused by the proprietor's neglect to complete work which it was necessary should first be done before the contractor could continue work under the contract, does not operate to discharge the contractor from the penalties unless notice of the contractor's work having reached the stage at which the proprietor should do his part of the work had been received by him.

Neither the proprietor's entering into occupation of the building on completion of the work, insuring it, or making payment on the contract price, after the time for completion, and after actual completion of the work operate as a waiver of the penalty clause.

Though perhaps on the giving of his final certificate the architect became *functus officio*, his estimate of the proper allowances to be made was accepted as reasonable, and allowed by the Court, in reduction of the penalties payable for delay in completion.

[SCOTT, J., *September 5th, 1897.*

Statement.

Action on a building contract tried at Edmonton on the 18th, 19th, 20th, 22nd, 23rd and 24th days of March, 1897. Plaintiff's claim is for work and materials supplied, being as follows:

The carpenter work, tin, brick and other work required in the continuation of the erection and completion of a dwelling house for defendant as per contract, dated the 7th of June, 1893 ..... $4,100 00

Extras partly done and supplied under contract and partly not so, as per account rendered $120 75

Deductions agreed upon 50 75

70 00

Total 4,170 00

Amount paid on account 3,720 00

Balance due ..... $ 450 00

The agreement under which the work was undertaken was made on the 7th day of June, 1893, and the clauses which came in question are as follows:

"The party of the first part doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, in manner following, that is to say:

"That he shall and will for the consideration hereinafter mentioned on or before the 15th day of August in the year 1893, well and sufficiently execute and perform in a true, perfect and thorough workmanlike manner, all the carpenter, tin, brick and other work required in the continuation of the erection and completion of a dwelling-house for the party of the second part, on lands and premises situate in the town of Edmonton aforesaid, in the District of Alberta, agreeably to the plans, drawings and specifications prepared for such works by Edmiston & Flater, architects, to the satisfaction and under the direction and personal supervision of W. S.

Statement.

Edmiston, architect; and will find and provide such good, proper, and sufficient material of all kinds whatsoever as shall be proper and sufficient for finishing all the works of the said building shewn on the said plans and mentioned in said specifications, and signed by the said contractor within the time aforesaid, for the sum of four thousand one hundred dollars of lawful money of Canada."

Then follows a covenant for payment of said sum by the proprietor as the work progresses.

"Provided that in respect of the semi-monthly payments, a progress certificate shall be obtained from and signed by the said architect, and that he considers the payment properly due, the said certificate, however, in no way lessening the total and final responsibility of the contractor, neither shall it exempt the contractor from liability to replace work afterwards discovered to have been badly done or not according to the drawings or specifications either in execution or materials.

"And further provided that if required in each case, a certificate shall be obtained by the contractor from the Registrar of the District where Mechanics' Lien may be recorded, and signed by said Registrar 'that he has examined the records and finds no Mechanics' Lien or claims recorded against the land of the proprietor,' on account of the said contractor; and thereupon on or before the thirtieth day after completion of the said works, a final certificate shall be obtained from and signed by the said architect, certifying to the balance due to the contractor on the said contract, and for all extras in respect thereof. But if from any reasonable cause whatever, such final certificate should not be obtained, or that the giving of the same could be refused by the said architect, the said contractor shall, nevertheless, from the expiration of the said thirty days, be entitled to proceed at law to enforce payment of the balance due to him under the said contract, and for all extra work in respect thereof; and the production of a final certificate shall not in any case be a condition precedent to his right to recover the amount justly due and owing to him, and such balance of the amount due

Statement.

in respect to extras shall be recovered if justly due, without the necessity for the production in evidence of any final certificate, and the right of action hereby provided shall not be controlled by the arbitration clause hereinafter set forth.

"And it is hereby further agreed by and between the said parties as follows, that is to say: . . .

"Third. Should the proprietor or the architect at any time during the progress of the said works, require any alterations of or deviations from, additions to, or omissions in, the said plans and specifications, he shall have the right and power to make such change and changes, and the same shall in no wise affect or make void the contract, but the value of the work omitted shall be deducted from the amount of contract by a fair and reasonable valuation; and for additional work required in alterations, the amount to be paid therefor shall be agreed upon before commencing additions, and such agreement shall also state the extension of time (if any) which is to be granted by reason thereof; provided, that in estimating the value of such alterations or additions regard shall be had to any loss, outlay or damage necessarily and reasonably sustained by the contractor in the preparations to comply with the original drawings and specifications. . . .

"Fifth. Should any question arise respecting the true construction or meaning of the drawings or specifications, or should any dispute occur from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the architect, whose award shall be final and conclusive, subject only to the exception provided for in clause sixth in reference to the value of any claim for extras or deductions. . . .

"Ninth. The proprietor shall insure the building from time to time to the extent of at least two-thirds of its value during the course of erection, and in case the proprietor should not insure, he will be required to run all risks of loss so far as regards the value of the works; and upon such insurance the contractor shall re-pay to the proprietor a proportionate part of the ordinary premium, and also pay to

Statement.

the insurance company, the whole amount of the increased premium in respect of a builder's risk until the building is taken over by the proprietor. . . .

"Eleventh. Should the contractor fail to finish the work at or before the time agreed upon, he shall pay or allow to the proprietor by way of liquidated damages, the sum of fifty dollars per week for each and every week thereafter the said works shall remain incomplete, due allowance to be made for extension of time for additional work or alterations as laid down in clause number three of this agreement.

"Twelfth. Should any work be delayed beyond the time mentioned in this agreement by the inclemency of the weather, or by reason of general strikes of a particular trade, the architect shall have full power to extend the time for the completion of the works, making a just and reasonable extension for that purpose."

The defendant by his defence says that the plaintiff refused and neglected to perform the contract within the time mentioned in the agreement, the 15th of August, 1893, and did not do so until the 14th of December, 1893, by reason of which the defendant was damaged to the extent of $750, after allowing for extension of time; and also that plaintiff performed the work in a negligent, unworkmanlike, careless and improper manner, and did not provide proper and good material, by reason of which the defendant was further damaged to the extent of $250, and counterclaimed for the said sums.

In reply the plaintiff alleges that the provision referred to in the first part of the defendant's statement of defence had been waived, by defendant's going into occupation before the completion, and after the time fixed thereof by contract; insuring the house after the expiration of the carpenter's risk; making payments to the plaintiff after the time fixed for completion and after actual completion; directing plaintiff to use other material than that provided for by the specifications, which could not be obtained within the time fixed for completion; and directing the plaintiff to construct certain

Statement.

portions of the work according to new plans and specifications, which were not furnished promptly; by the architect extending the time for completion by forty-seven days, and granting a final certificate certifying the amount due and the defendant thereafter making payment on account; and by the extra work ordered by the defendant, and by delay in work to be done by defendant. And the plaintiff objects that it is not open to the defendant to plead or prove the second part of his defence.

By rejoinder the defendant says that if he did any of the acts or things alleged in the plaintiff's reply, they were done on the express understanding that they should be in no manner understood to be any waiver; that no extension of time was agreed upon as provided by the terms of the contract; that any certificate granted by the architect was without the defendant's knowledge or consent, contrary to his instructions and contrary to fact; and that any payments made thereafter, were expressly made without prejudice to his rights; that no certificate of the architect exempts plaintiff from liability to replace works afterwards discovered to be done badly or not in accordance with the specifications; that no disputes were ever referred to the architect; and that the acts relied upon by the plaintiff, as a waiver, did not in law constitute a waiver.

The evidence appears sufficiently from the judgment.

Argument.

N. D. Beck, Q.C., for plaintiff.

S. S. Taylor, Q.C., for defendant.

[*September 5th, 1897.*]

Judgment

SCOTT, J. (after referring to portions of the pleadings and contract)—On 11th December, 1893, the architect, Mr. Edmiston, gave the plaintiff the following certificate:

"Edmonton, Alberta, 11th Dec., 1893.

"Dr. H. C. Wilson,

"Edmonton.

"We hereby certify that Mr. K. A. McLeod has satisfactorily completed his contract for building your house accord-

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ing to plans and specifications. The balance held by you is eleven hundred and fifty dollars ($1,150).

"Yours truly,
(Sgd.) Edmiston & Flater.

1st Instalment	$ 600
2d Instalment.....	1,000
3rd Instalment	850
4th Instalment	300
5th Instalment	200
	2,950
Balance due	1,150
	$4,100

Contract price, $4,100."

This certificate is in the hand writing of Mr. Edmiston, and was signed by him in the name of the firm of which he was a member. In his evidence at the trial he states that at the time it was made out by him he was satisfied that plaintiff had completed the work in accordance with the plans and specifications, that, a few days before the certificate was given by him, he went over the house with the defendant, who pointed out what he thought required to be done, and he (Edmiston) then made out a list of what was to be done in order to satisfy the defendant; that this list was handed by him (Edmiston) to the plaintiff, that they then went together to the house and he (Edmiston) remained there until plaintiff completed the work, and that, after the work was finished, defendant expressed himself as being satisfied with the completion. Defendant, however, denies that he expressed his satisfaction with the work. His version is as follows: "When Edmiston and plaintiff came down to the house, after plaintiff had finished the work pointed out to him, Edmiston asked 'if that was all?' I replied 'Yes, that is all;' but I did not then or at any time express my satisfaction with the work."

Apart from any question as to whether the work was actually performed in accordance with the plans and specifi-

Judgment.
Scott, J.

cations, or as to whether defendant was satisfied with the manner of its performance, I am of opinion that, in the absence of fraud, or collusion, no suspicion of which arises in this case, the final certificate given by the architect is so far binding upon the defendant that he cannot now contend that the work was not done in accordance with the plans and specifications.

I cannot see any material distinction between the provisions of this contract relating to the giving of a final certificate, and those in question in the large number of cases cited in Mr. Hudson's work on building contracts, in which it was held that a final certificate was binding upon the owner of the building to the extent I have mentioned.

Among the reasons urged on behalf of the defendant why the certificate was not binding upon him were that the architect had no power or authority to make it; that it was made without defendant's knowledge or consent, contrary to his instructions and contrary to fact.

I am satisfied that, by the provisions of the contract, the architect was authorized to grant such a certificate. Having authority to grant it, it was immaterial whether defendant had knowledge of his intentions to grant it, or that he consented to it or forbade its being granted. If it was untrue or contrary to the fact, defendant might have a remedy against the architect for issuing a false certificate.

Another reason urged against the finality of the certificate was that the contract provided that no certificate of the architect should in any way lessen the total and final responsibility of the plaintiff, nor exempt him from liability to replace work if it be afterwards discovered to have been done badly, or not according to plans and specifications.

I can find no such provision in the contract. By its terms 70 per cent. of the value of the work done was to be paid semi-monthly, and the balance 30 days after completion, and it is then provided that, in respect of the semi-monthly payments, a progress certificate should be obtained from and signed by the architect, and that said certificate shall in no way lessen plaintiff's total and final responsibility to the ex-

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tent referred to. I think that the only reasonable construction of this provision is that it refers only to progress certificates and not to the final certificates.

Another defence is that, by the terms of the contract, plaintiff agreed to perform and complete the work before 15th August, 1893, and further agreed that should he fail to complete the work by that time, he should forfeit and pay the defendant, by way of liquidated damages, the sum of $50 per week for each and every week thereafter that the work should remain incomplete, due allowance being made for extension of time for additional work or alterations; that defendant allowed plaintiff two days to do and perform all alterations and additional work, which defendant alleges was sufficient time for that purpose, but plaintiff did not fully complete the work until 14th day of December, 1893, and thereby prevented defendant occupying the building, and compelled him to pay rent for another house, and in other ways damaged defendant to the extent of $750, which he claims as liquidated damages and to set off as much thereof as will satisfy plaintiff's claim.

The evidence shews that the building was not completed until long after 15th August, 1893, but plaintiff contends that the provisions respecting penalty for non-completion were wholly or partly waived and plaintiff discharged from liability under them by reason of certain facts set out in the pleadings.

One of the grounds relied upon by plaintiff as constituting a waiver of and discharge from the penalty is that the delay in completion was caused by changes made by the defendant in the plans and specifications and in the materials for the work.

The contract provides that the defendant or the architect should have the right to require such changes and alterations to be made; further, that for additional work required in alterations, the amount to be paid therefor should be agreed upon before commencing the work, and that such agreement should state the extension of time (if any) which was to be granted by reason thereof. It also provided that,

in computing the time after 15th August, 1893, in respect of which the penalty for non-completion should be payable, due allowance should be made for extensions of time for alterations. Judgment. Scott, J.

Certain changes were made by the architect in the plans and specifications which caused delay in completion, but, in my opinion, these changes and the consequent delay did not constitute a waiver of the penalty clause except to the extent of the delay thereby caused. I would be inclined to hold otherwise were it not for the fact that the contract provides that reasonable extensions of time for completion shall be allowed on account of such delays, and that such extensions shall be taken into consideration in fixing the penalty. The contracts in question in the English cases, in which it was held that delays caused by changes in plan will avoid the penalty clause, contained no such provision, and it would seem that the provision is designed to overcome the effect of these decisions.

The contract also provides that, should any work be delayed beyond the time mentioned for completion by inclemency of the weather, the architect should have full power to extend the time for completion of the work, making a just and reasonable extension.

It is contended by the plaintiff that the architect having given his final certificate on completion of the work, stating a certain amount to be due to the plaintiff, and without making any deduction for the penalty, it is final and conclusive upon the question of the penalty, and, therefore, that the plaintiff is not liable for any.

It appears from the evidence that the question of penalty was never considered by the architect until after he gave the final certificate, and, therefore, whatever its legal effect may be, it was never intended by him to deal with or dispose of that question.

But, in my opinion, the certificate is not final or conclusive upon that point. So far as the extensions of time by reason of changes in plan are concerned, it does not appear that the architect had any authority to fix the time that

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should be allowed. True, all disputes were referred to him, but that question could not be said to have been in dispute because it does not appear to have been mentioned by either party. If the architect had no power to fix the extensions of time, and no such extension had been fixed or agreed upon before the giving of the final certificate, he was not, when giving it, in a position to state what (if any) deductions should be made by way of penalty for non-completion.

Has the defendant lost his right to exact the penalty because the extensions of time he should have allowed, by reason of delay caused by alterations, were not fixed or agreed upon before the giving of the final certificate? I think it would be unreasonable so to hold, as it would be unreasonable to hold that the plaintiff had forfeited his claim for extra work in case the price of it had not been agreed upon before the certificate was given.

The contract provides that the final certificate of the architect shall certify the balance due to the plaintiff on the contract and *for all extras in respect thereof*. Plaintiff is now suing for extras on the contract, and yet the certificate is silent as to extras. If his contention as to its finality were upheld, it would appear that his claim for extras would be gone even though it has been shewn that they were not considered by the architect when making the certificate.

The case of *Laidlaw* v. *Hastings Pier Co.* reported in the appendix to Jenkins and Raymond's Architect's Legal Hand Book was relied upon by plaintiff's counsel in support of his contention that the penalties to which plaintiff was liable should have been deducted in the architect's final certificate, and that, not having been so deducted, defendant's right to exact them was gone. I find, however, that the provisions of the contract in question in that case differ materially from those of the contract now under consideration. The former provided that the contractors "should forfeit and pay to the company £20 a week *to be paid to and retained by the company* as ascertained and liquidated damages, while the latter provides that in case plaintiff should fail to finish the work by time agreed upon, "he should pay

or allow the proprietor by way of liquidated damages the sum of fifty dollars per week." Lord Coleridge, C.J., in his judgment in that case, says: "It appears to me that they (the company) have, by their conduct, disentitled themselves to insist upon the penalties, because the penalties, as I understand, are to be reserved or retained by them the moment they accrue from time to time, and they have not so retained them." It appears to me that this language is not applicable to the contract in the present case, because I can find nothing in it indicating an intention that any penalties accruing to the defendant should be retained by him by way of deduction from the contract price. Judgment. Scott, J.

A further circumstance relied upon by plaintiff as constituting a waiver of the penalty clause is that certain work which the plaintiff had to perform under the contract could only be done after certain other work which was to be done by the defendant had been done by him, and that the defendant delayed the performance of the latter work for so long a time as to prevent plaintiff from completing the work by the time limited, the instances specified in the pleadings being that defendant who was to furnish the glass and the furnace for the building, did not do so until after the time fixed for completion.

The evidence does not satisfy me that defendant did not furnish the glass or the furnace at the proper time. It is shewn that they were delivered in the neighborhood of the building long before they were required. The heavy parts of the furnace were delivered at the building, while the lighter parts and the glass were stored in the defendant's stable, a short distance from the building, along with the hardware supplied by defendant for the building. The hardware was used by plaintiff and the workmen in the building from time to time as it was required, and I am satisfied that the plaintiff or his foreman knew that the glass and the furnace were on hand ready for use when required. Plaintiff states that delay in laying the basement floor and making the furnace connections was occasioned owing to the furnace not having been set up in the basement until after the time fixed for

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completion, but it does not appear that defendant was called upon to set it up at an earlier date.

Assuming that material delay in the completion, caused by the owner's neglect or omission, would operate to discharge the contractor from the penalties for non-completion in cases where the contract did not provide for an extension of time by reason of such delay, I think that the principle should not be applicable to cases where an act to be done by the owner could not be done by him until after the contractor had done certain work required to be done by him, and the owner had not received notice that such latter work had been done. The furnace could not be set up until the building had reached a certain stage towards completion, and it may be presumed that the plaintiff knew best when that stage was reached. It cannot be presumed that the defendant would know even if he were on the spot and saw the building every day. I, therefore, think that the plaintiff should have given the defendant notice when he required the furnace set up. If after giving such notice, there had been unreasonable delay on the part of the defendant in setting it up, the plaintiff might have been discharged from the penalty, but not otherwise. Some delay may have been caused by certain glass furnished by the defendant not fitting the frames therefor, furnished by the plaintiff, and plaintiff having in consequence to alter some of the frames to cause it to fit, but this, at most, would only entitle plaintiff to an extension of the time for completion.

Another ground upon which the plaintiff claims a waiver of the penalty clause is that, during the progress of the work, the defendant directed the plaintiff not to use the material provided for by the specifications in the making of the stairway, but to make inquiries as to other material and the cost thereof from certain dealers in Minneapolis; that as a result of the information received in answer to such inquiries, defendant directed the plaintiff to obtain other materials than those specified; that plaintiff accordingly, by direction of the defendant, ordered said other materials from them, but they became temporarily unable to supply them, as defendant

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well knew, and did not supply same until long after the time fixed for completion, and that but for the change made by the defendant, the plaintiff could have completed the work by the appointed time. In my opinion these facts would not constitute a waiver of the penalty clauses.

A further ground upon which a waiver is claimed is that defendant instructed plaintiff not to construct the stairway according to the plans and specifications but according to certain new plans and specifications, to be afterwards prepared and furnished to him by the defendant, and that owing to the delay in the preparation and furnishing of such other plans and specifications, plaintiff was prevented from completing the building at the appointed time.

The plan of the substituted stairway was furnished between 19th June and 4th July. Plaintiff says that the change in the stairway was decided upon at least two weeks before the latter date. Defendant says it was decided upon before plaintiff's tender was accepted. The architect says it was early in the work. Plaintiff says that he went to the architect's office several times and asked him to hurry up the plans, but he does not state how long it was after his first visit that the plans were furnished, nor does he state what time was lost by him, owing to the plans not having been furnished when he required them. I, therefore, think that no material delay has been shewn to have been caused by the omission to furnish the plans.

Other grounds upon which a waiver is claimed are that before the completion of the work, defendant entered into occupation of the building, that defendant insured the building at his own risk and took the building over as his own property on the cessation of the carpenter's risk thereon, and that defendant made payment to the plaintiff on account of the contract price after the time fixed for the completion of the work and after actual completion.

By agreement of the parties at or before the time of defendant entering into occupation, his occupation was not to be a waiver of plaintiff's liability under the contract. In

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addition to this I am of opinion that neither such occupation nor either of the other grounds referred to would operate as a waiver of the penalty clause.

I now come to the question of what, if any, extensions of time plaintiff became entitled to. Although the architect did not consider that question before he gave his final certificate, it appears that shortly after giving it, he made an estimate of them, which estimate he now states was a reasonable one. In it he gives in detail the different delays occasioned to plaintiff and their causes, and the number of days extension of time plaintiff should have in respect of each. The total number of days extension allowed was 47, which would extend the time for completion to the 1st October, 1893.

While it may be open to question whether the architect, after having given his final certificate, was not *functus officio* and therefore not in a position to bind either of the parties by his decision upon any question arising under the contract, and also whether some of the matters in respect of which extensions of time were allowed by him were not matters in respect of which he ever had any authority to grant any extension, yet apart from these questions, I think his opinion as to what extension should be allowed is entitled to great weight, and I think that I should adopt his estimate. By reason of his position as overseer of the work, he had an exceptionally favourable opportunity for observing the progress of the work, and ascertaining what delays were occasioned and the cause of them, and in addition to this he was a disinterested observer. It is possible that, upon a close scrutiny of the evidence, it may be found that the weight of it might tend to shew that his total estimate should be reduced or increased by a few days, but the increase or reduction would be small and hardly worth consideration.

The stairways, rails, balusters, newel posts, etc., were ordered by plaintiff from a manufacturing firm in Minneapolis. The order was sent on 24th July, but owing to a fire in their factory, they were not shipped until 19th August, and owing to delay on the railway, they did not reach Edmonton until a few days after 1st October. So far

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as the actual construction of the stairway is concerned, the delay in finishing it was not attributable to the plaintiff but mainly to the causes I have mentioned. It was contended on the part of the plaintiff that the defendant was answerable for that delay because, when a change in the stairway material was completed, the architect handed plaintiff the illustrated catalogue of the Minneapolis firm, containing cuts of the style of newel posts, etc., which had been selected, and asked him to write for quotations of prices of walnut and cherry respectively. This plaintiff did, and upon being notified as to the material decided upon, he ordered the stairway from that firm. If the evidence disclosed that either the defendant or the architect required that plaintiff should procure the stairway from that firm, then I think it reasonable that the former should be responsible for the delay occasioned by the plaintiff following such instructions, but I do not understand that any restriction was placed upon the plaintiff as to where the stairway should be procured. What was done by the architect was merely to suggest where it might be procured, and it certainly was not contemplated that the defendant should be responsible for delay occasioned by it being ordered where it was ordered.

The building was not completed by 1st October, 1893; in fact it does not appear to have been finally completed until 11th December, 1893, upon which day the final certificate was given, because on that day some things were done by plaintiff in order to finally complete it to the satisfaction of the architect; but what was done on that day was of small moment mainly in the nature of repairs. The work was substantially completed sometime before that date, although it is hard to determine the exact dates. Small jobs and some repairing and changing were done both in November and December, but with the exception of some varnishing and painting in hall and stairway early in November, were also of small moment. On the 3rd October, defendant wrote the architect, complaining that the building was not completed and specifying certain work which was unfinished. Beyond the staircases and bookcases, the work specified was of small

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importance. The stairway, except as to painting, was completed on the 28th October, and the bookcases were put in on 18th October. I think a fair and reasonable view is that the work was substantially completed on the 28th October, and not before, and that therefore defendant is entitled to set off against plaintiff's claim $200 for damage for non-completion within the time limited by the contract.

In referring to the provisions of the agreement relating to the payment of damages for non-completion, I have referred to them as the penalty clauses and to the damages as a penalty, but this was only for the sake of brevity. It was conceded by the plaintiff's counsel at the trial that those provisions must be construed as a contract for the payment of liquidated damages, and that the amount payable could not be considered a penalty.

I give judgment for plaintiff for $305.50, made up as follows:—

Balance claimed by plaintiff	$450 00
Less amount of set-off	200 00
	$250 00
Int. from 11th Dec., 1893	55 50
	$305 50

I also give judgment for plaintiff on defendant's counter-claim.

REPORTER:

J. E. Wallbridge, Advocate, Edmonton.

DOIDGE v. TOWN OF REGINA (No. 1).

Security for costs—Assets within the jurisdiction—Substantial, not "floating."

Plaintiffs who were non-residents had, at the time of an application for security for costs, assets within the Territories to the amount of $4,000, consisting of live stock and railway plant in use upon contract work for the Canadian Pacific Railway Company, in construction of the Crow's Nest Branch railway.

Held, that this property was not substantial and fixed, but floating, and an order for security for costs was made.

[RICHARDSON, J., *13th November, 1897.*

Statement.

The plaintiffs were contractors residing beyond the jurisdiction, and defendants obtained a summons for an order for security for costs. On the return, plaintiffs filed an affidavit showing that they were at that time engaged upon contract work for the Canadian Pacific Railway Company in the construction of the Crow's Nest Pass branch, such work being within the jurisdiction of the Court; and that they had in the Judicial District of Alberta, engaged on such work, a large quantity of personal property liable to execution, consisting of live stock and railway plant, to the value of at least $4,000. The extent, terms, and time for completion of this contract were not shewn.

Argument.

Norman Mackenzie, for defendant.

Ford Jones, for plaintiff.

[*13th November, 1897.*]

Judgment.

RICHARDSON, J.—On defendant's application under section 520 Jud. Ord. for security for costs the plaintiffs object to the order being made as applied for, because, as shewn by the affidavit of Edwin Doidge, the plaintiffs are at present

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Richardson, J.

engaged upon contract work for the C. P. R. Co. in construction of the Crow's Nest Pass branch, such work being within the North-West Territories, and have within the jurisdiction engaged on such work a large amount of personal property, at least, $4,000, liable to execution, consisting of live stock and railway plant within the Judicial District of Alberta.

In support of this contention I am referred to *Re Apollinaris Co.*,[1] in which case the order for security for costs was refused, because, as Lord Halsbury, who delivered the judgment in appeal, states, it appeared that the plaintiffs, although resident abroad, had a fixed and large business establishment in London, from the nature of which and the amount of stock in such business it was impossible to doubt plaintiff's assets in England would be found capable of answering any possible costs of the appeal.

This judgment does not, as I read it, overrule the principle laid down in *Ebrard* v. *Gassier*[2] (also in appeal), by Bowen, L.J., who says: "To avoid an order being made plaintiffs must show substantial, not floating, but fixed property to answer costs."

To my mind Lord Halsbury's meaning is that where such conditions are shewn as in *Re Apollinaris*, reasonably exercised discretion will determine them as within the principle of the *Ebrard* case and sufficiently substantial.

In the case now before me I fail to perceive anything from which I can, using Lord Halsbury's expressions, arrive at the conclusion that it is impossible to doubt plaintiff's assets now in the Territories will be found *infra juris* when and if wanted capable of answering any possible costs of defendants in the action.

Plaintiffs, it is stated, have a contract under which $4,000 worth of material is in use now, and it is beyond contradiction and notorious that the Crow's Nest branch extends far beyond the jurisdiction to the west. The extent,

[1] (1891) 1 Ch. 1; 63 L. T. 502; 39 W. R. 309 C. A. [2] 28 Ch. 232.

beginning and ending of this contract is not shewn, or the time set for its completion.

Judgment.

Richardson, J.

In my judgment the property plaintiffs are shewn to have in the North-West Territories is not substantial, but floating, and the order applied for ought to go. The amount I fix at $100, unless Mr. Mackenzie convinces me this is not sufficient by 15th November.

REPORTER:

C. H. Bell, Advocate, Regina.

RANDALL v. ROBERTSON.

Practice—Parties—Adding defendant—Third party procedure—Action for conversion — Application defendant to add person on whose behalf seizure made refused — Counterclaim — Judicature Ordinance.

In an action of conversion against a bailiff, an application under sec. 45, J. O. 1893,* by the bailiff's principal to be added as a defendant on the grounds that the bailiff was entitled to be indemnified, and the principal was entitled to set up, by way of counterclaim, certain claims against the plaintiff not arising out of the conversion complained of, was refused.

The plaintiff brought an action against the defendant for conversion of certain household furniture. The defendant applied to add or substitute, as a defendant, one O., on whose behalf he had, as bailiff, seized and sold the goods in question, alleging (1) that O. had agreed to indemnify him against the seizure, and (2) that O. desired to be added or substituted as defendant for the purpose of counterclaiming against the plaintiff certain claims, none of which appeared to arise out of the subject matter of the action.

Held, that the Court had no jurisdiction to substitute or add O. as a defendant as it was not necessary for the determination of the question in dispute, he being only indirectly interested in the result, and could be brought in by defendant as a third party; and that he could not be added for the purpose of setting up a counterclaim which did not arise, and was not involved in the subject matter of the action.

[SCOTT, J., *March 5th, 1898.*

Statement. Application by defendant to add one A. D. Osborne as a defendant, and for leave to said Osborne to defend set-off or counterclaim as he may be advised.

* 45. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Judge may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before him. The Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just, order that the names of any parties improperly joined whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence in the cause may be necessary in order to enable the Judge to effectually and completely adjudicate upon and settle all the questions involved in the cause or matter, be added. Every party whose name is so added as a defendant shall be served with a summons or notice in such manner as the Judge may order, and the proceedings as against such party shall be deemed to have begun only on the service of such summons or notice. (Now J. O. 1898, C. O. 1898, c 21, r. 35.)

Statement.

The action was for the conversion by defendant of certain household furniture of plaintiff, and the grounds of this application were as follows:

(1) That defendant seized and sold the furniture in question as bailiff to Osborne under color of a distress for rent, claimed to be due by plaintiff to Osborne, and that Osborne before the seizure by defendant had undertaken and agreed to indemnify him against any claim by plaintiff in respect of the seizure, and that Osborne had a good defence to the action on the merits.

(2) That plaintiff agreed to purchase from Osborne certain goods and chattels on the demised premises for the sum of $204, of which $100 became due before the issue of the writ in this action; that plaintiff had only paid $10 on account thereof, and has wholly broken the agreement for purchase; that Osborne desired to be added or substituted as defendant for the purpose of counterclaiming the rescission of the agreement.

(3) That the plaintiff had taken and converted to his own use property of Osborne to the value of $12, and he desired to counterclaim therefor.

(4) That plaintiff is indebted to Osborne in $40 for occupation rent of the demised premises, and he desired to set off same against plaintiff's claim, or to counterclaim therefor.

Argument

N. D. Beck, Q.C., for plaintiff.

S. S. Taylor, Q.C., for defendant.

[*March 5th, 1896.*]

Judgment.

SCOTT, J. (After referring to the facts as set out.)—The first ground is not sufficient to entitle defendant or Osborne to have the latter substituted as a defendant. It merely entitles defendant to bring in Osborne as a third party under sections 51, *et seq.*, of the Judicature Ordinance.

The second, third, and fourth grounds are merely matters of counterclaim.

Judgment.
Scott, J.

Defendant's counsel relied upon *Montgomery* v. *Foy*[1] in support of his contention that under section 45 of the Ordinance, Osborne should be added as a defendant for the purpose of enabling him to counterclaim against plaintiff in respect of the matters referred to.

In that case the question involved was the amount plaintiff was entitled to receive for freight charges upon certain goods carried by him. He was entitled to certain charges subject to a claim by the consignors for damages for a breach by plaintiff of the contract of affreightment. The consignors by whom the freight charges were ultimately payable were not parties to the action. It was held that they were entitled to be added as defendants in order to counterclaim for damages for the breach.

Lord Esher, M.R., says: "Here there is one matter only, viz., one contract of affreightment under one bill of lading out of which all the disputes between the plaintiff and the defendant and the shippers arose, and I know of no case which decides that one of the great objects of the Judicature Act cannot in the present case be carried into effect."

Kay, L.J., says: "I wish to guard myself against being thought to hold that every person who may be added as a defendant under Order 16 is thereby entitled to set up a counterclaim against the plaintiff. . . . The amount of freight due the plaintiff is clearly a question involved in the action, and if he had brought an action against the shippers they would have had a claim which might diminish the amount recoverable. I agree that a counterclaim does not stand upon quite the same footing as set off, but supposing that the ship owner brought an action for freight against the shippers, and the shippers brought an action in respect of short delivery and damage to goods, could not the Court order both actions to be tried together, and refuse to give judgment in one action before the other had been decided. The object of such an order would be to determine the actual amount due the shippers."

[1] 65 L. J. Q. B. 18; (1895), 2 Q. B. 321; 14 R. 575; 73 L. T. 12; 43 W. R. 691; 8 Asp. M. C. 36.

Judgment.

Scott, J.

A. L. Smith, L.J., says: "The whole dispute arises out of one contract of affreightment."

In the present case the only questions involved are the conversion by defendant of plaintiff's goods, and the amount of damages plaintiff is entitled to recover by virtue of such conversion. It is not necessary for the determination and settlement of these questions that Osborne should be added as a defendant, or that he should be permitted if so added to set up by way of counterclaim matters which are foreign to these questions.

In *Moser* v. *Marsden*,[2] Lindley, L.J., in speaking of the rule referred to says: "It begins by saying, 'No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties.' That is the key to the whole section. If the Court cannot decide without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the Court. It was said that the rule goes further; but can it be reasonably extended beyond this? It appears to me that it does not . . . Can we stretch the rule so far as to say that whenever a person would be incidentally affected by the judgment he may be added as a defendant. No case has been cited which goes as far as that."

Even if the defendant is liable to the plaintiff in this action, it does not necessarily follow that Osborne is also liable because he authorized the distress. The liability of defendant may have arisen by reason of some act done by him in excess or outside of the authority conferred upon him by Osborne. In such case Osborne might not be liable to plaintiff. It would be unreasonable to compel a plaintiff to proceed against a person who is not liable to him, and thus render him liable to the payment of costs of a successful defence on the ground of such non-liability.

It has not been shewn that plaintiff has the same right of action against Osborne as he has against the defendant, and even if he had I doubt whether he could be compelled to proceed against both.

[2] 61 L. J. Ch. 319; (1892) 1 Ch. 487; 66 L. T. 570; 40 W. R. 520.

Judgment.
Scott, J.

In my opinion section 45 does not authorize me to add Osborne as a defendant merely for the purpose of setting up by way of counterclaim any of the claims against plaintiff which are disclosed on this application. None of them are claims arising out of the subject matter of the action, nor are the questions which arise in them involved in the cause or matter in respect of which this action is brought.

To hold that Osborne should be added for the purpose of enabling him to set up such matters by way of counterclaim would be in effect to hold that in every case where a defendant is entitled to bring in a third party under section 57 (†) *et seq.*, he or such third party is entitled under section 45 to have the latter added as a defendant for the purpose of setting up a counterclaim against the plaintiff. In my view section 45 does not authorize the making of such an order.

If plaintiff recovers judgment in this action Osborne may ultimately be called upon to pay the amount of it to the defendant, and may not be able to obtain payment of his claims against plaintiff. I would be disposed to make the order applied for in order to prevent the possibility of such a result, but I am obliged to hold that I have no authority to do so.

The application is, therefore, dismissed with costs to the plaintiff in any event on final taxation.

REPORTER:
J. E. Wallbridge, Advocate, Edmonton.

† Now J. O. 1898, C. O. 1898, c. 21, r. 60.

DOIDGE v. TOWN OF REGINA (No. 2).

Order for discovery—Default of compliance—Motion to dismiss action —Indorsement of notice on order.

In order that a party taking out an order for discovery may invoke the provisions of sec. 184 J. O. 1893,* though only with the object of having a plaintiff's action dismissed or a defendant's defence struck out, the order must be endorsed in accordance with s. 311.†

[RICHARDSON, J., *11th March, 1898.*

Statement. The defendants obtained an order for discovery on 10th January, 1898, with which plaintiff failed to comply. On 22nd January the defendants took out a summons calling upon the plaintiff to shew cause why his action should not be dismissed for want of compliance with the terms of the order. (Sec. 184, Judicature Ordinance.) The order for discovery had not been indorsed with the notice referred to in section 311, Judicature Ordinance.

Argument *Ford Jones,* for plaintiff. The order for discovery is not indorsed with notice, and is therefore invalid. *Farden* v. *Richter*[1] is not in point. The question determined there is not whether an order for discovery need be indorsed with notice under section 311, Jud. Ord. (decided in *Hampden* v. *Wallis,*[2]) but whether an order that judgment be entered unless an affidavit be filed within 3 days does or does not require to be served. Sec. 311 (E. M. R. 573), comes up only incidentally in *Farden* v. *Richter,*[1] and there is the bare dictum of Huddleston, B., to the effect that it refers only to cases in which it is intended to threaten attachment. An order for discovery does require to be served, and would have to be served personally were it not for section 185, Jud. Ord., and must be indorsed with a memorandum under section 311, as decided in *Hampden* v. *Wallis.*[2] In any event service on the

* Now J. O. 1898, C. O. 1898, c. 21, rule 198, Eng. M. R. 363.

† Now J. O. 1898, C. O. 1898, c. 21, rule 330, Eng. M. R. 573.

[1] 23 Q. B. D. 124; 58 L. J. Q. B. 244; 60 L. T. 304; 37 W. R. 766.

[2] 26 C. D. 746; 54 L. J. Ch. 83; 50 L. T. 515; 32 W. R. 808 C. A.

Argument. advocates is not sufficient service upon which to found an application to dismiss the action, as section 185 makes such service sufficient service on which to found an application for attachment only.

Norman Mackenzie, for defendant. English Marginal Rule 363, is divided into two distinct parts: first, attachment; second, dismissal. The Annual Practice of 1898 deals first with attachment, and states that *Hampden* v. *Wallis*[2] applies "hereunder." It then goes on to deal with dismissal, and does not refer to this case as applying under this second heading. In *Farden* v. *Richter*[1] a decision three years later than *Hampden* v. *Wallis*,[2] Baron Huddleston says:—"Clearly also the order is not affected by Order XLI., r. 5, which only refers to cases in which it is intended to threaten attachment." Here the plaintiff being out of the jurisdiction could not be attached even were he so threatened.

[*March 11th, 1898.*]

Judgment. RICHARDSON, J., decided that the order for discovery should have been indorsed with notice, and directed that the summons be discharged with costs.

REPORTER:
C. H. Bell, Advocate, Regina.

GLENN v. SCOTT ET AL.

T. R. P. Act—Mortgage—Purchase subject to mortgage—Implied covenant of indemnity—Assignment of implied covenant—Survivorship of joint contractors.

The obligation, declared by the T. R. P. Acts 69,* to be implied in every instrument transferring any estate or interest in land under the provisions of that Act subject to mortgage or encumbrance, is assignable by the implied covenantee to the original mortgagor.

The implied covenant takes effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer.

Plaintiff sold, subject to a mortgage, to L. & V.; L. & V. gave a mortgage back for the whole price, the understanding being that L. & V. should pay the first mortgage, the amount thereof being credited in reduction of the second; L. & V. sold to T. for a certain sum and T. was to pay what was then owing on the two mortgages; T. sold to S. for a certain sum, and S. was to pay what was then owing on the two mortgages. S. thus became by mesne transfers the registered owner subject to the two mortgages, the first made by the plaintiff, the second by L. & V.; S. died and the contesting defendants, his administrators, became by transmission, registered owners, subject to the two mortgages. L. died, and V. assigned to the plaintiff the rights of L. & V. on T.'s implied covenant to discharge two mortgages. T. also assigned to the plaintiff his rights on S.'s implied covenant to discharge the two mortgages.

Held, plaintiff was entitled to an order against the contesting defendants, the administrators of S., that they pay the balance owing upon the two mortgages with costs, and that *de bonis propriis* if the assets of the estate proved insufficient.

Semble, the assignment from V., the survivor of L. & V., conveyed the rights also of the representatives of L.

[RICHARDSON, J., *11th March, 1898.*

Statement.

The plaintiff, in 1891, held a certificate of title to lot 1, block 28, in Indian Head, subject to a mortgage for $600 to The M'Clary Manufacturing Co. On 7th December, 1891, he transferred the lot to Last & Vian for $3,300, who executed a mortgage on the land for that sum. It was agreed, however, that out of this $3,300 they should pay off the first mortgage. Last & Vian on 7th September, 1892, transferred the lots to defendant Thompson for $3,300, and so much as was then outstanding on the two mortgages

* Now Land Titles Act, 1894, 57-58 Vic. (1894), c. 28, s. 65.

Statement.

was to be paid by Thompson out of that sum. On 29th April, 1893, Thompson transferred the land to James Scott in consideration of $500 and the payment by Scott of what was outstanding upon the two mortgages. James Scott having died, the defendants Scott, Leeson and Johnston, the administrators of the estate, became holders of a certificate of title to the land in question subject to plaintiff's mortgage, and the mortgage to the McClary Co. Last having also died, defendant Vian assigned to the plaintiff all rights which Last & Vian had against Thompson under his agreement to pay off the mortgages. Thompson likewise on 11th February, 1897, assigned to plaintiff all rights vested in him (Thompson) arising out of Scott's agreement to pay the mortgages. At the commencement of the action the mortgages were outstanding and unpaid. Vian and Thompson did not defend, but it was not shewn that they had been served with the writ of summons.

The plaintiff sued Vian and Thompson and the administrators of James Scott deceased: 1st, as for unpaid balance of the purchase money; and 2nd, on the implied covenant under section 69 of the Territories Real Property Act to pay the mortgage moneys.

Argument.

W. C. Hamilton, Q.C., for defendant.—There was no contract, express or implied, with Scott, deceased, and plaintiff to pay the mortgage money, or between Thompson and plaintiff. There was no privity between Thompson and Glenn or Scott and Glenn. The contract, if any, was one of indemnity, a personal contract not assignable. There was no consideration for the assignments from Vian to Glenn and Thompson to Glenn. Vian's assignment does not completely vest Last & Vian's rights in Glenn. The implied contract created by the Territories Real Property Act only implies where the transfers are executed in conformity with the Act. The transfers from Last & Vian to Thompson, and from Thompson to Scott do not conform, because they are silent as to the mortgages: T. R. P. Act, ss. 65, 69; L. T. Act, s. 65, form J. If Scott is liable at all, it is only to the extent

Argument.

of the land transferred. Scott's promise to pay the debt is void by the Statute of Frauds, not being in writing: *Eastwood* v. *Kenyon*.[1] *Campbell* v. *Morrison*[2] is not in point. Thompson was not a mortgagor within *Campbell* v. *Morrison*,[2] in which there was a direct and not an implied covenant: *Frontenac* v. *Hysop*,[3] *Canada L. & N. I. Co.* v. *Shaver*,[4] *Barber* v. *McCuaig*.[5] See also sections 49, 94 and 110 of the Australian Act. These are stronger than the Land Titles Act: *Australian Bank* v. *Lord*.[6] At most Scott would only be liable to the extent of the land: *Re Errington*,[7] Jones on Torrens System, p. 756.

Hugh Robson, for plaintiff.—The statement of claim is in the alternative. It claims under a transfer in consideration of $3,300, and under one in consideration of $500 and the payment of plaintiff's mortgage and the prior incumbrance to McClary Co. Only $500 was paid on the second transaction and the balance retained to pay off the mortgages, or held by Scott as a trustee to pay them off: *Re Cozier*.[8] The alternative claim is upon the right of indemnity. Vian had the power to assign the rights of Last & Vian: Addison on Contracts, "Survivorship of Joint Contractors," p. 239; Williams on Executors, p. 1775; but, in any event, Scott cannot raise this objection. The assignments of Vian and Thompson shew considerations, but both are under seal. Want of consideration was not pleaded. If section 69 of T. R. P. Act applies, the argument that the transfer must name the incumbrances is not correct, because that section says: "In every instrument . . . transferring an estate or interest *which is* subject . . . there shall be implied, etc." The Statute of Frauds is not pleaded. The liability here is statutory; but, if not, it is equitable like a case of money received, the receiver being called upon to account: *Campbell* v. *Morrison*,[2] *British Canadian Co.* v. *Tear*.[9] In *Australian Bank* v. *Lord*[6] there was no assignment. *Re Errington*[7] is the same.

[1] 11 A. & E. 438; 3 P. & D. 276; 9 L. J. Q. B. 409; 4 Jur. 1081.
[2] 24 O. A. R. 224. [3] 21 O. R. 577. [4] 22 O. A. R. 377. [5] 24 O. A. R. 492; 29 S. C. R. 126. [6] Hunter's Torrens Title Cases, 388.
[7] (1894) 1 Q. B. 11; 10 R. 91; 69 L. T. 766 D. [8] 24 Grant 537.
[9] 23 O. R. 604.

Argument. *Mr. Hamilton,* in reply.—The implied contract does not arise under section 69, T. R. P. Act, unless the mortgage is specified in the transfer and the latter is made subject to the mortgage.

[*March 11th, 1898.*]

Judgment. RICHARDSON, J. — Neither Vian nor Thompson have entered a defence, but as nothing appears on the record to shew they were served with the writ of summons, I am not in a position to make any order against them.

As regards the other defendants, the administrators of James Scott, deceased, these admit the transfers from Thompson to Scott and from Last & Vian to Thompson, but deny that any portion of the consideration in either transaction was unpaid, or was to be paid on the mortgage given by Last & Vian to plaintiff. In so far as Thompson is concerned, if he has been served with the writ, as he has not defended, plaintiff's allegation as to what formed the consideration in his purchase is admitted.

The evidence adduced on the hearing was conclusive that not only was the outstanding amount of the Last & Vian mortgage estimated as part of the consideration to be paid by the transferee in each of the two transactions, but such was positively agreed upon to be paid in each instance by the transferee. As to Scott, both plaintiff and Thompson swear to this, as also that this agreement has not been performed by either of them.

As between Thompson and Scott, under the arrangement the latter became, *quoad* Thompson, a trustee for so much of the purchase price as was represented by the Last & Vian mortgage. The evidence was also conclusive that Vian, the surviving transferee of the plaintiff, assigned whatever claim Last and he had against Thompson arising out of the transfer to him, to pay off and indemnify them against the personal liability created by their mortgage to plaintiff, as also to pay off the same. It was likewise conclusive as to the execution of an assignment by Thompson of James Scott's

Judgment.
Richardson, J.

liability incurred when he became transferee from Thompson of the land *quoad* the mortgage plaintiff held. These defendants, however, contended at the trial that the facts alleged in plaintiff's statement are insufficient in law to maintain the action because:

a. Any covenant by James Scott, deceased, or by the defendants, his administrators, implied by section 69 of the Territories Real Property Act, was a covenant between Scott, or these defendants, and Thompson, consequently there was not nor is there any privity of contract *quoad* the plaintiff.

b. Such covenant being one to indemnify Thompson, he, Thompson, cannot enforce until he has been damnified or compelled to pay the mortgage or a portion of it.

c. Any such covenant is a personal one and not assignable.

On the argument it was urged that because Last, or his representative, he being dead, did not join in the assignment by Vian, the plaintiff must fail. Even if the authority cited by Mr. Robson did not answer this objection, which I conceive it does, while Thompson might have raised the point had he defended the action, I cannot see how Scott or his representatives can do so, because plaintiff's right as against Scott and his estate must stand or fall on the assignment direct from Thompson to himself.

As the result of the transaction between Thompson and Scott, the latter *quoad* what would be, if anything, outstanding on the two mortgages, became a trustee for the former of the balance of his purchase money over the $500 paid; and as, between the parties at the time, it was known a considerable sum was due, his trusteeship would extend to this.

It was thus a claim or chose in action which Thompson could enforce against Scott, consequently assignable, and his assignee the present plaintiff is entitled to enforce against Scott's personal representatives. See Burton, J., in *Ball* v. *Tennant*.[10]

[10] 25 O. R. 50; 21 O. A. R. 602.

Judgment.
Richardson,J.

It was then urged by Mr. Hamilton, Q.C., for the contesting defendants, that because in the transfer put in from Thompson to Scott the incumbrances existing, and to which the land was subject, were not noted by memorandum as provided by section 65 of the Territories Real Property Act, the action fails. True the section does so provide, but the Act does not make a transfer without this void or disallow its registration. The section states that a transfer shall contain an accurate statement of the estate . . . intended to be transferred, and on looking at the transfer in question it appears that Thompson being registered owner of an estate in fee simple subject to incumbrances, liens and interests . . . transfers all his estate and interest to Scott in the land described. It is clear Scott became registered owner of the land, and having become so by section 60 of the Territories Real Property Act, he held the land subject to such incumbrances as were notified in the folio of the register constituted by the certificate of title. It is further to be noted that this transfer is not under seal. Then what followed?

In so far as brought before me at the hearing, a certificate of title is produced, granted 12th Sept., 1896, of the land in question to these contesting defendants by which the title is passed to them in their representative capacity in fee simple, subject to:—

1. Glenn mortgage to The McClary Co.

2. The mortgage by Last & Vian to the plaintiff, that now sued on.

It will be borne in mind that when this certificate of title was granted the Territories Real Property Act had been superseded by the Land Titles Act, and it was under the provisions of section 89 of the latter Act that the certificate now alluded to was granted to these defendants, not as transferees but by transmission. The defendants who now contest admit in the pleadings that by the transfer Thompson to Scott, the land was transferred to the latter subject to the incumbrance and mortgage. Its registration is also admitted, by which (section 60 of the Territories Real Prop-

erty Act) James Scott thereafter held the land subject to the incumbrances on the register, and the register shews the mortgages in question were then entered in it. Then by section 69 there was engrafted into the transfer the following covenant by Scott; that he, Scott, would pay the interest . . . secured by such mortgages . . . and indemnify and save Thompson harmless from and against the principal sum or other moneys secured thereby. That payment of these could be enforced from Thompson is clear to me. He, Thompson, had covenanted with Last and Vian to do this, and Scott had also undertaken to relieve and indemnify Thompson. Judgment. Richardson, J.

This undertaking or covenant by Scott is a chose in action assignable, and being assigned as shewn, the privity which otherwise was wanting supports plaintiff's action as mortgagee against Scott's estate in the hands of his representative to compel payment of the outstanding mortgage money by the estate.

And the plaintiff in my judgment is entitled to the relief he seeks by his action with costs against the contesting defendants *de bonis propriis*, if no assets of the estate to cover, less, however, such costs as have been occasioned by making Vian and Thompson defendants.

REPORTER:

C. H. Bell, Advocate, Regina.

[See Maloney v. Campbell, 28 S. C. R. 22.—Ed.]

RE McCARTHY (No. 1)—McCARTHY v. WALKER.

Taxation of advocate's bill more than twelve months after delivery—Special circumstances—Receipt of client's moneys—Commission.

An order for the taxation of an advocate's bill of costs ought not to be granted on the *ex parte* application of the client, where the bill has been rendered more than twelve months before the application to tax.

Orders of course defined.

Semble, (1) on an application to set aside an *ex parte* order to tax, if special circumstances are shewn by the client which would in the opinion of the Judge have warranted an order to tax on a special application, the *ex parte* order will be allowed to stand. (2) The receipt by the advocate from time to time of moneys belonging to his client, does not constitute such special circumstances, nor, although overcharges would, under certain circumstances, constitute such special circumstances, does the mere fact that a commission of 5 per cent. is charged on the collection of a sum of twelve hundred dollars.

On the trial of an action on an advocate's bill the trial Judge may, without special circumstances appearing, and notwithstanding the lapse of twelve months from delivery, direct a reference or enquiry as to any disputed items, although no application to tax has previously been made.

[SCOTT, J., *September 28th, 1898.*

Statement

The plaintiff, an advocate of the Supreme Court of the North-West Territories, brought an action against the defendant on two bills of costs, the first of which amounted to $87.95, and was incurred by the defendant for work done on her behalf by the firm of McCarthy & Harvey, of which the plaintiff was a member, and the second of which amounted to $108.29, and was incurred by the defendant for work done on her behalf by the firm of McCarthy & Bangs, of which the plaintiff was also a member. Harvey & Bangs had each assigned their interest in the above bills to the plaintiff.

The writ was issued on the 21st day of June, 1898. On the 21st July, the defendant's advocates applied for and obtained *ex parte* an order for the taxation of the bills of costs in question. The bill of costs of McCarthy & Harvey had been rendered to the defendant more than one year before this order was obtained. The plaintiff thereupon ob-

tained a summons calling upon the defendant to show cause why this *ex parte* order in so far as it related to the bill of costs of the firm of McCarthy & Harvey should not be set aside and vacated on the ground that it was made *ex parte* and without notice to the plaintiff, and on the further ground that there were not sufficient special circumstances upon which the same could have been made. Argument.

P. McCarthy, Q.C., the plaintiff, in person, in support of the application referred to *Re Inderwick*;[1] Seton on Decree, vol. 1, page 607; Morgan & Wurtzberg, p. 437.

R. B. Bennett, for the client, referred to Annual Practice, 1109; *In re Robinson*;[2] Cordery on Solicitors, p. 257.

[*September 28th, 1898.*]

SCOTT, J.—On the 21st July last, on the application of Elizabeth R. Walker, by her advocate, I made an order *ex parte* for the taxation of certain bills of costs which had been delivered to her by the above-named firms. Judgment.

Prior to the application, Mr. McCarthy, who was a member of both firms, had, in his own right and as assignee of the other members thereof, commenced an action in this Court against Mrs. Walker, the applicant, for the recovery of the amount claimed to be due in respect of the bills so delivered. These bills were produced on the application and it appeared therefrom that those rendered by the firm of McCarthy & Harvey had been delivered more than twelve months prior to the application. Mr. Bennett, one of the advocates for Mrs. Walker, in his affidavit filed on the application, states that he verily believes from the date marks thereon that they were rendered some years ago, but that, as said McCarthy & Harvey and McCarthy & Bangs were receiving moneys for her from time to time, said bills were not taxed, moneys being retained from time to time by said advocates out of said moneys so received by them.

At the time of the application Mr. Bennett called my attention to an item in one of the bills rendered by Mc-

[1] 25 Ch. D. 729; 50 L. T. 221; 32 W. R. 541. [2] 37 L. J. Ex. 11; L. R. 3 Ex. 4; 17 L. T. 179; 16 W. R. 110.

Judgment.
Scott, J.

Carthy & Harvey containing a charge of $60 for commission on collections made by them, and claimed that it was an unreasonable and unauthorized charge. Except as I have mentioned no special circumstances were shewn on the application.

On the 26th July last upon the application of Mr. McCarthy I granted a summons to show cause why the order so made by me, in so far as same relates to the bills of costs of the firm of McCarthy & Harvey, should not be set aside or vacated on the following grounds:

1. That it was made *ex parte*, and without notice to said McCarthy.

2. That it was made improvidently and without sufficient material therefor.

3. That there were no special circumstances upon which it could have been made.

I am now of opinion that the order should not have been made by me *ex parte*. I cannot find any case in which an order was so made for the taxation of a bill after the expiration of twelve months from delivery. Upon the argument it was contended by Mr. Bennett that an order to tax was an order of course, and therefore should be made *ex parte*. In support of this contention he referred to the Annual Practice, 1897, p. 1109 (Notes to order 62, rule 16), where it is stated that an order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk. It is also there stated that orders of course under the Solicitor's Act are made on petition of course, and in *Re Pollard*[3] is cited in support of that statement. Upon referring to that case I find that it clearly defines the distinction between orders of course and orders not of course, and the different practice which prevails with respect to each. Fry, L.J., at page 278 of the report in the Law Journal, says, as follows: "Orders under the section in question were divided into two classes—first, orders of course where there was no

[3] 57 L. J. Q. B. 273; 20 Q. B. D. 656; 59 L. T. 96; 36 W. R. 515.

dispute and no special circumstances requiring the exercise of a judicial mind; and secondly, orders not of course, as where there was some matter in dispute or some special circumstances demanding attention. Orders of course were made on petition of course by the Secretary of the Master of the Rolls. Special orders were made by the Master of the Rolls or any of the Vice-Chancellors in Chambers."

Judgment. Scott, J.

In the light of this definition I think there can be no doubt that the order, so far as it relates to the taxation of the bill of costs of McCarthy & Harvey, should not have been made *ex parte*.

Even though the order as to the taxation of those bills was improperly obtained, I would be disposed to let it stand if I were now satisfied that such special circumstances as would warrant it, have been disclosed, but I am not satisfied on that point.

When making the order I appear to have given undue weight to the allegation in Mr. Bennett's affidavit as to the receipt from time to time by the two firms of moneys of their client. In McCarthy & Harvey's bills only one such sum is credited to her, and it has been shewn on this application that no other sums were received by that firm on her account.

It is true that several sums are credited by McCarthy & Bangs as having been received by them on her account, but it is not alleged that there was any connection between the two firms or their accounts, nor does any such connection appear, beyond the fact that Mr. McCarthy appears to have been a member of both. Apart from this, I am now inclined to doubt whether the fact of an advocate receiving moneys of his client from time to time constitutes a special circumstance within the section under which the order was made (Ord. No. 9 of 1895, section 21), as that fact alone does not appear to me to afford any reason why taxation should not have been applied for at an earlier date.

It has been held that overcharges in a bill would under certain circumstances constitute a special circumstance sufficient to warrant such an order, but it is not clearly shewn that the bills in question contained any overcharges. So far

Judgment. Scott, J.

as I can remember only one item was objected to, viz., a charge of $60, being a fee of 5% for the collection of a sum of $1,200; whether that is an overcharge or an improper charge appears to me to depend upon the circumstances under which it was made. It is not alleged, nor does it appear that it was an improper charge, and the most that can be claimed by the client on the material before me is that it may be an improper one. I think she should have gone further and have disclosed circumstances that would at least lead to the suspicion that it was an improper one.

Even though Mrs. Walker does not obtain the order for taxation of the bills in question, she is not left without a remedy, as—apart from the Solicitor's Act and the Ordinance referred to—upon the trial of this action, the trial Judge may direct a reference or enquiry as to any disputed items of the bills. (See in *Re Park, Cole* v. *Park*.[4]).

The order of 21st July last will therefore be varied by striking out that portion thereof which directs the taxation of the bills of costs delivered by McCarthy & Harvey.

Mr. McCarthy will have the costs of this application.

Order set aside in part.

[4] 58 L. J. Ch. 547; 41 Ch. D. 326; 61 L. T. 173; 37 W. R. 542.

HULL v. DONOHUE (No. 2).

Costs—Counsel Fee before Court in banc—Application to Fix—Disbursements—Travelling Expenses.

It is not proper to make a formal application to the Court en banc to fix a counsel fee in a case argued before it. If the marking of the fee is overlooked by the Court, it would be proper for counsel to draw attention either in open Court or otherwise to the omission, and as a matter of courtesy only to notify counsel on the other side of his intention.

No allowance can be made to counsel for travelling expenses.

[*Court en banc, December 5th, 1895.*

Statement. An appeal to the Court *in banc* was allowed with costs. At the time of delivery of judgment a counsel fee to the appellant's counsel was marked on the appeal book. The judgment of this Court was reversed by the Supreme Court of Canada with costs. A formal motion was made by counsel for the successful party for a counsel fee and certain disbursements, travelling expenses, etc.

Argument. *Ford Jones*, for motion.

W. C. *Hamilton*, Q.C., contra.

[*December 5th, 1895.*]

Judgment. RICHARDSON, J.—The mode of application adopted in this cause for the allowance of a counsel fee on the hearing *in banc* is not one to be approved of.

The tariff item 104 authorizes the allowance of "counsel fee" in the discretion of the Court.

While the usual procedure, i.e., of marking on the original appeal book at the time of delivery of judgment was followed in this, it has happened that the judgment then pronounced has been reversed by the Supreme Court of Canada with costs both below and in that Court. It therefore

Judgment. Richardson, J.

follows that the Court *in banc* now sitting should consider and determine what (if any) counsel fee should be authorized, taxable to the now successful party as a simple matter of duty, which almost, *ex necessitate*, would come before the members of the Court when the formal judgment or rule issued out of the Court was as a matter of course brought up before them by the registrar. When this happened, possibly the Court might desire the matter to be spoken to in Court, and thus afford an opportunity for both or either side to speak to it.

As it might happen that a matter of such importance to a successful suitor could be overlooked, it would not, it seems, be out of place for a counsel interested to draw attention either openly in Court, or otherwise, and it might be a matter of courtesy in advance to indicate to the opposite side the intention of reminding the Court, as also to suggest the exercise of discretion.

The course adopted of a formal motion, the only apparent object of which seems to be to increase costs, is one which is not to be approved of, in so far as counsel fee is concerned; as to the other part of the application, i.e., asking for disbursements, travelling expenses, etc., there is no provision in the tariff for allowing such. Besides at an early Term of the Court the consideration, as well as the granting thereof, was refused, and the Court now sees no good reason to depart from that ruling.

The present application is refused, but, under the circumstances, there will be no costs.

Mr. Justice SCOTT having been engaged in the case as counsel takes no part in the application.

WETMORE and MCGUIRE, JJ., concurred.

Application refused without costs.

THE QUEEN v. BREWSTER (No. 1).

Criminal Law—N. W. T. Act—Jury—Accused's Election—Re-trial—New Election—Duty of Judge—Judge's Power to Refuse to try summarily.

The North-West Territories Act, R. S. C. c. 50, s. 67 (section substituted by 54-55 Vic. (1891), c. 22, provides that "when the person is charged with any other criminal offence, the same shall be tried, heard and determined by the Judge with the intervention of a jury of six, but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the intervention of a jury."

Held that the consent of the accused does not make it imperative upon the Judge to try the charge without the intervention of a jury.

It appears to be assumed by the Court that where the accused had been tried by a Judge with the intervention of a jury who disagreed and were discharged and the accused was brought up again for trial, the Judge on the second trial might, had he seen fit, have on the accused's consent, tried him without the intervention of the jury.

[*Court en banc, June 2nd, 1896.*

Crown case reserved.

On January 7th, 1896, the prisoner was charged with having stolen cattle of value of about $800. He elected to be tried by a Judge with the intervention of a jury. The jury failed to agree on a verdict and were discharged, the accused being remanded until Feb. 19th, 1896. On that date he was again brought up, when he applied to be tried by a Judge summarily without a jury. This application the trial Judge refused and tried the accused with the intervention of a jury. Statement.

The jury having brought in a verdict of guilty and sentence having been postponed, the trial Judge reserved the following questions of law for the opinion of the Court of Appeal:—

(1) Whether on the facts stated, on the trial being resumed on the 19th of February, the trial Judge was bound

Statement. to comply with and grant the accused's application to be tried summarily; and (2) whether the trial by jury was a mis-trial.

Argument. *C. C. McCaul*, Q.C., for the Crown.

J. A. Lougheed, Q.C., for the prisoner.

[*June 2nd, 1896.*]

Judgment. RICHARDSON, J.—Brewster was duly charged before Mr. Justice Rouleau with theft of a number of cattle, the value exceeding as appears $200, on the 7th January, 1896, and was then tried before that Judge with the intervention of a jury. The jury upon that occasion being unable to agree upon a verdict were discharged by the Judge. That trial thus failing results, Brewster was subsequently on the 19th February again brought before the same Judge for trial on the charge, with the intervention of another jury, when Brewster expressed his consent and applied to be tried by the Judge alone in a summary way, and without the intervention of a jury. The Judge refused this application and the trial took place with a jury. The Judge having some doubts after the trial as to the correctness of his ruling, has referred the following questions to the Court for Crown Cases Reserved.

1. When an accused person under s. 67 of the North-West Territories Act as amended consents to be tried by the Judge alone in a summary way without the intervention of a jury, can the Judge refuse to so try him, and is he bound to comply with the prisoner's request?

2. Did the Judge's action result in a mis-trial?

The answer to the first question propounded by the Judge depends upon the construction which this Court gives to s. 67, and particularly as to whether or not the word "may" used in that section has an imperative or discretionary meaning. In other words whether an accused has an absolute power of determining the manner of trial or has only the

right of consenting, if the Judge be willing and considers the case before him a proper one and is willing to assume the whole responsibility of trying it alone. Judgment. Richardson, J.

The North-West Territories Act, ss. 66 and 67, provide procedure for the trial of all criminal charges. As to the class of cases falling within those described in s. 66, the charge shall be tried in a summary way and without the intervention of a jury. Section 67 then enacts that when the person is charged with any other criminal offence the same shall be tried, heard and determined by the Judge with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury.

Now it is plain that unless the accused consents the trial must in those cases comprised within s. 67 be with a jury, but waiving his rights by consent to the other form of trial, the accused may be tried by the Judge alone. No imperative duty is by the section cast upon the Judge as in the previous section. There is nothing in the context by which the intention of Parliament (as appears to this Court), can be construed to require a Judge to depart from the definition of the word "may" in the Interpretation Act, and to assume the undivided responsibility of trying alone. The sentence is to be construed as authorising the Judge on an accused so consenting, to assume the province of a jury if he thinks fit.

This disposes of the questions put for the consideration of this Court by the learned Judge, the result being that his ruling is confirmed.

WETMORE, J., MCGUIRE, J., and SCOTT, J., concurred.

LIMOGES v. CAMPBELL.

AND OTHER CASES.

Interpleader—T. R. P. Act—Creditors Relief Ordinance—Execution—Expiry—Renewal—Priorities—Seizure—Sheriff's Sale—Advertisement—Postponement—Appeal—Admission of Point of Law.

Held (1) No question of the effect of the Creditors Relief Ordinance having been raised, that the priorities of several executions against land depend not upon the date of their delivery to the sheriff, but upon the date of the deposit with the registrar of certified copies of the executions, accompanied by memoranda of the lands sought to be charged.

(2) The sheriff's advertisement of sale of land is a seizure of the land.

(3) The effect of s. 94 of the Territories Real Property Act is to provide that neither the delivery of the execution to the sheriff nor his seizure of the land binds the land, but only the deposit with the registrar of the copy-execution and accompanying memorandum.

(4) Any seizure by a sheriff enures to the benefit of all execution creditors whose executions are then in his hands, and this notwithstanding that, in case the seizure is by way of advertisement, the advertisement mentions only one or some of such executions, and *semble*, also, notwithstanding that some of such executions were not in the sheriff's hands for a sufficient time to authorize an advertisement for sale under them alone.

(5) The sheriff's advertisement of the sale of lands may properly run prior to the expiration of the year, during which he cannot actually sell, and *semble*, even if the date fixed for the sale fall short of the year, but the sale is adjourned to a date subsequent to the lapse of the year, the sale would not be bad on that account.

(6) A sheriff having seized lands under an execution before it has expired can proceed with the sale of such lands after the lapse of the time for the renewal of unexecuted executions.

[WETMORE, J., *October 20th*, 1895.

On appeal to the Court in banc. *Held* (1) The priorities of several executions against lands is not affected by the provisions of s. 94 T. R. P. Act, and that therefore such priorities are not determined by the order in which copies-execution and accompanying memoranda are deposited with the registrar, but by the dates of delivery to the sheriff.

(2) The distribution of the proceeds of the sale was governed by the provisions of the Creditors' Relief Ordinance.

(3) Although no question was raised before the Judge of first instance, as to the effect of the Creditors' Relief Ordinance, and it was there conceded that the respective execution creditors had the right to have the proceeds of the sale applied on the executions

in the order of their legal priority, this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the ordinance were not in force, but merely as a contention on their part that the whole fund should be applied on their executions, and in the absence of consent on the part of the sheriff and all the parties interested in the fund, the provisions of the ordinance must govern its disposal.

[*Court en banc, June 5th, 1896.*

Statement.

Sheriff's interpleader summons heard before WETMORE, J., as to the proceeds of the sale of lands under a number of executions. Executions against the lands of the judgment debtor Daniel Campbell, were placed in the sheriff's hands at the suits of several judgment creditors as follows:

(1) H. S. Wesbrook & Co.; (2) James Grierson; (3) The Manitoba and North-West Land Co., at the same time on 7th July, 1893; (4) The Agricultural Society of Whitewood on 23rd August, 1893; (5) Joseph Lamont on 1st November, 1893; (6) Benjamin Limoges on 27th February, 1893.

Certified copies of five of these several executions, with the proper memoranda charging the land in question, were delivered by the sheriff to the registrar, pursuant to the Territories Real Property Act (R. S. C. (1886) c. 51), s. 94, as replaced by 51 Vic. (1888), c. 20, s. 16,† in the following order: (1) Lamont, on the 11th November, 1893; (2) Limoges, on 9th March, 1894; (3) Wesbrook, Grierson, and Manitoba and North-West Land Co., all at the same time on a subsequent date. No copy of the execution of the Agricultural Society was delivered to the registrar.

The sheriff's advertisement of the sale of the land in question was dated the 10th May, 1894, and gave notice that the sale would take place on the 13th August, 1894; the sale was subsequently postponed until the 5th November, 1894, when it took place.

The interpleader summons was argued before WETMORE, J., at Moosomin.

Argument.

F. F. Forbes, for the sheriff.

† For the terms of this section, see *Re Claxton*, *ante*, vol. 1, p. 282.

Argument. *William White*, Q.C., for H. S. Wesbrook & Co., James Grierson, The Manitoba and North-West Loan Company, and The Agricultural Society of Whitewood.

E. A. C. McLorg, for Limoges and Lamont.

[*October 20th, 1895.*]

Judgment. WETMORE, J.—This is an interpleader proceeding on behalf of the sheriff to determine the right to certain monies levied under execution against the lands of the defendant Campbell.

The following executions at the suit of the different plaintiffs named below, against the lands of the defendant, were placed in the hands of the sheriff to be executed.

H. S. Wesbrook & Co.—endorsed to levy $696.63 and interest from 21st June, 1893, and $14.10, the costs of executions.

James Grierson—to levy $761.16 and interest from the same date, and $14.10 for costs of execution.

The Manitoba and North-West Loan Co.—to levy $435.79 and interest from the same date, and $14.10 costs of executions.

These executions, as apears by the sheriff's endorsements thereon, were all lodged with him at the same time, namely at eighteen minutes after ten o'clock on the 7th July, 1893.

The following executions at the suit of the different plaintiffs below named, against the lands of the defendant, were subsequently, in the order and at the date specified, delivered to the sheriff to be executed.

The Agricultural Society of Whitewood—on the 23rd August, 1893, endorsed to levy $372.65 and interest from the 4th July, 1893, and $14.10 for costs of executions.

Joseph Lamont—on the 1st November, 1893, endorsed to levy $188.40 and interest from the 11th October, 1893, and $12 for costs of executions.

Judgment.

Wetmore, J.

Benjamin Limoges—on the 27th day of February, 1894, endorsed to levy $346.02 and interest from the 27th February, 1894, and $16 for costs of executions.

The sheriff by advertisement dated the 10th day of May, 1894, advertised certain lands of the defendant to be sold under all these executions on the 13th August, 1894, and the sale was postponed until the 5th November, 1894, when they were sold, realizing $1,007.50 less expenses.

Certified copies of some of these executions with the accompanying memoranda charging the lands so sold, were at the dates hereinafter specified delivered by the sheriff to the registrar of the Land Registration District within which such lands were situated.

Joseph Lamont's on the 11th November, 1893, Benjamin Limoges' on the 9th March, 1894, and those of H. S. Wesbrook & Co., James Grierson and the Manitoba and North-West Loan Co. at a subsequent date, not earlier than the 28th June, 1894, or later than the 15th August of the same year. No copy of the execution of the Agricultural Society of Whitewood was ever delivered to such registrar, and the matter of this execution may be dismissed from further consideration because under any aspect of this question as presented to me the Agricultural Society would have no interest in the proceeds of this sale, as it unquestionably comes in order of priority after the executions which were delivered to the sheriff on the 7th July, 1893, and these executions are sufficient to sweep away the whole of the proceeds of the sale.

No question was raised before me under the Creditors' Relief Ordinance. It was conceded that the respective executions had the right to be satisfied out of the proceeds of the sale, or to have such proceeds applied to them in the order of their legal priority without regard to that Ordinance.

The Agricultural Society duly appeared to the interpleader summons, but urged no claim to participate in the proceeds of the sale.

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No claim to participate in these proceeds was lodged with the sheriff by the Manitoba and North-West Loan Company, but I am not prepared to say that this fact would prevent their participating, if the land in question is held to be bound by the executions in the order of their delivery to the sheriff. It is true that the amount of the executions of Wesbrook & Co. and Grierson are more than the proceeds of the sale, and if these last mentioned executions have priority over the executions of the Manitoba and North-West Loan Company they will absorb the whole of such proceeds; but as before stated, these three executions were all delivered to the sheriff at the same time, and there is no evidence to establish the dates at which the copies of executions and accompanying memoranda in these causes were delivered to the registrar, therefore I have nothing before me which will enable me to decide as to the priority of these three executions as between them. I do not understand the Manitoba and North-West Loan Company to relinquish any rights, in fact this company appeared and resisted the claim of the claimants Lamont and Limoges.

Limoges and Lamont claim that their executions have priority over all the others because copies of their executions, with memoranda charging the lands, were first delivered to the Registrar of Land Titles, and therefore that their executions must be first satisfied out of the proceeds of the sale, and so notified the sheriff.

Wesbrook & Co., Grierson, and, I presume, the Manitoba and North-West Loan Co., claim that their executions have priority by reason of their having been first delivered to the sheriff to be executed.

These questions depend on the construction to be placed on s. 16 of 51 Vic. (1888) c. 20, being the section substituted for s. 94 of the Territories Real Property Act, and which I will hereafter refer to as s. 94 of the principal Act.

That section, after providing for the delivery of a copy of an execution with the memorandum charging the lands to the Registrar, goes on to provide that "no land shall be bound by any such writ or other process until such copy and memorandum have been so delivered." Judgment. Wetmore, J.

Mr. White, the learned advocate who appeared for Wesbrook & Co., Grierson, and the Manitoba and North-West Loan Co., urged that the words in this section which I have quoted were only intended to provide a method by which the sheriff should notify persons, who might intend to purchase the land, of the charge against it, so that if they did purchase they might have clear notice of such charge and take the land subject thereto; that the delivery of the copy of execution and memorandum was merely a matter between the sheriff, the execution creditor and any subsequent purchaser; and that it did not take away or in any way interfere with the right of priority which the several execution creditors had apart from this section among themselves by reason of the order in which their several executions were delivered to the sheriff to be executed. He urged that the subsequent part of this section which provided that the delivery of the copy of execution and memorandum to the registrar shall "operate as a caveat against the transfer by the owner of the land mentioned in such memorandum or any interest he has therein; and no transfer shall be made by him of such land or interest therein except subject to such writ or process," indicated an intention on the part of Parliament to control the words of the section which I have previously quoted, and merely to give the effect to them which he contended for.

Referring to s. 100, s.-s. 4 of the Territories Real Property Act, he urged that that section indicated what the effect of a caveat was, namely, that it was merely a notice which, while it existed suspended the right to deal with the property. It seems to me that s.-s. 4 purports to deal with the particular description of caveat provided for by s. 100;

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because the operation of that caveat as provided by s.-s. 4 is quite different from the operation of the caveat mentioned in s. 94. The caveat mentioned in s. 100 operates to prevent the land being transferred or dealt with at all, but under s. 94 the land may be transferred subject to the caveat. The language of s. 94, which I have first quoted, appears to me to be clear and explicit. I can find nothing in the Act indicating an intention to cut down or abridge its plain unequivocal meaning. The language is "no land shall be bound by any such writ or process until such copy and memorandum have been so delivered." What language can be plainer? It seems to me that the section provides for two things, first that the land shall not be bound by the execution until such copy and memorandum are delivered; second, that when so delivered, no transfer shall be made except subject to the charge so created.

I must therefore give effect to what I consider to be the clear and explicit language of the statute, and hold that the land was not bound by any execution until the copy of execution and memorandum was delivered to the registrar. It will follow as a matter of course that the land will be bound by each execution in the order in which the copy of such execution and memorandum is so delivered, and each execution will take priority over the others accordingly. I hold this entirely irrespective of s. 41 of the Territories Real Property Act, or of whether or not the copy of execution and accompanying memorandum is an "instrument" within the meaning of that Act. But I so hold under s. 94 of the Act; because the land by that section is not bound until the copy and memorandum is delivered, but when delivered the land is bound and is only bound by each execution when the copy of that execution and memorandum is so delivered. The land must therefore be bound by these executions if there are several, in the order in which the copy of each execution with the accompanying memorandum is delivered to the registrar.

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I therefore hold that, so far as the question I am now considering is concerned, Lamont's execution, a copy of which with the accompanying memorandum was first delivered to the registrar, is *prima facie* entitled to priority over all the other executions; that Limoges' execution, a copy of which with the accompanying memorandum was next delivered, comes next in order of priority, and that the executions of Wesbrook & Co., Grierson, and the Manitoba and North-West Loan Co., come next as before stated. I cannot decide the order of priority as between these three last mentioned executions; but no doubt no difficulty can arise as to them, because I notice that Mr. White is the advocate on the record of all these three execution creditors, and if necessary can readily instruct the sheriff as to their priority if any priority is claimed as between them. There is no evidence before me to explain how it happened that copies of Lamont's and Limoges' executions, with the accompanying memorandum, were delivered to the registrar prior to those of the execution creditors whom Mr. White represents, seeing that Lamont's and Limoges' executions were not lodged with the sheriff until after those other executions. I may surmise how it occurred, but I have no right to state my surmises. It is sufficient for the decision of the matters before me that as a matter of fact the copies of executions and memoranda were delivered to the registrar at the times I have stated.

The conclusion I have reached, however, does not dispose of all the questions raised on this interpleader summons. The executions of Wesbrook & Co., Grierson, and the Manitoba and North-West Loan Co. were renewed for one year from the 6th July, 1894. None of the other executions were renewed. Assuming that s. 327 of the Judicature Ordinance was in force as it was originally enacted, and that the executions in question were not affected by the amendment made to that section by Ordinance No. 5 of 1894, s. 12, all these executions were in force by their original operation at the

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time the lands in question were advertised for sale, on or about the 10th May, 1894. On the 13th August, 1894, the date at which the lands were originally advertised for sale, one year from the date of any of the executions had not elapsed except as respects those executions which I have above stated were renewed. On the 5th November, however, when these lands were actually sold, more than a year had elapsed from the date of Lamont's execution and Limoges' execution had not been in the sheriff's hands a year.

On this state of facts Mr. White raised the following questions:

1st. That inasmuch as the executions of Lamont and Limoges had not been a year in the sheriff's hands on the 13th day of August, the date for which the lands were originally advertised for sale, the sale so far as those executions were concerned, could not under s. 345 of the Judicature Ordinance take place, and therefore was void, and must be taken to have been made under the executions of the parties he represented, which were delivered to the sheriff on the 7th July, 1893, and subject to the registered charges created by the delivery to the registrar of the copies of Lamont's and Limoges' executions with the accompanying memoranda, and therefore that his clients are entitled to the proceeds of the sale, and the purchasers take their title from the sheriff subject to the charge so created in favour of Lamont and Limoges.

2nd. That if in error in that contention, inasmuch as Limoges' execution was not in the sheriff's hands a year on the 5th November, when the sale actually took place, the sale quoad that execution was void and the purchasers took subject to the registered charges created under such execution.

3rd. Quoad Lamont's execution, supposing that he cannot succeed as to his first contention; that the sale under that execution on the 5th November was void under s. 327 of the Judicature Ordinance as it stood at the time of the date of

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the issue of that execution, because more than a year had elapsed since the date of that execution, and it had not been renewed; the year expired on the 1st November, four days before the sale.

The result of Mr. White's contention, if he is successful, will be that, while his clients will absorb the proceeds of the sale, the purchasers from the sheriff will take their titles clear of all charges created in favour of Lamont and Limoges, because their executions not having been renewed within the year, they have expired and the charges do not exist. I may state that this state of matters is within my own knowledge because an application was made to me by the sheriff to confirm the sale of these lands. Upon looking at the abstract of title and the other documents presented on that application, some of the questions now raised presented themselves to my mind, and I refused to confirm the sale until the execution creditors as well as Campbell had notice to appear before me. All the execution creditors interested having appeared before me by their advocates, it was represented and conceded that if the sale ought *prima facie* to be confirmed and certificates of ownership issued to the purchasers subject to Lamont's and Limoges' charges, those charges amounted to nothing as the executions had expired, not having been renewed within a year from the date of their issue. I thereupon confirmed the sales without reference to any charges in favour of Lamont or Limoges, leaving the several execution creditors to take what steps they might be advised to take with regard to their respective rights to the monies realized from the sales. The interpleader proceeding was the result. I may add that my attention was not then drawn to the amendments to s. 327 of the Judicature Ordinance. Probably if my attention had been drawn to these amendments, I would have given the matter more consideration than I did before confirming the sale. I merely refer to these facts as they throw light on Mr. White's conten-

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tions, not because they affect the question beyond that; because if Mr. White's points of law are well taken he is entitled to succeed no matter what the consequences may be.

I am satisfied under the authorities that in so far as any objections taken before me are concerned, Lamont is entitled to have his execution first satisfied out of the proceeds of the sales of the land in question. It seems to be conceded that in so far as s. 345 of the Judicature Ordinance is concerned, the sheriff may advertise lands for sale prior to the expiration of the year mentioned in that section, provided that the lands are not actually sold before the year has expired. I know as a matter of fact that it is the constant practice of the sheriff to so advertise and sell lands, and I never heard its correctness disputed. Anyway, so far as this application is concerned, the correctness of that practice must be conceded, otherwise there was no sale at all, as none of the executions had been a year in the sheriff's hands at the date of the advertisement of sale. But Mr. White contends that the execution creditor must, under s. 345 of the Ordinance referred to, be at the time fixed by the original advertisement for the sale of the lands in a position in point of time to have the lands sold *quoad* his execution, and that it is not sufficient that he should be in such a position at the time fixed for the adjourned sale, because a different notice is required for the original sale than for the adjourned sale. The notice of the original sale must be posted in the sheriff's and clerk's offices and published in a newspaper. The notice of the adjourned sale is only, by s. 346 of the Ordinance, required to be posted in the sheriff's and clerk's offices, that is, that as at the time appointed for the original sale one of the execution creditors was not entitled to have the lands sold under his execution, the notice of sale could not be held to have been under his execution at all, the notice must be read as if his execution was not mentioned in it, and therefore *quoad* that execution, the provisions of s. 345 of the Ordinance as to advertisement were not complied with. I am not inclined to take that view

of the law. I am of opinion that if the sale had been under Lamont's execution alone, the provisions of s. 345 were substantially complied with, and the object intended by the Legislature attained, that is, that the lands were duly advertised in accordance with that section, the sale duly postponed, and at the time of actual sale the year had elapsed. Judgment. Wetmore, J.

But suppose I go so far as to adopt Mr. White's contention that we must read the advertisement as if Lamont's execution was not mentioned in it. What then? In *Hall* v. *Goslee*,[1] the plaintiff's execution was in full force at the time that the lands were advertised for sale, but the sheriff's advertisement did not specify his writ; it described the seizure as having been made upon the writs only of the Commercial Bank, but the Court held that this circumstance was of no consequence. A. Wilson, J., at p. 104, lays it down as follows, "as it is a seizure, it is a seizure under all the writs according to their priority, which the sheriff has then in his hands to be executed." I cannot find that that case has been overruled and I accept it as good law. I think all the authorities concede that the sheriff's advertisement is a seizure. It may possibly be urged that this conclusion is not consistent with the operation I have given to the 94th section of the Territories Real Property Act, as a seizure involves a binding of the lands. Now under the laws in existence in other parts of Canada, I do not know that apart from statutory enactments it was the seizure that bound the lands. I think as a rule the delivery of the writ to the sheriff bound the lands. I know that that was the practice in New Brunswick. But supposing that the rule was that it was the seizure that bound, that could be changed by Act of Parliament. Parliament could provide that the land should not be bound by the delivery of the writ to the sheriff, or by the seizure, but that something else should be

[1] 15 U. C. C. P. p. 101.

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necessary; and that is just what I hold Parliament has done by s. 94 of the Territories Real Property Act; and Parliament could do that just with the same effect as the Legislature of Canada before Confederation could provide, as it did do, that the lands could be bound before delivery of execution to the sheriff, namely, by registering the judgment with the Registrar of Land Titles; and as the Legislature of New Brunswick did by providing that the land should be bound by registering a memorial of the judgment with such officer. Now I have no doubt under the operation I have given s. 94, that in the sheriff's office as writs of execution come to him they take priority in the order in which they are delivered to this extent, that unless there is some reason to the contrary, as, for instance, the fees for doing so not being forthcoming, the sheriff ought to deliver copies of the executions and memoranda to the registrar in the order in which he received the writs, and to maintain their priority, but if for some reason he does not do so, as I have already held, the writs will take their priority in the order in which the copies and memoranda are delivered to the registrar. But this does not affect the seizure or the applicability of *Hall* v. *Goslee*[1] to this matter. Any seizure the sheriff makes enures to the benefit of all the executions in his hands, at any rate of those by virtue of which the property at the time of sale is liable to be sold; and the sheriff must apply the proceeds of sale to these executions in the order of their then priority as established by law. Perhaps it may be as well to mention here, although no point was made of it, that at the date the sheriff advertised these properties, the 10th May, 1894, the only executions, copies of which had been delivered to the registrar, were those of Lamont and Limoges, and it may also be as well to mention that the sheriff by his advertisement states that he had seized and taken in execution Campbell's right, etc., to these properties.

Then as to the point that on the day of actual sale of these properties, the 5th November, 1894, Lamont's execution had

expired. I am of opinion that it had not expired. Section 327 of the Judicature Ordinance, as it originally stood, provided that "every writ of execution shall bear date the day of its issue, and shall remain in force for one year from its date (and no longer if unexecuted) unless renewed." I am of opinion that this writ on the 5th November was not unexecuted within the meaning of that section. It is only unexecuted writs that require to be renewed; and the term *unexecuted* there implies that the writ may be executed and still something is to be done arising out of the execution, because if to have a *fi. fa.* executed everything must be done that is required to be done arising out of its execution, there would be no necessity to renew it at all. Such a thing would never have entered into the contemplation of the Legislature. But, apart from this, in my opinion a sheriff having seized lands on an execution before it has expired, can proceed with the sale of such lands after its expiration. Take, for instance, the case of *fi. fa.* against goods. That writ is executed when the sheriff seizes and levies upon the property. He can sell after the writ has expired; s. 351 of the Judicature Ordinance is only declaratory of the law in that respect. When under the old practice writs were returnable on a day certain in term, the sheriff could seize on the return day but not after, but he could sell at any time after. If he did not sell it is true a *venditioni exponas* might be issued, and of course he would have to sell before the return of that writ. But I never heard it controverted that he could sell under the *fi. fa.* after it had expired. So in Eastern Canada, when lands were taken in execution, if he seized before the return day of the writ he could sell after the return day; or, in other words, after it expired. I am satisfied that in enacting s. 327 of the Ordinance, the Legislature contemplated that a writ of execution was executed when the property was seized. I would also in this connection draw attention to remarks of A. Wilson, J., in *Hall* v. *Goslee*,[1] in discussing this very question, whether lands seized before a writ expires could be sold

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after it expired. It is true he relied on a statute to support the right to sell, but it is clear to me that he would have sustained the right to sell apart from the statute. Before Lamont's writ expired everything had occurred to entitle him to have his money realized, that is, the property had been charged in the registry office, the sheriff had seized and advertised, and I am of opinion that under such circumstances his writ did not require to be renewed in order to enable him to participate in the proceeds of the sale. I may add that I am not so clear that s. 12 of the Ordinance No. 5 of 1894, which increased the currency of executions to two years, did not affect this execution of Lamont's and continue it for two years from its date. At the passing of that Ordinance Sept. 7th, 1894, this writ was in full force, that is, the year had not expired. I am not so clear with respect to Limoges' execution. That writ at the time of sale had not been a year in the sheriff's hands, and I have great doubt whether as regards that writ Mr. White's contention is not correct. But I have arrived at the conclusion, I must confess with considerable hesitation, that this writ is also embraced in the reason of the decision of *Hall* v. *Goslee*[1]; that the sheriff having in his possession a writ under which he could properly sell the lands under the provisions of s. 345 of the Judicature Ordinance, and so selling the lands that such sale enured for the benefit of all the executions he held in his hands to be executed, and that the proceeds of such sale must be applied to all such executions in the order of their priority.

I therefore order that the proceeds of the sales of the land in question be applied—

1st. In satisfaction of Lamont's execution.

2nd. So far as they will extend in satisfaction of Limoges' execution.

3rd. That the balance, if any, be applied in satisfaction of or on account of the executions of Wesbrook & Co., Grierson, and the Manitoba and North-West Loan Company, according

to the priorities of such executions to be notified to the sheriff by Mr. White, their advocate. Judgment Wetmore, J.

And I order that Wesbrook & Co., Grierson, and the Manitoba and North-West Loan Company pay to the sheriff and Lamont and Limoges, the costs of the interpleader proceedings.

From this judgment Wesbrook & Co., Grierson, and the Manitoba and North-West Loan Company appealed.

William White, Q.C., for the appellants.

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

[*June 5th, 1896.*]

SCOTT, J.—This is an appeal from the judgment of WETMORE, J., upon an interpleader proceeding on behalf of the sheriff of the Judicial District of Eastern Assiniboia, to determine the rights of these plaintiffs and others to certain moneys levied by him under execution against defendant's lands.

Executions against the lands of the defendant in the following suits were placed in the sheriff's hands for execution as follows:

H. S. Wesbrook & Co., plaintiffs,
James Grierson, plaintiff. and on 7th July, 1893.
The Man. & N. W. Loan Co., plts.

The Agricultural Society of Whitewood, plaintiffs. on 23rd August, 1893.

Joseph Lamont, plaintiff.
Benjamin Limoges, plaintiff. on 1st November, 1893.

Under the provisions of s. 94 of the Territories Real Property Act, as amended by 51 Vic. c. 20, s. 16, certified copies of the following executions, accompanied by a memorandum of the lands sought to be charged (being the lands from which

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the moneys in question were realized) were delivered by the sheriff to the Registrar in the following order:

Lamont v. *Campbell*, on 11th November, 1893.

Limoges v. *Campbell*, on the 9th March, 1894.

Wesbrook & Co. v. *Campbell*, on or after 28th June, 1894.

Grierson v. *Campbell*, on or after 28th June, 1894.

It appears that certified copies of other executions referred to were never delivered by the sheriff to the registrar. The lands were sold on the 5th November, 1894.

The learned Judge held that, as s. 94 provides that the lands of the execution debtor shall not be bound by the execution until a certified copy thereof with the accompanying memorandum is delivered by the sheriff to the registrar, the lands must be bound by the several executions in the order in which the copies thereof are so delivered, and therefore, that the several executions must take priority in that order.

It may be said of the Territories Real Property Act, as was said by Lord Watson of the Victorian Transfer of Land Statute, in *Gibbs* v. *Messer*[2]: "The main object of the Act and the legislative scheme for the attainment of that object are equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity." It would appear that s. 94 was passed with that object in view. Up to the time of the passing of the Act executions against lands bound the lands of the execution debtor from the time of delivery to the sheriff to be executed. To carry out the object of the Act it became necessary to make a different provision, otherwise persons dealing with the registered owner would have to go behind the registry in order to satisfy themselves that there were no executions affecting the land. Hence the provision that executions should not bind until

[2] 1891 A. C. 248, Hunter's Torrens Titles Cases, p. 8.

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they appeared on the register. That this was the object sought to be attained by s. 94 appears from the concluding words of the section, which are as follows:—"And from and after the delivery of a copy of any such writ or other process and memorandum to the registrar the same shall operate as a caveat against the transfer by the owner of the land mentioned in such memorandum or of any interest he has therein, and no transfer shall be made by him of such land or interest therein except subject to such writ or other process until such copy and memorandum have been so delivered." These words should be taken to mean merely that for the purposes of the Act alone they should not be bound until such delivery. The Act does not contemplate that the procedure under executions should be interfered with to any greater extent than was necessary for the purposes of the Act, and for those purposes it was not necessary, for instance, to provide that priority should be given to executions in the order in which copies thereof are delivered to the registrar. The reasonable construction of s. 94 is that it merely provides that in case of any dealing with the land by the execution debtor the person acquiring an interest from him would take such interest subject only to those executions of which copies had been delivered to the registrar. The effect and meaning of the word "bound" used in s. 94 is limited by the concluding words of the section which have already been quoted.

Apart however from any limitation implied by these concluding words, there is abundant authority to support the view that the effect of that word should be limited to the extent necessary to arrive at the construction I have given the section. In Archibold's Q. B. Practice, 14th edition, pp. 804-5, it is shown that, at common law, the goods and chattels of a judgment debtor were bound by the execution from the time of its *teste*, but that, by statute 29 Car. 2, c. 3, s. 16, it was provided that no writ of *fi. fa.* or other writ of execution should bind the property in the goods of the debtor against whom such writ of execution issued out, but from

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the time such writ of execution is delivered to the sheriff to be executed. It is then stated (and a number of authorities are cited in support), that "the statute of Charles was intended only to protect purchasers from an injury which might arise to them from the relation which writs of execution had to their *teste* at common law and therefore, as far as relates to the party himself *and to all others but purchasers for a valuable consideration*, writs of execution bind the parties' goods from their *teste*." The meaning of the words "that the goods shall be bound by the delivery of the writ to the sheriff" is that, after the writ is so delivered, if the defendant make an assignment of the goods even for a valuable consideration, unless in market overt, the sheriff may take them in execution. The binding both in case of the Crown and a private person relates only to the debtor himself and his acts, so as to vacate any intermediate assignment by him otherwise than in market overt, but the property in the goods is not altered until execution and sale by the sheriff.

In *Holmes* v. *Tutton*,[3] a similar effect and meaning is given to the word "bind" in the garnishee clauses of the Common Law Procedure Act, in which it is provided that the garnishing order upon the garnishee shall bind the debt in his hands.

Lord Campbell, C.J., in his judgment in that case says, "We construe the word 'bound' as not changing the property or giving an equitable property either by way of mortgage or of lien, but as putting the debt in the same position as the goods when the writ was delivered to the sheriff. We take the word 'bind' to mean that the debtor or those claiming under him shall not have power to convey or do any act against the right of a party in whose favour the debt is bound, and we construe it as not giving any property in the debt in the nature of a mortgage or lien."

I see no reason why lands could not, at the time the Territories Real Property Act was in force, have been sold

[3] 24 L. J. Q. B. 346; 5 El. & Bl. 65; 1 Jur. N. S. 975.

under execution and a certificate of title issued to the purchaser from the sheriff without a copy of the execution having been delivered to the registrar under s. 94, provided of course, the lands had not been dealt with by the judgment debtor prior to the registration of the transfer from the sheriff. In *Beath* v. *Anderson*,[1] the Supreme Court of Victoria held that under the Victorian "Transfer of Land Statute" (which contains a section similar in effect to s. 94 of our Act), execution creditors were entitled to priority from the time of delivery of the execution to the sheriff to be executed, and not from the time of the filing of copies thereof with the registrar. Judgment. Scott, J.

In my view a copy of an execution with the accompanying memorandum delivered to the registrar is not an "instrument" within the meaning of s. 41 of the Act, nor is it covered by the definition of that term given in s.-s. (1) of s. 3. It is not of the nature of any of the documents specifically mentioned in that sub-section, nor is it a document "relating to the transfer or other dealing with land or evidencing title thereto." Furthermore, s. 41 shows that the only instruments referred to by it are those which create, transfer, surrender or discharge an estate or interest in land.

For the reasons I have stated, I am of opinion that the priorities of the several execution creditors are not affected by the provisions of s. 94, and that such priorities are not determined by the order in which the copies of execution with the accompanying memoranda are delivered by the sheriff to the registrar. I am also of opinion that the learned Judge was right in holding as he did that Lamont's execution had not expired at the time of the sale by the sheriff, and that the sheriff having in his possession a writ under which he could properly sell the lands, and, so selling them, such sale enured for the benefit of all executions he held in his hands for execution at the time the lands were advertised for sale.

I am also of opinion that the proceeds of the sale of the land should be distributed by the sheriff among the several

[1] 4 Australian L. T. 151; Hunter's Torrens Titles Cases, p. 528.

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execution creditors under the provisions of the Creditors Relief Ordinance. True, it appears by the judgment of the learned Judge that no question was raised before him as to the effect of that Ordinance, and that it was then conceded that the respective execution creditors had the right to have the proceeds of sale applied on the executions in the order of their legal propriety, but this cannot be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the Ordinance were not in force, but merely as a contention on the part of the appellants and respondents respectively that the whole fund should be applied on their own executions, and, in the absence of any such consent on the part of the sheriff, and all parties interested in the fund, the provisions of the Ordinance must govern its disposal.

The learned Judge ordered that the appellants and the Manitoba and North-West Loan Company should pay the sheriff and the respondents their costs of the interpleader proceedings.

This order should be changed. The sheriff is entitled to his costs, but, as both appellants and respondents were in error in claiming that the whole fund should be applied on their respective executions, neither should be entitled to costs as against the other. I think that the reasonable direction would be that the sheriff should deduct his costs from the fund before the distribution thereof, and that neither the appellants nor respondents should be entitled to the costs of the interpleader proceedings. In my opinion the respondents should pay the appellants' costs of this appeal.

RICHARDSON, J., ROULEAU, J., and MCGUIRE, J., concurred.

Appeal allowed with costs.

THE QUEEN v. BREWSTER (No. 2).

Criminal Law—Appeal—New Trial—Jury—Conflict of Testimony—Perverse Verdict.

On a charge of theft a new trial was refused although the verdict was contrary to the view of the trial Judge, the evidence being conflicting, but the Court being of opinion that the verdict of guilty was one which reasonable men could properly find.

In deciding the question of the reasonableness of the verdict the opinion of the trial Judge is entitled to and ought to receive great weight; but it is not conclusive.

[*Court en banc, June 5th, 1896.*

Statement. The prisoner, on trial before ROULEAU, J., and a jury, was convicted of theft. Leave to appeal was granted on the ground that the verdict was against the weight of evidence.

The appeal was argued before the Court *in banc* at Regina on 2nd June, 1896.

Argument. *J. A. Lougheed*, Q.C., for the prisoner.

C. C. McCaul, Q.C., for the Crown.

[*June 5th, 1896.*]

Judgment. WETMORE, J.—The defendant was convicted before my brother ROULEAU and a jury, of the offence of stealing a number of cattle from one Page, and by leave of the learned Judge has appealed to this Court, on the ground that the verdict is against the weight of evidence.

The evidence establishes beyond all question that a number of cattle which were once owned by Page, were found in the possession of the defendant with the brand which was on them when so in Page's possession, changed and disfigured.

The defendant accounts for these cattle getting into his possession as follows:—That Page was indebted to him in $300 for money loaned, that pressing him for this money Page agreed to sell him about 38 head of cattle at $20 a head,

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and that the defendant thereupon paid Page $450. These cattle were to be delivered to the defendant, and Page employed one Bowers to drive them over to the defendant's place at a place called Lone Pine, and on the 10th September met the defendant at Innisfail and told him that the cattle were on the way to Lone Pine. That Page and the defendant proceeded in the direction of Lone Pine, when they met Bowers with 38 head of young cattle and 12 calves, and Page helped the defendant and Bowers to drive these cattle some seven miles farther on to a place called Sproat's Creek, when he (Page) left them and went home. The defendant and Bowers proceeded the next morning with the cattle to John Brewster's, where the defendant proposed to winter them. That after Page and the defendant met the cattle and before Page went home, the defendant paid him $10 to make up the price of the 38 head at $20 a head, and the calves were thrown in. In short the defendant sets up that Page sold him these cattle for $760. Bowers corroborated the defendant, and swore that Page employed him to drive these cattle and deliver them to the defendant. Page swore that he never sold the cattle to the defendant, that he never authorized Bowers to drive or deliver them as above stated, that at the time of the alleged agreement for the sale of the cattle he did not owe the defendant $300 or any other sum, that the defendant did not pay him $450, and that he never informed him that the cattle were on the way to Lone Pine, or helped to drive them.

If the testimony given by Page is true, the evidence for the prosecution establishes a clear case of theft. If the evidence on the part of the defendant is true he is not guilty. The evidence given by Page was in some respects of such a character that the jury would have been warranted in discrediting it altogether.

He certainly with respect to some important matters showed that his memory must have been very bad or he was untruthful. At the same time I cannot say that the

jury would for these reasons be bound to wholly discredit him. It was just a case where the credit to be given was entirely for the jury, and there was other evidence that the jury might consider corroborative of Page. There was also testimony which the jury might consider corroborative of the defendant's testimony. He was corroborated by Bowers as before stated, and also by the fact that Page and the defendant met him with the cattle and helped him drive them to Sproat's Creek. Other witnesses were called who testified that they saw Page and the defendant and Bowers together driving the cattle; other witnesses testified that they saw the defendant and Bowers with cattle over the route they stated they drove them, and at or about the time stated. A witness testified he met Page and the defendant riding together on the 10th September between Innisfail and where the defendant says he met the cattle. Another witness swore that he heard the bargain between Page and the defendant for the sale of the cattle, as stated by the defendant. But while there was this testimony, the credit to be given to the witnesses was entirely for the jury. On behalf of the Crown there was the testimony of Page, to which I have referred; there was the fact that the brands which were on the cattle when they were in Page's possession were altered and disfigured by the defendant. A very important question upon which the parties contradicted each other was, whether Page was indebted to the defendant in $300 or any other sum when the alleged agreement for the sale of the cattle was made in the latter part of July. Because if he was so indebted the defendant's story would be quite probable; but if he was not so indebted the defendant's story must be a fabrication. The defendant swore that this indebtedness of $300 was made up of a sum of $200 loaned by him to Page on October 17th, 1893, and a sum of $100 loaned to him before that date. Page, although at the first trial of this case (for it was tried twice) he denied borrowing the $200, eventually admitted it, and the cheque for that amount signed by the defendant was produced. But

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he swore that on the 5th February, 1894, he and the defendant had a settlement of their affairs, and everything was then adjusted between them, and he produced a receipt of that date signed by Brewster, which acknowledged payment of all accounts in full up to that date.

The defendant swore that the $300 was not included in settlement, that the settlement was money of a partnership between him and Page, and that the $300 was left out because Page did not want his wife to know about the $200 loan. There however is the receipt, and that on its face corroborates Page; and moreover Mrs. Page corroborates her husband that all accounts were settled on the 5th February, and she swore that at that time she was aware of the $200 indebtedness to the defendant. The testimony for the defendant was to the effect that the place where they camped with the cattle at Sproat's Creek on the 10th of September was at the bridge. The evidence shows that this bridge was in sight of Sproat's house and that the country is open; while Sproat will not swear that there was a band of cattle there that evening, he swears that he was home, and that he neither saw the defendant or Bowers or a band of cattle that evening or the next morning. Several witnesses were called who were in a position to see a bunch of cattle such as the defendant alleged he was driving if they passed along the route at the time specified, yet while they will not swear such a bunch did not pass, they swear they did not see them.

While this testimony was possibly of a slight character, still it was a circumstance for the jury to consider. It is, I think, significant and worthy to be marked, although possibly not of very great weight, that when the cattle broke loose the night they were taken to John Brewster's, they wandered back in a direct line between that place and Page's ranche, instead of going by the very circuitous route by which they had been driven to John Brewster's. It is also significant that two witnesses swore that they saw the de-

fendant and Bowers down at James Brewster's, which is close to Page's ranche, before the snow storm, and one of these witnesses swore that they were then looking for cattle. Judgment. Wetmore, J.

Then it is stated that this drive of over seventy miles in three days was a very long drive, and one that it is very unlikely that a person would force his own cattle at that time of the year. The jurors would be quite familiar with that question. According to Bowers' own statement, some of the calves were about played out when they got to Lone Pine at noon on the 10th, yet they drove them on that day to Sproat's Creek, and drove them 30 miles next day. The probability of this was a question entirely for the jury. The defendant's case attempted to set up that Page put a new brand on the cattle, or altered the brand before the delivery, because the defendant did not want any cattle with another brand on the E brand. There was some evidence on the part of the Crown other than that of Page, to show that after the alleged contract of sale and before the alleged delivery, no cattle were branded at Page's ranche, and that there were no cattle in the corrals at Page's on the 9th September for Bowers to drive away. The jury might also have considered it out of the usual course for the defendant to have returned the receipt for $750 when the cattle were delivered. The learned trial Judge has informed the members of this Court that he is dissatisfied with the verdict and thinks that the defendant ought to have been acquitted, and that while he left the question of fact to the jury, and under the evidence he could not do otherwise, yet on commenting on the facts he charged in favour of the defendant.

I am free to confess that looking at the evidence as it appears on paper, I think if I had been trying the case without the intervention of a jury I would have acquitted the defendant. I have not, however, had the opportunity of observing the demeanour of the witnesses, the jury have, and they are, when there is a jury, the constituted judges of the

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facts. It has been urged that when an appeal has been brought on the ground that the verdict is against the weight of evidence, the Court will as a matter of course order a new trial if the trial Judge expresses himself dissatisfied with the verdict. That, however, is not the law as established by the later authorities. The law as so laid down is, that in deciding whether there should be a new trial, the question is whether the verdict is one that the jury as reasonable men would properly find: *Solomon* v. *Bitton*,[1] *Webster* v. *Friedeberg*,[2] and see the *Metropolitan Railway Company* v. *Wright*,[3] *Commissioners of Railways* v. *Brown*,[4] and *Phillips* v. *Martin*.[5] No doubt in deciding the question as to the reasonableness of the verdict the opinion of the trial Judge is entitled to and ought to receive great weight. But it is not conclusive.

I am unable to bring my mind to the conclusion that the verdict in this case was one that the jury as reasonable men ought not to have come to. I moreover think that it is worthy of consideration that the defendant, although he has had two trials, was unable to satisfy either jury that Page's testimony was a fabrication, the first jury having disagreed.

I think the new trial should be refused.

RICHARDSON, J., MCGUIRE, J., and SCOTT, J., concurred.

New trial refused with costs.

[1] 8 Q. B. D. 176. [2] 55 L. J. Q. B. 463; 17 Q. B. D. 736; 55 L. T. 49; 34 W. R. 728. [3] 55 L. J. Q. B. 401; 11 App. Cas. 152; 54 L. T. 658; 34 W. R. 746; [4] 59 L. J. P. C. 62. 15 App. Cas. 240; 62 L. T. 469; [5] 15 App. Cas. 193.

THE QUEEN v. THOMPSON.

Criminal Law—Perjury—Appeal—New Trial—Description of Offence—Confession—Improper Admission of Criminating Answers before Judicial Tribunal.

A count alleging perjury before a coroner—omitting any reference to the coroner's jury—was held sufficient in view of section 611, s.-s. 3 and 4, and s. 723 of the Criminal Code.

A new trial was granted on the ground of the reception of evidence of an admission made by the accused in answer to questions put to him as a witness on the inquest before the coroner's jury, it being held that s. 5 of the Canada Evidence Act, 1893, compelled the witness to answer, and protected him against his answers being used in evidence against him in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence, and this without the necessity for the claim of privilege on the part of the witness. (But see now 61 Vic. (1898) c. 53, s. 1).

[*Court in banc, June 5th, 1895.*

Statement.

The prisoner was charged before WETMORE, J., on the following and another count:—"That he committed perjury on the inquest or inquiry before Andrew J. Rutledge, Esquire, one of Her Majesty's coroners in and for the North-West Territories, concerning," etc. The said inquest was held before the coroner and a jury, and on the preliminary investigation of the charge before a Justice of the Peace the prisoner admitted that he had lied when making a certain statement at the coroner's inquest. Upon the trial the evidence of the prisoner's admissions in his testimony before the justice was admitted and submitted to the jury. The prisoner was convicted and sentenced on both counts.

Upon objection that as the inquest was held before the coroner and a jury, and not before the coroner alone, as charged, the prisoner was not guilty of perjury before the tribunal alleged in the charge, the following questions of law were reserved for the decision of the Court *in banc*:—

1. Should the inquisition offered in evidence have been received?

Statement.

2. Should the above count have been withdrawn from the jury, or should they have been instructed to acquit the prisoner, on the ground that the inquest was before a coroner and jury, and not before a coroner, as charged.

3. Whether the evidence of the prisoner's admissions in his testimony on the preliminary investigation of the charge ought to have been struck out or withdrawn from the jury's consideration.

Argument.

F. L. Gwillim, for the Crown.

No one contra.

[*June 5th, 1896.*]

Judgment.

ROULEAU, J.—The following questions of law were reserved by WETMORE, J., for the consideration of this Court:

1. Whether the inquisition offered in evidence should have been received or not?

2. Whether the first count of the charge should have been withdrawn from the jury, or the jury should have been instructed to acquit the prisoner on that count, on the ground that the alleged inquest or inquiry was proved to have been held before the coroner and a jury instead of before the coroner as charged?

3. Whether the evidence of the prisoner's admission in his testimony before Mr. McDonnell ought to have been struck out or withdrawn from the consideration of the jury?

The prisoner was charged on two counts, the first count being that he had committed perjury on the inquest or inquiry before Andrew J. Rutledge, Esquire, one of Her Majesty's coroners in and for the North-West Territories concerning the death of one Sarah Jane Thompson, held at Moosomin on the 30th day of October, 1895, by swearing that he was awake all night previous to his sister Sarah Jane Thompson's death, attending to a colt for a spavin, and did not sleep at all.

Judgment. Rouleau, J.

Objection was taken that inasmuch as the evidence taken was taken before the coroner and jury, and not only before the coroner, the prisoner was not guilty of the perjury before the tribunal alleged. I think that s. 611 of the Criminal Code, s.-s. 3 and 4, dispose of this objection, because the words of the indictment were "sufficient to give the accused notice of the offence with which he was charged." The circumstance that the evidence was given before a coroner and jury instead of before the coroner alone, does not alter the fact that false swearing before the coroner or before the coroner and jury, would have been a perjury. Besides s.-s. 4 referred to is very explicit: "Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to, provided that the *absence or insufficiency of such details shall not vitiate the count.*" Moreover by s. 723 of the Criminal Code it was then open to the Court before which the case was tried to amend that count if of opinion that the accused had been misled or prejudiced in his defence. Surely in this instance the prisoner was furnished with such reasonable information as not to be deceived as to the offence he had committed, and I am of the opinion that the inquisition offered in evidence should have been received by the learned Judge.

And for the same reasons I am also of opinion that the first count of the charge should not have been withdrawn from the jury, or the jury instructed to acquit the prisoner on that count on the ground that the alleged inquest or inquiry was proved to have been held before the coroner and a jury, instead of before a coroner as charged.

The third objection is based on the fact that the prisoner's admission in his testimony before Mr. McDonnell, J.P., was given in evidence, namely, his statement that it was a lie when he swore before the coroner on the 30th

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October that he was awake all night previous to his sister's death attending to a colt that was spavined, and did not sleep at all. Section 5 of the Canada Evidence Act of 1893 reads as follows: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or any other person. Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence." In *Regina* v. *Sloggett*,[1] the prisoner was examined in the Court of Bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the Commissioner to consider himself in custody. On a case reserved it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case, Jervis, C.J., observes, "The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." Under our law a witness cannot refuse or object to answer any question, and it would be of no avail to him to object. Everybody is supposed to know the law, and knowing that he is bound by the law to answer any question, whether criminating him or not. A witness would be very foolish to claim a privilege which the law does not give him. He is deemed to know also that the same law protects him from using that answer by which he criminates himself in any prosecution. So I am of opinion that the witness need not object to answer in order to avail himself of this enactment of the law, which says that no evidence so given shall be used or received

[1] Dears. C. C. 656; 25 L. J. M. C. 93; 2 Jur. N. S. 764; 4 W. R. 487; 7 Cox C. C. 139.

in evidence against such person in any criminal proceeding thereafter instituted against him, etc.

Judgment. Rouleau, J.

I am of opinion, therefore, that the evidence of the prisoner's admission in his testimony before Mr. McDonnell, J.P., ought to have been struck out or withdrawn from the consideration of the jury.

The result is that the prisoner is entitled to a new trial on the first count.

RICHARDSON, J., MCGUIRE, J., and SCOTT, J., concurred.

GOWER v. JOYNER.

Constitutional Law—Masters and Servants Ordinance—B. N. A. Act—Constitution of Courts—Appointment of Judges—Property and Civil Rights—Justices of the Peace—Conviction.

The Masters and Servants Ordinance, R. O. 1888, c. 36, enacted that it should be lawful for any Justice of the Peace on complaint . . by any . . servant of . . non-payment of wages . . by his master . . to order such master to pay such complainant one month's wages in addition to the amount of wages then actually due him . . together with the costs of prosecution, the same to be levied by distress . . and in default of sufficient distress, to be imprisoned . .

Held, ROULEAU, J., dissenting, and SCOTT, J., expressing no opinion—against the contention that the provision was *ultra vires* of the Territorial Legislature, on the grounds that it assumed (1) to impose a penalty with imprisonment to enforce it, and (2) to provide for the appointment of judicial officers—that the provision was within the powers conferred upon the Territorial Legislature by the orders-in-council promulgated under the N. W. T. Act, R. S. C. c. 50, s. 13 of 11th May, 1877, and 26th June, 1883.*

The former order-in-council gave power to pass ordinances in relation to "6. The administration of justice, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction."

7. The imposition of punishment by fine, penalty or imprisonment for enforcing any Territorial ordinance, and

8. Property and civil rights in the Territories subject to any legislation by the Parliament of Canada on these subjects."

The latter O. C. contained clauses in the same words.

* See *ante*, vol. i., pp. xiii. and xv.

Per WETMORE and MCGUIRE, JJ.—The provision in question of the Masters and Servants Ordinance did not purport to constitute a criminal offence, but was designed to give enlarged rights, and a more effective and speedy remedy with respect to a civil contract: the remedy by imprisonment is a competent exercise of the power to legislate under the above cited paragraphs of the order-in-council: and paragraph 6 does not exclude the power of appointing judicial officers.

The Dominion Statute, 54-55 Vic. (1891) c. 22, s. 6, substituting a new section for s. 13 of the N. W. T. Act, R. S. C. c. 50, is more restrictive than the terms of paragraph 6 of the order-in-council, paragraph 10 of the section reading as follows:

"10. The administration of justice in the Territories, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction, *including procedure therein, but not including the power of appointing any judicial officers.*"

Per RICHARDSON, WETMORE and MCGUIRE, JJ.—The Legislature having power to pass the provision in question of the Masters and Servants Ordinance at the time it was passed the provision did not cease to be valid by reason of the subsequent restriction placed upon the power of the Legislature.

Per WETMORE, J.—The British North America Act, 1867, s. 96, which provides that "the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick," does not prevent a Provincial Legislature from constituting Courts other than Superior, District or County Courts, and appointing or providing for the appointment of Judges or other judicial officers therefor.

Per MCGUIRE, J.—The provision in question of the Master and Servants' Ordinance did not attempt to create a Court or to appoint judicial officers; the Legislature found a Court and judicial officers already existing and appointed under federal authority, namely, Justices Courts and Justices of the Peace, and assigned to them, as it had power to do, duties respecting matters within its legislative power.

[*Court en banc, 5th June, 1896.*

Statement. Appeal from a conviction under the Masters and Servants Ordinance, R. O. 1888, s. 36, referred to the Court *in banc* by RICHARDSON, J.

Argument. *W. C. Hamilton*, Q.C., for the appellant.

J. Secord, Q.C., for the respondent.

[*June 5th, 1896.*]

Judgment. RICHARDSON, J.—The respondent having complained, July 18th, 1895, on oath to one Guernsey, a Justice of the Peace, that the appellant, whose employee the respondent had

been, owed him $6.70 for wages earned, which, al- Judgment.
though demanded had not been paid, the ordinary proceed- Richardson, J.
ings were had under s. 4 of c. 36 of the Revised Ordinances, resulting in an order of the Justice of the Peace that the appellant pay the respondent this $6.70 and costs.

From this order the appellant appealed to the Judge, who, after hearing the parties, in so far as the facts are concerned, was prepared to confirm the order, but the appellant having attacked the law under which the Justice of the Peace made the order, as being *ultra vires*, the Judge reserved judgment and referred for consideration of the Court *in banc* the question so raised by the appellant.

In my opinion by this s. 4 the Legislature organized a Territorial Court for the adjudication of the class of disputes in that section named, which, as relates to the adjusting of wages not exceeding two months' wages, involved and dealt with a question of "civil rights" as between employers and employees, awarding damages for non-payment when the employer has violated his contract, and imprisonment as a method of enforcing payment of the damages awarded, and this under the Order-in-Council of June, 1883, the Legislature had I conceive the power to do. The Ordinance in question was passed in 1884, and at the time the complaint in question was made was included as c. 36 of the Revised Ordinances of 1888. Then having legislated as appears in 1884, had the Ordinance at the time the complaint was made and adjudicated upon by the Justice of the Peace ceased to have validity?

This question I answer in the negative, and my answer is based upon s. 12 of the North-West Territories Act, 1886, which enacts that "all laws and Ordinances in force in the Territories, and not repealed by or inconsistent with this Act, shall remain in force until it is otherwise ordered by the Parliament of Canada, the Governor-in-Council, or the Lieutenant-Governor-in-Council (i.e., the Legislative Assembly of the North-West Territories) under the authority of this Act."

Judgment.
Richardson, J.

The Ordinance had certainly not been repealed when the complaint was made, nor do I find any material in that Act by which it may be said this s. 4 is inconsistent with it.

In my judgment the order of the Justice of the Peace should be approved and appeal dismissed with costs to the respondent in the appeal, including this Court, to be paid him by the appellant.

WETMORE, J.—It is contended on the part of the defendant that s. 4 of c. 36 of the Revised Ordinances is *ultra vires* of the local Legislature on the grounds:—1st. Because it imposes a penalty and imprisonment to enforce it; 2. Because in giving the jurisdiction therein provided for to a Justice of the Peace, judicial officers are appointed.

It must be borne in mind that the Ordinance in question was passed before the Dominion Act, 54-55 Vic. (1891) c. 22, s. 6, was enacted, and that the right to legislate must therefore be found if anywhere in the orders-in-council promulgated under the provisions of the original s. 13 of the North-West Territories Act (R. S. C. c. 50). If the Assembly had the power to enact the section of the Ordinance in question at the time it was enacted, it is *intra vires*, and I cannot find any subsequent legislation by Parliament which in any way interferes with it.

With respect to the first ground above specified, it seems to me that in order to support it, it must be established that the legislation in question attempted to create a crime. If it did, the section is clearly *ultra vires*. I am of opinion that it did not attempt to create a crime. I do not intend to make lengthy quotations from *Regina* v. *Wason*,[1] but I will apply what I conceive to be the principle upon which that case was decided to the question under consideration. Looking at the general scope of the section, it is not framed with the object of "creating an offence in the interest of public morality."

[1] 17 O. A. R. 221.

It is not "designed for the promotion of public morals or the prevention of public wrongs." It is designed in my opinion for the object of giving enlarged rights and more speedy remedy with respect to a civil contract. This is quite *intra vires* of the Legislature by virtue of the authority given to it by the Order-in-Council to legislate on the subject of "Property and Civil Rights in the Territories." It would have been quite competent for the Legislature under this authority to have enacted: That if a master or employer ill-used his servant or employee, or refused to pay his wages, or improperly dismissed him from the service or employment, the contract of service should be deemed ended, and that the master or employer should pay one month's wages to the servant or employee in addition to the wages actually due by way of damages for his wrongful act, and have left such enactment to be worked out by the Supreme Court. The Supreme Court would, I conceive, have had no difficulty in working out and giving effect to such an enactment, and I hardly think it would be contended that it would be *ultra vires*. Now I think that is just what the Legislature has practically and in substance attempted to enact by the section in question, only, instead of leaving the provision to be worked out by the Supreme Court, it has created a cheaper and speedier jurisdiction to do so, and provided a means for enforcing the remedy which possibly the Supreme Court has not got for enforcing the payment of money, namely, by imprisonment, and instead of providing that the contract of service shall be *ipso facto* ended, it has provided that it may be declared at an end on the constituted authority finding the facts. Judgment, Wetmore, J

It is a well known rule in the case of domestic or menial servants that they are by the common law, in the absence of bad conduct on their part, entitled to a month's notice of dismissal, and if they are dismissed without such notice they are entitled to a month's wages in addition to what they have earned. The section of the Ordinance in question seems to me, in one aspect of it, just to extend this provision of the law to

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servants and employees other than domestic and menial servants, and to extend the right of all of them to the extra month's wages to cases where they have been ill-used or their wages have been refused. Surely this is legislating with respect to a civil right. I cannot understand why the section should be deemed *ultra vires* because it provides that imprisonment may be awarded as therein provided. Under the authority of the Order-in-Council referred to, the Assembly had power to legislate upon the subject of "the administration of justice, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction," as well as on the subject of "Property and Civil Rights in the Territories." By virtue of these two powers the Assembly has the right to provide a procedure or practice to enforce the observance of the civil rights which it may create or which may be in existence apart from its creation. It is generally conceded that in these Territories a person cannot be arrested on *mesne* process for a debt. It is also conceded that as a general rule a judgment awarding a sum of money to a party cannot be enforced by imprisonment of the judgment debtor.

In fact I think it may be broadly stated that a person cannot be imprisoned for the non-payment of money except in some particular cases, as for instance when an advocate refuses to pay over moneys collected by him as such, and there may be some other cases. It is unnecessary to point out the nature of the legislation which has brought this state of things about. It is generally understood that such is the law, and that is all that is necessary for the decision of this case. But there is no law that I know of to prevent the Legislative Assembly enacting that a debtor can be arrested on *mesne* process, or from providing that a judgment debtor may be arrested and imprisoned for non-payment of the amount of a judgment awarding money to the other party. Such legislation would be a mere matter of practice and affecting the civil rights of the subject to the liberty of the person. And that is just what the legislature has done in the section

of the Ordinance I am discussing. The fact that the imprisonment is limited to one month does not affect the question in the slightest degree, because if the moneys are paid at any time before the month expires the party must be discharged from custody. This shows that the imprisonment is intended to enforce the remedy not to punish the party. Under s. 5 of the Debtors' Act, 1869 (Imperial Act, 32-33 Vic. c. 62), "Any Court may" under certain circumstances "commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment on any debt due from him in pursuance of any order or judgment of that or any other competent Court." I am of opinion that this is legislation upon matters of practice and procedure and affecting the civil rights of the subject. The provision in question in the Ordinance seems to me to be on exactly similar lines.

As to the other ground urged against the validity of this section, that it appoints a judicial officer, I will assume that this is the effect of the section in this respect. I have already drawn attention to the powers conferred on the Assembly by the Order-in-Council to legislate on the subject of "The administration of Justice, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction." There is nothing in this power so conferred which excludes "the power of appointing judicial officers," such as is provided in the Dominion Act 54-55 Vic. c. 22, s. 6, s.-s. 10. The question therefore is not whether the section of the Ordinance in question would be *ultra vires* if enacted after the passing of that Act, but was it *ultra vires* in view of the powers conferred by the Order-in-Council? If the section was valid when enacted, it was not rendered invalid because the powers of the legislature *in futuro* were subsequently cut down. The powers given to legislate with respect to "the constitution and organization" of these Courts were full, subject only to two limitations, namely, that they should not be inconsistent with, alter or repeal any provisions of any Act

Judgment. Wetmore, J.

of Parliament; and that they should not be in excess of the powers conferred upon the legislatures of the several Provinces by the British North America Act.

There was no Act of the Parliament of Canada then in force that I know of, which limited the power of the Assembly to constitute and organize Courts of civil jurisdiction within the Territories. The powers to constitute, maintain and organize Provincial Courts of civil jurisdiction were conferred on the Provincial Legislatures by virtue of s. 92, s.-s. 14 of the British North America Act; but the powers to appoint the Judges of certain specified Courts, namely, Superior, District, and County Courts, were by virtue of s. 96 of that Act conferred on the Governor-General. Therefore the local legislatures while they might by legislation constitute these Courts, could not appoint or authorize the appointment of Judges thereof. But it is very obvious that Courts cannot be constituted and organized without Judges or officers who will exercise similar functions. If therefore the legislatures of the Provinces desired to create Courts of civil jurisdiction other than Superior, District or County Courts, they would have powers to do so fully. They could provide for the appointment of Judges of such Courts or of officers exercising the functions of Judges and direct that the appointment be made by a local authority such as the Lieutenant-Governor-in-Council. So since Confederation the legislature of New Brunswick has passed a number of Acts creating Courts with a limited civil jurisdiction which were neither Superior, District or County Courts, and which they designate in some cases Stipendiary Magistrates' Courts, and in other cases Commissioners' Courts, and have empowered the Lieutenant-Governor-in-Council to appoint the Stipendiary Magistrates and Commissioners of such Courts who are the officers who exercise the functions of Judges thereof. The Supreme Court of New Brunswick in *Ganong* v. *Bayley*,[2] held that this legislation was *intra vires*.

[2] 1 P. & B. (N.B.) 324.

I agree with the conclusion of the majority of the Court in that case. Judgment. Wetmore, J.

The Legislative Assembly of the Territories has gone no further in this respect in enacting the section of the Ordinance under discussion. Assuming that they have created a Court it is one of civil jurisdiction, it is neither a Superior, District or County Court, and in constituting and organizing it they have appointed a Judge or an officer exercising the functions of a Judge, and in doing so it has not exercised powers in excess of those conferred upon the Legislatures of the Provinces by the British North America Act.

I am therefore of opinion that in so far as the objections raised to the validity of the section of the Ordinance in question are concerned, the section was *intra vires* of the Legislative Assembly.

McGUIRE, J.—This is a reference by Hon. Mr. Justice RICHARDSON to this Court of a question raised on the hearing before him of an appeal from the order of a Justice of the Peace against a master for the non-payment of wages to his servant under the provisions of s. 4 of the Masters and Servants Ordinance, being c. 36 of the Revised Ordinances of 1888, the objection being that said section of said Ordinance is *ultra vires* of the Legislative Assembly.

The Masters and Servants Ordinance was first enacted, so far as the printed Ordinances of the Territories show, in 1879. Some amendments to another section of this Ordinance were made in 1884, and in the Revised Ordinances of 1888 the Ordinance of 1879 as amended in 1884 appears as c. 36. Section 4, which provides for complaints by a servant against his master, has been reproduced verbatim from s. 4 of the Ordinance of 1879. In 1893 c. 36 was amended by adding to s. 4 a s.-s. (a) giving a servant 30 days after the termination of his employment within which to lay his complaint, and substituting a new s. 1.

Judgment. McGuire, J.

Chapter 36 as thus amended provides, s. 1, "that every contract or hire of personal service shall be subject to the provisions of the Ordinance, and if such contract is for any period more than a year it shall be in writing, and be signed by the contracting parties."

Section 2 provides for complaints before a Justice of the Peace by masters against their servants for certain breaches of their contract of service.

Section 4 enacts "that it shall be lawful for any Justice of the Peace on complaint on oath by any employee or other servant of ill-usage, non-payment of wages (not exceeding two months' wages, the same having been first demanded), or improper dismissal by his master or employer, to cause such master or employer to be brought before him, and upon proof to his satisfaction of the complaint being well founded, to order such master or employer to pay such complainant one month's wages in addition to the wages then actually due him, not exceeding two months' wages as aforesaid, together with the costs of prosecution, the same to be levied by distress and sale of the offender's goods and chattels; and in default of sufficient distress, to be imprisoned for any term not exceeding one month unless the said moneys and costs be sooner paid.

The principal objection urged against the constitutionality of the foregoing section is that it makes a breach of a contract of hiring a crime and punishable as a crime, and is therefore *ultra vires* of the Legislative Assembly, as trespassing upon the legislative domain of the Parliament of Canada.

If the section in question did attempt to create and punish a "crime" within the meaning of that word in s. 91, s.-s. 27 of the British North America Act, unquestionably it would be *ultra vires* of our local Assembly.

We have then to consider whether s. 4 does attempt to make the matters of complaint there set out, crimes in the sense above mentioned. Prior to the North-West Territories

Act of 1891, 54-55 Vic. c. 22, the legislative powers of the Assembly were defined by Orders-in-Council. The Order-in-Council passed on 11th May, 1877, was in force when Ordinance No. 5, of 1879, was enacted. Judgment. McGuire, J.

By that order the Lieutenant-Governor-in-Council was empowered to make Ordinances in relation to the following subjects, *inter alia*: "6. The administration of justice, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction; 7. The imposition of punishment by fine, penalty or imprisonment for enforcing any Territorial Ordinance; 8. Property and civil rights in the Territories, subject to any legislation by the Parliament of Canada upon these subjects; and 9. Generally all matters of a merely local or private nature in the Territories."

On 26th June, 1883, an Order-in-Council was passed which amended some of the provisions of the above recited order, but left untouched said paragraphs 6, 7, 8 and 9.

Under the powers contained in paragraph 8—property and civil rights—the Lieutenant-Governor-in-Council had in 1879 authority to make Ordinances in respect of contracts between masters and servants, for, though formerly doubted, it was decided by the Judicial Committee of the Privy Council in *Citizens* v. *Parsons*,[a] that the words "civil rights" in the corresponding sub-section of s. 92 of the British North America Act embraces "rights arising out of contract, subject, of course, to any legislation by Parliament on those subjects." I am not aware of any legislation by Parliament with which s. 4 of the Ordinance of 1879 would conflict.

By section 1 of that Ordinance it was provided that "every contract of hiring of personal service for any period more than a year shall be in writing, signed by the contracting parties."

Clearly this was within the powers given by paragraph 8. Impliedly such contracts for periods not exceeding a year need not be in writing.

[a] 51 L. J. P. C. 11; 7 App. Cas. 96; 45 L. J. 721.

Judgment. McGuire, J.

By s. 4, already recited, provision was made for enabling a servant to complain in respect of certain breaches of his contract of service, one of which is "non-payment of wages."

It seems to me clear that the Territorial Legislative body had jurisdiction over the subject matter of the contract between master and servant, and that under its authority over the administration of justice it had the power to legislate as to the enforcement of the contract of service.

It had the right to say, as it impliedly does say, a master or employer shall observe his contract with his servant as to the payment of wages therein stipulated. But the Ordinance would, as observed in the argument in *Reg.* v. *Wason*,[1] be a mere *brutum fulmen* unless some means were provided of enforcing the legislative command.

Had the legislature authority to provide such means?

In addition to its powers in relation to the administration of justice it had, by paragraph 7, power to enforce its Ordinances in three ways—by fine, by penalty, by imprisonment. We accordingly find that in s. 4 it was provided that the servant might make complaint on oath before a Justice of the Peace, and that the Justice might cause the employer to be brought before him, and upon satisfactory proof of the non-payment of wages as in such section set out, order the payment of the wages due (not exceeding two months'), and an additional month's wages, and costs, that if this order were not obeyed a warrant of distress might issue, and in default of distress the master might be imprisoned for a period not exceeding one month, "unless said moneys and costs be sooner paid."

All these proceedings are manifestly for the purpose of enabling the servant to collect his wages, except the provision as to the additional month's wages which was probably made so as to give liquidated damages to the servant for his loss through his master's breach of contract, a provision possibly suggested by the rule that menial servants were in certain

cases entitled to a month's notice of dismissal or a month's wages in lieu of notice. If not intended as damages, it may have been as a penalty for the breach of the Ordinance. In either view it was within the powers of the legislative body—see judgments of Taschereau and Patterson, JJ., in *Lynch* v. *The Canada North-West Land Company*,[4] and of Dunkin, J., in *Ex parte Duncan*.[5] It has been contended that s. 4 attempts to create a new crime and to punish it as such, and therefore trespasses on the exclusive legislative powers of Parliament under s. 91, s.-s. 27 of the British North America Act. I think it is now well established that this contention cannot prevail. In *Reg.* v. *Boardman*,[6] Richards, C.J., pointed out that whatever comes under s.-s. 15 of s. 92, B.N.A. Act (corresponding to our paragraph 7 above recited), must be excluded from the "criminal law" confided to Parliament by s.-s. 27 of s. 91, provided however that as held in *Reg.* v. *Lawrence*,[7] it is not a crime indictable at common law or by statute. The case of *Reg.* v. *Wason*[1] in the Ontario Court of Appeals has very clearly discussed and dealt with the subjects now under consideration. There the Ontario Legislature passed an Act regulating the supply of milk to the cheese and butter manufactories, and provided penalties for the infringement of these regulations, recoverable before a Justice of the Peace. In the Divisional Court of the Q. B. Division, Armour, C.J., delivering the judgment of the majority of the Court, thought the Act was *ultra vires*, as its "primary object" is to "create new offences and to punish them by fine and in default of payment by imprisonment, and thus is its true nature and character." Mr. Justice Street dissented, and on appeal his view was unanimously sustained. He said, "Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and

Judgment. McGuire, J.

[4] 19 S. C. R. 204; [5] 5 Cart. 427; [6] 2 Cart. 297; 19 L. C. Jur. 188.
[6] 30 U. C. R. 553; [7] 43 U. C. R. 164.

Judgment McGuire, J.

rights of cheesemakers and their patrons with punishments imposed for the protection of the former? If it is found to come under the former head I think it is bad as dealing with criminal law; if under the latter I think it is a good exercise of the rights conferred on the Province by the 92nd section of the B. N. A. Act. An examination of the Act satisfies me that the latter is its true object, intention and character."

Applying this language to the Ordinance here under consideration, must not an examination of s. 4 satisfy one that it was not enacted for the purpose of creating a crime and punishing it in the interests of public morality, but for the purpose of providing a cheap, expeditious and summary mode of enabling servants *inter alia* to obtain payment of their wages? It may be observed that by s. 7 care is taken that nothing in this Ordinance shall in anywise "curtail, abridge or defeat any civil or other remedy for the recovery of wages or damages" by masters against servants, or by the latter against their employers. It may also be observed that by the N.W.T. Act (R.S.C. c. 50) consolidating 49 Vic. c. 25 (1886), s. 12, it was enacted that "All laws and ordinances in force in the Territories and *not repealed by or inconsistent with this Act*, shall remain in force until it is otherwise ordered by the Parliament of Canada by the Governor-in-Council or by the Lieutenant-Governor-in-Council, under the authority of this Act."

There is nothing in that Act which repeals or is inconsistent with s. 4 of the Masters and Servants Ordinance, and it has not been "otherwise ordered" as above provided.

Now this Ordinance was passed in 1879 and was "in force in the Territories" in 1886 at the passing of the N. W. T. Act.

The revision of the Ordinance in 1888 had not the effect of making the Ordinances thereby revised new Ordinances.

Section 5 of the Ordinance respecting the Revised Ordinances provides that they shall not be held to be new laws,

but shall be construed as a consolidation, and, by s.-s. 2 of that section, where the Revised Ordinances are the "same in effect" as the Ordinances repealed, they shall be "held to operate retrospectively as well as prospectively, and to have been passed upon the days respectively upon which the Ordinances so repealed came into effect." Judgment. McGuire, J

It has been urged that while under the Orders-in-Council prior to the Act of 1891, c. 22, power was given to legislate in respect of "6. The Administration of Justice, including the Organization, etc., of Territorial Courts of Civil Jurisdiction," no power was expressly given to appoint judicial officers for such courts. I think that if necessary to the disposal of this case it might fairly be held that the power given by paragraph 6 implied the power to appoint the necessary officials in the absence of any limitation to the contrary. See *Reg.* v. *Bush*.[8] There was no such limitation in the Order-in-Council. But in c. 22 of 1891, s. 6, declaring and defining the powers of the Assembly, there is such limitation, the words "but not including the power of appointing any judicial officers" being added to s.-s. 10, corresponding to paragraph 7 of the Order-in-Council. But c. 36, of the Revised Ordinances, was then in force, and c. 22, s. 6, I think, applied only to future legislation, and it might be urged with great force that it did not affect existing legislation, or Territorial Courts or judicial officers already organized or appointed.

However, I do not think it necessary to decide these questions, as I submit that the Masters and Servants Ordinance does not attempt to create a Court or to appoint judicial or other officers. The legislative body found a court and judicial officers already existing and appointed under federal authority, namely, Justices' Courts, and Justices of the Peace, and I think the Territorial legislative body had the right to assign duties to these Justices of the Peace. In

[8] 15 O. R. 398.

Judgment McGuire; J.

Valin v. *Langlois*,[9] it was held that there was "nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces."

Upon the same reasoning, may not provincial legislatures impose new duties upon existing Federal Courts or give them new powers as to matters not within the exclusive jurisdiction of parliament, but within the legislative powers of the provincial legislature? Dorion, C.J., in *Bruneau* v. *Massue*,[10] said, "Judges, as citizens, were bound to perform all the duties which are imposed upon them by either the Dominion or local Legislatures." Reference may also be made to *Wetherell* v. *Jones*,[11] and *Wilson* v. *McGuire*.[12]

I think that s. 4 of c. 36 of the Revised Ordinances of 1888 was *intra vires* of the Legislative Assembly by which it was enacted.

SCOTT, J.—I wish to state that owing to a misunderstanding as to the Ordinance under which this conviction was made—it was only set at rest yesterday—I was under the impression that the conviction was made under the last Ordinance, I think of 1895. I am bound to state that up to a short time ago I had a very strong impression that the Ordinance in question was *ultra vires* on the two grounds raised by the party who is taking objection, and particularly on the grounds expressed by my brother ROULEAU. The argument and the subsequent discussion to-day and yesterday by my brother Judges upon the question has to some extent shaken that view, but I am not yet fully convinced of the validity of the Ordinance, and as the majority of the Court have decided

[9] 49 L. J. P. C. 37; 5 App. Cas. 115; 41 L. T. 662. [10] 23 L. C. Jur. 60, quoted in Clement's Canadian Constitution, p. 231; [11] 4 O. R. 713; [12] 2 O. R. 118.

that it is valid it is therefore unnecessary for me to express an opinion. I think I should under these circumstances refrain from giving an opinion. Judgment. Scott, J.

ROULEAU, J.—This is a reference made by RICHARDSON, J., as to whether s. 4 of c. 36 Revised Ordinances is *ultra vires* or *intra vires* of the Legislative Assembly.

The said s. 4 reads as follows: "It shall be lawful for any Justice of the Peace on complaint on oath by any employee or other servant of ill-usage, non-payment of wages (the same having been first demanded), or improper dismissal by his master or employer, to cause such master or employer to be brought before him, and upon proof to his satisfaction of the complaint being well founded, to order such complainant to be discharged from his engagement, and to order such master or employer to pay such complainant one month's wages in addition to the amount of wages then actually due him, not exceeding two months' wages as aforesaid, together with the costs of prosecution, the same to be levied by distress and sale of the offender's goods and chattels, and in default of sufficient distress to be imprisoned for any term not exceeding one month, unless the said moneys and costs be sooner paid."

The legislative powers of the North-West Council were determined by the Order-in-Council on the 26th June, 1883.

Section 6 of the said Order-in-Council includes "the administration of Justice, including the constitution, organization and maintenance of Territorial Courts of Civil Jurisdiction," and s. 7 "the imposition of punishment by fine, penalty or imprisonment for enforcing any Territorial Ordinances."

Since the said Order-in-Council has been passed, the Legislative Assembly has replaced the North-West Council and s. 6 has been amended by adding the following words thereto: "but not including the power of appointing any judicial

Judgment.
Rouleau, J.

officers." Although it was contended that before the said s. 6 was amended the Legislative Assembly had the power to appoint judicial officers, I do not think it is necessary to decide this point in this case, because the said s. 4 of c. 36 of the Revised Ordinances does not come within the purview of ss. 6 and 7 of the said Order-in-Council. Is s. 4 of c. 36 of the Revised Ordinances a provision by which a penalty or fine might be imposed to enforce any Territorial Ordinance?

There is no doubt it is not. I do not believe either that it is a provision to constitute a tribunal for the purpose of collecting a just debt. If it is anything it is a penal Ordinance by which there is a fine and penalty imposed to enforce a contract. The breach of a contract between a master and his servant gives cause to a civil action, like any breach of contract between any two parties, and in my opinion this Ordinance does not come within the provision of s. 7 of the said Order-in-Council, because it is not for the purpose of enforcing a Territorial Ordinance by the imposition of punishment by fine, penalty or imprisonment. If it were an Ordinance to regulate the business carried on by certain parties with reasonable penalties to ensure obedience to its regulations, I would have no hesitation to consider it to be within the powers given by the constitution to the Legislative Assembly under s.-s. 9 of s. 6, statute of 1891, to wit, "Property and civil rights in the Territories." "When powers are derived from Statute it is the bounden duty of whomsoever has obtained the same to keep strictly within these powers, and not to be guided by any fanciful view of the spirit of the Act which confers them." *Tinkler* v. *Wandsworth*.[15] The Legislative Assembly of the North-West Territories derive their powers from c. 22, 54-55 Vic., and must keep strictly within these powers. Having the powers to enforce any Territorial Ordinances by fine, penalty or imprisonment, they cannot

[15] 1 Giff. 412; 3 Jur. N. S. 1292; 6 W. R. 50; affirmed 2 De G. & J. 261; 27 L. J. Ch. 342; 4 Jur. N. S. 293; 6 W. R. 390.

extend these powers so as to enforce the covenants or contracts between parties by fine, penalty or imprisonment. Judgment Rouleau, J.

If the Legislative Assembly had the power to enforce the collection of wages of a servant against his master before a J. P., and in default of payment and failure of sufficient distress, to imprison the defendant, I cannot see any reason why the said Assembly would not have the power to enforce the payment of any other debt by the same mode. And as no such power has been given by s.-s. 15 of s. 92 of the British North America Act to the local legislatures, it would follow that the Legislative Assembly of the North-West Territories would have more powers than any local legislature of the Provinces, which derive their powers directly from the British North America Act. Besides s. 4 of the said Ordinance is in direct contravention to the "Debtors' Act of 1869," which says that "with the exceptions hereinafter mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money." "There shall be excepted from the operation of the above enactment: (1) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract." (2) Default in payment of any sum recoverable summarily before a Justice or Justices of the Peace. (3) Default by a master or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control. (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order. (5) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order. (6) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made."

Judgment.

Rouleau, J.

The only sub-section that would apply to this case would be s.-s. 2, if the justice was trying a case for a fine and a penalty to enforce an Ordinance, and not a penalty and fine in respect of any contract. And in all the other cases such a jurisdiction can only be exercised by a "Judge or his deputy, and by an order made in open Court and showing on its face the ground on which it is issued; and only in respect of a judgment of a County Court by a County Court Judge or his deputy," etc., and it goes on to state the procedure to be adopted in such cases. This Act is in force in the Territories and I cannot find any law applicable here that has repealed any of the enactments to which I have just referred. I am of the opinion that s. 4 of c. 36 of the Revised Ordinances is *ultra vires* of the Legislative Assembly, and that my Brother RICHARDSON should be so advised.

Conviction affirmed with costs.

[IN BANC.]

PAUL v. FLINN.

Pleading—Defence — Striking out as Embarrassing — Third Party Proceedings—Stay of Proceedings.

In an action for foreclosure of a mortgage made by the defendant and his deceased partner, paragraphs of the defence alleging in effect that the administratrix of the estate of the deceased partner was a necessary party to the action inasmuch as the defendant was entitled to contribution from the estate, and as by virtue of an order made that no action should be brought against the administratrix as such, and staying all pending proceedings against her as such administratrix for four months, prevented the defendant from pursuing his remedy in that behalf, were struck out as embarrassing: the defendant's proper course being an application under the third party procedure, and the plaintiff not being affected by the effect of the order upon the defendant's rights or remedies.

[Court en banc, June 5th, 1896.

Statement.

This was an appeal (by special leave) from an order of RICHARDSON, J., striking out certain paragraphs of the state-

ment of defence. The action was brought for foreclosure of a mortgage given by the defendant and K., his since-deceased partner, to plaintiffs. Prior to the issue of the writ an order was made under s. 492 (10) of the Judicature Ordinance, that no action be brought, and that all actions and proceedings pending against the administratrix of the estate of K. be stayed for a period of four months. Statement.

The paragraphs of the statement of defence struck out alleged that as the defendant was the surviving partner of the firm of K. and himself, the administratrix of the estate of K. should be made a party, inasmuch as he was entitled to contribution from the said estate, and by the above order was prevented from proceeding against the estate for contribution. From the order striking out this portion of the statement of defence the defendant appealed.

Hugh A. Robson, for respondent. Argument.

John Secord, Q.C., for appellant.

[*June 5th, 1896.*]

McGuire, J.—This is an appeal, by consent of Mr. Justice Richardson, from a Chamber Order made by him striking out certain paragraphs of the statement of defence. The whole order is not appealed from, but only so much as strikes out paragraphs 8, 9, 10 and 11. These paragraphs do not constitute separate independent defences, but together constitute the defence or contention sought to be raised by the defendant on the grounds set out in these paragraphs. The effect of these paragraphs is that the defendant, Flinn, who is the surviving member of a partnership, says that the administrator of the estate of his deceased partner is a necessary party to the action "inasmuch as the defendant is entitled to contribution from the estate of the said William George Knight, and because (as is alleged in paragraph 10) the defendant is by such order prevented from proceeding against the said estate for contribution, the order referred to Judgment.

Judgment. McGuire, J.

being one made by Mr. Justice RICHARDSON on the twenty-seventh day of December, 1895, under Ordinance No. 7 of 1895, s. 6, that no action should be brought against the said administratrix as such, and staying all actions and proceedings against her as such administratrix for four months from the date of said order."

This action was begun on the 22nd of January, 1896; the statement of defence bears date 26th of March, 1896, the summons to strike out portions of the defence is dated 30th March, and the order appealed from is dated 9th April, 1896. The four months' stay of proceedings will not expire until the 27th April. The apparent and expressed object of the defence is that the defendant desires the administratrix to be made a party to the suit so that he may be able to get contribution against the estate, but from his allegation that the existence of the above order staying proceedings against the administratrix prevents him proceeding against her for contribution, it would seem that he is desirous of setting up that his right of getting contribution from the estate is prejudiced by the existence of that order. It is not clear from the defence what the exact purpose of the defendant was. It is stated in the argument that he sought to raise the objection that the administratrix is a necessary party to the action, and as at the commencement of the action that necessary party could not have been made a party defendant, therefore the action was premature. If that was the true intent it certainly is not, to my mind, disclosed by the paragraphs dealing with that branch of the defence. Paragraph 8 merely alleges that the presence of the administratrix before the Court is for the purpose of enabling the defendant to get contribution from the estate. But s. 64 of the Judicature Ordinance provides how a person not a party to the action is to be reached by a defendant who claims to be entitled to contribution, namely, by issuing by leave of the Court or Judge the notice in that section pro-

vided, and not by claiming the relief in the statement of defence. Or if the third party sought to be reached is also claimed to be, as regards the plaintiff, a necessary party to the action, he should apply under s. 46 of the Judicature Ordinance corresponding to English Order, 16 R. 11, as suggested in the Annual Practice for 1896, page 421. The defendant does not in his defence allege that as regards the plaintiff the administratrix is a necessary party, but on the contrary that it is merely for contribution. In that case he should have adopted the Third Party Procedure under s. 57. But he complains in paragraph 10 that, owing to the order, the administratrix cannot, till the expiration of the four months, be made a party, and that he is thereby prevented from getting contribution. But that is his misfortune, if any, and the plaintiff is not to be forced to share with him the burden of that difficulty. The plaintiff is not concerned with the right of the defendant to call upon some one else to contribute, nor whether from some cause for which he is not to blame, and over which he has no control, the defendant may be hampered if he is hampered. Therefore I think paragraphs 8, 9, 10, and 11 sought to be restored are ambiguous and embarrassing, and tend to prejudice, embarrass and delay the fair trial of the action, and seek to set up matters which the defendant had no right to set up by his statement of defence, and that the order of Mr. Justice RICHARDSON properly directed them to be struck out. Judgment. McGuire, J.

I think the appeal should be dismissed with costs.

RICHARDSON, J. Mr. Justice WETMORE desires me to say he concurs.

SCOTT, J., concurred.

Appeal dismissed with costs.

IN RE FORBES, ADVOCATE (No. 1).

Advocate—Solicitor—Legal Professions Ordinance—Striking off Roll—Suspension.

Under the provisions of the Legal Profession Ordinance, No. 9 of 1895, s. 16, which enacts that "the Supreme Court may strike the name of any advocate off the Roll of Advocates for default by him in payment of moneys received by him as an advocate," the Court has no power merely to suspend an advocate temporarily from practice.

[*Court en banc, June 5th, 1896.*

Argument. *F. L. Gwillim* moved to strike F. F. Forbes off the roll of advocates.

No one *contra*.

[*June 5th, 1896.*]

Judgment. RICHARDSON, J.—Mr. Gwillim moved on the opening of the term for an Order of this Court striking Mr. Forbes off the Roll of Advocates upon the material which is referred to below.

The application is made under the provisions of s. 16 of Ordinance No. 9 of 1895 "Respecting the Legal Profession," which took effect upon its passing 30th September, 1895, and which enacts "That the Supreme Court may strike the name of any Advocate off the Roll of Advocates for default by him in payment of moneys received by him as an Advocate," and is supported by the following proof:

1. A certificate of the Lieutenant-Governor's Secretary that Mr. Forbes was and is an Advocate of the Territories;

2. An affidavit of Mr. W. White, Q.C., showing that Mr. Forbes is now and has been for a number of years past practising the profession of an Advocate at Moosomin in the Judicial District of Eastern Assiniboia;

3. An affidavit of one Fred E. Calvert that in or prior to 1894 he placed in Mr. Forbes' hands claims for collection

CORRIGENDUM.

P. 411, lines 29 and 30, for "but to no other person ordinarily entitled to administration," read "but to no person other than a person ordinarily entitled to administration."

from various persons who were debtors of persons for whom Mr. Calvert was collecting agent; Judgment. Richardson, J

4. That on some of these claims moneys were collected by Mr. Forbes, and some payments over to Mr. Calvert made, but being unable to procure any account of his dealings with such claims from Mr. Forbes, he instituted proceedings in the Court in Eastern Assiniboia, to compel an account, etc., through the machinery of the Court, as also for a Judgment in his favour against Mr. Forbes for such amount as on taking of the accounts should be found due him from Mr. Forbes;

5. That these proceedings resulted in a Judgment of the Court 1st November, 1895, by which Mr. Forbes was found indebted to Mr. Calvert in $347.30, which with plaintiff's costs to be taxed (and which were afterwards taxed at $366.83), Mr. Forbes was ordered to pay to Mr. Calvert within three weeks, of which he, Mr. Forbes, had formal notice on 5th November, 1895;

6. That Mr. Forbes has not complied with that Judgment or Order, and this notwithstanding that on 12th December, 1895, a written demand to pay the said sums was made upon him;

7. That notice of Mr. Calvert's intention to make this motion was served upon Mr. Forbes on 20th May last, eleven days before the Term opened, and with the notice copies of the material showing the facts above stated were also served, and that the claim of Mr. Calvert is still unsettled and in default;

8. Notwithstanding the notice given him Mr. Forbes neither appears nor is excuse offered to this Court on his behalf for non-appearance;

It is to be observed that the moneys in reference to the non-payment of which this application is made were received by Mr. Forbes before the Ordinance authorising the proceedings was passed; namely, 30th September, 1895.

Judgment. Richardson, J.

No complaint is, or could be, made with regard to that; his failure to pay, as shown by the demand in writing served on him 12th December, 1895, and nearly six months ago, and subsequent to the Ordinance, is the ground upon which the Court in Banc is empowered to strike an Advocate off the Roll.

The material before the Court establishes:

1. That Mr. Forbes had prior to 4th February, 1894, received moneys belonging to Mr. Calvert as the latter's advocate.

2. That the amount he had so received and had not paid over on 1st November, 1895, was $347.30.

3. Consequently Mr. Forbes has become liable to have an Order of this Court made under s. 16 of the Ordinance, striking his name off the Roll of Advocates, an Order however reluctant and disagreeable it may be personally to the members of this Court to make, yet is one which in the public interests and for the upholding the honourable profession of Advocates in the Territories it becomes a duty from which they will not, certainly in clearly established instances as this, shrink from making.

It may be a matter of regret that the Legislature, when passing the Ordinance, has not given this Court the alternative of suspending in lieu of striking off the Rolls as appears to exist in England for dealing with solicitors.

The Rule asked for by Mr. Gwillim's motion will therefore be made with costs of the application to be paid by Mr. Forbes.

Rouleau, J., Wetmore, J., and McGuire, J., concurred.

Application granted.

IN RE MCARTHUR'S BAIL (No. 1).

Criminal Law—Bail—Recognizance — Estreat — Sittings of Court—Non-appearance—Notice to Appear—Notice of Intention to Estreat.

In a recognizance of bail the expression "the next sittings of a Court of competent criminal jurisdiction," means the next sittings fixed by the Lieutenant-Governor in Council in pursuance of the N. W. T. Act, s. 55. The fact that a special sitting was held in the interval pursuant to the N. W. T. Amendment Act, 1891, s. 12, s.-s. 2, for the trial of a designated prisoner confined in gaol and awaiting trial, did not affect the obligation of the accused to appear at the next sittings fixed by the Lieutenant-Governor. No notice to the bail of intention to estreat or to produce the accused is necessary.

Regina v. *Schram*;[1] *Re Talbot's Bail*,[2] followed.

[*Court en banc, June 5th, 1896.*

Statement. Motion on behalf of bail to set aside proceedings estreating the recognizance of bail.

Argument. *W. C. Hamilton*, Q.C., for applicants.

C. C. McCaul, Q.C., for the Crown.

By the recognizance the cognizors acknowledged that they severally owed Her Majesty $500, to be made and levied of their goods and chattels, lands and tenements, respectively, to Her Majesty's use, unless one Edward McArthur, who had been charged before a Justice of the Peace with theft, should personally appear "at the next sitting of a Court of competent criminal jurisdiction, at the city of Calgary, in and for the Northern Alberta Judicial District, and there surrender himself into custody and plead to such charge."

It was for the alleged non-fulfilment of this condition to appear that the proceedings to enforce the payment of the indebtedness were taken.

No notice of intention to estreat or to produce McArthur had been given.

[1] 2 U. C. R. 91; [2] 23 O. R. 65.

Argument. The recognizance was entered into on the 12th October, 1895, and the proceedings were taken for the alleged default of appearance of McArthur at the sittings at Calgary held on the 5th November, 1895.

It was contended on behalf of the cognizors that, inasmuch as on the 29th October, 1895, two persons, who had previously been committed to gaol for trial at Calgary, were brought before ROULEAU, J., and tried, this was the "sitting" to which the condition applied, and consequently that the proceedings taken were irregular. The trial of these persons was had under 54 & 55 (1891) Vic. c. 22, s. 12, s.s. 2, which confers specific powers and duties upon a Judge when any person charged with a criminal offence is committed to gaol for arraignment and trial. It was not shown that it was known on the 12th October, 1895, that there would be a sitting for criminal business on the 29th of that month.

[*December 14th, 1896.*]

Judgment. RICHARDSON, J.—By the recognizance in question dated 12th October, 1895, the cognizors Wigmore and Walpert acknowledged that they severally owed Her Majesty $500, to be made and levied of their goods and chattels, lands and tenements, respectively to Her Majesty's use, unless one Edward McArthur, who had been charged before W. A. Holmes, a J.P., with theft, should personally appear "at the next sittings of a Court of competent Criminal Jurisdiction at the city of Calgary in and for the Northern Alberta Judicial District and there surrender himself into the custody of the common gaol there and plead to such charge as may be brought against him for and in respect to the charge aforesaid."

There was thus created as stated in *Reg.* v. *JJ. Glamorganshire*,[3] "A Bond of Record testifying" that each of them Wigmore and Walpert owed Her Majesty $500, such indebt-

[3] 59 L. J. U. C. 50; 24 Q. B. D. 675; 62 L. T. 730; 38 W. R. 640; 17 Cox C. C. 45; 55 J. P. 39.

edness to be discharged if Edward McArthur should appear and surrender and plead as stated in the condition, but not otherwise, and it was for the alleged non-fulfilment of this condition to appear that the proceedings to enforce the payment of the indebtedness so created were taken. No notice of intention to estreat or to produce McArthur was necessary so far as I can find authority, and even if so, giving notice would be but a ministerial act merely for the convenience of the parties, *Reg.* v. *Schram*,[1] and *Re Talbot's Bail*,[2] nor do I find that the Crown Office Rules of England, adopted in 1886, have any application, and there is nothing to show that the English Rule No. 124 then enacted, or one like it, had previously been in force in England: *Rex* v. *Clark*.[4] Judgment. Richardson, J.

These proceedings appear to me to have been taken in conformity with s. 916 of the Criminal Code, assuming, however, that the sittings of the Supreme Court for the Judicial District of Northern Alberta held on 5th November, 1895, was the next sittings of a Court of Competent Criminal Jurisdiction after the date on which the recognizance was entered into (12th October, 1895). It is not questioned that this sittings had competent criminal jurisdiction over the offence with which McArthur was charged, but was it the next following the 12th October, 1895? It is claimed on behalf of the cognizors Wigmore and Walpert, whose application to this Court is to have the proceedings taken to enforce the payments set aside, that inasmuch as on 29th October, 1895, two prisoners Vogel and Snowden, who had previously been committed to gaol for trial at Calgary, were brought before Mr. Justice ROULEAU for trial and then tried, this was the sittings to which the condition of the recognizance applied, and consequently that the proceedings taken are irregular because not based upon action taken then, and that being the case, that the applicants are entitled to the relief asked for.

[1] 5 B & Ald., 728.

Judgment.
Richardson, J.

Now the trials of Vogel and Snowden, it appears from the material in Court, were had under 54-55 Vic. c. 22, s. 12, s.-s. 2, which confers specific powers and duty upon a Judge when any person charged with a criminal offence is committed to gaol, for that person's arraignment and trial. It is not shown, nor does it seem possible, that it was known on 12th October, 1895, when the recognizance was entered into, that Mr. Justice ROULEAU would be sitting for any criminal business on the 29th of that month. Besides his sitting then was by the Act, in so far as that Act was concerned, limited to the trial and delivery of identified persons, who were then in gaol committed for trial, which would not include McArthur. In my opinion the expression "next sitting" in the condition meant then the next sitting at Calgary of the Supreme Court of the North-West Territories for the Judicial District of Northern Alberta, as had under the North-West Territories Act, been previously fixed by the Lieutenant-Governor, and it was known to the public that there was a regular sitting fixed by the Lieutenant-Governor for the 5th November, 1895.

Independently of this view, I fail to comprehend how the applicants can be relieved. They became by the recognizance debtors to the Crown, the liability for paying which depended upon the fulfilment of the condition named, which did not happen.

What did the parties to the recognizance contemplate when it was entered into? We must construe the instrument in the light of the then surrounding circumstances. Under the North-West Territories Act the Lieutenant-Governor may appoint sittings of the Court in each Judicial District to be held at stated times in each year. The Lieutenant-Governor has exercised such power and appointed such sittings in and for Northern Alberta, and under such appointment a sittings was to be held on the 5th November, 1895. At the time this recognizance was entered into that was the

"next Court of Competent Criminal Jurisdiction" which the parties to the recognizance had in view, and must therefore be taken as the Court at which the parties to the recognizance understood that the party charged should appear. That undertaking cannot be cut down or altered because a Judge in the meanwhile held a special sittings, especially as it does not appear that such special sittings was contemplated at the time the recognizance was entered into. Judgment. Richardson, J.

WETMORE, J., MCGUIRE, J., and SCOTT, J., concurred.

WEST ASSINIBOIA DOMINION ELECTION CASE.

McDOUGALL v. DAVIN.

Controverted Elections Act—Election Petition—Preliminary Objections—Motion to Strike out—Appeal—Fixing Time for Trial.

Preliminary objections to an election petition having, on summons to strike them out or otherwise dispose of them, been struck out on the ground that they were not filed in time inasmuch as they were filed after office hours on the last day limited for filing: and an appeal from the order to the S. C. of Canada being pending—

Held that inasmuch as the preliminary objections had not been considered upon their merits, and one of the objections if sustained would finally dispose of the petition, the Court should not fix a time for the trial of the petition.

[*Court en banc, December 14th, 1896.*

Application to fix the time for the trial of an election petition. The several sections of the Dominion Controverted Elections Act, R. S. C. 1886, c. 9, considered in the judgment are noted below.† Statement.

† 12. Within five days after the service of the petition and the accompanying notice, the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the petition of the petitioner, or against any further proceedings thereon, and shall in such case at the same time file a copy thereof for the petitioner, and the Court or Judge shall hear the parties

Statement.

Preliminary objections were filed with the Clerk of the Court at 2.30 p.m. on August 3rd, the fifth day after the petition was served. By the Judicature Ordinance, s. 17, s.-s. 1, the office of the Clerk is to be closed at 1 p.m. during August and September.

RICHARDSON, J., granted a summons to show cause why the preliminary objections should not be struck out or otherwise disposed of. On the return of the summons it was enlarged, and before the enlargement expired the advocate for the petitioner served notice of an objection, not taken when obtaining the summons, that the preliminary objections being filed after office hours should not be considered as being properly on the files of the Court. On the return of the motion the learned Judge sustained the objection. The respondent appealed from this decision to the Supreme Court of Canada. Before the decision of the Supreme Court of Canada on the appeal, the petitioner made the present application to have the petition set down for trial. Respondent opposed the application on the ground that a *bona fide* and sub-

upon such objections and grounds and shall decide the same in a summary manner.

13. Within five days after the decision upon the preliminary objections, if presented and not allowed, or on the expiration of the time for presenting the same, if none are presented, the respondent may file a written answer to the petition together with a copy thereof for the petitioner; but whether such answer is or is not filed the petition shall be held to be at issue after the expiration of said five days, and the Court may at any time thereafter upon the application of either party fix some convenient time and place for the trial of the petition.

50. An appeal shall lie to the Supreme Court of Canada under this Act by any party to an election petition who is dissatisfied with the decision of the Court or a Judge:—

(*a*) From the judgment, rul , order r dec sion of any Court or Judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection if it had been allowed would have been final and conclusive and have put an end to such petition; provided always that, unless the Court or Judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition.

(*b*) From the judgment or decision on any question of law or of fact of the Judge who has tried such petition.

stantial appeal to the Supreme Court of Canada was pending, and that the petition could not be set down, not being at issue. Statement.

The motion came on for hearing on the 14th day of December, 1896.

H. A. Robson, for petitioner. Argument.

W. C. Hamilton, Q.C., for respondent.

[*December 14th, 1896.*]

WETMORE, J.—This is an application to fix a time for the trial of this petition. Judgment.

On the last day for presenting preliminary objections to the petition and at half-past two o'clock in the afternoon of that day, and after the time prescribed by the Judicature Ordinance for office hours, preliminary objections were filed

An application was made to my brother RICHARDSON to strike out or otherwise dispose of these preliminary objections.

At the time that this application was made and the summons granted by the learned Judge, there can be no doubt that the petitioner intended to attempt to have the preliminary objections struck out or disposed of on the merits. On the return of the summons, it was enlarged, and before the enlargement expired the petitioner took a ground against proceeding on those objections not thought of at the time he took out the summons, namely, that the objections being filed after office hours could not be considered as being properly on the files of the Court. Notice that this objection would be raised was served on the respondent, and on the return of the enlargement it was raised before the learned Judge, and the learned Judge agreed with and gave effect to the objection, and held that the preliminary objections being filed after the prescribed office hours were a nullity, and that consequently he had nothing to dispose of.

Judgment. Wetmore, J.

The respondent has appealed to the Supreme Court of Canada from that decision, and he now asks this Court not to fix a time for the trial of the petition because this appeal is pending, and because the grounds of appeal are substantial.

Assuming for the purposes of what I am now about to observe, that the decision of my brother RICHARDSON is appealable, it seems to us clear in view of s. 50 of the Controverted Elections Act, that the Legislature intended that where an appeal was taken from preliminary objections, such appeal should not delay the trial of a case unless some reason was assigned which would be sufficient to induce the Judge or the Court in its discretion to delay it.

No copy of the preliminary objections was furnished to this Court in the material used on this application, but on inspecting the preliminary objections on file I find that one of those objections is of a character which if allowed would put an end to the petition; the others are objections to part of the petition only and would not if allowed put an end to it.

If these preliminary objections had been considered by the learned Judge on the merits and he had overruled them, this Court might have refused to delay the trial of the case. If in that case this Court fixed a time for the trial it would be entirely acting within its proper functions, and its act could not be questioned no matter what might subsequently transpire.

If in that case all the objections were sustained in the appellate Court, it is true there might be an end to the petition, but the act of this Court in fixing a time for the trial could not be questioned and would not involve any intricacies or difficulties whatever, because reading ss. 13 and 50 of the Act together, it is intended that when the decision of the Judge on such objections is so given, the cause shall be deemed at issue on the expiration of five days from the date of such decision, and that whether an appeal is taken from such decision or not.

Judgment. Wetmore, J

But this case is in a very different position from what it would have been in if the learned Judge had ruled on the merits of the preliminary objections and disallowed them and an appeal had been taken from such ruling. In that case, the cause would clearly have been at issue, and no ruling of the appeal court could alter the state of things. But as the appeal stands in this case the very question which the Supreme Court of Canada will have to decide when it comes before it is, "Has the learned Judge disposed of the preliminary objections?" If that Court should hold that the preliminary objections were filed in time, or, if not, that the omission to do so was merely an irregularity which had been waived, and that therefore the learned Judge ought to deal with such objections on the merits, this cause would not be at issue, and we would have no right to fix a time for the trial. If it had been shown that the appeal was entirely without merits, in our opinion it would have been our duty to comply with the request of the petitioner and fix a time for the trial. It is, however, not for this Court to say, nor are we asked to say, whether the learned Judge was correct in his ruling or not, and therefore that it is by no means a frivolous appeal.

This, then, not being a frivolous appeal, this Court ought not in its discretion (if the matter is appealable) to fix a time for the trial because, if it does, and the appeal is allowed, it will be in the position of having set down the cause for trial when it was not at issue, and it might happen that the trial Judges might go on to trial and the appeal court might send the matter back to my brother RICHARDSON for him to deal with the preliminary objections on the merits (because that Court has no facts upon which it can itself so deal with such preliminary objections), and so the trial Judges might be sitting in one place trying a petition which never was at issue at all, and determining questions raised by the petition, and another Judge might be sitting in another place to determine, and might determine, that there was no petition pro-

Judgment. Wetmore, J.

perly on file to be dealt with at all. It is sufficient for our purposes to say that in our opinion this appeal raises a grave and serious question as to whether the learned Judge was correct in his ruling, and as to whether his order is appealable. We think this Court in its discretion ought not to make an order out of which such a state of things might arise. Then coming to the question whether an appeal lies from the judgment of my brother RICHARDSON, because if this Court is satisfied that no appeal lies we should set the cause down for trial, I am free to say that so far as I am concerned I incline to the view that an appeal does not lie, but that does not settle it. Two at least, and I think I may say three, of my learned brethren incline to the opinion that an appeal does lie, and that being so it is far from clear that it will not lie. Therefore we come back to the same thing, if we fix a time for the trial it is not by any means unlikely that we may be instrumental in placing this cause in the peculiar position which I have already referred to, and I think that this Court should not make an order which might involve any such consequences.

It is a matter of regret that this trial may be delayed, but the respondent has not brought it about, the petitioner has brought it about by raising the question referred to before my brother RICHARDSON, who complied with his request. We do not say that he had not the right to take the objection, but the effect is that the cause has got in this involved position. In the opinion of the Court this application must be at present refused. The costs of both parties to the application will be costs in the cause.

We may add with respect to the affidavits read this morning that we are not in a position to say from those affidavits whether the case has been entered, or whether the petitioner is in a position to have the appeal quashed or not for not being entered in time. Those affidavits simply prove that certain telegrams have been received: there is nothing to

prove that the facts contained in those telegrams are true, and therefore we are not in a position to say that the appeal has been entered, or that the petitioner is in a position to have the appeal quashed. At any rate that is entirely a matter for the Court of Appeal, which is in a position to get the information whether their rules have been complied with or not. Judgment. Wetmore, J.

ROULEAU, J., MCGUIRE, J., and SCOTT, J., concurred.

RICHARDSON, J.—I have to state that so soon as this petition is in shape for trial, that is, so soon as the matter which is before the Supreme Court of Canada is disposed of, if it be brought to my notice, a date will be fixed when a sufficient number of Judges will be here to deal with any application that may be made.

Application refused, costs to be costs in cause.

IN RE FORBES, AN ADVOCATE (No. 2).

Legal Professions Ordinance—Advocate—Striking Off Rolls—Reinstatement—Material Required on Application.

The Legal Professions Ordinance, 1895, confers no jurisdiction on the Supreme Court of the N. W. T., to reinstate an advocate who has been struck off the rolls.

Semble, that in this case had there been jurisdiction the application must have been refused on the grounds (1) that the applicant was in default in not paying the costs which by the order striking him off he had been ordered to pay; (2) that there was no evidence that the advocate was not liable to an application to strike off in respect of moneys other than those in respect of which he had been struck off, and (3) that the lapse of time since the misconduct charged was unusually short.

[*Court en banc, December 14th, 1896.*

Application to reinstate on the roll of advocates an advocate who had been struck off. Statement.

Hugh A. Robson, for the applicant. Argument.

W. C. Hamilton, Q.C., contra.

Judgment.
Richardson, J.

[*December 14th, 1896.*]

RICHARDSON, J.—On the opening of this term Mr. Robson moved, on notice previously given to one Calvert, for a rule or order authorizing the reinstatement of Mr. Forbes on the roll of advocates of the North-West Territories.

This Mr. Forbes had for several years prior to last Term of this Court been an advocate upon the roll of which His Honor, the Lieutenant-Governor, is the custodian, but, on application of the Mr. Calvert referred to under the provisions of s. 16, of Ordinance No. 9 of 1895, respecting the legal profession, in that term an order was made striking his name off the rolls, the foundation for which order was the non-payment of money belonging to Mr. Calvert, received by Forbes as the former's advocate. The order further provided that Forbes should pay Calvert's costs of the application.

The material upon which the present application is made, is that in the interval between the making of the order of last Term and the present Term, Mr. Forbes has satisfied the moneys for the non-payment of which that order was made, and having done so, and producing affidavits of two gentlemen of the same town that Mr. Forbes' character in the community is good, this Court is asked to make an order restoring him to the roll. To this order going, Mr. Hamilton makes the objection, on behalf of Calvert, that the costs of the application in last Term have not been paid. The serious question which has presented itself here is that of jurisdiction to make the order; Mr. Robson argued that jurisdiction is conferred by s. 11, which confers upon the Court the same powers and jurisdiction over and in respect of advocates as was when the Ordinance was passed, possessed by the Supreme Court of Judicature in England over solicitors of that Court. It must be noted, however, that this section only gives jurisdiction over "such advocates" as under the preceding sections of the

Ordinance are entered upon the roll, the custodian of which is the Lieutenant-Governor, and it will be observed by looking at the Ordinance that the only power vested in the Court to interfere with this roll is by ss. 15 and 16 of the Ordinance, the limit of which is to strike off. Judgment. Richardson, J

As therefore the Ordinance only empowers the Court to deal, whether punitively or otherwise, with advocates on the roll, inasmuch as Mr. Forbes is not on that roll the application must be rejected.

Even were it otherwise, and jurisdiction existed, we are not satisfied that the application should be granted, because (1) the order of last Term has not been fully complied with, i.e., the costs imposed have not been paid, and (2) we have no evidence that there are no other moneys of the same character as in that respect of which Mr. Forbes was struck off, and (3) the time which has elapsed since the misconduct, is, so far as any authorities which we have been able to refer to go, unusually short.

No costs are imposed.

ROULEAU, WETMORE, MCGUIRE and SCOTT, JJ., concurred.

Application refused without costs.

HICKSON ET AL. v. WILSON ET AL.

Prohibition—Court of Revision—Prohibition after Sentence.

A Municipal Court of Revision, after the assessment roll had been completed by the assessor, and checked over by the assessment committee, passed in consequence of a successful appeal to the Court by the promovents, a general resolution reducing the entire assessment by twenty per cent.

Held, hesitante, affirming the judgment of ROULEAU, J., that prohibition lay.

The Court should not be chary at the present day in exercising the power of prohibition.

The proceedings before the Court of Revision were not terminated inasmuch as its decision necessitated the amending of the roll, and this duty imposed upon the clerk would be the act of the Court by the instrumentality of its clerk.

In any case prohibition will lie after sentence, when it appears on the face of the proceedings that the matters are not within the jurisdiction of the tribunal.

[*Court in banc, March 5th, 1897.*

Argument.

S. S. Taylor, Q.C., on behalf of one Hickson and others, moved absolute a *rule nisi* for a writ of prohibition against one Wilson and others, councillors of the town of Edmonton, constituting the Court of Revision for the year 1896.

The assessment roll for the year had been completed in the ordinary way by the assessor. The assessment committee, in pursuance of the Municipal Ordinance, No. 3, of 1894, part IV., sec. 21, which directs the committee, on the completion of the assessor's roll and before the assessment lists are sent out, to check over the assessment roll and make such corrections as the majority of the committee may decide, increased the assessment made by the assessors by twenty per cent.

The persons on whose behalf the present application was made appealed to the Court of Revision against their respective assessments. The Court of Revision, on the hearing of these appeals, passed a general resolution reducing the whole amount of the assessment by twenty per cent., thus not only

allowing the appeals but making a like reduction in the case of all other persons assessed without any appeal being before it. Argument.

N. D. Beck, Q.C., opposed the appeal on behalf of the town of Edmonton.

The motion was heard before ROULEAU, J., at Edmonton.

[*November 11th, 1896.*]

ROULEAU, J.—The principal ground upon which the *rule nisi* is based is that the said Court of Revision reduced the whole assessment of the town 20 per cent., affecting thereby the persons, corporations, and estates who appealed against their respective assessments to the said Court of Revision, as well as the persons, corporations, and estates who in no manner appealed against or complained of their respective assessments or the assessment of any other persons, corporations or estates to the said Court of Revision or any other Court of Revision. Judgment.

There seems to be no doubt that a Superior Court can exercise its powers by way of prohibition, whenever any body of persons, other than the Superior Court, is entrusted with the powers of imposing an obligation upon individuals. However it has been decided that this writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a Court, or by any other name, on whom the law confers no powers of pronouncing any judgment or order imposing any legal duty or obligation on any individual. *Re Godson and the City of Toronto.*[1]

Is the Court of Revision a Court exercising any judicial functions having the power to impose any legal duty or obligation upon individuals?

[1] 16 Ont. App. Rep. 452.

Judgment.
Rouleau, J.

I am of the opinion it is within its sphere. It is a regular tribunal created by statute to hear and determine all complaints which individuals may have against the action of the assessor, in assessing their properties. The decision of the said Court is binding and thereby creates the obligation on the complainants to pay their taxes on the valuations as finally passed by the said Court. It has all the powers and ordinary functions of a regular Court of Justice. It tries all complaints regularly made with respect to the roll of assessment; it summons witnesses and administers the oath to them; it hears their evidence and finally gives its decision, which decision, certified by the Clerk of the said Court, is valid and binding on all parties concerned, unless there be an appeal to the Judge of the Supreme Court. In my opinion, it is just as much a judicial tribunal for the purpose it is created, as a Recorder's Court, or any other Courts for the hearing and determining a certain class of cases. So I cannot see why, in strict law, a writ of prohibition should not issue if the said Court acted without jurisdiction.

I think that the Court had no jurisdiction in this case to decrease the assessment roll 20 per cent. on the whole valuation, without the statement of the assessor attached to the assessment roll, which statement is tantamount to a complaint upon which the Court would have had jurisdiction to make a report; and in acting thus, I think that the Court did not do justice to the appellants, nor to those who had no complaints to prefer against the assessment roll. It seems to me that the Revision Court, in this instance, had no more jurisdiction to act as it did, than any other Court would have had in hearing and determining a case not regularly brought before it, or rather not brought at all before the Court by any person.

As to the question whether or not the Court was in existence, because it was contended that it had finished its duties, I am of a different opinion. Under s. 33 of the Municipal

Ordinance, the existence of the Court was not at an end, for it can be summoned to meet at any time by the mayor of the municipality, unless strict interpretation is given to the following words of the Ordinance: Judgment. Rouleau, J.

"And all the duties of the Court of Revision shall be completed before the 15th day of June in each year."

The parties interested seem to have conceded the fact that there are authorities to shew that such a Court may still act legally after that date. At all events the point was not argued, and I don't wish to be understood to have decided it.

Taking for granted that the Court had a right to sit, I am of the opinion that it exceeded its jurisdiction, and that the *rule nisi* should be declared absolute.

I may add that I do not grant the issue of the writ of prohibition without a certain amount of doubt, but I am of opinion that it is the shortest remedy under all circumstances, and that the corporation can yet easily regulate its proceedings so as not to lose the benefit of the taxes for the current year. On the other hand, by refusing to issue the writ, I believe that future proceedings might be taken to have the assessment roll declared null and void, and if the judgment was adverse to the town, the consequence would be disastrous and the damage almost irreparable.

From this judgment the defendants appealed. The grounds of appeal taken were the following: Appeal.

1. That a Court of Revision does not exercise judicial functions, or at all events, functions of such a judicial character as will be interfered with by prohibition.

2. That the Court of Revision, in so far as it dealt with cases of assessment of persons who had not complained of their assessment, was not acting judicially but ministerially, and after the manner of a board of equalization.

Statement.

3. That assuming the Court of Revision was acting judicially, it had a general jurisdiction over the subject matter in question, and both parties, viz., the assessor and the assessment committee, being before it, and neither objecting to the jurisdiction on the ground of the absence of the statement provided for by s. 30 of part IV. of the Municipal Ordinance,(†) the absence thereof was waived and the Court therefore had absolute jurisdiction.

4. That the provisions of s. 30 of part IV. of the Municipal Ordinance as to the attaching of a statement by the assessor, are directory only and not mandatory.

5. That the attaching of the statement provided for by s. 30, part IV. of the Municipal Ordinance, is a matter of procedure only.

6. That at the time of the application for the writ of prohibition, the Court of Revision was *functus officio*, it having given its decision on all questions brought before it and having finally adjourned and dissolved, and nothing but a ministerial act of the clerk being required to carry its decisions into effect.

7. That asuming that the action of the Court of Revision was invalid, it was validated by being confirmed by resolution of the municipal council.

8. That the assessor still may attach a statement such as contemplated by s. 30, part IV. of the Municipal Ordinance, and the order in any event ought to have directed the issue of the writ of prohibition only *quousque*, viz.:—Until the attaching of such a statement and the consideration thereof by the Court of Revision.

† "Should the assessor not agree with the assessment committee on the valuation of any or all assessments, he may attach a statement to the assessment roll showing the difference, and such report shall be referred to the Court of Revision, whose report shall be final, except as herein provided for by an appeal to a Judge."

9. That the question of whether or not a writ of prohibition should issue being doubtful, as the learned Judge held it to be, he ought not to have directed its issue. Statement.

10. That the issue of a writ of prohibition being in any case discretionary, the learned Judge in the exercise of a sound judicial discretion ought not to have directed its issue.

11. That there was no jurisdiction to grant costs to the applicants for the writ of prohibition.

The appeal came on to be heard 16th December, 1896.

N. D. Beck, Q.C., for appellants.

C. C. McCaul, Q.C., for respondents.

[*March 5th, 1897.*]

WETMORE, J.—The assessor's roll for the town of Edmonton for the year 1896 having been completed, was checked over by the assessment committee under s. 21 of part IV. of "The Municipal Ordinance" (No. 3 of 1894), and the value of all estates as assessed by the assessor were increased by twenty per cent. Judgment.

It seems that the increase was contrary to the opinion of the assessor, but he did not take the steps provided by s. 30 of the same part of the Ordinance and so there was no reference to the Court of Revision as provided for by that section. The roll was therefore completed as so revised by the assessment committee, and notices of assessment were sent out as provided by s. 24 of that part. There were 469 persons, estates, and corporations assessed by said list, and of these about 60, among whom were the promovents, appealed to the Court of Revision against their assessments.

Some of these appeals were on the ground that the parties appealing were assessed too high, others were on different grounds and were specially dealt with in so far as their alleged grounds of appeal were concerned. With respect to

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the appeals on the ground of excessive assessment the Court of Revision reduced the whole assessment valuations twenty per cent., thus affecting not only the assessments of the parties appealing, but those of persons who had not appealed from their assessments or whose assessments had not been appealed against by other persons. The promovents thereupon applied for and obtained a chamber summons calling on the respondents below who constituted the Court of Revision, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in confirming or amending the assessment roll as to all assessments that were not appealed, or complained against, to such Court of Revision.

The matter of that application was heard before my brother ROULEAU, who ordered the writ to issue, and from his judgment the respondents below appealed to this Court.

The grounds of appeal taken were:

1st. That the Court of Revision were acting within their powers under s. 30 of part IV. of "The Municipal Ordinance" in reducing the whole assessment;

2nd. If not a writ of prohibition will not lie.

Hereafter in this judgment, in any reference to a section of this Ordinance, I intend a section of part IV. unless otherwise stated.

This Court, at the argument of this appeal, held that the Court of Revision had not, at the time they did so, any authority to reduce the whole assessment in the manner in which they attempted to do it. As the reasons for so holding were not then fully stated, I will now state my reasons.

Whenever a tax is attempted to be placed on the subject in the manner in which municipal taxes of the character in question are imposed, in respect of his property, the invariable rule has been so far as I have been able to discover to give the subject notice of the amount his property has been assessed at, for the purposes of the tax, in order that if the

assessment is incorrect he can take steps to have it made correct; and generally some tribunal has been constituted to which he can resort for the purpose of having it so corrected. Judgment Wetmore, J.

I do not hold that the legislature could not impose a tax without providing for such notice, but when the Act provides as in this case a general procedure whereby notice is to be given, and a tribunal to which an appeal may be taken, I would require very clear language to convince me that the legislature intended in any case to deprive a person of the benefit of that procedure or of that appeal. To hold that the Court of Revision had at the time they attempted to make this reduction the power to do so, under s. 30, would clothe them with the power to affect the assessments of persons not before them, who had no notice of the attempted interference and who might conclusively be deprived of all redress. Because no provision is made in the Ordinance for giving such persons notice of such alteration, and unless by some accident they get apprized of it within eight days from the decision, they would be deprived of their appeal to a Judge. (See s. 39, s.-s. 1). Now a person assessed may appeal against his assessment, not only on the ground that it is too high, but on the ground that it is too low. He may also complain that some other person has been assessed too high, or too low (s. 36, s.-ss. 1, 2, and 9). In all these cases the Ordinance provides that notice shall be given to the person whose assessment is complained against, and he is notified when and where the Court of Revision will meet to hear the appeal (s. 36, s.-s. 9), and he is thus given an opportunity of being heard. Thus a ratepayer desirous of civic honours, but who has not been assessed sufficient to qualify him under s. 5 of part II., and who is of opinion that he is possessed of the qualification, has an opportunity of having his assessment corrected so as to qualify. On the other hand, a person so desirous of civic honours may be assessed on the roll sufficient to qualify him, whereas as a matter of fact he is not possessed of property sufficient for the purpose. If so, and

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there is a ratepayer who desires to dispute his qualification, he may do so by complaining that his assessment is too high. Because the moment a person gets notice of his own assessment he knows that the roll is or will very soon be open for inspection, and he can inspect it if he desires to do so. But if the authority claimed by the Court of Revision can be exercised in the way and at the time it was attempted to be exercised in this case, namely, after the notice of assessment had been issued, a person qualified for office may be disqualified, or an unqualified person qualified without the person immediately interested or any other ratepayer having an opportunity of being heard.

I think the power claimed in this way is all the more dangerous to vest in the Court of Revision, seeing that it is composed of the mayor and councillors, who are likely therefore to be competitors for civic honours. It seems to me it might possibly afford a very easy way of getting rid of a dangerous opponent, for the powers under s. 30, when properly exercised, may be exercised in respect to the assessment of an individual ratepayer, as well as to the whole of the ratepayers on the roll. I am therefore of the opinion that the legislature intended that the powers conferred by s. 30 on the board of revision should be exercised before the roll was completed as to the amounts assessed and before the assessment notices were sent out, and that in this case the Court of Revision had no authority to act under s. 30, because the attempt to do so (if they did consider they were acting under that section) was too late. Possibly this would have been more clear if s. 30 had been placed immediately after s. 23. But be that as it may, if the legislature intended as I have held, it is immaterial where the section is placed. It is not necessary to determine what is intended by the concluding words of the section, providing that the report of the Court of Revision "shall be final except as herein provided for by an appeal to a Judge." It may be intended to provide an appeal to the Judge as between the assessor and

the assessment committee. I am satisfied that the intention of the section is not to deprive the ratepayer of the right of appeal which is given to him after he has received his notice of assessment. I am also of opinion that the Court of Revision had no power to act as they did, because they were not required to do so inasmuch as no statement by the assessor was attached to the roll as required by s. 30. Judgment. Wetmore, J.

I have, not without some hesitation however, arrived at the conclusion that a writ of prohibition will lie in this matter. It was urged that a Court of Revision, acting under s. 30 of the Ordinance, does not exercise judicial, but merely ministerial functions, that it is merely a revising board. That contention may be correct, but it is not in my opinion necessary for the purposes of this case to decide it, because we cannot assume that such Court was acting or attempting to act under the powers conferred by that section, as the step necessary to confer those powers on the Court were not taken, because the statement of the assessor referred to before was not attached to the roll, and I may also add because the time for acting under that section had gone by.

We must assume therefore, that the Court of Revision were acting or attempting to act under the powers conferred on it by s. 31 and following sections of the Ordinance.

This assumption is rendered conclusive by the fact that the Court of Revision, by the very judgment by which they decided the appeal of ratepayers who lodged their appeals under s. 36, undertook to affect the assessments of persons who had not lodged any appeals. Such judgment cannot be treated as judicial as to one set of ratepayers and ministerial as to the others. I am of opinion that the powers conferred on the Court of Revision by these sections are judicial. It could hardly be contended that the powers conferred on a Judge by s. 38 and following sections, are not judicial. The powers conferred on the Court of Revision by s. 31 and following sections, are of a precisely similar character. In

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Wetmore, J.

the first place the Court has before them contentious persons and matters, on the one hand persons asserting they or somebody else are assessed too high or too low, on the other hand persons asserting the contrary. There is a controversy, and the decision of the Court settles the controversy subject only to the appeal given. By its judgment it fixes the basis on which a legal liability is created. It decides in many instances in substance the questions of a person's qualification for office. In some instances it decides whether a person is liable to be assessed or not, and therefore in effect whether or not such person is liable to a tax. Under s. 34 the Court has the power of taking evidence under oath, of administering oaths and summoning witnesses. These appear to me to be judicial functions of no mean character. This Court, I conceive, should not be alert to limit the power of exercising prohibition. The remarks of BRETT, L.J., in *The Queen* v. *The Local Government Board*,[1] "that my view of the power of prohibition at the present day is, that the Court should not be chary of exercising it," commends itself to my judgment, and unless prevented by authority I am prepared to act on it. In the matter in question, the Court of Revision being clothed with judicial functions, were attempting to exercise them in respect of persons who were not before them at all, which they had not power to do, and were therefore acting without jurisdiction. The power of the Court is to try complaints (s. 35), the proceeding for lodging complaints and the trial of them, and the notice to parties, are provided by s. 36; and by s.-s. 11 of that section the Court is to determine the matter and confirm or amend the roll after hearing the complainant and the party complained against and any evidence adduced. Now the matter there referred to is the matter with respect to which a complaint has been lodged, not a matter with respect to which no complaint has been lodged. It was urged, how-

[1] 10 Q. B. D. 321.

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Wetmore, J.

ever, that inasmuch as at the time the writ of prohibition was applied for, the Court of Revision had delivered its judgment, the unlawful act was done, and there was nothing to prohibit in so far as that Court was concerned. The affidavit of Mr. Randall, the clerk of the town, and the clerk of the Court of Revision, and the assessor, as well shews that the Court of Revision rose and has not been in session since. The Court, however, still exists, and may be called at any time (s. 33). The duty of altering or amending the roll is that of the Court, not of the assessor or of the municipal council (s. 36, s.-s. 11), and the affidavits disclose that this duty had not been completed, but that the clerk was proceeding to amend the roll in accordance with the judgment of the Court. Now the clerk could not be presumed to do that as clerk of the municipality, but as clerk of the Court of Revision (see ss. 32 and 37), and therefore as the officer of the Court.

A special meeting of the municipal council was held after the decision of the Court of Revision was given, at which it was resolved, "that the decision of the Court of Revision, made on the 22nd September last, that the whole assessment valuation of the town be reduced 20 per cent., be and the same is hereby confirmed, and that accordingly all valuations of property appearing on the assessment roll for the current year, be and are hereby declared to be reduced by an amount equal to 20 per cent. thereof." No authority was pointed out, nor can I find any authority for the council to pass such resolution, or in any way to interfere with the assessment in that manner. Such resolution, therefore, amounts to nothing. As before pointed out, the proper authority to amend a roll under a judgment of the Court of Revision, is that Court.

A prohibition can issue after sentence, when, it appears on the face of the proceedings, as in this case, that the matters were beyond its jurisdiction. Shortt on Information,

Judgment Wetmore, J.

etc., p. 459. As I have stated, the clerk in proceeding to amend the roll must be deemed as acting as the clerk of the Court of Revision. But it seems to me that the matter is set at rest by s.-s. 11 of s. 36, which enacts that the Court of Revision is to carry out its decisions by itself amending the roll. Of course such Court can only do this by instructing its clerk, but it none the less itself does the act by its clerk.

I am therefore of opinion that this appeal should be dismissed with costs.

RICHARDSON and SCOTT, JJ., concurred.

Appeal dismissed with costs.

PATTON v. THE ALBERTA RAILWAY & COAL COMPANY.

Master and Servant—Independent Contractor — Negligence—Putting Questions to Jury — Jury's Answers to Questions—Findings of Jury—Verdict—Setting Aside.

An employer is liable for the consequences, not of danger, but of negligence. He performs his duty when he furnishes machinery of ordinary and reasonable safety. Reasonable safety means safety according to the usages, habits and ordinary risks of the business. No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It is only so far as a duty arises on the part of the employer to provide proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is a cause of injury, that a right of action accrues to the person injured.

One Knowlton entered into an agreement with the defendant company to draw the coal and debris produced in the mine from the places at which the miners worked to the pit bottom, and to carry from the bit bottom to the workmen, certain things required in their work, and Knowlton agreed to provide competent and efficient drivers. The vehicles used were cars running on a railway track and drawn by a horse. The plaintiff was employed by Knowlton as a driver, and while so employed was injured.

On the evidence set out in the case, notwithstanding certain adverse answers to questions submitted to the jury, and the trial Judge's judgment thereon for the plaintiff, the Court

Held (1) That the plaintiff had failed to prove negligence on the part of the defendants; and

(2) That if the evidence established negligence on the part of Knowlton, resulting in the injury to the plaintiff, as was the inferential finding of the jury, Knowlton was an independent contractor for whose conduct the defendants were not liable.

The judgment for the plaintiff was set aside and a judgment directed to be entered for the defendants.

[*Court in banc, 8th March, 1897.*

Statement.

Trial of an action before SCOTT, J., and a jury, at Macleod, 18th July, 1896.

C. F. Harris, for the plaintiff.

C. F. P. Conybeare, Q.C., for the defendants.

The action was for damages for negligence. The evidence is fully discussed in the reasons for judgment of the Court *in banc*. The questions submitted to the jury and their answers are as follows:

1. Was plaintiff sent by Knowlton to bring out the cars of stone from Vare's entry?

Answer.—Yes.

2. Was plaintiff negligent in attempting to bring out the cars without having obtained any information as to the manner in which they should be brought down?

Answer.—No.

3. Could he have protected himself from injury if he had known the danger?

Answer.—Yes.

4. Did he know the danger?

Answer.—No.

Should he have known the danger without having been warned of it?

Answer.—No.

5. If not, who should have warned him?

Answer.—Knowlton.

6. Was the grade in the Vare entry unreasonably dangerous?

Answer.—Yes, under the circumstances it was.

Statement.

7. Should defendant company have gone to the expense of reducing the grade in order to lessen the danger to drivers?

Answer.—Yes, unless there were other appliances to those existing.

8. Was defendant company negligent in not providing better appliances for easing loads down the Vare entry grade?

Answer.—Yes.

9. If the plaintiff is entitled to damages, what amount should he recover?

Answer.—$4,000.00.

Upon these answers SCOTT, J., gave judgment for plaintiff for $4,000.00.

The defendants appealed.

The appeal came on to be heard on the 10th December, 1896.

Argument.

J. A. M. Aikins, Q.C., and *C. F. P. Conybeare*, Q.C., for appellant.

C. C. McCaul, Q.C., and *C. F. Harris*, for respondent.

[*March 8th, 1897.*]

Judgment.

MCGUIRE, J.—This is an appeal against the judgment of the Hon. Mr. Justice SCOTT and the findings of the jury in favour of the plaintiff.

The action was brought to recover damages for personal injuries caused, as the plaintiff alleged, by the negligence of the defendant company.

The defendants are the owners of a coal mine. They had given to one Knowlton the contract of drawing the coal and debris produced by the miners to the pit bottom and of carrying from the pit bottom to the miners and other workmen in the mines certain things necessary for their work, and among other things it was provided by the contract that Knowlton should "provide competent and efficient drivers."

Judgment.
McGuire, J.

The company were to provide the horses and to employ a man to take care of them whose wages were to be paid by Knowlton. Knowlton was to be paid a certain amount per ton of coal.

The vehicles used in carrying the coal and other things were cars running on a railway and drawn by a horse.

The plaintiff was employed by Knowlton as a driver in January, 1895, and worked in the mine until the date of the accident, 4th September, 1895. On that day he had been instructed by Knowlton to take in some timber to some of the men in the Vare entry, and, as plaintiff himself says, though this is contradicted by Knowlton, to bring out a load of stone. The Vare entry was one of many passages leading from the main shaft to the various parts of the mine from which coal was being taken. Plaintiff had been working up to this time in other "entries" and this was his first experience in the Vare entry. For some distance back from the mouth of the entry there is a grade varying from about 1 in 18 to 1 in 25. Beyond that for some distance it is about level. In bringing out coal or stone the cars would have to descend this grade, near the bottom of which there was a curve. Plaintiff says he had been in that entry once before to take in some cars and some timber, but that on that occasion he did not bring back a load with him. He tells us in his evidence that there is no means of "controlling the speed of cars upon an incline other than by spraggs." These, it appears, are bars of iron put between the spokes of the wheels to prevent them turning.

In coming down the entry and before reaching the top of the grade the cars would be stopped and these spraggs put in. One of plaintiff's witnesses, Rosblasky, says it was usual to put in six spraggs for four cars loaded with stone, other witnesses say from five to seven according to circumstances. On the occasion when the accident happened the plaintiff was bringing down four cars of stone. He says he had never done any spragging before as the trucks where he worked did

Judgment. McGuire, J.

not need it, and he did not ask anyone about the necessity for spragging in this entry except one Smith, a miner. "When Knowlton told me to bring the stone down I knew there was a grade in the entry, but I did not ask him about it or spragging, I did not ask anyone except Smith. I relied on Ed. Smith's knowledge and my own knowledge of driving to carry me down the entry that day." He says Smith told him it was usual to spragg, and volunteered to help him and he put in four spraggs. He says these were all he saw, three at the stone tunnel and the other at the top of the grade. He does not say what search, if any, he made, or whether he made any inquiry as to the existence of any more.

If the witness, Rosblasky, is correct, there must have been at least six spraggs in use there. He then started down the grade sitting on a seat hung in front of the first car. "After the train started it began to run easier, and all at once it made a bound and ran up against the horse, and when the box struck the horse he started on the run, and he ran from there to the bottom of the hill." There was a curve in the track at the foot of the grade, and at this point the front car ran off and against the side of the passage, jamming plaintiff's legs and causing the injury complained of. As to the cause of the accident, the plaintiff himself swears: "The accident was solely due to the steepness of the grade and the badness of the road. All I know of its badness is that there were holes between the sleepers." I do not see any evidence on which a jury could reasonably find that the holes referred to had anything whatever to do with the accident, and I am also of opinion that the steepness of the track and insufficient spraggs were the sole cause of the runaway. From the nature of the grade it was unsafe to allow cars to go down it loaded, without some means being employed for controlling their speed. These means were the spraggs. There is no evidence that these were not the usual and ordinary means employed in such cases; the plaintiff himself says, "there was no other means." One witness does say that sometimes a rope is used to let the cars

down, but there is no evidence of this being a usual or customary means on such a grade as this. It seems to me that the only duty, if any, which could be attributed to the defendants arose out of the steepness of the grade; a duty arose to provide the ordinary and usual means sufficient to enable the cars to be taken down in reasonable safety. Now, according to Finlay's evidence, and it is not contradicted, Vare's entry had been in use from the time he became manager in March, 1894, nearly a year and a half before the accident to the plaintiff, and continued to be used until 29th May, 1896, and no accident is proved to have taken place prior to the one in which the plaintiff got hurt, nor after that except to two horses. In one of these cases the accident happened through not spragging, and the circumstances of the other are not stated. This is evidence that the Vare entry was not unreasonably unsafe when the means of controlling the cars provided by the defendants were employed. Beven in his work on Negligence, at page 762, quotes from an American case, *Titus* v. *Bradford B. & K. R. Co.*,[1] to the effect that a master performs his duty when he furnishes machinery of ordinary and reasonable safety, and that reasonable safety means safe according to the usages, habits and ordinary risks of the business. They are liable for the consequences, not of danger, but of negligence; no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It seems to me these observations may be applied to the defendants in this case. The dangerous nature of the grade was not in itself negligence. Dangerous employments are not *per se* prohibited. The ship owner who employs the sailors to navigate his ship must necessarily expose them at times to extreme danger; men employed in quarrying where dynamite and other violent explosives are used incur the greatest of risks. It is only so far as a duty arises on the part of the

[1] (1890) 136 Pa. 618; 20 Atl. 517.

Judgment. McGuire, J

employer to provide proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is the cause of injury, that a right of action accrues to the person injured. In this case the plaintiff admits he knew that underground mining was dangerous and that he "expected to take ordinary risks," which must mean risks ordinary to such employment. Was there any extraordinary risk shown here? Is a grade on a mine entry an unusual thing? It was not a concealed risk. He admits he knew there was a grade in this entry; he must be assumed to have known that a loaded car if not checked will run down a grade and may attain such a speed as to cause it to leave the track. Any person of ordinary, or even imperfect, intelligence would know that. He was told spragging was necessary and he did spragg, but evidently he did not put in enough spraggs. He says he put in four. One of his witnesses, William Davis, says he saw only three, but another of his witnesses says that four were not enough, and that six were necessary. The employer is not liable when the injury results from the management of proper machinery by servants not competent: *Barton's Hill Coal Company* v. *Reid*,[2] and surely the same may be said if the servant carelessly neglects or omits to use the appliances provided for his safety. It may be said the plaintiff used all the spraggs he saw. If the defendants furnished sufficient spraggs and some of them were temporarily mislaid or were placed where plaintiff did not see them, that surely could not be imputed as a fault to the defendants without evidence of knowledge by them direct or implied, of the absence of the other spraggs. The entry was dark, and it is consistent with the evidence that other spraggs may have been lying near by. Besides there was no obligation upon him to go down until he did find a sufficient number. If he chose to go down relying, as he says, on Ed. Smith's knowledge and his own, without taking means to find out how many spraggs were

[2] 3 Macq. H. L. 266; 4 Jur. N. S. 767; 6 W. R. 664.

necessary, was that not his own negligence, and did the runaway not happen as a consequence of that negligence? Suppose the horse hitched in front of the train had got killed would not the company have had a ground of action against the plaintiff therefor?

But it may be said that he should have been informed of the danger, that is, the extent of the danger, and the number of spraggs necessary. If so, whose duty was it to inform him? Surely not the defendants. He was not *their* servant, it was not *they* who sent him in on that day.

There is no evidence that any officer of the company knew or had anything to do with his undertaking to drive down on that occasion. Knowlton had contracted to employ competent drivers, and it is fair to assume the company might in the absence of notice to the contrary, believe he had done so. Knowlton employed his own men and controlled them and sent them into the entries when it suited him, without referring to the company. Can it be said that the defendant was bound to be hourly on the watch, and to notify his drivers of the nature of the grade and the means necessary to control the speed of the cars? And we find that the jury took this view of it. After finding that plaintiff did not know the danger, and that he ought to have been warned of it, they find that it was Knowlton's duty to have so warned him, and they also find that if he had known the danger, i.e. (taking their other answers into consideration), if Knowlton had discharged his duty as to warning him, the plaintiff could have protected himself from injury. And this shows that they must have thought that the means sufficient to protect against accident were available—were within his reach—presumably a few additional spraggs. So that it appears from reading their answers together that in their opinion it was the negligence of Knowlton that is to blame for the injury.

They do not say that the defendants were guilty of any negligence unless they intended to say so in their answer to question 7, that the defendants should have reduced the grade.

Judgment. McGuire, J.

But their answer to question 3 is that plaintiff could have avoided the injury had he possessed the requisite knowledge of the danger, i.e., that all that was necessary was knowledge, or in other words, want of the necessary knowledge was the cause of the accident. If so, it was not the omission to lessen the grade which in their opinion was the cause of the injury, and their answer to 7 may be nothing more than a suggestion of what the company should have done. I do not think there was affirmatively shown by the plaintiff any negligence of the defendants causing the injury. There was no evidence from which a jury might reasonably and properly have found that the injury arose from any negligence of the company.

It is at least quite as consistent with his evidence that the accident arose through his own want of the skill and knowledge, which as one assuming to drive he should have possessed, and, through his own carelessness and want of caution, as through any conduct of the defendants. If so, he could not succeed and the case should not have been submitted to the jury.

But the learned Judge having seen fit to take the answers of the jury to the questions put to them, I may further add that for the reasons already set out, I am not prepared to say that the learned Judge should not upon their answers and particularly having in view their answer to the fifth question—that it was Knowlton's duty to warn the plaintiff, and inferentially that it was his breach of duty in that respect which caused the accident,—have entered a verdict for the defendants. Knowlton was an independent contractor, and the defendants were not responsible for his negligence in the carrying out of his contract or in respect to his own servants.

I think the appeal should be allowed, and a verdict for the defendants entered with costs in the Court below, and of this appeal, to be paid by the plaintiff to the defendants.

RICHARDSON, ROULEAU and WETMORE, JJ., concurred.

Appeal allowed with costs.

IN RE FORBES, ADVOCATE (No. 3).

Legal Professions Ordinance—Advocate—Striking Off the Rolls—reinstatement—Rescission of Order—Jurisdiction.

The Court having, as held *ante*, p. 423, no jurisdiction to reinstate an advocate struck off the rolls, cannot effect the same result by rescinding the order.

[*Court en banc, June 11th, 1897.*

Application to rescind an order striking an advocate off the rolls. Statement.

T. C. Johnstone for the applicant. Argument.

W. C. Hamilton, Q.C., contra.

[*June 11th, 1897.*]

RICHARDSON, J.—Mr. Johnstone moved in this Term for a rule or order of Court *in banc*, directing that the order made or pronounced on 5th June, 1896, that Mr. Fred Fraser Forbes be struck off the roll of advocates for the Territories, be rescinded or set aside, or for an order that the said Forbes be reinstated upon the roll as an advocate, or be enrolled as such, or for such other order as this Court shall seem meet. Judgment.

There does not appear to have been any formal written motion paper, but the notice of application served upon the advocates of a Mr. Calvert, at whose instance the order of 5th June, 1896, was made, and by this notice the material upon which the motion was announced to be made and which was stated by Mr. Johnstone, is the affidavits of (1) Mr. Forbes, (2) the joint affidavits of Messrs. Tennyson & Cole, advocates of the North-West Territories, as also the affidavits, exhibits and proceedings used on the application referred to on file in this Court.

The facts deposed to by the newly made affidavits are very brief. Mr. Forbes states that, (1) He has paid over and

Judgment. Richardson, J.

satisfied all moneys due and payable by him under the order which formed the subject matter of the application to strike him off the roll; (2) "So far as I am aware, I hold no trust moneys of any person whatever."

Messrs. Tennyson & Cole state: (1) That they have severally known Mr. Forbes for some years past; (2) That the said Forbes during the last six months "has been of good character and conduct."

On the motion coming on Mr. Hamilton, Q.C., appeared for Mr. Calvert, who had prosecuted the order to strike off the roll, and raised the question of jurisdiction in this Court to entertain the application. From the record of the proceedings in this Court, it appears that in the last Term on an application to have this Mr. Forbes reinstated as an advocate on the roll of advocates of the North-West Territories, it was held that the only power vested in this Court by the Ordinance in force respecting the legal profession to deal with advocates was to strike off the roll; and that as by the force of the order previously made Mr. Forbes at the time of his application to the Court was not on the roll, the Court possessing only such powers as had been by the Legislature expressly conferred upon it, and dealing with persons off the roll by reinstatement or otherwise not being included—this Court, no matter how much the members composing it might otherwise personally wish, was constrained to hold it had not jurisdiction.

With that decision, no grounds are now before us which would lead this Court to reverse it. It is true the wording of the motion goes further now than previously, by asking the Court to rescind the former rule, as also to direct Mr. Forbes' re-enrollment, as alternatives to reinstatement, as also any further order which to the Court might seem meet. But as at present advised the powers conferred by the Legislature being expressly limited to one single power in such cases as Mr. Forbes', and the alternative grounds for the

present application practically asking for the same relief as before, except that to order his re-enrollment, must be refused. Judgment. Richardson, J.

As regards ordering re-enrollment, the Court points out that by the Ordinance respecting the legal profession, one, and only one, method is defined by which re-enrollment can be effected, i.e., through a single Judge, and even if it could be held that this Court *in banc* could exercise those powers, the material required by the Ordinance for enrollment is not before us.

It is open to serious doubts in the minds of the members of this Court, whether the members of the Legislature could have intended when framing the Ordinance to confer on a Judge the power of re-enrollment after an order striking off had been made.

The application must therefore on all grounds be refused.

ROULEAU, WETMORE, and SCOTT, JJ., concurred.

Application refused.

THE CALGARY GAS AND WATER WORKS CO. v. THE CITY OF CALGARY.

Assessment and Taxation—Companies Ordinance—Gas and Water Company.—Mains and Pipes—Real Estate—Land—Fixtures—Exemptions—Double Taxation—Amendment of Roll on Appeal—Appeal.

Where a water works company was assessed for certain lots, and opposite the entry and under the heading on the assessment roll: "Value of lot in parcel without improvements" was placed "$315," and under the heading "value of buildings or other improvements," was placed "$100,000," and in this latter sum it was intended to include the company's water mains and pipes laid on the streets of the city.

Held (1), reversing the decision of ROULEAU, J., and following *The Consumers' Gas Company of Toronto* v. *The City of Toronto*,[1] that the company's water mains and pipes were assessable as "land."

[1] 27 S. C. R. 453.

Statement.

(2) That, however, the form of the assessment did not include the mains and pipes, and that the attempted assessment of them was ineffective, and that the roll could not be amended in view of the fact that the value of the mains and pipes had not been made a question in the proceedings.

(3) That the fact that the city charter gave power to assess the shares of the company did not prevent the city from exercising the power also given thereby to assess any part of the company's real or personal property.

(4) That the fact that the mains and pipes were laid under the authority of an agreement with the city in that behalf did not exempt them from assessment.

[*Court in banc, June 11th, 1897.*

The respondent company was incorporated by special Ordinance No. 23 of 1889. By s. 7 of that Ordinance the Companies Ordinance, R. O. 1888, c. 30, including the several clauses (ss. 90 to 103) entitled "special clauses for joint stock water and gas companies," were incorporated as part of the special Ordinance.

Section 30 of the Companies Ordinance provided that "Every company . . may acquire, hold, sell, and convey any real estate requisite for the carrying on of the undertaking of such company, and shall forthwith become and be invested with all property and rights, real or personal, theretofore held by or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking . . Section 94 of the Companies Ordinance provided that "Any such company may break up, dig and trench so much and so many of the streets, squares, highways, lanes and public places of the municipality for supplying which, with gas or water or both, the company has been incorporated, as are necessary for laying the mains and pipes to conduct gas or water or both from the works of the company to the consumers thereof, doing no unnecessary damage in the premises and taking care, as far as may be, to preserve a free and uninterrupted passage through the said streets, squares, highways, lanes, and public places, while the works are in progress."

Statement.

The company had laid down water mains and pipes on streets in the municipality of the city of Calgary. The company was assessed in the year 1896 for Lots 26 to 32, "value of lot in parcel without improvements, $315;" "value of buildings or other improvements, $100,000;" "Total, $100,315." In the $100,000 was intended to be included the value of the company's water mains and pipes.

The company appealed to the Court of Revision, which sustained the assessment. The company then appealed to a Judge and the appeal was heard before ROULEAU, J., at Calgary.

The following were the grounds of appeal: 1. That the assessment was excessive. 2. That the property was not assessed in accordance with the provisions of the Ordinance incorporating the city of Calgary, No. 33, of 1893. 3. That the assessment was not according to law.

Argument

James Muir, Q.C., and *P. McCarthy*, Q.C., for the appellants.

C. C. McCaul, Q.C., and *A. L. Sifton*, for the respondents.

[*April 24th, 1896.*]

Judgment

ROULEAU, J.—The appeal is entirely confined to the "value of buildings and other improvements;" the value of the lots is not contested.

Section 31 of the City charter provides that "land," "real property," and "real estate," respectively, shall include all buildings and other things erected upon or affixed to the land, and all machinery and other things so affixed to any building as to form any part of the realty, and all mines, minerals, and quarries in and upon the same.

Section 32 defines "personal property" and "personal estate," and s. 33 goes on to say that "property" shall include everything set forth in the two preceding sections.

It is evident, therefore, that the Legislature did not intend to give a wider meaning to the words "land," "real

Judgment. Rouleau, J.

estate," and "real property" than the meaning given to these expresions by s. 31 under the heading "assessment." Otherwise, the words "unless otherwise declared or indicated by the context," used in the interpretation clause at the end of the Ordinance, would be meaningless. The interpretation clause reads thus: Unless otherwise declared or indicated by the context, whenever any of the following words occur in the Ordinance, the meaning hereinafter expressed shall attach to the same, namely . . . (2) the words "land," "lands" "real estate," "real property," respectively, include lands, tenements, and hereditaments, and all rights thereto and interest therein.

In my opinion, the interpretation clause, as to the words referred to, cannot mean anything else when these words are employed in the Ordinance without any expressed meaning given to them, except in the case of assessment, when a specific meaning is given.

It is conceded in this appeal that the water mains and pipes of the company, which, it is claimed by the city, are assessable against the appellants as real property, are included in the assessment, and that the value of the buildings, and improvements on said real property, without the mains, would be that placed on them by Mr. George Alexander, the only witness examined in the case.

On behalf of the city it is contended that the mains are either fixtures, or appurtenances, or hereditaments, and as such are assessable, because they form part of the buildings and lots, being attached thereto, and being a part of the whole system called the "water works."

This contention is based principally on the case of *The Consumers' Gas Company* v. *City of Toronto*[2]. BOYD, C., who rendered judgment in that case, seems to have followed the principle laid down in the cases cited therein in support of his views. But it never struck him that these cases are decisions

[2] 26 O. R. 722.

given under 43 Eliz. c. 2, s. 1, where occupiers of lands or houses are declared assessable for the poor rate as provided in the statute.

Here it is not a question of persons being assessed; it is the real property, the land itself; so that ownership is not taxed, but the land.

The decision in the case of *Toronto Street Railway Co.* v. *Fleming*,[3] is conclusive as to the difference between our assessment law, and the law under 43 Eliz. c. 2.

The only case that seems to give some reason for the conclusion arrived at by BOYD, C., in *The Consumers' Gas Co.* v. *City of Toronto*,[2] is the case of *Metropolitan R. W. Co.* v. *Fowler*.[4] This case is quite distinguishable from the one submitted. The assessment law under which that case was decided is a special Act called the Metropolitan and District Railways (City Lines and Extensions) Act, 1879, 42 & 43 Vic. c. 201. By the 16th section of that Act, it was provided that "with respect to any lands which the two companies are by the provisions of the Act authorized to enter on, take, and use for the purposes of the railways, new street and works, and which are in or under the roadway or footway of any street, road, or highway, the two companies shall not be required wholly to take those lands or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house in any such street, road, or highway, but the two companies may appropriate and use the subsoil and undersurface of any such roadway or footway, and if need be they may purchase, take and use, and the owners of and the other persons interested in any such vault, cellar, or arches shall sell the same for the purposes of the railways, new street, and works, or any of them; and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building or manufactory within s. 92 of the Lands

[3] 37 U. C. R. 116; [4] 62 L. J. Q. B. 553; (1893) A. C. 416; 1 R. 264; 69 L. T. 390; 42 W. R. 270; 57 J. P. 756.

Judgment. Roulcau, J.

Clauses Consolidation Act, 1845." The Court then, after applying the provisions of the Land Tax Act, 38 Geo. III., c. 5, to s. 16 of the Act above referred to, came to the conclusion that the tunnel was the property of the railway company, and that as such it was taxable.

It was intimated during the argument that this case virtually reversed the decision of *Chelsea Waterworks Co.* v. *Bowley*.[5] I do not find anything of the kind. Lord Herschell only referred to that part of the decision which said that the water company, in respect of their right to lay pipes for the purpose of carrying a stream of water through certain lands, had no interest in the lands, but had only an easement over them. His Lordship does not seem to share that opinion, but goes on to add: "I do not propose to enter upon a further discussion of those cases—*Regina* v. *East London Waterworks Co.*,[6] and *Chelsea Waterworks Co.* v. *Bowley*,[5] because the *ratio decidendi* in the case of *Chelsea Waterworks Co.* v. *Bowley*,[5] was distinctly this, whether the decision was right or wrong, that the water company had no greater rights than those which are possessed by a person entitled to an easement, and that they had no interest in the land."

This is exactly what SCOTT, J., decided last year in an appeal before him by the same parties on a similar case, and I have certainly no great reason to differ from his decision.

The question as to how the land is assessable has been fully determined by the case of *Electric Telegraph Co.* v. *Overseers of Salford*.[7] Pollock, C.B.: "The estate extends indefinitely upwards and downwards." Alderson, B.: "There is not any distinction in principle between electric fluid conveyed through a parish and water conveyed through a parish; neither can it matter whether it is conveyed through space,

[5] 17 Q. B. 358; 20 L. J. Q. B. 520; 15 Jur. 1129. [6] 18 Q. B. 705; 21 L. J. M. C. 174; 16 Jur. 711. [7] 11 Ex. 181; 24 L. J. M. C. 116; 1 Jur. N. S. 733; 3 W. R. 518.

or above or under ground, for all up to heaven and all below the earth to its centre are equally land."

Following this decision, it is clear that under the city charter an assessment cannot extend any further underground or upwards than the limit of said land, owned by the company. Besides, according to the authorities, the mains and pipes through the streets form part of said streets as long as they are there, and as the streets are exempt from taxation under s. 38, s.-s. 5, of the city charter, it necessarily follows that they are not taxable. If, on the contrary, they were assessable as realty, there is no doubt they would be subject to sale, and under the law the town is prohibited from selling either the streets or any part thereof.

It was contended also on behalf of the company that their lands or personal property were not assessable at all, because the City had the power to tax their stock. But, as the shares of the company are not taxed, neither their income, so as to enable them to claim that they are paying taxes on a double assessment, I fail to see where the prohibition comes in. It will be time enough for the appellants, when their income is taxed, to raise the objection that their real estate should be exempt from taxation on the ground of double assessment.

Having reviewed all authorities cited as carefully as time would allow me, I come to the conclusion that, 1st, the mains and pipes of the company passing through the streets form part of the streets, and as such are not assessable, because it is especially enacted by the city charter that "all property belonging to the city" is exempt from taxation; 2nd, that these mains and pipes are neither fixtures, nor appurtenances, nor hereditaments, forming part of the realty assessable and belonging to the company, outside of the limits of said lots; 3rd, that s. 31 of the city charter defines what is meant by "land," "real property" and "real estate" in all cases of assessment of real property; and 4th, that the assessment on said lots is excessive.

Judgment. Rouleau, J.

Appeal allowed and the assessment to be amended by deducting the sum of $94,580 therefrom.

Appeal.

From this judgment the city appealed to the Court in banc.

The appeal came to be heard on December 8th, 1896.

C. C. McCaul, Q.C., for appellant.

Jas. Muir, Q.C., and *P. McCarthy*, Q.C., for respondent.

[*June 11th, 1897.*]

Judgment.

WETMORE, J.—In view of s. 7 of the Ordinance incorporating the respondent company (No. 23 of 1889) and ss. 30 and 94 of "The Companies' Ordinance" therein referred to, this Court is in my opinion bound by the recent decision of the Supreme Court of Canada in *The Consumers Gas Company of Toronto* v. *The City of Toronto*,[1] and must hold that all the respondents' mains and pipes which are within the city of Calgary are assessable as land unless effect is to be given to some of the respondents' contentions which are hereafter mentioned.

Sections 30 and 94 respectively of The Companies Ordinance are substantially to the same effect as sections 1 and 13 of the Act incorporating The Consumers' Gas Company of Toronto (11 Vic. c. 14) cited by Mr. Justice GWYNNE in his judgment in *The Consumers' Gas Company of Toronto* v. *The City of Toronto*.[1] It was urged however on behalf of the respondent company that for the purposes of assessment s. 31 of the Ordinance incorporating the City of Calgary (No. 33 of 1893), defined the meaning of "land," "real property," and "real estate" completely, and that those words for such purposes only embraced what that section specified and *Wood* v. *McAlpine*,[2] was relied on for such contention.

I do not dissent from that case, but I think the clear indication of the Legislature in the Ordinance renders that

[1] 1 O. A. R. 234.

Judgment, Wetmore, J

case inapplicable. In the first place the section provides that those terms "shall include all buildings" and the other things specified, it does not provide that they shall not include what they ordinarily mean, and to hold that they do not include what they ordinarily mean would involve an absurdity, because in that case "land" as land in its ordinary sense could not be assessed as such, only the buildings and other things erected upon or affixed to the land and machinery and other things affixed to a building as specified in the section, and mines, minerals and quarries could be assessed as land, the soil and the herbage, the piece or plot of land itself could not be assessed as land, and if assessable could only be assessed as personal property under s. 32.

Every section of the Ordinance bearing on the question indicates that the Legislature never contemplated that. It is unnecessary to decide, therefore, whether the definition of these words as given in s. 177 of the Ordinance is to be applied to these words when used for the purpose of assessment. The term "land" in itself includes the soil.

It was further urged that no property of the company was assessable in Calgary because the city had taken the power to tax the shares in the company and, therefore, they cannot tax the corpus; it would be a double taxation. However objectionable that might be under the constitution of the United States, it affords no objection under the laws in force in the Territories. In *Ex parte McLeod*,[9] the applicant was assessed in the Parish of Richibucto on his personal estate; he was also liable to be assessed in the city of St. John under "The St. John Assessment Act," "on all his personal property wherever the same may be," and he was assessed on such property in the city of St. John. The Court sustained the assessment in Richibucto. That was a double taxation in every sense of the word. RITCHIE, C.J., in delivering the judgment of the Court quotes Lord Cairns in *Part-*

[9] 1 Pugs. N. B. 226.

Judgment. Wetmore, J.

ington v. *The Attorney-General*,[10] as follows: "As I understand the principle of all fiscal legislation it is this: if a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown seeking to recover the tax cannot bring the subject within the letter of the law the subject is free, however apparently within the spirit of the law the case may otherwise appear to be." Section 38 of the Ordinance enacts that "*all land, personal property and income in the city shall be liable to taxation.*" In view of what I have held this property in question is land and therefore embraced by the language of the Ordinance which I have just quoted.

It was also objected that the mains and pipes were not liable to taxation because of the agreement put in, whereby it is alleged the City gave the company for a consideration the right to put in such mains and pipes. I must say that I am unable to appreciate this contention. If it means anything it must mean this, that because the city having the authority to do so, has for a consideration allowed the company to appropriate a portion of its property, the company cannot be taxed. If that is correct, if the city for a money consideration paid, sold a portion of its property, say an acre of its land, to a private citizen, such property would be exempt from taxation because the city was paid for the land. I think it is quite sufficient to say that the Ordinance does not provide that such property shall be exempt from taxation and the whole purpose of the Ordinance is that the property of all the citizens within the city, no matter how acquired, unless exempted as the Ordinance prescribes, shall be assessable for the purpose of maintaining the objects for which the incorporation was obtained. I am of opinion therefore that so far as this branch of this appeal is concerned the respondents' mains and pipes within the city of Calgary are assessable as land.

[10] L. R. 4 H. L. 122.

Judgment.
Wetmore, J.

This, however, does not dispose of this appeal because very serious questions are raised with respect to the form of the assessment and the powers of this Court to amend it.

If their mains and pipes are fixtures to the lots assessed within the meaning of s. 31 of the ordinance incorporating the city, no amendment is necessary, the assessment is proper in form. If fixtures they ought to be assessed as such in connection with such lots. But I cannot bring my mind to the conclusion that seven or eight miles of pipes extending from these lots and ramifying all over the city and beyond it are fixtures to such lots as I have understood the term.

I can find no authority for holding that they are fixtures except that of BOYD, C., in *The Consumers' Gas Company* v. *Toronto*,[2] and in that respect I must respectfully differ from that judgment. The *Queen* v. *Lee*,[11] does not decide that they are fixtures to the land or building where the pumping or generating works are situated. The mains and pipes were not mentioned in that case. The cases generally seem to point in the direction that such pipes and mains ought in case they are situate in different wards or parishes making separate and distinct assessments to be proportionately assessed in the different wards or parishes; see *Consumers' Gas Company* v. *Toronto*,[2] and the judgments in the Supreme Court of Canada in this case already referred to. This seems to me to be altogether inconsistent with their being fixtures to the land or building where the pumping or generating works are.

The pipes and mains being, as decided in the last mentioned judgment, land, the form of assessment is not correct. In fact the respondents have not on the face of the roll or of the notice served on them been assessed at all in respect of such mains and pipes. They have merely been assessed in respect to lots 26 to 32 in block 11 and the buildings and

[11] 35 L. J. M. C. 105; L. R. 1 Q. B. 241; 12 Jur. N. S. 225; 13 L. T. 704; 14 W. R. 311.

Judgment. Wetmore, J.

improvements on such lots. Although no doubt the intention was to assess them in respect of the mains and pipes, as a matter of fact the city has not in form so assessed them, and as the roll stands at present no assessment in respect of mains and pipes can be enforced. It is claimed, however, that this Court can so amend the assessment and the roll as to place these mains and pipes and the assessable values of them in due form on the roll. Conceding for the purposes of this branch of the case that the Court of Revision under the power conferred by s. 40 to alter the assessment and amend the roll accordingly had such powers of amendment, and that the Judge under s. 41 had similar powers, and that this Court can exercise the same powers, I think this Court is not in a position to make such amendment, as it has nothing to make it by, and it might be an injustice to the respondents to do so. The respondents were served with a notice of assessment informing them that they were assessed $100,315 in respect of the value of Lots 26 to 32 in Block 11, and of the value of the buildings and improvements thereon. They appealed to the Court of Revision from such assessment on the ground that too great a value was placed on these lots, buildings and improvements. The burthen of showing that was cast on them; they were not called upon to show the value of something else in respect of which so far as the face of the notice of assessment and the roll went they were not assessed at all. If the respondents had been notified in the notice of assessment that they were assessed over $94,000 in respect of their mains and pipes, they might have been in a position to show by evidence that they were over assessed in that respect and to carry an appeal forward on such assessment.

The respondents, therefore, not being called upon to do anything but prove that the lots specified and the buildings and improvements thereon were over assessed, did not come prepared to prove anything else, and the mains and pipes

not having on the face of the record been assessed, the principle of *omnia acta rite* will not apply in favour of the city. Mr. Alexander proved all that it was necessary to prove for the purposes of the respondents' appeal, and the city can take no advantage because he failed to prove the value of the mains and pipes. Judgment. Wetmore, J.

If the city wished to amend by placing the mains and pipes and their value on the roll, it was incumbent on them to give evidence of the value so as to enable the amendment to be made, and the respondents should have been in a position to answer such evidence and show the true assessable value of such mains and pipes if such evidence was erroneous. If we amend now as desired without any evidence to show the value, we would do what is practically against the principle of every assessment law, that is, we would assess these respondents with respect to the value of these mains and pipes without giving them an opportunity to be heard with respect to such value.

On this ground, therefore, I am of opinion that this appeal should be dismissed and the judgment of my brother ROULEAU affirmed.

I think the appellants ought to pay the costs of this appeal, but as the respondents were successful as to the substantial question argued, namely, the right to assess the mains and pipes within the city, and as the discussion of that question took up nearly the whole of the time occupied in hearing the appeal, I think the fee allowed the respondents should be comparatively small, $20.

RICHARDSON, J., MCGUIRE, J., and SCOTT, J., concurred.

Appeal dismissed with costs.

HEIMINCK v. THE TOWN OF EDMONTON.

Way—Highway—Trail—Dedication—Crown Land—User—Squatter's Right—Patent—Reservation—Arbitration and Award—Estoppel—Trial—Judge's Findings—Appeal—Drawing Inferences of Fact.

The Edmonton settlement was surveyed by the Dominion Government in 1882. At that time there were numbers of persons in occupation of different parcels of the land forming the settlement.

One McDougall was in occupation of the parcel shown on the Government plan of survey as River Lot 8, and had been so for some years previously. McDougall's rights as a "squatter" under The Dominion Lands Act, R. S. C. (1886) c. 54, s. 33, were recognized by the Government, and he was given a right to purchase the lot outright at $1 an acre. He exercised this right and a patent was eventually issued to him on the 30th September, 1889.

It appeared that at the date of the survey there were two well defined trails crossing the lot, and that both had been used as public roads for a period of more than 20 years previous to the attempted closing by McDougall's successor in title of the trail in question in this action—the southerly trail of the two above mentioned.

Per SCOTT, J.:—The fact that the patentee before the issue of patent never interfered with the user by the public of the trails crossing the lot, or that he permitted such user, would not constitute an implied dedication by him of such trails as highways. Having no legal right or title of occupation, he was not in a position to prevent such user, and it would be unreasonable to hold that a dedication should be implied as against him merely because he permitted an act to be done which he was powerless to prevent.

The patent contained the following words: "Reserving thereout the public road or trail one chain in width crossing the said lot."

SCOTT, J., *held*, that this reservation was not void for uncertainty, but that the defendants, upon whom the onus of proof lay, had failed to show that the trail in question was that one of the two trails which was intended by the reservation.

In the year 1894 the defendant municipality expropriated a part of River Lot 8. McDougall was then the owner of the portion expropriated. The plaintiff represented McDougall on the arbitration proceedings. Upon the arbitration it was material that the arbitrators in order to arrive at the amount of the compensation should ascertain whether the trail in question was a highway. His counsel contended that it was a highway. The award found that it was a highway.

SCOTT, J., *held*, that the plaintiff was estopped from denying that the trail in question was a highway.

On appeal, RICHARDSON and WETMORE, JJ., *held*, that taking into account all the facts, and applying the principles laid down in *Turner* v. *Walsh*[1], a dedication of the trail in question ought to be presumed and on this ground agreed in dismissing the appeal.†

[1] 50 L. J. P. C. 55; 6 App. Cas. 636; 45 L. T. 50.

† Reversed on appeal to the S. C. of Canada, 28 S. C. R. 501.

ROULEAU, J., dissented, and was of opinion that the appeal should be allowed.

Section 509 of the Judicature Ordinance, 1893,‡ provides, amongst other things, that the Court on appeal "shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require."

Per WETMORE, J.:—The exercise of these powers I conceive to be discretionary with the Court, and possibly the Court ought not to find facts not found by the trial Judge, unless they are clearly established by the evidence or the weight of testimony is manifestly in favour of the finding. Where such is the case, however, I am of opinion that the Legislature intends that this Court shall dispose of the case without sending it back for a new trial.§

[*Court in banc, June 11th, 1897.*

Statement. This was an action of trespass to land brought for the purpose of trying the question of the existence of a public highway.

The substance of the pleadings and the points in issue appear in the judgment of SCOTT, J., before whom the action was tried without a jury at Edmonton.

Argument. *C. M. Woodworth*, for the plaintiff.

N. D. Beck, Q.C., for the defendant.

[*June 24th, 1896.*]

Judgment. SCOTT, J.—In this action the plaintiff claims that he is the owner and entitled to the possession of certain portions of River Lot 8 in the Edmonton settlement, and that defendant municipality, by its agents and servants, entered upon same and tore down and destroyed a fence which plaintiff had lawfully erected thereon. He claims damages for the trespass and a final injunction restraining further trespass.

The defendant municipality denies the plaintiff is the owner or entitled to possession of the premises, and also denies the trespasses complained of. By the third paragraph

‡ Now Jud. Ord. C. O. 1898, c. 21; R. 507; E. M. R. 868.

§ See as to findings of fact by a Judge, as contrasted with the findings of a jury, *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 540, and *Village of Granby* v. *Menard*, 31 S. C. R. 22, where the cases are collected. ED.

Judgment Scott, J.

of the defence, it is claimed that the acts and matters complained of were done or occurred not elsewhere than upon a public highway running over said lands and being within the limits of defendant's municipality.

The grounds upon which the existence of a highway is claimed are as follows:

(a) That the patent from the Crown for River Lot 8 expressly reserved said highway for public use.

(b) That the highway was dedicated to the public use by the Crown, and by the patentee from the Crown, and such dedication is to be implied from the following amongst other circumstances, viz.: That the said highway was notoriously and uninterruptedly used as such by the public for a long period of time, exceeding 20 years; that such user was with the tacit consent and approval of the Crown, and also that of the patentee from the Crown, both before and after the issue of the patent, the patentee from the Crown being in actual possession and occupation of the said land long prior to the issue of the patent with the consent of the Crown, and claiming to be entitled by reason of such possession and occupation to the patent, which was accordingly issued to him; and that such user was also with the consent and approval of the Crown and the Parliament of Canada to be implied from the public statutes and orders of the Governor-General in Council and the departmental regulations relating to trails in the Territories.

(c) By prescription under the provisions of 2 & 3 Wm. IV. c. 71, s. 2.

(1) By presumption of a grant or other lawful origin of the right of user of the highway by reason of actual use thereof by the public for a period exceeding 20 years.

Plaintiff by his reply joins issue, and says that if he is not the owner of any portion of the lands claimed, he is entitled to possession thereof as against the defendants; that the public highway claimed by defendants did not exist, that

if it ever existed it had ceased to exist as such, and the defendants had accepted other highways in lieu thereof. Plaintiff also raised certain questions of law as to the sufficiency of portions of defendants' defence. Judgment Scott, J.

The action was tried before me at the Edmonton sittings on the 1st, 2nd and 5th days of November, and the 15th, 16th and 17th days of December, 1895.

About the beginning of February, 1895, one Wilson, who was employed by plaintiff for the purpose, started to erect a fence on the south side of Jasper avenue on the northern boundary of the land in question. On the 5th February while the fence was in course of erection, the solicitor of defendant municipality wrote plaintiff demanding the removal of the fence, and claiming that it was being erected upon a public highway. The next day the clerk of defendant municipality wrote one Campbell, constable, requiring him by order of the town council, to forthwith remove the obstruction which was being erected on the travelled trail to the river, viz., on River Lot 8, between Cameron's and Sutter & Dunlop's stores. Campbell thereupon proceeded to remove, and did remove some of the posts that had been planted by Wilson on that trail in erecting a fence for plaintiff. At that time no work had been done on the fence except the planting of the posts, although material had been cut and been prepared for it, and had been placed on the ground, but so far as appears from the evidence these materials were not interfered with by defendant municipality or under its authority.

I find that the wrongful act shewn to have been done on behalf of the defendant municipality was the removal of certain posts which were on the trail crossing River Lot 8, hereinafter referred to as the southerly trail, which is claimed by defendant municipality to be a public highway. No evidence was given as to the value of these posts, but I think it may be presumed that the damages caused by the trespass were merely nominal.

Judgment.
Scott, J.

The Edmonton settlement, including River lot 8, was surveyed for the Government in 1882 by one Deane, a Dominion land surveyor. This survey was approved and confirmed by the Surveyor-General on 25th day May, 1883. The patent from the Crown, which was issued to David McDougall, the plaintiff's predecessor in title, on the 30th September, 1889, contained the following reservation: "Also reserving thereout the public road or trail one chain in width crossing the said lot." At the time of the survey and for some time prior thereto, McDougall, the patentee, was in possession of the lot, and had made improvements thereon. He remained in possession up to the issue of the patent, but it appears that he purchased the lot from the Government, and that the patent issued to him on payment of the purchase money. On 30th September, 1887, he registered a sub-divisional plan of a portion of it.

At the time of the survey of River Lot 8, in 1882, there were *two well defined trails* crossing it, viz., one north of what is now called Jasper avenue, as shewn on plan, and the other south of Jasper avenue, and near the top of the bank of the valley of River Saskatchewan. For convenience, I will hereafter refer to the first mentioned trail as the northerly trail, and to the last mentioned as the southerly trail.

The southerly trail ran easterly from Lot 8 over River Lot 10 into River Lot 12, where it divided into two branches, one branch continuing along or near the top of the bank over River Lots 14, 16 and 18 into, but not across, River Lot 20, and the other branch running in a northerly or northeasterly direction to Rat Creek, where it united with the northerly trail, and with it formed the main cross country trail north of the river. Upon Lot 8 and near its westerly boundary, the southerly trail divided into two branches, one leading down the bank to the river, and the other continuing along the top of the bank across River Lot 6 into the Hudson's Bay Company's reserve, and through that reserve to the company's flat near the river.

Judgment.
Scott, J.

The northerly trail continued easterly from River Lot 8 across River Lots 10, 12, 14, 16, 18 and 20 to Rat creek, where it joined the southerly trail. West of River Lot 8 it crossed River Lot 6 into the Hudson's Bay Company's reserve and over the reserve to the company's fort.

Both these trails are shown on the field notes of the Government survey of River Lot 8, but with this difference, that in the case of the southerly trail the points of intersection of both its northerly and southerly limits with the boundaries of the lot are shewn, while in the case of the northerly trail, only the point of intersection of its centre with the westerly boundary is shewn, and neither its width or its point of intersection with the easterly boundary is defined by measurements. The usual practice of Government surveyors is to note only the point of intersection of the centre of a trail with a boundary. The difference in the mode of noting the two trails on the field notes would indicate that the surveyor considered the southerly trail the more important one.

As I have already stated, it has not been shewn that McDougall, the patentee of River Lot 8, had any title or right of occupation prior to the issue of the patent to him. True it may have been the case that those in occupation of the different lots in the settlement at the time of survey were given the prior right to purchase, but that would not confer any legal right of occupation until the purchase was completed. I can find nothing in the Dominion Lands Act which gives any such right or authorizes the Governor-General in Council to confer any such right. Such being the case, the fact that McDougall before the issue of the patent never interfered with the user by the public of the trails crossing Lot 8, or that he permitted such user, would not constitute an implied dedication by him of such trails as highways. Having no right or title of occupation, he was not in a position to prevent such user, and it would be unreasonable to hold that a dedication should be implied as against him merely because he permitted an act to be done which he was powerless to prevent.

Judgment
Scott, J.

The evidence is not in my opinion sufficient to establish an implied dedication by the Crown of either of the trails as highways. Evidence was adduced to shew that both have been used as public roads for a period of more than 20 years, but a dedication cannot be implied from that circumstance alone. (See *Regina* v. *Plunkett*.[2]) Section 108 of the North-West Territories Act appears to indicate that since its passing a dedication cannot be implied merely from user by the public no matter for how long a period.

There was, however, by the reservation contained in McDougall's patent an express dedication by the Crown as a highway of "the public road or trail crossing the said lot." This reservation is not, as was contended on behalf of the plaintiff, void for uncertainty. The use of the word "the" shews that it was intended to refer to a road or trail which was in existence and in public use at the time of the issue of the patent. The words "one chain in width" are not intended as words of description of the trail as it then stood, but are merely intended as a provision that thereafter the roadway should be of that width.

Had there been only one road or trail across the lot at that time I would have had no difficulty in determining that there was a complete dedication of it as a highway, but as the evidence shews that there was more than one, a latent ambiguity is thereby disclosed, and the onus of proving that the southerly trail was the one referred to in the reservation rests upon the defendant municipality.

Some twenty witnesses were examined upon this point, and a careful consideration of their evidence leads me to the following conclusions, viz.: That at the time of the survey in 1882, there were only a few settlers in what is now the town of Edmonton, and the bulk of the trade was then in the hands of the Hudson's Bay Company, all or nearly all of whose traffic came over the northerly trail; that the settlers

[2] 21 U. C. R. 536.

from further down the river who then dealt with the company usually passed to and from the company's fort over the northerly trail; that the southerly trail was then ordinarily used only by persons travelling between the town settlement and the Fort and St. Albert, although settlers from down the river who occasionally had business in the town settlement, or both there and at the Fort, would also use the southerly trail; that by reason of these facts, the bulk of the travel was then over the northerly trail. Between 1882 and the date of the issue of the patent, there was a gradual change in this state of affairs. The town settlement and its population and trade gradually increased so that at the latter date the traffic over the southerly trail was greater than that over the northerly. I am not satisfied, however, that even at the latter date the traffic over the southerly trail was so much in excess of that over the northerly one as to entitle the former to be designated the main trail, or as "the" trail.

Mr. Chalmers, a Dominion land surveyor, who was examined as a witness for the defendant municipality, states that in his opinion the southerly trail is the one intended by the reservation, because the intersections of both sides of that trail with both boundaries of the lot are shewn on the field notes, and only the intersection of the centre of the northerly trails with the westerly boundary of the lot is shewn. I cannot but think, however, that if at the time of preparing the patent reference were had to the field notes, the fact that there were two trails crossing the lot would have been disclosed, and the necessity of specifying which of them was intended to be reserved would have been apparent. I am not satisfied that the reservation was made with reference to what appeared upon the field notes.

It was shewn that a reservation similar to that contained in the patent of Lot 8 was contained in the patents of Lots 12, 14, 16, 18 and 20, and it was contended on behalf of the defendant municipality, that the evidence shewed that the

Judgment.
Scott, J.

northerly trail did not cross Lots 18 and 20, and that therefore the southerly trail must have been the one intended to be reserved as a highway. As to this contention, I am not satisfied from the evidence that the northerly trail did not cross these lots. The evidence of John Fraser, upon whose testimony this contention rests, is not clear upon the point. He does not speak with certainty, and it is open to doubt whether he knew the location of the boundary lines of those lots. On the other hand, the plan of the settlement shews the northerly trail as crossing those lots, and as crossing Rat Creek at the head of Lot 20. Then there is the further fact that the north branch of the southerly trail joined the northerly trail at Rat Creek, and if the northerly trail did not cross Lot 20, the southerly trail did not cross it either, because the southerly branch of that trail only led into, not across, that lot.

In my opinion the defendant municipality has failed to shew conclusively that the southerly trail was the trail referred to in the reservation in the patent of River Lot 8.

There remains the further question whether a dedication by McDougall of the southerly trail as a highway should be implied from his acts or conduct subsequent to the issue of the patent to him, or whether by reason of any such acts or conduct he is estopped from denying that it is a highway.

About September, 1894, the defendant municipality, under the provisions of the Municipal Ordinance, took the necessary steps to expropriate that portion of River Lot 8 which lies in rear of Lot 1, one of the lots south of Jasper avenue, shewn on plan, for the purpose of extending McDougall street south from Jasper avenue to the top of the bank of the river valley. McDougall was then the owner of the portion sought to be expropriated, as well as of the adjoining unsubdivided portion of River Lot 8, and in the arbitration which ensued between him and the municipality for the purpose of

Judgment.
Scott, J.

ascertaining the compensation due to him for the damages resulting from such expropriation, the plaintiff represented him as agent. Upon that arbitration it was material that the arbitrators in order to arrive at the amount of compensation which McDougall was entitled to receive, should ascertain and find whether or not the southerly trail was a highway, because if it were, it afforded him an outlet from the unsubdivided portion to Jasper avenue, and therefore the extension of McDougall street south was not required by him as an outlet. On the other hand, if the trail was not a highway, the McDougall street extension would give him an outlet, and he would thereby derive an advantage from the extension, which advantage the arbitration should, under sec. 33, part 8, of the Ordinance referred to, take into consideration in fixing the amount of compensation.

The plaintiff was examined as a witness on behalf of McDougall on the arbitration, and the evidence given by him leads to the conclusion that he was contending that the trail was a highway. At all events the counsel for McDougall on the arbitration so contended, and also contended that by reason of the trail being a highway, the extension of McDougall street did not benefit the adjoining land. He himself admits that in his opinion it was material for the arbitrators to find whether or not it was a highway. It does not appear from the evidence that the municipality opposed this contention.

A majority of the arbitrators found, as appears by their award, that the trail was a highway, and I think there cannot be any reasonable doubt that if they had not so found, the amount of compensation they would have awarded McDougall would have been less than the amount they actually awarded him on the basis of that finding.

In *Pickard* v. *Sears*,[3] the following rule is laid down with respect to estoppel by conduct: "Where one by his words or conduct wilfully causes another to believe in the existence of a

[3] 6 A. & E. 469; 2 N. & P. 488.

Judgment. Scott, J.

certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."

In *Freeman* v. *Cooke*,[4] Parke, B., in referring to the rule laid down in *Pickard* v. *Sears*,[5] says: "By the term 'wilfully,' however, in that rule, we must understand if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

The rule laid down in *Carr* v. *London and Northwestern Railway Co.*,[6] is as follows:

"If a person either by express terms or by his conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted on in a certain way, and it is acted upon in that way in the belief of the existence of such a state of facts to the damage of him who believes and acts, such person is estopped from denying the existence of such a state of facts."

In *Baxendale* v. *Bennett*,[7] BRAMWELL, L.J., says: "Estoppels are odious and should never be applied except in cases where the person against whom it is used has so conducted himself either in what he has said or done, or failed to say or do, that he would unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do." In *Simm* v. *Anglo-American Telegraph Co.*,[7] BRAMWELL, L.J., says: "An estoppel exists where

[4] 6 D. & L. 187; 2 Ex. 654; 18 L. J. Ex. 114; 12 Jur. 777. [5] 44 L. J. C. P. 109; L. R. 10 C. P. 307; 31 L. T. 785; 23 W. R. 747. [6] 47 L. J. Q. B. 624; 3 Q. B. D. 525; 26 W. R. 899. [7] 49 L. J. Q. B. 392; 5 Q. B. D. 188; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280.

the truth is one way and a person is compelled to act as if it was not the truth but something else was." Judgment. Scott, J.

It may be contended that the facts I have set out do not bring McDougall's conduct within any of these rules, inasmuch as the representations made by him were not made or acted upon by the defendant municipality, but were only made to and acted upon by the arbitrators; but although his conduct may not be within the letter of these rules, it may still be within their spirit. The representations were made with the intention that by reason of belief in their truth defendant municipality should be compelled to act upon them as if they were true, and to its damage, and it was so compelled to act upon them.

To my mind the evidence clearly shews that McDougall's representations as to the existence of the highway were believed by the arbitrators and acted upon by them to the prejudice of the defendant municipality; and such being the case, I think that upon the ground of good faith alone he should as against the municipality be estopped from denying the truth of those representations, and I doubt whether in holding that he was so estopped, I would be extending the principles of the law of estoppel as they are stated in the authorities I have quoted.

For the reasons stated I hold that McDougall is estopped as against defendant municipality from denying that the southerly trail across River Lot 8 is a public highway.

In his evidence before the arbitrators plaintiff stated that McDougall was then the owner of the portion of Lot 8 upon which the trespass complained of was committed; that the money would go to McDougall if it were sold, and that the property was in his (plaintiff's) name.

The certificate of title under which the plaintiff claims title was issued to him on 5th December, 1894, after the arbitration proceedings. It does not appear from the evidence that after giving his evidence before the arbitrators he acquired any beneficial interest in the property, but even if he

Judgment. Scott, J.

did acquire any such interest he must claim title under McDougall, and he is therefore bound by the estoppel.

Any beneficial interest acquired by him was so acquired with full knowledge of the circumstances creating the estoppel.

It may be open to question whether the defence of estoppel is raised by the pleadings, and further whether such a defence is required to be so raised in order to entitle a defendant to avail himself of it. See *Freeman* v. *Cooke*,[4] cited above. No objection was taken at the trial as to the admission of evidence to prove it or as to the right of the defendant to raise that defence; and it appeared to be conceded that it was one of the questions in issue. In *Stevens* v. *Buck*,[5] circumstances creating an estoppel were shown by the evidence although not pleaded, and the Court directed a plea of estoppel to be added to the record. Following that case I direct that the defendant municipality may if so advised amend its defence in such manner as to set up the estoppel.

It was shewn by plaintiff that the portion of Lot 8 on which the trespass complained of was committed was assessed by defendant municipality during the years 1892, 1893, 1894 and 1895, and it was contended by plaintiff's counsel that although this did not amount to an estoppel, it was a circumstance tending to shew that the portion was not a highway.

There was nothing in the acts or conduct of McDougall prior to the arbitration referred to from which a dedication of that portion as a highway could be implied, and therefore it was properly assessed up to and including the year 1894.

As to the assessment for 1895, it is shewn that plaintiff appeared at the Court of Revision for that year, and on his application his name was substituted for that of McDougall on the assessment roll in respect of the property in question, but even apart from this fact I do not see at present how the

[5] 43 U. C. R. 1.

assessment of the property for that year can affect the matters in question. Judgment. Scott, J.

At the trial plaintiff tendered as evidence certain letters written by the Surveyor-General relating to the question of a highway across River Lot 8. These were objected to and I received them and certain evidence relating thereto subject to the objection.

I now hold that they are not admissible as evidence because even if the Surveyor-General is an officer whose admission would bind the Crown, they are at the most admissions made by a predecessor in title after such predecessor had parted with all interest in the property.

Judgment for the defendant.

From this judgment the defendants appealed, and the appeal came on to be heard on the 12th day of December, 1896. Appeal.

C. C. McCaul, Q.C., for appellant.

N. D. Beck, Q.C., for respondent.

[*June 11th, 1897.*]

RICHARDSON, J.—The plaintiff in this suit claiming to be the owner of a part of River Lot 8 in the Edmonton Settlement, according to the plan of the Dominion Government survey (such part being a narrow strip about fifty feet in width and extending in depth about 172 feet) sued the defendants for having on 6th February, 1895, by its servants, agents and town constable entered upon this strip, torn down and destroyed a fence the plaintiff had legally erected thereon, claiming Judgment.

1. Damages for the acts complained of;
2. An injunction restraining the defendants from further trespassing on the said land.

As a defence to the action the defendants deny the commission of the acts charged, as also the title of the plaintiff

Judgment. Richardson, J.

as alleged, and assert that the land described in the statement of claim comprises a dedicated public highway.

The action was tried at Edmonton before Hon. Mr. Justice Scott, the result of which trial was a dismissal of the action, from which the plaintiff appealed to this Court, asserting on several grounds set up that the learned trial Judge had erred in his judgment and asking this Court to reverse such judgment and order a judgment to be entered for the plaintiff.

The appeal was heard in December Term 1896, when, after lengthy arguments, elaborately addressed to the Court by the learned counsel on both sides, extending over several days, judgment was reserved to enable the members of the Bench before whom the appeal was argued to consider the various and intricate questions submitted. This the three Judges hearing the appeal, of whom I am one, have done, and our opinions are given separately.

From the voluminous evidence given at the hearing before the trial Judge it appears, that across River Lot 8 as shewn by the Government map, a certified copy of which was produced, there have been for a number of years two distinctly marked trails, for convenience named the north and the south trails, travelled over by the public requiring their use for a number of years both prior and subsequent to the survey, without any interruption whatever (except that in two or three instances as regards the south trail parties had by building somewhat encroached on the sides, still, however, leaving this trail as a roadway, used as such until the plaintiff began the erection of a fence across it, for the removal of which the action was brought).

The aim and object of the litigation was and is to have it determined whether or not over the land in question there exists a dedicated public highway.

There was, as I construe the evidence, no question but that there had been user (uninterrupted by the owners of the soil)

by the public of this particular trail for a number of years before suit, and while many of the witnesses owing to their limited residence in the neighborhood, were not able to fix this user up to twenty years before suit, or more than about eighteen years, these witnesses one and all testified that when they came to that part of the country the trail was in use as such. Other witnesses, old settlers, some going back beyond 30 years, testified to the trail being used as a highway for considerably over twenty years. Coupled with this is the Government map in which is defined the trail over the *locus in quo* as surveyed in 1882, adopted by the Government in 1883; the reservation in the letters patent to David McDougall of Lot 8 issued 30th September, 1887, "reserving thereout the public road or trail one chain in width crossing the said lot;" the fact of David McDougall having been a squatter on Lot 8 for a number of years preceding the issue of the patent to him and subsequent to its issue up to 5th December, 1894, when he transferred a part comprising the *locus in quo* to the plaintiff, during which time no interruption or obstruction to its user by the public was shewn, or by the plaintiff up to February, 1895, when the fence for removal of which the action was brought, was erected. Judgment. Richardson, J

There was further in evidence, properly as I think, as an admission of the existence of the *locus in quo* as a public thoroughfare, that the plaintiff, in an arbitration held in 1894 anent expropriation for a street by the defendants, of another part of Lot 8, had asserted its existence as such for the purpose of enhancing the value of the portion expropriated. There was also evidence clearly establishing the existence of the other, the north trail, as a travelled highway for a much longer period than the south one.

From this evidence the learned trial Judge was fully justified in my judgment in finding as he plainly has, that both trails, i.e., the north and south one, had been used as public roads for periods of more than 20 years; coupled,

Judgment. Richardson, J.

however, with this expression, he continues in his judgment, "but a dedication cannot be implied from that circumstance alone," and it is here that my opinion differs from his. The learned trial Judge then proceeds and justifies dismissal of the action, by holding that by plaintiff's evidence in the arbitration matter referred to, he was estopped from denying the dedication claimed.

The argument addressed the Court by the learned counsel on both sides was chiefly upon the doctrine of estoppel and whether or not it was applicable as held by the learned trial Judge in this case.

But as in my view of the law, when continuous user by the public, for over twenty years, of a road over and across a piece of land, without interruption by the owners of the soil, whether the Crown or its transferees, during such continuous period is proven, dedication not only may, but ought, to be presumed, and this view is based upon the decision in *Turner v. Walsh*,[1] and as such user has been found by the trial Judge to have existed over the *locus in quo* for over twenty years before the action, in my opinion the judgment of Mr. Justice SCOTT dismissing the action was correct, notwithstanding I do not support it for the same reasons he has; and I agree with my brother Judge WETMORE, in holding that the appeal be dismissed with costs.

WETMORE, J.—I am of opinion that the judgment of this Court ought to be for the defendant. I have reached this conclusion, however, for reasons different from those assigned by my brother SCOTT, and in order for me to do so it has been necessary for me to find facts which I cannot discover have been found by that learned Judge. The facts I have so found, however, are not at all inconsistent with his findings.

I am of opinion that it is quite open to this Court to find questions of fact not found by the trial Judge, and possibly in some cases to find contrary to his findings.

Judgment.

Wetmore, J.

Section 509 of the Judicature Ordinance provides that "The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." These powers may under the same section be exercised in favour of the respondents or parties, "although such respondents or parties may not have appealed from or complained of the decision." The exercise of these powers I conceive to be discretionary with the Court, and possibly the Court ought not to find facts not found by the trial Judge, unless they are clearly established by the evidence, or the weight of testimony is manifestly in favour of the finding. Where such is the case, however, I am of opinion that the Legislature intends that this Court shall dispose of the case without sending it back to a new trial.

I entirely agree with the trial Judge in his finding that at the time of the survey of River Lot 8 in 1882 and at the time of the issue of the patent therefor to David McDougall there were two well defined trails crossing it, one north and the other south of what is now known as Jasper avenue, and that the defendants failed to shew conclusively that the southerly trail (the one in question in the action) was the trail referred to in the patent of that lot, and I agree that on such findings the defendants failed in point of law in establishing that this trail was dedicated as a public way by virtue of the reservation in the patent or the certificate of title to McDougall. I have moreover very great doubts whether under the facts so found, there being two trails crossing this lot, the reservation is not void for uncertainty. I also doubt, assuming that no trail had existed north of Jasper avenue, whether the trail in question answered the description of the trail mentioned in the reservation, and in this connection I refer to *Boyington* v. *Holmes*.[9] However, in view of the conclusion I have reached, it is not necessary to express a decided opinion on those questions.

[9] 3 Ker (N. B.) 74.

Judgment.
Wetmore, J.

I may also say that I have very great doubts whether the doctrine of estoppel precludes the plaintiff from setting up his right to the *locus in quo* by reason of the position that David McDougall took at the arbitration to fix the amount of compensation to be given for the lands expropriated for the extension of McDougall street. I do not wish to be understood as dissenting from the learned trial Judge on this question, but as I have doubts I prefer putting my judgment on another ground.

I am of opinion that the defendants have established by an uninterrupted user of the trail in question by the public as a public way for over twenty years, coupled with the conduct of McDougall, a dedication of the *locus in quo* as a road or highway, and I am of the opinion that the reservation of a public road or trail in the grant is a circumstance in ascertaining whether as a matter of fact there was such a dedication by user. James Gibbons, one of the witnesses for the defence, testified that he had lived in the Edmonton settlement for thirty years and that the trail in question to the south of Jasper avenue had been travelled ever since he came to the country, which would be therefore sometime in 1866. Kenneth McDonald swore that he first struck Edmonton in 1852, and that he came in by this trail, and that such trail has been travelled ever since. It seems that when this man first came to Edmonton this trail was only a road for saddle and pack horses and for sleighs in winter, as there were then no wheeled vehicles in that part of the country. This testimony is not contradicted by any person except Malcolm Groat, and some testimony hereinafter referred to of a somewhat similar character. I am not disposed to put very much confidence in Groat's testimony. He swore that at the time of the rebellion, and in 1882 and 1883, the trail north of Jasper avenue was the only trail that crossed River Lot 8. The rebellion we know as a matter of history was in 1885. Now the overwhelming testimony in the case shews that in 1882

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when Dean made his survey the trail south of Jasper avenue was a well worn, well defined, and largely used trail, and that this trail crossed River Lot 8 is established beyond all question, and Groat in his cross-examination testified that the trail crossing this lot south of Jasper avenue "was the only trail used for traffic between the village and the fort at the time of the survey," and that "prior to 1882 it was a good, well developed cart trail."

One or two other witnesses gave testimony with the apparent object of shewing that at the time of the survey the only trail that crossed this lot was the northerly trail, but they either broke down in that respect on cross-examination, or shewed that their memory on the subject was not to be relied on. Gibbons' and McDonald's testimony therefore remains unimpeached. The fact of the southerly trail being used continuously in later years, for some years prior to 1882 and down to the time of the trial, has been conclusively proved. Just the time when wheeled vehicles commenced to be used on this trail is not very clearly established. Groat swears that carts came into general use about 1862. However, I do not consider this material. I find therefore as a matter of fact that it is established by the evidence that the southerly trail was openly, publicly, notoriously, and continuously used by the general public as a road or way for over twenty years prior to the grant to David McDougall of River Lot No. 8 in September, 1889, and that it continued to be so used down to the date of the trial, subject only to the obstruction placed or attempted to be placed across it by the plaintiff, the removal of which is the cause of this action. If the evidence established no more than this, I am very doubtful whether, in the language of Sir Montague E. SMITH in *Turner* v. *Walsh*,[1] "dedication may and ought to be presumed." In *Regina* v. *Plunkett*[2] it was established that owing to the fact that the original allowances for roads were not opened in what were called the Humber Plains in the township of Etobicoke, people were accustomed to cross where they pleased, and in

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doing this they had used a way across the defendant's lands for over twenty years. The country was a sandy plain very thinly settled and for a long time uncultivated and unenclosed. The Court held in view of the usual course of things in this country that under the circumstances a dedication of the way could not be presumed, and that notwithstanding statute labour had been performed on the way. The Supreme Court of New Brunswick in *Rex* v. *Good*,[10] as far back as 1826, had decided in effect the same thing. The last mentioned Court in *Reg.* v. *Deane*,[11] cited *Rex* v. *Good*[10] with approval as establishing that under the circumstances of a newly settled country stronger evidence of user and dedication might be required than would be sufficient in England to establish those facts. I am free to confess that these decisions strike me with approval, especially as applicable to a country like the North-West Territories, where there are vast tracts of country unfenced and uncultivated, where the country is level and as easy, and sometimes easier, travelled outside than on the road allowances, which in the great majority of instances are unopened, and therefore the temptation to cut across country is so inviting. But I have grave doubts as to the effect of *Turner* v. *Walsh*.[1] That is a decision of the Judicial Committee of the Privy Council, and if in point is conclusively binding on this Court.

The question that came up for the consideration of the Committee in that case arose in New South Wales, where the circumstances were in all probability somewhat the same as they are here, and the question was whether the dedication of a way could be presumed under the evidence from long continued user. The case was tried with a jury, and the trial Judge charged the jury that user might be relied on in the colony in like manner as it might in England for the purpose of presuming and establishing dedication of a road. This direction was upheld by the Colonial Court and appeal was

[10] Chipman's Rep. N. B. 35. [11] 2 Allan N. B. 233.

taken to the Judicial Committee complaining of the ruling that user might be relied on in the colony in the same manner as it might be in England. The Court held that the direction was correct. In giving judgment Sir Montague E. SMITH is reported as follows at page 56, "their lordships are not aware of any reason in point of law why the same presumption from user should not be made in the case of . . . lands in the colony as should be made in England . . . *though the nature of the user and the weight to be given to it may of course vary in each particular case.*" Perhaps the language of the judgment which I have underscored may be sufficient to shew that *Regina* v. *Plunkett*,[2] and *Rex* v. *Good*,[10] are not in point of fact overruled. Possibly the attention of the Judicial Committee may not have been sufficiently called to the circumstances and surroundings of a new and sparsely settled country embracing a large area. It is not necessary to express a decided opinion on the question because I think there is further evidence in this case to which I will now draw attention under which, following the decision in *Turner* v. *Walsh*,[1] I must hold that there has been a dedication of the way in question. Matters being in the condition I have found for over twenty years prior to the issue of the patent to McDougall, such patent issues and by it the Crown reserves "the public road or trail one chain in width crossing the said lot." Now it is here where I think this reservation is a circumstance worthy of consideration in determining whether or not there has been a dedication. The presumption of dedication by long user takes effect because a grant of the way is or may be presumed. Now whether this reservation in the grant to McDougall was good as such or not, whether it was void by reason of some ambiguity or by reason of insufficient description or not, it is clear that the Crown intended to recognize and reserve a way which had been used and was in existence across this lot before the grant issued, and therefore it is open to be presumed, as the term is understood as applied to questions of the kind I am considering, that the Crown had previously made a grant of such a way, at any rate it is a circum-

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stance that points in that direction. McDougall receives this patent, he must have been aware of its contents, he must have been aware that the Crown intended to reserve some trail or way, and I think it is in this connection important to bear in mind that McDougall and the persons through whom he claimed his squatter rights had been in possession of this very lot during a great portion of the time during which this trail was being used by the public, because presuming a grant of the way he would be in a better position than anybody else to know what way had been granted. The public then having used this trail in the manner I have described, McDougall being possessed of the knowledge and aware of the facts to which I have referred, and the user of the trail still going on uninterruptedly, appeared by his agents before the arbitrators appointed under sec. 269, sub-sec. 5, and secs. 239, 240, 241, and 242 of the then Municipal Ordinance (Cap. 8 of the Revised Ordinances) to determine the amount of compensation to be awarded to him for the expropriation of his land by reason of the proposed extension of McDougall street.

In view of sub-sec. 6 of sec. 269 of the Ordinance it was clearly a matter for the consideration of the arbitrators in fixing such compensation, whether this trail existed as a highway, for if it did McDougall had an outlet to Jasper avenue and would not be benefited by the extension of McDougall street, and therefore would be entitled to more compensation for his land so expropriated, and McDougall by his agents made this very contention before the arbitrators; he represented that this was a public trail and thereby got more damages than he would otherwise have got. If the trail were a highway it could only be so by virtue of the user, and because it was the trail intended by that patent. I am of opinion that leaving the question of estoppel out of consideration this conduct of McDougall's coupled with the long user to which I have referred, is such that, to use the language of the Court in *Turner* v. *Walsh*,[1] "dedication of the trail as a public way may and ought to be presumed." It is not necessary, I take it, in order that a dedication may be presumed

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that it must be established as against each separate owner of the land; that is, that unless it is established as against the Crown before they parted with the title, the time must take a new commencement and make a fresh departure in order to establish it as against the patentee. On the contrary, the time having once commenced to run, if the presumption can be raised by the long user coupled with other acts, whether of the Crown or patentee or of both, it will be found, unless it is shewn that something in the meanwhile occurred which prevented the owner or the person by whom the grant is presumed to have been made from entering to interfere with the user. McDougall appearing before the arbitrators practically says to them, I am the owner of this land, and I concede that this is a way, I concede that it must be presumed that there had been a grant of this trail as a way. It is an admission on his part which coupled with the user I think any jury or judge of fact would be justified and ought to take against him, and I therefore find under the evidence that there was a dedication of the way in question by user and consent of the parties. The *locus in quo* on which the alleged trespass was committed is embraced in the second piece of land described in the statement of claim and in the certificate of title to the plaintiff dated 5th December, 1894.

Heiminck therefore obtained this title from McDougall after this arbitration, and after the dedication of the road was complete. He can get no better title than McDougall had, and he takes his title subject to the right of way [see Territories Real Property Act, 49 Vict., ch. 51, s. 61, par. (c), and Land Titles Act, 1894, s. 56, par. (c).] It has been urged that *Turner* v. *Walsh*,[1] is not applicable to this case because it must be presumed that the government were aware of the road in that case being used, as the mails were carried over it. I do not think that that fact lay at the root of that decision at all. The Court simply held, as I have before stated, that the same rule that applied in England applied to the colony, and it is clear that in England knowledge of the person who or authority which is presumed to have made the

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grant will be presumed from the open and notorious user in the absence of anything to rebut the presumption.

As to the circumstances under which a grant of an easement will be presumed see *Ring* v. *Pugsley*.[12] This case was appealed to the Supreme Court, and sent back for a new trial, but not on grounds affecting the purposes for which I refer to the case. The question is not affected by the provisions of sec. 17 of the Acts of 1891, ch. 22.

There is nothing in this section or in sec. 108 of the North-West Territories Act or in sec. 91 of the Acts of 1880, ch. 25, providing that highways or roads can only be dedicated in the way there set out, as was provided in the New South Wales Act under consideration in *Turner* v. *Walsh*.[1]

In my opinion the judgment entered for the defendants should be affirmed and this appeal dismissed with costs.

ROULEAU, J.—This is an action brought by the plaintiff against the defendants for a trespass on a plot of land, being part of Lot No. 8 in the town of Edmonton, in the district of Alberta, known as the piece of land between John Cameron's and Sutter & Dunlop's stores.

The defendants pleaded that there was a public highway over the plot of land, and justified their acts in the proper use of that highway. The question in the action is whether or not the defendants have proved that such a highway had become dedicated at the time of the grant from the Crown dated the 30th September, 1887.

It was contended by the defendants that by a continuous user of twenty years without any interruption or interference on the part of the Crown, when the Crown had power to dedicate, a dedication might be presumed.

It is a fact that the Crown interfered and interrupted the said dedication, if such dedication could be had by user against the Crown, in the year 1887, when the patent for Lot 8 in question was given to David McDougall, containing these words: "also reserving thereout the public road or

[12] 2 P. & B. (N. B.) 303.

trail one chain and a half wide crossing the same." In order to claim dedication by the Crown by a continuous user of twenty years without any interruption or interference on its part, the defendants must prove that the said trail or road was used since the year 1866 as a public road or trail.

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The only evidence produced by the defendants which refers to the year 1866, is the evidence of Kenneth McDonald. He says that he came to live at Edmonton in the year 1866, and in 1869 he squatted upon River Lot 20 and afterwards got a patent for it. When he squatted upon River Lot 20 there were no settlers between that and the Fort. It is abundantly proven by all the other witnesses that the trail in question was used principally by the settlers of Edmonton to go to the Fort, and that the main trail was the trail passing north of Jasper avenue, called the "Victoria Trail," which was used by freighters and the mail stage. Besides it is sufficient to look at the map to ascertain that fact. No person would come by this trail, lengthening their road by several miles, when there were no settlers at Edmonton, and where the only business they could have was with the Fort of the Hudson's Bay Company. It is evident therefore that Mr. Kenneth McDonald is romancing when he speaks of the trail in question when he struck Edmonton in 1852. He must be alluding to the north trail crossing Lot 8 near Rat Creek.

William Borwick, another witness, who came to Edmonton in the fall of 1853, swears positively that he came in by the Victoria trail that crossed River Lot 8 north of Jasper avenue, and that it was the main trail up to 1879, being the time of the survey by Mr. Deane. Malcolm Groat is still more positive. He said that the Victoria trail, sometimes called the Fort Pitt trail, crossed River Lot 8 north of Jasper avenue in 1861, and that in 1881-1882 that trail was the only trail crossing River Lot 8. It was the trail that all the traffic was on. The Hudson's Bay Company had all

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their traffic on it in those days. So it seems to me clearly proven that the trail in question, south of Jasper avenue, was only opened and travelled by settlers at Edmonton having business at the Fort, and that it was only a local trail for local purposes. So that I am of opinion that the defendants cannot claim user against the Crown, because it is impossible that that trail should have been used for 20 years before the patent issued to David McDougall.

Besides, I doubt very much whether or not the case of *Turner* v. *Walsh*,[1] would be applicable and good law in this country. Section 108 of The North-West Territories Act, 49 Vic. c. 50, provides that, "Whenever the Governor in Council receives notice from the Lieutenant-Governor that it is considered desirable that any particular thoroughfare or public travelled road or trail in the Territories, which existed as such prior to any regular surveys, should be continued as such, the Governor in Council may direct the same to be surveyed by a Dominion land surveyor, and thereafter may transfer the control of each such thoroughfare, public travelled road or trail, according to the plan and description thereof, to the Lieutenant-Governor in Council, for the public uses of the Territories."

It would be very inconsistent with this law, if a dedication of any such trail was contemplated by mere user. On the contrary that law contemplates that before a trail is dedicated the proceedings above referred to must be had.

In *Regina* v. *Plunkett*,[2] it was decided that "No right by dedication could have been gained by the public while the fee remained in the Crown." At all events whether or not the case of *Turner* v. *Walsh*[1] would be good law, I am of opinion that the defendants failed in their proof as to the continuous user of twenty years without any interruption or interference on the part of the Crown.

I cannot overlook the fact also that the corporation of the town of Edmonton have very little merit in claiming this part of the trail in question as a public road, for it is

of evidence that the property on the south side of Jasper avenue and lying between the stores occupied by John Cameron and Sutter & Dunlop, and being part of River Lot 8 (the very trail in question), was assessed to David McDougall, but the Court of Revision struck out his name from the assessment, and substituted that of the plaintiff (evidence of Arthur G. Randall, clerk of the municipality of Edmonton, p. 29). The printed plans for the use of the municipality filed in this case do not shew any trace of the trail in question, meaning thereby that the municipality never claimed the said trail as a street or public road. The fact also that the municipality allowed Cameron and others to build partly on this trail, and leaving only a passage about 50 feet wide, is further evidence that the said municipality never claimed that trail as a public road or street, otherwise it could have taken means to prevent such a trespass. Taking these facts into connection with the fact that Jasper avenue was opened by the defendants across lot 8 and improved by them, that McDougall street was expropriated for the purposes of connecting Jasper avenue with the road down the hill going to the ferry; also that this trail has been done away with to go to the Fort, and streets opened instead, I am of opinion that it was never the intention of the municipality to claim that part of the trail as a public highway. I cannot come to any other conclusion also than the learned trial Judge was right in his conclusion that the trail mentioned in the patent to David McDougall was, according to the evidence, the main trail passing north of Jasper avenue, and was the only trail dedicated by the Government.

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As far as that part of the judgment of the learned trial Judge holding that the plaintiff was estopped from denying that the southerly trail across Lot 8 is a public highway, I must confess that I cannot agree with him after due consideration of the authorities cited. Because a person would testify on an arbitration case to open a road or street across

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his property, that he does not want that road, because he has another road to reach the place or outlet contemplated, I don't think that he is estopped in another case from saying or denying that the said trail or road was dedicated. A may allow B to cross his property for a certain time, still B cannot claim that this indulgence is a dedication, unless he comes within the common law of user. As it was said in the case of *Dunlop* v. *The Township of York*,[13] "In a new country like Canada, user of a road by the public is not to be too readily used as an evidence of an 'intention' on the part of an owner to dedicate it. Such user is very generally permissive, and allowed in a neighbourly spirit, by reason of access to market or from one part of a township to another, being more easy than by the regular line of road. Such user may go on for a number of years with nothing further from the mind of the owner of the land, or the minds of those using it as a line of road, than that the rights of the owner should be thereby affected." It is exactly what took place in this case, when Edmonton came to be settled. Settlers having to deal with the Hudson's Bay Company made a short trail to reach there. Since the incorporation of the town the trail has been given up and streets have been opened to the public. That piece of the trail in question is only used by those that wish to cross the river by the lower ferry; all the rest of the trail has been interrupted and closed.

I am of the opinion that this appeal should be allowed and that the judgment should be entered for the plaintiff for the sum of $40, as being the amount of damages proved, and the defendants forbidden to trespass on said lands by their servants, or to claim or use said lands, or any part thereof, as a public highway under the jurisdiction of the municipality or otherwise; the defendants to pay the costs of the Court below and the costs of this appeal.

Appeal dismissed with costs.

[13] 16 Grant Ch. 216.

DIGEST OF CASES REPORTED

IN THIS VOLUME.

ADMINISTRATION.

See PRACTICE.

ADMISSION.

On point of law: *See* CREDITORS' RELIEF ORDINANCE.

ADVOCATE.

Advocate—*Solicitor—Legal Professions Ordinance — Striking off Roll — Suspension.*]—Under the provisions of the Legal Professions Ordinance, No. 9 of 1895, s. 16, which enacts that "the Supreme Court may strike the name of any advocate off the Roll of Advocates for default by him in payment of moneys received by him as an advocate," the Court has no power merely to suspend an advocate temporarily from practice. *In re Forbes, Advocate* (*No.* 1), (Ct. 1896), p. 410.

Legal Professions Ordinance — *Advocate — Striking Off Rolls — Reinstatement — Material Required on Application.*] — The Legal Professions Ordinance, 1895, confers no jurisdiction on the Supreme Court of the N. W. T. to reinstate an advocate who has been struck off the rolls. Semble, that in this case had there been jurisdiction the application must have been refused on the grounds (1) that the applicant was in default in not paying the costs which by the order striking him off he had been ordered to pay; (2) that there was no evidence that the advocate was not liable to an application to strike off in respect of moneys other than those in respect of which he had been struck off, and (3) the lapse of time since the misconduct charged was unusually short. *In re Forbes, an Advocate* (*No.* 2), (Ct. 1896), p. 423.

Legal Professions Ordinance — *Advocate—Striking Off the Rolls—Reinstatement — Rescission of Order — Jurisdiction.*] — The Court having, as held *ante*, p. 423, no jurisdiction to reinstate an advocate struck off the rolls, cannot effect the same result by rescinding the order. *In re Forbes, Advocate* (*No.* 3), (Ct., 1897), p. 447.

AGENCY.

See PRINCIPAL AND AGENT.

AMENDMENT.

See CONDITIONAL SALES — LANDLORD AND TENANT—PRACTICE.

APPEAL.

See CONDITIONAL SALES—CONVICTION —COSTS — WAYS — ASSESSMENT AND TAXATION—CRIMINAL LAW.

ASSESSMENT AND TAXATION.

Assessment and Taxation—*Companies Ordinance — Gas and Water Company — Mains and Pipes — Real Estate—Land—Fixtures — Exemptions — Double Taxation — Amendment of Roll on Appeal—Appeal.*]—Where a water works company was assessed for certain lots, and opposite the entry $ under the heading on the assessment roll: "Value of lot in parcel without improvements" was placed "$315," and under the heading "value of buildings or other improvements," was placed "$100,000," and in this latter sum it was intended to include the company's water mains and pipes laid on the

streets of the city. Held (1), reversing the decision of ROULEAU, J., and following The Consumers' Gas Company of Toronto v. The City of Toronto, 27 S. C. R. 453, that the company's water mains and pipes were assessable as "land." (2) That, however, the form of the assessment did not include the mains and pipes, and that the attempted assessment of them was ineffective, and that the roll could not be amended in view of the fact that the value of the mains and pipes had not been made a question in the proceedings. (3) That the fact that the city charter gave power to assess the shares of the company did not prevent the city from exercising the power also given thereby to assess any part of the company's real or personal property. (4) That the fact that the mains and pipes were laid under the authority of an agreement with the city in that behalf did not exempt them from assessment. *The Calgary Gas and Water Works Co.* v. *The City of Calgary.* (Ct. 1897), p. 449.

ATTACHMENT OF DEBTS.

Attachment of Debts—*Garnishee Summons—Issue—Attachable Debt—Extent of Issue—Fraudulent Conveyance—Future Creditors.*] — An issue was directed to try the question whether certain moneys in the hands of a garnishee—being part of the purchase price of certain designated lands in respect of which moneys a garnishee summons had been issued against the garnishee—were, at the time of the service of the garnishee summons, the moneys of the plaintiff in the issue, a creditor of the judgment debtor, as against the defendant in the issue. The moneys sought to be made subject to the garnishee summons were the balance of the purchase price of land sold by the judgment debtor's wife to the garnishee. Held, per Rouleau, J., the trial Judge, that the Court in such an issue could not enquire into the question whether the land, having formerly been that of the judgment debtor, had been fraudulently conveyed to his wife. On appeal to the Court in banc: Held, reversing the judgment of Rouleau, J., who adhered to his former opinion, that the Court could so enquire. (Reversed and judgment of Rouleau, J., restored, 24 S. C. R. 683.) Per McGuire, J.—It was not open to the defendant in the issue to contend that the moneys sought to be attached did not constitute an attachable debt, because the form of the issue, which might have been so drawn as to have raised that question, was based on the assumption that the moneys were attachable if a debt at all, and the defendant was bound by the form of the issue; and semble, the moneys did constitute an attachable debt. Per Wetmore, J.—The moneys in question did not constitute an attachable debt; but it was not open to the defendant in the issue so to contend, because she was estopped by reason of having applied for and obtained an order for the payment into Court of these moneys by the garnishee in the garnishee proceedings. Per Rouleau, J.—The moneys did not constitute an attachable debt, and it was open to the defendant to raise that question upon this issue; the question whether the moneys were attachable was a question of law involved in the issue; if the moneys were those of the judgment debtor they were attachable; if those of the defendant they were not. Wetmore and McGuire, JJ. (Richardson, J., concurring) found as a fact upon the evidence that a certain business alleged to have been the separate business of the defendant (the judgment debtor's wife) was not in fact her separate business; and that consequently moneys derived from that business were not her separate property; and that the land, the proceeds of which were in question, was in truth the land of the judgment debtor, and had been fraudulently conveyed to his wife. Per McGuire, J.—(1) If at the time of a voluntary settlement the settlor were either insolvent, or became so immediately on the making of the settlement, and he was indebted at the time, so that the then existing creditors could have impeached the settlement, then if any of these debtors still remain unpaid subsequent creditors may also impeach it. (2) Furthermore a voluntary conveyance, made under such circumstances, may be set aside at instance of a subsequent creditor, notwithstanding that no debts contracted before the conveyance remain unpaid: Jenkyns v. Vaughan, 3 Drew. 419; 25 L. J. Ch. 338; 2 Jur. N. S. 109; 4 W. R. 214; Taylor v. Coenen, 1 Ch. D. 636; 34 L. T. 18; Holmes v. Penny, 3 K. & J. 90; 26 L. J. Ch. 179; 3 Jur. N. S. 80; 5 W. R. 132; and Newman v. Lyons, 12 Can. L. T. 262, considered. Per Rouleau, J.—In order to set aside a voluntary conveyance as against future creditors it is necessary to show that it was made with the view

of entering into a risky business, and in the event of failure for the purpose of securing the property against future creditors. *Hull et al.* v. *Donohoe* (*No.* 1). (Rouleau, J., 1893), (Ct. 1894), p. 52.

Attachment of Debts—*Garnishee—Exemptions — Proceeds of Exempted Property—Voluntary Sale by Debtor of Chattels Exempt from Seizure—Right of Creditor to Garnish Proceeds.*]—The proceeds of chattels, exempt from seizure and sale under execution, voluntarily sold by a debtor, are attachable. *Slater* v. *Rodgers — Sheppard, Garnishee.* (Richardson, J., 1897), p. 310.

BAIL.

Criminal Law — *Bail — Recognizance — Estreat — Sittings of Court—Non-appearance — Notice to Appear — Notice of Intention to Estreat.*]—In a recognizance of bail the expression "the next sittings of a Court of competent criminal jurisdiction," means the next sittings fixed by the Lieutenant-Governor in Council in pursuance of the N. W. T. Act, s. 55. The fact that a special sitting was held in the interval pursuant to the N. W. T. Amendment Act, 1891, s. 12, s.-s. 2, for the trial of a designated prisoner confined in gaol and awaiting trial, did not affect the obligation of the accused to appear at the next sittings fixed by the Lieutenant-Governor. No notice to the bail of intention to estreat or to produce the accused is necessary. Regina v. Schram, 2 U. C. R. 91; Re Talbot Bail, 23 O R. 65. *In re McArthur's Bail* (*No.* 1). (Ct. 1896, p. 413.

BANKRUPTCY AND INSOLVENCY.

Bills, Notes and Cheques—*Debtor and Creditor—Agreement for Composition and Discharge — Alterations in Terms of Agreement — Default—Payment of Composition—Renewal of Original Debt — Payment into Court — Costs.*]—The defendant being in difficulties procured from all his creditors, among whom were the plaintiffs, a deed of composition and discharge on the terms that within sixty days he should give them secured promissory notes representing 75 cents on the dollar. Before the expiration of the 60 days the defendant, under pressure from his creditors and by an arrangement with them, sold his entire assets on certain terms, which netted 64½ cents on the dollar to the creditors, payable and paid by the purchaser's promissory notes. All the creditors except the plaintiffs, upon receiving the 64½ cents on the dollar, gave a formal discharge to the defendant. The plaintiff sued upon the promissory notes for the balance of their original debt, or alternatively, for the difference between 64½ and 75 cents on the dollar. The defendant among a number of other defences paid the amount representing this difference into Court, together with costs up to defence. The jury found in answer to questions, (1) that the plaintiffs did not receive the 64½ cents in full of their claim; (2) that they did receive it on account of the 75 cents; and (3) that the 64½ cents were not paid on account of the original claim:—Held, that the plaintiff's action on the promissory notes was discharged by the agreement for composition and discharge, although its terms had not been fulfilled; and the trial Judge, Rouleau, J., dismissed the action with costs. An appeal by the plaintiffs was dismissed with costs (affirmed on appeal to S. C. of C., 26 S. C. R. 372). Effect of payment into Court upon form of judgment and disposition of costs discussed. *Howland et al.* v. *Grant.* (Rouleau, J., 1895), (Ct. 1895), p. 158.

BILLS OF SALE AND CHATTEL MORTGAGES.

Bills of Sale Ordinance—*Foreign Chattel Mortgage—Removal of Goods to Territories—Non-registration in Territories — Bona Fide Purchaser—Conversion.*]—A chattel mortgage made in a foreign country upon goods there, which is valid and binding there as against not only the mortgagor but also subsequent mortgagees and purchasers, is valid and binding to the same extent in the Territories, notwithstanding that the provisions of the Bills of Sale Ordinance of the Territories have not been complied with. Where, therefore, goods then being in a foreign country were comprised in such a mortgage and subsequently removed to the Territories, and there taken by the agent of the mortgagee out of the possession of a bona fide purchaser for value without notice of the mortgage, and the latter

sued the agent for conversion:—Held, reversing the judgment of Rouleau, J., that the plaintiff could not succeed. *Bonin* v. *Robertson*. (Ct. 1893), p. 21.

Chattel Mortgage—*Description—Interpretation—Construction—General Following Particular Words—Ejusdem Generis Rule—Inferior Following Superior.*]—Held, that the following description in a chattel mortgage, "All office fixtures, lamps, desks, chairs, furniture, stationery and all goods, chattels and effects now in the store and office of the mortgagors," did not include a safe, the general words being restricted by the preceding words. *Goldie* v. *Taylor*. (Scott, J., 1896), p. 298.

See CONDITIONAL SALES—BANKRUPTCY AND INSOLVENCY.

BILLS, NOTES AND CHEQUES.

Promissory Note—*Irregular Indorsement—Presentment—Notice of Dishonour—Waiver of—Endorser becoming Administrator.*]—The defendant A. M. put his name on the back of a promissory note made by M. M. in favour of the plaintiff, which was then delivered to the plaintiff:—Held, that defendant A. M. was an endorser of the note, liable as such to the payee and entitled to notice of dishonour. M. M. died before maturity of the note, and defendants A. M. and H. were appointed two of his administrators; after their appointment and before maturity, they had a conversation with the plaintiff in respect of the note, and plaintiff swore that he told them when it would be due, and one of them asked for an extension of time, which was granted. Defendant A. M. swore that plaintiff told him not to worry, that he would not look to him for payment, but take whatever the estate was able to pay, and he did not ask for an extension, nor did he hear defendant H. ask for any. Defendant H. could not remember what took place:—Held, insufficient to prove that defendant A. M. waived presentment or notice of dishonour. The plaintiff also, before maturity, pursuant to administrators' advertisement for creditors, filed with their solicitor a copy of the note and statutory declaration that it was unpaid:—Held, that this is not such a presentment as is required by section 45 of "The Bills of Exchange Act, 1890": Held, also, that notwithstanding the endorser became one of the deceased maker's administrators before maturity of the note, presentment and notice of dishonour were nevertheless necessary. *Fraser* v. *McLeod*. (Scott, J., 1895), p. 154.

Promissory Note—*Endorsement without Value—Fraud—Set-off Defeated.*]—Action by an endorsee against the maker and the endorser of a promissory note. Defence that the indorser, for whose benefit the note was made, and who had received the consideration, endorsed it to the plaintiff's brother, who when he was indebted to the endorser in collusion with the plaintiff, and for the purpose of defrauding the endorser, and preventing him from collecting the sums due by the plaintiffs to others, endorsed the note to the plaintiff without consideration:—Held, that the plea was no defence to the action and must be struck out as embarrassing. *Caldwell* v. *McDermott*. (Scott, J., 1895), p. 249.

BUILDING CONTRACT.

See CONTRACT.

CERTIORARI.

Certiorari—*Municipal Ordinance—Transient Trader—By-law—Proof of By-law—Costs.*]—The Municipal Ordinance (R. O. 1888, c. 8, s. 68, s.-s. 31) authorizes municipal councils to pass by-laws for "licensing, regulating and governing transient traders and other persons who occupy premises in the municipality for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality, and the time the license shall be in force." The defendant was convicted "for that he, the said (defendant) whose name had not been entered on the last revised assessment roll of the municipality on, &c., within said municipality, was a sewing machine agent carrying on his business, occupation and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of By-law No. 25 of the said municipality." On an application for a writ of certiorari it appeared from affidavits filed that the original

by-law was produced before the convicting justice, but that neither the original nor a copy was put in as evidence, and it was sought to prove the by-law on this application by affidavit; — Held, (1), that the by-law could not be proved by affidavit on the application for the writ of certiorari. (2) That therefore the only means available of ascertaining the provisions of the by-law was by reference to the information and conviction. (3) That the offence stated in the conviction was not one which could be created by a by-law passed under the above quoted clause of the Municipal Ordinance, inasmuch as it did not allege that the defendant was "a transient trader or other person occupying premises in the municipality for a temporary period." (4) That costs of quashing a conviction on certiorari will not be granted, unless there be misconduct on the part of the informant or of the Justice. *The Queen* v. *Banks.* (Ct. 1894), p. 81.

COMPANY.

See ASSESSMENT AND TAXATION.

COMPOSITION AND DISCHARGE.

See BANKRUPTCY AND INSOLVENCY.

CONDITIONAL SALES.

Appeal—*Special Leave—Notice of Appeal—Amendment—Lien Note—Conditional Sale—Bills of Sale Ordinance—Description.*] — Notwithstanding the case is of such a character as to require special leave to appeal, the Court in banc has power to amend the notice of appeal; such an amendment is a matter for the exercise of the discretion of the Court, and such discretion will not, in such a case, be exercised without any great precautions. The Ordinance respecting receipt notes, hire receipts, and orders for chattels (No. 8 of 1889) requires such instruments to be registered "where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee." The instrument in question in this case provided that "the title, ownership and right to the possession of the property, for which this note is given, shall remain in" the bailors:— Held, that inasmuch as the "receipt note" in question in this case provided that the bailors might on certain contingencies take possession of the property, it was clear on its face that, though the right of possession was in the bailors the actual possession was to pass to the bailee, and that, therefore, the instrument was one which came within the terms of the Ordinance. Sutherland v. Mannix, 8 Man. R. 541; and Boyce v. McDonald, 9 Man. R. 297, considered. The said Ordinance provides (s. 2) that the provisions of the Ordinance respecting Mortgages and Sale of Personal Property (R. O. O. 1888, c. 47), and amendments thereto shall apply to such receipt notes, hire receipts, or orders for the purposes of this Ordinance, in so far as the provisions thereof may not be incompatible with or repugnant to this Ordinance:— Held, affirming the judgment of Richardson, J., that this provision made applicable to such instruments s. 8, Ord. No. 18 of 1889, which provides that mortgages, sales, assignments or transfers of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished. The receipt note in question in this case stated that it was "given for one team of oxen":—Held, reversing judgment of Richardson, J., before whom the point was not fully argued, that inasmuch as the instrument itself showed further that the team of oxen was one bought by the bailee from the bailors for the price therein mentioned, that the team immediately previous to the bailment had been owned by the bailors and at the time thereof was taken over by, and was in possession of, the bailee, the team of oxen was sufficiently described. *The Western Milling Co.* v. *Drake & Balderson.* (Ct. 1894), p. 40.

CONSENSUS AD IDEM.

See VERDICT.

CONSTITUTIONAL LAW.

Constitutional Law — *Legislative Assembly of the Territories—B. N. A. Act — Ferries — Excessive Privilege —*

License—Tolls — Highway — Infringement—Private Ferry—Municipal Law —By-law—Resolution.]—The Legislative Assembly of the Territories has power to pass an Ordinance providing for the issue of an exclusive license to ferry over a navigable river and for the imposition of tolls for the use of such ferries on such rivers. Such power is conferred upon the Assembly by one, if not both, of the following provisions of the Dominion Order-in-Council of 26th June, 1883—made under the authority of the North-West Territories Act — which authorizes the passing of Ordinances in relation to: 3. Municipal Institutions in the Territories—subject to any legislation by the Parliament of Canada as heretofore or hereafter enacted. (See B. N. A. Act, s. 92, s.-s. 8.) 8. Property and civil rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects. (See B. N. A. Act, s. 92, s.-s. 16.) The power of the Legislative Assembly to delegate its powers discussed. The question of the extent of the jurisdiction of the Legislative Assembly over surveyed highways, the control of which has been given by Parliament to the Legislative Assembly discussed. A municipality having by Ordinance been given, with respect to a certain portion of a navigable river, all the powers of the various officers named in the Territorial Ordinance respecting ferries:—Held, that it was not necessary for the municipality to exercise its powers by by-law; and that an agreement with, and a license to, the licensee both under the corporate seal of the municipality were sufficient. The plaintiff held an exclusive license for a ferry. Another ferry was operated within the plaintiff's territory by an unincorporated association of persons, which issued tickets to its members to the amount of their respective "shares" in the association: — Held, this latter ferry was not a private ferry and that the plaintiff's right was thereby infringed (affirmed 26 S. C. R. 252). Judgment of Rouleau, J., reversed. *Humberstone* v. *Dinner et al.* (Rouleau, J., 1895), p. 106.

Constitutional Law — *Colonial Legislatures—Powers of—Extra-Territorial Laws — Judicature Ordinance — Service Out of the Jurisdiction—Small Debt Procedure.*] — A colony having authority to establish Courts of Civil Jurisdiction and to provide for procedure therein, has also the power necessarily incident thereto of providing for service of process upon defendants residing out of its jurisdiction. The Legislature of the Territories has authority under the powers conferred by the N. W. T. Act to make such provisions. Section 32 of Ordinance 5 of 1894 (amending J. O. 1898), relating to small debt procedure, provides: "The summons shall be returnable. (c) Where the defendant resides in any place in Canada outside the Territories or in the United States of America, at the expiration of 20 days from the service thereof; (d) Where the defendant resides in any part of the United Kingdom at the expiration of 30 days from the service thereof; (e) In any of the above cases it shall not be necessary to obtain an order for service out of the jurisdiction": Held, (1) Neither an order for leave to issue a writ for service out of the jurisdiction, nor an order for leave to serve such a writ, is necessary under this procedure. (2) Nor is it necessary that a proper case for service out of the jurisdiction should be shown by the statement of claim; but semble, if a defendant served out of the jurisdiction can show affirmatively that the action is not one in which service out of the jurisdiction would be allowed under the ordinary practice of the Court, he would be entitled to an order setting aside the service. *McCarthy* v. *Brener.* (Scott, J., 1896), p. 230.

Constitutional Law—*Masters and Servants Ordinance—B. N. A. Act—Constitution of Courts—Appointment of Judges—Property and Civil Rights—Justices of the Peace — Conviction.*] — The Masters and Servants Ordinance, R. O. 1888, c. 36, enacted that it should be lawful for any Justice of the Peace on complaint . . . by any . . . servant of . . . non-payment of wages . . . by his master . . . to order such master to pay such complainant one month's wages in addition to the amount of wages then actually due him . . . together with the costs of prosecution, the same to be levied by distress . . and in default of sufficient distress, to be imprisoned. . . .: — Held Rouleau, J., dissenting, and Scott, J., expressing no opinion against the contention that the provision was *ultra vires* of the Territorial Legislature on the grounds that it assumed (1) to impose a penalty with imprisonment to enforce it, and (2) to provide for the appointment of judicial officers, that the provision was within

the powers conferred upon the Territorial Legislature by the order-in-council promulgated under the N. W. T. Act, R. S. C. c. 50, s. 13 of 11th May, 1877, and 26th June, 1883. The former order-in-council gave power to pass ordinances in relation to "6. The administration of justice, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction. 7. The imposition of punishment by fine, penalty or imprisonment for enforcing any Territorial ordinance, and 8. Property and civil rights in the Territories subject to any legislation by the Parliament of Canada on these subjects." The latter O. C. contained clauses in the same words. Per Wetmore and McGuire, JJ.—The provision in question of the Master and Servants Ordinance did not purport to constitute a criminal offence, but was designed to give enlarged rights, and a more effective and speedy remedy with respect to a civil contract; the remedy by imprisonment is a competent exercise of the power to legislate under the above cited paragraphs of the order-in-council; and paragraph 6 does not exclude the power of appointing judicial officers. The Dominion Statute, 54-55 Vic. (1891) c. 22, s. 6, substituting a new section for s. 13 of the N. W. T. Act, R. S. C. c. 50, is more destructive than the terms of paragraph 6 of the order-in-council, paragraph 10 of the section reading as follows: "10. The administration of justice in the Territories, including the constitution organization and maintenance of Territorial Courts of civil jurisdiction, including procedure therein, but not including the power of appointing any judicial officers." Per Richardson Wetmore and McGuire, JJ.—The Legislature having power to pass the provision in question of the Masters and Servants Ordinance at the time it was passed, the provision did not cease to be valid by reason of the subsequent restriction placed upon the power of the Legislature. Per Wetmore, J.—The British North America Act, 1867, s. 96, which provides that "the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick," does not prevent a Provincial Legislature from constituting Courts other than Superior, District or County Courts, and appointing or providing for the appointment of Judges or other judicial officers therefor. Per McGuire, J.—The provision in question of the M. & S. Ord. did not attempt to create a Court or to appoint judicial officers; the Legislature found a Court and judicial officers already existing and appointed under federal authority, namely, Justices Courts and Justices of the Peace and assigned to them, as it had power to do, duties respecting matters within its legislative power. *Gower* v. *Joyner*. (Ct. 1896), p. 388.

See EXECUTION — MARRIED WOMAN'S PROPERTY.

CONSTRUCTION OF STATUTES.

Homestead—*Exemption Ordinance—57 & 58 Vic., c. 29—Seizure—Construction of statutes.*]—The Exemption Ordinance, c. 45, R. O. 1888, s. 1, s-s. 9, exempted from seizure under execution the homestead to the extent of 160 acres, of the execution debtor. This sub-section having been declared ultra vires of the Legislative Assembly, In re Claxton, 1 Terr. L. R. 289, the Dominion Parliament by 57 & 58 Vic. (1894) c. 29 (D.), declared that the territorial legislation on this subject "shall hereafter be deemed to be valid, and shall have force and effect as law;"—Held, that an execution filed against the homestead of the defendant prior to the passing of the validating statute constituted, but that an execution against the lands of the defendant filed subsequently to the passing of the said Act, did not constitute a charge upon the homestead. Rules for construction of statutes considered. *Massey* v. *McClelland*, *Baker* v. *McClelland*. (Ct. 1895), p. 179.

See EXECUTION.

CONTRACT.

Contract — *Essential term—Condition precedent—Substantial performance—Waiver—Quantum meruit—Allowance for defects — Notice to contractor or his assignee—Admission—Admissions made under mistake.*]—Plaintiff sued as the assignees of the balance of the contract price for putting in a hot-water heating apparatus by N. D. M. & Co. for the defendant. The contract provided amongst other things, "as the essence of the

contract," that "the heating of the entire building shall, easily and without forcing the boilers, maintain throughout the building a temperature of not less than 65 degrees Fahrenheit in the most severe cold." Scott, J.—The trial Judge charged the jury to the following effect: 1. That the effect of the contract between the parties was that N. D. M. & Co. were bound to supply a system which would easily maintain 65 degrees without forcing the boilers; that they were bound to put in a radiating surface to the percentage named in the contract in any event, and if a greater surface was necessary in order to produce the 65 degrees, they were bound to furnish the greater quantity necessary for that purpose. 2. That the maintenance of the 65 degrees in the manner mentioned was an essential of the contract, the performance of which was necessary to entitle the plaintiffs to recover; not only was it made essential by the terms of the contract, but even had it not been specially provided for, it was so much a substantial element of the contract that non-performance would disentitle the contractors to recover. 3. That if they found that the system was not capable of maintaining the required temperature, they must find for the defendant and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature. 4. That if the system was capable of supplying the required temperature, they should find a verdict for plaintiffs for $621.66 (i.e., contract price, less payments on account and expenses of completing some plumbing work plus interest). 5. That if the jury found that the casing for water-tanks should have been supplied and was not supplied, and that the cost thereof as sworn to by the defendant was $28, the verdict for the plaintiffs should be reduced by that amount and interest thereon. 6. That the defendant was not bound by the admission in his letters as to the amount due by him, so long as the plaintiffs had not altered their position by reason of the admission, and the defendant consequently was not precluded from showing that the admission was a mistake. 7. That notwithstanding the statements in his letters to the effect that the only work done was some plumbers' work, the defendant was not precluded from resisting payment on the ground of some defect which was unknown to him at the time he made the admission, provided the plaintiffs' position has not been altered by reason of such admission. 8. (The jury having asked for further instructions as to whether they could find for the plaintiffs for a sum less than that already specified) that if they found for plaintiffs they would not be justified in finding for a less amount than $621.66, or for that sum less the cost of the casing for the water-tanks. 9. That the defendant was not bound to notify plaintiffs that the system was defective. The jury found a verdict for the defendant. On appeal:—Held, that there had been no misdirection. The questions of the "substantial performance" of a contract and of the waiver of a special contract and the substitution of a new contract to pay according to a quantum meruit, discussed. *Toronto Radiator Manufacturing Co.* v. *Alexander.* (Scott, J., 1894, Ct. 1895.), p. 120.

Mechanics' lien — *Building contract—Pretended tender — Estoppel—Owners' default—Discharge of penalty clause.*] — Where the tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a quantum meruit. The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers, did not estop the plaintiff from disputing its bona fides against the defendant. Failure by the owner to supply material which the contract provides he shall supply, discharges a penal clause. Where a building contract provides for the certificate of an architect and no architect is appointed, the provision is inoperative. *Degagne* v. *Chave.* (Scott, J., 1896), p. 210.

Building Contract — *Construction —Architect's Certificate—Binding on Proprietor — Delay in Completion — Penalty Clause—Waiver of.*]—Where under the terms of a building contract, the work is to be done under the direction and to the satisfaction of the architect who is given authority to grant a final certificate, and the architect certifies to its completion:—Held, that in the absence of fraud or collusion, a certificate of the architect is so far binding upon the proprietor that he cannot contend that the work was not done in accordance with plans and specifications, and it is immaterial whether the proprietor had knowledge

of his intention to grant it or that he consented to or forbade its being granted; if the certificate is untrue, the remedy is against the architect. A provision in a building contract providing that the architect's certificate should not lessen the contractor's total or final liability, was held as a matter of construction to apply not to the final certificate but only to proper certificates. A provision in a building contract for liquidated damages for non-completion within the prescribed time, subject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications, is not discharged by delays caused by such changes. Aliter, had no provision been made for such extensions: Where the contract gives to the architect authority to settle all disputes, matters about which no dispute had been raised when he gave his final certificate are not concluded thereby. As a matter of construction it was held that the contract gave the architect no authority to make some extensions of time on account of changes in plans, except upon a dispute arising. Where the contractor is to "pay or allow to the proprietor" a certain sum as liquidated damages, it is not necessary that it should be retained from the contract price or fixed by the final certificate. Delay in the completion of the contract caused by the proprietor's neglect to complete work which it was necessary should first be done before the contractor could continue work under the contract, does not operate to discharge the contractor from the penalties unless notice of the contractor's work having reached the stage at which the proprietor should do his part of the work had been received by him. Neither the proprietor's entering into occupation of the building nor completion of the work, insuring it for making payment on the contract price, after the time for completion, and after actual completion of the work, operate as a waiver of the penalty clause. Though perhaps on the giving of his final certificate the architect became *functus officio*, his estimate of the proper allowances to be made was accepted as reasonable and allowed by the Court in reduction of the penalties payable for delay in completion. *McLeod* v. *Wilson*, (Scott, J., 1897), p. 312.

See VERDICT—SALE OF LAND.

CONVERSION.

See BILLS OF SALE AND CHATTEL MORTGAGES—PRACTICE.

CONVICTION.

Liquor License Ordinance — *Summary Conviction — Criminal Code —Direction as to One or More Justices —Conviction — Appeal—"Shall" and "May."*]—The Liquor License Ordinance (No. 18 of 1891-92) provides by s. 105 that "All informations or complaints for prosecution of any offence against this Ordinance, except as herein specially provided, shall be laid or made . . before a Justice of the Peace," and by s. 106, that "such prosecution *may* be brought for hearing and determination before any two Justices of the Peace." The Criminal Code, Part LVIII. (Summary Convictions), which has been made applicable to summary proceedings under the Liquor License Ordinance, provides (s. 842) that "every complaint and information shall be heard, tried, determined and adjudged by one Justice or two or more Justices, as directed by the Act or law upon which the complaint or information is framed, or by any other Act or law in that behalf," and that "if there is not such direction in any Act or law, then the complaint or information *may* be heard, tried, determined and adjudged by one Justice." Held, on an appeal from a conviction, that s. 106 constituted a "direction" that prosecutions should be heard, etc., before two Justices of the Peace, and that, therefore, one Justice had no jurisdiction to convict, except in the certain cases specially provided for in the Ordinance. *The Queen* v. *Wilson*, (Ct., 1894), p. 79.

See CERTIORARI.

COSTS.

Practice—*Costs — Advocate and Client — Advocate's right to Recover Counsel Fees from Client by Action —Allocatur for Counsel Fees before Court in Banc — Notice to Client of Application for Allocatur.*]—The Judicature Ordinance (R. O. 1888 c. 58), s. 462, enacted: In all causes and matters in which duly enrolled advocates holding certificates as such and resident in the Territories are employed, they shall be entitled to charge and be allowed the fees in the "Advocates' Tariff" appended to this Ordinance, or as the same may be from time to time varied by the Judges of the Supreme Court in banc. In view

of this provision, on a taxation of a bill of costs by an advocate, it was held,—1. That counsel fees are on the same footing as other fees allowed by the tariff, and an advocate can recover them from a client by action. 2. That an allocatur can be granted for such fees only as are prescribed by the tariff. 3. That any Judge of the Court may grant an allocatur for counsel fees before the Court in banc, and the giving of notice to the client of application for an allocatur for fees is discretionary. *Hamilton* v. *McNeill* (*No. 2*) (Ct., 1894), p. 151.

Costs — *Taxation—Reviews—Abortive and Irregular Proceedings — Insufficient affidavit on Production—Several Subpœnas.*]—It is not open to a party on taxation of costs to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows: (1) the costs of an order de bene esse, irregularly obtained, were allowed to defendant where no application had been made to set it aside, and plaintiff's advocate had attended on the examination, (2) the costs of an insufficient affidavit on production where an application for a better affidavit had been dismissed and no appeal taken; (3) the costs of an order to examine plaintiff issued ex parte and without notice, where an application to set it aside had been refused and the grounds of the refusal were not shewn on the review. A subpœna for each of several witnesses may be allowed where they reside in different parts of the country, and the same original cannot be conveniently produced to them all. *Craig* v. *New Oxley Ranch Co.* (Scott, J., 1895), p. 277.

Costs — *Review of Taxation—Scale of Action for Detention of Goods—Judgment for Return — Miscellaneous Items—Previous Taxation not Appealed Against.*]—Plaintiff in an action for detention of a horse alleged to be of the value of $1,000, recovered judgment for its return and $10 for damages. Held, against the contention of the defendant that costs should be taxed as in an action under $100, or in the lowest scale of the tariff; that in the absence of evidence to the contrary the value alleged in the statement of claim should be treated as the real value for purposes of taxation. The following items were allowed to plaintiff against the contention of the defendant: 1. Instructions for affidavit of writ of replevin. 2. Two separate affidavits on production by co-plaintiffs where they resided in different parts of the country. 3. An order postponing trial on application of defendant on terms of payment of costs taken out by the plaintiff, where defendant had neglected to take out order. An application by the defendant to have deducted from the bill certain costs of the day claimed to have been improperly allowed on a previous taxation not appealed from, not entertained. *Allison* v. *Christie*, (Scott, J., 1895), p. 279.

Execution — *Seizure—Stay—Appeal—Irregular Notice of—Execution for Costs—Undertaking by Advocate to Repay—Costs of Levy — Costs of Application — Terms of Order.*] — Defendants having served notice of motion to the Court in banc for a rule to shew cause why verdict for plaintiff should not be set aside, or for a nonsuit for a new trial, applied to the Trial Judge, under C. J. Ord. 512, after seizure under execution issued upon the judgment, for a stay of proceedings upon the grounds of irreparable loss and inability of plaintiff to repay amount levied in case the appeal should be successful. : — Held, (1) that there was jurisdiction to entertain the application although the notice of motion was perhaps irregular in form. (2) That the fact that plaintiff would not be able to repay the amount levied in case of an adverse decision on appeal is sufficient ground for granting stay. Stay ordered on security being given. (3) That execution for costs should be stayed unless the advocates give personal undertaking to repay them in case appeal succeeded. (4) That defendant having delayed making application until after issue of execution and seizure, should pay the costs and expenses incurred by reason of the delivery to him of the execution. (5) The costs of application must be paid forthwith by party applying. *Merry* v. *Nicholls*, 42 L. J. Ch. 479; L. R. 8 Ch. 205; 28 L. T. 296; 21 W. R. 305; and *Cooper* v. *Cooper*, 45 L. J. Ch. 667; 2 Ch. D. 492; 24 W. R. 628, followed. *Patton* v. *Alberta Coal Co.* (Scott, J., 1896), p. 294.

Costs—*Counsel Fee before Court in Banc — Application to Fix—Disbursements — Travelling Expenses.*]—It is

not proper to make a formal application to the Court in banc to fix a counsel fee in a case argued before it. If the marking of the fee is overlooked by the Court it would be proper for counsel to draw attention either in open Court or otherwise to the omission, and as a matter of courtesy only to notify counsel on the other side of his intention. No allowance can be made to counsel for travelling expenses. *Hull* v. *Donohue* (*No. 2*) (Ct., 1895), p. 351.

See CERTIORARI — BANKRUPTCY AND INSOLVENCY — EXECUTION—SOLICITOR AND CLIENT — LAND TITLES ACT.

Security for: *See* PRACTICE.

COVENANT.

See LAND TITLES ACT.

CREDITORS RELIEF ORDINANCE.

Interpleader — *T. R. P. Act — Creditors Relief Ordinance—Execution —Expiry — Renewal — Priorities — Seizure — Sheriff's Sale — Advertisement—Postponement—Appeal — Admission of Point of Law.*]—Held (1) No question of the effect of the Creditors Relief Ordinance having been raised that the priorities of several executions against land depend not upon the date of their delivery to the sheriff, but upon the date of the deposit with the registrar of certified copies of the executions, accompanied by memoranda of the lands sought to be charged. (2) The sheriff's advertisement of sale of land is a seizure of the land. (3) The effect of s. 94 of the Territories Real Property Act is to provide that neither the delivery of the execution to the sheriff nor his seizure of the land binds the land, but only the deposit with the registrar of the copy-execution and accompanying memorandum. (4) Any seizure by a sheriff enures to the benefit of all execution creditors whose executions are then in his hands, and this notwithstanding that, in case the seizure is by way of advertisement, the advertisement mentions only one or some of such executions, and semble, also, notwithstanding that some of such executions were not in the sheriff's hands for a sufficient time to authorize an advertisement for sale under them alone. (5) The sheriff's advertisement of the sale of lands may properly run prior to the expiration of the year, during which he cannot actually sell, and semble even if the date fixed for the sale fell short of the year, but the sale was adjourned to a date subsequent to the lapse of the year, the sale would not be bad on that account. (6) A sheriff having seized lands in an execution before it has expired can proceed with the sale of such lands after the lapse of the time for the renewal of unexecuted executions. Wetmore, J., October 20th, 1895, on appeal to the Court in banc:—Held, (1) the priorities of several executions against lands is not affected by the provisions of s. 94 T. R. P. Act, and that therefore such priorities are not determined by the order in which copies-execution and accompanying memoranda are deposited with the registrar, but by the dates of delivery to the sheriff. (2) The distribution of the proceeds of the sale was governed by the provisions of the Creditors Relief Ordinance. (3) Although no question was raised before the Judge of first instance as to the effect of the Creditors Relief Ordinance, and it was there conceded that the respective execution creditors had the right to have the proceeds of the sale applied on the executions in the order of their legal priority, this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the Ordinance were not in force, but merely as a contention on their part that the whole fund should be applied on their executions, and in the absence of consent on the part of the sheriff and all the parties interested in the fund, the provisions of the Ordinance must govern its disposal. *Limoges* v. *Campbell.* (Ct., 1896), p. 356.

See EXECUTION.

CRIMINAL LAW.

Criminal Law—*Seduction of Girl under 16 — Corroboration — Judge — Jury.*]—In a prosecution under Criminal Code, s. 181, for the seduction of a girl under sixteen, in addition to the evidence of the girl, evidence was

given by other witnesses to the following effect: — That the accused and the girl were found in a house alone; that the accused came out partially dressed, that he was then leaving sheep (which were in his charge) unattended and refused to go with the witness to where the sheep were; that before he was charged with any offence he stated to the witness "that he had been advised if he could get the girl away and marry her, he would escape punishment." Held, that the girl was corroborated in some material particular by evidence implicating the accused within the intention of Criminal Code, s. 684. Semble, that the fact that the accused, in giving evidence on his own behalf, stated that he had first had connection with the girl at a date after she had reached sixteen; while one of the witnesses for the prosecution stated that the accused, two months before that date, had admitted with reference to the girl that he had "got there," might, though this admission was made after the girl had reached sixteen, be taken into consideration with the other facts as tending to implicate the accused. Where there is any corroborative testimony is a question for the Judge, but if there is any such testimony the sufficiency of it, and the weight to be given it, is for the jury, unless of course the corroboration is so slight that it ought not to be left to the jury at all. *The Queen* v. *Wyse* (Ct., 1895), p. 103.

Criminal Law—*Trial—Election to be Tried by Judge or Judge and Jury—Withdrawal of Election—New Election—Effect of Elections — Refusal of Judge to Dispense with a Jury.*]—The N. W. T. Act, R. S. C. 1886, c. 50, s. 67 (section substituted by 54-55 Vic. 1891 c. 22, s. 9), provides that: "When the person is charged with any other criminal offence the same shall be tried, heard and determined by the Judge with the intervention of a jury of six: but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury. Held that in the event of the accused electing to be tried by a Judge alone the Judge is not bound so to try the case, but may insist upon the intervention of a jury. So held where the accused was first tried with the intervention of a jury who disagreed, and upon a second trial coming on withdrew his first election and elected to be tried by the Judge alone. *The Queen* v. *Webster* (Ct., 1896, p. 236.

Criminal Law—*N. W. T. Act—Jury—Accused's Election — Re-trial—New Election—Duty of Judge—Judge's Power to Refuse to Try Summarily.*]—The North-West Territories Act, R. S. C. c. 50, s. 67 (section substituted by 54-55 Vic. (1891, c. 22, provides that "when the person is charged with any other criminal offence, the same shall be tried, heard and determined by the Judge with the intervention of a jury of six, but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the intervention of a jury:"—Held, that the consent of the accused does not make it imperative upon the Judge to try the charge without the intervention of a jury. It appears to be assumed by the Court that where the accused had, on his consent, been tried by a Judge with the intervention of a jury who disagreed and were discharged and the accused was brought up again for trial, the Judge on the second trial might, had he seen fit, have, on the accused's consent, tried him without the intervention of the jury. *The Queen* v. *Brewster* (*No.* 1). (Ct., 1896), p. 353.

Criminal Law — *Appeal — New Trial—Jury—Conflict of Testimony—Perverse Verdict.*] — On a charge of theft a new trial was refused although the verdict was contrary to the view of the trial Judge, the evidence being conflicting, but the Court being of opinion that the verdict of guilty was one which reasonable men could properly find. In deciding the question of the reasonableness of the verdict the opinion of the trial Judge is entitled to and ought to receive great weight: but it is not conclusive. *The Queen* v. *Brewster* (*No.* 2). (Ct., 1896), p. 377.

Criminal Law—*Perjury—Appeal—New Trial — Description of Offence—Confession—Improper Admission of Criminating Answers before Judicial Tribunal.*]—A count alleging perjury before a coroner—omitting any reference to the coroner's jury—was held sufficient in view of section 611, s.-s. 3 and 4, and s. 723 of the Criminal Code. A new trial was granted on the ground of the reception of evidence of admission made by the accused in answer to questions put to him as a witness on the inquest be-

fore the coroner's jury, it being held that s. 5 of the Canada Evidence Act, 1893, compelled the witness to answer, and protected him against the use of his answers being used in evidence against him in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence, and this without the necessity for the claim of privilege on the part of the witness. (But see now 61 Vic. (1898) c. 53, s. 1.) *The Queen* v. *Thompson* (Ct., 1895), p. 383.

See CONVICTION — EXTRADITION—HABEAS CORPUS.

CROWN LANDS.

See WAYS.

DEBTOR AND CREDITOR.

See BANKRUPTCY AND INSOLVENCY.

DEDICATION.

See WAYS.

DOMICIL.

See MARRIED WOMAN'S PROPERTY.

ELECTION (PARLIAMENTARY).

Controverted Elections Ordinance — *Practice — Clerk or Deputy Clerk—Petition Filed with Clerk of Court—Writ of Summons Issued by Deputy Clerk—Deposit — Bank Bills.*] —A petition under the Controverted Elections Ordinance (C. O. 1888 c. 5), was filed with the Clerk of the Court at Calgary under s. 3, he being the Clerk whose office was nearest to the residence of the returning officer, and afterwards forwarded to the Deputy Clerk at Edmonton. The deposit of $500 required by s. 5 was made with the Deputy Clerk, who thereupon issued the writ of summons under s. 7:—Held, that the Deputy Clerk was by virtue of s. 3 of Ordinance 10 of 1891-2 the proper person to receive the deposit and issue the writ of summons. The deposit was made in bills of a chartered bank:—Held, that a payment or deposit of a sum of money required by statute need not, in the absence of express provision, be made in gold of legal tender; and that therefore the deposit was sufficient. *Prince* v. *Maloney*. (Scott, J., 1895), p. 173.

Controverted Elections Act— *Election Petition — Preliminary Objections — Motion to Strike out — Appeal — Fixing Time for Trial.*] — Preliminary objection to an election petition having, on summons to strike them out or otherwise dispose of them, been struck out on the ground that they were not filed in time inasmuch as they were filed after office hours on the last day limited for filing; and an appeal from the order to the S. C. of Canada being pending:—Held, that inasmuch as the preliminary objections had not been considered upon their merits, and one of the objections if sustained would finally dispose of the petition, the Court should not fix a time for the trial of the petition. *West Assiniboia Dominion Election Case. McDougall* v. *Davin* (Ct. 1896), p. 417.

ESTOPPEL.

See BUILDING CONTRACT.

ESTREAT.

See BAIL.

EVIDENCE.

See VERDICT — SALE OF LAND—CERTIORARI — CRIMINAL LAW—CONTRACT—EXECUTION.

EXECUTION.

Execution — *Creditors Relief Ordinance — Territories Real Property Act — Priorities—Instrument—Constitutional Law—Ultra vires.*]—Per Rouleau, J.—In so far as it purports to affect executions against lands, the Creditors Relief Ordinance is ultra vires

of the Legislative Assembly of the Territories inasmuch as in that respect it is inconsistent with the Territories Real Property Act. Per Wetmore, J. —This is so quoad lands which have been brought under the operation of the Territories Real Property Act, because the latter Act provides (s. 41) that instruments . . . shall be entitled to priority the one over the other according to the time of registration, and the copy-writ of execution, with the accompanying memorandum of lands to be charged, delivered by the sheriff to the Registrar is an "instrument" within the meaning of s. 41. Per Richardson and McGuire, JJ.—The copy-writ of execution with the accompanying memorandum of lands to be charged, is not an "instrument" within the meaning of s. 41, and, therefore, there is no conflict between the Creditors Relief Ordinance and the Territories Real Property Act, and the Creditors Relief Ordinance is, therefore, not ultra vires. There having been lodged with the registrar a copy of fi. fa. lands in two several actions, with memoranda of the same land to be charged, the land standing in the defendant's name at the time of the lodging of the first fi. fa., but having been transferred to and standing in the name of a purchaser from the defendant at the time of the lodging of the second execution, and the lands having been sold under the first fi. fa.:—Held, on a first argument for the reasons given above, per Rouleau and Wetmore, JJ., that the first execution creditor was entitled to the whole proceeds of the sale; per Richardson and McGuire, JJ., that the proceeds should be distributed between the two execution creditors pursuant to the Creditors Relief Ordinance. The question having again come before Richardson, J., alone, and he having made an order, in accordance with his opinion as above stated, for the distribution of the proceeds of the sale between the two execution creditors: On appeal Rouleau and Wetmore JJ., adhered to their former opinions, and McGuire, J., followed Roach v. McLachlin 19 O. A. R. 496, and Breithaupt v. Marr, 20 O. A. R. 689, which had not on the former argument, been called to the attention of the Court, and it was therefore:—Held, Per Curiam, reversing the decision of Richardson, J., that the first execution creditor was entitled to the whole proceeds of the sale. *Re the Massey Manufacturing Company* v. *Hunt, and the McCormick Harvesting Machine Co.* v. *Hunt.* (Ct., 1895), p. 84.

Execution — *Renewal — Seizure —Registration of Writ—Transfer in Fraud of Creditors—Bona fides—Evidence—Costs.*] — The Judicature Ordinance (No. 6 of 1893), s. 327, enacted: "Every writ of execution shall bear date the day of its issue, and shall remain in force for one year from its date (and no longer, if unexecuted), unless renewed, but such writ may, at any time before its expiration and so on from time to time during the continuance of the renewed writ, be renewed by the party issuing it for one year from the date of such renewal, etc. This section was amended by Ordinance No. 5 of 1894, s. 12 (which came into effect 7th September, 1894), by substituting "two years" for "one year" in both instances:—Held, that the amendment could not be construed as reviving or enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two years an execution which had been renewed only for one year. The registration by the sheriff of a writ of execution against lands in the Land Titles Office under s. 94 of the Territories Real Property Act, as amended by s. 16 of 51 Vic. c. 20, cannot be construed as a seizure, and is not sufficient to continue the execution in force without renewal. An execution issued on 20th October, 1893, was renewed on 20th October, 1894:—Held, that the renewal was made in time and the execution continued in force. In an action to set aside a conveyance of lands as a fraud upon creditors, if the action is not brought on behalf of all the creditors of the debtor, the plaintiffs must shew that they have obtained both judgment and execution, and if their executions have lapsed for want of renewal before the commencement of the action, the action will fail. A. D. made a homestead entry on certain lands, but by mistake his homestead duties were performed on adjoining lands. The government cancelled his entry, but agreed to sell the lands to the nominee of A. D. at $1 an acre. In pursuance of this agreement the lands were sold by the Government to one Alloway, as A. D., nominee, and Alloway received a patent for the same:—Held, that Alloway held the lands as trustee for A. D. and that a transfer of the lands

from Alloway to the defendant, the wife of A. D., for which the defendant gave no consideration and which was made at a time when A. D. was, to the knowledge of the defendant, in insolvent circumstances, should be set aside as fraudulent and void. A letter written by A. D. to one of the plaintiffs subsequently to the date of the transfer attacked was held to be inadmissible as evidence against the defendant. Costs in case of partial success of plaintiff. *McDonald et al.* v. *Dunlop* (*No.* 2). Ct., 1898), p. 238.

See LAND TITLES ACT — COSTS — CREDITORS RELIEF ORDINANCE.

EXECUTORS AND ADMINISTRATORS.

See BILLS, NOTES AND CHEQUES.

EXEMPTIONS UNDER EXECUTIONS.

See CONSTRUCTION OF STATUTES — ATTACHMENT OF DEBTS.

EXTRADITION.

Criminal Law — *Extradition — Larceny—False Pretences.*]—In extradition proceedings the Judge is to find (1) whether there is prima facie evidence of the commission by the accused of an offence, which if committed in Canada would be an indictable offence by the law of Canada; and, if it be so found, then (2) whether there is prima facie evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition. "Grand larceny in the second degree" is an extradition crime under the extradition arrangement between Great Britain and the United States of 1889-90. *In re F. H. Martin* (*No.* 1). (Richardson, J., 1897), p. 301.

Habeas Corpus — *Extradition—Larceny — False Pretences—Form of Warrant.*] — "Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act, and the extradition arrangement between Great Britain and the United States of America. A warrant of committal under the Extradition Act which recited the Judge's determination that the prisoner should be surrendered in pursuance of the Act "on the ground of his being accused of grand larceny in the second degree within the jurisdiction of the State of Minnesota," was held sufficient. *In re F. H. Martin* (*No.* 2). (Richardson, J., 1897), p. 304.

FEIGNED ISSUE.

See ATTACHMENT OF DEBTS.

FERRY.

See CONSTITUTIONAL LAW.

FOREIGN CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

FORFEITURE.

See SALE OF LAND.

FRAUD.

See BILLS, NOTES AND CHEQUES.

FRAUDULENT CONVEYANCE.

See ATTACHMENT OF DEBTS — EXECUTION—PARTIES.

GARNISHEE.

See ATTACHMENT OF DEBTS.

HABEAS CORPUS.

Criminal Law — *Habeas Corpus —Summary Conviction — Warrant of Commitment—No Conviction Alleged*

—*Prisoner Discharged.*]—On an application for a writ of habeas corpus, and for discharge of prisoner, detained in custody, under a warrant of a Justice of the Peace in Form V., Criminal Code, sec. 596 (committal for trial), the warrant did not allege conviction but only that the accused had been charged before the justice. The conviction upon which the warrant was issued was admittedly bad, but an amended conviction was returned to the clerk by the justice after the argument. Held, that where a warrant of commitment upon a conviction does not allege that the prisoner had been convicted of an offence, the conviction cannot be referred to in order to support the warrant. Order made discharging prisoner. Semble, that had the warrant shewn the prisoner to have been convicted of some specific offence, even though insufficiently stated, the conviction could be referred to to support it. An application to discharge a prisoner held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view of supporting the warrant, if the prisoner has been actually brought up on a habeas corpus, aliter where he has not been brought up. *The Queen* v. *Lalonde* (Scott, J., 1895), p. 281.

See EXECUTION.

HIGHWAY.

See WAYS.

HOMESTEAD.

See CONSTRUCTION OF STATUTES.

HUSBAND AND WIFE.

See MARRIED WOMAN'S PROPERTY.

INTERNATIONAL LAW. (PRIVATE.)

See BILLS OF SALE AND CHATTEL MORTGAGES — MARRIED WOMAN'S PROPERTY.

JUDICIAL SALE OF LAND.

Judicial Sale of Land — *Party Purchasing without Leave—Confirmation refused.*]—In the absence of any order or direction, plaintiff and not the Clerk of the Court is to have the conduct of a judicial sale. Where plaintiff who had conduct of such sale purchased the land without leave, confirmation was refused. Such a sale is void, not merely voidable, and it is unnecessary for the person opposing to shew that the purchaser has perpetrated fraud, or acquired the property at less than its value, or obtained undue advantage, or that the lands should have realized sufficient to give him an interest in the proceeds. Any person having any interest in the proceeds of a sale, whether a party or not, has a right to object to confirmation. *Pruden* v. *Squarebriggs* (Scott, J., 1896), p. 200.

JURY.

See VERDICT — CRIMINAL LAW—MASTER AND SERVANT.

JUSTICE OF THE PEACE.

See CONVICTION — CONSTITUTIONAL LAW.

LACHES.

See LAND TITLES ACT.

LAND TITLES ACT.

Territories Real Property Act —*Unregistered Transfer — Execution —Priority—Cloud on Title—Sheriff—Patics—Costs.*] — Held, reversing the judgment of ROUTLEAU, J., that the Territories Real Property Act has not altered the law that a writ of execution binds only the beneficial interest of the execution debtor; and therefore a transferee (whose transfer is unregistered) from the certificated owner is entitled to have an execution.

filed subsequently to the making of the unregistered transfer, declared to be a cloud upon his title; so likewise is entitled a person who, though he has received no actual transfer, is entitled to one under an enforceable agreement, affirmed 26 S. C. R. 282. To such an action the sheriff, against whom an injunction is asked to restrain proceedings upon the execution, is a proper party. Where in such an action the sheriff joined in, and set up the same defences as the execution creditor, he was ordered to pay the costs as well as the execution creditor. *Wilkie et al.* v. *Jellett et al.* (Ct., 1895), p. 133.

Territories Real Property Act —*Omission of Registrar to Enter Memorial of Mortgage in Register—Subsequent Mortgagee Paying off Prior Mortgage — Subrogation — Laches—Effect of Memorial—Assurance Fund —Section* 108—*Costs—Several Issues—Divided Success.*]—On the 26th September, 1899, one G. applied to the plaintiff for a loan of $500, and executed a mortgage to him of the lands in question of which he was the owner. The plaintiff's advocates made search in the Registry Office on the 14th of October, and, ascertaining that the only encumbrance on the register was a mortgage to one P., registered the plaintiff's mortgage and a discharge of the other, which had been obtained on their undertaking to pay the amount due, and the Registrar endorsed memorials accordingly on the certificate of title, on receipt of which certificate the plaintiff's advocates paid the amount due to P., and advanced the balance to G. No other memorials appeared on the certificate at the time of the advance nor were the plaintiff's advocates aware of any other incumbrances, but there had in fact been filed with the registrar a mortgage from G. to the defendant B. for $2,000, which had been entered in the day book only. Subsequently on an application to Maguire, J., under the T. R. P. Act, on behalf of the defendant B. by way of a summons to the Registrar and the plaintiff to show cause, it was held that the $2,000 mortgage to B. had been registered within the meaning of the Act at the time of filing, and had priority over the plaintiff's mortgage, and an order was made to amend the memorials on the certificate accordingly. Then default having been made by G. in payment of the mortgage to defendant B., the lands were offered for sale, and a foreclosure order obtained on the 15th September 1900, notice of application for which having been duly served on the plaintiff. Held that the plaintiff was entitled as against the defendant B. to be subrogated to the rights of P. in respect of the mortgage held by him and paid by the plaintiff, and to be entitled to a first mortgage upon the lands in question for the amount thereof with interest; so held, against the contention of the defendants that the question of the plaintiff's priority was res judicata either by the judgment of Maguire, J., or the foreclosure order. Brown v. McLean, 18 O. R. 533, and Abell v. Morrison, 19 O. R. 669, followed. Laches discussed. Held, also, that the endorsement on the certificate of title of the plaintiff's mortgage was equivalent to a certificate that there were no prior encumbrances affecting the land other than those appearing on the certificate, and that the plaintiff was entitled to be paid out of the Assurance Fund the balance of his claim with interest under sec. 108 of the Territories Real Property Act. It is unnecessary for the plaintiff, in order to recover against the Assurance Fund, to show that he has been deprived of any land or any interest therein by the mistake or omission of the registrar, it being sufficient if loss or damage is shewn. Nor is it necessary for the plaintiff to shew that he has been barred from all other remedies before proceeding under sec. 10; it is enough that his principal remedy has been barred. Section 108 discussed. Oakden v. Gibbs, 8 Vic. L. R. referred to. And held in a subsequent judgment as to costs that the plaintiff and the Registrar were both entitled to tax as against defendant B. the costs of the issue as to the right of subrogation, and the plaintiff against the Registrar the other costs of the action. *Morris* v. *Bentley*, (Scott. J., 1895), p. 254.

T. R. P. Act—*Mortgage—Purchase Subject to Mortgage — Implied Covenant of Indemnity — Assignment of Implied Covenant—Survivorship of Joint Contractors.*]—The obligation, declared by the T. R. P. Acts 69, (a) to be implied in every instrument transferring any estate or interest in land under the provisions of that Act subject to mortgage or encumbrance, is assignable by the implied covenantee to the original mortgagor. The implied covenant takes

effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer. Plaintiff sold, subject to a mortgage, to L. & V.; L. & V. gave a mortgage back for the whole price, the understanding being that L. & V. should pay the first mortgage, the amount thereof being credited in reduction of the second; L. & V. sold to T. for a certain sum and T. was to pay what was then owing on the two mortgages; T. sold to S. for a certain sum, and S. was to pay what was then owing on the two mortgages. S. thus became by mesne transfers the registered owner subject to the two mortgages, the first made by the plaintiff, the second by L. & V.; S. died and the contesting defendants, his administrators, became by transmission, registered owners, subject to the two mortgages. L. died, and V. assigned to the plaintiff the rights of L. & V. on T.'s implied covenant to discharge two mortgages. T. also assigned to the plaintiff his rights on S's implied covenant to discharge the two mortgages: — Held, plaintiff was entitled to an order against the contesting defendants, the administrators of S., that they pay the balance owing upon the two mortgages with costs, and that de bonis propriis if the assets of the estate proved insufficient. Semble, the assignment from V., the survivor of L. & V., conveyed the rights also of the representatives of L. *Glenn* v. *Scott et al.* (Richardson, J., 1898), p. 339.

See EXECUTION — CREDITORS RELIEF ORDINANCE.

LANDLORD AND TENANT.

Landlord and Tenant—*Surrender of Case—Sub-tenant—Liability of Tenant for Rent—Amendment.*]—Where a tenant by arrangement with his landlord secured another occupant for the premises, but was given to understand at the time that he would still be liable for the rent:—Held, that this did not amount to a surrender of the lease. In order to constitute a surrender it must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee in the place and stead of the original lessee by the mutual agreement of the parties:—Held, also, that the fact that the landlord at the request of the tenant has issued a distress warrant against the sub-tenant is not sufficient to constitute a surrender by operation of law. An endment allowed so as to include a claim for additional rent which fell due after the commencement of the action. *Lougheed* v. *Tarrant et al.* (Rouleau, J., 1893), p. 1.

LIEN NOTE.

See CONDITIONAL SALES.

LIQUOR LICENSES.

See CONVICTION.

MARRIAGE.

See MARRIED WOMAN'S PROPERTY.

MARRIED WOMAN'S PROPERTY.

Marriage — *Domicile — Married Women's Property Ordinance, N. W. T. Act—Construction of Statutes — Ultra Vires.*] — Whether a husband and his wife are living together or apart, her domicile in legal contemplation follows his. Where, therefore, a man domiciled in the Territories married in Ontario a woman domiciled there, and thereafter they resided in the Territories, it was held that as to furniture belonging to the wife brought by her to the Territories, the question whether it passed to the husband jure mariti or was the wife's separate property depended upon the law of the Territories. Ordinance No. 16 of 1889, enacted: A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a feme sole, and may alienate and by will or otherwise deal with personal property as if she were unmarried:—Held (Wetmore, J., dissenting), affirming the judgment of Rouleau, J., that this Ordinance referred only to such property of a married woman as was covered by the provisions of the N. W. T. Act, R. S. C. (1886), c. 50, ss. 36-40 (Reserved on appeal to the S. C. C., 26 S. C. R. 397). Per Wetmore, J.: The Court held in Re Claxton, 1 Terr. L. R. 282, that a provision in an ordinance accepting as a homestead 160 acres of land, without limit as to value, was ultra vires of the Legislative Assembly on the ground

that it was inconsistent with the Homestead Exemption Act (R. S. C. 1886, c. 52), inasmuch as the latter Act expressly provided in effect, that a homestead exempt from seizure should not exceed 80 acres nor exceed a certain value. The Married Women's Ordinance in question is not inconsistent with the Dominion legislation on married women's property in the Territories; it does not assume to take away from a married woman any right given her by the Dominion Act; it goes further and gives her rights with respect to other property. The Assembly has power to legislate as to "property and civil rights" in the Territories; to hold the Ordinance ultra vires would be to hold that if the Parliament of Canada legislated upon a particular subject included in the terms "property and civil rights," the Assembly would have no power to legislate upon the subject at all. *Conger* v. *Kennedy* (Ct. 1895), p. 187.

Husband and Wife — *Separate Estate of Wife—Personal Property—Jus Disponendi — Matrimonial Domicil —Removal—Conflict of Laws — International Law.*]—The law of the matrimonial domicil regulates the rights of the husband and wife as to the movable property of either of them: — Held, therefore, where the matrimonial domicil was Ontario that personal property, which by the law of Ontario was the separate property of the wife, remained such on the removal of the parties to the Territories; and furthermore was subject to the provisions of the Ordinances of the Territorial Legislature, subsequently passed relating to the personal property of married women. *Brooks* v. *Brooks et al.* (Richardson, J., 1896), p. 289.

MASTER AND SERVANT.

Master and Servant — *Negligence — Putting Question to Jury — Jury's Answers to Questions — Findings of Jury — Verdict — Setting aside.*] — An employer is liable for the consequences, not of danger, but of negligence. He performs his duty when he furnishes machinery of ordinary and reasonable safety. Reasonable safety means safety according to the usages, habits and ordinary risks of the business. No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It is only so far as a duty arises on the part of the employer to promote proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is a cause of injury, that a right of action accrues to the person injured. One Knowlton entered into an agreement with the defendant company to draw the coal and debris produced in the mine from the places at which the miners worked to the pit bottom, and to carry from the pit bottom to the workmen, certain things required in their work, and Knowlton agreed to provide competent and efficient drivers. The vehicles used were cars running on a railway track and drawn by a horse. The plaintiff was employed by Knowlton as a driver, and while so employed was injured. On the evidence set out in the case, notwithstanding certain adverse answers to questions submitted to the jury, and the trial Judge's judgment thereon for the plaintiff, the Court:—Held, (1) that the plaintiff had failed to prove negligence on the part of the defendants; and (2) That if the evidence established negligence on the part of Knowlton, resulting in the injury to the plaintiff, as was the inferential finding of the jury, Knowlton was an independent contractor for whose conduct the defendants were not liable. The judgment for the plaintiff was set aside and a judgment directed to be entered for the defendants. *Patton* v. *The Alberta Railway & Coal Company.* (Ct., 1897), p. 438.

See CONSTITUTIONAL LAW.

MECHANIC'S LIEN.

See BUILDING CONTRACT.

MISTAKE.

See VERDICT.

MORTGAGE.

See LAND TITLES ACT.

MUNICIPAL LAW.

See CERTIORARI—CONSTITUTIONAL LAW.

NEGLIGENCE.

See MASTER AND SERVANT.

PARTIES.

Practice—*Action to set Aside Conveyance — Parties.*] — The execution debtor is not a necessary nor a proper party to an action by execution creditors to set aside conveyances to his co-defendant as fraudulent and void as against them, no relief being claimed against him except costs. Participation in fraud is not a sufficient ground for adding a party for purpose of rendering him liable for costs. *McDonald et al.* v. *Dunlop* (*No.* 1). (Scott, J., 1895), p. 177.

See LAND TITLES ACT.

PAYMENT INTO COURT.

See BANKRUPTCY AND INSOLVENCY.

PENALTY.

See SALE OF LAND—CONTRACT.

PLEADING.

Practice—*Pleading—Defence— Embarrassing Pleading—Reasonable Cause of Action or Defence—Striking Out.*]—McEwan v. The North-West Coal and Navigation Co., 1 Terr. L. R. 203, followed. Matter in a statement of defence, attacked as tending to prejudice, embarrass or delay, will be struck out less freely than in a statement of claim. Statement of claim set up a partnership between plaintiff D. and defendant P., a mortgage by D. & P. of partnership goods to C. and a mortgage of P.'s interest therein to C. Bros. The first paragraph of the defence of C. Bros. denied the partnership. The second paragraph set up that, "whatever relationship existed" between D. & P., that relationship was put an end to and the entire ownership of the goods mortgaged then vested in D. free from any interest of P.:—Held that the second paragraph was embarrassing inasmuch as, while it assumed some relationship to have existed between D. and P., and alleged it to have been put an end to and the property to have vested in D., it did not allege (1) the nature of the relationship, (2) the mode in which the relationship had been terminated and the property become vested in D., i.e., whether by operation or implication of law or by agreement of dissolution or other agreement stating the nature of such other agreement. The 7th paragraph of the defence of C. Bros. alleged that, even if the mortgage to C. constituted a partnership liability, C. Bros. had a separate claim against D. before C. acquired any such partnership liability:— Held, that paragraph 7 was embarrassing inasmuch as it did not allege that the separate claim of C. Bros. was the same as that for which they held the chattel mortgage, and as if that was not the case the whole paragraph was entirely immaterial. The 8th paragraph of the defence alleged that the mortgage to C. was void, and did not comply with the Bills of Sale Ordinance and no affidavit of bona fides accompanied it:—Held, that the 8th paragraph was embarrassing inasmuch as it was uncertain whether it intended that the mortgage was void on the ground only of the absence of an affidavit of bona fides, or as well for non-compliance with other requirements of the Bills of Sale Ordinance, or on grounds apart from that Ordinance. *Davis et al.* v. *Patrick et al.* (Ct. 1893), p. 9.

Pleading — *Defence—Striking out as Embarrassing — Third Party Proceedings — Stay of Proceedings.*] — In an action for foreclosure of a mortgage made by the defendant and his deceased partner, paragraphs of the defence alleging in effect that the administratrix of the estate of the deceased partner was a necessary party to the action inasmuch as the defendant was entitled to contribution from the estate and as by virtue of an order made that no action should be brought against the administratrix as such, and staying all pending proceedings against her as such administratrix for four months, prevented the defendant from pursuing his remedy in that behalf, were struck out as embarrassing; the defendant's proper course being an application

under the third party procedure, and the plaintiff not being affected by the effect of the order upon the defendant's rights or remedies. *Paul* v. *Flinn*. (Ct. 1896), p. 406.

POSTPONEMENT OF TRIAL.

See SALE OF LAND.

PRACTICE.

Practice—*Pleading — Amendment of Statement of Claim at Trial—New Case—Application after Close of Defendant's Case Refused—Civil Justice Ordinance, section* 164.]—In an action for damages for trespass and for an injunction, the statement of claim alleged that the defendant, who was in occupation of adjoining property which was being operated as a coal mine, had entered upon and under lots B and C owned by the plaintiff, and had removed coal and minerals therefrom. From the evidence for the defence it appeared that no excavations had been made on Lots B and C since the date trespass was alleged to have commenced, but that the defendant's tunnel had extended into other adjoining lands owned by the plaintiff in respect of which no complaint had been made. The plaintiff at the close of the defendant's case applied for leave to amend the statement of claim under section 164 of the Judicature Ordinance by alleging that the trespass had been committed upon these last mentioned lands:—Held, that the real controversy between the parties was whether the defendant had committed trespass upon lots B and C, and no amendment was necessary for the purpose of determining that question, and it would be an unreasonable exercise of the powers conferred by the section to allow the plaintiff after the close of the evidence to amend by setting up a new cause of action discovered from the evidence for the defence:—Held also, that a refusal by defendant to allow inspection by plaintiff of the workings of the mine was not sufficient reason for allowing the amendment as the defendant might have obtained an order for inspection. Greater latitude should be allowed to a defendant in amending by setting up new grounds of defence than to a plaintiff in setting up new causes of action, because a defendant cannot afterwards avail himself of such defence, while a plaintiff does not lose his claim in respect of such cause of action. *Moran* v. *Graham* (Scott, J., 1896), p. 204.

Practice—*Application for Administration—Order to Render Proper Account under O. 55, R.* 10 *A. (Eng.)—Affidavit Verifying—Not Filed—Application to Cross-examine.*] — Upon an application for administration an order was made under English O. 55, R. 10a, that the application stand over for six weeks, and that the defendant within one month render to the plaintiff a proper statement of his accounts and dealings with the estate, which was duly furnished and verified by affidavit. The plaintiff did not appear on the further hearing of the application, and some months had elapsed when this application was made to cross-examine the defendant on the affidavit:—Held, that as the affidavit was not filed when notice of the application was served, but only (if at all) by the plaintiff himself on the return, the application must be refused. Quære, whether the rule authorizes a direction that such accounts be verified under oath, and whether such an affidavit is an affidavit "used or to be used on any proceeding in the cause or matter." (J. O. 1893, sec. 261, now r. 282, J. O. 1898.) The proper practice in order to obtain explanations of any of the items of accounts so furnished seems to be to formulate objections on the further hearing and have the disputed items adjudicated upon in Chambers. *Allan* v. *Kennedy*. (Scott, J., 1895), p. 285.

Security for Costs—*Assets within the Jurisdiction — Substantial, not "Floating."*]—Plaintiffs who were now residents had at the time of an application for security for costs, assets within the Territories to the amount of $4,000, consisting of live stock and railway plant in use upon contract work for the Canadian Pacific Railway Company, in construction of the Crow's Nest Branch railway:—Held, that this property was not substantial and fixed, but floating, and an order for security for costs was made. *Doidge* v. *Town of Regina* (*No.* 1). (Richardson, J.), 1897), p. 329.

Practice—*Parties—Adding Defendant—Third Party Procedure — Action for Conversion—Application — Defendant to add Person on whose Behalf Seizure made Refused—Counterclaim—Judicature Ordinance.*] — In an action

of conversion against a bailiff, an application under sec. 45, J. O. 1893, by the bailiff's principal to be added as a defendant on the grounds that the bailiff was entitled to be indemnified, and the principal was entitled to set up, by way of counterclaim, certain claims against the plaintiff not arising out of the conversion complained of was refused. The plaintiff brought an action against the defendant for conversion of certain household furniture. The defendant applied to add or substitute, as a defendant, one O., on whose behalf he had, as bailiff, seized and sold the goods in question, alleging (1) that O. had agreed to indemnify him against the seizure, and (2) that O. desired to be added or substituted as defendant for the purpose of counterclaiming against the plaintiff certain claims, none of which appeared to arise out of the subject matter of the action:—Held, that the Court had no jurisdiction to substitute or add O. as a defendant as it was not necessary for the determination of the question in dispute, he being only indirectly interested in the result, and could be brought in by defendant as a third party; and that he could not be added for the purpose of setting up a counterclaim which did not arise, and was not involved in the subject matter of the action. *Randall* v. *Robertson* (Scott, J., 1898), p. 332.

Order for Discovery — *Default of Compliance—Motion to Dismiss Action — Indorsement of Notice on Order.*]— In order that a party taking out an order for discovery may invoke the provisions of sec. 184 J. O. 1893, though only with the object of having a plaintiff's action dismissed or a defendant's defence struck out, the order must be endorsed in accordance with s. 311. *Doidge* v. *Town of Regina* (*No.* 2). (Richardson, J., 1898), p. 337.

See VERDICT — PLEADING — SALE OF LAND—CRIMINAL LAW—PAYMENT INTO COURT—PARTIES—APPEAL — WAYS — MASTER AND SERVANT — ELECTIONS (PARLIAMENTARY) — CREDITORS' RELIEF ORDINANCE — CONSTITUTIONAL LAW.

PRINCIPAL AND AGENT.

Sale of Land—*Agency—Ratification — Statute of Frauds — Part Performance.*]—One T., who had been appointed agent for the management of the plaintiff's estate at E. by the plaintiff's wife, which appointment was expressly ratified by the plaintiff, had appointed with her authority, one M., a real estate agent, as agent for sale. M. made several sales, all of which were confirmed by the plaintiff, and, on the 3rd February, 1904, sold to the defendant C., the land in question, of which sale the plaintiff was duly notified; and the defendant went into immediate possession and commenced making improvements, of which the plaintiff was also notified on the 19th of February. On the 8th of June after a large sum had been spent in improvements, the plaintiff notified the defendants that he repudiated the sale and brought action for possession:—Held, (1) That M. had authority from plaintiff through T. to make the sale to the defendant. (2) That if M. had not been authorized to make the sale, the plaintiff had ratified it by his conduct in standing by and allowing defendant to make improvements under the arrangement of purchase, and not immediately repudiating it and giving notice within a reasonable time. (3) That the part performance of the agreement of purchase by the defendants was sufficient to take it out of the Statute of Frauds. Quære, whether non-compliance with the Statute of Frauds comes in question in an action of ejectment or whether the plaintiff could recover possession in such an action by reason of a breach of any of the terms of the agreement. *McDougall* v. *Cairns*. (Scott, J., 1896), p. 219.

PROHIBITION.

Prohibition — *Court of Revision—Prohibition after Sentence.*]—A Municipal Court of Revision, after the assessment rate had been completed by the assessor, and checked over by the assessment committee, passed in consequence of a successful appeal to the Court by the promovents, a general resolution reducing the entire assessment by twenty per cent.:—Held, hesitante, affirming the judgment of Rouleau, J., that prohibition lay. The Court should not be chary at the present day in exercising the power of prohibition. The proceedings before the Court of Revision were not terminated inasmuch as its decision necessitated the amending of the roll, and this duty imposed upon the clerk would be the act of the Court by the instrumentality of its clerk. In any

case prohibition will be after sentence, when it appears on the face of the proceedings that the matters are not within the jurisdiction of the tribunal. *Hickson et al. v. Wilson et al.* (Ct. 1897), p. 426.

QUANTUM MERUIT.

See CONTRACT.

RECOGNIZANCE.

See BAIL.

SALE OF LAND.

Sale of Land—*Vendor's Title—Title in Third Party—Incumbrance — Repudiation — Penalty—Forfeiture — Practice — Evidence—Commission — Order for Commission — Irregularities—Suppression of Commission Evidence — Waiver — Postponement of Trial to Supply Defect in Evidence.*]—Where at the time of an agreement for sale and purchase of land, the title to the land stood in the name of the vendor's wife, but the vendor obtained and tendered a transfer from his wife to the purchaser before the purchaser repudiated the agreement:—Held, following Paisley v. Wills, 19 O. R. 303; affirmed 18 O. A. R. 210; that the purchaser was liable in an action for balance of purchase money. Right to repudiate discussed. If a thing be agreed to be done, though there be a penalty annexed to secure its performance, yet the very thing itself must be done, and the Court will not permit the person on whom the penalty rests to resist specific performance by electing to pay the penalty. Where a commission to take evidence was issued without a formal order therefor, but merely on an informal memorandum of a Judge, containing no direction as to the commissioner's name or the time, place or manner of taking the evidence, but the commission, before being sent out, had been shown to the advocate for the opposite party, and due notice of the time and place of taking the evidence under the commission had been served on him, and on the return of the commission it had been opened at his instance:—Held, (1) that the irregularities in connection with the issue of the commission, which might at an earlier stage have been taken advantage of by motion to suppress, were waived by the advocate for the opposite party, with knowledge of the irregularities, causing the commission to be opened; that being a fresh step within the meaning of s. 541 of the Judicature Ordinance. (2) That in any case, the trial Judge having received the evidence and s. 501 of the Judicature Ordinance providing that a new trial shall not be granted on the ground of the improper admission or rejection of evidence unless on the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial, and the Court being of the contrary opinion, no effect should be given to the objection. Trial of action adjourned to enable plaintiff to supply defect in the evidence in the support of his case under s. 236 of the Judicature Ordinance. *Hamilton v. McNeill.* (Wetmore, J., 1894), p. 31.

See JUDICIAL SALE OF LAND—PRINCIPAL AND AGENT.

SET-OFF.

See BILLS, NOTES AND CHEQUES.

SHERIFF.

See LAND TITLES ACT.

SMALL DEBT PROCEDURE.

See CONSTITUTIONAL LAW.

SOLICITOR AND CLIENT.

Taxation of Advocate's Bill more than Twelve Months after Delivery—*Special Circumstances — Receipt of Client's Moneys — Commission.*]—An order for the taxation of an advocate's bill of costs ought not to be granted on the ex parte application of the client, where the bill has been rendered more than twelve months before the application to tax. Orders of course defined. Semble (1) on an application to set aside an ex parte order to tax, if special circumstances are shewn by the

client which would in the opinion of the Judge have warranted an order to tax on a special application, the ex parte order will be allowed to stand. (2) The receipt by the advocate from time to time of moneys belonging to his client, does not constitute such special circumstances, nor, although overcharges would, under certain circumstances, constitute such special circumstances, does the mere fact that a commission of 5 per cent. is charged on the collection of a sum of twelve hundred dollars. On the trial of an action on an advocate's bill the trial Judge may, without special circumstances appearing, and notwithstanding the lapse of twelve months from delivery, direct a reference or enquiry as to any disputed items, although no application to tax has previously been made. *McCarthy* v. *Walker—Re McCarthy* (*No.* 1). (Scott, J., 1898), p. 346.

SQUATTER.

See WAYS.

STATUTE OF FRAUDS.

See PRINCIPAL AND AGENT.

SUBROGATION.

See LAND TITLES ACT.

SURVIVORSHIP.

See LAND TITLES ACT.

TERRITORIES REAL PROPERTY ACT.

See LAND TITLES ACT.

TRIAL.

See WAYS—MASTER AND SERVANT

VENDOR AND PURCHASER.

See SALE OF LAND.

VERDICT.

Practice — *Jury Verdict — Setting aside Misdirection — Non-direction — Questions to Jury—Special or General Verdict — Contract—Evidence — Consensus ad Idem—Mistake.*]—The terms of a verbal contract were in question. The plaintiff and defendant being the only witnesses on the point, each swore positively to his version of the contract. Counsel for each of the parties at the trial proposed certain questions asking that they be submitted to the jury and objecting to the submission of the questions proposed by the other side. Rouleau, J., submitted both sets of questions, but directed the jury that they were at liberty either to answer the questions and thus give a special verdict or to give a general verdict. The jury gave a general verdict for the plaintiff. On a motion by the defendant to set aside the verdict: — Held, that the question of there being a mistake or no consensus ad idem did not arise, and that the verdict depended on the jury's view of the credibility of the parties, and that, therefore, the verdict should not be disturbed. *Newson* v. *McLean*. (Rouleau, J., 1893), p. 4.

See MASTER AND SERVANT—CRIMINAL LAW.

WAIVER.

See SALE OF LAND—CONTRACT—BILLS, NOTES AND CHEQUES.

WAYS.

Way—*Highway—Trial— Dedication —Crown Land—User—Squatter's Right — Patent — Reservation — Estoppel — Trial — Proper Findings — Appeal — Drawing Inferences of Fact.*]—The Edmonton settlement was surveyed by the Dominion Government in 1882. At that time there were numbers of persons in occupation of different parcels of the land forming the settlement. One McDougall was in occupation of the parcel

shown on the Government plan of survey as River Lot 8, and had been so for some years previously. McDougall's rights as a "squatter" under The Dominion Lands Act, R. S. C. (1886) c. 54, s. 33, were recognized by the Government, and he was given a right to purchase the lot outright at $1 an acre. He exercised this right and a patent was eventually issued to him on the 30th September, 1889. It appeared that at the date of the survey there were two well defined trails crossing the lot, and that both had been used as public roads for a period of more than twenty years previous to the attempted closing by McDougall's successor in title of the trail in question, in this action—the southerly trail of the two above mentioned. Per Scott, J.:—The fact that the patentee before the issue of patent never interfered with the user by the public of the trails crossing the lot, or that he permitted such user, would not constitute an implied dedication by him of such trails as highways. Having no legal right or title of occupation, he was not in a position to prevent such user, and it would be unreasonable to hold that a dedication should be implied as against him merely because he permitted an act to be done which he was powerless to prevent. The patent contained the following words: "Reserving thereout the public road or trail one chain in width crossing the said lot." Scott, J., held, that this reservation was not void for uncertainty, but that the defendants, upon whom the onus of proof lay, had failed to show that the trail in question was one of the two trails which was intended by the reservation. In the year 1894 the defendant municipality expropriated a part of River Lot 8. McDougall was then the owner of the portion expropriated. The plaintiff represented McDougall on the arbitration proceedings. Upon the arbitration it was material that the arbitrators in order to arrive at the amount of the compensation should ascertain whether the trail in question was a highway. His counsel contended that it was a highway. The award found that it was a highway. Scott J., held, that the plaintiff was estopped from denying that the trail in question was a highway. On appeal, Richardson and Wetmore, JJ., held, that taking into account all the facts, and applying the principles laid down in Turner v. Walsh, 50 L. J. P. C. 55; 6 App. Cas. 636; 45 L. T. 50, a dedication of the trail in question ought to be presumed and on this ground agreed in dismissing the appeal. Reversed on appeal to the S. C. of Canada, 28 S. C. R. 501. Rouleau, J., dissented, and was of opinion that the appeal should be allowed. Section 509 of the Judicature Ordinance, 1893, provides, amongst other things, that the Court on appeal "shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." Per Wetmore, J.:—The exercise of these powers I conceive to be discretionary with the Court, and possibly the Court ought not to find facts not found by the trial Judge, unless they are clearly established by the evidence or the weight of testimony is manifestly in favour of the finding. Where such is the case, however, I am of opinion that the Legislature intends that this Court shall dispose of the case without sending it back for a new trial. *Heinmick* v. *The Town of Edmonton*. (Ct. 1897), p. 462.